any tacit relocation in the person of the tacksman, whose right was expired, and he not in possession, and so that he needed not to be warned. No 46.

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

Fol. Dic. v. 2. p. 338. Durie, p. 627.

1637. *March* 16. Lo. JOHNSTON *against* E. NITHSDALE.

No 47.
Who must be warned in the case of forfeiture?

THE Lo. Johnston pursuing removing from the lands of Knock against the E. of Nithsdale, who alleging, that no process ought to be granted in that removing against him, or any others of the defenders; because he neither was warned, nor the Lo. Cranston his author, nor any to represent him, albeit his said author was heritably infeft in the lands libelled, by a public infeftment holden of the King, proceeding upon the forfaultry of the umquhile Lo. Maxwell his brother, and that the excipient stands sicklike infeft in the same lands, and by virtue of their infeftments they have been these 27 years in possession of these lands libelled, by receiving of duty therefor yearly from the tenants, possessors of the ground; and being *replied*, That he hath summoned by his summons of removing the E. of Nithsdale, so that there was no necessity to warn him, and so much the rather because he was not infeft the time of his warning, which was executed *in anno* 1621; neither was there necessity to warn any to represent his author the Lord Cranston, because he needed not to take notice of him, nor of no other, having to do with his own tenants; likeas he offered to prove, that these tenants defenders were ever tenants to him, and to his father, and to his father's author, past memory of man; neither can the defender be ever able to shew, that ever any of the Lord Maxwell's predecessors were infeft in these lands, so that the Lord Cranston's infeftment upon the Lord Maxwell's forefaultry ought not to be respected; and if it could be respected, yet he had no necessity to warn him, because before the warning he was denuded of his right in favours of the Earl of Nithsdale the defender, wherethrough he needed never to know him, especially seeing the most and longest possession which he could allege to have, by virtue of this right of the Lord Cranston, which was *in anno* 1610, and whereof by contract he was denuded *in anno* 1617, is thereby only for the space of seven years, which is not of that sufficiency, that it laid any necessity on him to warn the Lord Cranston's heir; and the Earl of Nithsdale was not infeft upon that contract made in his favours, while after his warning, viz. *in anno* 1621, so that he could not warn him; and whatever possession he had since the warning and intenting of this cause, it cannot be reputed to have the force of a possessory judgment, but must be esteemed vicious and violent; notwithstanding of the which reply, the LORDS found the exception upon the not warning relevant, albeit the Lord Cranston's possession before the warning was only for the space of seven years; and albeit

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.