form. But it was nevertheless, it seems to to me, sufficiently good as an ordinary summons of declarator and payment at common law. All that could be said against it was that it incorporated, although quite separably, an inappropriate conclusion for the rents of the lands, &c., during non-payment. But that, I consider, was in substance only a *pluris petitio*, and was therefore competently enough rectified by the pursuers' minute of restriction.

On the whole, therefore, I am of opinion the Lord Ordinary's interlocutor should be affirmed.

LORD PEARSON—I am of the same opinion as your Lordships.

The Court adhered.

Counsel for the Pursuers and Respondents—Dickson, K.C.—Macmillan. Agents—Davidson & Syme, W.S.

Counsel for the Defenders and Reclaimers—Craigie, K.C.—Munro. Agent—P. R. M'Laren, Solicitor.

Friday, December 21.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

PLOTZKERS *v.* LUCAS.

Process—Summons—Instance—Action on Behalf of Partnership at Instance of Whole Individual Partners—Existence of Partnership not Disclosed in Instance.

A note of suspension and interdict was presented at the instance of A, B, C, D, and E, "proprietors of the business 'Irish Linen Company.'" The respondent objected to the instance in respect that while on their statements the complainers were partners and acting on behalf of the partnership, the instance did not disclose that fact.

Held that the respondent was entitled to have that fact set forth in the instance, but that his objection was obviated by the pursuers substituting "carrying on business under the style of Irish Linen Company" for the words quoted.

Opinion (*per* the Lord President) that while a firm may competently sue in the names of the whole individual partners, an instance which merely enumerates the names of the partners without disclosing that the action is in respect of a partnership right is defective.

On 14th September 1906 a note of suspension and interdict was presented for "Marcus Plotzker, residing at 67 Exeter Road, Cricklewood, London; William Plotzker, residing at 4 Acomb Street, Greenhays, Manchester; Herman Plotzker, residing at 26 Row Lane, Southport; David Plotzker, residing at 311 Ecclefall Road, Sheffield, and Bernard Plotzker, residing at 5 University Avenue, Glasgow, proprietors of the business, 'Irish Linen Company'—complainers," against Hessel Lucas, carrying on business at 23 Nicolson Street, Edinburgh, under the name of "Irish Linen Company."

The respondent, *inter alia*, pleaded—"(1) The instance in this note is defective, and the note should be dismissed with expenses."

The circumstances in which the action was raised and the nature of the complainers' averments are stated in the Lord President's opinion.

On 4th December 1906 the Lord Ordinary (MACKENZIE) repelled the respondent's first plea-in-law and allowed a proof.

Opinion.—"The respondent's first contention was that the instance is defective, inasmuch as the complainers' averments necessarily involve that there is a partnership. They argued that as the Irish Linen Company was a separate *persona* the instance could only be stated by giving the descriptive name of the firm and three of the partners.

"It seems to me a sufficient answer to this that the complainers nowhere aver that they are partners, and the respondents themselves deny that there is a partnership. Whether the complainers are joint adventurers or not there is not in my opinion disclosed on the record the existence of a separate legal *persona* which ought to be made a party.

"The first plea-in-law for the respondent should therefore be repelled. . . ."

The respondent reclaimed, and argued The averments showed that the complainers were partners and were suing in respect of partnership rights. A joint adventure, assuming that it existed here, was really a partnership — Bell's Prin. sec. 392; Bell's Com. ii, p. 538, *et seq.*; Partnership Act 1890 (53 and 54 Vict. c. 39), sec. 1 and sec. 4 (2). A partnership sued in Scotland in the descriptive name with the addition of at least three of the partners—*Antermony Coal Company* v. *Wingate, &c.*, June 30, 1866, 4 Macph. 1017, 1 S.L.R. 206—and a foreign (*e.g.*, English) firm, such as this firm was, must, if it availed itself of the Scottish Courts, comply with the Scottish forms of procedure. The respondent's objection was not merely technical. The individuals named in the instance might have no assets, and in the event of success the respondent could not attach firm assets in Scotland (without raising a supplementary action) unless he got a decree against the firm. Moreover, a defender was always entitled to know by whom he was being sued. The complainers were in a dilemma. For if this was a firm the instance was bad; if it was not a firm the complainers' demand was irrelevant, as it was based on the existence of a partnership.

Argued for respondents (complainers)—A firm was entitled to sue in the names of the individual partners — Mackay's Manual, p. 159. The complainers, however, were quite willing to add to the instance the words, "carrying on business under the style of 'Irish Linen Company.'" That obviated the respondent's objection.

LORD PRESIDENT—This is a note of suspension and interdict presented by five men of the name of Plotzker against a man of the name of Lucas.

Dealing with the matter untechnically, the object of the interdict is to prevent the respondent doing two things—(First) Using the name of "Irish Linen Company," which the complainers say is their exclusive property, as trade name, and (secondly) passing his (the respondent's) goods as the complainers'. The Lord Ordinary has allowed proof before answer, after repelling the respondent's first plea-in-law, which is to the effect that the instance of the note is defective.

Now the point on the instance arises in this way. The instance is by five gentlemen giving their names and addresses and going on to state that they are proprietors of the business "Irish Linen Company." That is followed up by a statement of facts in which the complainers set forth that their head office is in London, and that they have for ten years carried on business under the style and title of "Irish Linen Company"; then they state that they have a large number of branches, only one of which is in Scotland, namely, in Glasgow. Then they go on to say in considerable detail that this name "Irish Linen Company" had come to mean their shops alone, and that it would be detrimental to them if anyone else should use that name and should supply their goods, and then they say that the respondent has already set up shop under that name, and has tried to palm off his goods as if they were their goods. Now the argument addressed to us has been this—It has been contended for the respondent that the complainers are either in partnership or that they are not; that they have not actually stated that they are a partnership in so many words, but that at the same time their averments are such as to make it clear that they are really suing in respect of one business. The respondent further says that the well-known way for a firm with a descriptive name to sue is to use that descriptive name, and to add to it the name of three of the partners, and that here the descriptive name is not used as a part of the instance.

Now, in the discussion which has taken place before your Lordships it did occur to me that from one point of view the respondent might have something to complain of in the way that this bill of suspension and interdict is launched against him, because his counsel suggested that what was really being attempted here by means of not openly avowing the partnership was to try to make a property in a trade name, not for one firm that possessed that trade name, but for a sort of congeries or *fasciculus* of firms, which were all agreeable that they among themselves should use the name, but were banded together to prevent anybody else using it. It was argued that that was not a legal possibility.

Now I confess that if I thought the summons put him into any risk of having that question allowed to go to proof without a judgment upon the relevancy of it, I think he would have been entitled to some relief. But it seems to me all that matter is obviated by the proposal the complainers now make that they should be allowed to amend the summons by putting into the instance instead of the words "proprietors of the business 'Irish Linen Company'" the words "carrying on business under the style of 'Irish Linen Company.'" If that is done it seems to me the whole objection really gives way. It is quite true that the ordinary way in Scotland of suing is first of all to table the descriptive name of the firm and then to add three partners, but I do not think that is the only way.

After all, your Lordships will remember that the history of this matter is as follows—In old times the only idea of a firm was to call it by the name of the individuals composing it, but very early it was held in Scotland that a firm could sue in the name of the firm's style, where the firm's style was composed of the names of individuals. Then came the question whether the firm could sue under a descriptive name, and the leading authority on that is *Antermony Coal Company* v. *Wingate*, which decided that you could sue under the descriptive name—that was a sort of privilege of the firm—but that you must also adjoin thereto the names of three partners, in order that the defender, whatever the action was, might know who he was dealing with and have somebody to get decree of expenses against. But, nevertheless, that does not seem to me to displace the idea that the firm having to sue may always sue by tabling the name of the whole of the partners and making them sue together. Accordingly I notice that in the well-known work on Practice by Sheriff Mackay, at page 158, the law is stated thus:—"To sue in the name of the whole individual members, or to call the whole members as defenders, is always competent, whatever be the form or name of the association or company, but is inconvenient if the members are numerous." I think that is quite a correct statement of the law. No doubt you want something more than the mere enumeration of the names, because if you do not have something more than an enumeration of the names then you are not certiorated that they are suing for a partnership debt. And therefore if the instance were to end with the list of names, I believe that would be a bad instance, but when it goes on "carrying on business under the style of 'Irish Linen Company,'" and is followed by the statements I have already indicated, it seems to me clear as day that the action is in respect of partnership rights; and therefore it seems to me that Mr Morison is in perfect security that any further progress in this case will be on the footing that the complainers are suing in respect of a partnership right. I do not say whether they have such a right or not, because that obviously depends on facts. Therefore I think that upon the complainers amending their instance as they proposed to do your Lordships should adhere to the

Lord Ordinary's interlocutor and remit to him for further procedure.

LORD KINNEAR—I agree. If we read the instance and the statement of facts here, I think we have a perfectly clear statement that the complainers designated in the instance are persons carrying on a certain business in common with a view to profit, and that that business is carried on under the style and title of "Irish Linen Company." Now if they mean what they say in that averment—and at this stage of the proceedings of course we must assume that they do—we have a clear averment that they are co-partners carrying on one business in common. But then I agree with your Lordship that the respondent has a legitimate interest to say that if that is their meaning it should be expressed not only in the statement of facts but also in the instance. But then I agree that this difficulty has been met by the amendment, which makes it clear that what the complainers are endeavouring to vindicate is an alleged right of copartnery, and not merely an individual right of one of the individuals designated in the instance.

LORD PEARSON — I am of the same opinion.

LORD M'LAREN was absent.

The Court allowed the proposed amendment, and that having been made, adhered.

Counsel for Complainers and Respondents—Crabb Watt, K.C.—Orr Deas. Agent—Robert M. Scott, Solicitor.

Counsel for Respondent and Reclaimer—Morison, K.C.—A. A. Fraser. Agents—Robertson & Wallace, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday December 21.

(Before the Lord Justice-Clerk, Lord Stormonth Darling, and Lord Low.)

BARTY *v.* HILL.

Justiciary Cases—Weights and Measures—Offence—Complaint—Relevancy—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 430—*Party Liable to Penalty need only have Sold or have Measured Incorrectly Marked Goods, not Both—Necessity to Narrate in Complaint Preliminary Procedure.*

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 430, enacts—"The chief-constable . . . or any inspector of weights and measures in the burgh, may, at all reasonable hours, enter any building . . . in which any article is sold, or is made up, or kept or exposed for sale by weight or measure, or in which articles are sold or are set apart or kept or exposed for sale in numbers, or in which any article is weighed or measured, or any articles are numbered with a view to their being bought or sold, . . . and require such article or articles to be weighed, measured, or numbered in his presence; and if the weight, measure, or number thereof ascertained does not correspond with the weight, measure, or number thereof which has been represented by the person who has sold or made up or kept or exposed the same for sale, or who weighed, measured, or numbered the same with a view to purchase or sale, such chief-constable . . . or inspector may seize, impound, and convey such article or articles to the police office, . . . and the magistrate may sentence the person who has sold or made up or kept or exposed the same for sale, and who has incorrectly weighed, measured, or numbered the same with a view to purchase or sale, to a penalty not exceeding £5, and declare such article or articles, in so far as belonging to such person, to be forfeited, unless such person shall prove to his satisfaction that the deficiency in weight, measure, or number has arisen without any fraudulent intent."

A person was charged with a contravention of the above section on a complaint which set forth that he had exposed for sale certain packages of butter which were all deficient in the weight represented by him. The relevancy of the complaint was objected to on the ground that it was not stated therein (1) that the accused had weighed and measured the goods as well as exposed them for sale, and (2) that a constable or inspector of weights and measures had entered the shop and had gone through the procedure required by the section of the Act. *Held*, on appeal—Lord Stormonth Darling *diss.* on (1)—that the complaint was relevant.

On 21st June 1906 Richard Hill, licensed grocer, Main Street, Callander, was charged in the Sheriff Court of Perthshire at Dunblane at the instance of James Webster, Procurator-Fiscal for the Western Division of Perthshire, with an offence against the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 430 (*v. sup.* in rubric).

The complaint, brought under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, set forth that the accused "did on Wednesday, the 16th day of May 1906, within the shop in Main Street, Callander, aforesaid occupied by him expose for sale by weight nine packages of fresh butter, none of which packages corresponded with the weight represented by the said Richard Hill, namely, that each was half a pound in weight, each of said packages being deficient in weight from the weight represented, and said nine packages being deficient *in cumulo* to the extent of 39½ drams, contrary to the Burgh Police (Scotland) Act 1892, section 430, whereby. . . ."

At the trial on 27th June 1906 objections were stated to the relevancy, *inter alia*—