closed seller, and if a mandate were given to an intermediate person that would be a sale. Probably that was not the case here, as it appears to be part of the duty of excise officers to give parties an opportunity of breaking the law, and the presumption therefore is that the officer did not mean that the transaction should have a legal appearance. Now I do not think that these circumstances bring David Beattie under the description of "a person then and there selling." I cannot overlook the fact that the transaction took place through the defender's wife. It does not appear that she had liquor under her charge. With reference to the word "retail," I do not think it necessary to go into that matter. But I am not moved by the statutes, as they describe persons who make habitual sales, and only prescribe the limit that shall distinguish the dealer in large and small quantities. They do not give the idea that they contemplate an isolated act. We are told that it was proper to bring this temperance hotel under the regulations that other hotels are subject to, for the good of the community, I suppose. I rather think that we are sitting here in exchequer, with a view to the revenue of the Crown, and that in this case morality and public welfare is not what we have to deal with, and I don't think that this case comes before us so as to make a strong appeal to our moral sympathies.

The Court therefore returned their opinion, and gave direction to the effect that the facts did not warrant a conviction, and that the conviction by the Justice of Peace Court at Blairgowrie ought to be quashed.

FRASER, for the defendant, asked expenses, and referred to Quarter Sessions of Perth *v.* Anderson, 18th Dec. 1861, 24 D. 221 ; the Queen *v.* Gilroys, 4 Macph. 656, and 18 and 19 Vict., cap. 90, secs. 1 and 2.

The LORD ADVOCATE was heard in answer, and referred to White *v.* Simpson, 28th Nov. 1862, 1 Macph. p. 72.

The Court refused to award expenses. Their Lordships thought it fixed by the cases of White and Gilroy that the Justices could not give expenses in such matters ; that what was before the Court was merely a consultation by the Justices, and not a cause ; and that it was not competent to award expenses.

Agent for the Crown—The Solicitor of Inland Revenue.

Agent for Defendant—John Galletly, S.S.C.

Wednesday, Dec. 19.

SECOND DIVISION.

THOMAS *v.* THOMSON.

Bankruptcy—Fraud at common law and under Statute 1621, *c.* 18, *and relative Issues—New Trial.* A cautioner for the due execution of a building contract, who had taken no security from his principal, made advances to the principal during the progress of the contract to an extent exceeding the value of securities afterwards taken. Held, at common law, that, after the principal was insolvent, the cautioner was not entitled to take securities from the principal for relief from his advances, past or future, under the cautionary obligation, but that under the statute the securities were not granted without true, just, and necessary cause. Verdict of jury on common law issues sustained, but set aside on the issues under the statute.

This was an action of reduction instituted by James Thomas, trustee for the creditors of the late David Robertson, builder, Dundee, appointed in a process of *cessio bonorum* at Robertson's instance against his creditors, and also himself a creditor of David Robertson, against William Thomson, clothier in Dundee. It was sought to set aside two dispositions of house property in Dundee granted by David Robertson in favour of the defender on 20th January 1854, with the infeftments following on them and a promissory note for £5717, 3s. 1d., granted by Robertson to Thomson on 17th February 1858. The action arose out of the following circumstances :—

In 1851 or 1852 the corporation of the Dundee Infirmary resolved to erect a new infirmary, and the tender of David Robertson to execute the whole work for £9080 was accepted. The contract for the erection of the infirmary was dated 7th May 1852, and under it the defender, who was brother-in-law of Robertson, became cautioner for the due execution of the works. At the time of entering into the contract no security was stipulated for by Thomson, or granted to him. The work was commenced soon after the date of the contract, but before the end of 1852 Robertson found himself unable to go on with it without assistance, and was obliged to apply to the defender for pecuniary aid. The defender made advances to him from time to time, and he avers that at 20th January 1854, the date of the dispositions under reduction, these amounted to above £2000. The consideration mentioned in the dispositions is £1600, but it was admitted by the defender at the trial that though the dispositions were *ex facie* absolute, they were truly intended only as securities. It was further alleged by the defender, that after giving credit for the sum of £1600, the amount of his advances as at 17th February 1858 (the date of the promissory note), was £5717, 3s. 1d.

It appeared that unless certain allowances for extra work were made, the contract would be a losing one. The claims for these allowances were ultimately referred to Mr James Leslie, C.E., Edinburgh. Under this reference Robertson and the defender together gave in a claim for about £7000, but the sum allowed by Leslie only amounted to between £1600 and £1700, and from this time Robertson was undoubtedly insolvent, his solvency having all along depended on his receiving a sum approaching the amount of his claim for extra work, the infirmary having cost him in all about £13,394.

The present action was raised in 1864, and was founded on allegations that the defender's infeftments and promissory note were fraudulently granted both under the Act 1621, c. 18, and at common law. The issues adjusted for trial are printed *ante*, vol. ii., p. 252.

The trial took place in June last, before the Lord Justice-Clerk and a jury, and resulted in an unanimous verdict in favour of the pursuer on all the issues.

The defender now moved to have the verdict set aside as contrary to evidence ; and a rule having been obtained, parties were heard thereon.

SOLICITOR-GENERAL and BALFOUR, for the pursuer.

YOUNG and WATSON, for the defender.

At advising,

Lord COWAN—The defender's motion for a new trial is supported on the ground that the verdict is contrary to evidence ; that the jury had not evidence before them to justify them in arriving at

the verdict which they gave. It is not enough to satisfy us that there are doubts; we must be satisfied that the evidence is not such as to justify the verdict at all. In this view I have had doubts as to part of the verdict, and I am not disposed to think that the verdict should be allowed to stand on the 2d and 4th issues, being the issues founded on the statute, and the 6th and 7th issues, being the issues in regard to the promissory note. But I think that we cannot touch the verdict on the 1st, 3d, and 5th issues.

This is a very remarkable case. The party alleged to have got the fraudulent deeds under reduction was not an ordinary creditor of Robertson. He was cautioner for him under a building contract at the time when he took the securities for debts due or to become due with reference to that contract. His obligation is in these terms—"And moreover I, William Thomson, clothier in Dundee, do hereby bind and oblige myself, my heirs, executors, and successors, as cautioners, sureties, and full debtors for and with the said David Robertson and his foresaids, that he and they shall well and truly do, execute, and perform, or cause to be done, executed, or performed, the various matters and things incumbent on him and them by these presents, and shall pay, or cause to be paid, any sum and all sums of money that may become payable by him or them in virtue thereof." That is a very absolute obligation for fulfilment of the contract. In January 1854, the state of accounts brought out a debt due by Robertson to Thomson to a large extent—to the extent, as stated by Thomson, of £2075. But in April, the date of infeftment on the dispositions, it is recorded in Robertson's cash book by Thomson himself, that Robertson had fallen into utter insolvency; for I find a docquet in these terms under date 22d April 1854—"The contractor was so completely prostrated at the period of the last entry as above (having had to part with all his heritable property, worth £100 a year, and his trade, worth £200 more), that the building had to be carried on and finished by his cautioner. The cautioner can give any additional information that may be required. (Initialed) W. T." Therefore, under the hand of the defender, we are certiorated that Robertson was utterly insolvent when the securities were completed. I have no wish to press against Thomson anything not in evidence, and I don't think the two deeds were granted for prior debt. They were rather granted for the current account between Thomson and Robertson, and I give Thomson the benefit of the future advances. But what strikes me is this. Thomson as cautioner was bound with Robertson as principal to complete the contract. He was bound for performance and responsible for payment of debt to arise in consequence of non-completion. Were the dispositions not securities to Thomson to cover this debt and protect himself, and so secure an advantage he would not otherwise have got? Down to 1856 the pursuer continues to supply lime, while Robertson's whole property has been taken possession of by Thomson. It was in security of debt due or to become due under the contract to which Thomson was bound that the dispositions were taken. As to Thomson's knowledge of Robertson's insolvency, the docquet I have read is conclusive. When a creditor takes securities for prior obligations with his eyes open, and knowing the state of his debtor's affairs, he does what in the eye of the law is a fraud, and to the prejudice of other creditors.

These grounds do not lead me to the same conclusion as to the issues under the statute. It is not established that the deeds were granted without a just, true, and necessary cause, and therefore the statute does not apply. But though they are not securities for a prior debt, they are for a current contract, and I therefore think that though not reducible under the statute, they are reducible at common law.

Lord BENHOLME—I concur. The issues at common law present a difficult case, and the difficulty arises because the transaction turns out to be a security in the form of an absolute conveyance, and my doubt is whether it should not be held to be a security for subsequent advances. The ground on which my doubt is rested is this. Thomson entered into a cautionary obligation of an important kind, exposing him to a risk of very heavy loss without obtaining any security. Matters proceeded on this footing, and in the very midst, after Thomson had made large advances, and when he knew that Robertson was insolvent, and had no hope of completing the contract without failing, these dispositions were taken to secure Thomson. The future advances were part of the same system of liability as the prior ones, with this difference only—he had less hope of being reimbursed, because insolvency then stared Robertson in the face, and Thomson knew of this. I think he cannot be held to have been in the position of a third party making advances on faith of security. On the whole, I think the view of the jury is a just one. It is quite plain, in consequence of Robertson's insolvency and his inability to make advances for the Infirmary, that the cautioner had to carry on the contract. He had to make advances for himself, and the question is, are these advances to be considered as *nova debita?* I think not. Thomson was bound to make them in justice to himself, whether the securities were granted or not. This is not the case of a man who, on good security being given, makes large advances, and I therefore think that on the 3d and 5th issues the jury have taken the right view.

Lord NEAVES—I am of the same opinion. As to the issues founded on the statute, I think the circumstances are not those to which the first part of the Act 1621 is applicable. That part of the Act is intended to reach pretended alienations to a person who is truly a trustee to hold the property conveyed for behoof of the bankrupt, and not dispositions to a creditor, whether his debt be of smaller amount than the property conveyed or not. What is included in the category of fraud at common law is very plain. When a man is insolvent, and knows it, he is barred by the first principles of justice from giving any preference to one of his creditors over another. That this is also the law is stated by Lord Corehouse in the case of M'Ewan and Miller *v.* Doig, where his Lordship observed, "It is the duty of a person notoriously insolvent to abstain from every act which can affect the preferences of his creditors." (6 S. 889.) There is no doubt that Robertson was prostrate, and the only nicety in this case is that Thomson began without security, and undertook the whole obligations in the contract without stipulating for any. If it had been a pecuniary bond with Thomson as cautioner, and Robertson had drawn the whole amount, and if Thomson had given Robertson money to fulfil his obligation to the bank, this would not be a *novum debitum*, but only a security for relief. There might be cases where it would be better for the cautioner to allow the matter to go by the board, but behind the back of every one Thomson takes security for all liabilities past

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,