

No 5.

continual custom of Athole, not only at the miln libelled, but also at other milns, to do the like in case of abstraction foresaid ; and because thereafter the pursuer offered to prove, that the heritor of these lands, whereof he was tenant, was infest in lands, *cum molendinis, &c.* ; and that the excipient qualified not the thirlage of the same lands to his miln libelled clearly, whereby it might appear that the thirlage was constitute and uncontroverted, but alleged only, that the possessors of the lands foresaid, were in use past memory of man, to come and grind their corns at the said miln, as astricted thereto, and to pay greater multure than out-sucken multure ; and was not more special, upon a determinate and clear constitution of thirlage ; therefore the allegiance was repelled, and the use of coming to the miln as thirled, and paying of multure not as out-sucken, as said is, was not sustained to make a thirlage, but the spuilzie sustained, reserving always the modification to the Lords.

Fol. Dic. v. I. p. 116. Durie, p. 743. & 761.

No 6.

A tenant dis-
poned corns
to his master,
in security
of arrears,
with liberty
to intromit
brevi manu,
if the money
were not paid
by a day fixed.
The master
found entit-
tled so to in-
tromit,
without
sentence of a
judge de-
claring
failure.

1661. December 19. JAMES DEWAR against The COUNTESS of MURRAY.

JAMES DEWAR pursues the Countess of Murray, for ejecting him out of certain lands, whereof he had tack, and spuilzieing from him certain goods.—The defender *alleged* absolvitor ; because there was a clause in the pursuer's tack, providing that if two years duty run together, the tack should expire, and in that case he renounced the tack ; and thereafter the pursuer having compted with the defender's chamberlain, by writ produced he acknowledged himself debtor in such sums, and such duties for bygone years, with this provision, that if he failed in payment thereof, my Lady should, (at her own hand) intromit with the corns and others libelled, which were disponed to her for satisfaction of the rent ; and likewise it should be leisum to my Lady to set the lands to any other tenant thereafter, at the term of Martinmas, and to dispose thereof at her pleasure.—The pursuer *answered, non relevat*, unless, by authority of a judge, the failzie had been declared.—The defender *answered, maxime relevat*, because declarators are only necessary in reversions, back-tacks, or infestments, being of great importance ; but not in ordinary tacks betwixt master and tenant.

THE LORDS found the defence relevant, founded upon the accompt and bond, in respect of the tenor thereof as aforesaid ; but would not have so done upon the clause of the tack, unless it had born expressly a power to enter to the possession at any time *brevi manu*.

The pursuer further *replied*, That the defence ought to be repelled, because he offered to prove, before the ejection, he had paid a great part, and offered the rest.

THE LORDS having considered the instructions of offence produced, found, That it was not special, bearing any sum of money produced or offered, and that there was no consignation following thereupon ; and therefore sustained the defence, notwithstanding the reply. See REMOVING.

Fol. Dic. v. I. p. 116. Stair, v. I. p. 70.