upon him to do any diligence; and at most *tenebatur tantum de dolo et lata culpa*, seeing you never interpelled, nor required me to do diligence; likeas, it would have been frustraneous, the common debtor being broken: and the Lords have often found the acceptation of such commissions did not bind to diligence, 17*th July*, 1672, *Earl of Wemyss* against *Sir William Thomson*; 18*th July*, 1672, *Watson* against *Bruce*.

The Lords thought it hard to oblige the grand-child now, after thirty-eight years' time, to condescend or instruct whether there was diligence done or not; and therefore assoilyied him, unless they could instruct he had got payment both of his own and theirs; but withal ordained him to denude, and retrocess the pursuer in his own place, though the reposition would be now ineffectual by the debtor's insolvency. But the taciturnity for so long a time, and posterior transactions, without noticing this, and the never interpelling him either to do diligence, or denude, determined the Lords much in this decision.

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1696. *December* 25. ROBERT MURDOCH *against* HYSLOP.

IN the mutual declarators pursued betwixt Robert Murdoch, writer, and one Hyslop, a wright, of the property of a piece void ground, lying beneath the piazzas, on the High Street of Edinburgh; the one claiming it as pertaining to his shop, and the other claiming it in right of his adjacent cellar; the Lords, after balancing the pretences of both parties, found neither of them had a right of property in this inconsiderable controverted piece of ground, but that it was *usus communis*, being a *locus publicus*, and a highway, and passage to all the lieges, as much as the High Street and causeway is; and appointed for people retiring to shelter under them in time of rain, as the ground under fore stairs is, and ought not to be enhanced or built up to the prejudice of the public convenience. So both the contenders lost the cause, and the Town, who were not competing, gained it. *Vol. I. Page* 748.

1696. *December* 30. SIR ALEXANDER MONRO of BEARCROFTS *against* GRIZEL BRUCE, &c.

MERSINGTON reported Sir Alexander Monro of Bearcrofts against Grizel Bruce, one of the heirs-portioners of Reddoch, and her mother and servants; being a charge, upon a decreet of the Justices of the Peace, for breaking, tearing up, and destroying ninety-two trees he had planted on a ditch, in the march betwixt them, at £20 Scots each tree, conform to the 41st Act of Parliament, 1661. The reasons of suspension were, 1*mo*. The decreet was null by the 28th Act of that same Parliament: among the instructions given to the Justices of the Peace, and their constables, they are not to meddle with heritors above ten chalders of victual of yearly rent. This was REPELLED, in respect the Act does not restrain their cognoscing on such, but only that they may not imprison

them. *2do.* ALLEGED,—She was minor, and her curators were not called. ANSWERED, 1*mo.* Wrong has no warrant; and, she being convened for a delinquency, there needed none to be called but herself. *2do.* She is nineteen years old, and has no other curator but her mother, and she is called. The Lords repelled this reason also, but not in respect of the *first* answer, which they thought not sufficiently relevant, but of the *second*; though the mother was convened as *socia* and not *qua* curatrix. *The third* reason was,—The ground whereon they were planted was her own, and *quilibet potest suo abuti*, at least it was a controverted march. ANSWERED,—Though the Justices of the Peace be not competent to property, yet, *per l. 2. D. de Jurisdict.* they may cognosce it in consequence of the riot; and accordingly it was fully proven to be the pursuer's ground; which the Lords sustained *hoc loco.* The *fourth* was,—That sixty of the ninety-two were but thorns, and designed only for a hedge; and so they fell not under the Act, appointing £20 for every growing tree destroyed; there being only £5 Scots of fine imposed on the breaking of hedges.

The Lords ordained trial to be taken, Whether the hawthorns were set by way of trees, at a distance, or only to make a hedge: And, in regard the Act 1685 has restricted the penalty to £10 for any trees within ten years old, they decerned for the other thirty-two trees at that rate, looking on that last Act as correctory of the former statutes. And though it was a very malicious act to destroy planting, *esto* it were on your own ground, for then *plantata solo cedunt*, yet they desired to be cleared, if they stood any time, and had taken root, or were challenged, *ex incontinenti*, after the planting, and broken down: and the Lords allowed the Reporter to pass to the ground and visit the same, and consider if it was designed for a hedge only, which the law esteems not to be trees, but only *arbusta*; or if it was destinate for large growing timber, to fence his house against the wind. *Vol. I. Page* 749.

1696. *December* 31. The COUNTESS of DUMFERMLING *against* The CREDITORS of The EARL of DUMFERMLING.

ARBRUCHELL reported the Countess of Dumfermling against the Creditors. She had raised a summons for modifying to her an aliment, (in regard it had been refused to her by way of bill,) which she only craved during the dependence of the ranking. It was OBJECTED against it, 1*mo.* That all the officers of state were not called, *viz.* the secretary, justice-clerk, &c. *2do.* That it could not have summary discussing, by virtue of the Act of Parliament in September last, 1696, because it was raised before the Act.

ANSWERED to the *first*,—The commissioners of the treasury, and donatars of the forfeiture, who had the greatest interest, were called. To the *second*,—It was seen and returned *communi forma*, which was enough, though the Act had no retrospect.

The Lords repelled the dilators, and allowed to call the rest of the officers of state, *cum processu.* But, on a review, they inclined to sustain the first dilator on the Act of Parliament. *Vol. I. Page* 749.