"cution. But should no such intention manifestly appear, "there is not a single case which does not take it for granted that the personal estate is by law the first fund for the "payment of debts." In a later case, Watson *v.* Brickwood, 9 Vesey, jun., p. 453, the rule, as above laid down by Lord Thurlow, was confirmed and adhered to.

Watson *v.* Brickwood, 9 Vesey, jun., p. 453.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed, so far as "in respect the set-"tlement by which the lands of Knockie are disponed "to Simon Frazer of Farraline, one of the defenders, "could only import a right to these lands, subject to "the heritable debt with which they were burdened, "and that the clause, taking the executors bound to "pay the debts, cannot have the effect of altering the "right of relief between him and the executors: Finds "the executors entitled to relief from Simon Frazer of "Farraline, Esq., of the heritable bond libelled on, con-"form to the conclusions of their action of relief, and "decern accordingly." And it is farther ordered, that with this affirmance, the said cause be remitted back to the Court of Session, without prejudice to any application by the appellant to the Court which he may be advised to make, touching the questions whether the processes should have been conjoined, and whether the appellant has been properly called in the action of these executors.

For the Appellant, *Sir Samuel Romilly, M. Nolan, Geo. Cranstoun.*

For the Respondents, *Wm. Adam, John Clerk.*

(Fac. Coll. vol. xiii. p. 544. Mor. App. Damage and Inter. No. I.)

THOMAS BOSWALL, late Merchant in Leith, now residing in Edinburgh, . } *Appellant;*
JAMES MORRISON, Merchant in Leith, *Respondent.*

House of Lords, 20th July 1812.

CONTRACT OF SALE—DAMAGES FOR NON-FULFILMENT.—Action was raised for delivery of four puncheons of spirits, or for damages for

1812.

BOSWALL
v.
MORRISON.

non-fulfilment of the contract of sale. The spirits were purchased in the knowledge, on the buyer's part, that there was to be a rise in the price, and he bought at the old price. The seller was ignorant of this intended rise in the price, and of this information from London, which the buyer possessed. He afterwards refused to deliver: Held him liable in £200 of damages, being the sum concluded for, estimated according to the highest price of whisky that could be got at the time of pronouncing decree in the action.

This was an action raised by the respondent against the appellant, for delivery of four puncheons of spirits, or failing which, for damages for non-fulfilment by him of a contract of sale in regard to these spirits, entered into on 3d October 1799, in the following circumstances: It appeared that on 30th September 1799 an order had been made in the House of Commons for leave to bring in a bill to prohibit for a time the distillation of spirits in Scotland; and the respondent having heard of this early on the morning of the 3d of October, and perceiving that the effect would be to raise very materially the price of spirits, he resolved to purchase up as much spirits as he could at the old price, before information of the Goverment order became generally known. Accordingly he called on the appellant, and concluded a bargain for four puncheons, to be delivered to him at the rate of 5s. 4d. per gallon. After hearing of the news from London, which reached the same day, after the sale was effected, the appellant refused to deliver the spirits at the price agreed on, (the price having risen to 16s. per gallon), stating that he had been tricked and deceived in the matter, whereupon the present action was raised.

After a special interlocutor, stating the facts, the Lord
Jan. 22, 1803. Ordinary found the appellant liable in the sum of £200 damages for non-delivery of the spirits, the loss being estimated as equal to the sum of £200, concluded for in the libel on 1st November 1799, the date of citation to this action.

On reclaiming petitions to the Court varying interlocutors * were pronounced. At last the Court pronounced this
Jan. 25, 1805. interlocutor: "The Lords having resumed consideration of "this petition, and advised the same, with the answers "thereto, alter the interlocutor complained of, and in terms "of the previous interlocutor of the Lord Ordinary, modify

* The variation in the interlocutors of Court was upon the amount of damages, and the rule for estimating that amount.

"the damages to £200 Sterling, and decern for payment "thereof to the pursuer, with interest from the 1st Nov. "1799: Find expenses due from the date of the interlocutor "of the Court of the 24th Feb. 1802."* Thereafter, on reclaiming petition, the Court adhered. And their Lordships, upon advising the account of expenses, with the auditor's report, modified the account to £101. 14s. 2d., and decerned.

Mar. 4, 1806.

Mar. 12, 1806.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The appellant maintains that the bargain into which he was betrayed, on the morning of the 3d October 1799, was of the nature of a catching bargain, and that it is not obligatory in law. The fact, as uniformly averred by him, has already been stated. On the forenoon of that day, several hours after the mail coach had passed through Leith, and after part of several of the English letters and newspapers had been delivered, Morrison came to the appellant's wareroom, and, under pretence that his stock of spirits was reduced, prevailed on the appellant to sell him four puncheons of whisky at 5s. 4d. per gallon, assuring the seller at the same time that he had no information of any probable rise in the price of the article. At the time this declaration was made, Morrison's stock was not reduced, and he was aware that an event had taken place in the House of Commons, of which the unavoidable consequence was, an immediate rise in the price of Scotch spirits. 2d. But, if this contract, in these circumstances, stands as binding, the appellant ought not to be subjected to the payment of £200 of damages. He is unable to discover on what grounds the Court has proceeded in giving that precise

---

* Opinions of the Judges:—

It was held by the Court: "1st, That the buyer's demand was "not to be limited to the price at the stipulated day of delivery. "2d. That although the non-delivery be imputable to no fault, the "buyer must be indemnified for his actual loss. 3d. That the price "at the day of citation was not to be taken as the criterion, since "the call to fulfil his engagement would thus discharge the seller "from the bad consequences of his subsequent refusal. And, 4th. "That it was not practicable, without throwing the matter entirely "loose, to enter into the consideration of the probable time at which, "had the delivery been duly made, the article would have been disposed of."—Bell's Com. vol. i. p. 450.

1812.

BOSWALL v. MORRISON.

sum. It cannot be because that sum is the amount concluded for in the summons, for summonses of damages generally conclude for a random sum, considerably higher than is awarded. No doubt spirits rose 3s. a gallon, but the Lord Ordinary has estimated the damages at £200, a sum equal to a rise of 10s. per gallon on the price agreed to be paid, supposing the four puncheons to contain 400 gallons; but this is not a just reason or rule for assessing the damages. Other rules more equitable for adjusting these ought to obtain, such as the market price at delivery, or at raising the action, for, until these events, he was not culpable nor contumacious.

Pleaded for the Respondent.—The facts above stated are not established by evidence; and even if they were admitted, they would not be relevant, inasmuch as it was competent, and perfectly legitimate for the respondent to avail himself of his superior information, in order to make the best bargain he could—a course which is well recognized in mercantile dealings. 2. The appellant contends that the amount of damages ought to have been estimated according to the selling price, when delivery ought to have been made, or from the date of raising the action; but if the first rule obtained, then no seller of spirits could fulfil his bargain in a rising market; and the second rule cannot regulate the amount of damages, because the date of an action is arbitrary. But it humbly appears that the soundest rule for regulating an assessment of damages, in a case of this sort, is to hold, according to the principle of the civil law, that the party committing the breach of contract is liable, according to the profits the purchaser would have gained if the contract had been implemented at any time during the contumacy of the culpable party. At all events, the decree of the Court of Session must remain effectual, which awards less than the highest profits that could have arisen to the respondent if the contract had been implemented.

After hearing counsel,

LORD CHANCELLOR ELDON said,

" My Lords,

" In this appeal, there are two questions: 1st, Whether the appellant was liable to an action of damages at the instance of the respondent or not? as to which I never had the least doubt.

" 2d. Whether these damages had been properly estimated or not?

" It does not appear to me that, with regard to the second ques-

tion, your Lordships should make any alteration in this judgment of the Court of Session.

" I therefore move to affirm."

(Nothing was said about costs).

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

For the Appellant, *Wm. Erskine, Fra. Horner.*
For the Respondent, *Robert Forsyth, Hen. Brougham.*

(1st Action.)

SIR WILLIAM JOHNSTON of Hilton, *Appellant;*

NATHANIEL MIDDLETON and RICHARD JOHNSON, formerly of Stratford Place, in the County of Middlesex, now of Pall Mall, London, Bankers, and ANDREW MACWHINNIE, their Attorney, . . } *Respondents.*

(2d Action.)

SIR WILLIAM JOHNSTON of Hilton, Bart. *Appellant;*

Messrs. NOEL, TEMPLAR, and Co., Bankers in London, with concurrence of MIDDLETON and JOHNSON, two of the partners of that Co., and ANDREW MACWHINNIE, their Attorney, ... } *Respondents.*

(3d Action.)

SIR WILLIAM JOHNSTON of Hilton, Bart., *Appellant;*

MESSRS. NOEL, TEMPLAR, and Co., Bankers in London, and the said ANDREW MACWHINNIE, . . . } *Respondents.*

House of Lords, 12th Dec. 1812.

ACCOMMODATION BILLS.—Circumstances in which the allegation that part of the debt in the bond was for accommodation bills, granted for the benefit of other parties, was disregarded.

Three actions were raised by the respondents against the appellant, the first on a bond for £16,000, and the second for payment of a balance on their banker's account of the sum of £1977. 3s. 7d., after giving credit for £16,000, and