

S E C T. VI.

Sale remaining unimplemented, how the Price and Rents are to be accounted for?—Price of Lands retained in the hands of the Purchaser, how to be employed?

No 26.

1758. *January 20.*

ISOBEL STRANG *against* ANDREW ARMOUR.

When a minute of sale lies over without performance, on either side, the Court of Session names a new day for performance.

The price, in this case, was made to bear interest from the term preceding the citation in the process.

By minute of sale, March 1724, Andrew Armour sold to James Strang his lands of Shettleston, with the rents thereof, for crop 1725; obliging himself to purge incumbrances, and to deliver a disposition at Martinmas then next. James Strang, on the other hand, became bound as soon as Andrew Armour should fulfil the premisses, to make payment to him of the price, being 1700 merks. James Strang died in September following, before the minute of sale was fulfilled in any part, leaving a daughter, Isobel, to represent him, an infant three years old. Her affairs were neglected; and Andrew Armour, in order to make the bargain effectual, took some legal steps which were found irregular. Isobel Strang, *anno* 1752, claimed performance of the minute of sale; and the diligence done by Armour being laid aside, the question came in what manner the mutual claims were to be adjusted; which depended on a preliminary question, Whether the account for the rents and for the price ought to be instituted, as if performance had been made at the date of the minute of sale, or according to the real fact, that there was no performance on either side? An account made up upon the former supposition would make the vender liable for the rent from the time stipulated for the purchaser's entry; and would make the purchaser, on the other hand, liable for the price, with interest from the same period. Upon the latter supposition, the account would be more simple. The vender would be entitled to the price. He would have no claim *retro* for interest, nor the purchaser for rents.

In judging of this case, the first thing that occurs is, That seeing performance cannot now be made in terms of the minute of sale, because the term of performance is past, justice requires an equivalent, so as to put matters upon the same footing as if the covenant had been regularly fulfilled. But upon reflection this cannot hold. A *mora*, indeed, on either side, will give the other the same advantage as if the covenant had been fulfilled to him; because one ought not to suffer by the fault of another. But where neither is *in mora* this rule will not hold; and this being the present case, the question is, How the minute of sale is to be fulfilled, now that the stipulated term is elapsed? This

is plainly a *casus incogitatus*, for which there is no provision made in the minute of sale. The purchaser cannot demand the bygone rents, were it his interest to demand them. He has no right to these, because he is not proprietor of the land. Nor can he demand them upon the footing of the covenant, because he is not entitled to demand possession till he first offer the price. Nor, on the other hand, is the vender entitled to the interest of the price, till he first enter the purchaser into possession. Equity then must here supply the defect of the covenant, by making a new bargain precisely similar to the former; which is done by fixing a new term for performance.

The price accordingly was made to bear interest from the term preceding the citation in this process.

Sel. Dec. No 141. p. 197.

1773. February 2.

The CREDITORS of SCOTT, late of Howden, *against* WILLIAM WILSON, Writer to the Signet.

WILLIAM WILSON, as purchaser of the lands of Howden from James Scott, in 1753, had brought a process of multiplepoinding against the Creditors of Scott, shortly after his purchase, in which a variety of questions having occurred, which prolonged the dependence, the creditors at length insisted, that, as the bygone interest upon the price was lying dead in the purchaser's hands, he should be appointed to pay it up, in order that it may be converted into a stock, and lent out to a proper person, at the sight of the creditors.

Upon the 24th of November 1772, the Lord Justice-Clerk, Ordinary, pronounced the following judgment: " Finds it unnecessary to enter into the discussion, who have been most to blame for the long continuance of this litigation before the former Ordinary; and that, supposing the creditors, as too often happens in a common cause, to have been less attentive to their interest, and less diligent in bringing the cause to a conclusion than they ought to have been, still equity will not permit the purchaser, who has been in possession of the lands since the date of his purchase in the 1753, to hold the annualrents of the price which have accrued since that time, being nineteen years, as a deed stock in his hands, to his great profit, and their great loss; and therefore finds, that the purchaser must either hold the bygone annualrents at the price due, at and preceding Martinmas last as stock bearing interest from that term, or must pay over these bygone annualrents to any person authorised by the creditors, to the effect they may be laid out, upon proper security, at their risk, for such interest as they can obtain; and, in order to carry this interlocutor into execution, ordains the creditors, betwixt and next calling, to give in a state of the annualrents of the price remaining in Mr Wilson's hands, at and preceding Martinmas last; and, against the same time, ordains Mr Wilson

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The bygone annualrents upon the price of lands, retained by the purchaser on account of incumbrances and arrestments not being purged, and till the issue of certain other questions, must either be accumulated by him into a principal sum bearing annualrent, or lent out upon proper security.