are presumed to be empowered and furnished with cash to disburse. And what if the party should dwell in the isle of Sky or the far Highlands, must the witness go seek his expenses from them there? he had better twice over quit it; and it should have summary execution without formalities or delay.

The Lords thought there could be no general rule for the *first;* there being cases where it may be absolutely necessary to call them, and in others the calumny is evident, and so expenses will be due, but not always in all cases. As to the *second,* Some of the Lords thought it hard to burden agents with the payment of such expenses, when they might have no effects nor provisions in their hands; but that the most effectual compulsitor was to refuse process, and stop any farther procedure at that party's instance in the cause, till he paid what was modified: and so if it was the pursuer, he would obey rather than sist his process; and if the defender, then he would be no farther heard in the cause, but decreet go against him till he paid. *Vol. II. Page* 176.

December 7.---The Earl of Northesk against the Lady Kinfauns and her Son, mentioned 29th January 1703. It was a declarator, That any eases Kinfawns, his uncle, got out of the debts he paid and transacted, they ought to accresce to the Earl; and the creditors, who gave the eases, being ordained to be examined, before answer, on the quota, and their oaths coming to be advised, who acknowledged sundry years' annualrents to have been then quit by them, the debate arose, If the lady and her son were obliged to allow the same, because Kinfawns, her husband, being made assignee for an onerous cause, his cedents' oaths could not militate against him.

ANSWERED,---The principle of law held good in the general, but had exceptions; as where the party transactor was a near relation, and acted as *negotiorum gestor,* and was now dead, so that his oath on the abatements could not be got; in such a circumstantiate case the Lords had recurred to the creditors' oaths, though it was but a single testimony.

The Lords found, If Kinfawns had been alive, his own oath or writ could only have liquidated the eases he got when he bought in the debts; but that manner of probation now failing by his death, and he being the Earl's uncle, and acting in his affairs universally *tanquam negotiorum gestor,* therefore, without making any general rule, they found the eases proven by the creditors' depositions. But one of them, *viz.* the Laird of Inchsyra, having deceased before examination, and emitted a declarator under his hand anent the ease he gave of his sum; the Lords rejected it, as ultroneous and not probative.

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1703. *December* 8. SIR THOMAS ELPHINSTON'S DAUGHTERS *against* LADY AIRTH and her HUSBAND.

ELPHINSTON, and Robert Allan her husband, against the Lady Airth and her husband. By contract of marriage in 1650, betwixt Sir Thomas Elphinston of Calderhall and Mrs Jean Lauder, daughter to the Laird of Haltoun, there was this clause inserted:---" And because the lands are provided to the heir-male of this or any subsequent marriage, whilk failing, to his other heirs-male; in which

cases, or either of them, the daughters to be procreate of this marriage will be debarred; therefore he binds and obliges himself, and the heirs male and tailyie foresaid, to pay the daughters of the said marriage the sum of 25,000 merks." Of this marriage there were both sons and daughters procreated; and Sir Thomas dispones the lands to Richard Elphinston, his eldest son of that marriage, *in anno* 1674, narrating the contract as to the clause in favour of the eldest son, (but not that clause in favour of the daughters;) for implement whereof, and in regard his son had undertaken the burden of sundry debts, and particularly of a provision to his younger children, therefore he dispones the lands to him, with the burden of 11,000 merks for their provision; with which burden the said disposition is expressly made by Sir Thomas the father, and so accepted by Richard the son allenarly, and no otherwise: and accordingly Richard grants bond for that sum; and thereafter marries the heiress of Airth, and, getting that estate settled in his person, his daughter now succeeds to him therein. Sir Thomas's daughters raise a pursuit against Richard's heirs, founded on the disposition burdened with the 11,000 merks in their favour, and obtain a decreet against him; but afterwards coming to the knowledge of the larger provision of 25,000 merks in their favour, by their mother's contract of marriage, they raise a new process against this Lady Airth and her husband, as representing Sir Thomas the debtor by progress, for payment of the said 25,000 merks to them.

ALLEGED,—1*mo*, However the words are conceived, yet the plain sense of mankind must regulate the clause: that it has been only designed to take effect and be obligatory against extraneous heirs, but not the heir-male of the same marriage with themselves; seeing no instance can be given, in our law or custom, where provisions are destinate to daughters where there are sons, but they are left to the providence and discretion of the father. And why should daughters be more provided for in that case than the younger sons, who are wholly past over in silence, and unprovided? and it has certainly been an escape of the writer to insert these words, "of this marriage." And where clauses are exorbitant, they must be reconciled in the best manner that can be: even as here, the words, —"in which cases, or either of them, the daughters shall have 25,000 merks," may admit of this rational interpretation restrictive to the two immediate precedent cases, of an heir of another marriage, or his other heirs-male whatsoever, but not to the third case, of an heir of the same marriage. And these words, "of debarring the daughters," clearly import this; for debarring, seclusion, and privation presuppose an antecedent right, which the daughters could not pretend, when they had a brother of the same marriage; for the common law debarred them: so that the *cortex verborum* is not to be attended here, but the meaning of parties, which is the *regina et domina* in all human transactions.

ANSWERED,—Where parties have clearly and distinctly expressed their minds, there is no more room left for conjectures; else judges may, on such notions, change and transubstantiate the wills and agreements of parties at their pleasure. And, therefore, by an express act of sederunt in 1598, the Lords, to repress some arbitrary latitudes that had been taken in exposition of clauses, declared, in all time coming, they would interpret irritant clauses and the like, conform to the precise words and tenor thereof, seeing, *in claris, non est amplius locus conjecturis*. And, however unusual such a provision to daughters may now seem, yet we know not their views and designs after so long a time. Neither will any say

the clause is unlawful, seeing, by the twelve tables, and subsequent Roman law, all children came in equally, both sons and daughters; and the laws of Holland follow this natural course of succession: and the inequality of primogeniture was much augmented by the feudal law. And the Lords had just the parallel case before them, between *Borthwick of Cruickston and his Sisters, on the 4th of July*, 1694, where they sustained such a provision to daughters, and whereupon there is a decreet extracted.

There being an evident conflict here betwixt the words and letter, on the one part, and the sense and meaning on the other, the Lords were loath to deviate from the clear words of the clause, though they were generally convinced it was not so designed by the parties; yet, in regard the defenders had not seen that decision and decreet of Borthwick's, they waved this first allegeance till they should see that practick; and proceeded to the second defence, That it was only the heirs male and of tailyie who were bound in that provision; and she was neither, seeing their father had sold the lands of Calderhall.

ANSWERED,---Their father being liable *præceptione hæreditatis*, by accepting the disposition, his innovating the tailyie could not prejudge the daughters.

The Lords repelled this *second* defence, in respect of the answer.

Then Airth recurred to the *third*, viz. That, having pursued for the 11,000 merks, and obtained a decreet, they had accepted that in satisfaction of all other provisions, as they had restricted themselves thereto.

ANSWERED,---I can never homologate nor renounce a right I know not: *Nihil consensui tam contrarium est quam ignorantia et error, l.* 116, *D. de Reg. Jur.* But so it is, the daughters, when they pursued for the 11,000 merks, knew nothing of the more opulent provision made them by their mother's contract, which we may easily believe they would never accept 11,000 merks for 25,000 merks; so *res ipsa loquitur* that their pursuing for 11,000 merks will never cut them off from the superplus, no more than if a creditor for 25,000 merks had pursued him as liable, on his disposition, to pay him 11,000 merks, to which his debt was only stated, would be precluded from insisting for the remainder of his bond.

The Lords did not think it properly a homologation; but considered, that Sir Thomas's disposition to his eldest son Richard was expressly burdened with the said 11,000 merks allenarly to the daughters, and so accepted by him; therefore, he could be no farther liable than in the terms of that disposition; seeing, it was granted *ea lege*, and accepted on the same condition, he could not be overtaken, as representing by that disposition, for any more than the precise sum thereby undertaken, unless they could fix some other passive title upon him, besides his acceptance of that disposition. And, therefore, the Lords, by plurality, sustained this *third* defence to assoilyie from the pursuit founded on that *medium* of the disposition; but prejudice of their insisting to make her liable to any other passive title; for, it was thought, that, in thir cases, *rapienda est occasio quæ præbet benignius responsum;* and though *lex contractus erat sic scripta*, yet, *ubi æquitas postulat, subveniendum est; in ambiguis et obscuris ad benigniorem et maxime usitatam interpretationem propendere debemus.*

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