been so recorded, or as set forth at full length in any conveyance or deed recorded in the appropriate register of sasines, and forming part of the progress of the deeds of the said lands held under such deed of entail," &c.

By section 3 of the said Act the meaning of the words "deed" and "conveyance" is declared to be as follows:—"The word 'deed' and the word 'conveyance' shall each extend to and include all charters, writs, dispositions, whether containing a warrant or precept of sasine or not, and whether *inter vivos* or *mortis causa*, and whether absolute or in trust, feu-contracts, contracts of ground-annual, heritable securities, reversions, assignations, instruments, decrees of constitution relating to land to be afterwards adjudged, decrees of adjudication for debt, and of adjudication in implement, and of constitution and adjudication combined, whether for debt or implement, decrees of declarator and adjudication, decrees of sale, and decrees of warrant and of special service, whether such decrees contain warrant to infeft or precept of sasine or not, and the summonses, petitions, or warrants on which any such decrees proceed, warrants to judicial factors, trustees, or beneficiaries of a lapsed trust, to make up titles to lands, and the petitions, on which such warrants proceed, writs of acknowledgment, contracts of excambion, deeds of entail, procuratories of resignation *ad remanentiam*, and all deeds, decrees, and writings by which lands or rights to lands are constituted or completed or conveyed or discharged, whether dated, granted, or obtained before or after the passing of this Act, and official extracts of all deeds or conveyances."

The attention of the Lord Ordinary (TRAYNER) was called to the difficulty suggested by the reporter.

On 11th September 1896 the Lord Ordinary pronounced the following interlocutor:—

> "The Lord Ordinary officiating on the Bills having considered the petition and proceedings with the report by Mr P. H. Don Wauchope, W.S., Finds that the procedure has been regular and proper, and in conformity with the provisions of the statutes and relative Acts of Sederunt: Approves of the draft deed of ratification: Authorises and empowers the petitioner to grant, with the consent of the trustee and commissioners on his sequestrated estate, in favour of John M'Knight, quarryman, Uphall, his heirs or assignees whomsoever, a deed of ratification of the feu-charter in accordance with the said draft, and decerns."

Counsel for the Petitioner—Lyon Mackenzie. Agents—Davidson & Syme, W.S.

Thursday, October 15.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DRYBURGH *v.* A. & A. S. GORDON.

Sale — Title — Inhibitions — Obligation to Disencumber Record.

By disposition dated and recorded 28th February 1895, A disponed *ex facie* absolutely certain heritable subjects to B, his law agent.

By disposition dated 6th and 7th December 1895 A, as "proprietor of the subjects after disponed," with consent of B, for all interest competent to him in virtue of the former disposition, disponed to C a part of the subjects included in the former disposition. The sale was carried out by the firm of law-agents of whom B was a partner, and they undertook "to produce searches showing a clear record as at 10th December 1895." The searches produced showed two inhibitions against A recorded on 22nd May 1895.

In an action by the purchaser against the law-agents the defenders maintained that the inhibitions, not having been recorded until A's title was divested, were inoperative. *Held* that the defenders were bound to clear the record of the inhibitions, it being immaterial whether they were valid or not.

Opinion (by Lord Kincairney) that an inhibition may effect a heritable right in the person of one who does not hold it by feudalised title.

By disposition dated and recorded 28th February 1895, William Shaw, builder, Edinburgh, "heritable proprietor" of certain subjects in Gorgie Road, Edinburgh, disponed these subjects, "for certain good and onerous causes and considerations, not exceeding in all the sum of £600 sterling," to Alexander Gordon, S.S.C., and his heirs and assignees whomsoever, heritably and irredeemably.

By disposition dated 6th and 7th December 1895 William Shaw, "proprietor" of the subjects after disponed, with consent and concurrence of Alexander Gordon, and Alexander Gordon for all right and interest competent to him in the subjects in virtue of the disposition in his favour of 28th February, and both with joint consent and assent, in consideration of the sum of £979, 13s. 9d. instantly paid to William Shaw as the price, disponed to Alexander Dryburgh, grocer, Edinburgh, two shops, 205 and 207 Gorgie Road. These shops were a part of the heritable subjects mentioned in Shaw's disposition to Gordon of 28th February. Shaw granted absolute warrandice from his facts and deeds only. Among the writs assigned were certified copies personal searches against Gordon and Shaw.

By letter dated 7th December 1895 addressed to Alexander Dryburgh, A. & A. S. Gordon, W.S., Edinburgh, who were the

agents of William Shaw, and of whose firm Alexander Gordon was a member, undertook with reference to the settlement of the purchases of the shops 205 and 207 Gorgie Road, the price whereof had been received that day, to produce searches showing a clear record as at 10th December 1895, and to deliver the personal searches assigned in the disposition.

The searches exhibited by A. & A. S. Gordon as in implement of their undertaking, disclosed two inhibitions against Shaw, both recorded in the general register of inhibitions on 22nd May 1895.

Dryburgh requested Messrs Gordon to purge the record of these inhibitions, but they refused to do so, on the ground that they had implemented their obligation, and that the inhibitions being recorded after the date of the disposition by Shaw to Alexander Gordon, did not affect the subjects.

Thereafter Dryburgh raised an action against Messrs Gordon to have them ordained to exhibit and produce to the pursuer searches showing that the subjects purchased by him were free from all encumbrances.

On 19th June 1896 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds (1) that by letter addressed by the defenders to the pursuer, dated 7th December 1895, the defenders undertook to deliver to the pursuer searches showing a clear record, in reference to the subjects conveyed by the disposition in favour of the pursuer, dated 6th and 7th December 1895; (2) that the searches furnished by the defenders disclosed the two inhibitions against William Shaw, granter of said disposition, set forth on the record; (3) that in respect of said inhibitions the said obligation contained in said letter has not been implemented; (4) that the defenders are bound to disencumber the title to the said subjects of said inhibitions: Appoints the cause to be enrolled that effect may be given to the foresaid findings."

Note.— . . . "The question is, whether the obligation expressed in the letter to produce searches showing a clear record has been implemented, or whether the two inhibitions showed that the record was not clear, and were encumbrances which the defenders were bound to remove.

"On considering the case I formed an opinion in favour of the pursuer, but it appeared to me that the letter was not sufficiently stamped. That defect has been rectified, and having reconsidered the cause I retain the opinion that the pursuer is in the right, and that the defenders' obligation has not been fully implemented.

"The letters of inhibition are in the form of the Schedule QQ in the Titles to Land Consolidation Act 1868, and they purport to prohibit Shaw, *inter alia*, from 'disponing his lands or heritages.' Of course the prohibition is in general terms and mentions no lands. Before 1868 letters of inhibition affected not only lands belonging to the person inhibited at the date of recording the letters, but also lands subsequently acquired by him (Stair, iv. 50, 17; Ersk. ii. 11, 10). But it is provided by the 157th section of the Act of 1868 that no inhibition shall affect *acquirenda* except in cases mentioned in the section.

"By the disposition to the pursuer Shaw does the precise thing which the letters prohibit. *Prima facie* the disposition is in breach of the letters and reducible *ex capite inhibitionis*. Section 157 does not affect the question and need not be considered, because there is no suggestion that the subjects have been acquired by Shaw since the inhibitions were recorded. He had the same right to the lands then as at the date of the disposition.

"The defenders' answer is that the inhibitions do not affect the lands, because at both dates Gordon, and not Shaw, was proprietor in virtue of the disposition to Gordon, dated 28th February, and so prior to the inhibitions recorded on 22nd May. I am, however, of opinion that it is competently ascertained that at these dates Shaw, and not Gordon, was the true proprietor. It is true that the disposition of 28th February by Shaw to Gordon is *ex facie* absolute. It bears to be granted 'for certain good and onerous causes and considerations not exceeding in all the sum of £600.' It does not bear expressly that any sum was paid, but yet it is *ex facie* absolute.

"But the disposition in favour of the pursuer granted by Shaw as well as by Gordon proves, I think, incontestably that the disposition by Shaw to Gordon was only in security, and left the radical right in Shaw. The disposition to the pursuer has the effect of a registered back letter on the previous disposition by Shaw to Gordon. It bears that the price was paid to Shaw, that it was Shaw who undertook absolute warrandice, and (which appears conclusive) it expressly describes Shaw as the proprietor, and that I take to be the language of Gordon as well as of Shaw. But the defenders say that at all events the feudal title was in Gordon, and that what was left in Shaw was only a personal right to have the subjects reconveyed. That is no doubt true, and is fully borne out by the case of the *Union Bank of Scotland, Limited*, v. *National Bank of Scotland, Limited*, Dec. 10, 1886, 14 R. (H.L.) 1, quoted by the defenders. I do not doubt that Gordon could have given a good title, and I do not say whether a disposition by Gordon could have been objected to on account of letters of inhibition against Shaw. But I am not concerned with a disposition by Gordon, but with a disposition by Shaw, as principal granter, he having the radical right, but not the feudal title. The defenders quoted no authority to the effect that the operation of an inhibition depends on sasine or registration; or that an inhibition does not affect such a radical right in lands as was in the person of Shaw. It has, it is true, been doubted whether an inhibition will affect an heritable bond which has never been feudalised.—Dirleton's Doubts, p. 100, and Stewart's Answers, p. 163. But it has been decided that if a heritable bond has been feudalised and then assigned, further transferences of it will be struck at by an inhibition, although the right of the

inhibited disponer be only personal—*Low*, December 6, 1814, F.C. That is to say, that an inhibition may affect an heritable right in the person of one who does not hold it by feudalised title. I do not think that I require to decide whether, assuming the radical right to be in Shaw, that right is affected by the letters of inhibition. I lean to the opinion that it is. But it is enough if the point be fairly open to serious question. I think that it is; and on that account I am of opinion that the pursuer is entitled to object that a search which discloses such inhibitions does not shew a clear record.

"Further, I regard the defender's letter as corroborative of the obligation of Shaw as seller. It adds the obligation of the defenders to his; and it appears to me that the obligation of the defenders may be measured by Shaw's obligation. Now, that was the ordinary obligation of a seller to disencumber the subjects. On that point Professor Menzies observes, 'If there are inhibitions undischarged, discharges must be insisted for, unless the party inhibited has been afterwards sequestrated; the sequestration terminates the effect of inhibition in relation to third parties, for it is under it that inhibition must be made effectual.'—Menzies' Lectures, 3rd ed., p. 836. That, it is true, was written before 1868, but, as I have remarked, the provision in the Act of 1868 does not seem to affect the case. It can hardly be doubted that before 1868 a purchaser could not be compelled to take a title from a seller under inhibition, nor to do so now, unless it appeared that the seller had acquired the lands since the date of the inhibition, and so was in a position to plead the 157th section of the Act of 1868.

"On the whole, I am of opinion that, so long as the letters of inhibition are not taken out of the way, the obligation of the defenders has not been implemented."

The defenders reclaimed, and argued—(1) An inhibition did not act *retro*. A search either real or personal was only brought down to the date on which the person against whom the search was made was divested of the property. If the record was clear as against that person at the date of divestiture, it was clear against him for all time. It reduced the matter to an absurdity to contend that the record required to be cleared of all inhibitions although these might be recorded long after the person against whom the search was made had been divested of the property. If therefore Shaw was divested of the property on 28th February 1895, the defenders had fulfilled their obligation to produce a search showing a clear record; if the record was clear as at the date (2) Shaw was in a legal sense divested of the property on 28th February 1895. He had not even a reversion, he was only entitled to insist in an accounting. His right was a personal one, that of a creditor. An inhibition was not effectual to secure his right—Bell's Comm. 7th ed. ii. 135. According to Stair, iv. 50, 2, inhibition was only extended to ground rights by infeftment, and this doctrine was qualified by the decision in *Low* v. *Wedgwood*, December 6, 1814, F.C., in which it was held that the right must be capable of being perfected by infeftment, and that infeftment must have followed upon it. Now, Shaw's right in the property after his disposition to Gordon was not a ground right capable of being perfected by infeftment, and no infeftment had followed upon it.

Argued for pursuers — He had got a disposition which described Shaw as the proprietor of these heritable subjects and under which the price was to be paid to Shaw. The defenders had come under an obligation to produce searches showing a clear record as at 10th December 1895. The searches produced showed two inhibitions against Shaw recorded 22nd May 1895. The record therefore would not be clear until it had been purged of these inhibitions. As long as they stood the pursuer's title would be unmarketable. The question as to whether the disposition of 28th February 1895 had divested Shaw of the property so that inhibitions were unavailing against him was a difficult question of law, and one in which the Lord Ordinary had arrived at a different opinion from the defenders. It was not for the pursuer to settle this matter, all he demanded was a marketable title and a search showing a clear record as against Shaw at 10th December 1895.

LORD JUSTICE-CLERK—The defenders by letter dated 7th December 1895, which had reference to a purchase of property from Mr Shaw, a client, gave an undertaking to the pursuer to produce searches showing a clear record as at 10th December. That undertaking was given in regard to a disposition to the pursuer by Mr Shaw, who is described in the deed as owner of the property, and to whom the price was to be paid.

In these circumstances when the search was made it was found that there were on the record two undischarged inhibitions applying to the property, and dated prior to the disposition. Whether these inhibitions are ineffectual is a question which cannot be decided in this action. The only question before us is whether a search showing a clear record has or has not been made. All I say is, that standing the disposition by Mr Shaw and the undertaking by the defenders, and standing these undischarged inhibitions, the defender's obligation has not been carried out.

LORD YOUNG—I am of the same opinion. When I first read the papers in the case I was of opinion that we could not decide anything on the validity of the inhibitions, the inhibitors not being here, and it not being incumbent on the pursuers to call them. The action is founded on a letter of obligation by the defenders to the pursuer to produce searches showing a clear record as at 10th December 1895 in regard to a property purchased by the pursuer from Mr Shaw. The disposition bears that Shaw is the proprietor, and that the conveyance is made in consideration of a sum

paid to him. In the disposition Mr Gordon is made a consenting party and co-disponee. That could not do any harm, but the purchase was made from Shaw as proprietor through Messrs Gordon as his agents, and the purchase money was paid to Shaw. In these circumstances it was natural, at least quite intelligible, that a letter should be taken from the Messrs Gordon binding them to show a clear record as at 10th December 1895. That undertaking was clearly as regards Mr Shaw, who bears on the face of the disposition to be the proprietor and disponer. The search showed that the record was not clear, that two inhibitions existed dated in May 1895. Now, it is said, and on intelligible grounds, that the inhibitions are of no use, because Mr Shaw in February divested himself, from a conveyancing point of view, of the property by making a disposition of it in favour of Mr Gordon. It is said that Mr Shaw having divested himself of the property in February, the inhibitions in May were inoperative. But the purchaser has no concern with the relations between Mr Shaw and Messrs Gordon. I give no opinion as to whether the inhibitions, if they were fully investigated, would be found to be operative or not. All I decide is that it is for Messrs Gordon to clear the record. If the inhibitions are easily proved to be worthless, it will be an easy matter to clear the record; if the question as to the validity of the inhibitions is a more serious matter, (and I cannot regard it as other than serious when I find that the Lord Ordinary has decided that the inhibitions are of value) still the obligation to clear the record exists. I am therefore very clearly of opinion that the only result we can arrive at is to affirm the judgment of the Lord Ordinary without entering into any of the questions raised in his judgment in regard to the validity of the inhibitions.

LORD TRAYNER—I am of the same opinion. The action is brought to enforce the obligation contained in the letter of 7th December 1895, in which the defenders undertook to produce searches showing a clear record as at 10th December 1895. That meant a clear record not merely in the property register, but also in the register of personal diligence. The search produced discloses two inhibitions. I am of opinion that whether these inhibitions are valid or invalid, the pursuer is entitled to have the record cleared of them, and that the defenders are bound to clear the record of these inhibitions before their obligation can be held to be fulfilled.

LORD MONCREIFF—I concur. I think it is unnecessary to decide as to the validity of the inhibitions. My judgment proceeds on the letter of obligation. What the title requires is a clear record as to Shaw as at 10th December. By the disposition itself a personal search is required as against W. Shaw, who on the face of the disposition appears as the proprietor, and to whom the price was paid. The defenders cannot be held to have fulfilled their obligations till the record is cleared of these inhibitions.

The Court adhered.

Counsel for the Pursuer — Balfour, Q.C. — Macfarlane. Agents — Macrae, Flett, & Rennie, W.S.

Counsel for the Defenders—W. Campbell — Clyde. Agents — A. & A. S. Gordon, W.S.

Saturday, October 17.

SECOND DIVISION.

(With Three Judges of the First Division.)

[Lord Low Ordinary.

CRAIG *v.* HOGG.

Judicial Factor — Expenses — Personal Liability—Decree for Expenses against a Litigant "as Judicial Factor."

A judicial factor, who defended an action brought against him in that capacity, was found liable in expenses to the pursuer "as judicial factor." *Held*, by a majority of seven Judges —*diss.* the Lord Justice-Clerk and Lord Trayner—that the decree did not warrant personal diligence against the defender.

Opinions per the Lord Justice-Clerk, Lord M'Laren, Lord Trayner, and Lord Moncreiff, that a judicial factor who litigates unsuccessfully is as a general rule personally liable for the expenses of the successful party. *Opinions contra per* Lord Young, Lord Adam, and Lord Kinnear.

On 13th December 1892 James Craig, C.A., Edinburgh, was appointed judicial factor on the estate of the deceased Archibald Rodan Hogg, Solicitor, Edinburgh. The estate consisted chiefly of a claim for repayment of £2026, 8s. 9d. of cash advances made to John Baird, builder, Edinburgh, secured over the reversion of certain heritable subjects conveyed by absolute disposition. This estate the factor was unable to realise so as to yield a surplus to the factory estate.

On 21st April 1893 the Reverend David Nasmyth Hogg raised an action of accounting against Mr Craig as judicial factor, calling upon the latter to exhibit and produce an account of the intromissions of Archibald Rodan Hogg as executor of his deceased brother Dr Robert Hogg, or as vitious intromitter, and craving that Mr Craig as judicial factor foresaid should make payment to the pursuer as one of the next-of-kin of Dr Hogg of £1000, or such other sum as might appear to be the balance due to him, and in the event of the judicial factor failing to produce an account, craving for decree against him as judicial factor of £1000. Mr Craig lodged defences to this action.

On 1st March 1894 the Lord Ordinary (Low) "pronounced an interlocutor decern-