building impinges upon the statutory 30 feet, and we cannot now help that, the remainder shall not do so." I hold they cannot take up that position now, and I cannot say that I do so with very much regret, because, the building having been already part completed, and extending within the 30-foot line for about three-fifths of its length, it is really futile to require the remaining two-fifths of its length, extending to about 40 feet necessary for the completion of the building to be set back from the line, which must continue to be kept by the building so far as it is already up.

I therefore think that the case may be disposed of without determining the larger questions to which I have adverted.

LORD MACKENZIE was not present.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

Counsel for Pursuers (Respondents)—Cooper, K.C.—W. J. Robertson. Agent—Sir Thomas Hunter, W.S.

Counsel for Defender (Reclaimer) — Solicitor-General (Anderson, K.C.) — Pitman. Agent—Thomas Carmichael, S.S.C.

Thursday, July 11.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

MELVILLE *v.* CUMMINGS.

Patent—Process—Reduction—Relevancy—Title to Sue—Concurrence of Lord Advocate—Jurisdiction of Court—Patents and Designs Act 1907 (7 Edw. VII, cap. 29), *sec.* 94 (3).

The Patents and Designs Act 1907, sec. 94 (3), enacts—"Proceedings for revocation of a patent shall be in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest with his concurrence, which concurrence may be given on just cause shown only. . . ."

A civil engineer, a member of a firm of reinforced concrete contractors, having obtained the concurrence of the Lord Advocate, brought an action in his own name for reduction of a patent relating to concrete. He averred that his firm did a large business in reinforced concrete, and that his, "the pursuer's business," was in danger of injury by the defender's threatening to take proceedings for infringement of the patent.

Held that the pursuer had, with the Lord Advocate's concurrence, a good title to sue in his own name.

Observed that the Court must decide the relevancy of the action, although the Lord Advocate had given his concurrence.

Opinion reserved as to whether the concurrence of the Lord Advocate was conclusive on the question of title to sue.

The Patents and Designs Act 1907 (7 Edw. VII, cap. 29) enacts—Section 25 (3)—"A petition for revocation of a patent may be presented—(*a*) by the Attorney-General or any person authorised by him. . . ." Section 94 (3)—". . . [*quoted in rubric.*] . . ."

Alexander Melville, civil engineer, of the firm of Melville & Dundas, reinforced concrete contractors and engineers, 30 George Square, Glasgow, *pursuer*, brought an action for reduction of a patent against Robert Augustus Cummings, of Pennsylvania, U.S.A., *defender*. The Lord Advocate granted his concurrence on 31st July, and the summons was signeted on 1st August 1911.

The pursuer averred, *inter alia*—"(Cond. 1) The pursuer is Alexander Melville, civil engineer, of the firm of Melville & Dundas, reinforced concrete contractors and engineers, 30 George Square, Glasgow, who do a large contracting business in reinforced concrete constructions. . . . (Cond. 2) The defender is patentee of the alleged invention described in the letters-patent mentioned in the summons. . . . [*In condescendence 3 the pursuer averred that the patent was invalid for the reasons therein set forth.*] . . . (Cond. 4) The said patent protects a process of manufacture of reinforced concrete which is directly in the line of the pursuer's business. The pursuer understands that the defender is threatening proceedings against any parties infringing his alleged rights under the said patent, and as the pursuer's business in Scotland is in danger of being seriously affected thereby, the present action for the revocation thereof has been rendered necessary in the interests of the pursuer's said business."

The defender pleaded, *inter alia*—"(2) The pursuer having no title or interest to sue, the action should be dismissed."

On 14th December 1911 the Lord Ordinary (ORMIDALE) sustained the second plea-in-law for the defender and dismissed the action.

Opinion.—"This is a short but an important point. I fail to see that the pursuer has set forth an interest and title, in respect that he has not stated that he is in any way carrying on a business which is affected by the existence of the patent.

"He describes himself as a civil engineer, and the firm to which he belongs as reinforced concrete contractors and engineers, who do a large contracting business in reinforced concrete construction. He says nothing about his carrying on any individual business. If he means by 'the pursuer's business' in cond. 4, the business of his firm referred to in cond. 1, then I think it was for his firm to sue the action, and as I read the record I find it difficult to understand why the firm should not have been the pursuers. The matter might be made perfectly clear and definite by a very slight amendment. As the record stands, I cannot hold that the pursuer has set forth a relevant averment of title and interest.

"I do not see how the Lord Advocate's concurrence can supersede the duty of the Court to deal with the record as laid before it.

"I must sustain the second plea-in-law for the defender and dismiss the action."

The pursuer reclaimed, and argued—The case should be remitted back to the Lord Ordinary for proof. The pursuer as an individual had a patrimonial interest which entitled him to sue, and the mere fact that his interest was that of a member of a firm could not disentitle him. Moreover, the Lord Advocate had granted his concurrence in terms of section 94 (3) of the Patents and Designs Act 1907 (7 Edw. VII, cap. 29), "on just cause shown," which proved that the pursuer had at any rate a good *primâ facie* title to sue. In England anyone whom the Attorney-General authorised to sue in terms of section 25 (3) (*a*) of the Act had a good title—Terrell on Patents (5th ed.), p. 251; *London County Council* v. *Attorney-General*, [1902] A.C. 165—and the concurrence of the Lord Advocate in a Scots case must have the same effect as the authorisation of the Attorney-General in an English case. *Lawrence* v. *Comptroller-General of Patents*, 1910 S.C. 683, 47 S.L.R. 524, was also referred to.

Argued for the defender and respondent—The Lord Ordinary was right in dismissing the case, for the pursuer had no title to sue. The Lord Advocate's function, in terms of section 94 (3) of the Patents and Designs Act 1907, was merely to concur if he thought that the pursuer had a probable cause—*Gillespie* v. *Young, &c.*, July 20, 1861, 23 D. 1357 (*per* Lord Justice-Clerk at p. 1362). It was not for the Lord Advocate to decide whether the pursuer had a good title. That was a question for the Court. *Todd & Higginbotham* v. *O'Regan*, July 15, 1859, 21 D. 1320, was also referred to. The pursuer had no title to sue as an individual, since it was his firm and not he himself that had the interest.

At advising—

LORD JUSTICE-CLERK—This is in all respects a very peculiar case; I do not think I have ever seen anything like it. The pursuer, Mr Melville, who is a civil engineer, desires to attack the patent of the defender, the patent being one relating to the kind of work that the pursuer does in his business. So far as we can guess, he is in the firm of Melville & Dundas, reinforced concrete contractors and engineers in Glasgow, and they do a large contract business in concrete construction. Now that this gentleman, Mr Melville, is interested in matters relating to reinforced concrete construction, there cannot be any doubt, taking his averments to be facts, as we must do in considering the question of relevancy.

But then it is said that he has no title to sue this action, because he has revealed the fact that he is a member of the firm of Melville & Dundas. I am unable to understand how it can be maintained that that fact defeats his title. To begin with, it is not said, nor is it averred by the defender—which he could have done if it had been true—that "Melville & Dundas" is anything more than the name of an established firm. It is quite possible that the pursuer is the only partner in it, but why as a civil engineer interested professionally in reinforced concrete construction he should be excluded from suing the defender for the purpose of having a patent set aside because he belongs to a firm which does work of the kind to which the patent relates, I cannot understand. I think he may be held to have a perfectly substantial interest to set aside the patent; and he has gone to the Lord Advocate and has got the concurrence of the Lord Advocate, which, it is quite certain, can now only be given on cause shown. I presume that means cause shown as regards having some probable cause to attack the patent, and, as regards having right to raise an action, if it is an action that can be stated relevantly.

I am not to go into the question of the absolute right of the Lord Advocate to deal with such a matter to the exclusion of the jurisdiction of this Court; but I am very clearly of opinion that if a party brought an action which upon the face of its own condescendence was irrelevant, it would not be an answer to say that the matter had been inquired into by the Lord Advocate, and therefore the Court must hold it relevant. I think we would be perfectly entitled, if a case was not relevant, to throw it out as irrelevant. All that the Lord Advocate has done, after investigation, which we must assume he has made, is to grant his concurrence, and thereby put the pursuer in the position of being able to repel any objection raised on the ground that he has not settled with the Crown upon the matter. It is quite plain that the object of the concurrence of the Lord Advocate is to protect the Crown against actions being raised for the suppression of patents which the Crown has granted, if there are not reasonable or ostensible grounds for doing so.

I do not think I need to go into the matter any further. It is not a sufficient ground for holding that the pursuer, an engineer, has not got a title to sue a party who has a patent relating to the engineering business in which he practises his profession, whether alone or along with others, that in point of fact he carries it on at present under the firm name of Melville & Dundas either alone or with others. I do not think it is even stateable that if he is a member of the firm, the firm only can sue. He is in the exercise of his rights as a citizen who, being an engineer, has an interest to prevent a patent standing which does or may interfere with him in his business, whether in partnership with others or as an individual. I cannot understand the idea that he is to be excluded from taking up that position because he happens to be a member of a firm. Without going deeper into the question of the duties of the Lord Advocate and the privilege of

litigants, I am of opinion that the interlocutor of the Lord Ordinary is wrong and ought to be recalled.

Mr Maitland referred to the case of *Gillespie* v. *Young* (23 D. 1357) and to the observations made in it. What the Court decided there was that the Lord Advocate could not be held to have given his consent in terms of the Act. In terms of the Act the giving of his consent requires that he should have investigated the case. All that was done in that case apparently was that the party went formally with his summons in his hand to the chief clerk of the Lord Advocate, who wrote upon the summons—"Grants concurrence for Her Majesty's Advocate to the foregoing summons." That was following the form used in many cases in which the concurrence of the Lord Advocate is a mere formal matter in order to put things in shape, as, for instance, in petitions for breaches of interdict. But the observations of Lord Justice-Clerk Inglis in that case are very important as regards concurrence in such a case as this. His Lordship said—"The defender says that is not such a concurrence as is contemplated by the Act of Parliament. It is a mere formal concurrence; it does not pretend to be anything else; it is just the ordinary formal concurrence granted by somebody holding a general authority from the Lord Advocate, but it is not the concurrence which the Lord Advocate is directed to give or withhold upon consideration of the matter. Again, the pursuer rejoins to this, the only question into which the Court can inquire is whether the concurrence of the Lord Advocate has been given. Whether he has given it upon just cause shown or not is a question with which the Court has nothing to do. That is a matter touching the proper discharge by the Lord Advocate of his official duty, for which he is not responsible to this Court, but only to the Queen and to Parliament.

"It appears to me that there is a fallacy in this reply. It is quite true that if the concurrence of the Lord Advocate has been given, and if the fact of that concurrence being given is authentically proved to your Lordships, you have nothing to do with the conduct of the Lord Advocate in the administration of his department of the Government. That is quite true. You cannot inquire whether just cause was shown to him, or what cause was shown to him, or whether he required any cause to be shown, because he might be so well acquainted with the subject as not to require any cause to be shown, or he might think he was so well acquainted with the subject and so completely master of the merits of this patent or its demerits that he did not require any cause to be shown to him. And he might be right or wrong. But with all that your Lordships have nothing to do. I think if the Lord Advocate's concurrence is given, and if there is authentic evidence of that concurrence being given before the Court, your Lordships can inquire no further."

That is exactly the position in which we are as regards the concurrence of the Lord Advocate; we must assume that he made sufficient and satisfactory inquiry before he granted his concurrence. As I said before, if an irrelevant case was presented to us, the fact that the Lord Advocate concurred in it would not affect our decision, because we are bound to see that the proceedings which are brought before us in the form of a summons and condescendence are relevant; but as regards going behind the Lord Advocate and inquiring what he has done, that is out of the question, for the reasons expressed by the Lord Justice-Clerk in the case quoted.

Upon the whole matter, I am satisfied that no ground has been shown for sustaining the Lord Ordinary's judgment.

LORD DUNDAS—I am quite of the same opinion. I confess I have some difficulty in understanding the way in which the Lord Ordinary has dealt with this case. He holds that the pursuer has not set forth an interest and title to sue, because, while he is designed as a civil engineer "of the firm of Melville & Dundas," he says nothing about his carrying on any individual business. Apparently, if the firm had sued the Lord Ordinary would have been satisfied. Upon that I can only say that I think articles 1 and 4 of the condescendence set forth a quite sufficient statement of interest in the matter to satisfy the ordinary rules of pleading, especially as there is no averment made by the defender in any way to raise the point or to challenge a fuller statement as matter of pleading. The Lord Ordinary goes on to say—"I do not see how the Lord Advocate's concurrence can supersede the duty of the Court to deal with the record as laid before it." If his Lordship meant by that to affirm broadly that we have right in such cases to scrutinise the reasons for the Lord Advocate's concurrence, I should disagree with him. *Prima facie* this action is in perfectly good order, because the concurrence is granted, and I do not doubt that we are to presume that the concurrence was "given upon just cause shown." Whether there might be a case in which, even although the Lord Advocate had granted concurrence, the defender could satisfy us that we ought to throw the action out for want of title, it is not necessary here to decide. I can only say that I think it would require some very special case, which I do not at the moment figure. But I am quite clear that the present is not that case; and, for the reasons which your Lordship has more fully stated, I am for recalling the Lord Ordinary's interlocutor and remitting to his Lordship to allow a proof.

LORD SALVESEN—I am of the same opinion. Like Lord Dundas I desire to guard against laying down as an absolute rule that the mere fact of the concurrence of the Lord Advocate is conclusive on a question of title. I should require further argument before I was satisfied upon that point. No doubt one of the things which the Lord Advocate will consider is whether

the person who desires to reduce a patent has any interest to do so, and if he thought he had none he would be very slow to grant his concurrence. At the same time, just as in a matter of relevancy the Court must decide whether the case is relevant notwithstanding the Lord Advocate has thought that a relevant case for reduction had been presented to him, so it may also be that we have a duty to consider the question of title. On that matter, however, I do not wish to express any considered opinion.

LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Lord Ordinary and remitted to him to allow a proof.

Counsel for Pursuer and Reclaimer—J. R. Christie. Agents—Davidson & Syme, W.S.

Counsel for Defender and Respondent—Murray, K.C.—Maitland. Agents—Macandrew, Wright, & Murray, W.S.

Thursday, June 27.

SECOND DIVISION.

[Sheriff Court at Haddington.

DINGWALL *v.* BURNETT.

Contract—Breach—Retention—Numerous Stipulations in Contract with Deposit Directly Applicable to One—Claim to Retain Deposit Applicable to One Stipulation till Question of Damages Over Whole Contract Settled.

An agreement for the lease of an hotel contained a clause providing for the sale to the lessee of the furniture and fittings, and for consignation by the purchaser of £200 on deposit-receipt to account of the value thereof. The purchaser failed to carry out the agreement, and sued for delivery of the deposit-receipt. The vendor having refused delivery, on the ground that the purchaser had rendered himself liable in damages for breach of other clauses of the agreement, *held* that the purchaser was not entitled to delivery of the deposit-receipt until the vendor had had an opportunity of constituting his claim for damages.

Contract — Breach — Penalty — Liquidate Damages.

An agreement as to the lease of an hotel, containing various stipulations differing in importance, bound the parties "to implement their part of this agreement under a penalty of £50, to be paid by the party failing to the party performing or willing to perform, over and above performance." *Held* (1) that the £50 was not liquidate damages but penalty, and (2) that the measure of damages recoverable for breach of the contract was the amount of damage actually sustained, and was not limited to the sum stated in this penalty clause.

Johnstone's Trustees v. *Johnstone*, January 19, 1819, F.C.; *Hyndman's Trustees* v. *Miller*, November 21, 1895, 33 S.L.R. 359; and *Lord Elphinstone* v. *Monkland Iron and Coal Company, Limited*, June 29, 1886, 13 R. (H.L.) 98, 23 S.L.R. 870 (*per* Lord Fitzgerald), *commented on.*

David Dingwall, hotel manager, Glasgow, *pursuer*, brought an action in the Sheriff Court at Haddington against George Wilson Burnett, St George Stables, Dunbar, *defender*, in which he claimed (1) decree ordaining the defender to endorse and deliver to the pursuer a deposit-receipt for £200, dated 24th April 1911, and (2) payment of £58, 10s. The claim of the pursuer arose out of a minute of agreement between the pursuer, therein called the second party, and the defender, therein called the first party, dated 18th April 1911, the material clauses of which were as follows—"Whereas the first party is the proprietor of the St George Hotel, Dunbar, and has on his application *qua* proprietor received a seven days' licence in his own name for said hotel, for the year Nineteen hundred and eleven to Nineteen hundred and twelve, from the licensing authorities of the county of Haddington, in succession to the licence held by Mrs Craig, the present tenant of said hotel, and whose tenancy terminates at Whitsunday Nineteen hundred and eleven; and whereas the second party is desirous of becoming tenant of said hotel, it is hereby agreed as follows—*First.* The first party hereby lets to the second party (subtenants and assignees being excluded) the said hotel and pertinents, as presently possessed by Mrs Craig, for four-and-a-half years from and after the term of Martinmas Nineteen hundred and eleven, at the annual rent of Eighty pounds, payable half-yearly at the usual terms of Whitsunday and Martinmas, all conditional upon the granting of an application for a transfer of said licence presently held by the first party in favour of the second party at the statutory licensing court in October Nineteen hundred and eleven, which application the second party undertakes to duly lodge and follow forth. In the event of said application being refused, this agreement shall *ipso facto* come to an end. *Second.* In the event of said application being granted, the second party shall take over from the first party at mutual valuation, as at the said term of Martinmas Nineteen hundred and eleven, the furniture and fittings and stock of liquors, &c., belonging to the first party, which shall then be in the hotel. To account of the valuation price the second party hereby undertakes to consign within seven days from the date hereof, in the joint names of the first party and himself, the sum of Two hundred pounds, to be available to the party having right thereto as aforesaid. Failing the said sum being deposited as aforesaid within the time stated the first party shall have the option of terminating this agreement. . . . *Fourth.* The second party