No 2.

*** Kerse reports this case:

THE LORDS sustained a summons raised against a party as charged to enter heir, albeit the summons was raised within the 40 days, and that because the summons was not executed until the 40 days were expired.

Kerse, MS. fol. 139.

No 3.

1702. *July* 17. BIGGAR *against* WALLACE.

THE LORDS sustained a general charge and summons thereon, though both were given on the same day and at the same time; because there were 21 days given for the first, and six for the second diet, after the out-running of the 40 days appointed for the general charge.

Fol. Dic. v. 1. *p.* 465. *Fountainhall.*

*** This case is No 125. p. 3775, *voce* EXECUTION.

No 4.
An adjudication was sustained tho' it was executed before the days of the charge to enter heir were expired, and a part of the *inducia* of the summons were co-incident with the days of the charge.

1703. *November* 30. SINCLAIR of Barack *against* SINCLAIR of Southdun.

THE LORDS advised the debate, Sinclair of Barack *contra* Sinclair of Southdun. It was a competition betwixt two adjudications, both of them being for implement of special dispositions, wherein Barack repeated his reduction of Southdun's adjudication as null, on this reason, that, before the forty days of the special charge to enter heir were run, Southdun had raised his summons of adjudication, and executed the same within the forty days of the charge, to compear upon twenty-one days warning, a part of which twenty-one days were co-incident with the forty days of the charge, contrary to all form and law, which requires, that either the forty days of the special charge be elapsed before the summons thereon raised be executed, or else if it be executed during the currency of these forty days, that it have twenty-one free days for the first diet, and six for the second, over and above the forty days, making in all sixty-eight days, conform to the 106th act 1540, and the 27th act 1621, which specially require the elapsing of the forty days of the charge before executing the summons; which not being observed by Southdun, his preposterous diligence must be declared null. *Answered* for Southdun, 1*mo*, His adjudication being all proved *scripto*, needed not two diets, but only one. 2*do*, Though it had, yet by the continued practice and style now received, these *duplicatæ inducie* of forty days, and then twenty-one and six for the two citations on the summons, are wholly in desuetude; and by our style there is nothing more ordinary now than to raise them both at one time, providing the

day of compearance in the summons be made to a day posterior to the outrunning of the forty days of the charge; and to sustain this as a sufficient nullity and objection now, were to cast most of the adjudications and diligences in the nation; which were of most dangerous consequence to the peoples securities and rights: And it is confessed, that it is practised in general charges, and summonses of constitution following thereon; and there is the same parity of reason to sustain it in special charges, that the diets of citations might run together, and be co-incident with the days of the charge; even as the Lords found, 11th of February 1680, Gordon *contra* Hunter, No 3. p. 170., that, though an adjudication for a sum requiring requisition to be made did not mention it, yet they allowed it still to be produced for sustaining the adjudication; and even so may a summons of removing be raised and executed within the forty days of the warning, providing the day of compearance be without the forty days. *Replied*, The general charge was introduced by custom and the decision of the Lords, and was little known in the year 1540, when that act of Parliament was made, as appears by Sinclair's decisions in March 1540*, likewise marked by Skene, who calls personal rights *nudæ promissiones*, or bare rights, according to that maxim of law, *Traditionibus non nudis pactis transferuntur rerum dominia, et nulla sasina nulla terra:* So that the act 1540 relates only to special services and charges, which were most in use in those days; and however the practice in some cases has deviated since, yet it can make no rule, unless it were a custom long, constant, uniform, and approven in judgment, which this is not; as appears by the decisions in Durie, 15th February 1627, Earl of Cassillis *contra* Macmartin, No 1. p. 2167.; and 19th June 1628, Macculloch *contra* Marshall, No 2. p. 2168. THE LORDS found the general custom had so prevailed, that it might brangle many rights, if condemned, and therefore sustained Southdun's adjudication, and repelled the nullity objected against the same. No 4.

Fol. Dic. v. 1. p. 465. Fountainhall, v. 2. p. 195.

* See APPENDIX.