No 10. Robert younger, and had reported his discharge; which payment was really made in presence of Robert elder, he then not opponing thereto; and the father opponing 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 opponed 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 11.
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*, absolvitor, 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 desiit 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, absolvitor, 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 obligement 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

could not prohibit, specially they being sitting in Parliament in the time; and therefore, in that case, his silence cannot import a consent. No 11.

THE LORDS sustained the libel, and repelled the defence, but would not suffer the price of the watch to be proven by the pursuer's oath, but *prout de jure*. See OATH IN LITEM.

Fol. Dic. v. 1. *p.* 378. *Stair, v.* 1. *p.* 119.

1663. *January* 8. NICOL *against* HOPE.

No 12.

IN a perambulation of marches, it was *alleged* by the defender, That he had built a park dike on a part of the ground challenged by the pursuer, *sciente et astante domino*. *Answered*, Such a slender presumption of consent is not relevant to take away property, neither was it incumbent upon the pursuer to dissent, seeing he knew that what was built upon his ground would become his own.—THE LORDS repelled the defence, but they thought the taciturnity might operate this much, that the builder might remove the materials of his wall, or give to the pursuer the price of the land cut off from him by the park dike.

Fol. Dic. v. 1. *p.* 378. *Stair.*

*** See the case No 49. p. 2200.

1779. *November* 17. THOMAS LOMBE *against* THOMAS SCOTT.

No 13.
Silence of a merchant, to whom goods have been sent contrarily to the commission given by him, imports his homologation of the sender's proceedings.

ON the 10th of March 1776, Thomas Scott, merchant in Kelso, commissioned from Thomas Lombe at Rotterdam twenty hogsheads of lintseed for sowing, to be shipped on board the first vessel from Rotterdam to Leith, Berwick, or any of the interjacent ports; mentioning at the same time, that if the lintseed could not be landed before the 11th of April, he did not incline to make any purchase of that kind.

This commission reached Mr Lombe on the 23d of March. At that time there were no ships at Rotterdam destined to the ports specified by Mr Scott. Mr Lombe, however, shipped the lintseed on board a vessel for Newcastle, from whence it might be forwarded speedily, and at a small additional expense, to any of them.

On the 6th of April Mr Scott received Mr Lombe's letter, acquainting him with these particulars, but returned no answer till the 25th; when, upon being informed by Mr Lombe's correspondent at Newcastle, that the goods had arrived, he signified his disapprobation of Mr Lombe's proceedings, and declared his resolution to take no concern in the disposal of the articles sent.