No 147. Lords, representing this has been but an omission of the writer, and that the Lords commonly sustain the fifth or sixth part of the principal sum to be the conventional penalty and liquidate expenses; and therefore craved the Lords would allow the extractor to insert that sum in his adjudication, otherwise he would be a considerable loser, being in all probability to lie long out of his money. The Lords thought the writer of the bond culpable and censurable for so gross an omission; but did not find they had power to supply his defect, and therefore refused the bill.

Fol. Dic. v. 1. *p.* 498. *Fountainhall, v.* 2. *p.* 256.

1711. *June* 21.

Alexander Calder Younger of Asswanly, *against* Elizabeth Middleton, Daughter to Andrew Middleton of Balbegno.

No 148.
The principal sum in a bond being payable with annualrent at such terms after the granter's decease, as certain trustees therein mentioned should appoint; and both the granter and these trustees having died without determining the manner and terms of payment; the Lords decerned for principal and annualrent from the date of the decree.

Andrew Middleton of Balbegno, and Robert Middleton his eldest son, granted a bond of provision to Charles and Andrew Middletons his younger sons, wherein they obliged themselves to pay to Charles 5000 merks, and to Andrew 4000 merks, with annualrent thereof at such terms after the father's decease as Colonel Middleton and others therein mentioned, or any two or three of them should appoint. After the persons in whom this faculty was lodged, and the granters of the bond, were all dead, without determining the manner and terms of payment, Alexander Calder, assignee to the bond, having pursued Elizabeth Middleton as heir to the said Andrew Middleton elder, her father, to pay the money, the Lords, upon her renunciation to be heir, decerned *cognitionis causa* for payment of the principal sum and and annualrent thereof from this day.

Fol. Dic. v. 1. *p.* 498. *Forbes, p.* 509.

*** Fountainhall reports this case:

Andrew Middleton of Balbegno grants bond to Charles and Andrew Middletons his sons for 9000 merks betwixt them, but with this quality, that it shall not be payable but at such a term as four friends named by him or any two of them should appoint, it always being after his decease, with power also to determine from what time they shall bear annualrent. Both the father and two sons being deceased, Elisabeth Middleton their sister confirms herself executrix to them, and assigns the foresaid 9000 merks to Calder of Asswanly, who charging her to enter heir, pursues her for payment; and having given in a renunciation, the difficulty arose, that the friends, to whose arbitration the term of payment and commencement of the annualrents was remitted, were dead without giving any determination; and therefore he on a bill craved that the Lords,

as come in their place, *per abitrium boni viri* might supply this defect, as the only remedy law has provided in such cases. There being no answer nor opposition to the bill, the Lords thought themselves obliged to look more narrowly to the case; and therefore it was observed, that the bond of provision in its narrative bore it was for their education and upbringing, and made no mention of heirs or assignees, and so might seem to be extinct by the son's death. It was agreed, that if they had died before the father, the provision would have ceased; but that not being alleged, the Lords took it for granted that they outlived him, and so transmitted the debt to their sister, as nearest of kin. But then Asswanly craved the Lords might fix the term of payment, and the annualrents to begin at the father's death, which was proved to have happened about Martinmas 1699; but the Lords considered their power begun from the application made to them to supply the friends' defect; and therefore made the term of payment and commencement of the annualrent from this date, and decerned *cognitionis causa* in the constitution, that so he might proceed to adjudge. For though childrens provisions be *debitum naturæ*, yet children must be easy to parents on this head, and the Lords must follow what he would probably have done in such a case, according to the direction of *l.* 34. *D. De reg. jur. Semper in stipulationibus et cæteris contractibus id sequimur quod actum est; et si id non appareat, sequendum quod in regione illa frequentatur*, and if that be not apparent, then *ad id quod minus est, illa summa redigenda est.*

Fountainhall, v. 2. *p.* 649. No 148.

1711. *July.* 3.

SIR WILLIAM BAIRD of Newbyth, JOHN BAIRD his Eldest Son, JOHN WAUCHOP of Edmonston, and ANDREW WAUCHOP his Brothers, Supplicants. No 149.

THE deceased William Wauchop of Niddery having named by his testament the petitioners who are Protestants, and five others of his Popish relations, to be tutors to Andrew Wauchop now of Niddery his son, and appointed three to be a quorum, James Wauchop brother to the defunct, who is Roman Catholick, being always one; the LORDS authorised the petitioners to officiate and act as tutors by virtue of the foresaid nomination, and held the *sine quo non*, and other Popish nominees (who are incapable by law to officiate) *pro non adjectis.*

Fol. Dic. v. 1. *p.* 499. *Forbes, p.* 516.

*** Fountainhall reports this case:

THE lately deceased William Wauchope of Niddery having named 10 friends to be tutors and curators to his son, any three to be a quorum, his brother James Wauchop being always *sine quo non*, who being a Papist, and other four of them being of the same persuasion; Sir William Baird of Newbyth, Wauchope of