1817.

TOWART
v.
SELLARS.

and in that view also the length of time is an important feature in the case.

"Upon the whole, therefore, it appears to me that the decision of the Court below cannot be sustained. It is not consistent with the nature of the proceeding, which impeaches these deeds, on the ground of utter incapacity since 1782. But the judgment does not apply to that case, as it sustains the deeds to a certain extent. The result is, that the evidence for the respondent is not sufficient to reduce these deeds. There is positive evidence to support them, as it must be taken that the attesting witnesses would, if alive, have given evidence of the sanity of Maitland at the time the deeds were executed. There is positive evidence, therefore, of the sanity at the time of the execution of the deeds, or, at least, that he was sane in the judgment of the attesting witnesses; there is positive evidence of the sanity in the notes written by Maitland himself, which show that he knew and understood the nature of the transaction. There is, on the one side, clear, positive evidence to support the deeds; and, on the other, only general evidence to reduce them, which, consistently with the positive evidence, cannot be true. This is not, therefore, a case of doubtful balance of testimony, but the appellant's evidence is decidedly the stronger.

It is ordered and adjudged that the said interlocutors complained of be, and the same are hereby reversed. And it is further ordered, that the defences be, and the same are hereby sustained, and the defender (appellant) be assoilzied.

For the Appellant, *John Clerk, John Blackwell, Andrew Skene.*

For the Respondent, *John Leach, John Jardine.*

[Fac. Coll. Vol. xvii. p. 606.]

1817.

GEDDES
v.
PENNINGTON.

JOHN GEDDES of Verreville, Glasgow, . *Appellant;*

DAVID PENNINGTON, Horse Dealer, Glasgow, . *Respondent.*

House of Lords, 16th June 1817.

SALE OF HORSE—BLEMISH—REPETITION of PRICE—WARRANTY EXPRESS.—An action was raised for repetition of the price of a horse, bought expressly warranted "free from vice and every blemish," and a "thorough broke horse for either gig or saddle." The horse, when on a journey in harness, plunged, ran off, and broke the gig. Held, in the circumstances as proved, that the

buyer was not entitled to repetition of the price. Affirmed in the House of Lords.

An action was brought by the appellant, to have repetition of the price of a horse (£84), sold to him by the respondent, warranted by the respondent, by letter, in the following terms:—"I warrant this horse sound, free from vice and every blemish. He is quiet in harness, and sure-footed, and a thorough broke horse for either gig or saddle."

It appeared, that both before the sale, and for three weeks thereafter, the buyer had had opportunities of testing this warranty, by driving the horse in a gig. And for about two months, he, as well as his sons and friends, frequently drove the horse in a gig, and it was found, that in this respect, the horse answered the character given of him. However, having occasion to go on a journey from home, in going down hill in the gig, the horse plunged and kicked, ran off, broke the carriage, and threw the appellant and his wife to the ground.

It likewise appeared in evidence, that Pennington had bought the horse sometime before from Mr Anderson, Edinburgh, for sixty guineas, who explained to Pennington at the time, the qualities of the horse, and that, in particular, the reason of his selling the horse was, that having made use of him to run in the gig for sometime, he kicked and plunged and ran off on a late occasion on the Queensferry road, when the gig was overturned, and broken to pieces, and his own and his wife's life endangered; Pennington, in selling the horse again to Geddes, concealed these facts from him.

These, and other facts having been proved, the magistrates decided, that there was a breach of the warranty, and decerned for repetition of the price.

In an advocation of this judgment to the Court of Session, the Lord Ordinary (Alloway) pronounced this interlocutor:

"The Lord Ordinary, having considered this bill and answers, June 22, 1813.
"with the Inferior Court process, on account of the very great
"litigation which has already taken place, and that the cause
"appears now to be ready for an ultimate decision; appoints
"the bill and answers, together with the proof, to be printed
"at the mutual expense of the parties, and copies thereof to
"be put into the Lords' boxes, in order that the same may
"be reported to the Court."*

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* Note by the Lord Ordinary:—
"This is a difficult case. This horse was two months, all but

1817.

GEDDES
v.
PENNINGTON.

The cause was then reported to the Court; and the Court, after hearing counsel, remitted to the Lord Ordinary to pass the bill *without caution*, giving the opinions as noted below.*

" four days, in possession of Mr Geddes without complaint, al-
" though he constantly used him in a gig. And the horse never
" seems to have been unsteady, except during the last journey, in
" which two instances are mentioned. As a horse might easily
" acquire bad habits from careless driving, or otherwise, during
" that time, this could afford no pretence for returning the horse.

" The difficulty is, that Anderson had sold him to Pennington
" on account of the accident which happened at Queensferry Brae.
" But yet Anderson had no scruple of granting a certificate, stating,
" that he was regularly trained to harness. Although he mentioned
" to Pennington the accident at Queensferry, and told him he had
" never afterwards driven him in a gig, Pennington finding the
" horse perfectly quiet, and having repeatedly exercised him in the
" gig, was entitled, *bona fide*, upon three weeks' trial of the horse in
" that way, to warrant him as safe in harness, when he again sold
" him to Mr Geddes. He ought, perhaps, to have mentioned what
" happened at Queensferry. This would have been very fair. But
" if he had imputed that to accident, and the horse had been cured
" of fault in that respect, which seems to have been the case at the
" time of the sale, he might have *bona fide* sold the horse as a good
" horse. And that he was a good gig horse, for nearly two months
" after the sale, is certain.

" As to the case of Campbell and Jardine, so much founded on,
" the horse was returned in ten days. He was warranted sound;
" but it was proved he was afflicted, at the time of the sale, with
" running thrushes of considerable standing. So that case does not
" decide the present.

Jardine *v.* Campbell, Jan. 15, 1806. M. Sale, App., p. 13.

" But as the act requires bills of advocation to be passed on
" *caution*, the Ordinary does not think himself warranted to dis-
" pense with it in the present case, by pronouncing an interlocutor
" to that effect. And he has, therefore, ordered the bill and an-
" swers to be printed, in order to report it."

* Opinions of the judges :—

LORD SUCCOTH.—" The difficulty is where the Lord Ordinary puts it, in his note.

" The warranty by Pennington to Geddes is, that the horse is ' free from vice, and steady in harness.' This is strong and express; and no mention was made by Pennington of the accident at Queensferry, although this was particularly mentioned *to him* by Anderson. Thus, a *concealment* of a material fact in the history of the horse, took place.

" I doubt if it be a sufficient answer, that Pennington had reason to think he was *cured*, because he had gone quietly with

On the case being again heard before the Lord Ordinary, the respondent pleaded, that the horse had been proved to conform to the warranty. He had traced its history, and all the witnesses agreed in this, that the horse was steady and gentle in an uncommon degree. And so far from being addicted to running off, or unfit for harness, he had the horse driven in a gig sometimes by his children, and occasionally when there was no fewer than four in the gig. He was led down a close yoked to a gig, and down two steps of stairs. He was repeatedly left standing in the streets of Glasgow, yoked to the gig, without any person holding him. So that the whole character of the horse showed the reverse of that of a vicious animal, or a horse unfit for a gig, or inclined to run away. The accident which occurred in going down hill, must, therefore, have occurred from some mismanagement on the part of the appellant.

Besides, the appellant had kept him for two months without making any complaint, or offering to return him as disconform to warranty.

The Lord Ordinary (Gillies) pronounced this interlocutor:

" Sustains the reasons of advocation, advocates the cause, Dec. 9, 1813.
" assoilzies the defender (respondent) and decerns: Finds the
" pursuer liable in expenses: allows an account thereof to be
" given in, and remits to the auditor to tax and report."

On reclaiming petition, the Court adhered.

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him for sometime. He probably was *constantly* on his *guard* and a good whip. The length of time before returning the horse, I think, will not bar the action in this case, where the vice or fault showed itself only *very seldom*, and not every time the horse was in harness. There is some appearance that Mr Geddes managed the horse unskilfully in the driving, but this is not clearly made out."

Lord Hermand.—" The accidents all arose from unskilfulness of the driver. The horse was originally quiet."

Lord Balmuto.—" I am for passing the bill without caution. There is a clear proof, that he was quiet, and the accidents arose from the bad management of the drivers."

Lord President (Hope).—" The bill should be passed *without* caution, for the fault was in the *driver*, not in the *horse*. Anderson had driven the horse all about Edinburgh, and nothing happened until the accident at Queensferry Hill. It is said, that he kicked at this hill *without any cause*, but it is not explained, whether there was any breaking of the horse or not after that date. If a man whips a horse and checks him at sametime, the whip ought to be applied to him—not to the horse."

1817.

GEDDES
v.
PENNINGTON.

Against these interlocutors, the present appeal was brought to the House of Lords, by the pursuer (appellant.)

Pleaded for the Appellant.—1st, It was clearly proved, that the horse in question was not in terms of the respondent's warranty *a thorough broke horse for a gig.* 2d, The breach of the warranty in this case must be held to have been incurred, even if the respondent had shown, that at the time of the sale, he acted *bona fide* in representing the horse as free from vice, and a thorough broke horse for a gig; but the evidence shows, that he was in *pessima fide* so to represent the horse, he having been informed what befel Anderson on the Queensferry road, who cautioned him not to sell the horse as a gig horse. The concealment of this, and other circumstances, and the misrepresentation of the respondent were grossly fraudulent, and must vitiate the contract.

Pleaded for the Respondent.—The action is founded on the respondent's warranty, that the horse sold by him to the appellant was sound, free from vice and blemish, quiet in harness, sure footed, and a thorough broke horse for a gig. The breach of this warranty assigned by the appellant, is that the horse was vicious, being habitually addicted to running away, and unfit to be used in a gig; and, therefore, that he is entitled to recover back the price under the respondent's warranty. But, *First,* he failed to recur to the warranty *debito tempore;* and *Second,* he also failed to prove the alleged vice of the horse, and its unfitness to be used in a gig. The accidents alluded to, besides, must have occurred from unskilful driving, and not from any viciousness in the animal.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,

" My Lords,

" In this case, which is certainly somewhat difficult to deal with, it is stated, that a sum of £215 has been awarded as the costs of one of the parties, and the question is no more than this, whether a horse answered the warranty given by Pennington to Geddes, in this letter, in which he says, " I have this day re-
' ceived from your son, Mr Archibald, £84 sterling, the price of
' my dark bay horse sold you. I warrant this horse sound, free
' from vice and every blemish. He is quiet in harness, and sure-
' footed, and a thorough broke horse for either gig or saddle."

" It has been admitted on all hands, that the horse was sound and free from vice, except as afterwards mentioned; and that he

was quiet in harness, if along with another horse. But the question is, what was the demeanour of this horse in a gig? My noble predecessor could have better dealt with this case, and I wish it had fallen to his lot, and not to mine, to advise your Lordships in the decision of it. But as it is, I must deal with it as well as I can.

"It seems, that three of the judges below were of opinion, that this was a good horse for a gig. And one of them said, that it was very indiscreet to whip a horse and check him at the same time, and that, in his judgment, the whip ought to have been applied to the man rather than to the horse. Pennington had represented, that this was one of two horses sent to him from England, to be disposed of, which was not the fact. One of the judges says, that this was nothing at all; and I agree with him so far, that, if the warranty is answered, a misrepresentation as to the place from which the horse was procured, will not suffice to set aside the sale. But then, the misrepresentation may be a material consideration with respect to costs. Another judge seems to think, that, on account of this misrepresentation, Pennington could not successfully defend the action. That I conceive not to be correct, if it is made out that the horse answered the warranty.

"The appellant kept the horse two months. I have not had experience of late in Courts of law; but I understand, that, in this country, the time within which a horse ought to be returned, in cases of this kind, depends very much upon the period when the defect is discovered.

"But the principal question here is, whether the accident was owing to vice in the horse, or want of skill in the driver. And as to that, I think that the three judges below were right. But still, it is a doubtful case, and on that account, it may be improper to give the respondent the costs of the appeal; and another reason for not giving costs, is the improper misrepresentation, for the object of it must have been, to prevent inquiries which might lead to the rejection of the horse. But that misrepresentation will not invalidate the transaction, if the horse was a fit horse for a gig at the time he was sold. I propose, therefore, to your Lordships to leave the matter as it is, without giving costs to either side. My noble friends concur with me in this view of the case. Judgment affirmed. No costs on either side."

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *John Clerk, J. Cunninghame.*

For Respondent, *J. Greenshields, Fra. Horner.*