1775. *July* 27.

ANDREW PITCAIRN junior, Writer in Edinburgh, *against* UMPHRY and ANDERSON, and Others.

No 21.
One who has been imprisoned upon a recognizance entered into for another person has no claim for a *solatium*.

IN the year 1768, the pursuer was employed by the defenders to take care of their interest, in a question about the seizure of a vessel and cargo belonging to them; and a claim being entered on the part of the owners, two bonds of recognizance were necessary, (because there were different causes of seizure tried upon separate informations) which the pursuer entered into, to the extent of L. 60 Sterling for costs. In the first trial, which related to some spirits and tea, a verdict was found in favour of the defendants, and, of course, the recognizance for costs was not vacated. As to the other information, a compromise at length took place, by which the ship and the remainder of the cargo were given up to the makers of the seizure, who, in consideration thereof, paid a certain sum to the owners. These had left the care of settling this compromise to the attornies in Exchequer, whom the pursuer had originally employed to enter the claim, &c. in Exchequer, without his having had any further concern in the matter; but the recognizance he had entered into not having been retired, a writ of *fieri facias* was issued against him, which was put in execution both against his person and effects, and he incarcerate in the Canongate prison, till he was liberated upon making payment of L. 52 : 8 : 10 Sterling, the amount of the costs incurred.

Mr Pitcairn then instituted an action against the owners of the vessel, in which he concludes, 1*st*, for payment of L. 52 : 8 : 10 Sterling, incurred upon the recognizance for costs; 2*dly*, for payment of L. 16 : 16 : 10 Sterling of charges, poundage, prison-fees, &c. with interest of the said sums from the 13th of September 1770; 3*dly*, for payment of L. 100 Sterling of damages; and, *lastly*, for expenses of process. And the Lord Ordinary having, by his first interlocutor, found the defenders liable in payment to the pursuer of the two first articles, and, by a subsequent interlocutor, having found the defenders liable in the sum of L. 20 Sterling in name of damages, and as a *solatium*, and a certain sum as the expenses of process, the defenders reclaimed as to the whole articles, and

Pleaded: That, as the pursuer had neglected to acquaint the owners of the vessel, that the bond or recognizance was not vacated, it was most certainly his duty instantly to have paid the money when demanded from him; by which means, all these charges and dues would have been avoided. If a cautioner should allow an adjudication to pass against his estate, that would not found him in any claim against the principal debtor; and, in the same way, the pursuer, in this case, can have no claim against the defenders on account of these charges, so unnecessarily incurred. It may be said, that the situation of the pursuer put it out of his power to pay the sum incurred upon the bond: But, if that was the case, he ought to have been the more attentive, and to have taken

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,