

1710. December 29.

MARGARET HAY and WILLIAM CARRUTHERS, her Husband, *against* JOHN HAY,
Doctor of Medicine.

No 109.

A man obliged, in his contract of marriage, to employ a sum upon bond, annualrent, or other security, and to take the rights to himself and his spouse in liferent, and to the children of the marriage in fee, found to have implemented the contract, by taking rights in the terms foresaid to a lodging in a burgh, in respect the contract bore, that the security to be taken for the money should be such as he thought sufficient at the time.

DOCTOR JOHN HAY, in his contract of marriage with Jean Law, his first wife, being bound to bestow and employ 8000 merks upon bond, land, annualrent, or other security that he should think sufficient for the time, and to take the rights to himself and her, the longest liver in liferent, and to the bairns of the marriage in fee, which failing, to his own heirs and assignees whatsoever, and to re-employ the money, if uplifted, in the same terms; Jean Hay, only child of that marriage, with the concurrence of her husband, pursued the Doctor for implement of the contract. The defender offered, in implement, to resign a tenement, or lodging, in the High Street of Edinburgh, belonging to him, for new infestment to himself in liferent, and to the said Jean Hay, his daughter, in fee, for security to her of so much of the 8000 merks, as knowing persons should estimate the lodging to be worth.

Alleged for the pursuers, A house in Edinburgh, which before the Doctor's death, that the pursuer could come to enjoy it, might happen, through decay for not repairing, (which liferenters are very guilty of) or through some fatal accident of fire, to be worth little or nothing, is no such security as can satisfy the terms of the contract.

Answered for the defender, It being rational for him, a residing burghess in Edinburgh, exercising his employment there at the time of the contract, to acquire a dwelling-house for his own use, his child may very well be satisfied with a security of that nature, which is not affected with any real incumbrance. Accidents never come under consideration; for even country land hath been lost by inundation, or overflowing; and it is not possible to be absolutely secure in the lending of money.

THE LORDS found, That the tenement in Edinburgh ought not to be received as a part of the security to be given by the Doctor, in implement of his contract of marriage with the pursuer's mother.

But thereafter, 18th January 1711, the LORDS, upon advising a reclaiming bill, presented by Doctor Hay, and answers made thereto by the pursuers, found the tenement to be a sufficient security, the Doctor disposing the same; in respect the contract obligeth him to employ the money upon bond, annualrent, or other security that he should think sufficient at the time, which allows him to be arbiter in the matter; and it could not be thought but that, when he bought the tenement, he looked on it as a sufficient security for what money it cost him.

Fol. Dic. v. 2. p. 289. Forbes, p. 467.

* * * See a former case between these parties, No 94. p. 12967.