

1775. *January 19.*

DAVID MAXWELL of Cardiness, in his own name, and as Attorney for the Reverend Mr WILLIAM THOMSON, *against* JOHN Earl of GALLOWAY, and JAMES GORDON of Balmeg.

No 108.

What deemed
a simoniacal
paction con-
cerning a pre-
sentation to a
vacant
church.

IN the year 1769, the parish of Anwith, in the stewartry of Kirkcudbright, having become vacant, Mr Maxwell of Cardiness, the patron, intended presenting Mr Thomson, then minister of the presbyterian meeting at Workington, in Cumberland.

James Gordon of Balmeg had a son, William, then a probationer, whom he was desirous of having settled, as a parish minister; and, having a political connection with the late Earl of Galloway, he applied for and obtained his interest to promote this plan for his son. And Mr Maxwell the patron, though unacquainted with Balmeg, willing to oblige Lord Galloway, agreed to give the presentation to Mr Gordon, upon his Lordship's application, and offered to grant an obligation to pay Mr Thomson, whose English cure did not produce above L. 20 Sterling yearly, an equivalent to the difference of the profits of these two cures, until Mr Thomson should be better provided.

Matters being thus settled, the late Earl of Galloway wrote and delivered to Mr Maxwell a letter of the following tenor: 'Galloway-house, 1st September 1769. Sir, As I am anxious to have Mr William Gordon of Balmeg settled in the parish and kirk of Anwith, of which you are patron; at the same time, I am perfectly sensible of your inclinations to serve Mr Gordon, and oblige me; yet, as you wish to do a friendship for Mr William Thomson, minister of the Presbyterian meeting at Workington in Cumberland, I promise that, upon your settling Mr Gordon in the parish and kirk of Anwith, to pay to Mr Thomson the sum of L. 20 Sterling yearly during all the days of his life, or until he is provided in a parish and kirk in Scotland; and, if he refuses to accept of a presentation, to have the same effect as if he had been settled; and this annuity to continue during Mr William Gordon's life, and his being continued in the possession of the parish and kirk of Anwith. But in the events, either of Mr Thomson's not accepting of a presentation, or death, or being otherwise provided, or of Mr Gordon's removal from Anwith, or his death, this obligation to be void and null; the first half year's payment of Mr Thomson's annuity, to wit L. 10 to be payable when Mr Gordon is entitled to, and has a right to half a year's stipend, and so yearly and termly thereafter; and I farther promise, to grant an obligation on stamped paper, upon the above terms, when required.'

Of even date, Mr Gordon of Balmeg, being then also at Galloway-house, wrote and delivered the following letter of relief to the Earl: 'Galloway-house, Sept. 1st 1769. My Lord, As your Lordship has granted your obligation to Mr Maxwell of Cardiness, to pay to the Rev. Mr William Thomson, Presby-

terian minister in Workington, Cumberland, the sum of L. 20 Sterling yearly, upon Mr Maxwell's settling my son William minister of Anwith, and that said L. 20 is to be paid yearly and termly until Mr Thomson is presented to a kirk in Scotland, or otherwise provided in England, or till the event of Mr Thomson's death, or the event my son's death, or his leaving the parish of Anwith; and as your Lordship has been so kind and friendly to me, to grant such obligation entirely to serve me, I hereby oblige myself to free and relieve your Lordship of said obligation, by paying you said L. 20 Sterling, yearly and termly, as above narrated. And I do hereby oblige myself to grant your Lordship an obligation, on stampd paper, in terms of the above, whenever your Lordship thinks proper to demand it.'

Mr William Gordon was accordingly settled in the parish of Anwith, prior to Whitsunday 1770; and Mr Thomson having granted a letter of attorney to Mr Maxwell, of date 15th August 1770, empowering him to uplift the fore-said annuity, he, in virtue thereof, received from the Earl, by the hands of James Gordon of Balmeg, one year's annuity, falling due at Whitsunday and Michaelmas 1770, for which he granted a receipt in the terms above mentioned.

It appeared that, some time after the conclusion of the transaction, a letter was granted to Mr Maxwell by Mr Gordon of Balmeg, wrote after a scroll prepared by the former, (but without date, and the cause of granting whereof was differently accounted for by the parties,) in the following terms: ' Sir, As Lord Galloway granted an obligatory missive letter to you, bearing date, at Galloway-house, Sept. 1st 1769, wherein his Lordship obliged himself to pay you, for behoof of the Rev. Mr William Thomson, minister of the Presbyterian meeting-house in Workington in Cumberland, L. 20 Sterling during his life, or till his Lordship procured him a presentation to any parish church within Scotland; providing always, that you presented and settled my son Mr William Gordon as minister of Anwith, as the said missive letter more fully bears; and, seeing you have fulfilled your part of the obligation, by settling my son minister of Anwith, it is but just and reasonable Mr Thomson should have his annuity regularly paid him; and, as I am satisfied that annuity should be regularly paid, without giving my good friend Lord Galloway any trouble, I hereby empower you, in name of my son, to pay Mr Thomson his annuity of L. 20 Sterling yearly, out of the teinds payable upon your estate in Anwith; and I hereby oblige myself, upon your producing Mr Thomson's receipt for said sum of L. 20 Sterling, to procure you my son's discharge for the teinds payable out of the estate, equal or effeiring to the foresaid sum of L. 20 Sterling yearly. I am,' &c.

Balmeg having refused payment of the second year's annuity, Mr Maxwell had recourse to the Earl of Galloway, to accommodate whom, it is said, he had

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agreed to the proposal, that he would accept of the annual payment for Mr Thomson by the hands of Balmeg, but conditionally, that he should have recourse upon his Lordship when he ceased to be punctual in his payments; and from him he received the following letter: 'Newton Stewart, August 21st 1772. Dear Sir, I expected to have had the pleasure of meeting you here at the races, and to have talked to you fully in regard to Balmeg's refusing to pay the annuity that he and I bound ourselves to pay to you for Mr Thomson's behoof. I have had another communing with Balmeg, and he tells me plainly that he will never pay one farthing of it till he is compelled by a decret. As that is the case, surely it is more just and reasonable that you insist against him than against me, especially as he begun the payment with you, and you received one year's annuity from him, and gave him a discharge for it. I am perfectly pleased that you give us both a summons upon our obligatory letters. I shall make no defence, only so far as to fix the payment upon Balmeg, and relieve myself, which I think will be easily done, and be most obliging to me; and you will pardon me for refusing to pay upon any other terms. I remain, Dear Sir, &c.

Mr Maxwell, in December 1772, brought the present action, founding upon the *species facti* above narrated, and particularly upon the Earl of Galloway's holograph obligatory missive, of date Sept. 1st 1769, above recited, and concluding against the Earl alone for payment of the two years' annuity then due, and for continuing the allowance agreed to be paid to Mr Thomson in time coming, under the conditions in the above recited letter. Lord Galloway having died during the dependence of this suit, the action was wakened, and transferred against the present Earl his son, and compearance was made in it for Mr Gordon of Balmeg, who was admitted to be heard for his interest in this cause: Lord Galloway likewise brought an action for relief against Balmeg, who, acknowledging his being liable in such relief, likewise undertook the defence of Lord Galloway; and

Pleaded; That the stipulation was simoniacal; that, as such, it was reducible by the canon law, and by the municipal law of this kingdom, which, it was maintained, had received and adopted the canon law so far as related to simony, 1st act, Parliament 1612; as had also the Church of Scotland, by acts of Assembly 1753 and 1759; And, in a case that lately occurred, apparently more remote from simony than the present, because neither patron nor presentee were privy to nor in the knowledge of the paction, the decision proceeded on the principles of the canon law, adopted in the above acts by the General Assembly, Steven *contra* Lyell and Others, 20th February 1759, No 107. p. 9578.

Answered; That it was not a simoniacal paction; for that the patron had not directly put money in his pocket, but only, by disposal of his patronage, had procured a comfortable subsistence to a poor friend, and relation of his family; and, *adly*, That the whole transaction was without authority, or the least

knowledge of the presentee, and, therefore, a fair and honourable transaction, which the law would support. No 108.

THE COURT pronounced the following judgment :

“ THE LORDS find, that the transactions within mentioned, between the Earl of Galloway and Mr Maxwell of Cardiness, and James Gordon of Balmeg, and also the subsequent transaction between the said Mr Maxwell and James Gordon, were all simoniacal pactions, entered into *ob turpem causam, et contra bonos mores*, and, therefore, that no action lies upon the obligations granted relative thereto : Dismiss this action, assoilzie and decern ; but, in respect of the accession of the said Messrs Maxwell and Gordon to said transactions, they fine and amerciate Mr Maxwell in L. 30 Sterling, for the use of the poor ; and also Mr Gordon in L. 60 Sterling, for the use of the poor ; which sum they decern to be paid to David Ross, clerk to this process, to be disposed of as the Court shall think proper ; and declare, that all execution necessary shall pass at Mr Ross' instance, for recovery thereof.” Thereafter,

James Gordon having reclaimed, the Court, in consideration of his particular circumstances set forth in his petition, modified the fine formerly imposed upon him to L. 30 Sterling.

Act. *Walt. Campbell, Al. Murray.* Alt. *Dav. Dalrymple.* Clerk, *Ross.*

Fol. Dic. v. 4. p. 25. Fac. Col. No 150. p. 9.

1794. *January 22.* The Rev. DR BOYD *against* The EARL OF GALLOWAY.

IN 1769, the Earl of Galloway, patron and titular of the parish of Penninghame, granted a bond of annuity for L. 20 to Dr Boyd, the minister, which he afterwards gave up on receiving L. 300 Sterling.

Of the same date with the bond, the minister granted a missive to the Earl binding himself ‘ never to ask or sue for any augmentation of glebe or stipend.’

The Doctor, nevertheless, having brought a process of augmentation, the Earl, in bar of it, founded on the missive.

The Court, considering the transaction as *pactum illicitum*, repelled the objection.

The Earl, in a reclaiming petition,

Pleaded ; A minister is the unlimited proprietor of his stipend. He may assign it either gratuitously or for an onerous cause, during his life, although he should thereby render himself incapable of supporting his rank. As therefore an assignation from the pursuer, conveying to the Earl his whole stipend, on

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An obligation granted by a minister not to bring a process of augmentation in consideration of a sum of money received by him from the patron, is not binding.