

No 21. care to have given previous notice to the owners, that they might have adjusted the affair in due time.

Most of the observations that have been made upon this branch of the libel, will apply with equal force to the claim of damages made by the pursuer; for, if the defenders have been successful in shewing that the pursuer has no right to the charges unnecessarily incurred by him, it must follow, that he can have no claim for damages on account of that imprisonment which, by his imprudence and inattention, he brought upon himself.

The most favourable light in which the pursuer can be viewed, is that of a cautioner. But it never was understood, that a cautioner was entitled to demand damages from the principal debtor, on account of any distress he might have suffered; and, if so, it is not at all obvious upon what principle the pursuer can support his present claim.

It appeared to the Court, upon the whole circumstances of the case, that the pursuer had been badly treated by the defenders. The sole difficulty was as to the *solatium*, which, though allowed to be highly equitable, it was doubted if it could be awarded consistently with principles. And the question having been put, as to this article singly,

THE LORDS 'altered the Lord Ordinary's judgment only as to the L. 20 of *solatium*, but *quoad ultra* adhered thereto.'

Act. *Crosbie.*

Alt. *Abercrombie.*

Clerk, *Ross.*

*Fol. Dic. v. 3. p. 168. Fac. Col. No 188. p. 113.*

1791. December 13.

CREDITORS of DAVID CURRIE *against* WILLIAM HANNAY.

No 22.

The highest offerer at a public roup, who failed to find caution according to the articles, by which the purchase devolved to the next, was found liable for the surplus of price.

By the articles of roup of Mr Currie's estate of Newlaw, which was sold judicially, it was stipulated, 'That in case the highest offerer should fail to find caution for payment of the price within thirty days after the roup, the immediately next offerer was to be preferred, &c.; without prejudice to the creditors to insist against the several offerers for the surplus parts of the prices offered by them respectively.'

Mr Hannay was the highest bidder by an excess of L. 290; and it appeared probable, that, by his interference, the price had been greatly enhanced. From some accidental cause, however, he failed to find caution within the time prescribed. He afterwards presented a regular bond, but the right to the purchase was then claimed by the next offerer, on whom, by the articles, it had devolved. This point was afterwards the subject of a litigation, in which Mr Hannay was unsuccessful.

An action having been brought against him for payment of the surplus part of the price offered by him, he, in defence,

*Pleaded*; The articles of roup, it is plain, conferred no new right. The terms, 'without prejudice,' instead of creating any such, could only reserve what already existed at common law. Now, the common law does not seem to warrant a claim of penalty or damages, like the present, against a party who has committed no fault, and has given occasion to no loss. On the contrary, the defender's appearance as a purchaser has actually produced a large augmentation of price. A special stipulation, therefore, would have been necessary for the support of this action.

*Answered*; The question here regards not any penalty, but a claim of indemnification, plainly arising *ex contractu*. The highest price offered, which is not to be presumed more than adequate to the value of the lands, was that which the creditors were entitled to receive; and since it has been by the defender's failure withdrawn from them, they have a right to be indemnified of the resulting loss.

THE LORD ORDINARY took the cause to report on informations.

The COURT found Mr Hannay liable for the difference of price.

A reclaiming petition being advised with answers, was refused.

Reporter, *Lord Stonefield*.

Act. *Corbet*.

Alt. *Dean of Faculty, Catcart*;

Clerk, *Home*.

*Fol. Dic. v. 3. p. 168. Fac. Col. No 195. p. 405.*

See REPARATION.—PERICULUM

See LITERARY PROPERTY.—APPENDIX.