a contract by which he was employed as factor on this estate, but then he goes on to say that he was required to do certain things which were not within the scope of his employment as factor. If that is his case it lies on him to aver specifically what the new contract was, just as he would have been bound to do had the new contract been an entirely different one from from that which had subsisted before. I agree with your Lordship in thinking that we must follow what was laid down by Lord President M'Neill in the case of *Latham* v. *Edinburgh and Glasgow Railway Co.* (4 Macph. 1084), where he says the pursuer must specify what the services were which he was engaged to perform, what the extra duties were which he did, and what was the remuneration that was agreed to be paid him for these extra duties. I do not think that his Lordship in the last clause intended to exclude claims made on the basis of a *quantum meruit*, but I certainly think he intended to say that the pursuer must make a distinct averment as to what his duties were under the original contract, what his new duties were, and what his remuneration for these new duties was to be, whether it was fixed at a certain sum, or was to be measured by the value of the services rendered.

I think the pursuer has failed to satisfy these conditions. I find no specific averment that what the pursuer did was not within the contract. I agree that it is impossible to lay down, from our own knowledge or from common knowledge, exactly what all the duties of a factor are on such an estate as that of Kilmuir in Skye, but we know enough to know that a factor has a variety of duties which may vary indefinitely on different estates and yet will all fall within the general description of estate management. Such an employment seems to me to be just what the Lord President meant in *Latham's* case when he spoke of the duties falling under a "general engagement."

If in fulfilment of such a general engagement as this some circumstances arise making it necessary for the proprietor to ask the factor to do something different from what he would in ordinary circumstances have been bound to do, I think—so long as the business is really something arising out of the ordinary work of the estate—the presumption is that he asks him to do it as factor, and if he does the work the inference is that he does it under the general engagement. But, on the other hand, if the business requires exceptional skill or experience, or is of a kind which he is not accustomed to do, it is quite open to the factor to say, "We must have a new understanding, and I must have some additional remuneration." But if that is so, then it lies on the factor to make it quite clear to his employer that these are the conditions on which he performs the work. The new contract must be clearly understood by both parties, otherwise there is no contract at all. There is nothing on record to show that the pursuer ever brought this before his employers, or that he did not do the alleged extra work in his ordinary capacity as factor. I therefore think that, following the case of *Latham*, we should adhere to the judgment of the Lord Ordinary.

LORD PEARSON concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Morison, K.C. — Munro. Agents — M'Leod & Rose, S.S.C.

Counsel for Defenders (Respondents) — Fleming, K.C.—Lyon Mackenzie. Agent—W. F. Haldane, W.S.

Saturday, March 16.

FIRST DIVISION.

[Lord Dundas, Ordinary.

DOWGRAY *v.* GILMOUR AND OTHERS.

Process — Proof — Secondary Evidence — Terms of Document Not Produced—Document in Custody of Crown Officials and No Diligence Applied for—Competency of Proving Terms of Document by Parole—Reparation—Slander.

In an action of damages for slander alleged to have been committed by signing and circulating a slanderous document, the actual document signed by the defenders was in the custody of the Crown officials, who had declined to produce it. The pursuer had made no attempt to recover it by diligence. At the trial he proposed to prove its terms by parole.

Held (disallowing exception to ruling of Lord Dundas, Ordinary) that as the pursuer had not exhausted the known and proper means of recovering the document in question he was not entitled to prove its terms by parole.

Process — Proof — Secondary Evidence — Terms of Document Not Produced—Admission by Defender on Record that He had Signed "a" Document but Alleged Terms Not Admitted — Competency of Putting Defender in Box to Prove Terms of Document Signed — Reparation — Slander.

In an action of damages for slander alleged to have been committed by signing and circulating a slanderous document, the defenders admitted on record that they had signed "a" document but denied that the document signed was in the terms alleged. The pursuer did not produce the document, and at the trial proposed to put the defenders in the witness-box and ask them if they had signed a document in the terms alleged.

Held (disallowing exception to ruling of Lord Dundas, Ordinary) that the pursuer was not entitled to do so, the

defender's admission being not that he had signed a document in the terms alleged, but that he had signed "a" document of the terms of which he was ignorant.

On 11th April 1906 John Dowgray, miner, Earnock Street, Burnbank, Hamilton, raised an action against the Rev. John Gilmour, minister of the United Free Church, Burnbank, Hamilton, and others, in which he sought decree against the defenders jointly or severally, or severally, for £200 in name of damages for slander.

In May 1904 an action had been tried in the Small Debt Court at Hamilton at the instance of one Cairns against one George G. Walker, in which Cairns was successful. In that action Dowgray gave evidence on behalf of Cairns. He averred that subsequent to such trial Walker had complained to the Lord Advocate and to the Procurator-Fiscal that he had committed perjury at the trial, but they had refused to take up the complaint, and "(Cond. 4) Notwithstanding this, in or about the month of December 1905, when a new Lord Advocate had been appointed, the defenders, acting in conspiracy and complicity with the said George G. Walker, prepared, or caused to be prepared, signed, and forwarded to the Lord Advocate a document which bore to be a '*Crimen falsi* petition,' and which contained the following:—*Crimen falsi* petition by George G. Walker, Glenlee Cottage, Burnbank, to the Lord Advocate, House of Commons, craving that criminal proceedings be taken against John Cairns, John Dowgray . . . for having been guilty of the crime of conspiracy, aggravated by wilful and corrupt perjury committed in Hamilton Small Debt Court, 20th May 1904.' This document was signed by all the defenders, and was thereafter hawked about Burnbank and surrounding district at the instigation of the defenders for the purpose of getting additional signatures, and did in fact get many more signatures on the strength of their (the defenders) having signed the said document. . . . The statements made by the defenders in the said document thus have become widely known to and been much discussed amongst the inhabitants of Burnbank and district."

In answer, the defenders stated—"(Ans. 4) Admitted that the defenders, at the request of the said George G. Walker, signed a document which he presented to them in or about December 1905. The said document is referred to for its terms. *Quoad ultra* denied. . . . With regard to the signing of the document complained of, explained that the said George G. Walker called upon the defenders and asked them to sign a petition, which he represented to them as being a petition to the Lord Advocate to have a rehearing of the said action, or an inquiry with regard thereto. The defenders adhibited their signatures on this understanding, and none of them read or was aware of the heading thereof, or that it contained any allegation against the pursuer. In so signing the defenders acted innocently and in good faith, and in the belief that they were merely assisting the said George G. Walker to obtain an investigation of a matter with regard to which he represented himself as having a grievance. They had no knowledge that the heading of the petition contained any statements reflecting upon the pursuer, and had they known that it did so they would not have adhibited their signatures."

The case was tried on 1st November 1906 before Lord Dundas and a jury on the following issue—"Whether in or about the month of December 1905 the defenders subscribed a letter or document in the terms contained in the schedule hereto annexed, and whether the said letter or document was, at their instigation or with their consent and approval, circulated in the district and submitted for subscription to . . . or one or more of them, and whether the said letter or document is of and concerning the pursuer, and is false and calumnious, to his loss, injury, and damage? Damages laid at £200 sterling."

[The document quoted above, Cond. 4, was printed in the schedule.]

At the trial the document signed by the defenders was not produced. It appeared that the Crown Authorities, to whom the pursuer had written asking for its production, had declined to produce it, but the pursuer had made no attempt to recover it by diligence. Counsel for the pursuer proposed to prove the contents of the document by parole. Counsel for the defenders objected to the proposed line of evidence in respect (1) that it was an attempt to prove by parole the contents of a confidential document which had been sent to a public officer, and production of which was refused by him; and (2) that it was an attempt to prove by parole the contents of an existing written document which was not produced. The objection being sustained, exception was taken. (*Exception* 1).

Counsel for pursuer then proposed to put one or more of the defenders in the witness-box and ask him or them whether he or they had signed a document in the terms printed in the schedule. Objection being taken and sustained, pursuer's counsel excepted. (*Exception* 2).

Counsel for the pursuer having stated that he could not compatibly with the above rulings, prove the alleged slander, his Lordship directed the jury to return a formal verdict for the defenders. Exception was taken to the direction. The jury returned a formal verdict for the defenders. A bill of exceptions was taken.

At the hearing on the bill:—Argued for pursuer—(1) The document in question being inaccessible the pursuer was entitled to lead secondary evidence of its terms—Dickson on Evidence, i. 236, 239; Taylor on Evidence (10th ed.), sec. 457 (p. 349), citing *Doe* v. *Ross*, 1840, 10 L.J. Ex. 201 (7 M. and W. 102); *Doe* v. *Clifford*, 1847, 2 C. & Kir. 448. Reasonable means had been taken to get the document, and that entitled the pursuer to prove its terms by parole—*Clark* v. *Clark's Trustees*, November 30, 1860, 23 D. 74. The record and issue had been laid before the Lord Advocate with a request

for the document, but production was refused, and in these circumstances a diligence for its recovery would have been unavailing—*Arthur* v. *Lindsay and Others*, March 8, 1895, 22 R. 417, 32 S.L.R. 334. (2) The pursuer was entitled to call the defenders as witnesses and to ask them if they signed the document printed in the schedule, the document actually signed being irrecoverable—Taylor on Evidence, sec. 410 (p. 318). It was not necessary that the document should be absolutely lost; it was enough if it were practically so. The admission of each defender could only be evidence against himself, but an admission by each in the witness-box would entitle the pursuer to succeed, no issue having been taken in justification—*per* Lord Mure in *Ross* v. *M'Kittrick*, December 17, 1886, 14 R. 255, 24 S.L.R. 190.

Argued for defenders—(1) The Lord Ordinary was right. The issue was adjusted on 6th June 1906 and no steps were taken by the pursuer to recover this document till within eight days of the trial, so that in any case the pursuer could not have used it. No diligence was asked for. All that the pursuer did was to write to the Crown Office. That was not enough. No doubt he subsequently enrolled for an order on the Lord Advocate to produce it, but the motion was not intimated to the Lord Advocate, and, moreover, was made too late, and had been rightly refused by the Lord Ordinary. The defender's objection was timeously made at the trial, for it was not necessary that a writing complained of should be produced at the adjustment of issues—*Ellis* v. *National Free Labour Association*, May 12, 1905, 7 F. 629, 42 S.L.R. 495. Crown papers had been asked for before in similar cases and refused, and secondary evidence of their contents was then inadmissible—*Little* v. *Smith*, December 9, 1845, 8 D. 265; February 17, 1847, 9 D. 737. (2) The Lord Ordinary had rightly refused to allow the pursuer to prove the terms of the document by means of the defenders. That was only another way of trying to prove the terms of an existing document by secondary evidence. The fact of competent evidence being wanting was no reason for admitting incompetent evidence—*per* Lord Pitmilly in *Craig* v. *Marjoribanks*, March 13, 1823, 3 Murray's Rep. 341, at p. 347. Reference to a writing for its terms was not an admission of the existence of the writing—*Pringle* v. *Bremner and Stirling*, May 6, 1867, 5 Macph. (H.L.) 55, 4 S.L.R. 18. As to what admissions might be used in evidence, reference was made to *A. S.*, February 16, 1841, sec. 22. [LORD PRESIDENT—Is not the admission of a witness evidence as against himself whether there be any document in existence or not? I refer to the judgment of Baron Parke in *Slatterie* v. *Pooley*, 1840, 10 L.J.Ex. 8, cited by Taylor on Evidence, sec. 410, p. 318.]

At advising—

LORD PRESIDENT—This is a bill of exceptions against two rulings of Lord Dundas in a trial which took place at the instance of John Dowgray against the Rev. John Gilmour and others.

It is very necessary first of all to see what was the precise issue that was being tried. The pursuer alleged in his action that the defenders had prepared a document which they called by a name which certainly was something new to me, and which I do not think is a *nomen juris*. They called it a "*crimen falsi* petition," and they said that this *crimen falsi* petition contained a slanderous statement about the pursuer, in that the petition represented that he had been guilty of perjury, and that this petition was intended to be presented to the Lord Advocate, and was hawked about the district for signature. Now, there was a discussion as to what issue was to be allowed on these facts, and the issue as finally adjusted—which of course we must take as properly adjusted, and in saying that I am not for a moment casting any doubt on it being properly adjusted, for I think it was properly adjusted—the issue allowed was—"Whether . . . [*quotes supra*] . . . subscription" to a number of people named.

Now the gravamen of the matter which has to be proved to entitle the pursuer to an affirmative verdict on this issue is divided into two heads. It must first be shown that the defenders "subscribed a letter or document in the terms contained in the schedule hereto annexed." I call special attention to that because the defenders in their defences admit that they signed some document which was presented to them, but they entirely fail to admit, and indeed deny, that they signed a document in the terms in which the pursuer says it was framed. They say they signed a document which they believed was a quite innocuous document. Therefore the first point the pursuer has to prove is that the document which the defenders signed was a document in the terms contained in the schedule annexed to the issue. After that he has to prove that they circulated it in the district and submitted it for subscription by various people.

When the trial came on the pursuer was put in the box, and it became apparent from a question his counsel put to him that counsel was going to ask him about the contents of the document. To that the defenders' counsel objected, and that raised the matter of the first exception. I am reading now from the bill of exceptions—"At this stage the defenders' counsel pointed out that the document containing the alleged slander was not produced. Pursuer's counsel stated that this was so; that the Lord Advocate, in whose custody the document was, had declined to produce it or to allow it to be produced." He then said that he proposed under these circumstances to prove its tenor and contents by parole. The learned Judge, upon that statement of the facts, refused to allow the question to be put, upon the ground that it was an attempt to prove by parole the contents of an existing written document which was not produced.

Now the first question for your Lord-

ships is whether that direction was correct. I am clearly of opinion that it was. There is nothing better settled in the law of Scotland than that you are not entitled to prove the contents of a document by parole when the document itself is extant and can or may be produced. Now the pursuer's counsel stated, as I have said, that the Lord Advocate had declined to produce the document, but it seems to me that where the pursuer failed here was that he had not taken the proper and only real steps for seeing if he could not make the Lord Advocate produce it. He had written a letter to the Crown Office asking for the document and that request was refused. The next step should have been to apply for diligence in the ordinary way. It is quite true that if a diligence had been applied for the Lord Advocate would have been entitled to appear, and doubtless would have been represented by one of his deputes, who would have come to the Court and said what the Lord Advocate was to do, and it is equally clear that if the Lord Advocate had appeared and said that, considering the whole circumstances he though tit was not in the public interest that that document should be produced, the Court would probably not have ordered him to produce it. I think we had occasion to make some remarks upon that the other day. At any rate the matter is well settled; the Court has, no doubt, the right to order the Lord Advocate or anyone else to produce documents that are within his power to produce, but it would require very strong circumstances to induce the Court to order the Lord Advocate to produce a document which he said it was against the public interest to produce. But all that depends on the Lord Advocate and on what he says if he comes to the Court; and if he had come in this case I cannot know what he would have said. But what he would have said is not to be ascertained simply by writing to the Crown Office and asking it to give up a document, for anyone knows that the Crown does not give up documents to anyone who chooses to ask for them. The Lord Advocate might have refused to part with it, but he might have come, or made some-one else come, and produce it to the Court. But all that is speculation. The point is that the pursuer did not take the steps he should have taken, and as he has not taken them I think the learned Judge who presided at the trial had no other option but to pronounce the order he did.

That matter being ended, counsel for the pursuer said he proposed to put one or more of the defenders in the witness-box and to ask him or them the question whether or not he or they had signed a document in the terms printed in the schedule, and the learned Judge said he would not allow that question to be asked; and that raises the second exception. Now the learned counsel for the pursuer relied very strongly on a passage in "Taylor on Evidence" as to an admission by a party being good evidence though it was about the contents of a document, and the case on which he relied was *Slatterie* v. *Pooley* (10 Law Journal Reports, Ex. p. 8). I need scarcely point out that the decision of the Lord Ordinary on this second point was at first sight a corollary of what the learned Judge had already done in refusing to allow the tenor of the document to be proved by parole. At first sight it appears that his disallowing this question was simply repeating his former ruling. But then there is this matter of admission by a party which, it is said, introduced a distinction. At first when I heard it stated I had some doubts, owing to the high authority of the English cases, but I confess on consideration these doubts have entirely disappeared. In applying to English authorities for guidance on such a point it is necessary to keep in view two facts. The first is that the English law on such a matter to a great extent depends on the rules of Court, and that therefore makes a decision in the books a very dangerous authority to rely on, because we cannot pretend to familiarity with the English rules of Court. Nay more, it is almost impossible for us, as a mere matter of book learning, to know what were the rules in vogue at the date of certain decisions, and unless one does do that one cannot know on what the decisions really proceeded. The second is, that in a matter between party and party as to the question of a party's admission we have got something which the English Courts have not, and which goes very deeply into the matter—I mean a reference to the oath of the other party. That is part of our procedure, and must be taken into account. In England they have not got that, and there again that seems to me to discharge to a great extent the applicability of English authority in such matters. But further, though I have indicated that I approach English authorities on such a matter with some diffidence, yet on the best examination I have been able to make I do not think the case of *Slatterie* v. *Pooley* (10 L.J.R. Ex. 8) would rule this matter. On the contrary, I think this case more resembles the equally important case of *Darby* v. *Ouseley* (25 L.J.R. Ex. 227), where the Courts, consisting of Chief-Baron Pollock and Baron Alderson, commented on *Slatterie* v. *Pooley* (10 L.J.R. Ex. 8). The question there in one sense brings up a point which is curiously analogous to the one here. The action was for libel, imputing to the plaintiff, a tide waiter in Liverpool, that he was a rebel and a traitor by reason of his being a Roman Catholic and a member of a Roman Catholic society for the conversion of England "by prayers and other means" to the Roman Catholic faith. Counsel proposed to ask the plaintiff whether his name was inscribed in a certain book—the book being the register of members of the society—that is to say, he wanted to prove it out of his own mouth that he was a member of this Roman Catholic society. The question was disallowed, and it came up before the judges in Exchequer Chamber. Counsel said the question proposed to be asked was not as to the form of a written document but as to a fact—

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-