burden. Had this been done in the same deed, it would have been clearly a burden. Why should its being in another deed make any difference?

ALVA. The intention of parties is plain. No one could pretend ignorance. All parties having interest supposed that there was a burden.

MONBODDO. In all the many cases quoted in the answers, there was merely a *power* to burden: here an *exercise* of the power.

JUSTICE-CLERK. The meaning of the clause is, that, if a deed is executed, there shall be a burden.

PRESIDENT. I thought the cause clear. There is no actual burden, but merely a power of creating a burden.

On the 5th July 1774, "the Lords found that the 8000 merks disponed by Mary Crawford to her daughters, was moveable *quoad* the said daughters, and descended to their nearest of kin, and not to their heirs;" adhering to Lord Kennet's interlocutor.

Act. R. M'Queen. *Alt.* Ilay Campbell.

Diss. Kaimes, Alva, Monboddo.

1773. *December* 8. LORD FREDERICK CAMPBELL, Lord Register, *against* DAVID SCOTT of Scotstarvet, Director of the Chancery.

REGISTER—CONSUETUDE.

The Custody of the Records of the Great Seal in Chancery appertains to the office of the Lord-Clerk-Register.

[*Faculty Collection, VI.* 233; *Dictionary,* 13,531.]

HAILES. I should be sorry if the judgment in 1733 were to be considered as a *res judicata.* I must be permitted to say that the case was carelessly argued in 1733. The lawyers for the Lord Register, instead of urging ancient practice, amused themselves with establishing the antiquity of the office of Register by the testimony of the laws of Malcolm M'Kenneth. I do not think that the judgment 1733, in a possessory action, can be held as a *res judicata* against the present Lord Register. I see nothing but late custom on the side of the Director of the Chancery. I do not see what right he has to give extracts which ought to bear faith in judgment on the side of the Register. I see ancient practice, and a statute tending to prove that the King's Records ought to be in the custody of the King's Register.

ALVA. A *res judicata* is not so strong in questions between public officers, as between private persons. The cause will depend upon the interpretation of the Act 1685.

GARDENSTON. The method used by Lord Marchmont, in 1733, was the same as had been used by Sir George Mackenzie, and it was a proper

one. I have a great regard for the judgment of this Court. But what determines one is the long usage. Usage has great effects: it is the peculiar excellence of our law that by it the lieges have a sort of legislative capacity in making and unmaking laws. In the case between *Weddell* and *Inglis, clerks of the bills,* long usage was found sufficient to vary the original rights of office. Long usage has set aside the law of burghs, as laid down by statute. Had it been shown to me that the disuse of lodging the records of the Register had been productive of inconveniences, I should hesitate, But nothing of this nature appears. I see a constant usage since 1646. There is no occasion for the Courts interposing to root up an usage so inveterate.

COALSTON. No part of our law is more wisely calculated than that which provides for the Records, and appoints them to be transmitted from time to time into the General Register. I shall therefore always give a liberal interpretation to the statute 1685. I think this action still competent upon this rule, that every *res judicata* may be overturned upon new documents. The cause was not properly stated in 1733: the lawyers *there* were more anxious to show their learning than to go into the cause. It appears plain, from the Act 1685, that all registers ought to be transmitted to the General Register. If this question had occurred recently after 1685, there could have been no doubt. The only difficulty is from the usage since 1685. I doubt whether the plea from usage be good in a matter of police: the neglect will not abrogate the statute. If a Lord of Regality should have neglected to transmit his register, that would not abrogate the general law, which requires it to be transmitted.

JUSTICE-CLERK. By the common law of the realm, every part of the constitution, particularly the nature and extent of offices and jurisdictions, may be abrogated by usage. The Act 1685 seems to proceed on this principle. It only speaks of clerks who had been in use to transmit their registers. If the Lord Register at that period had thought his power was such, he would have demanded the charters from the Chancery; but he thought he had no power, and therefore never demanded them. If it could be shown that the judgment 1733 had been pronounced upon error, the argument against it would be cogent. The cause was perhaps not fully argued,—but the material thing, the usage since 1646, was urged.

KAIMES. The judgment 1733 is no more than an interlocutor in a possessory action; besides, it was founded on error, and error can never sanctify. We have it from the civil law, that an error in fact renders a decree *ipso jure* null. The question is, Whether the Chancery is under the rule, or under the exception in the statute 1685. To clear this, we have *first* a delivery of the records for *eight* years, actually made to the General Register. The question is, How came they there? I answer, regularly; because the contrary is not proved *Secondly,* The warrant of the Court of Session in 1683, against which the Director of the Chancery said nothing, though he must have known of it. The Court allowed the charters in the Chancery to remain *there* for *five* years; then came the Act 1685, which changed *five* into *ten* years: *this* takes away all consuetude prior to 1685. I think nothing of consuetude since that time.

ELLIOCK. Of Lord Kaimes's opinion, for the reasons given by him. Great inconveniences would arise from a contrary practice. The Director of the Chancery may issue a *vera copia,* but he cannot issue an extract of a charter.

AUCHINLECK. I know that at present both offices are in very good hands. It is not alleged on the part of the Register that *retours* were ever delivered to him. As to charters, originally there was no record of charters. In the ancient rolls charters are engrossed not according to their dates, but just as they were brought in. When our records were brought back, after the Restoration, they were put in the Register-house. *This* was proper, but the Lord Register did not consider them of any consequence. Then came the Act 1685, which refers to *use*. The question is, Whether the records of Chancery fell under the rule, or under the exception? I see no *use* previous to 1685.

KAIMES. No argument arises from retours, which were not a *nomen juris*, and were of no moment till the statute 16th Geo. II. concerning elections.

MONBODDO. The retours were first collected by the private authority of Sir John Scot of Scotstarvet in 1633.

On the 8th December 1773, "the Lords found that the Lord Register has a title to the custody of the record of charters."

Act. Ilay Campbell. *Alt.* R. M'Queen. *Rep.* Kaimes.

Diss. Justice-Clerk, Pitfour, Gardenston, Kennet, Auchinleck.

Non liquet, Monboddo. *Absent.* Strichen, Alemore, President.

1774. *July* 7. GARDENSTON. It is now admitted that the fees in the two offices are the same, so that the public is not concerned; it is merely a patrimonial dispute among officers. My difficulty lies on the judgment 1730.

HAILES. I thought, and still think, that the judgment 1730 does not stand in the way. It was a judgment *in possessorio* upon an erroneous state of facts. The Court had not the evidence of the Register's ancient possession which it now has. The more recent possession is not sufficient to abrogate a statute which, the fact being understood, seems express.

JUSTICE-CLERK. I was formerly of the opinion of the minority, but now have changed my opinion. We are called to give judgment on the sense of the statute 1685. From the nature of the Lord Register's office, he is the proper keeper of the Registers. There is now demonstrative evidence that the record of charters was formerly in the possession of the Register for a period of 204 years; that they were returned to him after the Restoration for a period of about ten years; then came the act of this Court in 1683; next the Act of Parliament 1685, executorial of the act of sederunt, only enlarging the time for lodging the records from *five* to *ten* years. The judgment 1730 was only *in possessorio*. The proposition which was not made good then, has been made good now.

PITFOUR. I was present at the pronouncing the former judgment. I thought it right. It will require stronger argument than any I have yet heard to make me think it wrong.

COALSTON. Two questions here. 1*st*, Import of the Act 1685; 2*d*, Whether any thing has since passed to make us determine otherwise than the tenor of the Act suggests. As to the first question, had it recently occurred, it would have been determined by practice, and *that* is now perfectly cleared. There is demonstrative evidence that the charters were in the possession of the Lord Register as of right. The records from 1628 were never conveyed to England,

and consequently could not be returned from England. The records since 1628, for many years, are in the hands of the Lord Register; therefore they are so *proprio jure*. As to the decision of this Court there is new evidence produced. *Instrumentum noviter repertum* will open up any decree. I should have had difficulty if every thing had been formerly before the Court. As to the practice of not transmitting the records, this seems to imply that the Act has gone into disuse. I doubt how far such an Act can go into disuse; but it is not said that the whole Act has gone into disuse: how can we hold that the Act has gone partly into disuse?

MONBODDO. The *res judicata* is no more than a judgment in a suspension. Had a declarator been repeated, the judgment would have been stronger; yet still that might have been set aside by new evidence. The Lord Register is the proper keeper of the records. The Director of the Chancery is no more than an officer who is a depositary. Prescription will not apply to this case.

AUCHINLECK. The favour of the present possessor is great; yet we must determine on the matter of right. I am now satisfied that the Lord Register has the right. [He was formerly of a contrary opinion, and it was owing to the reputation of his skill in antiquities that the cause came to this second hearing.] In ancient times the Lord Register gave *extracts*, which shows that he was possessed of *the principals*. The Director of the Chancery has been in the practice of giving what is called a *vera copia*. It is not difficult to discover *when* this phrase took place, and consequently when the practice began. Formerly retours were given back to the party; afterwards they were kept in Chancery, and a *vera copia* given to the party. This practice began about 1640. The first records of retours of Chancery are not according to their dates, but just as the Chancery happened to become possessed of them. The exemplars of charters were introduced in imitation of this. [The argument would have concluded just as well that the *vera copia* of a retour was an imitation of a *vera copia* of a charter.] The possession by the Director of the Chancery has been owing to the remissness of the Lord Register. It is high time to correct the error.

PRESIDENT. The only thing that difficults me here is the usage confirmed by the judgment of this Court. The case of *Inglis* and *Waddel*, determined here and in the House of Peers, went upon usage.

On 7th July 1774, "The Lords preferred the Lord Register;" adhering to their judgment of 8th December 1773.

Act. R. M'Queen. *Alt.* Ilay Campbell.

Rep. Kaimes.
