No 30. verified, but requiring a course of probation, ought to have two diets; and the late act of Parliament allows only alimentary actions to be summarily discussed, without dispensing in the least with the days of citation, or the number of them.

Fol. Dic. v. 2. p. 178. Forbes, p. 25.

*** Fountainhall reports this case:

DAVID OLIPHANT, as heir-male of the family of Gask, pursues for an aliment, against James Oliphant of Williamston, as the heir of line of Gask. *Alleged*, The heir-male has no title for pursuing for an aliment, unless it were libelled and instructed, that the estate was provided by the ancient investitures to the heirs-male, seeing the feudal law presumes all lands to hold ward. *Answered*, *Jura feudalia* are *localia*; and now the presumption runs as much in favour of the heirs of line; and many great estates in Scotland are feminine feus, and pass to and by heiresses. THE LORDS did not regard this defence. Then it was *alleged*; This summons of aliment was null, because it contained allenarly one diet, whereas all processes requiring a tract of probation must have two diets, in which number aliments are one; for there must be a previous trial and probation led of the rental of the estate, and quantity of the debt, to know the excresce before any modification of the aliment can be made. *Answered*, That, by the 21st act 1696, summonses of aliment, as favourable, are privileged, and therefore need no more but one diet; but *esto* they required two, the messenger has, by his execution, cited them to two; so if they must have two diets, it is done, and if not, then two comprehend one, *et superflua non nocent*. *Replied*, There is no warrant in the summons but for one diet, and so the messenger has acted beyond and contrary to the will of the letters, in citing to two several diets; and so it is null, whatever way you take it; and though the act of Parliament declares these processes to come in summarily, yet that is only by dispensing with the roll, but not as to the diets of citation. THE LORDS sustained the dilator, and found no process, till he were legally of new cited to two sundry diets.

Fountainhall, v. 2. p. 284.

No 31. A summons not called within year and day after elapsing of the last diet of compearance falls, and cannot be wakened.

1708. *July* 27.

JOHN DRUMMOND of Megginsh, *against* JOHN STUART of Innernytie.

IN a wakening of a special declarator of Blairhall's escheat, at the instance of Megginsh, against Innernytie and his tenants; the defender alleged no process, because the summons not having been called in judgment within a year after elapsing of the last day of compearance, expired, and could not be summarily wakened, as was decided November 1684, Belshes of Tofts, *contra* Earl of Lou-

doun, No 26. p. 11975. For a wakening is only of summons superannuated after it was once called, Stair, B. 4.T. 34. § 4. This holds for the same reason, that a summons not executed within year and day after the raising, becomes null, March 1686, Jolly *contra* Laird of Lamingtoun, (See APPENDIX). So, in the Roman law, the prætor's edict lasted only for a year, unless turned into a process, by judicial signatures within that time; and even after *res* was *litigiosa*, there was a certain time prefixed for a final determination of the cause, L. 13. § 1. C. De Judiciis. Which is also done in most places abroad. No 31.

THE LORDS found, That the summons, not being called within year and day after the last diet of compearance, fell and could not be wakened.

Fol. Dic. v. 2. p. 179. Forbes, p. 275.

1709. *July* 19.

WILLIAM BAILLIE of Lamington *against* MR ALEXANDER MENZIES of Culterallers.

No 32.
Citation for the second diet sustained, though the day of compearance was nineteen months after the citation, it being within a year of the first diet of compearance.

LORD BOWHILL reported William Baillie of Lamington, against Mr Alexander Menzies of Culterallers, who holding some lands of Lamington, he was pursued in a declarator of non-entry. *Alleged*, No process, for the execution is null, in so far as the day of compearance for the second diet is without the year from the giving of the citation, whereas both the days should be within the year from the first execution; and he has that respect for the superior, that he would not have proponed this dilator, if Lamington had not declined all terms of accommodation. *Answered*, This was neither a nullity nor an informality; for it agreed to the analogy of the old form and custom, whereby, after the first execution there were acts and letters issued out, which might have been executed after year and day of the first execution; it was enough if the day of compearance for the first diet was within the year of the summons; and the 6th act 1672, taking away acts and letters, and appointing both to be executed at one time, for the ease of the people, and abridging expenses, does not alter the distance; and the reason why the second diet was without the year, was, there were more defenders, and it was fit one day of compearance should be made to serve for all. THE LORDS found it no nullity, but sustained process, and repelled the dilator. Some thought it inconvenient, and wished it were amended by an act of sederunt for time coming, though it could not amount to a nullity *quoad* bygone citations.

Fountainhall, v. 2. p. 516.

*** Forbes reports this case:

1709. *July* 15.—IN a reduction, improbation and nonentry, at the instance of Lamington against Culterallers his vassal, the defender *alleged*, That no pro-