Lords Deas, Mure, and Shand concurred.

The Court accordingly recalled the arrestments.

Counsel for Petitioners (Reclaimers)—Balfour—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Respondents—Trayner—Murray. Agents—Mason & Smith, S.S.C.

HOUSE OF LORDS.

Thursday, December 13.

LORD PERTH AND MELFORT *v.* LADY WILLOUGHBY D'ERESBY'S TRUSTEES.

(Before the Lord Chancellor, Lord O'Hagan, Lord Blackburn, and Lord Gordon.)

(*Ante,* March 9, 1875, 2 Rettie 538.)

Entail—Crown Charter—Attainder—Effect of Crown Charter as obviating consequences of Attainder.

A party founding on an entail created by a procuratory of resignation dated in 1687, raised an action to have it found that under the Act of 1690, cap. 33, on the attainder in 1746 of one of the heirs of entail, nothing passed to the Crown but the life interest of the attainted heir, and that on his death the estates reverted to the heirs nominated in the deed. The action was dismissed (the House of Lords *aff.*) on the ground that it was essential to the plea stated that the deed of entail should be recorded, which had not been done.

A second action was then brought founding on a Crown charter following upon the above-mentioned procuratory of resignation, and containing a provision that on the attainder of any of the heirs of entail the estate should revert to the next heir in succession. It was maintained that the charter was a fresh grant importing a new title apart from the entail.

Held (*aff.* judgment of Court of Session) (1) that the sole warrant for the charter being the procuratory of resignation, it was a mere charter by progress, the conditions of which as founded upon could not be held to affect the superior's right, and could have no such result as was contended for; and (2) that the terms of the entail, and the history of the title following upon these down to the date of the attainder, further precluded the action.

Observed by the Lord Chancellor that even if the charter had been an original royal grant it was doubtful how far it would have protected a subject from the constitutional consequences of an attainder for high treason.

In an action dealing with the right to the Perth estates, finally decided by the House of Lords on June 19, 1871, 9 Macph. (H. of L.) 83 (reported in the Court of Session, March 11, 1869, 7 Macph. 642), Lord Perth unsuccessfully founded upon a deed of entail dated 11th October 1687, but which was not registered in accordance with the Act of 1690, cap. 33. He thereafter raised another action relating to the same matter, in which he relied upon a Crown charter of 17th November 1687, contending that it was a fresh grant from the Crown, and that as it contained a clause shifting the estate upon the treason of any holder to the next in succession the Act of 1690 as to registration was inapplicable.

By the terms of that charter James Lord Drummond, the first heir of entail called under the deed, was not restricted from disponing, and in 1713 did dispone, in favour of his son, all the fetters in the charter being omitted. Again, in 1731, the third Duke of Perth expeded a Crown charter of resignation and *novodamus* in favour of himself and the heirs-male of his body, whom failing his other heirs and assignees whomsoever. In this charter, on which infeftment followed, all restricting and fettering clauses were omitted. Upon that state of the titles the respondents urged that the estates were held in absolute fee-simple, and the heir-apparent, Lord John Drummond, being attainted, that the Crown became entitled to the estates. The Second Division of the Court of Session, on 9th March 1875, 2 Rettie 538, decided that although they could not sustain the plea of *res judicata*, as the Lord Ordinary (Young) had done, yet that, as the new grounds of action were not relevant to support the pursuer's title to call for production of the writs specified, they must dismiss the action upon that ground.

The pursuer appealed to the House of Lords.

Their Lordships did not call on the respondents' counsel.

On delivering judgment—

Lord Chancellor—My Lords, in the year 1868 the present appellant raised an action against the present respondents claiming the same estates which are claimed in the action out of which the present appeal arises. That litigation, after some interlocutors had been pronounced by the Court of Session, came before your Lordships' House, and was finally decided adversely to the appellant on the 19th June 1871.

The Lord Ordinary, before whom the present case was first discussed, was of opinion that the whole of the claim of the appellant in the present action was covered by what was decided in the former action, and was in fact *res judicata*. The Second Division of the Court of Session differed from the Lord Ordinary, in so far that they held that the whole of the claim of the appellant was not *res judicata*, but they found that the *media concludendi* on which the present summons proceeds, in so far as the same differ or are maintained to be different from those on which the former action was founded, are not relevant or sufficient to support the appellant's title to call for production of the writs specified in the summons. The Lord Advocate, appearing for the appellant at your Lordships' bar, stated very distinctly the points which he considered were not concluded by the judgment in the former action, and the question comes simply to be one of relevancy—whether, taking those points, they are sufficient to support the appellant's title?

The first point in the case of the appellant arises in this way:—In the former action the appellant founded upon a deed of entail created by

a procuratory of resignation dated the 11th of October 1687, by which James Fourth Earl of Perth, then Chancellor of Scotland, after reservation of his own liferent, disponed his lands and estates to and in favour of his eldest son James Lord Drummond and the heirs-male of his body, whom failing to his other heirs-male whomsoever, whom all failing to his own heirs and assignees whomsoever. And he contended that in 1746, when Lord John was attainted, nothing passed to the Crown but the life interest of Lord John Drummond as an heir of entail, and that on his death the estates reverted to the heirs of entail nominated by the deed creating the entail, and that the appellant was the nearest of these heirs of entail. This argument was founded on the Act of 1690, cap. 33, which it was said introduced a privilege in favour of heirs of entail whereby forfeiture was not to go beyond the person attainted. To this argument, however, it was held in the former action to be a conclusive answer that by the words of the Act it was an essential condition that the entail of which the benefit was thus to be given to heirs-substitute should be recorded in the Register of Entails, and the entail in question not having been so recorded, it was held that the appellant could not claim the benefit of the Act of 1690.

In order to avoid this difficulty, the appellant in the present action founds, not upon the Chancellor's own deed, the procuratory of resignation of the 11th October 1687, but on the Crown charter that followed that procuratory of resignation, the date of which Crown charter is the 17th of November 1687; and he argues that this is to be looked at as a fresh grant from the Crown, and that as it contains a clause shifting the estate upon the treason of any holder to the next in succession, he can get rid of the consequence of the attainder without resorting to the Act of 1690.

If the charter of the 17th of November 1687 had been an original royal grant, it would have become necessary for your Lordships to consider whether a clause in a grant from the Sovereign, even at that date, protecting the subject from the constitutional consequences of his attainder for high treason, could be valid, and, speaking for myself, I should have required much stronger authority than any which was produced to satisfy me of the validity of such a clause. But, my Lords, your Lordships are, I think, relieved from any difficulty which might attend the decision of that question, for I entirely agree with the Lord Justice-Clerk and the other learned Judges of the Court of Session, that the charter of 1687 was not, and was not intended to be, an original royal grant—it is nothing more than a charter by progress. As Lord Gifford says, "Its sole warrant is the procuratory of resignation, which prescribes its terms—the Crown, like any other superior, will insert in a charter by progress any conditions which the owner pleases, not affecting the superior's rights." The entail is never the act of the superior, but the act of the vassal or procurator, who alone has the right, if he chooses, to entail the lands in accordance with law. The clause of *novodamus* does not in the least alter the nature of the deed, but is merely inserted to meet the case of lost title-deeds, or of doubts as to validity of the title, and to form the foundation for a new and prescriptive right.

My Lords, this alone would be sufficient to dispose of the appellant's case, for if he fails in separating the charter of 1687 from the procuratory of resignation, the entail must stand on the procuratory of resignation of the 11th of October 1687, as to which it is *res judicata* by this House that the appellant cannot claim under it because the entail is not recorded.

But even supposing that the appellant had escaped from this difficulty, he would have been met by another, and, as it appears to me, a fatal impediment in his way. Assume that the entail of 1687 is to stand upon the Crown charter of the 17th of November of that year, and assume also that the clause in the charter shifting the estates in the event of treason is a valid clause, what was the history of the title between 1687 and 1746, when the attainder of Lord John Drummond took place? The first destination of the entail was to James Drummond, the son of the Chancellor, and the heirs-male of his body, and this destination is not fenced by prohibitory, irritant, or resolutive clauses. The institute James Lord Drummond was therefore left unfettered to dispone and contract debt as he thought proper. Availing himself of this liberty, James Lord Drummond, the fifth Earl, in 1713 executed a disposition of the estates in favour of his son James, reserving his own liferent, and in this disposition all the restrictions and fetters contained in the charter of 1687 were omitted. Again, in 1731 James the Third Duke of Perth, who was then in right and possession of the estates, expede a Crown charter of resignation and *novodamus* in favour of himself and the heirs-male of his body, whom failing his other heirs and assignees whomsoever, and in this charter, again, on which infeftment duly followed, all restricting and fettering clauses were omitted.

The result is, that at the time of the Rebellion of 1745 James Third Duke of Perth stood in this way absolute and fee-simple proprietor, unfettered and unrestricted, although there was a simple destination in favour of heirs-male. He died without issue, his heir-apparent being his brother John, who was attainted as on the 12th of July 1746, and the right of the Crown to all the estates held by John in apparency has already been decided. This again is fatal to the case of the appellant.

My Lords, although the printed documents connected with this case are voluminous, the questions upon which the title of the appellant depends, and to which I have called your Lordships' attention are capable of being stated in a few words, and are in my humble opinion entirely free from doubt. There was no difference of opinion in the learned Judges of the Court of Session, and after your Lordships had heard at your bar the very able counsel on behalf of the appellant—who advanced in support of the appellant's case everything that could be said—your Lordships did not, I think, entertain any doubt as to the decision at which you ought to arrive. At the same time, looking to the importance of the case to the appellant, and to the magnitude of the interests involved, you deemed it more fitting, after having fully heard the appellant's case, to examine minutely and carefully the documents, the pleadings, and the judgments in the Court below. Your Lordships have now done this, and I believe that in none of your Lordships'

minds does there exist any doubt—none certainly exists in mine—but that the interlocutor of the Court of Session must be affirmed. I accordingly move your Lordships to that effect, and that this appeal be dismissed, with costs.

Lord O'Hagan, Lord Blackburn, and Lord Gordon concurred.

Interlocutor appealed from affirmed, and appeal dismissed, with costs.

Counsel for Appellant—Lord Advocate (Watson)—Davey, Q.C.—Low—Pollock. Agents—Willoughby & Cox, Solicitors.

Counsel for Respondents—Benjamin, Q.C.—Balfour. Agent—W. A. Loch, Solicitor.

COURT OF SESSION.

Thursday, January 10.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

BAIN *v.* MUNRO AND OTHERS.

Succession—Executry Estate—Goodwill of a Profession—Personal or Transmissible.

A question having arisen as to whether the sum obtained from the sale of the practice of a medical man after his death fell to be included in his executry, he having bequeathed it in his will to his widow—*held* (*dub.* Lord Gifford) that the benefit derived from the exercise of such a profession is of a nature so personal to the individual exercising it that it cannot be transmitted after his death; and that in the circumstances as proved in the present case the value obtained from the sale of the practice of the deceased was mainly due to the recommendation of his widow, and must be held to belong to her.

Opinion (*per* Lord Gifford) that there may be the goodwill of a profession as well as of a trade, and that it may be bequeathed after death; and that the sum obtained for such a goodwill must be included in the deceased's executry estate, the goodwill being a thing which was derived from and attributable to him alone.

John Bain, the pursuer in this action, was a co-obligant with Alexander Munro, one of the defenders, and his son, the late Alexander Donald Neill Munro, doctor of medicine, Cupar-Fife, under a cash-credit bond granted by them to the Union Bank on 15th May 1871, for the sum of £400, and interest thereon. After Dr Munro's death on 15th March 1873 the Bank had called upon the pursuer to pay up an overdrawn balance of £437, 5s. 9d., and eventually this action of relief was brought by him against Alexander Munro, the principal debtor, and against Mrs Munro, the widow and executrix *qua* relict of Dr Munro, concluding against them, conjunctly and severally, for payment to the bank or to the pursuer of the balance due under the bond. The action as laid was directed against Mrs Munro, as the executrix of her husband Dr Munro, and as such bound to implement a letter which Dr Munro had granted to the pursuer guaranteeing to relieve him of risk under the cash-credit.

It was stated that the total free balance of Dr Munro's estate amounted to £33, 2s. 10d.; but the pursuer alleged that Mrs Munro had been *lucrata* by her husband's death, not only in the £33, 2s. 10d., but also to the extent of £2346 or thereby, consisting of various sums, including a sum of £400, being the price which she obtained by the sale of her deceased husband's practice. Other questions were raised in the action, but it is unnecessary to notice these.

Dr Munro, by a will dated 2d October 1872, had nominated a Mr Nicholson, (who predeceased him) his executor, and it further bore that he wished his wife "to inherit all or any property I possess." There was this further provision—"She will employ him to sell my practice for her, and she shall have it in her power either to take a sum in payment—say £500 or £600—or to take bonds and security for payment of a third part of the gross drawings of the practice for four years. Mr Nicholson shall guide her, and shall see that she sells the practice. If she cannot obtain the price I have mentioned, she will take what she can get, but it is distinctly my wish that she should sell the practice. Further, I consider it would be advisable for her to sell Weston House, and realise her money for it."

It appeared from the evidence which was led in the case that, after advertisement, Weston House where Dr Munro lived, was sold to Dr W. Whitelaw, Dr Munro's successor, for £1500, who also bought for £400 the "goodwill" of his practice. For the discharge of these obligations Dr Whitelaw entered into a personal bond, one clause of which was as follows:—"Therefore I hereby bind and oblige myself and my heirs, executors, and successors whomsoever, jointly and severally, without the necessity of discussing them in their order, to pay to the said Mrs Hay Margaret Edie or Munro, and her executors and successors or assignees, the sum of four hundred pounds sterling, by five equal yearly instalments of eighty pounds each."

The following letter was written by Mr Pagan, Mrs Munro's agent, in answer to an offer made by Dr Whitelaw to purchase the practice:—

"*8th April* 1873.

"I have your letter of 7th curt., and I am authorised to accept your offer for Weston House and the goodwill of Dr Munro's practice . . . The bonus for the goodwill to be eighty pounds per an. for five years, payable 31st March yearly, commencing first payment 31st March 1874. . . .

"I think you had better come at once and get introduced and set to work. Mrs Munro can receive you *ad interim*, and Dr Wood is ready to do his part.

"As to a circular from us, you would need supply your qualifications, experience, &c., for our preparing same.

"I think you have secured an excellent opening, and if you attain the success I wish for you, you will have nothing to regret in settling among us."

The pursuer maintained that the £400 having been received for the sale of the practice, must be included in the executry estate, and he therefore