No. 1. is held that all sales at public markets are good, not only to the parties but to all having any right or property in the subject; Blackstone, vol. 2. p. 449. By the ancient law of Scotland, indeed, the contrary doctrine prevailed; but it was at the same time enacted, that purchasers of cattle at public market should demand a *borgh of haimbald*, or security to warrant the possession to the purchaser, who was liable in heavy penalties, if the subject should be afterwards evicted as having been stolen; Reg. Majes. B. 1. Cap. 18; Ferguson against Forrest, 19th March 1639, No. 3. p. 9112. As this custom has now gone into disuse, the purchaser at a market has no means of security; and it is highly expedient that the old law, adapted to this state of matters, should be modified to the existing circumstances of the country, in the same manner as has been done in other cases, when the ancient law was deemed incompatible with the present state of commercial transactions.

But the petition was refused with answers. It was observed, that though a landlord's hypothec was not good in a competition with a purchaser at a public market; it was very different with regard to a *vitium reale* in the subject.

Lord Ordinary, *Glenlee.* For Petitioner, *W. Clerk.* Agent, *David Christie.*
Clerk, *Scott.*

J. *Fac. Coll. No. 253. p. 567.*

No. 2. 1807. *November* 18.

Money being inclosed in a letter, which was wafered, addressed to a certain person, and committed to a servant to be given to a runner to the post-office; the person to whom the letter is addressed was held to have an exclusive right to receive this money in a competition with a trustee (not judicial) for the creditors of the sender, tho'

WILLIAM and JOHN CRAWFORD *against* WILLIAM KERR.

GEORGE HENDERSON owed Messrs. William and John Crawford £296. With a view of paying this debt, on the evening of the 30th March, he wrote the following letter:—'Gentlemen, Inclosed is one half of bank notes and a bill, 'which, when you receive the others, per next post, will make £296, to pay 'my acceptance to you due to-morrow; the 2d I will pay you the first time 'I am in Leith. I am," &c.

Having indorsed the bill to Messrs. Crawford, he then put it with the half notes into this letter, shut and wafered it, directed it to Messrs. Crawford, and gave it, with a penny, to a servant, to be given next morning to a runner who was in use to carry his letters to the post-office. The servant put it in a place where his letters were usually put, to be ready for the runner, who came early in the morning.

Having finished this letter, Mr. Henderson then entered in a day-book, which he kept, the bill and notes as remitted, but he post-dated this entry, making it the 31st March. The other half of the notes were left in his pocket-book.

Betwixt the hours of four and five the next morning, Mr. Henderson died suddenly.

No. 2. the sender died while the letter was still lying in his house, and though it was opened and the money retained, and delivered to the trustee by a person who took charge (but without authority) of the deceased's effects.

The letter was not given to nor taken by the runner, but was left on a table in the house.

One Mr. Stocks, who was in Henderson's house at the time of his death, without any authority, took some management of his affairs; and having found the letter and the half notes that were in the pocket-book, he opened the letter, took out the bill and the other halves of the notes, and received the value of them, having changed the indorsation into an indorsation to himself.

Henderson, though in very good credit at the time of his death, yet turned out to be insolvent; and his creditors, at a general meeting, without any judicial step, chose William Kerr to be trustee for the general behoof. William Kerr received the above sum of £296 out of the hands of Stocks. He divided the rest of the funds among the creditors, but the division of this sum was objected to by the Messrs. Crawfords, who claimed the whole of it. To clear this matter, the trustee raised a process of multiplepoindig, in which he, as trustee, claimed this sum for the general behoof of the creditors, while the Messrs. Crawfords claimed it as belonging exclusively to them.

The interlocutor of the Lord Ordinary was, (14th June 1806)—Prefers the 'said William and John Crawfords upon the interest produced for them, and 'decerns in the preference, and against the raiser of the multiplepoinding, for 'payment accordingly.'

And on advising a representation with answers, the interlocutor of the Lord Ordinary was, (12th Nov.)—'Finds that Mr. Stocks had no right to break 'open the letter, addressed to the respondents, which appears to have been 'closed with a wafer, as part of it still remains on the edge of the paper, to 'score the indorsation upon the bill, to fill up a new indorsation, or in any 'shape to dispose of it or the other contents of the letter; refuses the desire 'of the representation, and adheres to the former interlocutor.'

The trustee reclaimed; and his petition was answered.

Argument for the trustee.

The trustee is willing to take no advantage whatever from the opening of the letter, but to argue as if it still remained wafered, and was in Court in that state. In that state, he contends that it and its contents would not belong to Messrs. Crawfords, because it never was delivered to them.

He admits that there was here an *intention* to make a payment; but the money never having left the house of Henderson, having, till the moment of his death, still remained under his power, and having afterwards fallen under the charge of those who came into his place, that act of delivery on the one hand and acceptance on the other, which is essential to a payment, had not passed, and no payment of course was made.

If Henderson had not died, it is palpable that the money was still in his power, subject to recal, or rather to stoppage.

No. 2. If, instead of death, bankruptcy had arisen,—if, on the morning that the letter was to be sent off, a sequestration had been obtained, and the sheriff's officer had locked up the shop and warehouse of Henderson; the sending off the letter having been prevented in this way, the payment could not have been held to be made.

Even if the letter had been sent, the creditor might have rejected the bill and notes. They were no legal tender, and the sending of them would have been no extinction of the debt if the creditor had not chosen to accept them.

Thus, it appears, that neither was the payment made, nor was it accepted; and this conclusion is drawn on the supposition that the whole of the notes necessary for completing the payment had been inclosed in the letter. But it was only half bank notes that were in the letter; the other halves were to be sent next day, and without them there could be no payment.

In short, in this case there was nothing more than a mere intention and preparation for delivery. It is just similar to that of Salter, 7th Feb. 1786, No. 38. p. 14202. in which it was found that there was no transmission of the property.

Argument for Messrs. Crawfords.

There was not only an intention on the part of Mr. Henderson to deliver these notes and the bill to Messrs. Crawfords, but he had actually done all that was in his power to deliver them, and had in fact completed the delivery of them. The letter with the penny was given to his servant to be given to the runner, and was lying ready to be given to him before the time of Mr. Henderson's awaking in the morning, if he had lived to awaken. Even though he died, it ought still to have been delivered as he had ordered. His servant no doubt would have delivered it, if Stocks had not interfered. But Stocks had not the smallest right to meddle with it. Not only had he no right to open it and to change the indorsation, but he had no right to stop the letter at all. He had no more right to stop the course of this letter than a mere robber, who had taken it from the servant by force, would have had. The delivery, therefore, must be still held to have been completed, notwithstanding this interference. The creditors of Mr. Henderson cannot take any advantage of such an illegal act. It is not enough to say, then, that the letter is still to be regarded as unopened; it must be regarded as if it had reached the Messrs. Crawfords by the post, in which case there is no doubt they would have been entitled to receive the money for the notes and bill.

There was some difference of opinion on the Bench. One Judge observed, That Henderson, after he had written the letter and given it to his own servant, still retained the power of stopping it, as it was still in his own possession by means of his servant: That this right of retaining it, on his death passed to his creditors, and if Stocks had not interfered, it would have come into the hands

No. 2.

of the trustee in a legal way: That, in that case, the trustee would not have been bound to deliver it, but would have retained the property for the general behoof of the creditors: That, besides, only one-half of the notes were in this letter, and as to the other halves they were clearly not delivered, which rendered the delivery of the first half, even if it had been delivered, an unfinished step.

On the other hand, it was observed, That in this case there was no sequestration, the trust was merely voluntary, and therefore the creditors had not in them nor had their trustee any right to this money at all: The act of Stocks alone put it into their hands, and that was clearly an unwarrantable act, which the creditors could not take advantage of: The delivery of the letter to a servant, to be conveyed to the postman, gave the person to whom it was directed a right to receive it, the direction having never been recalled by proper authority: That as to the other half of the notes, not being enclosed, that was of no importance, because payment would have been made by the bank on the first half and the letter.

The Court "adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Hermand.* Act. *David Cathcart.* Alt. *Geo. Jos. Bell.*
John Tweedie, W. S. and *J. & T. Peat*, Agents. *Scott*, Clerk.

M. *Fac. Coll. No. 6. p. 23.*