

CHARLES FERRIER, (GEORGE LYELL'S Trustee,) Appellant. No. 60.
—Gifford—Clerk—Bell.

JAMES MUDIE and JAMES FORD, Respondents.—Cranstoun—
Jameson.

Sale—Latent Burden.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) that a purchaser of an estate was entitled to be relieved of a latent burden created by a subtack, and which could not be discovered from the rights on which the tenants possessed.

GEORGE LYELL, proprietor of the estate of Kinneff and of the lands of Dickmontlaw, being involved in debt, executed a trust-disposition of his whole property in favour of John Colville, town-clerk of Arbroath, James Leach there, and Robert Jamieson, writer to the signet; any two to be a quorum.

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1ST DIVISION.
Lord Alloway.

After unsuccessfully exposing the lands of Dickmontlaw to sale by public roup at £20,000, an agreement was entered into between Colville and the respondent Ford for the purchase of the property. In reference to this, Colville wrote to Ford in these terms:—‘As the only trustee of George Lyell, Esq. of Kinneff, now in this quarter, I do hereby make offer to you of the lands of Dickmontlaw at the sum of £18,000 sterling; your entry to be at Martinmas next 1812, at which term the price to be payable. On the said price being paid, I engage that you shall receive a proper and valid disposition at the expense of the said George Lyell’s estate, and along therewith to deliver up a complete progress of writs, it being understood that the said trustees are to be entitled to the rents of crop 1812, and all preceding crops, whatever may be the conventional terms of payment thereof, it being always understood that the said lands are to be relieved of all encumbrances affecting the same at and preceding the term of your entry. Your answer in six days, if or not you accept this offer, is requested by,’ &c. To this Ford made the following answer:—‘I am favoured with yours of this date, making me offer of the estate of Dickmontlaw, provided it meets with Mr. Jamieson’s approbation, at the sum of £18,000 sterling, payable at Martinmas next, with right to crop 1813, you paying whole costs of disposition stamp; of which offer I hereby accept, provided it meets Mr. Mudie of Pitmuir’s approbation.’

Mr. Jamieson having approved of, and Mr. Mudie having concurred in the transaction, a minute of sale was executed in April 1812, by which ‘the said trustees hereby sell and dispose to and in favour of the said James Ford and James Mudie

June 9. 1823. ' equally, &c. all and whole the lands of Dickmontlaw, &c. together with all right, title, and interest which the said trustees, or the said George Lyell, have or can pretend to the said lands, teinds, and others. The trustees bind and oblige themselves and their successors in office, and the said George Lyell and his heirs and successors, duly and validly to infest and seise the said James Ford and James Mudie,' &c. ' and to discharge all public and parochial burdens preceding that date, the said James Ford and James Mudie and their foresaids being liable for the same in all time thereafter,' &c. : ' Declaring hereby, that the said James Ford and James Mudie's entry to the premises is to be at the said term of Martinmas next in this present year 1812, they having right to crop 1813, and all crops thereafter: But it is hereby understood and declared that the creditors of the said George Lyell are to be entitled and have right to the rents of the said lands for crop 1812, and all preceding crops, whatever may be the conventional terms of payment thereof; and further, the said trustees bind and oblige the said George Lyell and his heirs and successors to warrant this minute of sale, and the conveyance to be granted in consequence thereof; at all hands, and against all deadly : And the said Robert Jamieson and John Colville bind and oblige themselves and their foresaids to warrant this minute of sale, and the conveyances to be granted in consequence thereof, from their proper facts and deeds, allenary. For which causes, and on the other part, the said James Ford and James Mudie bind and oblige themselves, conjunctly and severally, their heirs, executors, and successors whomsoever, to content, pay, and deliver to the said Robert Jamieson and John Colville, a quorum of the trustees aforesaid, and their above written, the sum of £18,000 sterling for the foresaid lands and others, and that at the term of Martinmas next in this present year 1812, with interest,' &c.

The respondents having declined to pay the price, except under certain deductions, a charge was given to them, of which they brought a suspension, and inter alia stated that they had discovered, since the date of the sale, that there was a latent burden on the lands of a rent of £19. 19s., of which they had not been aware, and which they could not discover from the tacks or the rental which had been exhibited to them, and the history of which was of a very complicated nature: From their statement it appeared, that there were two farms on the estate called Gibraltar and Mains; and that in 1788 the former proprietor had let the farm of Gibraltar, at a rent of £111, to three tenants, for 57 years, and for the liferent of the heir-at-law of Alexander

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Scott, one of the three tenants. In the same year these tenants subset two parks to Dr. Stevenson at a rent of £19. 19s. for 38 years, and the liferent of the tenant in possession. Thereafter, in 1791, Alexander Scott obtained right, by assignation from his co-tenants, to the lease of the farm. Scott then transferred it to Robert Lindsay, under whom Dr. Stevenson thus became subtenant of the two parks. This subtack was acquired from Dr. Stevenson by a Mr. Kirkaldy in 1801, who thus became bound to pay Lindsay the subrent of £19. 19s. In 1806 Lindsay entered into a transaction with the proprietor, Mr. Lyell, by which he renounced the original lease, and obtained a new one for a longer period at a rent of £171, and with power to draw from Kirkaldy the subrent of £19. 19s. In 1809, Mr. Lyell purchased right to this subtack from Kirkaldy, and thus became bound to pay the subrent of £19. 19s. to his own tenant Lindsay. At the same time he granted a lease of the other farm of Mains to Richard Howieson for £500, including in it the two parks which were held by sublease; but in the lease to Howieson it was stated that the whole were derived from Lyell as heritable proprietor of the lands, no distinction being made as to the two parks. From the respective tacks, therefore, of Lindsay and of Howieson, who were in possession of the lands at the date of the purchase, it appeared that the former was bound to pay a clear rent of £171, and the latter of £500. But Lindsay now claimed deduction out of his own rent of the subrent of £19. 19s., on the ground that Mr. Lyell was by the subtack bound to pay him that sum; or, which was the same thing, he claimed right to £19. 19s. of the rent payable by Howieson, as being in possession of the lands which had been so subset.

The respondents therefore contended, that as this was a transaction which did not appear on the face of the tacks—was one which they had no means of discovering,—and as no mention was made of it in the rental,—and the tack of Howieson proceeded on a statement which was not true, they were entitled, in terms of the stipulation in the missive of sale, and at common law, to be relieved of this burden.

On the other hand it was contended, that as they had bought the lands without any reference to a rental, and as it was their duty to have inquired into the state of possession, whether enjoyed under tacks or subtacks, they were not entitled to any deduction.

The Lord Ordinary, ‘ before answer as to the deduction of
 ‘ £19. 19s. sterling, on account of the difference of rent payable
 ‘ by Lindsay, one of the tenants, in consequence of a sublease of
 ‘ part of his farm to another tenant—a transaction alleged not to

June 9. 1823. ‘ have been known or communicated to the purchaser,—ordained
 ‘ the chargers (Lyell’s trustees) to give in a condescence, in
 ‘ terms of the act of sederunt, of the facts they allege and offer
 ‘ to instruct; from which it is to be inferred that the purchasers
 ‘ knew or might have known of the alteration in the rent stated.’

Thereafter, on advising the condescence with answers, his Lordship found, ‘ That the subjects in question were purchased
 ‘ by private sale, by missive and minute of sale entered into be-
 ‘ tween the trustees of Mr. Lyell and the suspenders, without
 ‘ having any reference to the articles of roup:—that by the leases
 ‘ it seems impossible to discover the deductions from Mr. Lindsay’s
 ‘ rent, and which amount to £19. 19s., and it is not offered to be
 ‘ instructed that the suspenders were acquainted with the latent
 ‘ or confused transaction betwixt Mr. Lyell and his tenant by which
 ‘ this deduction could be claimed, and therefore found the sus-
 ‘ penders entitled to a deduction from the price corresponding to
 ‘ the £19. 19s.’ To this interlocutor his Lordship adhered, ‘ in
 ‘ respect that the deduction claimed arose from a latent burden
 ‘ created by the proprietor having let to one tenant the lands
 ‘ which had been previously included in a lease to another te-
 ‘ nant, and for which he granted that tenant a deduction by way
 ‘ of subrent, and which, unless particularly explained, could
 ‘ neither have been discovered by the leases nor by the rental,
 ‘ and the chargers do not offer to instruct that it was explained,
 ‘ or that the purchasers were acquainted with it.’ To these in-
 terlocutors the Court adhered on the 12th of January and 8th
 of June 1819.*

Thereafter, Mr. Lyell’s estate having been sequestrated under
 the Bankrupt Act, and Mr. Ferrier having been appointed trustee,
 he entered an appeal; but the House of Lords ‘ ordered and ad-
 ‘ judged, that the said petition and appeal be, and is hereby dis-
 ‘ missed this House; and that the said interlocutors therein com-
 ‘ plained of be, and the same are hereby affirmed.’

Appellant’s Authorities.—3. Ersk. 2. 2; 4. Stair, 46. 21; 3. Ersk. 3. 10; Lloyd,
 Feb. 13. 1782, (13334); Hannay, Jan. 26. 1785, (13334); Inglis, June 27. 1788,
 (13335); Urquhart, Feb. 8. 1769, (14163); Gray, Jan. 23. 1801, (No. 2. App.
 Sale); Murray, Jan. 26. 1815, (F. C.); Sugden, 275.

J. CAMPBELL,—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 14.*)

* Not reported.