No 47.

the Earl of Nithsdale was summoned, and that he compeared, and proponed this exception, of not warning of himself, or his author, which the Lords found he might propone, notwithstanding of his compearance; and albeit the pursuer offered to prove his retaining of the possession, being *in libello*, and thereby craving preference to the defender; and albeit the defender never offered to prove, conform to the act of Parliament 1584, that the forefaulted person was five years in possession of the lands before the forefaulture; none of which were respected, but the exception found relevant *ut supra*, and necessity found that he should have been warned.

Act. *Stuart et Johnston*. Alt. *Advocatus et Nicolson*. Clerk, *Scot*.

Durie, *p*. 837.

1663. *January* 30. RICHARD *against* KIRKLAND.

No 48.
A principal tacksman holding by tacit relocation need not be warned, the warning against the subtenant being sufficient.

RICHARD being tacksman of a roum of the barony of Loudon, set the same to a sub-tenant, who suspended, and *alleged*, That the charger had subset to him as tacksman, and was obliged to produce his tack to him, and being warned by the heritor, he did by way of instrument, require the charger's tack, (if he any had) to defend himself thereby, which he refused; and the truth is, he had no tack unexpired; whereupon he was necessitated to take a new tack from the heritor, for the hail duty he was obliged to pay to the heritor, and Richard before. The charger *answered*, *Non relevat*, unless as he had been warned, he had also been removed by a sentence, in which the charger would have compeared and defended, and albeit he had not compeared, the defender had this defence competent, that he was tenant to the charger by payment of mail and duty, who had right by tack, either standing, or at least he bruiked *per tacitam relocationem*, and he not warned nor called.

"THE LORDS found the reason of suspension relevant, and that the foresaid defence of tacit relocation would not have been relevant, tacit relocation being only effectual against singular successors of the natural possessor, the warning of whom is sufficient to interrupt the same, not only as to those who are warned, but any other tacksman whose tacks are expired, and therefore the defence in that case must always be, that the defender is tenant, by payment of mail and duty to such a person, who either is infeft, or hath tack and terms to run after the warning; but if the charger had a tack standing, the Lords ordained him to produce the same, and they would hear the parties thereupon.

Fol. Dic. *v*. 2. *p*. 338. *Stair* *v*. 1. *p*. 168.

*** Gilmour reports this case:

No 48.

JOHN KIRKLAND alleging him to have a tack from the Earl of Loudon of the lands of Gilfit, sets to William Richard a subtack for payment of the principal tack-duty to the Earl of Loudon, and L. 30 to the said John; for which L. 30 William being charged, suspends upon this reason, That he was warned to remove by the Earl, which warning he did intimate to the said John Kirkland, and required him to make furthcoming the pricipal tack to the suspender, to the effect he might defend against the warning, which the principal tacksman and charger refused; whereupon the suspender having nothing to defend him, was forced to take a new tack from the Earl, which he did, otherwise to remove, or to be under the hazard of violent profits. It was *answered*, That the reason was not relevant; because the suspender might have defended himself against the warning, in respect the charger (setter of the subtack) was not warned; for though he had no tack, or that his tack had been expired, yet seeing he was in possession by setting of a subtack, and having paid duty by himself or sub-tacksmen, he bruiked *per tacitam relocationem*. It was *replied*, That the Earl of Loudon had no necessity to warn the said John Kirkland, since he neither had right, nor was in natural possession, the master of the ground being only obliged to warn the possessor, unless the possessor bruik as tenant to another master who has infeftment, or has from the pursuer a tack standing for terms yet to run, or such a right as might defend the master if he had been warned; and tacit relocation is not in the case where the tacksman is not in possession, and though it were, yet the master using warning against the possessor, the presumption of tacit relocation is taken away.

THE LORDS found the reason of suspension relevant, and suspended the letters *simpliciter*.

Gilmour, No 71. p. 52.

1666. *June* 14. DUMBAR *against* LORD DUFFUS.

No 49. Effect of ejection as to re-possession.

THE Lord Duffus having obtained a decreet of removing against Dumbar, his tenant, and having executed the same by letters of possession, the tenants raise suspension and reduction of the decreet, and a summons of ejection. The reason of reduction was, that the Sheriff had done wrong in repelling, and not expressing in the decreet a relevant defence; 2*do*, That the tenant could not be decerned to remove, because he was already removed irregularly by ejection, and ought not to be put to defend in the removing, till he were re-possessed: *spoliatus ante omnia est restituendus*; which he instructed by an instrument taken in the hand of the clerk of Court. And where it was *replied* be-