dered this case, found, That it was a dangerous preparative to sustain actions upon verbal treaties of marriage, there being neither a subscribed contract nor mandate; but there being this singularity, that it was libelled that the Lady had given full assurance, and had engaged the pursuer to be at great charges in the prosecution of that marriage, and notwithstanding had obstructed the same, all being performed that she had required, they did sustain the action, reserving to modify after probation: But as to the manner of probation, found it only probable, by the Lady's writ or oath; and in case it were referred to her oath, they did grant diligence to cite such as were her confidents, and named to be present. At her deposition she granting that she did give assurance; they found it probable by witnesses, that she did impede and hinder the young gentleman to see the young lady, and so stopped the marriage. No 5.

Gosford, MS. No 820. *p.* 517.

1687. *January* 25. SPENCE and WATSON *against* ROBERT ORMISTON.

No 6.
Goods were seized before delivery, and redeemed by paying triple excise. The purchaser found entitled to damages to the extent only of what he had actually paid, not for any profit he might have made.

THE case of Spence and Watson *contra* Robert Ormiston, was reported by Kemnay.—Ormiston had sold Spence a teirce of brandy, and was to deliver it to to him in his shop at Edinburgh; but the waiters seized on it, and it was confiscated, being stolen in at the port without paying the town's dues; and he being forced to redeem it by paying the triple excise, pursued the seller for refunding his damage, which he restricts to what he actually gave.—*Alleged*, After tradition the peril is the buyer's.—*Answered*, You sold it *prout optimum maximum*, free of all incumbrances; unless you offer to prove, that the buyer took it with the hazard; and the seizure arose from a deed of your's, in not paying the custom. The question was, On whose peril the brandy was confiscated? ——THE LORDS found it was the seller's, he being obliged to deliver it in the buyer's shop in Edinburgh; but restricted it to the true damage sustained by him, and not to what he might have made by retailing it. This was reclaimed against by a bill.

Fol. Dic. v. 1. *p.* 208. *Fountainhall, v.* 1. *p.* 442.

1710. *June* 20.
SIR GEORGE HAMILTON *against* WILLIAM DUNDAS of Airth and his LADY.

No 7.
A person was bound to produce an adjudication on a third party's estate by a pre-

THE Laird and Lady Airth having assigned to Sir George Hamilton several debts due to them by Alexander Hamilton of Grange, particularly an adjudication led upon the estate of Grange in February 1678, in so far as might be extended to 19,000 merks owing by them to Sir George; and Airth having obliged himself and his heirs to deliver the adjudication betwixt and a certain day, under a

No 7.
cise day, under a penalty, over and above performance. Having made diligent search for it, he was found liable in the sums only which were lost by the want of it.

penalty, by and attour performance; and being charged by Sir George upon the said obligement, to deliver the adjudication; he suspended upon this reason, That they had made all possible search for the adjudication, and could not find it, and the charger could ask no more than *damnum et interesse loco facti imprestabilis.*

THE LORDS found the suspenders liable only for damage and interest, in so far as the charger's right to the sums in the adjudication, might have been effectual against the estate of Grange, had the adjudication been delivered in due time.

Fol. Dic. v. 1 *p.* 207. *Forbes, p.* 411.

1712. *November* 18.

ANNA NAIRN, Daughter of the deceased DAVID NAIRN, Doctor of Medicine, *against* THOMAS and ANTONIA BARCLAYS.

No 8.
The Lords found action not competent against an heir, for damage sustained by the predecessor's relict, through the want of a jointure-house all the years of her widowhood, occasioned by the not performance of her husband's obligation in her contract of marriage, to build and repair the house for her accommodation, unless the heir had been required to build and repair in her lifetime; because *damnum et interesse* can only be due after *mora*, and there was no *mora*, since there

By contract of marriage betwixt Sir David Barclay of Collairny, and Dame Anna Riddel his spouse, the Lady was provided to a liferent of the lands of Pitblado and others; and because the house of Pitblado was ruinous, and had not been inhabited for many years before, Sir David obliged him and his heirs to build and repair the same, with all easements and office-houses necessary thereto, for accommodating the said Dame Anna Riddel in a jointure-house, in case she survived him. Sir David died in the year 1655, leaving the house of Pitblado in no better case than it was the time of the contract of marriage; and the Lady, without requiring her husband's representatives to repair it, provided herself of a dwelling-house elsewhere; after whose decease, Anna Nairn, as deriving right from Dr Nairn her father, to whom the Lady had assigned her liferent, with the whole obligements in her contract of marriage, pursued Thomas and Antonia Barclays, as representing Sir David, for payment of 5000 merks yearly from the 1655, when Sir David died, till Martinmas 1686 inclusive, as the damage sustained by the said Dame Anna Riddel for want of her jointure-house all that time.

Alleged for the defenders; The obligement to repair consisting *in facto* prestable at no precise time, they could not be pursued for damage or interest, unless they or their authors had been *in mora*, which cannot be pretended; seeing they were never required in the Lady's lifetime to put the house in repair; and if by the civil law *debitor in obligatione quæ in faciendo consistit*, who could not be pursued precisely *ad factum præstandum*, but only for damage and interest arising from his *mora*, might still redeem himself from that, *præstando factum*, or by performance at any time *ante litem contestatam*, *L.* 84. *ff. de V. O.*; much more the defenders, who could not be *in mora* till requisition, ought to be assoilzied from damages by our law, which obligeth a man *præstare factum* by