

## **PLEASE NOTE**

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### The Third Lateran Council and the *Ius Patronatus* in England

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Any discussion of judges and judging in medieval England must take into account that there were many different courts and many different kinds of judges. In addition to the king's courts, there were county courts, hundred courts, and borough courts, not to mention manorial courts. And there was also an independently functioning system of ecclesiastical courts that had extensive jurisdiction over many matters that we would not think of as religious, such as inheritance, marriage, and defamation. Although the king's courts and the king's judges would eventually assume the preeminent position in the English system of justice, they were only a part of that system, and the decisions of other judges could have a significant impact on the lives of Englishmen of all stripes.

The subject of this paper is the relationship between the king's courts and the king's Chancery and the parallel system of ecclesiastical courts, with respect to one particular topic: the law of advowsons. As defined by Maitland, an advowson is "the right to present a clerk to the bishop for institution as parson of some vacant church; the bishop is bound to institute this presented clerk or else must show one of some few good causes for a refusal."<sup>1</sup> Litigation over advowsons and benefices took place in both the king's courts and the ecclesiastical courts, although it assumed different forms in those two venues and each venue challenged the other's jurisdiction. The jurisdictional contest over rights of presentation forced both the royal judges and the ecclesiastical judges to decide how to deal with the respective rules and decisions that were being laid down in each other's courts. A central milestone in this process was the Third Lateran Council, which met in Rome in 1179 and had important ramifications for the English royal and ecclesiastical courts.

For many years, the conventional wisdom was that the Third Lateran Council prompted a change in the English common law, namely, the development of a new action

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<sup>1</sup> Pollock & Maitland, *History of English Law*, vol. 2, 136.

called the assize of darrein presentment to deal with advowson disputes.<sup>2</sup> In his 1975 book *Jus Patronatus*, however, Peter Landau argued that the Council was not responsible for the development of the assize, which actually developed earlier.<sup>3</sup> Instead, the assize of darrein presentment actually influenced the development of canon law, prompting Pope Alexander the Third to issue a decretal protecting the rights of priests whose patrons had prevailed at the assize.<sup>4</sup>

I will argue today that Landau's theory is insufficiently supported by the evidence, and that the Third Lateran Council most likely did prompt the creation of the English assize of darrein presentment. However, I will also argue that the relationship between the common law and the canon law was more complex than the traditional view might suggest. It is possible that the English ecclesiastical courts were already following procedures prior to the Council similar to those adopted by the common law courts in the form of the assize of darrein presentment. While the royal judges and the king's Chancery acted independently in matters pertaining to advowsons, the solutions they adopted were not alien to the ecclesiastical system. Moreover, the English judges and bishops interpreted the Council differently than the leading canonists, and cooperated in a way that allowed slightly greater latitude to the lay patrons involved in advowson disputes.

In the first clause of the Constitutions of Clarendon, promulgated in 1164, Henry the Second proclaimed that controversies concerning advowsons and presentation to churches, whether between laymen, between laymen and clerks, or between clerks, were to be decided in his own courts.<sup>5</sup> This sweeping statement, which was fundamentally at odds with canon law, set the stage for centuries of advowson litigation in the royal courts. Nonetheless, as J.W. Gray demonstrated in a 1952 article,<sup>6</sup> the ecclesiastical courts continued to play a role in disputes over benefices long after Clarendon.<sup>7</sup>

A typical patronage dispute might arise from the actions of a layman, who claimed the advowson of the church and either gave it to another religious house or

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<sup>2</sup> See, e.g., R.C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (London: Selden Society 1959), 77 SS 332-33.

<sup>3</sup> Peter Landau, *Jus Patronatus: Studien zur Entwicklung des Patronats im Dekretalenrecht und der Kanonistik des 12. und 13. Jahrhunderts* (Cologne: Böhlau Verlag, 1975), 195-98.

<sup>4</sup> *Id.* at 196-98 n. 696.

<sup>5</sup> “*De advocacione et praesentatione ecclesiarum si controversia emerit inter laicos, vel inter clericos, vel inter laicos et clericos, in curia domini regis tractetur vel terminetur.*” William Stubbs, *Select Charters and Other Illustrations of English Constitutional History*, 9th ed., ed. H.W.C. Davis (Oxford: Clarendon Press, 1921), 164.

<sup>6</sup> J.W. Gray, “The Ius Praesentandi in England from the Constitutions of Clarendon to Bracton,” *English Historical Review* 67 (1952): 481-509.

<sup>7</sup> Ecclesiastical courts continued to hear benefice disputes well into the fourteenth century, at least in the ecclesiastical province of York. See Charles Donahue, Jr., “Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined after 75 Years in the Light of Some Records from the Church Courts,” *Michigan Law Review* 72 (1974): 647-716, at 659, 661 (explaining that some of these cases involved an underlying dispute over the patronage); but see David Millon, “Ecclesiastical Jurisdiction in Medieval England,” 1984 *University of Illinois Law Review*: 621-38, at 624-25 (arguing that, while benefice cases continued to be heard, “few, if any, cases appear to have exceeded the bounds of ecclesiastical jurisdiction as determined by the common law”).

presented a clerk to the bishop. The issue for the royal courts was whether the layman had held the advowson. Nevertheless, there was usually a second issue involved: whether the church's current occupant was legitimately instituted parson. The latter issue was within the province of the ecclesiastical courts.

By the end of the reign of Henry the Second, litigants could invoke the authority of the crown to call a halt to ecclesiastical litigation that encroached on the king's prerogative.<sup>8</sup> A defendant in an ecclesiastical case that touched on a right of presentation could sue for a royal writ of prohibition to stay the ecclesiastical proceedings.<sup>9</sup> While the availability of writs of prohibition ensured the primacy of royal court jurisdiction in matters concerning advowsons, however, the ecclesiastical courts continued to hear pleas in which a clerk claimed that another clerk had intruded on his benefice. The royal courts did not attempt to usurp this jurisdiction, provided that the word "advowson" was not mentioned in the plea. Moreover, by the thirteenth century if not earlier, it was standard procedure for the bishop to order an inquest *de iure patronatus* every time a church became vacant.<sup>10</sup> An inquest by the bishop or his official often preceded any dispute concerning an advowson in the royal courts.

In general, the early plea rolls show that bishops and church courts continued to play a vital role in disputes concerning advowsons well into the thirteenth century and long after the constitutions of Clarendon. To the extent that Clarendon stood for the principle that the royal courts should be the exclusive forum for advowson disputes, that goal was not realized in the late twelfth or early thirteenth centuries. The fact remains, however, that the king's courts became extensively involved in advowson disputes in the decades following Clarendon, which set the stage for a jurisdictional struggle between the two systems of courts.

Beginning with Gratian's *Decretum* in the mid-twelfth century,<sup>11</sup> and especially in the latter half of the twelfth century and the early thirteenth century, canon lawyers and legislating popes developed a system of rules relating to patronage of churches. The interesting question, therefore is whether the English royal judges paid heed to canon law rules in deciding advowson disputes. Papal legislation and canonistic commentary limited the benefits that patrons could receive from advowsons; defined the concept of inheritance; delineated the period within which a vacancy had to be filled; imposed restrictions on the ability to sell or give away an advowson; and attempted to restrict the

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<sup>8</sup> According to Flahiff, the writs of prohibition probably date to the period 1165-70, although "proof positive of their use is not to be had before the early 1180's, and the first actual form of a writ of prohibition is to be found only in Glanvill's treatise a few years later." G.B. Flahiff, "The Writ of Prohibition to Court Christian in the Thirteenth Century [pt. 1]," *Mediaeval Studies* 6 (1944): 261-313, at 271-72.

<sup>9</sup> G.B. Flahiff, "The Writ of Prohibition to Court Christian in the Thirteenth Century [pt. 2]," *Mediaeval Studies* 7 (1945): 229-90, at 232-49.

<sup>10</sup> Gray, "Ius Praesentandi," 491.

<sup>11</sup> Gratian's *Decretum* was written in two stages, a first and second recension; both recensions were completed in Bologna between 1138 and 1150. Anders Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2000), 144; Paolo Nardi, "Fonti canoniche in una sentenza senese del 1150," in Peter Linehan, ed., *Life, Law and Letters: Historical Studies in Honour of Antonio García y García*, Studia Gratiana 29, Rome 1998, 661-70.

jurisdiction of the secular courts. All of these rules could be applied, or ignored, by the royal judges.

By at least the early twelfth century, canon law imposed restrictions on the ability of a lay patron to receive income from the church of which he had the advowson. Laymen were not allowed to appropriate tithes to their own use,<sup>12</sup> and clerks who paid money for ecclesiastical office committed the grave sin of simony, for which they could be deprived of their benefice.<sup>13</sup> Canon law did allow a patron to receive “tribute” from the church; however, the tribute had to have been established by long custom and (in the view of some canonists) the bishop had to have approved.<sup>14</sup> Apart from this limited right to tribute, the patron could not receive any income from the church.

It is clear that advowsons could be of great value to medieval English litigants. Moreover, the source of the advowson’s value lay in the tithes that pertained to the church. The simple fact that advowsons derived their value from the church’s tithes, however, does not mean that simony was widespread in medieval England or that the lay patrons of churches were directly controlling the tithes. Advowsons were a valuable source of patronage that could be used to reward a clerk who had served the patron faithfully in the past, or to encourage such a clerk to provide service in the future. The administration of a great estate required a private civil service,<sup>15</sup> and some of those who served wealthy lords were clerks who had taken holy orders.<sup>16</sup> Lay magnates needed literate and numerate men to keep track of the rights, expenditures, income, and debts of their manors. Holding out the prospect of a lucrative appointment to a parsonage was a good way to persuade bright, motivated clerks to enter one’s service.

Thus, while the value of the advowson ultimately lay in the tithes, the lay patron did not have to keep the tithes himself in order to benefit from the advowson. A patron who brought a writ of prohibition to halt an ecclesiastical suit concerning tithes might simply be protecting his clerk. The early plea rolls give no indication that lay patrons were flouting canon law by taking direct management of churches, or that the royal judges were tolerating blatant simony.

One question that greatly interested the early canonists was whether an advowson could be transferred from one patron to another. The answer depended on the circumstances, but one type of transfer was always considered impermissible. Under canon law, an advowson could not be sold as independent property; only when the advowson was appurtenant to an estate and sold with the estate was a sale permissible.<sup>17</sup> The debates of the canonists on this issue concerned what would happen to the advowson

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<sup>12</sup> 3 Conc. Lat., c. 14 (1179) = X 3.30.19; 4 Conc. Lat., c. 44 (1215) = X 3.13.12.

<sup>13</sup> 2 Conc. Lat., c. 1-2 (1139). The term “simony” comes from Simon the sorcerer, who tried to buy the power of the Holy Spirit from the apostles. Acts 8: 9-21.

<sup>14</sup> Landau, *Jus Patronatus*, 130-36.

<sup>15</sup> N. Denholm-Young, *Seigniorial Administration in England* (Oxford: Oxford University Press, 1937), 2-3.

<sup>16</sup> See Newman, “Greater and lesser landowners,” 281.

<sup>17</sup> *Id.* at 94. Peter Cantor was a lone dissenter on this point. *See id.* at 98.

after an illegal sale, with some offering the view that the patronage would come to an end, with others allowing the heirs of the seller to reclaim the advowson.<sup>18</sup>

The evidence suggests that the royal judges did not violate the canonical prohibition by recognizing the sale of advowsons. Disregarding cases where an advowson is alleged to have been sold with some land, the plea rolls from the late twelfth and early thirteenth centuries contain only one instance in which an advowson or moiety thereof is adjudged to a party who acquired it by virtue of a sale.<sup>19</sup> In that case, the sale is referenced only in the jury's verdict, and was not alleged by either of the parties. It is possible that the sale had included land as well as a moiety of the advowson, and the jury simply neglected to mention this fact (or it was not reported on the roll). In any event, one contrary instance does not mean that the canonical prohibition was being flouted in the royal courts.

In these basic ways, therefore, the rules of canon law regarding advowsons appear to have been respected in the royal courts. The plea rolls do not show a general toleration for simony or a refusal to adhere to the prohibition on sale. While the mere exercise of jurisdiction by the royal courts in advowson disputes theoretically violated canon law, there is no evidence that the substantive rules of canon law were being systematically violated by the royal judges. Nevertheless, in 1179, the Third Lateran Council presented a challenge to royal jurisdiction over advowsons that could not be ignored. The challenge had to do with the authority of the bishop to act when a dispute over the patronage lasted longer than a few months.

The eleventh ecumenical council observed by the Roman church, the Third Lateran Council dealt with a variety of issues, including the condemnation of the Waldensian heresy and the restoration of ecclesiastical discipline. For present purposes, however, the most significant provision is Canon 17, which dealt with rights of presentation. This canon began by describing disputes which had arisen among different putative patrons, and condemned such disputes. First, as to co-patrons, the canon provided that if the "founders" of a church preferred different candidates, "the one would be preferred who has the greater merit and is chosen and approved by the greater number."<sup>20</sup> If this could not be done "without scandal," then the bishop would make the selection.<sup>21</sup> More importantly, when a legal controversy arose concerning the patronage and no decision was arrived at within a specified period of time, the bishop would automatically choose the parson himself.<sup>22</sup> Most scholars have assumed that this

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<sup>18</sup> *Id.* at 99-101.

<sup>19</sup> In 1227, Thomas de Burgh claimed a moiety of the advowson of Penistone (Yorks) from Richard de Alencun. The jurors reported that a moiety of the advowson had been sold to William de Neville, father of Sarah who was Thomas's mother and whose heir Thomas was; the other moiety had been sold to Roger de Munbegun, whose heirs were Eudes de Lungvillers and Geoffrey de Neville. The court awarded Thomas the presentation of the moiety in question and Richard was amerced. 13 CRR no. 370, p. 85 (Trin. 1227).

<sup>20</sup> [S]i forte in plures partes fundatorum se vota diffuderint, ille praeficiatur ecclesie, qui maioribus iuvatur meritis et plurium eligitur et probatur assensu. 3 Conc. Lat. c. 17 (1179) = X 3.38.3.

<sup>21</sup> *Id.*

<sup>22</sup> 3 Conc. Lat. c. 17 (1179) = X 3.38.3.

provision of the Third Lateran Council had an impact on the English common-law rules relating to advowsons.

*Glanvill*, writing toward the end of the reign of Henry the Second, describes two principal advowson writs. The first, the writ of right of advowson, commanded the sheriff to order the defendant to release the advowson of the church in question to the plaintiff. If the defendant failed to do so, he was told to appear on a particular day and was told in advance where to appear.<sup>23</sup> The defendant had several opportunities to delay the proceedings. Once the defendant did appear, the plaintiff would state his claim and offer to prove it by a champion.<sup>24</sup> In *Glanvill*'s day, the defendant could then choose between battle and the grand assize, the latter option having been introduced by the assize of Windsor in 1179.<sup>25</sup> Prior to 1179, the only option would have been battle, which involved more opportunities for delay.<sup>26</sup>

Canon 17 of the Third Lateran Council added an additional complication for plaintiffs seeking to recover advowsons by writ of right. If the dispute lasted longer than the proscribed period, the bishop would automatically choose the parson without regard to the pending lawsuit. A procedure was needed that could quickly decide an advowson dispute before the passage of time triggered the conciliar canon and gave the bishop the prerogative to choose his preferred candidate. Several English bishops and clerks were present at the Council, and were in a position to act upon its provisions as soon as they returned home.<sup>27</sup> This may have been the impetus for the assize of darrein presentment, the second main advowson writ described by *Glanvill*.

The assize of darrein presentment was one of several “recognitions” devised during the reign of Henry the Second, all of which summoned a jury-like body called an “assize” of twelve free and lawful men from a particular location to resolve a question or questions specified in the writ. In this assize, the question was which patron presented the last parson who was now dead to the church in a stated village, which church was alleged to be vacant and of which church the plaintiff claimed the advowson.<sup>28</sup> Thus the assize concerned the last presentation, and has acquired the French-derived name of darrein presentment. The person or persons found to have presented the last parson recovered seisin of the advowson and were entitled to present the next parson.<sup>29</sup>

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<sup>23</sup> “*Rex uiccomiti salutem. Precipe N. quod iuste et sine dilatione dimittat R. aduocationem ecclesie in illa uilla quam clamat ad se pertinere, et unde queritur quod ipse ei iniuste difforciat. Et nisi fecerit, summone eum per bonos summonitores quod sit ibi eo die coram me uel iusticiis meis ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breue. Teste etc.*” *Glanvill*, IV, 2, p. 45.

<sup>24</sup> *Glanvill* IV, 6, p. 46. *Glanvill* refers to “*probos homines*,” but the champion is usually a single individual in the early plea rolls.

<sup>25</sup> *Id.*; J.H. Round, “The Date of the Grand Assize,” *English Historical Review* 31 (1916): 268-69.

<sup>26</sup> *Glanvill* II, 3, p. 23; II, 11-12, pp. 30-32.

<sup>27</sup> English attendees at the Council included the bishops of Bath (Reginald FitzJocelin), Hereford (Robert Foliot), Norwich (John of Oxford), and Durham (Hugh de Puiset), as well as Peter of Blois, archdeacon of Bath, and Walter Map. See D. Whitelock, M. Brett & C.N.L. Brooke eds., *Councils & Synods with Other Documents Relating to the English Church* I, Part II, 1011-12 (Oxford 1981).

<sup>28</sup> *Glanvill* XIII, pp. 148-70; XIII, 19, p. 161.

<sup>29</sup> *Id.* XIII, 20, p. 161.

Because the earliest surviving reference to the assize of darrein presentment dates to 1180,<sup>30</sup> some scholars have assumed that the assize was created in response to the Third Lateran Council.<sup>31</sup> Peter Landau, however, has argued that the assize must have been created before 1176.<sup>32</sup> A decretal of Alexander the Third, dating to the years 1173-76, ruled that a clerk instituted in a church at the presentation of one who believed himself patron ought not to lose his benefice when another recovers the advowson in court, provided that the one who presented him “*possessed* the right of patronage of the church” and did not merely “believe himself to be patron without possessing the right”.<sup>33</sup> This rule is attributed to an “English custom.”<sup>34</sup> In Landau’s view, the distinction drawn by the decretal makes sense only if there was an action available in English law to recover “possession” of an advowson, because otherwise there was no way to distinguish the putative patron from the possessor.<sup>35</sup> Landau thinks that the assize of darrein presentment was that action.

It is possible, therefore, that the assize was created before the Third Lateran Council. The procedure of the assize, however, seems tailored to solve the problem the Council created, and one may doubt whether the earlier decretal of Alexander was in fact referring to the assize. In deciding whether the parson could keep his benefice, the ecclesiastical court might have looked to whether the parson’s predecessor was also presented by the party who lost in the action of right: that is, whether the putative patron already had possession of the advowson when the current parson was presented. If so, the parson would keep his benefice notwithstanding a successful action of right, but if not, the parson would be forced to step aside. This determination could have been made independently by the ecclesiastical court when the benefice was claimed, without reference to a secular judgment. In other words, the English custom in question might have been a custom of the English ecclesiastical courts in cases where a layman had recovered the advowson by writ of right.

In his decretal, Alexander was discussing a lawsuit in the ecclesiastical court between rival clerks, not a lawsuit in the secular court between rival patrons. It was the ecclesiastical courts, therefore, that applied the “English custom” in question, and there is no particular reason to infer that it was dependent on a judgment in the royal courts. One doubts that Alexander would have made the outcome of the ecclesiastical case depend on a prior action in the secular courts. It is simpler to read the decretal as suggesting that the

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<sup>30</sup> R.C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (London: Selden Society 1959), 77 SS 332-33; *English Lawsuits*, 107 SS no. 518. An 1182 entry in the pipe rolls may also refer to the assize of *darrein presentment*, though it could also refer to the grand assize. *Pipe Roll 28 Henry the Second*, 83 (1182) (‘*Radulfus Ferrariis reddit compotum de 10 marcis pro respectu de recognitione cuiusdam ecclesie*’).

<sup>31</sup> See, e.g., Van Caenegem, *Royal Writs*, 77 SS 332.

<sup>32</sup> Peter Landau, *Jus Patronatus: Studien zur Entwicklung des Patronats im Dekretalenrecht und der Kanonistik des 12. und 13. Jahrhunderts* (Cologne: Böhlau Verlag, 1975), 195-98.

<sup>33</sup> *Si vero tunc non possidebat ius patronatus, sed tantum credebatur esse patronus, cum tamen non esset, nec possessionem patronatus haberet secundum consuetudinem Anglicanam poterit ab eadem ecclesia removeri.* 1 Comp. 3.33.23.

<sup>34</sup> *Id.*

<sup>35</sup> Landau, *Jus Patronatus*, 196-98 n. 696.

ecclesiastical courts made an independent determination of possession based on the penultimate presentation.

In arguing that the assize of darrein presentment was not a response to the Third Lateran Council, Landau makes the point that the conclusion of the assize did not necessarily end the advowson dispute, because it might continue in the form of an action of right.<sup>36</sup> Thus, Landau says, the assize was not a solution to the problem posed by the Third Lateran Council. This argument, however, ignores the fact that, at the conclusion of an assize of darrein presentment, the prevailing party would be adjudged seisin of the advowson and would be entitled to present a clerk to the bishop. If the assize was followed by an action of right, it would take place after the institution of this clerk, when the church was no longer vacant. Once the church had been filled, the bishop would no longer be able to institute a parson by virtue of the Council. Moreover, actions of darrein presentment were not necessarily followed by an action of right, and the assize itself could put an end to the litigation. This suggests that the assize was indeed created in response to the Council, and the earlier decretal of Alexander referred to the practice of the English ecclesiastical courts in disputes between clerks.

The possibility that the English ecclesiastical courts may already have been awarding benefices on the basis of possession raises the interesting question of whether the assize of darrein presentment was in fact modeled on the existing practice of the ecclesiastical courts. Although this is necessarily speculation, it is at least possible that the king's advisers were not the first to think in possessory terms, and that canon law presented them with a solution to the problem posed by the Council. On the other hand, one should note that the "English custom" referred to in Alexander's decretal is explained differently by *Glanvill*, who says that the incumbent whose patron was "believed to be patron at the time of the presentation" would be protected, not mentioning possession.<sup>37</sup> This explanation does not suggest that possession was central to the determination in the ecclesiastical courts. The procedure in those courts, however, was tangential to *Glanvill*'s treatise, and he may have simply been alluding to a rule that was more complex than his description. It is hard to see how the presenter would be "believed to be patron" unless he had made a recent presentation.

The other notable issue raised by the Council was how long the dispute could continue before the bishop could exercise his prerogative to act. Although two months was the time limit expressed by the Council, later canonists referred to three or four months, and four months was the limit referred to when the canon was included in the *Compilatio Prima* and the *Liber Extra*.<sup>38</sup> On the other hand, a decretal of Alexander the Third directed to the bishops and archbishops of England specified that, in a controversy over the patronage, the bishop, six months after the vacancy occurred, could himself fill

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<sup>36</sup> *Id.* at 196 n. 696.

<sup>37</sup> *Glanvill* IV, 10, p. 50. See Gray, "Ius Praesentandi," 488 n.4.

<sup>38</sup> The time limit originally expressed in the Council seems to have been two months, although later canonistic writers referred to three or four months and four months was the limit included in the *Compilatio I* and the *Liber Extra*. Landau, *Jus Patronatus*, 171-72.

the church.<sup>39</sup> Canonists offered different explanations for the contradiction between the four-month period of the Council and the six-month period of the decretal. Bernard de Pavia, who taught at Bologna during the 1170s,<sup>40</sup> thought that the shorter period applied when the disputing parties were responsible for the failure of the process to conclude, while the longer period applied when the judge was responsible for the delay.<sup>41</sup> Other writers thought that the six-month period was counted from the point in time that the church became vacant, while the four-month period was counted from the beginning of the controversy between the rival patrons.<sup>42</sup> Eventually, the canonists settled on the explanation that the four-month limit applied to secular patrons, while the six-month period applied to spiritual patrons.<sup>43</sup>

The records of the English royal courts do not refer to two different time limits. The plea rolls do sometimes report that a benefice was filled by the bishop “by authority of the Council (*auctoritate concilii*)” because of a lapse of time. If the time in question is specified, however, it is always said to be six months.<sup>44</sup> The plea rolls do not refer to a four-month period, nor do they give any indication that there were separate time periods for secular and spiritual patrons. The plea rolls leave the impression that the English royal judges interpreted the Third Lateran Council as establishing a six-month time limit for all patronage disputes. None of the canonists writing during this period shared this opinion, which raises the question of how the English royal judges reached this conclusion.

One possibility is that the English bishops made a practice of waiting six months before instituting a clerk according to the Council, and the plea rolls simply reflected the behavior of the bishops in practice. If the bishops followed this practice, however, it was probably out of deference to the jurisdiction of the royal courts in advowson disputes. It seems unlikely that the bishops would have relinquished their rights under canon law absent pressure from the king and his judges.<sup>45</sup> The most likely explanation is that the bishops cooperated with the royal courts to give a little more time for *darrein presentment* actions to run their course. In order to persuade the bishops to wait six months, however, the royal judges must have had some basis for their interpretation of the Council.

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<sup>39</sup> X 3.38.22.

<sup>40</sup> See <http://faculty.cua.edu/pennington/1140a-b.htm>.

<sup>41</sup> Landau, *Jus Patronatus*, 172.

<sup>42</sup> *Id.* at 173 (discussing the French *apparatus glossarum* “*Materia auctoris*,” the *apparatus* of Vincentius on the *Compilatio III*, and the *Glossa ordinaria* on the *Decretum* of Johannes Teutonicus).

<sup>43</sup> *Id.* The theory was developed by Bernard de Botone (ca. 1200-1266), and was confirmed by Boniface VIII in a decretal included in the *Liber Sextus*. *Id.* at 173-74 (citing VI 3.19.un.).

<sup>44</sup> See, e.g., 12 CRR no. 379, p. 72 (Hil. 1225) (*episcopus . . . quia ecclesia vacavit ultra sex menses, ipse auctoritate concilii illam contulit . . . clerico suo*); 14 CRR no. 81, p. 13 (Trin. 1230) (*dominus Cantuariensis per lapsum sex mensium contulit ei ecclesiam illam auctoritate concilii*); 14 CRR no. 1227, p. 260 (. . . *contulit ecclesiam illam . . . ratione concilii post lapsum vi. mensium*).

<sup>45</sup> Such pressure might have taken the form of the writ of *quare incumbavit*, a version of which was apparently in use as early as 1200. See 1 CRR 242 (Trin. 1200). It is puzzling, given the existence of this writ, that the bishops were able to apply the Council at all. The early plea rolls, however, do not contain many such cases, suggesting that either the bishops ignored the writ or Chancery was reluctant to grant it in light of the Council. Further work needs to be done on the early history of *quare incumbavit*.

Although the provision of the Third Lateran Council dealing with advowson disputes referred to a time limit of two months (extended to four months in the *Compilatio Prima* and the *Liber Extra*), another provision of the Council does refer to a six-month period. Canon 8 provides that, when ecclesiastical prebends or other offices in a church become vacant, they should not remain unfilled, but within six months they should be conferred on persons who can suitably administer them.<sup>46</sup> Unlike Canon 17, this provision was not specifically aimed at controversies over patronage. It seems, however, that the English interpretation viewed the six-month limit of Canon 8 as taking precedence over the shorter limit of Canon 17. This interpretation was undoubtedly reinforced by the decretal of Alexander the Third referenced above, which also spoke of a six-month limit.<sup>47</sup>

What is significant about the English interpretation of the Council provisions is that the perspective of the secular courts seemed to matter more than the theories of the leading canonists. Four months did not leave the king's judges much time to hold an assize of darrein presentment, but six months gave them a bit more flexibility. Thus, while the king's Chancery most likely did respond to the Council by creating a new writ, the English bishops were somehow persuaded to refrain from exercising the rights theoretically granted to them under the canon law. The common law was not completely reactive, and was capable of charting its own path when new challenges were presented by the parallel system of canon law. At the same time, however, no attempt was made to disregard the rule of the Third Lateran Council entirely, however attractive that option might have been to the lay lords who claimed rights of patronage in the royal courts. The royal judges acknowledged the authority of canon law, but interpreted it in their own way.

In conclusion, at least in the context of advowson litigation, the common-law courts and ecclesiastical courts did not function in isolation from each other. Instead, the two systems were forced to balance the conflicting needs of king and church, and work out solutions that were acceptable to both. Although ecumenical councils and decisions by the king's Chancery played a key role in shaping the canon law and the common law respectively, it was ultimately the individual judges in both systems who decided the cases, and each group was equally capable of acting independently or learning from the decisions of the other. The key to progress lay in the interaction of the two systems.

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<sup>46</sup> *Cum vero praebendas ecclesiasticas seu quaelibet officia in aliqua ecclesia vacare contigerit vel etiam si modo vacant, non diu maneant in suspenso, sed infra sex menses personis, quae digne administrare valeant, conferantur.* 3 Conc. Lat. c. 8 (1179).

<sup>47</sup> X 3.38.22.