APPENDIX.

PART I.

DAMAGE AND INTEREST.

1806. *March* 4. MORISON *against* BOSWELL.

No. 1.
By what rule the damage due for non-implement of a contract of sale, is to be ascertained.

ON 3d October 1799, James Morison, merchant in Leith, purchased from Thomas Boswell, also merchant there, four puncheons of whisky, at the rate of *5s. 4d. per* gallon. On the same day, intelligence was received, that in consquence of the failure of the crop, distillation was to be stopt; in consequence of which the price of spirits rose immediately, and continued gradually rising for many months afterwards, till the selling price reached 16*s. per* gallon. Boswell, conceiving that Morison had received previous information of the expected event, refused to deliver the whisky; upon which an action was raised against him, to ordain delivery of "four puncheons of good and sufficient aquavitæ or "whisky, of proper quantity, strength and quality, at the foresaid rate or "price of *5s. 4d. per* gallon, or otherwise to make payment to the pursuer of "the sum of £200. Sterling of loss and damage sustained and incurred by "him through the defender's failure to do so."

The defences were repelled both by the Lord Ordinary and the Inner House, 24th February 1801; and the cause was remitted to the Lord Ordinary, to estimate the amount of the damage. The following interlocutor (22d Jan. 1803) was pronounced: "Finds that in the morning of the 3d October 1799, "the pursuer James Morison purchased from the defender Thomas Boswell four "puncheons of whisky, at the rate of *5s. 4d. per* gallon, to be delivered to the "pursuer the same day: Finds, That the defender failed to deliver the spirits "in terms of the said bargain, and that intelligence of the bill brought into Parlia-"ment for stopping the distillation from grain having arrived that very day, "the price of spirits instantly rose, and continued to rise for a consierable time "thereafter: Finds, That notwithstanding repeated demands made for delivery

No. 1. " of the said four puncheons, the defender refused, or delayed to comply; in " consequence of which, the pursuer brought the present action; the summons " in which was executed upon the 1st November 1799, and concluded against " the defender for delivery of the said four puncheons at the rate stipulated, or " otherwise for the sum of £200. Sterling, as the damages sustained by the de- " fender having failed to deliver the same: Finds, That although it was in the " defender's power to have fulfilled his bargain, and to have complied with " the pursuer's repeated demands for delivery of the spirits, yet he wilfully and " culpably refused doing so, till at a very late period of the present litigation, " when the price of spirits had fallen a very considerable degree: Finds, That " in these circumstances the defender is liable in damages to the pursuer, for " his culpable failure in implementing the bargain; and as from what is stated " by both parties, it appears the loss sustained by the pursuer was at least equal " to the sum of £200. Sterling, concluded for in the libel on the 1st November " 1799, the date of citation to this action, modifies the damages accordingly to " that sum, with the interest thereof from the said 1st day of November 1799, " and decerns for payment thereof to the pursuer: Finds expenses due from the " date of the interlocutor of the Court of the 24th February 1802, and allows " an account thereof to be given in."

Against this interlocutor, Boswell reclaimed. The Court (15th June 1804) " alter the interlocutors complained of, and find the petitioner liable in dama- " ges, according to the highest selling price of whisky per gallon, from the 3d " October 1799, the date of the sale, to the 1st of November thereafter, the " date of citation to this action."

Morison now reclaimed; and the Court (25th June 1805) " alter the inter- " locutor complained of, and, in terms of the previous interlocutor of the " Lord Ordinary, modify the damages to £200. Sterling, and decern for pay- " ment thereof to the pursuer, with interest from 1st November 1799: Find " expenses due from the date of the interlocutor of the Court of the 24th " of February 1802, and allow an account thereof to be given in."

To which judgment they (4th March 1806) adhered, by the narrowest possible majority.

This cause, in its various stages, occasioned great division upon the Bench. The defender argued, that, in estimating damage, the price on the day of the sale, which was also the date of delivery, must be the rule. The purchaser is entitled to have the contract implemented, by obtaining delivery of the article sold, for payment of its just price; but he is not entitled, under the denomination of damages, to impose a high fine, nor to convert a claim for *id quod abest a patrimonio* into a penal action, demanding a sum of money by way of *solatium*.

But this answer was held to be satisfactory, that if this was the rule, no bargain would ever be implemented when there was a rising market, and that the

utmost disregard of good faith in mercantile transactions would often become profitable. No. 1.

The pursuer in his turn maintained, that it was a rule of law, founded in justice and expediency, that the seller, refusing to implement his bargain of sale, is liable for damages, to be estimated according to the highest price which could have been got for the commodity, at any time during his contumacy or lawless perseverance in denying justice; that is, any time during the course of the litigation.

The defender, however, contended, that the mode of estimating the damage was not by considering what profit the other party might have made, but by a regard to the conduct of the party who refuses to fulfil the sale,—by examining his motives, to see how far he was to blame. If delivery has by any accident become impossible, he is only bound for the value of the commodity at the time of the bargain; if it has been from a palpable disregard of his own obligation, he must be responsible for the utmost consequences which can result from his dishonourable conduct. Where, again, delivery may have been possible, there may be many cases where the alleged seller may have strong arguments for believing that it was not required of him. If the seller has apparently good reason to believe that he had been imposed upon by the buyer, in such a manner as to warrant him in refusing to deliver the goods, his belief may have been discovered to be erroneous. A court of law will find him obliged to implement; and if this cannot be done by specific delivery, as he had committed no wilful wrong, the value ought to be estimated as on the day of delivery. Before the seller can ever be liable for more, it must be found, not only that he failed to implement, but that the failure must have proceeded from an illegal and fraudulent design.

But to this it was answered satisfactorily, that the estimation of damage for non-implement never can be an arbitrary question, depending upon the criminality of which the seller may have been guilty, which would consequently vibrate backward and forward, according to every shade of difference in the evidence, as estimated by different minds. In a mercantile contract of sale, the purchaser has no concern with the moral turpitude of the other party; and as a private individual, he has no right to demand that punishment shall be inflicted on that account. Contracts must be faithfully implemented, either by specific fulfilment, or by an equivalent in money; this must indemnify him for the loss he has sustained by not having the goods; and the true estimate is therefore the profit which might have been made had the bargain been duly implemented.

The question which next divided the Court was, Whether the damage should be estimated at the highest selling prices between refusal to implement and the date of citation, or during the whole of the litigation which ascertained that the contract must be fulfilled?

No. 1. With regard to estimating the damage by means of the date of citation, it appeared that this would be a very arbitrary and inadequate rule. The date of citation in an action must depend upon a variety of casual circumstances, totally unconnected with the merits of the case between the parties, or with any fixed principle of law. The citation solemnly calls the defender to fulfil his engagments; and this call never can be held to set him free from fulfilling it.

The majority of the Court thought, that the rule of law was to estimate the damage at the highest profit which could have been made previous to pronouncing decree for implement, according to the rule of the civil law, *L.* 1. *etc.* and *L.* 1. § 3. *Act. Empt. et Vend.* and under all the circumstances of the case, that the sum awarded by the Lord Ordinary was the most proper sum to fix as an estimate of the damage. It did not reach the highest selling price during the course of the litigation about implement, but it was the sum concluded for in the summons. One of the Judges expressed it as his opinion, that the correct view of estimating the damage, was to consider the ordinary course of trade, and of the purchaser's dealings, and the time the stock which ought to have been delivered would have probably been sold off. That then his real profit would have been ascertained; for it seemed to be unjust to ascertain the price at a sum which could only have been obtained by retaining the goods unsold an extraordinary length of time. It was giving the high price of speculation without allowing him to incur the slightest risk of loss. But to adopt such a rule, it was thought, would throw great ambiguity into the matter, instead of ascertaining it on any fixed principle.

Lord Ordinary, *Cullen.* Act. *H. Erskine, Forsyth.* Agent, *Jo. Russell.*
Alt. *Colquhoun, W. Erskine, Cockburn.* Agent, *Ro. Ayton,* W. S.

F. *Fac. Coll. No.* 242. *p.* 544.