necessary; and I shall move your Lordships, that the word 'both,' and the words 'its true intention,' should be omitted in the affirmation of the judgment. I state that, because I profess that my concurrence in this judgment goes upon this ground, that whatever may be my individual opinion with respect to the real intention of these parties, I do not think that that real intention of these parties ought, under the circumstances of this case, to determine who should be called to the succession of the estate. But if that which is here stated be the legal construction of these instruments, the defender must have the estate; and that amounts to neither more or less than this, that Sir Hew Dalrymple and John Hamilton set about doing a thing which they have not effectually done, and which not having effectually done, he follows that out by other proceedings to render it so. But whatever might have been their intention, the legal construction of the instrument, though perhaps it may be at variance with its true intention, must, in my opinion, regulate your Lordships' decision. Therefore I humbly advise your Lordships to affirm the judgment which has been pronounced by the Court below, with those slight alterations which I have pointed out.

June 20. 1825.

Appellant's Authorities.—2. Stair, 5. 25.; 2. Ersk. 3. 51.; Creditors of Brighton, June 30. 1739, (10,247.); Monro, May 19. 1812, (F. C.); 1617, c. 13.; 2. Stair, 12. 15.; 2. Bank. 12. 1., and 3. 55.; 3. Ersk. 7. 12. 74.; 2. Stair, 12. 15. 17. 25.; 2. Bank. 12. 1, 2.; 3. Ersk. 7. 4. 6., and 8. 15.; 3. Stair, 5. 12.; 3. Ersk. 8. 47.; Earl of Dalhousie, Jan. 13. 1712, (14,014.); M'Lauchlan, Jan. 12. 1757, (2312).

Respondent's Authorities.—3. Stair, 5. 50.; 3. Ersk. 8. 32.; Lord Mountstewart, Nov. 13. 1707, (14,903.); M'Kinnon, June 16. 1756, (6566.); M'Kenzie's Observ. Act 1617, c. 13.; 3. Ersk. 7. 19.; Lamb, Jan. 11. 1673, (10,984.); Cases in Dict. vol. vii. 397. *v.* Succession; Smith, June 30. 1752, (10,803.); Denham, Nov. 24. 1802, (11,220.); Yuille, March 4. 1813, (F. C.); 2. Craig, 15, 16.; 3. Ersk. 8. 48.; Earl of Selkirk, Jan. 8. 1740; reversed in House of Lords, (14,941.); Hay, June 20. 1771, &c.; affirmed, (15,425.); Hay, April 6. 1773; affirmed, (F. C.); Ball, March 6. 1806, (F. C.); Richardson, July 5. 1821, (1. Shaw and Bal. No. 131.)

EDGE—J. CHALMER,—Solicitors.

Honourable MARIANNE MACKAY FULLARTON, Appellant. No. 43.
SIR HEW DALRYMPLE HAMILTON, Bart., Respondent.

Inhibition.—The Court of Session having found an inhibition on a supplementary action nimious and oppressive, recalled it, and ordered it to be scored in the record, and marked on the margin as done by their authority;—The House of Lords affirmed the judgment in hoc statu, so far as it recalled the inhibition; but reversed it, so far as it found the inhibition nimious and oppressive, and ordered it to be scored on the record and marked on the margin.

June 20. 1825.

2D DIVISION.

AFTER the remit from the House of Lords on the 26th July 1822, the appellant Mrs Fullarton raised against the respondent, Sir Hew Dalrymple Hamilton, a supplementary action of removing, count and reckoning and payment, to the extent of L. 200,000, as the amount of rents and profits from the death of John Hamilton in 1786, inhibited on the dependence, and used arrestment to the amount of half a million sterling. The respondent petitioned and complained to the Court, that this measure was nimious and oppressive, and resorted to for the purpose of harassing and distressing him; and he presented a bill to have the arrestments loosed without caution. The Court found (1st February 1823), 'that the inhibition complained of is 'nimious and oppressive, and recall the same; ordain it to be 'scored in the record, and to be marked on the margin that 'the same is done by authority of the Lords;' and superseded consideration quoad ultra. On advising the bill, the Court held, that the arrestments ought to be loosed without caution, unless Mrs Fullarton should find caution on her part to answer for the damage resulting from keeping up the arrestments; and in consequence of this deliverance, found it unnecessary to pronounce further in the petition and complaint; and afterwards, on advising a reclaiming petition for her, (4th March 1823), adhered, and found her liable in the expense of the answers.*

Mrs Fullarton appealed the question of inhibition.

Appellant.—The inhibition and arrestment were used in a competent form. They were precautions which the appellant had a legal right to resort to. If the property of the respondent be entailed, then the inhibition can do him no harm. But, in point of fact, great part of it is held by him in fee-simple. Besides holding under the deed 1780, the appellant has no security against creditors, for that deed is not recorded. The appellant is not actuated by oppressive motives. The respondent is not to be regarded to be in bona fide, merely because he avers it.

Respondent.—The inhibition is altogether unwarranted. The appellant is in no danger, whatever be the result of the action. Besides, it was incompetent to raise it on the supplementary action. The nimious and oppressive nature of the proceedings is spoken out by the sum for which the diligence has been raised,

* See 2. Shaw and Dunlop, Nos. 241–2.

and the amount for which the arrestments have been executed. 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? June 20. 1825.

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 Cringletie.