and future for his own relief, and the bankrupt granting that security committed a legal fraud. The verdict on issues 3d and 5th must stand. As to the bill the pursuer has no case.

LORD-JUSTICE-CLERK—It appeared to me at the trial that there was no evidence on the 2d, 4th, and 6th issues, or rather that any evidence was against the pursuer. The defender proved that when he took the dispositions, Robertson was considerably indebted to him; and that when he took the promissory note Robertson was indebted to him in the sum of £5717. In these circumstances the securities and promissory note were not granted without just, true, and necessary cause. But the other issues are in quite a different position, and raise a novel question of importance. The securities were granted in January 1854. At that date the cautioner had made considerable advances exceeding the value of the property. In so far as the security was for advances then due they are liable to be reduced at common law as an illegal preference. But in consequence of the dispositions being absolute in their terms, the defender may maintain them for subsequent advances, and if such had been subsequently made by a party unconnected with the bankrupt, they might have been supported as *nova debita*. No doubt Thomson was under no positive obligation to make such advances. No one could have compelled him. If Thomson had left the infirmary unfinished, there would have been a claim against him for damages. It was for the purpose of avoiding this that the cautioner involved himself, and he had so identified himself with the contractor that he had, so to speak, elected to make the advances. That being so, the substance of the case is that the securities were granted to relieve the cautioner, and that takes the case out of the principle of *novum debitum*, and makes the dispositions to be regarded not as securities granted in respect of advances to be made, but truly in relief of obligations long previously undertaken by the cautioner.

The Court accordingly pronounced an interlocutor by which they "discharge the rule in so far as the verdict finds for the pursuer on the 1st, 3d, and 5th issues, *quoad ultra* make the rule absolute, and appoint a new trial to take place on the 2d, 4th, 6th, and 7th issues, reserving in the meantime all questions of expenses."

Agents for Pursuer—Hill, Reid, & Drummond, W.S.

Agent for Defender—James Webster, S.S.C.

Tuesday and Wednesday, Dec. 18, 19.

JURY TRIAL.

(Before Lord Barcaple.)

BROATCH *v.* JENKINS (*ante*, vol. ii. p. 169).

Fraudulent Misrepresentation—Jury Trial. Verdict for pursuer.

In this case, in which Robert Broatch, writer in Kirkcudbright, is pursuer, and David Jenkins, writer in Kirkcudbright, is defender, the following was the issue:—

"Whether the defender, David Jenkins, by fraudulent misrepresentation as to the number and extent of the accounts, and amount of the balance, claimed by him from the defender, James Rankine, induced the pursuer to become a party to the minute of reference, No. 29 of process, as cautioner for the said James Rankine?"

After a trial which lasted two days, the jury, by a majority of nine to three, returned a verdict for the pursuer.

Counsel for Pursuer—Mr Macdonald and Mr Inglis. Agent—Robert Johnston.

Counsel for Defender—Mr Pattison and Mr Burnet. Agent—James Somerville, S.S.C.

COURT OF TEINDS.

Wednesday, Dec. 19.

MINISTER OF KILBIRNIE *v.* THE HERITORS.

Augmentation of Stipend—Objection that Teinds Valued. An objection having been stated to an augmentation that the whole teinds of the parish had been valued in 1636, and the decree of valuation having been recognised in an augmentation granted in 1815, and since then acquiesced in, although it was now said to be invalid, held that the minister must first raise a declarator of the invalidity of the decree, and process sisted for this purpose.

This was a process of augmentation, modification, and locality, at the instance of the Rev. John Orr, minister of the parish of Kilbirnie, against the heritors. The last augmentation was granted in 1815. The minister now asked for an augmentation of 10 chalders, and £15 for communion elements.

MARSHALL (with him RUTHERFURD CLARK), for the heritors, objected (1) There was no free teind. The parish consisted of three baronies, Ladyland, Glengarnock, and Kilbirnie. By three separate decrees, applicable to the various baronies, the whole teinds in the parish had been valued, and the minister was in possession of the total valued teind. The decree of valuation of the lands and barony of Kilbirnie was dated 16th March 1636. To this valuation the minister for the time was a party, for the decree was an incidental proceeding in a process of augmentation at his instance. But even if the minister was not cognisant of this decree, the valuation was not thereby invalid, as it was an act of the High Commission of 1633. Simpson *v.* Skene, 20th June 1837, 15 S. 1163. (2) If the augmentation asked were granted, the stipend would at once be leviable. As the interim scheme of locality could not be reviewed, there would be no opportunity of then having the validity or invalidity of the decree of 1636 ascertained. (3) The augmentation asked was excessive.

HAMILTON PYPER, for the minister, argued—The decree of March 1636 was null, in respect the minister was not called as a party. Brown *v.* Stewart, 31st January 1851, 13 D. 556; Minister of Banchory-Devenick *v.* the Heritors, July 1 1863, 1 M'P. 1014, and February 3, 1865, 3 M'Ph. 482; Kirkwood *v.* Grant, Nov. 7, 1865, 4 M'Ph. 4.

The LORD PRESIDENT—This question is one of expediency, convenience, and justice, rather than of law or of fixed rule. Here an augmentation is asked to which confessedly objections as to the granting or refusing of it will be made by the heritors. I don't mean to say that the mere production of a decree of valuation *ex facie* bad will be a stopper to a process of this kind. But if a decree of valuation is produced which has certain sanctions attached to it, and which obviously requires discussion and inquiry,

then comes the question, what are we to do at this stage of such a case? Although I may be inclined to draw certain inferences from the tenor and import of this decree, I think it does require consideration, and has certain sanctions attached to it. It is a decree which has received effect in the process of 1815. It had then been produced, and no objections had been taken to it or none had received effect. Then there has been acquiescence in that view of matters for fifty years. There was sufficient opportunity to bring an augmentation, and there were strong considerations to induce the minister to do so. He has not done so. I think, therefore, there has been acquiescence. In these circumstances I think this decree requires further discussion. At what stage is that to be had? If we grant the augmentation at present, it would appear the result would be that the heritors would be compelled to pay under the interim scheme of locality, although it might be ascertained in the discussion of the final scheme that this was a valid decree. That would be inconsistent with justice. Therefore, I am disposed to sist procedure until an action of declarator is raised for the purpose of ascertaining the validity or invalidity of this decree; and I think this action should be at the instance of the minister. Meantime, he will have the benefit of the date at which he has brought his augmentation.

The LORD JUSTICE-CLERK—I concur; but I cannot help expressing regret that there are no means of trying such a question as this in the process of augmentation. Whether it would be competent to us to grant the augmentation conditionally upon there being found to be free teind, and remitting to the Lord Ordinary to ascertain that before preparation of the interim scheme, I give no opinion. But I cannot help saying that I do not see any reason why this should not be made competent by Act of Sederunt, there being no statute law on the subject. But I don't much regret, in the present case, that we should come to the conclusion of requiring the minister to clear his way by an action of declarator, because the incumbent of the parish since 1815, having remained quiescent, it is no great hardship that he should be called upon to take a step which, under other circumstances, might be a hardship.

The other Judges concurred.

Agent for the Minister—John Gillespie, W.S.

Agents for the Heritors—Tods, Murray, & Jamieson, W.S.

COURT OF SESSION.

Thursday, Dec. 20.

FIRST DIVISION.

CRAIG *v.* TAYLOR.

Expenses. A pursuer of an action of damages, who obtained a verdict with one farthing of damages, held entitled to expenses.

This was an action of damages for defamation at the instance of William Blackburn Craig, merchant in Glasgow, against William Taylor, junior, oil merchant and colour manufacturers, Liverpool. The case was tried before Lord Ormidale and a jury on the 17th July 1866, upon the following issue:—

"It being admitted that on or about the 14th day of March 1866, the defender, William Taylor, junior, wrote and transmitted to the pursuer a letter in the following terms:—"Liverpool, March 14, 1866. Sir,—Yours of the 13th inst. to hand. Just as I expected, '*your orders plentiful* yr. money *nowhere*, but there are too many of this class in your Town particularly—please try elsewhere, but friends in my way of business in this Town will have the opportunity of reading your communications. I cannot say I wish you better fortune elsewhere, because I believe Yr. system shd. be put a stop to. Yours, &c.,

(Signed) "W. TAYLOR, Jr.

"Mr Craig, Glasgow."

"Whether the said letter is of and concerning the pursuer, and falsely and calumniously represents the pursuer as a dishonest person who had sought to obtain goods from the defender, William Taylor, junior, without having the means of paying the price thereof, and without intending to pay the price thereof, and as one of a class who conducted business on the system of buying and obtaining goods without having the means of paying and without intending to pay, the price thereof, to the loss injury, and damage of the pursuer?"

Damages claimed, £500.

The jury returned a verdict for the pursuer, and assessed the damages at one farthing; and the question now in dispute was whether, under the circumstances of the case, this verdict carried expenses. The Lord Ordinary (Ormidale) on the 28th November 1866, found that it did. His Lordship observed in his note:—

"As a general rule, it cannot be denied that a pursuer of an action of damages, for slander or defamation of character, who has succeeded in obtaining a verdict, although only for nominal damages, is entitled to expenses. At the same time, it is equally undoubted that exceptional cases have occurred where a pursuer in an action of damages for slander or defamation of character has not been found entitled to expenses, notwithstanding of his having been successful in obtaining a verdict. The question here is, whether the present case falls under the general rule or the exception.

"The Lord Ordinary is of opinion that the present case is not to be treated as an exceptional one, and therefore the pursuer is entitled to expenses. In arriving at this conclusion, he has been influenced by the following considerations:—(1.) The slander or defamation by the defender, of which the pursuer complained, as set out in the issue, is of a very serious description. (2.) The jury, while by their verdict they found it proved that the slander or defamation complained of was uttered by the defender, have at the same time found that it was false and calumnious, and to the loss, injury, and damage of the pursuer. (3.) The defender down to the last made no apology or retractation; and (4.) while in consequence of no publication of the slander being proved, the jury may have thought it sufficient to give the pursuer only nominal damages, it cannot be overlooked that it was of importance to the pursuer to have the very serious charge made against him by the defender negatived by a jury; the more especially as the letter containing the slander also expressed something of the nature of a threat, that the matter would be made known by the defender to his friends in his line of business in Liverpool."

Against this interlocutor of the Lord Ordinary the defender reclaimed.

RHIND (with him RUTHERFURD CLARK), for