

R E G I S T E R.

1773. December 8.

LORD FREDERICK CAMPBELL, Lord Clerk Register of Scotland, and his Deputy-Keepers of the General Register-Office, *against* DAVID SCOTT of Scotstarvet, Esq. Director of the Chancery, and his Deputy.

No 1.

THE question between these parties regarded the custody of the records of the great seal.

By act 33, Parliament 1685, it is enacted, 'That all clerks within the kingdom, who keep such registers as are, or have been, in use to be delivered into the Clerk-Register, to be preserved in his Majesty's General Register-house, shall give in all their registers and books preceding the 1st August 1675, before the 1st of November 1685, to be kept by the clerk of the registers, and that, hereafter, they shall only keep ten years records in their own hands, for the use of the lieges, with certification, that those who fail, shall incur such pains and penalties as the Lords of Session shall think fit. And it is hereby declared, that no private grant, made by any Clerk-Register, shall excuse them from obedience to this act, which tends so much to the security of the people, and preservation of the records.'

The custody of the records of the Great Seal, in Chancery, appertains to the office of Lord Clerk-Register.

In 1731, the Earl of Marchmont, Lord Clerk-Register, applied for, and obtained from the Court of Session, a warrant upon the Director of Chancery, and his clerks and servants, to deliver into the General Register-house the whole records then lying in that office, from 1646 to 1660, from 1664 to 1668, and from 1670 to January 1721; all the records of Chancery prior to 1646, and likewise those from 1660 to 1664, and from 1668 to 1670, being then in the General Register.

The Director of Chancery, and his deputies, having been charged with hording, in virtue of this order, presented a bill of suspension to the Court, complaining of it as an encroachment on their privileges, and containing various reasons of suspension; to which answers were given in on the part of the Lord Register, and a remit granted to an Ordinary to discuss the reasons summarily.

No 1. And upon his report of the minutes of debate, the Court, 28th November 1732, "suspended the letters *simpliciter*."

From that time, matters were allowed to continue on the same footing, till the now pursuers, having made the necessary inquiries, and discovered evidence, in their apprehension, sufficient to counteract the plea which the Director of Chancery had maintained with success in the suspension, and, in particular, the denial, on his part, that the records of Chancery had ever been in use to be delivered into the Clerk Register's office, and thereby putting his defence on the implied exception in the act 1685, they, in October 1772, brought this process of reduction and declarator before the Court, against the present Director of Chancery, and his deputies and clerks, for setting aside the decree in the suspension, and for having it found and decared, that the records of the Great Seal, or records of Chancery, fall under the care and custody of the Lord Register, as much as any other record in the kingdom; and that the Director of the Chancery, for the time being, his deputies and clerks, are bound to deliver over the whole records now in their possession, retaining only ten years' records for the use of the lieges, in terms of the limitation in the statute 1685.

In defence against this action, the defenders *objected*, *imo*, *A res judicata*, in respect of the decree pronounced in the suspension, *anno* 1732.

Answered to this plea, *first*, As there was at that time no declarator on either side for ascertaining the rights of the parties, but only a charge at the instance of the then Lord Register, for enforcing a particular order, and a suspension of that charge, in name of the Director of Chancery, the Court had only to consider whether sufficient reason was shown for their staying execution on that particular charge. They accordingly did not find that either the one party or the other had the right to them; they only refused to award execution for enforcing the order they had given against the Officers of Chancery, which could not bar either party from afterwards insisting in a regular action, the procedure in the suspension being merely of a possessory nature.

In the *next* place, the parties here are not, in reality, the same with the parties to the decree of suspension in 1732; and, in the *third* place, even supposing the question of right to have fallen within the cognizance of the Court, a decree suspending the letters could not bar a new action at the instance of the chargers, more especially upon new matter, or upon evidence not formerly discovered. It is a well known rule, that competent and omitted is not good against pursuers; and so the Court has found in a variety of cases. See PROCESS, Section 20.

II. Upon the point of right, *argued* for the defenders; Although the decree 1732 were out of the way, the pursuer's own libel, which concludes against the defenders for delivery of the whole records from the year 1646, is an admission, upon their part, that, for the space of 126 years, the records of the Great Seal have at least not been in use to be delivered in to the General Register. This

must of itself be sufficient, independent of the decree 1732, to procure, in favour of the defenders, an absolvitor from the present action. No 1.

The defenders have no occasion to follow the pursuers in their condescendence given in, in order to show, that, prior to the year 1646, the records of charters had been in use to be brought into the General Register, which goes back for a long period, and of which it cannot be expected that the parties, at this distance of time, can give a proper history or explanation; but when it is seen, that, for the space of 126 years past, no delivery whatever has been made by the Chancery, it is sufficient to establish, that the records of the Great Seal do not fall under the enactment of the statute 1685, and that these records are none of those which the Lord Register has a right to call for, under the authority of that statute. A possession of much shorter endurance than 126 years is sufficient for explaining and ascertaining the rights of parties. Every thing must be presumed in favour of an uniform possession, where the same has been continued for so long a period. *Consuetudo facit legem.* It is well known, that usage is sufficient not only to make law, but even to alter the law, though established by express acts of the legislature. The tacit or implied consent of the nation in general, has always been understood sufficient to abrogate the most express enactment of the legislature; and there is no reason why the statute 1685 may not be repealed, either in whole or in part, by a long contrary usage, as much as any other statute whatever.

Answered; imo, From the nature of the office of the Lord Register, it is apparent, that he ought to be entitled to the custody of all these records, which are properly defined the records of the Crown. He is described as Keeper of his Majesty's Records and Rolls, and Clerk of his Council; and it seems abundantly evident, that the record of the Great Seal is, in strict propriety, the King's record.

It is equally certain, that, from the earliest period, the offices of Keeper of the Great Seal, and of Chancery, which last is, properly speaking, the office of Writer to the Seal, existed as separate and distinct offices from that of the Lord Register; and, as it is now proved, that the record kept in the office of Chancery was, in the earliest periods, transmitted to, and put under the care of the Lord Register, the legal presumption, from the title and definition of his office, must be put beyond cavil. In evidence of this fact, the pursuers referred to a condescendence of instances, for proving that the records of the Great Seal, kept in the office of Chancery, were time after time transmitted from that office into the custody of the Clerk Register, prior to the Restoration of King Charles II.

That the custody of these records belonged to the Lord Register in antient times, is further proved by the act of sederunt the 17th May 1538, which expressly ordained the Great and Privy Seals to be appended to all charters extracted from the registers by the Lord Clerk Register; for, if these registers

No 1. had not been in his custody, that order would have been perfectly absurd and ridiculous.

These, however, are not the only proofs in support of the pursuers position. It is admitted, that they are in possession of all the records of the Great Seal, preceding the year 1646; and, unless the defenders could show some other cause for their getting these records into their possession, it must be presumed, that the custody of them was understood to belong to, and was actually entrusted to the Lord Register.

The pursuer's right, independent of the act 1685, is also further ascertained by the order of the Court of Session, of the 30th March 1683, upon an application made to the Court by Sir George M'Kenzie of Tarbert, then Clerk Register.

2do, Did any doubt remain of the Lord Register's right by common law and the nature of his office, to the custody of the records of the Great Seal, by the act 1685, his right thereto was completely established. That act does not, indeed, particularly mention the records of the Great Seal; but it does what is tantamount; for it ordains, "That all clerks within the kingdom, who keep such registers as are, or have been in use to be delivered into the Clerk Register, to be preserved in his Majesty's General Register House, shall give in all their registers and books, preceding the 1st of August 1675, before the 1st day of November 1685, to be kept by the clerk of register; and that hereafter they shall keep only ten years records, in their own hands, for the use of the lieges." And as it is clearly proved, that the records of the Great Seal were in use to be delivered to the Clerk Register; they must, of course, be comprehended under the enactment of the statute, although it cannot apply to the records of the Commissary or Admiral Courts, or to the record of infestments in burgage-tenements, which never were in use to be transmitted to that officer.

3tio, In answer to the defender's plea of usage, or prescription, the pursuers have proved the practice of delivering the records of the Great Seal into the General Register, long after the year 1646. They have, indeed, brought the proof of that practice down till within ten or twelve years of the act 1685. None of the records after the year 1628, were transported to London, in consequence of the seizure made of the registers by General Monk, after Charles II. came to Scotland in 1650. The records between that time and 1646, which are all now in the pursuer's custody, must therefore have been delivered after the restoration; and, as the pursuers are likewise possessed of other records of charters, as far down as the year 1672; so the use and delivery is thereby brought down to within ten years of the date of the act and warrant of the 1683, and within twelve years of the act of Parliament 1685.

This being the case, it cannot be doubted, that, if the Lord Register had brought an action against the officers of Chancery, recently after the act 1685, they must have been decreed to deliver up the records of the Great Seal to

him in terms of that act; therefore, it only remains to consider, how far the neglect of the pursuer's predecessors in office, from 1685 down to 1731, can make such an alteration upon a public law, respecting a matter of national police and general concern, as to transfer the right of keeping the records in question, from an officer who always formerly enjoyed that right, and had the authority of the legislature in his favour, to another officer, who, till then, never pretended to any such privilege, and on whom the legislature never meant to bestow it.

That a posterior custom may repeal, or derogate from a prior statute, it is not necessary for the pursuers to dispute; but no statute can be repealed by mere non-usage or neglect of the law; for, as is well said by Mr Erskine, in his late Institute, "Non-usage is but a negative, which cannot constitute custom. There must be some positive act that may discover the intention of the community to repeal it." In the present case, however, there is nothing to show any intention of the community to repeal the act 1685, or to take away the right the Lord Register had, either by virtue of that act, or by common law. And the defenders have nothing to found upon but the neglect of the pursuer's predecessors in office, to carry the law into execution; a neglect which cannot altogether be justified, but for which very probable causes have been mentioned.

The Court pronounced judgment as follows: "Sustain the reasons of reduction of the decree of suspension of the 28th of November 1732; and find, That the records of the Great Seal in Chancery ought to be in the custody of the Lord Clerk Register; and, therefore, that the defenders, and their successors in office, are bound to deliver over to the pursuers, or their successors in office, the whole records of the Great Seal now in Chancery, to be kept by the Lord Register, retaining only ten years' records for the use of the lieges, in terms of the act of Parliament 1685; and that hereafter they shall only keep ten years' records in their own hands for the use of the lieges; and reduce, decern, and declare accordingly." Which was adhered to upon a reclaiming petition and answers.

Act. Hlay Campbell. Alex. Wright.

Alt. R. M'Queen.

Clerk, Pringle.

Fol. Dic. v. 4. p. 221. Fac. Col. No 93. p. 234.

See APPENDIX.