Lord Pitfour would have pointed out the distinction. I see none. I cannot enter into the doctrine of notoriety. If I could, the circumstances of notoriety here are as strong as any thing required by the statute.

KAIMES. Here is a statute calculated to obviate different undue preferences. The case which now occurs is not mentioned in the statute. *Quær.* Can we extend the statute to it? I look upon it as a *casus incogitatus omissus per incuriam.* It belongs to a Court of equity to supply that defect. If that is competent to the Court of Session, it is still more to the House of Peers.

ALVA. The nation must have considered this as a settled point for some time. It is dangerous to remove land-marks, although the marches may not be so straight as we would wish.

PRESIDENT. Read the argument in the case of Woodstoun. Lord Hardwicke's opinion lay on this, that a man apprehended was legally in prison. I am entitled to inquire into the proceedings of the House of Lords, as being a court of equity; but the House of Lords has no more power than we have.

[This, in answer to a rash expression of Lord Kaimes, that the House of Lords had still more power in equity than the Court of Session; but which opinion he retracted.]

On the 3d July 1774, the Lords found that the debtor fell within the statute 1696.

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

*Reporter,* Gardenston.

---

1774. *July 5.* JAMES HILL *against* MARY HILL.

PERSONAL AND REAL.

**A faculty to burden, to the extent of a certain sum, being reserved in a disposition by a mother to a son, who, of even date, granted a relative personal obligation therefor—whether that sum was thereby made a real burden *de præsenti?* whether the faculty was exercised *habili modo,* by after deeds of the mother's executed with that view?**

[*Fac. Coll. VI.* 321; *Dict.* 10,180.]

MONBODDO. A great deal of the argument goes to matters distinct from the merits of the cause; which turns upon this single point, Whether the 8000 merks are a real burden on the land? I am clear that there is a real burden.

COALSTON. A reserved faculty does not create a real burden on lands. *Here* there was a real burden, if exercised. The difficulty is, that the power has not been exercised in a proper manner: it is in a *personal* not an *heritable* bond. Intention is not sufficient. In the case of a bond secluding executors, intention is not carried into execution.

KAIMES. A *faculty* is not a *burden.* It is neither a moveable nor an heritable subject. But this is an anomalous case; a marriage contract, *ex facie,* containing a *faculty,* but, in another deed of the same date, converted into a

*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