A Plain State of the Case of the Duchess of Kingston; with Considerations [...] (1776)

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Contents

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A PLAIN STATE

OF THE CASE

OF HER GRACE

THE DUCHESS OF KINGSTON

A Plain

S T A T E

OF THE

CASE

OF HER GRACE THE

DUCHESS OF KINGSTON;

WITH

CONSIDERATIONS,

Calling upon the Interference of the HIGH POWERS, to stop a Prosecution illegally commenced, unimportant of Example, alarming to the People, expensive to the State, and pregnant of ill Consequences.

Ensem amicis, inimicis vulnus.

LONDON:
Printed in the year 1776.

(Cover image by John Alexander)

Introduction

The case of the Duchess of Kingston concerns Elizabeth Chudleigh's secret marriage with J. Augustus Hervey and its deception that followed and resulted in Chudleigh's failed relationship with the Duke of Kingston. Chudleigh was widely known throughout the eighteenth century as Elizabeth Hervey, Countess of Bristol, Duchess of Kingston, and several other titles (Corley 1). The exposure of Elizabeth Chudleigh as a bigamous proved to be a case that left an impact on the religious sectors of London and society's opinions about clandestine marriage.

Clandestine or secret marriages of the eighteenth century were prevalent in London but were mainly discussed in society once a scandal arose from them (Newton 152). Clandestine marriages strayed away from the common church authorities' ideas of marriage and were heavily criticized because they made it difficult for British residents' behaviors to be tracked (Newton 152).

Chudleigh was the youngest child of Colonel Thomas Chudleigh, lieutenant Governor of Chelsea Hospital, and Henrietta Chudleigh of Chalmington, Dorset. When Chudleigh was 6 years old, her father passed away, and their family soon became impoverished, forcing Chudleigh and her mother to move to the country. Chudleigh became a promiscuous and attractive woman early in her life and acquired the title of mistress at the young age of 15 (Corley 2).

When Chudleigh was 23, her good friend William Pulteney appointed her as a maid of honor for Augusta, Princess of Wales, and at the age 24, she secretly married Lieutenant the Hon. Augustus John Hervey RN (Corley 1). The couple's secret marriage took place at Lainston House in Winchester, England, and was privately arranged by several family members friends and a clergyman, who helped read the marriage service

(Pearce 253). The secrecy of her marriage to Augustus allowed Chudleigh to remain at court for Augusta, but, unbeknownst to her, this would become the source of her life's biggest adversity (Corley 2). After spending two years in the naval service in the West Indies, Hervey returned home to learn that his bride had been unfaithful. Though the couple tried to reconcile their differences, their relationship was ultimately severed (Corley 2).

In 1759 Augustus's elder brother, George Hervey, 2nd Earl of Bristol became deathly ill, leaving Augustus as his successor (Corley 2). Upon learning about Augustus' new title, Chudleigh confessed to the Princess Dowager of Wales about her marriage and soon fled to Hampshire, where she acquired a parish register and made record of her marriage to Augustus (Corley 2).

Hervey wanted to legally divorce from Chudleigh in 1768 because he was hoping to marry someone else (Corley 2). At this time, Chudleigh was the mistress of the 2nd Duke of Kingston upon Hull, Evelyn Pierrepont, and she did not want her marriage to Augustus to be seen on public record, so she filed a suit of jactitation against him. Chudleigh was able to win this case against Hervey because he could not provide proof of their marriage, and she told the court that the ceremony "had been such a scrambling and shabby affair as to amount to no marriage at all" (Corley 2-3).

Soon after, Chudleigh married Pierrepont and became the Duchess of Kingston. After several years of marriage, the Duke died, leaving his estate and income to his wife. When the Duke's nephew and heir, Evelyn Medows, learned of the his uncle's death, he disputed the Duke's will and accused Chudleigh of bigamy (Corley 3) . The act of bigamy was illegal in Britain during the eighteenth century, and, if found guilty of such an act, Chudleigh's relationship with the Duke of Kingston would have resulted in separation (Pearce 260).

Chudleigh was tried in April 1776 in Westminster Hall as a peeress, where she testified in front of her fellow peers. She tried to blame others

around her, but the members of the House of Lords found her guilty of bigamy (Corley 3). She fled Britain by boat to Calais, France, before she could be confined to country, escaping the case sentence and never returning (Corley 3).

The following information found in this text detail the legal proceedings that took place surrounding Elizabeth Chudleigh's 1776 trial as an accused bigamous within the Ecclesiastical Court. Ecclesiastical Courts, called Ecclestiatic Courts in the text, specifically had authority over cases that deal in mainly religious or spiritual matters. The courts embraced issues of moral offences and could address a wide range of issues surrounding human behavior, specifically those regarding marriage arrangements, communal discord and sexual misbehavior (Outhwaite 2).

In August 1788, after losing a civil suit over a mansion she purchased at Montmartre, France, Chudleigh had a "tantrum" and burst an internal blood vessel (Corley 4). The next day, Chudleigh suddenly died in Paris. Although Chudleigh was not mourned by many, during her lifetime she was "the most talked-of woman for at least one half of the eighteenth century" (Pearce 17).

A Note on the Text

The text is transcribed from its 1776 version from Oakland University's Kresge Library in Rochester, Michigan. An online copy of the text exists on Eighteenth Century Collections Online (ECCO) under the English Short Title Catalogue code T92947 and is sourced from the British Library. Other print versions of the text can be found at the Dublin Honourable Society of King's Inns, the University of Wales Lampeter, Cornell University, Ohio University, and Yale University (The British Library Board). Oakland University's copy is bound into a blank-covered book and missing the original cover page available on ECCO, which states the text's London publishing and price of one shilling and sixpence. The ECCO text includes a printer's address, saying, "Printed for J. Wilkie, No. 71, in St. Paul's Church-Yard."

Editorial decisions for the text were made through discussions between three editors and in consideration of the intended audience of readers: those familiar with British literature but unfamiliar with various legal terminology. This edition's notes aim for maximum clarity concerning vocabulary and complete understanding of the persons likely present in the Duchess' case. Notes are indicated alphabetically and can be found listed in full at the end of this edition before the bibliography of consulted sources. Our notes define legal terminology and put them in conversation with the text. The original footnotes for the text are intact on subsequent pages and are changed from the printed symbols to numerals.

In the text itself, we chose to keep capitalization and italics cases, and we preserved the original page breaks to keep the text true-to-format. The original indentation and text size changes remain intact in our effort to keep the our edition close to the primary text, and because the original

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changes seem to be for the readers to gain a deeper understanding of the contexts of Elizabeth Chudleigh's case. In our decision to preserve those breaks, we aim to make the initial intent for reader comprehension of the case's details even more apparent. Spelling is modernized, except for cases with proper nouns, e.g. "Ecclesiastic Courts," and cases of English word spelling are kept intact. We modernized the spelling of the repeated words "shewn" (shown) and "stile" (style) in the edited text and corrected small typing errors apparent in the printed edition. The eighteenth-century long ſ was removed in our effort to modernize. The page-turner words were omitted because of the ease-of-access given when viewing the text online.

Following this note is the edited text, our added notes on the text, a bibliography of sources, and then a collection of images of the original 1776 text that we transcribed.

Veronica Selke Katie Valley Raychel Avery
Oakland University

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To the PUBLIC.

UNSOLICITED, almost unknown, in rank only of a well wisher to her Grace's cause, I have, almost at the last hour, set down a range of thoughts on the state of her Grace's case : as I cannot but think, that the prosecution has run its present length from a general ignorance of the cause. I own, a proposal comes late, to be grounded on any expectance of stopping its progress, after a Lord High Steward has kissed hands on his appointment : but if the prosecution be shown inconsistent with itself, as baring its own progress, and consequently disagreeable to all rules of law and justice, to the policy of the State, and to the voice of the People ; from that moment the fault is in the State to suffer it to proceed ; and a suppression of it, even the day before its appointed trial, is gaining a political day from error.

It will be shown ; this undertaking took rise from an accidental attendance in the House, the day of Lord Hillsborough's motion. The press has ever since hung on a doubt ; whether the opening the merits of her Grace's case might not injure it in its present situation. But the motion of last Tuesday, evidencing a sense of error ; by appearance, things promise fair for being set to rights. The first concession is always the greatest difficulty ; and amendment generally follows.

A PLAIN
STATE OF THE CASE
OF THE
DUCHESS OF KINGSTON.

THIS publication was resolved upon in the House of Lords, the day of Lord Hillsborough's able and spirited motion in the matter of the Duchess of Kingston, from the necessity, then observed, of a general better understanding of her case. It is not intended to bring any evidence forward to the prejudicing the opinions of the Lords ; who may fit upon the trial : but with a contrary view, it is to state some peculiar circumstances, attending her case, for the previous knowledge or consideration of their Lordships, the Bishops, the Privy Council and His Majesty, to induce an intermediation somewhere—even now—tho' late—to arise, to stop a prosecution;

which is not within the letter, intent, or meaning of the statue, upon which it proceeds. From hence, and from other circumstances, a proof is to be gathered ; that the prosecution is in its nature vexatious and malicious ; or spirited by some sinister design of making it a means of trying a foreign question of property.

> A part of this argument may be turned against the necessity of any such application ; as being a matter that would go in evidence against the prosecution at the trial. True. But why let that trial come forward—to no political or moral end—for persecution's sake only, and at such an expense to the nation? An allowance to show a matter in evidence is no recompense of the injury let to go against us.

HER GRACE by her friends, when Miss Chudleigh, having heard frequent reports ; that Mr. Hervey made repeated boastings of a marriage with her, so long ago as in the year 1744 ; and such report having greatly injured her in her fame and expectation of marriage; she, by the advice of her lawyers, libelled him in a suit of jactitation[A] in the Ecclesiastic Court, in the year 1768 (which is the only remedy the Ecclesiastic Courts can give for such injury.) Mr. Hervey appeared ; but failing in the proof of his allegations, *sentence* was decreed and pronounced against him ; whereby Miss Chudleigh, as the honourable Elizabeth Chudleigh, was declared a *single woman*, and Mr.

Hervey enjoined *perpetual silence*. He afterwards appealed, and then withdrew his appeal. The time for prosecution thus having elapsed ; Miss Chudleigh afterwards married the Duke of Kingston. Who, dying in about four years after (in 1773) left her his Executrix and whole personal fortune, and also certain real estates for her life ; as his wife Duchess of Kingston : so long as she continued his widow.

There are but two kinds of sentences in the Ecclesiastic Courts relating to marriages, viz. Of Divorces and Jactitation. Of the first, where the divorce is total from the tie of marriage, called *a vinculo matrimonii*, as in cases of consanguinity, and age under consent : there, the marriage is declared void, and the parties may instantly marry again : or where the divorce is only from bed and board, called *e mensa et thoro*, as in cases of incontinency, &c. there the marriage is not so dissolved or declared void, as that the parties may marry elsewhere : but they ask the aid of the Common Law, by an Act of Parliament.[B] Of the latter kind, viz. Jactitation, the sentence is, where a marriage is set up on the one side, and denied by the other ; and it being a full declaration, after the fullest hearing of no proof of the pretended marriage having existed ; the parties, after a lapsed time for prosecuting an appeal, may diversely marry. For there must be certain periods fixed to all prosecutions in all Courts; or there would be no barrier of peace or certainty; but more especially in this case of marriage. A marriage therefore, on any of the three grounds, can never

afterwards be controverted, to the destruction of settlements, the bastardizing of issue, and the confusion of families and their titles.

It has been urged, that these proceedings in the Ecclesiastic Courts are open to contrivances of annulling marriages by consent. The best state has produced traitors. Stratagem[C] and deceit will creep into all courts of judicature : Else why such rules and delays in their proceedings, but to give opportunity to frustrate such designs? The only sentence liable to this objection is that of the second sort of divorce for *inconsinency* : which does not give a right of second marriage, but only dissolves the first, so far as a total separation of the parties. The contrivance *meant* must then go against the Parliament : and yet, to gain an act of Parliament, evidence of the charge must be given before either house.[1] But after an act passed, and a new marriage or marriages had thereupon, was it ever heard, that an attempt had been made to set such marriages aside, by any after-offer of proving collusion or contrivance in obtaining them ? As to the other sentence of divorce, for consanguinity or nonage; the fact, there, are not liable to imposition. Nor can there be danger of collusion in the present *sentence* : as it does not go against *actual*, *acknowledged* marriages ; or against *such*, where the parties have been known to have lived in a state of matrimony ; but only in very singular, dark and particular cases, as in the present ; where the marriage is

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[1]Which is no act against the sentence of divorce, nor can it set it aside. Parliament speaks only this, "if you ask our aid ; you shall lay before us your evidence of the charge." It requires the same satisfaction ; tho' evidence has been given before a jury at common law in an action of damages.

set up at such a distance of time ; its name never adopted ; denied from the first ; and avoided for such a series of years. For which reason, the examination of the evidences of Divorce *a vinculo matrimonii* and of Jactitation never come *coram judice* of the law courts.[D] For they cannot be reversed for error in the law courts : and any new matter of evidence given in another court can never set aside the judgements or sentences of the former : as every court shall be supposed capable of determining of the evidence brought before it. And in the Ecclesiastic Court, as in those of law, appeals may be had for any new matter of evidence against collusion or suppression of witnesses. Their *sentences* therefore have ever been allowed to be conclusive evidence in the Courts of Law and Equity ; nor can they be set aside by new evidence given therein ; nor has ever any pretence or offer of collusion, or of contrivance in obtaining them, been admitted : But this very *sentence* of jactitation is and ever has been allowed a plea in all civil suits, and consequently to go in evidence against all criminal ones. This line of respect, observed to the sentences of the Ecclesiastic Courts, has been always reciprocally paid back by them to the decrees and judgments of the Common Law and Equity Courts. The contrary would be an infringement of the honour of both, and might be attended with evil consequences.

The heirs at law to the Duke, being the family of his Grace's sister, Lady Frances Meadows, on his Grace's decease, filed a bill in equity against her Grace, as wife of Mr. Hervey, to set the will aside, as to the devises to

her, on an assurance ; that they would prove a former marriage with Mr. Hervey ; and that the sentence obtained in the Court-Christian was by collusion, &c.[E] To this bill the said *sentence* was put-in as a regular plea. [and was afterwards admitted by the present Lord Chancellor, by the precedents, to be final and conclusive.] Aware of the force thereof, they commenced the present prosecution ; which becomes a means of instrument of trying the former question of property.[1] Hereupon they preferred a bill of indictment against her for a marriage of the Duke, living Mr. Hervey ; and got it returned by an inquest at Hick's Hall of the grand jury of Middlesex.

> If the prosecution was commenced from an hope, that the above *sentence* would not operate as evidence against the criminal suit, or from a design to seize the spirits of her Grace to some terms of resignation *to them* of the estates, or to enjoy a revenge in the disturbance of her peace, in all these but the last, they must be deceived. The *sentence* must be equally allowed, in aid of the party, to be evidence against a criminal prosecution, as a plea in a civil suit : especially, as notice is taken of it in the statute on which the prosecution proceeds : which will be immediately shown. And,—allowing a supposition[F] to run a moment in compliance

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[1] The received doctrines of the courts by no means countenance criminal prosecutions affecting matters of claim pending a civil suit : as being thought to be actuated either by an interest or a wish of persecution. It was expressed by Lord Mansfield to be the chief exception he had to the trial : "For," says his Lordship, "I shall always be against criminal prosecutions laying a ground for pursuing and maintaining civil claims."

to argument—in case of a verdict of the Lords against her Grace, her right in the devised estates cannot be affected ; as she holds them not in right of settlement or jointure only, but also by will ; and as the description of her is fully signified therein, to denote the identity of her person ; especially, under the firm belief that the Duke himself had of the propriety of the description, by supposing her his real, legal wife.

There is something to be said of the manner of procuring the present indictment : For it having been brought before a quarter-session jury[G] of Middlesex at Hicks's Hall ; men of their circumscribed stations in life are incapable of judging the nice circumstances, or intent of the *prosecution*. I would not be misunderstood to say *case* : they being to find only a matter of fact. Yet part of a fact is not a whole one. For had they known of the sentence ; they could not have found the late marriage to be *contrary to the form of the statute.* A convenience of getting persons to serve as jurymen in this populous county, has begot an illegitimate custom of choosing them of the lowest householders : against a rule of law, practiced everywhere else throughout England, and dependent on express statutes, of the necessity of summoning freeholders, to a certain amount. How far this may go in a challenge of their competency, if thought expedient, is of other consideration. A custom cannot prevail, or make a precedent against an express statute. Had the cause proceeded with a courage of its merits ; the indictment had come with better appearance before the grand inquest, in the higher court of the Crown at Westminster: Which is composed of men respectable in their stations of

> life and fortune. Before whom all indictments against persons of any rank are so generally brought ; that the contrary is almost without a precedent. It then had offered itself to an examination ; that had given a sanction to the trial, or had stifled it in its birth.

When this indictment was preferred, her Grace was in *Italy* : but the charge reaching her, that "the Lady, who had married the Duke of Kingston, was accused of having been previously married to a Mr. Hervey, who was then alive ;" she, to exonerate her honour, even there affected, expeditiously returned to England, under a bad state of her health, with an intent to have tried *the fact* instantly on its own ground, and not have troubled her peers. With this view of trial, she moved it by *certiorari*[H] into the court of King's Bench, as a place of more dignity than the Old Bailey.

> For being indicted as a commoner, she was under no necessity to plead her privilege : 'Tis otherways, if a peer or peeress be indicted according to their dignity ; they cannot then wave it.

But upon consideration, believing the wicked purpose of the prosecution to be an attack upon her property ; she was advised, indeed her own judgment dictated to her, to take such advantages, as her situation in life had given her, against the prosecution, by placing herself

more immediately under the protection of the Lords. The indictment, therefore, was remanded back by a *procedendo* to its former court. She then surrendered herself to the sheriff of Middlesex, and was immediately brought by *habeas corpus* into the court of King's bench ; where she entered into a recognizance *as Duchess Dowager of Kingston, to appear in the said court, or before the King in Parliament, to answer the said indictment, whenever thereunto demanded.* And moreover, not to let the prosecution hang like a cloud over her, she also petitioned the Lords *to cause the indictment to be brought before them for trial.* And by an order of their house, a writ of *Certiorari* was directed to the court below to return the indictment to them.

This preference of trial by her Peers[I], proceeded certainly with a view of stopping the prosecution, as a ground for pursuing a civil claim : for having been before acknowledged, by an act of Parliament passed to her, as Duchess of Kingston, since the indictment ; 'twas believed ; their Lordships would see the expediency, for the support of their own proceedings, of addressing his majesty for a *noli prosequi* ;[J] to the quieting a prosecution, apparently so interested and inveterate : especially when its main question had been already adjudged by them in her favour, by such ACT ; which allowed her Grace's peerage on

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her late marriage, as to render void all necessity of a further trial:—the validity of her marriage with the Duke of Kingston, and the charge of a former one, being the same point in question—and more especially, as the prosecution could proceed to no end, in opposition to the legal evidence of the Ecclesiastical sentence against it. It had now, perhaps, been thought better for all parties, had the intent taken effect : but their Lordships having immediately taken the trial on themselves ; the peculiarity of the case has thrown them into an embarrassment ; which they have variously attempted to get clear of, and cannot.

We are to supposed their Lordships foresaw, that had they at once denied her Grace's petition, and she had been sent back to take her trial under her recognizance in the court of King's-bench ; the consequence had been,—she having claimed privilege, would certainly have pleaded it there—no judge would have ventured to have tried the right set up, and the trial could not have proceeded : or had their Lordships regularly referred her claim to the Attorney and Solicitor General ; those officers must have proceeded on the evidences of the Ecclesiastic sentence, and the registry of her late marriage ; which had proved her claim of the Duchess of Kingston : They therefore admitted her claim of trial, at all events ; as the phrase was : Arguing, that a conviction, leaving her Countess of Bristol, or a clearance yielding to the superior title, equally proved the trial to be regular. This has been thought short of the precision of order and of precedent ; that in such points is so necessarily required,

and has heretofore always marked their proceedings. The admission of her claim was certainly an acknowledgment of her peerage. But the afterthought not till then occured, that " if they allowed her privilege as Duchess of Kingston, it must be on the established marriage with the late Duke : that marriage being admitted legal, there was an end of the question and the necessity of a trial :" recourse must then be had to the Ecclesiastic sentence, or a *noli prosequi* to stop all confusion. There was therefore a contrivance of words, partly to give, partly to retract the title of Kingston, by an addition of the words in their proceedings ; viz. *Calling herself Duchess of Bristol.*

This brought on the motion of the noble Lord, who moved the House for the question being put the the judges ; " *Whether upon that indictment, as it now stands, Elizabeth, styled, calling herself Duchess Dowager of Kingston*—thereby not fully acknowledged a real peeress—*the wife of J. Augustus Hervey, Esq.* AND THEREFORE A COMMONER, *could be tried as a Peeress* ?" The affirmative of which, appearing evidently an acknowledgement of her claim as Duchess of Kingston, or productive of a new indictment, an amendment to the question was voted of the additional words, to be inserted after the words J. Augustus Hervey, Esq. : *now a peer of the realm* ; Taking-in the lame, the useless, the totally illiberal aid of a supposed conviction, at the last to set them right, at all events. The judges answered on the amended question : which, by the bye, was not the question, and no amendment to the proceedings.

In what point of view they considered it, is not known : For they only answered affirmatively, " *she might be tried as a Peeress on the present indictment*." This again was not clearing the confusion. *As a Peeress*—What Peeress ? certainly on the title she avowed, not on the one, which must fix her conviction. For suppose, Miss Chudleigh has married a commoner, a Mr. Kingston ; and Lord Bristol had been a peer before the indictment ; would they under the present circumstances, have ventured to have given her the peerage of Countess of Bristol ? Could they have indicted her any other way—as it is their mode of indictment ?—How was she to be called before the House? Lord Bristol, as husband, could not be evidence, nor call her thither. Would the Lords force their privilege on a person, that would disavow it, as her conviction ?[1]

As this may be said to have been a caution in the Lords to avoid prejudging the trial—though it comes too late after the former acknowledgment by act of Parliament, than which nothing can be greater evidence in the law—so on the other hand, it was thought by the public unfair and cruel to prejudge the crime against her ; for if accusation was embarrassed, or disadvantageously situated, it was not to be aided by an act of countenance of the judges. The public therefore

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[1] Otherwise it may be in cases, where the first marriage is indisputable. If this shows the regularity of an indictment, where the second marriage is the point only to be proved ; perhaps, the present one is wrong ; where the case is just the reverse. But we avoid entering into law altercation ; we argue here on the particularity of this case only.

saw with a concern her Grace stripped of her armor, to be laid open to accusation. Her cause was certainly injured before trial ; her honor disavowed the contest, on the terms offered her ; and her friends rather wished, she had met the trial on the former ground : where the evidence of the ecclesiastic sentence would not come before such a final authority : so that at least the verdict, if found against her, might be expected to be special ; not could any worse consequences be apprehended : for in the case of a full verdict, she, as a peeress, of which she would then be convicted, would evade all punishment. But as the Lords were in possession of the proceedings, 'twas difficult to change again the field of action : for the door was thus endeavoured to be shut upon her, from receding ; and she compelled to take her trial on presumption of a claim she disavowed, and to submit to be arraigned by a style ; whereby she must wave her dignity of peerage at the first instance on her trial : which, as before said, she cannot do. The Lords were under a two edged dilemma : The acceptance of the trial on themselves was an acknowledgment of her claim ; according to her recognizance entered into, to appear before them, as *Duchess of Kingston* : and their acceptance of the trial on any other strained reservation of her claim of that right of trial upon her conviction, was injurious to her, even in the presupposition of her guilt : It wanted precedent, and handed down none. The whole was an illegal interference ; unless the ground of that interference was regularly and fairly decided upon. It looked a fondness for the business. Suppose Mr. Hervey had not become a peer ; would their Lordships have denied her a claim ; –supposed even in the case of accidental murder–which their own acts and records

have acknowledged and confirmed? Certainly in all reason of things they would have granted it ; or if they had refused it ; they could not have refused it, and yet have tried her afterwards, as they do now : she must have been sent back to the court of King's-bench, where she had promised to appear.[1] The necessity was therefore visible, that her summons from the Lords must be in the same style ; else she certainly had not right to obey it ; nor did she even risque her bail : or, if she did obey it, she had a sure plea in abatement. The Lord Chancellor therefore, *ex officio*, in ordering the summons for her Grace's surrender (last Tuesday) moved to alter the style of their former proceedings, and again leave out the former words *calling herself Duchess*, thereby totally acknowledging her Duchess of Kingston ; which again brings the case to the first acknowledgment of her marriage, and stops all necessity of the trial. And thus their Lordships are left in the same maze as a first.

The peculiarity of the case is certainly without precedent, and may, perhaps, ever stand alone in the records of the English law. But the constitution is created, and is a proof of its clearness and rectitude. The confusion arises from the inconsistency of a prosecution, where there is no crime. On the other hand, the means taken to ground this late marriage on the *sentence*, showed a guiltless and prudent care,

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[1] Though the King's-bench does not hold more than the chamber of the House of Lords, yet trials of the highest consequence are there heard.

to avoid all confusion to the state. None there need be : unless a self-interested, inconsistent prosecution finds advocates to disturb it. This argument of political *inconvenience* in letting the prosecution go forward, being only one against it, we shall proceed to others more meritoriously in our favor, and show, from the *illegality of the prosecution itself*, how *unjust as impolitic*, would be the labor to support it.

The statute, on which the indictment proceeds, is the first of James I. commonly, though irregularly, called the statute of Bigamy[1] ; which statute, *in terrorem* of persons of unknown residence, going about into diverse counties, to seduce the children of honest people (which is the preamble,[2] and shows it to have been originally designed, in suppression of such practices, on the male side chiefly) made the trespass of marrying a second husband, or wife, living the first, felony, under five exceptions ; viz. absence abroad for seven years ; absence for the same time within the same kingdom, the party not knowing the others to be living ;[3] divorces by sentence in the Ecclesiastic Courts ; or where the former marriage shall be

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[1] Bigamy is the act of marrying a second wife, formerly disallowed to the clergy. Every widow or widower, marrying, commits bigamy. Polygamy is the crime of second, or many marriages, existing the former.

[2] *The preamble* is, forasmuch as divers evil-disposed persons, being married, run out of one county into another, or into places where they are not known, and there become married, having another husband or wife living, to the great dishonor of God, and utter undoing of divers honest men's children, and others.

[3] If four times seven years the parties not cohabiting, or caring whether the other be living, be not within the reasoning of the statute?

declared by *any* sentence of the said court *of no effect* ; and persons under the age of consent. No forfeiture, &c.

The last three exceptions are evidences in themselves against any charge under the statute ; but, being by it noticed as exceptions, they become more evidently so. For every sentence in the Ecclesiastic Courts, declaring any former marriage, *actual or disputed*, to be void, and of no effect, are herein excepted by the statute itself. It is therefore very insignificant to the merits of this case, under what division, or mode of the ecclesiastic sentences, these two exceptions rank ; as every sentence, so operating, is generally excepted. The difference of the sentences has been strenuously endeavoured to be marked in the two exceptions, and indeed with self-evident proof, vis. That as the first-mentioned sentence, in the third exception, speaks itself to relate to divorces only ; so the latter *sentence*, in the fourth, means by jactitation on a former, *pretended* or *boasted* marriage ; there being no other sentence that can interfere. The draftsman of the statute, supposed to be a common lawyer, did not fully express the words of the Ecclesiastic Courts ; however, he took care to cover all forms of words by the general exception : yet the distinction is evident ; the former exception of divorces in general goes against marriages in fact ; the latter against such as are *unacknowledged*, or *disputed* by either party, which is that of jactitation. A former marriage is, at all events, supposed by the statute ; otherwise it could not be an exception ; which is as effectually set aside as of *no effect* by this *sentence* ; as those *in fact* are by the sentences of divorce. And it is to be strongly remarked, that though the statute, as a criminal one, is to be

taken strictly ; yet the exceptions are to be construed liberally, in favour of the party accused.

To overcome this great barrier of defense, the *sentence*, they hope to undermine and sap it by art. They therefore have gone to work with the tool of presumption ; *that collusion has been used in the manner of obtaining it* : which they *promise* to show at the trial ; when it shall be set up in evidence against them.

This is a mere imposition on the judgments of the House of Lords ; began giddily, for the chance of a fortunate ending. The reflection must involve the late most honourable Duke, and the present Earl of Bristol, in the same predicament of accusation with the Lady. A reflection very unfair ; as being a supposition below their honour ; unfit to be admitted to the ears of that House, on account of the respect paid to the deceased's memory, by those who fill it. When prosecutions, from being malicious or interested, grow wicked, it is high time they were stopped. The pretense cannot be here allowed even in the idea : for, to show its improbability, (which is the highest evidence can be given against bare assertion) supposing a depravity of all their sentiments to have conspired a chicane[K] separation from the first marriage ; (and it is impossible to suppose a single one alone guilty) might not an acquiescence to a divorce have been more easily, and in less time, obtained ? Certainly by a general confident ; as an evasion, before observed, less assailable by law.

F

But without affronting its veracity, though this asserted collusion has not yet dared to utter its own falsehood ; it is here unallowable by the law ; as tending to break up the foundations of the settled sentences, decree and judgments of the courts; especially, where all time is elapsed for entering such proof against them. The sentences of judgments of one court cannot be reversed by *evident only*, shown in another. They are daily reversed for matter of error in their proceedings, but not upon matter of *new evidence* ; because the court, from whence the sentence or judgment sprung, is supposed to have been capable of judging of that evidence. The contrary procedure would be want of decency and respect ; and beget confusion in the dignity of the courts themselves.

To run into proofs of collusion, would be a trial against rule of two different offences, under one indictment. The argument, for and against its admission, may protract this expensive solemnity to a length of days ; which is a proof of the inconvenience of breaking through the formal rules of law. And though it means to slide into the trial, as evidence against the sentence ; yet parol evidence in one court, is inadmissible against the records of another. It had a remedy elsewhere in the opportunity of proving itself, if it had pleased, in the court where it was committed. In the meantime, the presence, or promise of what may or may not be shown collusive, claims not the respect of denial of an immediate remedy to be put into the present persecution ; especially, after so long a delay of taking the proper steps of showing the collusion to the Ecclesiastic Courts, and repealing the *sentence* : and especially, as there is almost a certainty, that

it cannot legally be gone into against the *sentence* at the trial, even on a supposition of its authenticity.

A party, out of their depth, who can feel no ground, catches at feathers on the surface. Was it imagined, any real evidence actually existed on the side of the prosecution ; the subject, as a dangerous one, should be immediately dropped : but how insulting must it be to the nation, if the thing, they call evidence, should turn out to be an interested and factious servant soliciting her Grace's attorney for money, and, who driven off with contempt, has since become inventive of revenge. Suppression, or the keeping back of evidence, is a kind of self-reservation. No one is asked by law to speak the truth against himself. Suborning, or bringing forward a false evidence is indeed an attack upon society. Why then, supposing an attention paid to this anger-fuming smoke, raised from the stirred-up embers of dying-report ; why is the false cry of fire to be given to it, or let to pass, to throw the nation into an alarm, which must still end in the original sum ?

So far the argument has run, defensive of the charge. It shall now be shown,

No offense existed under this statute, to give the prosecutor a right to bring this prosecution.

The offense charged was a trespass at common law before the statue ; for which a personal action lay to the injured parties, (viz. the wife or husband of the imposed, or second

marriage) or an indictment for the offence. The statue, however, did not take away the personal action at law ; but left it still as better remedy against persons of property, or known residence, for the special damages which might be obtained. This case is then to be viewed in a two-fold light, as a private injury to the party imposed upon, which must be the late Duke of Kingston, (who must not be admitted in this argument, as a party in the collusion, or imposition against himself) and as a public offence under the statute. If the first is not established by some injury of imposition done, or intended ; there can be no foundation for the latter, and the whole must fall to the ground.

Can any imposition be supposed to have been practice on the late Duke? The pretense of a prior marriage, and of measures obtaining the *sentence*, being notorious, his own marriage was upon a firm basis. Does there arise, out of this transaction, any personal trespass against his Grace, to give him a right of action for imposition or injury, or of indictment for the offense? Certainly none. If then, there was no private injury, imposition, or offense ; when can the public offense arise, to ground the prosecution in law, or support it in sense? How is the public peace insulted ; where no complainant of any attempt of injury appears? Who then is to start up champion for the crown, to force the public into a prosecution of—no offense? It has been shown ; the late Duke could not have had any right of action or indictment : certainly, no other can have it ; if the party in law cannot, which is supposed the injury one. 'Tis true, anyone may prosecute for the crown: But, if a

regard to public justice be pretended ; the prosecutor should have commenced his suit in the life-time of his Grace: It had been laughable to have seen his Grace give evidence against his own prosecution. If His grace was anyways deceived ; it was not by himself, or the lady, but by their lawyers, who advised this action of jactitation : and if by any distorted construction, the marriage be brought within the dead letter of the statue, it is thus so very peculiarly circumstanced ; that in respect to his memory, it is entitled to the justice of having this iniquitous prosecution taken out of the hands of an interested prosecutor. Inconceivable as it is, the prosecution, on his Grace's death, has run this length, from a vague supposition of injury (not an injury within the statute) to the heirs at law, in regard to the estate held from them during her Grace's life. Hence emerges the *interest* and *intent* of the prosecution : which is an insult to our laws ; as they are open to try every separate right of the subject : But more particularly so, when it appears the instrument of aid to a civil suit, carried on at the same time.

Was not here the danger of giving her Grace offense an objection to the recital ; I could add, from safe authority, a proof of one crime more to the prosecution ; that of ingratitude. The sons of Lady Meadows, the late Duke's sister, had by no means recommended themselves to the good opinion of his Grace : *Yet the estate rests in the family.* And herein his Grace's intent is contrasted *by ill blood.* His Grace planning by his will their respect to *her*: knowing, she had no near relations of her own to aggrandize, no other family to prefer. How well, and how soon her Grace begun to put the intent of the will in G

force, may be conveyed to imagination by her immediate offers of her affection to the family in general of her deceased husband : Their avidity by their complimentary letters to secure her Grace's favour could only be outdone by their folly, or faith in law, in deserting it.

The inference towards a conclusion is, in the first place, to consider the heinousness and importance of the charge of offense.

'Tis a charge founded on a private marriage ; or what the law even then termed a clandestine one; and now has so exploded, that it does not allow a like transaction to be any marriage at all ; (we speak as to the political state, considering it a religious obligation) : a transaction, if ever such was, so dark, that a reality of it never has come to light, in a length of time of thirty years, by any acknowledgement from either party ; denied by the one, unpursued by the other ! Weigh then the *charged* marriage in the scales of sense, law, policy, and religion, against the *late one*, *solemnized under the sanction of all four.* How then is a prosecution allowed to proceed against an object, that is now the care of such authority?

In the second place, to consider the consequences of allowing this marriage, solemnized under sacred and legal sanction, to be liable to an after-examination.

A marriage, so fortified, to be called out of that of security, to answer a claim, which was by it before challenged to prove its right, which it refused or neglected to do, would be a breach of all faith with the State, in which we live ; a disrespect to all ecclesiastic laws ; a dishonour to G O D ; a dangerous experiment to the State itself ; a confusion to families ; and, alas! what injury to the younger race, that may be the offspring of such confidential marriage!

In the third place, to consider the consequences of allowing offers of proving collusion to be a reason for opening such examination.

The pretence of collusion may be always set up, as the common challenge, to disturb the peace of such marriage and its property ; not only the peace of families , but to create a new trouble, and alarm to the public, after its own neglect of proving it in the proper place and time. Even if after-proofs should arise, they come too late : they are barred, like after-claims in law. The probability of the proofs, where they are openly shown, cannot be considered : But in this case the improbability may. As no mention of facts, shown, is made ; but only pretense and promise.

In the fourth place, to consider the first cause of the prosecution, arising from some injury, somewhere done ; and the offence, the public takes there-at, to call out for a delinquent for an example.

In this case, no one private injury has been done, to ground a public offence. Nor is there a ground for the prosecution : unless we suppose the public offense to be, without a private injury, by the Duke being criminal in a collusion to contrive his own dishonour. A proposition, which dare not be asserted against probability and his memory ; —in particular, by the prosecutor. Had indeed, by any issue or trial at law, a double marriage been proved ; any advocate for the public might have commenced the prosecution : but where no proof has yet been shown, (as there might had been, and ought, if any such were) and consequently the charge yet in doubt ; the general opinion of the public, instead of expressing their sense of an offense, thinks the prosecution premature, at such a risk of expense and solemn preparation.

In the fifth and last place, to consider who is the prosecutor : and whether the motives for the prosecution be actuated by an uninterested regard to justice, or from private considerations.

The heirs at law are prosecutors, apprehending themselves injured by the large bequest made by the Duke to her Grace : who cannot be charged of a criminal injury, any more than for having existed at the time, and enjoyed so great a share of the love and respect of her deceased husband. The prosecutors are therefore interested in the prosecution : as in her conviction, annulling the marriage, they place their hopes of divesting her of those estates, she holds under the will, for her life, continuing his widow. For on this question

a renewed suit is now depending ; which waits the conviction of this trial for its decision.

From these considerations, the conclusion comes, viz. the necessity of some remedial application to prevent further progress of a prosecution, even in the last stage ; against which, new difficulties and arguments every day appear ; and the dissatisfaction of the people increases, as it proceeds.

For,—to sum up the past argument,—though all sentences of the ecclesiastic courts, making all former marriages, whether in *fact*, or *unacknowledged* by the party, of *no effect*, are evidences in themselves against the statue ; and are also excepted by it; so as to bring this case out of the letter : and though no actual injury was committed to ground the public offence, which is in other words, though there be no public offence to ground the prosecution ; which brings the case out the meaning of the statute : all which is matter capable of being shown at the trial : yet as innocence is not to meet injury, because a distant remedy may be left her for an after justification ;— though, to the disgrace of sense, it is the common language of law ; — it is not the present wish to abide the battle, for the sake of victory. The act of prevention shows greater skill than the art of cure.

Therefore, never was a case which more merited the interposition of the royal prerogative in the N O L I P R O S E Q U I,

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than the present, under these general considerations, viz. *the mutual confidence of the Ecclesiastic Courts, and those of equity in common law;*[1] *the bad effects of a breach of that confidence ; the honour of constitutional marriage ; and the sacred function that must depend on the faith of the above courts in the solemnization thereof* ; — and, though here are no offspring of this marriage, yet in the general regard, — *the children of others ; the peace of families ; and the countenance of virtue ; the dangers of endless dispute and impositions, from pretense of prior claims ; and from personally interested criminal prosecutions.*

There is yet another material and polite consideration, which has not been mentioned to the public ; Lord Bristol : whose right of marriage, and of perpetuating his family and title, may be hereby affected. His celibacy is now equally proved, as was her Grace's, when Miss Chudleigh. To suppose a power capable of subverting that *sentence*, as to him, maybe to lay open scenes of dispute in affliction to his heirs, and to children yet unborn.

But from what part of national jurisprudence is the first movement for a *noli prosequi* to come? *from a*

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[1] The marriage was solemnized by the archbishop of Canterbury, on a licence taken out of his own court. Doubtless, all parties conscious of its regularity and legality.

general motion in the House of Lords for *a delay of the trial*, and on a state of the foregoing considerations, *for an address to his Majesty* to interpose this his prerogative. *The Lords* will then regularly *preconsider* those points in the case, that call for their predetermination. If the circumstances merit interposition, *the general address will be voted*, and as certainly, most graciously *complied with*.

Or the *Privy Council, the King's* more immediate servants, to prevent the public alarm increasing, may *politically* take the matter up, even at the last moment, and recommend to *his Majesty* the reconsideration of the prosecution; as a fit object for *his royal interference*, and grant of a *noli prosequi*, by his sign manual, or authority of himself and council.

> As to any objection which may be made ; "that the proceedings and preparations having run to a great length, the Lords, in case of the above motion taking place, will be obliged to contradict their own orders :" the farther they proceed, the greater is the dissatisfaction of the public. The noble Lord, before mentioned, observed ;— in whose words this endeavor is sure of closing with sense—that, "*It is meritorious to tread back our steps, the moment we perceive either error or misinformation.*"

FINIS.

Notes

[A] Defined as a "public or open declaration," and can be boastful or bragging ("Jactitation"). Chudleigh and her lawyers took Mr. Hervey to court over the spread of defamatory statements about her marriage (Corley 2).

[B] "The unwritten law of England, administered by the King's courts," ("Common law).

[C] "Stratagem" (plan or scheme devised to achieve a particular end) refers to the court's acknowledgement of falsehood that can exist in Ecclesiastical Court such as Elizabeth's.

[D] *Vinculo matrimonii* (Absolute marriage) would be impossible to dissolve without a Private Act of Parliament: a statute which would legally confirm the divorce. Securing a statute requires a divorce *e mensa e thoro*, which provides grounds for separation. ("Divorce and Nullity, England").

[E] "Collusion" (deceit, trickery) refers to Chudleigh's conduct in her 1769 case.

[F] An assumption, without reference of its truth or falsehood, refers to the claims that are being made about Elizabeth's supposed behavior as a bigamous while on trial ("Supposition").

[G] Quarterly meetings held in front of a justice of peace who has the ability to give rulings on certain cases ("quarter sessions").

[H] "Certiorari" (a writ issued by a superior court) refers to Elizabeth's choice to have the trial in the court of King's Bench which she deemed to have more dignity than the Old Bailey court.

[I] Individuals of higher ranking could attempt to be tried by their peers of the same standing. Officially claiming peerage provided an

escape from being sentenced by higher ranking officials who administer severe rulings. (“Peerage, Privilege of.”).

[J] Latin, more commonly spelled nolle prosequi, a decree made by a suit prosecutor that a case will be dropped (“Nolle Prosequi”).

[K] In legal terms, a particular case of subterfuge or petty trickery (“chicane”).

[L] The plaintiff or prosecutor, who issue a complaint against the defendant (“complainant”).

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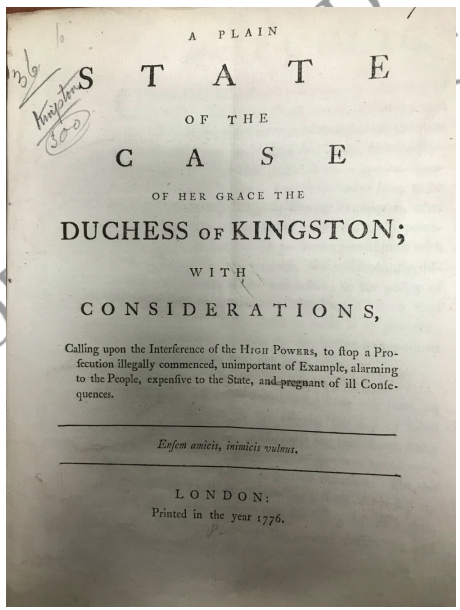


A PLAIN

STATE

OF THE

CASE

OF HER GRACE THE

DUCHESS OF KINGSTON;

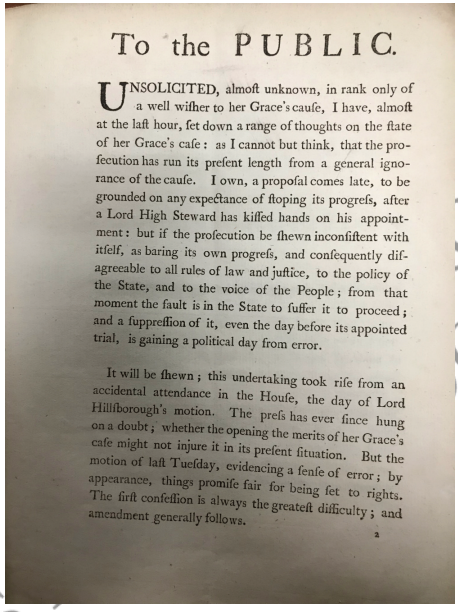
WITH

CONSIDERATIONS,

Calling upon the Interference of the HIGH POWERS, to ſtop a Proſecution illegally commenced, unimportant of Example, alarming to the People, expenſive to the State, and pregnant of ill Conſequences.

Enſem amicis, inimicis vulnus.

LONDON:
Printed in the year 1776.



To the PUBLIC.

UNSOLICITED, almoſt unknown, in rank only of a well wiſher to her Grace's cauſe, I have, almoſt at the laſt hour, ſet down a range of thoughts on the ſtate of her Grace's caſe: as I cannot but think, that the proſecution has run its preſent length from a general ignorance of the cauſe. I own, a propoſal comes late, to be grounded on any expectance of ſtoping its progreſs, after a Lord High Steward has kiſſed hands on his appointment: but if the proſecution be ſhewn inconſiſtent with itſelf, as baring its own progreſs, and conſequently diſagreeable to all rules of law and juſtice, to the policy of the State, and to the voice of the People; from that moment the fault is in the State to ſuffer it to proceed; and a ſuppreſſion of it, even the day before its appointed trial, is gaining a political day from error.

It will be ſhewn; this undertaking took riſe from an accidental attendance in the Houſe, the day of Lord Hillſborough's motion. The preſs has ever ſince hung on a doubt; whether the opening the merits of her Grace's caſe might not injure it in its preſent ſituation. But the motion of laſt Tueſday, evidencing a ſenſe of error; by appearance, things promiſe fair for being ſet to rights. The firſt confeſſion is always the greateſt difficulty; and amendment generally follows.

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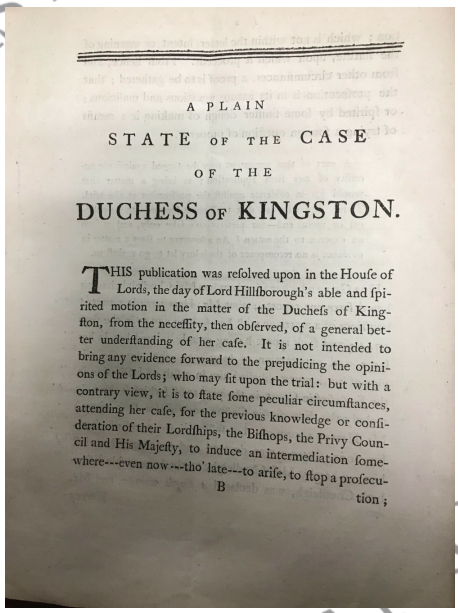

A PLAIN

STATE OF THE CASE

OF THE

DUCHESS OF KINGSTON.

THIS publication was reſolved upon in the Houſe of Lords, the day of Lord Hillſborough's able and ſpirited motion in the matter of the Ducheſs of Kingſton, from the neceſſity, then obſerved, of a general better underſtanding of her caſe. It is not intended to bring any evidence forward to the prejudicing the opinions of the Lords; who may ſit upon the trial: but with a contrary view, it is to ſtate ſome peculiar circumſtances, attending her caſe, for the previous knowledge or conſideration of their Lordſhips, the Biſhops, the Privy Council and His Majeſty, to induce an intermediation ſomewhere---even now---tho' late---to ariſe, to ſtop a proſecu-

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tion;