No. 121.
extend to meal or flour imported by the inhabitants of a burgh, and grinded before it is purchased.

illata; and that they were liable for the multure of flour which in that state they had purchased out of the thirle, and imported.

The existence of the thirlage was established by the Town's charters, and other documents.——With respect to its extent, the defenders

Pleaded: The phrase "tholling fire and water," in the definition of the thirlage in question, is interpreted by "steeping and kilning," in opposition to "baking and brewing;" Stair, B. 2. Tit. 7. § 20; Erskine, B. 2. Tit. 9. § 25. And accordingly, in a case similar to the present, it was found, 24th January, 1749, That the thirlage did not comprehend flour purchased when ground and then imported within the thirlage; Town of Perth against Rait and others, No. 90. p. 16024.

Answered: In the words of Lord Bankton: "If meal or ground malt is brought within the thirle, and sold again in kind, it falls not within the thirlage; but does if manufactured into bread or ale; or otherwise it should elude the thirlage, and render it ineffectual; whereas the same extends to what is brewed or baked." B. 4. Tit. 7. § 49.

The Court gave judgment agreeably to the decision above mentioned in the case of the Town of Perth; and

"Found, That flour-meal and grinded malt bought by the defenders, after being grinded, and then imported by them into the burgh of Haddington, was not subject to the thirlage in question."

Lord Ordinary, *Alva.* Act. *C. Brown.* Alt. *M. Ross.* Clerk, *Sinclair.*

S. *Fac. Coll. No.* 24. *p.* 40.

1789. *June* 14. DAVID SMITH *against* TRUSTEES of DR. THOMAS YOUNG.

No. 122.
How far thirlage is extinguished, in consequence of the owner of the mill becoming proprietor of the astricted lands, or *vice versa?*

The lands of Kinvaid were anciently thirled to the mill of Drumsay, at a time when they belonged to different owners. In 1726, the grandfather of Mr. Smith of Methven became proprietor of both.

Even after this event, however, the tenants of the lands continued uniformly to pay the usual multures: And on this footing matters remained till the year 1765, when the lands of Kinvaid were sold, without any mention of the thirlage, to the late Dr. Young. At this time, in some of the leases which were excepted from the warrandice, the payment of multures was expressly stipulated, while in others a reference was made to the possession held by the preceding tenants, all of whom actually paid them.

A doubt having occurred, whether the lands were to be considered as still astricted; Mr. Smyth brought an action for payment of the multures, against Mr. Oliphant, and several other persons whom Dr. Young had appointed his trustees. The defenders

Pleaded: The servitude of thirlage must be completely done away, when the property of the mill and of the lands is united in the same person, agreeable to the maxim, *quod res sua nemini servit.* In this manner, when the pursuer's grandfather became purchaser of the mill of Drumsay, and of the lands of Kinvaid, the incum-

brance with which the lands were formerly affected was for ever discharged. Since that period, indeed, those who were tenants of the lands have been obliged, by their leases, to carry their grain to their landlord's mill, and to pay the heaviest rate of thirlage. But in this manner the lands could not be burdened, but so soon as the leases expired, the contract of astriction, as appendant to them, was necessarily at an end; L. 1. D. Quemadmodum servit amit.; L. 10. D. Commun. præd. tam. urb.; L. 116. D. De. legat. 1. L. 30. D. De servitut. præd. rustic.; Stair, B. 2. Tit. 7. § 16.; Bankt. B. 2. Tit. 7. § 41.; Erskine, B. 2. Tit. 9. § 36, 37. No. 122.

Answered: Even with respect to what are properly termed real servitudes, the rule of law referred to on the other side, is far from being an universal one; but the question must in every case be determined according to the probable intention of the parties. If one is obliged to admit into his wall the beams which are necessary for supporting his neighbour's house, it never can be thought that this servitude, so indispensably useful, will not continue to affect the servient tenement in all after changes of the property. In the same manner, supposing the owner of a mill to have the privilege of an aqueduct through his neighbour's lands, which he afterwards purchases, how absurd it would be to imagine, that if he thereafter sells the lands, the right of aqueduct, though as requisite as ever for the use of the mill, was to be at an end?

But with regard to thirlage, which has been sometimes, though, erroneously, classed among real servitudes, the maxim appears to be altogether inadmissible. Not only is it in the power of a proprietor, by astricting the tenants of his lands to his own mill, to establish a thirlage, which will in all time coming be a real burden on the lands; but where an astriction of this sort has once existed, it is necessary, in order to effect a liberation, in case of the proprietor's afterwards selling the lands, that they shall be disponed *cum molendinis et multuris*, so that a conveyance, in which a certain feu-duty is stipulated, *pro omnia alio onere*, will not be sufficient to create an exemption; Craig. Lib. 2. Dieg. 8. § 7. 11.; Stair B. 2. Tit. 7. § 15, 16, 24.; Bankt. B. 2. Tit. 7. § 38, 52, 53.; Erskine, B. 2. Tit. 9. § 18, 21, 38.

The judgment of the Lord Ordinary was in the following terms:

"In respect it is admitted, that there was a separate constitution of the thirlage in question before the property of the lands and of the mill come both into the person of the pursuer's predecessor; and that it is also admitted, that while the pursuer's predecessors were proprietors both of the lands and mill, they took their tenants in the lands bound in their tacks to come to the mill, and that they came accordingly and paid in-town multures; finds, that the lands continued astricted to the mill after they were sold to Dr. Young."

After advising a reclaiming petition, which was followed with answers, the Lords "adhered to the judgment of the Lord Ordinary."

Lord Ordinary, *Lord Justice Clerk.* Act. *Rolland, C. Boswell.* Alt. *Steuart.* Clerk, *Gordon.*