

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.

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to make his election, whether he will hold these as a stock bearing interest from said term, and what interest he is willing to pay, or if he will pay over the same to the creditors."

Upon a reclaiming petition for Wilson, upon this and other points,

"THE LORDS refused the same, in so far as it reclaims against that part of the Lord Ordinary's interlocutor respecting the bygone annualrents of the price of the lands preceding Martinmas last, and remitted to the Lord Ordinary to see the same accumulated by the petitioner into a principal sum, bearing annualrent, or let out on proper security, in terms of the interlocutor."

Act. R. Cullen.

Alt. A. Wight.

Clerk, Gibson.

Fol. Dic. v. 4. p. 253. Fac. Col. No 52. p. 135.

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1773. December 14. CREDITORS OF JOHN GEILS *against* COLIN RAE.

Bygone annualrents of the price of lands, in the hands of purchasers, from the trustees of a person insolvent, ordained to be accumulated into a stock, on the application of creditors.

THE deceased John Geils being much involved in debt, in the year 1736 conveyed his whole heritable estate to trustees, for behoof of his creditors. In execution of the trust, most of the lands were sold off in 1737; in particular, the lands of Little Govan-haugh were sold to Robert Rae, father of Colin, the party in the present question.

Mutual processes of multiple-poining, count and reckoning, and payment, &c. respecting the sums in the hands of the trustees, and the balances of the prices owing by the purchasers of Geil's subjects from them, had depended in the Court of Session since the 1764; which not being yet brought to a conclusion, an application was made to the Lord Ordinary to these conjoined processes, in February 1773, on the part of Geils's creditors, setting forth, that there was a great deal of interest lying in the hands of the purchasers, and craving that it might be accumulated into a principal sum, bearing interest from that date; and thereupon the Lord Ordinary pronounced this interlocutor: 'Finds, That the bygone annualrents of the price must, as on the 13th February instant, be accumulated into a stock, bearing interest from that day, and in time coming; and betwixt and Tuesday next, appoints the purchasers to make their election, whether they will hold the money in their hands, in that way, at the legal interest, or they will pay up the same to a person or persons, to be suggested by the creditors, at whose risk it shall be lent out.'

Against this interlocutor, Colin Rae, heir of Robert, one of these purchasers, preferred a representation; upon advising which, on the 2d March 1773, the Lord Ordinary pronounced this other interlocutor: "Having considered this representation, and also considered that the price which the representer was bound to pay, has been in his hands since the year 1743, so that the interest far exceeds the principal sum; and that the pretence for keeping matters as they are, viz. to force the creditors to end the ranking, is a compulsion too severe, and contrary to equity, and which this very day was rejected by the Court in a