On the 7th March 1775, "The Lords, having considered the proof already brought, and the particular objections to the two witnesses, refused the desire of the petition."

Act. R. M'Queen. *Alt.* A. Rolland.

1775. *January* 18. DAVID MAXWELL of Cardness *against* JAMES GORDON of Balmeg.

PACTUM ILLICITUM—SIMONIACAL PACTION.

What deemed such, concerning a presentation to a vacant church.

[*Faculty Collection, VII.* 9; *Dictionary,* 9580.]

AUCHINLECK. If this transaction is supported in law, it is apparent that, in time to come, all presentations will be bestowed for money. The patron, here, has acted a most unworthy part towards the parish. Mr Gordon, who dealt with the patron, appears in a bad light; neither do I think that his son, the minister, is clear of blame. It is said that he knew nothing of the bargain that his father had made for his benefit; *Credat Judæus apella, non ego;* we have *verbum sacerdotis* indeed for it; but I would inquire whether the first payment of L.20 was not actually made out of the stipend. I should be sorry that, after such a shameful transaction, the parties were to get free without paying any thing. I would order the L.20 *per annum* to be paid to the charity work-house.

PRESIDENT. We have no law for that. If, however, this is thought to be simony, we may fine the parties, as was once done on a former occasion. I doubt as to a simoniacal practice here: there is nothing of that in Lord Galloway's letter, nor in Mr Thomson's right to the L.20, though there may be in Mr Gordon's letter. If there is no *turpis causa accipientis*, the *turpis causa dantis* will not bar the action.

HAILES. If a simple bond to Mr Thomson had been granted for L.20, without any reference to a bargain, action might have been sustained at his instance; but here he pursues upon letters which detect the whole plan, and prove the bargain to have been intrinsically simoniacal.

GARDENSTON. If we do not find this to be a simoniacal paction, a wide door will be opened for those practices which so scandalously prevail in England, notwithstanding so many good laws and judgments to the contrary. We shall then deal in the same wicked commerce, though upon a smaller scale; because our livings are smaller than they are in England. It is true that I do not like to see a man grant an obligation, and then plead a point of law to screen him from fulfilling it; but that can have no effect upon our determination. If a patron take a sum of money, not to himself, but to a friend, still the paction is null:

were a different rule to be followed, it would be impossible to preserve the purity of the Scottish church, which has hitherto remained so pure.

KAIMES. The incumbent could not be ignorant of the paction. Although a patron should take a sum of money, not to himself, but to a friend, the paction would still be null. But I doubt how this will apply to the present case. Thomson would have been presented, had it not been for the bargain between the patron and Gordon. He was a loser by that bargain. He was disappointed of the charge, and therefore he did not get the L.20 *per annum, sine causa.*

JUSTICE-CLERK. What I desiderate in that view of the case, is an antecedent right in Thomson that could found him in any claim, less or more. He had no pretensions to the stipend. He had not so much as a promise of the presentation.

COALSTON. Where is the turpitude on the part of Thomson?

GARDENSTON. Because he seeks a benefit from a *pactum de turpi causa.*

PITFOUR. If the transaction is simoniacal, I would allow no party to profit by it.

On the 18th January 1775, "The Lords found that this bargain libelled on was simoniacal, *ob turpem causam et contra bonos mores*, &c.; therefore, that no action lay, and fined the pursuer, Maxwell, in L.30, and the defender, Gordon in L.60, for the use of the poor."

Act. W. Campbell. *Alt.* D. Dalrymple. *Reporter*, Coalston.

Diss. Kaimes, Coalston. *Non liquet*, Alva, Monboddo.

1775. *March* 7.—COALSTON. Formerly, simony was not punishable in England at common law, but only censurable in the ecclesiastical court. I imagine that the same was anciently the case in our law. The Act 1612 is the first statute with us that speaks of simony, and indeed rather encourages than discourages it. Simony properly means the conferring orders by unjust bargains, for a gift or reward. I think this English definition is a good one: it is the same thing whether the patron gets the reward for himself or another. The question is, Whether is there *here* a *corrupt* bargain? I do not think that there is. There are many cases of bargains in the English law-books, which are not held to be *corrupt bargains*, and yet have a more simoniacal appearance than the present case. I do not think that there is any thing here *contra bonos mores.*

PITFOUR. It is simony where one has the power of presenting a minister, and makes that power a matter of merchandise. I see cases in the law of England where that is supposed not to be simony which I should hold to be simony.

AUCHINLECK. This is an uncommon case, and we have reason to be thankful that it is so. The settlement of ministers should be upon a pure footing. If we find it lawful to give so much of a stipend in Scotland to an English dissenting clergyman, the next step will be, to give so much, without any circuit or cover, to a Scots voter. About seven years hence we shall hear of many stipends quartered upon by voters.

GARDENSTON. The very nature of this contract is wrong. The law has settled a provision for men who discharge a very useful office. It is wrong to take any thing off this provision. If a sum may be paid to the cousin of the

patron's wife, the next plea will be, why not pay it to his son, or his grandson, or his nameson: this will tend to establish curacies, or something like curacies. The Crown presentations will have *riders*, as in civil offices.

ALEMORE. My wishes that it should be law make me apt to imagine that simony of this kind is prohibited in the law of Scotland. Our ministers are poorly provided; if this little may be made less, the clergy will become contemptible. Simony, however differently it may be defined, has been prohibited in all Christian countries, whether it has been used for obtaining an ordination or a stipend. With the view of getting a little money to Thomson, the patron presented a man whom he knew nothing about. As to the law of England, I shall only say, that I am shocked at reading the accounts of cases which are held by that law not to be simoniacal.

HAILES. The counsel whose province it was to show that this contract is not simoniacal, has spoken with much pleasantry of the canon law, and particularly of the chapter *hinc etenim* in the 49th Distinction of Gratian's Decretal. Unluckily, *that* chapter is a transcript from the law of Moses, *Leviticus*, c. 21. The canon law is not the law of Scotland; but the law of Scotland contains much of the canon law. This is so certain, that, in many cases, we determine according to the canon law, without knowing it. I never imagined that simony was an offence unknown in the law of Scotland previous to the statute 1612: indeed, it would be singular if a statute, declaring that certain things should not be held as simony, were to be understood as a statute declaring simony for the first time to be an offence. I doubt not that, on inquiry, it would appear that, before the Reformation, there were examples of simony being punished. We know that it was an offence loudly complained of at and even before the Reformation. Lewdness, ignorance, usury, and simony, were the great charges against the Popish clergy of Scotland. We had many laws against *barratry;* that was a particular species of *simony*, to which, however, the Legislature gave a more gentle name, even when it meant to prohibit and punish it, for this plain reason, that the Legislature meant to keep on fair terms with the papal court.

MONBODDO. Although money should be stipulated for charitable uses, I should still think that it was simony. In England, a rich bishop or a fat prebendary may be saddled; but that will not do with our poor beneficiaries.

JUSTICE-CLERK. Wherever there is a corrupt bargain, I consider it as simony. There may be much charity in providing for poor friends, and it may be very just for a poor patron to take something to himself. I can make no distinction between the two cases. A patron is a trustee for the benefit of the parish, to make choice of a well-qualified person as minister. We run hazard enough from the patron's making an improper choice through ignorance, or by means of political connexions; but it would be terrible were we to open so wide a door for abuses as an alteration of this interlocutor would occasion.

PRESIDENT. From commiseration to the poor English clergyman, I wished to have found law to support his claim; but I cannot. The canon law is in a great measure the law of Scotland. As to the English law, I do not understand it: we get no information from it. *Here* is a presentation on a bargain for money. Were this interlocutor to be altered, I should expect to see a pre-

sentation advertised to be given to the person who should give the most money to the poor relations of the patron.

On the 7th March 1775, "The Lords assoilyied," &c. adhering to their interlocutor of 18th January 1775; but, in respect of Mr Gordon's circumstances, restricted the fine imposed on him to L.30."

Act. A. Murray, W. Campbell. *Alt.* D. Dalrymple.

1774. *December* 21. PEREGRINE CUST, Esq., *against* The CARRON COMPANY.

COMPETITION.

A competition between an assignment intimated after the death of the cedent, and a confirmation of an executor-creditor, expede upon the same day, was found to be regulated by priority of the hour.

[*Faculty Collect. VII.* 74; *Dictionary*, 2795.]

HAILES. It is not said by Messrs Garbut and Company that the Commissary Court met before *eleven*. It was probable that their decreet was not obtained for several hours after. It is certain that the assignation was intimated between *eight* and *nine* that morning; nay, more, it is probable that the decreet was hurried on, because it was known that the assignation was to be intimated. Hence I have no doubt as to the preference.

AUCHINLECK. *Prior tempore potior jure*: there is satisfying evidence that the proceedings at Carron were first, *i. e.* between eight and nine, whereas the Commissaries do not meet till 10 o'clock; why should we demur in giving preference according to time?

GARDENSTON. I would favour a *pari passu* preference; but *here* there is no room for it. Whenever there is a clear priority established upon legal evidence, we must judge according to it. Where there are clear principles, I would avoid arbitrary decisions.

PITFOUR. There are cases where the judges have given preference by hours, but I always thought such cases very doubtful.

COALSTON. It is a favourite principle of our law, that *vigilantibus jura subveniunt*, and that *prior tempore potior est jure*; hence the Court has given a preference upon hours, though with difficulty. Lord Stair was against it. The Court has so found in questions between arresters and assignees: but the present case has never been determined. If the same idea had prevailed formerly as now in favour of a *pari passu* preference, I doubt whether the Court would have established such principles: are we to extend, from analogy, a decision which was not approved of by some of our best lawyers.

MONBODDO. If this interlocutor were altered, the Court would set aside the established rule as to hours; for, of the fact, there can be no doubt that there