

\*.\* Spottiswood reports the same case.

No 31.

IN a contravention pursued by Mr Patrick Grant, minister, against James Grant and others, among other contraventions this was one, that the defender had taken and with-holden from a tenant of the pursuer two horses and a mare, for such a space, whereof one of them died for want of food. *Alleged*, This could not be sustained at the master's instance, but only at the tenant's own. *Replied*, It ought to be repelled, in respect the defender was bound not to harm the pursuer, his men, tenants, or servants, &c. THE LORDS would not sustain the contravention at the master's instance, in respect of the generality of the deed, being only prejudicial to the tenant himself, and his master not being interested therein.

*Item*, betwixt Denniston and Lindsay, No 35. p. 8040.

*Spottiswood*, (CONTRAVENTION.) p. 75.

1633. *January 30.*

The LAIRD of Wemyss *against* Sir WILLIAM STUART of Gairntilly.

No 32.

IN an action of contravention pursued by the Laird of Wemyss against Sir William Stuart of Gairntilly, the LORDS found an allegiance relevant to purge the contravention, but sustained the libel to be converted for damage and interest.

*Spottiswood*, (CONTRAVENTION.) p. 75.

\*.\* Durie reports this case.

*January 31.*—L. WEMYSS, younger, pursuing contravention upon this fact, viz. that after caution of lawburrows found to him, the defender had cut a great ditch and fosse betwixt the pursuer's lands, whereby he had drawn in a burn, which came within that ditch with so great violence and impetuosity, that it overflowed the pursuer's land, whereof he was heritor and fiar, and had run away a great part thereof, and was like thereby to continue and prejudice him greatly in time coming; and the defender excepting, that the said ditch was cast by common consent of the pursuer's father, who was liferenter of the lands, and of consent of this excipient, and conform to a decret arbitral betwixt them thereanent; and the pursuer *replying*, that his father's consent or deed, who was liferenter only, could not be a warrant to the defender to do any deed prejudicial to him in his heritage; THE LORDS found the allegiance relevant *ad hunc effectum*, to assoilzie the defender from this action of contravention; but they sustained this action, being converted in a pursuit for reparation of his interest, and skaith sustained by the fact libelled, and for pre-

No 32. serving of him therefrom in time coming; which the LORDS permitted the pursuer to do *hoc ordine*, and to turn his summons into this desire, and that the defender should answer thereto now, without any process or action to be intented thereon.

Act. — — & Baird.

Alt. Stuart.

Clerk, Gibson.

*Durie, p. 666.*

\*\*\* This case is also reported by Auchinleck.

THE Laird of Wemyss, younger, pursues contravention against the Laird of Gairntillie for dividing the course of the burn through Wemyss's land. It is *excepted* for the defender, that this deed cannot infer contravention, because the same was done for fulfilling of a decreet arbitral, whereby the Laird of Wemyss, liferenter, consented to the dividing of the said burn. It was *replied*, that the liferenter could not consent to any thing that might prejudice the fiar of his heritage. THE LORDS found no contravention, but permitted the pursuer to convert the summons in an action of damage and interest.

*Auchinleck, MS. p. 33.*

1633. January II. KING'S ADVOCATE & DENNISTON against LINDSAY.

No 33.

A deed of contravention being the cutting wood, a posterior liberty of cutting wood was held to be a remission.

IN a contravention founded upon a deed of cutting of wood, to the quantity of eight horse-load, within the pursuer's proper wood of his land, wherein he was infeft; it being *alleged*, that the pursuer, after the time of the cutting thereof libelled, granted license and liberty thereafter, at another time, to the defender to cut some wood, for the use of the defender's house, whereby in effect he had remitted *presumptive* the alleged preceding wrong of cutting wood done before, by granting of this license thereafter; this exception was found relevant to elide this contravention, *quia dissimulatione tollitur injuria*; and this being an action of contravention, and so penal, *et in qua agitur ad vindictam et pro pena et non pro damno dato*, it was sustained to elide this penal action; but the LORDS not the less reserved action to the pursuer to pursue for his damage and interest, sustained through the wrongous cutting of his wood, and for repairing thereof against the defender, albeit the exception was sustained to elide the pursuit of contravention; and the LORDS found, that this exception upon the said license, granted by the pursuer, was probable by witnesses, and found, that he ought not to be compelled to prove the same by writ or oath of party; albeit it was *alleged*, that the pursuer being infeft in his lands, within the which the wrong libelled was done, and his infeftment thereof produced, with no reason could he prove by witnesses any deed which might tend to give the defender a liberty within his property, uncontrovert.