

upon him to do any diligence ; and at most *tenebatur tantum de dolo et lata culpa*, seeing you never interpellated, 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, 17th July, 1672, *Earl of Wemyss* against *Sir William Thomson* ; 18th 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 assoilyed 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 interpellating him either to do diligence, or denude, determined the Lords much in this decision.

*Vol. I. Page 747.*

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 decret 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, 1mo. The decret 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