1786. *August* 2. WILLIAM DAVIDSON *against* GREGOR GRANT.

PACTUM ILLICITUM.

A transaction between a Kirk-Session and a person guilty of Fornication, whereby the latter became bound to pay a sum of money to the Kirk-treasurer, legal.

[*Fac. Coll. IX.* 447 ; *Dict.* 9571.]

BRAXFIELD. The statute orders fines to be applied to pious uses within the parish. The kirk-session are the guardians of the poor: What should hinder them from taking a voluntary payment, instead of bringing an action?

ESKGROVE. The statute makes no mention of kirk-session: they may be informers, and so may every individual. This business looks like a transaction for an offence.

PRESIDENT. The law has not expressly excluded a transaction of this nature, and there is great expediency in it. Besides, there has been an inveterate and universal practice, which is the best interpreter of the law.

ROCKVILLE. Such compositions afford a fund for the poor: they save people from shame, and they prevent the murder of bastard children.

HENDERLAND. I cannot discover any authority in the statute for such transaction.

ESKGROVE. Should it be thought that the suspender is bound to pay a bill which he has granted, I hope that the general question, as to the legality of such exactions, will remain entire.

On the 2d August 1786, " The Lords found the letters orderly proceeded;" altering the interlocutor of Lord Hailes, Ordinary.

Act. W. Miller. *Alt.* W. Honeyman.

Diss. Eskgrove, Henderland, Stonefield, Hailes.

N. B.—I cannot satisfy myself as to this judgment. It appears to blend ecclesiastical law with civil, and to suppose that, in Scotland, the clergy and the officers of the church may, for *money*, dispense with *discipline*.

1786. *November* 15. JOHN, DUKE of ARGYLE, *against* JAMES ERSKINE of Alva.

IMPLIED OBLIGATION.

[*Dict.* 6573.]

PRESIDENT. When a proprietor reserves to himself so strong a right, he reserves, tacitly, the power of working; but still, however, so as not to do any

thing emulously to the hurt of the vassal or tenant. In tacks, a reservation of coal implies a power of working without paying damages. There is no prescription here: I would interpret dubious words by possession; but here the damage paid seems to have been for the houses, and so it is limited to the small payment of two horse-loads of coal in the week.

BRAXFIELD. This question has never been tried before; and the reason is, that clauses are thrown into feu-contracts to prevent any such question. When a superior excepts minerals, this implies a power of working; for, without *that*, the reservation would be nothing. Why may not the proprietor work his mine as freely as the tenant may sow and reap his crop? Should a superior wantonly set down pits, he would be checked. The only question is as to possession. Had an uniform sum been paid for damages, I should have presumed a right by some separate bargain.

ESKGROVE. It is plain that the original feu was without any reservation: the reservation has been thrown in, one knows not why, into a precept of *clare constat*. The power of working, without payment of damages, can hardly be inferred from the general tenor of the clause; and this the more especially, because it appears that something has been wont to be paid in the name of damages to the vassal.

HENDERLAND. The superior could not have stipulated for damages to be paid to himself.—[This obscure.] In the case of *Hamilton of Fala*, the tenant had right to the whole surface.

On the 15th November 1786, "The Lords declared in terms of the libel."

Act. W. Craig, Ilay Campbell. *Alt.* J. and H. Erskine.

Reporter, Hailes.

Diss. Eskgrove, Ankerville, Rockville.

1786. *November* 16. RICHARD THOMSON *against* CREDITORS of MR DAVID ARMSTRONG.

PERSONAL AND REAL.

[*Dictionary*, 10,229.]

BRAXFIELD. The cause turns upon this,—Whether the titles were properly made up by Mr Armstrong; and, in determining on this, we ought to consider what clauses are necessary to be inserted in a charter and infeftment, and what clauses are merely personal. Where clauses are meant to be put in, the disponee cannot leave them out to the hurt of the disponer: as, for instance, if there was a clause of redemption, he could not leave it out. But here lands were disponed, heritably and irredeemably, with an obligation to account, and then another deed was executed. The obligation to account was merely personal;—hence I think that Mr Armstrong might have sold for a price, and the purchaser would have been secured by his *bona fides*. The same is the case as