fall to be allowed to M'Kechnie for trouble in recovering this fund.

LORD NEAVES absent.

The Court pronounced the following interlocutor:—

"Before answer, allow the reclaimer to lodge in process a statement of any claim he may have for time, trouble, and expense in connection with the action of damages for slander at his instance against Messrs W. & J. Mutter."

Counsel for Petitioner (Respondent) — W. A. Brown. Agents—

Counsel for Respondent (Reclaimer)—Dean of Faculty (Watson). Agent—Ronald, Ritchie, & Ellis, W.S.

Tuesday, November 16.

FIRST DIVISION.

[Lord Craighill.

OYSTON *v.* TURNBULL.

Process—Agent and Client—Mandate.

In an action of reduction the preliminary defence was stated that the action had been raised and carried on without the authority of the pursuer, who was resident in England. A mandate was produced, signed by the pursuer and duly tested, appointing the agent conducting the case to be her law-agent in Scotland, with authority to raise such proceedings as he might think necessary. There was no averment of forgery nor of withdrawal of the mandate before the action was raised. The Court repelled the defence.

Process—Advocate—Implied Mandate.

The presumption of authority raised by the appearance of counsel for a party to a cause amounts almost to a *presumptio juris et de jure*, and can only be rebutted by a disclaimer.

This was an action of reduction at the instance of Mrs Beatrix Scott or Oyston, residing at 21 Carter Street, Sunderland, widow of John Oyston, sometime shoemaker in Sunderland, against Mrs Grace Dunsmure or Turnbull, residing at Buckenham Hall, Brandon, Norfolk, widow of William Barclay David Donald Turnbull, advocate and barrister-at-law, sometime residing at Stone Buildings, Lincoln's Inn, London. The pursuer sued for reduction of certain deeds which she alleged she had been induced to execute by fraud and circumvention, and when in a weak and facile state of mind. The defender denied the pursuer's averments and stated as a preliminary defence—"The present action has been instituted and is being carried on without the authority of Mrs Oyston, in whose name it has been raised. In fact it has been raised and is being carried on contrary to her express desire." The defender's first plea in law was—"The present action not being authorised by Mrs Oyston, it ought to be dismissed, and her pretended agents be found liable in expenses."

The pursuer produced (1) a letter of appointment to her agent as follows—"Sir, I, Mrs Beatrix Scott or Oyston, residing in Sunderland, widow of the late John Oyston, sometime Shoemaker in Sunderland, afterwards residing at No 1 Tarvit Street, Edinburgh, hereby nominate and appoint you my law-agent in Scotland, and authorise and empower you to raise such proceedings as you may deem advisable for the purpose of enforcing my claim to the succession of William Turnbull of Fenwick, Crailing, and Briery Yards, in the county of Roxburgh, who died on 20th December 1840, and of Thomas Turnbull his son, a lunatic, who died on 15th October last, and to reduce all deeds granted by me in prejudice of my rights to and in favour of Mrs Grace Dunsmure or Turnbull, and generally to institute and follow forth such proceedings as you may think necessary on my behalf. And I hereby revoke and recal all mandates and appointment of agents in Scotland prior to this date.—In witness whereof I have hereunto set my hand and seal, and subscribed this letter of authority, written by Lewis William Michie, clerk to T. & W. A. M'Laren, W.S., Edinburgh, at Sunderland, upon the 23d day of March 1875, before these witnesses, Francis Marshall Bowey, solicitor, and George Jackson, ship and insurance broker, both in Sunderland." And (2) a mandate to her agent, as follows—"Sir, I, Mrs Beatrix Scott or Oyston, sometime residing at No. 1 Tarvit Street, Edinbnrgh, now at No. 21 Carter Street, Sunderland, widow of John Oyston, sometime shoemaker in Sunderland, in the county of Durham, do hereby authorise and empower and appoint you, as my mandatory, to apply to and receive from James Lawson Hill, W.S., Edinburgh, or from any other person or persons in Scotland in whose possession the same may be, all letters, memoranda, deeds, documents, or other papers belonging to me, and if necessary to raise and follow through any suit or process at law you may consider expedient for the recovery thereof, and upon each recovery to grant receipts therefor, which shall be as valid and effectual to the granters thereof as if the same had been granted by myself.—In witness whereof I have hereunto set my hand and seal, and subscribed these presents, written by James Cran Innes, clerk to T. & W. A. M'Laren, law-agents and conveyancers in Edinburgh, at Sunderland, the 4th day of August 1875 years, before these witnesses, Francis Marshall Bowey, solicitor, Sunderland, and William Anderson, clerk to the said Francis Marshall Bowey."

The second of these documents was granted a considerable time after the action was raised.

The Lord Ordinary *in initio litis* granted a commission for the examination of the pursuer, and the commission having been executed, the report was ordered to lie *in retentis*.

After discussion of the defender's plea, the Lord Ordinary issued the following interlocutor:—"The Lord Ordinary having heard parties' procurators, repels the first plea in law for the defender, and finds her liable in two guineas for the expense of this day's discussion; and upon the motion of the defender, allows her to reclaim against this interlocutor."

The defender reclaimed, and argued—If the report of the commission were looked at, it would appear that the pursuer never authorised the action, and did not desire that it should be proceeded with. The letter of appointment was only an implied mandate, and was removed by the averment that the action was carried on without authority. If the pursuer did not authorise

the action, the defender would have no proper decree against her.

The pursuer argued—The report of the commission could not be looked at before trial, and only then upon proof that the witness was unwell and unable to attend personally. A disclaimer, and nothing else, would entitle the Court to stop the action.

Authorities cited—*Noble* v. *Magistrates of Inverness*, 8th February 1825, 3 S. 516; *Thomson* v. *Candlemakers of Edinburgh*, 25th May 1855, 17 D. 774; *Cowan* v. *Farnie*, 4th March 1836, 14 S. 634; *Duncan* v. *Salmond*, 6th January 1874, 1 Ret. 329; *Lawsons* v. *British Linen Bank*, 20th June 1874, 1 Ret. 1065.

At advising—

Lord President—In this case neither party has, I think, ventured to impugn the proposition that a counsel's gown is a sufficient mandate, and duly authorises him to appear and represent his client. The only question is, how is this presumption to be met? It is hardly a *presumptio juris et de jure*, although very nearly amounting to that. I think it can only be met in one way, if the object be to stop the action, viz., by the production of a disclaimer. I should be averse to check the progress of any case except on this sole ground, which would necessitate an inquiry into the circumstances of the case. But here there is only a bare averment by the defender, and I must say, a very remarkable one. A mandate from the pursuer to her agent is produced; the fact of her residence out of Scotland has required this, as it was necessary, until a recent statute (Judgments Extension Act, 1868), that a party so resident should be represented by a mandatory sisted in the process. The mandate in this case is a very formal document; it is a probative instrument, tested according to Scotch law, and, further, signed, sealed, and delivered according to English forms. The averment of the defender is that this action has been raised and carried on without the pursuer's authority. I see no other way in which to construe this statement except on the footing that the mandate is a forgery, or was withdrawn before the action was raised. The averment is utterly irrelevant as it stands. What we are asked to do is to send it to probation. But if this mandate is not to be held as good, where is the objection to such documents to stop? On the ground of expediency, which is important in matters of practice, we cannot give effect to the contention of the defender, and upon principle it is still more inadmissible. The defender may communicate with the pursuer, and the latter may intimate a repudiation of the authority she has given, if she so chooses.

I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

Lord Deas—Any specialty which might have been founded on in this case on the ground of the pursuer being out of the kingdom, has been removed by the fact that her agent holds a mandate from her. No objection has been taken that this is not a probative document, or on any other ground. It is tested according to our law, and further, bears to be tested according to the law of England. I entirely agree with your Lordship that the contention of the defender can only be supported by a disclaimer from the pursuer. There is no instance, so far as I can remember, in which an objection to the progress of a case like the present has been sustained on any other gronnd. This plea in law is an entire novelty, and it would be very inexpedient to allow its introduction and give effect to it. It would enable any defender, however pressing the action, and however objectionable delay was, to interrupt its course, that he may be enabled to ascertain whether the pursuer has duly authorised it or not. I am of opinion that the Lord Ordinary's interlocutor must be adhered to.

Lord Ardmillan—I entertain no doubt. The presumption with which the law covers a counsel at the bar is that he represents his client under a sufficient mandate. I don't say that the presumption is *juris et de jure*, but it can only be rebutted by a disclaimer. In the absence of this, the power of counsel cannot be questioned. In this case we have more; there is a mandate completed according to the forms of both England and Scotland, which must be held to be quite conclusive. The pursuer's deposition has been taken, and we are asked by the defender to inquire into it; but it cannot be opened up or referred to at this stage, and must continue to lie *in retentis*. I think the interlocutor of the Lord Ordinary is right.

Lord Mure concurred.

The Court adhered.

Counsel for Pursuer—Fraser—Campbell Smith. Agents—Messrs T. &. W. A. M'Laren, W.S.

Counsel for Defender—Dean of Faculty (Watson)—Asher. Agents—Hill & Fergusson, W.S.

Tuesday, November 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MILLER & CO. *v.* POTTER, WILSON, & CO.

Ship—Liability as Shipowners for Advances to Master—Bond of Bottomry.

A firm of shipowners acting as agents for a navigation company, ordered a ship on commission, advanced money for her outfit, and employed a captain, who, under their direction, took her out to a distant port, there to await the instructions of the company. The ship was registered in name of the firm, though afterwards transferred in security for a loan to that of a bank. The captain on his voyage out, for sums advanced to him for necessary repairs, granted a bond binding himself, heirs, executors, and administrators, and also the ship with her tackle, &c., and the freight, and at the same time drew a bill on the firm for a similar amount. The navigation company having failed, the firm obtained a transfer from the bank, sold the ship and received her price. In an action against them at the instance of the holders of the bill, *held* (1) that as the captain was employed by, and received his authority from the firm, he had power to bind them, although not at the time the registered owners of the