1784. *January* 16.—GARDENSTON. This execution is rather inaccurate than defective: no precise words are required with us as with the Romans.

ESKGROVE. The subscription of the two witnesses sufficiently verifies the execution.

SWINTON. This is different from the case of *Gilchrist*, 21*st February* 1781, where the messenger only reported that every thing was *lawfully* done, without saying how.

On the 16th January 1784, "The Lords repelled the objection;" adhering to the interlocutor of Lord Braxfield, and to their own interlocutor, (21st February 1781.)

Act. B. W. M'Leod. *Alt.* Adam Ogilvie.

[Hailes in the chair this week; so hardly any notes.]

1784. *February* 3. WILLIAM PALMER *against* CHARLES HUTTON.

PACTUM ILLICITUM.

A British subject, prisoner on board a French privateer, while she captured a British ship, having purchased the prize *bona fide* on his own account, was found to have not thus acquired the property, but that the original owner was entitled to reclaim it upon payment of the legal salvage.

[*Fac. Coll. IX.* 219; *Dict.* 9569.]

BRAXFIELD. By the *jus gentium*, the subjects of belligerent powers can have no commercial dealings. The consequences of a different doctrine, if established, would prove fatal to Britain.

HAILES. I have no doubt of the illegality of this sale. It was illegal on the part of Magray, the French commander, because the ship had not been condemned, as the king of France's commission required it to be; and if the fact had been known in France, Magray would have been severely punished for pretending to make a sale in direct violation of his instructions. It was illegal also on the part of Hutton. I never heard of such *commercia belli* as authorised the subjects of powers at war to purchase, on the high seas, ships taken from the fellow-subject of either nation: if any thing of that nature had been ever heard of or considered as lawful, the statute against ransoming would have contained a prohibitory clause as to such sales: for to what purpose prohibit *ransoming* if *direct sales* be lawful?

ESKGROVE. If a ship belonging to Britain be taken and then retaken, it will belong to the original owner. It is impossible that a British subject can, by any purchase, prevent the chance of such recovery. A British ship, indeed, may be lost to the original owner, by a fair sale, not to an enemy or to a subject of Britain, but to a neutral person. The case of the Danish ship, mentioned in the papers, was decided on this circumstance, that a neutral person had regularly purchased it.

GARDENSTON. If the ship had been carried into France, a foreign port, and condemned, the property might have been transferred: but here the case is very different; there was no transference of the property.

HENDERLAND. By the *jus gentium*, there is no commerce between enemies. By the *jus gentium secundarium* there are exceptions, but this is none of them: besides, the statute against ransoming will reach to this case.

JUSTICE-CLERK. All the nations in Europe agree as to principles. A French privateer takes a dozen of ships: he cannot take them into port,—he has a prisoner on board,—he offers to sell them all to the prisoner,—the purchase is made;—this will not transfer property: it would introduce frauds innumerable. If such a bargain had been made with a Danish captain, it would have been good for nothing: a British vessel might have taken it back next day. If such would have been the case as to a neutral person, can the purchase, when made by a British subject, be held effectual?

KENNET. Hutton did nothing immoral, yet the bargain is ineffectual. Property is transferred immediately to the captor, but a recapture brings it back again. There can be no purchase before a regular condemnation.

On the 3d February 1784, "The Lords found that the property of the ship in dispute was not transferred to the suspender by the sale made to him, and that the charger is still entitled to reclaim or recover the said ship."

Act. B. W. M'Leod. *Alt.* A. Abercrombie.

Reporter, Eskgrove.

BRAXFIELD. Here there was a moral wrong in Hutton; for a thing prohibited by statute becomes a *malum in se*. I consider him as one who has bought goods knowing them to have been stolen. Now he is obliged to give them back, and demands a recompense.

GARDENSTON. Hutton acted rather erroneously than dishonestly: he did not think of the necessity there was of a condemnation. He ought indeed to have offered the ship back to the owner.

HAILES. There seems no doubt of the illegality of the sale. Magray could not sell, because the ship had not been condemned, and he was liable to punishment in France for what he did in direct violation of the orders of the French king, under whose commission alone he acted. Hutton, again, could not buy. I never heard of such a commerce between enemies on the high seas. If, in the late wars, that had been understood to be law, there would have been cruisers for the special purpose of purchasing the ships and effects of friends

and fellow-subjects, and no enemy privateer would have touched so convenient purchasers.

SWINTON. I never can bring my mind to think that there was any moral turpitude in the conduct of Hutton. It was as lawful to buy the ship from the French captor on the high seas, as after condemnation. The owner may reclaim the property, but then he must pay the value disbursed.

JUSTICE-CLERK. Had Hutton made the purchase for the benefit of Palmer, something might have been said; he might have had good action or retention for a recompense: But here lies the difficulty,—there was an illegal transaction. Hutton interposed for his own behoof alone, and withheld the property from the right owner. If, under the name of recompense, you give Hutton indemnification, the consequences will be fatal: *who* can know whether the bargain was fair? This will open a door for frauds innumerable, and strike at the security of the commerce of this nation. Hutton cannot be entitled to any thing more than a salvage.

ESKGROVE. To award L.150 paid by Hutton for the ship, would be to subvert the former judgment. Had Hutton been acting in the sense of a *negotiorum gestor*, he might have had action for indemnification; but he has destroyed his claim, by showing his intention to keep the ship to himself.

On the 3d February 1784, "The Lords found a recompense due;" adhering to the interlocutor of the 4th July 1783.

Act. A. Abercrombie. *Alt.* B. W. M'Leod.

Diss. Braxfield, Eskgrove, Hailes, Henderland.

[Afterwards, without a vote, they found that the recompense cannot exceed legal salvage and the expenses laid out on the ship.]

1784. *February* 3. WILLIAM SCOTT *against* ANDREW GRAY.

BILL OF EXCHANGE—PRESCRIPTION.

A partial payment made and marked on the back of the Bill, after the running of the sexennial prescription, by the representatives of the debtor, saves from the prescription.

[*Fac. Coll. IX.* 218; *Dict.* 11,126.]

BRAXFIELD. The Act of Parliament is not accurately worded: it goes no farther than to a presumption of payment; but this is not an extinction of the