1630. *November* 27. Cairncross *against* Laird Loudon.

No 407.

Cairncross of Cunoshie pursues Laird Loudon for a certain sum contained in a contract of marriage registered more than 40 years ago, which the Lords found to be prescribed, notwithstanding of the registration thereof.

Auchinleck, MS. p. 163.

1635. *June* 26. L. of Wauchton *against* Hume of Ford.

No 408.
In a thirlage of *omnia grana crescentia* established by writ, it was found that the defender having grinded a part of his corns at the mill to which he was thirled, this was sufficient to sustain the astriction for the whole, though there was a desuetude for the rest above the space of 40 years.

In an action for abstracting of thirle-multures, the ground whereof was a charter granted by the umquhile Lord Holyroodhouse to umquhile William Lermonth of Hill, whereby he thirled his lands of Ford and others particularly therein designed, to the said William Lermonth's mill of Linton, and also all the corns in-brought by the possessors of the said lands which should happen to be grinded by them; this was the tenor of the astriction, the right whereof being come in the Laird Wauchton's person, and he pursuing therefor, and the defenders compearing to defend, it was found by the Lords that the astriction, albeit of the tenor foresaid, whereby the lands were thirled to the mill, albeit not bearing omnia grana crescentia in dictis terris, to be thirled; and albeit also bearing in the subsequent clause, (viz. and sicklike the corns in-brought which should happen to be ground there) did extend to oblige the tenants and possessors of the lands to pay the multures acclaimed for the whole corns which should grow upon the said lands, as well for the corns that should be ground at other mills than the mill of the astriction libelled, as for the whole other corns growing thereon which should be ground any where; and found, that the said subjoined clause, viz. anent the corns which should happen to be ground, did extend only to the corns in-brought by the tenants, and not to the corns growing upon the lands. And whereas the defender *alleged*, That the astriction did extend only to the corns growing upon the lands for so much thereof as should happen to be ground at any other mill, according to the words and meaning of the said astriction, as said is, and no further, ought to be enlarged to all the corns growing, which should not happen to be ground, as said is, at no other mill; in respect he *alleged* that it was so expressed in the writ and thirlage, being in itself odious and not favourable, it should rather be retrenched than enlarged; for, albeit by the custom of this realm, parties by express paction may thirle all their corns growing, *quo casu* such thirlage being so particularly and *specifice* convened upon, the same may have effect; but where the paction does not *specifice* comprehend the same, it ought not to be extended; for it were against equity and reason, that multures should be kept for corns not ground, *nisi sit ita conventum*; likeas of the common law, all these astrictions are instituted and allowed, only that vassals and tenants should come to their over lord's and master's

mill and grind their corns thereat, rather than at any other mill, in respect of the natural bond betwixt vassal and superior, and master and tenant; but that they should grind all their corns, and such as they have not use nor necessity to grind, it is in itself most unjust and tends to oppression, and ought not to be mentioned; likeas, in this instance of the case controverted, he alleged that the words of the writ of astriction proport no otherwise, and also according thereto the defender and his authors, these 40 years bypast, without question, have been in use to use and dispone upon the corns growing upon the said lands alleged astricted at their pleasure and where they pleased, except such as they had necessity to grind, and no more; during the which whole space they were never questioned nor convened for any of the said abstracted corns, and so the pursuer and his predecessors have acquiesced with the said thirlage so retrenched to the corns ground, and now cannot be heard to desire the astriction to be any further extended than as has been possessed these forty years bypast, as said is; this allegeance was repelled *ut supra*, and found, that albeit the defenders nor their predecessors were not troubled never so long of before for their corns abstracted, and that never any question nor pursuit was moved against them thereanent during all that space; yet seeing the defenders have ground a part of the corns growing on the lands thirled, it was sufficient to sustain the astriction; and the desuetude to pay the multure for the whole corns growing these 40 years bypast, and the not pursuing therefor, did noways prejudge the thirlage; but found, that notwithstanding thereof, they remained astricted in the whole corns growing, as effectually as if *omnia grana crescentia* had been astricted, with deduction of such particulars as the Lords should find in law and reason ought not to be defalked, when the particulars should be proponed. No 408.

Act. *Advocatus & Nicolson.* Alt. *Stuart.* Clerk, *Gibson.*

Fol. Dic. v. 2. *p.* 129. *Durie, p.* 768.

*** A similar decision was pronounced, 25th July 1727, M'Leod against Feuars of Muiravonside. See APPENDIX.

1665. *February* 17. BUTTER *against* The LAIRD of BALLEGERNO.

IN an action Butter and Gray of Ballegerno, the LORDS found, that a summons raised upon a bond and executed, though the day of compearance was after 40 years, the summons and execution being before the expiring of 40 years, is sufficient to interrupt the prescription. No 409.

Fol. Dic. v. 2. *p.* 127. *Gilmour, No* 141. *p.* 102.