

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.

ed by this same excipient's self; for thereby the defender, by the deposition of two witnesses, might make his land and wood unprofitable to him, which not the less was sustained to be proved by witnesses. And another deed of contravention being libelled for pasturing in the pursuer's muir, this was not sustained, in respect the defender alleged the muir to be part and pertinent of his lands, and qualified as strong possession, as the pursuer did, which the LORDS also sustained to purge the contravention, and would not respect the reply, whereby the pursuer *replied*, upon a decret betwixt the tenants of the defender's lands and the pursuers, done 40 years since, whereby their lands were divided, and this muir libelled, was declared to pertain to the pursuer's lands, and conform whereto, the same was alleged ever since to be so possessed by him. Likeas, this same reply was admitted to the pursuer's probation, in an action of removing pursued by him against the defender, for removing from the said muir, and therefore alleged it to be alike relevant here. And in fortification thereof, he offered further to prove, that he had diverse years before the deeds libelled, tilled a part of the said muir, and sown and shorn the corns thereon, which were the greatest deeds of property that could be done, and the rest of the muir he possessed by pasturing, and by debarring all others, specially this defender; notwithstanding whereof, the exception was sustained upon the defender's possession, by pasturing thereon 40 years bypast, and by alleged debarring of this pursuer therefrom, to purge the contravention, ay and while the process of removing from the muir were ended by a sentence; but if the pursuer would restrict the fact of contravention to be done specially on that part of the muir, which the pursuer replied to have been tilled, sown, and shorn, without respect to the fact libelled, as alleged done upon the rest of the muir, not so laboured, then the LORDS would sustain the contravention for the fact so done upon that arable land allenarly, and no further.

Act. *Advocatus & Mowat.*

Alt. *Cunningham & Burnet.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 534. Durie, p. 662.

* * * Auchinleck reports this case.

1633. *January.*—IN an action of contravention pursued by John Denniston against Mungo Lindsay, for cutting of certain watlings in his wood, *anno 1624*, it was *alleged* in *anno 1628*, that the pursuer granted license to him, which being after the pretended libel, was a tacit passing from the former cutting, or remitting of the alleged injury; which allegiance, the LORDS found relevant.

Auchinleck, MS. p. 32.