

this, because *Quitwell* tells *Baker*, if the last Post did not bring an Addition of three to six, Mrs. *Jones* may see what is still wanting for the purchase she intends to make.

Now suppose, by *Quitwell* and *Howell*, are meant *Dillon's* Secretary; and by *Baker* and *Hatfield*, *Kelly* is intended; and suppose, that by the Addition of three to six, is meant a Remittance of Money; by *Wine* are meant Soldiers; and by Mrs. *Jones* is meant my Lord Bishop of *Rochester*: Yet can what *Dillon's* Secretary writes to *Kelly*, or what *Kelly* writes to *Dillon's* Secretary, affect the Bishop of *Rochester*? If it can, it is in the power of any two Men, one residing here, and the other beyond Sea, to take away the life of any Man breathing. But suppose we can make it appear, as most certainly we shall, that by Mrs. *Jones*, cannot be meant the Bishop; then what becomes of this part of the Charge?

The next thing to support this Charge, is, a passage in an Extract of a letter dated the first of May, written from *Quitwell* to *James Baker*; in which 'tis said, that 'Mrs. *Jones* cannot take a better Time to have himself fitted with an easy Saddle, &c.' If an Extract of a letter can be of any Weight, and the Construction put upon it is to be allow'd; then the Bishop is turn'd General, or at least a Colonel. For by *Neynoe's* Information and *Plunket's* Cypher, Saddlers, and Saddles, are Irish Soldiers, and Regiments: so the Bishop is represented as undertaking to raise a Regiment of Irish Soldiers, and to mount on Horseback himself to command them.

As to the third thing charged, which was to raise a Rebellion at the Breaking up of the Camp; there is no Pretence of Evidence. So that, upon the whole, there does not appear to be any pretence for that part of the Preamble to the Bill, which chargeth the Bishop with having been deeply concern'd in forming, directing, and carrying on the Conspiracy.

The next thing charged against his Lordship, is, that he was concern'd in a Correspondence Abroad, and some Transactions at Home for bringing in the Pretender.

Now as to this, I would observe, that there is not one Witness against his Lordship of any criminal Act; that tho' all his Papers have been seiz'd, yet there appears not any Letter, or Paper, under his Hand, of a criminal Nature; nor any letter prov'd to be written or receiv'd by him, which is criminal: Neither is there any Charge of any Meeting or Consultation with any Persons for carrying on this Conspiracy. Indeed he is mention'd as a Member of a Club, call'd the *Burford-Club*, of which the Earl of *Orrery* was said to be Chairman; which Club (as I apprehend) was never heard of 'till *Layer's* Trial. This Accusation I know to be false; and never met with any one that believed it: Therefore shall not trouble your Lordships with any farther Observations upon it, than just to take notice, that tho' he who made the list hath join'd me with persons of great Quality and Honour; yet I presume to say, that my Profession in the Law, as well as my Religion, has given me such a Sense of my Duty, that no persons whatsoever are great enough to draw me into a plot against his Majesty and the Government.

I beg leave to observe that this Charge is founded, partly upon the Hearsay of *Pancier* and *Ney-*

*noe*, and partly upon the three letters dated the 20th of April 1722.

As to the Hearsay-Evidence; *Pancier* deposes, that *Skeen* told him, that the Bishop of *Rochester* and Lord *North* and *Grey* had the principal Direction of the Conspiracy; that 200000*l.* had been raised by Contribution, and was put into the Management of the Bishop; and that it was call'd the *Military Ghost*. Now can this be Evidence in an Indictment, or Action, for the most minute Trespass, or in any Case? Can it be imagin'd, that so much money could be raised among the *Jacobites*? or that such a Sum could be rais'd, and not one Contributor discovered? Can it be imagin'd that such a Sum should be entrusted with one Man? Or that my Lord Bishop would be that Man, who would have the Care and Trouble, and run the Hazard, of such a Sum? To which it may be added, that *Skeen*, the only Person living, who by any Person living is said to have said this, is now in Custody, ready to be examin'd upon Oath, and denies every Word of it.

As to *Neynoe's* Examinations, he speaks only what *Kelly* told him; and can what *Kelly* told him affect the Bishop? Besides, none of his Examinations are upon Oath, or so much as sign'd by him; (whereas the Examination of *Goodman*, that was given in Evidence against Sir *John Fenwick*, was upon Oath:) all of them appear to be taken after he was in Custody, under great Apprehensions and Terrors; nay, it appears that one of them was taken the Day before he drown'd himself: And moreover, that only one of them was read, which was extract'd out of three Examinations, mark'd A, B, C, and said to contain the Substance. We desire all the Three Examinations may be produced, and read; and then it will appear, whether that one contains the whole Substance; or whether there be not some Things very material omitted: And it will likewise appear, that there are such Inconsistencies in them, as will take off their Credit. For in one place he says, he saw *Kelly* make use of the Cyphers; and that *Kelly* own'd with great Freedom they were for carrying on a Correspondence with the Pretender and his Agents: and yet in another place he says, That *Kelly* never open'd himself as to the plot now on foot; that indeed he had seen several letters from *Paris* and other places, but they contain'd nothing material. So that it must be supposed, either that there was no Treasonable Correspondence carry'd on by *Kelly*; or that *Neynoe* was not so great a Confident of *Kelly's* as he pretended.

*Neynoe* says, he drew three Memorials; and the last was in December 1721, to the Regent for five thousand Men; that all the Memorials were drawn by the Order of, and dictat'd by, one *Henry Watson*, whom he did not know, but took to be the late Earl *Marishal*; that *Henry Watson*, whom he took to be Earl *Marishal*, was in England all last Spring, and that he lay with him several Nights.

'Tis very extraordinary, that the Earl *Marishal* should trust a mere Stranger to draw three Memorials, and one of them for five thousand Men to invade the Kingdom; and that afterwards he should lie with him several Nights, and not know who he was.

In one of his Examinations he says, the Heads of the Memorials were given him by *Kelly* and *Watson*; in another he says, they were all drawn by

by *Watson*: And 'tis observable, that the *rough Draught*, or a *Copy* of any one of them, is not produced; which certainly, he that intended to turn Evidence, and so soon after became an Informer, would have done, if there had been any such.

The Committee are pleased in their Report, *Page* 38. to take Notice, that *Neynoe* said, *Kelly* told him, that a *Lord of the Council* gave the Bishop Notice of his being to be taken up, some Days before it happen'd; and are pleas'd likewise to say, that he afterwards confes'd, (as they were inform'd) that in that, and other his Examinations, he endeavour'd all he could to create *Diffidence and Suspensions among his Majesty's Servants*. And what Credit can be given, after this, to one, who had so little Regard to Truth, as to say any Thing, tho' never so false; to so wicked a Purpose, as to create a Misunderstanding among his Majesty's Servants? especially if one considers how probable it is, that the Remorse he had upon his Conscience, occasion'd by the Evidence he had given, and his Dread of the Shame of being forc'd, when he came upon his Oath, to deny what he had said when he was not upon his Oath, were the Reasons of his making away with himself. And we shall call some Witnesses, who will give a full Account of him.

We shall call one, who but lately depos'd before your Lordships, that *Neynoe* told him, he had said several Things to a great Man, which he neither would nor could swear without being perjur'd.

I most humbly beg your Lordships Pardon, for being so particular in a Matter which I had so lately an Occasion to mention: But this is the Hinge upon which the Weight of the whole Charge against the Bishop turns, and therefore I doubt not but your Lordships will excuse me.

The next Charge against my Lord Bishop ariseth from three Letters, dated the 20th of April, 1722. One signed *J. Jones*, innuendo the Bishop; to *Chivers*, innuendo *Dillon*: The second signed *Illington*, innuendo the Bishop; to *Musgrave*, innuendo Lord *Marr*: The third to *Jackson*, innuendo the Pretender; and signed 1378, innuendo the Bishop. These letters are said to be wrote by *Kelly*, and dictated by the Bishop.

Now as to these letters, I beg leave to observe there is nothing Criminal appears to be in any of one them. But then 'tis objected, that two of the Persons are attainted of Treason, and are Agents of the Pretender; and 'tis High-Treason to write to them: And the third is the Pretender himself.

Supposing *Chivers* were *Dillon*, and *Musgrave* were *Marr*; yet writing to them in private Matters, not criminal in themselves, nor relating to the Pretender, is not Treason.

But how comes the Lord *Marr* to be an Agent for the Pretender? He quitted the Pretender's Service many Years before; and from the Time of quitting his Service, till after the Date of those letters, had a Pension from his present Majesty. I believe the Counsel for the Bill, and all Mankind, will be at a Loss to tell by what Law writing to one, who hath quitted the Pretender's Service so many Years, and who hath subsisted ever since by a Pension from his Majesty, can be an Offence.

Indeed, if it be proved that *Jackson* is the Pretender, I admit Writing to him is Treason:

But if it be proved (as it will beyond all Dispute) that by *Jackson* neither is nor can be meant the Pretender; and that my Lord Bishop neither did nor could write or dictate any one of these letters; then the whole Charge against my Lord Bishop, founded upon those letters, falls to the Ground.

The next Thing I would observe, as to those letters, is from the Report, *Page* 42. where the Committee are pleas'd to observe, that the letter to *Chivers* is, great Part of it, out of Cypher; which seems to allow that the other Part was in Cypher. Therefore it was very necessary, I think, to have printed the letters in the Cyphers and Characters, in which they were written; and also as they are decypher'd: Then the Persons accus'd would have had an Opportunity of employing Men skill'd that way, to see if they were rightly decypher'd. This was done in *Colman's Case*.

The French Papers, in the Appendix, are printed first in that language, and then as they are translated; which was not so necessary as Printing the letters in Cypher in this Case: Because almost every one understands French enough to tell, at first Sight, whether a French letter be rightly translated; but 'tis impossible for a Man of the great Skill in the Art of decyphering, to tell, upon a sudden at the Bar, whether a letter be rightly decypher'd: So that all a Man hath in the World, is to depend upon the Skill and Integrity of the Decyphers. Nor are they infallible; for the Witnesses who decypher'd the letters, admit, that there are some Words in them which they could not decypher; and those Words may give a Turn to the whole Sense of the letters. Nay, Mr. *Willes* said, that one of the Numbers he could not decypher stood for two Words: He was likewise pleas'd to say, it was impossible that the Number he could not decypher could make an Alteration in the Sense; which is very extraordinary for a Man to swear: But if one Word could not make an Alteration in the Sense, surely two might.

The writing these letters is charged upon *Kelly*; which cannot affect my Lord Bishop, unless they were dictated by him, or written by his Direction, or Privity; of which there is no Pretence of Proof. And therefore I shall next offer to your Lordships some Observations upon the Arguments and Circumstances alleged to support this Charge.

It is observed in the Report, that the Person who wrote these letters, speaks of himself as being in ill Health, in great Pain, under some sad and melancholy Circumstances, which he expects will soon blow over; and from thence 'tis infer'd it must be the Bishop, because his Wife was then ill, and died in six Days after; and that he himself was at that Time afflicted with the Gout. One of the Gentlemen, who was Counsel for the the Bill, said, These were Circumstances, that did not happen to any two Men in the World at that Time: And give me leave to instance one other Circumstance, which, I believe, did not happen to any one Man in the World; which is, writing a Letter of Politicks, when his Wife lay a Dying.

Why these Circumstances must necessarily intend the Bishop, more than any other Person that was sick, and under Misfortunes, I cannot apprehend. That ill Health must necessarily imply the Gout; and that it must be intended, that no Man had

had the Gout *the 20th of April*, but the *Bishop*; that *melancholy Circumstances* necessarily imply a Man's *Wife being sick or dying*; and that *no Man* had a *Wife sick or dying*, but the *Bishop*; is, in my humble Apprehension, a new way of arguing.

Another way of proving these letters to be wrote by the Bishop, is by the Names and Figures subscribed. For one letter is subscribed, *T. Jones*, and another letter is subscribed, *T. Illington*: And the Report observes, that where-ever *Jones* and *Illington* are named, the Bishop is to be understood. But *why* the Bishop is to be understood by those Names, *non constat*; nor is there any *Pretence of Evidence*. And if we shew (as we infallibly shall) that by those Names the Bishop *could not be meant*, and that he *could not write*, or *dictate those Letters*; then the *Inferences* against the Bishop *from those Letters*, and from the *subsequent Correspondence* under those Names, become of no Force or Weight.

A Third letter is subscrib'd, 1378; which the *Decyphers* say denotes a Person, whose proper Name begins with an *R*. And the Report is pleas'd to infer, that *it must be* the Bishop of *Rochester*. Now why 1378 denotes a Person, whose Name begins with an *R*, the *Decyphers* only know: And we are as much at a Loss to know, why by a Name beginning with *R*, must be intended the Bishop of *Rochester*. If that Number appear'd to denote a Name beginning with *R*, and if no Name began with that letter but the Bishop of *Rochester's*; there would then, I confess, be some Weight in the Observation.

That *Jones* and *Illington* are not the same Person, appears from the letter of the 10th of *May*, from *Hatfield* to *Howel*; where, within the Compass of two Lines, they are distinguished. For in one Line he saith, *Jones* promiseth to be a good Customer; and in the next Line but one he saith, *Illington* is gone in the Country; which plainly shews them to be distinct Persons. Besides, in the Papers mention'd concerning the Duke of *Norfolk*, his Grace is several times denoted by the Name of *Jones*: In *Layer's* list, *Sir William Ellis* is described by that Name; and in *Plunket's* list *Jones* stands for the *Germans*.

The Evidence to prove *Jones* and *Illington* to denote the Bishop, and the Intimacy between the Bishop and *Kelly*, is the Present of a Dog called *Harlequin*.

The Evidence stands thus. — *Rep. 40. E. 35.*  
 ' *Hatfield*, who is supposed to be *Kelly*, in his  
 ' letter of the 30th of *April* to *Howel*, who is  
 ' supposed to be *Dillon's* Secretary, writes thus.  
 ' Mrs. *Jones* died last Week; pray present my  
 ' Respects to Mr. *Musgrave* (meaning *Marr*)  
 ' and let him know, I received the Present sent  
 ' by the young lady; that he had a leg broken  
 ' in the Journey: However I will take all the  
 ' Care imaginable of him; and inform Mr. *Jones*  
 ' of it, to whom I know any thing from that  
 ' Quarter will be very acceptable.'

*Hatfield*, in his letter to *Musgrave* of the 7th of *May* 1722, says; ' Mrs. *Illington* is in great  
 ' Tribulation for poor *Harlequin*: However his  
 ' Obligations to the lady are as great, as if he  
 ' had come safe.'

From these letters 'tis inferr'd, that by *Jones* and *Illington* the Bishop is meant; and that a young lady sent the Dog to *Kelly* as a Present for the Bishop: And 'tis urged, that Mrs. *Barnes* in her Examination of the 23d of *May*, says, The Dog

was not design'd for her, but for the Bishop of *Rochester*: That *Kelly* told her, the Dog was for the Bishop; and that *Kelly* promised to get the Dog for her from the Bishop, in case it did not recover its lameness.

It is admitted, that Mr. *Kelly* brought such a Dog from *France*; that Mrs. *Barnes* had it; and that its leg was broken: But that it was design'd for the Bishop, or that the Bishop ever had, or saw it, there is no *Pretence of Proof*; and my lord Bishop utterly denies it; and Mr. *Kelly* hath solemnly deny'd it to your lordships: And instead of its being a Present from a young lady to the Bishop, Mr. *Kelly* says he bought it of a Surgeon at *Paris*, to give it to Mrs. *Barnes*.

There is one Expression in the letter of the 7th of *May*, which is remarkable; and, in my humble Opinion, enervates and destroys the Force of all those letters relating to the Dog: For it was written four or five Days after the *Bishop's Lady* was bury'd; and it says, ' Mrs. *Illington* is in great Tribulation for poor *Harlequin*.' Mr. *Kelly* was supposed to write that letter, and was supposed to be a Friend of the Bishop's; and could a *Friend*, could any Man of *Common Sense*, be guilty of such a *foolish* and *ridiculous* Expression? Could any Man say of one of my lord Bishop's Character, who was in the utmost Affliction for his Lady, that he was in great Tribulation for the breaking of a Dog's Leg? 'Tis evident, he who wrote that letter, did not know the Bishop's melancholy Circumstances: 'Tis likewise well known, that the Bishop never loved a Dog, nor ever had one.

The next Method of proving Letters upon the Bishop, is by *Similitude and Comparison of Hands*; not by comparing any Paper written by him with any other Writing; but by producing a letter suppos'd to be written by Mr. *Kelly* in *August*, and by proving that the three Letters written in *April*, were open'd and copy'd, and sent forward; and that those Letters were of the same Hand with that produced.

It was to be hoped, that, since Mr. *Sidney's* Case, the Evidence by *Similitude of Hands* in criminal Prosecutions would never have been offer'd: He was convicted upon such Evidence, and for that Reason his Attainder was revers'd in Parliament. And therefore, I humbly hope your lordships will not in your Legislative Capacity admit that to be Evidence in this Case, which in the same Capacity you were pleas'd to condemn in Mr. *Sidney's*.

In 1695, *Crosby* was indicted for writing treasonable letters; and the Evidence was *Similitude of Hands*: Which Evidence was disallowed by the Chief Justice *Holt*, and *Crosby* was acquitted.

In *Francia's* Case, my lord Chief Baron *Bury* declared *Similitude of Hands* to be no Evidence: And if it was not admitted in those Cases, where Papers, were produced, and proved to be of their own Hand-writing, and the Papers with which they were charged were produced, and compared with those other Papers; we presume, your lordships will not allow it in this Case, where it is carry'd farther than ever it was attempted before.

The Proof, as to this Point, stands thus. — Three Clerks of the Post-Office swear, that the 20th of *April* 1720. these three letters were open'd; that they took Copies of them, and seal'd them up again, and sent them forward; that

that *four Months* after, another Letter came to the Office, which was stopp'd: That is produc'd; and they all swear, they believe the *three Letters* were the same Hand-writing with the Letter produc'd. Now that Men, who never saw a Hand but once, and thro' whose Hands *so many* letters pass in a Month, should be able to swear, that three letters, which were sent in *April, 1720*, were of the same Hand-writing with a letter which was stopp'd *four Months* after, is strange and incredible.

I beg leave farther to observe, that the Clerks of the Post-Office own they *did not compare* the Copies of the three letters with the Originals. And was ever a Copy allowed to be read, unless the Person who produc'd it swore that he compared it with the Original, and that 'twas a true Copy?

It is remarkable, that *Clark*, one of the Post-Office, said, It was impossible to write a Hand, that had any Resemblance to those letters; but yet, he said, the *Figures* bore a Similitude to the Hand-writing: So that one Hand cannot be like another; but *Figures* may be like a Hand-writing.

It is also observable, that the letter produc'd is proved to be *Kelly's* Hand-writing, only by *Hutchins* the Messenger; who says he had him in his Custody a Week, and saw him write several letters; and by *Malone*, who proves Mr. *Kelly's* Hand by a Supercription in *French*, and yet owns he cannot read *French*: Whereas, we shall prove by *three positive Witnesses*, that this is not his Hand. Besides, they might have produced the letter which he wrote to my Lord *Townshend*, which is admitted to be his Hand.

We shall likewise prove by several Witnesses, That at the Time when the three letters are said to be written, the Bishop was at *Bromley*, and so lame with the Gout, that he could not stir Hand or Foot; that his Lady was dying; that no Person was admitted to him, but two or three Servants; and that Mr. *Kelly* was not at *Bromley* at that time, nor for *three or four Months* before, or after. And therefore 'tis impossible those letters should be written, or dictated, by the Bishop.

The Evidence of *Wood* the Coachman, confirms this. For he swore, that he never saw Mr. *Kelly*, till he was carry'd to see him in the Tower; and that *Kelly* was not at *Bromley*; that *ro Stranger* was at *Bromley* from the 12th of *April* till the 26th, when the Bishop's Lady died; and that he must have known it, if there had; that the Bishop never sent the Coach for *Kelly*, or any other Person in *Berry-street*, or any Place near *Pall-Mall*. So that by this, the Examinations of *Elizabeth Levet* and *Neynoe* are quite destroyed.

But 'tis objected, that a Man might put his Horse at an Inn, and come to see the Bishop, and *Wood* not know it. Can it be imagined, that *Kelly*, who is supposed to be so particular a Friend of the Bishop's, would leave his Horse at an Inn? But we shall examine other Witnesses to this.

It was objected, that on the 10th of *June* the Bells rang, and the Servants had *Roses*. But it appears, most of them were red *Roses*: And if it should be criminal to ring the Bells on the 10th of *June*, we shall shew that the Bishop knew nothing of the Ringing of the Bells, or of the *Roses*.

In the Report, Page 50. the Committee of the Commons are pleased to take Notice; "That

" on the 11th of *June*, *Kelly* sends his Friends at *Paris* an Account of his late Misfortunes; and after complaining of the Neglect in not bailing him out sooner, says, your Old Friend *Rig*, indeed, offer'd all that could be expected from the poor Man;" and infer, "That by *Rig* is meant the bishop of *Rochester*."

Can it be imagined, that *Kelly* would call the bishop *Gerrard's* old Friend; who, 'tis not pretended, ever knew him, or saw him? and if poor Man be taken by way of Contempt; can it be imagined that Mr. *Kelly*, a Gentleman of that good Sense and Breeding, would use such an Expression of my lord bishop? If these Words are taken in the literal Sense, 'tis as improbable; for the bishop was not taken for a poor Man: Besides, how could he, who had 200,000*l.* Contribution-Money, and had the Command of the *Military Chest*, be said to be poor? And I dare say, there is nobody but believes, that if my lord bishop would have intermeddled on Mr. *Kelly's* behalf, he had Interest enough to procure whatever bail *Kelly* wanted: And therefore I apprehend, that *Rig* cannot be intended to be the bishop.

Indeed, no Credit can be given to *Cant-Names*; for the same Names are us'd for several Persons: As *Laws* in *Plunket's* Cypher stands for *Marr*; and in the Cypher found on *Dennis Kelly*, it signifies Mr. *Cesar*. *Hawksby* in *Plunket's* Cypher, stands for King *George*: And in the Report 62, there are Compliments from the Pretender and his Spouse to *Hawksby*; which, I presume, they did not mean for his Majesty. *Jones* is used many times for the Duke of *Norfolk*. It is used for Sir *William Ellis*; and it is also used for the *Germans*; as I before observ'd.

That *Jackson* cannot mean the Pretender, is plain. App. E. 30. A Postscript in the letter from *Quitwell* to *Vernon* says, "Mr. *Chivers* advises, that the Money you mention, in *Clinton's* Hands, should be equally divided between *Medley* (meaning the late Duke of *Ormond*) and *Jackson*, meaning the Pretender." Now would any one devoted to the Pretender's Interest, put *Ormond* before the Pretender? *Jackson* is put for the Pretender only in *Plunket's* List; and yet 'tis observable, that *Plunket* in all his Correspondence never calls him *Jackson*, but *Joseph*, or *Jephson*: And in the voluminous Correspondence charged on *Kelly*, he is not once called *Jackson*; but the usual Names are *Jephson* and *Joseph*.

As for the letter to *Dubois*, it seem'd at first to be a letter written from *France* TO the bishop, by the Name of *Dubois*; and after a Month's time they find it to be a letter written BY the bishop. If so; Writing a letter, and not sending it, can be no Offence. But how comes the bishop to keep that letter seal'd, which he had written seven Months before? The Writer of that letter owns, he had receiv'd one from *Dubois* two Months before, by Mr. *Johnson*; which was the Name *Kelly* went by: And 'tis very strange, that the bishop should be so weak, as to mention the Name of the very Person, who, 'tis said, us'd to write his letters, and by whom he was suppos'd to carry on his Correspondence. If it be presum'd that He wrote this letter; it must also be presum'd, he was out of his Senses when he did it.

That letter was not signed, and was dated the 16th of *Dec.* but no Year; tho' they have put the Year 1721 to it. For a Month together they never thought the letter to *Dubois* to be the bishop's Hand; tho' they had several of his letters. As to the Observation made by one of the Gentlemen, that the letter to *Dubois* was sealed by a *particular Seal*, and not the Seal with which he seal'd such letters, as He *intended all the World should see*; that Gentleman would do well to let us know, *what* letters were written by the bishop, which he intended all the World should see.

That *so many* letters were written before 1712, and *so few since*, was occasioned by his lordship's great Correspondence about Matters of *Learning* at that Time, and his being *from* that Time often afflicted with the *Gout*, so that he could not write many letters, and consequently receiv'd but few. Besides, He was made bishop in 1713, and Dean of *Westminster*; so had not Time to write much himself, but kept a *Secretary*.

As the Matters before mention'd to be charg'd against my lord bishop, arose from letters supposed to be written *by* him; I shall next consider the Charge against Him, which arises from letters supposed to be written *to* Him.

There are *Two Letters* mention'd in the Report as written to Him; one of the 11th by *Motfield*, interpreted to be lord *Marr*, wrote to *Illington*; the other of the 25th of *July* from *Digby*, interpreted *Dillon*, to Mrs. *Weston*.

Now I would observe, That it is not pretended, that either of those letters was ever *receiv'd* by the bishop; so consequently must be *intercepted*: Therefore it would have been proper, to have *produced the Letters*, and to have *prov'd the Hands*.

As to the letter from *Motfield*, 'tis only a *Compliment of Condolence*: And 'tis infer'd that it *must be the Bishop*, because his *Lady died* a little before. The letter says, "We must submit with Resignation, to what the just and great God thinks fit to order; but you know such Things so much better than I do, that I will not trouble you with saying any more upon it." From these last Words it is infer'd, That this letter was written to a *Clergyman*, and *consequently the Bishop*.

What Weight this way of Reasoning will have with your lordships in *criminal Prosecutions*, is humbly submitted: But it must be observ'd, That this letter is said to be an *Answer* to the letter, said to be written the 20th of *April* to *Musgrave*. And as we have shew'd, that it was impossible the bishop should write or dictate either of the letters of the 20th of *April*, the *Answer* must fall with the letter. But from hence the Observation is natural, and undeniably true; that if *Jones*, who wrote the letter to *Musgrave* of the 20th of *April*, could not be the *Bishop*; and *Illington*, to whom *Motfield* wrote, be the same as *Jones*; then neither *Jones* nor *Illington* can denote the Bishop.

As to the letter from *Digby* to Mrs. *Weston*, who is interpreted the bishop; it was written the 25th of *July*, N. S. wherein *Digby* says, "I cannot on any reasonable Grounds complain of your Silence, because I am inform'd of the Situation of your Health, and the Concern your Family are in, by Bankrupts, and Law-Suits."

It must be observ'd, that on the 7th of *July* O. S. *G. W.* in his letter to *Digby* says, "I saw Mrs. *Weston* yesterday; she never was better in her Life than now." It is strange, that *Digby* the Week following should take Notice of the ill Situation of Mrs. *Weston's* Health. 'Tis plain both these letters can't be Genuine, and therefore no Credit can be given to such a Correspondence.

One Way of fixing the intercepted Correspondence, and the Cant-Names mentioned therein, upon the bishop, is, by the *Coincidence of Times*, and other *Circumstances*; as of his lordship being *in Town*, and *out of Town*: And there are several Mistakes in them. For in *Hatfield's* letter to *Musgrave* of the 7th of *May*, he says, Mr. *Jones* is come to Town *only for a Day*: If that be to be understood of the bishop, it is not true; for he came to Town the 5th of *May*, and did not go out of Town till the 10th.

In the letter from *I. H.* to *Dixwell*, of the 18th of *June*, 'tis said, 'Mr. *H. Rig*, and *Rep.* are I hear in the Country.' And 'tis said, by *Rig* is meant the bishop: Which cannot be, for the bishop was then in Town. So in a letter to *Maisonneuve*, of the 19th of *July*, 'tis said, '*Rig* is in the Country.' Whereas the bishop was then in Town. This is the more observable; because the *Report*, taking Notice of the bishop's being ill of the *Gout*, says, *Page 41.* 'This Particularity, as also several others, which will be taken notice of as to the bishop's being in Town, or in the Country, at the respective Times mention'd in the intercepted letters, have been carefully inquir'd into.' And in the next Paragraph, the *Report*, taking notice of the letter to *Musgrave* of the 7th of *May*, which says Mrs. *Jones* is come to Town, says, 'This agrees with the Inquiry.' And yet it will plainly appear, that there are such Mistakes, as to those Times, as I have before mention'd.

I hope I may have leave to observe, that these Mistakes escaped the Observation of the Honorable Committee of the House of Commons; and that tho' the letter of the 7th of *May*, in the *Appendix*, says, 'Mrs. *Jones* is come to Town only for a Day;' yet in the *Report*, the Words *only for a Day* are left out.

All the Circumstances before mention'd are made use of to fix the Names of *Jones* and *Illington* upon my lord bishop; and therefore the next Paragraph but one in the Report is very observable: Which is this.

'These several Circumstances, joined to *Neynoe's* Declaration, that *Kelly* had told him, the bishop went sometimes by the Name of *Jones*, and that *Carte* had told him, the bishop went by the Name of *Illington*, shew, that wherever *Jones* and *Illington* are named in *Kelly's* Correspondence, the bishop of *Rochester* is to be understood by those Names.'

So that the whole Proof of the Correspondence, charged to be carry'd on by my lord bishop under the Names of *Jones* and *Illington*, is resolv'd into this; that *Neynoe* DECLARED that *Kelly* and *Carte* TOLD HIM the bishop went by those Names.

I beseech your lordships, Is this *Proof*? Is this Evidence sufficient to deprive a Reverend Prelate of all his Ecclesiastical Preferments? And to send him into perpetual Banishment? Do the

the Lives and Liberties of *Englishmen* stand upon so weak a Foundation? If they do, I presume to say they are very *precarious*, and the most innocent Man alive cannot say he is *safe*.

I beg your Lordships Indulgence to observe farther, that this heavy Charge against my Lord Bishop is supported only by *Innuendos*: And with what an Eye *Innuendos* have been always look'd upon in *criminal* Cases, many Instances may be given.

I shall trouble your Lordships but with *one*; which is full to this Purpose, and of the greatest Authority: I mean the Resolution of your Lordships in the Case of Sir *Samuel Barnardiston* in 1683. He was prosecuted for writing letters, alledged to be seditious, and highly reflecting on the Government, and the publick Justice of the Nation; and was found guilty, and fined 10000*l*. He brought a writ of Error in this most Honourable House, and your Lordships were pleas'd to reverse that Judgment; for that the Information being grounded on *Letters*, which in *themselves* were not *criminal*, but made so by *Innuendos*, your Lordships were pleas'd to declare, that *Innuendos* and *forced Construptions* ought not to be allow'd; for all *Accusations* should be *plain*, and the *Crimes* ascertain'd.

Now if it can be suppos'd, without any *Evidence*, that my Lord Bishop wrote the letters charged to be written by him; even then this Case is the same with Sir *Samuel Barnardiston's*. For the letters are not *criminal* in *themselves*; nor can be made so but by *Innuendos*, and *strain'd, forc'd Construptions*. Nay, I presume to say, there is not *one Part* of the Charge but subsists purely by *Innuendos*, and *strain'd Construptions*.

I will trouble your Lordships with instancing only *one* letter; which is that of the 20th of *April*, written to Mr. *Jackson*, and subscribed 1378. With the *Innuendos* it is thus. 1378, *Innuendo* a person whose proper Name begins with an *R*, *Innuendo* the Bishop of *Rocheſter*, did write to Mr. *Jackson*, *Innuendo* the *Pretender*; that, notwithstanding *this* Opportunity, *Innuendo* an Opportunity of raising a *Rebellion* in England at the Time of *Elections* of *Members* of *Parliament*, had elapsed; I, *Innuendo* the *Bishop*, agree with you, *Innuendo* the *Pretender*, that another, *Innuendo* another Opportunity of raising a *Rebellion* in England, may offer before the end of the Year, *Innuendo* at the *breaking up* of the *Camp*. Your Lordships will please to observe what a *Superſetation* of *Innuendos* (if I may so say) there must be to support this Charge; and without *Innuendos* no Part of the Charge against the Bishop can be maintain'd: And therefore I humbly hope that the same Reasons which induced your Lordships to reverse the Judgment against Sir *Samuel Barnardiston*, will prevail upon you to reject this Bill.

To what I have objected, I imagine it will be answered, That your Lordships are now acting in your *Legislative* Capacity; and that in your legislative Capacity you are not bound by the *Forms of Law*: But I humbly submit it, whether you will not think fit to proceed according to the *Rules of law*, tho' not according to the *Forms* of it.

*Mens Lives*, and *Properties*, are to be try'd and determin'd *secundum Allegata & Probata*; and the Proof in such Cases must be *legal* Proof. And I apprehend with great Deference, that when your Lordships proceed in your *Legislative* Capacity in

*other* Instances, you proceed according to the *Rules of Law*: As in Bills for enabling persons to *sell*, or *settle Estates*; or for *making Rivers navigable*. If the Title or Property of any Person come in question, your Lordships are pleas'd to hold the parties to *strict legal Proof*: And why not in Bills of *Attainder*? Are Bills of *Attainder* (whereby *Mens Lives* are forfeited, their *Estates* confiscated, their *Blood* corrupted, and their *Families* undone) of less moment than Bills to enable Persons to settle their Estates for the benefit of their Families? I humbly apprehend that your *Legislative* and *Judicial* Capacities are here so *united*, that they *cannot be separated*. For a *Bill of Attainder* is a *Condemnation* by *Parliament*; and your Lordships always hear and judge whether a Party be *Guilty*, before you *condemn* him. Will you then be pleas'd to judge, and determine upon *less Proof* in *one* Case than in *another*? Can it be conceived that your Lordships will not act by the *same Rule* in *both* your *Capacities*? or that you will not have an equal *Tenderness* and *Regard* for the *Lives*, *Liberties*, and *Estates* of the Subject in *one* Capacity, as in the *other*?

When a Man *flies from Justice*, he gives *Judgment* against himself; and when a Person accused doth by corrupt or indirect Means *conceal* or *convey away* the *Witnesses* against him, then *he* is the Cause, why *strict* and *legal Proof* cannot be had: And that may be a Reason, why less Proof should be admitted. But in Cases not attended with *either* of these *Circumstances*, to say that less than *legal Proof* is sufficient for a *Bill of Attainder*, is to affirm that PRIVATE OPINION alone, without *Proof*, is a sufficient Foundation to pass a *Bill of Attainder*. And how harshly that would sound in the Ears of *Englishmen*, is humbly submitted to your Lordships.

My Lords, By our Law a *Judge* cannot go according to his own *private Opinion*; but must be govern'd by the *Evidence* given before him in *Court*. For the Rule is, *Nil refert, quod notum sit Judici; si non notum sit in Forma Judicii*. And if *Mens Rights* and *Liberties* were to be determin'd by *private Opinion*; how *precarious* would the *Lives* and *Estates* of *Englishmen* be? The most innocent Man could not be safe; the wisest Man could not foresee, where it would end; and *England* must no longer boast of the Excellency of her Constitution.

It is a Rule, both in Law and Reason, that *Nemo bis puniri debet pro eodem Delicto*: And yet that may happen to be the Bishop's Case. For the Charge in the Bill is *general*; intending to raise a *Rebellion*, and holding *treasonable Correspondence* in order to bring in foreign Forces: But there is *no particular Fact* charged upon him. Now if he should be *indicted* for either of those Species of *Treason*; and *particular Overt-Acts* of such *Treason* should be alledg'd, as *buying Arms*, and *lifting Men* for the *Pretender*, and the *Overt-Acts* should be proved by *two Witnesses*; he might be *condemn'd* and *executed* for it. For he could not plead *this Bill* in *Bar* to such *Indictment*; because the *Indictment* would not be for the *same Facts*, there being *no particular ones* charged in the Bill. And yet it may happen (as I said) that my Lord Bishop may be *indicted* and *try'd* for the *Treason* mention'd in this Bill: As in the Case of *Hampden* and *Fitzbarris*, which I lately mention'd. For Mr. *Hampden* was try'd for meeting and consulting to raise a *Rebellion*, was fined

40000*l.* and was afterwards tried for High-Treason for the same Fact: And tho' he insisted on his having been try'd for the same Fact, and desired to plead it; yet the Court would not allow it. And in *Fitzbarris's* Case, he was indicted for High-Treason, and pleaded an Impeachment; and averr'd, it was for the same Fact. But the Plea was overruled: For there being no particular Article, the Averment could not be supported; because he could not aver any thing that was out of Record.

I humbly hope your Lordships will excuse me for taking up so much of your Time. But the *Multifariousness* of the Matters of which the Accusation consists, and the *Weight* of the Subject, drew me into it. I humbly thank your Lordships for your great Indulgence and Patience in hearing me: And if, as a *Lawyer*, thro' my Zeal for my Client's Service, or, as an *Englishman*, asserting those *Laws* which I apprehend are the *Security of British Liberties*, I have let drop any Expression, which may be thought improper; I most humbly beg your Lordships Pardon. And if there be a difference between your *Legislative* and *Judicial* Capacity; I submit it, whether your Lordships will be pleased to give that Judgment in your Legislative Capacity, which the Counsel for the Bill do, in my Apprehension, admit you could not give in your Judicial. And therefore, I hope your Lordships will be pleased to reject this Bill.

Mr. *Wynne* (his Lordship's other Counsel) spake next.

*May it please your Lordships,*

I AM of Counsel for this Reverend Prelate: And however unnecessary I know Apologies to be before your Lordships, who are always ready to hear what the youngest and most unexperienc'd Person has to offer; yet it becomes me to say something for my first Appearance at your Lordships Bar, in a Matter of the last Consequence; and it was the Desire of this Reverend Prelate, rather to make his Defence by such weak Hands as mine, as if he was persuaded, that his Cause needed not the Assistance of Art or Experience, in order to move the Passions, or to impose upon the Reason of his Hearers; which he knows to be but an impotent Help to Persuasion, in comparison of Truth and Innocency. He appears before those, who (he hopes) will regard plain Facts and positive Law; and Truth, notwithstanding all the Disadvantages of an unskilful Pleader, will, he hopes, at last prevail.

For my own part, since your Lordships have assign'd me for his Counsel, I shall be under no Apprehensions of Danger or Displeasure in performing my Duty to him, in humbly offering every thing I think necessary for his just Defence: and I will not doubt, but I shall be fully and favourably heard. And tho' it is his Lordship's Misfortune to be already pre-judg'd in another Place, and to be condemn'd without Doors, by some few vulgar mislead Apprehensions; yet he hopes better Things of you, my Lords: He does not doubt, but that your Lordships, who in Matters of less Importance proceed with Calmness, Justice and Prudence, will be careful not to deviate from those Measures in a Matter which demands the greatest Caution and Deliberation:

For it is the Case, the Reputation, the Liberty, the Fortune, and (I was going to say) the Life of a most learned Prelate; because some Circumstances of this Bill are so cruel and extreme, that it is little better than if it had affected Life itself.

Every one that is a Friend to this Bill, must avow, that it is not to be offer'd without an evident and cogent Necessity. But, I hope, my Lords, tho' the Grounds and Suggestions of it were true, and duly proved, yet that there is no such Necessity.

In order to discover whether there be any such Necessity or not, I shall consider the End proposed by this Bill, and then weigh the Means whereby 'tis hoped to attain that End, and whether this Bill be a Means necessary or convenient to attain it.

The End, I hope, is the Security of the Government, and the Execution of Justice, and it ought to be pursued by all regular and lawful Means; and therefore, before I speak particularly to the Crimes supposed in this Bill, or the Proofs which have been offer'd to make them out, I shall beg leave to say something as to the Manner and Method of this Proceeding. Not that I shall presume to question your Lordships Power in such Cases: But, as on the one hand we must admit your Lordships may, and have in some Cases exerted your legislative Capacity, in declaring That a Crime which was not so before, or by inflicting particular or extraordinary Punishment on common and ordinary Crimes; yet, on the other hand, till that is done, I hope I am at Liberty freely to represent the Inconveniency, the Injustice, and the Imprudence of making such a Declaration, or of passing such a Law, in the Case now before you. If it should become a Law, his Lordship must dispute it no longer, but submit to it as just, whatever Hardships he may, in the Retirement of his own Heart, conceive introduced upon him by it. But, thanks be to God, this is yet no Law, and that I am at full Liberty to represent the Injustice and the Unreasonableness of this Bill; and to say, this is not a proper Occasion that needs or calls upon your Lordships to exert your legislative Power.

I might here enlarge upon the Injustice of all Laws made *ex post facto*, and for one particular Case or Person, and no other; that they are against the Common Law, and the Common Right which every one is entitled to, in the Place or Community where he lives; because Laws, in their Nature, ought to be Rules for the general Order, and Good of Society; and Natural Justice would surely in all such Cases stop the Precipitancy of your Lordships Resolution, by this Question; Against what Law hath he transgress'd? If he hath transgress'd any publick known Law, he is undoubtedly subject to undergo the Pains or Penalties enacted by it, when the Proof is duly and fully made which that Law requires. But if there is no such Law yet in being, or if there is no such Proof as that Law requires to suppose him guilty, will your Lordships introduce a new Law, or a new Sort of Proof to make him so? If these Methods are to be taken, the most innocent Man is not safe, and the wisest Man cannot judge what is an Offence, or in what Degree; what Proof is necessary for his Defence, or how he is to be try'd. And in vain does the Legislature every Session provide  
Laws,

Laws, if a particular Law or a particular Proof is still to be made for every particular Purpose, not only contrary to the Tenor of all the former; but such as is not to be a Rule or Law in any other future Case whatsoever.

Thus much I am sure may be justly urged in any Place of Judicature in the World, against all such Laws in general; but much more as we are *Englishmen*, as we have Laws, which my Lord Bacon calls wise and just, that give to God, that give to *Cæsar*, that give the Subject, that which belongeth to them. Not like those of other Countries, imposed upon the Subject at the Will of the Prince, before Probation or Trial, whether they are fit and convenient for the Genius of the People; nor the Production of one Man, or of one Parliament in any one Age, but the Wisdom and Experience of many Generations.

And I am sure one of the greatest Excellencies of this Law, beyond that of other Nations, has been always esteemed the common and ordinary Method of Trial. It has been always accounted the Birth-right of an *English* Subject to be try'd *per Pares*, according to the known Course of the Law.

And therefore, the better to shew the Difference, and to evince the Hardship of this extraordinary Proceeding, I shall a little consider the Nature of the ordinary Trial; and tho' I might do this in the Language of *Magna Charta*, and of many eminent antient Writers of the Law, I rather chuse my Lord Chief Justice *Hales*, that great and good Man, whose happy Moderation between the Prerogatives of the Crown, and the just Liberties of the Subject, can never be remember'd by Posterity, without the deepest Honour. He says<sup>a</sup> it is the best Trial in the World, and one of the first Principals upon which our Constitution is erected. Here a Man has a legal Exception to any one of his Triers, if they have any Dependance upon either of the Parties, are prepossess'd or prejudiced before they hear the Evidence. All the Evidence is given openly, in the Presence of the Judge, Jury, Counsel, and Parties; not in private, before a Commissioner or a Clerk, (as in Chancery, or by the Civil Law) where oftentimes a Witness delivers that, which he will be ashamed to testify *ore tenus*, and wherein a crafty Clerk will oftentimes make a Witness speak what he really never meant, by dressing up his Evidence in his own Terms, Phrases, and Expressions. Or a Man may depose in Writing, what the Fear of being falsified, or perhaps a better Recollection would not let him adhere to in open Court, where he has an Opportunity to correct, amend, or explain his Testimony.

Besides this, (says that learned Judge) a Jury must all agree in their Verdict, and are not to be concluded by a Majority; and therefore, tho' in some Cases, the Law don't positively require two, nor one Witness, *viva voce*; yet the Credit of a Verdict is great, where twelve Men on their Oaths unanimously agree.

The Counsel on the other Side may be apt to reply upon me, with the frequent Abuses and Corruptions of Juries. My Lords, I do agree, that may happen to be the Case; or it may happen that one more knowing or over-bearing Man among them, may sometimes govern all the rest. But, if the same may happen, and often does in every Society or Number of Men, and the best

regulated Bodies in the World, surely that can never be a Reason to deprive a Man of his common Right, and to lay aside a most valuable Institution.

I am afraid, my Lords, this little has been too much upon a Point that so little needs it: but the Love of one's Country, and its antient legal Constitution, is an honest Prejudice, which every one is apt to indulge; and the Advantage of this Privilege, every one that hears me, (I doubt not) is in the Heart sufficiently convinced of, and would boldly insist on it as his Birth-right in any Case of his own, where his own Property, his Reputation, his Life, or his own Liberty was in the least concerned.

It is urged by the Counsel for the Bill, and indeed by the Bill itself, that this is an extraordinary Case, and requires an extraordinary Remedy, where the Offender has taken Care, by subtle Contrivances, to keep out of the Verge of the Law, and the Reach of all ordinary Proceedings. But if such a cruel artificial Suggestion be allow'd to be a good Reason to deprive a Man of the Benefit of the Law, no Man's Life or Liberty is safe. The same may be suggested of every Offender, and in every Offence: That a Man endeavours to evade the Punishment of the Law. The same may be said with more Justice of every one that pleads Not Guilty, and insists on his Trial, that he endeavours to evade the Law, because such an Accusation or such an Indictment is found against him. And yet the most rigid Casuist never yet maintained, but that any Man (tho' he knew himself to be a most guilty Criminal) might plead Not Guilty, and insist on his Trial.

But if this cruel Artifice is to prevail, and this should be a Reason to exert such an extraordinary Proceeding: Wo! be to all Men of Sense and Ingenuity. Nay, my Lords, if such a Notion is to take Place, the Bishop is in a much worse Condition, than if *Neynoe* were alive, or any other Witness would have deposed, *viva voce* against him, all they would have had them. For even then, his Accusation or Indictment must have been found upon the Oaths of Twelve Men at least, he would have had his legal Trial, and his Challenges. This I say upon a Supposition that the Gentlemen of the other Side may not allow his Lordship to be a Peer of the Realm; but if they do allow his Right of Peerage before your Lordships Bar, and consequently that he is intitled to a Trial by his Peers, yet still he would have had his legal Exceptions to the Testimony of the Witnesses; there must have been two positive Witnesses to the same Overt-Act; and his Accusation must have been found by twelve Men at least upon their Oaths; and, after all, if his Lordship should have been found Guilty, he might move in Arrest of Judgment. All which Benefits he is now utterly deprived of, by this Method of Proceeding.

We shall be told (I doubt not) by the Counsel for the Bill, that your Lordships sit now in a Judicial Capacity; that you are Judges of the Fact, as well as of the Law. No Man will doubt, but your Lordships have a Judicial Capacity, and have at all Times most worthily exercised it; but yet I must beg leave to doubt, whether your Lordships are now properly acting in that Capacity or not? You have a Power, 'tis true, in this

<sup>a</sup> *Hist. of the Law*, cap. 12.



Method of Proceeding to condemn this Reverend Prelate, if Guilty; but not to save and acquit, if you are ever so well satisfy'd of his Innocency: and whether it be your Lordships Pleasure to pass or reject this Bill, I desire to know of the learned Counsel, whether it may be pleaded in Bar of a Prosecution in the Courts below, that he was *auterfois acquit*, or *auterfois convict* before your Lordships; or whether this Proceeding by Bill might be pleaded in Bar, even of an Impeachment for the very same Treasons; or whether your Lordships Resolution on this Bill (whatever it be) would be any legal *Estoppel* to any other Bill in a future Session. No, my Lords, I humbly apprehend, it would not be a good Bar or a legal Plea, either at Common Law, or according to any Rule or Usage, of Parliaments; and therefore we hope your Lordships will not do that, which after all cannot be a complete or a final Judgment, and by that means draw this Reverend Prelate into the Danger of a double Trial. Which, I am sure, is not only contrary to the Rules of Law, but also of Natural Justice. I have the more Countenance in saying this, not only from *Hampton's* Case, but from the known Case of *Fitz-Harris*, who pleaded this very Matter to the Jurisdiction of the Court of *King's Bench*, that he was impeached for the same Crime by the Commons of *England*: but it was the Opinion of that Court, with the Advice of all the Judges, that he might, notwithstanding, be try'd there: and in fact, was try'd and condemn'd by the Court of *King's-Bench*, though the Impeachment was still depending before your Lordships House.

But if your Lordships are resolved to proceed in your *Legislative* Capacity, and my Lord Bishop must, after all, be in Danger of the ordinary Method of Trial; yet suffer me to say what has been done, in former Times, by former Parliaments, on the like Bills: and how light soever other Authorities may seem, we hope your Lordships will have some Regard to your own Usage and Resolutions.

There have been too many Instances, I confess, my Lords; but those, that can be in any Degree justify'd, may be reduced to these few. They are such as pass'd against Persons dead, or who fled from Justice, and did not render themselves by the Time appointed; or they have pass'd against such as were in actual Rebellion, in direct Opposition to all Methods of Trial, and in Defiance to all Courts of Justice; or against such whose Treasons were flagrant and undeniable, but their Persons above the reach of inferior Courts and Commissions. Those few Sacrifices to the Heat and Necessity of the Times have been most of them revers'd with Infamy and Detestation, when Men were cool, and at Liberty to hearken to the Voice of Law and Reason, and began to consider they had only prepared Shackles for themselves. Those few melancholy Instances, procur'd without due Trial by an Excess of Prerogative, of Persons that have been forth-coming, principally because it was the Will of a Prince; are not to be mentioned without Horror and Detestation. Such as those, says my Lord *Coke*<sup>a</sup>, *auferat oblivio si potest, si non, utcunque tegat silentium*. Let such gross Breaches and Violations of the sacred and unalterable Rules of Justice be forgot, if it be possible; or at least draw a Veil over them, and let them be buried in perpetual Silence.

But in all sober regular Times, a free Trial in the ordinary Course of Law has seldom been denied, even where the Facts have been so notorious as (one would think) almost to need no Trial, and so evident as to need no Proof; as the *Regicides*, except such as fled from Justice were admitted to Trial, no less than Twenty Nine before one Commission of *Oyer*, and every one heard with Patience in the ordinary Course. Even *Pilton*, that stabb'd a Prime Minister in the Execution of a High Commission, tho' he confess'd the Fact, both before the Council and Court of *King's-Bench*, and justify'd it as a publick Service to the Nation, in the most daring and impious Manner, was brought to Trial, without superseding any of the ordinary Methods and Circumstances of Justice. Indeed where some flagrant Crimes have been legally prov'd and determin'd in the Courts below, Parliaments have sometimes thought fit to add to, or heighten the Degrees of Punishments. It was so resolv'd in the Case of the Gun-powder Plotters 5 *November*, that they were at first to be try'd at Law, and then the Parliament (if need be) to add a Confirmation to it. Nay, that Resolution went farther; it says they were not competent Judges of it, before it was found in the Courts below.

I might mention the Opinion of Judge *Doddridge*, the Mirror of Justice, Lord Chief Baron *Atkins*, &c. who say the Parliament is a supreme Court of *Oyer*, and that the proper Subject of their *Oyer* is such Offences for which Right cannot otherwise be had, and to deal with Delinquents too high for the ordinary Courts. And, as I am before your Lordships Bar, I am very proper to mention the Resolution of your Lordships Predecessors, in the Case of *Fitz-Harris*, who (as I before mentioned) was impeach'd by the Commons of High-Treason; they refused to take him out of the Hands of ordinary Justice, and directed him to be proceeded against according to the Course of the Common Law.

And what Opinion subsequent Parliaments have had of my Lord *Strafford's* Bill of Attainder, best appears from the Words of the Act of Reversal, by ordering all the Records and Proceedings relating to it to be cancell'd and destroy'd, that no Remains of so evil and unjust a Precedent might be visible in after Ages, or brought into Example to any one's Prejudice. But even in that detestable Instance, such Informations and Evidence were not admitted, the Witnesses were all examin'd, *viva voce*, upon Oath, and he was first adjudged Guilty, by way of Impeachment at the Bar of the Lords, before there was any Order for a Bill. The very same Method was observ'd in the Cause of Archbishop *Laud*, and Articles fully proved against him, as they thought. If it had not been so, even that House of Commons, as bad as they were, and as thirsty as they were after the Blood of those Noble Persons. probably would not have order'd those Bills. But yet this latter Instance of Archbishop *Laud*, never had the Royal Assent: and 'tis well known in History, what desperate Measures were made use of to induce the Lords to pass it; and at last I think there were but seven of your Lordships whole House, that were present when it was pass'd. But if this Bill should pass, we must no longer blame and condemn those Instances; for this will, in effect, re-enact them, and many others, which the Wis-

<sup>a</sup> 4 Institut. 37

dom of former Parliaments have revers'd with Marks of Infamy and Detestation.

How much more is there to be said of Sir *John Fenwick's* Case? he had been indicted upon the Evidence of two positive Witnesses: There had been several preceding Trials, at Law, by which it manifestly appeared that he was equally concerned with those that were found Guilty. Sir *John Fenwick* had likewise withdrawn himself from Justice, and was retaken; (a Circumstance always urged as a strong Presumption of Guilt.) He had protracted his Trial by Offers of Discovery, the Reason of which afterwards appeared to be, that one of the King's Witnesses might withdraw himself beyond Sea; and altho' that Witness was gone, yet his Evidence not only remained in Writing sign'd, and upon Oath, but was attested and confirmed by some of the Grand-Jury themselves that found the Bill, and by others of the Petty-Jury, before whom that Witness had given the very same Evidence. There was a Proof likewise that he had attempted to corrupt the remaining Witness, as well as some of the Jury. These were Circumstances upon which that Case was founded; no Man can say, but there was a reasonable Evidence, tho' not strictly legal; one full and positive Witness, and many strong undeniable Circumstances; and yet the Opposition, which that had in both Houses, was very great. Whether the Reasons that prevail'd for the passing of it were sufficient, becomes me not to enquire: Since it is still a Law, I must presume them just.

But is there any thing, my Lords, like that, in the Case now before your Lordships? Has there been any Attempt to withdraw from Justice; and yet that Honourable Committee have been pleas'd to observe, his Lordship had Notice that he was to be apprehended some considerable Time before. Has there been any preceding Trial, in which my Lord Bishop's name was mentioned as an Agent, much less (as this Bill suggests) a principal Manager and Director in the Conspiracy? Or, in that one Trial which hath been, has any thing appeared to derive the least Suspicion of Guilt upon him? Can any one say he has used any Methods or Artifices to avoid or protract his Trial in the ordinary Course of Law? Has he not on the contrary (and as one of the strongest Proofs and Convictions of Innocency) sought and petitioned to be tried? Yes, my Lords, he has applied in all Courts, and in all Places, in the most earnest and legal manner, to be brought to Trial. Has this Reverend Prelate used any indirect Measures to corrupt or withdraw a Witness? and yet Mr. *Kelly*, (who is the only Person suppos'd capable of testifying against him) 'tis well known, had his full Liberty, even after his Lordship's Apprehension, but would not hazard his Recognizance by one Day's Non-appearance. No, my Lords, nothing of that kind has been attempted to be prov'd, nor so much as insinuated in this Case; nor is there here before your Lordships any one positive Witness of any kind: Nor is there the Sanction of any one Oath here, or any where else, in any one material Point against his Lordship. What need therefore, or what Reason can there be for this Bill? Surely your Lordships will never pronounce a Judgment that shall affect any Man's Life, Liberty, or Fortune, without some Oath, and on Circumstances so widely different in every respect from those of Sir *John Fenwick*.

And if this Case bears no Proportion nor Similitude with that of Sir *John Fenwick*; I am sure it has much less, or rather none at all, with any of those before mentioned. For we hope, after so long and full a Discovery of the Conspiracy, and those many just Methods of Preparation against it, the Danger cannot now be so great or cogent, as to require so precipitate a Resolution. His Person, your Lordships see, is safe and forthcoming, and the Courts of Law in their usual and open Course; and at this Time filled with such learned and resolute Judges and Ministers of Justice, that they are equal and able to deal with the most bold and daring Offender.

There can be less Reason therefore, none at all we hope, for your Lordships at this Time to exert such an extraordinary Method of proceeding.

But there is this further Objection against proceeding by Bill, that it makes not only your Lordships pronounce Judgment against one of your own Members, and a very terrible one too; but it makes the King himself, without hearing one Word of the Defence, in Person, pronounce a Judgment upon his Subject, which his own gracious Temper must be averse to; which the Common Law therefore has wisely left to be pronounced by his Justices, even in those Courts where he is always suppos'd to be present. But in this Instance, there is something which must be still more ungrateful to him; in that it is to exclude a Branch of prerogative which his Majesty most delights in, and it must be some Surprize to every good Subject to find his Royal Judgment so highly mistrusted.

There is another Thing, which, I persuade myself, your Lordships will fully consider; that if this Method of Proceeding by Bill be encourag'd and grow familiar, it will put an End to one considerable Branch of Judicature, which your Lordships were heretofore so justly jealous of, as not to admit at any time the least Competition. The Lower House will hardly care to appear any more before your Lordships as Accusers or Prosecutors, when they can so easily partake in your Judicial Capacity. And every such Bill (especially against a Member of this House) is a direct Infringement and Diminution of that high and valuable Privilege, and will open a Door to some other Mischiefs to the Peerage: which I had much rather your Lordships would suggest to yourselves, than I express. It has been always doubted without Doors, whether your Lordships could begin such a Bill against a Commoner; but I think it may be more justly doubted, whether the Lower House can begin such a Bill against any one of your Lordships: and, if this Bill should have no other Consequence, it will establish this so far, as to bear no Question hereafter. My Lords, I need not say, how much more proper it would have been, for the Lower House to have left this Matter intire to your Lordships; because it has been so often resolv'd by your Lordships Predecessors, that the *House of Commons* have no Power of Judicature or Coercion against any one, but in Matters concerning that House. Whereas this is a Case of Peerage, the Punishment, and the Exclusion of a Member of this House. There is an Instance on your Lordships Journals, where the Lord *Purbeck* voluntarily surrendred his Title and Dignity of Viscount to the King by Fine, and yet your Lordships unanimously

nimously revers'd that Judgment, and declared, that no Place could judge of, or intermeddle with Dignities or Rights of Peerage, but your Lordships own House.

And those my Lords of that Reverend Bench, will surely consider what a fatal Blow this Bill will give to the Discipline and Polity of the Church of *England*. They have more than ordinary Reason to be jealous of increasing such Precedents, and of introducing Methods of depriving Bishops and Deans, hardly known to former Ages. The antient Canons have already prescribed Methods of judging, censuring, and deposing Bishops, and the Cases when and where those Methods are fit to be exercis'd. I don't say the Parliament cannot do this, or any thing else which they think proper; but the Metropolitan, their Lordships know, is intrusted with this Power over his Suffragans, or a Provincial Synod. And 'tis plain, the Law of *England* takes Notice of no other Power, that can regularly deprive. For to mention but this Instance, if an Issue should be joined, whether a Bishop be deprived or not, the Court where such Issue should arise, could only write to the Archbishop to certify. And to prove this Assertion, I will not name Bishop *Stillington*, or any of those great Ecclesiastical Authorities, (since possibly they may be excepted against, as Persons who have too much Interest in the Case to be impartial) but it is so laid down by my <sup>a</sup> Lord Chief Baron *Atkins*, in his great Argument of Ecclesiastical Commissions, and by my Lord Chief Justice *Holt*, and the Court of *King's-Bench*, in the Case of *Dr. Watson*, Bishop of *St. Davids*.

All Precedents, my Lords, will increase; and the Scorn and Contempt of Libertines against your Lordships sacred Order is too great, to drop or to forget a Precedent so grateful and pleasing to them as this will be. Every one knows the Destruction of the smaller religious Houses, only made way for that of the greater. A Time has been when their Lordships Predecessors were all excluded and sequestred; and it has been attempted, even since the Restoration, to take away Deans and Chapters. I am far from apprehending any such thing at present, and I hope it will never enter into the Heart of any Man. But, my Lords, I confess I thought as little at this Time of such a Bill as is now before you, to deprive a Bishop and Dean at once, not only of all his Dignities and Benefices, but from the Exercise of any Part of his holy Office and Function: And I will say, that if this Bill should pass, and by any of their Lordships Assent, such a Design will be rendred more easy and familiar, and much more unpitied, by all Mankind.

Give me leave, my Lords, next to observe, with what Caution and Moderation other Parliaments have proceeded, even in those Cases where they have thought proper to exercise their legislative Capacity. I pass over the Statute 7 *W.* c. 19. for Imprisonment of *Sir Thomas Coke*, &c. and many other such Cases, which were too great and intricate for the ordinary Course of Law, but yet too low and inconsiderable to enter into this Comparison. But the Statute 8 *W.* c. 5. may be named, I am sure, with that now before you, for the Imprisonment of *Counter*, &c. concern'd

in the Assassination Plot, against all whom there was some positive Evidence upon Oath. Tho' the Zeal of that Parliament can never be question'd from an Act so full of Gratitude, and in such strong Terms and Accents of Loyalty to the King, yet they did not at once, and at one single Stroke, cut them off from the Land of the Living, and utterly deprive them of all the Necessaries of Life. The first Step that Parliament took was to pass an Act for the Detainment of them for the Space of one Year only, not to the Forfeiture and Deprivation of all they were worth, or to the Exclusion of his Majesty's Mercy, but even to leave a discretionary Power of Bailing within that Time, to any six of the Privy-Council, if they judged proper. Their further Obstinacy and Impenitency occasioning another Act, 9 *W.* c. 4. to detain them a Year longer, it was still under the same Exception. At the End of that Term another Act was made, empowering the King to detain them during his Pleasure, 10 *W.* c. 11. After these, two other Acts passed, empowering the late Queen and his present Majesty to detain them. What the particular Reason of these Alterations were, I cannot take upon me to determine, because the Acts themselves are wholly silent; but, my Lords, such were the prudent and moderate Steps taken by former Parliaments, even in that bold and wicked Conspiracy.

I may also justly take Notice of the Prudence and Clemency of the last Parliament, when there was so loud and so general a Cry for Justice, and when the Necessity of the Time seemed to require a more speedy and extraordinary Degree of Punishment than the Common Law was acquainted with: but with what Difficulty, with what slow Paces, and with how many tender Circumstances did that Bill pass? Your Lordships will easily imagine, that the Persons I here speak of are the late Directors of the *South-Sea* Company.

It would ill become me, my Lords, if I had Inclination, to insult the Distress'd, or to aggravate any of those Gentlemen's Misfortunes; but the Service of the Reverend Prelate now under Consideration, requires me just to mention what a State of Confusion they had reduced the Kingdom to: How many Thousands have felt, and still feel the pernicious Effects of that Scheme? Tho' their Crimes had no particular Appellation, or determinate Punishment in our Law, yet the <sup>b</sup> Civil, and the Laws of other Countries could have told us, that *Crimen Peculatus*, the Robbery of the publick Money, was such an infamous Transgression, that the Punishment of it was Death, both in the Principal and Accessaries. How different and how mild was the Punishment inflicted by the late Parliament, in comparison of that, I need not mention; and every one knows, how tenderly and sparingly that Law has since been executed upon them, and how much they still enjoy of the Spoils and Plunders of the Nation.

Let us not then follow every Precedent that has been, but the just and Prudent Precedents of moderate Times, and of good and peaceable Reigns. Let us not be ambitious to surpass the Proceedings of violent and arbitrary Men, which we or our Posterity may have Cause to repent of hereafter; but let us imitate such only as are

<sup>a</sup> Sal. Rep. 135.

<sup>b</sup> Dig. 48. 1. 6. &c.

agreeable to the Law and Constitution, such as are grounded upon true Reason, and the Principles of exact Justice.

Having thus spoken as to the Method of these Proceedings in general, and shown (in some measure, I hope) that they are contrary to the publick Wisdom, contrary to the known Rules of Law, and the common Right of the Subject, I shall, with your Lordships Favour, next examine the Foundations and Suggestions of this particular Bill. As for those general Matters and Allegations with which it is introduced, and upon which the Counsel for the Bill have spent so much Time, there is no Necessity, as we conceive, to answer to. We are here before your Lordships only as Counsel for this Reverend Prelate, one single supposed Conspirator; and it would ill become us in the least to controvert, that there has been a Conspiracy formed and carried on by some Persons abroad and by others at home, after it has been so solemnly resolved by both Houses of Parliament. Nor can we deny, but that Mr. *Laver* has been, Tried, Convicted, and Attainted of it: But we are yet to seek, how these Things have any Relation to the Case now before your Lordships; or how that unhappy Gentleman's Case comes to be connected and made part of my Lord Bishop's, as it is by this Bill. We may justly appeal to every one that heard or read that Trial, whether this Reverend Prelate's Name is so much as mention'd in any one Line of it; whether there are any Grounds to think, from any of that Gentleman's Papers or Examinations, that his Lordship was privy to, or in the least concerned or acquainted with his Person, or his Intentions: And I dare say, his Lordship is as much amazed at the Rashness and Folly of his Schemes, as he detests the Wickedness of them. Notwithstanding which, it is his Misfortune to be charged in this Bill as a principal Actor and Director in the framing and carrying on of those very Schemes and Designs for which that Gentleman has been convicted. And as to the Cyphers and Papers of *Plunket*, I am as much at a loss to imagine, upon what Grounds they should be given in Evidence against the Bishop, since 'tis not so much as suggested in the Bill; nor is there any thing throughout the *Report* or *Appendix*, that in the least charges his Lordship with any Inter-course or Correspondence with him.

It is strange, my Lords, that Persons Thoughts and Intentions, so widely distant in all other Respects, should yet center in such unnatural Projects, and wild Undertakings, without some previous Discourse, some Consultations, or Acquaintance one with the other; and yet as strange and unaccountable as it is, this Reverend Prelate is charged in the very same manner by this Bill, with consulting and endeavouring to raise an Insurrection, to procure a Foreign Force to invade the Kingdom, and Corresponding with the Pretender, and Persons employ'd by him, knowing them to be so employ'd. And if these Facts, my Lords, had been duly and legally proved, I should have very little to say in his Defence, but humbly intreat the Mercy and Compassion of this Honourable House; for they are Offences in themselves so great, that on the one hand they are not capable of Aggravation, nor on the other of Excuse or Diminution, by any thing I can say. But if the Facts have not been proved in the Whole nor in Part, the bare Affirmation or Allegation of them is only *Brutum*

*fulmen*, and does his Lordship no more Harm; than any other innocent Man, whose Misfortune it is to fall under an unjust Accusation. Or if those Circumstances which have been proved, are not Criminal in themselves, they shall not, we hope; by Inferences and Deductions, be heightened into Crimes; and the Number or Complication of them, shall never make them exceed their Nature. And, my Lords, we hope, that notwithstanding all that has been affirmed, alledged, or proved, this Reverend Prelate can still say, not only in the Form of Law, but boldly and with a safe Conscience, and upon an impartial and serious Recollection, That he is Not Guilty of any one of the Charges contained in the Bill: That he is not conscious to himself of any one treasonable or irreverent Expression, or of any one Degree of Offence committed by him, with respect to any of those Charges. He can still say, that he has not acted in direct Violation of his Oaths and Obligations, nor to the Scandal of Religion or his Holy Function. I am sure, my Lords, I should not take upon me to say this for his Lordship, or any Man alive, unless I thought we had a full and positive Answer to every thing that has been said, unless I was verily persuaded we had a sufficient and a legal Proof to encounter all that has been offered on the other Side; or unless my Instructions told me, that many Things in the Course of their Evidence are utterly false and groundless; false; I say, as we shall prove (if my Instructions are true) by the fullest Proof, and the most satisfactory Evidence that is possible in the Case; by such Arguments and Reasonings, as we think are clear and undeniable; by some Witnesses we never saw nor heard of before, consequently the more credible and impartial; by others, whom I am sure we had no Opportunity to lead or instruct; and all (as I am informed) glad, that it is consistent with the Rules of your Lordships House, to receive their Testimony upon Oath. In short, every Circumstance, every Part of the Evidence produced against us, your Lordships, in the End, we hope, will find, turn strongly for us.

There is one thing which I take for granted, from the Nature of the Evidence that has been offer'd, That it is admitted as fully by the Counsel for the Bill (as if they had said so in express Terms) that there is no legal Evidence against his Lordship in all they have offer'd; or else this extraordinary Method of Proceeding, and this new sort of Evidence had never been set up. Nay, I am sure, it is a sort of Force upon those Learned Gentlemen, so well versed in Methods and Notions of Law, to maintain so many gross Paradoxes, which have not the least Colour of a legal, or even a reasonable Evidence, and would never be allowed, they well know, in any Court of Law or Equity. And tho' your Lordships have been pleased to permit those Papers and Letters to be read, your Lordships did not (as I apprehend) finally declare or determine them to be Evidence; but were willing to hear all Things, and afterwards judge how far it was reasonable or fitting to admit them as Ingredients in your Lordships Judgments. And whatever Opinion your Lordships might be of on the two former Bills, as we are Strangers to them, so we hope we are not precluded from offering any thing farther, why they ought not to be allowed in this Case. If it be your Lordships Pleasure at last to

adhere to that Opinion, or to resolve the like in this Case, we must submit.

If there is any thing certain in Law, or agreeable to Reason, it is this, That in all Criminal Charges, the Evidence ought to be clear and positive; and that the higher and more heinous the Nature of the Charge is, the more clear and undeniable the Evidence ought to be by which a Man is convicted. Now, I beseech your Lordships to consider at one View (as far as it is possible in such various and perplexed Facts) the Methods made use of to prove his Lordship Guilty, and what they have offer'd to your Lordships under the Name of Evidence. Where Words have been capable, and sometimes where they have not been capable, of two Senses, an arbitrary and invidious Interpretation has been put upon them. Where Words have been plain and proper for the Occasion, and which considered separately by themselves, it was impossible to put a criminal Gloss upon, the Writer is supposed to have some mysterious Meaning or double Entendre; or else they are complicated and thrown together with those which will infer some criminal Meaning. In other Letters the Names and Words relative to Men, are supposed to be used for those of Women, and the proper and usual Appellation of Women, for those of Men; and because one fictitious Name will not answer all they would have it, the Names are often shifted, one and the same Person is supposed to pass under seven or eight different Denominations: and often two or three Names in the same Letter, within the Compass of two Lines one to the other, are urged to stand for the same Person. Some Letters which are writ of another, and speak in direct Terms of a third Person, they would have to mean the Writer himself, tho' as often without any Name, Date, Subscription or Supercription at all. Books of Accompt, Manuscripts, and common Mercantile Terms, which seem proper for the Person and the Occasion of the Correspondence; and the Name of Stocks, which every one knows the true Meaning of, and carries all the Appearance of Reality, are very particular and exact in the current Prices at that time, by a new kind of Metaphor are to be taken in an ill Sense. Others which are only to be informed of the Distemper of a Friend, the Variations which happen in it, and the Opinion of Doctors upon it, by a strange and arbitrary Construction are applied to explain very different Purposes: and, as if they were suspicious even of their own Suspicions, and distrustful of these Explanations, they call in for Aid several disjointed Fragments, Extracts, and Scraps of Papers, which no Man but themselves can tell what to make of; and when there happen to be some Words which cannot be reconciled with such a Construction, or the Uses which they would make of them, they are totally omitted, and we are told they are not material, or not yet decypher'd, or not legible in the Original, but your Lordships and the World must intend them to mean something criminal.

My Lords, if such foreign Suppositions, Glosses, and Intendments, such unnatural Constructions, false Inferences and Innuendos, are to be admitted as Evidence, and deserve the Name of Proof, I must confess, they have given you some.

If the Whimsies and Conjectures of Decypherers, the Hearsays and Reports of third, fourth, and fifth Persons are to take place in your judicial Proceedings, instead of that plain, honest, and positive Proof, which the Law requires; or if the Number of Facts and the Variety of Circumstances could make them alter or exceed their Nature, I must confess, they have offered some Things worthy of your Lordships Consideration.

But if it were your Lordships Pleasure to construe Things according to the most natural plain Sense and Import of the Words, as others would have understood them, and in such a Sense as the Writer probably meant them, or in that just manner which your Lordships have hitherto done on criminal Prosecutions, no one can say they have shewn one Degree of legal or reasonable Evidence, to prove any one Suggestion in the Bill. This I most humbly assert, and, I think, no one can disprove my Assertion.

Thus far in general of the Proofs that have been offered; but I shall, under your Lordships Favour, speak now more particularly to them, and shall be so far from abridging or sliding over any thing that has been said, that I am willing every thing those learned Gentlemen for the Bill have been pleased to offer, or that Honourable Committee have observed in their *Report*, should have its full weight, and be put in the strongest Light against us.

It has been observed, that there were three several Methods and Times fixed for the Execution of this intended Conspiracy.

The first was to have procured a regular Body of foreign Forces to invade the Kingdom, at the time of the late Elections, which was from the middle of *March* to the middle of *April* 1722.

But have they shew'd your Lordships any Evidence, or even one Passage in the *Report* of that Honourable Committee, that particularly charges his Lordship with being privy to any one of these three Designs thus generally and roundly affirmed? He is not charg'd with being privy to either of the three Memorials to the Regent for Forces. The only Passage that can be pretended to contain any Imputation of that kind, is in the Letter sign'd 1387 to *Jackson*, which, they say, there is reason to believe was from my Lord Bishop to the Pretender: but this we hope in the Course of our Evidence effectually to disprove.

The second Design was to have made an Attempt at the time it was believed his Majesty would go abroad; but all that is insinuated in relation to his Lordship, is contained in two or three obscure Passages relating to one *Jones*, in Letters said to have passed between *Dillon*, or his Secretary, and Mr. *Kelly*: which Passages being something ambiguous, are interpreted in an ill Meaning, by Hearsays from *Neynoe* and *Pancier*, and *Plunket's* Cypher; but cannot, without the greatest Absurdity, be thought to relate to his Lordship.

Two of these Passages<sup>a</sup> relate to Remittances of Money, which they insinuate the Bishop was to furnish; but it amounts in the whole to no more than the bare Hearsay of one Man, and an arbitrary Interpretation of some Expressions in the Letters of two others, (to either of which his

<sup>a</sup> Rep. p. 47, 8. App. E. 43, 4. C. 51.

Lordship has not in the least been prov'd privy;) and the Whole depends upon a Supposition, that *Jones* here and elsewhere in the Correspondence means him; which depends again upon another Supposition, that the Bishop dictated those three Letters of the 20th of *April*, one of which is signed *Jones*; a Supposition which we hope likewise to prove absolutely false, and by that means shake the Foundation of the whole Charge.

The other Passage<sup>a</sup> is in a Letter from *Dillon's* Secretary to *Kelly*, about *Jones's* sitting and providing himself with Saddles; which by the same Methods is explained to mean Soldiers and Regiments, which his Lordship is supposed to have undertaken to procure: and if the Words are to be taken in that Sense, and applied to him, he must likewise be supposed to have undertaken to be at the Head of them; which, considering his Lordship's Function, Age, and Infirmities, is so absurd and ridiculous, that, instead of spending more of your Lordships time in answering of it, I shall only make use of it hereafter, as one Instance (among many others) to shew, how much they are mistaken in affirming, that, wherever *Jones* is named, his Lordship is to be understood.

The third and last Design, tho' I must confess the most enormous, if it were true, because Part of it was the Seizure of his Majesty's Person, was to have been put in Execution at the breaking up of the Camp. But, I am sure, there is not one the least Hint throughout all this voluminous Affair, that his Lordship was concern'd or privy to that.

And therefore 'tis surprizing to think upon what Grounds his Lordship can be (as he is in the Preamble of the Bill) charg'd with having been deeply concern'd in forming and directing this Conspiracy; which, as your Lordships have heard, consisted of those three several Designs. The Counsel, indeed, for the Bill have endeavour'd by divers Methods and Reasonings, by some little Circumstances, and seeming Probabilities, to charge upon his Lordship in general such a Correspondence: And they may all be reduc'd to these four Heads:

1. Hearsays.

2. The three Letters said to be dictated by his Lordship, and wrote by *Kelly* to Lord *Marr*, *Dillon*, and the Pretender.

3. Two Letters said to be wrote to the Bishop.

4. The Co-incidences of Circumstances, Times, and Names, in the intercepted Correspondence, to induce a Belief of the before-mention'd Hearsays, and supposed Facts.

To all which I shall endeavour to give some Answers.

But before I enter upon these Particulars, I shall beg leave to observe to your Lordships, That if such Evidence is to be countenanced, it will be in the Power of any two Men, the one in *England*, the other beyond Sea, getting an Account of the Circumstances and Motions of a third Person, by an artificial intercepted Correspondence, to raise what Suspicions of him they please; and yet he be all the while innocent and ignorant of what is doing. Whether that is the Case here, I shall afterwards submit to your Lordships Judgments.

But it is very remarkable, that in all the intercepted Correspondence to and fro, there are no Footsteps or Descriptions which any ways point out to, or of whom they are written, but those alone which are supposed to relate to his Lordship; and in them, as the Counsel observe, things are said and done in such a manner, and with such particular Circumstances, as lead directly to him, and him only. And this being so contrary to the Caution and Reserve practis'd in all other Instances, carries in it some manifest Marks of Fraud and Contrivance.

This Remark I humbly apprehend to be the stronger, because there has been no Proof of any particular Meetings or Consultations with other Persons, towards carrying on these Designs. And how a Man can conspire with himself, I know not, except that it is barely alledg'd he was a Member of the *Burford Club*; the Falsity of which Assertion that Honourable Committee themselves seem so sensible of, and by that Indulgence and Enlargement which one of those Noble Persons (tho' said to be the chief of them) has since met with, is now so well understood, as to need no manner of Refutation.

I may also as justly observe, that there is no one Witness against this Reverend Prelate of any one criminal Act or Expression, from the Time of his Majesty's Accession to the Throne; tho' one of the Counsel (as your Lordships may remember) was very particular about the Manner of his passing of the 10th of *June*, which the Coachman gave them an Account of for four Years together; and tho' all his Papers were seiz'd, not one Letter, or Paper, under his own Hand, produced of a criminal Nature, or pretended to have been seen or intercepted. Not any one Letter intercepted that is pretended to have been written to him, much less any prov'd to have been receiv'd by him, the Matter of which appears to be Treasonable, or any ways Criminal. My Lords, I must own a great Consequence is drawn by that Honourable Committee, because a great Quantity of Letters and Papers were found dated before the Year 1712. This very Objection was made in the Accusation of his Lordship's worthy Predecessor, and a slight Answer satisfy'd his Examinants; and the plain Reason is, that his Lordship at that Time had a settled Correspondence with many eminent Men on Matters of Learning, which he esteem'd so valuable as to preserve; but since the finishing of those Controversies, he had less occasion to write, and his Lordship's Merits having call'd him up to a more high and busy Station, he had less Opportunity to write; and he that writes little will receive but little. From that Year therefore (they justly observe) few of any Consequence were found, and even those few, (if no other than what are printed, and as yet produc'd) we beg leave to say, are of no Consequence at all, to support the Inference drawn from them.

The first, I think, is from a great Lady; but so general and uncertain, that it does by no means warrant the Conclusion drawn from it; for it does not so much as appear to have been a Letter, or what it was that was enclos'd. And I beseech your Lordships, what more can be infer'd from Captain *Halshead's* Letter,<sup>b</sup> the Contents of which are no more, than that a Neighbour, as

<sup>a</sup> Rep. p. 47. App. D. 17.

<sup>b</sup> D. 7.

Captain *Halfstead* was to the Bishop, desires leave to dine with his Lordship on a *Thursday*, which was his publick Day, in Company of 20 other People? I must confess they have laid a Stress upon the Character of the Man in their Opening; but nothing more has been prov'd, than that he was in a Ship by some Name different from his own. Another Letter that was said to be found among his Lordship's Papers, was that directed to *Dubois*. But this (my Lords) I shall beg leave to reserve for a more proper Occasion.

I shall now consider the four several Charges against the Bishop: And the First arises from *Neynoe* and *Pancier's* Informations, all mere Hearsays; some from living, and some from a dead Person; but positively and expressly denied by the living Persons, from whom such Informations are supposed to have come.

All that *Pancier's* Informations<sup>a</sup> say, relating to this Reverend Prelate, is, That one *Skeen* told him, that the Bishop of *Rochester* had the Principal Direction of the Conspiracy; and that 200000*l.* had been rais'd and put into his Management. This *Skeen*, it seems, is still in Custody, and your Lordships will hear how far he will support this Charge.

Tho' the very Accusation itself we beg leave to call absurd and incredible; that such a Sum of Money as 200000*l.* could be rais'd and deposited in one Man's Hands, and not yet traced up to some of the Contributors, or to the Hand where it was deposited, especially when it is charged upon a Person not used to deal in Merchandizes, or Remittances. Tho' the Counsel for the Bill have slid over this, yet being often repeated in the Report, as if there had been some Weight in it, I thought myself oblig'd to take Notice of it, tho' it is so incredible, I confess, that it is scarce worth removing.

Of *Neynoe's* Informations, your Lordships may observe there are Four, but none of them sworn to nor signed; and it was expressly resolved, in *Lord Audley's* Case,<sup>b</sup> by all the Judges of *England*, that no Examination without Oath ought to be read except of the Party himself that is tried. They are all either of a Date subsequent to his Lordship's Commitment, (and therefore till then thought<sup>c</sup> inconsiderable, and not worth reducing into Writing,) or else they are of no Date at all. One of the Two without a Date appears manifestly to have been taken after he was seiz'd, and brought up from *Deal* in *September*, which sufficiently shews what just Distrust there was at that Time of his Credit; that on the 27th of *September*, was on the Day before he drowned himself; and both, when he is known to have been under the greatest Terrors and Apprehensions, in that he was not able to make good what appears by the Paper (mark'd E. 11. and found afterwards in his Pocket) to have been undertaken by him, or required of him. It is not said, as to one of his Examinations,<sup>d</sup> before whom it was taken: Another of them, and the only one they now think fit to make Use of, is an Extract only from three other Papers, and said to contain the Substance of them; but the Papers themselves, out of which it was extracted, do nowhere appear. And there are some Particulars in the Report<sup>e</sup> of that Honourable Committee, which he is said to have confess'd, which do not appear in any one of these Examinations, and are

of such a Nature as to affect the Credit of all he said, and (if produced) would, we doubt not, in other Respects entirely blast the Credit of his Testimony. And, my Lords, if the Examination of a Man is thus taken to pieces, the Antecedents and the Consequents left out, Treason (and what not) may be made and inferred from the most innocent Things and Expressions.

But his Examinations, even as they lie in the Appendix, are full of Inconsistencies and Absurdities: Inconsistencies, I mean, not only with *Pancier's* and the Depositions of other Persons, but even with themselves. For *Pancier* says, little pass'd in Writing in the Conduct of the whole Affair: *Neynoe* says, there were many Bundles of Letters that Mr. *Kelly* brought with him from *France*, and which he had seen him write at several Times. But yet they are much more inconsistent with themselves; for instance, *Neynoe* says, in his Examination, mark'd E. 7. that he had seen several Letters written by *Kelly*, and sent to him from *Paris*, and other Parts, but they never contain'd any thing material: And yet in E. 8. he says, that he had seen several Cyphers of *Kelly's*, and seen him make use of them; and that *Kelly* with great Freedom acknowledged they were for carrying on the Correspondence with the Pretender's Agents. Whereas it is utterly incredible that a Man, who had really been so communicative in his Discourse, and of his Cyphers, should yet be so reserv'd as to hide from him any thing material in his Letters. In the very same Examination (he says) he was well acquainted with one *Watson*, i. e. the late Earl *Marishall*, and lay several Nights with him; but after all his Intimacy, at last it comes out, that he did not know really who he was. There are some other Inconsistencies, which have been already taken notice of by Sir *Constantine*, which I shall not repeat.

But, my Lords, if the Persons and Credit of *Neynoe* and *Pancier* were unexceptionable, yet what they say is only Hearsay, or mere Affirmation: And was ever that allow'd as Evidence in any material Point by any Law, or in any Court in the World? 'Tis expressly resolv'd in the Trials of *Langburn* and *Lord Ruffel* to be no Evidence; and it is the first Time it ever receiv'd so much Countenance as to be read in judicial Proceedings; and I dare say, there is no such Practice in the Courts of *Inquisition* abroad. Even common Fame and Reputation is but of little Weight in any Case that I know of. It may, my Lords, be a sufficient Ground for an Officer of the Peace, in some few Cases, to arrest a Person, or for a vigilant Ministry to make Enquiries, i. e. to accuse or apprehend; but was never yet allow'd to be a Guide in judicial Proceedings, or to condemn any Man in any Criminal Case, whatever. But even when the Commons (in the Case of the Duke of *Buckingham*, 1 *Car.* 1.) had declar'd, that common Fame was a good Ground of Enquiry, it was complain'd of, and the Commons afterwards receded from it, and proceeded upon the Examination of Witnesses, and other Evidences, and in every Article of their Accusation the particular Facts are express'd. Much less will your Lordships allow the Hearsay of one single Man, and only Extracts of that Hearsay, to be of any Weight, nay, to be of more Weight and Authority now he is dead, than if he were living; for if he were living, and could only depose by Hear-

<sup>a</sup> Report 10. 35. Append. D. 1.<sup>b</sup> State Trials

F. 1.

<sup>d</sup> E. 9. E. 10.<sup>e</sup> Page 38.

say, no one surely can say it would be admitted as Evidence; but since he is dead, and we have no Opportunity of cross-examining of him, why ought not his Lordship to have the Advantage of it, as was resolv'd in the Case of the <sup>a</sup> King against *Pain*? Or like the known Case of a Man dying in Execution, the Law is satisfied, and his Creditor is without Remedy? And it cannot be deny'd, but if one of our Witnesses had died, and a Person had taken Minutes of what he could say, we should not have had the Benefit of his Testimony; and where there is the same Reason, there ought in Justice to be the same Law and Construction. And yet this is the Foundation and Support of the whole Charge against his Lordship. It is upon this Man's Examination singly that it is affirm'd, among other notorious Untruths, that the Pretender rely'd more upon Advices from the Bishop, than from any other Persons. But this, and whatever else is in them, with Submission to your Lordships, amounts to no more than this, that *Neynoe* was heard to say, what he heard *Kelly* say, what *Kelly* must have heard some other Persons say, what they had heard the Pretender say, what neither they, nor any one else, ever had Reason to say.

But, my Lords, there is still something more strange in what is now attempted; for the Persons of whom 'tis pretended they heard all this, and into whose Testimony it must all be resolv'd, are now both living, and are so far from supporting what 'tis pretended they have heard from them, that they absolutely deny and contradict every Word of it. One of them has already done it (if my Instructions are true) in the most solemn Manner, at your Lordships Bar, and the other is now ready to do the same. And *Neynoe* was so conscious to himself of the Falsity of what he had said, that he lost his Life to avoid the Punishment that might otherwise have fallen on him, (for his Flight, my Lords, can admit of no other Sense or Construction.) He could not apprehend himself in Danger, if what he had said was true; but on the contrary, had reason to expect Rewards, if he could make out the Truth of his Information. Charity forbids me now, my Lords, to say any more of him, unless it be thought requisite to prove the Falsity of his Information by his own free and voluntary Confession, often repeated and confirm'd to Strangers and indifferent Persons. And (if my Instructions are true) we have those that will speak most fully to it.

This is the first and the principal Part of their Proof; and if we take away this Foundation, all the mighty Superstructure rais'd upon it must fall to the Ground, and all their corroborative Proofs and concurrent Circumstances must come to nothing.

The second Head of Accusation against his Lordship, is, from three Letters, supposed to be dictated by him, of the 20th of *April*. The first to *Chivers*, interpreted *Dillon*, signed by the Name of *Jones*; the second to *Musgrave*, interpreted *Marr*, sign'd *Illington*; a third to *Jackson*, explain'd to mean the Pretender, sign'd 1378, and sometimes 'tis printed 1387; and therefore which of these two is right I cannot tell.

Before I speak of the Letters themselves, I shall mention one Word as to the Manner of their Con-

veyance: They are said to be enclosed in a Packet to one *Gordon* of *Boulogne*, in a Letter from *Kelly* himself, sent by the ordinary Post, and sign'd with a Name, which they say he most usually signed and went by. This is so improbable, that out of eight or ten Names they are pleas'd to give him, he could bethink himself at that Time of no other Name to sign a Letter enclosing three of the utmost Consequence; and is so inconsistent with that Caution and Subtlety all along insinuated in this Correspondence, that it almost needs no Confutation. But yet (if my Instructions are true) Mr. *Gordon*, to whom they are said to have been directed, and the only indifferent Person in the Case, and can be under no sort of Influence from hence, has attested upon his Oath, that there was no such Letter, or Packet, ever came to his Hands.

And supposing these Letters were sent, as they suppose, to the Persons they suppose, and dictated by the Persons they suppose; is there one Passage in them of such a criminal Import, as would be sufficient to found an Indictment at Law? If there is not, they are not to be made criminal by Arguments, Innuendos, and Implications. The Case of Sir *Samuel Barnadiston*, already mention'd by Sir *Constantine*, is expressly in Print; and the Reason given for the Reversal of that Judgment (as appears by your own Journals) is, because the Information was grounded upon Letters, which in themselves were not criminal, but made so by Innuendos, and forced Constructions. There is *Crosby's* Case to the same Purpose, before the Court of *King's-Bench*, in the Year 1695, who was indicted of Treason; and the Overt-Acts laid in the Indictment, were for inviting the *French* King to invade the Kingdom, and by sending Letters and Instructions, how and where to make the Descent. Tho' the Court thought his Hand-writing was prov'd, and the Matter of the Papers of a very odd and suspicious Nature, and the *French* King frequently mention'd in them, and the Indictment supposed them to be contriv'd for to invite him over; yet they held it not Treason.

And the chief Thing that gives any Ground of Suspicion, in this Case, is, the Person to whom they are supposed to be directed: but I must submit to your Lordships, that there has been no Proof that either *Chivers* and *Musgrave*, or *Jackson*, are the very Persons supposed, or that his Lordship was privy to the Writing of one, or the other of them; nor are they capable of Proof, as we hope immediately to make appear.

However, for the present, supposing as they have supposed, that *Chivers* and *Musgrave* mean *Dillon* and *Marr*, and that such Letters were wrote to them by his Lordship without any Disguise, (unless the Matter of them, as I before said, were plainly criminal) or unless your Lordships will suppose (as they suppose) something criminal contained in the Words not decypher'd; and unless it could have been prov'd that the Persons writing or dictating these Letters, knew them to be the Pretender's Agents, and as such address'd to them; I dont know (my Lords) how it could be construed a treasonable or criminal Correspondence, either within the Letter or Intention of *Stat*, 14 *W.* III. c. 3. or any other Law whatsoever.



For tho' the late Lord *Marr* is an attainted Person, it can't be denied but he is still in many Senses a Subject of *England*, and is no more divested of his natural Allegiance, than a banish'd, or an out-lawed Man: and tho' he appeared in open Arms and Rebellion against his Majesty, he was not thought so dreadful a Man, as to have a Correspondence with him made Treason or Felony; but that was a peculiar Favour, reserved for this Reverend Prelate and his Friends. My Lords, I would not be understood to mean, as if the most innocent Correspondence with a Person under such Circumstances, was prudent or convenient; but I think I may affirm (even from the Clause of this Bill) it would not of itself have been criminal. But (according to my Instructions) this Reverend Prelate was little known to that Lord, and never had any Friendship or Acquaintance with him while in *England*, and cannot be supposed to have contracted such a Friendship since he was abroad.

That *Dillon* was an Agent of the Pretender's, nothing appears antecedent to these Letters: Nor did *Marr* at that Time appear to be one of his Agents, when it was so well known (as that Honourable Committee observe) that he was at that Time subsisted by a Pension from the Court of *England*. This Pension indeed, is said to be stopt last *August*; but the Letter to him of the 20th of *April* (by whomsoever wrote) was some Months before.

Indeed, if *Jackson* had been proved to mean the Pretender, the Writing to him would be High-Treason plainly within the Statute: but that the Pretender is not, and cannot be understood by that Name, we hope to make appear fully, before we have done, even from the Lights that Honourable Committee have afforded us.

I shall next consider the Nature of the Proofs to induce your Lordships Belief, that these Letters were dictated by my Lord Bishop: And the first they offer, is, Because the Matter of them agrees with his Lordship's Circumstances at that Time; *i. e.* his being ill of the Gout, and the approaching Death of his Lady; which (they say) is morally impossible should suit so exactly to any one Man else. These two Circumstances must be allow'd to be agreeable to those which his Lordship was then under: But one would think (my Lords) they are Circumstances so melancholy in themselves, that they might have been spared, especially considering the little Use or Advantage that can really be made of them. But these Circumstances were no Secrets: every one that knew his Lordship, must likewise know them; and whoever wrote these Letters with a Design to have them intercepted, and imputed to him, (as we hope to shew the Case really was) would certainly mention such Matters or Circumstances in them, as might be naturally thought to describe him. Or if they were written without his Knowledge, (as they will be clearly proved to have been) it is no wonder, if the Writer, who personated his Lordship, should insert all that was proper to fasten the Suspicion he intended on him.

Another Proof that they were dictated by his Lordship, they say, is, from the Subscription of the Names of *Jones*, *Illington*, and the N<sup>o</sup> 1378, which are all affirmed to denote his Lordship: And the Reason why that Number belongs to

him, is, because the Decypherer has found that Number to denote the proper Name or Title of a Person beginning with the Letter *R*. If this is his real Opinion, must that needs be the Bishop? Is there no body else, whose Name or Title begins with the same Letter?

But, with Submission to your Lordships, it seems impossible to affirm even thus much with any Degree of Certainty, and it must be only Matter of mere Conjecture. Dr. *Wallis*, who is allowed to be the Father of the Science, (such as it is) and was the Wonder and Envy of all Foreigners, directly owns, that the Whole was built upon Conjectures; and he that had the best Guess, was the best *Artist*. Such, my Lords, is the Science of Decyphering. And from such uncertain and conjectural Premises, what certain Conclusion can possibly be drawn? And 'tis plain, Mr. *Willes* is not so infallible as he pretends to be, by that Number of Passages not yet decypher'd.

When we took our Objection first against the Nature of this new sort of Evidence, the Counsel for the Bill were pleased to cite a Statute in *Q. Eliz.* Time, wherein they said the Word *Cypher* is mention'd. I have since looked for that Statute, but could find nothing about it; and, perhaps, may be mistaken in the Statute which they mean. But, my Lords, I am sure they did not mention any particular Trial, where it was ever heard of, or allowed as Evidence. I rather believe, that, according to the Notions of those Times, (for soon after the Statute was made against *Witches*) if any Decypherers had appear'd then as Evidence, they might have been in more Danger than the Criminal.

But if there are any certain Rules, or any reasonable Methods in Decyphering, I am sure 'tis highly improbable, that Persons so cunning and wary, as these are all along represented to be, should be guilty of such a fatal Oversight, as just to sign with such Numbers, that all, it seems, who understand Cyphers, must necessarily know to be intended for the Initial Letter of their Names. It would, my Lords, in my humble Opinion have been more consistent with that Care and Caution, to have made those Numbers stand for quite contrary Letters, and those Letters to have been express'd by quite contrary Numbers; and there is no Doubt, but they might have made any others signify the same Thing. However, since the Decypherer has not shew'd us by what Methods he has arrived at this Conclusion, 'tis impossible for us, by any positive or direct Evidence to confute it: But 'tis sufficient for us, to deny on the one hand, what he has on the other hand affirm'd, without telling us the Reasons of it.

That the Names of *Jones* and *Illington* belong to his Lordship, is endeavoured to be proved by some Passages in subsequent Letters, and by refining on the Matter of them, which they think is applicable to his Lordship only.

I have already mentioned two of those Instances, *viz.* his Lordship's own Indisposition, and the Death of his Lady, which are likewise mentioned in the subsequent Letters, in order to fasten the Imputation intended, yet deeper on him. There is a Third, which relates to the Present of a Dog.

That

That such a Dog was sent does indeed appear; but that his Lordship had received it, or saw it, or had any Letter or Message about it, has not been proved, and he positively denies it; and to whom, or from whom it was really sent, Mr. Kelly can best determine, and his Lordship must refer himself to what he has always affirmed in his Examination; and (if I am rightly inform'd) since re-affirm'd at your Lordship's Bar, that he gave it to Mrs. Barnes, and designed it for her from the first, and for her only.

My Lords, I should apologize for taking Notice of such minute and low Circumstances; but it is the Evidence and Nature of the Proof made use of against us. I should rather have expected, that ingenious Gentleman (the Decypherer) would have shewn, by some Rules of his Art, that the whole Story of the Dog had been a Fable or Fiction, and explain'd it to something that was reasonable and probable, which I am sure this is not, to suppose (as the Letters read to your Lordships do suppose) *Musgrave*, i. e. *Marr*, in one Part of the World, General *Dillon* in another<sup>a</sup>, widely distant one from the other, and a learned Prelate, to be in such Tribulation and Concern for a little Dog; which no way suits the Characters of any one of the Persons to whom it is applied; much less the Circumstances of this learned Prelate, who had at that time a much nearer Concern upon him, from the Death of his Wife, and was himself in such great Disorder and Weakness of Body. The speaking therefore of this Present, backwards and forwards, with such particular Circumstances, and the Report of it so industriously spread many Months before my Lord Bishop's Apprehension, (as some of your Lordships cannot but remember) is absurd and ridiculous upon all other Suppositions, but upon the Design of fastning something on his Lordship, the Point all along in their View.

If the Writer of these Letters had been really and truly informed of his Lordship's Circumstances, he might, perhaps more properly, have affirm'd it of his Lady; which 'tis plain, the Writer was not, because he speaks of her as Living 11 Days after she was Dead. And how ignorant of them the Writer really was, appears by another Passage in that very Letter; where he says, <sup>b</sup> 'Mr. Jones is come to Town for a Day only, <sup>c</sup> May 7th.' Whereas his Lordship had been in Town Two Days, and staid Three more, as appears even by their own Evidence, *Lawsen* and *Wood*.

By these your Lordships may see, how many forced Inferences and Constructions, and what a Train of Absurdities and Suppositions are necessary to support one poor, and (if true) yet inconsiderable Assertion, when once we depart from the sure and known Rules of Law!

A Third Way of proving these Letters to be the Bishop's, is from the Hand-writing, which is supposed to be Kelly's, and he is supposed to have been his Lordship's Secretary in these Matters: Both which Suppositions are destitute of any proper or satisfactory Proof.

The first is attempted to be supported by the Testimony of the Clerks of the Post-Office. But before I speak to the Testimony which they have given, I must beg leave to offer one Word as to their manner of obtaining it; and shall endeavour

not to transgress your Lordships late Resolution: And when I mention any Words of that Act of Parliament, it is only to shew the cautious Measures the Legislature took even in imparting this Power to them, and the just Apprehensions they had of the Abuses and ill Consequences that might attend it. My Lords, I am so far from endeavouring to bring them in danger of a Penalty, as the Counsel were pleased to object, that I am willing to suppose those Clerks had proper Warrants at that Time, and for that particular Opening and Detaining. But that is all which the Act gives, and the Words of it are fully satisfied by such a Construction, without going farther, and extending the Words of the Act to that which was not in the least within the Intention or Purview of it. It don't appear to me, my Lords, I confess, how they are empower'd to take Copies (for all such Acts which are in Restraint of Trade and Commerce, are to be strictly and literally construed:) But I am utterly at a Loss to know, from what Words of the Act it can be infer'd, that such Copies shall be received as Evidence in Courts of Judicature; and not only against the Writer himself, but against other Persons too.

A private Act of Parliament (tho printed in *Rastal* and other authentick Collections of Statutes) has been disallow'd, when it has not been examined with the Record. But, my Lords, I don't know that a Copy of any Thing was ever allow'd as Evidence, but what was made by a proper Sworn Officer, known in Law, and where every one may have Access to it; and therefore, if false, may be disproved by the other Side. But is there the same Reason here? My Lords, can the Party ever have an Opportunity to disprove it, if falsly copied, when the Original is sent forward? Or, if it were still in their Possession, have we any Power to procure a Sight of the Original? or to have a Copy of that Copy? And therefore, we hope your Lordships will not regard that Part of the Evidence, if it were material. But to consider also, my Lords, what it is they have deposed of these Copies; That the Originals were written in the same Hand with some Papers shewed them; and which, they were told, were Mr. Kelly's Hand-writing. Your Lordships, I doubt not, observe the Time when they deposed this first, *viz.* the 24th of August, and afterwards the first of January last; i. e. The first of these Depositions four Months, the other eight Months, after they had seen the Originals of the 20th of April: For, they were forwarded by the Post, and the Clerks only took Copies of them, and did not detain any one Original for a Specimen till their first Deposition; and surely that was a little of the latest: So that it rests singly upon the Memory of the Clerks for four or eight Months. I think St. James says, *That a Man may even behold his own Face in a Glass, but he is no sooner gone, but he straitway forgetteth what manner of Man he was:* And it is much more impossible for any one so exactly and nicely to remember all the little Strokes and Dashes of the Pen, by which the Sameness or Diversity of Hands can only be made out.

And all *Malone* swears, is, That he believes it to be Kelly's Hand-writing; and 'tis remarkable, that his Deposition is but in January last, and he left Mrs. Barnes's Service in May, so that he

<sup>a</sup> Rep. 40. App. E. 42.

<sup>b</sup> App. D. 47, 8.

could not have seen him write since that Time. He don't say, he ever read any of his Writing, or at most the Supercription of a Letter: He might, perhaps, see him write at some Distance, as he came in and out of the Room; but surely, that cannot be sufficient to form a Judgment of a Man's Hand-writing; and I am sure the Improbability is much greater after nine Month's Time. And *Hutchins* the Messenger, from seeing the Supercription of a Letter to the Secretary of State, has likewise, I think, taken upon him to swear the same thing.

But supposing these Persons had seen Mr. *Kelly* write frequently, and had, within a more reasonable Distance, swore it to be like his Hand, will any one say, That it is a sufficient, or even a reasonable Proof, in any criminal Case? But because Mr. *Kelly* is all along affirmed to have acted in these Matters as his Lordship's Secretary, I must beg your Lordships Patience to consider, How far that Doctrine of Similitude of Hands has prevailed.

Colonel *Sidney's* Case was the first wherein it was ever admitted as a Proof in a Criminal Case; but that Judgment was afterwards reversed by Parliament, as manifestly unjust. In Lady *Car's* Case, *Sid. Rep.* 419. which was only an Information of Perjury, yet a Letter under her own Hand was positively denied to be Evidence; tho' a Witness swore he believed it to be hers. I must own, my Lords, this Case at the late Trial of Mr. *Layer*, was not only denied to be Law, but all Men defy'd to make common Sense of it: But, with the utmost Deserence to that learned Gentleman that said so, I beg leave to mention the Words of Sir *J. Hawles* upon that Case, who was of a different Opinion. 'At that Time, 'says he, when the Case of Lady *Car* was adjudged, besides *Twisden* and *Keyling*, two very eminent Judges, there sat in that Court Sir *Wad. Windham*, whom all will own to have been the second best Judge who sat in *Westminster-Hall* since the Restoration; and if it is not Evidence in Misdemeanour, much less, says he, in Treason.' Which Inference, besides the Reason of the Thing itself, is supported by the Authority of Lord *Coke*.

In my Lord *Preston's* Case, his Hand-writing was proved by three Witnesses, that had belonged to him while in the Secretary's Office, and must necessarily have seen him write a thousand Times: But that was not all; for those Papers were seized on him, sealed with his own Seal, as he was going to *France* in the Heat of War, contrary to an Act of Parliament, which at that Time made it Treason.

In the Trial of the Seven Bishops, the same Question arose, Whether Similitude of Hands was a Proof in a Criminal Matter? and it was not admitted.

In *Francia's* Trial, before all the Judges at the *Old-Baily*, it is positively laid down by the Chief Baron, and not contradicted by any others, That it was no Proof or Evidence of itself; and the Letter in that Case would not have been admitted, but that it was found by his Bedside, and a Copy of the very same Letter enter'd in his Pocket-Book, which he had owned and explained to some Lords of the Council.

In *Crosby's* Case, the Hand-writing was sworn to by three positive Witnesses, and owned in

one of the Papers by the Prisoner himself; yet Lord Chief Justice *Holt* and the Court held it no Evidence, *Because one Hand, says he, may be like another, and Presumptions shall never take Place in Treasons.*

In the late Case of Mr. *Layer*, 'tis well known, that besides the Proof of his own Hand-writing, the Treasonable Papers were delivered by his own Hand to the Witness; and 'twas upon that Ground only, they were permitted to be read against him. Besides this, he had said *that* before the Lords of the Council, which the Court thought amounted to a full Acknowledgment that it was his Writing. But even all this, my Lords, was made use of against him but as concurrent Evidence, because there were two positive Witnesses, *viva voce*, against him, as to the other Overt-Acts.

I will mention to your Lordships some Foreign concurrent Authorities upon this Point, to shew, that the Reason and Equity of this Doctrine has been uniform and universal, That Similitude or Comparison of Hands is not a sufficient Proof of it. There is a famous Case of *Jean Millard*, in a Book called, *Le Journal du Palais*. He had lived 40 Years from his Wife, and then returned and reclaimed her, after she was marry'd to another. One of his Methods made use of to prove him to be the same Person, was, the Hand-writing of Letters that had formerly passed between them: Which occasion'd this Question before all the famous Judicatures of *France*, 'Whether the Testimony of skilful Notaries, who fully deposed of the Similitude of the Hands, was a sufficient Proof in this Case?' and it was universally denied. And yet this, my Lords, was a Case highly favour'd in all Laws; but more highly in those Places, where Marriage is reputed as a Sacrament, and in favour of which they will often admit even the Party's own Oath.

*Codex Fabrianus Lib. 4. Tit. 14. Def. 71.* says, 'A Proof by Comparison of Hands, is a very dangerous Proof: *Idque in causis civilibus duntaxat; sed in criminalibus, in quibus periculum majus versatur, aut capitis, aut existimationis, non item.*'

*Voet*, an eminent Modern Civilian, *Lib. 22. Tom. 4. Sect. 11.* to the very same Purpose. And so does *Cujacius* in his Commentary on the Novels 73. 'The Romans, says he, never allow'd it, but when no other Proof could be had. And in latter Times, when Forgeries became more frequent, they would not allow of it at all, unless the Writing had been acknowledged by the Party, or proved by two Witnesses who saw him write it.'

And then it was necessary to bring both into Court, that the Judges themselves might make the Comparison, and not leave the Witnesses to be the only Judges of it.

But it was never known, and I may defy all the Writers of Law to shew me one Instance, that any Evidence of the Similitude of Hands (which can only be made out by Comparison) was admitted, but where the Papers pretended to be written in the same Hand, were produced and compared: Which is so far from being the present Case, that even the attesting Clerks, who are the only Witnesses in the Case, never had an Opportunity of comparing the Original Letter stopp'd in *August* last, with any one of the three original Letters dated *April* 20. or with any

any of the intermediate Letters, which they affirm to have been written in the same Hand.

And if it be consider'd, how much more difficult it is to distinguish the Hand of one writing in Figures (which stand single one from another) from the Hand of one writing in Words at length (which are variously connected and combined) your Lordships will never give them the least Degree of Credit.

But at once to put an End to this Evidence (if my Instructions are true) it has already appear'd to your Lordships, upon Mr. *Kelly's* Bill, That the only Original Letter of the twentieth of *August*, stopt as a Sample at the Post-Office, and the only Ground of affirming these Three to have been his, was not his Hand-writing; and, if need be, we have the same and stronger Evidence to produce. Upon the whole therefore, I think I may affirm, That there is no legal or reasonable Ground to infer those Letters to have been wrote by *Kelly*.

And surely, my Lords, it was incumbent on them to prove, as well as to affirm, that they were wrote by his Lordship's Direction, before they can affect him; even tho' the Writer (whoever he was) had presumed to have signed them with his Lordship's own Name and proper Appellation. I beseech your Lordships, how does it in the least appear, that Mr. *Kelly*, or Mr. *Carte*, (as is afterwards upon no better Grounds suggested) was employ'd by his Lordship to carry on that Correspondence? It has, I confess, been frequently said at your Lordships Bar, as well as by that Honourable Committee, but like other Charges, without any Shadow of Proof; unless it be an obscure Passage in a Letter of *Chitwell* from abroad, to one *Williams* here, *D. 27.* which says, *They had a Story in France of Welton's Clerk being laid up for Debt:* Which, as I shall afterwards shew, could not possibly mean his Lordship. There is another Passage also in the Letter to *Dubois*, from whence the same Inference is made. What unknown Person that *Dubois* is don't appear, or whether it is a real or fictitious Name; for all their Lists and Cyphers afford nothing like it. The Committee are pleas'd to suppose it a Letter to the Bishop, and received by him from Abroad; and from thence infer, he us'd to receive Letters directed to him by fictitious Names. The Counsel for the Bill suppose it a Letter from *himself* to *himself*, because the Hand-writing, they say, (or rather the Letter *e*) is something like his Lordship's. It is not signed by any one, and dated only the sixteenth of *December* without any Year; and tho' that Honourable Committee are pleas'd to affix, in their Observations on it, 1721. because *Johnson*, they say, was about that Time at *Paris*, yet for what appears from the Letter itself, it might be written before his Majesty's Accession, or before the several Acts of Grace that have been; and if it had any Criminal Meaning, 'tis improbable his Lordship would have mentioned the Hand of Conveyance at length; and much more improbable, that he should have destroyed all his other Letters (as the Committee are pleas'd to insinuate) and to preserve this only, which is of no Consequence, but to furnish Evidence against himself, and to explain the Thing most wanted. Another Proof that it is his Letter, is from a broken Seal, which, they say, is made by the

same Seal as that seized on his Servant at the *Tower*. But consider, my Lords, how many *Similitudes* we are at last come to in this one Attempt, *Similitude of Hands, Similitude of Figures, Similitude of Characters, and Similitude of Seals.*

That Similitude of Hand-writing is no Proof, I have shewn by a Variety of the best Authorities: much less, the Similitude of one Letter in the Alphabet; that is, I dare say, a Conceit perfectly new. And 'tis well known, Artists are capable of counterfeiting any Man's Hand or Seal in such a Manner, that even the Person whose Hand or Seal it is, shall not be able to distinguish it from his own: And your Lordships yesterday saw an ample Specimen of it.

It is upon these Grounds, my Lords, that *Kelly* hath been affirmed to have been his Lordship's Secretary in these Matters; but there is not the least Charge or Pretence of his having writ any other Letters of any kind for the Bishop, but these Three only, and not one throughout the whole Correspondence charg'd to have been written by *Carte*, (tho' he is in general charged as another Manager of this Correspondence.) This, my Lords, we must insist, ought to have had the fullest Proof, and the most undeniable Evidence: For it is the Gift of the Offence, 'tis the Foundation of the Statute 14 *IV. III. c. 3.* and 'tis the particular Suggestion of this Bill. 'Tis possible some such Letter might be wrote by *Kelly* or *Carte* to the Persons they are address'd to, without the Bishop's Privity or Direction; 'tis not so uncommon a thing to pretend Acquaintance with Persons of Distinction, or to make use of their Name and Authority, to give themselves a greater Degree of Credit with their Correspondents.

If this may be so, and ought now to be presumed so, since no Man has proved it otherwise; then no Man surely ought to suffer by the Act of another, or to be punished for another Man's Fault.

I believe no one will think it any Reflection to hear many of your Lordships Names in these Cyphers, and afterwards to find a frequent Mention of them in the Correspondence; or to find his Majesty's own Name in *Plunkei's* Cypher, under the Disguise of *Hawkesby*, and Page 62 of the *Report*, Compliments from the Pretender and his Wife to one *Hawkesby*. No Man, I say, will apply these, or many other Names of Persons of Honour mentioned in them, to the Persons themselves, or imagine those Letters were really wrote by their Privity or Consent. By the same Rule of Justice, and by a Parity of Reason, my Lord Bishop's Name may be presum'd to have been made use of, without his Privity or Consent; and if there is any certain Rule or Position in Law, it is this, That all Presumption ought to be in favour of Innocency.

And to shew the little Intimacy there was between his Lordship and Mr. *Kelly*, (if *Rig* means his Lordship, as they suppose, or that Letter *E. 64.* was from *Kelly*, as they also suppose) it will be sufficient to remind your Lordships of one Part of it, where the Writer says,—  
 ' That *Rig* and one *Skin* had been together;  
 ' but the Result of their Meeting he knew nothing of. *Rig* had fixed his Suspicion somewhere, tho' I cannot find out the Place; but  
 ' you will hear it from *Skin*, to whom, it's probable,

‘ bable, he may have communicated his Sentiments that way.’ That is, my Lords, if I understand the Meaning of those Words, that *Kelly*, the supposed Secretary on all these Occasions, knew nothing of the Matters, or at least much less than *Skin*, whom *Kelly* had but just before introduc’d into *Rig*’s Acquaintance.

There is another Letter which has likewise been read, *E.* 47. (if it is to be understood to be Mr. *Kelly*’s, as they suppose, and *Rig* is to mean his Lordship; tho’ we are far from admitting the one or the other) which we desire to make use of, and amounts to a full and direct Confession, that the Writer (whoever he is) had nothing in his Power or Knowledge to charge him with. I have the more Countenance, my Lords, to repeat the Words of this Letter, because that Honourable Committee have let it pass without Exception, *Fol.* 59. of the *Report*: Wherein the Writer vows, ‘ He never heard of the Cant Names of *Jones* and *Illington*, or who was meant by them: That some Persons in whose Power it was to do for him, had shewed no Concern at all for his Misfortunes; that it was well he had no Secrets to reveal, since such Usage might provoke a passionate Man.’ And all the World is since convinced he had not, since no Person seemed to be apprehensive that he could do them any Mischief. My Lords, I say, if this Letter is to be understood as from that Gentleman, we think we are intitled to have the Benefit of his open and candid Declaration.

But however, my Lords, if we should not be allowed to make this Use of it, yet (if my Instructions are true) Mr. *Kelly* fully asserted this himself at your Lordship’s Bar; and even without it, we shall be able to make appear most plainly, in the Course of our Evidence, that *Kelly* did not, and could not write those Three Letters from his Lordship’s Mouth, or by his Lordship’s Direction.

The Date of all Three is 20 *April*; when this Reverend Prelate (as has been already mentioned to your Lordships) was deprived of the Use of both Hand and Foot: had for a great while been confined to his Room, under the greatest Weakness and Disorder, when his Lady lay in the next Room, on her Death-bed.

These, my Lords, and other remarkable Circumstances in his Family, which distinguish this particular Period of Time, as on the one hand, they have given the Writer of these fictitious Letters some Advantage towards fixing them on the Bishop; so, on the other hand, they afford his Lordship a like Advantage (in the most providential Manner, I may say) towards clearing himself from the Imputation of them. Because his Servants then attending him, are able to recollect what passed on that Occasion, and to be very positive and particular in their Evidence concerning it.

His Lordship happened then to have Three Men-Servants actually attending on him, and some one of these always, both Day and Night, either present with him in the Room, or waiting in the Passage at his Chamber-Door; and the Weather being warm, and the Room close, the Door was generally wide open: It was then this Reverend Prelate’s Misfortune, that he was not

able, without their Help, to stir, or even to lift up what he eat or drank to his Mouth. Besides these, there were Two Women-Servants, which constantly attended his Lady in her Room, which is next adjoining, and came frequently to him (once or twice an Hour) every Day with Accounts how she did, the Bishop himself being disabled (for several Days before her Death) to go out of his Room.

And all these five Servants will depose, That for 14 or 15 Days before his Lady’s Death, no Stranger whatever visited his Lordship, much less stayed there any Time with him. This (my Lords) the Women-Servants will affirm, as far as their frequent seeing of him gave them Opportunity to make these Observations. His Coachman (tho’ now Witness against him) has constantly affirmed the same thing, both below as well as before your Lordships. But the three Men (one of which was always in the Room, Day and Night, as I before observed) can be most full and peremptory in their Testimony. So that the Bishop could not possibly dictate these Letters, either to Mr. *Kelly*, or to any Body else, without the Privy and Observation of some of them.

This being a Negative, it is impossible to be more fully proved in any Case; and nothing but the remarkable Circumstances which happened at that time, to which the Writer of those Letters unluckily pinned them down, could have help’d us to so strong and undeniable a Proof of it.

Whether Mr. *Kelly* was ever acquainted or visited his Lordship, indeed I am not instructed; their Evidence, <sup>a</sup> I am sure, has proved nothing like it, nor is it material, much less criminal. But as to the particular time (12 *April*) when Mr. *Kelly* is supposed to have told Mrs. *Barnes*, and she is supposed to have told Mrs. *Levett*, that his Lordship sent his Coach for *Kelly*, we shall expressly prove the contrary: and besides that it is only Hearsay of Mrs. *Levett* from Mrs. *Barnes* who denies it, and his Lordship’s Disability at that time to receive Company; I say (my Lords) besides these Circumstances, it is remarkable that the Coachman, and the Baker (who it seems were directed to keep a Diary of every Body that came, and of all that happened in his Lordship’s Family) say not one Word of this remarkable Incident, in either of their Depositions. The Coachman has denied that he ever fetch’d Mr. *Kelly* in his Lordship’s Coach since he lived with his Lordship, or ever was at *Kelly*’s Lodgings, or that he ever saw him or Mr. *Carte* in his Lifetime; and surely their Silence (if there were nothing else in the Case) is sufficient to infer, that he was not there at that time: And all Mrs. *Kay* and *Malone* swear is no more, than that they don’t remember *Kelly* lay at Mrs. *Barnes*’s that *Thursday* or *Friday* (the first only speaks in her printed Deposition of a *Thursday* or *Friday* about the middle of *April*.) And how is it possible they should remember the Time so exactly, for neither of them belonged immediately to *Kelly*, but were only Servants to Mrs. *Barnes*, who had other Lodgers in her House? They did not even make these Affidavits till the 6th of *February* last; and ’tis no easy Matter to remember such an inconsiderable Circumstance of a Lodger (ten Months together) unless they

<sup>a</sup> D. 47. S. 9 E. 6. b. c.

likewise had been instructed before-hand to keep Diaries of Mr. *Kelly's* Motions.

The Third General Charge against my Lord Bishop, is <sup>a</sup> the receiving of Letters from Abroad relating to this Conspiracy.

Two Instances only of this Kind have been <sup>b</sup> produced. The first from *Motfield* (interpreted *Marr*) 11th of *May*, addressed to *Illington*.

The other from *Digby* (supposed to be *Dillon*) 14th of *July*, addressed to Mrs *Weston*. Neither of which (do they pretend to say) came to his Lordship's Hands, or if they had, that there is one criminal Word contained in them, and consequently could not be (as I before proved) a treasonable Correspondence, within the Letter or Intent of any Law.

That of *Motfield's* is a mere Letter of Friendship, and (if from Lord *Marr*, as they suppose) is to a Person with whom he never had either Friendship or Acquaintance; but really seems designed for no other Purpose but to fix upon his Lordship the Letter directed to *Musgrave* of the 20th of *April*, (for the same reason interpreted *Marr*) the Receipt of which is there acknowledged; and in his Words of Condolence there is something, which, 'tis said, points out his Lordship's Character and Function, tho' in my humble Apprehension, no more applicable to his Lordship, either as a Bishop or a Clergyman, than to any other Person; especially if it be considered (as it really is) the Style of a Letter of Compliment. But if the Letter itself, to which this is pretended to be an Answer, should prove to be a mere fiction, the Answer to it (tho' it were Criminal) must fall with it, as a part of the same Contrivance.

And as to the Letter from *Digby* to *Weston*, tho' that Hon. Committee seem to lay some Stress upon it, by printing it at length in their Report, yet there is nothing in it that can affect any Man criminally, but his Lordship not at all; because the passage in it relating to his Health, and the Concerns of his Family, cannot possibly be applied to him. It implies, that he was then in a very ill State of Health (*July* 25.) and his Family in great Disorder; whereas his Lordship (I can speak it, my Lords, upon my own Knowledge, as well as the Testimony of several Clergy of his Diocese, and others) was then perfectly well, and able to transact all the ordinary Business of his Diocese and Deanery, and had been so for above two Months, having myself the Honour at that time to be concerned with his Lordship in a very tedious and intricate Enquiry; and the Disorder in his Family (if it means the Death of his Lady, for that or nothing is meant by it) had been over a much longer space of Time.

Nor is it probable that such a Mistake should be made by the Person (whom the Name of *Digby* is supposed to denote) if what the Report p. 39. and the Appendix D. 32 and 29. informs us, be true, that two Letters had some time before been written to *Digby*, or his Secretary; the one (*July* 4) assuring, *Weston* was never better in his Life, the other (14 *July*) affirming he was then perfectly well. But it is still more improbable, if your Lordships will consider what that

Hon. Committee have justly observed, in the very same Leaf, that the Professions of these two Correspondents were so foreign and different, as to lay no sort of Foundation for Intimacy or Intercourse between them: and the natural and only Conclusion (we think) from hence, is, that the Letters on this Head, either from this or the other side of the Water, cannot be genuine; and that no fair or regular Correspondent could be guilty of such gross Mistakes.

And of both these Letters from *Motfield* and *Digby*, your Lordships have (I doubt not) observed, that there is no Pretence of Proof concerning the Hands in which they are written; which surely would have been more requisite, than the Application of feigned Names, to ascertain them. Otherwise any one who was acquainted with such Names might write Letters from the other Side, as coming from the Persons designed by those Names, which they themselves were ignorant of.

And as the Receipt of these Letters by his Lordship has not been proved, so there is not any Insinuation or Pretence that he ever answered them, tho' they both bear Date long before his Lordship's Commitment.

This part of the Scheme therefore for charging his Lordship with a foreign Correspondence under fictitious Names, was not so artfully contrived as the former; and seems, by so many grosser Mistakes, to have proceeded from Somebody that had a much worse Intelligence concerning his Lordship's Affairs.

I shall here beg leave to take Notice of the Letter taken from one of his Lordship's Servants in the *Tower*, on which the learned Counsel have laid such great Stress, because there were no Professions of his Innocency in it. If there had been, I suppose they would not have been much regarded. Why therefore should it be any Argument against him, because there is no such thing? Matters are at a very low Ebb, when such Trifles are relied on. But there is another Reason. The Letter I suppose to have been intended for some near or intimate Friends, and to such Persons there was no need of making such a Profession. They knew (whoever they were) and were before sufficiently persuaded of his Lordship's Innocency, and that it was impossible he should be guilty of what is laid to his Charge. And by what has already appeared to your Lordships, I may say, this Reverend Prelate had no need of making such an Apology, and that the Persuasions of his Friends were not ill-grounded.

The Fourth Head, to which the Charge against his Lordship may be reduced, is the Coincidence of Circumstances, Times, and feigned Names in the intercepted Correspondence, to induce your Lordships Belief of the before mentioned Hearsays and supposed Facts, that his Lordship, and he only, is meant by that Correspondence.

And the chief Observation about the Coincidence of Times and Circumstances relates to the three Letters of *April* 20. his Lordship's Illness, and the Death of his Lady, and the Present of

<sup>a</sup> Rep. 41. Append. D. 24.    <sup>b</sup> Rep 51. Append. D. 35.

the Dog, about the same Time. All which have already been accounted for, either as Truths publickly known, turned by ignorant or malicious Correspondents to ill Purposes, or as absolute Falsties, as will appear to your Lordships by our Evidence.

1. As to the Article of Times, of his Lordship's coming and going, it must be own'd, the Penmen of these Letters are sometimes right, but they are as often wrong, and the Mistakes are of more Consequence to destroy what is inferred from them, than the real Agreements, in point of Time, are or can be, to establish it. There is no doubt, but the Correspondents on this Side (whoever they were, and whether out of Malice or Vanity) apprized themselves as well as they could of his Lordship's Motions, in order to give a colour of Probability to what they said of him; and yet it happens, that out of seven Instances occurring in these Letters, and referred to in the Report, three of them (if not four) are plain and gross Mistakes: two only are true in all their Circumstances; and of the other two, it may be doubted whether they answer the Truth in every respect, or not.

First, As to the two doubtful Instances, one is 49 pag. Rep. D. 29. where June 14. G. W. writes to *Quitwell*, Mr. *Wiston* is in the County, I saw him two Days ago. If these Words mean, that he saw him two Days ago in the Country, (which is the most obvious Sense of them) then the Assertion is false; for his Lordship came to Town June 12. as appeared yesterday by the Coachman's Book: but if they mean, I saw him two Days ago in Town, then the Assertion may be true.

The other Instance is Report 51, 52. D. 14. somebody writes July 26. to *Maisonneuve*, that *Rig* and *Skin* had been lately together, and that *Rig* went into the Country the Day after. Now by Depositions D. 48. it appears, the Bishop went out of Town July 21. they must have met therefore on the 20th, which don't well answer the Word *lately*, which one would think imported 6 or 7 Days more. And therefore these two Instances we set aside, as neither plainly true nor plainly false. The three next are manifest Mistakes.

In *Hatfield's* Letter to *Musgrave* May 7. it's said, <sup>a</sup> Mr. *Jones* is come to Town only for a Day, and yet (if *Jones* means the Bishop) he had been in Town two Days, and stay'd in Town three Days longer; for he came 5th May, and returned 10th May, as appears by *Lawson* and *Wood's* Examination.

So in a Letter of J. II. to *Dixwell*, June 12. it's said, *Rig*. (supposed to mean the Bishop) is, I hear, in the Country; whereas his Lordship was at *Westminster* June 18 and 19, as appears by the Coachman's Books.

In a Letter to *Maisonneuve*, July 19. F. 59. *Rig* is again said to be in the Country, whereas his Lordship was at *Westminster* that very Day, and continued there till the 21st, as appears by the same printed Depositions.

And the Mistakes in these three Instances are the more remarkable, because they all affirm his Lordship to be in the Country, when he positively was not; whereas it was ten to one, but that even mere Guesses had been true, at a Time

of Year that every one almost is in the Country, and his Lordship was really ten Days in the Country, to one that he was in Town during the whole Summer.

But, *My Lords*, I must with some Regret take notice, that none of these Mistakes are acknowledged in the Report of that Honourable Committee, tho' all the Letters and Passages are transcribed in it, particularly that of the 7th of May, E. 42. These Words are inserted in the Report, page 41. [*Mr. Jones is come to Town*] but the following Words [*only for a Day*] are omitted; and yet the Section concludes, *that it agrees with the Enquiry made at that Time*; which indeed it does (as far as it is there quoted) tho' not with the Appendix. E. 42.

What Enquiry of this kind was then made, and with what Views, we cannot say, unless we may suppose it to be made by his Neighbour *Lawson*. If it was, 'tis strange that he could not depose from his own Knowledge and Observations in May, but only as to what he had heard and was told by *Wood*, his Lordship's Coachman, so lately as the 19th of February last. I would reconcile this if it be possible: and the most natural Inference I can draw from it is, that *Lawson* (or whoever that Inquirer was) had pretended to take some Account of his own at the Time mentioned by the Committee, which, upon Comparison with that of the Coachman's, he found to be manifestly false and erroneous, and therefore would not produce or depend upon that: But we hope his Testimony can receive no Advantage from such a Conduct. And upon the whole it appears, that tho' more Industry has been employed on the Article of Enquiry, yet as many Mistakes, have been made in it, as in any other.

And as for the Coachman's Book, after all it cannot be entirely relied on; because the Entries made in his Book can only relate (as we apprehend) to the Charges of Turnpikes and Ferryings, or such other Matters for which he was accountable. He had no Reason to take Notice in such an Account, when his Lordship was in the Coach, when *Not*; and your Lordships have heard, cannot be positive on that Head. And therefore how exact soever his Accounts may be, in respect to those little Disbursements, they can add no Weight to the Observation drawn from them by that Honourable Committee; and tho' great Stress has been laid on them, (with Submission to your Lordships) they amount to no more, than *that some Persons on this side the Water, writing to some on the other side, are supposed to mention his Lordship, sometimes as in Town, or in the Country*: and from thence 'tis inferr'd, that they had frequent Access to him, and consequently the Matter of their Correspondence is imputed to him.

Had these Correspondents been exact, *my Lords*, in all their Accounts of his Motions, surely no such Conclusions could have been reasonably made: but as they are oftner wrong than right, it follows, they were not so well acquainted with his Lordship or his Circumstances, as (to serve their evil Purposes) they have pretended to be.

Having thus spoken as to the Circumstances of Times, (which are thrown in to induce a Belief, that his Lordship was meant by that Correspondence)

<sup>a</sup> D. 47, 8. E. 49.

dence) I shall next offer something as to the Cant Names: And tho' it has been already observed to your Lordships in various Instances, that the Names of *Jones*, *Illington*, and *Weston*, could not possibly belong to him; yet give me leave (*my Lords*) to say further, that *Jones* is not only a very common Name (for in one Society, I think, I remember no less than sixteen of the Name at once) but that Name is manifestly applied to very different Persons, even in the Papers contained in the Appendix. In *Plunket's* Cypher *Jones* denotes the *Germans*: Twelve or fourteen times it is supposed to denote the Duke of *Norfolk*, in three other Places to denote Sir *W. Ellis*; and even in the Letters imputed to *Kelly*, there are <sup>4</sup> Passages (besides those already mentioned to your Lordships) which cannot with any Reason or Probability be applied to his Lordship: For instance, *D. 23.* *Jones* and *Illington* are within the Compass of two Lines plainly distinguished, as two different Persons, and therefore both cannot be apply'd to his Lordship. And in the same Letter as well as a preceding Letter, *D. 13.* *Jones* is mentioned as having undertaken to do something for a Boy at *Eaton*; where it is well known his Lordship has no Influence or Acquaintance, and if he had interested himself there on any such Account, it would easily have been discovered. And this, my Lords, is one strong Instance, to shew the Ignorance of the Writer, even in some of his Lordship's most notorious Circumstances.

A great deal of Pains has likewise been taken, by the help of divers Suppositions and Reasonings, to prove that *Rig* denotes his Lordship. However, I shall take Notice but of one, in the Letter to *Gerrard*, which is said to be Sir *J. D'Obrian*, Report 49 *E. 47.* where something is said of *Rig*, highly improper, and absolutely false, if to be understood of the Bishop. An Account is said to be given of the Difficulty *Kelly* had to get Bail, and it is added—*Your old Friend Rig indeed offered all that could be expected of the poor Man.* (If my Instructions are true) *D'Obryan* is a Name his Lordship never heard of before, nor had the least Concern in procuring *Kelly's* Bail, nor knows to this Day who they are; the only Words applicable to him in this Passage, are those of *Poor Man*; and his Lordship permits me to say, that he is really such, poor both in Body and Purse, and as poor as his Enemies almost can make him: and tho' he may have Reason (if your Lordships should pass this Bill with all the Severities intended by it) to be heartily sorry he is so, and that he has neglected those Opportunities of enriching himself, which others would have laid hold of; yet he gives me leave, my Lords, to say, he is not ashamed of that Poverty, because free from all unjust Acquisitions, and unworthy Compliances. But that he was a poor Man at that Time, *i. e.* unable to procure Bail, (which is the Sense that Writer means it in) cannot with any Decency or Justice be applied to one of his Lordship's Interest and Station, if he had concerned himself in it.

Give me leave, my Lords, to take Notice of another Mistake of that Honourable Committee in the very same Letter; I mean, a Passage cited from it which is not in it, to prove that *Rig* and his Lordship are the same Persons; which I should

have omitted, but that it breaks at once the Chain of Reasoning there made use of. The Words are, *how far this late Affair may affect him (Rig) I cannot tell*, and *E. 47.* is cited for them. Now *E. 47.* gives an Account of *Kelly's* Examination promiscuously with other Matters, and was written *June 11th*; but the Letter where the Words really are, is *E. 49.* of the 18th of *June* (near a Month after *Kelly's* Examination.) Nor is there a Word in that about the Dog; but it might be proper to confound these two Letters, and connect these two Particulars, in order to make out, that *Rig* and his Lordship are the same, tho' they have really no Relation one to the other.

We might add, my Lords, many gross Errors in the Application of Names: but if your Lordships are satisfied with the Justice of those already mentioned, (as I hope your Lordships are) there will be no need to regard the rest; for tho' they have some little Coincidences of Time, yet they are dashed with so many Inconsistencies, and so many Falsties, that no fair Correspondent could be guilty of. But there is one which of all others bears hardest upon this Reverend Prelate, the most criminal in the Matter of it, and from which he is most deeply concerned to clear himself; *i. e.* the Letter of *April 20th*, which has been over and over affirmed by that Honourable Committee, as well as by the Counsel for the Bill, to be a Letter to the Pretender. If that be so, and had been proved by any Degree of Evidence, to have been dictated by his Lordship, we should have been utterly at a Loss what to have said, in a Case that would have been so fully within the Letter of the Law. Part of it, my Lords, we have already shewn to have been charged on his Lordship without the least Proof or shadow of Evidence; the other Part of the Charge we hope now to prove equally groundless and false.

That the Letter addressed to *Jackson* was not to the Pretender (whomever else it may mean) we think, appears clearly from the Words of it, *our Circumstance on this Side*; a Phrase not only used by all Writers, but is the constant usual Style throughout all the Papers in the Appendix, in contradistinction to *France*, which is the other Side, but never to *Italy*, as the Case must be here, if *Jackson* means the Pretender. The Instances in the Appendix are almost infinite.

Another Reason, why we think the Name of *Jackson* cannot reasonably be supposed to denote the Pretender, is from *E. 30.* where there is mention of dividing *Clinton's* Money between *Medley* and *Jackson*, *i. e.* says the Rep. p. 54. between *Ormond* and the Pretender. But it is not to be imagined that a Letter written from one devoted to the Pretender's Interest, should place *Ormond* before him; this is so unlikely, that even the Committee, speaking in their own Persons at the bottom of this very Page, slide naturally into the other Way of placing the Words, the *Pretender* and *Ormond*. Besides this, my Lords, there are so many Familiarities [to mention but one, *all such pretending People*] in the Letter itself that it could never come from any one (as I before said) devoted to that Interest, at least not to the Pretender himself, but to some Equal or rather to some Inferior. *Jackson* therefore must mean some-

<sup>4</sup> Rep. 48, 9. 59. 68.



body else, somebody in *France*, and not the Pretender in *Italy*; and on this Supposition, every Word, and Phrase of that Letter is better accounted for than on any other.

The Committee of that Honourable House below, have been pleased also to observe, *p.* 45, 46. that *Jackson* appears from other Letters to be the same as *Malcolm*, (which they say means the Pretender) and for this Reason, because [*p.* 54. E. 30.] *Clinton's* Money is to be divided between *Medley* and *Jackson*. And *pag.* 56. somebody hopes *Clinton* has sent *Malcolm* half Money; which proves indeed, that either *Medley* or *Jackson* means *Malcolm*, but which, may be still a Question, as much as it was before.

That *Malcolm* means the Pretender, 'tis proved, because application is made to *Malcolm*, in a Letter from *Scotland*, for a Patent, and for Power to raise a Regiment, *Rep.* *pag.* 45, 75. But with Submission to that Honourable Committee, neither of these Instances prove that Assertion; since the most natural Way of applying in such Cases, is to Persons employed under the Principal, and not immediately to the Fountain Head itself: and if the late Duke of *Ormond* was to have come over last Summer to head the *Scots*, and they daily sent pressing Messages to that Effect, (as Mr. *Stanhope* writes from *Madrid*, *Rep.* *p.* 75.) who more proper to be applied to by a *Scots* Man on both these Occasions? *Malcolm* therefore (with Submission to the Committee) more naturally means the late Duke of *Ormond*.

I may add to this, my Lords, that in the Cypher inserted among the *Scotch* Papers, I. 14. *Davis* and *Lloyd* (not *Malcolm*) is said to be the Name and Designation of the Pretender.

I hope we may be allowed to argue in this Manner, from one Cypher to another, because the same Method has been made use of against us, upon this very Article, both by that Honourable Committee, and the Counsel for the Bill: for the only Colour there is for interpreting *Jackson* to be the Pretender, is taken from *Plunket's* Cypher, in which (as it is printed) *Jackson* is set over against the Name of the Pretender, and from the Titling to the Draught of a Letter of *Plunket's* to *Jackson*, C. 41. and admitting this Letter to have been so entitled by himself, (which has not yet been proved) yet it does not follow, (as I observed) that because a Letter address'd to one at *Rome* by *Plunket* under the Name of *Jackson* signified the Pretender, that another Letter directed to one of that Name in *France*, by a quite different Person, should likewise necessarily signify the Pretender. This, my Lords, I beg leave to say, is no certain or natural Consequence: but it is most certain, that that Draught (whomsoever it was intended to) was not written upon that Cypher which the Committee refer'd to, in order to have it thought to have been written for the Pretender; for there is but one only of the many Cant Names in the whole Letter, which is to be found in that Cypher. But if your Lordships will be pleased to consider that Cypher a little farther, it will appear, that the very Persons supposed to be concerned in dictating this Letter to *Jackson*, were utterly strangers to the Correspondence; for it consists of a hundred and fifty Names, and no Man can find above four that are in this Cypher, or in all that voluminous Correspondence attributed to *Kelly*; nor any of those four ever used in the Letters supposed to be writ

by *Kelly*; but in those only supposed to be written to him from abroad.

The Name of *Jackson* is not once in all that Correspondence applied to the Pretender: and tho' there be a hundred proper Occasions of mentioning him, it is always under some other Appellation. And *Plunket* himself, in his Examination C. 73. Sect. 14. (when he could not possibly know the Tendency of the Question) not only says positively, that he never writ to any Person by the Name of *Jackson*, and does not know who is meant by it, but it is also remarkable (my Lords) that in all the Letters said to be written by him upon that Cypher (after it was formed) he never once styles the Pretender *Jackson*, but either *Joseph* or *Jephson*.

The first of these Letters is in *May* 1721, and therefore that Honourable Committee have with great Exactness placed this Cypher immediately before it, as supposing it about that Time framed; for all the preceding Letters are manifestly written upon another Cypher. Now this Letter of the 20th of *April*, supposed to be dictated by his Lordship, was written before that Cypher of *Plunket's* was framed, and consequently could not take a Name from a Cypher which then had no Existence.

There is another Observation of that Honourable Committee, which I beg leave to take Notice of. They say, that the Cypher made use of in this Letter to *Jackson*, is the same made use of in the Letters from the late Duke of *Ormond's* Agents, and in Letters to *Dennis Kelly*; and yet the Pretender has some other Names in such Letters, but in none of them ever once styled *Jackson*. How comes it then, my Lords, that he should be styled so once, in this one Letter, and never before, nor after, by that Writer or by any other?

We have been the longer, my Lords, in removing this Imputation, because of all others it is the hardest and most unjust upon this Reverend Prelate; and upon the whole, we hope it is fully and effectually done, (notwithstanding the Difficulties we had of proving a Negative) and even from those Lights and Materials the Committee themselves have afforded us: and if we had had an Opportunity of inspecting the Originals, we doubt not we should have been able to have proved much better, that *Jackson* (to whom this Letter of the 20th of *April* was directed) could not possibly mean the Pretender.

And if that be the Case, as it certainly is, and it appears farther by the Evidence which we shall produce, that these three Letters of *April* 20. were not, and could not possibly be dictated by the Bishop, the Foundation of the whole Charge is destroyed, and consequently, all the Superstructure must fall to the Ground. Nay, I will venture to affirm, that it is impossible for them to form any Scheme to prove the Bishop wrote these Letters but what is, and will be actually disproved and falsified, by some Part of their own Evidence.

Having thus, my Lords, gone thro' every Part of the Charge, I must crave your Lordships Patience, yet to speak to two Things, which have been much insisted on by the Counsel for the Bill. That when your Lordships proceed in a *Legislative Capacity*, you are not to be guided by the *Rules and Niceties of Law*, and therefore that we are not in this Case to expect an Evidence strictly legal. The other Thing was, *that at this time of Day, circumstantial Evidence* is sufficient in a Charge

*Charge of High-Treason*, as the Case now before you is. This (my Lords) we have heard fully and often repeated, as it were to anticipate us in this Objection, which they themselves know to be so justly founded.

I have so far acted in Complaisance to them, as to argue chiefly on the Facts and Circumstances themselves, and under the very same Lights they have presented them to us, and hope (my Lords) our Inferences from them have been more just, our Construction more natural, and our Probabilities much greater than theirs; and even in that View (considered abstractly from what the Common Law, and the Common Justice of the Realm requires) I hope we have fully shewn to your Lordships Satisfaction, and to the Conviction of every reasonable or impartial Person, that there are no Grounds for what is suggested in the Bill; and that all who hear me may justly wonder, how this Reverend Prelate comes to be charged (as he is in the Preamble of the Bill) with being deeply concerned in forming, directing, and carrying on a Conspiracy; when it has not been proved, that he entred into any one Consultation concerning any one Measure, gave any one Direction, that he has done any one criminal Act, written, dictated, or received any any one criminal Letter: and if we should wave insisting on an Evidence strictly legal, or a Proof according to the known Rules of Law; give me leave to say, my Lords, because it is true, there has not been a reasonable Evidence.

But yet, my Lords, I shall always insist, both as an *Englishman*, and as Counsel to this Reverend Prelate, that there ought to be a legal Evidence in these, as well as in any other Criminal Proceedings. If there is any Difference, it is in this only, that as there are certainly many greater Inconveniences to the Subject in this Method of Proceeding, there ought to be a stronger Proof, and a Conviction more strictly legal. I will always hope, your Lordships will expect a Proof in such heavy Charges, agreeable to the Laws of the Land, and the Rules and Resolutions of other Judicatures. I am far from thinking your Lordships are circumscribed by the Forms of inferior Courts, because they are in their own Nature discretionary, and the Courts themselves often vary and depart from them. But the fundamental Maxims of Law, the unalterable Measures of Justice, and the positive Directions of an Act of Parliament, are of another Nature; they are binding every where, to all Persons and Authorities, (as long as they continue Laws) the King himself not excepted. I should beg Pardon, for carrying my Assertion so far, but that I am taught by the Bill of Rights that the King himself is bound by the Law, that it is not in his Power to alter, suspend, or dispense with Laws. But if the Doctrine of the Counsel for the Bill is true, and every one at Liberty to follow the Dictates of his own Judgment, and what Rules he pleases; what Confusions, Uncertainties, and Arbitrariness must that introduce in all Proceedings! Private Opinion will too often be a Pretence to exercise private Malice, Revenge, or Ambition.

I might appeal to every one that hears me, whether he has not at some Time or other, believed some things, as strongly as he did at first this Reverend Prelate to be guilty of what was suggested against him, and has afterwards found

himself mistaken? What is more common than for Men that agree in the same Notions of Morality, to deduce different Conclusions and Applications from them? (even where Interest or Partiality do not intervene;) and therefore the Wisdom of the Law of *England* has been, to determine general Notions of Justice and Right by particular Rules and Applications, in order to settle that Variety and Inconstancy, which without some established Rule must necessarily follow. Where then shall we go for true and proper Notions of Law or Equity, but to those great Oracles and Fountains, my Lords the Judges? What better Guide or more certain Rule, can any one of your Lordships propose to himself, than the constant and uniform Judgment of those, whom the Constitution of this Kingdom have made the proper Dispensers of Justice, and the Interpreters of Law?

'Tis your Lordships peculiar Advantage, to be continually assisted by some of my Lords the Judges; and we hope in this Instance (if any Doubt can at last remain) your Lordships will hear their Opinion, with the same Deference and Candor as in former Cases. Let it never be said, my Lords, that you, who are the supreme Oyer of the Kingdom, whose Judgments and Resolutions are Laws to other Courts, and ought to be an Example to all others, in the Justice and Equity of your Proceedings, that your Lordships will not regard the solemn Judgment of the Judges, or the Usages of former Parliaments: and let it not be said, that because other Courts are bound by a Law, to require such and such Circumstances to infer an Offence, or such a Proof before they condemn a Man, that you (my Lords) will follow your own private Opinion, make what you please to be an Offence, without any Evidence at all, but upon mere Hearsays, Conjectures, and Suppositions. Who can read that melancholy Case without Concern, which my Lord *Coke* has in his 3d *Instit.* of an Uncle that was condemned and executed for the supposed Death of his Niece, merely upon a Train of Presumptions and circumstantial Evidence; or *Harrison's* Case within Memory, where the Father and Mother both suffered upon Presumption for a supposed Murder? And with what Shame and Remorse did that hasty Judge see himself convicted by the Persons returning from beyond Sea? And every one almost remembers the Charge of Treason against this Reverend Prelate's Predecessor. If such a Bill had been thought on, or much stronger Evidence had been received, it might have pass'd before the Truth could have appeared. But happy was it for that innocent Prelate, that a quite contrary Method was taken, and his Accusers brought Face to Face to him, by which he quickly discovered the Villany of those Miscreants. Private Opinion or Persuasion therefore is such a Position, that every honest Man ought to disclaim in these Cases; and the greater the Crime is, in which he is to judge, the stronger Proof he ought to require: and when one adheres strictly to Justice, and goes according to the *Allegata & Probata*, by the best Rules and Reasons of Law; whatever Mistakes, Misinformations, or false Evidence may happen in the Case, he can never have Cause to repent, and neither the present Age nor Posterity can blame him.

It was formerly a Question, whether the *Star-Chamber* was bound by the Rules and Resolutions of

of other Courts: and the many Excesses, and extravagant Opinions in this Respect was the Reason that ancient Court was laid aside. And it has been as great a Question, whether the Court of Chancery was to be guided by Rules and Precedents. But the better Opinion has always been, that a Judge in Equity ought to regard the Rules and Resolutions that have been in like Cases; unless he is resolved to make Decrees totally arbitrary.

For tho' Equity and Reason, in itself, is the same all the World over, and nothing can alter the proper and intrinsic Notions of it; yet, as the Matters about which it is conversant, are represented in different Circumstances, and, like Streams of Water, will receive some little Tincture from the Soil thro' which it runs, and there is something in every Man's Temper that will slide into his best formed Notions; it shews the Necessity of some fix'd and establish'd Rules, at all Times, and in all Places of Judicature. And therefore, in that high Court of Equity, tho' the Rigor of the Common Law is in some Respects softned, yet there is nothing more known, than that it is not to be impeach'd in any of its essential and fundamental Points.

I hope your Lordships will pardon me, if I mention an Authority or two of great Name, that expressly say, the High Court of Parliament is likewise bound by the Rules of Law. Lord Chief Justice *Holt* says, The Authority of Parliament, is from the Law; and as it is circumscribed by Law, so it may be exceeded; and if they do exceed their legal Bounds and Authority, their Acts are wrongful, and cannot be justified any more than the Acts of private Men. I might add to this, the Opinions of *Vaughan*, *Hale*, and *Hobart*, to the same purpose; that the Rules of Law ought to guide in passing of Acts of Parliament, as well as in the ordinary Course of Judicature. But when I mention the Sense of a living Authority, that has filled the highest Stations in the Law, and so great an Ornament to your Lordships House, and whose Merits have been so lately distinguished by new Honours, I need cite no more. It was in a Case, where the same Doctrine was advanced (that the Parliament was not bound to conform to the Rules and Proceedings of other Courts:) In answer to which, that noble Lord with great Truth observed, that those Rules were not to be Patterns to them, only because they were Rules of those Courts, but because they were Reason, and Reason approved of by long Experience, and they obtain there as Rules for that Cause; and I hope (says he) that is a Cause why the House should imitate them, as much as *Westminster-Hall*; or else how can they be said to go according to Reason, or Justice, when they go beside, or transgress those Rules?

Besides these great Authorities, there have been Times, when Parliaments have thought themselves bound by the common Rules and Proceedings of Law, and Parliaments that were very tender and sensible of their own Power, in other Respects. Not to mention several antient Acts of Reversal, because Judgments given in Parliament were not pronounced according to the known Laws; there is the Act for the Attainder of the Earl of *March*, because he had been instru-

mental in procuring the Attainder of another Lord, under pretence of a Letter, which (the Record expressly says) was no Evidence. And the Record for reversing the Attainder of *Roger Mortimer*, 28 E. 3. Sir *Thomas Haxley*, &c. is expressly declared to be, because they were attained contrary to the good Laws and Customs of the Realm. And not only the Lawyers and the Histories of those Times condemn them as grossly contrary to Law and Justice, but the Stat. 1 E. 6. cap. 12. is directly levelled at them. For it recites that those Proceedings were terrible and extreme, introduced for particular Policies and Purposes, repeals several Statutes that had been enacted in the preceding Reigns; and, that there might be no more such for the future, reduces all Treasons to the antient Standard of the 25 E. 3. and goes on and enacts, That no Person or Persons (*i. e.* my Lords, as I humbly apprehend, no manner of Persons, in no manner of Place, Court, or Method) shall be convicted for any Offence of Treasons, Petit Treasons, Misprisions, for which the Offender shall in any wise suffer any Pains of Death, Imprisonment, Loss of Goods, or the like, unless accused by the Testimony of two lawful and sufficient Witnesses. The Stat. 5 E. 6. cap. 11. goes further, and says, There shall not only be two Witnesses, but those two Witnesses shall be produced in Person before the Party, and shall before his Face maintain and avow what they have to say. The Words of this Statute, as well as the former, are as general as they can be, without any Exception of Place or Proceeding.

But notwithstanding these two Statutes, there was still Occasion for the Stat. 7 W. 3. to ascertain Treasons, and to regulate the Method of Trials. For there had been several tender complainant Laws introduced by the pretended Zeal of Ministers, with a peculiar Eye to the Prince on the Throne; which tho' others could not apprehend the Justice or Necessity of, yet on these Laws there had been many unreasonable Penalties, undue and irregular Prosecutions, in the preceding Reigns, and which Sir *Jo. Hawkes* remarks as one of the great and immediate Causes of the Revolution. And to shew the Repentment of the Nation on these Proceedings, they were all reversed by particular Acts of Parliament; and to prevent the same for the future, that glorious Statute was made of the 7 W. 3. cap. 3. That Persons accused as Offenders should be justly and equally try'd, and not debar'd of all just and equal Means for the Defence of their Innocency. And whoever casts his Eye over the preceding Trials, will find every Clause of that Statute as it were a particular Provision against the Mischiefs that had been, and to prevent the like for the Time to come.

I do admit (my Lords) there is a Proviso in the End of that Statute, that it shall not extend to any Impeachments or Proceedings in Parliament, and therefore I don't mention it as a Rule to Parliamentary Proceedings in all Respects, as it is to inferior Courts. But surely the Reason and Justice of that Act ought to be a Guide, as far as it is consistent with the Nature of your Lordships Proceedings. And inasmuch as it was the Sense of the wole Legislature, and the united Voice of the Nation at that Time, and on a dear-bought Experience, it is surely so far worthy of your

<sup>a</sup> *Sam. Rep.* 505.

Lordships Imitation. It can never be consistent with publick Wisdom, to run again into the same Mischief from which we are so happily rescued, or to split on the very same Rocks, on which many of your Lordships noble Ancestors have perish'd.

And it can never be (with Submission to your Lordships better Judgments) a natural or a reasonable Construction of that Proviso to enlarge the Proceedings of Parliament, or to give a greater Latitude than ever they had before. And to remind your Lordships how the Usage of Parliament was, preceding this Statute, I need mention but two or three Instances out of many. Lord *Delamere's* Case in King *James's* Time, 1685, where there was one positive Witness and a strong circumstantial Evidence; and yet your Lordships Predecessors thought that not sufficient to find him guilty. The Lord *Stamford's* Case in the very same Year, where there was also one Witness, and strong Circumstances, and he was in the like manner acquitted. In the Case of the Earl of *Pembroke*, 1677, for Blasphemy and Abuse of the Sacrament, your Lordships Predecessors declared, That the single Testimony of a Commoner, tho' on Oath, was no sufficient Evidence against a Peer denying the Fact upon his Honour; and upon that address'd his Majesty that he might be released from his Imprisonment.

And, as I humbly apprehend, your Lordships have thought fit to admit some of the Regulations of that Act into your Proceedings, such of them (as I before said) as are agreeable and consistent with the Nature of your Proceedings. Your Lordships have been pleas'd to allow Counsel to a Prisoner in Treason, to speak to Matters of Fact as well as Law: You allow a Copy of the Charge against him; you require the Witness for him to be upon Oath, as well as against him; neither will your Lordships admit Evidence of a Fact not in the Charge. And surely (my Lords) there is as much Reason, and as much Equity to require (as that Statute requires in the Courts below) the Testimony of two lawful and sufficient Witnesses. Nay, my Lords, I hope the Reason is much stronger, because (altho' your Lordships should consider your selves as unrestrained by the Stat. 7 *Will.*) yet it is positively requir'd by both the Statutes of *Ed. 6.* which are general and without Exception, (as I before observ'd) and because it is agreeable to the Usage of Parliament (as I have likewise shewn) from that Time even down to the Stat. 7 *Will.* And if your Lordships are not enlarged by the Statute of King *William*, and the Statutes of *Edw. 6.* are still Laws, give me leave (my Lords) to say, it can never be just or lawful to take away any Man's Life or Liberty on less Evidence than what those Statutes require, in any Place, or by any Method whatsoever. Because I am taught by Casuists, that every just Law is a Rule of Conscience, whether divine or human; and no Man can say, his Conscience is void of Offence towards God or Man, unless he acts according to the Laws of the one Sort, as well as of the other.

And if your Lordships will give me leave to step once more out of the Verge of my own Profession, I will mention a Word out of the Civil Law conformable to this: That is a Law (my Lords) in some Degree receiv'd by all Nations, as a Scheme of the greatest Equity and Justice.

The Number of Witnesses by that Law, ought to be two at least, to make a full Proof, and free from all Exceptions, both as to their Persons and to their Deposition. The Testimony of a single Witness is of no Validity, unless where other Circumstances concur; and it was not the Manner of the *Romans* to condemn any Man, before that he, which is accused, have his Accusers Face to Face. And this (my Lords) is not only the dead Letter of the *Code* and the *Dig.* but the learned *Groenw.* in his Notes upon these Laws, says, It is the general Policy, and obtains at this Day in most Parts of the World. I do own that there are many Cases that happen with us in the Courts below, where the Testimony of two Witnesses is not required; but then, my Lords, it is, when the Trial is by Jury, that is, when twelve Men, coming from the Party's own Neighbourhood, and consequently must be supposed to know something of the Fact upon their own Knowledge, find a Verdict upon their Oaths. But I need not say, that even in a Trial by Jury, if it is a Case of High-Treason, like this now before your Lordships, there must be two Witnesses, and nothing less can warrant the Verdict. And surely, my Lords, it is a Practice founded on Reason; not because this or that Law, or this or that Court requires it, but because it is absolutely necessary for the Discovery of Truth, and for the forming of a right Judgment, whether what is sworn be true or false. One Witness may mistake, or be perjured, and yet happen to be consistent with himself; but when there are two separately examined, the Truth is much more easily found out: And tho' a Criminal may now and then escape for want of such a Proof, yet that would be a far less Evil, than to trust so much, in Cases so Penal, to Circumstances and Presumption, and to the Malice and Mistakes of one Person.

But if, notwithstanding the Opinion of the greatest Lawyers both *English* and Foreign, your own uniform Usage and Resolution, and the Reason of the Thing itself, your Lordships are resolv'd, in this one Instance, to follow every one his own private and particular Conscience; let every one hearken to that still Voice within him with an honest Attention, unto those secret Whispers, with Temper and Moderation. Let no Man be sway'd by Hopes, over-rul'd by Fears, or transported by Zeal beyond the Bounds of Justice, and through this Reverend Prelate's Side give a Wound to himself or Posterity, which may never be cured. Consider, my Lords, if not for his, yet for your own Sakes, the Circumstances, the Probabilities, and Evidence on both Sides, with an unbiass'd Conscience, and by the Measures of Law and Justice. For tho' some Proceedings may seem convenient to certain Times and Occasions, yet unless they agree with the Law, with Reason, and with Justice, no Man ought to think he has any Power to consent.

There is a noble Instance on Record of the Lord *Digby*, and worthy of every one's Imitation. He had been, my Lords, one of the most violent Managers in the Impeachment of the Lord *Strasford*; and yet when that Proceeding was wav'd, and a Bill of Attainder brought in, he spoke as violently against it: Tho' he was still of Opinion (he said) that that Lord was the same dangerous Minister, and great Apostate to the Com-

<sup>a</sup> *Dig.* 22 5, 12. *Col.* 4. 20 9.

monwealth, who must not expect to be pardoned in this World till he was dispatched to another; yet he had rather lose his Hand than put it to that Dispatch. He put them in mind of the Difference between Prosecutors and Judges, and how unbecoming that Fervor was in them, now they were Judges, which perhaps might be commendable in them as Prosecutors: That when he gave his Consent to the Accusation, he was assured, his Crimes would have been fully and legally proved, which if they had, he cou'd have condemn'd him with Innocency, as he had prosecuted him with Earnestness; but as the Case then appear'd, no Man could satisfy his Conscience in the doing of it. The Parliament, 'tis true, had a Judicial and a Legislative Capacity; the Measure of the one ought to be legally just, the other political and prudential: but these two Capacities were not to be confounded in Judgment; they were not to piece up (says he) the Want of Legality by Matters of Convenience, to the Ruin of a Man, by a Law made *ex posteriori*.

What can I say more? For it must appear to your Lordships by this Time, that this Proceeding is contrary to the fundamental Laws of the Kingdom, contrary to Publick Wisdom, and unjust in itself: That the Reasons and Suggestions upon which it is grounded have not been proved with any Colour of legal Evidence, or with any Degree of Proof or Probability, which ought to satisfy the Conscience of an honest, reasonable Man. But if the Matters, which I have humbly laid before your Lordships, have not all the Weight, which I hope they have; or if I have omitted any thing that is material or necessary for this Reverend Prelate's Defence, Your Lordships, I hope, as Judges, and (consequently in some measure of Counsel for the Prisoner) will, from your own Observation, supply it. Or if I have laid them before your Lordships in an improper Light, or a less effectual manner than others might have done; yet the Case itself will speak better and more strongly than any Words or Expressions of mine can do. It is the Cause, the Fortune, and the Liberty of a most Reverend and Learned Prelate, who is to be strip'd and torn from those Dignities and Preferments which his own high Merits justly call'd him to, and which he has ever since adorned with the greatest Lustre. Upon what slender and insufficient Grounds, Your Lordships have already heard, and I was going to say, without Precedent: but I must own there have been Instances of Deprivation, some in the Beginning of Queen *Elizabeth's* Reign, and some others since the Revolution. But yet they were upon a general Law, then in being, and an Incapacity voluntarily incurr'd by those Prelates, after the full Knowledge and Publication of those Laws, by refusing to give that Security to the Government, which at those Times was absolutely necessary. And tho' they were peremptory in the last Degree, and their Example might have produced worse Consequences than it did; yet their Punishment went no further. But this is a particular Law, to be introduced for this particular Prelate, subsequent to the supposed Offence, and which is not thought fit to be enacted as a Law for any other Person hereafter; and I wish, my Lords, I could say, this Act went no further. But this Reverend Prelate is likewise to be deprived, not of his Life indeed, but of all the

Conveniences and Comforts of it, of the Commerce of his Friends and Relations, and of all that is valuable to an *Englishman*. He is to be doom'd to the Curse of *Cain*, and to be turn'd out of his native Country, full of Age and Infirmities, to the Cruelty of Strangers and Foreigners, and even beyond the reach of his Majesty's most extensive Goodness.

But if your Lordships should pass this Bill, he will still have, I doubt not, the Peace of his own Mind, and this comfortable Reflection, which no Man can take from him; That he shares the Fate of the greatest and most honest Statesman of the last Century: tho' in this Instance also 'tis his Lordship's Misfortune to be very much distinguish'd. For he, tho' innocent, was afraid of the Violence of the Times, and withdrew from Prosecution. But this Reverend Prelate has been all along forthcoming, and, as it were, fearful of nothing, and conscious of nothing but his own Innocence, has sought in all Places to be brought to Trial. That noble Lord's Crimes (or at least his Accusation) were going to be proved in a proper Parliamentary Manner by Numbers of Persons: But this Reverend Prelate is to be involved by Implications, Inferences, Constructions, and the Conjectures of Decyphers, in Crimes, which he is here ready to deny, and of which no Man accuses him.

I would not be understood, my Lords, by any Thing I have offered in relation to the particular Penalties, as if I thought any one Suggestion of the Bill had been duly proved, so as to deserve this or that Part of the Penalties; tho' I must say, they are all so extraordinary in their Nature, as to deserve your Lordships Attention. And I doubt not, but your Lordships in your Goodness will consider what is already passed, the Length and Closeness of the Imprisonment, which this Reverend Prelate has already suffer'd as a supposed Criminal. Prisons before Conviction are only for the safe Custody of a Man, and not for Punishment; but his Imprisonment has not been so: which (if my Instructions are true) has been attended with such unheard of Barbarities, and such distinguishing Severities, as are a Shame and Reproach to every civiliz'd Nation. The Case of *Colledge* every one has thought hard and barbarous; but 'tis this Reverend Prelate's Misfortune to be distinguish'd in this also, as well as in every thing else: For that Case was before the Law allowed Counsel or Solicitors to assist a Prisoner in his Defence, but now they are allowed by Law, and were actually and duly assigned to my Lord Bishop; and yet part of his Defence, and part of his Evidence torn and taken from him. So that, all these Things considered, his Lordship cannot escape without being a very great Sufferer, tho' your Lordships should utterly reject this Bill.

Your Lordships will also consider the Infirmities of Body, under which that great and noble Mind even now labours before you; which have render'd him almost incapable of attending his Defence. Your Lordships will also consider the Grief and Vexation it must be to appear as a Criminal before this Honourable House, where he has so long sat as a Judge, and under the Suspicion of those Crimes which are laid to his Charge; and how grievous it is for one of his Lordship's Character and Function, to be tax'd with Breaches

of his Duty to God and Man, of Scandal to Religion, of Designs of overthrowing Church and State, in favour of Popery; who happens to be the only Clergyman in *England*, that ever thought it worth his while to draw his Pen in Defence of *Martin Luther*, the great Instrument of our Reformation from Popery; and who has, upon all other Occasions, appear'd the most strenuous Assertor of it. I might add much more of his Lordship's personal Merits, and of those high Abilities so eminently conspicuous in him; but that I know it is some kind of Violence to his Lordship to hear even thus much mention'd.

Yet suffer me to say, That if these Suggestions should be carried into a Law, without any Degree of Evidence or Probability, but rather (as your Lordships will immediately hear) against the strongest Evidence and Probabilities that are possible of the contrary: I say, if this Bill should pass on such Circumstances, whatever the present Age may think, his Case will be a standing Mark of Reproach to it, and he will be the Wonder and the Pity of all succeeding Generations.

I shall add to your Lordships Trouble but one Word more, in Behalf of myself: That your Lordships will pardon any Warmth of Temper, any unguarded Word or Expression that I may have been guilty of in the Course of this long Defence, in a Case, which every *Englishman* naturally considers as his own, and therefore will, in some measure, warm the most even Temper. And that this Learned (and whom I will now call Innocent) Prelate, will accept those little Services I have been able to perform, and will pardon the many Failings, which I may already have been guilty of, in his necessary and most just Defence.

After the Bishop's Counsel had done speaking, the Bishop produc'd several Witnesses to be examin'd, and on *Saturday, May 11.* Sir *Constantine Phipps* made a short Recapitulation of the Evidence, as follows.

*My Lords,*

WE have done with our Evidence; and hope we have fully answer'd every Part of the Charge contain'd in the Bill, and apprehend there is no one Circumstance left unanswer'd. Particularly, that we have totally destroy'd the Credit of *Neynoe's* Hearsay Evidence: For when the *Improbabilities, Inconsistencies, and Contradictions* of his Examinations are consider'd, and the *Testimony* of the *Witnesses* is duly weigh'd; no Person can give the *least Credit* to what *He* hath said, without offering the greatest Violence imaginable to his Reason.

And it is wonderful, that the Counsel for the Bill should insist he should be credited in *any Thing*: When we have *proved*, he had the Confidence to declare, that a *Right Honourable Person* had *endeavour'd* to persuade Him to *accuse* Persons of Quality of Things *He knew nothing of*.

Hath he not said that, when he was to be examin'd, *That Right Honourable Person* had him first *in private*, and told Him, *what Questions* would be ask'd Him, and *what Answers* He should give? Did he not say, that the very same Gentleman gave Him *five Questions* or *Inquiries*, and told Him *what he should reply* to each of them? Hath He not said, that refusing to give Evidence, He was *threatn'd* with *Newgate*; and that *thereupon* He gave Them *Informations* against my Lord Bishop

and *Others*? Nay, had He not the Impudence to say, that the *same Right Honourable Person* offer'd Him 2000*l.* 500*l.* *per annum*, and a *Place*, to accuse the *protesting Lords*, the Earl of *Orrery*, and *this Reverend Prelate*? And that being ask'd whether He *knew any Thing of the Plot*, He swore *No*, nor *Any body else*: But that he knew of *two other Plots*, viz. *One* of Mr. *Walpole* against the *Protesting Lords*, the *Other* of *Himself* upon Mr. *Walpole*, to get 2000*l.* of Him. Nay, it is *proved* He declared that the *same Gentleman* press'd Him *so hard* to *accuse some Persons*, that He had it once in his Mind to take up *That Right Honourable Person's* Sword, and *run him thro'* with it; and so make an End of the *Plot*.

These are things which have been *proved* upon *Neynoe*: And all these Things being consider'd, I believe the Counsel for the Bill will readily agree with me, that *no Credit* ought to be given to one Word *He* has said: And if *His* Evidence be laid aside, the greatest Part of the *Charge* against my Lord Bishop *falls to the Ground*.

My Lords, The Evidence Mr. *Lewis* gave was very material. For he shew'd your Lordships, that *Brockett*, who was of the Post-Office, was so skilful in *counterfeiting Hands and Seals*, that he wrote the Supercription of a Letter, and took the Impression of a Seal, and seal'd it again; and did it so well, and gave it such a Lustre, that Mr. *Lewis* could not distinguish it from the Original.

The *Engravers* likewise said, they could take off the Impressions of Seals so well, that they could not be distinguish'd: Nay, tho' the Wax were broken, yet if no Part of the Wax were lost, it might be done.

Your Lordships observe how the Engravers themselves were mistaken in relation to some Impressions, which were produced to them: And You farther observe, that the Seal in question was a *Cicero's* Head, which all the Engravers agree to be a very *common* one; and they had many of them: So that no Objection can be made against my Lord on account of That Seal. Nay, one of the Engravers said, it appear'd to him that the *Seals* of the *two* Letters were not *the same*. As to the *Dog*, there is Mr. *Crawford's* Certificate, and *Birmingham's* Affidavit.

As to Mrs. *Barnes's* Evidence, she hath found out now, That there were *Two Dogs*, tho' nobody else ever heard of *Two*. She said, the first was for the Bishop of *Rochester*. Now it is plain, the *First* was sent in *March*; and it was *His Leg* that *was broken*: And *Birmingham* swears, and Mr. *Kelly* solemnly affirms, that it was for Mrs. *Barnes*, and not for the *Bishop*.

As to the *Three Letters* of the 20th of *April*, we have proved it impossible that the Bishop should write, or dictate, those Letters to Mr. *Kelly*. And your Lordships take Notice, how the *Butler* came to observe these Letters could not be written by the Bishop; and the Servants, tho' under Confinement, and not permitted to see any Body, agree in their Evidence. There is *Gordon's* Affidavit that he never had such a *Pacquet*: And *James Talbot* was here in *Town* the 29th of *April*.

Thus, your Lordships observe that a *Bill* of the most *extraordinary* Nature that ever was *seen*, hath been supported by the most *extraordinary* Evidence, that ever was *heard*: And we hope, we have set the *dark Passages*, of which the *Charge* is compounded, in such a Light, that every One

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may plainly see the Right Reverend Prelate is *not* guilty of any One Offence charged against him.

Mr. *Wynne* spoke next.

*My Lords,*

I shall beg your Patience to close our Defence with an Observation or two on the Evidence that has been given by my Lord Bishop: and I need take up the less of your Lordships Time, because our Witnesses have fully answered all I opened, and in many Things have exceeded my Instructions.

And for your Lordships clearer Apprehension of so many various and perplex'd Facts, I shall just recapitulate what I humbly conceive to have been the Substance of the Charge against my Lord Bishop, and, as briefly as I can, state the Evidence, which we have produced in order to falsify and disprove it.

The first and chief Accusation against his Lordship, was founded on the Informations of *Philip Neynoe*, and therefore the first Part of our Proof was as to his Credit. Your Lordships, I doubt not, remember the Purport of his Information read against us, and the many gross Absurdities and Inconsistencies in his other Information read by us; and likewise how fully they have been all disproved, and the Credit of them entirely blotted, even from *Neynoe's* own Confession, several Times repeated, and confirmed by three unexceptionable Witnesses.

Your Lordships have fully heard of the Terrors and Apprehensions he was continually under; because (as he himself express'd it) he had given false Informations against this Reverend Prelate, and so many other innocent Persons. Your Lordships have heard the Inducements he had to give those Informations, and how often he had declared his Intentions to escape, in order to avoid the Punishment which he apprehended most justly due to him, because he could not make out the Truth of them.

Two of those Witnesses (*Bingley* and *Skeen*) are still in Custody, and destitute almost of all the Necessaries of Life: I say, my Lords, they are still in close and strict Custody, and consequently there could have been no Opportunity to lead or instruct them in what they should say, or so much as to be apprized before-hand (which surely would have been a reasonable Liberty) whether they could say any thing material or not; and we are only beholden to those lights, which the Report of that Honourable Committee has afforded us: And all three of these Witnesses utterly unknown to my Lord Bishop, both in Person and Reputation, as well as his Lordship is unknown to them. They have not conversed together for several Months, but yet are perfectly consistent with themselves, and entirely supported and confirmed by each other. And all three declare, they had very early told, and frequently repeated this Account of *Neynoe* to their Fellow-Prisoners and Acquaintance, as long as they were permitted to have Access to them. Mr. *Skeen* being ask'd in relation to the Discourse between him and Captain *Pancier*, as in the printed Deposition of *Pancier*, *App. D.* 1. has denied on his Oath every Word of it. He says indeed, that Captain *Pancier* us'd all his Endeavours by Treats and Entertainments to induce him to support this Informa-

tions; but that he never gave him, nor could give him Grounds to say any such Thing of him.

We have shewn your Lordships, that Mr. *Stewart* in particular was so far from patching up, or contriving Evidence (as was objected to him by the Counsel for the Bill) after he had seen the Report and Appendix, that he had given this whole Account to several Persons long before. For he says, the Things which *Neynoe* told him were so surprizing, that he could not stifle them in his own Breat. Tho' your Lordships, I doubt not, observed with what Difficulty and Modesty he was brought to speak out in this publick Manner, where his Evidence seem'd to reflect on a great and Honourable Person.

Two of these Persons have likewise been produced to your Lordships. To one of whom (Mr. *Gordon*) he told these Matters some Days even before *Neynoe's* Death; and to Mr. *Kynaston* some considerable Time before the Meeting of the Parliament: and we could have called others to the same purpose, but that we were unwilling to give your Lordships further Trouble in a Matter which already had, as we thought, the fullest, the most satisfactory, and consistent Evidence that could be.

The second Head of Accusation against this Reverend Prelate, was upon Account of the three Letters of the 20th of *April*. The two first we before observed to your Lordships not to be criminal; if really designed for and addressed to the Persons supposed. The third we have likewise shewn by various Circumstances and Reasonings, could not possibly be addressed to the Pretender, whoever wrote it, or whomsoever else it might be wrote to.

And the Evidence offer'd to prove them to have been dictated or wrote by my Lord Bishop, was first by the Subscription of the common Name of *Jones*, which they would have to denote his Lordship. As to this, I doubt not, your Lordships remember, that even in the Cyphers and Letters that have been read, the Name of *Jones* is manifestly applied (as the Committee themselves have observ'd) to many different Persons; sometimes to one, and sometimes to another, as the Circumstances there mentioned seem'd to give Occasion; but cannot once in any Place, with Reason or Justice be applied to my Lord Bishop.

The next Proof that has been offer'd to your Lordships, to prove these Letters to have been dictated or wrote by the Bishop's Privy, is, from the ill State of Health, the Death of his Lady, and the Present of a Dog; Circumstances, which they say, are applicable to the Bishop, and to him only.

That his Lordship did not, nor could possibly write or dictate these three Letters, we have laid before your Lordships such a Proof, as the like hardly ever was before: and 'tis impossible, in my humble Apprehension, for a Negative to be more fully proved in any Case. Your Lordships have heard the great Weakness and Inability of this Reverend Prelate at that very Time for all manner of Business and Conversation. No less than six, if not seven of his Servants, have spoken fully and positively to it, That his Lordship was not able, without their Help, to stir, turn in his Bed, or even to perform the common and ordinary Offices of Life. One would think, my Lords, such melancholy Circumstances, in themselves, sufficient to guard any Man from Suspicion.

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But the Witnesses have gone much further; for they have told your Lordships, that no Stranger approached the Bishop's Room all that Time; nor had any one been for a considerable Time before and after the 20th of *April* under his Roof. Even some of those Persons that usually were with my Lord Bishop at other times (as his Son, his Chaplain, and his Son's Tutor) happened then all to be absent at the Election of *Westminster* School.

One of those Servants, who happens to be a Prisoner with his Lordship in the *Tower*, being asked, whether my Lord Bishop had not put him in mind of these Circumstances, told your Lordships, that it was entirely his own Recollection, by casually taking up the Report, after my Lord Bishop was gone to Bed, and dipping on that Part of it, in which his Lordship is charged with having writ these three Letters. Upon which, the next Day (he said) talking to his Fellow-Servant, and he agreeing to the very same Circumstances, they acquainted the Bishop with what they had read, and how they could, from their own Knowledge and Remembrance, falsify and disprove that Circumstance.

I must likewise crave leave to observe to your Lordships, that four or five of these Servants, that have spoke to these particular Facts and Times, are still in Custody, under separate Messengers, without any Opportunity to converse together, and were hardly to be found by my Lord Bishop, when he had need of their Evidence; and yet every one of them have been perfectly consistent with themselves, and one with the other, and all equally positive.

The Bishop's Coachman, your Lordships, I doubt not, remember, tho' now under another Influence, and called as Witness against his Master, confirmed what they said, and was as positive and peremptory in his Testimony concerning this Matter, as far as the Nature of his Employment gave him an Opportunity to make such Observations. And upon the whole, I may now, with more Reason, and with greater Confidence, repeat my former Assertion, that it is impossible for them even to devise or frame any Scheme to prove his Lordship to have wrote, or dictated these three Letters, but what will be actually disproved and falsified by some Part of the Evidence.

Another Reason, by which 'tis proved that his Lordship wrote these three Letters, was, from the Subscription of the Number 1378, to the Letter addressed to *Jackson*. Which Number Mr. *Willes* (a Decypherer) says, denotes the proper Name or Title of a Person beginning with the Letter *R*. The little Time we have had to enquire into this Assertion, and your Lordships not permitting some Questions, put by us to the Decypherer, to be answered, won't enable us flatly to disprove it. But with Submission to your Lordships, it seems impossible to affirm even thus much, with any degree of Certainty, and it must be (as I before observed to your Lordships) Matter of Conjecture only; and it appears manifestly to your Lordships, by several Passages occurring up and down in this Correspondence, not yet decyphered, that either the Art is not so infallible, or that Mr. *Willes* is not so great an Artist as he pretends to be.

But, my Lords, admitting such a Number in

this Cypher does really denote a Person's Name, or Title, beginning with the Letter *R*. what a strange and uncertain Proof is that, to fix a Charge of High-Treason on the Bishop, when there are other Persons Names, and Titles, found like his, and many others which begin with the very same Letter; and this not to be admitted as Evidence in a minute or inconsiderable Circumstance, but in the very Gift of the supposed Offence, in the principal Foundation of the Charge, in the only Letter that is criminal, and which is to magnify and improve the rest into High-Treason?

Another way of proving these Letters to have been dictated by the Bishop, was, because another, supposed to be an Answer to this, mentions the Present of a Dog. I need not here repeat what Mr. *Kelly* himself has constantly said in his Examination, because your Lordships, I doubt not, remember what Mrs. *Barnes* said; that Mr. *Kelly* indeed sometimes told her of another Dog that was for the Bishop, but that she always apprehended that Dog, which she had in her Possession, was designed for her, and never heard of any other Dog that did come from *France*: She owns, that she never received any one Message from the Bishop about it, but still kept it, when it was recovered, as her own, as long as it lived; and tho' his Lordship never had, nor loved a Dog in his Life, yet it would have been natural, and good Manners to the Person that sent it, especially if so considerable a Person as is supposed, to have made now and then some little Enquiry about it, if my Lord Bishop had really known any thing of the Dog.

But we have shewn your Lordships by the solemn Attestation of Mr. *Birmingham*, the *French* Surgeon, that he was the Person who gave this Dog (in *March* 22.) to Mr. *Kelly*, for Madam *Barnes*, of whom he had received Civilities in *London*, and for no other Person, nor with any other Intent. He likewise says, that he never received any such thing as a Dog, or Message from Lord *Marr*, (as alledged in the Report) never had any the least Thought of the Bishop of *Rocheſter*, or his Lady, much less of making either the one or the other (to both of which he was utterly unknown) any such Present.

Your Lordships observe this to have been a solemn notarial Act upon Oath, of a Person not only reputed, but attested likewise by the Lord of the Seignury, to have been a legal Notary, and to have exercis'd his Office as such for some time. That the Testimony of such a Person beyond Sea is a good and unexceptionable Proof in every Case, I need not say; or that it has been often allow'd here, where no other is to be had, nor any other<sup>a</sup> Method to have the Benefit of a Man's Testimony that is beyond Sea. And our Witness has told your Lordships that he has frequently translated such Instruments: That he believes it to be the Notary's Hand-writing, and the publick Seal of his Office. I need not, my Lords, have said thus much; for in all Events it must surely have been of more Weight in your Lordships Judgments, than the Extract of an Information given by a Person, infamous in his Character, absurd and inconsistent in all he said, and without being signed or sworn to, even by that Person.

<sup>a</sup> 2 *Rolls Rep.* 346.

*Law of Evid.* 3.



But yet this Affidavit of Mr. *Birmingham* has the more Credit, because his Majesty's own Resident at *Paris* (Mr. *Crawford*) has been pleas'd to examine him about this Matter, (being employ'd by him in his Profession as a Surgeon) and he has confirm'd the same Account to him, which has been likewise transmitted, and read to your Lordships.

Another way of proving my Lord Bishop to have been concerned in these Letters, was from the Hand-writing, which is suppos'd to have been *Kelly's*, and he is supposed to have been his Lordship's Secretary in these Matters. But both these Allegations, we think, with Submission to your Lordships, are still utterly destitute of any proper or satisfactory Proof.

I before observ'd to your Lordships, that the first time the Clerks of the Post-Office have made any Deposition about the Similitude of the Hand-writing, was four and eight Months after they had seen the Original Letters; which is a little of the latest so exactly to remember all the little Strokes and Turnings of a Pen, by which the Identity or Diversity of a Hand can only be made out. That *Malone*, the Footman of Mrs. *Barnes*, was never called upon for his Testimony till *January* last, that is, nine Months after he had seen any of *Kelly's* Writing, and consequently not then very able (if ever he was) to form a Judgment of it.

I have already observed to your Lordships, that this was the first, and the only Instance, that any Evidence of the Similitude of Hands was ever admitted, but where the Papers pretended to be in the same Hand were produced and compared in Court; which is so far from being the present Case, that the Clerks of the Post-Office never had any Opportunity of comparing the Original of the 20th of *August*, with any one of the three Originals of the 20th of *April*, or with any one of the intermediate Letters which they affirm to have been in the same Hand: so that they are made the absolute and ultimate Judges of this Matter, without any Possibility on our Side of detecting any casual or wilful Mistake.

And I would not again repeat an Observation I have before made to your Lordships, that a great part of these Letters are in Figures, and how much more difficult it is to distinguish the Hand of one writing in Figures, from Words and Syllables in length; because we have shewn your Lordships, by three positive Witnesses (well acquainted with Mr. *Kelly's* Writing, one of them above 20 Years, and his School-fellow) that the only original Letter of the 20th of *August*, stop'd at the Post-Office, as a Sample to the rest, (and which is the only Foundation upon which those Clerks have affirmed these three Letters to have been *Kelly's* Writing) really and in fact, was not his, nor like it. This, my Lords, we have fully proved by three Witnesses; and as a Demonstration of what they said, they shew'd your Lordships, among a Variety of Papers produced to them at your Bar, that they could at once distinguish which was *Kelly's* Hand, which was any thing like it, and which was not.

We have likewise produced to your Lordships, the solemn Attestation, on Oath, of <sup>a</sup> *Alexander*

*Gordon Junior*, the Son, Banker at *Boulogne*, that no such Packet of Letters ever came to his Hands, as mentioned by the Counsel for the Bill; and consequently he could not deliver any such to *Talbot*, (who, they say, called for them at *Boulogne*.) He farther deposes, That he never had any Business or Intercourse with *Kelly*, or *Johnson*, nor ever had acquaintance with any Person so called, in his whole Life.

And we have proved to your Lordships, that *James Talbot*, the tall black Man, <sup>b</sup> described in the Letter printed in the Appendix, and who is supposed to have been the Person that called upon *Alexander Gordon* at *Boulogne* for this Packet, was so far from doing it, at the Time supposed, that he was at *London* that very Day, as appears by the unexceptionable Testimony of *Edward Crofton*, his Shoemaker, and by the Entries of his Shop-book, to whom he accidentally paid a Bill upon that very Day, at his House in *London*.

We have likewise shewn your Lordships by two Witnesses, Mrs. *Kilborn*, and her Maid *Anne Lewis*, that Mr. *Kelly* was at her House in *London*, on the 20th of *April*, (the very Day upon which my Lord Bishop is supposed to have dictated these Letters to him) and by a great Variety of Evidence, impossible to escape any one's Memory, that my Lord Bishop was ill in Bed, at *Bromley* in *Kent*: and *Quod non datur actio in distans*, is an Axiom of Reason as well as of Philosophy.

And I must humbly submit it to your Lordships, that it has not yet, in the least, appeared by any Shadow of Evidence, that Mr. *Kelly* ever was employed by my Lord Bishop to carry on a Correspondence; that he wrote any one Letter for the Bishop, upon that, or upon any other Occasion whatsoever.

That Passage in the Letter to *Weston*, that seems to give countenance to such a Supposition, the learned Counsel for the Bill told us yesterday they had waved, and were angry that we should offer to disprove that which they had not proved. But, with Submission to your Lordships, tho' they have been pleased to wave that Part of the Charge against my Lord Bishop, yet, as it makes no small or inconsiderable Appearance in the Report of that Honourable House, and will be so handed down to Posterity; we thought it proper to give an Answer to it; and, we hope, it has been to your Lordships Satisfaction and still in your Memory.

The next thing was the Letter to *Dubois*; and I confess myself at some loss to know for what purpose that was read in Evidence to your Lordships; for the Counsel for the Bill have not, as yet, made any particular and direct Use or Application of that piece of Evidence, and therefore I shall submit it to your Lordships upon the Observations I before made on it.

There was indeed some of your Lordships Time spent in comparing the Seal of that Letter, with that which happen'd to be taken on my Lord Bishop's Servant at the *Tower*: if it was intended as any Proof, I cannot at present judge; however, we thought it proper to follow them in the Course and Manner of their Proof, and your Lordships yesterday have fully heard the Danger and Uncertainty of admitting such a Proof. First, you have had some Account from Mr. *Erasmus Lewis*

<sup>a</sup> *Rep. P. 42. 45. Append. E. 26.*

<sup>b</sup> *Append. E. 26.*

of the known Practice of one *Brockett*, who was able to counterfeit any Man's Hand or Seal, in such a manner that even the Person (whose Hand or Seal it was) should not be able to distinguish it from his own.

Then we produced to your Lordships two Seal-gravers, who fully attested the same thing. *Mr. Atkins* said, That he himself could make such an Impression, so as not to be distinguish'd by an Artist, and give it the very same Lustre. That he could even take an Impression from a broken Seal, and tho' there would at first necessarily be some little Flaw in it, yet he said he could mend it, and then make such an Impression from it, that even an Artist could not discover it from the Original.

*Mr. Johnson*, another eminent Seal-graver, likewise told your Lordships, that he could do the same thing: In particular, That he had once such an Impression taken in Paste by one *Mr. Wisembergh*, and from that he made another Impression, so perfect and exact, that *Mr. Wisembergh* himself could not distinguish one from the other: But as to the Seals of these two Letters, he doubted very much whether they were made by the same Seal or not; and from some little Strokes in the Head, that were very visible to any one, tho' not so easy to be expressed, he rather inclin'd to believe, that they could not be made from one and the same Seal.

And when your Lordships were pleas'd to enquire of them, How such a thing was practicable? They did not cover themselves (as their Decypherer did) by saying, It would discover the Secrets of their Art, but frankly told your Lordships the very Manner and Method of doing it.

Their own Seal-graver, *Mr. Christian*, owned, That this might be done, altho' he had never done it: And in the Experiment made on *Mr. Raulus*, their other Seal-graver, he was once plainly in the wrong, as well as once in the right. And it manifestly appears from every one of their Testimonies, that this Practice of taking Impressions is very easy. And, as one of my Noble Lords inform'd the House, his Footman could do it as well as any of them; and, as your Lordships yesterday observ'd, even to deceive *Mr. Raulus* himself, who, they say, is so great an Artist. And therefore, my Lords, it is a most dangerous sort of Proof, and too uncertain at the best, to receive any judicial Countenance in a criminal Matter.

So that I must humbly insist, that this Part of the Charge against my Lord Bishop has not been proved any better than the former; and that when your Lordships do consider the Evidence that has been given on the one Side as well as on the other, as to this particular Charge, we hope you will be of Opinion, that there is no just or reasonable Ground to presume, that these three Letters were wrote by *Mr. Kelly*, and much less that they were dictated by my Lord Bishop.

The next general Charge against this Reverend Prelate, was, the receiving of two Letters from abroad, in relation to this Conspiracy. The Council indeed for the Bill have wav'd the Letter signed *Digby*, address'd to *Weston*, and (as I apprehended from them last Night) did not now pretend to prove any Thing concerning the Bishop, under the Name of *Weston*.

Neither have they as yet pretended to prove, that the other Letter from *Motfield* to *Illington*

ever came to his Lordships Hands, or in whose Hand-writing it was wrote; tho' if it were the Lord *Marr's* (as it is supposed) many of your Lordships must have been well acquainted with it. Nor has it been yet said, that my Lord Bishop ever returned any Answer to it.

And as we have now proved (and fully too, we apprehend) the Letters of the 20th of *April*, to which this is supposed to have been an Answer, to be a mere Fiction, or Imposition upon the Bishop; this, which is designed as an Answer to it, must likewise fall to the Ground, as Part of the same Contrivance.

The next and last general Charge arises from the Coincidencies of Times and Names in the intercepted Correspondence, the more readily to induce your Lordships Belief, that my Lord Bishop was really meant by that Correspondence.

Some of them I accounted for before, as Truths publickly known, but turned by ignorant and malicious Correspondents to ill Purposes, or else as absolute Falsities, and manifest Mistakes.

We have shown your Lordships by various Reasons, that the fictitious Names supposed to denote my Lord Bishop, cannot be applicable to him, with any Colour, Truth, or Decency; that there is a great doubt to be made, whether many others of those fictitious Names were really intended for the Persons supposed to be denoted by them: and especially, that *Jackson*, to whom the Letter of the 20th of *April* is address'd, we have proved by various Arguments, and even from those Lights the Committee have afforded us, could not possibly mean the Pretender, whomsoever else it may mean; and consequently that that Letter (if it were wrote by *Kelly*, and dictated by the Bishop) cannot be High-Treason.

And as to the Articles of Times, and the Accounts of my Lord Bishops coming and going, it must be owned, they are sometimes right, but as often wrong.

There is no doubt, but the Correspondents on this Side the Water, whoever they were, whether out of Malice or Vanity, or out of any other Inducement, appriz'd themselves as well as they could, of the Bishop's Motions to and fro, in order to give the better Colour or Probability to what they said of him. But yet it has happen'd, unluckily to them, as your Lordships have heard, that out of six or seven Instances occurring in these Letters, two only are true; two of them may be doubted whether true or false, because ambiguously expressed; but three of them are gross Mistakes, as appears even by the Accounts of their own Witnesses.

And the Mistakes are the more remarkable, because they all affirm the Bishop to have been in the Country, when he positively was not: whereas it was ten to one, but that the mere Guesses of a Stranger, at that time of the Year, had been true; and the rather, because his Lordship was really in the Country ten Days to one that he was in Town, all last Summer.

There is another Thing remains for me yet to speak to, and that is the Intimacy of my Lord Bishop with *Mr. Kelly*; which was likewise thrown in to swell the Number of Circumstances, and as another weighty Argument to induce your Lordships belief of the foregoing Matters.

But has any thing appeared to your Lordships like it, even upon their own Evidence? First, a Chairman is brought to tell your Lordships that he carry'd Mr. *Kelly* to the Deanery three or four Times about four Years ago, but the Bishop was not once at home. And a Porter says, he carry'd two Letters from *Kelly* to the Bishop; one of them about *Christmas* last was Twelvemonth, and the other Letter some time before that; but received no Answer in Writing, nor Message, but only his Service to Mr. *Kelly*. But there is one extraordinary Circumstance, which shews him, I confess, to be a very willing Evidence, tho' not so very likely and credible; that is, that this Porter, dirty as he must be in the midst of Winter, deliver'd his Message to the Bishop in his Bed-Chamber.

And *Malone*, the Person that usually attended Mr. *Kelly*, and went on his Errands, was asked to the same Purpose; and one might have expected that he should have given some Account of it, and had been often employed on Errands to and from the Deanery: But I submit it to your Lordships Memory whether he did not say, that he never was at the Deanery in his Life-time, nor did know to this Day where it stood.

Mrs. *Kilborn*, with whom Mr. *Kelly* had lodged a considerable Time, says, she remembers a Message once came to *Kelly* from the Bishop; but positively denies that my Lord Bishop's Coach ever came to fetch Mr. *Kelly* at her House, as that Honourable Committee have been pleas'd to affirm in their Report. And I appeal to your Lordships Memory, whether Mrs. *Barnes*, whom the Counsel for the Bill think so credible a Witness in some other respects, and with whom it must be confess'd *Kelly* frequently lodged, was not equally positive in this Matter, and that she did not believe there could be any Friendship or Intercourse between the Bishop and Mr. *Kelly* without her knowing of it.

Thus the supposed Intimacy and great Acquaintance between my Lord Bishop and Mr. *Kelly* stand upon their own Evidence. And I beseech your Lordships to consider, what sort or degree of Proof all this can possibly amount to. But we have shown your Lordships the direct contrary, by no less than ten Witnesses, Servants to my Lord Bishop, some or other of which were always with him, whether he was in Town or in the Country, and every one of them has lived with his Lordship above two Years; and they say, as it were with one Voice, that they don't remember any such Person or Name as *Kelly* or *Johnson* coming to the House; as they must have remember'd him, they say, if he had been frequent in his Visits or Messages: and some of them say, they usually wrote down the Names of those that did come; and the Coachman in particular, who has liv'd four Years with his Lordship, and appears now as Evidence against the Bishop, and therefore cannot be suppos'd partial to him in his Testimony, is yet as positive and peremptory, that he never saw Mr. *Kelly*, or *Johnson*, at his Master's House, in all his Time. And being carry'd to the *Tower* by a Messenger, to see if he could recollect his Face, then frankly own'd, he had never seen his Face before. And being ask'd how he could pretend to know all Persons that came to the House, whose Business was at the Stables? He told your Lordships,

that he was as often in the House, us'd to wait at Table when Company was there; and that let him come which way he would, he should have seen him coming or going, or have heard of him in the Family, if he was a Person that had frequented his Master's House.

Some of the other Servants likewise spoke as fully to these Circumstances.

We have likewise shewn your Lordships by Mr. *Pope*, who has been for these two or three last Years, the most constant Companion of his Lordship's Hours; two or three Days, he says, almost in every Week, and an Hour or two almost in every of those Days: That his Lordship generally sat in one Room, which I think was his Bed-Chamber; that he was admitted to him at all Hours, and into all Companies, and never found the Discourse change at his coming in: That his Lordship never in the least discover'd any Thoughts or Intentions like those now charged upon him; but had heard occasionally many Things drop from the Bishop, of a Tendency directly contrary. And to this we might have called many others, if it were necessary.

We were likewise ready to lay before your Lordships, several laborious and intricate Searches, several Publick Buildings, and Controversies in Matters of Literature with different Persons, which my Lord Bishop was engaged in last Summer; and would have been a full Employment for some Mens whole Lives: But your Lordships did not think it necessary; being (as we hope) fully satisfied and convinced of my Lord Bishop's Innocency, by that Variety of Proof which we had before made.

There are, my Lords, some other Observations that might be made: but have been, I doubt not, already much better taken notice of by the learned Gentleman that spoke before me: And I think this is the Substance and Purport of the Evidence that has been hitherto offer'd on both Sides.

What the Issue or Success of this long Hearing may be, I know not; That is in your Lordships Pleasure only to determine; to Acquit, or to Condemn: But I hope you will say, We find in him no Fault at all.

The Proof which has been against the Bishop, (if it can deserve that Name) has neither been such as is reasonable in itself, nor agreeable to the known Rules and Proceedings of Law; but chiefly by Probabilities, Circumstances, Conjectures and Suppositions: Whereas we have encounter'd and disprov'd even them, by far greater Probabilities, much stronger Circumstances, and also by such Evidence, as would be convincing and sufficient in any Court of Law or Equity within the Kingdom.

And, upon the whole, I hope I may venture to affirm, That there does not now remain the least Suspicion of the Charge brought against the Bishop; not even a Suspicion of a Suspicion of High-Treason; not one probable Probability, or one presumptive Presumption: I mean, That there is not now remaining before your Lordships, the least Degree of Probability, or the very lowest sort of Presumption that is known in Law: And therefore, shall humbly conclude with the same Prayer Sir *Constantine Phipps* has made before me, That your Lordships will reject this Bill.

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The Bishop then spoke in his own Defence, as follows:

*My Lords,*

I Have been under a very long and close Confinement, and have been treated with such Severity, and so great Indignity, as I believe no Prisoner in the *Tower*, of my Age and Function, and Rank, ever was. By which Means, what Strength and Use of my Limbs I had, when I was first committed in *August* last, is now so far declined, that I am very unfit to make my Defence against a Bill of such an extraordinary Nature.

The great Weakness of Body and Mind under which I labour, such Usage, such Hardships, such Insults, as I have undergone, might have broken a more resolute Spirit and much stronger Constitution than falls to my Share.

Your Lordships were pleased to permit me to appear before the House of Commons, if I thought fit, lest my Silence should be turned to my Disadvantage; as, in fact, the Counsel for the Bill have done their utmost towards it.

I should not have thought to decline any Occasion of justifying myself; but I crave leave to tell your Lordships some Reasons why I did not appear there, and make use of the Leave your Lordships gave me.

After seven Months of close Imprisonment, I was not a little surprized when I heard, that on the 11th of *March*, by the House of Commons, it was thus resolved, 'That it appears to this House, that *Francis* Lord Bishop of *Rochester*, was principally concerned in Forming, Directing, and carrying on a detestable Conspiracy, &c.'

Upon duly weighing which Resolution, and the Copy of the Bill, I found not any thing charged in the Bill, but what was fully contain'd and previously resolved in this Vote; and therefore whatsoever should have been offered on my behalf to that House, would have been an express Contradiction to it. And what Hopes I could have of Success in such an Attempt, I need not say: What they sent me was the Preamble of the Bill only, which they could not alter, consistent with what they had resolved.

The Bill itself was to inflict Pains and Penalties, which followed; but there was no room to object against any of those which they had not then declared; they have since been added, and sent up to your Lordships, in like manner, without any Oath made, or any criminal Act proved against me by any living Witness. And is a Person thus sentenced below, to be deprived of all his Preferments, and his very Function, and to be a perpetual Exile, and to be render'd incapable of any Office and Employment? To be one whom no Man must correspond with by Letters, Messages, or otherwise? And, my Lords, one who is a Bishop of the Church of *England*, and a Lord of Parliament?

It is the first Instance wherein a Member of this House hath been so treated and prejudged, and (as I have once before said to your Lordships) I pray God it may be the last, and that such Precedents in this Kingdom may not be multiplied in After-Times.

My Counsel have amply done their Part, by arguing the Points of Law, by explaining and enforcing the Evidence, and shewing the little Colour, Appearance and Shadow of Proofs against

me, (permit me to call them so) by answering what hath been offer'd against me, and by setting out the Consequence which such a Bill, founded and carry'd on in such a manner, and which enacts such severe Penalties, must and will be attended with.

Yet it becomes me to say something for myself, lest my Silence be construed Consciousness of Guilt, or at least, an Unwillingness to enter into Matters of so dark and perplex'd, so nice and tender a Nature; as if I was not able, or did not care to clear and explain myself, and rather chose to leave it to the Management of others: I thank God, I am under no such Restraint, and can speak to your Lordships on this Subject with great freedom and plainness.

But before I proceed, I beg leave that I may represent to your Lordships some particular Hardships under which I have laboured.

The first is, reading Extracts of anonymous Letters, without suffering any other Parts of the same Letters, tho' relating to the same Subject, to be read. — Another is, — Excusing the Decyphers from answering Questions asked by me, and which I thought necessary for my Defence, lest they should reveal their Art. — The next is, not suffering me to be answered by the Clerks of the Post-Office, lest the Secrets of that Office should be discovered. — Another was, not suffering a Person, who had been at least ten Years out of the Secretary's Office, to answer any Questions, which came to his Knowledge by being some Years in that Office.

Another is, reading Examinations neither dated, signed, nor sworn to.

Another is, reading Letters supposed to be Criminal, writ in another Man's Hand, and supposed to be dictated by me, without offering any Proof that I either dictated them, or was privy to them.

Another is, not allowing me Copies of the Decypher'd Letters, tho' petition'd for, till the Trial was so far advanced, and I so employed and weakned by it, that I had not sufficient time to consider them. — Another is, not allowing me to read out of the Collection of Papers before the House any part of them, in order to discharge myself, but what hath been read by Clerks. — And all this in a Proceeding where the Counsel for the Bill profess they have no legal Evidence, and that they are not to be confined to the Rules of any Court of Law or Equity; tho' as often as it is for their Service, they constantly shelter themselves under it.

My Lords, these are the Hardships which I previously mention, and humbly lay before your Lordships.

By your Lordships Leave, I proceed now to make that Defence, as well as I am able to make it, in the Condition of Health I am now in; humbly praying your Lordships, if I find myself in any degree sinking under it, that you will indulge me, and allow me a little Time to go on.

The general Charge of the Bill is, That I have been deeply concerned in forming, directing, and carrying on a wicked and detestable Conspiracy, and was a principal Actor therein.

The Charge is divided into two Heads:

First, That I traitorously consulted and corresponded with divers Persons to raise an Insurrection, &c. in this Kingdom, to procure foreign Forces to invade it, &c.

Z z z

Secondly,

Secondly, That I traitorously corresponded, with the same Intent, with Persons employed, &c. But neither part of this Charge hath been made good by the Counsel for the Bill, nor have they proved, nor attempted to prove me at one Consultation; nor is there any thing tends towards such a Proof, except the exploded Story of the *Burford Club*,<sup>a</sup> and two or three Hearsay Informations which were mentioned of my Lord *Strafford*, Lord *North and Grey*, Lord *Orrery*, and Sir *Henry Goring*, said to be concerned in the Management of this Affair. I have met all these Lords, I own it, but at different Times; and upon the best Recollection I can make, I never was in all my Life with any three of them at once, unless perhaps about some general Matters depending in Parliament. The Earl of *Strafford* hath visited me, and I have, when in Health, dined with him once at his House. At my Lord *North's* Table I have not eat: Tho' I have great Honour for him, yet I never had any Intimacy with him, especially since the Affair of the *Dormitory*, wherein he appeared so against me, that I certainly had lost the Cause, had not his Affairs call'd him to *Holland*.

*Laceston* had sworn, that this Lord did often visit me at *Bromley*; but in truth he never was there above twice or thrice in all his life-time.

I have not been once these two Years with Lord *Orrery* on any Business whatsoever; we twice dined together at the House of a Person, whose Name if I should mention, your Lordships would not think there was any Harm at all in dining there. Sir *Henry Goring* I never saw in all my Life, till he saw me at *St. James's*, and he was but once at *Bromley*; and the Occasion of his coming to me, was his placing four Sons at *Westminster-School*, and intending to breed up some of them to the Gospel: The last Time I saw Sir *Harry Goring*, was about twelve Months ago, when I promised to bring down one of his Sons to be upon the Foundation; and I shall be sorry if I can't be as good as my Word.

Your Lordships will excuse me for being so particular, when you consider how dangerous the Charge is, and how fit it is to clear the Persons charged, from such mischievous Correspondence; especially since it is with these, and these only, that I have been speaking of, and it is insinuated that I have held Consultations with, to forward the Conspiracy.

The first is an Intent, and indeed a Conspiracy, without a Consultation. But how hath that too been made good? Your Lordships will observe, that there is not one Overt-Act, or Circumstance of Time or Place mentioned, proved, or alledged. I have not therefore consulted or conspired at Home.

The next, and the only material Part of the Charge is, corresponding abroad with the Pretender, &c.

A high and heinous Accusation, strongly asserted, much insisted upon; but how maintained, is the Question.

The true State of this part of my Charge, as well and as fully as I can recollect, is this, (I will not in any degree dissemble before you:) 1st, That I did the 20th of *April*, 1722. dictate three Letters to Mr. *Dillon*, the late Lord *Marr*, and to the Pretender himself, under the feigned Names

of *Chivers*, *Musgrave*, and *Jackson*; to which Letters the Names of *Jones*, *Illington*, and 1378, were, by my Direction, subscribed.

Secondly, That afterwards two Letters, in answer to these two sent to *Marr* and *Dillon*, one dated *May* the 11th, and the other *July* the 25th, under the feigned Names of *Motfield* and *Digby*, were intercepted.

Thirdly, That there is certain intercepted Correspondence between the Pretender's Agents abroad and *Kelly* here, carry'd on by him; and that I was at the Head of it, and am answerable for what it contains.

This is the Substance of my Charge; all other particular Circumstances are made use of, as they thought would give Light and Strength to one or other of those Articles.

As to the first of these Points, *that I did dictate these Letters*.

That it could not be possible that I dictated these Letters, hath been made out to your Lordships by such a Concurrence of Evidence, so clear, so full and legal, as I persuade myself can have left no Doubt remaining upon any candid and indifferent Person: A plain Matter of Fact, supported by such Testimony, cannot be overthrown by little Guesses and consequential Surmises.

My Lords, I was under the known Difficulty of proving a Negative, which in many Cases is not to be done; but it so happens in this Case, that peculiar Circumstances attend it as to the point of Time. My being disabled in my Chamber, and attended before and after that Time by some of my Servants, and receiving frequent Messages from others: The agreeing Testimony of my Servants, that no Stranger came near me about that Time, and for some Time before and after; and the full Evidence of the School at *Westminster*, hath enabled my several Servants to recollect the Time, and to furnish such a Proof of my Innocence in this Matter, as is not to be mistaken, and shews the Clearness of the Impossibility of it.

The Clerks of the Post-Office swear, they believe these three Letters to have been in the Hand-writing of Mr. *Kelly*, my supposed Amanuensis. Your Lordships will remember, that their Oaths were at four Months distance from the Time of seeing those Letters; during the whole Series of which Time, it never hath appeared that they have compared one Original with another, and the only Original, as a Specimen, hath been proved at your Lordships Bar, not to be the Hand-writing of Mr. *Kelly*: And be pleased to remember, the very Supposition of Mr. *Kelly's* being my Secretary, or any ways intimate with me, hath been fully sworn to be false.

If it be said, Who then writ those Letters, and with what View were they writ? The Answer to this is obvious: my being here at your Lordships Bar sufficiently explains it. It is enough to prove that I did not write or dictate them, and I have proved it abundantly. Let but any momentous part of the Charge against me be made out with half the Evidence, and I will submit without any Dispute. Eight or nine such Witnesses would have borne down the Evidence of one or two that had sworn: But where there is none on

<sup>a</sup> See State Trials, Vol. 8. 570, 571.

the one Side, but all on the other Side who appear, and that give direct positive Evidence, can your Lordships deliberate a Moment for the Reason of giving your Judgment, which in doubtful Cases ought always to lean to the doubtful Side? And so taking this Point as it stands, there is an End of the whole matter; for all other Insinuations, feigned Names, and obscure Passages in Letters, depending upon this, must fall together.

As to the other Part of the Accusation, where it is said the Letter to *Jackson* was a Letter to the *Pretender*, I have nothing to do with it; he that writ the Letter, when known, will best be able, and most concerned, to disprove it.

Since this Objection carries a very odd Sound, I shall briefly shew your Lordships how that stands. *Jackson*, in a Cypher of *Plunket's*, is said to denote the *Pretender*: That Cypher consists of one hundred and fifty Names, of which not one is used in any of the Letters attributed to Mr. *Kelly*; three or four of these Names are used by Persons supposed to have writ to Mr. *Kelly* from abroad, but not one of them is used by him; nor doth *Jackson* ever, in his part of the Correspondence, stand for the *Pretender*, but he is always under other Appellations: Nay, *Plunket* himself, in all his Letters writ in decyphered Names, never styles the Pretender *Jackson*, but either *Joseph* or *Jephson*.—Why should a Name, used in *Kelly's* Correspondence, be explained by *Plunket's* Cypher, when *Kelly* appears to be no ways acquainted with him, and *Plunket* himself did never dictate to him? I forbear Repetition; I only add, that at this Rate, there is nothing that may not be proved.

The Letter to *Dubois* there is little said of, because there is no use made of it; it is charged in the Report as a Letter which I had received from abroad. The Tables are now turned, and I myself designed to have sent this Letter to a feigned Correspondent, but kept it among my Papers under my Seal: For what End? the Letter itself is an errant Delusion: Why, to furnish Proof, which is much wanted, of my receiving Letters that were directed *Joris* and *Illington*; and it is very strange, that I, who am represented as being so very cautious, should be so negligent in this, and preserve something that is of no use, and yet might hurt me so much, when discover'd.

It is absurd to think, that I should by that means mention the Name of my Correspondent, and mention the Name of *Johnson*, which the Committee of the Lower House observe was constantly with me.

I know not what farther can be said for this Matter, till the Counsel have further explain'd it, and shew'd what Use they make of this Letter, which hath given your Lordships so much Trouble, and which I own I do not comprehend.

Here is still a fifth Letter, which I have acknowledged to be my Hand; that which was taken on my Servant. Mr. *Reeves* hath made some uncharitable Observations upon it, which, for ought I know, may be allow'd as the Form of Law in the Ordinary Courts; but, I am sure, in a Court of Equity, the most favourable Construction ought to take Place. I have taken Minutes of his Observations, and I think they are these: He observes that the Bishop doth not in his Letter insist on his Innocence in general, but considers only what Evidence doth affect him.

It comes out, at last, for whom my Letter was designed, and I think that an Answer to Mr. *Reeves's* first Observation, and I shall explain it no further. He observes next, tho' I clear myself from the Knowledge of *Layser*, *Neynoe*, &c. there I say nothing of *Kelly*.

The Gentleman I designed the Letter for, knows it was in answer to one wrote to me about *Layser*, and will swear it himself, if there was room for it.

The third Observation is, where speaking of myself, I say, 'If I cannot ward the Blow, I must be a Prisoner some Years without Remedy:' from which he is pleas'd to infer, not in that good-natur'd way he generally did, my Meaning must be, that I was conscious of Guilt.

I apprehended an Impeachment would have been lodged and never prosecuted, as in the Case of my Lord *Danby* and the Earl of *Oxford*; and then I should have lain without Trial, and without Bread.

The second Article of my Charge, is the two Letters from *Marr* and *Dillon*, under the feigned Names of *Motfield* and *Digby*, which were intercepted.

One of these they have dropt.

That I received them, is not pretended; both Letters, tho' without a criminal Expression or Word of Business in either of them, would yet have affected me in some Degree, if received by me, and I was the Person as is supposed who writ the Letters to which they are Answers. That I used to have any Correspondence, is that proved? Is not one and the same necessary in order to ascertain the Charge?

Any Man that pleases may write to me, and take those Names upon him; I am not to answer for that, unless I have appeared to receive them, and kept up the Correspondence.

The Letter from *Motfield*, dated the 11th of *May*, cannot be reasonably thought to have been wrote with any other View than that of being intercepted, and of fixing upon me the Letter of *April* 20th.

This Letter is committed to the common Post-Office, and sent upon this Errand; one may doubt who writ it, but one cannot doubt with what Design it was writ: your Lordships Wisdom will see thro' those malicious Disguises, and not make me account for Letters which have been banded to and fro, between unknown Correspondents, on a Design to raise a Suspicion of a third Person, altogether a Stranger to what is writ. And here I desire that the Observation made by one of my Counsel may not be forgot; that is, All the intercepted Letters from abroad, mention Persons that lay hid under secret Names, and are discover'd by doing of such Deeds, and by such Circumstances as will fasten those Names upon them: Tho' the Committee were not at a Guess, yet they were often at a Loss.

In my Case the fictitious Names applied to me are often attended with such Descriptions and Circumstances, as very naturally lead those that offer these Letters to fix them on me. The Writers of them use all their Art not to disguise, but to open the thing, and seem to be in pain lest they should not be well enough understood.

This being contrary to the Method of Reserves in all other Cases, smells strong of a malicious Design.

The Letter of *July 25th*, from *Digby to Weston*, is not so well contrived as it should have been; yet I am to be understood by it, because of the Circumstances I was then under, which the Writer was apprised of.

These are the only two Instances of Letters supposed to be writ from abroad: They are not consistent: Shall they affect me in so high a manner?

It remains to be considered in the third place, Whether there was a supported Correspondence between the Pretender and his Agents, and Mr. *Kelly* here? Whether I was at the Head of it, and am justly to answer for it? Mr. *Kelly*, I hear, hath owned at your Bar, and declared, which I also declare, I never knew a Line of any Letter he writ to foreign Parts.

I meddle not with what concerns him any further than when it may affect me.

The chief Part is the Present of the Dog; the Account of that is in a Letter to *Hatfield*, dated *May 5*. not signed; in which are these Words *The little Dog was sent ten Days ago, and ordered to be delivered to you*: but there is no Intimation in this, or any other Letter from abroad, that this Present was intended for me.

In two Letters from hence, by whom writ it doth not appear, somebody is meant under the different Names of Mr. *Jones* and Mr. *Illington*, in such Manner as designed for the same Person; but the Circumstances are neither applicable to my self nor my Wife, particularly. The Letter dated *May 7th*, from *Hatfield to Musgrave*, being five Days after the Burial of my Wife, cannot mean her; and being but five Days after, it can as little mean me: So that the Writer of this Letter must either have known nothing of my Family-Affairs, or, if he did, must dissemble his Knowledge of them to raise a Suspicion; and in either Case what he says is not to be regarded. The Surgeon and Mr. *Kelly* only knew any thing of this matter, and they can best clear it.

Mrs. *Barnes*, she varies, and sometimes the Dog is for me, and sometimes for her.

As for myself, I never asked for, received, or saw this Present, nor know any thing of it, but from common Fame; nor have I, to this Day, had any Message or Letter whatsoever concerning it. The End of this Design seems to be, to point me out by the Name of *Jones*, and *Illington*, subscribed to the Letters of *April 20th*, by using them again in relation to this Present.

And perhaps they are not much in the wrong to think, that *one intercepted Dog* should be of as much use as *Ten intercepted Letters*. Both Contrivances then must have succeeded, had I not been able to prove that those Letters were not writ with my Order or Knowledge; and therefore the Use of those Names, in subsequent Letters, is a Continuance of the Fraud, and this obviously runs thro' the whole of the Correspondence: For wherever the Names of *Jones* and *Illington* are, they are used in applying them to me, because they are the same.

These Points have not only been deny'd, but disprov'd with all Manner of Credence and Clearness.

My Counsel have shew'd, that all these suspicious Correspondencies are to the last Degree absurd to apply to me, and no one would apply them: That I could not order the Letters of the

20th of *April*, to which the Names of *Jones*, &c. are subscrib'd, I think is plain, and then the Evidence falls which depends upon it.

As to the Journeys to and from *Bromley*, where the Prisoner *Kelly* had frequent Access to me, and therefore I might probably dictate those Letters, the Counsel for the Bill have not open'd themselves on that Head; but your Lordships have heard it made out, and because it is material I shall repeat it.

(Here *Wood's Examination* was read.)

By all these Accounts, nothing could have been easier for the Persons themselves to manage here, than getting an Account of my Neighbours, in order to render the Contrivance more plausible.

That Mr. *Kelly* is no Stranger to me I own: but that he is in any Degree intimate with me, or frequently saw me, I deny. And what Evidence is there from them to the contrary; or how is this solemn denial at your Bar contradicted?

The Chairman says, he carry'd him twice or thrice to the Deanery, three or four Years ago; and this *Brown*, the Chairman, he swears, he carry'd me once in three or four Years Time. I believe he may. The Porter he says, that he brought a Letter and some Stockings from *Kelly* to me. The Foundation of this Story is true, for Mr. *Kelly* used to furnish me with *Beaver* Stockings and Gloves: not but that the Circumstance of the Porter coming up to my Bed-Chamber at that dirty Time of the Year, is very extraordinary; and even this Evidence owns, he was never sent by me to him.

Now on the other Side, there is the Evidence of almost all my Servants, who have, upon Oath, attested, that they do not know either the Name or the Face of Mr. *Kelly*, which could not possibly be, did he use frequently to resort to me. Such a slight Acquaintance as I had with him, could not be any Temptation to enter into Secrets with him, of such a dangerous Consequence as these are, which the Report insinuates to have pass'd between us: However, Suspicion is not now the Business. They that prove some Things may be allow'd to suppose more; they that prove nothing have no Right to indulge their Suspicions and Conjectures to the Ruin of any Man: Twenty Probabilities, allow'd to be such, are not equal to any one Matter of Fact, well attested; it may strengthen the Fact, but cannot support it. They cannot be Evidence themselves, because one Probability may be set against another.

I use this Distinction between Evidence in Law, and reasonable Evidence, because the Counsel for the Bill have asserted something like it.

I own I always thought the Publick Law of the State, the Publick Reason of the State; and whatever it is in another Country, yet, in this Country, no Evidence can be reasonable that is not legal. But I ask, What sort of Evidence, either in Reason or Law, is brought against me? How am I prov'd to consult and correspond, to raise an Insurrection against his Majesty and his Kingdom, and to procure a foreign Force to invade the same in Favour of the Pretender?

How am I prov'd in the second Place, to have corresponded with the same Pretender, and with Persons employ'd by him? Is one Article of these Charges made out against me with any Colour

Colour of Reason? Suppositions without Proof, Suppositions disprov'd, and shewn to be vain, and unjust.

If the Proof in these Cases wants Strength, can the Hearsay of *Neynoe* supply the want of Proof, and render it valid, since *Neynoe* pretends, for ought that appears, not to have known any thing of me? He only heard *Kelly* say so, and Mr. *Kelly* denies it; and there is, I think, no Reason why such a dead Evidence should affect me, or *Kelly* himself, much less me thro' him. Was *Neynoe* alive, and *Kelly* dead, and incapable of contradicting what *Neynoe* said, I believe what *Neynoe* said would not be of any Weight; besides, what *Neynoe* dead says, and *Kelly* now alive denies, ought not to have any Force.

Concerning Hearsay Evidence in general, and concerning the due Regard to it, I humbly desire your Lordships, that a Passage may be read out of Sir *John Fenwick's* Bill of Attainder. [The whole Preamble read.]

My Lords, I humbly desir'd to have this read, because I thought it would take away a Distinction between Legal and Parliamentary Evidence; that what was not Legal might be Parliamentary. I believe here is a Condemnation of him by Parliament; therefore, I think, the Condemnation of him must be by Parliamentary Evidence. It is recited in this Act, as one of the Inducements that mov'd the King, Lords, and Commons to pass that Act, that Sir *John Fenwick* had contriv'd and fram'd several Papers, &c. only by Hearsay.

Shall that be accepted in this Parliament for Evidence, which is declar'd the only Motive of attainting a Man in another? If it was judg'd hard in Sir *John Fenwick's* Case to charge a Man by Hearsay, can the being thus charg'd be any Proof against me? Sure the House of Commons in 96, that brought that in, would have so thought, nor would those of your Lordships consented here, or elsewhere, to have pass'd it.

As for those that did not consent, I will venture to say, I am exceedingly puzzled to know why they did not oppose Sir *John Fenwick*, but favour'd his Case, and are yet against me. Is the Guilt objected to me, if prov'd, in any Measure like his? Or is there any Comparison between the Proof against him and me?

As to the Paper and Information given in by *Neynoe*, and printed in the Appendix, it is plain he was drawn in to have sworn backward or forward, to have affirm'd or deny'd any thing. He knew a certain Lord of the Council, that gave me Notice of my being taken up some Days before it happen'd. He knew what Use and Purpose the Protests of your Lordships were chiefly design'd for and calculated; and it appears by his Paper that was taken in his Pocket after his Death, that he had undertaken to give a positive Account, and design'd either to ask or receive such a Sum of Money.

'Tis said he was the late Earl *Marjball's* Bedfellow for several Months, and had drawn up Heads for Memorials to be delivered to the Regent; but he had kept no Copy of these Heads, or soul Draughts which would have shewn whether they were given in to promote it, or discover it; in either Case the Evidence of being then employ'd, would have been of Service: but they have not been able to produce a Line of such Heads or Memorials, yet the Report of the

House of Commons, upon the Basis of these Memorials, builds the whole Fabrick. He knew that I went under the Names of *Jones* and *Illington*, and undoubtedly he knew Mr. *Dubois*: If the Scheme of writing that Letter myself had been seen, he would have found out a Reason for the Correspondence; and 500*l.* would have made him affirm, That he carry'd the Letter himself. He knew the Pretender's particular Opinion of me, or of any Body else, and that he rely'd on Advices from me: How did he know that? He told him so. Who told him? It is not suppos'd Mr. *Kelly* had it from himself, but from Persons of high Estate, and that were near the Pretender.

Let me speak, my Lords, as always I hope I shall, with that Modesty as becomes Justice, but yet with Freedom, to you.

Hath nothing been open'd to you concerning this Man's Character, and his secret Transactions? Is it possible to believe this Pretender to Secrecy could have had, or shall he still have any Degree of Weight, that threw away his Life, rather than venture to stand to the Truth of what he said before his Death, and then he could have been contradicted, or Pangs of Conscience might have made him unsay what he had said? But a dead Man can retract nothing; what he hath writ, he hath writ: The Accusation must stand just as it did, so far as it concerns him; and we are depriv'd of the Advantage, which Truth and Remorse once extorted, and would have again extorted from him. However, I would have been glad to have had all that ever this Wretch said; and would hope that by comparing of the several Stories, which he several Times told, some Light might have been gain'd, which is now wanted: — Particularly by the Knowledge of what he said freely and voluntarily, when he was in good humour, and before his rough Usage, on his Return from *Rome*, had frightened him; but I think we have the Evidence only of a few of the last Days of his Life, all the preceding Time is blank. He underwent frequent Examinations, but they were not, it seems so maturely weigh'd and digested as to be thought worth the committing to writing: but he is gone to his Place, and hath answer'd for what he hath said at another Tribunal. I desire not to disturb his Ashes, farther than what is necessary for my Defence.

Your Lordships will observe first, the Inconsistency of some Part of the Charge. Secondly, the Improbability of it. The Report takes Notice of three several Periods, or Stages of Time; when, by Consequence of some Informations from the Regent, the Design did not take Place: The first was, during the Election; the second was, the King's going to *Hanover*; and the third was, the breaking up of the Camp. There is not the least Hint as to the last of these three Designs, in any of the Papers; tho' in the Recital of the Bill it is mention'd as the third Part of the Plot, and the most detestable Part of the Design, to lay violent Hands on his Majesty and his Royal Highness.

There is not the least Colour of Proof, as to the first Part of the Conspiracy, which was to take place at the Election; their only Reason for that, is from a Passage, where it is said, that the present Opportunity is claps'd, that is the Opportunity of the Election.



I shall recite the Passage, as it lies in the intercepted Letter, and make some Reflections on it: *Notwithstanding the Opportunity is elaps'd*, (says the Writer to Jackson) *I agree with you, another may offer before the End of the Year, tho' not perhaps every Way so favourable.*

The Committee suppose this Letter to be from Kelly, and dictated by me; and they suppose the Words to refer to the time of the Election, and from those Suppositions infer that I knew something of it. On the contrary, I shall, on the two first Suppositions shew the Impossibility of it; if this was a Letter from me, or from any other Person, dictated by me to the Pretender, I must write as in Answer to some Letter sent from them to me, in repeating the Expression; and his Opinion in the Letter must have been founded on Intelligence before receiv'd: This Intelligence, considering the Distance between London and Rome, must have been communicated two Months, if not longer, before the Date of this Letter, if we go back two Months, and talk of *the Election being elaps'd*, it was not begun; consequently that Opportunity in the Letter could not possibly mean the *Time of the Election*; and if so, it is impossible that it should be a Letter to the Pretender, that can consist with the Charge of the Person's writing in April 1720.

If it be a Letter writ in good Earnest, it appears they had given over all Thoughts at that Time: *I agree with you*, says he, *another may offer before the End of the Year*: and yet he finds some Words in a Letter writ ten Days after, wherein, under the Name of Jones, I am made to be deeply concern'd in a Conspiracy.

How can this be consistent, if I writ and directed that Letter, and was engag'd in the second Part of the Conspiracy.

Both cannot be true, both may be false? and I hope I have satisfy'd your Lordships, that as I did not dictate the one, so I was no ways concern'd in the other.

Can any one believe, that under the sad Circumstance of being afflicted by the Death of my Wife, I should be concern'd in an Affair of this dangerous Nature? Was that a Time to provide for a Stranger? And for a Man, unless under the Power of Prejudice, to believe such an Improbability, or that I had such a Conjecture? I forbear former Instances.

I shall now consider the Improbability, as well as Inconsistency of the Charge brought against me without positive Proof. You will allow me to answer the Indictment in the same Manner as it is laid.

Is it probable that if I were engag'd in any such Design, no Footsteps should be seen of any Correspondence I had with the late Duke of Ormond, to whom, of all Persons abroad, I was best known, and to whom I had the greatest Regard, and still have all the Regard that is consistent with my Duty to my King and Country?

Is it probable that I would choose rather to engage in such a Design with Mr. Dillon, a Military Man I never saw, and with the Earl of Marr, whom I never convers'd with except when he was Secretary of State?

Did I not know, what all the World thinks, that he had left the Pretender several Years, and had a Pension abroad? Is this a Season for me to

enter into Conferences with him about restoring the Pretender; and do this not by Messages but by Letters, not sent by Messengers but by the common Post? That by thus writing to him by the Post, I should advise him after the same manner to write to me, and by these Means furnish Opportunities towards detecting the Persons, and bringing myself into Danger? How doth that consist with the Caution and Secrecy which are said to belong to me? Must not I have been rash to have laid myself open in such a Manner? This is an inconsistent Scheme, the other a bold Assertion. Is it probable, when attending the sick Bed of my Wife, and expecting her Death, not daily but hourly, that I should enter into Negotiations of this kind?

There was no need of dispatching any of those three Letters, merely to excuse my not writing: The Circumstances of my Family had been a sufficient Apology, and more effectual.

Is it probable, that when I was carrying on publick Buildings of various kinds at Westminster, and Brinkley, consulting all the Books from the Westminster Foundation, engaging in a Correspondence with learned Men, about settling an important Point of Divinity; that at that very Time, I should be carrying on a Conspiracy? Those that entertain such Thoughts without Reason, may also condemn me without Argument.

Is it probable that I should meet, and consult, in order to carry on and forward this Correspondence with no Body, and no where?

That I, who always liv'd at home, and except at Dinner Time, never stir'd out of my Chamber; receiv'd all Persons that visited me, and was deny'd to none, should have an Opportunity to be so engag'd? And if I had, that none of my Domesticks and Friends should ever observe any Appearance of any such Thing? No Evidence among my Papers, tho' they were all seiz'd at both my Houses, and confining all my Servants, but one now, for about 10 or 11 Weeks, searching him twice in the Tower, and searching myself, nothing of Consequence appears, nor is there any one living Witness that charges me with any thing that is really true.

Is it probable, that I should form and direct a Conspiracy, and carry it on with any Success, that am not us'd to Arms, which I am no more acquainted with, than with the Persons employ'd on those Occasions? My way of Life hath not led me to converse with such Men and such Matters, except on the Occasion of meeting in Parliament; but in a Council of War I never was. Have I yet in any Instance of my Life meddled remarkably out of my own Sphere, in Affairs foreign to my Business or Character? I might have been thought to have been too active in my proper Station and Business; but I was never charg'd with War, nor any ways inform'd in the Art of it.

Is it just, that Persons concern'd in the Military Way, should be punish'd without any Proof?

And must I, whose Way of Life is set at the greatest Distance from such Persons, and from the very Suspicion of being concern'd with them, suffer all the Pains and Penalties, short of Death, which the Parliament can inflict, for a suppos'd I know not what, and what I don't to this Day apprehend?

Here

Here is a Plot of a Year or two standing, to subvert the Government with an armed Force, an Invasion from Abroad, an Insurrection at Home; just when ripe for Execution it is discover'd: and 12 Months after the Contrivance of this Scheme, no Consultation appears, no Men corresponding together, no Provision of Money, Arms, or Officers — not a Man in Arms — And yet the poor Bishop has done all this.

*Layer* and *Plunket* carry on a Treasonable Correspondence: They go to *Rome* and receive Directions from the Pretender himself, to promote his Cause — It does no where appear that the Bishop has the least Share in, or is any way privy to their Practices — And yet the Bishop has done all, He is *principally concern'd in forming, directing, and carrying on this Detestable Conspiracy.*

What could tempt me to step thus out of my Way? Was it Ambition, and a Desire of climbing into a higher Station in the Church? There is not a Man in my Office farther remov'd from this than I am; I have a hundred Times said, and sincerely resolv'd, I would have been nothing more than I was at a Time when I little thought of being any thing before; and I could give an Instance of this Kind if I thought proper.

Was Money my Aim? I always despis'd it, too much perhaps, considering what occasion I am now like to have for it: for out of a poor Bishoprick of 500 *l. per Annum*, I have laid out no less than Two Thousand Pounds, towards Repairs of the Church and Episcopal Palace; nor did I take one Shilling for Dilapidations. The rest of my little Income has been spent as is necessary, as I am a Bishop. Nor do I repent of those Expences now, (tho' since my long Confinement I have not receiv'd the least Part of the Income in my Deanery) not doubting in the least, but that God who hath liberally provided for me hitherto, will still do it, and on his good Providence I securely rely.

Was I influenc'd by any Dislike of the Establish'd Religion, and secretly inclin'd towards a Church of greater Pomp and Power? I have, my Lords, ever since I knew what Popery was, oppos'd it; and the better I knew it, the more I dislike'd it.

I begun my Study in Divinity, when the Popish Controversy grew hot about that immortal Book of *Tillotson's*, when he undertook the Defence of the Protestant Cause in general; and as such I esteem'd him above all.

You will pardon me, my Lords, if I mention one thing.

Thirty Years ago, I writ in Defence of *Martin Luther*, and have preach'd, and writ to that Purpose from my Infancy; and whatever happens to me, I will suffer any thing, and will, by God's Grace, burn at the Stake, rather than depart from any material Point of the Protestant Religion, as profess'd in the Church of *England*.

Once more: Can I be suppos'd to favour Arbitrary Power? The whole Tenor of my Life hath been otherwise: I was always a Friend of the liberty of the Subject, and to the best of my Power constantly maintain'd it: I may have been thought mistaken in the Measures I took to support it.

It matters not by what Party I was called, so my Actions are uniform.

To return to the Point: The Charge brought against me in the Manner it is brought, is impro-

bable: if I could be guilty of it, I must have acted under a Spirit of Infatuation; yet I have never been thought an Idiot or a Madman.

My Lords, as to the Pains and Penalties contained in this Bill, they are great and grievous, beyond Example in their Nature and Direction.

I am here, my Lords, and have been expecting an immediate Trial. I have, my Lords, declin'd no Impeachment. The Correspondence with the Earl of *Clarendon* was made *Treason*, but with me it is only *Felony*. He was allow'd the Conversation of his Children, by the express Words of the Act: Mine are not so much as to write, so as to be sent to me.

What is most particular in my Case I will repeat distinctly, that my Reverend Brethren may hear it. I am render'd incapable of using or exercising any Office, Function, Authority, or Power Ecclesiastical, not only in his Majesty's Dominions, but any where else. Very hard! That such Spiritual Power as is not deriv'd from Men, but God himself, should be taken from me!

And I am not only *deprived of all Offices, Dignities, and Benefices Ecclesiastical*, and for ever *banish'd the Realm*, but likewise precluded from the Benefit of Royal Clemency, and *made utterly incapable of any Pardon by his Majesty, his Heirs and Successors.*

My Lords, I insist on my Innocence, that I am not guilty; and if I am not prov'd so, your Lordships will thus judge; if otherwise, I persuade myself I shall find some Degree of Mercy.

You will not strip a Man of his Substance, and then send him where he cannot subsist; you will not send him among Strangers, and then hinder others from performing Humanity to him; you will not give him less time to order his Affairs and depart the Kingdom, than the Bill hath taken in passing thro' both Houses.

The Great Man, I last mention'd, carry'd a great Fortune with him into foreign Parts, and had the languages; was well acquainted abroad: The Reverse of all this is my Case; I indeed am like him in nothing but his Innocency, and his Punishment. It is in no Man's Power to make us differ in the one, but it is in your Lordships Power to make us differ widely in the other, and I hope your Lordships will do it.

But to sum up the Arguments: It hath been frequently observ'd, that the higher the Crimes are, the fuller the Proofs ought to be. Here is a Charge of High-Treason brought against me, with no Evidence at all.

My Lords, pardon me, what is not Evidence at Law, can never be made so by any Power on Earth: for the Law that requir'd the Evidence, is as much the Law of the Land, as that which declares the Crime.

It is equally unjust to declare any Proof legal, because of my Prosecution: As extraordinary would it be, to declare the Acts themselves, *ex post facto*.

Never was there a Charge of so high a Nature, and so weakly prov'd.

A Person dead, so that there is not an Opportunity to falsify him by contradicting him, a Charge not supported by any one Evidence, nor by any one Proof of any Thing that hath been writ or receiv'd by me, nor even by any one criminal Word prov'd to have been spoken by me: but by intercepted Letters and Correspondence, in which appears not the least Certainty.

Some of those letters, shown to Persons, with a Design to fasten something on them; others writ in Cyphers, and fictitious Names, throwing out dark and abstruse Hints of what Persons went by those Names, sometimes true and sometimes doubtful, and often false, who continue all the while strangers to the whole Transaction, and never make the Discovery, till they feel and find it advancing itself towards them: My Lords, this is my Case, in short.

I have a hard Task to prove my Innocency: Shall I stand convicted before your Lordships on such an Evidence as this? The Hearsay of an Hearsay; a Party dead, and that deny'd what he said; by strange and obscure Passages, and fictitious Names in letters, by the Conjecture of Decyphers, without any Opportunity given me of examining and looking into the Decyphering; by the Depositions of Post-Office Clerks about the Similitude of Hands; their Depositions made at distant Times, and without comparing any one of the Originals, by a strange Interpretation of them: for nothing more, I am persuaded, can be made of the Arguments, than what is call'd the intercepted Correspondence.

Shall I, my Lords, be depriv'd of all that is dear to me, and in the Circumstances I am in, scarce able to bear up, and by such an Evidence as would not be admitted in any other Cause or any other Court; and would hardly affect a *Jew* in the Inquisition of *Spain*?

And shall it be received against a Bishop of this Church, and a Member of this House? God forbid. Give me leave to make mention of a Text in Holy Writ: *Against an Elder receive not an Accusation, but before two or three Witnesses.* It is not said, Condemn him not upon an Accusation, &c. but receive it not: I am something more than an Elder; and shall an Accusation against me be countenanced, without any one Instance of Proof to support it?

This is not directly Matter of Ecclesiastical Constitution: There you read, one Witness should not rise up against an Elder; but here, at the Mouth of two Witnesses, or three Witnesses, shall the Matter be establish'd: And as this Rule was translated into the State of the Church, People always thought fit to allow it.

Shall I be the first Bishop in this Church, condemn'd upon Conjecture, on fictitious Names and obscure Passages in letters, instead of two or three Witnesses?

Will not others endeavour to make the same Precedent, and desire the same Influence of it to succeeding Ages; and even concur in such an Act, in order to render me incapable of using or exercising any Power or Authority, &c. Is this good Divinity, or good Policy?

As to the Justice of the Legislature, in some Respects it hath a greater Power than the Sovereign Legislator of the Universe: For he can do nothing unjust. But tho' there are no Limits to be set to a Parliament, yet they are generally thought to restrain themselves, to guide their Proceedings in Criminal Cases, according to the known Law.

The Parliament may order a Criminal to be tortured: Who can say they cannot? But they never did, nor never will, I hope; because Torture, tho' used in other Countries, is not known here.

Is it not torturing, to inflict Pains and Penalties on Persons only suspected of Guilt, not plainly

prov'd guilty? It is not much unlike it. The Parliament may, if they please, as well upon Bills of perpetual Imprisonment, as upon Bills of perpetual Exile, reserve to the Crown a Power to determine the one as well as the other. They have reserv'd it in the former Case, but have not reserv'd it here in the other. The Law knows nothing of such absolute perpetual Imprisonments.

The Parliament may, in like manner condemn a Man on a Charge of Accumulated and Constructive Treason. They did so in the Case of the great Lord *Strafford*, and that by Accumulated and Constructive Proof of such Treason; that is, by Proofs so interpreted, as plainly to communicate Light and Strength to each other, and so to have all the Force without the Formality of Evidence. Was such proof ever admitted by any one to deprive his Fellow-Subject of his Fortune, of his Estate, his Friends, and Country, and send him in his old Age, without Language or Hope, without Employment to get the Necessaries of Life, to starve? I say again, God forbid.

My Ruin is not of that Moment to any Number of Men, to make it worth their while to violate, or even to seem to violate the Constitution in any Degree, which they ought to preserve against any Attempts whatsoever.

But where once such extraordinary Steps as these are taken, and we depart from the fixed Rules and Forms of Justice, to try untrodden paths, no Man knows where this shall stop.

Tho' I am worthy of no regard, tho' whatsoever is done to me may, for that Reason, be look'd upon to be just; yet your Lordships will have some regard to your own lasting Interest, and that of Posterity.

This is a proceeding with which the Constitution is not acquainted; which, under the pretence of supporting it, will at last effectually destroy it.

For God's sake lay aside these extraordinary proceedings; set not up these new and dangerous precedents; I, for my part, will voluntarily and cheerfully go into perpetual Banishment, and please myself that I am, in some measure, the Occasion of putting a Stop to such precedents, and doing some Good to my Country, and will live, where-ever I am, praying for its prosperity; and do, with the Word of Father *Paul* to the State of *Venice*, say *Esse perpetuo*: It is not my departing from it I am concern'd for; let me depart, and let my Country be fix'd upon the immovable Foundation of Law and Justice, and stand for ever.

I have, my Lords, taken up much of your Lordships Time, yet I must beg your Attention a little longer.

Some part of my Charge hath been disproved by direct and full Evidence, particularly that of writing the letters of the 20th of *April*, or that I knew who wrote them; which I utterly deny that I ever did, or as yet do know. Other parts of the Charge there are, which are not capable of such Disproof, nor indeed require it; there I rest. But my Lords, there is a Way allow'd of vindicating myself, it is generally Negative; that is, by protesting and declaring my Innocence to your Lordships, in the most deliberate, serious, and solemn Manner; and appealing to God, the Searcher of Hearts, as to the Truth of what I say, as I do it in what follows. I am charg'd in  
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the Report with directing a Correspondence to Mr. Kelly; but I solemnly deny that I ever, directly or indirectly, saw a single Line of any of their Letters, till I met with them in Print. Nor was the Contents of any of them communicated to me. I do in the next place deny, that I was ever privy to any Memorial to be drawn up to be deliver'd to the Regent. Nor was I ever acquainted with any Attempt to be made on the King's going to *Hanover*, or at the Time of the Election. Nor did I hear the least Rumour of a Plot to take place after the breaking up of the Camp, till some Time after Mr. *Laver's* Commitment. I do with the same Solemnity declare, that I never collected, remitted, receiv'd, or ask'd any Money of any Man, to facilitate these Designs; nor was I ever acquainted with, or had any Remittances whatsoever, from any of those Persons. I never drew any Declaration, Minutes, or Paper in the Name of the Pretender, as is expressly charg'd upon me. And I never knew of any Commission issu'd, Preparation of Arms, Officers, or Soldiers, or the Methods taken to procure any, in order to raise an Insurrection in these Kingdoms. All this I declare to be true, and will so declare to the last Gasp of my Breath.

And I am sure, the further your Lordships examine into this Affair, the more you will be convinc'd of my Innocency. These contain all the Capital Articles of which I am accused, in the Report of the House of Commons.

Had the Charge been as fully prov'd as ascertain'd, it had been vain to make Protestations of my Innocency, tho' never so solemn.

But as the Charge is only supported by the slightest Probabilities, and which cannot be disprov'd in any Instance, without proving a Negative, allow the solemn Asseverations of a Man in behalf of his own Innocence to have their due Weight, and I ask no more, than that they may have as much Influence with your Lordships as they have Truth.

If on any Account there shall still be thought by your Lordships to be any seeming Strength in the Proofs against me: If by your Lordships Judgments, springing from unknown Motives, I shall be thought to be guilty; if for any Reasons, or Necessity of State, of the Wisdom and Justice of which I am no competent Judge; if your Lordships shall proceed to pass this Bill against me, God's Will be done: *Naked came I out of my Mother's Womb, and Naked shall I return; and whether he gives or takes away, blessed be the Name of the Lord.*

May 13. was appointed for the Reply of the Counsel for the Bill, who were Mr. *Reeve*, and Mr. *Wearg*, Mr. *Reeve* spake as follows.

*May it please your Lordships,*

**T**O permit me to offer something, by way of Reply to the Arguments that have been made use of, and the Evidence that hath been given, in Behalf of the Bishop of *Rochester*.

My Lords, I shall not trouble your Lordships with entering far into the Arguments so much insisted on by the other Side, concerning the Power of the Parliament to pass Bills of Attainder.

They have been spoken of by the Counsel of the other Side, as inconsistent with our Constitution; Bills of Pains and Penalties, and Bills of Attainder, have been treated by them as un-

known to our Constitution, unless in a few Instances, which afterwards have been condemned.

And yet they have mentioned the Case of Sir *John Fenwick*, which is a Precedent of a Person attainted without legal Evidence, tho' he were forth-coming and amenable to Justice, and his Attainder remains still unreversed. And as to Bills of Pains and Penalties, they should, before they inveigh'd so much against them, have consider'd, that two such Bills have now already pass'd your Lordships House; and the Bills against *Counter*, *Bernardi*, and others, and against the late South-Sea Directors, are Precedents of Bills of this Kind.

They have mention'd many Instances, where Persons have been prosecuted according to the known Rules of Law, and the Parliament did not think fit to interpose. And doubtless, my Lords, generally speaking, where Evidence is to be had and to be produced, and the Persons are forth-coming, it is right to proceed according to the known Rules of Law, in the ordinary Courts of Justice.

But where Conspirators are carrying on their Designs with Art, and contriving to shelter themselves from those known Rules of Law; we apprehend, my Lords, the ordinary Prosecutions at Law will be no Argument against the Legislature's making use of their Authority, when the Circumstances of the Case, the Preservation of the publick Peace, and the Safety of the Constitution require it.

But I beg leave to mention one Instance, in which they are mistaken: They have said, that in the Case of the Regicides (that horrid and detestable Treason!) they were all prosecuted according to the ordinary Course of Law! but if they had look'd into the Acts of Parliament, they would have found, that some of them were punish'd by Bills of Pains and Penalties. The Lord *Monson* and others, who sat as Judges in the pretended High Court of Justice, were reserv'd by two Acts of Parliament that pass'd, to have Pains and Penalties inflict'd upon them; and tho' there was Evidence in that Case to have attainted them according to the ordinary Course of Law, the Parliament did proceed to punish them by Pains and Penalties, and they were not try'd according to the ordinary Course of Law.

This I beg leave to observe to your Lordships, in relation to the Power and Usage of Parliaments, in passing Bills of this Kind.

My Lords, in the next place I beg leave to take Notice, that the Observations that have been made, and the Evidence that hath been given by them, as to Facts mention'd in the *Report* and *Appendix*, concerning which we have given no Evidence at all, ought to be laid out of this Case, as foreign to the Matter before your Lordships. The Matters we have given in Evidence, it was proper for them to answer; but they have gone into the *Report* and *Appendix*, in order to disprove Facts mention'd there; tho' we gave no Evidence concerning them; and we humbly apprehend, it is not necessary for us to follow them as to those Facts; for if we maintain the Charge we have given, it doth not concern us to make good every Article in the *Report* and *Appendix*, relating to this Reverend Prelate now before your Lordships.

My Lords, we must admit the Evidence produced to charge the Reverend Prelate at your

Lordships

Lordships Bar, is not all of it Evidence strictly legal against him, if he was to be try'd according to the ordinary Course of Justice in *Westminster-Hall*. But, my Lords, we humbly apprehend you are not tied to the Rules of *Westminster-Hall*; for if your Lordships are satisfied that the Facts proved, laying them all together, do conclude the Reverend Prelate at the Bar guilty, notwithstanding they do not amount to Evidence according to the ordinary Rules of *Westminster-Hall*, your Lordships will be of Opinion, that it is fit he should be punish'd.

My Lords, the Evidence that hath been given by us, as to Facts committed by the Bishop of *Rochester*, hath been chiefly from three Letters, dated the 20th of *April*, 1722; each of these was written in the Hand of Mr. *Kelly*, and dictated by my Lord Bishop of *Rochester*.

My Lords, these Letters are writ, some Part in Cyphers, and some Part not; they are sign'd by the Names of *T. Jones*, *T. Illington*, and the Figures 1378. My Lords, if these three Letters are proved, to your Lordships Satisfaction, to be the Letters of my Lord Bishop of *Rochester*, we humbly apprehend they do prove all the Allegations in the Bill, which my Lord Bishop of *Rochester* hath been pleased to call upon us to shew that he hath been guilty of. They do contain, as we say, and as plainly appears from the Letters themselves, Matters relating to consulting and conspiring to invite a foreign Force into this Kingdom for an Invasion, and to promote an Insurrection. And if the Name of *Jackson* is the Name by which the Pretender is signified, that Letter will prove the other Part of the Bill, that the Bishop of *Rochester* hath held Correspondence with the Pretender himself.

My Lords, I beg leave to observe upon the Word *Jackson*: It hath been insisted upon, that tho' it is contain'd in *Plunket's* Cypher, yet *Jackson* may signify in Mr. *Plunket's* Cypher one thing, and in these Letters another; and these Letters are contrived in Figures, and not those Cant Words and Names, as in Mr. *Plunket's*; but so far they go, to admit that in *Plunket's* Cypher the Name of *Jackson* stands for the Pretender.

My Lord Bishop of *Rochester* was pleased to observe, that in all the Correspondence between Mr. *Kelly* and the Persons with whom he corresponded abroad, there is no Name contain'd in Mr. *Plunket's* Cypher, which *Kelly* hath made use of in any of his Letters, but this.

My Lords, it appears to your Lordships, that in the Correspondence between Mr. *Kelly* and the Persons abroad, several other Names, mention'd in *Plunket's* Cypher, have been used: and it is not material, whether these Names are contain'd in the Letters writ by *Kelly* himself, or in those of his Correspondents writing to him. When his Correspondents write to him, in answer to his Letters, they use several other of the Names which are contain'd in *Plunket's* Cypher; which, my Lords, we humbly apprehend is the same Thing as to this Purpose, as if they were used in Mr. *Kelly's* Letters; for he must be presumed to know the Meaning of those fictitious Names, when they are contain'd in Letters that come in answer to Letters from him, in the Correspondence which he carries on; and we humbly apprehend, my Lords, that is as strong an Evidence, as if they had been contain'd in the Letters writ by *Kelly* himself. Therefore, my Lords,

I beg leave to take Notice of several Names that are in Mr. *Plunket's* Cypher, and used by Mr. *Kelly's* Correspondents, in their Letters to him.

There is the Name of *Xoland*, which stands for *Wogan*; the Name of *Lane*, which stands for Lord *Marr*; the Name of *Cane*, which stands for *Dillon*; and the Name of *Howell*, for *Glascock*. My Lords, all these Names are in Mr. *Plunket's* Cypher, and made use of in the Letters that pass'd between Mr. *Kelly* and his Correspondents.

My Lords, I shall beg leave to submit it to your Lordships, when, among Persons concerned in carrying on the same Conspiracy, Cyphers are made use of, and in the Cyphers of some of the Conspirators, the Names comprized in Letters writ by others of the Conspirators are contain'd, whether it is not a reasonable Evidence, that those fictitious Names contain'd in the Cyphers of one of the Conspirators, and made use of in the Letters of the other, signify the same Persons; unless there is something to distinguish the Case, and shew that the same Names are made use of to denote several Persons.

My Lords, we humbly submit it to your Lordships, that it is plain from the Evidence we have given, that these three Letters are writ by the same Hand; and by the Circumstances in the Letters, they appear to be dictated by one and the very same Person. Therefore, my Lords, the Enquiry will be, who is the Person described by the Names of *T. Jones*, *T. Illington*, and the Figures 1378: for if we have proved the Bishop of *Rochester* to be denoted in this Correspondence by the Names of *Jones* and *Illington*, and that these Letters were written by *Kelly*, and dictated by *Jones* and *Illington*, then the Bishop of *Rochester* is the Person by whom these Letters were dictated.

This will appear to your Lordships from other Facts contained in Letters intercepted in this Correspondence; Facts that, all of them together, can relate to no Person but the Bishop of *Rochester*.

The Circumstances of the Bishop and his Family, are exactly described in the three Letters of the 20th of *April*; and those Circumstances plainly shew, that all the three Letters were dictated by the same Person, and that the Figures 1378 denote the same Person that *Jones* and *Illington* do.

My Lords, there are several other Facts contain'd in the intercepted Letters, that denote *Jones* and *Illington* to be the Bishop of *Rochester*. One of them is, the Fact relating to a Dog sent over to Mr. *Kelly*, which appears, by the Evidence given, to have been design'd for the Bishop of *Rochester*: Therefore in the Letter mark'd *E. 32.* (that is, a Letter to Mr. *Kelly* by the Name of *Hatfield*, and directed to Mr. *Hatfield*, under Mr. *Anthony Saunders's* Cover, which is one of the Persons describ'd in the List of Directions taken in *Kelly's* Pocket-Book) the Letter mentions *the little Dog was sent ten Days ago, and order'd to be deliver'd to you, &c.*---My Lords, afterwards Mr. *Kelly* by a Letter dated the 30th of *April*, 1722, *E. 35.* (it is a Letter from *J. H.* one of Mr. *Kelly's* Names to *Howell*, and which have been proved to be Mr. *Kelly's* Hand-writing) says, *I received the Present sent by the young Lady, but in such a bad Condition, that I am afraid he never will do well; for he had a Leg broken in his Journey, which is still*

very

*very bad with him; however, I will take all the Care imaginable of him, and inform Mr. Jones soon of it, to whom, I know, any thing from that Quarter will be very acceptable.*

My Lords, it appears by this Letter of Mr. Kelly's, that this Dog, that is there mention'd, was not a Dog for Mr. Kelly himself, but for Mr. Jones; a Dog for a Person denoted and understood by the fictitious Name of Jones: So that if the Evidence that hath been given of this Dog being design'd for the Bishop of Rochester, is true; then it follows that Mr. Jones, mention'd in this Letter of Kelly's, denotes the Bishop of Rochester.

There is another Letter relating to this Dog, E. 42: there is mention'd the Concern Mrs. Illington was in for poor Harlequin; *Mrs. Illington is in great Tribulation for poor Harlequin, who is in a bad Way, having slipped his Leg again before it was thoroughly well, however his Obligations to the Lady are as great as if he had come safe, which he desires you to let her know.*

My Lords, this shews that Jones and Illington are the same Persons. It appears by the former letter, that the Present was for Mr. Jones, and he should soon know of it; this letter says, that *Mrs. Illington is in great Tribulation, &c. However his Obligations to the lady are as great, &c.* Tho' in the first Part of the letter it is Mrs. Illington, in the latter Part it is *HIS Obligations to the Lady are as great as if he had come safe, which HE desires you to let her know.* That shews, that the Person in the former letter, described by the Name of Jones, is in this letter described by Illington, and consequently Jones and Illington are the same Person.

My Lords, the next Circumstance observable in these letters, the intercepted Correspondence between Mr. Kelly and his Friends abroad, is the letter dated the 30th of April 1722, E. 35. which says, *Mrs. Jones died last Week, and when the Days of Mourning are over, he will, I hope, be fit for Business.*

My Lords, it hath been given in Evidence, that the Bishop's Lady, his own Witnesses as well as ours, have given an Account, that the Bishop's Lady died the 26th of April: This letter is dated the 30th of the same April, consequently this suits exactly with the Bishop's Circumstances as to his Lady being dead.

My Lords, that Jones and Illington are the same, appears likewise by the Answer given to this letter, dated the 20th of May, 1722, E. 43. which says, *Mrs. Chivers gives you her kind Service, and prays you will condole in his Name on the Death of Mrs. Illington.* My Lords, this letter is in answer to that of the 30th of April, for it begins, *Yours of the 30th of April, which should have come by last Post, is come to hand; and this letter condoles on the Death of Mrs. Illington, whereas the letter of the 30th of April gave an Account that Mrs. Jones was dead.* So that Jones and Illington appear by these letters to denote the same Person.

My Lords, these are letters writ by Correspondents, concern'd, one with another, in carrying on this Conspiracy. It hath been objected, on the behalf of my Lord Bishop of Rochester, that he is not concern'd in writing of these letters, nor did any of them come to his Hands, nor were they writ by his Directions, but that they passed between Mr. Kelly and his Correspondents abroad.

Your Lordships, we hope, will be of Opinion, in a Correspondence of this Nature, (unless they shew something to induce your Lordships to believe, that there hath been a malicious Design in the Parties between whom these letters pass'd, to denote the Bishop of Rochester, in order to charge him) that these are Facts, which amount to a certain Proof who the Person is, that used to go by the Names of Jones and Illington.

Your Lordships observe how the Matter stands: Mr. Jones and Illington is a Person described, by the Letters of the 20th of April, to be in great Pain himself, to be in melancholy Circumstances in other Respects: He appears by the Evidence at that Time to have been ill of the Gout, his lady appears to have been ill, and dying; Mrs. Jones and Mr. Illington is a Person to whom a Dog was sent, and it appears by the Evidence, that this Dog was design'd for the Bishop of Rochester. Mrs. Jones, in one letter 'tis said, died last Week; and in another letter they condole the Death of Mrs. Illington: and it appears the Bishop's Lady died the Week before the 30th of April.

My Lords, there are other Circumstances, which I should mention, in relation to the Times when the Bishop was in London, and when in the Country; which, we apprehend, is an additional Proof who was meant by the Names of Jones and Illington. Therefore in Letter E. 41. a. Kelly says, *Mr. Illington is now in Town, and presents his kind Service to you; he is glad to hear you received his Letters by Crow, and wishes his next may be more to your Satisfaction.*

This letter is dated the 7th of May; there it is said, Mr. Jones is now in Town: It appears, by the Examination of Wood the Coachman, that on the 7th of May my Lord Bishop of Rochester was in Town.

There is another letter dated the 7th of May 1722, directed to Mulgrave, E. 42. which I beg leave to make some Observations on. There it is said, *I had the Favour of yours, which I communicated to Mr. Jones, who is come to Town only for a Day.*

My Lords, this letter shews, that the Person denoted by the Name of Jones was come to Town. But they object, that this letter cannot be apply'd to denote the Bishop of Rochester, because it appears by the Deposition of Wood, that the Bishop of Rochester staid in Town till the 10th of May; so consequently he did not come to Town only for a Day, and consequently can't be the Person meant in that letter.

My Lords, as to that it appears, that the Fact concerning Mr. Jones, applying it to the Bishop of Rochester, of his being come to Town, is true; as to the Bishop's being come to Town only for a Day, that is not Matter of Fact, but of the Apprehension of the Writer: He apprehended he was only come to Town for a Day, but he might be mistaken in that; but the Fact of his being come to Town is true, the Apprehension of the Writer that he came only for a Day, is false. But we must submit it to your Lordships; the Apprehension of the Writer is not sufficient to avoid the Truth of the Fact contain'd in that letter, when we have proved that my Lord Bishop of Rochester was in Town on the Day when Mr. Jones is mention'd to have been in Town in that letter.

Another letter dated Thursday the 10th of May 1722, E. 44. says, *Illington is gone to the Country;*

Country, and sent me Word he would be in Town on Tuesday Night, when he hath desired to see me at a particular Hour, by which I conclude it may be about Business; and the Tuesday following that Thursday happen'd to be the 15th of May. Another letter E. 45. dated the 14th of May, 1722, says, Mr. Jones is still in the Country, but he hath sent me Word he will be in Town to-morrow. My Lords, upon the Examination of the Coachman Wood, it doth appear, that the Bishop of Rochester was out of Town the 10th of May, out of Town the 14th of May, but that he came to Town the 15th of May, which is the Day mention'd in those letters that he had promised to come to Town: So that here are additional Circumstances, all agreeing to prove that the Bishop of Rochester was denoted by the Names of Jones and Illington. My Lords, we must submit it, that this is not probable conjectural Evidence only, as has been objected.

These letters contain Facts, and the Consequence from them is, that Jones and Illington is the Bishop of Rochester, in whom all these Facts agree. It is almost morally impossible, that all these Facts should agree in the Case of any other Person, as they do in the Case of the Bishop of Rochester.

It has been argued, as to the letters of the 20th of April; Was he the only Person that was in Pain and melancholy Circumstances at that Time? A great many might be so. They go thro' the Particulars of his being in Town and in the Country; a great many Persons might be in Town and in the Country on those Days besides him. It is true, it might be so. Was there nobody whose lady died the Week before the 30th of April, but the Bishop of Rochester? Certainly, there are a great many to whom that Circumstance may be applied. But, my Lords, taking the Circumstances together, they cannot all of them concur in the Case of any other Person, as they do in the Case of my Lord Bishop of Rochester.

It may not be improper here to take Notice of some other of the intercepted letters, that have been given in Evidence to your Lordships, which mention the Names of Jones and Illington.

In Mr. Kelly's letters, giving an Account of his being taken up, and his Examination before the Council, he takes Notice of his being examined concerning the Persons that were meant by several fictitious Names, and, among the rest, Jones and Illington, who, he says, are chiefly struck at. This is to give an Intimation to his Correspondents abroad, that there had been a Discovery, that the fictitious Names, concerning which he had been examined, were made use of in their Correspondence.

My Lords, he comes afterwards and writes a letter, after such Time as he was bail'd (he was taken the 19th of May, and bail'd the 7th of June) wherein he says, it is absolutely necessary now, that there should be a new Book of Accounts; says he, they must use no more their present Book of Accounts, since those, who have got Part, may have got the Whole.

My Lords, we humbly submit it, that he having given an Account of his being examined concerning those several fictitious Names, after when he comes and says it is absolutely necessary to have a new Book of Accounts, it is a plain

owning of Kelly by this letter, that the Names enquired after were the Names made use of in the Correspondence, and therefore he says, it is necessary to have a new Book of Accounts; that is, other Cyphers and fictitious Names, by which to carry on their Correspondence: He owns they have got Part, and fears they may have got the Whole.

From that Time the Names of Jones and Illington are no more met with in the Correspondence that follows. We have gone no farther in our Evidence to fix any other Names to mean the Bishop of Rochester, but only the Names of Jones and Illington. But there are other Names, which, in the Letters that follow, probably are design'd to mean the Bishop of Rochester; but they will be out of the Case, because we have given no Evidence concerning them: and the plain Reason why Jones and Illington are not made use of any longer, is, because it appears on the Examination of Mr. Kelly, that those Names were mentioned: therefore they were afraid, by making use of those Names, the Correspondence might be discover'd, and it might prejudice the Persons who went by those fictitious Names.

My Lords, this is the Substance of the letters, writ to and from Mr. Kelly and his Correspondents, concerning the Person that goes by the Names of Jones and Illington.

Tho' my Lord Bishop of Rochester insists, that he is not proved to be the Person concern'd in writing these letters, and that he had no Notice of them, and therefore they ought not to be look'd upon as Evidence against him; my Lords, we submit it to your Lordships, in a Correspondence of this Nature, when we pursue Facts and Circumstances that are stated and arise from the intercepted letters, which when they come to be apply'd together, are a plain Indication of the Person that is meant by them; when these Circumstances and Facts can fit none but the Bishop of Rochester; we hope, tho' it is not legal Evidence in Westminster-Hall, yet it is satisfactory Evidence to induce your Lordships to believe and be convinced, that no Person can be denoted by these Names but the Bishop of Rochester.

My Lords, this is a Matter that the Bishop of Rochester could not, with all his Care, be aware of; he takes Care that the letters of the 20th of April are in Cyphers, and not writ with his own Hand; fictitious Names are made use of, and he thinks he shall be sheltered by this Means from being found out to be the Person. The other Facts could not be supposed would come out to explain the Person.

But, my Lords, very often there is a Providence in detecting Things of this Nature; and where the greatest Caution and Care is used, Circumstances (that human Prudence could not guard against) are so strong and convincing, that they discover such secret Correspondence, and plainly prove who is the Person carrying it on.

Some Texts of Scripture have been cited on the other Side, my Lords, I beg leave to use one on this Occasion; and that is, *Curse not the King, no not in thy Thought, for a Bird of the Air shall carry the Voice, and that which hath Wings shall tell the Matter.*

In these treasonable Conspiracies and Correspondences against the King and Government, (notwithstanding they are carried on so secretly, that

that the Conspirators think nothing can discover them) there happen sometimes, thro' Providence, such Circumstances which the Persons cannot be aware of, that bring those things of Darkness to Light: and we hope this may be an Example, that may deter any Person from going in the most secret and concealed Way to engage in any thing of this Nature.

My Lords, there is a Matter I shall beg leave to mention to your Lordships, because my Lord Bishop hath insinuated as if I made hard and harsh Application of the letter taken upon his Servant. My Lords, he says that the Construction I put upon that letter was not a natural but an ill-natur'd Explication. The letter mentions an Impeachment, and says the Bishop in the letter, *if the Impeachment cannot be stopt, I am Prisoner for some Years without Remedy.*

My Lords, I did observe to your Lordships on that Expression in the letter, that it seem'd to import a Sense of my Lord Bishop's Guilt, because he said he was unavoidably a Prisoner for some Years. My Lord Bishop says, this is by no means a natural, but a forc'd and ill-natur'd Explication; for in that place he meant no more than, if an Impeachment were lodged, it would not be prosecuted, but made use of only that he might be detained a Prisoner for some Years.

My Lords, I must submit to your Lordships, which is the most genuine and natural Interpretation, that which I put upon the Words, or that which my Lord Bishop of *Rocheſter* doth; which so highly reflects on the Honour and Justice of your Lordships and the House of Commons.

My Lords, I shall beg leave in the next place to take notice of the Evidence that hath been given on the behalf of my Lord Bishop of *Rocheſter*, and to consider, whether that is sufficient Evidence to satisfy your Lordships of his Innocence.

My Lords, we did read the Examination of Mr. *Neynoe*, one of his Examinations, and the last that was taken; they on the other Side called for three other Examinations, of which the last Examination, which we read, was an Abstract; they read them all, and, my Lords, the Examination which we read, was consistent with three other Examinations, with relation to my Lord Bishop of *Rocheſter*: and I must own that the Charge, in the Examination of *Neynoe*, upon my Lord Bishop of *Rocheſter*, is only Hearsay from *Kelly*; that Mr. *Kelly* did tell *Neynoe*, that the Bishop of *Rocheſter* held Correspondence with the Pretender and his Agents; and that he was employed by the Bishop in writing for him, and carrying on the said Correspondences: So far, my Lords, it is Hearsay, what Mr. *Kelly* told *Neynoe*. Now, as to Mr. *Kelly* himself, it did affect him, by charging that he had confess'd to *Neynoe*, that he did carry on such a Correspondence: but as to my Lord Bishop, it cannot affect him but as Hearsay; and we must agree that if there was nothing else in the Case but this, all the Arguments made use of against such Evidence would be of great Weight.

My Lords, I can't say that this Charge from *Neynoe's* Examination is of Weight to charge the Bishop of *Rocheſter*, so as to condemn him. My Lords, they have urged that if this Charge is not to be believed, all comes to nothing: This, say they, is the Foundation, and if *Neynoe's* Exami-

nation is not sufficient to affect the Bishop of *Rocheſter*, then all the subsequent Evidence falls to the Ground.

My Lords, I beg leave to observe first, that if we had not *Neynoe's* Examination, the Proof against my Lord Bishop of *Rocheſter* is as strong without it as with it; it is certainly Evidence of the Conspiracy in general, but as to the Bishop it is only a Circumstance, to shew that another Man had said of the Bishop of *Rocheſter*, that he was carrying on a Correspondence with the Pretender, &c.

But, my Lords, taking the Examination of *Neynoe* out of the Case, and considering the other Facts mention'd and prov'd to your Lordships, there is no Occasion of *Neynoe's* Examination; whether *Neynoe's* Examination be false or true, is not material: There is sufficient to prove the Bishop of *Rocheſter* guilty, for they can't destroy the other Facts and Circumstances; and as long as they subsist, they prove the Bishop of *Rocheſter* to be the Person concerned in carrying on this Correspondence.

My Lords, I beg leave to observe in *Neynoe's* Examination, there is something more than Hearsay, there is a Fact in it, and we are able to support that Fact by other Evidence. *Neynoe* says, that he hath gone several Times with *Kelly* to the Bishop of *Rocheſter's*, and hath staid a considerable Time for him. My Lords, we shall prove by another Witness, that *Neynoe* about that Time came several Times to a House, where he said he waited for a Friend of his that was gone to the Bishop of *Rocheſter's*, and he staid and waited for him three or four Times, for an Hour, and an Hour and an half together. This will confirm what *Neynoe* said in that respect to be true.

They say there are several Improbabilities contained in *Neynoe's* Examination, and Inconsistencies; as to the Improbabilities, some of them are mentioned as if there was great Weight in them. That so much insisted on by my Lord Bishop himself, is, that *Neynoe* says, he was employed to write Memorials, and the last he wrote was in *December*, and that was to desire the Regent of *France* to furnish a Body of 5000 Men, to come and invade these Kingdoms: The Observation made by the Bishop of *Rocheſter* is, Where are these Memorials? Why did he not keep Copies of them? For he was at that Time concerned in a Design to serve himself one way or other; if he designed to betray those Persons he corresponded with, it would have been of Service to have kept those Memorials, to have delivered them to the Government: If, on the other side, he had kept to his Friends, it would have been proper to have kept them, in order to create a Confidence in him, and to shew the Part he had in the Conspiracy. These Observations can have no Weight, when your Lordships come to consider this was in *December*, and there was never any Application by him to make any Discovery of this Conspiracy till *July* following. As to the Service it might be to keep them with respect to his Party, my Lords, we humbly apprehend that, considering him as a Man engaged in a Correspondence of this kind, a Memorial of this Nature drawn up by him can be of no Use, but to detect himself and injure his Party, if he happens to be taken up, and such a Memorial found upon him; therefore it was necessary to destroy it.



My Lords, there is another thing mentioned with relation to *Watson*, and the Improbability of his being the Earl *Mareschal*; but *Neynoe* does not say that he was the Earl *Mareschal*, but says, there was one *Henry Watson*, which he took to be a fictitious Name, and does not know who he really was, but he took him to be the Earl *Mareschal*, and he gave him the Heads to draw up these Memorials.

My Lords, we apprehend it is not material, who *Watson* was; he is a Person that employed *Neynoe* to write these Memorials, and he might be the Earl *Mareschal*: *Neynoe* says he took him to be so. Say they, if it was the Earl *Mareschal*, why should he lie several Nights with *Neynoe*? this, say they, is very improbable. If it was him, he was to conceal himself, and take the fittest Place for that Purpose; therefore conversing with *Neynoe*, and not owning himself who he was, is not improbable. It is probable he would not discover himself to every Person; and tho' *Neynoe* was a Person engaged in the Conspiracy, if *Neynoe* did not know him to be the Earl *Mareschal*, it might not be proper for him to discover himself to *Neynoe*.

My Lords, I think these are the principal Things objected; there are some other little Matters, but I think dwelling on such Objections as these, is but mispending your Lordships Time.

My Lords, that which we humbly insist upon is, Whether *Neynoe's* Examination is an Examination to be credited or not credited? We agree it is only Hearsay, as to the Bishop of *Rochester*, and if we had not other Matter, it would not be sufficient; so that we humbly apprehend it's being true or false won't affect this Case. If your Lordships are of Opinion 'tis false, there is sufficient Evidence against the Bishop of *Rochester* without it.

My Lords, in the next Place they have produced in Evidence several Persons that come and give your Lordships an Account of *Neynoe's* Confessions to them. There is one Mr. *Bingley*, Mr. *Steward* and Mr. *Skeene*, and two other Persons, that give an Account of what Mr. *Skeene* and *Steward* had told them *Neynoe* had said.

*Bingley* by his Evidence would have it believed, that *Neynoe* had told him, he was employed by some Person in Power, to fix several things upon several Persons that they were innocent of; that he had said several things that were false, and had imposed upon a great Man he had made Application to, and had got great Sums of Money out of him.

My Lords, I don't know how far they would carry this; for by what hath been insisted upon by my Lord Bishop of *Rochester*, and his Counsel, it should seem as if they were labouring to shew from these Persons, that they have call'd to be examin'd, that all the letters relating to this Correspondence, the letters of the 20th of *April*, and subsequent letters, that relate to the particular Facts, that denote *Jones* and *Illington* to be my Lord Bishop of *Rochester*, were contrived between *Neynoe* and some other Persons, in order to charge my Lord Bishop of *Rochester* with being concern'd in this Conspiracy. This seems to be what they are labouring at by this Evidence.

My Lords, as to *Neynoe's* being a Person employ'd in writing these letters of the 20th of *April*, or any subsequent letters, in manner as

is suggested, we shall shew your Lordships that it's impossible to be true; we shall shew that the letters of the 20th of *April*, and all the other letters that mention the Facts which denote the Bishop of *Rochester*, were all intercepted and in the Hands of the Government, before such Time as it was known among the Ministry that there was such a Person as *Neynoe*: for *Neynoe* made Application to the honourable Person mentioned by their Witnesses, subsequent to all this Correspondence, when these letters were in the Hands of the Government, as a Person that could make Discoveries to the Government. Therefore that Insinuation must vanish, that *Neynoe* was employ'd to forge letters, which contain Facts under the Names of *Jones* and *Illington*, to charge the Bishop of *Rochester*; and that even those letters of the 20th of *April* were forged by him.

My Lords, we shall go into the Character of Mr. *Bingley*, who hath, at your Lordships Bar, owned, that he hath been whipt, pilloried, and imprisoned: and as he hath taken his Degrees, as he owned at your Lordships Bar, consequently he hath taken the Oaths.

As to the Character of Mr. *Skeene*, he hath likewise been produced as a Witness, and he carries his Evidence farther than the Evidence of Mr. *Bingley*; for whereas Mr. *Bingley* says, that *Neynoe* confessed he had imposed upon that Honourable Person, and had mentioned things that were false, yet he could not say that after the Time of his Examinations, after *Neynoe* was brought from *Dover* to Town, he had confess'd to him that what he had said on those Examinations was false: But *Skeene* says, that after his Examinations he own'd that they were false. The last Examination was the 27th of *September*, and he was drown'd that Night; but as to the Examinations before the 27th of *September*, and out of which that is collected, Mr. *Skeene* says, *Neynoe* said to him, that they were false.

My Lords, as to Mr. *Skeene*, we shall shew what sort of a Man he is, a Man attainted of High Treason; and tho' he is pardon'd, as to his having his life and liberty given him, he is in all respects an attainted Person: He was tried and condemned in the County of *Surry*, for being concerned in the *Preston* Rebellion, and consequently a Man of no Credit. And as to what he and *Steward* swear, relating to a Conversation with *Neynoe*, when in Custody, we shall shew they never were together after the first Night, when they supp'd together. He was asked, whether it was the first Night that he had this Conversation with *Neynoe*, and he did not pretend he had any Conversation of this Nature with *Neynoe* the first Night; and if it was not the first Night, we shall shew it could not be afterwards, for *Neynoe* was kept in a Room by himself, *Skeene* and *Steward* by themselves in a Room underneath; and therefore this seems to be a Story contrived between *Skeene* and *Steward*.

We shall shew it could not be possible for them to converse together, for *Skeene* and *Steward* were locked up in their Room; *Neynoe* was lock'd up in his Room separate and apart from theirs; so that they could never have Correspondence with him, nor come near him.

Another thing is sworn by one of them, about a Message sent to him by *Neynoe*, and a Paper, while

while they were in Custody of the Messenger; and he says, this Paper was brought to him by the Messenger's Maid from *Neynoe*, and that this Paper contain'd a Justification of my Lord *Orrery*, expressing that he knew nothing of my Lord *Orrery*, but what he had said of him was utterly false; that the Messenger finding he had some Paper, he, to conceal this Paper, burnt it. But that the Maid came to him with such a Message or Paper is false; the Maid never did, nor did the Messenger know of the Paper, as we shall prove to your Lordships.

My Lords, when we have proved this, we humbly apprehend we have taken off any Credit that could be given to what these People have said, if they have said any thing material. My Lords, before I leave this Head, I beg leave to observe another thing as to *Skeene*. He, upon his Examination concerning a Discourse with *Pancier*, denies it intirely; but says, that what *Pancier* hath inform'd in relation to him, is false. We shall call *Pancier*, who will inform your Lordships, that *Skeene* hath own'd that he was privy to this Conspiracy, and knew who were concern'd in it.

I own there are several noble Persons named to be concern'd; that there is no Reason to say, from what *Skeene* may have said of them, that they are guilty: But such as he may have used the Names of great Persons designedly, to keep up the Spirit of their Party, by telling them such and such Persons were concerned: and if there is no other Evidence but what such a Person hath said, the noble Persons mentioned will not be affected by it.

My Lords, there is another Head I shall beg leave to mention, and what they have insisted upon under this Supposition; that they would have it taken that there was a Design to forge Letters, in order to charge my Lord Bishop of *Rocheſter*, and several other Persons. Say they, it was easy to get Information of such Circumstances relating to the Bishop and his Family, as are mentioned in the intercepted Letters, and then to write such Letters, with a Design falsely to charge the Bishop with having been concerned in carrying on a treasonable Correspondence. Your Lordships will please to consider who this Charge must fall upon, of forging the Letters of the 20th of *April*, or the Letters that shew *Jones* and *Illington* to be the Bishop of *Rocheſter*.

My Lords, we have proved them all to be Mr. *Kelly's* own Hand-writing, or Letters that have come in Answer to them. They have objected we have not given sufficient Proof of *Kelly's* Hand: Say they, it is proved by Clerks of the Post-Office, who never had compared one original Letter with another, but at last they stop an original Letter, dated the 20th of *August*, after the Correspondence had been carried on several Months; and then come and swear that the original Letters, that were forwarded, were of the same Hand-writing with that of the 20th of *August*. Can this be looked upon as sufficient Proof? But we submit it, their Evidence is much stronger than if they had only compared one Letter with another, for they not only had these Letters come every Week, but they were employ'd every time these Letters came, to copy them; so that the Hand-writing of these Letters must, by the constant stopping of these Letters, and their copying of them, be so imprinted on their Memo-

ry, that they are much better Judges of the Hand than if they had two of these letters to have only compared them together: And the Hand-writing was so well known to them, that they could, as they have informed your Lordships, when any of these letters came, distinguish them by the Hand-writing of the Supercriptions, before they had open'd them, and they never were mistaken. And this, we humbly apprehend, is as satisfactory an Evidence as can be given, that these letters were the Hand-writing of Mr. *Kelly*, provided the letter of the 20th of *August*, which I shall take Notice of by and by, is sufficiently proved to be of his Hand-writing.

Taking it then, my Lords, that these letters are the Hand-writing of Mr. *Kelly*, and of his Correspondents in answer to them, I don't find that my Lord Bishop of *Rocheſter* hath charged Mr. *Kelly* with having any Malice to him. And if he had no Malice to the Bishop of *Rocheſter*, what should induce him to write those letters, on purpose to charge the Bishop of *Rocheſter* with being concerned in this Conspiracy?

My Lords, we humbly apprehend the Pretence of these letters being forg'd, must insinuate, that *Kelly*, a vile Fellow, intending to charge the Bishop of *Rocheſter* with being concern'd in this Conspiracy, and make him liable to forfeit every thing that was dear to him, hath contrived letters containing Circumstances, in order to fix him to be the Person denoted by the Names of *Jones* and *Illington*; he hath written Letters, and by Combination received others in answer to them, for this Purpose; and by these wicked and malicious Practices, hath furnished this Evidence against the Bishop, who is an innocent Man.

My Lords, this is the Substance of the Defence on this Head; and whether your Lordships will believe this, we must submit to your Lordships. Your Lordships have had *Kelly* before you, and by his Behaviour have had no Reason to think that he had any Malice against my Lord Bishop of *Rocheſter*, or any Design or Intention to prejudice him.

My Lords, the next Part of the Evidence I shall beg leave to observe, is a Part very considerable, and is so far from being a Defence, that the Defence attempted, hath confirm'd and strengthen'd the Evidence against my Lord Bishop of *Rocheſter*; that is, with relation to the letter taken among my Lord Bishop's Papers, directed to *Dubois*; a letter, which, they observe, don't contain any Treason, or is of any treasonable Import; but it seems to be a letter of Indifference, and, I believe, as such, it was not taken care to be destroy'd, as it would have been, had there been any Apprehension that Use would have been made of it, as now, against the Bishop of *Rocheſter*.

My Lords, the Use we make of it is, to shew that Mr. *Johnson*, or Mr. *Kelly*, was a Person employed by my Lord Bishop of *Rocheſter* in writing Letters for him. My Lords, your Lordships will observe by the Letter, he says, *I have heard nothing from you since the Letter I had about two Months ago by Mr. Johnson, to which I immediately in his Hand returned my Answer.*

My Lords, if this is the Bishop of *Rocheſter's* letter, either in his own Hand, or his letter writ by another Person, it plainly proves what we infer from it, that *Johnson*, i. e. *Kelly*, writ for the Bishop. Your Lordships will observe, it is