Gordon's debt has been proved to be extinguished. The only other debts are those of Kressau's or Macarthur's representatives. It has been shown that they are groundless, but supposing them good, their amount, according to the accountant's report, is only £154, 10s. 9d., and the sum ordered to be consigned, is sufficient to meet it.

1817.

FRAZER
v.
MACDONELL.

After hearing counsel,

The Lords find, that under the circumstances of this case, the whole of the balance due from the trustees of Lovat, of the price of Abertarff, ought to have been consigned in the same manner as the sum of £738, 6s. 6d., is by the interlocutor of the 22d of December 1810, ordered to be consigned; and that such balance, when so consigned, ought not to be paid to any person or persons, without notice to the trustees of Lovat. And it is further ordered, that with this finding, the cause be remitted back to the Court of Session in Scotland, to review the several interlocutors complained of, and to do therein as shall be just.

Journals of the House of Lords.

For the Appellant, *John Clerk, J. S. More.*

For the Respondent, *Sir Saml. Romilly, J. H. Forbes.*

ROBERT TOWART, Victualler, Glasgow, . *Appellant;*

ALEXANDER SELLARS, sometime Weaver in Glasgow, afterwards in Kirkintulloch, . *Respondent.*

1817.

TOWART
v.
SELLARS.

House of Lords, 16th May 1817.

INSANITY—PROOF—ADMISSIBILITY OF DEPOSITION OF AN AGED TESTAMENTARY WITNESS—OBJECTION TO WITNESS—INTEREST—AGENCY.—(1) Circumstances in which deeds were reduced, on the ground of insanity. On appeal to the House of Lords, the interlocutors reversed. (2) A deposition was taken before a Magistrate *ex parte* from an aged testamentary witness, eighty-three years of age, in anticipation of an action being raised to reduce the deed; this was refused to be received in evidence after his death. (3) Held the deposition of a witness was not to be opened up, whose testimony had been objected to on the ground of interest, and acting as agent for the appellant.

James Maitland was owner of some heritable subjects situated in Glasgow; and having become embarrassed in his cir-

1817.

TOWART v. SELLARS.

cumstances, he found it necessary to execute a trust-deed in 1783, for behoof of his creditors. The trustees were empowered by this trust-deed, to sell the subjects for payment of the grantor's debts, and they were taken bound to pay over the reversion, *if any, to James Maitland, or his heirs.*

Robert Towart, the appellant, was married to James Maitland's sister; and he was, besides, his largest creditor. By a transaction with the trustees, he proposed to pay all the appellant's debts, on getting a conveyance from the trustees to the subjects then under their management. The trustees, accordingly, executed a disposition in favour of him and his wife, containing the same powers and conditions, that were in

July 6, 1784. the original trust-deed, and on this they were infeft.

Thereafter, by another deed, in consideration of the obligation undertaken by the appellant, and the present payment of an annuity yearly to James Maitland, the latter renounced his

Aug. 28, 1784. reversionary interest in these subjects, and discharged the appellant and his wife of all claims competent to him under the trust-deed or otherwise; and declared these subjects to be heritably and irredeemably vested in them, and their heirs in all time coming.

A few years before his death, James Maitland had executed a general settlement in the appellant's favour of what-

July 17, 1798. ever property should belong to him at the time of his death.

James Maitland died in the year 1806, without being aware that there existed any relation by blood, except his own sister (the appellant's wife), and her issue, who all predeceased him.

But sometime after his death, a claim was made by the respondent; which was followed up by the present action of reduction, brought to set aside the four deeds above mentioned, on the ground chiefly, that previous to their date, James Maitland was insane, and incapable of concluding any legal transaction.

The appellant denied in toto the fact of incapacity from insanity; but admitted that he had contracted habits of idleness and drinking, but when sober, was intelligent and in full possession of his mental powers.

A proof having been allowed, several objections in the course of the same were stated and disposed of by the Court.

Before the summons was brought into Court, the defender, apprehensive that he might loose the benefit of the testimony of Mark Reid, the only testamentary witness then alive, who

was eighty-three years of age, applied to a magistrate to have his deposition taken, which was done accordingly. He afterwards died before the action was brought, and the defender having tendered this deposition in the proof, its production was objected to. The Lord Ordinary refused to allow this, and ordained the deposition to be withdrawn. On reclaiming petition to the Court, their Lordships superseded determining this point, until the cause should be before the Court for advising.

Another objection was stated in the course of the proof, to the testimony of Peter Peterson, which was rested on two grounds, *First*, That he was the appellant's confidential agent; and *Secondly*, That he had a *direct interest* in the cause, from holding an heritable security granted by the appellant over the property, and from being cautioner for loosening the arrestments, which the respondent was advised to use on the dependence, in the hands of the tenants on the property. The evidence of Peter Peterson was allowed to be taken by the Commissioner, and sealed up to abide the decision of the Court on the objections taken.

The Lord Ordinary (Craigie) allowed his deposition to be opened, and to form a part of the proof, reserving all objection to his credibility.

The Court, of this date, pronounced this interlocutor: July 10, 1812.
" The Lords refuse to open up the deposition of Peter Peter-
" son, and find that *in hoc statu* it can form no part of the
" proof, and in so far alter the interlocutor complained of."

When the general import of the proof was estimated, it appeared, that of the eighty-one witnesses examined, *thirty-one* of these concurred in thinking James Maitland insane, and *fifty* agreed in thinking him of sound mind. Many of the latter had superior opportunities of judging.

Thereafter the Court pronounced this interlocutor on the merits: [1]" Sustain the reasons of reduction of the deeds ex- Feb. 1, 1814.
" ecuted in the years 1784 and 1798, challenged, and reduce,
" decern, and declare accordingly; and as to the other deeds
" challenged, repel the defences, and also reduce the same,
" as titles to the subjects in question, and find that they
" only can be considered as a security, and as entitling the
" defender to be heard in the accounting, and reduce, decern,
" and declare accordingly; and remit to the Lord Ordinary
" to proceed in the accounting between the parties, and to
" hear counsel thereon, and on the other conclusions of the
" libel, and to do therein as he shall see cause: Find the

1817.

TOWART
v.
SELLARS.

Feb. 18, 1814.
Mar. 10, 1814.
May 14, 1814.

" pursuer entitled to expenses, ordain an account thereof to " be given in, and remit to the auditor to tax the same, and " to report."

On two several reclaiming petitions the Court adhered.

Against these interlocutors the defender (appellant) brought the present appeal to the House of Lords.

Pleaded for the Appellant.—The pursuer (respondent) undertook to prove, that the grantor of the deeds under reduction was insane. He cannot deny as to the import of the proof that at least the evidence is contradictory; but the appellant maintains, that on a due consideration of its whole import, the evidence decidedly preponderates in favour of the appellant, although even were that more doubtful than it is, the presumption of law would undeniably be in favour of the settlements.

The witnesses of the respondent are not only contradicted by those of the appellant, but they contradict each other in innumerable circumstances, many of which, too, of great importance. In particular, in regard to James Maitland's intemperate habits, they are completely at variance with each other—some stating that he was a confirmed drunkard, and others stating the very reverse.

Besides, in all the respondent's witnesses there is an evident tendency to exaggerate, and when closely pressed as to the grounds of their opinions, that tendency is quite manifest, some pointing out, as a proof of his supposed derangement, the negligence of his dress, and the outward appearance so naturally arising from his depraved habits; and others resting their conviction of his madness on frequent starting, talking loud, and other peculiarities and eccentricities of manner, which have been remarked, not unfrequently, in men of the most indisputable talents and soundest judgment. Such, however, was the criteria on which they arrived at the conclusion; but it is quite evident, that the question cannot be determined by the opinion of such judges, but by the evidence of the fact itself; and on the conduct which, for the most part, he manifested in the affairs of life. The subject of insanity, it is well known, is a difficult question, even among medical authorities, whose opinions are exceedingly various, and no one has yet been completely successful in giving a correct definition of it. But there is less difficulty in approaching the question here, when you have fifty against thirty-one stating, that the man was of quite sound judgment.

2. Even supposing the result of the evidence to be doubt-

ful; no sufficient reason has been shown for not permitting the deposition of Mark Reid (taken under circumstances that rendered any other procedure to secure it impossible), to form a part of the proof in process. By interlocutor of the 18th February 1812 the Lord Ordinary refuses to permit it to be received. But a petition having been presented against that judgment, the Court, by their interlocutor of the 5th June in the same year, superseded determining on the prayer thereof, until the state of the process should come to be advised. And yet, when the process was advised, no decision on this point is made, so that the point, whether Mark Reid's evidence should form a part of the proof, remains still undetermined.

3d, There is, further, no sufficient ground in this case, for not admitting Mr Peterson as a competent witness, reserving consideration of the credibility which may be due to his deposition as the agent of the appellant. In the cases of M'Latchie *v.* Brand, House of Lords, 27th November 1771; and M'Alpine *v.* M'Alpine, 2d December 1806 (Mor. App. 1, witness No. 4), the agents of parties in the cause were admitted as witnesses, under circumstances very much resembling, and, indeed, much stronger than any in the present question. In the latter of these cases, as in the present, the agent had executed the deeds under reduction; and was necessarily the best witness to those circumstances in which there must always be a *penuria testium*. And as to the other ground of objection against Mr Peterson, namely, that of interest in the issue of the cause, it is plain, from the respondent's own admission, that whatever interest he may have, is merely contingent, which has never been sustained in any one recent case, as sufficient to affect the admissibility of witnesses, although it may have some influence on their credibility.

Ante, vol. ii., p. 312.

Pleaded for the Respondent.—1st, On the question as to the opening the deposition of Peter Peterson, it is enough to say, that he, as the confidential agent for the appellant, advised all the legal proceedings in the cause, and among others, his own examination as a witness. He had also a direct interest in the issue, having obtained an heritable security to a considerable amount over the property in question from the appellant.

2d, On the merits; it has been proved that James Maitland was insane at the date of the deeds which have been reduced at the respondent's instance, as nearest heir on the father's side.

1817.

TOWART
v.
SELLARS.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,

"My Lords,

"I do not agree that this is an extremely important case; for as on the one hand, justice is always anxious to protect persons of weak minds from their own acts, and where insanity is established at the time the deeds are executed, will set them aside, whether in their nature such as ought to be executed or not; so on the other hand, if a man of weak intellect executes a deed which would not be proper if executed by a man of the strongest mind, it is not for us to say, that, because God has at one moment afflicted a person with such a malady, he shall, therefore, never be restored so as to be competent effectually to do an act which a moral and good man would think it most proper to do. The principle in our law is clear; and I do not know any difference in that respect between the principle in our law, and that of the law of Scotland. I remember the case of a gentleman, who was confined for some years in a house for the reception and care of insane persons. He had a lucid interval, and made a disposition of his property, which was exactly that which he ought to have made, having regard to the circumstance, that he had before provided for some members and not for other members of his family; and, that which he, before his insanity, communicated to a friend, he intended to make; and he did it under a sense of his situation, and the impression that no time was to be lost, and to protect himself against a relapse. That was held to be a good deed. For the question is not, whether a man has been insane, but whether he has recovered that *quantum* of disposing mind at the time he executes the deed, which ought to give it effect.

Faulder *v.* Silk, in K. B., Dec. 9, 1811. 3 Camp., p. 156.

"Another principle which we may safely lay down, is this, if property has been disposed of twenty or thirty years before, formally, and with the concurrence and assistance of individuals of good character; and if that disposition is not quarrelled with as speedily as may be, and only challenged when the parties best acquainted with the whole circumstances of the transaction, are dead and gone, it is dangerous to set aside that disposition at the distance of twenty or thirty years, upon a ground so fallible as human memory, and testimony as to the state of the person making that disposition at other moments without at all applying to the moment when he executes the deed.

"After these general observations, see what these deeds are. On the 20th December 1783, he makes a disposition of his property, proceeding upon this narrative: "That I am at present 'owing to sundry persons, considerable sums of money, which I 'am unable to repay, but which it is most just and reasonable 'should be paid and discharged as soon as possible; that I have

'no other fund for that purpose, but the heritable subjects after 'described, from which I expect a considerable reversion will arise 'to me after payment of my debts; but from my particular situa- 'tion at present, I incline to trust the management of my affairs 'to the persons after-named, my creditors and friends, in whom I 'have an entire confidence." What the particular situation was I do not know; the witnesses are in their graves; but one of the witnesses to the deed of 1798, in which he recites, that he was apt to be made the worse of liquor, and to be imposed upon by designing persons, says, that he read it over himself, took it away with him, and kept it by him for sometime, and, at a second meeting, executed it. In the recital to this deed of 20th December 1783, he might perhaps allude to the calamity with which he had been afflicted. But if God afflicted me two years before with such a calamity, and I made a disposition of my property, reciting, that I was afraid of the consequences of a relapse, whether it were the fear of imprudence, as in the Middleton case, or the fear of disease; is it to be held, that because a man recites that reason for doing the very thing which he ought to do, he is, therefore, not sufficiently recovered to rendered him competent to do that act? Then the narrative proceeds:—'Therefore, I do 'hereby, with the special advise and consent of James Blair, my 'grandfather,' &c.; so that he was acting by the advice and with the consent of his grandfather, Glen and Scott, who, in this year, 1783, had been engaged in many transactions with Maitland, making no objection; and this is no small circumstance in the absence of other evidence as to his state of mind at the moment of executing the deed. The trustees were in the first place to sell parts of the property for payment of the grantor's debts, *without any control from him.* That clause is not uncommon in instruments in this part of the island, and here again, I refer to the case of Chirk Castle estate.

Middleton *v.* Kenyon (Ld), 2 Ves. Jun., p. 391.

Middleton, *ut supra.*

"I wish to call your Lordships' attention particularly, that at the time the deed was executed, he was aware that he had to defend suits carried on against him by this Towart; and there was a special provision in the deed, that the trustees should be at liberty to defend the two processes, one before the Court of Session, the other before the Magistrates of Glasgow. This deed appears to have been executed with great particularity as to the date, the names of the witnesses, and the name of the writer of the deed. Then, with reference to the deed of December 1783, Glen and Stcot, who had been concerned with the grantor in that year in certain bills of exchange, and transactions of business, and who, as far as we know, were respectable persons, are parties to it, and they are to sell and pay his debts, and give the reversion to the grantor; and all this with the concurrence of his grandfather.

"Then it is said, that Maitland enlisted as a soldier, and was

1817.

TOWART v. SELLARS.

unable to do his exercise, a defect which I have known to belong to many worthy and sensible men. And they fix upon certain acts, which might be material if they had applied to the moment of executing the deed.

"Then the deed of 6th July 1784, proceeding upon the narrative of the trust-deed of 1783, and the purpose for which it was granted, was executed. It does not appear that Maitland himself was a party to this deed. But then, consider what a man may rationally do. Blair, the grandfather, or Glen and Scott, had no authority to execute this deed of July 1784, unless they had the consent of Maitland; and you must suppose that they were satisfied that they had his consent, unless they meant to be responsible for the acts of Towart and his wife, which, without that consent, they would be.

"Then the deed of August 28, 1784, was executed; and from this it appears that Maitland was served heir to his grandfather, and duly infeft on the 17th August 1784, a circumstance of great importance, though not noticed in the reasoning; and what follows upon that? A sale of a certain parcel of the land to one Armour, and a wadset for £100 on the 18th August. Is not this a transaction that deserved some attention? One who was supposed to be insane, served heir to his grandfather, and infeft on the 17th August, and selling and mortgaging his property on the 18th! Then it recites that the debts which he owed had been paid by Towart; and here be it noticed that Glen was a creditor to the amount of £144, and was paid his debt under these instruments; and then he conveys the property to his sister and her husband, subject to the payment of £100 mortgage money and of an annuity of £13, and £3 per annum for clothes to himself.

"It was said that he would not have executed this deed, if he had not been insane. Now, I don't say that if he had been insane, the deed would have stood, though the consideration had been more than sufficient. But still that is a circumstance to be attended to; and the only evidence we have here is, that the consideration was more than sufficient. But if it had been less he might have intended to make a gift to his sister and her husband; and a payment of this description was well enough calculated for a person in his situation, and the use which he made of the money when he received it. Before the commencement of this process, all the witnesses to this deed were dead, except one, of the name of Reid. Reid also died before he could be examined in the cause; but he had been examined on this subject before a magistrate of Glasgow and two witnesses. His deposition was not admitted; but the objection to it might have been waived, and there appears to have been no bad reason for insisting upon it.

"We have no means, therefore, of knowing the state of Mait-

land's mind, except from these deeds themselves, and the parole evidence, till the execution of the deed of 1798, which was a *mortis causa* disposition. This deed bears on the face of it, that Maitland had favour and affection for his sister, and one of the witnesses speaks to the admission by Maitland, that he, in fact, had that favour and affection. The witnesses say that he read this disposition aloud, that he said he would think about it, took it away with him, and afterwards signed it. Then, as to the only instrument, the witnesses to which were alive, they speak to his sanity; and though they might have judged wrong, they must have been convinced that he was of sane mind when he executed it. This deed professes to give over all the property and all the claims which he then had, or might have at the time of his death; and then he states that he was apt to be made the worse of liquor, and liable to be imposed upon, and, therefore, does this act. And is it to be said that, because he chooses to allege that reason, which is the true one; therefore, this and the other deeds are bad, though not quarrelled with till 1808, the respondent being in a situation which enabled him to challenge them at a much earlier period?

"Then the case comes to this, supposing Maitland to be a weak or insane man, if he was sane at the time he executed these deeds, his sanity at these moments is sufficient to sustain them. And the question is, whether this mass of written evidence in support of his sanity at the moment when these deeds were executed, which cannot now have its full weight, but which must be considered as at any time very weighty, is so affected by the parole testimony of persons speaking to his condition at other times, that you can say, at the risk of what belongs to such a decision, that the deeds were executed by a man, not by one liable to be imposed upon, for that is not this case, but by a man entirely incompetent to do such an act.

General insanity is not sufficient if the party was sane at the time the deed was executed.

"It often happens in these cases, that when witnesses are describing the condition in which the man was two or three years before, there are no cases more difficult to deal with; the witnesses on the one side describing him as being as mad as mad can be; and those on the other side representing him as a man of the strongest and the soundest intellect. Like the smuggling cases which we sometimes had in the Exchequer, where the question was, whether a vessel was within three leagues of the coast, with barrels of a certain size, while the evidence on one side was, that she was not three leagues from the coast, the evidence on the other side generally was, that she was at least twenty leagues from it. So, in these cases, the witnesses on the one side swear that the person whose sanity is in dispute, was one of the weakest; and those on the other side swear that he was one of the strongest minded men that ever existed. But the

1817.

TOWART
v.
SELLARS.

question is not, whether this man was weak, or whether he was mad when in liquor, or insane at other times; but whether in 1817, when the deeds challenged, are rational in themselves, and are not quarrelled with till the witnesses to them are in their graves, except those to the deed of 1798, who give testimony which would support that deed in any case, whether you can say that these deeds ought to be entirely set aside (for they cannot stand as securities unless they can stand as titles), at such a distance of time, and under such circumstances. In my opinion, that would not be safe, and I cannot consent that this judgment should be affirmed."

LORD REDESDALE:—"I concur in that opinion, and I confess this case appears to me very important. With regard to the words in one of the deeds, that the trustees were to act without control, they are not uncommon in English deeds of this nature. As to the decision of the Court below, that must be varied even on its own principle. It is uncertain, for one cannot see what are the deeds impeached by it; and it is inconsistent, because the deeds, if they be reduced on the ground of utter incapacity, cannot stand for any purpose.

"The deeds are impeached by parole evidence only, which is an important circumstance; and that evidence is applied generally, and not particularly, to the time when the deeds were executed. The allegation is, that since 1781, or 1782, Maitland was utterly incompetent to execute any instrument, and that was attempted to be made out by parole evidence, without any qualification whatever. But on that case the Court below has not decided. On the other side there is likewise strong parole evidence.

"Now, in endeavouring to find out the truth from contradictory evidence, by the test of collateral circumstances, as to which there can be no doubt, let us analyse the evidence, in order to ascertain how far it is consistent with these circumstances. Having gained this ground, we have all that is necessary to dispose of the cause; for, when the evidence is so tried, it appears clear that the respondent's evidence cannot be true, and that the appellants' evidence may be true. The evidence of the respondent's witnesses is inconsistent with the collateral circumstances. They represent him as utterly incompetent from 1782. Now, in the first proceeding, the respondent did not quarrel with the deed of December 1783; so that he then had no conception that Maitland was at the time of the execution of that deed, in the state of mind which he afterwards attributed to him. The respondent did not then pretend to reduce the deed, but treated it as a rational deed executed by the advice and with the concurrence of respectable persons; and it appears, that about that time, Maitland was engaged in a variety of dealings, utterly inconsistent with the evidence of notorious incapacity. The deed of the 14th May 1784, was executed by the grandfather, and

Glen and Scott, and was sustainable on the same grounds as that of 1783. Now, what appears from that deed? 1st, That Maitland had executed a bond for what was due to his sister. That was a distinct instrument, executed with the approbation of his grandfather and the other trustees. Do they not declare, then, that he was then competent? They had engaged to defend the suit, and this was a compromise of it. The persons who prepared these deeds, and who were parties and witnesses to them, were dead when the process commenced; and we must take it that they would have sworn that he was competent; for we have no right on this general testimony to assume the contrary. The same observation applies to the deed of 28th August 1784. The parties to it must be taken to have sworn that he was of sane mind when the deed was executed, and no deed would be safe, if that were not a principle of law. But the matter does not stop there. Part of the consideration in this deed is 5s. a week, or £13 a year, to be paid to Maitland. Now it is in evidence that he was in the habit of receiving this 5s. per week, under the deed; and the notes he gives acknowledging the receipt, written by himself, are in evidence; and from them it is demonstrable that Maitland was not in the condition in which he was represented to be by the respondent's witnesses, for these notes show that he was capable of knowing what he received and ought to receive. He writes acknowledging the receipt of what was due to him, and expresses his hope that his sister and her child are well. Is that the language of a man in such a state that he could do no rational act? This written evidence is worth a host of parole testimony, as it demonstrates that the evidence for the respondent cannot be true.

"The next point is the consideration. It has been said that the property was more valuable than the consideration paid for it; and with reference to that, it ought to be recollected that there was a diminution of ten acres, sold to Armour. That, too, is a transaction in which other persons were concerned, as well as Armour, who advanced the money, and all of them are, in effect, witnesses of Maitland's sanity; and it was impossible they could have so acted if this man had been, as the respondent's witnesses represented him to be, notoriously insane.

"The length of time, too, that elapsed, from 1784 till 1807, was to be considered. The value of the property might have trebled in that time, and yet Towart was suffered to remain in possession, managing and disposing of it as his own; and the effect of this decision is, to impeach all these transactions. If, then, the consideration was equal to the value of the property in 1784, would it be justice to put an end to the transaction in 1807, or 1808, when the value was so different? The delay, too, had a tendency to deprive the appellant of the means of showing that Maitland was of sound mind at the time of executing the deeds;

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