

# The House of Lords and Religious Toleration in Scotland: James Greenshields's Appeal, 1709–11

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*This article examines how the House of Lords, as the ultimate appellate authority of the new kingdom of Great Britain, formed after the union of 1707, provided a degree of religious toleration for Scotland's episcopalian minority when they supported James Greenshields's appeal on 1 March 1711. Greenshields was a Scottish episcopalian minister who appealed to the Lords in February 1710 after he was imprisoned by the Edinburgh magistrates for using the English Book of Common Prayer to conduct a service for a private episcopalian congregation. The Lords' decision confirmed that no law in Scotland proscribed the Prayer Book liturgy and provided a degree of legal recognition to the episcopalians who used it. This article examines the arguments that Greenshields and his supporters used to advance his appeal. In doing so, it sheds new light on the relationship between Scotland's established church, the nation's episcopalian minority and the new British state.*

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On 30 December 1710, Narcissus Marsh, archbishop of Armagh, wrote to Thomas Tenison, archbishop of Canterbury, to provide a reference for a Scottish episcopalian minister named James Greenshields. Greenshields had recently returned to his native Scotland after ministering in Ireland. Marsh testified that Greenshields's time in Ireland had been uncontroversial, but submitted that 'what his Behaviour has been in Scotland, I will not undertake to give you any account of, He being best able to do it himself'.<sup>1</sup> Greenshields had been imprisoned in Edinburgh's tolbooth in September 1709 after he was caught using the English Book of Common Prayer to conduct a service for a private episcopalian congregation. He was cited before the presbytery of Edinburgh and the

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<sup>1</sup> London, LPL, Correspondence of Thomas Tenison, MS 1029, fol. 110, Narcissus Marsh to Tenison, 30 December 1710.

city's magistrates, and his sentence was confirmed by the Court of Session, which was Scotland's highest civil court. In February 1710 Greenshields appealed to the House of Lords, which, after Scotland and England had united under the Treaty of Union in May 1707, was the ultimate appellate authority of the new kingdom of Great Britain, with power to overturn decisions of the Court of Session despite the securities that Scotland's legal system held under the union.<sup>2</sup>

On 1 March 1711, the Lords decided in favour of Greenshields. Their decision had four consequences for Scotland's religious affairs. First, it confirmed that there was no law in Scotland that allowed the nation's episcopalian minority to be prosecuted for using the English Book of Common Prayer of 1662, even though this constituted a form of Nonconformist worship in Scotland. Second, it provided a degree of legal toleration to the ministers who continued to use the Prayer Book. Third, it challenged the authority of the Church of Scotland and its established presbyterian standard of polity, and the Calvinism expressed by its doctrinal standard, the Westminster Confession of Faith. These two standards had been re-established in the church by the Scottish parliament in June 1690 after the episcopal structure that had existed since 1662 was abolished during the revolution of 1688–9.<sup>3</sup> Both standards had also been reaffirmed by this parliament in November 1706 when it passed the 'Act for Securing of the Protestant Religion and Presbyterian Church Government'.<sup>4</sup> Fourth, the Lords' decision confirmed the upper house of the Westminster parliament as the leading legal authority in the kingdom of Great Britain and hence as the ultimate arbiter of Scotland's religious divisions. It thus highlighted the issue of parliamentary sovereignty, which would ultimately be demonstrated by

<sup>2</sup> *Records of the Parliaments of Scotland to 1707*, 1706/10/315, 'Act ratifying and approving the Treaty of Union of the Two Kingdoms of Scotland and England', 16 January 1707, online at: <<http://www.rps.ac.uk>>, accessed 2 September 2019; Christopher A. Whatley with Derek J. Patrick, *The Scots and the Union* (Edinburgh, 2006), 306–7.

<sup>3</sup> Alasdair Raffe, *Scotland in Revolution, 1685–1690* (Edinburgh, 2018), 140–4; Tim Harris, *Revolution: The Great Crisis of the British Monarchy, 1685–1720* (London, 2006), 378–88.

<sup>4</sup> *Records of the Parliament of Scotland*, 1706/10/251, 'Act for Securing of the Protestant Religion and Presbyterian Church Government', 12 November 1706, online at: <<http://www.rps.ac.uk>>, accessed 2 September 2019; Derek J. Patrick, 'The Kirk, Parliament and the Union, 1706–7', in Stewart J. Brown and Christopher A. Whatley, eds, *The Union of 1707: New Dimensions* (Edinburgh, 2008), 94–115.

the British parliament when it passed the Toleration Act for the episcopalians on 3 March 1712.<sup>5</sup>

Previous historians have provided similar interpretations of the Greenshields controversy. Legal scholars such as Brian Levack and John Cairns have shown that the appeal demonstrated the Lords' ability to overturn the decisions of the Court of Session.<sup>6</sup> Tristram Clarke, in his doctoral thesis on the Scottish episcopalians, offers a detailed investigation into the Greenshields controversy and the political machinations that lay behind it.<sup>7</sup> Articles about the appeal by Richard Tompson and Jeffrey Stephen have taken different approaches. Tompson was less concerned to discuss the appeal's legal implications for the episcopalians, but provides a thorough outline of how it progressed.<sup>8</sup> Stephen also outlines the controversy, and offers interesting insights on the role of the English Book of Common Prayer in the appeal, but similarly does not focus on how the Lords' decision equated to a degree of legal recognition being given in Scotland to this English liturgical standard.<sup>9</sup> Both historians show that the Lords' decision led to the passage of the Toleration Act in March 1712, but neither of them has shown how that decision helped to form the basis of this statute.

The controversy that surrounded Greenshields' appeal provides an insight into the relationship between the Church of Scotland, the nation's episcopalian minority and the legal authority of the new British state. This article will explore this relationship to show how the appeal was used by an episcopalian tolerationist movement in Scotland to secure full legal toleration for their co-religionists by virtue of the statute in 1712. To do this, it will focus on three issues.

<sup>5</sup> *The Statutes of the Realm: Printed by the Command of His Majesty King George the Third*, 2nd edn, 11 vols (London, 1963; first published 1810–28), 9: 557–9.

<sup>6</sup> Brian P. Levack, *The Formation of the British State: England, Scotland, and the Union 1603–1707* (Oxford, 1987), 98; John W. Cairns, 'Scottish Law, Scottish Lawyers and the Status of the Union', in John Robertson, ed., *A Union for Empire: Political Thought and the British Union of 1707* (Cambridge, 1995), 243–68.

<sup>7</sup> Tristram Clarke, 'The Scottish Episcopalian, 1689–1720' (PhD Thesis, University of Edinburgh, 1987), 200–50.

<sup>8</sup> Richard S. Tompson, 'James Greenshields and the House of Lords: A Reappraisal', in W. M. Gordon and T. D. Fergus, eds, *Legal History in the Making: Proceedings of the Ninth British Legal History Conference Glasgow 1989* (London, 1991), 109–24.

<sup>9</sup> Jeffrey Stephen, 'English Liturgy and Scottish Identity: The Case of James Greenshields', in Allan I. Macinnes and Douglas J. Hamilton, eds, *Jacobitism, Enlightenment and Empire, 1680–1720* (Cambridge, 2014), 59–74.

First, it will provide some brief background to the events of the Greenshields controversy. Second, it will examine the progress of the appeal and how it was understood by contemporaries. Third, it will address the appeal's legal implications for the Church of Scotland and the episcopalians. To conclude, the article will assess what the Lords' decision meant for the future legal regulation of religious divisions in Scottish society.

#### THE BACKGROUND

The episcopalians were Scotland's largest Nonconformist group by the time of the Greenshields controversy. Their Nonconformity stemmed from their reluctance either to accept the Church's presbyterian structure or to subscribe to orthodox Calvinism as defined by the Westminster Confession, after they were re-established in June 1690. During the Restoration period, the episcopalians had grown distant from Calvinism as articulated by the confession and many started to favour an Arminian understanding of predestination.<sup>10</sup> This became apparent after 1690 when many episcopalians refused to subscribe the confession, despite being required by law to do so, and were deprived by ecclesiastical visitation commissions.<sup>11</sup> The group was also compromised by its members' Jacobite sympathies. Many had been reluctant to accept William and Mary after they were offered the Scottish crown in 1689, and maintained their allegiance to James II / VII and his successors. Although more episcopalians were willing to accept Anne after she acceded in 1702, many of these ministers continued to harbour Jacobite sympathies.<sup>12</sup>

Although the episcopalians' Nonconformity originated at the revolution of 1688–9, during the 1690s there were no widespread calls either for them to be legally tolerated as a separate church or for their

<sup>10</sup> Alasdair Raffe, 'Presbyterians and Episcopalians: The Formation of Confessional Cultures in Scotland, 1660–1715', *EHR* 125 (2010), 570–98; idem, *The Culture of Controversy: Religious Arguments in Scotland, 1660–1714* (Woodbridge, 2012), 48–50.

<sup>11</sup> Ben Rogers, 'Religious Comprehension and Toleration in Scotland, 1689–1712' (PhD Thesis, University of Edinburgh, 2019), 116–29.

<sup>12</sup> Bruce Lenman, 'The Scottish Episcopal Clergy and the Ideology of Jacobitism', in Eveline Cruickshanks, ed., *Ideology and Conspiracy: Aspects of Jacobitism, 1689–1759* (Edinburgh, 1982), 36–48; Tristram Clarke, "'Nurseries of Sedition?': The Episcopal Congregations after the Revolution of 1689", in James Porter, ed., *After Columba, after Calvin: Religious Community in North-East Scotland* (Aberdeen, 1999), 61–9.

suppression. Instead, the Scottish authorities promoted comprehension throughout the 1690s, seeking to receive episcopalians into the church under a series of settlements. However, as the government's approach to comprehension became associated with the strict terms that the presbyterians desired, which involved ministers having to accept presbyterianism as the only government of the church and subscribe the Westminster Confession as the confession of their faith, the many episcopalians who would have conformed under a flexible comprehension settlement became alienated. By 1703 many episcopalians were practising Nonconformity and an organized tolerationist movement of ministers, politicians and pamphleteers had emerged to call for the legal protection of their co-religionists as a separate church. A toleration act to this effect was proposed to the Scottish parliament in May 1703.<sup>13</sup> The act failed but episcopalian toleration became a recurrent presbyterian fear in the years that followed.

During the debates over the union treaty late in 1706, many presbyterians feared that a British parliament could impose toleration of the episcopalians on Scotland. Writing to Lord Godolphin, the English lord treasurer, on 22 September, John Erskine, earl of Mar and secretary of state for Scotland, stated that Sir James Steuart of Goodtrees, who was Scotland's lord advocate or chief public prosecutor, opposed the union treaty because of 'the loosening of our sovereignty & [a fear] that a toleration will ruin Presbitrie'.<sup>14</sup> In a series of addresses to the Scottish parliament during its debates over the treaty in November, the commission of the General Assembly, which was the standing committee of the Church of Scotland's main legislative body, presented a variety of arguments to outline the dangers of a British parliament. The commission's first address against the union asked that the church's presbyterian structure and the Westminster Confession be reaffirmed and 'that this Provision should be held and observed in all time coming as a fundamentall article and Essentiall Condition of any Treaty or Union'.<sup>15</sup>

This address was influential because its demands formed the basis of the Act for Securing of the Protestant Religion and Presbyterian

<sup>13</sup> *An Act for the Toleration of the Episcopal Church in Scotland which was thrown out by the Scotch Parliament An. 1703* (Edinburgh, 1703); Clarke, 'Scottish Episcopalians', 135–8.

<sup>14</sup> London, BL, Add. MS 28055, fol. 388<sup>r-v</sup>.

<sup>15</sup> Karin Bowie, ed., *Addresses against Incorporating Union, 1706–1707*, Scottish History Society 6th series 13 (Woodbridge, 2018), 40–1.

Church Government that Anne's Scottish administration proposed on 4 November 1706 to address presbyterian concerns. This act resolved most of the issues that the commission had raised in its address of 27 October. It reaffirmed the act of 1690 that had re-established presbyterian government and the Westminster Confession, and asserted that these standards would remain secured under a union with England. Anne's government hoped that the act would encourage the Church of Scotland to support the union, but the commission raised further issues in its second address to parliament on 8 November. This asked whether the Church of Scotland would be treated as a Nonconformist church by its English counterpart or whether it would be treated equally in a bi-confessional British state. It also pointed out that presbyterians could not accept that churchmen held civil power and that in the British parliament 'twenty six prelates are to be Constituent members and Legislators'.<sup>16</sup> A draft of the second address stated that this dangerous parliamentary situation meant that episcopalian toleration 'shall be Judged in point of civil policy in a parliament of Brittain necessary and inavoidable'.<sup>17</sup>

Sir James Ogilvy, earl of Seafield and lord chancellor of Scotland, argued that these hostile presbyterian sentiments motivated parliament to pass the Act for Securing of the Protestant Religion. He informed Godolphin when the act was first read on 11 November that its purpose was 'to exclude the power of the Parl[i]ament of Britain to grant a toleration within Scotland'.<sup>18</sup> John Dalrymple, earl of Stair, who was one of the Scottish commissioners who negotiated the treaty, had a different view. He informed Robert Harley, the English secretary for the northern department, on 12 November that the act provided no 'distinct exemption from the power of the Parliament of Britain'.<sup>19</sup> Stair's interpretation reflected the widespread belief, after this act was ratified together with the Treaty of Union on 16 January 1707, that the British parliament's sovereignty was unlimited and could not be restricted by previous Scottish statutes.<sup>20</sup>

<sup>16</sup> Bowie, ed., *Addresses*, 48–9; Alasdair Raffé, 'Petitioning in Scottish Church Courts, 1638–1707', *Parliaments, Estates & Representation* 38 (2018), 323–36.

<sup>17</sup> Bowie, ed., *Addresses*, 55.

<sup>18</sup> BL, Add. MS 28055, fol. 338<sup>r</sup>.

<sup>19</sup> *Report of the Manuscripts of the late Allan George Finch, Esq., of Burley-on-the-Hill, Rutland*, vol. 3, HMC 71 (London, 1957), 348.

<sup>20</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500–2000* (Cambridge, 2008), 101–15.

The issue of parliamentary sovereignty worried some presbyterians, such as John Stirling, principal of the University of Glasgow, who feared that it allowed the Westminster parliament in its capacity as the British parliament to overrule the Act for Securing of the Protestant Religion. John Barrington Shute, a leading English Nonconformist and a correspondent of Stirling, addressed the principal's concerns in a letter of 13 March. Shute disagreed with the widespread notion that parliament's sovereignty was unlimited and offered two reasons why the union had provided the church with an 'Indefeasible Security'. First, he argued that the act's authority 'in Law cou[ld] not be defeated or destroy[e]d & cou[ld] only be broke by violence & force'. Second, since the union treaty had been negotiated by Scotland and England, 'nothing can destroy this Contract by [th]e consent of [th]e Partys contracting'. Once the government was united, there was 'no way nor method in Law of defeating [th]e Security the Church ... gain[ed] by the Union'.<sup>21</sup>

This approach was not shared by the many presbyterians who feared that the sovereignty of the British parliament meant that it could still introduce legal toleration of episcopalianism in Scotland. This is evident in the work of James Webster, an anti-union presbyterian, in his pamphlet *Lawful Prejudices against an Incorporating Union with England* (1707). Webster rejected the idea that the act of 1706 prevented a British parliament from acting against the church. A British parliament, he argued, could 'overturn our Church constitution, when they shall think it convenient'. He felt that 'a Toleration will certainly follow the Union' and 'open the Sluice, and let in a Deluge of Errours and Heresy'.<sup>22</sup>

#### THE APPEAL

The Greenshields appeal exacerbated presbyterian fears about the prospect of legal toleration being imposed upon them. It began at a time when many presbyterians questioned the legal security that they held under the union. The failed Jacobite invasion in February 1708 and the resulting crackdown on episcopalian worship by Stuart of Goodtrees in the following months revealed how extensive

<sup>21</sup> Glasgow, Glasgow UL, Murray MS 651, unpaginated.

<sup>22</sup> [James Webster], *Lawful Prejudices against an Incorporating Union with England* (Edinburgh, 1707), 9–11; Raffe, *Culture of Controversy*, 79.

episcopalian Nonconformity had become. In March 1708 seventeen episcopalian ministers were prosecuted by Edinburgh magistrates for keeping illegal meeting houses.<sup>23</sup> Furthermore, the abolition of the Scottish privy council the following May forced the Scottish religious authorities to rely on the Scottish courts to prosecute episcopalian Nonconformists.<sup>24</sup>

The church's precarious position after the union was behind the commission of the General Assembly's decision to issue the 'Act against Innovations in the Worship of God' on 5 August 1709. The act asserted that the Act for Securing of the Protestant Religion had been 'violated by Persons of known Disaffection to the present Establishment'. These ministers had introduced 'Set Forms, Rites and Ceremonies ... contrary to the foresaid Purity and Uniformity'.<sup>25</sup> This act formed the basis of the presbytery of Edinburgh's case against Greenshields when he was cited before them later that year. However, the act was not supported by parliamentary legislation and this would be highlighted by Greenshields and his allies when the controversy grew.

The main issue of the controversy was the claim by Greenshields that there was no civil law in Scotland that proscribed private episcopalian worship and the use of the English Book of Common Prayer, and that he had not violated an earlier Scottish 'Act anent Intrusion into Churches' from 1695 that prohibited ministers intruding on vacant parishes. This claim, as Stephen has shown, was asserted from the beginning of the controversy. In the published account of his appearance before the presbytery in September 1709, Greenshields stated that he had been asked to minister 'by some English Gentlemen, who then attended Her Majesty's Service in Edinburgh, and others of the Communion of the Church of England'. He argued that he had qualified in Ireland by taking the required oath abjuring the Stuart Pretender and insisted that there was 'no Law, which prohibited or restrained the Exercise of the Worship of the Church of England in Scotland, in a private manner'.<sup>26</sup> By 'a private manner' Greenshields meant the private

<sup>23</sup> *A Narrative of the late Treatment of the Episcopal Ministers within the City of Edinburgh since March last 1708* (London, 1708), i–iii, 4–8; Clarke, 'Scottish Episcopalians', 190–2.

<sup>24</sup> P. W. J. Riley, *The English Ministers and Scotland, 1707–1727* (London, 1964), 92–5.

<sup>25</sup> *Acts of the General Assembly of the Church of Scotland, 1638–1842* (Edinburgh, 1843), 418–19.

<sup>26</sup> *The Appellant's Case* ([London?], 1710).



household to which he ministered. However, his acknowledgement that he had taken the abjuration oath was important because many episcopalians feared that it could be imposed on Scotland. The oath, which had been enacted by the English and Irish parliaments in 1702, required ministers to swear allegiance to Anne, abjure the Jacobite pretender and promise to support the Hanoverian succession.<sup>27</sup> These requirements challenged the episcopalians' Jacobite sympathies and set Greenshields apart from his co-religionists.

Greenshields expanded on these points in the bill of suspension that he presented to the Court of Session in November 1709 challenging the magistrates' decision. He insisted that the statute of 1695 against intrusion did not apply to him because he had not intruded upon a vacant parish and had only privately ministered 'to those of the same Communion with himself'.<sup>28</sup> When the session ruled against him, Greenshields maintained that he had never 'invaded the Sacred Office of the Ministry' and that using the Book of Common Prayer did not 'clash with any Law, establishing Uniformity of worship, or the Act of Union'. These reasons, he argued, proved that his confinement had 'no foundation in Law' and 'in a United Kingdom, should be far less used than formerly'.<sup>29</sup>

When Greenshields made this argument, he presented himself as an atypical episcopalian who stood out from the stereotyped image that the authorities feared. He was not a Jacobite, he had qualified himself by taking the required oaths, and he only wanted to provide the religious services that his congregation desired. This view, as Clarke has demonstrated, was promoted by tolerationist supporters of Greenshields to convince tory and high church groups in England to support legal toleration for the episcopalians.<sup>30</sup> These groups eventually gained the ascendancy after Anne invited Harley to form a tory ministry in May 1710 and the tories, who now included numerous Scottish MPs from the largely pro-episcopalian shires, won a majority in that year's general election. Goodtrees, whose removal the tories had long desired, was replaced as lord

<sup>27</sup> *Statutes*, 7: 747–50; Raffe, *Culture of Controversy*, 90–1.

<sup>28</sup> Tompson, 'Greenshields', 114.

<sup>29</sup> *To the Right Honourable Lords of the Council and Session: The Petition of Mr James Greenshields Minister of the Gospel* ([Edinburgh?], 1709), 3–5.

<sup>30</sup> Clarke, 'Scottish Episcopalians', 254–7.

advocate by Sir David Dalrymple who, despite his sympathy for the episcopalians, did not support their legal toleration.<sup>31</sup>

One anonymous account of the controversy emphasized Greenshields's atypicality and insisted that his co-religionists had always possessed the right to use the English Book of Common Prayer. The author claimed that episcopalians had been prosecuted in the 1690s because 'they were not Qualified to the Government', but that they had never been cited before the authorities for preaching a heterodox religious message. The author thus argued that the authorities were hypocrites for prosecuting Greenshields for using the Book of Common Prayer even though he had qualified himself by taking the oaths of allegiance and abjuration.<sup>32</sup>

There were many conflicting opinions as to how the Lords would interpret the appeal. Writing in February 1710, Mar asserted that if the Lords had immediately considered the appeal 'it would have been reversed & that would have given an absolut toleration in Scotland without any restriction'. However, the whig majority in the Lords had initially considered the appeal as a local dispute, and they did not issue a decision on it. Mar also discussed the possibility that the controversy could be used as a pretext to introduce legal toleration through statute. He argued that if the church was 'so wise not to oppose a legall limited toleration it would be the greatest security they ever had'. He believed that if the presbyterians continued with persecutory activities 'a toleration as is here [in England] must cure it'.<sup>33</sup> Mar was referring to a Scottish version of England's Act for exempting their Majestyes Protestant Subjects dissenting from the Church of England from the Penalties of certaine Lawes (1689), which had granted legal protection to Nonconformist ministers if they took the oath of allegiance and subscribed thirty-six of the

<sup>31</sup> Daniel Szechi, 'The Politics of Persecution: Scots Episcopalian Toleration and the Harley Ministry, 1710–12', in W. J. Shiels, ed., *Persecution and Toleration*, SCH 21 (Oxford, 1984), 275–87; David Wilkinson, 'Dalrymple, Hon. Sir David (c.1665–1721)', in D. W. Hayton, E. Cruickshanks and S. Handley, eds, *The History of Parliament: The House of Commons 1690–1715*, 5 vols (Woodbridge, 2002), online at: <<https://www.historyofparliamentonline.org/volume/1690-1715/member/dalrymple-hon-sir-david-1665-1721>>, accessed 2 September 2019.

<sup>32</sup> *A True State of the Case of the Reverend Mr. Greenshields, now Prisoner in the Tolbooth in Edinburgh* (London, 1710), 5–6.

<sup>33</sup> Edinburgh, NRS, Correspondence of Lord Grange, GD124/15/975, 1.

Thirty-Nine Articles of the Church of England.<sup>34</sup> To satisfy the Church of Scotland, it is likely that a Scottish version of this act would have used the Westminster Confession as a doctrinal test, under which most episcopalians would not qualify due to their reluctance to accept its particular definition of orthodox Calvinism.<sup>35</sup>

Many episcopalians came out in favour of the use of the English Book of Common Prayer and used arguments like those of Greenshields to defend it in response to a wider crackdown on their worship. In May 1709, the northern circuit court indicted forty episcopalians from Banff and Aberdeen for charges that included intrusion, the erection of illegal meeting houses and using the Book of Common Prayer. The prosecutions were based on the Act for Securing of the Protestant Religion and earlier legislation that had been passed by the Scottish parliament, which the court believed required all ministers to adhere to the uniformity of worship that was prescribed by law.<sup>36</sup> In a petition to the queen, the following year, the episcopalian ministers and laity of Banff complained of the court's actions and of the 'usurpation of the presbyterian party over our persons and Consciences'.<sup>37</sup>

Despite the growth in demand for the prayer book liturgy, Daniel Defoe urged the episcopalians not to push for toleration. In his pamphlet, *Greenshields out of Prison and Toleration settled in Scotland*, written shortly after Greenshields was released from the tolbooth in 1710, Defoe argued that the Act for Securing of the Protestant Religion meant that the English should not expect the 'People of Scotland should Admit, Receive, or Tolerate, the English Liturgy among them'.<sup>38</sup> He was of the opinion that Scotland's long history of hostility towards the Book of Common Prayer, combined with its lack of official recognition in Scotland (with the exception of Charles I's ill-fated attempt to introduce a Scottish Book in 1637), meant that the Scots would not accept it. It is unclear whether this was Defoe's own view, or why he denied the obvious fact that the

<sup>34</sup> *Statutes*, 6: 74–9; Ralph Stevens, *Protestant Pluralism: The Reception of the Toleration Act, 1689–1720* (Woodbridge, 2018), 13–18.

<sup>35</sup> Rogers, 'Religious Comprehension', 212–26.

<sup>36</sup> NRS, Mar and Kellie Judicial Papers, GD124/6/171, 1; Stephen, 'English Liturgy and Scottish Identity', 69–74.

<sup>37</sup> NRS, Episcopal Chest Manuscripts, CH12/12/1855.

<sup>38</sup> [Daniel Defoe], *Greenshields out of Prison and Toleration settled in Scotland, or the Case of Mr. Greenshields further examined* (London, 1710), 6.

Book of Common Prayer was being used in Scotland. Robert Harley, Defoe's former patron, may have employed him to produce this pamphlet to discourage the episcopalians, and their tory allies in his own party, from offending the Church of Scotland by using the controversy to push for toleration.<sup>39</sup> To this end, Defoe outlined two arguments against legal toleration if it should be enacted by parliament in response to the controversy. First, if legal toleration should be introduced, then Defoe argued that it would not be given 'without the Incumbrance of Oaths'. The episcopalians who would take such oaths would be abandoned by their congregations and it would create a 'worse Confusion than there is now'. Second, any toleration settlement would be rejected by the nonjurors because it would be 'clog'd with Oaths, Abjurations, praying for the queen, and submitting to the Presbyterian Church in Discipline'.<sup>40</sup> The Greenshields controversy, Defoe argued, did not justify tolerating the use of the Book of Common Prayer in Scotland or, indeed, the episcopalians in general.

Defoe's arguments were shared by some of the Scottish bishops. On 2 November, Bishop Alexander Rose of Edinburgh wrote to Archibald Campbell, who would later be consecrated as a nonjuring Scottish bishop, to distance himself from Greenshields. He acknowledged that Greenshields had initially approached him after being asked by Edinburgh's English residents 'to perform divin[e] office by the English liturgy'. Rose reported that he had asked Greenshields to consider 'who ar[e] to be constituents of y[ou]r meeting house', but refused to let his answer be considered as a licence. He felt that his actions 'cannot infer anything like an allowance or licence to Mr Greenshields'.<sup>41</sup> John Sage, who had been consecrated in 1705, made a similar point to Campbell on 18 November, but he felt that the imprisonment of Greenshields should not be used by the tolerationists.<sup>42</sup> Although Sage had supported toleration in 1703, he now insisted that the episcopalians 'do not want a Toleration'. 'No law', he argued, 'obliges us to be of the presbyterian communion, no law forbids Meeting houses, nay no law obliges those

<sup>39</sup> J. A. Downie, *Robert Harley and the Press: Propaganda and Public Opinion in the Age of Swift and Defoe* (Cambridge, 1979), 62.

<sup>40</sup> [Defoe], *Greenshields*, 9–11.

<sup>41</sup> NRS, Episcopal Chest, CH12/12/1815.

<sup>42</sup> Clarke, 'Scottish Episcopalians', 148.

who officiate in Meeting houses to Qualify'. Instead, the episcopalians wanted an 'Equitable Connivance' and should be allowed 'to enjoy what the Law allows us'. This allowance meant that 'no hot alarms shall be given to the Dominant Kirk ... so warm as those which must necessarily result from a formal Toleration'.<sup>43</sup> In short, Sage was happy with the de facto toleration that was permitted to episcopalians if they kept their heads down and did not provoke the authorities to implement the laws against intrusion.

Despite these arguments, the image of Greenshields as an atypical episcopalian was used effectively by his supporters to convince the Lords to back the appeal. Bishop William Nicolson of Carlisle, who was one of his English supporters, in a testimonial that he wrote for Greenshields to present to Archbishop Tenison when he arrived in London in September 1710 to further his appeal, wrote that the character of Greenshields was 'widely different from that of a daring and seditious incendiary'.<sup>44</sup> Although Nicolson was a low church bishop, the positive image of Greenshields that he and others of his churchmanship portrayed built on a pre-existing sympathy towards the Scottish episcopalians within the Church of England that was shared by low and high church clerics. This sympathy was demonstrated when the bishops voted in favour of Greenshields when the Lords considered his appeal on 1 March 1711. Despite assertions from some influential Scottish peers, such as John Campbell, duke of Argyll, and his brother Archibald, earl of Ilay, that Greenshields's appeal violated the Act for Securing of the Protestant Religion, there was widespread agreement that it was legal.<sup>45</sup> Nicolson noted in his diary on 1 March that there 'was little or no Debate on the main Subject' and the Court of Session's verdict was 'unanimously reversed'.<sup>46</sup>

George Lockhart of Carnwath, MP for Midlothian and a committed Jacobite, outlined in a pamphlet two reasons why the Lords favoured Greenshields. First, they viewed the appeal as 'a Civil Cause, arising from the Nature Rights of Mankind, to worship God after any manner not expressly prohibited by the Laws of the

<sup>43</sup> NRS, Episcopal Chest, CH12/12/1980.

<sup>44</sup> Clyde Jones and Geoffrey Holmes, eds, *The London Diaries of William Nicolson, Bishop of Carlisle, 1702–18* (Cambridge, 1983), 551.

<sup>45</sup> Clarke, 'Scottish Episcopalians', 245–7; Tompson, 'Greenshields', 114–15.

<sup>46</sup> Holmes and Jones, eds, *London Diaries*, 553.

Land'. The presbytery of Edinburgh's reliance on the city's magistrates and the Court of Session to prosecute Greenshields 'pla[i]nly shew[e]d the case is of Civil, and not Ecclesiastical' concern. Second, the Lords questioned whether any laws in Scotland prohibited publicly accessible episcopal meeting houses. They acknowledged that the basis of the prosecution had been Greenshields's alleged violation of the statute against intrusion but decided that this charge was false because the act did not cover episcopalians who preached in private meeting houses. Since Greenshields had not intruded into a vacant parish, there was no legal basis for the presbytery to act against him.<sup>47</sup>

According to Lockhart, these reasons motivated one unnamed Scottish peer to argue that the Lords should favour Greenshields because if they did not it would 'encourage the Presbyterian Faction to continue, nay, encrease their persecuting Temper'. The whig lords, in Lockhart's mind, were trying to appease Scotland's presbyterian establishment at the expense of the episcopalians. In an address that he claimed to have given to the Lords during the debate, he assured them that the presbyterians' strength was 'nothing but a Bugbear to frighten Children and Strangers'. This address was challenged by an unnamed English lord who stated that if Greenshields's appeal was dropped the queen would issue instructions to prevent the Scottish authorities from acting against episcopal meeting houses. This was in turn countered by the Scottish lord, who insisted that there was no law in Scotland upon which such instructions could be based and that any claim that such a law existed was an 'Old Weather-beaten Argument'.<sup>48</sup> This view was supported by most of the house when they voted by 68 to 32 in favour of Greenshields. However, Argyll and Ilay were outraged by the decision and walked out of the chamber after their attempt to call for an adjournment failed.<sup>49</sup>

<sup>47</sup> [George Lockhart], *The Present State of Mr. Greenshields Case, now before the Right Honourable the House of Lords: In a Letter from a Commoner of North-Britain* (London, 1711), 5–7; Daniel Szechi, 'Lockhart, George (1681?–1731)', *ODNB*, 23 September 2004, online at: <<http://www.oxforddnb.com>>, accessed 2 September 2019.

<sup>48</sup> [Lockhart], *Present State*, 13.

<sup>49</sup> Tompson, 'Greenshields', 113–14.

## THE LEGAL IMPLICATIONS

The Lords' decision sparked a debate on whether episcopalians now enjoyed legal protection to erect meeting houses and use the English Book of Common Prayer. John Anderson, the minister of Dumbarton, told Principal Stirling on 18 March that the 'hinge of the controversie' rested on whether to allow the episcopalians 'liberty' to use the English liturgy and to plant their own ministers.<sup>50</sup> Writing after the Lords' decision, Ilay stated that 'there stands at present a toleration in Scotland, decreed by a sentence and unlimited either in point of faith, or qualifications whatsoever'.<sup>51</sup>

One proposal, prepared for Archbishop Tenison just after the Lords' decision and which Clarke attributes to Greenshields, argued that the 'Decree of the Lords of Parliam[en]t is not sufficient to protect the Clergy in the use of the English Liturgy'. Instead, the proposal argued that meeting houses and the Book of Common Prayer should be protected by an act of parliament. It asserted that Edinburgh should have six meeting houses and that the towns, shires and former episcopal seats should have one each. This would lead to a total of forty houses, that would be supported by private collections and the former bishops' rents that would be granted to them by parliament. The religious qualification, the proposal suggested, should 'be the same as here in Engl[an]d', but it did not clarify whether episcopalians would qualify by accepting the Thirty-Nine Articles or the Westminster Confession. The proposal's civil qualifications were more stringent and challenged the episcopalians' Jacobite sympathies by requiring them to take the oath of abjuration.<sup>52</sup>

From March 1711 onwards there was an increased local demand for episcopalian worship and the Book of Common Prayer in their traditional areas of strength. An undated episcopalian petition to Anne by unnamed episcopalian heritors in the north-east asked her to protect their meeting houses against the presbyterian judicatories and stated that their request was supported by many parishes that

<sup>50</sup> Glasgow UL, Murray MS 650, unpaginated.

<sup>51</sup> Joseph McCormick, ed., *State Papers and Letters addressed to William Carstares, Confidential Secretary to King William during the whole of his Reign* (Edinburgh, 1776), 791.

<sup>52</sup> LPL, Papers of Thomas Tenison, MS 954(32), 'Some proper Methods to circulate the English Liturgy in Scotland', n.d.; Clarke, 'Scottish Episcopalians', 328–30.

'have already the English worship [settled] amongst [the]m, as in Old Aberd[ee]n Peterhead & Fraserburgh'. The petitioners insisted that they would not disturb 'her Maj[esties] Governm[en]t or the national Settlement of this Church'.<sup>53</sup>

The growth in demand for episcopalian worship and the liturgy alarmed the presbyterian authorities. Their concerns were allayed briefly when Steuart of Goodtrees was brought back as lord advocate in 1711. This caused the supporters of episcopalian toleration, such as Lockhart of Carnwath, to argue that a new wave of persecution was imminent, but the Lords' decision prevented the Scottish authorities from prosecuting episcopalians as they had done before.<sup>54</sup>

After the decision, many episcopalians started to argue that the Church of Scotland had no jurisdiction over them. On 12 November 1711, Henry Murray, an episcopalian in Dunkeld, was cited before the presbytery of Perth for intruding upon the parish, having his communicants kneel during communion, and introducing 'a Liturgy, and set Form, in the Publick Worship of God'. Murray, in his protestation against this citation on 21 November, reiterated the arguments that Greenshields had used. He denied the presbytery's authority to cite him and insisted that the statute against intrusion did not apply to him since he preached 'in a Meeting-House, and to a willing People'. Murray told the presbytery that if his actions were a crime it was 'purely Civil', and that the liturgy of the Book of Common Prayer was 'agreeable to the Word of God'. He reminded the presbytery that the Lords' decision in favour of Greenshields proved that 'where there is no Law there can be no Transgression'. Despite this, the presbytery deposed him on 10 January 1712.<sup>55</sup>

## CONCLUSION

On 3 March 1712, the British parliament passed the Act to prevent the disturbing of those of the Episcopal Communion in that part of Great Britain called Scotland in the Exercise of their Religious

<sup>53</sup> NRS, Episcopal Chest, CH12/12/1855.

<sup>54</sup> [George Lockhart], *A Letter from a Scots Gentleman residing in London, to his Friend in Edenborough* ([London?], 1711), 11–15; Clarke, 'Scottish Episcopalians', 287–8.

<sup>55</sup> *The Church of England still Persecuted, or the Case of Mr Murray, depos'd by the Presbytery of Perth, on the Tenth of January, for reading the English Service* ([Edinburgh?], 1712), 2–3.



Worship and in the use of the Liturgy of the Church of England.<sup>56</sup> The act resolved most of the legal ambiguities that the Lords' decision had revealed. Episcopalian ministers could erect meeting houses and use the liturgy if they qualified by swearing the oath of allegiance to Anne. However, the act's effectiveness was limited when Hlay and the whig lords inserted a clause requiring the swearing of the abjuration oath, effectively restricting the number of episcopalians who would qualify under it by requiring them to abjure the Stuart pretender. Despite this, the act ensured that a separate episcopalian church would be legally protected, and thus effectively ensured that the exclusive national status of the established Church of Scotland had ended.

The MPs who supported the act, such as Lockhart of Carnwath, had been some of the most ardent supporters of Greenshields, and their ability to argue that the episcopalians were being persecuted by a presbyterian established church convinced the Tories to support the legislation. The act confirmed the British parliament's legal authority as the ultimate arbiter of Scotland's religious affairs, but this authority had already been demonstrated by the Lords' decision to support Greenshields's appeal in March 1711. The Lords' decision had three legal implications for Scotland's religious affairs. First, it redefined 'intrusion', as it was classified under the Scottish statute of 1695, to mean a minister who was trying to take control of a vacant parish church, not one setting up a meeting house. Second, it affirmed that there was nothing to prevent episcopalians from using the English Book of Common Prayer. Third, since the liturgy was not proscribed by any civil law, it laid down that the Scottish courts were not allowed to act on behalf of the courts of the Church of Scotland. The kirk's discipline was restricted to its own members and this would be confirmed by the Toleration Act of 1712.

The Greenshields appeal reveals the legal complexities that surrounded the relationship between the emerging British state, the Church of Scotland and the nation's episcopalian minority. It showed that the British parliament was now the ultimate arbiter of Scotland's religious affairs, and that groups existing outside the established Church of Scotland could seek the state's recognition. The Lords' decision also provided a basis for the state's parliamentary sovereignty to be exercised decisively in 1712, when the Toleration Act

<sup>56</sup> *Statutes*, 9: 557–9.

was ratified despite widespread protests that it violated the union. Above all, the appeal demonstrates that the British state's authority to grant legal legitimation was a crucial factor in the recognition of religious pluralism in Scotland. This authority became more pronounced during the eighteenth century as parliament intervened more frequently in Scotland's religious affairs. The penal statutes that were introduced against the episcopalians after the Jacobite rebellions in 1715 and 1745, and their eventual loosening under the Episcopal Relief Act of 1792, show how the British state's legal authority normalized religious relations in eighteenth-century Scottish society.