The Lords thought the case properly fell under the Privy Council's jurisdiction, and therefore refused to sustain themselves judges to the reducing thereof.
Vol. II. Page 548.

1709. *November* 8 *and December* 30. JAMES GREENSHIELLS *against* The MAGISTRATES of EDINBURGH.

November 8.—MR James Greenshiells, having been an Episcopal minister in Ireland, and coming to Edinburgh, takes up a meeting-house, wherein he reads the English liturgy, with their service and ceremonies, for the use of the Englishmen and others that had not freedom to join in communion with the Scots Presbyterian church and their form of worship. The Presbytery of Edinburgh looking on this as a derogation and innovation to their establishment and the purity of their discipline, they summoned him to compear by their beadle; who declines their jurisdiction and authority, as noways judges to him, who was of another communion, *viz.* of the Church of England; and that the Union had incorporated the Episcopal church of Scotland, and made it a part of the national church of England. And being asked by what warrant he assumed the power to preach, he produced a patent or diploma from Mr James Ramsay, late Bishop of Ross, in 1694, making him a presbyter *secundum ritus et formas ecclesiæ Scoticanæ.* Which ordination, flowing from an abdicated and exauctorated bishop, five years after their abolition, could be no warrant nor legal institution; whereupon they discharged him to exercise any part of his ministerial function within their bounds; and he disobeying the next Sunday after his prohibition, the Magistrates of Edinburgh called him, and required him to desist; which he refusing, they put him in prison in September last, and offered, on his enacting himself to forbear, then to set him at liberty. But he, not complying, gave in a bill of suspension to the Lords, containing a charge to set at liberty, on thir reasons:—That, by the 16th Act of the meeting of the Estates in 1689, all ministers, either in churches or meeting-houses, are to be protected; and that there is no law empowering the magistrates to imprison any for using the service and liturgy of the Church of England. And the dissenting Presbyterian ministers in Ireland, (though they enjoy not that toleration given by Act of Parliament in England,) are not disturbed by the Episcopal clergy there; and, by the same rule of parity, the Presbyterian brethren in Scotland should give the same tender forbearance they meet with there. *2do*, He is fully qualified to the civil government, by taking the oaths to the Queen, and the abjuration against the Pretender; seeing they can neither charge him with error in doctrine nor immorality in his life and conversation: And he ought to have the benefit of the 27th Act of Parliament 1695, giving protection to all ministers who shall qualify themselves, by swearing to the civil government, which he has done; and the 6th Act, in 1701, has provided for our personal liberty, as one of the most dear and precious interests of mankind. And though his ordination be from an outed bishop, yet that no more invalidates it than the Presbyterian ordinations were in the time of Episcopacy; for though they were declared null by the 9th Act of Parliament 1672, yet the Presbyterian principles then taught, that no civil legislative power could deprive them of the right of continuing and ordain-

ing the succession, that being radically inherent in their intrinsic power, and so purely ecclesiastic, that no sanction of the supreme magistrate could divest them thereof; and if this Presbyterian principle and practice be good, then, by the same rule, a deposed bishop retains still the character and power of ordination, though deprived of the benefice and emoluments; otherwise, many of the Presbyterian ministers now preaching in pulpits, who had no other ordination, but when it stood condemned by law, should be no lawful ministers.

ANSWERED for the Magistrates,—That the Act of the Estates in 1689, and the Act 1695, can do him no good; for they concern ministers then in actual possession of churches, which he was not. And the 23d Act 1693 does plainly cut him off; for none are to enjoy the protection of law but they who subscribe the Westminster Confession of Faith, which he has not done. And it is a vain imagination to think a deposed bishop retains the power to ordain; for that were to perpetuate the schism. And the nonjurant bishops in England do not so much as pretend to it; so that this volunteer is truly no churchman at all, but a pure layman. And their consolidation with England is a sophistical notion, the Union establishing the Presbyterians; and no other set of a church has a legal being and existence here, but them only. And there needs no law condemning the English service, for the introducing the Presbyterian worship explodes it as inconsistent; and *l. 2, D. de Jurisdict.* says well, *Concessa jurisdictione ea omnia concedi videntur sine quibus exerceri non potest.* And the bishops can pretend to no jurisdiction but what they derived from the crown and the Acts of Parliament restoring them in 1662; so that they stood more *jure Jacobi et Caroli* than *jure divino*. And even the motive introductory of Presbytery in 1689 was the inclinations of the people; so both owe their footing to the Acts of Parliament. And though this seem Erastian, yet Holland and all the wise governments abroad practise it.

It was urged, If an abdicated bishop could ordain, what hindered an abdicated king to give commissions, both civil, military, and ecclesiastic? And yet the accepting any of these would be treason.

The generality of the Lords regretted the man's case; but thought his ordination illegal, though churchmen be unwilling to subject that question to the cognizance of civil judges, as without their sphere; and therefore refused to set him at liberty, unless he enacted himself to forbear the English service, in the terms of the Presbytery's and Magistrates' sentence.

Vol. II. Page 523.

December 30.—Mr Greenshiel's bill of suspension against the Magistrates of Edinburgh, mentioned *supra*, 8th November 1709, being refused, he gives in a new bill, enlarging his former grounds of law; and craving liberation, seeing there was no law nor Act of Parliament in Scotland against reading the English service-book; and that the power of ordination is an indelible character, and could not, by abolition of bishops, be taken from them. And, at worst, the bishop was a presbyter, and so might, with the concourse of other presbyters joining with him, give orders; which was as good as the Presbyterian ordination.

Some alleged, the want of a prohibitory law was not warrant enough; for if a Mahometan Mufti should set up to teach the Alcoran in Edinburgh, it would be no excuse for him to say there is no law in Scotland against the Alcoran. Others thought this comparison too wide. However, Mr Greensheil's bill being

refused the second time, he gave in a protest for remeid of law to the Queen and House of Peers in England. *Vol. II. Page* 549.

1709. *December* 30. SIR DAVID DALRYMPLE of HAILLS *against* ROBERT HEPBURN of BEARFORD.

I REPORTED Sir David Dalrymple of Haills against Robert Hepburn of Bearford. The deceased Viscount of Kingston, as heritor of Haills, intents a reduction and improbation against the vassals thereof in 1666; and, amongst others, calls Bearford's father, who, to stop certification, produces a disposition to the lands; and then, on the foot of Kingston's act, there is a receipt in 1667, bearing, that John Cochran, servant to Mr Alexander Seton, advocate, for my Lord Kingston, the pursuer, had borrowed up the disposition produced for Bearford, and obliged himself to reproduce it. This process lies over all Kingston's time, and Sir James Stanefield's, who purchased these lands; and at last Sir David having bought them at a roup, he raises a transferring and wakening of Kingston's old reduction, and, amongst the other vassals, he insists against Robert Hepburn, now of Bearford, and craves certification for not production of the rights called for; who ALLEGED, You can have no certification against me, because my father produced already, and your author's advocate's principal servant took up my production, and never returned it; as appears by his receipt on the foot of your own act, standing entire to this hour unscored; and therefore, till you reproduce my papers, you are *in mala fide* to crave certification.

ANSWERED,—It is true, advocates and their servants have power, by custom and the daily practice of the house, to borrow up papers produced by the contrary party, to see what their client or employers have to say or object against the same, or if they can discover nullities therein. But that power has its limitations and restrictions; for an advocate may not defer back an oath referred to his client's oath, unless he have a special mandate for that effect, showing the client declines to swear upon that point himself; neither can he cede or renounce his employer's rights, without a warrant in writ; and though the borrowing up papers requires no special mandate, but stands upon his privilege *ratione officii et muneris publici*, yet that can never empower him to keep them for months, sessions, and years; which were of the most dangerous consequence and importance to the lieges, as here it is forty years since the disposition was borrowed up. And it is impossible Bearford would let his papers lie so long, but certainly has got it back, only the receipt has been forgot to be scored, as frequently falls out where the subscriber is dead. And if Bearford neglected to seek it, *sibi imputet*, seeing *factum cuique suum, et mora sibi nocere debet, non alteri;* and, *esto* the disposition were still in the field, what would it signify against an infeftment under the Great Seal, which can never miss to be preferred to a personal right?

REPLIED,—Cochran's receipt is as good as if it had been my Lord Kingston's; in which case *qua fronte* could he crave certification against a writ in his own hand? And as to the negligence, Bearford alleges his father died shortly after that production was made, and he was left a minor. And if it was *lata culpa*