

I propose that we should adhere to his interlocutor.

LORD JOHNSTON—I agree. The question is, what was the intention of the parties. Now I do not suppose the parties had any particular intention except what must be imputed to them from their actings, and their actings consist of the terms of the contract they made, their conduct afterwards, and the general circumstances of the case. But in using these various considerations to arrive at the intention to be imputed to the parties we are told by section 18 of the Sale of Goods Act 1893 that certain rules are to be applied. Now without looking at these rules, and looking merely at the circumstances of this case, I should hold that the turning-point of it was the fact that the buyer was himself under contract to sell to the Government upon very special terms, and, *inter alia*, upon the special terms that the whole hay was to be delivered in bales of a certain density and of a certain weight. The buyer therefore had imposed on him the necessity of seeing that the hay was put into such bales, or else he could not have fulfilled his contract. The seller on the other hand was not concerned with this.

Now the custom under which the parties worked was that the hay was—I do not say to be delivered, as that would be begging the question—but was to be put in the power of the buyer in order that the buyer might bale it for himself. From that I should have deduced the conclusion that at that point delivery was complete, and that the mere fact that the carting of the bales to the station was undertaken by the seller in no way affected the passing of the property.

The only difficulty arises from section 18, rule 3, which enacts that "Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done and the buyer has notice thereof." If the fact had not been as stated by the Sheriff-Substitute, that "one of the conditions agreed upon was that both parties should accept the weight of the hay as ascertained on the railway company's weights for the purpose of carriage as determining the total amount payable to the pursuer by the defender," I think there might have been some difficulty in applying the rule in relation to the facts. But I do not think that the agreement to accept the railway company's weights for freight as the weights for the fixing of the price can be said to be equivalent to leaving it to the seller himself to weigh, measure, &c., in terms of the statutory rule.

I therefore cannot see any ground for impugning the Sheriff-Substitute's reasons for his conclusion.

LORD SKERRINGTON—The question is whether the risk of certain hay which was sold rested with the seller or had passed to the purchaser. In the absence of some other agreement the risk is upon the owner. That is enacted by section 20 of the Sale of

Goods Act 1893. It is not said that there was any agreement, express or implied, as to the risk. Accordingly we are driven to ask whether the property was in the seller or the purchaser on the day of the fire. In order to find the answer we must be guided by sections 17 and 18 of the statute.

The seller was bound to cart the hay to the station in order that it might be transmitted by rail to the nominee of the purchaser, but also in order that it might be weighed and the price thus fixed. This consideration if it stood alone would suggest that according to the intention of the parties the property still remained with the seller. There is, however, another consideration which points in the opposite direction and which is in my opinion of greater significance, viz., that the purchaser had a contractual right to deal with the hay in a manner difficult, if not impossible, to reconcile with any theory except that of ownership. I accordingly think that the property, and therefore the risk, was with the purchaser.

LORD MACKENZIE was absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—Blackburn, K.C.—Lippe. Agents—W. Croft Gray, S.S.C.

Counsel for the Defenders (Appellants)—Anderson, K.C.—Hamilton. Agents—Macpherson & Mackay, S.S.C.

Friday, June 8.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

MUIRHEAD v. MEIKLE.

Bankruptcy—Sequestration—Trustee—Votes of Creditors—Unstamped Assignations of Claims on the Estate.

Bankruptcy—Appeal—Competency—Election of Trustee—Error in Procedure—Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), secs. 67 and 166.

Held that in a competition for trustee in a sequestration, where one of the candidates was founding on assignations which were unstamped, the Sheriff-Substitute should have allowed a motion on his behalf to be allowed to consign the amount of the stamps and penalties, and should thereafter have given effect to the documents in the competition.

Held that the Sheriff-Substitute's refusal of the motion was an error in procedure which it was competent to bring under review notwithstanding section 67 of the Bankruptcy (Scotland) Act 1913.

Tennent v. Crawford, 1878, 5 R. 433, 15 S.L.R. 265, *followed*.

The Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20) enacts—Section 67—"The judgment of the Sheriff declaring the person or persons elected to be trustee or trus-

tees in succession shall be given with the least possible delay; and such judgment shall be final, and in no case subject to review in any court or in any manner whatever." Section 166—"It shall be competent to bring under the review of the Inner House of the Court of Session . . . any deliverance of the Sheriff, after the sequestration has been awarded (except where the same is declared not to be subject to review), provided a note of appeal be lodged with and marked by the Sheriff-Clerk, within eight days from the date of such deliverance, failing which the same shall be final, and such note, together with the process, shall forthwith be transmitted by the Sheriff-Clerk to the Clerk of the Bill Chamber, and the Lord Ordinary's decision shall, when not expressly made final by this Act, be subject to review of the Inner House. . . ."

Robert Wilson Muirhead, C.A., Glasgow, *appellant*, brought under review a deliverance of the Sheriff-Substitute (FYFE) at Glasgow in the sequestration of John Edward Younger, 132 Renfield Street, Glasgow. John Meikle, accountant in Glasgow, appeared as *respondent*.

At a meeting for the election of a trustee in the sequestration the appellant and the respondent were nominated for that office. No personal objection was taken to either candidate, but a large number of the votes were challenged as not valid for voting. The appellant having founded, amongst other documents, on unstamped assignments, offered to consign the amount of the stamp duty and of the appropriate penalty. The Sheriff refused to sanction this procedure. The Sheriff having made *avizandum* the appellant moved (No. 35 of process) for leave "to uplift (1) the assignment granted by Robert Deuchar Limited, brewers, Edinburgh, in favour of the Licences Insurance Corporation and Guarantee Fund, Limited, dated 6th and 7th November 1916, and (2) the assignment granted by William Kerr & Company, wholesale wine merchants, 93 Ingram Street, Glasgow, in favour of the Scottish Licences Mutual Insurance Association, Limited, dated 5th March 1917, in order that said assignments may be stamped with the appropriate stamp duty."

On 3rd April 1917 the Sheriff-Substitute pronounced this deliverance which was now brought under review—"Finds under reference to the annexed note that upon a scrutiny of the votes the valid vote for the competitor John Meikle, accountant in Glasgow, is £1527, 16s., and that the valid vote for the competitor Robert Wilson Muirhead is £93, 0s. 8d., showing an apparent majority for the competitor the said John Meikle of £1434, 15s. 4d.: Refuses the motion No. 35 of process for the competitor Robert Wilson Muirhead."

Note.—" . . . The result of the scrutiny of Meikle's votes is that his recorded vote of £1616, 15s. 9d. is reduced by £88, 19s. 9d., making Meikle's vote in the competition £1527, 16s. . . ."

"The result of the scrutiny of Muirhead's votes is that his recorded vote of £3063,

14s. 4d. is reduced by £2970, 13s. 8d., making Muirhead's vote in the competition £93, 0s. 8d.

"Meikle's valid vote in the competition being thus £1527, 16s., and Muirhead's £93, 0s. 8d., there is an apparent majority in favour of Meikle of £1434, 15s. 4d., and the usual practice is to conclude the Sheriff's statement of his opinions on the objections taken in the course of a scrutiny with the formal words which are used in declaring the election of a trustee; but if I do this I will of course foreclose appeal, if appeal is competent; and having regard to the peculiar situation I do not desire to do this or to seem to prejudge the question whether the thirty opinions I have expressed upon objections in the scrutiny are each an interlocutory deliverance, or that the statement of the majority arising upon the vote is an interlocutory deliverance subject to review. At the same time it is a statutory direction that the election of trustee is to be declared 'with the least possible delay' (section 67), and as my own personal opinion is that my opinions expressed in the course of a scrutiny are not appealable deliverances, I hesitate very much to refrain from declaring the election of the trustee. The circumstances, however, in this case are very exceptional, and I take it upon myself to delay declaring the election (1) because probably it is not for me but for the Court of Session to say whether appeal is competent; (2) because a great many of the questions discussed and decided in the scrutiny are very important bankruptcy questions upon which it would be exceedingly useful to obtain the opinion of the Supreme Court; and (3) because whilst section 67 directs the Sheriff to declare the election of a trustee 'with the least possible delay,' and although the practice is to make this declaratory deliverance along with the determination of the question where the majority of votes lies, the statute does not absolutely bar the formal declaration of the election of trustee being deferred. If I do not declare the election now, I cannot of course do so till the appeal days have elapsed, but as I am taking a very unusual course in not now declaring the election, I shall expect the parties not to cause the election to be deferred for eight days if neither of them proposes to attempt an appeal.

"The competitor Muirhead put in a motion two days after the scrutiny of votes and the discussion upon the objections had ended, and he desires me to deal with that motion. I do not think it is necessary to do so, for I have pointed out in my note that in the course of the scrutiny this competitor and the Licences Insurances Companies whose votes he had were quite willing either to stamp or to consign the stamp duty for the unstamped vouchers founded on, but that I declined to interrupt the progress of the scrutiny to enable the documents to be stamped, or to order consignment, because I thought neither course was competent under the Bankruptcy Act to enable a claim to be reckoned for voting purposes, and because I considered that the Stamp Act did not apply to a scrutiny of votes in

a bankruptcy. If the motion does require to be formally dealt with, obviously I must simply refuse it, because it asks me to do the very thing I hold I have no power to do, and which the Court in *Tennent's* case held the Sheriff at Hamilton had no power to do. I think also this motion would in any event have to be dismissed upon two technical grounds—(1) It was not timeously made. It might perhaps appropriately have been put in immediately upon the lodging of the note of objections for Meikle intimating the want-of-stamp objection. I am afraid it was too late after the scrutiny proceedings had been closed and I had made avizandum upon the notes of objections. (2) I do not think the competitor Muirhead, who makes this motion, had a title to make it. Even assuming it to be a competent motion at all, which I gravely doubt, clearly Muirhead could not make it, but only the interested creditors. I do not think, however, that this motion is really of any consequence at all. It was in my view quite unnecessary, even if competent, and the situation is not in any way affected either by the motion having been put in or by my refusing it."

The appellant (Muirhead) appealed to the Court of Session under section 166 of the Bankruptcy (Scotland) Act 1913.

The respondent (Meikle) objected to the competency of the appeal.

Argued for the respondent—The appeal was incompetent. A Sheriff's judgment regarding the appointment of a trustee was, according to section 67 of the Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), final and not subject to review. Alternatively as the Sheriff had not declared the election of any person to the office, he had not pronounced a deliverance against which an appeal could be sustained. The Sheriff's decision as to the validity of the various votes was final. An appeal might possibly have been competent had a question of procedure arisen at an early stage—*Tennent v. Crawford*, (1878) 5 R. 433, 15 S.L.R. 265. That case, however, was a bad precedent to follow—*Galt v. Macrae*, (1880) 7 R. 888, 17 S.L.R. 635; *Reid v. Strathie*, (1887) 14 R. 847, 24 S.L.R. 609; *Yeaman v. Little*, (1906) 8 F. 702, 43 S.L.R. 504; *Grierson v. Ogilvy's Trustees*, 1908 S.C. 959, 45 S.L.R. 722. These cases made quite plain what the policy of the Act was. Counsel also referred to *Wylie v. Kyd*, (1884) 11 R. 968, 21 S.L.R. 693, and *Farquharson v. Sutherland*, (1888) 15 R. 759, 25 S.L.R. 573.

The appellant argued—Under section 166 of the Bankruptcy (Scotland) Act 1913 the appeal was competent. Such an appeal had been regarded as competent in the case of *Moncur v. Macdonald*, (1887) 14 R. 305, 24 S.L.R. 225. A motion was made that the Sheriff should allow the documents to be after-stamped or allow the stamp duty and penalty to be consigned. This motion having been made in the course of the proceedings, was made timeously, and by section 47 of the Act the Sheriff ought to have acceded to it. His refusal to entertain the motion was unlawful. If the deed was capable of being

after-stamped it could be received and the vote in respect thereof was valid—*Mories v. Glen*, (1843) 6 D. 97. On the face of the deliverance there was no final appointment of a trustee, so that the appeal was at an early stage of the proceedings. The Court of Session could correct an apparent irregularity on the part of a judge of an inferior court even if no appeal on the subject were taken.

At advising—

LORD JUSTICE-CLERK—The competency of this appeal was objected to, and the point was fully argued. In my opinion the point is decided by the case of *Tennent v. Crawford*, 5 R. 433. That decision has, so far as I am aware, always been accepted as authoritative, and though regret has been expressed by high authorities that the law should be as was settled in that case no change was made when the recent Bankruptcy Statute was passed.

On the merits I do not think the written motion for Muirhead ought to have been granted. I think that also was decided in *Tennent v. Crawford*. But the Sheriff-Substitute in his note says—"In the case of *Tennent* it was not under the Bankruptcy Act but under the Stamp Act that the Court proceeded. But the view of the scrutiny of votes proceedings which I have set forth was not presented to the Court, nor was the question raised whether the Stamp Act applies to a scrutiny of votes in a sequestration. That was not argued nor decided. It was assumed that the Stamp Act applied." In my opinion the Sheriff-Substitute erred in not allowing the appellant to consign the sum required to pay for the assignation being stamped. That also appears to me to have been determined in *Tennent's* case. I cannot accept the Sheriff-Substitute's views as to the decision in that case. Lord Deas expressly refers to the Bankruptcy Statute in his opinion on the merits. There is, in my opinion, disclosed on the face of the present proceedings a failure to observe the proper procedure. I am of opinion that we should repel the objections to the competency of the appeal, sustain the appeal, recal the deliverance appealed against, find that the assignation may still be stamped, and remit to the Sheriff to allow the claimant, if so advised, to pay into the hands of the Clerk of Court the stamp duty and penalties, and thereafter to receive the document in evidence.

I do not think in so doing we in any way impinge on what was said and done in *Reid v. Strathie*, 14 R. 847. All the Judges in the latter case were parties to the decision in *Tennent v. Crawford*. Lord Shand in the case of *Reid*, 14 R., at p. 848, said—"If the objection had been one that admitted of instant verification by production of documents, or if a diligence had been asked to recover specified documents, the Sheriff might have allowed that." I think that quite warrants what we now propose to do even apart from the decision in *Tennent*.

The Sheriff-Substitute here thought he ought to disregard *Tennent's* case for the reasons he assigns, and I think therefore

he rightly took such a course as allowed his decision to be brought under review. But I venture to express the view that in the general case when a Sheriff has arrived at a decision in the course of the scrutiny as to the validity of the votes to be considered he ought to give full effect to his opinion by declaring the person elected to be trustee even though he may have doubts as to the soundness of the conclusion at which he has arrived.

LORD DUNDAS—I agree with your Lordship on both points.

Upon the merits of the question involved I think *Tennent v. Crawford*, 5 R. 433, is an authority binding upon us in the appellant's favour. The Lord President there held the document under consideration to be stampable, and that the Sheriff ought, in a competition of votes for a trusteeship, to have allowed it to be received on payment of the duty and penalties. Lord Deas said—"As to the competency of allowing such a document . . . to be stamped in a competition of this kind there can be no doubt." Lord Mure was of the same opinion; and Lord Shand had "nothing to add on the question of stamping documents."

As regards the respondent's objection to the competency of the appeal, I think *Tennent's* case is an authority for holding that it is not incompetent. The question, which the Sheriff-Substitute seems to have thought worthy of consideration by this Court, was timely raised during the scrutiny of votes by the appellant's verbal motion for leave either to take the documents away and get them stamped or to consign the stamp-duty. If the motion had been made in writing, and refused not verbally (as it was) but by a written deliverance, an appeal might, I apprehend, have been competently taken to this Court. By the interlocutor appealed against the Sheriff-Substitute, *inter alia*, refused a written motion by the appellant for leave to uplift the documents and get them stamped. He was right, as I think, in refusing the motion so made, but I consider that in the circumstances above summarised it is not incompetent for the appellant to raise before us by this appeal his alternative motion for leave to consign. I desire to guard myself by adding that I could not in the general case think it right that a Sheriff should deliberately refrain from following the "usual practice" of concluding "with the formal words which are used in declaring the election of a trustee," simply in order to leave open a right of appeal which would otherwise be foreclosed. But the course of procedure here adopted has been so odd and exceptional that it does not seem likely to occur again, and in the circumstances which have occurred, and for the reasons stated, I do not think the appeal is incompetent. We should therefore, in my judgment, so find and remit to the Sheriff-Substitute as proposed by your Lordship.

LORD SALVESEN—The Sheriff-Substitute has in this case heard and decided a number of questions arising on claims for voting for

the election of a trustee in a sequestration. In terms of the Bankruptcy Act 1913 he has written a very careful and elaborate note setting forth the grounds upon which he rejects certain claims by creditors who supported the appellant. The duties of the Sheriff-Substitute are regulated by section 66 of the Bankruptcy Act 1913, which is in the same terms as section 70 of the former Act of 1856. The last part of that section provides—"If there be competition or objection the parties shall, within four days from the date of the said meeting" (that is, the meeting for the election of the trustee), "lodge in the hands of the Sheriff-Clerk short notes of objections, and the Sheriff shall forthwith hear parties thereon *viva voce*, and give his decision and state the grounds thereof in a note, which note, as well as such short notes, shall form part of the process." The Sheriff-Substitute while, as his note shows, he has decided a large number of questions as to the validity of certain objections, has embodied the result only in a finding, and has not proceeded to follow up the finding by declaring the competitor John Meikle—who, as he holds, has established a valid vote to the extent of £1527, 16s., as against a valid vote for the appellant of £93, 0s. 8d.—to be elected as trustee. If he had done so, his judgment is, under the 67th section declared to be final, and in no case subject to review in any Court or in any manner whatever. It follows, I think, that we are not entitled to review on the merits the various decisions which the Sheriff-Substitute has arrived at on the objections stated by each competitor, the obvious intention of the statute being that so soon as the Sheriff-Substitute has ascertained that there is a majority of votes for one competitor, he shall proceed to declare that competitor elected as trustee, and as this judgment cannot be reviewed, neither can the grounds upon which it has been pronounced where the Sheriff-Substitute has refrained from following up his finding by declaring one of the competitor's elected. In short, I hold that the Sheriff-Substitute must make up his mind for himself, and that he is not entitled, even in a case of difficulty and importance, to permit the unsuccessful party to submit his finding to review by one or other of the Divisions of the Court of Session.

Accordingly if the procedure followed by the Sheriff-Substitute had been in every respect regular, I do not think we could have entertained this appeal, although it is not in form excluded by the 67th section of the 1913 Act. But it appears from his note that two objections related to claims by creditors which were said to be evidenced by defective vouchers as being unstamped. The Sheriff-Substitute records that the claimants offered in the course of the scrutiny either to take the document away and get them stamped or to consign the amount which the Sheriff-Substitute might order to be consigned as the stamp-duty appropriate. The Sheriff-Substitute refused either alternative, and has rejected both claims. If he had embodied this refusal in an interlocutor, I cannot doubt that such an

interlocutor would have been appealable. The very point was decided in the case of *Tennent v. Crawford*, 5 R. 433. It is true that the interlocutor there, so far as it allowed the claimant to produce the stamped document in process within eight days, was recalled, but the Court remitted to the Sheriff to allow the claimant, if so advised, to pay into the hands of the Clerk of Court the stamp-duty and penalties, and thereafter to receive the said document in evidence. I see no reason why the Sheriff-Substitute here should not have followed the same course. It was one of the alternative motions that he refused; and where it is plain that the learned Judge erred in procedure I think that we are entitled to review his decision, even although it forms no part of the interlocutor submitted to review, where, as here, the error appears on the face of the proceedings. I confess I do not follow the Sheriff-Substitute's view that in *Tennent's* case the Court proceeded not under the Bankruptcy Act but under the Stamp Act, or his view, expressed at a later part of his note, that the Stamp Act does not apply to the scrutiny of votes in a bankruptcy. The sole question is—Whether a voucher, which is defective because it has not been stamped although it required to be so, can be stamped if the claimant so demands before the Sheriff-Substitute proceeds to deal with the claim on its merits. I think the claimant was entitled to make this demand in the present case, and that, following the decision in *Tennent v. Crawford*, the Sheriff-Substitute was bound to accept consignment, which could be instantly made, and then proceed to deal with the voucher on the footing that it had the appropriate stamp. The purpose of the Stamp Act is to protect the revenue of the Crown, and whenever this has been done the validity of the document as a ground of claim for voting purposes can then be dealt with. I agree with the Sheriff-Substitute that he had no alternative but to refuse the motion subsequently made substantially on the grounds he states. The error in procedure which I attribute to him was that of not allowing the claimant to consign the amount of the stamp-duty and penalties, if any, appropriate to the document founded on. It becomes accordingly necessary for us to correct this error, and to remit to the Sheriff-Substitute to proceed with the scrutiny of votes on the footing that the objection to the vouchers as being defective from want of stamping had been cured by consignment of the stamp-duty if the appellant still adheres to his original motion. As he has already considered and decided all other questions on the merits, the task should be a simple one whatever its bearing may be on the ultimate result.

LORD GUTHRIE—The case, in so far as it relates to the competency of appealing, in a sequestration, a Sheriff-Substitute's deliverance dealing with procedure before the deliverance declaring the election of a trustee has been pronounced is ruled in the appellant's favour by *Tennent v. Crawford*, 5 R. 433. The subsequent case of *Reid*

v. Strathie, 14 R. 847, when the grounds maintained for the proposed appeal are examined, does not conflict with *Tennent*. Applied to the present case, it appears to decide that the Sheriff-Substitute's opinions on the merits, for voting purposes, of the first, third, and fourth of the four claims dealt with by him cannot be made the subject of an appeal. But it does not affect the appellant's complaint against the Sheriff-Substitute's refusal of his motion contained in the minute, so far as that motion relates to the procedure to be followed in connection with the second claim dealt with, namely, the claim for £1518, 6s. 8d. founded on the assignation in favour of the Licenses Insurance Corporation and Guarantee Fund Limited, and rejected by the Sheriff-Substitute as unstamped. The motion is not in proper form, because it should have contained an offer to consign the stamp duty appropriate to the deed; but it appears from the Sheriff-Substitute's note that this, the proper offer, was timeously made by the appellant in the course of the scrutiny, and that the offer was refused by the Sheriff-Substitute. In these circumstances I think we ought to treat the appellant as if he had repeated this offer in his minute. Treating the case on that footing, I think that the offer should have been accepted, and I concur in the course proposed by your Lordship.

The Court pronounced this interlocutor—

“Repel the objections stated by the respondent John Meikle, accountant in Glasgow, to the competency of the appeal: Sustain the appeal: Recal the deliverance of the Sheriff-Substitute appealed against dated 3rd April 1917: Find that the assignation No. 17/1 of process lodged with the claim No. 17 of process for the Licenses Insurance Corporation and Guarantee Fund Limited may still be stamped with the appropriate stamp: Remit to the Sheriff-Substitute to allow said claimants, if so advised, to consign with the Clerk of Court a sum sufficient to cover the appropriate stamp duty on said assignation and penalty, if any, chargeable: Remit also to the Sheriff-Substitute to proceed further as accords. . . .”

Counsel for the Appellant—Wilson, K.C.
—MacRobert. Agent—J. Gibson Strachan,
Solicitor.

Counsel for the Respondent—Chree, K.C.
—D. M. Wilson. Agents—Menzies, Bruce-
Low, & Thomson, W.S.