duty, liable,—if the alteration was so slightly made as not to attract attention, I think the verdict ought to be in favour of the toll-gatherer and his servant; but this is matter for you on inspection of the ticket.

Verdict—"Find for the defenders, Stirling "and Pearson, and for the pursuer against the "defender, Mill, and assess the damages at "L.5 Sterling."

Cockburn, for the Pursuer.
Jeffrey, *D. F.*, *Rutherford*, and *M'Neill*, for the Defenders.
(Agents, *Thomas Baillie*, S. S. C. and *Hugh Watson*, W. S.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

1830. March 15.

DICKSON & SONS *v.* DICKSON & COMPANY.

Finding for the defenders in an action against one company of merchants for executing an order intended for another.

AN action of damages for executing orders intended for the pursuers, and for violating an agreement not to open letters, the address of which was doubtful.

DEFENCE.—The agreement was with a former company, which is dissolved. The pursuer, as an individual, cannot pursue for any

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thing done against that company. The defenders did not commit the alleged acts against the pursuer.

ISSUE.

" It being admitted, that the pursuer is a " nursery and seedsman, carrying on business " in Edinburgh, under the company firm of " James Dickson and Sons, and that the de- " fenders are also nursery and seedsmen, car- " rying on business in Edinburgh, under the " firm of Dicksons and Company.

" Whether, on or about the 27th day of " February 1829, an order was transmitted by " Mrs Douglas of Old Melrose, intended for " the pursuer, and whether the defenders, " knowing that the said order was intended for " the pursuer, did wrongfully execute the same, " to the loss, injury, and damage of the pur- " suer?

" Whether, during the said month, in the " said year, an order was transmitted by Wil- " liam Wilkie, Esquire, of Preston, intended " for the pursuer, and whether the defenders, " knowing that the said order was intended " for the pursuer, did wrongfully execute the " same, to the loss, injury, and damage of the " pursuer?

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An opening counsel allowed to state facts which were objected to as irrelevant and tending to prejudice the jury.

Rutherford opened for the pursuer.—The similarity of the two firms affords the means of fraudulent dealing; and so early as 1814, the pursuer suspected that orders intended for him had been executed by the defenders.

Jeffrey, D. F. for the defenders.—The issue is to try two transactions in the course of last year; and is it tolerable that they are to open and prove what took place in 1815, with a different company, which did or did not get redress for the alleged injury?

Cockburn.—This is not only competent, but vital to the case. The Court know nothing of the case, except from the record, and the few sentences which have been stated. We do this advisedly, and must get credit in the first instance for its admissibility.

Jeffrey, D. F.—A party is bound to render it plausible that he will be allowed to prove what he states, and not to rest on the responsibility of his counsel. Is there no case in which interference is competent to prevent the jury from being prejudiced, suppose they go to the records of the Commissary Court?

LORD CHIEF COMMISSIONER.—If any thing so extravagant were attempted, as to introduce into a question on a transaction in trade, matter

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so irrelevant as has been supposed, the Court must interfere; but at the same time they must trust a great deal to the discretion of counsel. On the present occasion, I would recommend to Mr Rutherford not to state more than is absolutely necessary to make the case intelligible, and not to prejudice the jury. Were I now to reject this, it would be deciding on the admissibility of evidence, without knowing the case or the nature of the evidence. In all cases of questionable evidence, it is necessary for the Court to be most cautious, especially where character is involved, as that which is not evidence on one part of the case may be evidence on another. All the Court can say at present is, that it ought to be so stated as not to produce prejudice.

Rutherford.—The statement we make under this permission is, that there was a former action in which the defenders were subjected in L. 150 damages. That a second action was brought, but withdrawn, on an agreement to pay the same sum, and to bind themselves under a penalty of L. 500, not to open letters, the address of which was doubtful. In 1821, they acknowledge this forfeited, and agree to double the penalty. This was entered into with the

former Company of Dicksons Brothers, but was acted on with the pursuer.

In an action by an individual against a company for executing orders intended for the individual, incompetent to give in evidence a letter written by the defenders ten years before, acknowledging a similar offence, against a company of which the individual was then a partner.

When the letter in 1821 was given in evidence,

Skene, for the defender.—We wish explanation as to the object of giving this in, and how it bears on this issue.

Cockburn.—This is a letter from every individual of the one company to every individual of the other; and we produce it to show that the defenders could not have acted from accident or mistake; and to increase the damages, by showing that this is a repetition of the act.

Skene.—It is impossible to admit this in a case with an individual, which is a transaction with a company. That company was dissolved in 1815, and, even if the parties were the same, it could not bear on this question.

LORD CHIEF COMMISSIONER.—So far as my experience goes, this is a tender of evidence such as I have not seen. It is tendered for two objects. To show that the defenders acted wrongfully, and to enable the jury to judge of the damages. In both views, the objection that it is *res inter alios* applies; but I do not rest much on this, because if on other grounds

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it were admissible, perhaps the benefit of an agreement with the company should be communicated to the individual.

But the main question is, whether it supports the gist of the case, which is, that it was done knowingly and wrongfully; and how can it be said that a letter ten years before can aid the proof of their knowledge? It appears to me, that it would only mislead the jury, and tend to confusion, by laying before them matter which they ought not to consider.

A verdict and letter, on which damages were paid to the company, also rejected.

On the same grounds the verdict in the former case, and the letter on which L. 150 were paid, were rejected.

Jeffrey opened for the defenders.—The blame here lies with the pursuer, who assumed a company firm, which gave rise to the mistake. The question here is, fraud or not? and the pursuer accuses this great company of a pitiful fraud to obtain the profit of an order to the extent of four or five pounds. The orders were brought to them, and if they had intentionally executed the order, they must have known that detection was unavoidable.

LORD CHIEF COMMISSIONER.—It is now for you to find a verdict, and I shall at once pro-

ceed to the issues, which in this, as in all cases of the sort, show the ground on which the action will lie, and without which it is not maintainable. The first question is, whether this was done knowingly and wilfully? The questions, whether it was wrongfully done, or has a tendency to injure do not arise till the other is established. It is a principle of common sense as applicable to a case of deceit, that the person must know what he is doing before it can be said to be deceitful or fraudulent. As the Court and jury must proceed on legal evidence, your minds ought not to be affected by the evidence which was tendered, but rejected.

There is a curious contrariety of evidence as to the address of the order mentioned in the first issue, as there is no doubt Mrs Douglas intended to write, 32, Hanover Street; but the porter, who was going near Hanover Street, gave it back to the carrier to deliver at Waterloo Place, on his way to Leith; and you will consider whether this transaction does not establish that, by some mistake, the wrong address was on the parcel; but if you prefer the other evidence, you will then have to consider whether there was such deliberate knowledge on the part of the defenders as amounts to fraud. In deciding this, you will attend to the various facts

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proved, as bearing on the improbability of a fraudulent execution of the order.

The evidence on the other issue is shorter, but the principle is the same.

If you think such knowledge is made out as amounts to deceit or fraud, you will find for the pursuer, and assess the damages,—but if not, then for the defenders.

Verdict—" For the defenders."

Cockburn, *Rutherford*, and *Aytoun*, for the Pursuer.
Jeffrey, *D. F.*, *Skene*, and *G. G. Bell*, for the defenders.
(Agents, *Aytoun* and *Greig*, W. S. and *Walter Dickson*, W S.)

PRESENT,

LORD CHIEF COMMISSIONER.

1830.
March 15.

DICKSON & Co. v. JAMES DICKSON & SON.

Finding for the defenders in an action against one company of merchants for executing an order intended for another.

THIS was an action by the defenders in the former case against the pursuer. The issues were two in number, and in substance the same as in the former case.

Skene opened for the pursuers, and stated the facts, and that the defender, knowing the