

No 31.

1632. *January 28.*GRANT *against* GRANT.

It was not
contraven-
tion that the
defender had
taken horses
from the pur-
suer's tenant,¹
as the tenant
might prose-
cute for spuil-
zie.

A contravention being pursued by him to whom caution of lawburrows was found against the party who was bound, and found the caution upon this deed of the breach of lawburrows, viz. because the defender had taken from the pursuer's tenant, (who occupied his lands set to him by the pursuer for a yearly duty, to be paid therefor,) two horses; the LORDS found not this deed committed against the tenant, to be such a fact, whereupon breach of lawburrows and contravention might be sought at the instance of the tenant's master, seeing neither was there any special charge executed by the tenant, nor any caution found specially to that tenant, neither was the tenant pursuer of this action of contravention, to whom the wrong was alleged done, but only the master of the ground; for the tenant had his own action unprejudged by this pursuit, or any thing following thereupon against the party, for spuilzie or wrongous intromission with his horses; and it was not qualified that the fact done to the tenant had any relation to the master to whom the lawburrows was found, or that the said wrong was done, in regard of the master, or for that quarrel; but if it had been true, as it was also denied by the defender, yet it might have been done upon some other respect, and for some private question betwixt the defender and that tenant, wherein the master could have no interest; so that the pursuer not qualifying how that deed libelled did more particularly concern himself, than by that respect, (viz. because it was done to his tenant,) the LORDS found, that they would not grant contravention therefor, specially seeing the tenant's self complained not; neither was it respected, that the pursuer replied upon the tenor of the act, which bore, That the pursuer, his men, tenants, and servants, should be harmless in their bodies, lands, goods, and gear, &c.; seeing that was only the common stile of Court in such acts, and the tenants, as said is, complained not.

Act. *Burnet.*Alt. *Gibson.*Clerk, *Hay.**Fol. Dic. v. 1. p. 534. Durie, p. 615.*

*** Auchinleck reports this case.

If a master pursue contravention against him who found him lawburrows, alleging, that the defender had spuilzied some goods from the pursuer's tenants, the LORDS found not this a deed of contravention to infer against the breach of the lawburrows, seeing the summons was not at the instance of the tenant spuilzied, and the tenant had his civil action for the spuilzie reserved to him to be decided civilly; for there cannot be two pains for one cause.

Auchinleck, MS. p. 32.

. 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 déed, 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-