

No 7.
 cise day,
 under a pe-
 nalty, 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 obligation, 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 impres-*
tabilis.

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 compe-
 tent against
 an heir, for
 damage sus-
 tained 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 hus-
 band's obliga-
 tion in her
 contract of
 marriage, to
 build and
 repair the
 house for
 her accom-
 modation,
 unless the
 heir had been
 required to
 build and re-
 pair in her
 lifetime; be-
 cause *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 there- to, 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 obligations 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 inclu- sive, as the damage sustained by the said Dame Anna Riddel for want of her jointure-house all that time.

Alleged for the defenders; The obligation to repair consisting *in facto* pres- table at no precise time; they could not be pursued for damage or interest, un- less 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 in- terest 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

the compulsors of horning and caption; and where the fact comes principally, both *in obligatione et prosecutione*, and the damage and interest is only an accessory penalty, arising from the debtor's *mora*.

Replied for the pursuer; In all obligations *ad factum præstandum, loco facti succedit interesse*, and *dies interpellat pro homine*; now in the case of this obligation to build and repair the Lady's jointure-house, the term of performance being the husband's death before her, the damage takes place against his heirs, who failed to perform, and is to be liquidated with respect to the Lady's quality, and the convenience a jointure-house upon the lands would have afforded for the use of her tenants, and uplifting the rents. The L. 84. ff. de V. O. doth concern the building a house to one in property, and doth not liberate from damages sustained before performance, after he who stipulated to build was *in mora*, but only from after damages; as is clear from Cujacius's observe on that law, viz. *si propter moram actor jam ante litem contestatam damni aliquod senserit, non potest liberari offerendo*; so that the text cited out of the law doth not meet the case, in so far as Sir David's obligation was not to build and repair a house to his Lady in property, but only for a habitation to her and her family during her survivance. The pursuer doth not insist *ad factum præstandum*, but for damage the Lady sustained through not performance the years she lived after her husband; which can never be satisfied by an offer to build or repair the house now after her death, when she cannot enjoy it.

Duplied for the defender, *imo*, Albeit in obligations to be performed at a fixed day, *dies interpellat pro homine*; yet where no day is adjected, interpellation or requisition is necessary to produce the common effects of *mora* or delay. The maxim *quod sine die debetur, præsentis die debetur*, has indeed this effect, that the creditor may immediately demand performance; but requisition must be used in order to put him *in mora*, so as to be liable to damage and interest for not performing. And albeit the day of Sir David's death, implied in the nature of the obligation, was a time when the creditor might demand performance; the husband's representatives are not to be reckoned *in mora* from that day, till they were duly interpellated; *2do*, Sir David Barclay's obligation to repair a house to his Lady to dwell in after his decease, was conditional, at least conceived *in diem incertum, qui pro conditione habetur*; and in conditional obligations, purifying the condition doth not put the creditor *in mora*, without interpellation, *Boekleman, Com. in tit. ff. de Usur*.

THE LORDS found, That the obligation could produce no action at the assignee's instance, unless requisition was made in the Lady's lifetime; and that the damage, through the want of a house, could only be acclaimed from the date of the requisition.

Fol. Dic. v. 1. p. 207. Forbes. p. 631.

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was no requisition; and though requisition had been made, damages would have been due only from the date thereof.