No. 2. who was a *bona fide* purchaser, could not be affected by any private latent transaction between Forsyth and Dunbar.

Pleaded for the suspenders, Tacks may no doubt be renounced in particular cases by the implied consent of the parties, as where a tenant accepts of and uses a posterior tack, in which a variation is made in the provisions or conditions of the former lease, or if he shall acquire the real right to the subject let. But then if this second tack, or heritable right, shall not be effectual, the tenant's former tack will remain in force. Stair, B. 2. Tit. 9. § 36. Erskine, B. 2. Tit. 6. § 44. In like manner, in the present case, Forsyth gave up his lease in favour of Mr. Dunbar, upon condition of his performing certain obligations. But as Mr. Dunbar failed in performing his part of this agreement, the suspender could not be bound by the conditional obligation he came under.

As to the argument that Provost Gordon purchased *bona fide*, believing that this farm was out of lease,—there is nothing in it to the purpose. If the charger was improperly made to believe, that the suspenders had no tack, and on that account gave, as he alleges, a high price, he may have recourse upon the seller, either to be free of the bargain, or to obtain a deduction of the price: But it is impossible that this circumstance can in any way affect the suspenders, who were not parties to nor concerned in that transaction.

The Court, (19th December 1776,) remitted to the Lord Ordinary, "to "pass the bill of suspension."

Lord Reporter, *Gardenstone.* Act. *Crosbie.* Alt. *Elphinstone.*

J. W.

1777. *February* 7.

ALEXANDER BRODIE of Windyhills, *against* WILLIAM MURDOCH.

No. 3.
When a tenant enters to grass land at Whitsunday, which were afterward plowed by the master's consent, can he be removed at the term of Whitsunday, or is he entitled to the outgoing crop?

IN 1772, Mr. Brodie, by verbal agreement, let to William Murdoch, an arable farm of 40 or 50 acres, and also a meadow of four acres, for which, being quite detatched from the arable farm, he was to pay £14 Scots of money. By the custom of the County of Elgin, where the lands are situated, Murdoch's entry to the houses and grass was at Whitsunday 1772, and to the arable lands at the separation of the crop from the ground thereafter. Murdoch having at a small expense drained the meadow, which was subject to be overflowed with water, obtained the landlord's leave for plowing it, and accordingly had it in crop for the years 1773, and 1774. At Whitsunday 1775, Murdoch being removed from these lands, a question arose how far he was entitled to the outgoing crop of that meadow, as it had been plowed previous to the execution of the summons of removing.

No. 3.

Pleaded for the landlord, That as the tenant is only liable for three years rents, he can receive no more than three years crops. *Quoad* the meadow, he had the whole benefit of the summer's grass 1772, by getting possession of it at Whitsunday; and it is understood in grass farms, that the profit of the tenant and the rent of the whole year, arise from the half years possession betwixt Whitsunday and Martinmas. That in a question when the tenant's entry to a grass farm was at Whitsunday, the half year's rent payable at Martinmas, and the remainder at the Whitsunday thereafter, and the proprietor dying in January intervening, whether the half year's rent payable the next Whitsunday fell under the executory, it had been decided by the Court, that the rents in dispute fell under the executory; February 1727, Sir William Johnston, No. 51. p. 15913. That the tenants therefore, not only received the grass crop 1772, but also enjoyed the corn crop of his meadow in 1773, and likewise the corn crop 1774, being the third year of his possession of it. From harvest 1774, to Whitsunday 1775, the term of his removal, he had the benefit of the grass if he chose to take it. So that he had three full years possession of that meadow.

Answered for the tenant, That as he had the landlord's consent to convert the meadow from pasture to arable land, he has right to the removing crop of it, as well as of the other arable land in his possession. That as he was only a tenant at will, liable to be removed at pleasure, and had been induced to drain that meadow upon the landlord's consenting that he should have the benefit of cropping it, and as it was necessary to plow it up in harvest 1772, for crop 1773, he lost all the winter and spring grass of that year, as the first crop of new land is never equal to the succeeding ones: If he could have been turned out by the landlord after the first year's crop, the landlord received a most undue advantage by such a change. That, therefore, as the tenant loses so much by the first change of pasture into arable land, it must afterward fall under the general rule of arable land, that the removing tenant shall be entitled to labour and crop the land, just as much as any other part of his possession, which had been arable previous to his entry. That although he should receive the crop in dispute, it could not be considered that he received four years crops of that land, for as he was obliged, so early as the end of August 1772, to plow up the ground in question, by which means he had only three months grass, it is certainly much more equitable, that the tenant should have the advantage of three months grass for his improvements, than that the master should be entitled to demand a full year's rent on that account.

The Lord Ordinary had found that the tenant had the sole right to the crop in question. And upon advising a reclaiming petition for Mr. Brodie with answers, The Court, November 27, 1776, pronounced the following interlocutor. 'Having advised this petition with the answers, they adhere to the Lord Ordinary's 'interlocutor reclaimed against, and refuse the petition, and remit to the Lord 'Ordinary to proceed accordingly, and further to do in any other points of

No. 3.

'the cause as he shall see just; but find the petitioner liable in the expenses 'of process already incurred; and for ascertaining the same, ordain an ac- 'count thereof to be given into Court.'

But upon a second reclaiming petition for Mr. Brodie with answers for Murdoch, the Court pronounced this interlocutor, (25th Jan. 1777:) 'Find, 'that the defender having been removed from the meadow at Whitsunday 1775, 'is not entitled to the corn crop in question; but the same belongs to the pur- 'suer, upon paying of the price and expense of seed and labour; and remit 'to the Lord Ordinary to proceed accordingly, and further to do as he shall 'see just.' And to this interlocutor the Court (7th February 1777,) adhered, upon advising a reclaiming petition for Murdoch, without answers.

Lord Ordinary, *Elliock.* For Brodie, *Hay Campbell.* For Murdoch, *B. W. M'Leod.*

D. C.

1777. *July* 24. SIR ROBERT POLLOCK *against* THOMAS PATON.

No. 4.

The effect of a paction that the tenant should pay at the rate of 100*l.* Scots per acre, in case he should plough more than a certain given quantity.

See No. 144. p. 15262.

In the missive by which Sir Robert Pollock had let the lands of Flock and Flockside to Thomas Paton, for one year, there was contained the following clause: 'Further give you leave to plough what ground you had in potatoes last crop, 'lying in that division or inclosure in which your meadow lies, *and if you shall 'plough any more there, you hereby agree to pay me £100 Scots for each acre, and 'proportionally for more or less.*' And the missive on the part of the tenant contains these words. 'I hereby accept of the offers made me in said mis- 'sives.'

The tenant having thought proper to plough up in the meadow ground not only what had been in potatoes, but about an acre and a half more, which he was no doubt at liberty to do by the missives upon paying at the rate of £100 Scots per acre, Sir Robert demanded additional rent at that rate for what had been so ploughed. He refused to comply.

After various proceedings, the Sheriff-Depute of Renfrewshire pronounced the following interlocutor: 'In regard the £100 Scots per acre for what the 'defender should plough, more than what he is expressly allowed by the mis- 'sive containing the bargain, is not said to be of yearly rent, find that there- 'fore it must be understood to be penalty; restricts the same to what da- 'mage the pursuer sustained by the said ploughing, and allows him a proof 'thereof.' The question afterward came to this Court by advocation, and being reported upon memorials, it was argued for the tenant, that if any one principle can be said to be fixed in the law and practice of Scot-