[*26th April*, 1847.]

JAMES CLELAND, of Ravenshall, *Appellant.*

MRS. MARY WEIR, Executrix of the late William Weir, of Shotts, in the county of Lanark, and Others, *Respondents.*

Jury Trial.—Issue.—Observations of the House upon the structure of issues, and the mode of their trial.

IN January, 1834, the Appellant, as general disponee, and sole heir and executor under the last will of Williamson, brought an action against William Weir, alleging that on the death of Williamson, which happened in Yorkshire, the place of her residence, in the month of January, 1829, Weir had searched her repositories, and found in them a will which had been executed by her on the 8th of July, 1816, whereby she appointed Weir and another her sole executors; that at the same time he found written evidence that the testatrix had executed a subsequent will on the 4th August, 1821, whereby she nominated the Appellant executor, and revoked her previous will of 1816, and that this will had been placed by her in the hands of her solicitor. That Weir induced the solicitor to believe that the will which he had discovered was subsequent in date to that in the solicitor's hands, and communicated to the Appellant the contents of the will of 1816, but concealed from him the existence of the will of 1821. That Weir alone proved the will of 1816, and took possession and management of the real and personal estate and effects of the testatrix, and sold part of her effects without taking means to secure the best prices that could be got for them. That in March, 1832, the Appellant became aware of the existence of the will of August, 1821, and adopted proceedings in the Ecclesiastical Courts in England, in which, in July, 1833, he obtained a sentence recalling the probate of

the will of 8th July, 1816, and setting up that of 4th August, 1821, and granting probate thereof to the Appellant as executor. Upon this statement the summons concluded that Weir should be ordained to deliver over to the Appellant the whole means and estate of the testatrix, or failing his doing so, to make payment to him of 1500*l.*, as the value thereof; that he should also be ordained to hold count and reckoning of his actings as executor, and produce all proper vouchers, and to make payment of the balance which might be found to be owing upon the accounts; and that Weir was bound to have used strict legal diligence for recovery of the testatrix's estate, and was liable to make good any loss which might have arisen through his default in that respect.

Weir pleaded in defence to this action, that he proved the will of July, 1816, in ignorance of the will of August, 1821, and what he had done as executor had been with the authority of the Appellant. That in 1831 his suspicions of a will having been executed by the testatrix in 1821 were raised by the discovery of some letters, and in the autumn of 1831 he became aware of the existence of the heads of a will, and of a draft of the will itself, and until the sentence of the Ecclesiastical Court was obtained by the Appellant, establishing these papers as a will, it was very doubtful whether they could have that effect. That on being satisfied in this respect, he brought an action of multiplepoinding against all the parties interested, in which he set forth his receipts and payments, and his readiness to pay the balance in his hands to the parties interested, and in these circumstances the conclusions of the Appellant's action for count and reckoning were unnecessary, and those for damages were without foundation.

After the death of Weir the action was continued against the Respondents, and the following issue was sent for trial by a jury:—" It being admitted that, on the 8th day of July, " 1816, the late Mrs. Williamson, Scarborough, then spouse of

CLELAND *v.* WEIR.—26th April, 1847.

" Richard Williamson, of Scarborough, executed a testamentary " deed, by which she appointed the original defender, William " Weir, and another, her executors, and that on the 4th of " August, 1821, she executed a last will and testament, by " which the pursuer James Cleland was declared to be her sole " executor as to her real and personal property, Whether the " original defender, William Weir, knowing or believing the " existence of the will and testament last mentioned, by himself " or another, or others, wrongfully took, or from January, " 1829, to 24th May, 1834, or during any part of the said period, " wrongfully retained possession of all or any part of the pro- " perty or effects of the said Mrs. Williamson, or wrongfully " excluded the pursuer from the possession of the same."

This issue was tried before the Lord Justice Clerk, who in his charge to the jury, laid down that " it was not sufficient for " the pursuer merely to prove that the defender William Weir " knew or believed the existence of a later will or testament to " that of 8th July, 1816, of some date or other, without know- " ing or believing it to be of the date of the 4th of August, " 1821, mentioned in the admission: and also, that, according " to the true construction of the issue, it was necessary for the " pursuer to prove that the late William Weir knew or believed " in the existence of the will mentioned in the admission— " namely, a will of the date mentioned, by which the pursuer " James Cleland was declared to be her sole executor as to her " real and personal property. But if they were satisfied that " the defender William Weir knew or believed the existence of " a will and testament of the date mentioned, although he " might not know in whose favour it was, he wished them " separately to find to that effect."

The counsel for the Appellant excepted to this charge at the time, but the exception was overruled, and the jury found a verdict, " that William Weir knew and believed the existence " of a will and testament made after the one dated 8th July,

CLELAND *v.* WEIR.—26th April, 1847.

" 1816; but do not find it proven that he knew in whose favour " the said will was, or the date of the same: And, farther, find " that William Weir did not wrongfully retain possession of all " or any part of the property or effects of the said Mrs. Wil- " liamson, *until after* the pursuer proved his right as executor: " But find that the said William Weir wrongfully excluded the " pursuer from the possession of the said property or effects " after the second will was proved."

A bill of exceptions to the charge was argued along with a motion for a rule to show cause why a new trial should not be granted. After argument the bill was disallowed, and the rule refused by the Court on the 27th November, 1846.

The appeal was against this interlocutor.

The *Hon. Mr. Wortley* and *Mr. Anderson* were heard for the Appellant, and

Sir. F. Kelly and *Mr. Rolt* for the Respondent.

LORD CHANCELLOR.—My Lords, this case comes before your Lordships on an appeal against an interlocutor of the Court of Session disallowing a bill of exceptions taken at the trial, and the question is, whether the mode in which the learned Judge put the case to the jury was such as to make it the duty of this House to direct that the matter should be tried again.

Now the contest between the parties need not be adverted to further than appears on the interlocutor of the Court which is appealed from. The interlocutor directing the issue is in these words:—" It being admitted, that on the 8th day of July, " 1816, the late Mrs. Williamson, Scarborough, then spouse of " Richard Williamson, of Scarborough, executed a testamentary " deed, by which she appointed the original defender, William " Weir, and another, her executors, and that on 4th August, " 1821, she executed a last will and testament, by which the

" pursuer James Cleland was declared to be her sole executor " as to her real and personal property." With that admission, it became a question for the jury to try, whether the original defender, Weir, retained possession of all or any part of the property of Mrs. Williamson, or wrongfully excluded the pursuer from the possession of the same.

Now, my Lords, I entirely coincide in the opinion expressed by my noble and learned friend in the course of the argument, as to the complexity of this issue, involving different propositions which are each of them separate and minute. Here, however, it is—we are not now to try the merits of this issue, but to put a construction on what was meant to be tried, in order to see whether the intention of the issue was carried out by the mode in which the trial was conducted.

We have the fact of there being two testamentary papers, one of 1816, the other of 1821, and we know also that William Weir was the executor named in the first, and that the pursuer was the party named in the second; and the object of the enquiry is, whether William Weir, knowing or believing the existence of the testament last mentioned, (which is the one of 1821,) fraudulently took possession of and retained the property coming from the testatrix.

Now this matter came to be tried, and I must observe, my Lords, that it is clear that the date which this issue uses is merely designative of the will. There are two wills, and the latter one is the will last mentioned, and that is 1821; the real object of enquiry is, whether when this party was using and pleading the testamentary paper of 1816, he had knowledge of the paper of 1821, and if he had, whether, with such knowledge as he did possess, he wrongfully appropriated to himself the possession of the property of the testatrix. The Judge told the jury " that it was not sufficient for the pursuer clearly to prove that " the defender, Weir, knew or believed the existence of a later " will or testament than that of the 8th of July, 1814, of some

" date or other, without knowing or believing it to be of the " date of the 4th of August, 1821, the date in the admission."

Now as to that part of the direction of the learned Judge, I should not at all think there was any objection to it, if he had confined himself to this, that it was not open to the parties to prove that Weir knew the existence of any will or testament later than that of 1816, of some date or other, because that is not the object of the issue. The object of the issue, my Lords, is to direct the jury to enquire whether he knew of the will of 1821; but then the object is not to enquire whether he knew the date of the will of 1821, but whether he knew of the existence of that will which is found now to bear date in 1821.

He then goes on:—" And also that according to the true " construction of the issue, it was necessary for the pursuer to " prove that the late William Weir knew or believed in the " existence of the will mentioned in the admission, viz., a will " of the date mentioned, by which the pursuer James Cleland " was declared to be her sole executor as to her real and per- " sonal property."

Now, my Lords, considering what the object of the issue is, namely, to ascertain what knowledge Weir had of the will of 1821 when he proved the will of 1816, or during the intermediate period, how can it be material, whether his knowledge extended to the date of that will, the question being whether he wanted to retain property which did not belong to him, as representing the will of 1816—property affected by a will of a subsequent date.

I do not refer to the finding of the jury, which has been adverted to in the argument, for the purpose of seeing how far this direction is likely to have misled the jury. I see on this finding what may or may not amount to evidence of its having done so in point of fact, but which is not extremely doubtful, and for this reason; they are to enquire first as to the defender's knowledge of the will of 1821; then they are to enquire

whether he fraudulently withheld the possession of the property. It is quite obvious, my Lords, that that latter enquiry must depend very much on the result of the first. There may have been a limited knowledge of the will of 1821. There may have been some reason to suspect the existence of that will, and he may, at the time, have believed that it was destroyed. We cannot tell. It is matter for enquiry; but they can come to the conclusion solely from the degree of information they obtain as to the knowledge that Weir had of the will of 1821, and the substance and contents of the will. Then the jury are told it is quite immaterial if you find that he had a knowledge of the will of 1821, unless you also find that he had knowledge of the date of the will of 1821. The other part is much more material, and the date is perfectly immaterial. But the jury are told:— "Do not pay attention to anything of knowledge he may "have had unless it is accompanied with the date." He may have had quite sufficient knowledge of the contents of the will of 1821 to have made him quite certain that he was acting in fraud of somebody at least by pleading the will of 1816, and not dealing with the existence of a subsequent testamentary paper, but he may not have known the date, or he may have been mistaken in the date. The jury say, "we find he had "knowledge of the will of 1821, but it is not proved to us he "had knowledge of the date." Then the Judge tells them not to pay any regard to the knowledge, unless it is accompanied with knowledge of the date. They naturally pay attention to the direction of the learned Judge, and that knowledge of the date which they are told is essential, and without which they were not to pay any attention to it, is to negative the fraud.

It is not necessary to show that this direction misled the jury, it is sufficient to show that it is calculated to mislead; that they might have been misled. The direction was not such as properly grew out of the issue which they were trying; and for these reasons I submit to your Lordships, that the inter-

CLELAND *v.* WEIR.—26th April, 1847.

locutor of the learned Judge was wrong, and that the interlocutor appealed from ought not to be supported.

LORD BROUGHAM.—My Lords, I have considered this case throughout the argument as free from all reasonable doubt. I am sorry to say that I am so bold, because, my Lords, I have the most sincere and unfeigned respect for the learned Judges, all of whom appear to have fallen into error, and all precisely into the same mistake, one following the other. Lord Medwyn says in the most express terms (having first stated the issue) that the date is material, and that the knowledge of the date is a material fact in the case, and that it signified not what the jury found, provided they did not find the knowledge and belief of that particular fact. Lord Moncrieff goes on the same ground, and Lord Cockburn says still more explicitly the same thing. The Lord Justice Clerk's words cannot for a moment be doubted. I for a moment fell into the mistake of supposing that the thing had been an oversight, and that in the course of summing up, the Judge, as often happens, had made a slip in addressing the jury. But it turns out that the matter was argued before him, and he persisted in the erroneous opinion he had formed; and it was not only argued, but he went out to consult two of the Judges. Consequently, my Lords, he deliberately considered the case, and it was no slip or misunderstanding whatever. He first tells the jury it was not sufficient to prove the knowledge of a will later than 1816, of some date or other. If he had stopped there that would have signified nothing. But he goes on, "without knowing or believing it "to be of the date of 4th August, 1821," and then he goes on and says, "it was necessary for the pursuer to prove that the "late William Weir knew or believed in the existence of the "will mentioned in the admission," viz., a will of the date mentioned—"that is of the 4th of August, 1821."

Although, my Lords, we are not here to consider the issue,

we are to consider the manner in which the learned Judges have dealt with the question raised by the bill of exceptions, and that question is, whether or not the Judge misled the jury. But I am quite disposed to believe that the jury were misled by the very clumsy, complicated, and inartificial manner in which the issue is framed. It says, "whether the original "defender, Weir, knowing or believing the existence of the "will and testament last mentioned by himself," and so on, "wrongfully took, or from January, 1827, to 24th May, 1834, "or during any part of the said period, wrongfully took posses- "sion of the goods." I think that paragraph, "knowing or "believing the existence of the will and testament last men- "tioned," referring thereby to the will of 4th August, 1821, may have misled the learned Judges as to what was the issue before the jury, and to which alone the Judge's direction ought to have been applied. It is therefore the more vexatious that this issue should have been so framed, and which I trust will be avoided in future. One affirmative on the one side, and one negative on the other meeting that affirmative, is the definition of an issue, and if there are more facts than one sent to a jury, there ought to be for each of those facts one negative on the one side, and one affirmative on the other, which forms the issue upon that fact, and it is a most clumsy, inartificial, and dangerous mode of proceeding, to jumble together different matters in the same question. Every one knows you cannot get a distinct answer when you do so.

Suppose, my Lords, I put a question to a witness—and a question put to a jury is just the same—suppose I put this question to a witness:—"Did you go to York and buy á horse "there?" The man may not know how to answer; he may say, "I bought a horse, but I did not go to York," or "I went "to York, and I did not buy a horse," or "I neither went to "York, nor bought a horse," or "I both went to York and "bought a horse." Four distinct answers might be given to

this question, whether Weir, knowing the existence of the will, wrongfully took possession. He might have known of the will and not have taken possession; he might have taken possession and not have known of the will; he might neither have taken possession nor known of the will; or he might have both taken possession and known of the will. Just the same as in the case of the man going to York and buying a horse. It is not the way to put a question to a witness or to a jury, and I do think it tends much to confound the case and lead to the error which has been committed here.

This, my Lords, being clear, I agree with my noble and learned friend entirely, in thinking that it is not necessary to show that in point of fact the misdirection of the learned Judge led to the finding of the jury. It is quite sufficient for us that it might naturally lead to it, that it might without any constraint have led to it. It is enough that when I look at that direction, and when I look at the finding, a suspicion arises on my mind of its being highly probable that they did find as they found in consequence of that misdirection. It is quite sufficient that they might, without any constraint on the meaning of it, have been expected naturally to lead to that conclusion.

On the whole, therefore, my Lords, I am clearly of opinion that this interlocutor cannot stand, that there must be a *venire do novo*, and that, reversing the order of the Court below, disallowing the bill of exceptions, we must reverse that part of the order which awards expenses, and also the second interlocutor upon the account, giving 44*l.* 15*s.* 10½*d.* as the expenses.

[*Lord Chancellor.*—It is not appealed from.]

LORD BROUGHAM.—Then the first interlocutor must be reversed. We allow the exception and refuse the expenses applied for; that will be the judgment of the House.

LORD CAMPBELL.—My Lords, I feel under the necessity of concurring with my noble and learned friends, and it grieves

me very much indeed to find such a direction as this laid before a jury in Scotland. I am afraid that that mode of trial does not prosper there as well as its well-wishers could hope, and I am afraid it is not latterly improving, for the issues are not framed, generally speaking, as well as one could wish, and the results are found really mortifying to those who were friendly to that supposed improvement in the jurisprudence of the country.

The issues here are subject to the objections which have been referred to, and it seems to me that they really mix up law and fact together. It is not an issue of fact to be submitted to a jury as to a wrongful intromission or a vicious intromission; it opens a wide field in the law. Yet the whole of this, my Lords, is submitted to a jury, whether the possession was wrongful, and what amounted to a vicious intromission, although that is not at all a fact depending on evidence to be found either negatively or affirmatively.

My Lords, I need not say there is no Judge in Scotland or England whose decision I should be disposed to have a greater respect for than that of the Lord Justice Clerk, and I am sure there is no one in Scotland who is more anxiously desirous of discharging the important duties of his high office; but, at the same time, I am a little surprised to find that he should have laid down this proposition, when his attention was deliberately drawn to the direction he had given and to the language which is here imputed to him, and which must have been used by him because he signed the bill of exceptions. I can easily suppose that he or any other Judge might use such language, and it may be possible to pick out some inaccurate expressions used in the course of a long summing up of any Judge. But, my Lords, we must now suppose that those expressions were drawn to his attention, that the question upon them was argued, that the propriety of them was called to his attention, that he took the opinion of the other Judges on it, and that he deliberately lays

down that it would not be enough for the pursuer merely to prove that the defender Weir knew or believed of the existence of a later will or testament than that of the 8th July, 1816, of some date or other. And so far, my Lords, I think the direction is perfectly right, because there are only two wills mentioned in the pleadings, and it would not be competent to introduce the knowledge of another will. I think that would have been a surprise on Weir at the trial to attempt to prove that he knew some other will. Therefore, my Lords, so far I think the direction of the learned Judge is unexceptionable, but then, when we come to the part "without knowing or believing "it to be of the date of the 4th of August, 1821," I am bound to say, that is an erroneous direction, it is making the date parcel of the issue, and saying that, although Weir knew the contents of the will in every respect, and knew that it revoked the will he had proved, and conveyed all the property of the testatrix to another person, still that without his knowing the date it would entitle him to have the issue found in his favour.

Now I was at first of opinion that we should be able to put a different construction on this, and to make the words "with-"out knowing or believing it to be of the date of the 4th of "August, 1821," merely descriptive of the will, to make it identify the will, and if you could only blend in the words which have been suggested, "believing it to be the will of 4th "August, 1821," or, as Sir Fitzroy Kelly put it, to be *that* of the 4th August, 1821, it would have been merely a reference to identify the will, and would not have made the date an essential part of the issue. But the learned Judges prevent us from putting such a construction on it, because Lord Medwyn, Lord Moncrieff, and Lord Cockburn, more pointedly than any of them, consider the date as an essential part of the issue, and that without knowing the date the party would not be entitled to the affirmation of the issue. Lord Cockburn says:—"So "that in my view the issue is, whether the defender, knowing

" the existence of a will by the deceased, dated the 4th August, " 1821, and in favour of the pursuer as sole executor, did " wrongfully retain possession." It is not knowing the existence of the will of 1821—it is knowing the date of the will, and therefore it seems to me " the date of the will" is mistaken for " the will of the date," instead of being " the will of the date," they say it is " the date of the will." It is perfectly easy to conceive that Weir knew of a will of that date, though he did not know the date of the will.

I think under these circumstances, my Lords, we have but one course to pursue, which is, to come to the conclusion that this direction had a tendency to mislead the jury, and although it did not appear to us that the jury had been misled, we should be bound by our opinion, in the exercise of the functions which devolve on us, to say that the exception ought to have been allowed. But, my Lords, when I look at the verdict, I must say it seems to me there is great reason to suppose that the jury have been misled, because the jury found that Weir knew of the existence of a will and testament made after July, 1816. There was no other will in controversy except this one of August, 1821. Therefore, if he knew of a will after July, 1816, he must have known of that will—but the jury " do not find it " proven that he knew in whose favour the said will was, or the " date of the same." That is, he knew of the will of 1821, but he did not know the date of that will, or in whose favour it was. He did know of the will of 1821, though he did not know the date of that will.

Under these circumstances, my Lords, we are not at liberty, and it would not be competent for us, to do more than merely to set aside the interlocutor, disallowing the bill of exceptions. I should be very loth to come to a conclusion on that finding, that there had been wrongous or vicious intromission. But Weir had knowledge of the will, though he did not know the date, or in whose favour it was; he knew it was of a subsequent

CLELAND *v.* WEIR.—26th April, 1847.

date, and must have been aware that it revoked the will under which he claimed.

Under these circumstances, my Lords, I agree in the opinion expressed by my noble and learned friends, that the interlocutor which disallows this bill of exceptions must be reversed.

Mr. Wortley.—After what has fallen from your Lordships with regard to the issue, perhaps it would not be disrespectful if I were to submit to your Lordships that you might order the issue to be reformed. There may be a doubt whether the Court of Session has power to do it.

LORD BROUGHAM.—We have nothing to do with it. It is not before us.

LORD CHANCELLOR.—The appeal is not against the issue.

Mr. Wortley.—It would be for the benefit of both parties, my Lords.

Mr. Rolt.—It could not be done without our being heard on it.

LORD CAMPBELL.—The issue is not skilfully framed, but still under it the case may be tried.

Mr. Wortley.—A new issue, my Lords, might be sent instead of the same one.

LORD BROUGHAM.—We have nothing to do with it.

Ordered and adjudged, That the interlocutor complained of in the appeal be reversed: And it is further ordered and adjudged, That the bill of exceptions referred to in the said interlocutor of the 27th of November, 1846, be allowed, and that a new trial be granted: And it is also further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

DUN and DOBIE—DEANS, DUNLOP, and HOPE, Agents.