

BRAXFIELD. I should be against the legacy, had I never heard of the civil law, and I own that the civil law speaks less sense in this case than in many others.

HAILES. I wish that presumed will may be laid out of the question. *Here* there is every authority, at home and abroad, concurring with civil law, and I cannot venture to oppose any opinion to a concurrence so uniform and general.

PRESIDENT. Laying aside the principles of the civil law, and the authorities of English law, I should have no doubt of the legacy having lapsed. I do not think that all the subtleties of the Roman law are received into ours. It is plainly the opinion of Judge Blackstone, that, were it not for the course of decisions, the legacy, in the circumstances of this case, ought to be held as lapsed.

On the 9th December 1783, "The Lords decerned for payment of the legacy, with interest thereof;" adhering to the interlocutor of Lord Swinton.

*Act.* J. M'Laurin. *Alt.* Ilay Campbell.

*Diss.* President. *Non liquet*, Braxfield, Henderland.

1781. *February 21st, and 16th January, 1784.* JOHN PATERSON *against* JAMES THOMPSON.

#### EXECUTION—

Of inhibition sustained, though not mentioning, *in gremio*, "witnesses to the premisses."

[*Fac. Coll. IX. 216 ; Dict. 3807.*]

KAIMES. The great reason for giving faith to a regular execution is, that its detail leaves room for disproving particulars; but when a messenger keeps in generals, you cannot check him. Messengers ought to be cautious and exact.

BRAXFIELD. I would not lay hold on criticisms to cut down legal diligences. No man, seeing this inhibition on record, would have lent his money, from supposing that the diligence was not good: There are, indeed, omissions and inaccuracies in the diligence.

HAILES. What is it that makes null executions, but inaccuracies and omissions?

PRESIDENT. Of the same opinion; but hesitated on account of the decision 1752, *Waddel*.

On the 21st February 1781, "The Lords repelled the objection;" adhering to the last interlocutor of Lord Braxfield.

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

*Diss.* Justice-Clerk, Kaimes, Alva, Hailes, President.

*Non liquet*, Westhall.

*N. B.*—The Lords disregarded the objection that the name of the creditor did not appear in the diligence.

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

ESK GROVE. The subscription of the two witnesses sufficiently verifies the execution.

SWINTON. This is different from the case of *Gilchrist*, 21st 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?