*** Auchinleck likewise observes this case:

No 4.

A tacksman of teinds, notwithstanding that he serve inhibition, yet may not *brevi manu* lead or intromit with the teind, whereof he nor his author was in use to lead the teind before, but ought to pursue the spuilzie; and, if he intromit at his own hand, he commits spuilzie.

Auchinleck, MS. (SPUILZIE.) *p.* 216.

1635. *January* 22. MENZIES *against* M'KAY.

No 5.
A miller could not lawfully seize horses and meal abstracted from his miln, contrary to his right of thirlage, upon pretence of an old law giving that power; though he should prove such seizure to have been customary in the neighbourhood.

ONE M'Kay pursuing a spuilzie of a horse, the defender *alleged*, That (conform to the law of *Regiam Majestatem*) he being infeft in the miln of , to which miln the lands occupied by the pursuer were expressly thirled; against which thirlage the pursuer having carried his corns growing upon these lands, and grinding the same at another miln, the defender apprehended the horses bringing back the meal, made and grinded at the said other miln, which by the said law of the Majesty, he might lawfully do; likeas it is the custom of the country, not only in this miln, but in the other milns about, viz. in Athole, where the miln libelled, and the lands libelled, so thirled lye, to do the same. ——THE LORDS sustained this exception, to liberate the defender from spuilzie, but not from restitution of the horses again; and the reason the exception was sustained, was because the defender alleged that he sent back the horses again that same night to the pursuer's house, and re-delivered the meal to the pursuer's wife, albeit the pursuer received not the horses.

March 14. 1635.—One Gilchrist M'Kay pursuing Archibald Menzies, both indwellers in Athole, for spuilzieing of a horse, with a sack and meal therein, being on the horse's back; and the defender *alleging*, That he might lawfully intromit with the said horse and meal; because, conform to the law of the Majesty, the pursuer being tenant in the lands of , which are thirled to the miln of , pertaining to such an heritor, on whom he condescended, and of which miln the defender is miller; the said pursuer was transporting the meal of the corns growing upon the said lands so thirled, having ground the same at another miln than the said miln whereto the corns were astricted; which he having so apprehended, it was lawful to him, conform to the law of the Majesty so to do, and keep the said horse and meal, but danger of spuilzie, at the least ay and while the pursuer be satisfied for the multures of the said corns, so abstracted.——THE LORDS found this exception relevant to purge the spuilzie, the defender re-delivering the horse again, with sack and meal, as sufficient as the same was the time of the said spuilzie, albeit it was founded upon an old law of the Majesty unallowed, and not being in consuetude and observance; seeing it was offered to be proven by the defender, that it was the

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 infeft 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 multures than out-sucken multure; and was not more special, upon a determinate and clear constitution of thirlage; therefore the allegeance 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. 1. *p.* 116. *Durie, p.* 743. & 761.

No 6.

A tenant disponed 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 entitled so to intromit, without sentence of a judge declaring 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 infeftments, 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. 1. *p.* 116. *Stair, v.* 1. *p.* 70.