Verdict—Finding that the dues are raised, but that the jury could not fix the amount.

A bill of exceptions was tendered, to the direction, that it required a statute or immemorial usage to sanction the magistrates in drawing the custom levied under the new table. But the exception was disallowed by the Second Division of the Court of Session.

Moncreiff, D. F., Forsyth, Cockburn, and *Currie,* for the Pursuers.
Hope, (Sol.-Gen.,) L'Amy, and *Robertson,* for the Defenders.
(Agents, *Gibson-Craigs & Wardlaw,* W. S. and *Macritchie, Bayley* and *Henderson.*)

PRESENT,
LORDS CHIEF COMMISSIONER AND MACKENZIE.

CHATTO AND CO. *v.* PYPER AND CO.

1827.
July 24.

Finding for the proprietors of a stage coach on a question whether they wrongfully failed to deliver a parcel.

THIS was an action to recover L. 135, 2s. 9d., the sum contained in letters of caption, delivered to the defenders in a parcel to be transmitted to Glasgow.

DEFENCES.—The parcel was delivered in Glasgow. No money could have been recovered

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under the caption. The defenders have by advertisements limited their responsibility to L.5; and are not liable for papers; and this was known to the agents who delivered the parcel to the defenders.

ISSUES.

"Whether, on or about the 19th day of "September 1825, the pursuers delivered a "parcel, containing letters of horning and cap- "tion for an alleged debt of L. 135, 2s. 9d., "or caused the same to be delivered at the "mail coach-office in Edinburgh: And whe- "ther the defenders promised, agreed, or un- "dertook to deliver the said parcel to Edward "Railton, agent, Glasgow, and failed to per- "form the said promise, agreement, or under- "taking, to the loss, injury, and damage of the "pursuers?"

More opened for the pursuers, and said, The case is simple. The parcel was booked at the office of the defenders, and was not delivered. We shall show that money might have been recovered if the caption had arrived. The notice of the restriction to L.5 was not known to the agent. The law is more severe in England than here; but our law holds coach proprietors liable for neglect or misconduct.

Notice by a carrier restricting his liability must be proved to have been known to the pursuer in order to protect the carrier.

LORD CHIEF COMMISSIONER.—The notice protects the carrier when the knowledge of it is brought home to the party, but will not protect him against misfeasance. The carrier may put in the notice, but he must also prove that it was known; and even then he is liable for negligence or misfeasance. The question of negligence is a question of fact. When the law and fact are mixed, it is necessary to state shortly the points to the jury; but all details of argument are reserved for after discussion.

More.—I shall adopt this course; but it is necessary to state some of the cases which have occurred. A coach contractor has been held liable for sending by a heavy coach instead of the mail.

Bain v. Brown, &c. Dec. 4, 1824.

LORD CHIEF COMMISSIONER.—That was breach of contract.

More.—On the amount of loss, we hold them clearly liable for the debt.

Before leading evidence, it was admitted that the parcel was delivered at the office, but the contents were not admitted. When a caption issued on the loss of the other was produced, it was objected, that, being at the instance of a foreign company, and there being no mandate, it was null.

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Incompetent to ask a witness whether he believed that two individuals were in partnership.

A question was raised, whether the agent in Glasgow to whom the parcel was sent, and a messenger there, were in partnership? and one of the clerks of the agent was asked, whether he believed them to be partners?

LORD CHIEF COMMISSIONER.—I do not think this competent. You may prove acting as a partner, but not belief.

Before deciding whether an alleged partner of the pursuer is a competent witness, the fact of the relation in which he stands to the pursuer must be proved by initial questions.

When the messenger was called, the objection of partnership was stated, but afterwards given up, on learning the limited nature of the questions proposed.

LORD CHIEF COMMISSIONER.—If the objection is persisted in, make out by initial questions that he is a partner, and we shall then consider the objection. I should be sorry to clog such a case with any irrelevant matter.

Cockburn opened for the defender, and said, The fact here is simple; but there are several points of law of which you, the jury, are bound to be ignorant. Any statement of the damage to the public, from allowing the proprietors to limit their responsibility by a notice, is law. The defenders admit that they got the parcel, and are civilly responsible for it; but nothing was said of its value; and as the persons who

sent it knew of the notice, would you, in these circumstances, hold them liable if it contained L. 100,000? The person to whom it was addressed did not allow his parcels to be delivered at his office, but sent for them; and this parcel was delivered to one of his clerks. We shall prove that after it was executed it was burnt by the messenger, in presence of the clerks of the agent in Glasgow.

But even if you are of opinion that it was not delivered, the Court must direct you not to find damages, as it was suggested that a new caption should be sent, and if it had been sent, the debtor would have paid. Nothing could have been legally taken under the original caption, as there was no mandate.

Kyd v. Ferguson. March 11, 1826. 4. Sh. and Dun, 549.

Evidence admitted in replication, and a messenger, by whom it was alleged that a caption was destroyed, received as a witness.

Evidence was then called for the defenders, and the clerks of the agent in Glasgow shown to the witnesses, that they might state to which of them the parcel was delivered, and which of them were present at the time it was said to have been burnt. At the close of the evidence Mr Jeffrey stated, that the evidence as to the destruction of the caption was complete surprise, for which he was not prepared; but that, so far as he had evidence, he wished to call it in replication.

LORD CHIEF COMMISSIONER.—Unless Mr

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Cockburn has any thing to state in answer, this does appear to us surprise. I am not sure, however, that in this case we can take this fact in any other point of view than as evidence brought to induce the jury to believe, and the Court to state to them, that the parcel was delivered. Whether this evidence was expected or not, what you offer is highly proper, as it is with a view to discredit their witnesses, which is quite competent. When this is done, the counsel for the defenders will observe on the evidence now to be brought as affecting the credit of the witnesses; and then the counsel for the pursuer will reply on the whole case.

The clerks who had been formerly examined, having been reinclosed, were called and again sworn and examined.

When the messenger was called,

Cockburn again objected,—He is partner of the Glasgow agent; and if the parcel was destroyed by him, or those in his office, he is liable in an action.

Jeffrey.—The agent has a share in the messenger business, but the messenger has no share in the agency. Saying it was destroyed by his clerks assumes the fact to be proved. His interest, if he has any, is remote, and not in this cause.

Lord Chief Commissioner.—Being liable in an action does not disqualify a witness, unless the verdict in the depending cause can be used against him. It has been frequently decided that this objection may affect his credit, but does not exclude him. In this case he stands in a very peculiar situation, and in a state at least of great civil responsibility; and I shall think it right to warn him, that he may decline answering the questions.

After the witness was examined,

Cockburn.—By the necessary and expedient forms of Court, I am only entitled to observe on the evidence of the witnesses last called; but if you do not believe the natural story told by our disinterested witnesses, you stamp them with perjury; and, on the other side, you have only the messenger and his concurrents coming to white-wash themselves.

Jeffrey, in reply.—This is a most extraordinary case; but before going into it, I must say the plea as to the nullity of the caption is surprise, not being in the pleas in law; but the objection is without foundation.

Thomson on Bills of Ex. 613 and 614.

The knowledge of the notice limiting the responsibility to L. 5 has not been brought home to this party, and does not apply to this

case, which is one of negligence or misfeasance; and if either of these is proved, we have a clear right to the debt in the caption.

The question here is, Whether there was a wrongful delivery, or whether it was delivered to a person accredited by the agent? In support of this last alternative, evidence has been brought of its delivery and destruction by the messenger. Is it to be believed that a messenger and the clerks of the agent would, without any motive, concur in a criminal fraud to destroy their master's business, and come forward to-day by perjury to stamp themselves with infamy? On the other side, it is possible there might be mistake as to the individual who received the parcel, but on ours it can only be deliberate perjury.

LORD CHIEF COMMISSIONER.—This case presents features which must excite interest in the minds of those who are to decide on the facts. There are also other questions which can only be got at by your deciding the fact.

It is said the public have a great interest in this case. The individuals concerned in it are greatly interested, and the public, in so far as the law on the subject has not been so clearly brought out here as in England.

With respect to this being a caption at the instance of foreigners without a mandate, you may throw that out of view, and come to the consideration of the fact. The objection is one which would have been proper for consideration before the case came here; and had it been stated when the issue was preparing, would have been a ground for sending back the case to the Court of Session. I therefore state to you, that you are to consider the case as if no such formal objection had been made.

The issue consists of three sentences, and the two first are solved by admission and proof; and the question comes, what was the duty of the proprietors of the carriage, having got a parcel to deliver? It was the duty and the practice of the defenders to deliver the parcels safe to the persons to whom they are addressed; and the question is, whether they have failed? If they have, the pursuer has made out his title to damages; but if not, you must find for the defenders. The solution of this is to be drawn from the evidence; and if you find for the pursuer, you must then consider the damages.

As to the notice limiting the responsibility, it is not only necessary that notice be given by the proprietors of the vehicle, but it must be known to the other party. The notice by the proprie-

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tors is made out; and as this parcel contained papers, it came within the exception in the notice; the question, therefore, is, whether it was known to the persons sending the parcel? and if from the evidence you are satisfied that it was not, then it forms no bar to your finding for the pursuer. You will on this point come prepared to say, whether it is on this ground your verdict rests, that the subject may be agitated elsewhere.

But the question of delivery or not is the most important; and if you are of opinion that the parcel was delivered, then you will find for the defenders. On this I would state it, first, as a case of what I shall term constructive delivery; and secondly, as one of actual delivery; and on this last it is most important to consider the evidence.

On the first, the evidence shows that the agent in Glasgow was in the habit of sending for parcels, and that he did not send any written authority, or even make any formal introduction of his clerks to the persons at the office, but that one or other of them went for the parcels. The question is then put by the defenders, whether, in these circumstances, if they delivered the parcel to a well-dressed, and apparently well-behaved person, they are to remain

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liable, as they would have done had they, in the ordinary case, failed to deliver it at a house. They say, and with some reason, that delivery to the person sent is delivery to the party; and the question is, whether delivery to such a person as those sent by the party is delivery? It is a nice point to say that a public carrier shall be liable for the variety of persons sent, and that the other party shall be free. It is important to consider this part of the evidence well, and it is for the jury, not the Court. In this case, the practice of sending by the pursuer is proved. The book and witnesses prove the delivery out; and there is no evidence that it was a thief, or person of shabby appearance who got this parcel. You are therefore to consider whether, this being the common way of delivery to this person, it is the same as delivery at his house.

The next part of the case bears materially on this, and in it the burden of proof lies on the defenders. This is the attempt to prove actual delivery, and is matter entirely for you, the jury, on the evidence, and you will observe, that, though there is uncertainty among the witnesses as to the individual to whom the parcel was delivered, it is not uncommon to forget faces.

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This part of the case seemed clear for the pursuers, till the extraordinary case was brought forward on the part of the defenders. If you believe his witnesses, you must hold that the parcel was delivered; that it was in the hands of, and was executed by the messenger, and that he afterwards allowed it to be destroyed. It is very singular that this evidence should not have been known till the very day on which this case would have been tried, but for an arrangement delaying it till this day.

I shall not say any thing on the veracity of the witnesses on either side, till your verdict is returned, as the case should go pure to you; but you will consider the manner in which the evidence was given, and the witnesses for the defenders being mistaken as to the individual clerk. You will also consider the conduct of the witnesses for the pursuer. To me they appeared open, to speak to the point, and at once; and the one whom I warned did not take any benefit of the protection which was offered him; but it is for you to decide.

If on this part of the case you believe the witnesses for the pursuer, there is an end of actual delivery; but still the question remains on what I have called constructive delivery, and on the notice. If, on the whole, you find for

the pursuer, you must then assess the damages, which are clear; on this you must go to the full amount claimed, as I am not prepared to tell you that this was a null caption.

The great question is, whether, in the circumstances of this case, delivery to a wrong person is a misfeasance? for if that is made out it defeats the notice.

If I authorize an individual to go to a coach-office, and the persons there know that individual, and deliver my parcel to another, that is a misfeasance; but the question here is, whether, if a person different from five individuals, comes for a parcel to the office, the clerk there was bound to refuse delivery, and say you are not one of the five who occasionally come. If, from the circumstances, you think he might deliver to any one who was well dressed, and had the appearance of a clerk, then there was no misfeasance, and you will find for the defenders.

Verdict—For the defenders.

Jeffrey and *More*, for the Pursuer.
Cockburn, Cuninghame, and *Bain*, for the Defenders.
(Agents, *Campbell* and *Mack*, W. S. and *James Greig*, W. S.)