ings have not agreed to renounce probation, and as they are at variance regarding matters of fact, some inquiry would be necessary. Before there can be any inquiry, however, the respondents are entitled to a judgment on their preliminary pleas. The Sheriff has therefore, in conformity with the opinion which he formerly expressed, sustained the respondents' first plea-in-law. This renders it unnecessary to dispose of their second, third, and fourth pleas; but the second practically involves the same question as the first. As regards the third and fourth, the Sheriff may say that he does not think the petitioner's averments are so plainly irrelevant that the petition should on that account be dismissed at this stage; nor is he prepared to hold that his former judgment on the merits is *res judicata*, although it might form a precedent in similar circumstances, unless the Sheriff were convinced that it was erroneous."

The pursuer appealed, and argued that his production of his bill of assessment was a sufficient title to complain under the 67th section of the Act.

Argued for the respondents—Even if the pursuer had a title, he had no interest to sue, as he had not set forth that he had suffered either in his person or property by the proceedings complained of. Further, section 67 did not apply where an independent auditor had been appointed by the Sheriff in terms of section 69, and had audited the accounts in terms of section 70. In such a case the right of appeal was limited to that specified in section 70.

LORD JUSTICE-CLERK—I think that section 67 does confer upon a ratepayer the right to take objections to the accounts of the municipality, and I find nothing in section 70 which deprives the ratepayer of that right. As the sole question before us is the question of title to sue, I am unable to agree with the judgment of the Sheriff, and am of opinion that it should be recalled.

LORD YOUNG—I am of the same opinion. I think the petitioner here has a title to present a complaint under section 67 setting forth the grounds of his objection. The petitioner has done so, and I am of opinion that the Sheriff's judgment finding that he has no title to complain must be recalled, and the petition remitted to him to consider the complaint and the grounds of it. The Sheriff will exercise his own judgment as to how he ought to deal with those as stated by a party having a legal title to state them. It might be quite within the Sheriff's power in the exercise of his discretion to refuse proof nto all or any of them. That he must determine in the exercise of his judgment, having regard to the grounds of the objection, and also taking into account the position of the party stating them as the grounds upon which he was dissatisfied. By sending back the case to the Sheriff we decide nothing more than this, that the petitioner has a right to state his complaint and the grounds of his objections in the petition, and that the Sheriff must dispose of them.

LORD TRAYNER—I am of the same opinion. The Sheriff has held that the petitioner has no title or interest to sue. I think that it is impossible to read section 67 without seeing that any person who is assessed or liable to be assessed has a title to complain if dissatisfied, and this title is not abrogated in any way by section 70. The petitioner's title consists in the fact, admitted by the defenders on record, that he is a ratepayer of Leith, and that he has been assessed and is liable to be assessed. His interest is just the interest of a ratepayer, neither more nor less, and it is no answer to his complaint to say that he has no interest to make a complaint because he will not benefit pecuniarily by the result. The statute says nothing whatever about the right of the ratepayer to complain being qualified by his being interested pecuniarily.

LORD MONCREIFF was absent.

The Court recalled the interlocutor appealed against, and remitted the cause to the Sheriff to proceed, and found the pursuer entitled to the expenses of his appeal.

Counsel for the Pursuer—Party.

Counsel for the Defenders — Salvesen. Agents — Irons, Roberts, & Company, S.S.C.

Wednesday, March 9.

SECOND DIVISION.

[Sheriff-Substitute of Fife and Kinross.

CHRISTIE *v.* CAMERON.

Sale — Sale of Heritage — Obligation to Clear Record of Burdens — Disposition —Clause of Warrandice.

In the absence of a stipulation to the contrary, the seller of a heritable subject is bound, apart from the warrandice clause in the disposition, to free the subjects sold of all bonds and dispositions in security affecting them, and this obligation may be enforced by the purchaser after he has re-sold and disponed the subjects to a third party.

So *held* by a majority of the Second Division—*diss.* Lord Moncreiff.

Question—Whether the original purchaser had a title to sue upon the clause of warrandice in the disposition in his favour after he was divested of the subjects.

This was an action brought in the Sheriff Court at Dunfermline by Thomas Christie, flesher, Dunfermline, against Peter Hay Cameron, Solicitor before the Supreme Courts of Scotland, Edinburgh, proprietor of the lands of Clune, near Dunfermline. The pursuer prayed the Court to decern and ordain the defender instantly to dis-

burden certain heritable subjects, which the defender had sold to the pursuer, of two bonds and dispositions in security, one for £7000 and the other for £1200, and of any other bonds and dispositions in security which might be found to exist affecting said subjects.

By disposition dated and recorded February 1893, the defender, in consideration of a payment of £75 made to him and his sisters, Isabella Cameron and Margaret Cameron, *inter alia* disponed and conveyed to and in favour of the pursuer, his heirs and assignees whomsoever, heritably and irredeemably, 'All and Whole that strip of ground (formerly a strip of planting) being part of the estate of Clune, adjoining the piece of ground before disponed,' . . . with his whole right, title, and interest, present and future, therein. The defender also granted absolute warrandice. By disposition dated and recorded November 1894, the pursuer, with the consent of the after-named John Seton, in consideration of the sum of £490, *inter alia*, disponed the subjects above described to Mrs Jane Begbie or Seton, wife of John Seton, railway brakesman, then residing at No. 1 Ivy Terrace, Edinburgh. At the settlement of this transaction the pursuer's agent, in order to carry through the same, was obliged to grant the usual obligation to clear the record on a search disclosing burdens being presented to him within a short period thereafter, and as it had been previously ascertained by the purchaser's agent that the bonds and dispositions in security aftermentioned affected the subjects before described, the sum of £30 was retained by him from said price of £490, as the value of said subjects, to be deposited in bank to await the fulfilment of said obligation.

Upon a search being obtained by Mrs Seton the existence of the bonds referred to in the prayer of the petition was disclosed, and her agent having consequently requested the pursuer to have the record cleared, his agent called upon the defender to have the bonds restricted so far as the strip of ground was concerned, but the defender refused to do so.

The defender explained that the strip of ground in question was a small strip or fringe of rough pasture and brushwood incapable of cultivation; that in the opinion of the pursuer himself, as expressed in writing, its annual value to him as proprietor of the adjoining land did not exceed one shilling; that to any other it was worth absolutely nothing; that the price of £75 was the price of the feu-duty amounting to £2, 8s. 2d. per annum, and minerals conveyed by the other part of the disposition; and that the capital value of the strip of ground could not exceed twenty-five shillings; that as he regarded his title to the ground in question as doubtful, the pursuer having occupied it without paying rent, he practically presented it to the pursuer, and that consequently at the settlement of the sale to the pursuer no obligation to provide searches or to clear the record was given by the defender, but that on the contrary it was expressly stipulated by the defender, and agreed to by the pursuer, that no search was to be given.

The pursuer pleaded — "The defender having sold to the pursuer the subjects and others described in the prayer of the petition with absolute warrandice, and there having been found upon the record burdens affecting the same, the prayer of the petition should be granted, with expenses, as craved."

The disposition by the pursuer to Mrs Seton contained the usual clause of warrandice.

On 9th September 1896 the Sheriff-Substitute (GILLESPIE) issued the following interlocutor—"The Sheriff-Substitute, having considered the cause, finds that the pursuer having been divested of the subjects, and not having incurred any loss, judicially established, by the defender's contravention of warrandice, has no title to sue this action: Dismisses the action: Finds the defender entitled to expenses on the lower scale," &c.

Note.—"By disposition dated and recorded February 1893 the defender sold to the pursuer a small strip of ground.

"By disposition dated and recorded November 1894 the pursuer resold the strip of ground to a Mrs Seton.

"Both dispositions contain the usual clauses of warrandice.

"In this action the pursuer seeks to have the defender ordained to disburden the subjects of two bonds granted by the defender, by which a search shows it to be affected.

"It is not possible to say what consideration was either paid or received by the pursuer for the ground, as in both cases the conveyance included other subjects for a slump sum. But the defender says that the value of the strip is a mere trifle, and that if he is liable in warrandice he would prefer to pay its value rather than be at the cost of clearing the record.

"While the correct conception of warrandice is not an obligation to protect, but only to indemnify in case of eviction, the rule seems to have grown up in practice and to have been sanctioned by decisions, that if a threatened eviction arises upon the deed of the immediate author, the purchaser is entitled to call on him to clear the record without waiting till the property is evicted or carried off. See Montgomerie Bell's Lectures, 1st ed., p. 207. It may therefore be conceded to the pursuer that if he had still been vested in the subject acquired from the defender he could have sued the defender to disburden the subject of bonds granted by the defender without waiting till the creditors in the bonds took action, though it is thought that a tender by the defender of the value of the subject, as the same should be ascertained, would have been a sufficient answer to the action.

"But the pursuer being entirely divested of the subject, and Mrs Seton's title to it being complete, the right to call on the defender to disburden the subject has passed with the subject to Mrs Seton — Ersk. ii., 3, 31. The pursuer has, no doubt, a right to be

indemnified by the defender for any loss judicially established to which he may be put by the defender's contravention of warrandice. But all that the pursuer avers comes to this, that difficulties have arisen with Mrs Seton's agent in settling the price, and that he has kept back £30 until the subject is disburdened of the bonds. Mrs Seton's right to keep back the money from the pursuer has not been judicially established. Her claim of warrandice against the pursuer, rests not on any adverse right granted by the pursuer himself, but on a right said to be preferable to the pursuer's, and consequently it is at least doubtful whether, if she elects to proceed against the pursuer, she is not bound, in accordance with the fundamental conception of warrandice, to wait for some action on the part of the creditors in the bonds. The defender would be well advised to keep in view the observations of Mr Montgomerie Bell at the top of page 208 of his Lectures (1st ed.), and take the negotiations with Mrs Seton into his own hands. His defence on the merits that the strip in question is not part of the estate of Clune is not very hopeful in the face of the description of it as part of the estate of Clune in his own disposition to the pursuer."

The pursuer appealed to the Court of Session.

In the course of the discussion counsel for the pursuer stated that he desired to amend his record, which he subsequently did, *inter alia*, by adding the following plea-in-law:—"II. The defender being bound to disburden the subjects in question of all bonds and dispositions in security affecting the same, decree should be pronounced in terms of the prayer of the petition."

The argument for the pursuer and appellant sufficiently appears from the judgments.

Argued for the defender and respondent —(1) The pursuer's action was originally founded solely upon the clause of warrandice in the disposition by the pursuer to him. He had no title to sue upon this clause of warrandice, for he had assigned it to the sub-purchaser, who was now alone *in titulo* to enforce it — Ersk. Inst. ii. 3, 31. One who had assigned an obligation could not sue upon it. (2) The pursuer had no claim against the defender upon the original contract of sale, for all such rights had been merged in the obligation of warrandice in the disposition, which the pursuer had now assigned away. At most, upon the contract of sale he might have a right of relief for anything he might pay to the sub-purchaser, but such a claim of relief could not arise till a claim had been made upon him. (3) This action as laid was incompetent. Warrandice gave rise to a claim for damages, and not to a right to have the burden removed by way of specific performance. The obligation of the granter was to pay damages as indemnity for the grantee's eviction. An opportunity to remove the burden was a favour granted to the seller, and the only decree which could be competently pronounced against him was, failing removal of the burden, to pay damages. At least an action upon warrandice must conclude alternatively for damages, and not solely for an order to remove the burden—*Welsh* v. *Russell*, May 19, 1894, 21 R. 769, and Erskine ii. 3, 30, then cited by Lord M'Laren at p. 773; *Kettle* v. *Scott*, November 30, 1832, 11 S. 147; *Smith* v. *Ross*, February 17, 1672, M. 16,596, and January 18, 1687, M. 16,608, at p. 16,610.

At advising—

Lord Trayner—If the pursuer's demand had had no other foundation than the clause of warrandice in the conveyance granted in his favour by the defender, I should have had considerable difficulty in interfering with the interlocutor appealed against. It is difficult to see how the pursuer could base any claim upon a right, once his no doubt, but of which he has now divested himself in favour of another. But I think the pursuer has a good claim upon grounds independent of the clause of warrandice. The pursuer bought the property in question for an agreed-on price, and it is of no consequence that the property is of small value. Such as it is, the defender sold it to the pursuer, and I take it that when the pursuer sold the subjects, he sold them as unencumbered. When property is sold, it is to be held as sold free from encumbrances unless there be something to the contrary expressed in the bargain. If encumbrances are subsequently found to exist, the seller must clear the record. The defender pleads, however, that he is not bound to do so, because no obligation is imposed on him to that effect in the disposition which he granted. I think his obligation did not need to be expressed in the disposition, and in practice I do not remember ever to have seen this done. Granting a disposition does not free the seller from his obligation to disencumber. Nor does the fact that the pursuer stipulated that he should not be bound to supply a search, free him from the obligation to clear the record. It only frees him from the expense of supplying the search. But if the purchaser order the search himself, and finds that the land is burdened, the seller must discharge the burden.

Notwithstanding the fact that the defender has now conveyed the property to another, I think he is the creditor in the obligation to disencumber, and may enforce it. His interest to do so is obvious.

It is admitted now (although originally denied) that the bonds in question do affect the property which the defender sold to the pursuer. I think therefore that the pursuer is entitled to our judgment.

Lord Young—From the first I have never had any doubt about this case. I was a very willing party to delay being given, because I thought that it was a case which the parties with ordinary good advice could have arranged. The bondholders might have been induced to restrict their bonds. But the defender has been so foolish as to refuse to take any steps to that end, and the case must be settled according to the ordinary rules of law.

Now, I hold it well established, and indeed not disputed, that when something is sold, whether it be heritable or moveable, the seller is bound to free it of encumbrances, unless there is a bargain to the contrary. When a subject is sold it is presumed to be sold unencumbered, and if it is encumbered the seller is bound either to disencumber it, which he will be ordered to do if it is reasonably possible, or if there is any serious difficulty in doing so, the obligation will be enforced in shape of damages for failure to do what he was bound to do, the circumstances being such as to make it improper to enforce specific performance of the obligation.

I take the contract here as it appears on the face of the documents, and I do not give any effect to the previous communings of the parties. There is nothing in the disposition granted by the defender in the pursuer's favour to show that the subjects were sold as encumbered. I am therefore of opinion that as they were not sold as encumbered, and as they are encumbered, and it is admitted they are, the defender is bound to disencumber them.

It is maintained—I think the contention is quite untenable—that the obligation cannot be enforced by the pursuer because he has now sold the subjects to a third party, and that it can only be enforced at the instance of the party to whom the subjects have now been sold. I do not dispute that she might have had a right and interest to do so, but she has not the sole right. She has the same right to have the subjects disencumbered as the pursuer has. But she is entitled to demand that the pursuer, who has sold the subjects to her, should disencumber them, and she is not bound to go against the original seller. It might be the case that the original seller could not disencumber. He might be an undischarged bankrupt, and she is entitled to enforce the obligation against the person who has sold to her. She is not bound to take the obligation of anyone else. But if she is entitled to enforce the obligation against the pursuer who has sold to her, then the pursuer is entitled to enforce the original obligation against the defender. To say that the pursuer is not entitled to come upon the defender for relief, or to enforce the obligation in order to relieve himself from the claim which his own purchaser is entitled to make upon him, appears to me extravagant. I think, therefore, that the present defender is bound to disencumber the subjects, and that upon the demand of the present pursuer, who although he has sold them has still an interest to have them disencumbered, as he is under an obligation to his own purchaser to disencumber them. I should have thought this was indisputable.

I think the attitude taken up by the defender is unreasonable. He declines to take the trouble to come to any arrangement with the bondholders, and we must therefore decide the question on the merits. The result is that in my opinion the pursuer is entitled to judgment, and with expenses.

The LORD JUSTICE-CLERK concurred.

LORD MONCREIFF being absent from the advising, his opinion was read by the LORD JUSTICE-CLERK :—The defender's objection to the pursuer's title although technical is serious. The pursuer is no longer proprietor of the subjects conveyed to him by the defender. He has conveyed them, together with his whole right, title, and interest, to Mrs Seton, and assigned the writs, thus substituting her to all effects as proprietor of the lands ; and she is infeft in them.

The question is, whether in those circumstances there remains in the pursuer any title to call upon the defender to disencumber lands which no longer belong to him, the pursuer, and which he has conveyed, together with all rights, whether real or personal, necessarily attaching to them and not merely collateral, including the obligation of warrandice in his own favour. The seller's obligation to clear the record, although it often is made matter of special arrangement in missives of sale, is an implied term of the contract of sale of lands, and could probably be made effectual without any special undertaking in the disposition. But it is covered and can be made effectual through the obligation of warrandice, and this the pursuer has assigned to the purchaser from him. It is true that the pursuer has an interest to compel the defender to disencumber the lands, because he in his turn has undertaken an obligation to clear the title of the purchaser from him. The question is, does that interest give the pursuer a title to sue this action in his own name? Although I feel the question to be one of difficulty, I have been unable to satisfy myself that the judgment of the Sheriff is wrong. It is supported by the authority of Ersk. ii. 3, 31, and Menzies, p. 643, and Juridical Styles (Heritable Rights, 5th ed. p. 143 (note), and we were referred to no satisfactory authority to the contrary.

At the same time I do not regret that your Lordships are prepared to hold that the pursuer has a title to sue, because the defender could not, in my view, and does not maintain that he could, on the ground of title, resist the same demand if made by the purchaser from the pursuer. Unfortunately, according to our practice, another pursuer cannot be added.

Counsel for the defender argued that as the case had ultimately been decided upon the pursuer's amendment, which had not been put in until after the conclusion of the discussion, the pursuer was not entitled to expenses, but their Lordships refused to give effect to this contention.

The Court pronounced the following interlocutor :—

> "Recal the said interlocutor (of 9th September 1896), and ordain the defender to disencumber the strip of ground (formerly a strip of planting), being part of the estate of Clune, of the two bonds and dispositions in security for £7000 and £1200 respectively, men-

tioned in the prayer of the petition, and decern: Find the defenders liable in expenses in this and in the Inferior Court," &c.

Counsel for the Pursuer—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Counsel for the Defender—W. C. Smith—M'Lennan. Agent—P. H. Cameron, S.S.C.

Thursday, March 17.

SECOND DIVISION.

GORE BOOTH *v.* GORE BOOTH'S TRUSTEES.

Succession — Testament — Revocation—Residuary Bequest.

By trust-disposition and settlement dated in 1877 a testatrix directed her trustees to divide the residue of her estate in certain proportions among her sons *nominatim*. After her death there was found in her repositories a holograph writing beginning, "My will is in the keeping of" certain law-agents. The writing then proceeded — "In addition to this I hereby leave and bequeath" certain sums to various people. "Of my ornaments I leave," — here followed gifts of articles of personal use to various relatives and friends. "To my dear daughter Joana, my dressing-box and all my trinkets not mentioned above. Whom also I make my residuary legatee, to whom shall belong all my clothes, moveables, or personal property not otherwise disposed of, as well as furnishing and plenishing of my house, 88 Clyde St., Helensburgh. To Robert, part of silver plate, of which there is a separate list; also part of linen and backgammon box. Signed, ISABELLA GORE BOOTH, January 7, 1884."

Held that the bequest to Joana in the holograph writing did not operate as a revocation of the residuary bequest in the trust-disposition and settlement, but was confined to corporeal moveables *ejusdem generis* with those articles of personal use with which the words, both before and after those quoted, dealt.

Mrs Isabella Smith Gore Booth died on 23rd June 1897, leaving a trust-disposition and settlement dated 6th November 1877, by the last purpose of which she directed her trustees "to realise the whole residue and remainder of my said means and estate particularly and generally above conveyed, including the mansion-house and grounds of Artarman aforesaid, and to divide the same into six equal parts or shares, and to pay and convey to my son, the said Robert Henry, two of said parts or shares, and to my other sons, James, Edmund Henry, Henry Francis, and Reginald, each one of said parts or shares; declaring that in the event of any of my said sons predeceasing me leaving issue, such issue shall be entitled equally among them to the share which their father would have taken on survivance; and further, that in the event of any of them predeceasing me without leaving issue, or of their leaving issue, but of such issue all dying before receiving payment of their father's share, then the share which such predeceaser or predeceasers would have taken on survivance shall fall and accresce to his surviving brothers and the issue of any of them who may have predeceased, equally, as coming in place of their father."

After Mrs Gore Booth's death there was found in her house at Helensburgh a small travelling strong-box containing an envelope marked in her handwriting "Private Will 1881." It contained, *inter alia*, a holograph writing beginning — "My will is in the keeping of Messrs Ritchie & M'Lean, Hope St., Glasgow," a firm of law-agents; "Trustees" — here followed their names — "In addition to this I leave and bequeath"—here followed legacies of various sums to her sons and others and to her trustees. The writing then went on—"Of my ornaments I leave to my son Robert, for his wife when he marries, my set of pearls" — here followed legacies of other articles of personal adornment to nine other relatives and friends—"To my dear daughter Joana, my dressing-box and all my trinkets not mentioned above. Whom also I make my residuary legatee, to whom shall belong all my clothes, moveables, or personal property not otherwise disposed of, as well as furnishing and plenishing of my house, 88 Clyde St., Helensburgh. To Robert, part of silver plate, of which there is a separate list; also part of linen and backgammon box. Signed, ISABELLA GORE BOOTH, January 7, 1884."

A question having arisen, *inter alia*, as to whether the residuary clause in the settlement had been revoked by the holograph writing, a special case was presented by, *inter alios*, (2) Miss Joana Arabella Gore Booth, (7) Mrs Gore Booth's trustees, and (8) James Gore Booth, Robert Henry Gore Booth, Edmund Henry Gore Booth, Reginald Henry Newcomen Gore Booth, and (10) the Reverend Henry Francis Gore Booth, the residuary legatees under the trust-disposition.

The questions at law included the following — (4) Is the effect of the holograph writings, or any of them, which were found in the repositories of Mrs Gore Booth, to revoke the residue clause in the trust-disposition and settlement executed by her?

Argued for second party—The holograph writing had revoked the residuary bequest in the trust-disposition. The words used in the holograph writing were capable of including the whole personal property of the deceased, and were a valid bequest of residue. The mention of clothes did not derogate from the universality of the bequest, and the interpretation was strengthened by the words "moveables or personal property"—*Dobson* v. *Bowness*, 1868, L.R., 5 Eq. 404; *Wallace's Executors* v. *Wallace*, November 21, 1895, 23 R. 142.