act,(*d*) which positively prohibits clerks and registers from suffering the papers and records to be taken out of their offices, appears to have been so long and so generally disregarded as to have fallen into oblivion.(*e*)

These precedents would seem to sanction the position, that a positive legislative enactment may be virtually repealed by a long, general, and uninterrupted course of practice. But they are precedents which I should feel a great repugnance to adopt and enlarge upon. I hold it to be my duty to treat the acts of my predecessors with respect; and to yield implicit obedience to my superiors; yet I cannot lose sight of the sphere assigned to the judiciary, and allow myself, by any suggestion arising from the case, or by following any lightly considered precedent, to overstep the limits constitutionally prescribed to the judicial department to which I belong. No judge or court, either of the first or last resort, can have any right to *legislate;* and there can be no difference between the power to declare an act of Assembly obsolete, and the power to enact a new law. The power to repeal and to enact are of the same nature. I shall therefore always consider an express provision of a constitutional act of Assembly as an authority superior to any usage or adjudged case whatever.

The first enactment upon this subject(*f*) is strictly and literally applicable to the taking of an answer of an infant abroad in a partition case, such as this is; and that act has, as it would seem, been since much extended.(*g*) Hence I hold myself imperatively

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(*d*) 1747, ch. 3, s. 10.—(*e*) 1832, ch. 302, s. 1.—(*f*) 1797, ch. 114, s. 5.—(*g*) 1818, ch. 193, s. 11 & 12.

BURD *v.* GREENLEAF.—It was objected in this case, that all the parties were not before the court. Publication against the infant heirs of a defendant had been made according to the act of 1799, ch. 79, s. 1 & 4, instead of serving a *subpœna* upon them.

February, 1806.—KILTY, *Chancellor*.—It appears, that the general acts of Assembly for regulating the chancery practice do not extend to infants, but that particular acts have been passed for the purpose of binding them; as in the cases of contracts by their ancestors, mortgages, debts, partition, &c. The first section of the act of 1795, ch. 88, did not, as the complainants have contended, extend to infants, but provided for publication against persons of full age. The act of 1799, ch. 79, put infants on the same footing with other defendants, excepting reserving at all events the liberty of appearing within eighteen months. This section is not restricted to laws within the first section of the same act, but is applicable also to the first section of the act of 1795, or any other general act. Let us examine the intention of the two acts. The act of 1795 permits an appearance and re-examination within eighteen months, and the first decree is of course not final. The reason of which might be, that there could be no certainty of the absent defendant having seen the publication.