

1696. January 2.

BURNET *against* ALISON BURNET and DUNDAS her Husband.

ARBRUCHELL reported Burnet *against* Alison Burnet, and Dundas her husband. The deceased Captain Burnet of Barns, not being able to redeem his estate from its incumbrances, James Burnet in Leith, his cousin, advances him 25,000 merks, and with it acquires the preferable comprisings; and, in 1686, obtains a disposition from Barns of his lands, under a back bond, bearing a reversion on payment of the foresaid sum of 25,000 merks betwixt and Whitsunday 1687, and that it should be only redeemable by Barns himself and the heirs of his body, and none else. Barns does not redeem at the term limited in the back-bond; but, in 1691, finding that James Burnet had died, leaving none behind him but a daughter, (whom he judged unfit to represent his family and continue his memory) he uses an order of redemption, and consigns the money, and raises a declarator, and then assigns it to William Burnet his cousin; and Barns dying *pendente lite*, William insists in the declarator; against which it is *alleged* for Alison Burnet, *1mo*, That the time prefixed for the redemption, viz. Whitsunday 1687, was long expired before the order was used, and so it was null; *2do*, That all reversions being *stricti juris*, and not going beyond the persons therein expressed; and this being conceived in favours allenarly of Barns himself, and the heirs of his body, the same was not assignable; and so William Burnet, now pursuer, has no right thereto. *Answered* to the first, That though Whitsunday 1687 be the term, yet it is evident, by the whole tract of the writ, it has been blank *quoad* the year, and a larger term has been designed. *2do*, There is no irritant clause, that if redemption be not used precisely at that term, the reversion shall be void and null. *3tio*, Though there was, yet that being *pactum legis commissoriae in pignoribus*, 'tis reprobate by law, and purgeable at any time before a declarator of its expiration be obtained. To the second, Personal faculties to redeem cannot be assigned before they be exercised; but if the party to whom the power and right is reserved has once used the order, then he may assign it to whom he pleases. Though the tailzie to James Burnet seemed to be onerous, and that the reversion was only conditional to Barns himself, and the heirs of his own body; yet the LORDS found, seeing he had used the order and consignment, and raised the declarator in his own time, he might assign it, and so preferred William, but so as he should instantly purge the failzie, and pay the 25,000 merks contained in the reversion; and in regard the sum was great, they allowed him Candlemas (being a month's time) to pay it.

*Fol. Dic. v. 2. p. 75. Fountainhall, v. 1. p. 695.*

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A party who had used an order of redemption in his own lifetime, and raised declarator, was found entitled to assign it. See Murray *against* Mylles, *supra, b. t.*