the fact of the plaintiff's name appearing in a book. Baron Alderson interponed "appearing in a particular book. The question, of course, was not whether the name appeared in *a* book but in a certain book described--a book containing the names of the members of a particular society." Now the question here is not whether a person's name was in a certain document, but whether a certain document was in the terms alleged. Then Chief-Baron Pollock says this—which seems to me to end the matter—"There (in the decision of *Slatterie* v. *Pooley*, 10 L J.R. Ex. 8) it was held that a parole admission by a party to a suit is admissible as primary evidence against him even though relating to the contents of a written document; but there is a difference between proving an admission which has been made by the party and compelling him to make the admission contrary to the rules of the law of evidence."

Now here I hold that even upon these authorities—though it would be quite true if a person had put upon his record that he had signed a thing in these terms that might be held to prove the contents of the document — the pursuer had no right to say, "I propose to put you in the box to try to see if I cannot make you admit that you signed a document in these terms," the only admission being, not that he had signed a document in these terms, but that he had signed a document of the terms of which he was ignorant.

LORD PEARSON and LORD DUNDAS concurred.

The LORD PRESIDENT stated that LORD M'LAREN, who was absent at the advising, concurred in the judgment.

LORD KINNEAR was not present.

The Court disallowed the exceptions.

Counsel for Pursuer—Watt, K.C.—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for Defenders—Morison, K.C.—Macmillan. Agents — Ronald & Ritchie, S.S.C.

Saturday, March 16.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

SOUTAR *v.* MULHERN.

Reparation—Landlord and Tenant—Defective Drainage—Averments—Relevancy—Recoverable Damage.

A tenant suing his landlord for damages for loss caused to him by the defective drainage of his house, made averments to the effect that he had complained, and on the complaint the landlord had sent a plumber who had put matters right for the time but who had reported to the landlord that the drains would never work rightly and that new ones were required; that three months later the same thing occurred again; that again after three months he had to complain and certain work was done, assurances being given on each occasion that the drains had been put right; that six months later the burgh engineer called upon the landlord to put in new drains within six days, which he failed to do, and the tenant's child was taken ill with diphtheria within a month therefrom. As to damages he averred expense for medical attendance, drugs, and removal, and sought compensation for "great annoyance and discomfort, and also anxiety during the illness of his family."

The Court, *holding* that the cause was one in which there must be inquiry, but that the averment of annoyance, discomfort, and anxiety was irrelevant, *remitted* to the Lord Ordinary to *allow* a proof before answer of the items of damage set forth in a specification lodged by the pursuer, deleting therefrom a claim based on the general ill-health of his family.

Process—Jurisdiction—Court of Session—Exclusion of Jurisdiction — Value of Cause—Probable Amount to be Recovered —Court of Session Act 1810 (50 *Geo. III, cap.* 112), *sec.* 28.

A defender in an action of damages in the Court of Session argued, that if the claims which were clearly irrelevant were omitted, the amount which the pursuer, if successful, might recover, could not reach the minimum required for an action in the Court of Session, and that proof should therefore be refused.

The Court (*per* the Lord Justice-Clerk) in allowing a proof before answer—"We cannot consider the competency of an action by reference to what may come out at the proof."

On 6th June 1906 Thomas Garrow Soutar, commercial traveller, 282 Bonnington Road, Leith, brought an action against John Mulhern, whose tenant he had been in a house, 37 Meadowbank Crescent, Edinburgh, suing for £250. He, *inter alia*, pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault of the defender is entitled to reparation therefor."

The pursuer averred—"(*Cond.* 3) In or about the month of December 1904 the drains leading from the pursuer's house became choked. Waste water and sewage from the house occupied by the pursuer and from the houses above came up the drains into the pursuer's house, and also oozed out of the drains at the back of his house. The pursuer reported the matter to the defender's factor, who promised to have the drains put right and the nuisance removed. Shortly thereafter, on the instructions of the said factor, a plumber inspected the drains and cleared away the stagnant sewage, and the pursuer was assured by the defender's factor that the drains were all right. It is believed and averred, however, that the plumber re-

ported to the defender and his factor that the said drains would never work properly and that new drains were required. (*Cond.* 4) In March 1905 the drains again became choked, and the defender complained to defender, who promised to have the matter attended to without delay. Shortly thereafter a plumber, on the instructions of the defender, cleared out the drains, and it is believed and averred that the plumber again reported to the defender that new drains were required. In July 1905 the pursuer again complained to the defender and to his factor, and threatened to throw up his lease. Certain repairs were then executed by the defender, and assurances were given by the defender and his factor that the drains had been put right. Relying upon these assurances the pursuer was induced to continue his tenancy. (*Cond.* 5) In the beginning of this year the drains were inspected by the Burgh Engineer, and it is believed and averred that the defender was requisitioned by him to lay new drains within six days. This he failed to do. (*Cond.* 6) In February 1906 the pursuer's daughter Elizabeth became ill with diphtheria. The said illness was caused by the insanitary condition of the said drains for which the defender is responsible. It was the duty of the defender to keep the house in a sanitary and habitable condition. The means adopted by the defender to remove the nuisance, viz., by repairing the old drains, were insufficient. The defender had been informed by the plumber and knew that the drains could not be properly repaired, and it was his duty to lay new drains as suggested by the plumber and requisitioned by the Burgh Engineer. The defender never had the drains put right or the house put in a sanitary condition, and the assurances given by defender and his factor that the drains were all right were unwarranted, and given in the knowledge that their plumber had told them the drains would never be right until the old drains were replaced by new drains. (*Cond.* 7) In consequence of the condition of the said drains the pursuer has suffered great annoyance and discomfort, and also anxiety during the illness of his family. In addition to expenses incurred in obtaining medical advice and attendance and in providing drugs, &c., he has incurred considerable expense in connection with his removal to another house. For the annoyance, anxiety, and loss thus occasioned he considers the sum sued for reasonable compensation."

The defender, *inter alia*, pleaded that the pursuer's averments were irrelevant and insufficient to support the conclusions of the summons.

On 26th November 1906 the Lord Ordinary (MACKENZIE) allowed a proof before answer.

Opinion.—"After considering the cases cited and the full argument submitted by Mr Watson, I am of opinion that this is a case in which there must be inquiry.

. . . [*His Lordship examined the averments.*] . . . "It may be that on the proof the defender may be able to show he was not to blame, but as I read the record the averments amount to a case of defects which repair would not remedy, existing to the knowledge of the landlord, who nevertheless gave an assurance that the drains were all right. This seems to make the present more like the cases of *M'Nee and Others* v. *Brownlie's Trustees*, 26 S.L.R. 590; *Shields* v. *Dalziel*, 24 R. 849; and *Caldwell* v. *M'Callum*, 4 F. 371, than the cases of *Henderson* v. *Munn*, 15 R. 859; *Webster* v. *Brown*, 19 R. 765; *Baikie* v. *Wordie's Trustees*, 24 R. 1098; and *M'Manus* v. *Armour*, 3 F. 1078. It may be that it may turn out on the evidence that such an assurance was given to the pursuer that he was not bound to leave the house.

"The pursuer's averment of damage is this:— . . . [*Quotes Cond.* 7.] . . .

"The pursuer may have difficulties if it comes to the question of damages, but looking to the interlocutor in *Chalmers* v. *Dixon Limited*, 3 R. 461, at p. 468, I am not prepared to throw out as irrelevant the items mentioned in the first sentence of Cond. 7.

"I shall accordingly allow a proof before answer."

The defender reclaimed.

The pursuer in the course of the discussion lodged in process the following "specification of pecuniary loss":—

"1. *Illness of his Daughter Elizabeth.*

(*a*) Medical advice and attendance .	£2	10	0
(*b*) Chemist's account for drugs, disinfectants, &c.	2	0	0
(*c*) Cabs removing Elizabeth from hospital at Colinton . . .	0	5	6
(*d*) Convalescence expenses—removing her to Biggar—expenses there of board, &c., for 6 weeks at £1, 10s. per week . . .	9	0	0
Fares to and from Biggar, cabs, &c., for herself and travelling companion	1	0	0
Since said illness Elizabeth has been in constant ill-health, and this has necessitated further medical attendance, medicines, &c., up till the end of 1906, when owing to the state of her health she has been removed to the Royal Infirmary to be treated for St Vitus' Dance. She is at present there, and the pecuniary outlay occasioned thereby to the pursuer amounts to at least	5	0	0
(*e*) Fares, cabs, and incidental expenses incurred by the pursuer in connection with three visits to Biggar to see his daughter during her convalescence . .	3	0	0

"2. *Illness of Three Members of his Family.*

During the winter of 1905-6 three other children, viz., Thomas Yarrow and Minnie and Rita suffered intermittently from sore throats, headaches, and general ill-health, due as the doctor is now of opinion to the condition of the drains. An

Carry forward, £22 15 0

Brought forward £22 15 0
account was thereby incurred to Dr Murray, 1 Brandon Street, amounting to 0 10 0
And for medicines, amounting to 3 0 0
Two of said children, viz., Thomas Yarrow and Minnie, had to be sent to Biggar to recuperate for three weeks. Their board amounted to 9 0 0
And fares and cabs, &c., amounted to 1 0 0

"3. *Expenses of Removing.*

(*a*) As soon as the pursuer had ascertained that the drains of the house were in a dangerous state and had occasioned the illness of his daughter Elizabeth and the other children, he was forced at once to look out for another house. He could not do this at leisure nor (owing to the time of the year) in the evenings, and was forced to find a house and make all arrangements during business hours. The pecuniary loss in his business thereby occasioned to him amounted to at least 10 0 0

(*b*) The cost of removing from 37 Meadowbank Crescent to 282 Bonnington Road amounted to 7 10 0

(*c*) The pursuer was three days from work in connection with same, including loss of 5 0 0

£58 15 6"

Argued for defender (reclaimer)—The averments were irrelevant as they set forth no fault on the part of the landlord—*Baikie* v. *Wordie's Trustees*, July 14, 1897, 24 R. 1098, 34 S.L.R. 818; *Henderson* v. *Munn*, July 7, 1888, 15 R. 859, 25 S.L.R. 619; *M'Nee* v. *Brownlie's Trustees*, June 24, 1889, 26 S.L.R. 590; *Forbes* v. *Ferguson*, February 21, 1899, 7 S.L.T. 293—and as they showed that the tenant had accepted whatever risk there might be and had stayed on—*Smith* v. *Maryculter School Board*, October 20, 1898, 1 F. 5, 36 S.L.R. 8; *Webster* v. *Brown*, May 12, 1892, 19 R. 765, 29 S.L.R. 631; *Armour* v. *M'Kimmie's Trustees*, November 23, 1899, 2 F. 156, 37 S.L.R. 109. *Shields* v. *Dalziel*, May 14, 1897, 24 R. 849, 34 S.L.R. 635, was distinguished, in that there the tenant received a definite assurance, which was however unfulfilled. The averments were also irrelevant in that they set forth no recoverable damage. Anxiety did not form, and had never been held to form, a ground of damage. Anxiety caused by a relative's illness, even assuming the illness was due to the defender's fault, was too remote from the alleged fault to be a ground of damage—*Smith* v. *Johnson & Company*, unreported but referred to in *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, at 61. Mere annoyance and discomfort were also irrelevant, at anyrate when so generally averred. *Chalmers* v. *Dixon*, February 18, 1876, 3 R. 461, 13 S.L.R. 299, on the interlocutor in which the Lord Ordinary relied, was quite a different case, the nuisance being inflicted on outsiders who could not escape. Here the tenants could have removed at any time and escaped the alleged nuisance. As to the cost of removal and medical expenses since, anxiety, etc.—the principal stated ground of damage—was irrelevant, the Court should not allow the action to proceed, for the costs of removal and medical expenses could not in any reasonable view justify the action being brought in the Court of Session—*Baikie* v. *Wordie's Trustees, cit. sup., per* Lord Young; *Henderson* v. *Munn, cit. sup.*; *Forbes* v. *Ferguson, cit. sup.* [It was in consequence of this argument that the pursuer put in process the specification above referred to. After it was lodged the defender argued]—Head 2 of the specification was irrelevant. There were no averments on record for it. Of head 1, (*a*), (*b*), (*c*) were relevant but overstated, (*d*) and (*e*) were irrelevant. Of head 3, (*a*) and (*c*) were irrelevant. Consequently there was no reasonable chance of the pursuer recovering £25, and the action was incompetent. Just as the criterion of the competency of an appeal for jury trial was whether the pursuer could be reasonably entitled to a verdict of £40, being the minimum amount prescribed by the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 73, and the Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 40—*Sharples* v. *Yuill & Company*, May 23, 1905, 7 F. 657, 42 S.L.R. 538; *Dawson* v. *Stewart & Shaw*, June 8, 1905, 7 F. 769, 42 S.L.R. 621—so here the criterion of the competency of the action was whether the pursuer could reasonably recover more than £25, the minimum prescribed by the Court of Session Act 1810 (50 Geo. III, cap. 112), sec. 28.

Argued for pursuer (respondent)—1. The case was clearly relevant. Fault and breach of contract on the part of the landlord were averred, and that the tenant had been induced to stay on by his representations. The averments of damage were relevant, and he was entitled to have them remitted to proof. 2. The cases of *Sharples* (*sup. cit.*) and *Dawson* (*sup. cit.*) were under another Act, and had no bearing whatever on the present case. The only criterion of competency was whether the action concluded for £25 or upwards.

LORD JUSTICE-CLERK—Upon the question of the competency of this action I have no doubt. We cannot consider the competency of an action by reference to what may come out at the proof. We must take the action as we find it.

As regards the relevancy of the pursuer's averments of damage, we are all agreed that the first sentence of condescendence 7 is irrelevant. As to the other items of damage, the pursuer has now put in a statement of pecuniary loss which he has suffered, as he alleges, owing to the circumstances condescended on in the record. The statement is divided into three heads, the second of which was hardly maintained to be relevant. As to the others, there may be a question as to some of the items, but I think the proper course is to recall the interlocutor of the Lord Ordinary and

remit to him to allow a proof before answer of the items specified in heads 1 and 3 of the statement, reserving all questions of expenses.

LORD STORMONTH DARLING, LORD LOW, and LORD ARDWALL concurred.

The Court recalled the interlocutor appealed against, and remitted to the Lord Ordinary to allow the parties a proof before answer of the items specified in heads 1 and 3 of the specification. . . .

Counsel for the Pursuer (Respondent) —G. Watt, K.C.—R. S. Brown. Agent—Robert M. Scott.

Counsel for the Defender (Reclaimer) — Solicitor-General (Ure, K.C.) — W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, March 19.

SECOND DIVISION.

[Sheriff Court at Dumfries.

S.S. "FULWOOD" LIMITED *v.* DUMFRIES HARBOUR COMMISSIONERS.

(Reported *ante*, January 23, 1907, 44 S.L.R. 320.)

Expenses—Decree against "Harbour Commissioners" Unnamed in Summons—At Approval of Auditor's Report, Motion that Decree should be against them as Individuals—Refusal.

In an action brought in the Sheriff Court against "the Commissioners of the Harbour of Dumfries" (neither the summons nor the record in any way indicating who the Commissioners were), the defenders appealed to the Second Division of the Court of Session, which pronounced an interlocutor dismissing the appeal, finding the defenders liable in the expenses incurred in the Court of Session, remitting to the Auditor to tax and report. On the case coming up for approval of the Auditor's report, the pursuers moved the Court to grant decree against the Commissioners as individuals.

The Court *refused* the action, *holding* (1) that such a decree could not be granted against individuals who were in no proper sense before the Court; (2) that in any event the motion was made too late.

The case is reported *ante ut supra.*

The steamship "Fulwood" Limited brought an action in the Sheriff Court at Dumfries against the "Commissioners of the Harbour of Dumfries and the Navigation of the river Nith," to recover damages for injuries sustained by the "Fulwood" at Glencaple Quay. The summons did not mention the names of the Commissioners. The defences contained a statement that "the dues leviable by the defenders have all been assigned in security of borrowed money."

The Sheriff-Substitute assoilzied the defenders; the pursuers appealed to the Sheriff, who recalled the Sheriff-Substitute's interlocutor; the defenders appealed to the Second Division of the Court of Session; and on 23rd January 1907 their Lordships pronounced the following interlocutor:—"The Lords having heard counsel for the defenders on their appeal against the interlocutor of the Sheriff of Dumfries, dated 19th February 1906, Affirm the said interlocutor, with the following additions, viz., . . . With these variations, find in fact in terms of the findings in the said interlocutor: Therefore dismiss the appeal, of new grant decree against the defenders for the sum of £500 with interest as craved, and decern: Find the pursuers entitled to expenses in this Court, and remit to the Auditor to tax the account thereof, and of the expenses found due in the inferior court, and to report."

Upon the case appearing subsequently in the Single Bills for approval of the Auditor's report, the pursuers moved that decree should be granted against the Commissioners individually. The defenders opposed the motion.

Argued for the pursuers—From the defenders' own statements upon record it was plain that the Commissioners *qua* Commissioners had no funds. In such circumstances, rather than grant a decree which would be absolutely useless, the Court would grant decree against the defenders as individuals—see *Young, &c.* v. *Nith Commissioners*, July 6, 1876, 3 R. 991; 13 S.L.R. 636. Such a course was, moreover, in accordance with the ordinary practice of the Court, the harbour commissioners being neither more nor less than trustees, and trustees who litigate being, as was well settled as regarded liability to opponents for expenses, in the same position as if they were litigating as individuals—*Anderson* v. *Anderson's Trustee*, November 13, 1901, 4 F. 96, 39 S.L.R. 94 (Lords Adam and M'Laren); *Craig* v. *Hogg*, October 17, 1896, 24 R. 6, 34 S.L.R. 22. Especially was this so where, as here, they embarked in litigation knowing that the trust funds were exhausted. It was absurd to say that the motion was too late; the case was still before the Court, which was not being asked to do anything new, but merely to interpret the interlocutor they had already pronounced by explaining who the "defenders" actually were. A decree in the name of an agent-disburser was analogous. If the motion now made were not granted the pursuers would have to raise another action for their expenses, which was most undesirable.

Argued for the defenders—The motion was made too late. It ought to have been made when expenses were granted—*Warrand* v. *Watson and Others*, January 16, 1907, 44 S.L.R. 311. In any case, however, it could not have been granted—*Young, cit. supra.* The pursuers were suing a corporation and had called no persons individually in their summons, there being nothing before the Court to show who the Commissioners at the time of the raising of