and measure, and so it enacted that if anyone went into a shop and was supplied by the old measures a penalty would be incurred by the dealer. But the case of a man going into a shop and asking for three-penny worth of whisky is not a case of sale of that kind. Section 24, of which we heard so much, was introduced for the protection of customers against fraud by dealers. It provides that a dealer is not entitled to use or keep for use a measure not according to the standard and which is not stamped. It was to protect the dealer against the operation of that clause that section 22 was introduced, which provides that a dealer may sell in any vessel he likes so long as he does not represent the sale as one by measure. Section 24 standing alone would have struck against that, and again section 29 would have struck against it, though he did not use or intend to use it. But under section 22 you may sell in any measure you like, provided you do not represent it as a sale by measure, that is, by some denomination of the standard measure, and you may have such a measure in your possession if you do not intend to use it in sales by measure. I am of opinion that there was not here any sale by measure. The appellant did not lead his customer to believe he was buying by measure, that is, by imperial measure. The customer was not buying by any known or by any imperial or local or customary measure; he intended to buy three-penny worth or six-penny worth of whisky. A man going into a shop in this way requires no protection, and no uniformity would be desirable. In short, the policy of the statute has no application here at all, and I think that on the facts there has been no contravention of its provisions.

Lord Craighill—I have come to the same conclusion. At first sight the case presented some difficulty, but on consideration I have come to be of opinion, without any great difficulty, that no contravention of the statute has been here committed. The 29th section requires that every measure used in trade shall be stamped under penalty of a fine, but the language of this clause obviously implies that there may be other contracts than those for which it makes provision. That must clearly be held to be within the terms of the clause, and therefore there must be a way of finding that which is to be given where the contract is not by measure, and if there is a contract without weight or measure, which may be lawfully made, we are reduced to holding that such a sale was contemplated by section 22, the last clause of which provides that the person shall not be subjected to a fine for the possession of an unstamped vessel where it is not shown that such vessel was used, or intended to be used, as a measure. I think that what is truly meant here is, that where the vessel is not intended to be used as a measure, but merely for the purpose of ascertaining that which is to be given for so much money that its possession does not constitute a contravention of the statute. I therefore concur in what has been said by Lord Young.

Lord Justice-Clerk—I have come without any hesitation to be of the same opinion as your Lordships. I think the prohibitions and penalties of the statute are directed against contracts by weight or measure, and that so far as they relate to vessels for measuring liquids they relate only to vessels intended to be used as measures; and it is clear that the contract here is a contract in which the vessels used were not shown to be used, or intended to be used, as measures in the sense of the statute. Your Lordships will therefore sustain the appeal.

The Court sustained the appeal, and quashed the conviction.

Counsel for Appellant — Robertson — W. C. Smith. Agents—Auld & Macdonald, W.S.

Counsel for Respondent—Mackintosh—Lang. Agents—Campbell & Smith, S.S.C.

Wednesday, March 14.

[Sheriff of the Lothians.

TRAILL *v.* CHALMERS.

Justiciary Cases—Jurisdiction—Right of Appeal from Sheriff Court in Civil Causes—Suspension.

A party brought a bill of suspension before the High Court of Justiciary, in which he alleged that a Sheriff had refused to exercise his proper jurisdiction in refusing to sustain a reference to oath at his instance in a civil action in the Sheriff Court, and praying for recal or suspension of, *inter alia*, the said interlocutor, and for suspension of a charge following on an extract decree obtained by the opposite party. *Held* that the complainer had stated no relevant ground for holding that the Sheriff had not properly exercised his jurisdiction, and the prayer of the bill *refused*.

Opinion (*per* Lord Young) that, on the assumption that an inferior judge had not properly exercised his jurisdiction in a civil case, the High Court had no jurisdiction, unless it were specially conferred on it by statute empowering it to compel him to do so.

This was a bill of suspension. The facts alleged by the complainer were as follows:—That in August 1882 the respondent had raised an action against him in the Sheriff Court of Midlothian for payment of £20, and interest, in which action the respondent alleged himself to be onerous endorsee or assignee of an I O U which the complainer had granted to a person named Neilson; that the complainer had averred, on the other hand, in defence, that the respondent had never obtained any valid assignation of the said I O U, that he had never given any value for it, and that any transaction between the alleged granter of the assignation and the respondent in regard to it was simulate and illusory.

The circumstances out of which the Sheriff Court action had arisen as detailed by the complainer were—The complainer had become, along with Neilson, cautioner in a cash-credit bond for Neilson's brother, who becoming bankrupt, the cautioners had to pay the balance on the bond. The complainer had then granted the I O U in question to Neilson, who

had promised to the complainer when he signed the cash-credit bond that he would relieve him of all payments under it. In these circumstances the complainer maintained in the Sheriff Court that the respondent not being a *bona fide* holder of the I O U had no title to sue, and that he was therefore entitled to absolvitor.

The Sheriff-Substitute decided in favour of the respondent. The complainer appealed to the Sheriff, who dismissed the appeal. The complainer then lodged a minute of reference to the respondent's oath, which the Sheriff-Substitute refused to sustain. An appeal was taken to the Sheriff, who dismissed it on the ground that the appeal had not been timeously lodged. The complainer then petitioned the Sheriff specially to be allowed to refer the case to the respondent's oath, particularly the question of the resting-owing of the debt contained in the I O U. After this petition had been transmitted to the Sheriff, and was under his consideration, the respondent enrolled the case before the Sheriff-Substitute for approval of the Auditor's report on his account of expenses, when the Sheriff-Substitute approved of the report and decerned. The respondent then extracted the decree and charged the complainer upon it.

The complainer prayed for recal or suspension of (1) the interlocutor of the Sheriff-Substitute refusing to sustain the reference to oath; (2) the interlocutor of the Sheriff dismissing the complainer's appeal thereagainst; (3) the interlocutor of the Sheriff-Substitute approving of the Auditor's report, and decerning for expenses, and (4) for suspension of the charge following upon the extract decree.

The complainer pleaded—"(1) The proceedings complained of being illegal and oppressive the prayer of the bill or note ought to be granted. (2) The said Sheriff and Sheriff-Substitute having most wrongously and unjustly refused to allow the complainer to refer his cause to the respondent's oath, he is entitled to have the prayer of his note granted with expenses. (3) The interlocutor of 12th January [being that approving of the Auditor's report] having been pronounced when the Sheriff-Substitute had no process before him, the same falls to be recalled. (4) The said extract decree having been issued while the case was still *sub judice*, the charge ought to be suspended, with expenses."

Argued for the complainer—He came there not by way of review, but on the merits. The defence to the case was one which could be proved only by writ or oath of the pursuer. He was excluded from appeal to the Court of Session by reason of the value of the cause being under £25. The Court of Justiciary represented the Sovereign, and wherever an inferior Judge exceeded, or fell short of, the proper exercise of his judicial powers it had a general jurisdiction to set him right. He was entitled to come there at common law. Reference to oath was not a mode of proof, but a resource after all modes of proof were exhausted. He was compelled to take the form of suspension, because he had to suspend execution of the charge which had been given. The Sheriff having wrongfully deprived him of his constitutional right of referring to his adversary's oath, he was entitled to have the interlocutor doing so recalled by the only superior tribunal to which he was not expressly excluded from appealing.

Authorities—*Dick* v. *Great North of Scotland Railway Company*, 3 Irvine 617; *Pattison* v. *Robertson*, December 4, 1846, 9 D. 226, *per* Lord Moncreiff, p. 229; *Davidson* v. *Russell*, November 21, 1812, F.C.

Argued for the respondent—This was a purely civil cause, which was excluded from appeal under the Sheriff Courts Acts, not only to the Court of Session, but to the Circuit Court, "or any other court or tribunal whatever." The civil jurisdiction of the High Court was entirely statutory, and was therefore to be strictly construed. The appellant must bring his case under some one of these statutory categories, or be excluded on the ground of no jurisdiction. This was an appeal from a Sheriff's judgment refusing proof. A bill of suspension was not a competent form of bringing such an interlocutor under review. The complainer could point out no limit to this alleged jurisdiction; it would practically make the High Court a court of appeal in all civil causes from the Sheriff Court.

Authorities—20 Geo. III. c. 43, sec. 34; 54 Geo. III. c. 67, sec. 5; 16 and 17 Vict. c. 80, sec. 22; *Sandys* v. *Lowden*, November 26, 1874, 3 Couper 43, 2 R. (Jus. Ca.) 7; Moncreiff on Review in Criminal Cases, p. 162; 39 and 40 Vict. c. 70, sec. 27; Dickson on Evidence, p. 916.

At advising—

Lord Craighill—The grounds on which, according to the argument submitted at the bar for the complainer, suspension of the interlocutors and charge prayed for ought to be granted was, first, that the Sheriffs had refused to exercise their jurisdiction; and secondly, that the High Court of Justiciary being vested with the power to compel inferior judges to do their duty, ought to grant the remedy for which the complainer asks. On the assumption that this Court has jurisdiction in such a case, I am of opinion that there is no ground whatever for its exercise on the present occasion, because the Sheriffs, as appears from the proceedings, did not refuse to exercise their jurisdiction, but applied their minds to the questions submitted to them, and gave that judgment which according to their views of the facts and the law of the case ought to be pronounced. They might or they might not have erred in their decision; but even if they did err their decisions are final.

This view of the matter renders it unnecessary for me to give an opinion on the question of this Court's jurisdiction in civil matters; and I am glad I am relieved of this necessity, because this question, which is of the very highest importance, was imperfectly argued at the hearing of this suspension. The case of *Dick* and the case of *Lowden* were referred to as if they were decisive of the controversy; but it appears to me that these decisions only touched a fringe of the question which was raised for judgment. There are many more authorities in the books on the subject than those which were quoted, and it will be unfortunate if, when the time comes at which the question referred to must be determined, there is not a more exhaustive argument presented to the Court than that with which this suspension has been supported.

I may add that, had it been necessary for me to express an opinion on the question of jurisdiction in order that I might give judgment in this

cause, my present persuasion is that I would have concurred in that which is about to be delivered by Lord Young, but, for the reason explained at the outset, my opinion on this point is reserved.

Lord Young—I am of the same opinion as to the result at which Lord Craighill proposes to arrive.

On the question of jurisdiction I am of opinion that this Court has no jurisdiction in civil matters apart from statute, and that in this case, unless statute gives us special jurisdiction, we have none. This Court has no civil jurisdiction except in a variety of cases in which statute has given it, and I think this is not one of these. It is clear there would have been no appeal to the Circuit Court here if the case had been beyond the Lothians. That is certain. An appeal to the Court here is as an appeal to the Circuit Court would be had the case arisen elsewhere. Now in no statute is it suggested that the Court here has any civil jurisdiction which the Circuit Court would not have elsewhere. But it is said that in this case the Sheriff has refused to exercise his judicial function, and that in such an event this Court has an inherent power to interpose and compel him to do so. I cannot accede to that proposition, unless with this limitation, that it be in a criminal matter. That it has such a power in criminal matters may be conceded, but it has no jurisdiction to compel a Civil Court to exercise its jurisdiction in a civil matter. That power belongs to the Supreme Civil Court. But it was argued to us here that in respect there was in this case no right of appeal to the Supreme Civil Court, therefore the appellant was entitled at common law to come to the Supreme Criminal Court. That is a proposition I cannot sanction, and so I prefer to put my judgment on the point of jurisdiction. I think it is a hypercritical observation that, being on the merits of the case in favour of the respondent, it is not necessary to determine the question of jurisdiction, for we are really sustaining the jurisdiction by giving our decision on the merits. Practically we frequently say we do not need to be over anxious about our jurisdiction for we can form an opinion sitting under one mace just as well as under another, and it might be said that, if sitting under the criminal mace we should be of opinion that a Sheriff had not properly exercised his jurisdiction we might order him to do so as well under that mace as the civil one. But this is a case which the Legislature has expressly excluded from our review as a Civil Court, and has given us no jurisdiction as a Criminal Court, and therefore I think we cannot interfere.

Lord Justice-Clerk—I see no difficulty, as far as any question of jurisdiction is concerned here, in concurring in Lord Craighill's opinion. It is said the appeal is competent because it is one against the decision of an inferior judge refusing to exercise his jurisdiction. If there were such a case, the question would of course arise, whether this Court had power to interfere to compel a Civil Court to exercise its jurisdiction? I understand Lord Craighill to say that no such question arises here, for there is not disclosed in the petition any relevant ground for saying that the Sheriff did not exercise his jurisdiction. All that the petitioner says is that the Sheriff refused to refer the matter at issue to the respondent's oath. It turns out, as I read the case, that all that happened was that there was a flaw in the procedure, and the Sheriff properly dismissed the appeal.

In regard to the question of jurisdiction on the ground of the Sheriff having refused to exercise his proper function, I do not think it is necessary to give an opinion whether we have power to compel him to do so. But I do not think that question is so easily to be disposed of as Lord Young imagines; at the same time, I think it is not desirable that we should multiply questions beyond the strict limits of the statutes which give this Court its civil jurisdiction. There are one or two scattered authorities in our jurisprudence pointing in the direction of the appellant's contention, but, being of the opinion I have expressed on the merits of the case, I see no object to be gained by sustaining our jurisdiction in what is substantially a civil matter.

The Court refused the bill.

Counsel for Complainer—M'Kechnie. Agent Abraham Nivison, S.S.C.

Counsel for Respondent—Dickson. Agent—W. Considine, S.S.C.

LANDS VALUATION COURT.

Thursday, March 15.

(Before Lord Lee and Lord Fraser.)

PAROCHIAL BOARD OF BLANTYRE.

Land Valuation Act—Mines—Minerals—Exemption.

A mineral field was let at a fixed rent, with an option of certain lordships to the proprietor. One portion of the mineral field was not opened up. *Held* that this portion not being a "mine" which had not been wrought during the year of assessment, was assessable under the Valuation Acts—Lord Lee being of opinion that the whole subjects let formed one mine, and were assessable at the fixed rent stipulated for the whole; Lord Fraser being of opinion that the fixed rent stipulated for the portion in question ought to be entered in the valuation roll.

Where minerals are let on lease at a fixed rent or in the landlord's option certain lordships, and do not when worked afford lordships to the amount of the fixed rent, the fixed rent must be entered as the value on the valuation roll.

Where a mineral field had been let under a lease, by which the lessees were to pay a fixed rent or alternatively lordships on the output, and mines had been opened but had not been worked during the year of assessment—*held* that as there was no evidence that the reason of their not being worked was that they had been worked out, and as the tenant continued to pay the fixed rent,