1711. *January* 24.

WILLIAM KING in Auchindenan, *against* JOHN KER in Auchinboth.

No 14.
A cautioner took bond from the principal debtor for a sum of money, as a reward for becoming cautioner for him. This found to be *contra bonos mores*, and the bond reduced.

WILLIAM KING having charged John Ker upon a bond for L. 100, with annualrent and penalty, granted by him to the charger, as a premium for the hazard of his becoming cautioner for the granter for the sum of 800 merks, then borrowed from John Simpson at Beithkirk; he suspended upon these grounds, *1mo*, The bond is an unlawful usurary paction, in so far as, usury is not only the stipulating or exacting more interest than law allows, but also the taking directly, or indirectly, more profit for the loan of money than the ordinary interest. V. G. It would be usury, in the construction of law, to take from a necessitous debtor a bond for L. 100 for the loan of 800 merks, though the ordinary interest be pactioned for the sum borrowed; and what is usurary in the creditor, obtains against the cautioner; for Simpson having lent the money upon the faith of the cautioner, it must be understood to be lent to him, and *traditione brevis manus*, lent by the cautioner to the suspender, so that the cautioner was in effect creditor, besides, that he was creditor by the clause of relief. The case is the same, as if he had pactioned that, in the event of his paying the debt, the suspender should be obliged to give him the interest of 10 *per cent.* for it, or a liquid sum over and above his relief. Now, if law would reprobate such pactions in the event of payment, much more doth it disallow such a paction as this upon the hazard of payment, for *qui dicit majus dicit minus*. The law for restraining usury would be easily eluded, if cautioners be suffered to take what the principal creditors cannot, which were to allow the thing, changing the persons; and a covetous grasping creditor, under pretence of being a cautioner, might borrow his money from a feigned or pretended hand, and exact from the debtor at his pleasure.

Replied for the charger, Usury can only be where a creditor takes more than the legal interest from the debtor; and though the cautioner be creditor *quoad* the obligement of relief, he is not creditor *sortis*, but bound jointly and severally with the suspender for it. The bond charged on being given as *præmium periculi*, that the charger, as cautioner, run of paying the debt, became due to him whether he paid the debt or not, as in the present case he did not. Besides, penal laws, which are *stricti juris*, cannot be extended *de casu in casum*. It is no new thing to observe acts, the same upon the matter, to have different effects in law. V. G. A creditor lending money *filio familias*, could not recover the same, *quia obstabat exceptio senatusconsulti Macedoniani*; but that exception did not hinder repetition to him, who lent *filio familias* any other fungible. And it were hard to allow rewards to third persons, simply for procuring the loan of money, and deny the like to cautioners, who run great hazard by lending their credit. Nor will it follow, that creditors may as well take such *præmia* for the hazard they run of losing their money lent, because these are doing their own business in managing an ordinary trade, for which

No 14. law hath determined a reasonable profit; whereas cautioners interposing in another's affair, have no gain to expect, but are in danger of much loss. And there can be no danger of eluding the good laws against usury; because, if the suspender can allege, that the money borrowed was truly the cautioner's, and that the creditor's name was only borrowed to disguise the matter, the charger will find this relevant to infer the pain of usury against him.

Duplied for the suspender, Though this bond not being founded in the precise letter of the laws against usury, can have no penal consequence; yet it may, as *turpe factum*, and unlawful extortion, from the common principles of equity, and the parity of reason in the law discharging usury, be annulled, *L.* 13. *D. De Legibus*, *L.* 11. *D. De Præscript. Verb. L.* 7. § 2. *D. De Jurisdict.* 2*do*, It is only allowable to take *pretium periculi*, where the hazard doth not arise from the uncertainty of re-payment through the debtor's insolvency, but from some extrinsic hazard, as *in nautico Fœnore*, *L.* 5. *D. De nautico Fœnere.*—3*tio*, This new devised invention to impose upon the necessity of straitened debtors, ought to be checked in the bud; seeing cautionry is not the subject of commerce, but a friendly office, which law hath taken care to secure, by a full relief of all damages in the event of distress, and to ask more, is plain extortion.

Triplied for the charger, Bonds of this kind are so far from any turpitude, that they were frequent among the old Romans, who never authorised any deed *contra bonos mores*. For their law doth reckon that only to be *turpis et injusta causa*, when any thing is taken for the doing or not doing what one is obliged to by law, *L.* 2. *D. De Condict. ob turpem causam*; and this bond falls under neither of these heads, but is one of those innominate contracts *do ut facias*, or *facio ut des.* or *mandatum*, all which may admit of a reward, *L.* 19. § 1. *D. De Donat. L.* 6. *Pr. D. Mandati.* So Gothofred, upon these laws, observes, That *fide jubendi causa pecuniam accipere possumus.* And a woman getting money for her becoming cautioner, was liable as other cautioners, because thereby a gainer, *L.* 23. *C. Ad Senatusconsult. Velleian*; which argues, that it was allowed to take money for becoming cautioner. Again, as this paction being so warranted by the civil law, and hitherto condemned by no statute or decision, the charger was *in bona fide* to make it.

THE LORDS were clear, That the charger was not guilty of usury; but found, That his taking the L. 100 from John Ker, as premium for becoming cautioner for him, was *contra bonos mores*, and therefore annulled the bond.

Fol. Dic. v. 2. *p.* 20. *Forbes, p.* 484.

*** Fountainhall reports this case:

1711. *January* 27.—JOHN KER, weaver in Beath, having occasion to borrow 800 merks from one Simpson, who refused to lend it, unless he gave him a suf-

ficient cautioner, Ker applied to William King, who agreed to bind with him; but in respect of the trouble, risk and hazard, he took a bond from Ker for L. 100 Scots, bearing annualrent and penalty, as a reward and encouragement for his engaging and interposing his credit to procure him the money. Ker at the term of payment satisfies Simpson, the creditor, and retires the bond with a discharge, and shews it to King the cautioner; but he charges Ker on his L. 100 bond, who suspends on this reason, that the paction was plainly usurious, contrary to the act 222d, 1594, and act 251st, 1597; and it does not alter the case, that this is not betwixt tha debtor and the creditor, but is a paction betwixt the principal debtor and his cautioner engaging for him; for, as it would have been usury in Simpson, the creditor, to have taken bond for his 800 merks he lent, bearing the ordinary legal annualrent, and then taken a bond apart for L. 100 Scots for his gratifying him in lending it, this second bond in the construction of law would be certain usury; it is the same thing if the cautioner exact the same gratification from the necessitous debtor for whom he binds, the design of these excellent laws prohibiting usury being to pull poor debtors out of the claws of such cormorant harpies, and to secure them, that it shall not be in their power to injure themselves by borrowing money at exorbitant rates. What if a cautioner take a bond from the debtor, that if he be forced to pay the debt, he shall reimburse him with interest at 10 per cent? And though usury be properly committed *in mutuo* and loan of money, yet it extends to fidejussion, which is but an accessory; and the laws being made to repress grasping usurers and extortioners, it is all one to me whether I be oppressed by my debtor or my cautioner. *Answered*, There is no law making this case usury; and it being penal, cannot be extend *de casu in casum*. And there is nothing more ordinary than to give brokers a gratuity to find out money to borrow; and it is a trade by which some live, and has never been condemned; and *per l.* 5. *C. De naut. fœnore*, money may be given to a fisher, to be repaid if he have a good take, or to a wrestler or runner if he gain the prize. And it cannot be judged unlawful to paction a *præmium periculi*, when I ran the hazard of paying the money. THE LORDS considered, that many devices had been invented of late to evacuate these good laws; for some time usurers crave a consideration from indigent debtors for their pains in seeking the money, and in the mean time the money is their own, though they take the security in another man's name; 2*do*, They, in cases of necessity, take a bond for L. 100 when they only advance L. 90; 3*tio*, They bargain to get bond for L. 50, when they do not pay it all in money, but give a horse or a ring in part of it, estimated at L. 10 or L. 12, when they are not truly worth L. 5. Therefore the LORDS, in this particular case, would not find it direct usury, to infer the penal effects, but that it was *turpe lucrum, et pactum contra bonos mores*, and declared the bond null, and assoilzied from it.

No 14.

Fountainhall, v. 2. p. 631.