

and the amount for which the arrestments have been executed. June 20. 1825.
 Under any result, the bona fides of the respondent would protect him from repetition of bygone rents. If the appellant conceives she runs any risk from the deed 1780 not being registered, why does she not put it on record?

The House of Lords 'ordered and adjudged, that in hoc statu
 ' the interlocutors complained of, so far as they recall the inhibi-
 ' tion complained of, be affirmed; and it is farther ordered and
 ' adjudged, that the said interlocutors, so far as they declare the
 ' same to be nimious and oppressive, and ordain it to be scored
 ' in the record, and marked in the margin, be reversed.'

Appellant's Authorities.—2. Ersk. 11. 2. 10.; M'Creadie, Jan. 27. 1747, (6980.)

Respondent's Authorities.—4. Stair, 20. 29.; 2. Ersk. 1. 25. 29.; Duke of Roxburghe, Feb. 17. 1815, (F. C.); Duke of Buccleuch, March 16. 1824, (2. Shaw's Ap. Ca. No. 8.)

EDGE—J. CHALMER,—Solicitors.

JOHN OUCHTERLONY, of Guynd, Appellant.

No. 44.

OFFICERS OF STATE, Respondents.

Kirk-Yard—Prescription.—A party, who had for more than forty years made use of part of the interior of an abbey belonging to the Crown, as a family burial-place, in virtue of a disposition a non domino, but which was not followed by sasine;—Held, (affirming the judgment of the Court of Session), That he was not entitled to a prescriptive right, or to prevent the Officers of State from taking possession of the ground, removing a wall, and clearing away rubbish,—they consenting to inter on the spot the remains of the dead found there.

AFTER the Reformation, and dissolution of the Romish church in Scotland, the abbacy of Aberbrothwick and its revenues were erected into a temporal lordship. King William the Third granted a lease of the yard, orchard, and arable ground and grass within the precincts, to Ferguson, the clergyman then serving the cure of the parish; and, after his death, the Crown granted to the Magistrates of Aberbrothwick, 'for
 ' supporting the church, and other public buildings there, the
 ' rent, use, and possession of the whole arable ground and grass
 ' within the said yard and orchard, for the whole years and
 ' space of 19 years complete, from and after the term of Mar-
 ' tinmas in the year 1737, being the first term of Martinmas after
 ' the death of the said Mr John Ferguson, with full power to

June 21. 1825.

2D DIVISION.
 Lord Cringletic.

June 21. 1825. ‘ the said Magistrates and Town Council, and their successors
 ‘ in office, to enter in possession, labour, and manure the said
 ‘ yard and orchard, or set and dispose thereof at their pleasure,
 ‘ during the space foresaid, and to uplift the rents, and grant dis-
 ‘ charges thereof, which shall be sufficient to the receivers, and
 ‘ generally all other things concerning the said yard and orchard
 ‘ to do, that we could have done before the granting hereof.’
 Afterwards the Magistrates obtained a feu of ‘ predictum hortum
 ‘ et pomarium cum tota terra arabili et gramine inibi content.
 ‘ domibus super eundem ædificatis et totis partibus et pertinen.
 ‘ ejusd. sicut per dict. Magistratos et Concilium, et eorum te-
 ‘ nentes, nunc possessæ sunt.’ In 1770, ‘ a vote being stated
 ‘ (in the Town Council), if or not John Ouchterlony of Guynd
 ‘ should have 54 square ells of the ground of the Old Abbey Kirk,
 ‘ next the windows in the east end, for a burial-place? it was una-
 ‘ nimously voted, that Guynd get a feu-right to be granted of
 ‘ the foresaid piece of ground, for payment of a yearly feu of
 ‘ 2s. 6d. sterling, by half-yearly payments.’ Thereafter an irre-
 deemable right was made out of that space, on payment of 30
 years’ purchase of the feu-duty. The disposition contained a
 warrant for infeftment, but no sasine followed. The family en-
 closed the spot with a wall, and used it as their burial-ground.
 They were not heritors in the parish.

Many very wanton acts of destruction of the remains of the
 Abbey having taken place, the attention of the Officers of the
 Crown was drawn to the state of the ruins by Maule of Pan-
 mure. The temporal lordship had become the property of this
 family by grant from the Crown, in 1642, of the ‘ dominium ba-
 ‘ roniam et regalitatem de Aberbrothok et abbatiam ejusdem præ-
 ‘ dict. cum pertinen. proprietatem hujusmodi comprehendens. om-
 ‘ nes et singulas prædict. terras, dominia, baronias, burgum baro-
 ‘ niæ, et regalitatem, annuos redditus, molendina, multuras, silvas,
 ‘ piscationes, ecclesias, decimas, patronatus, jus regalitatis, aliaque
 ‘ suprascript. cum pertinen. a corona nostra et patrimonia ejusd.
 ‘ et a dicta abbatia de Aberbrothok, omnibusq. aliis beneficiis
 ‘ quibuscunque, ad qua eadem perprieus pertinuerunt seu quibus
 ‘ annexa fuerunt, cum omnibus actis annexationis generalibus
 ‘ et specialibus quæ extendi possent ad dict. erectum domi-
 ‘ nium baroniam et abbatiam hujusmodi, feudifirmas, decimas
 ‘ decimarum,’ &c. This right was forfeited, in consequence of
 the Earl of Panmure’s accession to the rebellion of 1715, and
 reverted to the Crown, but again came by purchase into the
 family. It was a matter of doubt whether, looking to the acts

June 21. 1825. -

of ownership by the Crown since the date of the grant, the Abbey itself, and its precincts, were conveyed, or merely the abbacy and lordship; but, without waiving his right, Mr Maule in 1814 applied to the Exchequer for the appointment of ‘keeper of the said fabric of the Abbey, and the whole ground and precincts thereof, with full power to him to debar and prevent all persons whatsoever from taking down any part of the said building, or removing the stones thereof.’ The result of the investigation which followed was the discovery that many encroachments had been made on the premises, and the site granted by the Magistrates to Guynd was the place where the high altar had formerly stood, although now covered with rubbish to the depth of ten or twelve feet. The Sheriff of the county then proposed to Ouchterlony, that the wall encircling this place should be cleared away to the original floor; that the bones and remains of bodies there buried should be set apart, and re-interred below the floor, where, also, subsequent burials of the family should take place, and a railing to be erected that would not interfere with a complete view of the pillars, &c. Ouchterlony presented a bill of suspension of the proposed operations, and challenged the Crown’s right and title. A declarator was then brought by the Crown. The Lord Ordinary, ‘in respect there is a radical title in the Crown to the Abbey of Aberbrothock; that the only title which the Magistrates of Aberbrothock have to any part of the precincts or ground attached to that building is by grant from the Crown; that the only right that the representor (Ouchterlony) has, is by the grant from said Magistrates; and that the subject of the grant is within the nave of the Abbey, and which was not conveyed to them, and which of course they had no right to convey to the representor; that the representor cannot plead prescription, owing to his having no infestment of date to be sufficiently old to be the foundation thereof, nor indeed any sasine at all, so far as he has yet made to appear; and, lastly, that the small place claimed by him is no part of a church-yard, and it is even said by the respondents, (Officers of State), that the representor is not an heritor in the parish of Aberbrothock,’ found, ‘that the Officers of the Crown are entitled to inquire into the extent of the grant by the Crown; and that the representor, whose only title is dependent on that grant, is not entitled to found on the title of Mr Maule, from whom he derives no right; and that he (Ouchterlony) has no title to the burying-ground claimed by him; and ordained him to remove therefrom, and to take away his wall

June 21. 1825. 'surrounding it:' and the Court, (27th June 1823), in respect of the statement in the answers,* adhered.†

Ouchterlony appealed.

Appellant.—For above 150 years there has been a general practice of burying in the interior of the ruins; and it is no longer at the pleasure of any party to disturb the ashes of the dead. Besides, the appellant holds a written grant from the Magistrates of Aberbrothock, who, since the Reformation, have uniformly exercised the power of regulating all matters relative to the original public church-yard, and the ruins converted into a church-yard, and prescriptive possession has followed. The right did not require infestment to perfect it; at any rate, the Crown have neither title nor interest to challenge; for the property of the Abbey is vested in Mr Maule.

Respondents.—The right to the Abbey of Aberbrothock is vested in the Crown. It was not conveyed to Mr Maule; and even if it were, the appellant cannot plead that defence. It was not conveyed to the Magistrates; and the disposition held by the appellant, therefore, proceeds a non domino. The act of converting the area into a burying-place was an usurpation; and the right to it could not be acquired by mere occupation and possession. Nevertheless, the respondents made the liberal offer to allow the appellant to inter below the pavement; but he rejected every arrangement.

The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors, so far as complained of, affirmed.

LORD GIFFORD.—My Lords, there is a case which was discussed some time ago at your Lordships' Bar, in which John Ouchterlony, Esq. is the appellant, and his Grace Alexander Duke of Gordon, and others, his Majesty's Officers of State for Scotland, are the respondents; and the question in this case was this, whether or not the appellant, Mr Ouchterlony, was exclusively entitled to a portion of the Abbey of Aberbrothock or Arbroath, which had been possessed by his ancestors as a burial ground? The respondents, who represent the Crown, contended, that that spot of ground was not the property of this gentleman

* This was understood to refer to the offer made by the Sheriff relative to the disposal of the remains which might be discovered on removing the rubbish, and the permission to inter below the original pavement.

† 2. Shaw and Dunlop, No. 416.

in the manner in which he contended ; and that, therefore, they had a right to remove some erections on this spot of ground, which contained a place of burial, to the removal of which Mr Ouchterlony was extremely averse, concluding, as it is natural to most men, that places of burial should not be improperly disturbed. But really, my Lords, the question at last came to this, whether Mr Ouchterlony had an exclusive right to this portion of land, to which he derived title under a conveyance from the Magistrates of Arbroath to an ancestor of Mr Ouchterlony, dated the 7th February 1771, and registered in the Books of Session 11th June 1816, which recites, that by an act of the Town-Council, dated the 8th of December last, they had agreed to grant a feu-right to John Ouchterlony of Guynd, now deceased, of 54 square ells of the ground of the Old Abbey Kirk. Then, by a positive clause, they sell, alienate, and dispoise from them and their successors in office, to and in favour of Ann Ouchterlony, her heirs and successors, the foresaid 54 square ells of ground as the same was then enclosed. Upon that disposition it appears that no infestment ever took place ; and therefore, under that conveyance to him, he could not properly sustain his title to this property.

My Lords,—It appears to me, on a reperusal of this paper, and on a consideration of the Cases, that the Officers of State have a sufficient title to pursue in this case, and that Mr Ouchterlony is not entitled to prevent the removal of those erections by the Officers of State ; but that, on the other hand, the Officers of State are entitled to have it declared that this spot belonged to the Crown. It appears to me, upon the whole, that the interlocutors which have been pronounced in this case are right ; and, therefore, I shall humbly move your Lordships to affirm this judgment. At the same time, my Lords, I must confess it would be a great gratification to me, to find that the Officers of State have no intention of improperly doing that which would be disagreeable to this gentleman's feelings. It appears that the object which the Officers of State have in view is, (this being a venerable and curious ruin), to remove some of those obstructions which have, from the negligence and inattention of those who have had the superintendence of this property, been suffered to take place in the interior of this Abbey, but at the same time taking care not to do any thing unnecessarily which shall tend to injure Mr Ouchterlony or any other person. In affirming this judgment, therefore, I do not apprehend Mr Ouchterlony's feelings will be unnecessarily distressed. It appears to me, in looking through these papers, that the question has been treated as a question of title to this spot ; Mr Ouchterlony conceiving that he had a title to this spot under the grant I have stated to your Lordships from the Magistrates of Arbroath, who certainly had no right whatever to grant it, the property remaining in the Crown, or being, as they contend, transferred to Mr Maule of Panmure. Upon the whole it appears to me, that the Officers of State have made out a sufficient title to this spot, and that Mr Ouchterlony has failed in so doing ; and

June 21. 1825.

June 21. 1825. therefore I cannot help thinking, under all the circumstances of this case, your Lordships are bound to affirm the judgment of the Court of Session.

SPOTTISWOODE and ROBERTSON—MUNDELL,—Solicitors.

No. 45. JOHN GRAHAM, Writer to the Signet, Appellant.

KEEPER, DEPUTE-KEEPER, and COMMISSIONERS of the SOCIETY of Writers to the Signet, and the TREASURER and PROCURATOR-FISCAL of that SOCIETY, Respondents.

Title to pursue—Corporation—Writers to the Signet.—An action having been brought by the keeper and depute-keeper of the signet, and of the commissioners, treasurer, and procurator-fiscal of the corporation or society of clerks or writers to the signet, (but not setting forth that they pursued on behalf of the society), against a member of the body, to have it found that certain rules were legal and proper; that effect should be given to certain proceedings by them against that member for alleged infraction of the rules; and that they had power to suspend him from or deprive him of his office; and the Court of Session having sustained the title of the pursuers to sue, and decerned in terms of the libel;—the House of Lords reversed, and assoilzied the defender.

June 21. 1825.

1ST DIVISION.
Lord Alloway.

ORIGINALLY the office of keeper of the signet was vested in the Secretary of State, but latterly the offices were in general kept separate. By the commission there is conferred on the keeper, ‘dictum locum munus et officium custodis dicti signeti cum omnibus feodis, proficuis, beneficiis, casualitatibus, libertatibus et immunitatibus, ad dictum locum et officium legitime spectan. et pertinen.’; but nothing is said as to a power to incorporate.

The writers to the signet were clerks in the office of the Secretary of State, and were prohibited from engaging in the business of ‘procuratoris, agentis, nor ordinarie servandis to the Lordis of Sessioun or men of law, or exerce ony othir particulare office in hurt and preiudice of the rest of the brethrene and general office. Bot that the sadis writeris, and ilk ane of yame, sal be friemen, keep oppin buithis, speciallie await and attend upon yair buithis and vocation, and naways be subject to ony uther particulare service or servitude of ony persones, under the pane of deprivation.’ In the progress of time, however, they began to perform their business in their own private offices, and acquired the privilege of acting as agents before the Supreme Court, which had been previously confined to advocates’ clerks. They are admitted by virtue of a commission granted by the keeper, who, in more ancient times, was in the practice of limiting the number. As clerks to the signet, they have the exclusive