

1623. *March 6.*HAMILTON *against* SHARP.

No. 18.

Eviction hap-
pening by
neglect of
the purchas-
er.

Mr. David Sharp, parson of Kilbride, ratifies to Robert Hamilton of New-house his tack, which the said Robert had of the teind-sheaves of some lands within that parish, set to him by his predecessors long before, and binds and obliges him to do no deed in prejudice of his former tacks : Thereafter the said Mr. David sets a posterior tack to another, whereupon Hamilton of New-house convenes Mr. David Sharp to refund to him the worth of the teind-sheaves set by the foresaid posterior tack, of all the years since, being 12 or 13 years, seeing after the tack set by the said Mr. David, his tacksman had possessed the said teinds contained in his tack, which of before were possessed by the pursuer by virtue of his said prior tack, ratified as said is. The Lords sustained this action, notwithstanding that the defender compeared, and alleged, that the foresaid posterior tack could never be a ground, which of the law could have prejudged the pursuer's rights, seeing the said prior right would have ever carried the pursuer to the right of the tack, and would have made him to be preferred in the right of the teinds to the posterior tacksman ; and if he had wanted his possession, or that the posterior tacksman had attained to the possession, it was the pursuer's own default, who might have lawfully maintained his own possession, or had a competent action against any who came betwixt him and his possession ; neither could the want of his possession, and the posterior tacksman's attaining of the possession, produce this action of warrandice against the defender, seeing he was never disturbed by order of law by the setting of the said last tack, by virtue whereof the teinds were not evicted from the pursuer, nor any action ever moved against him, which took away his right, so that the want of his possession, not flowing from any ground tried by law, but being in his own default, could not produce this action of warrandice, where there was no distress declared by sentence preceding ; which allegation was repelled by the Lords.

*Act. Hamilton.**Alt. Nicolson.**Clerk, Scot.**Durie, p. 55.*1623. *March 13.*LA. INVERTEIL *against* EARL GLENCAIRN.

No. 19.

The Lords found, that a clause of retention of money, introduced in favours of the party obliged, albeit he paid, did not prejudice him of his warrandice of the lands against the cautioners, except the retention had been *per expressum* introduced in favours of the cautioner.

Kerse MS. p. 200.