[*24th April*, 1849.]

JAMES CLELAND, residing near Glasgow, *Appellant*.

MRS. MARY FLEMING, Executrix of the late WILLIAM WEIR, and JOHN FLEMING her husband, *Respondents*.

*Process—Jury Trial—Verdict.*—Where a party has not complained of a verdict in the manner allowed by the statute, in so far as regards the facts found by it, he cannot in an appeal of the interlocutor applying the verdict complain of the verdict as not being an answer to the questions raised by the issue.

IN the year 1829, Weir procured probate of a will executed by Williamson in the year 1816, whereby he was appointed executor, and he entered into possession of and administered the estate under this title.

In consequence of proceedings adopted by third parties for setting aside this will, Weir, through Thornton his solicitor at Scarborough, made inquiries of the solicitors of the deceased, and he was furnished in September, 1831, with the heads of a will which had been prepared by Williamson in 1821.

In the month of March, 1832, the Appellant became aware of the existence of these heads of a will, and immediately applied to the Ecclesiastical Courts for recal of the probate which had been granted to Weir. In November, 1833, the Appellant succeeded in this application by obtaining decree, setting up the heads of a will as Williamson's last will and testament.

In October, 1833, Weir brought an action of multiple-

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poinding of Williamson's estate, in which he called the Appellant and other parties as defenders. And in May, 1834, the Appellant brought an action against Weir which was afterwards insisted in against the Respondents as his representatives for count and reckoning of Williamson's estate and for damages in respect of such part of the estate as might have been lost through Weir's misconduct or failure, to do exact diligence during his administration of it. This action was founded upon allegations that at the time Weir procured probate of the will of 1816, he was aware of the existence of the will of 1821, but, nevertheless, concealed its existence, and took possession of and mal-administered the estate.

The actions of multiplepoinding and of count and reckoning were conjoined. Before ordering any accounts to be taken, the Court directed the following issue to be tried by a jury.

"It being admitted that on the 6th 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 the 4th August, "1821, she executed a last will and testament by which the pur-"suer, 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 men-"tioned, by himself or by 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 property or effects of the said Mrs. Williamson, "or wrongfully excluded the pursuer from the possession of "the same?"

On the 6th of August, 1847, the jury returned the following verdict:—

"In regard to the period from the demise of Mrs. William-

" son to 19th September, 1831, find for the defenders; but " from September, 1831, when direct information was com- " municated by Mr. Thornton to Mr. Wallace of the fact that " he had possession of a deed which rendered Mr. Cleland sole " executor, forward to March, 1832, find that Mr. Weir acted " blameably in not communicating such information to Mr. " Cleland, but, whether in the defender's opposition to the " pursuer obtaining probate on the heads of appointment in the " Court of England, after the pursuer instituted his suit in " March, 1832, or in raising the Multiplepoinding in this Court " after the pursuer obtained the judgment of the English Court " in 1833, revoking probate of the will of 1816, the defender is " to be held as wrongfully retaining possession of the property " of Mrs. Williamson, or wrongfully excluded the pursuer from " possession of the same by such proceedings, the jury, these " being wholly or mainly questions of law, cannot say, and " leave to the Court to decide."

Thereafter notice was given by each of the parties of a motion to apply the judgment in favour of himself, and upon the coming on of these motions, the Court on the 11th of March, 1848, pronounced the following interlocutor:—" Having " heard counsel for the parties on the motions to apply the " verdict by the jury in this cause, and also on the points re- " served for the consideration of the Court, enter up the verdict " for the defenders, and find that the late William Weir did not " by himself, or another, or others, wrongfully take, or from " January, 1829, to the 24th day of May, 1834, or during any " part of the said period wrongfully retain, possession of all or " any part of the property or effects of the deceased Mrs. Wil- " liamson, or wrongfully excluded the pursuer from the posses- " sion of the same. But find, in terms of the said verdict, that " from September, 1831, when direct information was commu- " nicated by Mr. Thornton to Mr. Wallace of the fact that he " had possession of a deed which rendered Mr. Cleland sole

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" executor forward to March, 1832, Mr. Weir acted blameably " in not communicating such information to Mr. Cleland, and " remit to Mr. Donald Lindsay, Accountant, to proceed with " the accounting on the principle of the above findings. Find " neither party entitled to the expense of the first trial, but find " the defenders entitled to the expense of the second trial, and " the expense of the motion for applying the verdict, allow an " account of the said expenses to be lodged, and remit to the " auditor to tax the same, and to report. Find neither party " entitled to the expense of this day's discussion."

The appeal was against this interlocutor.

*Mr. Wortley* and *Mr. Anderson* for the Appellant.—The verdict returned by the jury does not answer the questions put to them by the issue. The question by the issue was whether Weir wrongfully took, or from January 1829, to 24th May, 1834, or during any part of that period, wrongfully retained possession of Williamson's estate. The verdict divides the time into three periods; first, from the death of Williamson to the 19th September, 1831; second, from September, 1831, to March, 1832; third from March, 1832, until the proceedings in the conjoined action. With regard to the first of these periods, the verdict answers the question put by the issue as it finds generally for the Respondents, and if this finding could be separated from the rest of the verdict, it would be unobjectionable; but this cannot be done, the whole verdict must stand or fall together.

With regard to the second period, from September, 1831, to March, 1832, the verdict does not return any answer to the issue: the question put was as to wrongful taking or retaining possession of property, but the answer is in regard to blameable non-communication of information. And as to the third period. the jury decline in terms to give any answer, and leave it to the Court as matter of law.

The verdict, therefore, is not an answer to the issue, unless indeed the word "blameable" is to be read as synonymous with "wrongful," for which there is no authority. And if that were so, the Court was bound by its interlocutor applying the verdict to give that effect to it. But the interlocutor does the reverse, for it finds that from January, 1829, to May, 1834, there was no wrongful taking or exclusion of possession, thereby assuming that "blameable" was not equivalent to "wrongful," and declaring that there had not been wrongful conduct, without any answer from the jury as to whether there had or not.

[*Lord Chancellor.*—How will negativing any wrong affect the account directed to be taken?

It will deprive the Appellant of his right to the mesne profits.

*Lord Chancellor.*—What should the Court have done then?

It ought to have arrested judgment and ordered a new trial.

*Lord Chancellor.*—If the finding of the verdict was not proper, it is the Appellants, fault that he did not bring it before the Court in the way allowed by the statute; the verdict is conclusive of the facts found by it. The only question is what the Court should have done upon the facts found.]

By the statute the verdict, if not complained of, no doubt is conclusive, but it is conclusive only as to those facts which are put in issue. Here the facts found are beside the issue,—there was no question as to communication of information, but as to possession or retention of property. Whatever might be the effect of blameable non-communication of information in the circumstances of the case, and it is not very obvious what that would be, the Court was not warranted in the inference of a conclusion which was directly put to the jury as a question of fact, viz., whether there had not been wrongful retention of property, without any answer having been returned by the jury to that question. In this respect, admitting that the Appellant is too late to complain of the verdict, he is within the 9th sect. of the 55 George III., cap. 42, and entitled to complain of the inter-

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locutor applying the verdict as giving it an application of which it is not capable from its terms. Campbell *v.* Campbell, *McL. & Rob.* 387.

[*Lord Campbell.*—The verdict finds facts—whether these facts were wrongful was a question of law, and it was for the Court to say whether they were so.

*Lord Chancellor.*—It is open to the Appellant to argue that the Court should have found the facts to be wrongful.]

From the time that he became acquainted with the existence of the will of 1821, the Respondent was deprived of all plea of *bonâ fides*, in his possession, Woolley *v.* Clark, 5 *Bar & Ald.* 744—at all events he was in *mala fide* to resist probate of that will, and still more so in bringing the action of multiple-poinding after probate had been granted, and if this had been found, he must in the accounting have been treated as one in wrongful possession, and bound to account accordingly.

*Mr. Rolt* and *Mr. Adolphus* for the Respondents.

LORD CHANCELLOR.—My Lords, this case undoubtedly has been conducted below in a way which one has some reason to lament, from the uncertainty which has been left upon the facts, notwithstanding all the care that has been taken to have them properly ascertained by means of a jury.

The claim being against the Defender, Mr. Weir, and he being charged by a party who has a right to administer the estate under a will ultimately established to be the last will, it was thought right to direct an issue, for the purpose of ascertaining the position in which the Defender stood, and of enabling the Court to decide in what way he was to be charged with the property which he had received during the time he acted as executor.

After stating that it was admitted that the late Mrs. Williamson executed a will of the 8th of July, 1816, which was the first will, and that on the 4th of August, 1821, she executed

another will which of course was the last will, the issue is directed in these words,—" Whether the original Defender, " William Weir, knowing or believing the existence of the will " and testament last mentioned, by himself or by 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 property or effects " of the said Mrs. Williamson, or wrongfully excluded the " Pursuer from the possession of the same."

Under that issue it was competent of course for the Pursuer to make out the best case he could, for the purpose of shewing the wrongful possession and the wrongful retainer of the property. The case having been tried, the jury find certain facts, they divide the period and they negative the wrongful possession at an earlier period. They say in regard to the period from the demise of Mrs. Williamson to September, 1831, they find for the Defender, negativing therefore the wrong imputed to him, and that is not in dispute, " But from September, 1831, when " direct information was communicated by Mr. Thornton to " Mr. Wallace of the fact that he had possession of a deed " which rendered Mr. Cleland sole executor, forward to March, " 1832, find that Mr. Weir acted blameably in not communica- " ting such information to Mr. Cleland, but whether in the " Defender's opposition to the Pursuer's obtaining probate on " the heads of appointment in the Court of England after the " Pursuer instituted his suit in March, 1832, or in raising the " multiplepoinding in this Court after the Pursuer obtained " the judgment of the English Court in 1833, revoking probate " of the will of 1816, the Defender is to be held as wrongfully " retaining possession of the property of Mrs. Williamson, or " wrongfully excluded the Pursuer from possession of the same " by such proceedings, the jury, these being wholly or mainly " questions of law, cannot say, and leave to the Court to " decide." Then there is a note which may not be considered

as properly part of the verdict,—" The jury explained that they " used the word ' blameably ' as something short of the term " ' wrongfully ' in the issue." That, in fact, is to be implied from the verdict itself without the note, because they distinguish between the retaining possession and the acting blameably. The question of wrong, by which they mean I presume legal wrong, they leave to the Court.

That verdict undoubtedly is not very happily expressed. But still I do not think there is any doubt as to what the meaning of the jury was, or as to the true construction to be put upon their verdict. As to the first period they find for the Defender. They negative therefore the wrong. As to the second, they find certain facts, and although they do not find them as a substantive finding, I think there is no doubt that the Court dealing with this verdict were entitled to consider this as a fact,—that in September, 1831, direct information was communicated to Mr. Thornton, and by Mr. Thornton to Mr. Wallace, of the fact that he had possession of a deed which rendered Mr. Cleland sole executor, and that Mr. Weir was blameable for not communicating such information.

The fact then as found by the jury is, that in September, 1831, Mr. Weir had information of the existence of a subsequent deed, and that he did not communicate that information to Mr. Cleland, Mr. Cleland being appointed executor under the second will. Those are the only facts which they find. They do not find any dealing with the property during that period, but they find the simple fact of information being communicated to Mr. Weir, and not being communicated by him to Mr. Cleland. Then the other facts which they also rather assume than state, and about which there can be no doubt, are, that the Defender resists the probate claimed by Mr. Cleland, and that he institutes a suit of multiple-poinding. Those are the two other facts.

Before I consider how the Court dealt with that verdict,

I must consider how far it is competent to the Appellant to object to the verdict, or to raise any question as to the mode in which it is given. The verdict was not quarrelled with by either party in the only mode in which it could be brought under the consideration of the Court below. They permitted the time to go by within which they could have brought it before the Court of Session. Neither party complained at the time, but at a subsequent period when by the act the verdict was conclusive and final as to the facts found by it, the Pursuer it appears applied to the Court for the purpose of getting judgment upon the verdict. Now the Act of Parliament says that the verdict shall be final as to the facts found by it. It is final, therefore, as to the first period; it is final as to the fact of information in September, 1831, having been communicated to Mr. Weir, and not by him communicated to Mr. Cleland. It is final as to the resistance of the probate applied for by Mr. Cleland, and it is final as to the fact of a multiplepoinding having been raised. Those are the only facts found; and when upon the application of the Pursuer, the Court had to consider what was to be done with the verdict, or with the case with the assistance of the verdict, which the jury had found, the Court had those facts established and no others, as far as now appears. Well then the Court says, We concur in the verdict, that is to say, we act on the verdict; and with regard to the first period, there is no question raised by either party. With regard to the second period, the verdict has found Mr. Weir to be blameable, but it negatives that his conduct was wrongful; and the question really is whether upon those simple facts so found by the jury in their verdict, the Court were right in treating his conduct as not wrongful, merely adopting the expression used by the jury in their verdict—that it was blameable.

Now the first point raised by the Appellant is, that this verdict, although not capable of being impeached or set aside,

is to be treated as a nullity. Why is it to be treated as a nullity? Does it find no facts? Does it not give the Court of Session some information at least? If it does not find all the information which the Pursuer thinks he could bring to bear upon the case which he had to make, he has only himself to thank for that. It was an issue directed under which he might have brought forward any case he had to make against Mr. Weir; he must be presumed to have been satisfied with the case he made from his not quarrelling with the verdict; and he is contented to ask the Court of Session for its judgment upon the facts found and stated in that verdict. Now whether that verdict would or would not justify the Court in giving an ultimate judgment in his favour, he cannot complain that in the course of the proceedings anything has been done impeding him in proving the case which he assumed to prove against Mr. Weir by the proceeding which he instituted. He proved what he could prove; he had the facts if he could establish them; and he did not, by some other proceeding impeaching the finding of the jury, complain to the Court that he was impeded in the mode of making out his case. He was contented, in short, with his case as it stood upon the verdict. It would be very strange if after that, he were permitted now to appeal from the judgment of the Court of Session upon his application to apply the verdict, and to ask the judgment of this House that there ought to be no judgment at all upon the verdict, for that the verdict is good for nothing: that although he had treated it as sufficient to enable him to ask the Court of Session for judgment in his favor, yet when the judgment appeared not likely to be in his favor, then he should impeach the verdict, and ask this House to treat it as a mere nullity.

I find that some cases were referred to as authorities to shew that it was competent to the Pursuer to adopt this course. The case of Campbell *v.* Campbell was referred to. Now certainly in reading the report of Campbell *v.* Campbell, to the

extent only of an observation which fell from one of the noble Lords who heard that case, and which observation was not intended as a decision upon the case, but was a question put to the counsel, there are some expressions to be found, upon which it might be supposed, if it had been the judgment of the House, and not a question put to the counsel during the argument, that something like an argument could be rested. But what was the result of the case? There a verdict had been obtained, an application had been made to the Court of Session for a new trial; that application had been refused, and the Court of Session applied the verdict and gave their judgment upon the fact found by the verdict. The party against whom the judgment was pronounced, the Defender, appealed, first of all raising a question as to the verdict and seeking to open it. It came twice before this House upon a question of competency: and upon the first application, as might have been expected, he was told that the verdict by the Act of Parliament was final, that what had been done below could not be reviewed by this House under the Act of Parliament; and that whatever might become of the case, they must deal with it upon the facts which the verdict had found between the parties. Then there came another appeal, and that appeal was not touching the question of the verdict, but it was against the interlocutor applying the verdict.

What is the judgment of this House in disposing of that case? The case came I think before Lord Lyndhurst, who was Chancellor at the time the second appeal came before the House. He says, "Under these circumstances the finding of "the jury is one that cannót now be disturbed, inasmuch as an "application was made to the Court of Session for a new trial, "and the Court of Session refused a new trial, and against that "interlocutor refusing a new trial no appeal can be presented "to your Lordships' House. The present appeal is against the "interlocutor giving effect to the verdict of the jury, that is to

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" say, the jury having found that the Defenders are indebted " and resting owing to the Pursuer in a certain sum, the inter- " locutor decreed that payment should be made. It is for the " Appellant to consider how far, in prosecuting this appeal, he " is likely to succeed." The House decided that it was competent for a party to appeal against an interlocutor applying a verdict, although the opportunity of questioning the verdict had passed by. But then Lord Lyndhurst says, You may appeal, but you must consider what chance you have of succeeding, because you are now fettered by the verdict finding the fact of there being a certain sum due and owing, and you come to the House questioning the interlocutor of the Court of Session applying that verdict, and directing payment of the sum so found due; therefore he naturally enough says to the Appellant, You must consider what chance you have under those circumstances of succeeding in your appeal.

How that can be an authority in favor of the party here appealing, I cannot at all see; but that it is very much in favor of the Respondents is perfectly obvious; because there also, as here, the verdict of the jury was conclusive—it was final; and the party coming to question the interlocutor applying that verdict, was bound to take the case fettered with that verdict, and to shew that the interlocutor was wrong, assuming that the verdict was right.

This verdict came before the Court with those facts found upon the face of it, and no others; and the Court apparently dealt with the case upon those simple facts. The Court says, With regard to the first period there is no question. With regard to the second period what do they find? I am not now referring to the language, but to the conclusion to which the interlocutor shews they came. They enter a verdict for the Defender, and they find " that the late William Weir did not, " by himself, or another, or others, wrongfully take, or from " January, 1829, to the 24th day of May, 1834, or during any

" part of the said period, wrongfully retain possession of all or " any part of the property or effects of the deceased Mrs. Wil- " liamson, or wrongfully exclude the Pursuer from the pos- " session of the same, but find, in terms of the said verdict, " that from September, 1831, when direct information was com- " municated by Mr. Thornton to Mr. Wallace of the fact, that " he had possession of a deed which rendered Mr. Cleland " sole executor forward to March, 1832, that Mr. Weir acted " blameably in not communicating such information to Mrs. " Cleland; and remit to Mr. Donald Lindsay, Accountant, to " proceed with the accounting on the principle of the above " finding."

The account was at all events to go on. The party had been in receipt and administration of the estate, under the authority of a probate, which turned out not to have been a proper probate, inasmuch as there was another will at the time existing, although it was not known to exist at the time probate was granted, which showed that another person was the party to whom probate should have been granted, if that second will had been known at the time. They say, therefore, account you must, and the question we have to decide is, whether, inasmuch as you had notice in 1831, and did not communicate that notice to Mr. Weir, you are to be dealt with as a wrongful intromitter during that period. What the effect of that wrongful intromission would have been is not material in the view that I take of this case; because, being of opinion that there was nothing upon the face of the verdict which called upon the Court to deal with Mr. Weir, as improperly in possession during the interval, that question does not arise. The simple fact which is found is, that he knew of the existence of the deed, and did not communicate it. He knew it in September, and at the end of March following the suit was instituted for the probate. What do we find to have been done in the mean time? No facts are found. The simple fact found is, that he had know-

ledge of the deed existing, and did not communicate it. When Mr. Cleland became informed of it, or how it was that the knowledge which was communicated to Mr. Cleland, gave rise to the proceeding in March following, does not appear. There is the naked fact, that he had information, and that that information was not communicated by him.

Now, my Lords, the propriety of communicating the fact, in a moral point of view, one can hardly dispute, but the question is, whether such transactions took place as to make it legally wrong, so as to affect him in the mode in which he is to account for this property. A man may hear of a fact, he may have good reason for doubting it, he may properly take time to enquire into it, and a variety of circumstances may exist which are not found here at all, and are not facts upon which the Court can proceed, for the Court knows nothing at all about them; but the Court has the simple fact of notice being communicated to him, and by him not communicated, and I think that to do what the Appellant now asks us to do, would be going a great deal farther than was even done in the case referred to of Woolley *v.* Clark, which was a case of English law and not of Scotch law, but there there was a dealing with the property. I cannot, however, pass by that case altogether without asking myself what would be the result of carrying that decision out, because there we find that there being no knowledge of any other will at the time, a party had improperly obtained probate of a will, by which he was appointed an executor; and he having administered the estate to a certain extent, another will was afterwards produced, and he was made to account; that is to say, there was recovered in an action, at the suit of the executor of the second will, not only property which the party had to be administered, but all the property which had come to his hands, although he had administered the estate, and was then a creditor of the estate to the extent to which he had administered. He might have been at the time

perfectly ignorant of there being anybody else entitled, or that any question could be raised as to his right to administer the property*. We find it stated in the report, "It was contended "on the part of the Defendant, that the revocation of the probate "of the first will did not avoid all the mesne acts, but that "the Defendants might show due administration of the assets "to the amount of the value of the goods. The Lord Chief "Justice would not allow the Defendants to give evidence "of administration of the assets." He may, therefore, have administered assets to the amount of 10,000*l.* He may have had in his hands property to the value of 10,000*l.*, to which he had a right to look to reimburse him what he had expended on the estate. And the effect of that as reported would be, that the 10,000*l.* worth of property which he had in hands, would be taken from him as part of the assets, and he would be left with a loss of 10,000*l.* My Lords, that case not being before us, and the facts not being before us, I will not say much more about it, because it certainly has no application to the present case, inasmuch as there the fact was found of a dealing with the property after notice, and here there are no facts found, except the simple fact of the notice being communicated at one time and not communicated at another; but before the expiration of six months, we find a suit instituted for the purpose of recalling the probate.

Now, my Lords, there is no question here as to accounting. Cases have been referred to where the question has arisen, whether a party is to account for profits, his conduct being *in malâ fide*, or whether his conduct was *in bonâ fide*, in which case he could not be called upon to account at all. I cannot see the application of those cases to the present, because that the executor, Mr. Weir, is liable to account for the estate cannot be disputed, and in accounting I suppose he ought to have his discharge for what he has paid. But according to the case

* The executor was aware of the first will at the time he sold the property. See 5 *Bar.* & *Ald.*, 744.

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referred to, for what he had received he would have to account, and what he had paid away he would not be allowed. Whether that be the law of England I will not say. It may be the law of England although not the law of Scotland, that a man, acting in good faith under the judgment of the Court that he is executor, and entitled to administer the estate, does so at his peril, viz., at the peril of not being allowed any of his payments, if it should turn out at a subsequent period, the fact not being known to him at the time, that there is another will, of which he knew nothing, under which another party may be found, at some future period, to be clothed with the character which he thought he himself possessed. I do not go further into the consideration of that case; I have observed upon it, so far as is material to distinguish it from the present, but upon the naked facts stated in this verdict, my opinion is, that the Court of Session have come to the right conclusion, and that, although there might be a moral duty upon Mr. Weir to communicate all that he had heard, to the party who was to take the benefit of that information if it turned out to be true; yet, that the mere effect of that knowledge coming to him, and not being communicated to another, would not convert his possession of the property from a rightful to a wrongful possession, or make him a wrongful intromitter in the sense in which that term is to be understood.

The result, therefore, will be, that I advise your Lordships to affirm the interlocutor appealed from with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. I consider that what he has stated in the last sentence of his argument, is a perfectly sound and just view of this case, and I should not have done more than express my entire concurrence with the result at which he has arrived, and at which I have myself also arrived, had it not been that mention has been made of the case of Woolley *v.*

Clark. I do not think it necessary, any more than my noble and learned friend thought it necessary, to say anything upon the case of Woolley *v.* Clark, because I do not consider that case to be applicable to the present, and this present case does not require us to say aye or nay, whether we approve of that case. But I will venture to say, that upon looking at the case of Woolley *v.* Clark, I do hope that when that case comes to be quoted in the Courts below, it will be most carefully considered and reconsidered before it is followed as a ruling and binding authority by those courts. Those other cases were not cited in the argument of Woolley *v.* Clark by myself. Of course I could not be expected to cite them, because they would have made against me as counsel with Mr. Chitty, in showing cause against the rule which had been obtained, and the learned Solicitor-General (Lord Lyndhurst) omitted to cite them, but Mr. Justice Williams, (then Mr. Edward Vaughan Williams,) has cited them in his very excellent book on the Law of Executors and Administrators, which is one of the most valuable books ever given to the profession, and he has stated most justly, that those cases were not quoted, consequently, those cases were not brought to the knowledge of the Court, and, therefore, (says he,) were not held to have been overruled by Woolley *v.* Clark. But not only they cannot be said to have been overruled by Woolley *v.* Clark, but *non constat*, that if they had been brought to the knowledge of the Court, they would not have overruled Woolley *v.* Clark, or rather have prevented Woolley *v.* Clark from taking the course it did. However, upon that I say nothing; I give no opinion upon Woolley *v.* Clark, because I am not called upon to give that opinion further than this, that I hope whenever Woolley *v.* Clark is mentioned again, and relied on again, it will be reconsidered, and fully considered.

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LORD CAMPBELL.—My Lords, I have very little to add to what has fallen from my noble and learned friends; and really I think this case is free from all difficulty.

The first point which has been made at the bar respecting the interlocutor being contrary to the law, because there was not a majority of the Court in its favour, is clearly unsustainable, for the interlocutor is in the regular form, "Edinburgh," such a day, and such and such a judgment given. We cannot upon the short-hand writer's notes of the reasons which were given, be asked to say whether, upon those reasons, the learned Judges must be supposed to have voted on the one side or on the other. We cannot go into such a speculation. The record states that there was that judgment of the Court, and by that record we must be bound.

With respect to the objection to the verdict that it does not exhaust the terms of the issue, and that, therefore, the judgment should be arrested and followed by a *venire de novo*, I think that to allow that objection would be expressly defeating the Act of Parliament. The verdict has been given, and it was not objected to within the proper time; therefore it stands, and the facts there found must be considered as having been established.

The only question which has been considered as debateable (and it has been debated very ably on the part of the counsel for the Appellant,) is whether, taking the facts found by the verdict of the jury, they establish in point of law that Mr. Weir was wrongfully in possession of this property. That is the question, and the only question. For the reasons which have been given by my noble and learned friend, the Lord Chancellor, it seems to me to be quite clear that these facts are not by the law of Scotland sufficient to shew that Mr. Weir was wrongfully in possession. It is quite clear that the onus is upon the Appellants to shew that the facts which are found by the jury would, according to the law of Scotland, make Mr. Weir, from the date

to which they point, what we should call an Executor *de son tort*. That onus lies upon them; and what authority have they produced? They have shewn no dictum and no decision for holding that a person in possession of property in his hands as executor, and who has merely some moral blame for not communicating information of another will, is a wrongful possessor; but it lies on them to shew the principle on which they say that the facts amount to satisfactory proof of wrongful intromission. Those cases which have been cited with respect to sums of money received and spent *bonâ fide*, do not in the slightest degree apply, because there the question was whether the party should account or not. Here the question is upon what principle he is to account? It being allowed on all hands that he is to account upon the question whether any distinction exists, as to the principle upon which he is to account, no authority has been cited. But it seems to me that none of the facts which have been found by the jury at all warrant us in coming to the conclusion that he was wrongfully in possession. I therefore concur with my noble and learned friends in thinking that this interlocutor must be affirmed.

[*Mr. S. Wortley.*—With respect to the costs, will your Lordships allow me to make one observation? It is quite clear that one of the Judges must have withdrawn his vote in order to produce a majority.

*Mr. Rolt.*—No, that is not the case.

*Mr. S. Wortley.*—In the previous case, under those circumstances, your Lordships did not give costs. In the case of Maule *v.* Moncrieffe, the language of the Lord Chancellor was this, "The Court was equally divided, and they had two courses "to take, either to retain that equal division and to send for the "consulted Judges, which they did not do, or to adopt the "course which they did adopt, and which brings the case here, "the Lord Justice Clerk saying, 'I withdraw my vote as a "'judge, and leave you to be two to one in favour of the inter-

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" ' locutor of the Lord Ordinary, in order that it may go to the " ' House of Lords.' Now, my Lords," says my Lord Chancellor, " this is stronger than a recommendation of a Judge to " appeal, which I look to as material in weighing the question of " costs." In this case it is manifest from the printed opinions that two of their Lordships were in favour of the Appellant.

*Lord Campbell.*—That is not at all clear.

*Mr. S. Wortley.*—In that case it only appeared from the opinions of the Judges that that was the course taken.

*Lord Brougham.*—We cannot go on speculation.

*Lord Chancellor.*—The common rule must be followed.]

Ordered and Adjudged, That the Petition and Appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

DUNN and DOBIE,—TATHAM, UPTON, and Co., Agents.