[*7th April* 1834.]

ALEXANDER SCOT, W.S., Appellant.—*Lord Advocate* (*Jeffrey*)—*Knight.* No. 12.

JAMES STEWART and Curators, Respondents.—*Dr. Lushington.*

Minor—Cautioner.—A gift of tutory dative was made in favour of three persons, without the specification of any quorum, or provision in favour of survivors; and the tutors appointed one of their number to be their factor, for whose intromissions a party became cautioner; and thereafter one of the tutors died: Held (reversing the judgment of the Court of Session), that the office of tutory terminated by the death of the tutor, that consequently the factory came to an end, and that the cautioner thenceforth was free from his obligation.

1ST DIVISION.

Lds. Eldin, Newton, Fullerton, Moncreiff.

JAMES STEWART of Brugh died intestate in March 1811, leaving the respondent, an only child, in infancy, and without tutors or curators. On the 2d of June 1814 a gift of tutory was obtained from Exchequer in favour of Mrs. Stewart, the respondent's mother, Thomas Strong, merchant in Leith, and Alexander Stevenson, writer in Edinburgh. The gift was in these terms: — "Nos fecimus, constituimus, et ordinamus "dilectos nostros Magistram Marionam Stewart, Tho- "mam Strong, et Alexandrum Stevenson, tutores "dativos dicti Jacobi Stewart, ac administratores om-

No. 12.

7th April 1834.

SCOT v. STEWART.

" nium et singularum terrarum suarum, hæreditatum,
" possessionum, bonorumque omnium, mobilium et im-
" mobilium, usque ad ejus legitimam ætatem pervenerit,
" proviso tamen quod dicta Magistra Mariona Stewart,
" Thomas Strong, et Alexander Stevenson, faciant et
" perimpleant dicto Jacobo Stewart omnia et singula
" quæ tutor dativus de jure, seu regni nostri consuetu-
" dine, facere et perimplere tenetur. Et cum ad ipsius
" legitimam ætatem pervenerit, sibi et propinquioribus
" suis amicis, de dictis terris, firmis, reditibus, et bonis
" fidelem computum et ratiocinium reddant."

A bond of caution was granted at the same time by the tutors and by Baikie, in these terms:—" We,
" Mrs. Marion Stewart, otherwise Strong, relict of the de-
" ceased James Stewart, last of Brugh, Thomas Strong,
" merchant in Leith, and Alexander Stevenson, writer
" in Edinburgh, as principals, and with and for us,
" James Baikie, Esq., of Tankerness, as cautioner in
" manner and to the effect after mentioned, considering
" that his Majesty, with the advice and consent of the
" Right Honourable the Barons of his Court of Exche-
" quer in Scotland, hath by gift, &c.: Wit ye us,
" therefore, to be bound and obliged, as we the said
" Mrs. Marion Stewart, otherwise Strong, Thomas
" Strong, and Alexander Stevenson, as principals, and
" I, the said James Baikie, as cautioner, bind and
" oblige ourselves, conjunctly and severally, and our
" heirs, executors, and successors, to make just compt,
" reckoning, and payment to the said pupil, when he
" shall arrive at the age prescribed by law, of all intro-
" missions, omissions, commissions, and acts of manage-
" ment had by us, the said tutors, under and by virtue
" of the said gift as accords of the law; and that we,

" the said tutors, shall give up inventories of the said
" pupil, his whole means and effects, both heritable and
" moveable, conform to and in terms of the act of par-
" liament made thereanent, and that under the penalty
" of 200*l.* sterling, over and above performance. And
" we, the said tutors, bind and oblige us and our fore-
" saids, jointly and severally, to free and relieve the
" said James Baikie, and his foresaids, of his cautionary
" for us in the premises, and of all damages and ex-
" penses he may sustain there through in any manner
" of way whatsoever."

The management of the estate was intrusted to Stevenson, who intromitted till 1819 without having any written deed of factory. On the 12th of April of that year a factory was granted to him in these terms:

" We, Mrs. Marion Strong, otherwise Stewart, and
" Thomas Strong, merchant in Leith, two of the tutors
" dative of James Stewart, now of Brugh, only son and
" heir of entail of the deceased James Stewart, Esq.,
" last of Brugh, conform to gift of tutory in favour of
" us and Alexander Stevenson, writer in Edinburgh,
" dated the 2d day of June 1814 years, considering
" that the said Alexander Stevenson has hitherto acted
" as our commissioner, factor, and cashier in the ma-
" nagement of the said pupil's affairs, and that it is
" necessary for us to confirm his appointment by a
" regular commission with the usual powers, and
" having full confidence in the integrity and ability of
" the said Alexander Stevenson for that purpose;
" therefore we do, by these presents, nominate, con-
" stitute, and appoint the said Alexander Stevenson to
" be our commissioner, factor, cashier, and agent for
" the purposes after mentioned, giving, granting, and

No. 12.

7th April 1834.

SCOT *v.* STEWART.

" committing to him full power, warrant, and commis-
" sion for us and in our names to manage, transact,
" and conduct all the affairs and concerns of the said
" James Stewart, our pupil, as fully, freely, and com-
" pletely in all respects as any other commissioner,
" factor, cashier, or agent named with the most ample
" powers could do in the like cases; and particularly,
" without prejudice to this general commission, with
" full power to our said commissioner to superintend
" the management of the whole affairs and concerns of
" the estates in Orkney and Shetland, belonging to the
" said James Stewart, and of any other lands or herit-
" ages which he may acquire or succeed to in time
" coming; as also, with power to sell and dispose of
" the whole kelp," &c.; " as also, for us and in our
" name, as tutors foresaid, to demand, uplift, receive,
" and, if necessary, pursue for all debts and sums of
" money (exclusive of principal sums lent out on bond)
" due or to become due to the said James Stewart, now
" of Brugh, or to us as his tutors, by any person or
" persons, receipts, discharges, and acquittances there-
" for, or conveyances thereof to grant, which shall be
" equally effectual as if subscribed by ourselves; as
" also with power to disburse and lay out such sum or
" sums of money as may be found necessary for the
" aliment, education, or expenses of the said pupil, or
" in the management of his estate and affairs; as also
" with power to settle and clear accounts with
" Mr. George Turnbull, present factor on the estate of
" Brugh, or with any other factor or factors to be em-
" ployed by us in Orkney in the management of the
" lands and estate belonging to the said pupil, or in
" any part of the affairs of the said James Stewart con-

" nected therewith, and to discharge the said factor or " factors of their intromissions and management, upon " receiving payment of the balances that may be found " due by them; as also with power to our said com- " missioner to pursue in our names, as tutors foresaid, " all such actions as may be judged necessary in the " management and execution of the said pupil's affairs, " and to defend us and him in all actions that may be " brought against us as tutors foresaid, or against the " said pupil, and in general to do every thing in exe- " cution of the powers hereby committed to him that " we could do ourselves if personally present; ratifying " hereby and confirming all and whatsoever acts and " deeds our said commissioner shall lawfully do or " cause to be done in the premises: but providing " always, as it is hereby specially provided and declared, " that the said Alexander Stevenson shall, by accept- " ance hereof, be bound and obliged to hold just compt, " reckoning, and payment to us or our quorum, for his " whole intromissions by virtue hereof, after deduction " always of his necessary disbursements, charges, and " expenses in the execution hereof, with a reasonable " gratification for his own trouble therein; declaring " the said Alexander Stevenson's acceptance hereof " shall not hurt or prejudge his right as one of the " tutors of the said James Stewart, and that this " commission shall subsist until recalled in proper form."

On the same day a bond of caution was granted by Stevenson, and Alexander Scot, W.S., his partner in business, which, after narrating that Mrs. Stewart and Mr. Strong, "tutors dative of James Stewart," &c. had appointed Stevenson to be their commissioner, factor,

No. 12.

7th April 1834.

SCOT *v.* STEWART.

&c. proceeded thus:—" Therefore I, the said Alexander " Stevenson, as principal, and Alexander Scot, writer " to the signet, as cautioner and surety with and for " me, do hereby bind and oblige ourselves, conjunctly " and severally, and our heirs, executors, and successors " whomsoever, that I, the said Alexander Stevenson, " shall hold just compt and reckoning with the said " tutors, or any person appointed by them, not only for " my whole actings, management, and intromissions " whatsoever already had by me with the estate, funds, " and effects of the said James Stewart as one of and " as acting for the other tutors dative since the date of " the said gift of tutory dative, but also for my whole " actings, management, and intromissions whatsoever " to be had by me in virtue of the before-mentioned " commission and factory, or as their factor, cashier, or " agent in any manner or way, and that I shall submit " to the said tutors, for their examination and satisfac- " tion, my accounts yearly, or so often as I shall be re- " quired by them so to do; and that I, the said Alex- " ander Stevenson, shall make payment to the said " tutors of all sums of money which I shall uplift and " receive in virtue of the said factory and commission, " or the balance that may remain due thereon at the " time, and that under the penalty of 100*l.* sterling, " over and above payment and performance; and I, " the said Alexander Stevenson, bind and oblige myself " and my foresaids to free and relieve, and harmless " keep, the said Alexander Scot and his foresaids from " his cautionary obligation above written, and of all " costs, skaith, damage, and expenses which he may " any ways sustain or be put to by his becoming caution " for me in manner foresaid."

Strong died in August 1820, and Stevenson continued to intromit as formerly. Baikie, the cautioner for the tutors, raised an action in 1823, before the Court of Session, against Mrs. Stewart and Stevenson, the representatives of Strong, and against the pupil and his tutors and curators generally, concluding for exoneration from the bond of caution. Stevenson and Mrs. Stewart lodged defences. Decree was pronounced, the extract of which was of the following tenor:—" After sundry steps of procedure had taken " place in said action before the Lord Cringletie, " Ordinary thereto, his Lordship, upon the 3d day " of June 1823, found that the respondent's bond " of caution ceased, and was at an end at the death " of Mr. Thomas Strong in August 1820; and or- " dained the defenders to give in a state of their " accounts up to Mr. Strong's death, and that against " the then next calling." The extract farther bore, that after a remit to an accountant, who made a report in January 1826, finding that a balance was due to Stevenson at the death of Strong, the Lord Ordinary, and by him the Court, "exonered and dis- " charged, and hereby exoner and discharge, the pursuer, " James Baikie of Tankerness, of the cautionary obliga- " tion undertaken by him for the defender." The balance due to Stevenson, as in August 1820, was said to exceed 300*l.*

Stevenson continuéd to act as formerly, and it was alleged that between August 1820 and February 1825 he had intromitted to an extent which left him indebted to the estate in upwards of 2,000*l.*

The pupilarity of the appellant having terminated on the 23d of that month, he made choice of curators, and

No. 12.

7th April 1834.

SCOT *v.* STEWART.

with their concurrence he brought an action of reduction in the Court of Session against Mr. Baikie and others, concluding to have the decree of the 3d of June 1823 reduced, on the ground that it was contrary to law, "in so far as it finds that the said gift of tutory fell "on August 1820, by the death of Thomas Strong, one "of the tutors; and also in so far as it finds that the "obligations come under when the said bonds ceased, "and were at an end by reason of Mr. Strong's death. "The gift and bond both remained in full force, not-"withstanding that event,—the gift till the respondent "attained the age of puberty, and the bond till the "whole intromissions had by the tutors in virtue of "said gift, and fully accounted for and paid to the "pursuer."

Mr. Baikie maintained, in defence, that the tutory fell by the death of Mr. Strong, and that consequently the bond of caution then terminated.

The case came before Lord Newton as Ordinary, who reported it to the Court; and their Lordships, considering the question attended with difficulty, transmitted the following query for the opinions of the other judges:—"Whether the tutory in this case fell by the "death of Mr. Strong?" A note was thereafter sent to the Court by the consulted Judges, stating, "that "before giving an opinion on the question submitted "to them in the case of Baikie v. Stewart and others, "they were desirous of obtaining information with re-"gard to the practice of the Court of Exchequer, both "as to the particular terms on which gifts of tutory "have been granted, where more than one person is "nominated, and whether, where a plurality have been "appointed, applications for new appointments have

" been made in consequence of death or other inca-
" pacity. The consulted Judges therefore wish that
" the necessary order should be made by the First
" Division to obtain a report from the King's Remem-
" brancer." A remit was in consequence made to the King's Remembrancer, who returned a report in these terms:—" There was laid before the King's Remem-
" brancer a remit from the Court of Session, requesting
" him to make a return or report on a note with regard
" to the practice of the Court of Exchequer, both as
" to the particular terms in which gifts of tutory have
" been granted, where more than one person is no-
" minated; and whether, where a plurality have been
" appointed, applications for new appointments have
" been made in consequence of death or other inca-
" pacity. The Remembrancer begs to observe, 1st,
" That tutory datives and curatory datives, where more
" than one person is nominated, generally, but not
" always, specify a quorum, and it is the practice, when
" the number of the quorum is reduced by death, to
" apply for a new gift. An instance of this kind took
" place in the year 1806; but the records of this Court,
" in so far as I can discover, do not afford an instance
" where a gift of tutory granted to more persons than
" one, and where, by the terms of the gift, the nomina-
" tion is neither jointly nor to a quorum of the Barons
" having been applied to for a renewed gift in conse-
" quence of the incapacity or death of one or more of
" the tutors first named. 2. When a gift is granted to
" two persons jointly, and one of them dies or refuses
" to act, or in the case of a lady afterwards marrying,
" by which she becomes in law incapacitated, a new
" gift becomes necessary, and would be granted upon

No. 12.

7th April 1834.

SCOT v. STEWART.

" the tutors observing the rules and directions of the " statute 28th June 1672. A case of this last kind " took place in Whitsunday term last. HENRY JARDINE, King's Remembrancer."

On considering this report, Lord Corehouse returned an opinion in these terms:—" I am of opinion that the " tutory dative did not fall by the death of Mr. Strong. " The authority of Lord Stair and Lord Bankton upon " the subject is express, and the return of the King's " Remembrancer seems to be sufficient evidence that " that authority has been uniformly acted upon." Lords Justice Clerk, Glenlee, Pitmilly, Alloway, Meadowbank, Mackenzie, Newton, and Medwyn stated, " We are entirely of the same opinion with " Lord Corehouse." Lord Cringletie subjoined, " In " consequence of the practice as reported by the proper " officer of the Exchequer, I am also of opinion that " the tutory did not fall by the death of Mr. Strong." When these opinions were laid before the Court, along with the report of the King's Remembrancer, a motion was made on the part of Mr. Baikie for a more particular investigation as to the practice, which, it was alleged, was not accurately stated in the report. The Court (28th January 1829) refused this motion, for the reasons set forth in the following interlocutor, and in which they also gave judgment on the merits.*

" The Lords, upon the report of Lord Newton, and " having advised the mutual revised cases for the par- " ties, and consulted with the Judges of the Second " Division and the permanent Lords Ordinary, and " heard counsel for the parties on the objection stated

* 7 S. & D., 533.

" by the defender, that the report of the Remem-
" brancer, although accurate as far as it goes, is not
" complete, find that on the 11th of March 1828 this
" Division, on advising cases for the parties, remitted
" the same to the Judges of the Second Division and
" permanent Lords Ordinary to give their opinion
" ' whether the tutory in this case fell by the death of
" ' Mr. Strong, and to give in the said answer quam
" ' primum ;' find that the consulted Judges, before
" answering the above question, desired that this
" Division should give the necessary order to obtain a
" report from the King's Remembrancer in Exchequer
" as to the practice in such cases; find that this
" Division, on 7th June 1828, did remit to the Remem-
" brancer accordingly ; find that on the 17th of June
" 1828 the Remembrancer made his report; find
" that this report was printed and boxed to all the
" judges on the 21st of June; find that this report,
" being a return to the requisition of the consulted
" judges, necessarily and properly became matter
" for their consideration, under the original remit by
" this Division of 11th March, and that no new order
" or remit was necessary to entitle the consulted Judges
" to resume the case, and answer the question put to
" them in said remit; find that the said report by the
" Remembrancer was printed and boxed and moved in
" Court nearly three weeks before the end of that
" session, and therefore when said report was moved
" in Court, and still more before the Court rose, the
" parties had opportunity and time to object to it, as
" either imperfect or inaccurate; find that the case
" was put out in the printed rolls on the very first days
" in the long vacation in July 1828 to be advised on

No. 12.

7th April 1834.

SCOT *v.* STEWART.

" the 10th of December 1828, along with the opinions " of the consulted Judges, expected to be put in; find " that the case accordingly was called on the 10th of " December, but the opinions not having come in, it " was delayed; find that on this occasion the parties " had another opportunity to have objected to the Re- " membrancer's report; find that the case was again " put out in the roll to be advised on the 13th of " January 1829, but was again delayed, as no opinions " had been given in, except by Lord Corehouse; find " that at moving the case on the 13th of January the " parties had another opportunity of objecting to said " report of the Remembrancer; — therefore find that " they cannot now be heard to object to said report, " or to the manner in which it was brought before the " consulted Judges, and considered by them; and " having resumed consideration of the case, with the " opinions of the consulted Judges, find, in terms of the " opinion of the majority, that the tutory in question " did not fall by the death of Mr. Strong, and decern " in the reduction accordingly; and appoint parties to ". debate on the consequences to follow from this judg- " ment."

Thereafter their Lordships remitted the case to Lord Newton to hear parties farther on the remaining points in the cause.

In the meanwhile the respondent and his curators, founding on the deed of factory and the relative bond of caution, raised an action against Stevenson (who had now become bankrupt), and also against his cautioner, the appellant, Scot, concluding for an account of the whole intromissions of Stevenson, from the commencement of the tutory till the expiry of the pupilarity, and for decree

against Scot, as jointly and severally liable with Stevenson for any balance remaining due.

In this action Lord Eldin, on 29th June 1827, "found "the defender, Alexander Scot, liable for the balance of "the intromissions of Alexander Stevenson under the "factory in question," &c.; but Scot having reclaimed, and before his reclaiming note was advised, the Court, having pronounced the judgment already quoted in the relative action against Baikie, remitted this cause also to the Lord Ordinary, "ob contingentiam, with power to "hear parties as to the consequences which ought to "follow from the judgment pronounced by the Court "in the case at the instance of Stewart v. Baikie, and "to proceed farther," &c. The case against Stevenson and Scot having been argued before Lord Fullerton, he appointed the parties to give in Cases to himself, and issued this note:—

"After the full discussion which the case has re-"ceived, it is with great reluctance that the Lord Or-"dinary issues the above order. But, upon a full con-"sideration of the whole circumstances, he foresees the "possibility of great inconvenience, and even injustice, "in separating entirely the present case from that de-"pending between the same pursuers and Mr. Baikie, "the cautioner for the tutors, which has not been "argued before him, and which must now, in all pro-"bability, fall to be decided by another Judge.

"It is due to the parties, however, to state the view "entertained by him on the points in dispute. If the "factory had been granted to a third party by two "tutors in their tutorial character, with the implied "sanction of the remaining tutor, and had thus been a "proper tutorial act, the judgment of the Court, hold-

No. 12.

7th April 1834.

SCOT *v.* STEWART.

No. 12.

7th April 1834.

SCOT v. STEWART.

" ing the tutory not to have fallen on the death of " Mr. Strong, would have been conclusive against the " cautioner for such factor. But here there is the pecu- " liarity, that the factory or commission is granted by " two individual tutors in favour of a third, Mr. Steven- " son; and Mr. Scot is cautioner for Mr. Stevenson's " intromissions, ' in virtue of the before-mentioned " ' commission and factory, or as their factor, cashier, " ' or agent, in any manner of way.' This specialty " gives rise to two questions: first, whether the fac- " tory, not being a proper official act of the whole " tutorial body, did not fall by the death of one of the " individuals who had granted it; and, secondly, what " is the extent to which the cautioner is bound?

" In regard to the first of these points, the Lord " Ordinary, though with some hesitation, inclines to " the opinion that the commission may be held in con- " sequence of the peculiar nature of the appointment of " the tutors, as ascertained by the judgment of the " Court, to have been granted by the two tutors and " the survivor of them, and therefore did not fall by the " death of Mr. Strong. The second question is attended " perhaps with still more difficulty. The cautioner is " bound for Mr. Stevenson's intromissions in virtue of " the commission and factory, or as the factor, cashier, " or agent of the two tutors who granted the factory. " But Mr. Stevenson being also a tutor himself, and " whose power in that character was expressly saved in " that commission and factory, had a right to intromit " as tutor, which circumstances raise the question, " whether any, or which, of his intromissions are to be " held as intromissions in virtue of the factory, for " which intromissions alone the cautioner was bound?

" This again seems to lead to an inquiry into the true " character and effect of the commission or factory; " whether it should be treated as a commission to a " third party, whose whole intromissions must be im- " puted to it alone, or as a mere devolution on one " tutor by the other two of the whole powers previously " shared by them all? Now, it appears to the Lord " Ordinary that this is a point in which Mr. Baikie, " the cautioner for the tutors, may have a material " interest, and which does not admit of being separated " altogether from this case; as, according to the first " view, Mr. Baikie would, in all probability, have the " benefit of Mr. Scot's cautionary obligation, while, " according to the second, that obligation might pos- " sibly be construed as merely protecting the two indi- " vidual tutors who granted the commission, and as not " available to Mr. Baikie in regard to Mr. Stevenson's " intromissions, which intromissions might be held to " be properly imputable, not to the factory or commis- " sion, but to his inherent powers as tutor, for the due " exercise of which Mr. Baikie was unquestionably " bound. Accordingly, Mr. Baikie's fourth plea in " law seems to involve a question of this kind, and " besides, the remit of the Court in the present case is " expressly granted ob contingentiam, meaning, as it is " presumed, the contingency of the case with that in " which the Court had pronounced judgment, being " the case of Mr. Baikie."

The Cases having come before Lord Moncreiff, he reported them, and also Cases in the question with Baikie, to the Court, and at the same time issued this note:—

" The Lord Ordinary regrets that, in this very dif- " ficult case, he has not had the benefit of a debate. It

No. 12.

7th April 1834.

SCOT *v.* STEWART.

" had been fully heard, and the Cases had been ordered " by Lord Fullerton, before it devolved on the present " Lord Ordinary; and after he had considered the " cases he found it necessary to make some orders in " the relative action of Stewart v. Baikie, in order that " both causes might be disposed of at the same time, " according to the intention of the Court. Both causes " being now fully prepared, he thinks it expedient to " report them. They have not been conjoined, the " interests and pleas in each being in a great measure " distinct, though so materially connected that they " ought to be decided together.

" The points in the case of Baikie are these:—

" 1. Is the judgment of the Court, reducing the de- " cree of exoneration to the effect of finding that the " tutory did not fall by Mr. Strong's death, conclusive " against its operation as a release to Mr. Baikie?

" 2. If it is not, is that decree res judicata as to the " termination of Mr. Baikie's obligation as cautioner, " either at the death of Mr. Strong, or at the date of " the summons? The Lord Ordinary thinks that it is " not res judicata; 1st, because the judgment may " have depended on the point on which the Court has " already reduced it; and 2d, because, though by that " decision it is settled that the pupil was not without " tutors, those tutors were the very persons for whom " Mr. Baikie was cautioner; and therefore a tutor ad " litem was indispensable.

" 3. Did Mr. Baikie's obligation fall by the death of " Mr. Strong? The Lord Ordinary thinks that there " is much greater difficulty in this point than the pur- " suer is willing to allow. It is finally settled that the " tutory did not fall; but the very peculiar terms of

" the bond of caution do certainly leave a question of
" importance open, whether the cautioner is liable for
" the actings of two of the tutors, after the death of one
" has removed his superintendence and put an end to
" his obligation of relief. There is great difficulty in
" holding that the tutory was so framed as to subsist,
" and the bond of caution so expressed as to fall. It
" could not be so intended: But whether it was, that
" the bond was framed on a different view of the effect
" of the tutory, or from what other cause, the terms of
" the bond are such as to render it very difficult, under
" the common rules as to cautionary obligations, to
" obviate Mr. Baikie's plea. The Lord Ordinary does
" not mean to say that he has formed a decided opinion
" that it is good; but at present the only answer made
" by Mr. Stewart is not satisfactory to him.

" 4. Supposing that the cautioner's obligation did
" not fall, is Mr. Baikie liable for the intromissions of
" Mr. Stevenson as factor? The Lord Ordinary thinks
" that he is; because, though Mr. Stevenson received
" the money as factor, yet being tutor also, as soon as
" he had it in his hands, he was bound, both as tutor
" and factor, to account for it and pay it to the minor.

" If it should be found that Mr. Baikie is released,
" the action against Mr. Scot will be of great import-
" ance to Mr. Stewart. But if Mr. Baikie should be
" found still liable, the interest will lie chiefly between
" him and Mr. Scot. The Lord Ordinary, therefore,
" allowed Mr. Baikie to see Mr. Scot's paper, and to
" put in an argument in that view.

" The points in Stewart v. Scot are these:—

" 1. Whether the pursuer has a title to found upon
" Mr. Scot's bond of caution? The Lord Ordinary

No. 12.

7th April 1834.

SCOT *v.* STEWART.

" thinks that there is nothing in the objection that this " was not stated as preliminary, because it is equally a " defence on the merits; but he is of opinion that the " plea is not well founded. He apprehends that where " tutors or trustees have power to grant factories, and " they do grant a factory, and take a bond of caution " for the factor's intromissions, the bond is available to " the minor or constituent, and that it can make, no " difference that the tutor had previously found caution. " He has no idea that Mr. Scot's bond was only taken " as a protection to Mrs. Stewart and Mr. Strong. " The question, to what it binds Mr. Scot, is very dif- " ferent.

" 2. Whether the factory fell by Mr. Strong's death? " This is a question of difficulty, and not absolutely " resolved by the judgment finding the tutory to sub- " sist; for the factory being to one of the tutors, it " cannot be held that it was so a tutorial act that it " must have subsisted as long as the tutory. If " Mrs. Stewart had died, it could not have stood, the " factor being himself sole tutor. The question, there- " fore, is, whether, as a mandate (clearly different from " contracts of lease, loan, &c.), it fell by the death of " one of the grantors necessary to its constitution, or, as " a tutorial act, subsisted as long as the nature of the " tutory admitted of it. The point is far from being " clear; but the Lord Ordinary is inclined to think " that it did subsist.

" 3. Whether, if the factory fell, Mr. Scot is liable " for Mr. Stevenson's intromissions, either as tutor or " agent? The question whether he would be liable on " the ground of Mr. Stevenson having acted as agent, " is not precisely argued by the defender, and is not

" clear. But the Lord Ordinary is of opinion that
" there are no words in the bond which could make him
" liable for intromissions as tutor; and is inclined to
" think, that, notwithstanding the words as to the
" character of agent, the true spirit and purpose of the
" bond made it dependent on the subsistence of the
" factory.

" 4. Supposing that the factory did not fall, did
" Mr. Scot's obligation as cautioner fall by Mr. Strong's
" death?

" This seems to be the most important question in
" the cause, and it is certainly attended with difficulty.
" There is nothing in the bond to settle it. Mr. Scot,
" though bound conjunctly and severally with Mr. Ste-
" venson, is so bound expressly as cautioner; and it is
" no solution of the point to say, that if Stevenson was
" liable, Scot is liable: Stevenson must have been liable
" in every event. But the question whether the cau-
" tioner's obligations subsisted to cover intromissions,
" had after the death of one of those to whom it was
" given, must depend on other principles. The cases
" quoted by the defender are evidently of importance,
" and some of them come very near to the point. And
" again, it would be difficult or impossible to say that
" the cautioner would have continued bound if Steven-
" son had become the sole tutor. On the other side, if the
" tutory and the factory both subsisted, and if the bond
" of caution be held to have been taken for the pupil's
" benefit, and to be available to Mr. Baikie, it is not
" easy to hold the tutorial act of taking it as having
" become ineffectual de futuro, by the death of one of
" the tutors. The Lord Ordinary has not a very de-
" cided opinion on this question. He has not been able

No. 12.

7th April 1834.

SCOT v. STEWART.

" to get over the general rules applicable to cautioners, " as recognised both in the Scotch and in the English " cases; but he sees much difficulty in applying them.

" 5. Whether, if the factory subsisted, all the intro- " missions of Mr. Stevenson must be considered as " falling under it? If special facts to the contrary were " condescended on, this might raise such a difficulty as " that suggested by Lord Fullerton; but the Lord " Ordinary does not think that it could be maintained " as matter of presumption, that money uplifted by the " factor was not uplifted in that character, but as one " of two tutors."

When the Cases came before the Court a motion was again made, on the part of the appellant, for a further inquiry in regard to the practice, but this was refused as being too late.*

---

* The appellant, in his appeal case, averred, that the record of signatures in Exchequer was destroyed by a fire in 1811; that the report of the Remembrancer " was framed from a mere recollection or impression as " to the practice, not from the actual examination of any record;" and in particular, that it " was not made from any examination of the records of " Chancery in Scotland." He farther alleged, that he himself had searched the latter records from 1st June 1808 to 3d July 1828, and that the following was the result;—

	Tutories dative.
There are on record - - - -	62
Of these taken to one tutor - - -	24
Remaining appointments to more than one - -	38
1. Of these taken to A., B., C., and the survivors or survivor, there are - - - - -	8
2. To A., B., C., & D., and a certain number as a quorum, - - - - -	5
3. To A., B., C., & D., or the survivors or survivor of them, and a certain number as a quorum -	16
4. To B. & C. jointly - - - - -	1
5. To A., B., & C., as in the present case, and including that gift - - - - -	8
	38

He farther stated that there was no evidence that in any of these cases a failure of any of the nominees arose from death.

No. 12.

7th April 1834.

SCOT v. STEWART.

Their Lordships (29th February 1832) pronounced this interlocutor in the case against the appellant:— "Find the defender Alexander Scot liable as cautioner for Alexander Stevenson, factor, appointed "by the tutors dative of the pursuer, for all the acts "and intromissions of the said Alexander Stevenson as "factor foresaid: Find him also bound to relieve James "Baikie, the cautioner for the tutors dative, of all re-"sponsibility falling upon him on account of the said "factor's intromissions; and remit to the Lord Ordinary "to proceed farther in the cause as to him shall appear "just: Find the pursuer entitled to expenses," &c. In the case against Mr. Baikie the following interlocutor was at the same time pronounced:—"Find the de-"fender liable, as cautioner for the tutors dative of the "pursuer, for the whole intromissions of the said tutors, "and of their factor, Alexander Stevenson; but find the "said defender, James Baikie, (in so far as he may be "made liable for the intromissions of the said Alex-"ander Stevenson, as factor named by the said tutors,) "entitled to relief against Alexander Scot, who became "bound as cautioner for the said factor's intromissions, "and remit the cause to the Lord Ordinary to proceed "farther in the cause as to him shall seem just: Find "the pursuer entitled to expenses," &c.*

Mr. Scot appealed.

Appellant.—1. Where there is a gift of tutory to three individuals together, and no survivorship is expressed, the gift falls by the death of any one of them.

---

* 10 S. & D., p. 392.

No. 12.

7th April 1834.

SCOT v. STEWART.

The general rule in regard to all mandates is, that the mandate terminates by the death of the mandatory; and where the mandate is conferred on a plurality of persons, the presumption is, that reliance is placed upon their united discretion and sagacity; and if that union be dissolved by the death of any one of them, the mandate expires.* The same principle applies to the office of tutory; for it is in reality a mandate to perform certain duties on behalf of an individual, who is himself incapable of acting. It is true that this principle is not held to apply in the case of tutors testamentary, the reason of which is assigned by Mr. Erskine to be, "the "favour of last wills and of minority creates a presump- "tion that the father or mother prefers any of the "tutors or curators so named, to those who are pointed "out by the law."† No doubt Lord Stair has a dictum, that in case of tutors dative the office does not fall by the death of one of the nominees; but the decisions t which he refers all relate to the case of tutors testamentary‡; and Lord Bankton merely adopts the dict um of Lord Stair.§ Neither does the practice afford any support to the plea of the respondent. The report of the Remembrancer is inaccurate and incomplete, and the records of Chancery show that there has been no such practice as that alleged. In the Court of Chancery in England the rule is established, that the office falls by the death of one of the nominees.‖

2. But, independent of the more general plea that the

---

* Ersk., b. iii. tit. 3. sec. 34, 40.
† Ersk., b. i. tit. 7. sec. 30.
‡ 1 Stair, 6, 14.
§ 1 Bankton, 7, 20.
‖ Bradshaw v. Bradshaw, 15th June 1826, Russell's Reports.

tutory terminated by the death of Mr. Strong, the appellant maintains that the factory came to an end, and at all events his bond of caution ceased to be operative, by the death of that gentleman. In interposing as cautioner for the factor, the appellant relied for protection on the circumstance that the factor would be superintended and kept to his duty by those who had appointed him to that office; but a material change was effected by the death of Mr. Strong, and this was practically exemplified by the fact, that at the time of his death the factor was owing no balance whatever, whereas, when his superintending control ceased to exist, the factor failed to account, and became bankrupt with a large balance in his hands. It has accordingly been fixed, in a great variety of cases, that a cautionary obligation addressed to two or more parties in favour of a third, is strictly personal to those to whom it is addressed,—that it falls upon any of these parties ceasing by death or otherwise to have an interest in the matter, is not transmissible to other parties, and is even held to expire by the assumption of other persons as creditors.*

3. Although there is no action of relief by Mr. Baikie against the appellant, yet the Court of Session have ordained the appellant to relieve that gentleman of his cautionary obligation to the tutors, which was incompetent.

Respondent.—1. The decision in the question with Mr. Baikie is conclusive as to the subsistence of the tutory, notwithstanding the death of Mr. Strong; and

---

* Philip v. Melville, 21st Feb. 1809; Elton Hammond v. Nelson, 24th June 1812; Fell on Guarantee, pages 125, 127.

No. 12.

7th April 1834.

SCOT v. STEWART.

even if the question be open, this judgment is well founded in law. It is admitted, that, in the case of tutors testamentary, the death of one of the nominees does not vacate the appointment, and therefore it follows that the rule as to joint mandates does not apply; and it is laid down expressly by Lord Stair, that "if "there be more tutors either nominate or dative, and "no quorum expressed, if some of them die, the office "is not void, but the rest of them may act."* The same doctrine is stated by Lord Bankton†, and also by Mackenzie.‡ In point of principle, there is no distinction between the nomination by a father, and the nomination by the king; the latter acts in making the appointment as pater patriæ. The decisions of the Court all recognise this principle.§ In like manner the practice of the Court of Exchequer is confirmatory of Lord Stair's doctrine, as established by the report of the proper officer.

2. The factory did not terminate by the death of Mr. Strong, unless on the supposition that the tutory was thereby dissolved. The granting of the factory was a proper tutorial act; and if the office survived in the persons of the other two tutors, the factory remained effectual until terminated by the bankruptcy of the factor. But if so, then the appellant's bond of caution must also remain as effectual as it was during the life of Mr. Strong. It is only in those cases where the appoint-

---

* 1 Stair, 6, 14.

† 1 Bankton, 7, 120.

‡ 1 Mackenzie, 7, 72.

§ Young v. Watson, 7th Nov. 1740, Mor. 16,361; Fisher's children, 2d August 1758, Mor. 14,596; Ellis v. Scott, 14th February 1672, Mor. 14,695.

ment itself falls, that the relative cautionary obligation ceases to exist.

3. No objection was taken in the Court below to the form of the judgment, and there was nothing incompetent in the Court finding the appellant bound to relieve Mr. Baikie; and, at all events, that part of the judgment finding him liable to the respondent is unobjectionable.

No. 12.

7th April 1834.

SCOT v. STEWART.

LORD CHANCELLOR.—My Lords, this case involves, among other questions of importance to the law of Scotland, one peculiarly deserving your Lordships consideration, namely, whether, upon tutors being appointed by proper authority, if one or more of them shall have died or become incapacitated, or declined exercising that function, the tutory-dative shall continue to exist? Upon this very important question no authority appears in the law of Scotland, so far as judicial decision goes, nor has any case ever been decided upon any other point so related to this, as arguing from the one decision to the other, to furnish authority in point of reason, which should enable us to rule the present case. Two very valuable authorities in the law of Scotland, and one particularly, Lord Stair, are cited. Lord Stair is followed by Lord Bankton, as supporting the proposition, that where there are either tutors-nominate or tutors-dative, though a joint appointment shall not be specified, nor a clause as to a quorum, nor sine quo, nor sine quibus non, introduced, yet upon a supervening incapacity or decease of one of those tutors there is survivorship of the tutorial office to the other tutors, in the case of tutors-dative, as well as in the case of tutors-nominate

No. 12.

7th April 1834.

Scot v. Stewart.

or testamentary. It is, however, important to observe, that although Lord Stair lays down this proposition expressly as to both offices, and cites three or four decisions, yet these decisions relate simply to the case of tutors-nominate or testamentary, and none of them refer to tutors-dative. When those cases are minutely examined, there is nothing, either in the argument from the bench, or at the bar, which can lead us (especially when we examine the more full report in Gosford) to form a conclusion that the Court ever admitted or assumed, much less pronounced any opinion, upon that branch of Lord Stair's dictum which embraces the cases of tutors-dative; and when some of the other decisions are resorted to, it is found that the reasons upon which they appear to have proceeded are such as from their nature are exclusively applicable to and drawn from the circumstances of the appointment of tutors-testamentary. These reasons have reference to the will of the father and his delectus personæ, (the return of the mandate to the mandant being in this case excluded by the decease of the mandant,)—the necessity of attending to his last will,—the impossibility of recourse to him in changed circumstances—the preference to be given to whomever he shall have deliberately selected — the exclusion in favour of those appointed by him of all, either tutors-at-law or tutors-dative—and, as arising from all those topics, the propriety of preferring any one of those appointed by the father, even though the others shall cease to act:—These apparently formed the grounds of the decisions in some of those cases; and in others, they actually form the grounds. Accordingly, some of the text writers, particularly Mr. Erskine, (both

in the larger and the smaller work,) have stated, that those are the grounds of the decisions; and it is needless to observe, that every one of those reasons is peculiar to the case of tutors-testamentary, and that no one of them has any place in the case of tutors-dative. It therefore should seem, that we are left with a dictum unsupported by decisions, and which rests not upon the reason supporting the other branch of the dictum as to tutors-testamentary. This leads to the entertaining of a very grave doubt, whether that unsupported dictum really is the law of Scotland. If the whole Court had been unanimous, I should have been slow to offer any opinion that might seem to call in question such a decision; but they are not unanimous;—a learned and experienced authority is found supporting the negative of that proposition. If, again, in default of judicial decision, and of a continuous and uninterrupted stream of authority of text writers, and of reason—if, in default of all this, one had found, upon resorting to the practice of the Court of Exchequer in issuing such orders of appointment, and dealing with such cases, when the fact happens of the decease or removal of one of the several tutors appointed, that it was clear and uniform, then I should have said, that all questions might practically be said to be excluded upon the authority of Lord Stair's dictum. But upon examining that practice, it does by no means appear clear that it exists at all. The question was very accurately framed by the Court of Session, but it is not very explicitly or distinctly answered. The King's Remembrancer certifies to the Court, that no instance is to be found of an application to the Court of Exchequer in such cases. But this we know, that of

No. 12.

7th April 1834.

SCOT v. STEWART.

the sixty odd cases in which tutors-dative have been appointed during the period, (within which, from the accidental destruction of the Exchequer books, we are enabled to institute the inquiry,) only eight of those cases are to be found which have neither the quorum clause, nor the sine quibus clause, nor the sine quo non clause, nor the words conjointly or conjunctly. To those cases, therefore, our inquiry must of necessity be confined; and I understand it to be stated, and not denied, but in terms admitted, that there is no one of those eight cases, in which we have any evidence that the decease had occurred, or that incapacity had supervened; so that, for any thing we can know to the contrary, in no one of those cases can the practice have been decided one way or the other. In order to make cases, in which the practice can give us light, two things must have occurred—first, a tutor-dative must have been appointed, without the word "jointly"—without the quorum clause—without the clause of sine quo non—otherwise the question does not arise; and, secondly, there must have been circumstances in which it could arise, namely, the fact of the decease or the removal having happened. If, in these cases, a vacancy had arisen, and no application had been made to the Court, the practice, to a certain extent, would have coincided with Lord Stair's dictum; but still the practice would have been imperfect. It would have been imperfect, because the Court itself would never have been resorted to upon the subject. Now, as this seems to be the only aperture through which one can expect any light to be let in upon this very important question, I am disposed to have recourse once more to the Court of Exchequer,

and to have a further examination made, as to whether or no there be any reason to suppose that, in one or two of those cases, the fact occurred, upon which alone the question could arise, namely, of a vacancy in the tutorial office. My opinion will depend very much, in one view, upon the result of that inquiry; that is to say, if I find the practice in those cases to have been such as is suggested, (but without any proof,) it would certainly very greatly obstruct me in the view which I am now disposed to come to, namely, to reverse the decision of the Court below upon this fundamental ground. It would certainly be very satisfactory if the rest of the case were such as to enable me to advise your Lordships to affirm the decision of the Court below, without raising this question at all; for it is always advisable, more especially in a Court of the last resort, and most especially of all in a Court which is deciding a case, more or less, on foreign jurisprudence, that we should avoid, unless there is a necessity for it, discussing and disposing of questions which do not come before us. But in this case, whatever opinion your Lordships might come to upon the second and third points which are made here, it is quite impossible to affirm the decision of the Court below, without at the same time carrying in its own bosom an adoption of the principle which is necessary to support that decision below; and therefore you cannot affirm upon the second and third grounds, without recognizing the principle, that the tutorial office, in the case of tutors-dative, survives, and therefore this would be a decision, for the first time here, of that point which has now, for the first time, been decided below, if not in the case of Baikie v.

No. 12.

7th April 1834.

SCOT *v.* STEWART.

No. 12.

7th April 1834.

SCOT v. STEWART.

Stewart. I do not understand that that point has ever been decided in the Court below in any case before Baikie v. Stewart, which is, however, identical with this case of Scot v. Stewart. Upon these grounds, therefore, I fear that it is impossible to withdraw from grappling with that difficulty and deciding that point; and being of that opinion, as at present advised, I shall beg your Lordships to adopt the course I have suggested, of inquiring further with respect to the practice, as far as there is any likelihood of gaining light upon that practice from the Court of Exchequer below. Should I continue to be of the same opinion — for unless the practice shall be certified from the Court of Exchequer to be such as it does not appear to be at present—I shall be disposed to advise your Lordships to reverse the judgment of the Court below. I need hardly add, having stated it so repeatedly, that all reason is most clearly and decidedly against the doctrine that the office of tutor bestowed by the Court, exercising the royal functions in this respect, upon one individual, propter dilectum personæ, in conjunction with another, may be bestowed upon that other, upon whom alone they never would have dreamt of bestowing it. They may appoint the mother, from delicacy towards her, and from respect towards her feelings, or from a wish that she may interpose where it may be expedient, with a view to the benefit of the infant; and even if it is not from respect to her feelings, it may be with a view to that aid, nurture, and other maternal assistance which the child may derive the benefit of during the early stage of infancy; but with her there may be added another in the more manly office of tutor,

which a man only can execute with success and with advantage. The mother may well continue to be the tutrix during the period of the child deriving that aid from her to which I have referred, and yet may ill continue to be the tutrix after others have been withdrawn by their decease or incapacity. The office of tutor is in its very nature joint, whether the words of junction be used or no; and the party deceased may be the very party upon whom principally, in the vast proportion of cases, the Court devolved the exercise of those functions, and the party to which it looked, and not to the other. It is perfectly clear that there is a great difference between this case and that of tutors-testamentary; because there, regard being so constantly and exclusively had to the will of the parent—the will of the parent being, according to the civil law (and which is the foundation of the whole of the Scotch law upon the subject), the governing rule of the Court, it is followed into all its consequences and ramifications; and accordingly that is the point upon which these cases, relied upon by Lord Stair, are all built; namely, that the ultimate decision and choice by the father is to be preferred, in all cases where any portion of it remains, and where even one part of it remains, though the other part is taken away. Though you may say non constat that he would have appointed one, if the other had not been added, yet it was for him to state the difference—it was for him to state the jointure—it was for him to say sine quo non, or sine quibus non; and as he has not said so, the Court will assume that he preferred even one of those, if all could not be had, to any other person whom the law might appoint, or whom the Court might appoint. Upon these grounds I shall be disposed (un-

No. 12.

7th April 1834.

SCOT *v.* STEWART.

less the practice shall be found to be otherwise than there is reason to suppose that the inquiry will show it to be) to advise your Lordships to reverse the decision of the Court below. This supersedes the necessity of my entering upon the other two branches of the case. I think, even if the first preliminary question could have been got over on the part of the respondent, and in support of the judgment, I should have very great doubts. But it is unnecessary for me to broach that question. It is a case of very great difficulty,—it is admitted by the Court below to be surrounded with difficulty,—it is admitted, that, even if the tutorial office shall be allowed to have survived, the questions that remain, so very far from being clear, are subjects of very great difficulty. That being the case, perhaps, had it not been for the other opinion which I am disposed to hold upon the preliminary fundamental question, I might have been inclined to say, that there was no sufficient ground for reversing upon these second and third points; for, considering that our views in this country, in these matters, exceedingly differ from some of the views that appear to have guided their Lordships, that, perhaps, would not be a sufficient ground for reversing the decision. But I am relieved from the necessity of entering into those second and third branches of the case, by the very strong opinion which I have come to reluctantly, of differing from the majority of the Judges of the Court below.

The House of Lords ordered and adjudged, That the several interlocutors complained of in the said appeal be and the same are hereby reversed: And it is declared,

That the tutory expired with the death of Thomas Strong, one of the tutors, and that the survivors did not take the office: And it is further ordered, That, with this declaration, the cause be remitted back to the Court of Session in Scotland, to proceed therein as shall be consistent with this judgment.

No. 12.

7th April 1834.

SCOT *v.* STEWART.

GEORGE W. POOLE—, Solicitors.