J. STEWART and E. DREW, Petitioners.—*Wetherell—Warren.* No. 57.
EARL of STAIR and Others, Petitioners.
J. V. AGNEW, Petitioner and Respondent.—*Gifford—Sugden.*

Appeal — Process—Rehearing.—Held incompetent to rehear a case on the merits formerly argued, and on which judgment had been pronounced by the House of Lords; but that the judgment might be amended as to a point on which no decision had been given by the Court of Session, and on which no argument had, through misapprehension, been stated in the House of Lords by the party against whom the judgment was pronounced.

Mar. 12. 1823.

2D DIVISION.

AFTER the judgments had been pronounced, noticed ante, p. 320 and p. 333 (which see,) reversing the decision of the Court of Session, and finding that the estate of Barnbarroch was not attachable for the debts of John Vans contracted subsequent to the date of the entail of that estate and of Sheuchan, and not made real prior to the date of infeftment—that the sales had not been lawfully made, and that the appellant, Mr. Vans Agnew, had right to the lands which had been sold, and to the rents from the period of his succession as an heir of entail,—he presented a petition to the Court of Session, praying it to apply the judgment of the House of Lords in ordinary form, by pronouncing decree conform to it. This was opposed by Messrs. Stewart and Drew, and by the Earl of Stair and others, the respondents in the appeals, who moved the Court, as Parliament was not met, to supersede advising the petition until they could have an opportunity of presenting a petition to the House of Lords to be reheard. The Court, on the 15th of November 1822, in consequence of this motion, superseded advising the petition for Mr. Agnew till Tuesday then next, in order to hear counsel, and required the respondents to lodge a minute, stating their intention to apply to the House of Lords on the meeting of Parliament. Counsel having been accordingly heard,

Lord Glenlee observed—If there had been any specific command by the House of Lords, ordering the judgment to be carried forthwith into execution, it must have been immediately obeyed; but the remit is, to do that which is just, and consistent with the judgment. The one party says that we must forthwith carry it into execution, while the other prays that this may be delayed for a short time. Both of these demands are consistent with the judgment; and therefore we are left to decide which is the most consistent with justice. No doubt, if there had been any act of sederunt, or any established and fixed course of practice, requiring that the judgment should be applied so soon as it was presented, then we could

Mar. 12. 1823.

have had no alternative. But there is no such regulation; and although the custom has been to apply the judgment whenever this has been asked, it has been, not because the Court were bound to do so, but because no opposition was made. This case, therefore, is quite out of the usual course; and if there be grounds for asking delay consistent with the ends of justice, there is no rule of Court, or of practice, to prevent it being granted. Indeed, we should go directly against the remit, if we did not do that which is just. Now it appears to me that sufficient grounds have been shown for granting delay. It has been established that it is competent on certain grounds to apply to the House of Lords for a rehearing after judgment has been pronounced. It is quite enough for us to learn that such petitions have been *entertained*, whatever the House of Lords may have done upon them. But it has also been shown that there are good grounds for expecting that a rehearing will be allowed. One part of the judgment decides a point that, in the state of the process, could not have been decided here, which is a different case from deciding the same point a different way from that done by us, or on different grounds. Besides, it appears that Mr. Agnew did not call all parties to the appeal having interest. Some of the creditors were dead, whose representatives were not called. If we were to apply the judgment at present, the process would be thereby transferred to this Court; so that, if a rehearing be competent, we should throw a difficulty in the way of the respondents in point of form, which we ought not to do. On the other hand, I cannot see that any injury can be sustained by Mr. Agnew by a short delay.

Lord Robertson.—We all know that we must obey the judgment of the House of Lords, and it is our inclination to do so; but we do not disobey it by delaying for a short time to carry it into execution. The question therefore seems to be, what has been the practice in similar cases? Now it appears that it has been the immemorial custom immediately to pronounce judgment in terminis of that of the House of Lords. The opposition of the respondents is unprecedented, and no example of it being sanctioned has been shown, either in this Court or the Courts of England. So far as practice is concerned, therefore, it is hostile to the respondents. To get out of it, and in order to succeed, they must show, 1. That it is competent to apply to the House of Lords to rehear; 2. That they have good grounds for such an application; and, 3. That if this Court refused to delay, they would be without a legal remedy. As to the first point, I am satisfied that the competency of the application has been clearly

established in virtue of the standing order of 1694, and the several cases which have been referred to. At the same time, a rehearing appears to be not a matter of right, but a remedium extraordinarium, for which cause must be shown. With regard to the second point, I can conceive cases where the Court might pause before giving effect to the judgment, so as to get it rectified, as if decree were given for £2000 where the summons concluded only for £1000; but this case is not of that description. It is a delicate thing for this Court to inquire whether there are grounds for the House of Lords reconsidering a case which they have decided. Into these I shall not enter. It has, however, been said that the appeal against Stewart and Drew was incompetent under the 48th Geo. III.—that the representatives of some parties who have died were not called—and that the applying of the judgment would be equivalent to execution, so that a removing might immediately take place. With regard to the objections to the competency, these ought to have been stated to the House of Lords; but they were not. Neither do I think that a removing could be immediately enforced. There is no order to that effect in the judgment, and there is no prayer for it in the petition before us. Besides, by the order which has been already written on the petition, the case is taken away from the House of Lords; and therefore, in form, there is a difficulty as to a rehearing. Whether the respondents can appeal against the interlocutor applying the judgment, it is not necessary to decide; but I think we are called on to apply it. Mar. 12. 1823.

Lord Bannatyne.—This is a case of great delicacy and importance. No such application as that made by the respondents was ever brought before us. I conceive that in this matter our duty is merely ministerial, and that we have no right to inquire into what may be the effect of the judgment. The House of Lords, like every other human tribunal, may err; but it does not belong to this Court to consider whether it has done right or wrong. It is our duty to put that judgment on record, and carry it into execution, by proceeding in terms of it. All that the respondents say amount to this, that the House of Lords have committed an irregularity. We cannot judge of that. They must go to the House of Lords, and if they satisfy them, I do not see that any proceeding of ours can prevent that House from rectifying their error, if they are satisfied that there is one. Neither do I see anything to hinder the respondents from appealing against our interlocutor applying the judgment. But, at all events, I think we must apply it; and if we did not, a precedent of most dangerous consequences would be established.

Mar. 12. 1823.

Lord Craigie.—There is perhaps a difficulty and delicacy in the case, so far as it may go to impeach the judgment of the House of Lords, which we cannot do; but in other respects I do not see the least difficulty. In the case even of a final decree here, it is competent at any time before extract to get any mistake rectified, or have it recalled when exposed to plain nullities. The House of Lords is a Scotch Court in reference to appeals from Scotland, and it must decide according to Scotch law; therefore I apprehend that what is competent here must be equally so there. In this case the House of Lords has directed this Court to do that which is consistent with its judgment, and just; therefore we are entitled to consider what is just and reasonable in the circumstances of the case, and are not called on to do that which is 'nimious and oppressive. But if we were to apply the judgment, I apprehend instant execution by removing might take place. In the circumstances, that would be most oppressive; and therefore, as I think a rehearing is competent, we ought to supersede applying the judgment till the respondents have had an opportunity of going to the House of Lords. It does not appear to me that, by writing on the petition, the case is removed from the House of Lords.

Lord Justice-Clerk.—We are certainly called on to perform a delicate and important duty, whether we regard the interest of the parties, or the law in general. I conceive, however, that there is no such immemorial custom as assumed by Lord Robertson, which requires us forthwith to apply the judgment; neither do I think that the presenting of this petition has the effect to remove the cause from the House of Lords. And if a rehearing be competent, I do not see that it is necessary for us to inquire whether there are such grounds as would induce that House to allow it. To me it appears that the standing order of 1694 decides the question as to the competency of a rehearing; and this is supported by the precedents which have been referred to. The ultimate fate of these applications is of no importance in this question; but I observe that in one case the petition was granted, so that at least it is clear that such petitions have been entertained. Indeed it would be the height of presumption in this Court to decide that a rehearing in the House of Lords is incompetent. The question therefore comes to be, whether we are imperatively required forthwith to apply this judgment? If we were to do so, we must go on to execute it; and thereby the cause would be brought here, and so taken away from the House of Lords. But there is no order on us to do so on the instant;

and although it has been our practice, where no opposition was made, to apply the judgment, yet I see that in the case of Scott *v.* Brodie, 8th March 1803, answers were allowed to the petition, so that some delay must have taken place. See also the case of Campbell, July 1743, (14968,) where the Court ordered precedents to be laid before them, prior to carrying the judgment into execution in the mode required. It is said, however, that if we apply the judgment, the respondents may appeal; but the competency of that does not appear; and at all events it would bar the rehearing. If, therefore, the respondents have a right to be reheard, we ought to do nothing to deprive them of that right; and as it has not been shown that we must forthwith apply the judgment, I think we ought to supersede advising this petition till the tenth sederunt day after the meeting of Parliament. Mar. 12. 1823.

The Court accordingly, on the 3d of December, superseded advising the petition 'until the 10th sederunt day after the meeting of Parliament for the dispatch of business.'*

In consequence of this, Messrs. Stewart and Drew, and the Earl of Stair and others, presented petitions to the House of Lords. By the former it was stated, that the judgment was not agreeable to the law of Scotland:—that as the Court of Session had found that the estate of Barnbarroch was affectable for the debts of John Vans generally, they had, in their argument at the bar of the House of Lords, conceived that they were only called on to support that decision, and that the question, as to whether any distinction could be drawn between the different classes of debts, was one which had not hitherto been argued:—that, however, the House of Lords had pronounced a judgment on that question, and that they ought, consistently with justice, to be allowed an opportunity of being reheard generally, and at all events on that point. Their prayer was, 'That your Lordships will be 'pleased to order that the appeal may be reheard, and that you 'will recal the judgment pronounced, and affirm the decree ap- 'pealed from; or at least that your Lordships will alter the judg- 'ment, so far as to find that the estate of Barnbarroch was affect- 'able for all the debts generally which John Vans owed at the 'date of recording the infeftment of 1775, so far as the same re- 'mained due at his death; or to do otherwise, as to your Lord- 'ships in your great wisdom may seem proper.'

By the Earl of Stair and others (who were purchasers under

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* See 2. Shaw and Dunlop, No. 63.

Mar. 12. 1823.

the act of Parliament) it was stated, that the decision of the House was contrary to the established law of Scotland:—that as the Court of Session had assoilzied them generally, the only question which had been or could be argued at the bar of the House related to the validity of the sales; but that their Lordships had found them liable for the bygone rents—a point on which they had never been heard, and against the claim for which they had well-founded defences. Their prayer was, 'That your Lordships will be pleased 'to order that the said appeal may be reheard generally, and 'that you will recal the judgment pronounced, and affirm the 'decree appealed from; or at least that your Lordships will be 'pleased to order the said cause to be reheard upon such of the 'points aforesaid as you shall see fit, and to make such alteration 'upon the said judgment as to your Lordships, upon such rehear-'ing, shall seem just; or to grant to your petitioners such other 'relief in the premises, as to your Lordships in your great wis-'dom shall seem meet.'

On the other hand, Mr. Agnew presented a petition, praying that an order should be issued to the Judges of the Court of Session forthwith to carry into execution the judgment of the House in terms of the remit.

After hearing the counsel for the parties, the House pronounced this judgment:—'The Lords being satisfied, that although the 'appellant's demand of the rents of the entailed estates, from the 'period of his accession to those estates, was properly and accord-'ing to the ordinary forms of proceeding before the House at the 'hearing of the appeal, and ought, according to such forms and 'the practice of the House, to have been made a subject of dis-'cussion at the hearing of such appeal, if the respondents had con-'ceived they had grounds for disputing such demand, consistently 'with the judgment of the House in favour of the appellant on 'the principal question, unless the respondents had submitted to 'the House that the discussion of that question might be remitted 'to the Court of Session, being a question which had not been 'argued in that Court, and the House had thought fit to remit 'the same accordingly; and the Lords being also satisfied that the 'particular question respecting such rents had not been argued, 'or proposed to be argued, at the hearing of the appeal; and con-'ceiving that the neglect of the respondents to argue such question, 'or to request that the question might be remitted to the Court of 'Session, had arisen from a mistaken apprehension on the part of 'the respondents that, as the question had not been discussed in 'the Court of Session, it was not necessary, or consistent with the 'forms of proceeding in this House, for the respondents to attend 'thereto on the hearing of the appeal; the Lords, therefore, con-

'ceiving that the neglect on the part of the respondents, either to discuss such question on the hearing of the appeal, or to request that it might be remitted to the consideration of the Court of Session, arose from such misapprehension;—the Lords think fit, under the particular circumstances of the case, to order, and it is therefore ordered by the Lords Spiritual and Temporal in Parliament assembled, that the said judgment be amended by omitting the words 'along with the rents from the period of his accession "to the entailed estates,' and inserting instead thereof the words, "without prejudice to any question which may be made in the "further proceedings in the Court of Session touching the rents "of the entailed estates, and the application thereof during any "period of time.' And it is further ordered, that as to all other matters prayed by the said petition of the respondents, the same be rejected, and the said petition be dismissed.'

Mar. 12. 1823.

Lord Redesdale.—Your Lordships have appointed to-day for the consideration of the petitions with respect to an appeal which was before your Lordships the last session of Parliament, in which Mr. John Vans Agnew was the appellant, and James Stewart and Ebenezer Drew, and several others, were the respondents; and another appeal, in which Mr. Agnew was appellant, and the Earl of Stair and others were respondents. Your Lordships, upon the hearing of those appeals, pronounced judgment reversing the judgment of the Court of Session, and sending, with your judgment, the cause back again to the Court of Session. The effect of the order which your Lordships pronounced was to dismiss the subject from the consideration of the House, and to remit it to the Court of Session to execute the judgment which you had pronounced on the subject.

The appeal in which Mr. Stewart was respondent, was an appeal from the decision of the Court of Session in 1784. The question in discussion upon that appeal it is not necessary, with the view I have of this subject, particularly to state to your Lordships. It was a particular question, whether certain estates were subject to the debts of a Mr. John Vans, the appellant's grandfather. The appellant, the present Mr. John Vans Agnew, was at that time a minor, and entitled only to an estate in tail in the property in question, under what was conceived a strict entail, after the death of his father. The decision in the Court of Session was adverse to his rights, as he conceived, charging the property, notwithstanding the entail, with all the debts due by his grandfather at the time of his death. The suit in which this decree was pronounced, was instituted by two persons of the name of Stewart and Drew, on their own behalf, and as assignees of and interested for the creditors of the late Mr. John Vans; and the question was, Whether the property was or was not subject to all the debts at the time of the death of that Mr. Vans of Barnbarroch, or was subject only to such as existed prior to the infeftment

Mar. 12. 1823.

being taken, according to the nature of the entail of this property, which was made a considerable time before?

The case coming before this House, your Lordships reversed the decision of the Court of Session, and your Lordships decided that the property was subject only to those debts of Mr. Vans of Barnbarroch which were made real charges upon the estate, before the deed of entail was made a proper settlement by taking infeftment upon it. Your Lordships therefore disposed of the subject.

The petition which has been presented to your Lordships on behalf of Mr. Stewart and Mr. Drew,—who are not the persons that were originally the parties to the suit in 1784, but are only the representatives of those two persons,—the petition which you have now under consideration proceeds upon the idea that your Lordships have erred in that judgment, and that, having erred in that judgment, you ought therefore to review the judgment which you have so pronounced.

In consequence of the petition having been presented, I have looked with the utmost care and attention into all the cases in which it has been suggested that the House has done anything in the nature of a review of its former proceedings. The earliest instance which has been submitted to our consideration, is one which I shall take the liberty of laying wholly out of the case; because, in the first place, the original decision was on the 3d of May 1642, which, your Lordships will recollect, was early during the period of rebellion, after his Majesty King Charles the First had left this part of the kingdom—had demanded entrance into his own fortified town of Hull—had been refused entrance into that town—and had declared the persons who so refused him an entrance guilty of high treason. Proceedings at that time were, after the Restoration, in many instances considered as not very regular proceedings in this House. But that is not the sole objection; because, really and truly, the proceeding was not a proper subject of appeal to this House, for it was an appeal, not from a regularly constituted Court in Ireland, but an appeal from an order of the Privy Council in Ireland—one of those proceedings which had been made the subject of the impeachment of the Earl of Strafford; and your Lordships find, that when the case was ultimately disposed of after the Restoration, when an attempt was made to review the proceedings, it was treated as an illegal and irregular proceeding from the beginning to the end, and one in which the House ought not to have interfered. That case I shall lay entirely out of your Lordships' consideration, on account of the particular circumstances attending it.

Other cases that have been mentioned are really of a description that, if the manner of the proceedings of this House had been at all understood, never would have been mentioned as justifying such an application as that which is now made to your Lordships. It was formerly not uncommon for your Lordships, when an appeal came to this House from a Court of Equity in this country, and there was a doubt upon the question, to direct an issue to be tried, for the purpose of ascertaining the facts; and your Lordships did not upon that issue remit the cause to the Court from

whence the appeal came, but you retained the cause in your own House, meaning to deal yourselves upon the result of that issue, as you might think the result warranted you, in reversing or affirming the decree. Mar. 12. 1823.

The first of this description that I find is Scudamore *v.* Morgan, in which your Lordships, on the 4th of March 1677, reversed the decree pronounced in the Court of Chancery, and directed such an issue. Your Lordships made orders, and directed the Court of Chancery to make orders, pending the trial of the issue; and after the issue had been tried, your Lordships affirmed the orders and decrees complained of. It is very evident, therefore, that you retained the whole proceeding in your own House, until, upon the trial of the issue, the facts found upon that trial convinced you that the decree which had been pronounced in the Court below was right; but there was no finding of your Lordships, disposing of the cause, until you pronounced a judgment, after that having been done, and then the cause was entirely disposed of.

There was another case of Chute *v.* Lady Dacre, which seems also to have been most extraordinarily misapprehended. The case of Chute *v.* Lady Dacre was heard on the 12th of November 1680. The Chancellor at that time had been obliged to withdraw from the House in consequence of illness; but it was not an uncommon thing, I see by the Journals, at that time, for the House to hear an appeal in the form of a committee; and this appeal was so heard. The committee were of opinion, generally, that the decree ought to be affirmed; but it does not appear that any order to that effect was understood to be made, because, on the 19th of November, the House took into consideration the perfecting of the order. In that case they therefore had conceived that they had not completed what they had proposed to be done. This was not on any application of the parties, but on the part of the House. The question that was then proposed was, Whether Mr. Chute's counsel should be heard to certain points only? At length an order was made, that he should be heard to these points. The House gave particular directions upon those points, and having given particular directions to those points, disposed finally by their judgment of the cause, so far as it came before them by appeal. Both parties afterwards petitioned the House against the order that had been made, and the House rejected both the petitions; because, as I conceive, they considered the thing had then passed—that it was res judicata—and that it was not competent to them to hear more upon the subject.

There was a case which came before the House in March 1689, in which the House made a decree, as it was at the time understood, with the consent of all parties. A person of the name of Warren, who was one of the parties to the appeal, afterwards presented a petition, by which he alleged that the decree had been unduly alleged to be a decree by consent. On investigating the subject, that was found to be an untrue assertion. If it had been a true assertion, and the House had been deceived upon the subject, as your Lordships will find in a subsequent case, then perhaps the House might have proceeded, upon that ground, to have re-

Mar. 12. 1823. considered the case; because, if the House is imposed upon by a fraud, that may be a ground for revising the judgment so fraudulently obtained. However, as it seems it was untruly alleged, the House affirmed what they had before done, and they heard the application simply on the point, whether that decree had been obtained by misrepresentation or not;—they would not hear it on any other.

There are other cases in which additions have been made, where the House have omitted necessary words. In fact, as your Lordships will see, the omission of those necessary words made what they had done imperfect, and they rendered their order perfect by the insertion of the necessary words. There are other cases in which there have been evident mistakes. Mistakes in the form of a judgment may be amended in the Courts of Law. There is a considerable number in which the House proceeded, as they did in the case of Scudamore and Morgan, which I mentioned some time ago to your Lordships, to direct issues to be tried for the purpose of ascertaining the facts, before they would determine whether they should or should not affirm or reverse what had been done in the Court below; and it seems to have been the practice in those early times to detain the cause in the House until the issues were tried. Your Lordships are aware that now it is the practice, instead of doing that, (which is really very inconvenient,) to remit the cause back to the Court from which the appeal is made, and to leave to that Court the trial of the issues, and the directions that may be consequent upon the event of that trial.

There is a number of cases which are somewhat of a similar description, though not exactly so. Your Lordships will find, that, during the period which elapsed between the Revolution of 1688 and the appointment of my Lord Somers to be first Keeper, and then Chancellor, the Great Seal was constantly in commission, and one of the Commissioners acted as Speaker of this House, and the then Lord Chief Baron acted as Speaker. The consequence was, that the Lord Chief Baron, acting as Speaker, was here simply as Speaker on the hearing of those appeals, and consequently could say nothing upon the subject, but as the House thought fit to propose questions to him. Consequently, from this there arose a habit of proceeding which prevailed for a considerable time, that when the Court below, the Court of Chancery or the Court of Exchequer, had dismissed a bill, if the House of Lords thought it ought not to be dismissed, the House reversed the decree, and did nothing more; the consequence of which was, that it was impossible to know what the Court below was to do. They did not remit to the Court below to do what was fit to be done in consequence of the reversal of the decree; they did not in any manner express to the Court below what decree ought to have been made, but they simply reversed the decree; and they seem, in consequence, as it would appear, of the representations of the officers of this House that this was the proper way of making their orders, to have persisted in this practice until Lord Somers became Keeper. When Lord Somers became Keeper in 1693, he obtained an alteration of that

practice, and then the House remitted the cause back to the Court of Chancery, or the Court of Exchequer, for the purpose of that Court doing that which became fit, in consequence of the reversal of that decree; or they remitted it back with such orders and directions as the House thought fit to give upon the subject. In those cases petitions were presented by the parties to the House, and many of them, I conceive, improperly disposed of, because the House had not pronounced a proper judgment; and whenever they were not disposed of, it was right they should be. In the first case that came before the House after Lord Somers was Keeper, proper directions were given by the House to the Court below to take a proper consideration of the subject. Mar. 12. 1823.

Another case of somewhat the same description was the very celebrated one of Philips *v.* Bury. There the House pronounced a judgment simply reversing the judgment of the Court of King's Bench. The House having simply reversed the judgment of the Court of King's Bench, it was impossible to do anything in the case, and the parties therefore petitioned the House on the subject in 1694, for the purpose of knowing what was to be done, representing that it was impossible for the Court of King's Bench to pronounce any judgment, their own judgment being reversed; that they could not pronounce a new judgment upon the subject; but that this House should pronounce that judgment which the Court of King's Bench would have pronounced, if they had seen the case in the light in which it appeared to this House. The House accordingly ordered the Chief Justice to attend; and your Lordships will find, that upon his representation, stating that it was impossible to proceed if the judgment of the Court of King's Bench was simply reversed without more, the House of Lords required the Chief Justice to state what would have been the judgment of the Court of King's Bench, if they had had the same view of the case which the House had had; and accordingly you added to your judgment of reversal that further judgment, without which there could be no justice in the case, but it would have been entirely inoperative.

I think I have pretty well shown to your Lordships what is the nature of those cases in which the House has done anything upon applications of this description, except cases in which there had been some clerical errors—some evident and palpable mistake, which had nothing to do with the merits of the case, where, for the purpose of making the judgment perfect, the House have thought fit to make an alteration of their original record; for instance, in a case where they had affirmed a judgment, with costs out of pocket not exceeding £200. That was no judgment at all, because there was no person who could ascertain what were the costs out of pocket not exceeding £200,—the House not having referred it to any person to ascertain what were the costs out of pocket not exceeding £200; and therefore the order was so imperfect, that nothing could be done upon it. This was afterwards brought before your Lordships, in regard that there was no officer of the House to tax costs. The alteration made was, by leaving out the words 'costs out of pocket not exceeding;'

Mar. 12. 1823.

and after the word ' pounds' inserting ' for his costs,'—showing that the House meant that the man should have £200 for his costs,—it being conceived, I suppose, that the costs out of pocket exceeded £200. An inquiry was not thought fit to be instituted as to the actual amount of the costs. That is clearly a judgment so imperfect, that it was incapable of being carried into execution without alteration.

In another case the House had in their judgment spoken of the officer of the Exchequer, who in that Court acts as a Master in Chancery. It used the word ' Master,' instead of the words ' Chief Remembrancer ' of the Court, or his Deputy.' It is perfectly clear that your Lordships' order was imperfect and inoperative in consequence of that error; and the House, on its being pointed out, directed that order to be altered, by leaving out the word ' Master,' and substituting the words ' Chief Re- ' membrancer, or his Deputy.'

One case has been very much spoken of, which is that of Luttrell *v.* Lord Irnham. In that case the circumstances were these:—When the appeal came before the House, there was produced, on the part of the respondent, an agreement between the parties, which was to put an end to all litigation. The House being deceived by this, they thought fit to say that they would not proceed further in the cause; and they, rather hastily perhaps under the circumstances, pronounced an order for affirming the order of the Court below. It appeared that the instrument that had been produced did not relate to the particular subjects in dispute, and Mr. Luttrell therefore applied for a further hearing; for it was quite a surprise upon the parties and the House; and the House upon that proceeded to hear—in fact, they had not heard before —they had determined nothing they did then enter into the merits, and they affirmed what had been done in the Court below.

There is another case, the case of Devereux *v.* Phelan, in which an application was made for a rehearing, alleging that the party was not before the House; for that, though he had been nominally a party, he had had no notice. Supposing that to be true, the House thought it was a case in which they ought to give relief, and they investigated it. It turned out that this was a most gross imposition. The petition was dismissed, and the petitioner was ordered to be taken into custody; but he ran away, otherwise he would have been punished for his imposition.

I apprehend, therefore, that the cases that have been referred to are nothing more than these:—First, the party who made the application was a party named in your judgment, but who was not before the House, as was supposed to be the case in Devereux *v.* Phelan; and the House certainly would not permit its judgment to injure a party who was not before them. In another case, the judgment pronounced was in itself imperfect, so that that which was intended to be done was incapable of being carried into execution, from the nature of the order of your Lordships; or, as in the case of Phillips *v.* Bury, from a supposition that it was not necessary for the House of Lords to make any order, further than to reverse the judgment of the Court of King's Bench, and to leave it to the

Mar. 12. 1823.

Court of King's Bench to proceed; and therefore they sent it to the Court of King's Bench without doing more. In other cases, the order pronounced was merely one directing an issue, or some proceeding, the determination upon which was necessary to the final decision, where the cause must come again before your Lordships; and you must come to a final decision upon the subject, because you had not finally decided the matter, and the thing had not been subsequently disposed of finally by you. The cause not being in the first instance disposed of finally by you, it must remain with you to consider what is fit for you to do, as it would in the Court below before they pronounced their judgment.

Others are cases of errors in the form of proceeding, where the words made use of are inapplicable; as, for instance, that case where the word 'Master' was introduced instead of the words 'Remembrancer of the 'Exchequer, or his Deputy.' Any informality of that description your Lordships will correct; but, I take it, no instances can be found of your Lordships rehearing a cause for the purpose of altering the substance of the judgment—that is, for the purpose of doing that which no Court does, except under the particular circumstances which the practices of certain Courts admit of. Your Lordships know that in the Court of Chancery, for instance, and in the Court of Exchequer, rehearings are permitted under certain circumstances; but, if a decree has been signed and enrolled, the appeal must be to this House. Formerly this House would not allow of appeals until the judgment was perfected and enrolled, though now it is otherwise. That practice was found to be inconvenient; and the House has acted otherwise, and permitted appeals when the decrees were only in paper. If a case comes from a Court of Law, and the House reverses the judgment, it must pronounce that judgment which the Court below ought to have pronounced, if it had been of the same opinion with the House. If it omit to do so, its judgment is imperfect; and in that case also the House has pronounced that judgment,—but it did not rehear the cause even in that case,—but it pronounced that judgment which was rendered necessary in consequence of its judgment being imperfect, by its merely reversing the judgment in the Court below—imperfect, because it did not add that judgment which would have been a right judgment, if the Court below had entertained the same opinion which the House did of the merits of the case.

Under these circumstances, this petition of parties, under the names of Stewart and Drew, being simply, 'That your Lordships will be pleased 'to order that the appeal may be reheard, and that you will recal the 'judgment pronounced, and affirm the decree appealed from; or at least 'that your Lordships will alter the judgment, so far as to find that the 'estate of Barnbarroch was affectable for all the debts generally which 'John Vans owed at the date of recording the infeftment in 1775, so far 'as the same remained due at his death; or to do otherwise, as to your 'Lordships in your great wisdom may seem proper;' it is really and truly nothing more than desiring a rehearing of the whole case upon its merits.

Mar. 12. 1823.

The ground upon which this petition seems to be put is, that when the application was made to the Court of Session in Scotland to execute your judgment, the Court of Session in Scotland thought your judgment wrong; and thinking your judgment wrong, they would not execute your judgment immediately, but they would give time to the parties to apply to the House to rehear the matter, and induce your Lordships to alter your decision, and make it conformable to what the parties thought it ought to be. Putting it in that point of view, it appears to me to be a very material question. If the Courts from which appeals are brought to this House can take upon themselves to say they will suspend the execution of the judgments that you pronounce, because they conceive that those judgments are wrong, I know not in what manner justice is to be administered. If they can do it once, they may do it twice—three times; —they may suspend the execution of your judgments as long as they think fit, because they consider them to be wrong. It is true, the suspension here was not for a great length of time. It was, however, a suspension for some months, so as to allow the parties an opportunity of making this application to your Lordships. Now it seems to me, that if I were convinced your judgment was wrong, it would be infinitely more mischievous in its consequences to permit this proceeding to take place, than to suffer your wrong judgment to remain unaltered. It is a judgment upon the merits. If a judgment can be reviewed in the manner in which it is sought to be reviewed in this case, I wish to know where there would be an end of litigation. I take it to be, generally speaking, a principle, (with the single exception I have before noticed,) that when a final judgment is pronounced by a Court of competent jurisdiction, that Court has no right to alter its judgment; and it cannot be altered, except by a writ of error to a Superior Court. If the decisions of this House, acting as a Court of ultimate resort, are subject to this sort of review, where is to be the end of litigation upon this subject? and what is to be the consequence to this House, burdened as it is with the numerous appeals that come before the House, if they are also to review their own decisions, because the Court below choose to think their own decision was right, and the decision of this House was wrong? It strikes me that it would lead to mischiefs almost incalculable; and therefore I conceive that your Lordships ought to reject this petition of Mr. Stewart and Mr. Drew.

With respect to the other petition—that of Lord Stair and a number of other persons—it is very nearly of the same nature; but they do in their petition allege something more. They were persons who had been purchasers of part of the estate in question, which the Court of Session had been authorized to sell by an act of Parliament, in a suit to which the heirs of entail were to be called as parties. The suit that was instituted was brought by a person who was entitled to possession under the entail, for the purpose of charging the property, in his own relief, with debts of his father, to the utmost extent to which it could be carried; and the proceedings were had in that cause without bringing

the minor heirs of entail (his children) before the Court, in the manner in which they alone could properly be brought before the Court,—that is, by having a curator present for the purpose of defending their interests, and seeing that justice was done to them. Your Lordships were of opinion, therefore, that all those proceedings were null and void. That was your Lordships' judgment. The Court of Session had certainly thought otherwise; but such was your Lordships' opinion upon the revision of the case, and you have sent it back to the Court of Session, for the purpose of your judgment being carried into effect. Now that is a positive judgment upon a matter properly before your Lordships; there is no pretence for saying that the judgment is not intelligible; there is no pretence entitling any one to say that the judgment you pronounced was not, at the time, the deliberate opinion of the House upon the matters before you. I do conceive, therefore, my Lords, that, so far, it is impossible to comply with the prayer of this petition. Mar. 12. 1823.

There is one thing suggested in this petition, to which I will call your Lordships' attention, because perhaps it might admit of some discrimination. At the same time I wish your Lordships to consider the difficulty which presents itself on that point. Your Lordships' judgment considered the appellant in that case (who had been one of the minor heirs of entail of the property sold) entitled to the possession of the lands that had been the subject of sale; and your Lordships added,—with the rents which have accrued subsequently to the death of his father, when his right opened. Now it was at one time insisted that that had not been sought in the Court below; that, I see now, is abandoned, and rightly so, because unquestionably it formed a part of what was demanded in the summons; but it is observed, that, according to the practice in the Court below, the summons being to reduce the instrument by which the property had been conveyed to those persons, if they had decided, as the House have decided, as to the right to the reduction, they would not have considered the question of the interim profits as immediately before the Court, without giving an opportunity to the persons who were interested in respect of those profits, to enter into the discussion whether they were or were not to be considered as bonâ fide possessors, and therefore not liable to answer for bygone profits, and particularly previous to the institution of the process of reduction. My Lords, that has had some weight on my mind; but, at the same time, if that really was not particularly discussed before your Lordships, it was the fault of those who attended your Lordships upon that occasion; because, as the appeal to your Lordships was to reverse what had been done in the Court below, and as your Lordships must pronounce a judgment following upon that reversal, it did become them to urge before your Lordships any matter that might have qualified the order which your Lordships might make with respect to the appeal before you. The only difficulty existing upon that subject is this, that your Lordships have clearly adverted to the whole of the proceedings in the Court below. If, in the Court below, a judgment would have been pronounced upon that part of the summons which prayed your Lordships for the possession,

Mar. 12. 1823.

without entering into the discussion of the question of the interim benefits, and leaving that open to further discussion, how far your Lordships may think that it would have been right for you so to do, if the matter had been suggested to you at the proper time, is a question which would have been well worthy of consideration; but that time is past. The minutes of the order which your Lordships pronounced upon that occasion, were some time in the hands of the agents for the parties by direction of your Lordships; they therefore had an opportunity of making any objection to the form of those minutes, if they had thought fit, before your Lordships finally pronounced the order. No such objection was made, and your Lordships directed that the party should be restored to the possession, and also that he should be restored to the rents and profits from the time that his right accrued.

Whether these persons could or could not have justified their claim to be exempted from the charge of rents and profits from the time that the appellant's right accrued, on the ground of being bonâ fide purchasers, is a question of some difficulty perhaps, considering all the circumstances of this case. According to my recollection, it appeared upon the evidence, that some of them stand in a very different situation in that respect from others. But, my Lords, there is another consideration which is important upon this part of the case. Purchasers of this description always take assignments of the debts for the payment of which the estates are to be sold, and they take that assignment of the debts as a part of the security for their title. All these parties had the assignment of these debts. Now, if any of them can establish those debts against the estates, under your Lordships' judgment pronounced with respect to how far the estate was liable to the debts of Mr. John Vans—if they can claim those debts, with all the interest for this length of time—and if they can at the same time retain the interim profits, they will certainly not be in a very conscientious situation with relation to the appellant. I own I have on that part of the case considerable difficulty, and I should very much like to hear what the learned Lord on the Woolsack thinks upon the subject. With respect to the prayer of this petition, so far as it seeks a general rehearing, I think it ought to be rejected upon the same principle as the other, to which I have before referred.

There is a third petition of the appellant, in which he prays that the Court below may be directed to proceed according to the direction of your Lordships in the cause. I presume, if your Lordships dispose of the other petitions in the manner I have proposed, that will be a matter of course, without a particular order from your Lordships.

Lord Chancellor.—This matter of Vans Agnew comes before your Lordships in consequence of three petitions presented to this House, which I will state to your Lordships. The first was the petition of the respondents, James Stewart and Ebenezer Drew; and, after stating all the proceedings that had been had in the Court of Session and this House, the prayer of that petition is, 'That your Lordships will be pleased to

'order that the appeal may be reheard, and that you will recal the judg- Mar. 12. 1823.
'ment pronounced, and affirm the decree appealed from; or at least that
'your Lordships will alter the judgment, so far as to find that the estate
'of Barnbarroch was affectable for all the debts generally which John
'Vans owed at the date of recording the infeftment of 1775, so far as the
'same remained due at his death; or to do otherwise, as to your Lord-
'ships in your great wisdom may seem proper.' The prayer of this petition is divided into three parts: *First*, That the appeal may be reheard, to recal the judgment pronounced, and affirm the decree reversed; which is praying that you will hear all the matter over again. *Secondly*, That you will alter the judgment, in so far as to find that the estate of Barnbarroch was affectable for all the debts generally that John Vans owed at the date of recording the infeftment in 1775, so far as the same remained due at his death; which, in any way, is calling upon your Lordships to rehear the whole of the merits, as far as they affect the question discussed between the parties at your Lordships' Bar, what debts of John Vans did, or not, affect this estate. And the *third* prayer is, to do otherwise, as to your Lordships in your great wisdom may seem proper; which is represented fairly enough to be not calling upon your Lordships to do anything in particular, but in general interfering to such an extent as you may think fit.

The next petition is a petition presented by the Earl of Stair and several other persons; and that petition prays, first, That the appeal may be reheard generally, and that you will recal the judgment pronounced, and affirm the decree appealed from; or at least that your Lordships will be pleased to order the said cause to be reheard on such other points aforesaid as you shall see fit, and to make such alteration upon the said judgment as to your Lordships, upon such rehearing, shall seem just. The first part of this prayer is calling upon your Lordships to rehear a cause which has been heard upon its merits; and the second prayer in this petition is referring your Lordships to certain points mentioned in the body of the petition, and desiring your Lordships to rehear the cause upon such of those points as you may think fit.

The third petition is a petition presented by John Vans Agnew, the appellant before your Lordships last year, and in whose favour the judgment now complained of is pronounced; and that petition, after stating what has passed in the Court below, and the interlocutor of the 15th November 1822, by which the Lords of Session 'supersede the considera-
'tion of this petition until Tuesday next, with the view of allowing the
'respondents to be then heard by counsel thereon;' and finally, having resumed consideration of that petition, 'supersede advising the petition.' That was a petition praying that the judgment of this House might not be carried into effect 'until the tenth sederunt day after the meeting of
'Parliament for the dispatch of business.' And this petition prays that your Lordships will be pleased to take the matters into consideration, insisting that, by this proceeding of the Court of Session, the judgment of your Lordships' House, pronounced in favour of the petitioner upon

Mar. 12. 1823. solemn consideration, has been suspended in the Courts below, and that you will adopt such means as shall be best calculated to carry into effect the judgment of this House, by making such orders as shall ensure prompt obedience to the judgments of your Lordships on the part of the Court of Session, and shall thereby procure to the petitioner that redress which it was intended to afford him by the judgment of this House.

With respect to the last petition, I cannot but persuade myself that it would be totally unnecessary to make any order, if you were pleased to be of opinion that you can do nothing upon the other petitions. I cannot bring myself to think that the Court of Session would require to be told by any order of your Lordships that they were to abide by that judgment. I should not act towards them with the respect I bear them, both as a body and as individuals, if I did not perfectly persuade myself that such order would be unnecessary. I am still willing to consider what has passed, as produced, not by that Court acting upon any notion that the House of Lords was wrong; because, whether the House be right or wrong, the judgment of this House must be obeyed by all the Courts below, although I have lived long enough in the profession to which I belong, to know perfectly well that in many instances in our Courts, as well as in the Court of Session, the judgments of this House have not been altogether recognised as right by those who in the Courts below judged of them; but all the Courts have felt that they were under the obligation to take those judgments to be right in the matter in which they were pronounced, however far they did or did not apply the doctrines maintained in those judgments to other cases not exactly similar in circumstances; and I am desirous, whatever might have been said by the counsel in the Court below, arguing with a degree of zeal founded upon their own opinion as to the judgment in the House of Lords, and attending to what has been reported to be said by the Judges in the Court below, in which it appears to me the Judges treated this House with great respect, I cannot help saying that your Lordships have a standing order about rehearing causes; and looking at this as a case in which the Court of Session have twice decided contrary to the ultimate decision of the House of Lords—looking upon it as a case in which the decision was a very important decision with reference to the effect of the act of Parliament, they seem to have had such a notion about the nature and effect of your Lordships' general order upon rehearing, as made it, in their judgment, till the matter was considered in this House, fit to give the parties an opportunity of applying to have the matter reheard.

Taking this course, the question your Lordships have to decide relates to the rehearing of a cause upon its merits; and it is not to be denied that you have on your standing orders one which, in its terms, is likely enough to mislead those who do not very accurately understand what the proceedings of this House are. My Lords, that standing order was made upon the 14th of February 1694, in which it is ordered, 'That no petition which relates to the rehearing of any cause, 'or part of a cause, formerly heard in this House, shall be read the

Mar. 12. 1823.

'same day that it is offered, but shall lie upon the table, and a future 'day be appointed for reading thereof, after twelve o'clock.' That is one of the standing orders of this House, and those who are not very conversant in what have been the proceedings of the House under that order, might naturally enough think it had a much more general effect than has been given to it. It follows—if your Lordships recollect another order which limits the time within which appeals shall be brought, and if the mode of proceeding in hearing appeals was taken to apply to the hearing of a cause upon the merits—your Lordships would have made some order as to the time within which they should be heard, or what number of rehearings there should be. My Lords, it seems to me, that if your Lordships will look at the constitution of our Courts of Justice, (meaning the House of Lords as one of them,) your Lordships will see a reason naturally attaching itself to the proceedings of the House of Lords against rehearings upon the merits, which does not apply to the other Courts. With respect to the Courts of Equity, a rehearing is a matter of right to a certain extent. If a judgment is pronounced by the Vice-Chancellor, you may apply to the Chancellor; if a judgment is pronounced by the Master of the Rolls upon the merits, you may apply to the Chancellor; if the Chancellor hears a cause in the first instance, you have a right to call upon him to rehear the cause in the House of Lords, it being very generally the case that the Chief Judge in the Equity Courts below has a seat in your Lordships' House, where his judgment may be explained by himself. This House is protected from that. It does not rehear causes that come to it from the Courts below. In the Courts of Law, causes may be ordered to be reheard; and if the case come here, your Lordships have a right to order the Judges to attend, and take the opinion of all those Judges seriatim, if they differ, or on the general opinion of all of them delivered by one, if they happen to agree. The House, therefore, has a great safeguard thrown round it, with a view to enable it, in the first instance, to give satisfactory decisions. Certainly, from the nature of the constitution of the Courts of Scotland, we cannot have in this House the same degree of assistance, and perhaps it is to be lamented we cannot have it; but the House has always been extremely careful; it may certainly fall into an error, or some degree of negligence, in an occasional instance; I cannot undertake to say it has not, in a very long memory of what has been passing here; but the House has endeavoured to throw around itself a protection as to Scotch causes; for, whatever observation may have been made upon the first Noble Lord whom I remember upon the Woolsack—I mean Lord Bathurst—I must take the liberty of reminding all persons who may have alluded to that Noble Lord, that I believe he was generally assisted, in Scotch causes at least, by a person of a name very much revered in Scotland —I mean Lord Mansfield. With respect to Lord Thurlow and Lord Loughborough—and I can speak of it with perfect confidence as to myself, for I never approach these Scotch causes without great fear and apprehension that I may be wrong, endeavouring, if possible, to be

Mar. 12. 1823.

right, but with great feelings of apprehension that I may be wrong —where the question has been one of considerable doubt, and where the House has looked upon the case as a question of great importance —I will go the length of saying, if it had been called upon to determine at the moment, it would have so acted in appeals of this sort, with a view to obtain that protection, as well as it can, which it receives in the cases of English appeals,—it has been in the habit of remitting to the Court of Session, that they might reconsider their judgment. That has occasioned some complaint, addressed to myself, of my practice to a very considerable extent indeed, in some period of the time that I have had the honour of sitting here. But there is one circumstance which is extremely discouraging, and that is with respect to matters of costs. The Court of Session gives costs much more generally than we do here, where we have a discretion; and after the experience of a great many years, and hearing the opinions of a great many persons who ought to be able to form just opinions upon that subject, I believe, in this part of the island at least, those who have had the most experience have always held it would be a most extremely improper thing that costs should follow the event in Courts of Equity; and I look upon the Court of Session as a mixed Court of Law and Equity; but undoubtedly I have sometimes felt, that when a remit has been made, (which is not what the party prays for,) but a remit which this House thinks necessary for its better information upon an important and difficult subject, I have been sometimes disposed to think it was rather hard upon a person, where the Court of Session again affirms a former judgment, to make him pay the expenses of the remit back by this House; and it is not without example, (though it is that upon which certainly the House should be very careful how it acts when it does it,) but it is not without example, where the House have reversed both judgments in the Court of Session.

Looking at the constitution of our Courts, give me leave to say, that I apprehend, upon grounds very satisfactory, looking at the general interest, it is infinitely better that the matter should be here finally decided upon one hearing, even if the decision is wrong, than that there should be a new litigation unknown to our proceedings, as to this matter of rehearing;—nor can any one say where it is to stop. In general, it is to be hoped the decisions of the House are right; but, whether right or wrong, it has been taken for granted that considerations of infinitely greater moment than the considerations which arise out of the particular mischief in particular cases, have led this House to determine, that where a matter has been heard between the parties at the Bar, and the House has given its decision upon the merits discussed by those parties, the House will not rehear the cause. And give me leave, most respectfully—for it becomes not the lips of a Judge to utter anything not respectful to those who hold judicial situations—give me leave only to ask, if we are to have hearings and rehearings, what would have been accomplished with respect to the appeals upon your Lordships' table in the last twenty years? I state that, with the highest respect for the individuals who

have argued matters at your Lordships' Bar, and with the highest respect to persons holding judicial situations in Scotland; I have never been otherwise than disposed to do great justice to the merits of both; but I have heard it stated, and that over and over again, that if we were to decide so and so, we should ruin the whole law of Scotland, and put an end to it as to the particular point then before us. And I know that when we have reversed the honest opinion, and the learned opinion, of the Judges in the Courts of Scotland, those very persons who have told us we were about to destroy the whole law of Scotland, have, in after cases, admitted that we have established the law of Scotland. All that the public have a right to expect, and all that the Courts in Scotland have a right to expect—and they have that right—is, that those who are to assist and advise your Lordships should task their industry and attention to the very utmost; but to say that the Judges in this House are not to decide according to what may be their conviction of the law, and that they are not to abide by that opinion, is to make a farce of an appeal, and is sacrificing the first principles of our judicial constitution. I am sorry to make these observations—I never do so without great pain; but if upon this occasion we are to take the judgment to be wrong in consequence of what we have heard, still the question now to be discussed is, Whether, according to the law administered in this House, that judgment, as it is stated to be, is to be reheard upon the merits of the question discussed at the Bar between the parties? I shall say no more than this, than that I desire it may not be understood that I think that judgment wrong. I gave that judgment, speaking for my own part, under a solemn impression that that was the judgment which an attentive consideration of my duty required me to give. I will not say more upon that; but I will address myself to the question, whether you can rehear it upon its merits, admitting it, if you please, for the sake of argument—but not admitting that I think it is in fact and substance—a wrong judgment. Your Lordships, however, will allow me to say, if I have been misled in this—and I am admitting myself to have been misled, for the purpose of the argument—when I look at the name of Sir Ilay Campbell—when I look at the names of Mr. Maclaurin and Mr. Crosbie—and when I look at the name of Lord Braxfield—(and I am much at a loss to know how he is to account for having formed that entail, if it is to have no other effect than has elsewhere been attributed to it)—if I have erred in this business, I have erred with men of great names; I am sorry to have erred with anybody.

Mar. 12. 1823.

Now, let us look at what our rehearings are. First, allow me to place myself in this part of the island. Do your Lordships think I have lived so long in the profession, without knowing that counsel have frequently retired from that Bar with something more than a doubt whether the judgment pronounced on this side of the Bar was right? But it was of very little consequence what we counsel thought. But have I not heard every day in my life—sometimes in the King's Bench, and sometimes in the Court of Chancery—Judges avowing that they could not agree in the

Mar. 12. 1823.

judgment of the House of Lords, though they admitted that that judgment bound them; and, carrying it to this extent, not scrupling to say, though they were bound by that judgment, and must apply that judgment in all cases exactly similar to it, yet, if they could find the slightest iota of difference, they should feel that a ground for acting upon their own opinion, and not ours? Take the case of Fytche *v.* the Bishop of London, on Simony;—see what the Court of King's Bench have been saying upon that case. There are other cases we might mention, in the Court of Chancery and elsewhere. I have no difficulty in saying here what I have said judicially elsewhere in the case of the Duke of Newcastle *v.* Lady Lincoln, (and your Lordships will recollect how strongly I opposed that judgment in this House); I thought it wrong, and I thought it my bounden duty to oppose it. I do not scruple to say, that I so little felt the authority of it, though bound by it, that if other circumstances were to be found in any other case that might be assimilated to it, I should think myself at liberty to see whether those circumstances did not let me loose from that judgment.

In looking at this case, I have wished very much to learn, what I have not learned, whether there is any such instance, or could be, of a rehearing of a Scotch cause in the Scotch Parliament. I have not heard that there is any such instance. Then, if we look at the Act of Union, as making this House the Court of dernier resort in Scotch appeals, we cannot apply any practice of the Court of Parliament in Scotland to the rehearing of Scotch appeals in England.

Look at English appeals. In the first place, as to the precedents quoted from the particular period of the century before the last, it is enough to say, if they amounted to anything, that if you look at them seriously, you cannot make much of them; for I believe I speak that in which I wish to be correct, when I say this of the precedents of that period as respects this House. But if you take cases where there are clerical errors, where judgments have been obtained in the way in which many or some judgments have been obtained—that is to say, a party has come to the Bar and argued his case, and suffered the House to suppose that notice was given to the other party, when that was not the case,—the observation made has been, You come not for a rehearing, but a hearing. I will take the case of Luttrell *v.* Lord Irnham, where an appeal was supposed to be barred by an order made by consent. It was shown to this House, upon an application for a rehearing, that it was all a mistake, and a surprise upon the House—that it was not such a consent as it was represented to be. So, where a fraud is practised upon the House, and the party, by the operation of that fraud, obtains the judgment of the House, a judgment so obtained by fraud upon your Lordships is no more than the judgment of any other Court obtained by fraud, and is an absolute nullity. None of the cases establish this—that this House will rehear a cause upon its merits;—and when we come to consider how many cases there are in which there must be a very strong appetite to rehear, and without any attempt being made to rehear it, and

how strongly the interests of persons would lead them to apply for a species of proceeding so well known in the other Courts in other cases, I should think there might be, if I may say so, a little itching even in Scotland to bring back causes for rehearing,—and yet we have heard of no such thing since the Union. The cases do not prove that this House will rehear a cause upon its merits; and the absence of any such case is a strong negative authority to show that the House will not do so. But whether we are looking at the question generally of rehearing, or at this particular case as to what debts of John Vans affected the estate at his death, or at the question whether the House have rightly decided against the purchasers under the act of Parliament,—(who, it has been said, have legislative titles that ought not to be disturbed; and I admit, if they have legislative titles that ought not to be disturbed, they ought not to be disturbed); but the House has adjudged that that act of Parliament was not pursued; and if it was not pursued, it would be just as good an authority for a sale in the Court of Chancery in England, as in the Court of Session in Scotland.—Still, however, whether it has decided this matter right or wrong, rehearings as to these points are rehearings upon the merits. Mar. 12. 1823.

There is another point, as to the act of the late King for the administration of the law in the Court of Session in Scotland. It has been said that that formed an objection to one of the parts of your Lordships' decision. In the first place, it does not apply here; and if it did, there is no foundation for the observation.

There is one other point which I confess has distressed my mind extremely, and that is the point which the learned and noble Lord adverted to the other day—I mean about the rents and profits—the time from which an account of the rents and profits ought to be taken; but I do not think that these petitions very fairly represent that, because the way in which they put that is this: They say that the applications to this House take no notice of the rents and profits. That is not so; because, if you look at the cases, and particularly the case as far as it affects Balfour's purchase, you will see, as to his purchases, the printed Cases expressly state, and no man can doubt as to that, that as to those an account of the rents and profits should be given. But the way in which it is fairly put is this: They say that the first question was, Whether the purchasers were liable at all? And that question being decided by the Court of Session in the negative, they then say, that the consequence of that was, that there was no occasion for your Lordships to address yourselves to the consideration of the consequential question, how they were to account for the rents and profits, if their purchases were set aside. Then it is said, it was not argued at the Bar here—that the question was not discussed—and that the regular course of proceeding would have been to have sent back the question to the Court of Session, and that they would have taken up the consequential question, having the opinion of the House of Lords upon the primary question; and that it would have been heard, and the decision of the Court of Session would

Mar. 12. 1823.

have been founded upon that consequential question, and brought to this House.

Now I think I shall not step beyond what is just to myself when I say, that it has not been my habit to advise your Lordships to decide, in this House, in the first instance, points upon which the opinion of the Court of Session has not been taken; but I cannot admit it to be, nor do I admit it to be, out of the power of this House to do so; and it would be an extremely mischievous thing to say, that that shall be generally done in all cases. Suppose a bill were filed in the Court of Chancery here, to have a man declared the trustee of an estate, and calling upon him to account for the rents and profits, according to the principle known in equity: If the Court had said you are not a trustee, they would not trouble themselves with arguing the question as to the principle upon which, or the time at which, the account of the rents and profits was to be taken; but if that case came to this House, it would be in the discretion of this House whether it would decide that point or not, if it reversed the judgment of the Court below, which disclaimed him to be a trustee. So I take it to be open for the party here, where the matter is merely brought in the form of appeal. Whether it be a distinct mode of proceeding, or whether another mode of proceeding had not better be adopted, is another question; but the House, if it pleases, may decide that, if it is brought before it. I cannot agree with this petition, that the question has not been brought before it, because the application to the Court of Session, at the conclusion of the summons, is for reducing all these purchases, and for an account of the rents and profits received by any of the purchasers; and the interlocutor appealed from is an interlocutor which in form decides all questions, because, if you will look at it, it assoilzies the defenders from all the conclusions of the summons; therefore an appeal from an interlocutor assoilzieing the defenders from the whole conclusions of the summons, opens to us the discussion of the whole matter.

There is another circumstance, which, if we have been wrong in this, which I do not admit nor assert we have, tends to show the real apprehension in the minds of the gentlemen. We put it to the Bar whether we need trouble ourselves with that consequential question, and not a single syllable was said to us at the Bar upon the point. But there is something more to be said; because, unless my memory very much deceives me, we did take the trouble, after drawing out the judgment, of submitting that judgment to the perusal and inspection, and consideration and reconsideration of the agents; and I never heard one word of objection from anybody as to the amount of the rents and profits, as they were directed. There is a difficulty, therefore, which I confess I have upon that question, and it is the only point of the case upon which I would reserve myself for two days' more consideration; for as to rehearing the case upon the merits, that cannot be done; but as to that point of the rents and profits I shall desire two days' more consideration, looking upon it to be extremely dangerous (unless you can bring the consideration of that part of the case within the principles of some of those cases upon which, to a

limited extent, we have had rehearings) to allow those rehearings to take place. On the other hand, your Lordships will feel that it may become a matter of very dangerous precedent, that where it is open to parties to submit to the consideration of this House a particular point, upon an interlocutor so framed, that the House in its discretion may decide or not upon that particular point; it is extremely dangerous if the House is permitted to go to judgment upon the whole of the conclusions, and afterwards an application is to be made to your Lordships, by persons who had not instructed their counsel to state that originally which they now state, in order to stay the judgment. We are in great danger from that; and it is one strong feeling, and the only one I cannot immediately, and perhaps I never shall, be able finally to gratify—the feeling I have of regret, that it has been decided by the House, without hearing all that could be said upon it. The question turned upon this, whether these purchasers were purchasers malâ fide or bonâ fide. According to the circumstances now stated to us, perhaps more can be said showing that they were bonâ fide, than can be said that they were not; but it is of very great importance, and of so much value, that if we have got wrong for want of being put in the way of being right, we cannot help feeling regret; but we must take care not to carry that feeling so far as would endanger the general principles of the House. My clear opinion, as far as these petitions go as to the merits of the case, is, that the House cannot rehear the cause, whether the judgment be right or wrong. Mar. 12. 1823.

It was my intention, looking at those Scotch statutes, to have moved your Lordships to proceed to final judgment this morning in the case of Mr. Vans Agnew. In consequence of its having been intimated to me that there was a case referred to in the Journals of the House of Lords in Ireland, which bore upon the question, I have thought it right to refer to that case, and shall immediately state its effect.

LORD CHANCELLOR.—In respect of the application of Mr. Agnew, that the Court of Session should be ordered to carry your Lordships' judgment into effect, I feel persuaded, that when the Court of Session know what is the opinion of this House on the question of rehearing the cause, such a direction will not be necessary. I should have thought it more respectful to dismiss that petition, without making any order upon the subject. Upon the point of rehearing I have nothing further to observe, than that there appears to be an act of the Scottish Parliament, (which in truth only states, by the authority of Parliament, that which is founded in reason and common sense,) that no decisions passed in Parliament after consideration of a cause shall be called in question by any inferior Judge whatever. If that statute applies to the case, the enactment renders the judgment final; and it seems to me it cannot be necessary, even in point of respect or any other consideration, to make any order upon that petition.

With respect to the case from Ireland, it seems that in the year 1787 —I think in May 1787, according to the Journals of the House of Lords in Ireland—there was a case of Magrath *v.* Lord Muskerry heard before

Mar. 12. 1823. the House, on an appeal from the Court of Chancery in Ireland; and the question being put, that the decree of the Court of Chancery should be reversed, the further hearing of the cause was put off till Friday. Then, after hearing counsel, 'It is ordered and adjudged by the Lords Spiritual 'and Temporal in Parliament assembled, that the said petition of appeal 'be, and the same is hereby dismissed this House; and that the said de- 'cree therein complained of be, and the same is hereby affirmed.' After this there was an application made by petition to the House of Lords in Ireland, praying that the petitioner's appeal might be reheard upon such day as to their Lordships should seem meet. The House proceeded to take into consideration that petition, and a motion was made, that the prayer of the petition be granted. A debate arising thereupon, and my Lord Lieutenant being present in the House, a motion was made, and the question being put to adjourn the debate for half an hour, it was resolved in the affirmative. After the Lord Lieutenant had left the House, the debate was resumed, and it seemed to have occurred to those who meant to support the prayer of the petition, that it was rather too much to move for rehearing the cause that the prayer of the petition should be granted generally; upon which it was moved that the original motion should be amended, by inserting after the word 'granted' the words following: 'Merely for the purpose of taking the opinion of the Judges upon 'the construction of the act commonly called the Tenantry Act, and for 'no other purpose whatever.' There was a debate upon that motion to amend the original motion, and, after long debate, it passed in the negative. Then the question being put upon the original motion that the cause should be reheard, the House resolved that the petition should be rejected; which shows that the House proceeded upon the ground, that at least for a century past it had not been the usage of Parliament to rehear a cause which had been heard upon the merits. The rule was thought not to apply where the House was in the habit of hearing causes by committee, and the committee reported to the House; for then they had not had the final judgment of the House. So, where parties were not before the House that were supposed to be before the House, and where notices had not been given that were supposed to have been given, or where there were errors in form, the House in such cases reheard the cause; but they have never reheard a cause, for a very long time past, where the cause had been heard upon the merits. There was a great deal of discussion upon the subject in a case in Ireland—a discussion that brings back to my mind a good deal which passed in the case of the impeachment of Mr. Hastings. It will be in your Lordships' recollection, that there were opinions, and very high opinions too, that a judicial proceeding dropped in consequence of a prorogation or dissolution of Parliament. One part of the argument, unless my memory deceive me, was, that formerly judicial as well as legislative proceedings used to drop by the prorogation or dissolution of Parliament. It was contended in the case to which I refer, that the word rehearing in our standing order (for there is the same standing order in the House of Lords in Ireland) meant the rehearing

of a cause which had been heard, and not decided; but taking it for the moment that that construction is not at all to be supported, still the question is, To what extent, and for what purposes, will the House rehear a cause—whether will it rehear it upon its merits? I conceive it will not. The report of the opinion there expressed ends with a passage which I will read to your Lordships, as it is a curious one: 'Respecting the obvious and proper point of the argument, this much I 'shall presume to say, that if causes were to be reheard, there would then 'be no end of decisions. This House would then be a House of plusieurs 'resorts, and not of dernier resort—a House of many applications, and 'not of final judgment; and the celebrated Latin epigram upon the 'tediousness and uncertainty of the Aulic Council at Spires might then 'be wrote over the front of this House, Lites ibi spirant, sed nunquam 'expirant.'

Having stated these cases to your Lordships, there still remains the single consideration, what is to be done as to the account of the rents and profits from the period when these purchases were made? Whatever may be done in this case, it will be necessary to take care, by some proceeding in this House, that cases of that kind shall not happen again. The necessity of attending to that, and the circumstance of my having discovered the above case since we were last here on Friday, lead me humbly to propose to your Lordships to postpone the final judgment in this case until Wednesday next.

Lord Chancellor.—The question which remains to be disposed of in the case of Agnew *v.* Stewart, is that which relates to the liability of the purchasers to pay to Mr. Agnew the bygone rents and profits. It is urged in the petitions before your Lordships, that upon that question the parties have not been heard either in this House or the Court of Session, and that the Court of Session never decided that question. With respect to the latter statement, it was perfectly competent for this House, notwithstanding it had not been discussed in the Court below, to decide it, if it came before them. That there may be no mistake whatever with respect to the practice of this House in matters of this kind in future, it is my intention to embody this principle in a standing order;—I mean, that it is altogether in the discretion of this House whether they will not decide upon all collateral and consequential questions, although these collateral and consequential questions have not been discussed in the Court below. This, however, appears to me to have slipped through our fingers by surprise. It was not argued at the Bar; it was taken for granted to follow upon the decision of the principal question; it was not submitted, therefore, to us, whether the right to the rents and profits would or not admit of a question; and although I think it will not be proper to say one word that may go to bring into question that practice of the House, I certainly am very unwilling that the parties should be concluded upon a question that was no way discussed, and which they conceived would still be open to them. I hope that the terms of the judgment I have

Mar. 12. 1823. prepared will preserve whole the jurisdiction of this House with respect to the merits, guarding only against the effects of surprise; meaning, however, to take care that, by an order to be entered in the standing orders of the House, no such neglect shall again happen upon the part of those who are called upon to discuss the original question.

J. CHALMER,—FRASER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*No Papers.*)

No. 58. GEORGE REID, Appellant.—*Wetherell—Lushington—Fullerton.* JEAN LAING, Respondent.—*Gifford—Forsyth—Moncreiff.*

Marriage—Proof.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) that a marriage had been constituted by a promise subsequente copulâ.

May 14. 1823. 2D DIVISION. Lord Robertson.

THE respondent Jean Laing, the daughter of a country labourer on the estate of Ratho-bank, the property of the appellant Mr. Reid, brought a declarator of marriage against him in 1817, stating, 'that for some years prior to the year 1808, George Reid, 'Esq. of Ratho-bank in the parish of Ratho and county of Edin-'burgh, made his addresses to the pursuer, professing the most 'sincere love and regard for her, and his purpose and intention 'of marrying the pursuer, which he frequently repeated, and 'thereby so far gained the pursuer's affection, that she consented 'to intermarry with him:'—that accordingly they exchanged written declarations of marriage on the 18th of October 1808, and that in consequence they had acted as man and wife, but that he now refused to acknowledge her as such; and therefore she concluded to have it found that they were lawfully married persons, and that he should be ordained to adhere to her as his lawful spouse. The document on which she libelled was thus expressed: 'I hereby engage to be a true, a faithful, a 'kind, and an affectionate husband to you, on conditions you 'are the same to me; and I further engage to show this to no 'person, and to make it known to nobody whatever, without 'your consent. (Signed) George Reid, October 18. 1808.'

In further support of this action, she produced a great number of letters from Mr. Reid, expressed in language of the warmest affection, and occasionally of extravagant enthusiasm; and she alleged that, on the faith that she was constituted his lawful wife,