The Court refused the appeal and affirmed the judgment appealed against.

Counsel for the Appellants — Salvesen — Shennan. Agents—Gill & Pringle, W.S.

Counsel for the Respondent—C. S. Dickson. Agent—James Coutts, S.S.C.

Wednesday, February 29.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

MILNE *v.* LESLIE.

Administration of Justice—Small Debt Court—Small Debt Act, 1837(1 *Vict. c.* 41), *sec.* 14—*Law Agents (Scotland) Act*, 1873 (36 *and* 37 *Vict. c.* 63), *secs.* 2, 13, 16—*Enrolled Law Agent—Notary-Public.*

Held (*diss.* Lord Rutherfurd Clark) that a person who is not duly enrolled as a law agent under the Law Agents (Scotland) Act 1873, may with the leave of the sheriff, on special cause shown, conduct cases for remuneration in the Small Debt Court under sec. 14 of the Small Debt Act of 1837.

Administration of Justice—Law Agents (Scotland) Act 1873 (36 *and* 37 *Vict. c.* 63)—*Enrolled Law Agent—Objection to Appearance of Unqualified Person—Interdict.*

Held that the remedy of an enrolled law agent, who objects to the appearance of an unqualified person in any process, is not by way of interdict, but by stating his objection in court when appearance is made by the latter.

The Small Debt Act of 1837 (1 Vict. c. 41), sec. 14, provides—"That no procurators, solicitors, nor any persons practising the law shall be allowed to appear or plead for any party without leave of the court upon special cause shown, and such leave, and the cause thereof, shall in all cases be entered in the book of causes kept by the sheriff-clerk." . . . Section 15 provides—"That any defender who has been duly cited, failing to appear personally, or by one of his family, or by such person as the sheriff shall allow, such person not being an officer of court, shall be held confessed, and the other party shall obtain decree against him; and in like manner, if the pursuer or prosecutor shall fail to appear personally, or by one of his family, or by such person as the sheriff shall allow, such person not being an officer of court, the defender shall obtain decree of absolvitor unless in either case a sufficient excuse for delay shall be stated, on which account, or on account of the absence of witnesses, or any other good reason, it shall at all times be competent for the sheriff to adjourn any case to the next or any other court-day, and to ordain the parties and witnesses then to attend."

The Law Agents Act of 1873 (36 and 37 Vict. c. 63), provides by sec. 2—"From and after the passing of this Act no person shall be admitted as a law agent in Scotland except in accordance with the provisions of this Act. Every enrolled law agent shall be deemed to be admitted, and, subject to the provisions of this Act with respect to stamp duty and subscribing the roll of law agents appointed to be kept for the Court of Session, and the several Sheriff Courts respectively, shall be entitled to practise in any court of law in Scotland." Section 13 provides—"A roll of agents practising in any Sheriff Court shall be kept by the sheriff-clerk in such form as the Lord President of the Court of Session may direct, and every enrolled law agent who has paid the stamp duty exigible by law on admission to practise as an agent before a Sheriff Court, shall be entitled to subscribe the said roll, and the sheriff-clerk shall be paid a fee of five shillings for such subscription, and every agent shall, in subscribing the said roll, deliver to the sheriff-clerk a note specifying his place of business, and shall deliver a similar note so often as he shall change the same." Section 16 provides—"From and after the 1st day of February 1874 no person shall be allowed to practise as an agent in the Court of Session or any sheriff court until he shall have subscribed the roll of agents practising before such court, or after his name shall have been struck off such roll, unless the same shall have been subsequently restored thereto."

James Milne, enrolled law agent, Fraserburgh, Aberdeenshire, presented this petition in the Sheriff Court at Peterhead, to have James Leslie, writer, Fraserburgh, interdicted from "practising as a law agent for or on behalf of any litigant or litigants, in any of the courts to be held at Fraserburgh or elsewhere within the city or county of Aberdeen, by the Sheriff of Aberdeen, Kincardine, and Banff, or his Substitutes, until such time as he shall have legally qualified himself so to do, and to grant interim interdict."

The pursuer was a law agent duly qualified and enrolled in pursuance of the provisions of the Law Agents Act of 1873. He had subscribed as such the roll of law agents kept for the county of Aberdeen in terms of the Act, and he practised as an agent in the Sheriff Court of that county. The defender was a notary-public, and practised as such in Fraserburgh. The pursuer averred that the defender had never been legally admitted as a law agent in any court of law in Scotland, and was not qualified to act in that capacity; that he had never been enrolled as an agent pursuant to the provisions of the Act of 1873, nor was he entitled to be so enrolled. He further averred that the defender had unwarrantably, illegally, and publicly assumed the name of a solicitor, or at least usurped the functions of a law agent in or in connection with the Sheriff Courts of the county of Aberdeen held at Fraserburgh by the Sheriff or his Substitutes, and had been in the habit of conducting cases therein as an agent for or on behalf of litigants, whereby the pursuer had sustained, and would sustain, serious loss and damage. The defender in answer admitted that he occasionally appeared in small debt causes "by leave of the Court." In answer to this admission the pursuer replied that it was *ultra vires* of the Court to give the defender leave to appear in Court as an agent.

The pursuer pleaded—"(1) The defender not having signed the roll of law agents kept for the county of Aberdeen, and not being qualified to do so, he is not entitled to practise as an agent in

the Sheriff Court of the said county, and should therefore be prohibited from so doing. (2) The defender having unwarrantably and illegally assumed the name of a solicitor, or at least usurped the functions of a law agent, the pursuer is entitled to interdict against him in terms of the prayer of the petition, with expenses. (4) *Separatim*—The leave of the Court, even if it had been granted to the defender, being *ultra vires*, cannot be pled by him as a defence to this action."

The defender pleaded—"(1) The averments of the pursuer are insufficient to support the conclusions of his action. (2) The action being irrelevant, the defender is entitled to absolvitor."

The Sheriff-Substitute (BROWN) on 22nd October 1887 pronounced this interlocutor:—"Finds that the pursuer has a sufficient title to sue the present action: Finds that the defender has not subscribed the roll of agents practising before the Court of the Sheriff of Aberdeen, Kincardine, and Banff, at Fraserburgh, or elsewhere within the city or county of Aberdeen, and therefore is not entitled to practise in said Court: Therefore ordains the defender to abstain from the acts complained of: Further instructs the Clerk of Court to refuse the privileges of an enrolled law agent to the defender, &c.

"*Note.*—The only point which I have felt to present any difficulty in connection with this case is one not raised by the pleadings, but I think requiring serious attention, viz., the question of the jurisdiction of the Court to entertain such an application. The doubt is suggested by the repeal of the Procurators Act of 1865, the 25th section of which gave right to any procurator to complain to the Sheriff in whose court he is entitled to practise against any person practising in such court who is not a procurator thereof, and to the provisions of the Law Agents Act of 1873, placing law agents within the jurisdiction of the Court, that is, the Court of Session. It may plausibly be contended that it was the intention of the Legislature, especially by the repeal of the Act of 1865, to make the whole question of the status, not only of procurators, but of persons professing to act as such, subject to the supervision of the Supreme Court only. It was pleaded by the pursuer in this case that the provision in the Act of 1865 was to be read as declaratory of the then existing law, and it is just the repeal of the statute, without substituting anything in its place in this matter, that raises the question whether the Procurators Act of 1865 was a true expression of the law when it passed. I have come to the conclusion, however, although not without difficulty, that the Act does not remove the right of a person possessing the necessary title and interest to have his rights protected by proceedings in the inferior court, and that what the Law Agents Act of 1873 makes privative to the jurisdiction of the Court of Session are questions affecting the title to be placed on the register of enrolled law agents, or the liability to be struck off that roll by reason of misconduct. But the defender in this case is admittedly not an enrolled law agent, and therefore the question raised does not fall within either of the categories just stated, but simply is, whether the pursuer is entitled to be protected from patrimonial loss caused by another engaging in practice in the court without having qualified his right to do so. I do not think that the concluding section of the Act of 1873 touches the question, for that obviously conserves only the right of inferior judges in so far as that is necessary to maintain the discipline of their courts, but I do not see that the right of the Sheriff to give such redress as the pursuer seeks here is withdrawn, either by express enactment or necessary implication.

"In the light of the foregoing remarks it appears clear that the only matter which can be regarded as falling within the merits of the case is the simple fact whether or not the defender is an enrolled law agent, and that is not matter of dispute. In the view I take of the question of jurisdiction it is not within my province to decide whether as a notary-public he has any right to be put upon the register, the ground of action to which I have given effect simply being that until he has been put upon the roll the defender does not qualify the right to practise. It is proper, however, that I should say, with reference to a part of the argument addressed to me on his behalf, that so far as I am aware there is no practice of sanctioning the appearance, either in the Small Debt Court or the Debts Recovery Court, of a person to act professionally who does not possess the qualification and the title of a law agent. Under both Acts there are certain classes of persons who are entitled in their absence to represent the parties to the suit, among which the pursuer is obviously not included, and the 'leave of the court' is not extended to anyone who, apart from such permission, has not the right to practise. The defender has from time to time appeared in the Court at Fraserburgh, but only on the assumption that he was entitled to exercise the privileges of a law agent, and it is this unlawful practice which the pursuer now challenges and seeks to bring to an issue.

"The form of action which the pursuer has adopted to put an end to what, quite relevantly, as I think, he represents to be an invasion of his rights, has given me some consideration, and in the end I have come to be of opinion that it should not be the course followed. In a question of interdict it is an essential element in the course of action proposed to be interdicted and prohibited that it shall be illegal and wrongful. But any acts performed with the sanction of the Court, such as appearing in judicial proceedings without objection from any quarter, do not possess that character of illegality and wrongfulness that is necessary to bring them within the category of acts that may be interdicted. The reason is obvious—a court of law cannot interdict itself, and it seems to follow that it cannot interdict any act performed under its sanction or authority. In my opinion the actings here complained of must come to an end, but my view is that the decree should not take the form of an interdict but that of an order of Court.

On appeal the Sheriff (GUTHRIE SMITH) on 11th November 1887 recalled the interlocutor and dismissed the action.

"*Note.*—The parties to this action are both engaged in the practice of the law in Fraserburgh. The pursuer, who is a law agent enrolled under the Act 36 and 37 Vict. cap. 63, asks the Court to interdict the defender, who is merely a notary-public, 'from practising as a law agent for or on

behalf of any litigant or litigants in any of the courts to be held at Fraserburgh or elsewhere within the city or county of Aberdeen by the Sheriff of Aberdeen, Kincardine, and Banff or his Substitutes, till such time as the defender shall have legally qualified himself so to do.' It is perhaps a sufficient answer to the application that the defender neither admits that he has practised, nor apparently does he claim the right to practise, in the ordinary Court of the Sheriff or Debts Recovery Court. He has no interest to make so broad a claim, for the simple reason that at Fraserburgh no ordinary court is held; and although there is now a monthly court for both small debt and debts recovery cases, it is only as regards the Small Debt Court that he claims the same privilege as other practitioners. That privilege, however, is very limited, for no one except the parties themselves is entitled to appear in any case without the leave of the court. The Small Debt Act, sec. 14, enacts 'that no procurators, solicitors, nor any persons practising the law, shall be allowed to appear or plead for any party without leave of the court on special cause shown, and such leave and the cause thereof shall in all cases be entered in the book of causes kept by the sheriff-clerk.' If the defender is not a procurator I am not sure that he may not be quite accurately described as a 'solicitor' (for in Scotland that is not a *nomen juris* with a fixed technical meaning), and in any case I have little doubt that, being a notary accustomed to give advice and frame deeds, and entitled (under *Aiken* v. *Kirk*, 3 R. 595) to charge the same *ad valorem* and other fees as the members of any incorporated society of law-agents, the defender is a person practising 'the law' within the meaning of the statute. I cannot therefore interdict him from exercising such rights as the statute gives him in the Small Debt Court; and in the Debts Recovery Court there is no dispute between the parties requiring to be settled by interdict—the right not being claimed.

"I am also not satisfied that the pursuer has either title or interest to make the application. The parties are two rival practitioners, but the pursuer fails to show what benefit he will gain by the defender being driven from the field. The usurpation of a practice may be a breach of law, but it is for the public authority to enforce the law, and no private citizen is entitled to complain of its violation without showing that it directly affects him in his personal and patrimonial rights. Interdict then becomes an appropriate remedy, for it is better to prevent a wrong than leave the party to a claim of damages after it is accomplished. But here no damage is relevantly averred or is indeed conceivable, unless we are to suppose that the pursuer has a grant of monopoly.

"In former times we were familiar in Scotland with exclusive trading corporations within burgh, the privileges of which were sometimes enforced by interdict, but always (so far as I am aware) by the corporation itself—never by an individual member. But the object of the Procurators Act was not to create a monopoly, or to call into existence a species of trades union of lawyers. The preamble of the Medical Act (21 and 22 Vict. cap. 90) explains the motive and purpose of all this kind of legislation. It rests on the expediency of enabling persons requiring medical or legal aid 'to distinguish qualified from unqualified practitioners.' The object was the protection of the public, and this is enforced by its being enacted in the case of medical men that a practitioner who falsely describes himself as a duly qualified physician, &c., shall be liable to a penalty of £20, which is recovered in Scotland by the Procurator-Fiscal or 'any other person' in the mode pointed out by sec. 41. The Procurators Act is not so severe. It first declares that an agent possessing a certain qualification may be enrolled in the roll kept by the Sheriff-Clerk of the Court where he wishes to practise for the sum of five shillings (sec. 13), and then it enacts that 'no person shall be allowed to practise as an agent in the Court of Session or any Sheriff Court until he has subscribed this roll' (sec. 16). This provision it is of course the duty of the Court to enforce—but as the Sheriff has no access to the roll he is entitled to assume that when audience is claimed by some one whose name is not on the roll the Sheriff-Clerk will duly inform him of the fact. It is not to be supposed that this official will neglect his duty in this respect, and if that be so, I fail to perceive what useful purpose the proposed interdict will serve. Evidently the time to enforce the statute is in open court when the claim to appear and plead is actually made, and it is probably this consideration which induced the Legislature to omit from the present Law Agents Act the provision in the repealed Procurators Act of 1865, that any law-agent might sue out an interdict against an unqualified petitioner. The title of a member to inform the Court of Session of any act of misconduct with a view to the exercise of discipline on a party already on the roll is a different matter. I therefore think that the present application is altogether incompetent, and I abstain from issuing the order on the defender which has been granted by the Sheriff-Substitute, because the Act of Parliament is itself a sufficient standing order on the subject."

The pursuer appealed, and argued—(1) Under the Small Debt Act the Sheriff had beyond doubt right to allow anyone to practise, systematically or occasionally, whether qualified or unqualified, and law agents were really under special disqualifications, because the Sheriff could only allow them to practise on "special cause shown." The result was that by the tacit leave of the Sheriff a whole swarm of unqualified practitioners took to practising in the Small Debt Courts. The Act of 1873 was accordingly passed in order to remedy this state of matters, and section 16 provided that no person should practise as an agent, *i.e.*, act professionally in the Small Debt Court or any other of the Sheriff's courts unless he was on the roll in terms of that Act. It did not repeal the 14th section of the Small Debt Act, which enabled the Sheriff to give leave to persons to practise upon special cause shown, but it provided that in addition to having the leave of the Sheriff the person seeking to practise in the court professionally for gain must be a qualified law agent. In fact, it struck at unqualified practitioners such as the defender. (2) The pursuer had a perfectly good title to maintain this action. True, it was a qualified title—on cause shown and with leave of Sheriff—but he had an undoubted right to practise in causes in which the Sheriff considered the assistance of a law-agent desirable. He had therefore

an interest to prevent what was unlawful. The result of the defender continuing to practise would be competition with the pursuer. In early cases the rights of a notary-public to be protected against unqualified persons had been recognised—*Mitchell* v. *Gregg and Others*, December 7, 1815, F.C.; *Procurators of Paisley* v. *Craig*, March 8, 1823, 2 S. 249. The right at common law of an incorporated law agent to have an unfit person's name removed from the roll of law-agents had been recognised in the case of the *Incorporated Society of Law Agents in Scotland* v. *Clark*, Dec. 3, 1886, 14 R. 161. An additional reason for holding this process of interdict to be competent was disclosed by the fact that the Act of 1873 imposed no pecuniary penalty for doing what the defender was here attempting to do. The defender ought, then, to be interdicted from practising in the Small Debt Court, and ought to give an undertaking that he would not practise in the Debts Recovery Court.

The defender replied—(1) While he admitted that he could not legally appear in the Debts Recovery Court, and therefore did not require to give the undertaking asked, yet he had a right to appear in the Small Debt Court with the leave of the Sheriff. This right depended on the 14th section of the Small Debt Act. He appeared not in the character of a law agent, but of "such other person as the Sheriff may allow other than an officer of the court." But (2) even assuming he could be debarred from so practising, even with the leave of the Sheriff, the remedy of interdict was not the appropriate one. [Lord Young—The remedy sought was just asking the Sheriff to interdict himself from giving leave.] The only cases to be found in the books were cases of actions at the instance of incorporated societies. The case of the *Incorporated Society of Law Agents in Scotland* v. *Clark*, *supra cit.*, dealt only with the right of a law agent to have the roll kept up to a certain standard. Again, the only power ever given to an agent to interdict the practice of another was one which was conferred by the Procurators Act of 1865 (28 and 29 Vict. c. 85), sec 25, which was to this effect—"Any procurator shall be entitled to complain to the Sheriff in whose court he is entitled to practise against any person practising in such court who is not a procurator thereof; and the Sheriff shall, on such complaint being proved to his satisfaction, interdict such person from practice." . . . This section with the rest of the Act had been, however, repealed by the Law Agents Act of 1873. The proper time to object was when the appearance was made. The Sheriff might then refuse to hear the complaint if he thought fit. The question for him really was, whether it was for the public advantage—*Gray* v. *Society of Advocates in Aberdeen*, March 6, 1841, 3 D. 813.

At advising

Lord Young—This is an out-of-the-way case, and therefore one of some interest. The pursuer in this application for interdict is an enrolled law agent in the county of Aberdeen, and practises in Fraserburgh, and he seeks to have interdict against a man who is not an enrolled law agent "from practising as a law agent for or on behalf of any litigant or litigants in any of the courts to be held at Fraserburgh or elsewhere within the city or county of Aberdeen, by the Sheriff of Aberdeen, Kincardine, and Banff, or his Substitutes, until such time as he shall have legally entitled himself so to do." It is admitted that the defender is not an enrolled law agent, as also that he is not entitled to practise in the Debts Recovery Court, or in the ordinary courts of the Sheriff. But he contends that he is entitled to act for others, or represent others in the Small Debt Court. I am using these expressions because it has been seen from the argument that a good deal may appear to depend on the particular language used to express it—"acting as law agent" is one form of expression; "representing or appearing for another with the Sheriff's permission under the Act of Parliament" may be another. What the defender here contends is that he has a right to represent or appear for another with permission of the Sheriff under section 14 of the Small Debt Act, and the really interesting question, and the one to which I shall chiefly confine myself, is whether he has that right.

Now, the Small Debt Act of 1837 was intended to confer a boon on the lieges, and to enable them summarily and at little cost to recover small debts, and for that purpose special protection has been extended to them against law agents by section 14 of the Act. Of course in 1837, as now, procurators, solicitors, and persons who are lawful practitioners of the law in any jurisdiction, are entitled to appear for others, and to represent them and uphold their interests. Therefore, without any prohibition, they would, in the exercise of the ordinary rights which they had otherwise, be entitled to intervene and appear for litigants in the Small Debt Court. But the Legislature intended a benignant protection, and prohibited these law agents, procurators, or others practising the law from appearing—that is to say, it deprived them of the privilege of appearing in that court as they would have otherwise been entitled to do. But then it was with the qualification that upon special cause shown they may appear. The view of the Legislature was that there might occasionally be wealthy parties in the Small Debt Court, and questions of law requiring considerable argument; it was therefore provided that it should be within the discretion of the Sheriff, in such special cases and on special cause shown, to remove the disabilities which in the interests of the public the Legislature had put upon these persons. Then the Legislature, compassionating still the ordinary poor litigant, does not insist absolutely on his appearing personally. The general rule is that he must appear personally, but the Sheriff may relax it, and may allow either party to appear and be represented by any member of his family or by anyone who is not an officer of court. Now, that provision, like almost any of so general a character, may be liable to abuse, but the general intention of the Legislature is plain, and it is that the poor litigant should be protected against the practitioner whose charges might be considerable, and might be represented with the leave of the Sheriff by anyone who is not an officer of the court. We have been told that the consequence has been that practitioners have started up who got to be experienced in ascertaining people's difficulties in the Small Debt Court, and in representing them to the Court, and who executed their wishes probably for very

moderate remuneration. It may be extended to an abuse, but I can see it may be a mighty good, and I firmly believe that it has been productive of good generally. Whether they would have any action for their hire is another matter. It does not arise here. They are willing to give their services for what the litigants are willing to pay.

Now, Mr Leslie, it appears, has been in the way of doing this with the leave of the Sheriff, and I can see nothing illegal in it. Permission may be given indiscreetly. I am not the judge of that. The Sheriff is the best judge as to whether it should be given or withheld. If he gives it, I apprehend he does so in the discharge of his duty, which is for the benefit of the public, and I cannot pronounce that in giving permission to Mr Leslie—or to Mrs Leslie even, if she had been able and willing to perform the part—that he would have been acting illegally. I think that clear under the Act of 1837, and I rather understood the Dean of Faculty to put his case on the 1873 Act alone, which in my opinion has no bearing whatever on it. It certainly was never intended to interfere with the Small Debt Act in any way whatever. The particular clause is the 16th, which has regard to the institution established by that Act of rolls of agents which did not exist before 1873. Before, practitioners in the Sheriff Court were admitted by the Sheriff Court, and agents admitted by the Supreme Court—such as Writers to the Signet and Solicitors of the Supreme Court—were confined in their court practice to the Supreme Court. Now, the Act of 1873 requires that all law-agents wherever they practise should be admitted in the same way by the Court of Session, and should be entitled to practise all over Scotland. But then it was provided that there should be a roll of practitioners for each Sheriff Court and the Court of Session; and clause 16, which I venture to say was not intended to have any bearing on the Statute of 1837, provides that "From and after the 7th day of February 1874 no person shall be allowed to practise as an agent in the Court of Session or any Sheriff Court until he shall have subscribed the roll of agents practising before such court, or after his name shall have been struck off such roll, unless the name shall have been subsequently restored thereto." I must say I think it requires some ingenuity to make that section bear on the Small Debt Act of 1837, which otherwise, it is conceded, is clear on this matter. I am therefore clearly of opinion not only that the defender is entitled with the permission of the Sheriff (and he admits he has no right without it) to appear and represent the interests of any pursuer or defender in the Small Debt Court; but I assume also that the Sheriff will have regard to the interests of the litigants in giving or withholding his permission.

Then with regard to the Debts Recovery Court and the ordinary Sheriff Courts, I am not apprehensive that the Sheriff will give permission to appear in these courts to anyone who is not an enrolled law agent, his name not being on the roll of practitioners in his court. The Sheriff says he will not grant such leave. Even if I thought this were the right form of process I should not be the least disposed to interdict any person from appearing, or the Sheriff from allowing him to appear or practise in the Debts Recovery Court, nor in the ordinary court on such a statement as this.

On the form of process I entirely agree with the Sheriff-Principal. To some extent I agree also with the Sheriff-Substitute when he says the case is not one for an interdict. The proper result of that view is, I think, the dismissal of the application. He says the proper view is that the application is for an order of Court. Well, then, if the application is for an order of Court, and the Sheriff-Substitute grants, but the Sheriff refuses it, it is to me a novelty that the person applying for the order, and being refused it, can appeal the refusal to this Court as in an ordinary litigation.

But in the form of process I agree entirely with the Sheriff-Principal that the proper time to take the objection to Mr Leslie's appearance is when the appearance is made. I do not think it is a case for an application for interdict. I am strengthened in that opinion by the fact that whereas by the Act of 1865 there was provision made for an application for such an interdict, that provision has been repealed. It was, I suppose, found inconvenient, and it was therefore repealed.

On the whole matter I am of opinion that this application for interdict ought to be refused *de plano*.

Lord Craighill—I concur with Lord Young. I have no difficulty as to the Small Debt Act. I do not think that section 16 of the Act of 1873 affected it. The latter Act assumes two things in all its provisions—(1) That enrolment gives the right to appear in all sheriff courts; and (2) that no other title is required in any of the courts to which its provisions apply. If these views are right, then so far as regards appearance in the Small Debt Court that Act can neither give nor take away a right otherwise possessed. The Small Debt Act of 1837, by sec. 14 provides that no person practising the law shall practise in the Small Debt Court without the leave of the Sheriff on special cause shown. There is nothing in the Act of 1873 which overcomes that. The case provided for in the Act of 1873 has no application to the provisions of the Act of 1837. It provides that agents must be enrolled, and that once enrolled they have a title to appear. Nothing more is needed to make certain his right of audience. That is not the case with the Small Debt Act. Under it any enrolled law agent is not entitled to audience. That which gives the right there is the leave of the Sheriff. On that view I come to the conclusion that there is no ground for the interdict sought. In fact, though not in form, the thing sought is to interdict the Sheriff from giving his permission to the defender to appear. I think there is no warrant for that. The Sheriff is the judge of that. He is charged with the protection of all concerned. If there is any hardship the Sheriff's duty is to prevent it. If he does not give leave, no one appearing for another has audience, and his leave, if given, is the only title.

As to the Debts Recovery Court, the defender does not insist in any right to appear there. But I think there is an interest in an enrolled law agent to object to the right to appear of a person who is not such. Such a person is an unauthorised competitor with him. I think that

whether there be any other remedy or not, he ought not to conclude that he cannot come to the Court for an interdict against such a person appearing. But in doing so the enrolled law agent is not acting in the public interest as has been suggested. He is acting for his own interest, and is protecting himself.

Lord Rutherfurd Clark—After as much consideration as I have been able to give to this case I am disposed to take a different view from that which has been expressed by Lord Young and Lord Craighill.

It is now certain that no one but an enrolled law agent is entitled to practise in any Sheriff Court. I think that was the law before 1873 and before 1865. I am not required to inquire whether that was the common law rule or not. It is now matter of statutory provision that no one but a duly enrolled law agent may practise in any Sheriff Court. That being clear, the next thing to consider is to what Court that statutory provision applies. I see no exception to the generality of the words. The Small-Debt Court is one of the Sheriff Courts as much as the Debts Recovery Court or the ordinary Court, and hence it seems to me a matter of plain statutory declaration that no one is entitled to practise in it as a law agent except a duly enrolled law agent.

It is true that in the Small-Debt Act there exists a certain disqualification which is applicable to law agents. They are not entitled as of right, as they are in the other Courts, to appear for their clients in the Small-Debt Court. They are only entitled to do so with the leave of the Sheriff given in the particular suit. This cannot take the shape of a general permission. The permission is for each particular case. But it seems to me to follow from what I have said that the Sheriff has no right to give leave to anyone to practise as an agent in his Court excepting an enrolled law agent. For the Sheriff cannot confer a right to practise. It is a right given by statute to certain persons, and he can only give leave to them to appear in particular suits. Therefore I think that a law agent is the only person entitled to practise in the Sheriff Court, and that he is the only person to whom the Sheriff can give leave to act as a law agent in any particular suit in the Small-Debt Court. The defender is not a law agent, but he maintains that he is entitled to take the cases of people who may employ him in the Small-Debt Court, and conduct them on their behalf for remuneration. I cannot see that that is anything else than practising as a law agent. It is true that he only claims to do so with the leave of the Sheriff, but the Sheriff is in my opinion not entitled to give him a right to practise as a law agent.

It is said that the Sheriff may do so under section 15 of the Small Debt Act of 1837. I cannot read that as applying to the employment of law agents. They had been dealt with under sec. 14, which provides for their appearance only by leave given for the particular case. The section does not relate to persons practising as law agents. It enables the Sheriff to give decree condemnator or absolvitor if the party does not appear personally, or by a member of his family, or by such other person as the Sheriff shall allow. It enables the Sheriff to allow another person to appear for a pursuer or defender. But I do not think that in the exercise of that power he is entitled to permit a person to practise as an agent. I do not say to what extent his power is limited, or how it is to be exercised. I only say that it is not permissible under that section to allow a person to practise as an agent who has not the legal qualification. The Sheriff cannot dispense with or set at naught a statutory provision as to the qualification of the persons who may appear in that capacity. To hold otherwise seems to be equivalent to holding that the Sheriff may create a special class of law agents to act as legal practitioners before the Small-Debt Court. It follows, if I am right in what I have said, that an unqualified person who appears in the Small-Debt Court is a person doing an unlawful thing, and if so, that unlawful thing ought to be stopped. It requires little interest to give a title to complain of what is unlawful. But the pursuer has I think a plain title and interest to stop an unlawful thing which interferes more or less with his practice of his profession and his earnings in it. Therefore as to practising in the Small Debt Court I think interdict should be granted. There is little importance in the question as to the Debts Recovery Court. The Sheriffs both think, and there is no doubt, that the defender is not entitled to practise in it. The respondent himself does not contend that he is, and he stated at the bar that he does not intend to claim so to do.

Lord Justice-Clerk—I so entirely concur with Lord Young in the result at which he arrives—and in the reasons for that result—that it is unnecessary for me to enter at length into this question, though it is one of some public and some professional interest.

In the first place, I think it is clear that this application cannot be sustained under the Act of 1837. Under that Act we have not a leave given to a qualified agent to appear, but a statutory prohibition against his doing so except with the leave of the Sheriff. From plain views of expediency the court is to be one not of lawyers, but a popular tribunal where each party is to plead his own case, but in which the Sheriff may give leave to appear to one who is not himself a party. I cannot for my part say that the Sheriff, if he give leave to appear to one who makes a charge for his services, is doing an illegal thing.

In the next place, I think that the Law Agents Act of 1873 does not apply to the matter at all. Its object was to provide that a qualification for one court should be a qualification for the other courts throughout the country. It was not intended to interfere with the Act of 1837, and particularly with the Sheriff's discretion to permit one not himself a party to appear, and I think it has not done so. As to the Debts Recovery Court, no case with regard to it has been established, It will be time enough to decide it when it arises. It does not seem a matter for much doubt, for the respondent does not maintain that he has a right to act for clients in the Debts Recovery Court.

As to the form of the remedy I am strongly of opinion that interdict is here an inconvenient and I rather think an incompetent remedy.

The Court dismissed the appeal and affirmed the judgment.

Counsel for the Appellant—D.-F. Mackintosh —M'Lennan. Agent—J. D. Macaulay, S.S.C.

Counsel for the Respondent—Comrie Thomson —James Ferguson. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, February 29.

SECOND DIVISION.

[Dean of Guild Court, Crosshill.

WALKER & DICK *v.* PARK.

Superior and Vassal—Building Restrictions—Rights of Adjoining Feuars—Dean of Guild—Competency.

The feuar in a feu-contract entered into in 1855, was taken bound only to erect villas or cottages upon the ground, and the superior obliged himself to insert a similar restriction in the feus granted by him of the remaining portions of the same estate. These obligations were mutually discharged by the parties in 1883. In the same year a feu was granted of an additional piece of ground to the feuar, by which it was permitted to erect dwelling-houses or shops. The sub-feuars of part of this additional piece of ground, whose title was unfeudalised, presented a petition to the Dean of Guild Court for a warrant to erect dwelling-houses and shops. This petition was opposed by a feuar who had entered into a feu-contract with the same superior in 1862, which contained obligations on the feuar to erect villas or cottages only, and on the superior to take the feuars of the immediately adjoining ground to the north bound to erect only buildings of a similar kind. The respondents maintained that though *ex facie* of their title the petitioners were entitled to erect the proposed buildings, yet the superior could not legally grant such a title, because, in the first place, a *jus quæsitum* had been created in favour of the other feuars by the terms of the feu-contract of 1855, with regard to building restrictions, and, in the second place, because such a title was in contravention of the obligation undertaken by the superior in the the feu-contract of 1862 with regard to certain ground, of which his feu was part; and further, that the petitioners were personally barred from availing themselves of the title as it stood. The superior was not a party to the proceedings in the Dean of Guild Court.

Held (1) that the obligation imposed by the feu-contract of 1855 was personal to the superior, and was not communicated to the other feuars; (2) that the question whether the granting of the feu-contract in 1883 was a breach of the obligation by the superior in the feu-contract of 1862 could not be decided in his absence; (3) that the petitioners were not personally barred from taking their second feu in 1883, without restrictions, as there was no averment that they knew of the obligation undertaken by the superior in the feu-contract of 1862; and (4) that as the title of the petitioners was unrestricted, they were entitled to the lining asked.

Opinions (*per* Lord Justice-Clerk and Lord Rutherfurd Clark) that it had not been proved that the obligation imposed on the superior by the feu-contract of 1862 applied to the ground feued in 1883.

Opinions (*per* Lord Justice-Clerk and Lord Craighill) that the questions raised upon the objections could not competently be decided in the Dean of Guild Court.

In May 1855 William Johnston, as trustee for William Dixon, proprietor of the lands of Crosshill, feued to James Allan about three acres of the said lands. In the feu-disposition the land was described as "bounded on the north north-east, in the first place, by the centre of a road or street which measures 50 feet in breadth," &c. In the deed there were these clauses of restriction and obligation—"But these presents are granted and accepted, and the subjects hereby conveyed are disponed, with and under the following conditions, provisions, and obligations, viz., that the said James Allan and his foresaids shall be bound to erect upon the said piece of ground a neat dwelling-house or separate dwelling-houses or villas or cottages, which shall cost at least £300 each, exclusive of the ground; . . . and that I, the said William Johnston as trustee foresaid, and my foresaids, shall be bound and obliged to take the whole feuars or purchasers of the remaining portions of Crosshill lands bound in similar terms, and to insert in their feu-rights, dispositions, or other conveyances the like clauses with reference to the erection of buildings, and formation and upkeeping of the same (under the foresaid reservations as to firebrick fronts), and of the streets and sewers therein as are hereinbefore inserted, which conditions, provisions, and obligations are appointed to be inserted in the infeftment to follow hereon, and thereafter validly referred to in all future conveyances and investitures of the said plot or piece of ground."

In 1868 the trustees of James Allan, who then held the land feued in 1855, brought an action against Dixon's trustees to interdict them from feuing the lands of Crosshill without taking the feuars bound in similar terms of restriction as in Allan's feu-disposition. The Court of Session granted interdict (December 9, 1868, 7 Macph. 193), and upon appeal the House of Lords affirmed the judgment—July 12, 1870, 8 Macph. (H.L.) 182. In May 1883 William Dixon's trustees and Allan's trustees executed a mutual discharge and assignation, whereby upon the narrative of the feu-disposition granted to Allan, and that the said interdict had been granted, the parties agreed and bound themselves, *inter alia*—"(First) that the second party (Allan's trustees) should discharge the first party's (Dixon's trustees') constituents, and the said lands of Crosshill and others now belonging to them, of the said obligation in favour of the said James Allan imposed upon the said William Johnston and his foresaids by the said feu-disposition by him in favour of the said deceased James Allan to take the whole feuars or purchasers of the remaining portions of Crosshill lands bound in similar terms, and to insert in their feu-rights, dispositions, or other conveyances the like clauses with reference to the erection of buildings, and formation and upkeeping