

very of the money being only an act of her own free will, which in law could infer no obligation.

No 8.

Fol. Dic. v. 1. p. 377. Gosford, MS. No 20. p. 8.

1677. February 14.

DUKE and DUTCHESS of MONMOUTH *against* EARL of TWEEDDALE.

No 9.

A DECREE-ARBITRAL being challenged by reduction, as being to the enorm lesion of a minor, one of the parties in the submission, requisition of a sum appointed to be paid thereby, was not sustained as a homologation, seeing he stopt there, and nothing followed upon it.

Fol Dic. v. 1. p. 377. Gosford. Stair.

** See the report of this case by Gosford, No 15. p. 349. ; and by Stair, No 8. p. 2369.

S E C T. III.

In what instances silence infers consent.

1632. January 31. JOHNSTON *against* HOWIESON.

No 10.

JANET JOHNSTON, in the contract of marriage of her daughter with Robert Howieson, spouse contracted to her daughter, being obliged to pay to Robert Howieson elder, father to the husband, and to the said Robert younger, the husband, the sum of 1000 merks in tocher, (for these were the words of the contract,) ' That she was obliged to pay it to Robert Howieson elder, and to Robert Howieson younger his son, to the effect it might be employed upon land, or annualrent, to the said husband and wife, and the longest liver of them two, and the bairns of that marriage, with another 1000 merks to be paid by Robert Howieson elder, and added to the former sum by him, the time of the paying of the said tocher ;' and by a posterior clause of the contract, of this tenor, ' The said Robert elder, was obliged that after his receipt of the said sum from the said Janet, he should employ the same with his own other sum, in manner foresaid.' Upon which contract, Robert Howieson elder, having charged her to pay, she suspends, that she had paid the same to

A tocher was payable to a father and son, to be employe by the father, with so much more, on land, for the use of the son and his wife in life-rent, and their children in fee. Payment made to the son, in presence of the father, was sustained, as good to the debtors.

No 10. Robert younger, and had reported his discharge ; which payment was really made in presence of Robert elder, he then not opposing thereto ; and the father opposing the contract, by the meaning of the words whereof, it is evident, that the payment should be made to him, seeing he is obliged to employ it, so that the son's discharge could not free her, in respect he has spent it, whereas it should have been employed, the LORDS found the reason relevant and proven, and that the payment made to the son in presence of the father, who opposed not against the payment at the making thereof, as he might if he disallowed the same, to be as sufficient, as if he had consented expressly thereto.

Clerk, Hay.

Fol. Dic. v. 1. p. 378. Durie, p. 617.

1662. July 3. LORD COUPER against LORD PITSLIGO.

No II.
One being pursued to restore a watch, his defence was, that, in the pursuer's presence, he gave it to a third person, the pursuer making no opposition. Answered, the parties being in Parliament at the time, the pursuer's silence cannot import consent. The defence was repelled.

THE Lord Couper *alleging*, That being sitting in Parliament, and taking out his watch to see what hour it was, he gave it to my Lord Pitsligo in his hand, and that he refuses to restore it ; therefore craves to be restored, and that he may have the value of it, *pretio affectionis*, by his own oath. The defender *alleged*, absolutor, because the libel is not relevant, not condescending *quo modo* the defender is obliged to restore ; for if the pursuer insist upon his real right of the watch, as proprietor, the libel is not relevant ; because he subsumes not that the defender is possessor, or haver of the watch, at the time of the citation, or since, or at least *dolo desit possidere* ; or if the pursuer insist upon a personal obligation, he ought to subsume, that the defender borrowed the watch, or took the custody thereof, and thereby is personally obliged to keep and restore. *Secondly*, Albeit the libel were relevant, absolutor, because the defender offers him to prove, that the pursuer having put his watch in his hand, as he conceives, to see what hour it was, the defender, according to the ordinary civility, they being both sitting in Parliament, the Lord Sinclair putting forth his hand for a sight of the watch, the defender did, in the pursuer's presence, put it in his hand, without the pursuer's opposition or contradiction, which must necessarily import his consent, and liberate the defender. The pursuer *answered*, That he did now condescend that he lent his watch to the defender, and that there was betwixt them *contractus commodati* ; because the defender having put forth his hand, signifying his desire to call for the watch, the pursuer put the same in his hand, and though there were no words, yet this contract may be celebrated by intervention of any sign of the party's meaning, which here could be no other than that which is ordinary, to lend the defender the watch to see what hours it was, which importeth the defender's obligation to restore the same. To the *second* defence, *Non relevat* ; because the defender's giving of the watch to the Lord Sinclair was so subit an act, that the pursuer