

P U R S U E R ' s P R O O F,

I N T H E P R O C E S S

A N D R E W A I T K E N Portioner of Ellfrighill, and Others,

A G A I N S T

J O H N W I L S O N Portioner of Ellfrighill, and John Bannatyne  
• Sheriff-substitute of Lanark.

**J** A M E S P A T E R S O N, tenant in Carnwath, aged 50 years, or A Wit. 1.  
thereby, depones, That he is a member of the birly court at Carn-  
wath, and has been so for a dozen of years past, and had occasion to  
know of their proceedings for many years before, and that their business  
was to settle disputes among neighbours with regard to marches, and  
mosses, and roads to and from the same, and every question respecting  
good neighbourhood: That, when any person was found in fault, or B  
when any members of court did not attend, the court was in use to draw  
a poind of a pot, or pan, or some such other utensil, and afterwards to  
fix a particular sum or fine, according to the nature of the offence, upon  
payment of which it was only to be redeemed; and that the poind was  
generally consigned in the hands of a person who sold a bottle of ale,  
the fine being commonly, though not always, applied to purchase a C  
bottle in a friendly way; and the deponent never knew any person, who  
was so fined or poinded, call the judgment of the birly court in question,  
by applying to any other jurisdiction: That the deponent never knew  
the birly court inflict a higher fine at a time, or for one offence, than  
threepence, sixpence, or one shilling. *Causa scientiae patet, &c.*

*Andrew Smith* tenant in Libberton, aged 50 years, and upwards, de-  
pones, That he has been a member of the birly court in the parish of  
Libberton for 20 years: That two members of the court are chosen year-

A

ly

D

Wit. 2.



ly by turns, whose business it is to prize corns and settle marches: That they have no scruple to settle marches between two tenants of the same proprietor, though called out only by one of them; but they do not take upon them to determine any disputes of that kind betwixt two different proprietors without being called upon by both; but that, in the village of Libberton, where the deponent is a birly man, there is a proprietor of a little farm, and he is considered to be equally subject to the rules of the birly court as General Lockhart's tenants in the neighbourhood, and is indeed himself a member of the birly court: That it is the practice of the birly court to impose a small fine of a pint or a quart of ale upon those who do not attend regularly, in order to make them more punctual, and that they are always in use to impose fines to the extent of sixpence, or thereby, upon those who are guilty of any transgression on the roads, and to draw a poind, which is given up on payment of the fine, the poind generally being a pot or pan, or some such other utensil which the offender cannot long conveniently want; but does not think that they ever carry their fines so high as a shilling for one offence, at least, he does not recollect any instance of that sort. *Causa scientiae patet, &c.*

Wit. 3.

*Thomas Brown*, tenant in Muirhouse of Libberton, aged 55 years, depones, That he has been a member of the birly court in Libberton these 30 years, and concurs, *in omnibus*, with the immediate preceding witness, with this addition, that he has been at times fined himself, and that it is customary to impose a double, or even a triple fine, when the offenders are contumacious. *Causa scientiae, &c.*

Wit. 4.

*Richard Robb*, tenant in Skirling, aged forty years and upwards, depones, That he is a member of the birly court at Skirling, and has been so for 19 years, but never was himself a birly-man, being a constable, and therefore freed of the trouble: That it was the business of the court to settle the boundaries of interspersed properties, and to ascertain damages occasioned by one neighbour trespassing upon another's grounds: That they were in use to impose fines upon offenders; and, when obstinacy was added to the offence, they knew of no limitation till they brought them to obedience: And that they did not impose such fines, except when the nature of the case was such as not to require the casuistry of a lawyer to ascertain the offence, and the fact was so glaring, and so immediately under the eyes of the judges, as to require no proof: That, in order to levy the fines, they were in use to poind: That he has been often



often detached to do so; and that they commonly took such things as A  
the family could not conveniently spare. *Causa scientiae, &c.*

*James Gilbert*, tenant in Dolphington, aged 50 years and upwards, Wit. 5.  
depones, That he spent great part of his life in Ellfrighill, and was  
long a member of the birly court there, and acted as a birly-man: That  
it was the business of the court to settle disputes among neighbours a- B  
bout their marches, or trespasses upon one another's grounds, and to fine  
those who were contumacious, or would not acknowledge their being in  
the wrong: That the fines were made suitable to the trespasses; and he  
has known them imposed as high as four shillings and sixpence; but  
they never went the length of a crown, it being understood among the  
members of the birly court, that they had no power to go that length: C  
That, when the fines were high, it was generally on account of the  
transgressors being contumacious, and refusing to submit to the birly  
court: That they were likewise in use to draw poinds for the fines  
which they imposed; and sometimes drank these fines when small; but  
the larger fines they were in use to give to poor persons within the  
parish. And further depones, That he has often seen members of the D  
court fined for giving bad language to the court. Depones, That the  
court was in use to regulate the marches betwixt the proprietors of farms  
within their district, as well as of tenants; and this they did, though  
desired only by one of the parties, and without the consent of both;  
and even though one of them should object; indeed, it was their custom  
every year to go through and regulate the marches betwixt the different E  
feuers: That it was expressly agreed, that the members of the birly  
court should submit to the determination of the majority. And being  
interrogate, In what manner it was so agreed? depones, That he cannot  
tell; but it was the law of the birly court since ever he remembers:  
And this last answer was made upon the defender's interrogatory. And  
being interrogate for the pursuers, Whether such agreement was ever F  
mentioned in the court? depones, That it was often mentioned; for  
that, when any person was contumacious, he was told, that it was the  
law of the court. Depones, That it is ten years since he left Ellfrighill.  
*Causa scientiae, &c.*

*William Pairman*, servant to John White in East Yets, aged 28 years, G Wit. 6.  
or thereby, depones, That he came to Ellfrighill about four years ago,  
and his master being dumb, has been in use of attending the birly court  
for him: That the first time that he was in the birly court, the defender  
John Wilson; the pursuer David Brown, and William Stevenson, tenant  
in Ellfrighill, laid down their office as birlymen, and desired the depo-  
nent,



**A** nent, and all the members of the birly court, to go with them to drink their birly-pint; and, because the deponent and the other members of the birly court did not go immediately along with them from the smithy, where they were all convened, the said John Wilson, David Brown, and William Stevenson, fined the deponent and the other members in sixpence Sterling each, at least they came to the deponent and  
**B** the other members, and told them that they had fined them in that sum, and were going to poind them for it; upon which John White of Howburn having said, that they would come in their will, the fines were mitigated to three-pence Sterling, and they went to the ale-house together and drank the fines, the said John Wilson, David Brown, and William Stevenson giving them their birly-pint at the same time. Depones,  
**C** That he has seen fines frequently imposed by the birly court; and that he himself has been sometimes fined for not regularly attending the court; but never in a higher sum than a penny, except the time above deponed to. And depones, That he never saw any poind drawn, but has heard of them, though none since he came to Elfrighill, except that which was drawn from John Wilson, which has given rise to the pre-  
**D** sent process: That he has known the defender, John Wilson, fined several times for being too long in coming to the court, or not coming at all; but does not know the extent of the fines imposed on him; but supposes, that, when he did not attend at all, he would be fined in two-pence Sterling; and that the said John Wilson always complied, and paid his fines till this last year: That he has known others fined for  
**E** using the court ill, or leaving the same before it was done, and tilling up their neighbours pits. And being interrogated, If he was present when John Wilson was fined in the month of May last, and for what cause he was so fined? depones, That the birly court were that day met to regulate the baulks and marches, and one of the pit stones between John Cuthbertson and John Wilson, being out of its place, and they two  
**F** having differed as to the spot where it should be fixed, David Brown, Andrew Aitken, and James Richardson, three of the pursuers, and the then birly-men, went up to two other pit-stones to take an observation to enable them to fix where to place the stone that was out: That John Wilson did not agree to the place where they proposed to set the pit, and went away, and said he would have no pits set there that day; but John  
**G** Cuthbertson insisted that it should be set, that the march might be clear; and it was set accordingly: That, after the court had left that place, John Wilson came to the pit, and the other stones from which they had taken their observation; and, after looking at what had been done, he came up to the members of the court, and told them, that one of the stones by which they had taken their observation, was not a pit-stone, but



but a loose stone ; and that they were men of no conscience for setting <sup>A</sup>  
pits by a loose stone ; upon which David Brown, and the other birly-  
men, took back all the members of the court to look at that stone, which  
John Wilson called a loose stone, when they found it to be a pit-stone ;  
and that the court then fined John Wilson for calling them back, and  
saying that they had set the pit by a loose stone ; but, to what extent they  
fined him, the deponent cannot remember ; and the fine was imposed <sup>B</sup>  
by the court with one consent : That John Wilson had other pits set  
that day upon his marches, to which he made no objections ; and he  
remembers particularly, that, at John Wilson's desire, a pit-stone was  
put in betwixt him and John Cuthbertson in another place. And being  
interrogate for the defender John Wilson, depones, That the baulk  
where the pit-stone first mentioned was placed, was rounded or crooked <sup>C</sup>  
at the bottom, where the said loose stone was placed ; and that he be-  
lieves the birly-men placed it agreeably to their best judgment, but whe-  
ther in a straight line with the other pits or not, he cannot tell ; and  
that all the three stones were at no great distance from each other : And  
further depones, That John Wilson said, that, if any part of the rigg  
was to be straighted, the whole of it should be straighted from top to <sup>D</sup>  
bottom : And being further interrogated, Whether, upon John Cuthbert-  
son's pointing out the place, where he thought the foresaid loose-stone  
should be fixed, John Wilson agreed that it should be fixed there,  
and whether it was not fixed in another place ? depones, That he  
does not remember what John Wilson said upon that occasion,  
but that he remembers that he objected to the place where the stone was  
fixed. Depones, That he does not remember whether or not any <sup>E</sup>  
objection was made to John Wilson's proposal, of straighting the baulk  
from top to bottom ; but that he knows that nothing was done to it,  
except fixing the stone already deponed to : And being further interro-  
gate for the pursuers, depones, That John Wilson had other fines im-  
posed upon him that same day, one in the moss, for calling John Law-  
son, a member of the court, a liar, and another for leaving the court ; <sup>F</sup>  
but does not remember what the amount of these fines was. *Causa sci-*  
*entiae, &c.*

Wit. 7.

*Thomas Muir* distiller and day-labourer in Edinburgh, aged 40 years  
and upwards, depones, That he has lived in the village of Ellsfrighill  
from his infancy, till within these four years and a half past, when he came <sup>G</sup>  
to reside in Edinburgh : That, previous to his leaving Ellsfrighill, he was  
twelve years and a half a member of the birly court there, and knew the  
practice of that court long before he was a member of that court : That  
he was several times chosen a birly-man, and once officer to that court.  
Depones, That it was the business of the birly court to settle the marches

B

once



A once a year, amongst the proprietors and tenants at Whitfundy yearly when any complaints were made by either ; as also, at any other time of the year, when a complaint was made by a proprietor or tenant to any of the birly-men, he called a court, and the complainer was ordered to attend, and lodge his complaint, which was done verbally ; and, if he did not attend at the time appointed, he was fined severely, as being the mean  
 B of calling the whole birly court together. Depones, That, as he thinks, the fine for ploughing up a pit-stone was half a crown ; for rubbing a pit-stone, one shilling ; and for going too near a pit-stone, sixpence. Depones, That other fines were imposed, particularly when the members did not attend the court when called, or were behind the hour ; and likewise fines were imposed upon members for contention, or  
 C speaking too high, or flyting ; and the deponent himself, and John Lawfon, one of the pursuers, having become hot in a dispute at one of these courts, the court fined them both in the price of a bottle of ale each, which they instantly paid : That the birly-men were judges of the offences ; but they could not free the delinquents, let their excuse be never so good, without the voice of the whole court.  
 D Depones, That the deponent has seen, and been present, when poinds were drawn for fines imposed : That the birly-men and officer, with whatever other members of the court they chused to call, went to the person's house from whom the fines were to be levied, and seized upon such articles as they judged proper, who gave them to the officer to be carried to a public-house where the fines were drunk, and the articles poinded left in  
 E pledge ; but that no poind was drawn when the offender came in the will of the court ; and, when that was the case, the fines were generally mitigated. Depones, That the defender John Wilson was a member of the birly-court for about six years before the deponent left Ellfrighill, and that the said John Wilson likewise acted as a birly-man during part of that period ; and the deponent knows that several fines were imposed  
 F during John Wilson's time, and he never knew him object to them but once ; and the occasion of it was this : The birly-men present at the court thought proper to impose a fine upon some delinquents ; that, at this time, the said John Wilson was either a birly-man or an assistant, and, in general, agreed with the rest, or made no objection to the extent of the fine : That, when some persons of the court, upon the fine's  
 G being reported to them, having observed, that the fine upon one person was too great, John Wilson said he thought so too, upon which he was fined, and, as the court said, for having been present and agreeing to the fine when it was laid on. Depones, That the common practice of the court is to take the votes of the birly-men and their assistants upon the extent of all fines. Depones, That before the deponent left Ellfrighill,



hill, John Wilson, and some others of the birly court, went to the house A  
of James Bell, in order to poind for a fine imposed upon him that day,  
and he not being at home, his wife met them at the house, and came  
in their will; so no poind was drawn. Depones, That, since the depo-  
nent came to Edinburgh, he happened to be at Ellfrighill at the time of  
their Whitsunday-court, when John Wilson was present: That, after  
coming from the marches, they assembled at the smithy, and the birly- B  
men having told that they were to adjourn to a certain public-house,  
ordered the court to follow them: That fundry of the members remain-  
ed for some time in the smithy conversing with the deponent, whom  
they had not for some time seen: That the birly-men, and those that went  
along with them to the public-house, fined those members for staying  
in the smithy: That, when those persons were going to the public-house, C  
they met severals of their brethren returning to the smithy to inform  
them, that, as they were transgressors, they were to be fined; and,  
when they came to the public-house, they were fined accordingly, which  
they paid in the deponent's presence, who likewise went to the public-  
house: That John Wilson was one of the persons who came to give the  
information, as above deponed to, and afterwards joined the company D  
in the public-house, and was present when the fines were paid. *Causa  
scientiae patet, &c.*

*David Hunter* in the Craig-farm of Skirling, aged 64 years, depones, Wit. 8.  
That he has resided in and about the neighbourhood of Ellfrighill since E  
he was five years of age, nineteen of which he lived in the town of  
Ellfrighill, afterwards he went to Newholm, and has lived in Skirling  
for twenty-three years last bypast: That, while he resided at Ellfrighill,  
he had frequent opportunities of knowing the business of the birly court  
there, and often attended for his father, who was a member of that  
court, and he himself, for his father, voted in questions that came be- F  
fore the court. Depones, That the common business of the court was,  
in case of any differences betwixt the tenants or proprietors, with re-  
gard to trespasses upon one another, by incroachments upon baulks,  
pit-stones, or thrawing marches, to settle these disputes at their courts.  
Depones, That, when the transgressors were mild and peaceable, their  
fines were generally very small; but, when they were obstreperous, or G  
gave ill language to the court, their fines were more severe. Depones, That,  
unless the fines were paid, the birly court poinded for these fines; and, if  
the party transgressor did not relieve the poind, the birly court rouped them,  
which



A which poinds were lodged ordinarily in the hands of the birly-men or birly-officer, and sometimes in a public house. Depones, That it was in the power of the court to dispose of the fines as they pleased: That they drank them sometimes, and the deponent has been informed, that the fines have sometimes been applied towards relieving some needy person. Depones, He understood that any person who thought themselves aggrieved, had it in their power to apply to a superior court for redress, and this was the general voice of the birly court then, but he never knew any body make such application. Depones, That, when any differences happened betwixt the proprietors or portioners of Ellfrighill, the birly court, when both parties were present, pronounced their judgment, tho' one of the parties was dissatisfied, and these proprietors were on an equal level with the tenants, and treated in the same manner. Depones, That the deponent has been present, and assisted the birly-officer in place of his father, to draw poinds: That they generally took away the thing they thought most needed in the house, in order to force the transgressor to relieve them soon; and he does not remember of any of the poinds being roup'd but once, because they were generally relieved: That this instance was a meal-baulk, and the fines were made to exhaust the whole price. Depones, That, after a fine was imposed, or even after a poind was drawn for such fine, if the transgressor came in the will of the court, they dealt easily with him, and mitigate his fine. *Causa scientiae patet, &c.*

E Compeared *John Lawson* tenant in Ellfrighill, to whom it was objected for *John Wilson*, That he cannot be adduced as a evidence in this cause, in regard he is, and was, at the time the fines, which is the subject of this process, were decreed by the birly court, a member of that court, and gave his assent to said fines: That he also was present at the meeting of the birly court the day the defender *John Wilson's* house was F spuilzied for these fines, and gave his assent or orders, with the rest of the birly court, to persons who took away the said *John Wilson's* goods; all which he acknowledged before the commissioner. And, further, from his connection with this birly court, it is plain he must have given partial counsel.

To which it was answered for *Andrew Aitken* and others, pursuers, G That the witness being a member of the birly court, cannot possibly disqualify him from giving evidence in the present dispute between one member of the birly court and another. The witness can have no interest



terest in the matter whatever. The present question is, whether the pursuers were justified by the immemorial practice of the birly court, and the conduct of the defender John Wilson, for levying the fine imposed upon him? and consequently, whether the said John Wilson was justifiable in preferring a criminal complaint against the pursuers to the sheriff of Lanark, and thereupon obtaining their incarceration, after having himself acted in the character of birly-man, and even fined, and levied these fines in conjunction with his brethren? The pursuers apprehend, that, as their conduct in this matter is the subject of the proof on their part, they are entitled to have the evidence of every person who was present, either at the time Mr Wilson was fined, or when the fine was levied, or who can prove the constitution or custom of the birly court, whether such person was a member of that court or not. John Wilson confined his complaint to the pursuers alone; consequently every other person present at any of these meetings must be a habile witness for either party, as no patrimonial interest can possibly be objected against the witness. With regard to the objection of partial counsel, it is altogether frivolous, and is not offered to be verified.

To which it was *replied* for the defenders, That the pursuers, during the whole of this proof, seem to have mistaken their cause; it is an action of wrongous imprisonment and damages, brought at the instance of the pursuers, against the sheriff-substitute and John Wilson, for incarcerating them in the tolbooth of Lanark, till such time as they should find caution to answer such complaint as should be exhibited against them, for their riotously entering the defender, John Wilson's, house, and carrying off his goods; and it is nowise material, what the practice of these pursuers, or their predecessors, may have been, as the parties are not in a process for declaring the powers of the birly court; but it is surely for the interest of the defender John Wilson, to object to any witness being examined, who acknowledges that he was one of the persons who laid on the fines, and gave authority for the gross riot that gave cause for the present action, and may be justly considered as actor, art and part, with the pursuers. The pursuers were only a part of the birly court, ordered by the rest to go upon this unlawful piece of business; and, although they may at present be carrying on this lawsuit at their own expence, or by collection from the rest, yet, in case of any loss or damages be awarded against them, they will have relief against the whole persons, of which this witness is one, who ordered them upon such an unlawful errand; and it is hoped the commissioner will have no difficulty in refusing to examine him.

*Duplied*



- A *Duplied*, That Mr Wilson seems to have taken for granted a fact of which there is no evidence, viz. that the witness acknowledged that he was one of the persons who laid on the fines, and gave authority for levying the poind; whereas no such thing appears; nor will the witness, it is believed, say so. And it would be altogether premature to stop a witness from being examined, merely because the defender thinks he may say so and so. It is one part of the pursuer's averment, that only three of their number were present at drawing the poind, although Mr Wilson, who knew the fact, incarcerated the whole. And the *alibi* of the other pursuers is one of the points to be proven by this witness; which, if Mr Wilson, who is present, will admit, the witness may be passed from. There cannot surely be a foundation for any damage against the witness, who happened to be present upon other business.
- C *Triplied* for John Wilson, That he appeals to the commissioner for the verity of the facts set forth in this objection, who, in presence of the company, asked the witness if he was at the court when the fines were laid on, and at the court when the poind was ordered, who declared he was, and gave his assent to both.
- D On the pursuer's part, it is averred, that the witness's words were, that his vote was never asked.

Having considered the objections, answers, replies, duplies, and triplies, ordains the witness to be examined, *cum nota*.

(Signed) JAMES STEWART.

Wit. 9. And the said *John Lawson*, aged 70 years or thereby, being solemnly sworn, &c. depones, That he has been all his life in Elfrighill, and a member of the birly court there these forty years, and is so at this day: That the birly court is calculated to promote and keep up good neighbourhood: That the business of the court is to regulate marches and settle disputes between neighbours, whether tenants or proprietors, when both parties are present: That the court is in use to impose fines on persons who are guilty of ploughing up pit-stones or march-baulks, or any other trespasses upon their neighbour's property: That the court is likewise in use to fine absent members, and those who may speak angry like, and use high words to one another, and some persons have been fined for trespassing upon their neighbours, who were not members of the court; and for all the different fines, poinds were drawn, if the transgressors did not submit to the will of the court: That



That formerly poinds were much more frequent than at present, there A  
 not being so many courts now held as formerly : That, when the  
 transgressors submit to the court, their fines are mitigated. Depones,  
 That he was acting as a member of the birly court that day John Wil-  
 son was fined : That he was fined once for a pit-stone being wrong, and  
 another time for calling the deponent a liar ; but cannot recollect what  
 other fines were imposed upon him, only he thinks he was fined for B  
 contumacy, or not obeying the orders of the court, but running away  
 and leaving it. Depones, That the fines laid on were by the consent of  
 the whole court, and he himself gave his assent to it, and there was no  
 vote put, nor no objection made by any of the members. Depones,  
 That the birly court was met upon the day John Wilson was poinded  
 for the above fines : That, at that meeting, it was resolved John Wilson's C  
 poind should be drawn ; and, accordingly, a number of the birly court,  
 viz. David Brown, Andrew Aitken, John White, William Richardson,  
 son of James Richardson, one of the then birly-men, who acted for his  
 father, and William Elder, officer, were ordered by the court to go and  
 draw the poind, and he himself agreed to that appointment : That these  
 people went, as he believes, to draw the poind ; but whether they did so D  
 or not he cannot say, only, that he has heard, by report, that it was  
 drawn. Depones, That, while John Wilson was a birly-man, he does  
 not recollect any person being poinded for fines ; but remembers one  
 James Bell was fined, and his wife told the deponent, that John Wil-  
 son, with others, came to her door to poind for the fine ; but, her hus-  
 band not being at home, she agreed to come in the court's will, and no E  
 poind was drawn. *Causa scientiae patet, &c.*

*James Muir*, late day-labourer in Cocklaw, now in Edinburgh, aged  
 28 years, or thereby, depones, That he has lived in the parish of Ellf-  
 righill all his life, till Whitsunday last, and had occasion to know the prac-  
 tice of the birly court there, being two years birly officer ; one year he of- F  
 ficiate for his father, and another for himself : That the knows the practice  
 of the court was to fine transgressors, and that he himself has been fined  
 once for being too long in coming to the court ; and paid his fine accor-  
 dingly. Depones, That one of the years, when, to the best of the depo-  
 nent's knowledge, he was birly officer, the defender, John Wilson, was  
 one of the birly men : That, at a meeting of the birly court, at which the G  
 deponent was present, and at the time when Thomas Muir, a former  
 witness, was at Ellfrighill, the court having met at the smithy, the birly-  
 men

Wit. 10.



A men went to a public-house, and ordered the rest of the members to follow them; but they having remained in the smithy for some time after these orders were given, the birly men fined the whole of them; among whom the deponent was one; but they having come in the will of the birly-men, they remitted the one half of the fine. *Causa scientiae, &c.* And depones, That he has heard of several poinds being drawn for fines, B but never was witness to any.

Wit. 11. *Elisabeth Robertson*, servant to John Wilson, one of the defenders, aged 20 years, depones, That she was in her master's house when his plates were poinded: That the plates were taken down by Andrew Aitken and David Brown, in presence of William Elder, the then birly Cofficer; and she saw no more of the pursuers upon that occasion: But depones, That, some little time before the plates were poinded, there were in her master's house John Lawson, and John White, two of the pursuers. And being interrogate, on the part of the defenders, What might be the value of the plates which were carried off by the said Andrew Aitken and David Brown? depones, That the two plates which D they carried off were large plates, which never had been used, and, according to her judgment, might be worth five shillings Sterling each. And depones, upon the pursuer's interrogatory, That the said Andrew Aitken and David Brown made no noise in the house upon the above occasion, but carried off the plates above mentioned, although her mistress told them she had brought them there herself, and that there was plenty E of other pewter in the house. And further depones, That, before the plates were poinded, her master was sent for, the birly officer having gone for him, and came home to the stack-yard, where he talked with the pursuers then present, before the plates were carried off, but came not into the house. *Causa scientiae, &c.*

Wit. 12. F *Hugh Stewart*, tenant in West Forth, aged 40 years, or thereby, depones, That he was present in the sheriff court of Lanark when the present pursuers attended there, in consequence of a complaint brought against them by the defender John Wilson, the deponent having occasion to be in court that day, on account of a cause he was himself concerned in: That he heard the defender, John Bannantyne, who was then G acting as sheriff-substitute, find fault with the pursuers, and say, they had gone farther than their orders allowed them; and further said, that they behoved to go up stairs; by which the deponent understood they were to go to prison: That, upon this, Andrew Aitken said he would not



not go to prison, for he said his cautioner was there; upon which the de- A  
 ponent stopped him from saying any thing further, as he was afraid he  
 might say something to irritate the sheriff; and the manner the depo-  
 nent stopped him was, by touching him, and desiring him to say no  
 more of that: That the deponent, upon recollection, believes Andrew  
 Aitken might have said something farther to the same purpose, though  
 he does not remember the words. Depones, That he does not remem- B  
 ber whether the defender, the sheriff-substitute, said any thing upon this  
 occasion, but that, some time after, he held over a paper to John Wil-  
 son, the then complainer, and desired him to do as he had a mind: That  
 William Brown, writer in Lanark, procurator for the said John Wilson,  
 said, in the public court, that, if the then defenders would give up the poind,  
 and pay his client the expences he had been at, he would demit the C  
 cause, and that there should be no more of the matter; upon which  
 David Brown, or Andrew Aitken, or some of the then defenders,  
 said that they had done nothing but what the complainer John Wilson  
 himself had done, or that he had had a hand in such dealings, in like  
 cases, as a birly-man: That, about this time, or immediately after,  
 David Brown, one of the present pursuers, said that they would consign, D  
 or lodge money, for some little time, till they should see and acquaint  
 their master, Mr Allan of St Laurence Chapple; and the deponent un-  
 derstood, that the money they were to consign was as caution to prevent  
 their being put in prison: But the deponent did not hear the said David  
 Brown, or any of the rest, say what sum they were to consign. And  
 being interrogate, If any others of the now pursuers, besides Andrew E  
 Aitken, offered caution, or said they had their cautioners ready? de-  
 pones, That John Lawson likewise said that they needed not go up stairs,  
 for their cautioners were there; and before John Lawson expressed  
 himself to that purpose, the deponent heard some person, whose name  
 he believes is Coffar, and who, the deponent was told, is a weaver in  
 Lanark, say that he would be caution for him. And further depones, F  
 That the pursuers, who were then standing at the bar, said, in general,  
 that they had their caution there. And being interrogate, What the  
 sheriff substitute said upon this occasion, and of the offer of caution made  
 by the pursuers? depones, That he does not recollect what the sheriff  
 said further, than, when leaving the bench, he said the pursuers behaved  
 to go up stairs: That, upon this, the sheriff went away, and the officers G  
 of court took the pursuers up stairs, but to what room the deponent  
 knows not, as he himself then went out of the court; but, in about an  
 hour or so afterwards, he saw the pursuers come out, and the deponent  
 drank a bottle of ale with the pursuers, and the defender, John Wilson,  
 who



A who were then together. Depones, That, while the papers were reading in court, the outer door of the court-house was shut; but whether it was locked or not, the deponent knows not, neither does he know whether the sheriff ordered the door to be shut; but recollects, that he heard him bid take tent of the men. And being interrogate for the defender, John Bannatyne, depones, that, while the matter above de-

B poned to was going on, the deponent offered to the pursuers to be caution for them; but he did not make any such offer to the sheriff himself, nor did he so much as speak to him. And further depones, That he did not hear the sheriff refuse any caution offered to him upon the part of the pursuers. And further depones, That the offer he made to the pursuers, of becoming caution for them, was altogether voluntary, they

C never having asked him to do so. *Causa scientiae, &c.*

Wit. 14. *William Gilbert* tenant in Borland of Walston, aged 45 years, and upwards, depones, That he was present at the sheriff court when the complaint, at the instance of John Wilson, against the now pursuers, was taken under consideration by the sheriff-substitute: That he heard both

D the complaint and answers read; and the sheriff having called the pursuers to the bar, and asked them, If what was contained in the complaint was true? they owned that part of it was true; but alledged, that other parts of it were not true: But the deponent, upon recollection, adds, that this was before the defences or answers were read in the court: That, after the defences or answers were given in, the sheriff

E passed sentence; upon which Andrew Aitken insisted, that there was no occasion for their going to prison, as their caution was at hand; but this, notwithstanding, the sheriff still insisted the pursuers should go up stairs to prison: That, upon this, the deponent, who was then standing at the bar, told the sheriff that he would become caution for the pursuers; to which the sheriff made no answer; but still insisted that

F they should go up stairs to prison: That the sentence pronounced by the sheriff was passed, as the deponent understands, before he offered to become caution for the pursuers, as his offer was made to the sheriff in consequence of his having heard the sentence read: That, after the sheriff had ordered the pursuers to find caution, he gave directions to the officers to take care of the doors, and they were accordingly shut and

G locked, and the pursuers were carried up stairs to a room above the sheriff court-house, where the deponent was carried along with them, and where the pursuers were detained till they granted a bond in terms of the sheriff's sentence, and paid the jailor-fees: That the pursuers remained in the room upwards of one hour, and the deponent, and James Coffar weaver in Lanark, were the two cautioners for the pursuers:

That,



That, after the sheriff's sentence was read, David Brown, one of the A  
 now pursuers, offered to lodge as much money as would answer the value  
 of the plates taken from John Wilson, and John Wilson's expence; and  
 the deponent thinks that John Wilson replied, that he wanted no more  
 than the value of his plates, and his expence; but the deponent does not  
 recollect the sheriff having said any thing upon that occasion. And being  
 interrogate for the defenders, Whether he addressed himself to the she- B  
 riff, when he offered to become cautioner for the pursuers, and in what  
 manner that offer was made? depones, That he directed his discourse  
 so as the sheriff might hear; but does not know whether the sheriff  
 heard him or not, though he looked about, but spoke none; and the  
 words the deponent used upon that occasion were, ' that he would be-  
 ' come bail for these men.' And being further interrogate, depones, That C  
 the pursuers had not at that time asked him to become bail for them,  
 he having offered it to them the moment the sentence was read? de-  
 pones, That, to the best of his belief, the defender, John Wilson, or  
 his procurator for him, agreed to give up the matter of the complaint,  
 upon the pursuer's restoring the poinded plates, and paying his expen-  
 ces; and that the answer to this proposal was what was made by David D  
 Brown, above deponed to, of consigning the value. And being fur-  
 ther interrogated, Whether he heard the sheriff refuse caution for the  
 pursuers? depones, he did not, and that they were liberate immedi-  
 ately after the bond was signed, and the fees were paid.

*James Coffar*, weaver in Lanark, aged about 52 years, depones, That E Wit. 14-  
 he was present in the sheriff court when the sheriff substitute pronounced  
 judgment upon the complaint at the instance of John Wilson against  
 the now pursuers; and that the deponent, and William Gilbert, a pre-  
 ceding witness, offered to become cautioners for them: That the de-  
 ponent did not mention to the sheriff that he was willing to become  
 cautioner for them, but told the pursuers themselves so; and they men- F  
 tioned in the public court that they had cautioners ready, to which he  
 heard the sheriff make no answer; and the particular persons who said that  
 their cautioners were there ready, were Andrew Aitken and John White,  
 whom he understood to speak for the rest of the pursuers as well as  
 themselves, and so loud as the whole court might hear them. And fur-  
 ther depones, That none of the pursuers asked him to be caution be- G  
 fore he made the offer; and he believes they did not know that he was in  
 court till he made such offer. And further depones, That he likewise  
 heard David Brown say, after the sentence was read, that he would  
 lodge as much money as would answer the value of the poind, and the  
 D expences



A expences John Wilson was put to; and the deponent heard the sheriff say nothing in answer thereto. Depones, That, after the sentence was read, he heard the sheriff order the doors of the court house to be locked; and the pursuers, before the court skaled, were carried up to the council chamber, where they remained till they sent for Robert Newbigging, procurator in Lanark, and a bond of caution was made out and signed by the deponent, and William Gilbert, a preceding witness, upon which the pursuers were liberated. Depones, That, when William Gilbert offered to be caution, his face was turned towards the sheriff, who might have heard him; but that it was not till after the sentence was read, that either the said William Gilbert, or the deponent, offered to be caution. And upon the defender's interrogatory, depones, That John Wilson, the then complainer, said in court, that he would be satisfied if the pursuers would deliver up the goods they had pointed from him, and pay him his expences; but whether this was before or after the sheriff had pronounced his sentence, the deponent cannot recollect. And being interrogate, Whether or not the sheriff advised the pursuers to close with that proposal, and to put an end to the affair? depones, That he thinks the sheriff did speak something to that effect; but the pursuers did not seem to fall in with the proposal, or to choose to pay the expence till they had a further hearing. And being interrogate, Whether the pursuers said in court they had a right to do what they had done towards John Wilton? depones, That he cannot pretend to recollect the particular expressions they made use of; but they, in general, seemed to him to justify their conduct; but he cannot say they spoke irreverently to the sheriff. *Causa scientiae, &c.*