*** 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 repossession.

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-

No 49. fore the Sheriff, That he had not found caution for the violent profits, he *answered*, That he needed not, seeing the pursuer himself was in possession by the ejection. It was *answered*, That the Lord Duffus offered him to prove, that all he did was to put in some corns and plenishing in an out-house, long after the warning of the tenant that had taken the roum; and that he continued to possess all the rest of the house, and the whole land by his cattle, till he was legally removed; and neither the family nor the goods of the new tenant came in till then. It was *answered*, That the allegeance was contrary to the tenant's libel of ejection, bearing, that he was dispossessed both from the house and lands.

"The Lords considering that the tenant's was only positive, in ejection from the house, and had once acknowledged that he was not ejected from the land, they assoilzied from the reduction of the decreet of removing; but they sustained the action of ejection, and repelled the defences, as contrary to the libel, reserving to themselves the modification of the violent profits, and the other party to debate whether, after the decreet of removing, the tenant should have re-possession, or only the profits or damages.

Stair, v. 1. p. 377.

*** Newbyth reports this case:

The Lord Duffus having obtained a decreet of removing against William Dunbar, before the Sheriff of Murray and his depute, the decreet was suspended upon this reason, That William Baillie, now tenant to the Lord Duffus, and others in his name, having intruded himself in the possession at least before by the decreet of removing he was removed, and that he had an action against the Lord Duffus for the same; for which it was *answered*, That he opponed his decreet and warning, and albeit he was removed, as he was not, before the decreet, yet the same behoved to be extracted for securing the intrant tenant.

The Lords found the letters orderly proceeded in the removing, reserving the defender's action of ejection; and the ejection being likewise called, the Lords repelled the allegeance proponed for the Lord Duffus, in respect of the libel and reply, and assigned a term to prove; but, in regard the tenant was possessed, the Lords inclined not to re-possess him, albeit he should prove the ejection, but would turn the same in damage and interest.

Newbyth, MS. p. 62.

No 50.
Process of removing ought not to be sustained, unless the principal tenant is called.

1745. *January* 18.

Lockhart of Carnwath *against* Ogston and his Sub-tenants.

Mr Lockhart of Carnwath having set to James Ogston, writer in Edinburgh, a part of the lands of Walston, with power to him to subset the same