

interest (and in those cases the answer was *coram rege*), which sometimes were thereupon answered immediately by granting or denying them. And sometimes they were by the king's especial direction sent unto the proper courts, and most ordinarily unto the chancery, with this indorsement, *soit drait fait*, as upon petitions of right; and sometimes were by the king intirely referred to be answered by some of his council or a committee of them, and sometimes in parliament time to a select number of lords and judges and great officers of the council finally to answer them. Thus it was *dors. rot. parl. 14. E. 3. n. 28. 29.* where besides the general *auditores petitionum cense sont assigne de seer sur petitions coram rege*, viz. one bishop, one earl, one baron, five judges, *associes le chauceiller et tresurer quant besogne ferro.* And *rot. parl. 36. E. 3. n. 31.* where it is specially ordered, that the lords and others assigned to be *auditores petitionum* may together with the chancellor, treasurer, and others of the council, answer and indorse all petitions in parliament without making an indorsement *coram rege* only.

THIS directive power of the *consilium regis* is well described *rot. parl. 2. R. 2. parte 2. n. 49.*

FOR in *rot. parl. 1. R. 2. n. 87.* the commons petition, *que queeles inter parties ne soient attemptes ne terminees par seigneurs ne officers de counsell, mes que la commune ley courge sans estre tarry par eux eins lieux, ou ils soloient d'ancien temps estre terminees, si ni soit tiel querele et encourer si grand person, que home ne suppose aillours d'avoir droit.*—RESP. *Le roy le voet.*

THE clause of this statute confirmed by the king's answer *rot. parl. 1. H. 4. n. 162.* But this was no act of parliament, for the petition was for one thing and the answer for another. The petition and answer run thus. *Item, supplient les communes, que come en temps de Richard nadgairs roy ad este use, que plusours personeles actions par outre partie et partie, que puissent estre determinables par la commune ley d'Engleterre, par maintenance de ceux que ount este de counseill del dit Richard nadgairs roy, pur brocage a eux fait, ils firent venir devant eux*  
E 2
plusours

*plusours des lieges nostre seigneur le roy par lettres del prive seal, al fuyte de partie illeokes, pur estre trie devant lour enemye, de personell action determinable par la commune ley d'Engleterre, dont ascuns actions sont unquore pendants en discussion, par mayntenance de ceux que sont adjuggez a Bristvyt pur malveys conseilours, en grande destruction des dits lieges nostre seigneur le roy, et en derogation de la corone, et ancintissement de la commune ley: Plese a nostre tres redoubte seigneur le roy, par aavyz de son tres sage counseill, ordeigner en cest present parlement, que touz manners actions personeles par entre partie et partie, dont le roy n'est partie, de cy en avant poient estre trieiz par la commune ley, et nemye devant le counseill nostre seigneur le roy, par nulle lettre de prive seal, ne par nulle autre faux suggestion quiconque al seute del partie: et que touz les actions personeles, issint pur devant ces heures dependantz devant le counseill de Richard nadgairs roy, par entre partie et partie, que unquore sont en discusse, soient adnulliez, et adjournez a la commune ley, pur dieu, et en œuvre de charitee.*

**RESP.** *Soit l'estatut ent fait tenez et gardez, la ou l'une partie est si graunt et riche, et l'autre partie si povre qu'il ne purra autrement avoir recoverer.*

**THE** truth is, that of 1. R. 2. was never drawn into an act of parliament; and this of 1. H. 4. could not be drawn into an act, for the answer was of a thing not desired by the petition.

**BUT** the commons finding the inconvenience of the last exception, for under colour thereof many suits were brought before the council, endeavoured to ratify it by a more general petition, viz.

**ROT. parl. 2. R. 2. parte 4. n. 49.** *Item supplient les communes, que nul brief isse hors de la chancellerie, ne lettre de prive seal soit, direct a nully, pur luy faire venir devant le counsell du roy, ou d'autre a respondre de son frank tenement ou choses appartenants a ycelle, come ordene estoit avant ces heures; mais soit la commune ley de la terre maintenu d'avoir son droit cours.*

THE answer well describes the directive power of the council above-mentioned, but subjoins something of jurisdiction, which will be further considered hereafter, viz.

RESP. *Il ne semble mye raisonnable que le roy nostre seigneur sceusse restreint qu'il ne pourroit par resonable cause envoyer par ses lieges, mais ceux, qui seront envoies devant le counsell, a leur venue ne seront mye compelles a y respondre finalement de leur frank tenement, eins seront d'illoques convoiez as places ou la roy le demande et le cas requiest, et mis en le droit cours. Parvez toutes voies, que a suite de partie, ou le roy et son conseil seront creablement enformez, que par maintenances oppressions et autres outrages d'aucuns en pays, le commune ley ne purra avoir duement son cours, que en tien cas le conseil purra envoyer pour la persone de qui la plainte est faite, pour lui mettre a respons de sa mesprisison, et en oultre par leur bone discretion de lui compeller a faire seurtee par serement, et en autre manere, sicome semblera mieltz a faire, de son bone port, et qu'il ne ferra par lui ne par autre maintenance, n'autre riens, que purra destourber le cours de commune ley, en oppression du peuple.* This answer mentions their directive power and their coercive power. The former was of great use in parliament time to disburthen the king and his houses with unnecessary or unfit petitions, and was oftentimes of great use to the suitors in putting them in a right course of proceeding. But the sending out process upon such petitions, though no more was done upon them than barely direction, especially out of parliament time, was a great grievance, and often complained of and discountenanced by acts of parliament, *de quo* CHAP. XXX.

## C H A P. V.

CONCERNING THE JURISDICTION AND COERCIVE POWER OF THE  
*CONSILIUM REGIS.*

**JURISDICTION** may be taken two ways. I. Left properly for acts of voluntary jurisdiction, which also takes in making constitutions and orders and ordinances. II. Properly for that judicial and coercive power *in foro contentioso*.—I shall say something touching the power of the council in both these cases.

I. **TOUCHING** ordinances and orders of the council, they were anciently of two kinds.—1. Such matters as the petitions of the commons and by consent of the lords in parliament were desired to be settled and ordered *par notre seigneur le roy et son bon counsell*. And there were very many of this kind, especially in the times of *E. 3.* where the commons shewed their grievance, but, not being fully advised concerning the remedy, desired the king by the advice of his council to provide the remedy therein. And in these cases the constitutions and orders of the council were of great authority, and next to the obligation of an act of parliament. But the inconvenience hereof was in process of time found; for by colour thereof they often proceeded too far. And therefore in after times either the remedy was provided in the petition; or if things were thus generally recommended to the order of the council, or of the king and his council, they were for the most part such as concerned the king's immediate interest, or such wherein the king and his council could make reformation without authority of parliament.—2. Such ordinances and constitutions were made by the king and his council, or by the council with the king's consent. And of such we have several instances in  
ancient



ancient records; though many times they adventured too far upon their own power.

INSTANCES of ordinances made by the council are many. I shall mention but a few.

CLAUS. 23. E. 3. par. 1. m. 8. *dorso*, an ordinance of the council touching labourers.

CLAUS. 24. E. 3. par. 1. m. 15. *dorso*, an ordinance of the council touching the payment of the king's customs.

CLAUS. 25. E. 3. par. 1. m. 10. an ordinance of the council for the due regulation of the city of London, and against fore-stallers, &c.

CLAUS. 30. E. 3. m. 22. an ordinance of the council and proclamation thereupon touching prices of wines *sub pœnd forisfacturæ*, but superseded *clausf.* 31. E. 3. m. 21. *Vid. clausf.* 29. E. 3. m. 38. touching the same matter.

CLAUS. 38. E. 3. m. 12. an ordinance of the council touching the fishmongers, drapers, and vintners.

BUT, as I before said, many times they exceeded their power both in the matter and the manner of their ordinances, which occasioned complaints in parliament.

ROT. parl. 13. R. 2. n. 30. *Item prient les comons, que le chaunceller, ne le counsell le roy, apres le parlement finy facent nul ordinance encounter le comon ley ne les auncient customes de la terre ne les statutes devant ces heures ou à ordeiner en meme cestui parlement, eins curge le comon ley a tout*  
le

*le peuple universall, & que nul judgement rendus soit admett sans due pro-  
cresse de ley.*

RESP.—*Soit use come ad estre use devant ces heures, issint que le regaly de  
roy soit sauves; et si ascun soit sent greve, monstre en special, et droit lui sera  
fait.*

II. As to the jurisdiction of the council *in foro contentioso*, it was exercised one of these three ways. (1.) Either in parliament time, when they sat either with the lords or as assistants to them. (2.) Or when a special power was committed to them, sometimes in particular petitions or causes, sometimes upon many petitions together, *authoritate parliamenti*. (3.) Upon the single account of their own authority merely as they were *consilium regis*.

(1.) TOUCHING the first of these, it is true, that in ancient times, especially in the times of E. 1. they did in parliament time sometimes alone, sometimes in conjunction with the lords house in cases of great moment, exercise an ample jurisdiction. The book in the Tower, styled *Placita Parliamenti*, now entirely printed by Mr. Ryley, gives us many instances of it, too many indeed to be here repeated; and therefore thither I shall refer the reader.—But, 1. If they were cases of smaller moment, they were by the indorsement of the petition referred to the ordinary courts with some such indorsement as this, *sequatur ad communem legem*, as is above shewn.—2. If they were cases wherein remedy was to be had only by a new act of parliament and not otherwise, they were dismissed, as well where the council alone, as the lords house together with the council or with their assistance, were consulted, with this answer, *ley n'est uncore ordeyn en ceo case, or non est lex ordinata, il ne poet estre sans nougel ley ordone in ceo case a quel chose faire le commonalty de la terre ne veult ny uncore assentu*. See for these and the like answers, Ryley, 652. the case of John de Kirbrooke,

brooke, who prayed remedy for waste done by tenants in tail after possibility of issue extinct. *Ibidem* 409. the case of Martin Chamberlain, praying restitution of a manor given by his ancestor to the templars, to be delivered to him as his estate upon the dissolution of their order. *Ibidem* 619. *inter petitiones*, 18. E. 2. upon a general petition of owners of land in forests to improve their lands without being put to sue a licence. And therefore, although it is generally said, that the *consilium regis*, or even the lords house in parliament, ought not to proceed in cases where the party hath remedy at law, it follows not, that they have power to relieve in all cases not remediable by law, for that were to give up the whole legislative power to the house of lords or *consilium regis*; but it is only then to be intended, that, where the case is remediable by laws already in force, but some obstacle falls in that impedes the proceeding at law, as an aid-prier of the king or some great confederacy and combination by persons in power, they may in some cases remove that obstacle or impediment, if it cannot otherwise be removed. But of this more hereafter.

(2.) As to the second of these, namely of special power committed to them to determine matters by consent of parliament, these were of two kinds. 1. When special acts of parliament were made giving the council power to hear and determine such or such causes or matters. And there were several such acts of parliament even before the statute of 3. H. 7. which erected the court of star-chamber in that form as it is thereby settled. As for instance, a *præmunire* for suing in the court of Rome, &c. by the statute of 27. E. 3. cap. 1. *de provisors*; by the statute of 12. R. 2. cap. 2. for *scandalum magnatum*; by the statute of 13. H. 4. cap. 7. for great riots; 31. H. 6. cap. 2. for riots and oppression; 1. R. 2. cap. 4. maintenance. 2. Again, there were many petitions referred to the council from the parliament, sometimes by the answer of particular petitions; and sometimes whole bundles of petitions in parliament, which by reason of the dissolution of the parliament could not be there determined, were

referred in the clofe of the parliament, fometimes to the council in general, and fometimes to the chancellor; and this I take to be the true original of the chancery's jurifdiction in matters of equity, and what gave the rife of thofe multitudes of equitable caufes to be there arbitrarily determined.

AND there are infinite instances of this nature, as well of the petitions of the commons, as of private petitions referred *authoritate parliamenti*, fometimes to the chancellor, fometimes to the council with the advice of the judges; only with this difference, that the general references of the petitions of the commons, that were undetermined at the clofe of the parliament, were fo referred at the request and by the confent of the commons, or otherwife they were refused in the next parliament. *Vid. rot. parl. 4. H. 6. n. 21. 6. H. 6. n. 45. 8. H. 6. n. 69\**. And then the answers to thefe petitions were equivalent to a determination of both houfes of parliament.

BUT many times particular petitions, though promoted by the commons, or by the particular petitioners themfelves, were referred to the council, either by the king alone or by the king and lords, either to the chancellor or council without the request of the commons; and yet fairly indorfed, *foit ce petition mande al counsell a determiner* *AUTHORITATE PARLIAMENTI*, as if it had the confent of both houfes. Touching which there was great complaint made by the commons *rot. parl. 3. H. 5. mentioned supra* CHAP. III. And although this indorfement thus made without the confent of the commons gave a countenance to their decifion; yet it was of no greater force, than a decifion made by the council alone or by the upper houfe and council. *Vid. rot. parl. 50. E. 3. n. 81. 140. 164. 141. 156. 160. 172. 182. Rot. parl. 9. H. 4. n. 31. 32. 37. 1. H. 4. n. 50. 3. H. 5. p. 1. n. 43. 44. 4. H. 5. n. 15. 15. H. 6. n. 33. 34†*. And thus

\* *Rot. parl. 22. E. 3. n. 4.*

† *Rot. parl. 6. H. 6. n. 17. 8. H. 6. n. 21. & 69.*

far touching the jurisdiction of the council by a kind of delegation by act or consent of parliament.

(3.) I COME now to consider the power of jurisdiction of the *consilium regis* simply considered as such.

THE time of exercise of their jurisdiction (which may make some difference) was either in time of parliament and upon complaints or petitions in parliament, which I shall consider specially hereafter, or else out of parliament and without relation thereunto, of which I shall say somewhat here.

THERE be some, that assert a primitive and original jurisdiction in the *consilium regis* in all matters or controversies as well civil as criminal. And they infer it,

1. FROM the oath they anciently took, *quod vide* 35. E. 1. Ryley 317. wherein there are these articles, 1. of advice or council; 2. of jurisdiction, viz. *que vous ne ferres per amour ne pur haour, per bone gree ne per maveis gree; que vous ne faces faire a chescun de quel estate ou condition droiture et reason solone vostre poiard et a vostre escient; et que nulli riens prendrez pur tort faire ne droiture delayer; et que en judgement ou droiture faire la ou vous seres assignes nous nespermes nulli pur hautesse ou poverté ne pur richesse que droit ne soit fait.*

2. AGAIN, they infer it from the frequent exercise of jurisdiction almost in all kind of causes, whereof the *Placita Parlamenti* E. 1. are full. And there are many instances extant thereof almost in all ages till the very erection of the court of star-chamber in 3. H. 7. which was but a kind of new modelling of this *consilium regis*, and retained the name of *consilium regis* in all the process they made.

3. BECAUSE notwithstanding the abridgment of their power in some cases by the statutes of 25. & 42. E. 3. whereof hereafter; yet



they had still the countenance of acts and proceedings of parliament in other cases (only causeless suits and suggestions were punished with a greater severity) as appears by the statutes of 37. *E. 3. cap. 18.* 38. *E. 3. cap. 9.* 17. *R. 2. cap. 6.* the petitions and answers *rot. parl. 1. R. 2.* 2. *R. 2. part. 2. n. 1.* 50. *E. 3. n. 80.* in matter of reprisal; *ibid. n. 140.* 164. in case of riots; *ibid. n. 241.* in cases of combinations to hinder trade; *ibid. n. 160.* merchants disavowing their factors; *ibid. n. 171.* usurpations by the cinque ports; *ibid. 182.* misdemeanors of bailies, and infinite more matters of the like nature, not only proceeded in by the council, but as it were tacitly admitted even in parliament to belong to their cognizance. *Vid. Crompt. Jurisdict. Courts, pag. 61. 62. 63.*

ON the other side it is contended, that the *consilium regis* had only a power of advice and direction, not a power of decision or determination of causes either civil or criminal, but that what they did in this kind was illegal and incroachment upon the common law; that the statutes of 25. *E. 3. cap. .* and 42. *E. 3.* were but affirmances of the common law, and the statute of *Magna Charta*. And therefore in all ages there have been continual complaints of the commons, not only against the arbitrary proceedings of the chancery, but even of the *consilium regis*, yea of the house of lords, for their process by *subpœna*, by privy seal, by general process *certis de causis*, and the like. *Vid. rot. parl. 21. E. 3. n. 28.* 25. *E. 3. n. 16.* 42. *E. 3. n. 12.* 45. *E. 3. n. 41.* 1. *R. 2. n. 23.* 2. *R. 2. part. 2. n. 49.* 13. *R. 2. n. 33.* 17. *R. 2. n. 10.* 1. *H. 4. n. 160.* 2. *H. 4. n. 69.* 4. *H. 4. n. 78. 79.* 3. *H. 5. part. 1. n. 46.* 9. *H. 5. part. 2. n. 25.* 1. *H. 6. n. 41.* 2. *H. 6. n. 15.* 10. *H. 6. n. 35.* 15. *H. 5. n. 25.* and the statutes drawn up upon some of these petitions, viz. 5. *E. 3. cap. 9.* 25. *E. 3. cap. 4.* 28. *E. 3. cap. 3.* 42. *E. 3. cap. 3.* But not to ravel into this business too far, I shall only give an account of what occurs touching this business in order of time.

1. IT is certain, that in ancient times the *consilium regis*, as well out of parliament as in it, exercised a very great jurisdiction both in causes criminal and civil, as appears abundantly in the *Placita Parlamenti* of E. 1.

2. BUT this power and the exercise thereof were much abated, especially in the time of E. 3. by act of parliament: as—5. E. 3. cap. 9. that no man be attached by any accusation nor forejudged of his life or limb, nor his lands tenements goods or chattels seized into the king's hands, against the form of the great charter and the law of the land.—25. E. 3. cap. 4. that none shall be taken by petition or suggestion to the king or his council, unless it be by indictment or presentment or by writ original at the common law, nor shall be put out of his franchise or freehold unless he be duly put to answer and forejudged of the same by due course of law.—28. E. 3. cap. 3.—By the statute of 42. E. 3. cap. 3. which takes notice of persons accused and taken and caused to come before the king's council by writ and otherwise against the law, it is assented, that no man be put to answer without presentment before justices or matter of record, or by due process and writ original according to the old law of the land. The parliament roll is somewhat fuller to this purpose, viz. *rot. parl.* 42. E. 3. n. 12.—The statute of 4. H. 4. cap. 23. Whereas in pleas real and personal, after judgment given in the king's courts, the parties be made to come under grievous pain, sometime before the king himself, sometime before the king's council, and sometimes to the parliament to answer thereof anew, to the great impoverishment of the parties and in subversion of the common law of the land; it is ordained, that after judgment given in the king's courts the parties and their heirs shall be thereof in peace until the judgment be undone by attain or by error, if there be error, as hath been used by the laws in the time of the king's progenitors.

YET it seems for all this, the suggestions to the king or his council were continued, though not in the same measure as formerly; for several

several statutes were made to force them to give sureties to prove their suggestions, and to punish them if they failed in proof; as 37. *E.* 3. cap. 18. 38. *E.* 3. cap. 9. 17. *R.* 2. cap. 6. 15. *H.* 6. cap. 4. which argue the use of these proceedings before the council were continued, though probably not so much as formerly.

3. BUT besides these acts of parliament abridging the power of the council, there were other circumstances and occurrences, that did gradually bring it into great disuse, though there remain some straggling footsteps of their proceeding down till near 3. *H.* 7. viz. —1. The substitution of the *auditores petitionum* in parliament, which did most of their business touching petitions in parliament.—2. And also in parliament the lords of the upper house of parliament took much of their parliamentary business touching petitions in parliament out of their hands, and assumed it to themselves, and only made use of the *consilium regis* as assistants.—3. The many businesses of state and public affairs so took up the time of the council, that they could not attend the dispatch of private petitions.—4. The attendance grew grievous, and the charge excessive, to the very suitors themselves, as well as the defendants; for sometimes they could not have a dispatch after a long attendance, but it may be when all was done they were sent to the ordinary courts, who made it their constant business to attend the causes that came before them; and therefore people chose to begin their suits rather in the ordinary courts, where they might have convenient dispatch.—5. When any matter of fact was in issue before the council, they did not as now try it by examination of witnesses (which is a civil law proceeding, and brought in by those chancellors and officers which for the most part were clergymen, and better liked the civil law trial than that of the common law) but either special commissions issued to try the issues of fact, which were remitted to them with the inquisitions thereupon found; or which was most ordinary, and is in many cases at this day used in chancery, the record itself was delivered either by the chancellor or  
by

by order of council to the king's bench to be tried, and then the whole proceeding both of judgment and execution was in the king's bench, and the record entered there, of which there are infinite instances in antient records, even in the *Placita Parliamenti*. Vide Ryley, *Placita Parliamenti*, pag. 41. 55. 65. 74. 117. 15. 16. 26. 34. 41. 48. 98. 180. 112. And this is one reason, why most of the proceedings in these *Placita Parliamenti* are not only entered here, but also in the king's bench, as that of the earls of Gloucester and Hereford, that of the archbishop of York and bishop of Durham, that of the prior of Tintern, that of William de Valentia, and many more; for they had for the most part their trial and final determination in the king's bench. And this was a great charge and trouble to suitors, and did by little and little wear out the exercise of jurisdiction by the *consilium regis*.—6. Again, the continual complaints of the commons against the proceedings before the council in causes civil and criminal, although they did not always attain their concession, yet brought a disreputation upon the proceedings of the council, as contrary to *Magna Charta* and the known laws.—7. Yea the judges themselves and the sages of the law, though members of this *consilium*, yet did not much countenance the proceedings in causes *coram consilio*, especially when so many acts and petitions in parliament were against it.

AND therefore, although some antient records in the time of E. 1. and before tell us of reversal of judgments by writs of error *coram consilio regis*; yet very few of them, if any at all, were before the *consilium regis*, but either in the lords house in parliament, or in the king's bench, in both which the *consilium regis* were in nature only of assistants.

*PLACITA Parliamenti E. 1. Ryley 57.* The abbot of Westminster complains of an erroneous judgment given against him in the king's bench. The complaint was *regi et consilio*. The judgment was reversed. But it is entered *inter placita parliamenti*; and, as I have shewn,

shewn, *consilium* is often intended of the lords house assisted with the *consilium ordinarium*.

IBID. pag. 62. Peter Maulore complained *coram domino rege et ejus consilio ad parlamentum* 18. E. 1. concerning an erroneous judgment given in the king's bench, which is in part affirmed. This was in the parliament *ut supra*.

PAG. 169. 167. Upon a complaint *regi et consilio* by the bishop of Durham of an erroneous judgment given against him by the justices itinerant in the county of Northumberland, *consideratum est per ipsum regem et consilium, quod judicium revocetur et annulletur et libertates restituantur*. This being in parliament time seems to be by the lords house in parliament.

IBIDEM 145. 150. A judgment given at Edinburgh *coram justiciariis et auditoribus querelarum regni Scotie* is brought *coram rege et consilio*, and errors are assigned and the judgment reversed. This receives the same answer.

IBIDEM 175. An outlayry in felony before justices itinerant against Robert Scuteville is by writ of *certiorari* removed *coram nobis ubicunque ut inde faciamus quod de consilio nostro duxerimus ordinandum*. Errors are assigned; *et per ipsum dominum regem et consilium suum concordatum est, quod exigenda præfata revocetur et omnino annulletur*. Pag. 183. It seems this was in the king's bench; for *coram nobis ubicunque, &c.* is the proper stile of that court, though the entry of the judgment and proceedings be *coram rege et consilio*.

IBIDEM 192. 199. a judgment given in Ireland, before the chief justice there, in the presence of divers of the council, between William Vesey and John Fitz-Thomas, was brought into the parliament of England 23. E. 1. and thence continued *usque proximum parlamentum*,



tum, and thence unto another parliament. *Ad idem parliamentum venerunt partes in propriis personis coram ipso domino rege et ejus consilio*; and upon errors assigned, *consideratum est per ipsum regem et consilium suum, quoddam predictus processus totaliter annulletur*. This appears to be a proceeding in parliament; for the stile is *placita et memoranda coram domino rege ad parliamentum*; the continuances are *ad parliamentum*; and though the judgment be entered *per regem et consilium*, yet that must be intended in the lords house in parliament, to which the word *consilium* is often applied, as appears in this record and those before mentioned CHAP. II.

INDEED in *Hil. 3. E. 1. rot. 8. dorf.* judgment in assise by Henry *de Novo Burgo* against William le Moyn was removed into the king's bench, and there judgment reversed; and a complaint thereof to the king, that the reversal was erroneous: thereupon a *scire facias* to the parties, *quoddam sint coram domino rege ubicunque, &c. ad faciendum et recipiendum*; where *videtur domino regi et ejus consilio*, that the reversal was erroneous, and judgment given for the plaintiff in the assise. The reversal in the king's bench reversed in the same court *per regem et consilium*.

BUT whether any of these judgments in antient times were by the *consilium regis* or not; yet certain it is, that in after-ages the constant opinion and practice was to disallow any reversals of judgments by the council, which appears by the notable case of *39. E. 3. 14.* In an assise the defendant pleaded in bar entitling himself as son and heir of *J. S.* who died seised: the plaintiff claiming as daughter pleaded the defendant was a bastard: the bishop certifies, that the defendant is a bastard because begotten upon the wife of *J. S.* by *G.* during her elopement in adultery, and so a bastard: the tenant fearing judgment might be given against him complained in parliament, that the bishop certified contrary to the common law of England. And thereupon a writ issued under the great seal to the justices of assise to surcease proceedings. Yet they took the assise in right of

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damages,

damages, and adjourned the parties into the common bench. Then there issued a writ to the common bench to remove the record into the council before the bishops of Bath and Ely, to try, whether the special matter were sufficient to bastardize the issue, and they judged it a good certificate upon the matter. *Et puis pur ceo que les justices d'assise prissent l'assise en droit de damages encontre le brief qui vient, le chancelor reverse le judgement devant le councell, ou il fut adjudge en meme le cours come l'evesque ust certify et mander arremain le record en bank. Et la, pur ceo que l'evesque ust certify, que le tenant fuit pleinement bastard, fuit agard, que le plaintiff recouveroit sa seisin et ses damages. Mes les justices ne prissent nul regard al reverse devant le councell, pur ceo que ce ne fait place ou jugement purroit estre reverse.* And therefore although 50. E. 3. B. R. rot. 46. divers of the judges of the common bench *et alii proceres et magnates de consilio* were present at the examination of infancy in a writ of error upon a fine; yet the judgment was given by the court of king's bench according to their ordinary and settled jurisdiction.

I HAVE given the case of 39. E. 3. at large, because it fully settles the exclusion of any jurisdiction in the council as such to reverse judgments, and shews other points of learning, which will be of use in this argument hereafter.

BUT now by what hath been said it appears, that the power of the *consilium regis* was much abridged and abated. Yet it did not wholly cease, but was exercised in many cases not committed to them by acts or authority of parliament.

IT is true, their power in civil causes was but rarely exercised. But yet exercised it was under another title; namely by the chancery: and therefore we may observe, that in these frequent complaints against the encroachments upon the common law, the council and the chancery are commonly joined.

As to their exercise of power in criminal causes it appears, that it was not altogether disused after the statutes above mentioned, though more rarely practised than formerly. And this appears,

1. BY the frequent processess by subpœna and privy seal and sometimes serjeants at arms issued to appear *coram rege et consilio*. *Vide Register* 124. 191. *Clausf.* 20. *E. 3. pars 1. m. 91. dorf. pars 2. m. 11. dorf.* *Clausf.* 21. *E. 3. part. 2. m. 21. & 39. dorf. 18. E. 3. part. 1. m. 22. dorf.* *Clausf.* 20. *E. 3. part. 1. m. 13.*

2. BY the frequent complaints in parliament against their proceedings, whereof before.

3. BY instances of record and proceedings before them in criminal causes, some whereof are mentioned by my lord Coke in his jurisdiction of courts touching the star chamber, page 61. to which may be added many more. *Clausf.* 31. *E. 3. m. 8. for the earl of Ormond; clausf.* 29. *E. 3. m. 17. between the chancellor and mayor of Oxon; clausf.* 24. *E. 3. pars 1. m. 11. dorf.* against the mayor of Newcastle for forgery; 43. *Aff.* 34. & 38.

AND thus the case stood with the *consilium regis*, till it received a new model and an access of jurisdiction by the statute of 3. *H. 7. cap. 1.*

BUT now by the statute of 17. *Car. 1. cap. 10.* as well the court of star chamber, as all jurisdiction of like nature and form, is taken away and abolished. Yet I have been the longer in this disquisition touching the *consilium regis*; because it gives some light to antient records and proceedings, and is of use to be known in order to the better prosecution of what hereafter follows.

## C H A P. VI.

CONCERNING THE *CONSILIUM REGIS*, AS IT STOOD IN RELATION TO OR CONJUNCTION WITH THE COURT OF CHANCERY.

ACCORDING to the method premised, I come now to consider of the *consilium regis* as it stood in relation to or conjunction with the other great courts or the king's principal officers of state. And therein I begin with the court of chancery; and I shall consider it in relation to the court of parliament in the last place, because then I shall consider of parliamentary proceedings.

THE court of chancery is a very great and antient court. No time can be assigned for its beginning; though as to several occasions of some points of its jurisdiction, we may trace their original, or give probable guesses at it.

THE chancellor having the custody of the great seal, the *consilium regis* borrowed their process for the most part from it; though sometimes they issued process under the privy seal, which was in the custody of the clerk of the privy seal, and sometimes under the seal of the exchequer when the matter concerned the revenue.

THE process under the great seal was by *subpœna*, and sometimes by *habeas corpus coram consilio* or *coram consilio in cancellaria*; and these processes were returnable for the most part in the chancery, yea, in cases where the cause was depending singly *coram consilio*. *Claus. 20. E. 3. pars 1. m. 21. dorf. pars 2. m. 11. dorf.*

AGAIN in some cases, where yet the chancellor was the ordinary judge, yet many of the *consilium regis* were co-assessors, and gave their  
advice,

advice, especially the judges, according to which advice the chancellor gave judgment, as shall be shewn more particularly in this Chapter.

AND hence it came to pass, that the proceedings in many cases in chancery were stiled *coram consilio domini regis in cancellaria*, and sometimes generally *coram consilio*.

43. Ass. 35. a complaint of a process *DE RECTO al chauncellor et counsell nostre seigneur le roy*: yet the suit was in chancery.

18. Ass. 18. Clifford's case. Process returnable in chancery to re seize lands for the king, *par avise le counsell le roy, court agard, que les tenements soient seise en maines le roy*.

43. Ass. 15. in the case of the Duchy of Cornwall, upon an inquisition found intitling the king to a wardship, *par agard de tout le counsell le gard fuit seise en maines le roy*: yet the pleading was in chancery upon an inquisition there returned. Register fol. 267. a. *Idiota examinando coram consilio*: yet it is done in chancery *assidente consilio*.

AND infinite records might be added to shew, that many pleas in chancery are stiled *coram consilio in cancellaria* and *coram consilio*, who are sometimes named; sometimes the treasurer, justices of both benches, barons of the exchequer; sometimes only the justices; sometimes *per totum consilium*. Take these instead of many more. Claus. 29. E. 3. m. 2. & 4. Claus. 26. E. 3. m. 20. dorf. Claus. 20. E. 3. part. 2. m. 11. dorf. Claus. 19. E. 3. part. 1. m. 8. dorf. Claus. 30. E. 3. m. 2. dorf. Claus. 43. E. 3. m. 7. Claus. 26. E. 3. m. 20. dorf. For all which, and many more that might be cited, the suit was in chancery, and yet stiled *coram consilio*; because divers of the *consilium ordinarium* were there present, and gave their advice, yea  
and



and sometimes the judgment given as well by the *consilium regis* as by the chancellor, though that form of entry was afterwards altered, as shall be shewed.

AND hence it is, that in many petitions in parliament mentioned in the former Chapter, and in the stat. of 31. H. 6. cap. 2. and some others, the chancery and council are used promiscuously to express the same thing; for it was but *consilium regis in cancellariis*.

BUT to descend to particulars.—The jurisdiction of the court of chancery is of two kinds. I. The equitable or English jurisdiction. II. The legal or Latin jurisdiction.

I. TOUCHING the equitable jurisdiction, though in ancient time no such thing was known; yet it hath now so long obtained, and is so fitted to the disposal of lands and goods, that it must not be shaken, though in many things fit to be bounded and reformed.

Two things might possibly give its original, or at least much contribute to its enlargement.—1. The usual committing of particular petitions in parliament not there determined unto the determination of the chancellor, which was as frequent as to the council; and when such a foundation was laid for a jurisdiction, it is not difficult for it to acquire more.—2. By the invention of uses, which were frequent and necessary, especially in the times of the dissention touching the crown.

IN these proceedings the chancellor took himself to be the only dispenser of the king's conscience; and possibly the council were not called either as assistants or judges. Yet *vid.* 27. H. 8. 14. the secretary sat with the chancellor. Possibly it was by way of advice, as sometimes the judges are called to the chancellor's assistance.

II. TOUCHING the legal or Latin side, the proceeding is of several kinds.

1. THEY proceed against officers of the court of chancery by bill or for them by writ of privilege until the parties descend to issue; and then it is sent into the king's bench to be tried, and there also judgment is given without remanding it to the chancery.

2. THEY proceed also in *scire facias* upon recognizances taken in that court; and if the parties be at issue, it is sent as above into the king's bench to be tried, and there judgment is given.

IN neither of these cases the *consilium regis* is concerned; but the chancellor proceeds as an ordinary judge; yea and in some respect in subordination to the king's bench; for if judgment be given in these cases in the chancery (as it must where it is by default or confession) a writ of error lies thereupon in the king's bench. 14. *Eliz. Dy.* 315. And so in a process upon a statute merchant certified into chancery, 17. *Aff.* 20. though some books seem to admit it an election to bring error in parliament. 37. *II.* 6. 13. 11. *E.* 4. 8.

THEY proceed in some cases by virtue of acts of parliament giving the chancellor power to hear and determine the same; sometimes alone; sometimes others of the council joined with him, as in the case of differences arising in the staple, *statutum staple* 27. *E.* 3. *cap.* 24. sometimes with the advice of one of the judges, as in cases of robbery at sea by the stat. of 31. *H.* 6. *c.* 5. *Vid.* 2. *R.* 3. 2.

3. THEY proceeded anciently in most cases of moment, that concerned more immediately the king's interest; as for instance, the determination of the king's right to wards (before the erection of the court of wards) and partitions thereupon made, or dower claimed  
of

of the ward's lands in the chancery, petitions of right, *monstrans* of right, traverses of right, *rege inconsulto*, and aid-pryers of the king; in which cases they pleaded in chancery and shewed their titles, and in some cases *procedendo* granted, in some cases finally there determined; and if issue were joined therein, then the record sent into the king's bench and there tried, and finally determined. *Vid.* 38. E. 3. 14. So in *scire facias* to repeal letters patent.

AND in these cases the titling or stile of the record in chancery was sometimes *placita in cancellariâ*, sometimes *placita coram rege in cancellariâ*, sometimes *coram consilio in cancellariâ*. *Claus.* 24. E. 3. m. 11. dorf.

AND anciently divers of the *consilium regis ordinarium*, but especially the judges and barons of the exchequer, were co-assessors with the chancellor.

AND sometimes the entry of the judgment in the chancery in these cases is as given by the chancellor and council as by one joint judicature. As *claus.* 19. E. 3. part. 2. m. 11. dorso, in the case of Clifford, which is the same case reported 19. *Aff. placito ultimo*. *Et super hoc habitâ per cancellarium thesaurarium justiciarios et Willielmo de Shareshul capitali barono de scaccario deliberatione, &c. de communi assensu eorundem cancellarii thesaurarii justiciariorum baronis et aliorum de consilio dicti domini regis consideratum est, &c.* *Claus.* 26. E. 3. m. 27. dorf. in the case of Clee, the parties *venerunt in cancellariâ coram consilio domini regis, præsentibus Simone archiepiscopo Cantuariæ cancellario, Willielmo Cicestrensi episcopo, Willielmo Shareshul capitali justiciario, et aliis de consilio dicti domini regis, &c.* *Et habitâ super hoc per dictum consilium deliberatione diligenti, &c. videtur eidem consilio, quòd hæc curia non habet cognoscere, &c. Ideo consideratum est, quòd eat sine die.* So that it seems a common judgment given by all, and not barely by the chancellor authoritatively.

ritatively. The like we may find *claus.* 19. *E. 3. part. 1. m. 17. dorf.* *Claus.* 28. *E. 3. m. 2. & 4.* *Claus.* 33. *E. 3. m. 2. dorf.* and in diverse other records.

BUT it is true in some records, though the judgment be given *de avifamento et assensu consilii*, it is authoritatively given by the chancellor or court of chancery. And although at this day in cases of this nature he doth and indeed ought to call the judges to his assistance, and to give judgment according to the advice of the greater part; yet the form of the entry or authoritative part of the judgment is by the chancellor or court of chancery. *Vid. Nov. Entries* 404. & 483. *Et super hoc habita maturâ et diligente deliberatione, de avifamento justiciariorum de utroque banco et aliorum peritorum de consilio domini regis in eadem curiâ cancellariæ existentium, consideratum et decretum est per Willelmum archiepiscopum Cantuariæ cancellarium Angliæ et curiam cancellariæ prædictam, quod manus domini regis amoveantur.* 19. *H. 7.* So that though the judges gave advice, yet the authoritative judgment was given by the chancellor and court of chancery.

IT is true, that in ancient time, judgment given in chancery, in cases of this nature, as well as in those others abovementioned, were reverfible in the court of king's bench. At least the party had election to bring his writ of error there or in parliament. *Vid.* 39. *Aff.* 18. 42. *Aff.* 22. upon a partition made in chancery. But I do know, that in case of a judgment given in the chancery upon a *rege inconsulto* upon an aid-pryer, in the case of Squibb for a teller's office in the exchequer, the then lord keeper would not grant a writ of error in the king's bench, but only in the parliament. And the only reason that can maintain this decision, and give a difference between this and a judgment in a *scire facias* or suit by privilege, must be this; because this is one of the cases, which is before the keeper or chancellor and the *consilium regis*, whereunto

the judges are or should be called, and give at least their advice: and so it is one of those cases abovementioned, which are of a higher nature than ordinary cases: and it is no reason, the judges, who are presumed at least to give advice in these cases, should be the judges of the errors of that judgment, wherein, by the constitution of the courts themselves, they are to be public assistants and advisers.

AND thus much shall suffice to shew, how the *consilium regis* mingled with the chancery, and derived even the very name of *consilium regis* to it, though with the addition for the most part of *consilium regis in cancellariâ*.



## C H A P. VII.

CONCERNING THE *CONSILIUM REGIS*, AS IT STOOD IN RELATION  
TO AND CONJUNCTION WITH THE KING'S BENCH.

THE *consilium regis* in ancient times did so often sit in the court of king's bench, and were so often mingled in and with that court and the transactions thereof, that the stile of that court many times was *placita coram consilio regis*, and sometimes *coram rege et consilio*. For instance, T. 37. H. 3. M. 1. E. 1. & H. 1. E. 1. *placita coram rege et consilio, placita coram consilio, placita coram rege et regi ad et consilio*; H. 1. E. 1. rot. 1. *placita coram rege et consilio*; P. 1. E. 1. *in schedula coram consilio*; and the continuances *coram rege vel ejus consilio*, in an appeal of robbery. H. 2. E. 1. rot. 17. Heref. in an assise between Penbrigg and Mortimer the entry is, *postea coram M. de Littleburg magistro Ricardo de Stanes et Nicholao de Stapleton justiciariis ad placita domini regis terminanda assignatis, Waltero de Milto tunc cancellario, Roberto de Burnell, et aliis de consilio domini regis*. Note the judges named in the first place. H. 3. E. 1. rot. 8. in an assise by Montford the record removed *coram domino rege* (which appears to be the king's bench), *et videtur domino regi et ejus consilio, quod minus rite processerunt ad captionem assise*, and the judgment for the defendant by the justices of assise there reversed and judgment for the plaintiff. P. 4. E. 1. the stile of the court is *placita coram domino rege*; and yet, *ibidem* rot. 28. Heref. in the case between Bohun and William de Valentia touching the profits of the court of Penbeach, the proceeding is *coram consilio domini regis*.—Vld. M. 9. & 10. E. 1. *coram rege* rot. 24. a judgment given justices itinerant in dower. The reversal is in the king's bench. Yet the entry of the judgment is, *visum est domino regi et ejus consilio manifestum esse erratum*.

AND when after about 10. E. 1. the stile of the king's bench ran generally *placita coram domino rege* and not *coram consilio*; yet there were ordinarily some cases, wherein there was a communication between the *consilium regis* and the king's bench.—1. By way of advice and direction\*. When difficult cases occurred in the king's bench, they oftentimes resorted to the council for their advice, as 19. E. judgment 174. touching the judgment for loss of the hand in case of striking in presence of the court. And so 39. Aff. 19. touching setting a fine in diverse other instances.—2. In cases of issues joined before the *consilium ordinarium* either in chancery or out of chancery, the record was commonly sent, sometimes by writ, sometimes by delivery by the chancellor *propriis manibus*, into the king's bench. And then the whole record is entered in the king's bench, and judgment most commonly there given.—3. In cases of great moment and example many times the *consilium regis* sat with the judges of the king's bench and gave their advice. M. 33. 34. E. 1. rot. 50. when the king of Scots did his homage to the king of England. H. 32. E. 1. rot. 19. *coram rege inter regem et priorem Wigornie* judgment given for the king, *coram toto consilio, tam thesaurario et baronibus de scaccario, quam cancellario et clericis cancellarie, et etiam iusticiariis de utroque banco*. The like P. 35. E. 1. rot. 45. Northampton. *coram toto consilio*. T. 24. E. 3. rot. 32. Otto de Holland *ductus ad barram pro escapio comitis de Ezo constabularii Francie coram domino rege, assidentibus cancellario, thesaurario, comitibus Arundel et Hunt. Bartho. de Burghersb, Nicholao de Northburgh clerico de privato sigillo, iusticiariis de banco*, where Otto was committed to the marshall.

BUT though the *consilium* sometimes sat with them; yet the actual jurisdiction was in the court, and the sitting of the council

\* T. 43. E. 3. rot. 72. a forged fine taken off the file *per advisamentum totius consilii domini regis, tam magnatum quam aliorum*. It seems it was the lords house in parliament.

with them was either for the greater solemnity or at most but by way of advice, and the court in after-times grew more curious therefore in their entries, that the authoritative judgment might appear to be in the court and not in the assessors (as was likewise done by the chancellor, as is before shewn).

AND therefore *P. 50. E. 3. rot. 46. Devon.* in a writ of error by John Pomroy and his wife to reverse a fine for the non-age of the wife the record runs, *quâ inspectâ coram justiciariis et justiciariis de banco et aliis proceribus et magnatibus de consilio domini regis ex hac causâ ibidem existentibus, et diligenter examinatâ, videtur eis, quod dicta Johanna modò non est infra ætatem, nec ad dictam quindenam Paschæ præteritam fuit infra ætatem, per quod ipsa ad scētam prædictam in formâ prædictâ faciendam non est admittenda: ideo Johannes Cary eat sine die.* It should seem this examination was in parliament; for it appears the record was sent into the king's bench by writ dated 10 May 50. E. 3. And yet it is observable, that the justices of the king's bench are named even before the *proceres* and *magnates*; because in truth it was most properly within their jurisdiction. The like method is *H. 2. E. 1. rot. 17. Heref.*

AND it is observable, that most of the great cases, which are recorded *inter placita parliamenti E. 1.* which were in their nature cognizable by the king's bench, are likewise entered *inter placita coram rege*, as if transacted and judged in that court, especially where they were criminal causes. For instance,

THE great case of the prior of Tinnuth, which was in the nature of a *quo warranto*, is entered *inter placita parliamenti E. 1.* But it is also entered and the judgment given as in the king's bench, *H. 20. E. 1. rot. 59. Northumbr. Placita Parliament. Ryley 25.*

THE case touching the liberty of the county of Pembroke, *M.* 23. 24. *E.* 1.

THE proceeding against the archbishop of York for excommunicating the bishop of Durham, *H.* 21. *E.* 1. entered *inter Placita Parliament.* Ryley 135.

THE great case between the earls of Gloucester and Hereford, *Hill.* 20. *E.* 1. & *M.* 19. 20. *E.* 1. yet entered *lib. parl.* Ryley 74.

THE case of Nicholas Segrave in *lib. parl.* Ryley 266. is entered in the king's bench *P.* 33. *E.* 1. *rot.* 22. *Northampton.*

MANY more of this nature appear; and the reasons thereof were these.—1. Sometimes the records themselves were delivered out by the king's command to the justices of the king's bench, an instance whereof is in the *parl.* of 20. *E.* 1. Ryley 102.—Again, 2. in all or most cases, where an issue was joined upon a complaint to the *consilium regis* either in parliament or out of parliament, the issue was tried by commission and returned to the council, but most commonly by the court of king's bench either at bar or by *nisi prius*, and then it was necessary the record should be entered there.—3. I have sometimes thought, that it was for the better and more authentic proceeding; for the court of king's bench having a fixed jurisdiction in most of the cases thus entered before them, especially in criminal, and they being always present with the rest of the *consilium regis*, where these matters were handled and judged, it was in effect the judgment of the king's bench itself in these ancient times; which was no small security and advantage to the proceedings, the record thereof being made and entered in the court of king's bench, who had unquestionable jurisdiction in the case, which possibly might not be so clear as to the bare authority of the *consilium regis*.



## C H A P. VIII.

CONCERNING THE RELATION AND CONJUNCTION OF THE  
*CONSILIUM REGIS* TO THE COURT OF EXCHEQUER, COM-  
 MON PLEAS, AND PRIVY SEAL.

AS to the court of exchequer, there were and are great officers belonging to it, who were also most commonly members of the *consilium ordinarium*, namely, the treasurer the chancellor and under treasurer of the exchequer, the barons and the chamberlains of the exchequer, and had a special seal, namely *sigillum scaccarii*, in the custody of the chancellor of the exchequer.

AND upon these accounts, and because the business of the king's revenue was a large business, those great officers did sometimes call other of the *consilium ordinarium* unto their assistance touching matters of the revenue. And oftentimes petitions to the council either in or out of parliament concerning the king's revenue were referred to them.

AND upon these accounts many times persons were called by writ under the exchequer seal to appear *coram thesaurario et consilio* upon suggestions, which writs were general *certis de causis*.

AND this appears by the complaints in parliament made against these proceedings in the exchequer by suggestion and process *certis de causis*. *Rot. parl.* 47. *E.* 3. n. 34. 3. *H.* 5. part. 2. n. 46.

AND yet it seems they still held the same course of proceeding, as appears by the case of *Chesterfield* 39. *E.* 3. and the case of *Ford* 17. *H.* 6. cited by my lord Coke in his jurisdiction of courts  
 under



under the title of the star chamber. *V. 33. E. 1. Ryley 372. Albat thesaurarium, qui convocatis sibi justiciariis et consilio ipsius domini regis sibi celerem faciat justitiam.* And possibly the case of 43. *Aff. 38.* might be a proceeding in the exchequer *coram consilio.*

THE place of the convening of the council was in the exchequer chamber, where they heard causes criminal as well as civil by bill in English or French if they concerned the revenue.

THE criminal jurisdiction is taken away to all intents by 17. *Car. 1. cap.* . But their power in civil suits concerning the revenue or the king's fee-farm debtor or accomptant continues, and so hath long done. *Vide statute 33. H. 8. cap.* . And the ordinary judges therein are the treasurer chancellor and barons of the exchequer, to whom the rest of the council were in nature of assistants when called, as they were to the chancellor in cases there.

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TOUCHING the common pleas, I do not at all find them as sitting in that court called *consilium regis*, though they were members of the *consilium ordinarium*. For they were not concerned but only in civil suits, and that for the most part between party and party. Only in cases of aid-poyer of the king the parties were sent *ad sequendum dominum regem* or *eius consilium in cancellaria*. And many times they advised with the *consilium ordinarium* in cases of difficulty depending before them. And some instances may be given in great and eminent cases depending before them, that some of the *consilium* sat by them in point of advice but not of jurisdiction.

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TOUCHING the keeper of the privy seal, which was antiently *clericus de privato sigillo*, he was a member of the *consilium ordinarium*, and  
fo

so continues, though with a higher title and precedence; and having the custody of the privy seal, which the council made often use of as well in process as otherwise, by the advantage thereof and by colour of some references made often to him by the council, and in conjunction with the master of request, he gained of late a kind of court of equity, and issued process of privy seal to parties upon petitions, or bills now formally preferred, though antiently only referred to him by the *consilium regis* or by the king. This court he held for a while, but being under a discountenance it hath now for many years lain asleep. This court *de facto* was no other but a branch of the council, wherein the lord privy seal being advanced to a higher stile than formerly presided.

## C H A P. IX.

CONCERNING THE HABITUDE AND RELATION OF THE  
*CONSILIUM REGIS* TO THE LORDS HOUSE IN PARLIAMENT,  
 AND THEIR CONJUNCTION THEREWITH.

I HAVE hitherto considered the *consilium regis ordinarium*, what it was, of what persons and officers it ordinarily consisted, how it stood in its own simple constitution, and what its power and business and jurisdiction was. And I also have considered it in its relation unto and conjunction with other ordinary courts of justice.

AND now I draw nearer to what was my principal design, namely, the consideration of the lords house in parliament, and as necessarily previous thereunto the consideration of the *consilium regis ordinarium* in relation to and conjunction with that house.

AND to say the truth, although much of the antient power, jurisdiction, and consistency of the *consilium regis*, is altered by process of time and several acts of parliament, as is above mentioned CHAP. V. yet, in the great court of parliament, at least the figure and model of the *consilium regis* and the persons whereof it consisted is to this day preserved in the lords house in parliament. For thither are summoned the great officers, whether they are peers or not; as the chancellor, treasurer, privy seal, secretaries of state, judges, barons of the exchequer, masters of chancery, king's serjeant and attorney, the treasurer of the household, steward and chamberlain of the household, and most if not all the king's privy council. And although they are summoned by writ, and sit in the lords house; yet their distinction from the lords spiritual and temporal appears, 1. In the manner of their summons, those having this clause in their writ,

*ad*

*ad tractandum nobiscum et cum cæteris prælatis proceribus et magnatibus*; and those of the council, *ad tractandum nobiscum et cum cæteris de consilio nostro*, as before is shewn. 2. In the seats of their sitting; the peers and bishops sitting on benches, those of the *consilium* if not peers sitting on the woolpacks in the middle of the house. 3. In the extent of their suffrages; those that are peers or lords of parliament having voices in the legislative power, but those of the *consilium ordinarium* having no voices therein.

AND yet we are not without an instance of their protestation entered against bills that were highly derogatory to the common law, and against the judgment and opinion of the chancellor and judges. *Rot. parl. 15. E. 3. n. 42.*

BUT as to their suffrages in point of judicature in the lords house, it should seem by the many instances *inter placita parliamenti tempore E. 1.* some whereof are before mentioned, they had their voices and suffrages therein. But about the time of *E. 3.* they began to be but in nature of assistants or advisers, and the authoritative and judiciary power rested in the lords house, which what it was we shall hereafter see.

YET in matters of law their opinion (of the judges especially) when they became but in nature of assistants, was in matters of law and judicial proceedings of so great weight and authority, that the advice by them given was the rule of the judgment of the lords house, from which they very rarely if at all departed. This appears by infinite instances. See for that purpose the statute of 14. *E. 3. cap. 5.* in the constitution of the commission for remedy of delays of justice; *rot. parl. 14. E. 3. n. 30.* on Stanton's case, where the judgment, not only of the lords house, but of both houses of parliament, was guided by the judgment of the chancellor, treasurer, the major voice of the justices and barons of the exchequer, *et autres de counsell de roy en le*

*dit parlement.* The like *rot. parl.* 9. *H. 5. n. 12.* concerning a prohibition in the case of Cooke, parson of Somertham: the judges and barons gave their opinions in parliament, that no prohibition lay; whereupon the *custos Angliæ* and lords awarded *selonc l'advise de les justices et barons, que nul prohibition gisoit sur le matter.* And infinite instances of this kind might be found in antient records.

YEA and in later times also. 1. *H. 7. 19.* In case of a writ of error in parliament, the lords *per consilium justiciariorum* proceed *ad errorem corrigendum.* And therefore in the case of the earl of Oxon. and Lyndsey touching the office of great chamberlain, now reported by justice Jones pag. 130. the lords gave their judgment conformable to the resolution of the greater number of the judges. And in the beginning of the parliament 1640, in the case for the barony of Gray de Ruthen between Langreish and the earl of Kent, where the question was, whether the rule of *possessio fratris de feodo simplici facit sororem heredem* extended to a barony by writ, it was resolved by the opinion of the judges delivered in the lords house, that it did not. Though these were cases only of advice and concerning matters of honour; yet the lords gave their judgment conformable to the opinion of the judges.

Now it is to be noted, that, although the *consilium regis* sat in parliament, yet we must remember, that they were still under a double capacity, viz.

ONE, as they were *consilium regis ordinarium.* In which respect, as they had petitions depending before them before the parliament; so they had in the time of parliament other petitions delivered to them or to the king, and delivered over or referred to them, which did not concern the parliament at all. And upon these they proceeded to give answers according to the nature of them as at other times out of parliament, and they were received as formerly by the clerk of the council. Touching these, and what they might or might not do in them, is at large declared *supra* CHAP. IV.



THEY had another capacity or consideration, as being part of the king's great council in parliament, or at least as great and necessary assistants thereunto. And though till about the middle of R. 2. all petitions, as well in parliament as out of parliament, were directed either to the king or the king and his council or to the king's council; yet the parliamentary petitions had a distinction from those that ordinarily concerned the council as such. 1. Most of the parliamentary petitions had something in the stile or body or prayer of the petition, which made it appear, that they were such; as for instance, *au roy et a son counsell en parlement*; or it prays that a record may be brought into the parliament, or that relief may be given *par roy et son tres sage counsell en parlement*. 2. The petitions in parliament had always a time prefixed for their delivery, viz. four or six days in the beginning of the parliament. 3. For the most part these parliamentary petitions were delivered to certain examiners appointed by the king the first day of the parliament, as shall be shewn more at large in the next Chapter. But those that were not parliamentary petitions were received of course by the clerk of the council. *Sed de his plus infra.*

## C H A P. X.

## CONCERNING THE VARIOUS NATURES OF PETITIONS, AND HOW ENTERED.

THE parliamentary petitions were of two kinds. I. Such as came up from the house of commons, as being assented unto by them and sent to the lords. II. Such as were petitions of private persons.

I. TOUCHING the former of these I shall say somewhat, but not much, because it is not the thing I principally intend. Of latter times, especially towards the latter end of *H. 6.* and so downwards, acts of parliament were drawn up in their full form, and so sent to the other house or to the king, sometimes in this form (when it came from the commons), *Item quedam petitio liberata fuit, &c. formam actus in se continens, viz.* and this avoided many great uncertainties and inconveniencies, which the course anciently used had occasioned.

BUT in the elder times down so low as *H. 6.* the petitions of the commons did not contain the formality of acts; but after the conclusion of the parliament the judges principally were employed, out of the petition and the king's answer, to draw out a formal act, which was sent by proclamation into all counties; and the acts, which were thus drawn up and proclaimed, were entered upon another roll, viz. the statute roll. *Rot. parl. 2. H. 4. n. 21. Item les commons prièrent a nostre seigneur le roy, que les besoignes faits ou a faire en cest parlement soient enactés et ingrossés devant le departer des justices, tant come ils aient en leur memory a quoi leur fuit respondus, que le clerke de parlement serra son devoyer pur enacter et engrosser le substance du parlement*

*lement par advise des justices, et puis le monstrier al roy et as seigneurs du parlement pur savoirr leur advise.*

AND this made up the statute roll in these elder times.

THE petitions delivered by the commons were of two sorts. Some were public; some were private petitions, presented first to them, and by them preferred to the lords, which yet were reckoned amongst the *petitiones communitatis*. And it seems, that these were immediately indorsed as bills now are, *soit bayl au seigneurs*; and if assented unto by the lords and king without any alteration, they did not use to indorse the bill as now, *soit bayl au roy*, but it was delivered to the clerk of the parliament to be enrolled; and if it began with the lords, it was not indorsed as now, *soit bayl al commons*, but sent down without indorsement. And the commons indorsement is, *les commons sont assentus*. 33. H. 6. 17. 18. *per Kerby*. And when answered and assented to by the king they then were filed, and were the warrant for the drawing it up into an act; though in truth no such indorsement now appears, because the petitions themselves are not extant.

AND as far as I can conjecture, all those *petitiones communitatis*, whether private or public, were delivered immediately to the lords, as bills now are; and such of them, as were agreed to by the house of lords, though it may be rejected by the king, were entered upon the parliament roll. For it is evident, that the parliament roll was made up in the lords house, most commonly by the clerk of the parliament, but sometimes by the clerk of the crown; and although no expresse assent to those petitions is entered to be made by the lords, yet it is not to be thought, that it would be entered in the parliament roll in the lords house, unless assented to by them.—And thus far of the *petitiones communitatis*.

FOR

II. For private petitions in parliament presented only by private persons, they were of two sorts, and accordingly were under two kinds of rolls or memorials.

SOME were immediately presented to the lords either by the parties themselves, or else sent thither by the council or *auditores petitionum*. Both these, if received and admitted by the house, were likewise entered on the parliament roll.

SOME again were delivered over by the receivers of petitions, either to the *consilium regis* or the *auditores petitionum*, and by them indorsed. And these petitions are not entered on the parliament roll, but were entered in *bundellis petitionum parliamenti* with their answers. Some of each bundle are preserved to this day, but diverse of them lost or mislaid.

So that besides the journals of parliament we have three notable memorials of parliamentary transactions.

1. THE bundles of petitions with their answers; which by the hands of the receivers of petitions were delivered, sometimes to the council, sometimes to the auditors of the petitions, and by the council or auditors of the petitions answered without troubling the lords with them.

2. THE parliament rolls, consisting amongst other things of the petitions of the commonalty whether public or private, and assented to by the lords; and of those petitions, which were immediately admitted by the lords from the petitioners themselves; or of such private petitions as were turned over to the house by the *auditores petitionum* or council.

3. THE statute roll made up and collected out of the petitions presented by the commons assented to by the lords, and therefore entered upon the parliament roll, and likewise assented to by the king.

THIS is my conjecture touching the records of parliamentary petitions, and their entry upon the parliament roll or bundle of petitions; which though it seems probable, yet is but a conjecture, for the records are dark and obscure touching it.



## C H A P. XI.

TOUCHING THE TRANSMISSION OR DELIVERY OF PARLIAMENTARY PETITIONS TO AND FROM THE *CONSILIUM REGIS*.

**A**NTIENTLY, as I have formerly said, all petitions, as well parliamentary as others, were directed to the king, or to the king's council, or to the king and his council; which titling of private parliamentary petitions continued with very little if any variation till towards the middle of *R. 2.* and then some were directed *al roy et al noble seigneurs assemble en parlement*; which latter titling became more common and ordinary in the time of *H. 4.* and so downward.

**BEFORE 8. E. 1.** it should seem, that as well parliamentary as other private petitions of this nature were received by the council themselves, either immediately, or by the hands of the clerk of the council. But ensuing times made great changes in the manner of transmitting of parliamentary petitions to the council.

**CLAUS. 8. E. 1.** Ryley 442. It was then settled, that the parliamentary petitions should according to their several natures be delivered to the judges of the respective courts to whose jurisdiction they did respectively belong, viz. such as concerned the chancery to the chancellor, such as concerned the exchequer to the exchequer, such as concerned other courts to other courts (only if the business was great or merely depended upon the king's grace, then the king to be acquainted with it, before any thing be done by them therein) and that so no petition come to the king or his council by other hands, that so they might have leisure to attend the weighty business of the kingdom, &c.

CLAUS. 21. E. 1. m. 7. in *scedula*, Ryley 459. it was ordained, que toutes petitions, que dest en avant ferrunt liverées en parlement, soient liverées a ceux que le roy assigne a recevoir les, et que toutes les petitions soient tot a primer apres qu'ils sont receves bien examines : et que cels que touchent la chancelaire soient mises en un lyaz severalment, et autres que touchent les eschequer en autre lyaz, et aussi soit fait de cels que touchent les justices et puis celes que, et puis celes que serront devant le roy et son conseil severalment en autre lyaz, et aussi celes que averont este respondu devant en several lyaz. Et auxi soient les choses report devant le roy devant ceo qu'il les commence a delivrer.

CLAUS. 3. E. 2. m. 23. in *scedula*, Ryley 524. which was after renewed in *totidem verbis*.

CLAUS. 3. E. 3. m. 13. in *scedula*, the receivers of petitions in such form as they were after in effect used were established at the request of the commons, viz. article le *finne*, que les chevalers gents de cities de burghs et autres villis, que sont venus a parlement par son commandement pur eux et pur le people, et ont petitions a liverer pur torts et pur grevances faits a eux, que ne poent estre redresse par commune ley ne en autre manere sans special garrant, il ne trouve home, que leur petitions receive si come soloit estre en temps le roy son pere en parlement, et de ce prient le grace et remedy.—Le roy voet, que en ses parlements desormes gens soient assigne a recevoir petitions, et qu'ils soient delivres par son counsell aussi come estre soloit en temps son pere.—Delivres par son counsell is intended of dispatched or answered by the council.

BUT although the council received the petitions from the hands of the receivers; yet they rarely (if at all) exercised any decision or decisive jurisdiction upon them, but only a kind of deliberative power, or rather direction transmitting them to the proper courts places or persons where they were proper to be decided, and sometimes wholly dismissing them because no law is ordained in the case or ne poent estre fait sans novel ley. Hence it is, that most of the an-

swers, that the council gave, were in nature of remissions of the petitions to those persons or courts, that had properly the cognizance of the causes.

IF the parliamentary petitions were a mere matter of grace, or concerned the king most immediately in point of interest, the indorsement was *coram rege*.

IF the petition were properly relievable in the ordinary courts of law, the indorsement was, *sequatur ad communem legem*.

IF the business concerned the ordinary proceedings in the chancery, then the answer was, *mittatur ista petitio in cancellariam, et ibi fiat justitia*; and if there were matters of fact inquirable in order to the determination of the petition, *mittatur ista petitio in cancellariam, et cancellarius faciat commissionem ad inquirendum de contentis in petitione* returnable into chancery, *et subinde fiat justitia per cancellarium*. These kinds of inquisitions were those, that came under the title of *brevia regis* in the tenures, which were inquisitions taken by commissions and returned into chancery, and hereupon sometimes *amoveas manus*, sometimes *scire facias* granted.

IF the business concerned the exchequer, then the petition was sent into the exchequer, sometimes without writs directing their proceedings, sometimes with writs to the treasurer and barons to make allowances or discharges, as the case required.

So that I do not find any considerable difference in the proceedings of the council, either in parliament upon parliamentary petitions, or out of parliament in the other petitions to the council, as to point of decision or determination of petitions tarrying before them; for the greatest business they did or jurisdiction they exercised therein was remission of petitions to their proper and ordinary jurisdiction.

ONLY there were these differences between the remissions.

THE ordinary petitions *de consilio* were commonly remitted to the ordinary courts or places, where they were determinable as above.

BUT parliamentary petitions, that came to the council from the receivers either mediately or immediately, had two kinds of remissions, that were not so usual nor indeed practicable out of parliament, which were principally these two.

1. WHEN the *auditores petitionum* were appointed in parliament, as we shall see in the next Chapter, they were antiently for the most part certain select lords chosen by the king, sometimes such as were of his council, sometimes others added, and a select number of the judges, together with the chancellor and treasurer, which were a kind of committee of the council. And sometimes the petitions, that came to those *auditores petitionum*, were by them referred to the whole *consilium ordinarium*, and accordingly the petition was indorsed *coram consilio*.

AND therefore in the parliament roll of 8. E. 2. there is a special titling of one of the rolls, viz. m. 5. *coram toto consilio*; and the next roll after, viz. m. 6. *responsiones coram rege et magno consilio*; which seems to enforce the difference.

AND yet amongst these very petitions, that were answered *coram rege et magno consilio*, the words *totum consilium* and *magnum consilium* are used promiscuously.

ROT. parl. 8. E. 2. m. 6. *petitio hominum de Lefwithiel* concerning the coinage of tin, the answer is, *videtur auditoribus petitionum*, that  
the



the coinage should be at Lestwithiel, *recitatis petitione et responsione coram toto consilio, placet regi et consilio, quod præmissa fiant.*

ROT. parl. 8. E. 2. m. 6. the titling of the record is, *responsiones coram rege et magno consilio in parlamento.* Ibidem, m. 6. pro comite Athol. *Cest petition fuit lue par commandement nostre seigneur le roy en plein parlement devant prelates countes et barons et tous autres, et respondue par assent.*

IBIDEM, m. 7. under the same title of *responsiones coram rege et magno consilio* in the case of a prohibition to the bishop of Chichester and a petition thereupon to the king and his council, *Resp. Videtur consilio, quod forma brevis non est concepta secundum usum cancellariæ, unde consulendum est super hoc cum domino rege. Postea habito colloquio ex parte magni consilii cum domino rege concordatum est, quod breve revocetur.*

2. AGAIN, many times the *consilium ordinarium* by their indorsement sent the petition *coram magno consilio*, and sometimes *coram rege et magno consilio* in cases of great weight and difficulty; and the like was done also by the *auditores petitionum.*

BUNDELLA *petitionum incerti temporis* Ed. 3. Ryley 651. in the case of the prior of Tykford, there are two indorsements, one by the *consilium ordinarium*, or at least *per auditores petitionum*, viz. *coram rege et magno consilio*; the other it seems by the *magnum consilium*, *le conseil ne assent point, que cest chose soit faite.* The like *ibidem* in the case of Sturmy *coram rege et magno consilio*, and then by the grand council *declare queux profits.*

AND sometimes the answer of the *auditores* or of the *consilium ordinarium* being read before the grand council, the former answer was corrected



corrected and altered by another answer of the grand council, so that they were a check and controul upon them.

Rot. parli. 8. E. 2. m. 10. dorf. upon a complaint made of *champertry* by Cecilia Beauchamp against William Inge, the answer of the *consilium ordinarium* is corrected by the grand council. *Videtur consilio, quòd nullum remedium potest fieri versus Willielmum de Inge antequam inquiratur de facto vice-comitis. Postea petitio illa lecta coram magno consilio visisq. statutis, &c. dictum est, quòd capiat breve nomine regis versus Willielmum Inge, si sibi viderit expedire. Eodem rotulo et m.* upon the petition of Thomas Hastings, *Videtur consilio, si domino regi placeat, quòd dicta custodia est resumenda in manum regis, &c.* But afterwards in the same roll the former petition and answer being remitted *coram magno consilio* received quite a different answer.

In the same parliament roll \* Joan Borresden prayed, that she might not be barred by the warranty of her mother without assents to demand the heritage of her father. The *consilium regis* were of opinion she ought not to be barred, and that it was within the reason of the statute of Gloucester. But the *magnum consilium* disliked this answer, and gave another, viz. *quia petitio illa non potest finaliter expediri sine explanatione, ideo ostendatur coram majoribus, et fiat inde explanatio.*

Now what this *magnum consilium* in parliament was, partly appears by what hath been before said; and I shall further illustrate it.

(1.) It was not meant of the *consilium ordinarium*; for by what goes before it appears, that the answers by the *consilium* and the *magnum consilium* were many times different; and the latter sometimes allowed,

\* It is the roll not of 8. E. 2. but of 8. & 9. E. 2. m. 2. dorf.—F. II.

sometimes corrected the answer as well of the *consilium ordinarium* as the *auditores petitionum*.

(2.) It was not intended of both houses of parliament; and the rather, because in the first and second membrane of that parliament touching the hospital of St. Thomas of Acon *coram consilio*, and the hospital of North Allerton *coram magno consilio*, and from thence adjourned into chancery, the petitions were both begun in the lords house.

(3.) And it seems to me, that it was not barely the house of lords, as it consisted singly of the prelates and nobility; and especially for this reason.

I HAVE before observed, that these petitions of the commonalty, that are entered upon the parliament roll, are such as were assented to by the lords of parliament. For, 1. We have no reason to think the lords, in whose house the parliament roll was entered, would have entered it among the records of that house. 2. We have no other evidence of their consent, but that entry; and yet we are sure they could not pass into a law without it.

AND yet we shall find in many parliament rolls many of the commons petitions, that were there entered upon the parliament roll, referred to the grand council, which could not be reasonably applied only to the lords in parliament, who had before given their consent to the petition. *Vid. rot. parl. 50. E. 3. n. 182. et 179. 178. 176. 172. 160. 141. 140. and many more.*

I THINK therefore the *magnum consilium* in parliament was the lords house, as it had united or joined to it the *consilium regis ordinarium*, a council within a council; and that in ancient time those things, that  
were

were transacted in the *magnum consilium*, came as well under the suffrage of the chancellor, treasurer, justices, and barons of the exchequer, as the lords. Indeed they had no voice in passing of laws; but in matters and points of jurisdiction and judicial proceedings they spake their judgment and gave their reasons.

AND although in process of time they came only under the notion and title of assistants; yet they were assistants of such a nature quality and weight, that their advice guided matters judicial and judicial proceedings in the lords house. But of this hereafter.

By what hath been before said,

(1.) IT seems, that in many times the answers given by the *auditores petitionum* were viewed by the *totum consilium*, and read before them, and sometimes before the *magnum consilium*; but commonly if the parties concerned in the answer were not satisfied with the answer, the party concerned did obtain a review of the answer by the council or the *magnum consilium*, which sometimes affirmed, sometimes corrected the answer.

(2.) THE like may be conjectured of the answers given by the *consilium ordinarium*. They were read before the *magnum consilium*, either of course or at the instance of the party concerned; and sometimes affirmed, sometimes corrected, by the *magnum consilium*.

(3.) THAT though the ordinary course of receiving parliamentary petitions, and handing them over to the *consilium ordinarium*, or to the *auditores petitionum*, was by the receivers appointed by the king; yet it was not always so. For, 1. It seems, that the *petitiones commun-  
• nitatis*, whether general or in the behalf of particular or private persons, were immediately delivered to the lords by the commons, or their speaker or messenger by them sent. 2. That many times, when

great persons were petitioners, or if they could get the favour of the house, private petitions were read immediately in the house of lords, and there answered or proceeded in as the case required : and such were oftentimes entered upon the parliament rolls, as appears in most parliaments in the beginning of the parliament rolls.

AND thus far touching the receiving and transmitting of petitions by the receivers, sometimes to the *consilium regis*, sometimes to the *auditores petitionum*, sometimes to the lords house or *magnum consilium*. Only I shall add this one thing, that as in the beginning of the parliaments, especially after 3. E. 2. the king appointed the receivers of petitions ; so there was always a short time prefixed, within which parliamentary petitions should be delivered, sometimes a week or less, to prevent the overcharging of the parliament with private petitions.

## C H A P. XII.

## CONCERNING THE AUDITORS AND TRIERS OF PETITIONS.

THE first day of the parliament the king appointed the receivers of petitions, commonly three for England, and three for Ireland Wales Gascony and foreign parts, and prefixed a time for the delivery of petitions to them.

He did likewise appoint two ranks of auditors or triers of petitions, viz. some for England, and sometimes for England Ireland and Wales, &c. and some for foreign parts. I shall meddle principally with those, that concern England.

THIS nomination of auditors of petitions was very antient; for though in the most antient times, as hath been before observed, the *concilium ordinarium*, for the most part, if not altogether, answered parliamentary petitions of private persons (for I speak only of these) yet to disburthen the council of that great incumbrance, that they might the better employ themselves in matters of public importance, these *auditores petitionum* were substituted, and gave answers to parliamentary petitions. For we find as antiently as 8. E. 2. answers given to such petitions by the *auditores petitionum*.

ROT. parl. 8. E. 2. m. 3. Upon the petition of Katherine Giffard the answer is, *videtur auditoribus petitionum*; and m. 6. dorf. upon the petition of the town of Lestwithiel, *videtur auditoribus petitionum*, &c. Yet the petitions were to the king and his council.

THESE were stiled *auditores petitionum*, and assigned sometimes *pur oyer les petitions*, and sometimes *pur responder al petitions*, and some-



times *pur oyer et tryer les petitions*: and this file they continued in their assignation until after 28. E. 3. And during all that time they had power to indorse an answer to petitions. This appears by their authority described by the king in the declaration of the cause of summons, *rot. parl. 28. E. 3. n. 3. Le tierce cause est, que ceux, que ont petitions a mitter en parlement pur grevances ou d'autres besoignes, que ne purroient estre exploit hors de parlement, les liveront as clerks soujecryes de les mettre en parlement, et le roi assignera certains prelatz et autres grantz de les respondre & ent faire droit.* And then the receivers and auditors of the petitions are named.

BUT after 28. E. 3. they lost the name of *auditores petitionum*, and only were assigned to be triers; whereby we may reasonably conjecture, that after 28. E. 3. they gave not answers to petitions, but only examined, whether they were proper for the parliament, and then delivered them over, either to the *consilium regis*, or to the *magnum consilium*, to answer.

AND possibly this may be the reason of the petition of the commons in parliament, *rot. parl. 36. E. 3. n. 31. Item pur tant que cest parlement feust summon pur redresser divers mischiefs et grevances faites al commons, et que chescun que se sentit greve mettroit son bill, et ferroient les seigneurs et autres assignes de les oyer; les queux seigneurs issint assignes, si nien touche le roy, font endocer les billes coram rege, et issint riens est fait, ne les grevances de riens redreschez: plese a sa bone grace d'ordeiner, que les ditz bills soient veues devant les dits seigneurs et chaunceller et tresorer et autres de counsell de roy, respondus, et endoces, en manere, come droit et reason demandent, pur Dieu et en oeuvre de charité; et ce devant le departir de dit parlement.—RESP. Le Roi le voet.*

FOR indeed those petitions were indorsed *coram rege*, that concerned more especially his interest or his special grace, and were referred to the king himself. Yet *vid. rot. parl. 14. E. 3. n. 29.* one bishop, one

one earl, one baron, and five judges, calling the chancellor and treasurer when needful, were specially assigned to sit upon the petitions *coram rege*, besides the general auditors of the other petitions.

THE first direction and ordering of the petitions in parliament by the *auditores petitionum* in the time of Edward the third is that in the parliament of *Hil. 6. E. 3. m. 1. 2. & 3.* where were assigned by the king three bishops, two barons, and four justices, *a tryer et terminer les petitions d'Angleterre*; and others for foreign petitions. And it was accorded, that they calling the chancellor, chief justice, and treasurer, or some of them, should proceed to try and determine the petitions; and that the petitions so tried and determined by them be sent into the chancery under one of their seals, and that the remnant of petitions should remain in the hands of the clerks receivers under the seals of the tryers till the morrow, and so from day to day; *et que les petitions, que sont a tryer et determiner devant le roy, soient tryes devant lui, appellees a lui tiels come il voudra; et que mesmes les petitions demourgent south les seals des auditeurs ou afeun de eux, tanque ils sont reportes devant le roy.*

AND because these *auditores petitionum* after their constitution did answer private petitions in parliament, and supplied the place of the *consilium ordinarium*, and eased them, and the busineses that came before them was for the most part in relation to suits at law and injuries, the persons, that were antiently nominated *auditores querelarum*, were for the most part such, as were of the council judges and men of ability for that employment. But in after-times, as the grandeur of the lords prevailed, so by degrees the power of the auditors and *consilium* decayed, by surcharging them with a numerous company of prelates and lords, which possibly were unacquainted with matters of this nature; and so the dispatches by the auditors and *consilium* were impeded and incumbered.

I WILL therefore take an estimate of the *auditores querelarum* and their quality, as they stood antiently, and how gradually they were altered.

14. *E. 2. rot. parl.* Ryley 186. for answering the petitions of England, three bishops, one abbot, two barons, and five judges.

*Rot. parl.* 14. *E. 3. n. 21.* four bishops, two earls, three barons, four judges.

*Rot. parl.* 15. *E. 3. n. 3.* two bishops, two earls, two barons, three judges.

17. *E. 3.* two bishops, two earls, two barons, four judges.

18. *E. 3.* two bishops, two abbots, two earls, three barons, four judges.

20. *E. 3.* one bishop, one abbot, one baron, four judges.

21. *E. 3.* three bishops, one abbot, one prior, two earls, four barons, four judges.

25. *E. 3.* three bishops, three earls, two abbots, one baron, four judges.

28. *E. 3.* three bishops, three earls, one abbot, two barons, four judges.

AND in all these cases the chancellor and treasurer were also to be called, when there was occasion. How many, or which of the bishops, earls, or barons, were of the council, it doth not appear. Possibly many of them were such. But hitherto there was a reasonable balance held in the constitution of the *auditores querelarum*, between the

the prelates and nobility of one part, and the chancellor treasurer and justices of the other part.

BUT afterwards, viz. after 28. *E. 3.* when these *auditores* became only tryers, the proportion of the nobility and prelates much exceeded.

36. *E. 3.* six bishops, two abbots, three earls, one baron, three judges.

37. *E. 3.* four bishops, three abbots, one duke, four earls, five barons, five judges.

50. *E. 3.* nine bishops, two abbots, five earls, three barons, four judges, calling the chancellor treasurer steward and chamberlain, as there should be occasion.

AND afterwards the number of the nobility rather increased among the tryers.

So that as in time the substitution of the *auditores petitionum* took up much of that business, which was before done by the council; and as they grew to be only tryers of petitions; so their authority lessened. And now the very tryers of petitions seem to be but a piece of formality; for the business formerly transacted by the *consilium* auditors or tryers is now for the most part transacted in the lords house, or by committees of petitions, and other committees of their own nomination.

## C H A P. XIII.

A BRIEF RECOLLECTION OF WHAT HATH BEEN SAID TOUCHING THE POWER AND JURISDICTION OF THE *CONSILIUM REGIS* AND THE *AUDITORES PETITIONUM*.

I HAVE in the foregoing Chapter gathered out of old and obscure records the *consilium regis*, who they were, and what their power both out of parliament and in it; and have brought them to their conjunction with the house of lords in parliament, and so making up that great court and council called the *magnum consilium*. I have also considered the *auditores petitionum*, and what they were, and how they supplied the place of the *consilium regis* in answering parliamentary petitions, and their various constitutions and modifications.

It will not be amiss to make a summary collection of such things as have been before promiscuously delivered touching the *consilium regis*, as may be of use in what follows.

1. THE *consilium*, though in conjunction with the house of lords in parliament, had never any voice in passing of bills or in the legislative power; but the same resided in the king the lords of parliament and the commons.

2. BUT herein they had only a power of advice and assistance when called thereunto: which power of advice had a double respect; one to the lords, to assist and advise them in passing bills; another to the king, when the bill passed both houses, to give the king their opinion touching such questions as should be by or for him moved in council touching the same; for both which advices they were qualified by their experience, education, and learning, and by being  
present



present in the lords house or at the committee appointed touching such bills and hearing the debates.

3. THEY had no voice in the trial of a peer, unless they were peers themselves ; but were only assistants to the court of high steward to give their opinions in matters of law when required by the court.

4. THEY had of right no jurisdiction to proceed criminally to censure any person, because restrained by the acts of 25. E. 3. and 42. E. 3. But before that time, at least when in conjunction with the lords house, they did together with the lords exercise a jurisdiction in criminals. And some few instances of criminal proceeding before the *consilium regis* were used, some by virtue of certain acts of parliament giving them jurisdiction in some cases, and some by way of usurpation, till 3. H. 7.

5. THEY had not power to determine rights of freehold between party and party ; for it is restrained by the statute of 25. E. 3.

6. THEY had power in conjunction with the lords to proceed in errors upon judgments in the king's bench, until by degrees that power was appropriated to the lords ; but even then their advice in matters of law ought *de jure* to be demanded, and without apparent and great cause to be followed.

7. BUT out of parliament they had no power to hold plea upon writs of error, but had only an assisting or advising power. 39. E. 3. 14. 1. H. 7. 19.

8. THEY had power, both in parliament and out of parliament, upon petitions coming before them, to remit and send the petitions, sometimes by writ, sometimes by indorsement, sometimes with particular direction, sometimes with special directions, sometimes only  
M generally,

generally, to the proper courts to which the remedy of the matter complained of belonged; but not to determine finally causes, that were relievable in other courts.

9. THEY had power, both in parliament and out of parliament, to proceed to the determination of some causes, that more specially concerned the king's interest; sometimes by virtue of an indorsement by the king *soit droit fait*, as in petitions of right; sometimes by their own power, as in cases of aid-prayer of the king, *procedendo in loquela et ad judicium*, *scire facias* to repeal patents, partitions, dower, and liveries of lands in ward to the king, traverses, *monstrans de droit*, *idiotia examinando*, *etate probanda*, and some others. And these were sometimes determined by this *consilium* in parliament, sometimes out of parliament; but most commonly by the chancellor and council, and of latter times by the chancellor with the advice of the council.

10. BUT in all cases, where a matter of fact was either put in issue or inquirable, it was not done as now in chancery by examination of witnesses, unless in case of examination of an idiot: but either the fact was inquired preparatorily by an inquisition taken by virtue of a commission out of chancery; or if an issue were joined, it was sent into the king's bench to be tried, and then judgment was given in the king's bench, and so it is to this day. To this purpose see the notable record *rot. parl. 9. E. 2. m. 7.* where upon a complaint in parliament by Badlemire, constable of the castle of Bristol, for divers riots and misdemeanours, they were called *coram consilio*, and the defendants by attorney appeared and pleaded not guilty, and a jury of twenty-four knights returned *coram consilio* found them guilty, and they made fine to 4000 marks. *Vid. simile rot. parl. 5. R. 2. n. 43.* where Clivedon accused Cogan in parliament of treason, and he pleaded not guilty, *et de hoc ponit se super patriam*, and the case thereupon dismissed to a trial at law.

AND this held, not only in the cases mentioned last, wherein they had a decisive power *de jure*, or in cases criminal or civil depending before them before 25. E. 3. but also in those cases, wherein they by their power sometimes usurped jurisdiction after that statute. For trial of causes by witnesses examined by commission was brought in by clergymen, who were chancellors, and were either doctors of the civil law and canon law, or much favoured it; though now by its long usage it is not in prudence to be shaken.

## C H A P. XIV.

## CONCERNING THE LORDS HOUSE AND THEIR JURISDICTION.

THE lords house may be considered two ways.—1. Either simply as consisting of the lords spiritual and temporal; and upon that account they had a voice in the legislative power; and the *consilium regis ordinarium*, whether judges or others, unless they were also lords of parliament, had no voice at all with them, but were and still are only to advise and assist when called thereunto.—Or 2. as the *magnum consilium*, consisting of a conjunction of the lords of parliament and the *consilium regis*.

Now whether their exercise of jurisdiction, that is, decision of causes civil or criminal, were lodged in the house of lords in the first capacity or in the second, or in neither, is here considerable.

AND it seems, that in two special cases they had and still have jurisdiction simply in the first capacity; namely, 1. in cases of breach of their privilege by arrests or suits in inferior courts:—2. in case of trial of a peer in case of treason felony or misprision of treason by temporal lords.

BUT as to other causes, especially between party and party, or in criminal causes that concern not peers in capital offences, misprision of treason, &c. we must distinguish the times.

IN antient times, especially in the time of E. 1. they did *de facto* exercise a civil and criminal jurisdiction, and had a great current of practice and countenance of law in so doing, as appears by the numerous judgments given by them in the time of E. 1. *libro parliamenti*.

AND

AND it seems, that this jurisdiction was so exercised in those times in the second capacity; not simply as they were lords of parliament; but as together with the *consensus consilii ordinarii* they made up that great court called *magnum consilium in parlamento* or *curia parliamenti*.

AND this I am persuaded to believe upon these accounts specially.—1. Because the summons of the lords is *ad tractandum super arduis negotiis regni*: and though it is not impossible, that under that general title they may be ordinary judges of private differences between party and party; yet such seem to be too low and inferior to the end and reason of their convention; and if it were admitted would possibly consume their time about petty things, to the detriment of the great end and business for which they were called, *ardua negotia ecclesiam et regnum concernentia*.—2. Because we shall find the *consilium regis* great officers and judges gave their consents and suffrages with the lords in parliament, as appears by those many instances that all are in the *placita parliamenti* E. 1.—3. Because when the causes deduced by petition in parliament were not sent to the several courts, as was usual, but finally decided in the lords house; they were many times determined by the *consilium ordinarium*, if they were small and of little moment, or if the lords were taken up with matters of greater moment.

AND thus seems to be the state of this business in those elder times.

BUT in later times it grew to be otherwise. The lords being great men did by degrees gain ground upon the *consilium ordinarium*, especially about the time of R. 2. and so downwards, and the authoritative jurisdiction was claimed and used by the lords spiritual and temporal; and the concurrence of the judges and *consilium ordinarium* was used by way of assistance, though not without great deference and respect. So that as in the legislative jurisdiction the judges and *consilium ordinarium* were but to advise and assist when called; so it

was



was also used in matters of jurisdiction where causes came to be heard in the house of lords.

As to the king's consent in matters of contentious jurisdiction, it is frequently mentioned in the judgments given in the lords house, as well antiently as of latter times.

THIS assent of his was of two kinds.—1. Actual, which was many times *de facto* given, but rarely if at all denied, when the house gave their judgment. And this consent of the king is entered of record very frequently, as we shall have occasion to see hereafter.—2. Virtual: for although the king gave not his actual assent; yet, it being supposed that the jurisdiction was lodged in the *magnum consilium*, or the house of peers by the law of the land being convened by the king's writ, it was taken, that the king's consent is involved, though he were not actually present. *Voluntas regis in curia lucet, non in camera.* 2. R. 3. as when a judgment is given in the king's bench, it is supposed to be virtually given by the king, when done by virtue of his commission authority and the law of the land.

ALL this hitherto in this Chapter is said only by way of concession or admission of the jurisdiction of the house of lords in decision of causes. But that shall be more strictly considered and examined in what follows.

## C H A P.   XV.

CONCERNING THE JURISDICTION OF THE LORDS HOUSE  
SPECIALLY: AND FIRST CONCERNING THEIR JURISDICTION  
IN THE FIRST INSTANCE.

THE jurisdiction, as sometimes it hath been *de facto* exercised, and hath been heretofore by some disputed, is of two kinds.—1. That, which is exercised in the first instance or by way of original suit or petition.—2. That, which is exercised in the second instance, either by way of adjourning causes thither, or by way of writ of error or appeal.—As to the former of these, namely, jurisdiction of causes in the first instance, they are in their natures of two kinds: 1. such as are criminal causes; 2. such as are civil causes.

AND certain it is, that *de facto* sometimes they have taken cognizance of causes by petition in the first instance, as well antiently when the *consilium regis* seemed to have a concurrent voice, as since they came to be assistants only.

AND although the most ordinary and indeed the true legal method of handling parliamentary petitions, as well by the *consilium regis* when before them, as the *auditores petitionum* when before them, and the *magnam consilium* or house of lords when before them, was not to decide them, but to remit them to proper ordinary courts of justices, sometimes generally, sometimes with special direction; yet it cannot be denied, but that sometimes, as well antiently as modernly, the *magnum consilium* or lords house in parliament did proceed to decide and determine causes brought before them by original petition. But how far or how justly by the laws of the land this might be done, shall be considered, (1.) in general; (2.) in special,

cial, under the several distribution of these original causes into causes criminal and causes civil.

(1.) CERTAINLY the original cognizance of causes in the lords house was always highly incongruous and prejudicial to the people in many respects: as—1. By reason of the great attendance that it required, in as much as necessarily these causes and their hearing must give way to weightier matters.—2. In respect that parliaments were of no long continuance anciently, and many times prorogued or dissolved before such causes could be heard, and then the suitor and defendant lost their labour and expence in attendance.—3. The ancient course even in parliament was, if a matter were put in issue, that either commissions issued out of chancery to try the point returnable thither, or else the record was sent into the king's bench to try, who also gave judgment; so that they were fain to go through several courts before they could come to a conclusion of the cause. I never read of any trial in capital causes by a jury at the lords bar, but only in the case of Thomas lord Berclay, 4. E. 3. for the death of E. 2. *de quo infra*.—4. The modern course of trial by examination of witnesses, either *viva voce* or by commission, is ten times worse, because the lords are thereby judges of fact as well as of law; and whereas if a jury give a false verdict an attain lies, here he is remediless if the lords make a wrong collection or conclusion upon witnesses, and the party has lost that trial that the law of the land and *Magna Charta* so much assert, the *legale judicium parium suorum*.—5. But that, which is more than all the rest, the lords are great persons; and if they give judgment against law, there is no appeal to any but themselves. If there be an appeal to the house of commons, the lords will not allow it: if to both houses, the same must pass through the house of lords, who will be doubtless partial to their own judgment once given: if the appeal be to another parliament, it is true the lords may reverse the judgment given by themselves; but who can expect they will do it?

THE wisdom of the laws of England is remarkable in these particulars.—1. That although the judges are constituted by the king and chosen out of learned men knowing in the laws; yet they are not nobles, nor peers of parliament, or such as would be too great to be called in question for corruption, or their judgments to be examined if there be cause.—2. That the ordinary courts of justice are still under the check of a review by writ of error, if there be cause: the judgments in the common pleas examinable in the king's bench, those for the most part in the exchequer chamber, those in the exchequer before the chancellor and treasurer, and all of them either mediately or immediately in the court of parliament.

BUT to begin with an original petition in the lords house, which is now simply the court of the last resort for appeals, is preposterous and infinitely prejudicial to the people.

So that if we may judge what is unlawful by what is highly inconvenient, we have no reason to think such a kind of jurisdiction in original suits was lodged in the lords house.

(2.) BUT besides this topic of inconvenience, there are not only sundry petitions of the commons against this kind of proceeding in the lords house; but the statutes of 5. E. 3. cap. 9. 25. E. 3. st. 5. cap. 4. & 42. E. 3. cap. 3. are general, that none be put to answer in criminals without presentment, nor touching his freehold without due process of law, which extend to all courts, and some of the parliamentary petitions against proceedings upon suggestion even in the court of parliament.

BUT I shall descend to particulars.

## C H A P. XVI.

## CONCERNING THE JURISDICTION OF THE LORDS HOUSE IN CRIMINAL CAUSES.

**C**RIMINAL causes are of two kinds.—1. Such as are capital, where the judgment is loss of life, as treason and felony.—2. Such as are less than capital, where judgment commonly is fine, imprisonment, and sometimes other corporal punishment, as the pillory, &c.

As to the former of these, there were anciently in parliament these several ways of proceedings.

1. BY way of authoritative declaration of treason pursuant to the clause of 25. E. 3. touching treasons not therein specified. And this was and ought to be done by the king lords and commons by act of parliament\*. And this equally concerns all persons whether peers or other. Such were the declarations of treasons touching John Imperial *rot. parl.* R. 2. the treason of † for breaking prison, *rot. parl.* H. 6. And therefore the declaration of the lords only acquitting the fact of the earl of Northumberland from treason *rot. parl.* 5. H. 4. being only by the lords, was not such a declaration as was warranted by 25. E. 3. *de prodicionibus*. But this concerns not the business in hand.

2. THERE was anciently a course, upon an accusation in the behalf of the king or by his command, to give judgment of death by the lords with the king's assent. And such was the proceeding *rot. parl.*

\* *Nota*, the case of the judgment of the earl of Salisbury though dead 2. H. 4. n. 30. was upon a kind of conditional attainder by act of parliament 1. H. 4. n. . if they should after take part with R. 2. *Placita coronæ in parlamento* 1. H. 4. n. 10. upon the petition of the commons.

† The case of sir John Mortimer in 2. H. 6. is probably meant. See *rot. parl.* v. 3. p. 202.—F. H.



4. E. 3. against some peers, as Mortimer and Matravers, about the death of E. 2. at which time also the lord Thomas de Barclay, though he were unquestionably a peer of the realm, and was summoned to and sat in divers parliaments before and after, yet waived his trial by peers and pleaded not guilty to the accusation, *et de bono et malo ponit se super patriam*; and a trial was thereupon had by twelve knights and esquires of the county of Gloucester *in pleno parlamento* at the lords bar, and by them he was acquitted; — the only precedent that ever I saw of a trial of a peer by other than his peers, and that by a jury appearing at the lords bar in parliament.

BUT besides these peers, that were tried upon an accusation of treason thus exhibited, there were some that were not peers had judgment of death given upon them, as Beresford Gurney and others for the same offence. But there is a solemn memorial entered upon the roll n. 6. *ne trabatur in consequentiam, viz.*

*Est assentu et accorde per notre seigneur le roy et tous les seigneurs en plein parlement, que tout soit il que les dits peeres come judges de parlement empristrent en la presence notre seigneur le roy a faire et rendre les dits juggements per assent du roy sur aucunes de eux que ne fuerent pas leur peres, et ce par encheson de murder de seigneur lige et destruction de celui que fut cy pres de sanc royall et fitz du roi. Que pourtant, que les dits peres que ore sont, ou les peres que seront a temps a vener, ne soient mes tenus ne charges a rendre judgement sur autres que sur peres, ne a ce faire. Mes ayent les peres de la terre poer eins de ceo pur tous jours soient discharges et quites. Et que les avant dits judgments ore rendus ne soient my trete en ensample n'en consequence en temps en venir, par quoi les dits peres puissent estre charges desores d'adjudger autres que lur peres contre le ley de la terre, si autiel case aveigne, que dieu defend.*

THOUGH this declaration is in part to own their power, but to disown any compulsion upon them to give judgment upon others than

their peers; yet the conclusion tells us, that such a judgment is against the law of the land \*. And it is observable, that though the case then in hand was a judgment of death, yet the tenor of the declaration is general.

AND yet the lords were not as good as their words; for in the case of Gomenies and Weston 1. R. 2. though they were no peers, judgment was given against them for treason; and the like was done in Hall's case 1. H. 4.

YET it seems, even before the statute of 1. H. 4. hereafter mentioned touching appeals of treason and other misdemeanors, the party accused by such a private impeachment might decline the trial by the lords by examination of witnesses, and put himself upon a trial by the country.

AND thus *rot. parl. 5. R. 2. n. 43.* when Clivedon accused Cogan in the lords house in parliament for a treasonable offence, the party impeached, being only a commoner and no peer, pleaded not guilty to the impeachment, *et de ceo il soy mette de bone et male sur le verdit de pays, et sur ce al fyne de ce parlement fuerent les parties adjournes devant les justices a la commun ley de quant que appartient a ce ley.*

AND this is agreeable to *Magna Charta, cap. 29. nec super eum ibimus nisi per legale iudicium parium suorum.* And this being duly considered, may perchance go far in impeachments of commoners, especially by private impeachments, and possibly by others, as to the point of trial by examination of witnesses before the lords in criminal causes.

SOME indeed have thought this declaration of 4. E. 3. being done

\* *Vid. Journ. Dem. Proc. 2 July 1689.*—F. H.

thus solemnly *in pleno parlamento* was a statute\* or act of parliament. But that seems not so clear. But it was certainly as solemn a declaration by the lords as could be made less than an act of parliament, and is as high an evidence against the jurisdiction of the lords to try or judge a commoner in a criminal cause as can possibly be thought of: 1. because done by way of declaration to be against law: 2. because it is a declaration by the lords in disaffirmance of their own jurisdiction, which commonly judges chuse rather to amplify, if it may be, than to abridge.

3. THE third method of proceeding in capital cases, as also sometimes in causes merely criminal, was by a kind of parliamentary appeal by certain lords appellants. Thus it was done in the great process in parliament 11. R. 2. by the lords appellants, and afterwards in 21. R. 2. by lords appellants of the contrary faction. And this not only, where peers were appealed, but where commoners were also appealed, who had in those cases judgment of death.

4. THE fourth course of proceeding even in capital causes was by articles of impeachment by the house of commons. And this was commonly used, not only before the statute of 1. H. 4. *de quo infra*, but after, as in the impeachments of Gomenies and Weston and the bishop of Norwich 1. & 7. R. 2. Lyons and Alice Peres 50. E. 3. the duke of Suffolk in 28. H. 6. the duke of Buckingham 3. Cha. the earl of Strafford in 16. Cha. and divers others: and that not only in cases capital, but such as were only misdemeanors.

Now to give an account how the law hath been taken touching these kinds of proceedings, and what hath intervened touching them.

\* The judges in 1689 inclined to this opinion. See *Journ. Dom. Proc.* 2 July 1689.  
—F. H.

1. FOR the first of these there is no question ; for such declarations by the king and both houses in pursuance of the statute of 25. E. 3. are of the strength of acts of parliament.

2. FOR the second of these, viz. impeachments of treason by the king's ministers, as his attorney generals, this hath been held against law, and particularly against the statute of 25. E. 3. *§. 5. cap. 4.* before recited. And though it were a turbulent time, yet it was so granted by the lords themselves in the impeachment presented by mr. attorney Herbert against lord Kimbolton and the five members of the house of commons, and the prosecution thereby desisted from, and the accusation withdrawn. And indeed the statute of 1. H. 4. seems to include this case.

3. As to appeals of treason and misdemeanors, though they were in use at the common law, as appears by Britton *cap. .* and much used in parliament, especially in the time of R. 2. yet by the statute of 1. H. 4. *cap. 14.* all appeals of treason and also of misdemeanors in parliament at the prosecution of any private person are wholly taken away. For the words are general, that no appeals be from henceforth made or in anywise pursued in parliament in time to come. *Vid. rot. parl. 8. H. 6. n. 38.*

AND therefore in this parliament now continuing by prorogation, where the earl of Bristol delivered in articles intitled of high treason and other misdemeanors against the earl of Clarendon, upon a solemn reference by the house of lords to all the judges, it was unanimously resolved and so reported, that both as to the matters of misdemeanors as well as those of high treason this impeachment was against law and against the statute of 1. H. 4. *c. 14.*

It is true, that *rot. parl. 15. E. 3. n. 41.* there was a judicature set up by act of parliament in the lords house for miscarriage of public ministers, viz. *que soient oustes et punies par le jugement des peres*



*peres et autres convenables y mises ; et sur ce le roy ferra prononcier et faire execution sans delay selonc le judgement des peres en parlement.* But this jurisdiction lasted not long ; for by the parliament of 17. E. 3. n. 23. that whole parliament is at once repealed, *et perdu le nosme de statut come cel qu'est prejudicial et contraire as leyes et usages de realme et as droits et prerogatives de nostre seigneur le roy*, and was never enacted again.

4. But as to a criminal proceeding upon an impeachment sent up to the lords by the house of commons, that was never esteemed within the prohibition of the statute of 1. H. 4. and accordingly it was declared by the judges in that resolution above mentioned in the case between the earls of Bristol and Clarendon. And the reason is ; because the accusation or impeachment of the house of commons is in nature of the highest presentment or indictment by the grand inquest of the whole kingdom.

In *rot. parl.* 2. H. 4. n. 30. after the making of the statute of 1. H. 4. there was a strange judgment of treason given against the earl of Salisbury after his death by the house of lords \*. *Rot. parl.* 2. H. 5. p. 1. n. 12. a petition of error by his heir was preferred and received by the lords ; and among other apparent errors, which are entered *rot. parl.* 2. H. 5. p. 2. n. 13. he assigns this for error, that the judgment was given *sans petition ou assent de communes en le dit parlement, queux de droit serront petitioners ou assentours de ceo que ferra ordeine pur ley en parlement.* The lords nevertheless affirmed their judgment ; and in 9. H. 5. the earl obtained an act of restitution. I only mention it to this purpose, that notwithstanding the statute of 1. H. 4. an impeachment by the commons was always

\* But *nota* this judgment against the earl of Salisbury after his death was in pursuance of a kind of conditional attainder, if ever he took part with R. 2. *Vid. rot. parl.* 1. H. 4.



allowed; and accordingly it hath been practised in all succeeding ages since.

THE causes before mentioned are indeed principally capital causes, as treason and felony. But withal the resolutions in the case of the earls of Bristol and Clarendon extend the statute of 1. H. 4. to criminal causes that are not capital: and the plain words of the statutes of 25. 28. & 42. E. 3. against putting men to answer upon suggestion without presentment extend equally to all criminal causes as well as capital.

AND yet I must grant, that even in criminals the house of lords did exercise a jurisdiction as well after those statutes as before.

1. IN all cases, where by special acts of parliament the king's council had jurisdiction, which are remembered *supra* CHAP. IV. there the *magnum consilium* or the lords house had a jurisdiction. And although it seems, that at first or in the more antient times the lords and *consilium regis* made as it were but one *magnum consilium* in parliament; yet when in process of time the whole power was assumed by the lords house, so that they became the court and the judges and others of the *consilium ordinarium* became but assistants, the lords in parliament carried with them the authoritative jurisdiction in these cases.

2. WHEREAS by the tacit concession of the commons petition in parliament *rot. parl.* 1. R. 2. n. 87\*. and the fuller enforcement thereof *rot. parl.* 2. R. 2. p. 2. n. 4. both mentioned at large *supra* CHAP. IV. there was a loose left for some jurisdiction in the council, where the offenders seemed too great for an ordinary prosecution, or the nature of the offence carried on by oppression with a high hand; the house

\* *Vid. rot. parl.* 1. H. 4. n. 162. confirming the statute 1. R. 2.

of lords after the abovementioned statutes did many times interpose with their power, and called the offenders before them upon complaint of private persons. But it rarely ended in any judicial punishment, unless the parties submitted thereunto; but only a due provision to amend the inconvenience.

SUCH were these that follow.

ROT. *parl.* 4. R. 2. n. 17. touching some dangerous letters supposed to be written by Ralph Ferrers found to be forged, and thereupon *rot. parl.* 5. R. 2. n. 42. discharged.

ROT. *parl.* 5. R. 2. n. 45. a great riot by the town of Cambridge upon the scholars. They submit themselves *de alto et basso* to the king's determination; *par vertu de quel submission le roy par advice de prelates et seigneurs en ce parlement* seizes their franchise, and gives part to the university, and restores the rest to the town.

ROT. *parl.* 8. R. 2. n. 12.\* Candish upon the complaint of the chancellor for a scandalous defamation by a petition. He Candish is fined and imprisoned. But this is but pursuant to the act of parliament against those, that fail in proof of their petitions.

IBIDEM n. 19. the townsmen of Bury adjudged by the lords to be bound to the abbot in bonds with certain conditions, *nient obstant le commune ley de terre est enconunter cest graunt et ordonnance*; for it was a capitulation by the townsmen by consent to gain a pardon.

ROT. *parl.* 15. R. 2. n. 16. upon the petition of the prior of Holland touching a riot and forcible entry, a commission issued to a

\* There is an error in this reference; n. 12. of 8. R. 2. being the case of Walter Sibill, who was fined and imprisoned for defaming Robert de Vere, earl of Oxford. —F. H.

serjeant at arms to take and bring in the rioters. They came and confessed the riot, and were committed to the Tower till they made fine to the king, which they did. This is the only case of latter times, wherein offenders of this kind were fined: but yet it was agreeable to law; for they had by the act of † cognizance of such cases.

IBIDEM *n.* 17. the abbot of St. Olyth complained of oppression and maintenance by John Rokell. He was committed; and after the difference ended by the award of the duke of Guyen.

IBIDEM *n.* 19. Brian committed for putting a papal bull in execution. This was, within the cognizance of the lords by the statute of provisors, which refers it to the *consilium regis*.

IBIDEM *n.* 20. 21. Hardinge committed to the Tower for a false accusation against the archbishop of Canterbury. This was but incident to their jurisdiction.

ROT. *parl.* 16. R. 2. *n.* 19. Richard Gomester complaining of the power and oppression of his adversary referred to an award; and if not ended that a good jury be returned in the suit in the court below.

ROT. *parl.* 17. R. 2. *n.* . between Windsor and Scrope touching champerty. The defendant acquitted by the judgment of the lords spiritual and temporal.

ROT. *parl.* 4. H. 4. *n.* 19. between Pomeroy and Courtney touching a riot, forcible entry, maintenance, and oppression in a suit at law. Direction given only that a good jury be returned.

† The original has a blank here.—F. H.

IBIDEM *n.* 20. between the abbot of Newnham and Courtney for a forcible entry and other outrages. Courtney committed and ordered to keep the peace.

IBIDEM *n.* 21. Portington against the same Courtney for oppressions and undue obtaining of release. The release, by consent of Courtney and judgment of the lords and king, thereupon vacated, and a special assise directed.

ROT. *parl.* 13. *H.* 4. *n.* 12. between the lord Ros and Tirwhitt for riots. Referred to the archbishop's award, and by him ended.

AFTER the time of *H.* 4. I find very little footsteps of proceeding in the lords house in cases criminal : but people took their ordinary course at law ; or if they resorted to parliament, they began in the house of commons, and then it was transmitted by them to the lords, and it ended in a bill or act of parliament.

AND those cases above mentioned are the most that I find after 25. *E.* 3. which nevertheless appear for the most part to be, either in such cases where the house of lords as the *magnum consilium regis* had jurisdiction by acts of parliament, as in great riots, false accusations before themselves ; or where by the power and outrageous oppression and violence of men of power the proceeding of the common law was obstructed ; and by the power of the lords house and their interposition that obstruction removed, and suits remitted to their ordinary regular course in the ordinary courts of justice.

AND indeed in those turbulent times there was great necessity and use of such interposition of the lords house to preserve the peace, and to afford the law its due course and current ; and therefore in those

acts of 1. R. 2. and 2. R. 2. above mentioned tacitly allowed even to the *consilium ordinarium*.

AND hence it was, that when *rot. parl.* 2. H. 6. n. 16. the private council of that young prince was established, and their power declared by act of parliament, it is specially provided, that all bills before them, that contain matters terminable at common law, be remitted there to be determined; but if so be the discretion of the council feel too great might on the one side and unmight on the other, there they might discreetly interpose, that suits be fairly carried.

AND though possibly as well the lords house, as the king's council, by occasion of these admissions and exceptions, might in some cases exceed; yet neither the one nor the other took upon them an universal or common jurisdiction in criminal causes, but left them ordinarily to the ordinary courts of justice.

BUT in all cases, where the evidence of the fact was not clear by the confession of the parties or great notoriety of the fact, the party complained of might plead the general issue, and put himself upon the country. And then the complaint was either sent into the king's bench to be tried, which was the usual course; or special commissions of enquiry issued to try it by inquest; or (which was very rare) it was tried by a jury returned *coram rege et consilio*, as was done in the case between Bartholomew Badlesmer constable of the castle of Bristol and the mayor and commonalty of Bristol; where the jury was returned *coram consilio*, and found the defendants guilty, for which they made fine of two hundred marks, *rot. parl.* 9. E. 2. n. 7. which though it were a process *coram consilio*, yet it seems to be in the lords house in parliament, because entered there of record; the only example of such a trial in parliament, except that of 4. E. 3. of the lord Barclay abovementioned, and that of Alice Peres, *rot. parl.* 1. R. 2. who pleaded not guilty, and was tried by a kind of jury.

AND



AND thus much of criminal proceedings in the lords house. Wherein I meddle not with proceedings in cases of breach of privilege, because of another nature. Nor have I mentioned many cases before 25. *E. 3.* in the times of *E. 1.* and some in the beginning of *E. 3.* because before the statutes of 5. 25. & 42. *E. 3.* which were made against proceedings without due presentment. Nor have I mentioned the proceeding against Lee *rot. parl. 42. E. 3. n. 21. 22. &c.* that against Lyons the lord Latimer and others *rot. parl. 50. E. 3. n. 17. 20.* against Gomines and Weston *rot. parl. 1. R. 2. n. 38.* that against the bishop of Norwich, † *R. 2*; that against the dukes of Surrey and Aumerle marquis of Dorset earl of Gloucester and John Hall touching the murder of the duke of Gloucester ‡: for he, that carefully looks into all parts of the records of these proceedings, will find them, either by the promotion or petition of the house of commons, or in pursuance of acts of parliament directing ; and therefore I do not mention them.

AND the like method of impeachments of the house of commons delivered into the lords house, against as well commoners as peers, hath been frequently used in latter times. Whereupon the lords took the defence or answer of the persons impeached; received proofs; and upon a private debate among themselves first had, agreed touching the censure whether guilty or not guilty; and if guilty, then proceeded to the particulars of their censure, and oftentimes acquainted the king with their sentence. And when the lords were agreed of their judgment, they sent to the house of commons to acquaint them they were ready for judgment. Whereupon the house of commons came up to the lords house with their speaker, and demanded judgment against the persons impeached; and the lords being in their robes, the chancellor or other speaker of the lords house read and pronounced the judgment of the lords. This was the method used in the parliament 1620 in 18. *Jam.*

† *Rot. parl. 7. R. 2. n. 15.*—F. H.

‡ *Rot. parl. 1. H. 4.*—F. H.

against the lord chancellor Verulam, 20. *Martii* 1620. 3. *Maii* 1621. 4. *Maii* 1621. against sir Thomas Michel; 4. *Maii* 1621. against Yelverton; 15. *Maii* 1621. against Flood, who was first censured by the house of commons, (whereof the lords complained as an intrusion upon their judicature) and then after a conference between both houses censured by the lords, 5. *Maii* 1621. 25. *Maii* 1621. The like method of proceeding in all points in the parliament 21. *Jam.* as against the lord treasurer, *viz.* the earl of Middlesex, as appears by the journal book of that parliament.

## C H A P.   XVII.

CONCERNING THE JURISDICTION OF THE HOUSE OF LORDS IN  
CIVIL CAUSES IN THE FIRST INSTANCE.

**I** COME to consider the jurisdiction of the house of lords in civil causes by original petition or in the first instance.

THE exercise of jurisdiction in cases of this nature is of two kinds.—I. By way of transmission.—II. By way of decision or final determination.

I. As to the former of these, it is without question, that the same was always exercised by the *consilium regis* as well in parliament as out of parliament, and by the *magnum consilium* in parliament, and by the house of lords when they assumed the judiciary power solely to themselves.

AND this was nothing else but a remitting of petitions and petitioners to the king's ordinary courts; sometimes generally; sometimes specially, with special direction either touching the process or some circumstances or directions of proceeding, whereby the ordinary courts were assisted and proceeded to the final determination of causes: and was indeed rather an act of advice council and direction, than any decisive or determining jurisdiction.

AND of such kinds of directions both the antient and later parliament rolls and bundles of petitions are full; and it was and is unquestionably allowed to that house, and was of great use to the people.

II. As to the second, the decisive or determining jurisdiction, such a jurisdiction as ended in a judicial sentence or judgment and coercion or execution thereupon. And this is considerable under two respects or relations :—(1.) In suits, where the king's interest was concerned :—(2.) In suits or petitions between party and party.

(1.) TOUCHING the former of these, it is certain, that in many cases the lords had jurisdiction to give a decisive judgment. Such were cases of petitions of right indorsed by the king to the house of lords; *monstrans de droit*; ordering of *procedendo in loquela* or *ad iudicium* upon *aids* *prayers* or *rege inconsulto* upon discussion of the case, *etate probanda*, *idiotia examinando*, interpleading upon livery prayed. And hitherto may be referred many of the cases *inter placita parliamenti Edwardi primi*, the pleas *coram magno consilio rot. parl.* 8. E. 2. m. 1. & 2. for the hospitals of Thomas of Acon and North Allerton, *rot. parl.* 9. E. 2. m. 3. *dors.* the great plea for a livery by the sisters and coheirs of Gilbert of Clare earl of Gloucester against the widow of the said earl, who to obstruct the livery alledged she was with child; where, after many transactions at length *coram archiepiscopo Cantuariæ, et aliis prælatis et comitibus et baronibus, cancellario, thesaurario, iusticiariis de utroque banco, cancellario et baronibus de scaccario, clericis de cancellaria, et aliis de consilio domini regis, ibidem recitatus fuit totus processus; et quia apparet, quod tantum temporis elapsum fuit à tempore mortis prædicti comitis, concordatum est, quod coheredes ad hæreditatem comitis admittantur.*

THE like was that great plea of the bishop of Durham, *ibid.* m. 8. for royal escheats, and infinite more.

AND hitherto may be referred the cases of titles of honour and precedence between the nobility; though regularly such cases come first to the king, and by reference from him to the lords. For these matters

matters of honour, whereof the lords are proper judges, such were the cases *rot. parl.* 11. *H. 6. n. 32.* for the earl of Arundel, where judgment is given for him by the king *de advisamento et assensu prælatorum ducum comitum et baronum in parlamento.*

BUT it is true *rot. parl.* 3. *H. 6. n. 11.* in the controversy for precedence between the earls marshal and Warwick it is judged by the king, *de advisamento et assensu dominorum spiritualium et temporalium, et communitatis regni, necnon justiciariorum, servientium domini regis ad legem, et aliorum de consilio,* that the earl marshal as son and heir of the duke of Norfolk *nomine stilo et honore Norfolciæ gaudeat et utatur,* and so had precedence.

*Rot. parl.* 27. *H. 6. n. 18.* the case of precedence between the earls of Arundel and Devonshire, and referred to the judges. They return their answer, that the case ought to be determined by the king and his lords, and not otherwise. Judgment given by the king by the advice and assent of the lords spiritual and temporal for the earl of Arundel to enjoy the place and precedence by reason of the castle and honour of Arundel. And of the same nature were the decisions of the house of lords on the titles of the office of great chamberlain and earldom of Oxon in 3. *Car. 1.* and of the title of lord Gray de Ruthen in the beginning of the parliament of 16. *Car. 1.* by reference from the king to the house of lords.

(2.) BUT as to petitions between party and party concerning matters of private interest, how far the lords could or could not exercise a decisive or judiciary determination in the first instance, hath of late been a great cause of contention.

To come therefore to some certainty in that case, we must suppose the matters, wherein relief is desired by such petitions, fall necessarily under one of these two heads, viz. FIRST, Either they



are such as are relievable in the ordinary courts of justice : Or, SE-  
CONDLY, They are not relievable in the ordinary course and courts  
of justice.

As to the FIRST of these cases, it is certain, that the lords had  
no decisive jurisdiction in such cases ; but were only to indorse the  
petitions with a remission to the ordinary course and courts of  
justice.

THIS appears abundantly,

1. BY the constant declaration of the king and both houses of  
parliament declaring their jurisdiction to extend only to such cases,  
*que ne purrent esploier hors de parlement*, it would be too troublesome  
to set down all the particular words of the declarations of parlia-  
ment in such cases. Take these few instances, for many more that  
might be given, plainly expressing this assertion : *Rot. parl.* 28. *E.* 3.  
*n.* 3. 2. *H.* 4. *n.* 15. 4. *H.* 4. *n.* 23. & 24. 2. *H.* 5. *p.* 1. *n.* 5.  
*p.* 2. *n.* 4.

2. BY the assignation of triers of petitions in parliament, whose  
office it was to garble the parliamentary petitions, and to dismiss as  
they found remediable or determinable in the ordinary courts of  
justice to their proper judicatures.

3. BY the constant form of the indorsements of parliamentary pe-  
titions determinable by the ordinary courts of justice, remitting them  
to their ordinary courts, viz. *sequatur ad communem legem* ; *sequatur in*  
*cancellariâ per breve originale* ; *habeat breve formatum in cancellariâ su-*  
*per casum* ; and many more to the same effect, the numbers whereof  
were almost infinite both in the parliament rolls and bundles of par-  
liamentary petitions.

4. BY

4. By the judgments of the lords themselves in parliament. Amongst many that might be instanced, I shall only mention two or three; which, being given by themselves in disaffirmance of their own jurisdiction, are of more weight and value than a whole cart-load of instances of private causes heard and determined by them in the first instance, where possibly the defendant durst not or did not plead or except to their jurisdiction.

ROT. *parl.* 18. E. 1. Ryley p. 33. 35. The bishop of Winton being questioned in parliament at the suit of the king and his mother touching the patronage of the hospital of St. Julian's in Southampton, he pleads, that he found his church seised thereof, and demands judgment, *si debeat sine breve domini regis inde respondere*. Judgment thereupon given, *ideo quoad hoc sine die ad presens; et dominus rex habeat breve versus ipsum, quòd reddat ei advocacionem; et quoad ejectionem custodis inquiratur veritas per patriam*.

PARL. 18. E. 1. Ryley 43. upon a suit in parliament between Adam claiming the lands of Henry Edelingthorp as his son and heir against Hugh Lowther, Hugh pleads, that *idem Adam actionem suam (si quam habere debeat) per assisam mortis antecessoris per legem communem in casu consimili habere possit et suum jus recuperare, & petit judicium, si de libero tenemento suo debeat hic respondere sine brevi; et quia actio de prædicto tenemento petendo et etiam recuperare suum, si quid habere debeat vel possit, eidem Adamo per assisam mortis antecessoris competere debet, NEC EST JURI CONSONUM VEL HACTENUS IN CURIA ILLA USITATUM, QUOD ALIQUIS SINE LEGE COMMUNI ET BREVI DE CANCELLARIA DE LIBERO TENEMENTO SUO RESPONDEAT, ET MAXIME IN CASU UBI BREVE DE CANCELLARIA LOCUM HABERE POSSIT: Dicitur est eidem Adamo, quòd sibi perquirat per breve de cancellaria, si sibi videret expedire*.

ROT. *parl.* 13. R. 2. n. 10. in the case of Adam de Changeor, an original petition was preferred to the lords touching the forfeiture of a

mortgage. The cause was heard, and the lords gave this judgment : *Il semble al seigneurs, que la dite petition n'est petition de parlement, eins que la matire en icel comprise deust estre discus par la commune ley ; et par ceo agard feust, que le dit Robert irroit ent sans jour, et que le dit Adam ne prendroit riens par sa suit, eins qu'il sueroit par le commun ley, si lui sembleroit a faire.*

NOTA 1. there was matter of great equity in the case ; for though the money were not, it may be, paid precisely at the day ; yet all or the greatest part thereof was satisfied.—2. Note the judgment is not barely a piece of kindness of the lords. The words are *deust estre discus par la commune ley*, and not in parliament, for that very cause.

5. By the acts of parliament of 5. E. 3. 25. E. 3. 28. E. 3. 42. E. 3. no man shall be put to answer touching his freehold without original writ and due process of law, which indeed is no other but in affirmance of the common law of the land.

So that upon the whole matter it is apparent, that for matters remediable in the ordinary courts remedy ought not to be given in the lords house ; and indeed it is against all reason it should invert the whole œconomy of the laws of England, as is shewn *supra* CHAP. XV.

IN the SECOND place therefore I come to consider of cases not relievable in the ordinary course of justice in the king's ordinary courts, and how far forth the house of lords hath jurisdiction or judiciary decision and coercion in such cases.

AND touching these there will be this diversity, which will be applicable to this inquiry :—1. Some cases may not be relievable in the king's ordinary courts ; because in truth there is no law already established

established for their relief, though it may be just and reasonable, that a law should be provided for the case or cases of like nature.—2. Some cases are not relievable in the ordinary courts of justice, by reason of some collateral impediment or accident, that obstructs the relief in the ordinary courts, though the law itself be more defective therein.

1. As to the former of these it is certain, the house of lords hath no jurisdiction or power of relief in such cases; for that were to give up the whole legislative power unto the house of lords. For it is all one to make a law and to have an authoritative power to judge according to that, which the judge thinks fit should be law, though in truth there be no law extant for it. In such cases therefore the whole parliament is to be resorted to, either to make a new general law which may comprehend the case in question, or to give particular relief to the case by the full legislative power and by act of parliament.

AND that this is so appears abundantly by the instances hereafter given, and many more that might be given in the case.

ROT. parl. 14. E. 2. Ryley 409. *Ad petitionem Martini Chamberlan* to have a manor held of him by the Templars now dissolved, *ita responsum est, NON EST LEX ORDINATA.*

TEMPOR. E. 3. Ryley 653. At the petition of John Kirbrooke to have remedy for waste committed by tenant in tail after possibility, *dorso, LEY N'EST MY UNCOR ORDEIN EN CE CASE.*

PETIT. parl. 8. E. 3. n. 44. At the petition of Lucas Burgh the king's attorney praying an exigent upon a judgment in attaint affirmed in the king's bench against sir Ralph Camoys, *responf.*

IL SEMBLE A COUNCELL QUE L'EXIGENT NE POIT ESTRE AGARD  
EN CET CASE SI CEO NE SOIT ORDEINE PAR NOVEL LEY.

ROT. *parl.* 8. E. 2. m.<sup>th</sup> . *dors.* Joan de Borresden petitioned, that she might be barred by the collateral warranty of her mother without assents. The *consilium ordinarium* thought it to be within the reason of the statute of Gloucester, which takes away the bar by the warranty of the father unless assents descend, and therefore answered accordingly. But this answer being recited *coram magno consilio* was disallowed. *Et quia ista petitio non potest finaliter expediri SINE EXPLANATIONE STATUTI PRÆDICTI, ideo ostendatur coram MAJORIBUS, et fiat inde explanatio.* And certainly that, which was meant by MAJORIBUS, was intended of the whole parliament to provide an explanatory act.

ROT. *parl.* . E. 3. . upon a petition for the owners to improve wastes in forests, the answer was, *Ceo ne poet estre fait SANS NOVEL LEY, a que les communes ne sont uncor advise d'assenter.*

BUNDELL. *petition.* 8. E. 3. n. 41. upon the petition of John de Roges desiring to be discharged of a statute merchant extorted from him by his guardian during his minority, *RESPONS. S'il soit uncor deins age, il ad fa fait devant le roy; et S'IL SOIT DE PLEINE AGE, L'AVERMENT NE MY GIST.*

By these and the like instances it is apparent, the cases not relievable by the law were not relievable in the lords house in parliament, if the unrelievableness were for want of a law to relieve them.

'AND therefore during the sitting of this parliament †, when the

\* 8. & 9. E. 2. n. 3.—F. H.

† Lord Hale means the second parliament of *Cha.* 2. which began 8 May 1661, and was not dissolved till above seventeen years afterwards, namely, till 24 Jan. 1688-9.—F. H.



coheirs of Vantore petitioned against a fine obtained from the lady Powell by a great force used upon her and by fraudulent contrivances of a very high nature; yet they could not have relief in that way, but were constrained to avoid it by an act of parliament<sup>\*</sup>; and yet not without great difficulty, notwithstanding the case of *E. 1.* where a fine was avoided by reason of the fraud of an attorney inserting more lands than were intended.

AND hence it was, that although it was notorious, that the Spencers by their great power and favour in the time of *E. 2.* had obtained fines and recognizances of great value, there was a special act of parliament *anno 1. E. 3. cap. 1.* to avoid these fines and recognizances, which could not otherwise have been avoided, no not by a judgment of the lords house.

2. THEREFORE we are to resort to the second kind of unrelievable-ness of cases, wherein yet there was relief to be had in the lords house in parliament; namely, when it was by reason of some collateral obstruction that hindered the relief.

AND this was principally in these cases.—1. When the king's interest was concerned, who could not by law be sued as a common person might, but it must be by petition, as in cases of petitions of right, *monstrans* of right, aid prayed of the king, suits for livery, and the like; all which, though many of them might be proceeded upon in chancery, yet were frequently begun and many times concluded, sometimes before the *consilium ordinarium*, sometimes in the lords house in parliament.—2. Where the party defendant was so potent, and his practices so turbulent, that the ordinary course of justice was obstructed, as by riots, maintenance, &c. whereof before  
CHAP. † in which cases the lords did oftentimes interpose their

\* See private acts of 13. and 14. *Cba. 2. chap. 27.*—F. H.

† CHAP. XVI. See before p. 96. to 100.—F. H.

authority to remove such obstructions and to give the ordinary course of law its current; and they had the countenance of parliamentary acts of concessions for so doing, as is before shewn CHAP. \* —

3. In the case of corruption or bribery of the judges, that were to determine causes, or when they unduly made use of their own power place and authority in cases of their own interest, of which we have had formerly instances.

THESE were the cases for the most part, wherein the lords decisive jurisdiction was exercised; because no relief could be ordinarily had otherways; and this is accordingly so expounded by those acts or parliamentary deliberations in 1. & 2. R. 2. mentioned in the former Chapters.

\* CHAP. XVI. p. 96. 99. 100.—F. H.

## C H A P. XVIII.

CONCERNING THE JURISDICTION OF THE LORDS HOUSE IN THE SECOND INSTANCE, VIZ. IN CAUSES ORIGINALLY BEGUN IN OTHER COURTS: AND FIRST OF VOLUNTARY ADJOURNMENTS.

**I** COME now to consider of the jurisdiction of the lords house in the second instance; namely, in causes originally begun in other courts.

AND this is in two kinds:—1. in relation to pleas or suits depending and not determined in the courts below:—or 2. concerning suits determined by judgment.

THE first I call pleas removed by way of adjournment. The second is in cases of writs or petitions of errors or appeals.

As touching adjournments, they are of two kinds, viz. 1. Such as are voluntarily made by the courts below themselves in cases of doubt or difficulty. 2. Where it is done by the precept or order of the court of parliament or lords house or by the king's writ.

CONCERNING voluntary adjournments of matter into the lords house, it was frequently done, 1. in cases of great difficulty; 2. in cases of great weight, moment, or concernment: both which were sometimes of the whole cause to receive its determination there, sometimes only of some particular point or question.

AND this was oftentimes of great use to the ordinary courts of justice; for here was a kind of concentration of the men of greatest learning in the laws, as the chancellor, justices, king's serjeants, masters of chancery, and other of the king's *consilium ordinarium*; and besides this there was the reputation and authority of the nobility and clergy.

THUS in 40. E. 3. 34\*. the judges advised with the lords in parliament touching the construction of the statute of amendments. And thus it was frequent for whole causes to be thus adjourned into the lords house. P. 4. E. 1. rot. . coram rege, T. 15. E. 1. *ibid.* rot. . T. 31. E. 1. rot. 34. *ibid.* P. 9. E. 2. *ibid.* rot. 112. rot. parl. 9. H. 5. p. 2. n. 11. 12. touching a prohibition issuing out of chancery.

SOMETIMES the causes were of that moment, that they could not well be settled without the joint advice of both houses, who were thereupon called together. Such an instance we shall in the next Chapter meet with, 14. E. 3. Staunton's case.

AND this course of adjournment, especially for advice, into the parliament is no other but what is directed by the statute of Westminster 2. cap. 24. *Scribant casus, in quibus concordare non possunt; et referant eos ad proximum parlamentum.* And the like direction in effect is given by the statute of 14. E. 3. in cases of delays of judgment by reason of diversity of opinion difficulty or weight, whereof hereafter.

BUT this course hath not been much of use in latter ages, by reason of the delay it gave in proceedings and the intervention of public business. But in cases of difficulty in latter ages adjournment of causes into the exchequer chamber for advice hath supplied in a great measure these difficulties.

\* *Vid. M. 40. E. 3. placito 39.*

## C H A P. XIX.

CONCERNING THE REMOVAL OF RECORDS INTO PARLIAMENT BEFORE JUDGMENT BY THE KING'S WRIT OR COMMAND OF THE LORDS, AND ANTICIPATION OF JUDGMENTS BY THEM IN INFERIOR COURTS.

IT is regularly true, that antiently the lords in parliament did sometimes upon complaint of delays of proceeding in judgment in the ordinary courts of justice, either by reason of difficulty or some other matter, indorse petitions with advice and remembrance to the subordinate judges to give all due expedition to businesses so depending. Yea and many times before the statute of 1. E. 3. cap. 8. sometimes by order of the lords, sometimes by the king's writ under the great or privy seal, upon petitions in parliament, records were removed out of the courts below into parliament before judgment, which were for the most part remanded again without any thing done thereupon. *Vid. Pasch. 33. E. 3. B. R. rot. 5. Vantort's case, T. 31. E. 1. B. R. rot. 34. Montford's case, and divers others in those elder times.* But these mandates tending to the delay of justice were afterwards disused, especially by reason of the statute of 1. E. 3. cap. 8.

BUT it was neither usual nor regular for them, at any time before judgment given in the courts below, to remove the records before themselves or before the council to direct what judgment should be given in the courts below, and so *per saltum* anticipate the deliberation and resolution of the ordinary courts, unless in two cases:—

1. When it was desired by the courts below for their own satisfaction in cases of weight or difficulty, as in the precedent Chapter:—Or
2. in the ordinary course of an aid-prayer of the king in the courts below, or in issuing a writ of *rege inconsulto* where the king's interest



was concerned.—Such anticipations as these, as they issued out of chancery ordinarily, so sometimes in cases of weight it was done by the king's mandate or the command of the lords in parliament. But this being but in nature of an ordinary process, I shall not further enlarge upon it.

AND that the anticipation of judgments in this manner by the lords was neither usual nor regular, *vide rot. parl.* 8. E. 2. m. 18. Upon the petition of Thomas Hobledon, praying that a record depending by writ of error in the king's bench might be removed in *plenum parliamentum*, because it had been long delayed; the answer was, *Sequatur placitum coram rege quousque revocatum vel affirmatum fuerit*, with a monition only to the judges to proceed to judgment *cum eâ celeritate quâ fieri potest secundum legem et consuetudinem regni*. And to the very like effect a like answer is given upon the like petition, *bundell. petition.* 8. E. 3. n. 14.

FOR it is an unreasonable thing upon the hastiness of a suitor to deny the ordinary courts of justice their due time of deliberation, or to suppose before-hand that they will not do what is agreeable to law in causes depending before them.

YET I do confess, that sometimes the importunity of petitioners to the lords have put them upon such anticipation, but rarely with any success, but delay and inconvenience to suitors.

AND this anticipation was sometimes by writ under the great or privy seal, sometimes by order of the lords.

BUT by the statute of 1. E. 3. cap. 8. whereby it is enacted, that notwithstanding commands under the great or privy seal the justices proceed to do right in their courts, the commands of this nature grew rare,