

PLEASE NOTE

This is a draft paper only and should not be cited without the author's express permission

The Third Lateran Council and the Ius Patronatus in England

Joshua C. Tate*

In the early days of the common law, patronage disputes tested the balance of power between the universal church and the English state. Litigation over advowsons¹ 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 called the assize of darrein presentment to deal with advowson disputes.² 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.³ Instead, according

* Assistant Professor of Law, Southern Methodist University. I would like to thank Paul Brand, Hamilton Bryson, Charles Donahue, Harry Dondorp, Paul Freedman, Lisa Hasday, Richard Helmholz, David Millon, Matthew Mirow, Jonathan Rose, David Seipp, James Whitman, Anders Winroth, and all those who attended my presentations at the Eighteenth British Legal History Conference in Oxford and the Thirteenth International Congress of Medieval Canon Law in Esztergom for their comments and suggestions. This paper is in draft form and should not be cited without my permission.

¹ 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'. F. Pollock and F.W. Maitland, *The History of English Law before the Time of Edward I* (2nd. ed. Cambridge 1898, repr. 1968) 2.36.

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

³ P. Landau, *Jus Patronatus: Studien zur Entwicklung des Patronats im Dekretalenrecht und der Kanonistik des 12. und 13. Jahrhunderts* (Köln 1975) 195-98.

to Landau, the assize of darrein presentment actually influenced the development of canon law, prompting Pope Alexander III to issue a decretal protecting the rights of priests whose patrons had prevailed at the English assize.⁴

Unlike Professor Landau, I am persuaded by the traditional argument that the Third Lateran Council prompted the creation of the English assize of darrein presentment. However, the relationship between the common law and the canon law may have been more complex than the traditional view implies. 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 after the Council 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 seem to have 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.

Canon Law in English Patronage Disputes

In the first clause of the Constitutions of Clarendon, promulgated in 1164, Henry II 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.⁵ 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, the ecclesiastical courts continued to play a role in disputes over benefices long after Clarendon.⁶ A typical

⁴ *Id.* 196-98 n. 696.

⁵ 'De advocacione et presentatione ecclesiarum, si controversia emerit inter laicos, vel inter clericos et laicos, vel inter clericos, in curia domini regis tractetur et terminetur'. D. Whitelock, M. Brett & C.N.L. Brooke eds., *Councils & Synods with Other Documents Relating to the English Church I* (Oxford 1981) pt. II, 878-79.

⁶ J.W. Gray, 'The Ius Praesentandi in England from the Constitutions of Clarendon to Bracton', *EHR* 67 (1952) 481-509. Ecclesiastical courts continued to hear benefice disputes well into the fourteenth century, at least in the ecclesiastical province of York. See C. Donahue, 'Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined after 75 Years in the Light of Some Records from the

advowson dispute might be brought by a layman, who claimed the advowson of the church by inheritance from some ancestor. The issue for the royal courts was whether the layman had a valid claim to the advowson, which might be challenged by another party to the dispute. Nevertheless, there was often a second issue involved: whether the church's current occupant had legitimately been instituted parson. The latter issue was within the province of the ecclesiastical courts.

By the end of the reign of Henry II, litigants could invoke the authority of the crown to call a halt to ecclesiastical litigation that encroached on the king's prerogative.⁷ 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.⁸ 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.⁹ 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

Church Courts', *Michigan Law Review* 72 (1974) 659-61 (explaining that some of these cases involved an underlying dispute over the patronage); but see D. Millon, 'Ecclesiastical Jurisdiction in Medieval England', *Univ. of Illinois Law Review* (1984) 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').

⁷ 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) 271-72.

⁸ G.B. Flahiff, 'The Writ of Prohibition to Court Christian in the Thirteenth Century [pt. 2]', *Mediaeval Studies* 7 (1945) 232-49.

⁹ Gray, 'Ius Praesentandi' 491.

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,¹⁰ 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. An 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 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, and clerks who paid money for ecclesiastical office committed the grave sin of simony, for which they could be deprived of their benefice.¹¹ 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.¹² 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 an 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

¹⁰ Gratian's *Decretum* was written in two stages, a first and second recension; both recensions were apparently completed in Bologna between 1138 and 1150. A. Winroth, *The Making of Gratian's Decretum* (Cambridge 2000) 144; P. 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*, SG 29 (Rome 1998) 661-70.

¹¹ On tithes, see 3 Conc. Lat., c. 14 (1179) = X 3.30.19; 4 Conc. Lat., c. 44 (1215) = X 3.13.12. On simony, see 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.

¹² Landau, *Jus Patronatus* 130-36.

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, and some of those who served wealthy lords were clerks who had taken holy orders.¹³ 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.¹⁴ Peter the Chanter (d. 1197) was the lone dissenter on this point, and his view was summarily rejected by other authors who discussed it.¹⁵ For the most part, debates of the canonists on this topic concerned what would happen to the advowson after an illegal

¹³ See N. Denholm-Young, *Seigniorial Administration in England* (Oxford 1937) 2-3; J.E. Newman, 'Greater and lesser landowners and parochial patronage: Yorkshire in the thirteenth century', *EHR* 92 (1977) 281.

¹⁴ Landau, *Jus Patronatus* 94. The prohibition on sale may be found in the first recension of Gratian's *Decretum* as well as in the decretals of Alexander III. See *Dictum post C.16, q.7, c.30* ('fundatores ecclesiarum . . . non habent ius uendendi, uel donandi, uel utendi tamquam propriis'); WH 1061, 1 Comp. 3.33.20 = X 3.38.16 (1174-81) ('quum inconueniens sit et penitus inhonestum vendi ius patronatus, quod est spirituali annexum, contractum illum . . . irritum esse decernas'); Winroth, *The Making* 216.

¹⁵ In Peter's view, because the advowson was a 'ius corporale', there was no reason why it could not be sold or mortgaged, provided that no creditor exercised the advowson without the patron's consent. Peter the Chanter, *Summa de Sacramentis*, ed. J.-A. Dugauquier (Louvain 1954-67) 3:2b.706-07 ('Credimus . . . quod ius patronatus merum sit corporale et vendi potest, et in perpetuum et ad tempus, et obligari pignori; tamen, si interim uacauerit beneficium aliquod, non debet creditor dare illud sine licentia patroni, quia illud accederet preter sortem et esset usura'). Peter acknowledged, however, that others did not share his view, and he offered no textual support for his position, which was rejected by later canonists. Landau, *Jus Patronatus* 98. On the intellectual approach of Peter the Chanter and its context, see M.L. Colish, *Medieval Foundations of the Western Intellectual Tradition, 400-1400* (New Haven 1997) 287.

sale, with some offering the view that the patronage would come to an end, with others allowing the seller or his heirs to reclaim the advowson.¹⁶

The evidence suggests that the English 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.¹⁷ 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 jurors 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.

The Third Lateran Council and the Assize of Darrein Presentment

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.

¹⁶ *Id.* at 99-101. For the latter view, see Bernard of Parma, *Glossa ordinaria* to X 3.38.6, v. 'spoliando' ('eo ipso quod imponitur pena emptori, et non venditori, videtur remanere penes ipsum patronum ius patronatus; quia si voluisset privari, hoc dixisset').

¹⁷ 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 Curia Regis Rolls [CRR] no. 370, p. 85 (Trin. 1227).

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’.¹⁸ If this could not be done ‘without scandal’, then the bishop would make the selection.¹⁹ 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.²⁰ Most scholars have assumed that this 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 II, 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.²¹ 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.²² 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 1179.²³ Prior to 1179, the only option would have been battle, which involved more opportunities for delay.²⁴

¹⁸ ‘[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.

¹⁹ *Id.*

²⁰ *Id.*

²¹ ‘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, summo 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.’. G.D.G. Hall ed. & trans., *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford 1965) IV, 2, p. 45.

²² *Glanvill* IV, 6, p. 46. *Glanvill* refers to ‘probos homines’, but the champion is usually a single individual in the early plea rolls.

²³ *Id.*; J.H. Round, ‘The Date of the Grand Assize’, EHR 31 (1916) 268-69.

²⁴ *Glanvill* II, 3, p. 23; II, 11-12, pp. 30-32.

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.²⁵ One of these attendee bishops, Reginald fitz Jocelin, was significantly involved in the king's affairs, appearing at the king's Easter court in 1176 and attesting a royal charter at Rouen the following year.²⁶ Another attendee, John of Oxford, was involved in several diplomatic missions on the king's behalf, and attested about sixty royal charters between 1176 and 1189.²⁷ It is inconceivable that these men did not immediately report what happened at the Third Lateran Council to the king upon their return to England. 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 II, 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.²⁸ Thus the assize concerned the 'ultima presentatio', 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.²⁹

²⁵ English attendees at the Council included the bishops of Bath (Reginald fitz Jocelin), Hereford (Robert Foliot), Norwich (John of Oxford), and Durham (Hugh de Puiset), as well as Peter of Blois, archdeacon of Bath, and Walter Map. *Councils & Synods* I, Part II, 1011-12.

²⁶ C. Duggan, 'Reginald fitz Jocelin (c.1140–1191)', *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004), <http://www.oxforddnb.com/view/article/9613>.

²⁷ C. Harper-Bill, 'Oxford, John of (d. 1200)', *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004), <http://www.oxforddnb.com/view/article/21058>.

²⁸ *Glanvill* XIII, pp. 148-70; XIII, 19, p. 161.

²⁹ *Id.* XIII, 20, p. 161.

The earliest surviving reference to the assize of darrein presentment dates to 1180, when a final concord was entered into between Ralph Murdac and Hugh of Bourton concerning a ‘recognitio summonita . . . in curia domini regis de presentatione persone que ultimo . . . obiit’ in the church of Black Bourton.³⁰ For this reason, some scholars have assumed that the assize was created in response to the Third Lateran Council one year before.³¹ Peter Landau, however, has argued that the assize must have been created before 1176, because of a decretal issued by Alexander III before that date.³²

In the decretal ‘Consultationibus’, issued at some point between 1173 and 1176, Alexander III ordered 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 was not merely ‘believed to be patron without possessing the right’.³³ This rule, or the possession it describes, is attributed to an ‘English custom’.³⁴ According to Landau, 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 mere putative patron from the possessor.³⁵ Landau thinks that the assize of darrein presentment was that action.

³⁰ Van Caenegem, *Royal Writs*, 77 Selden Soc. 332-33; R.C. van Caenegem ed., *English Lawsuits from William I to Richard I* (Selden Society 107; London 1991) 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 comptum de 10 marcis pro respectu de recognitione cujusdam ecclesie’).

³¹ See, e.g., Van Caenegem, *Royal Writs*, 77 Selden Soc. 332.

³² Landau, *Jus Patronatus* 195-98.

³³ Si aliquis clericus ab ordinario iudice in aliqua ecclesia fuerit institutus ad praesentationem illius, qui eiusdem ecclesiae credebatur esse patronus, et postea ius patronatus alius evicerit in iudicio, clericus, qui institutus est, non debet ab ipsa ecclesia propter hoc removeri, si tempore praesentationis suae ille, qui eum praesentavit, ius patronatus ecclesiae possidebat, cum ex hoc ei, qui de iure debet habere, nullum in posterum praeiudicium generetur. 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.

WH 184, 1 Comp. 3.33.23 = X 3.38.19 (1173-76) (emphasis added). The manuscripts indicate that the decretal was issued on April 8 at Anagni, and addressed to Simon, abbot of St. Alban’s. Simon held that position from 1167 to 1183. R.M. Thompson, *Manuscripts from St. Alban’s Abbey, 1066-1235* (Woodbridge 1982) 51. During that period, Pope Alexander was at Anagni on April 8 in 1173, 1174, and 1176, but not before 1173 or after 1176. P. Jaffé ed., *Regesta Pontificum Romanorum* (Leipzig 1888), 265, 275, 293, 297. This means that the decretal must have been issued sometime during the period 1173-76.

³⁴ *Id.*

³⁵ Landau, *Jus Patronatus* 196-98 n. 696.

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, which is otherwise unknown prior to 1180. Another possibility, not considered by Landau, is that the pope could have been referring to a local custom originally applied not in the English royal courts, but in the English ecclesiastical courts.

The problem posed by ‘Consultationibus’ arose when a patron who successfully had his clerk instituted subsequently lost in a secular action of right. In deciding whether the parson could keep his benefice, an English ecclesiastical court might have looked to whether the parson’s predecessor was also presented by the losing party in the secular action (or the losing party’s ancestor): that is, whether the defeated patron already had possession of the advowson when he presented the current parson. If so, the parson would keep his benefice, 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 ‘Consultationibus’, Alexander III was addressing a lawsuit in an ecclesiastical court between rival clerks, not the corresponding lawsuit in the secular court between the rival patrons. There is no compelling reason, in my view, to assume that the ‘English custom’ in question was a custom of the royal courts, or even dependent on a judgment in the royal courts. In general, medieval canonists and popes took the position that patronage disputes belonged in ecclesiastical courts, subject to certain pragmatic exceptions.³⁶ Given the church’s desire to maintain control over patronage disputes, why would Pope Alexander III, in this particular decretal, have made the outcome of a dispute between clerks depend on a superseded ruling in a secular court? One could just as easily read the decretal to suggest that the English ecclesiastical courts were making an independent determination of possession based on the penultimate

³⁶ *Id.* at 207-10. See also R.H. Helmholz, *The Oxford History of the Laws of England Volume I: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford 2004) 478-79 (citing X 2.1.3).

presentation. If the royal courts were not in fact making such a determination prior to 1180, it would have been logical for the ecclesiastical courts to do so instead.

English ecclesiastical courts in the second half of the twelfth century were well aware of the legal concept of possession, and applied it in lawsuits concerning benefices as early as 1161.³⁷ King Henry II had been meddling in patronage disputes since at least the 1150s.³⁸ Thus, the English ecclesiastical courts had several years to develop a customary rule for dealing with the problem in ‘Consultationibus’ before it came to the pope’s attention. Moreover, custom was a legitimate source of law in canonist theory, although it yielded to natural law and enacted laws.³⁹ By referring to the ‘consuetudinem Anglicanam’, Alexander III might simply have recognized a custom followed in the courts of his English bishops. Indeed, in another decretal, addressed to the bishop of Exeter, Alexander III specifically refers to a ‘custom of the English church’,⁴⁰ showing that such language could be used to refer to local ecclesiastical customs.

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.⁴¹ In Landau’s view, therefore, the assize was not a solution to the problem posed by the Third Lateran Council. This argument does not, however, address 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

³⁷ On the awareness of the concept, see J. Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford 1994) 104, 267; J. Biancalana, ‘For Want of Justice: Legal Reforms of Henry II’, *Columbia Law Review* 88 (1988) 500-01; M. Cheney, ‘*Possessio/proprietas* in ecclesiastical courts in mid-twelfth century England’, in G. Garnett & J. Hudson eds., *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt* (Cambridge 1994) 245; and J.C. Tate, ‘Ownership and Possession in the Early Common Law’, *American Journal of Legal History* 48 (2006) 292-94. For an early example of the concept in action, see W.J. Millor, S.J. & H.E. Butler eds., *The Letters of John of Salisbury* (Oxford 1986, rev. by C.N.L. Brooke), no. 72 (lawsuit held before Theobald, archbishop of Canterbury, in 1161), discussed in Biancalana, ‘For Want of Justice’ 501.

³⁸ Van Caenegem, *Royal Writs*, 77 Selden Soc. no. 196, p. 515 (1155-58).

³⁹ D.11 c.4.

⁴⁰ WH 244, 1 Comp. 3.26.4 = X 3.30.7 (1164-79) (‘generalem Anglicanae ecclesiae consuetudinem’). Innocent III also uses this phrase. X 2.20.32 (‘consuetudine generali Anglicanae ecclesiae’).

⁴¹ Landau, *Jus Patronatus* 196 n. 696.

bishop would no longer be able to institute a parson by virtue of the Council, and the king's prerogative to decide advowson disputes would be preserved. 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. In short, there is no strong reason to doubt the traditional view that the assize was created in response to the Council.

The possibility that the English ecclesiastical courts may already have been awarding benefices on the basis of possession prior to 1180 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. It is true that the 'English custom' referred to in Alexander's decretal is explained differently by *Glanvill*, who says in Book IV that the incumbent whose patron was 'believed to be patron at the time of the presentation (tempore presentationis credebatur patronus)' would be protected, not mentioning possession.⁴² This explanation does not suggest that the ecclesiastical courts inspired the possessory aspect of the royal assize. The procedure in those courts, however, was tangential to *Glanvill*'s treatise, and he may have simply been alluding in general terms to a rule that he knew to be more complex. Moreover, because the creation of the assize of darrein presentment made it difficult for a mere putative patron, lacking possession or right, to have his clerk instituted in a vacant church, the distinction in 'Consultationibus' may have diminished in practical significance in England by the time *Glanvill* was completed.

Even if 'Consultationibus' did indeed refer to a 'possessio' recognized in the royal courts, it need not have been determined by an assize of darrein presentment. It is possible that, prior to the creation of the assize, Chancery offered a different writ for a vacant church that ceased to be available after 1180, or that the king's court occasionally held ad hoc proceedings in the years before the Council to decide the issue of the last presentation in a dispute over a vacant church. The assize of darrein presentment might trace its origins to earlier proceedings in the royal courts regarding the last presentation that had ceased to be held by the time of *Glanvill*.

⁴² *Glanvill* IV, 10, p. 50. See Gray, 'Ius Praesentandi', 488 n.4.

Interpreting the Time Limit of the Council

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 may have been 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 I* and the *Liber Extra*.⁴³ By contrast, a decretal of Alexander III issued after the Third Lateran Council and directed to the archbishop of Canterbury specified that, in a controversy over the patronage, the bishop, six months after the vacancy occurred, could himself fill the church.⁴⁴

Canonists offered different explanations for the contradiction between the four-month period of the Council and the six-month period of the decretal. Bernard of Pavia, who taught at Bologna during the 1170s, 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.⁴⁵ 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.⁴⁶ 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.⁴⁷

⁴³ Landau, *Jus Patronatus* 171-72. Alberigo's edition of the Third Lateran Council gives 'tres menses' in the text, but 'quattuor' and 'duos' are listed as alternative possibilities. Giuseppe Alberigo et al. eds., *Conciliorum Oecumenicorum Decreta* (Bologna 1991) 220.

⁴⁴ WH 380, 1 Comp 1.8.5 = X 3.38.22 (1179-81). Another portion of the decretal, excerpted in 1 Comp. 1.8.5, mentions the Council, which led Holtzmann to assign a date of 1179-81.

⁴⁵ Bernard of Pavia, *Summa Decretalium*, bk. III, tit. 33, § 9, pp. 122-23 (E. Theodor Laspeyres ed., Graz 1956); <http://faculty.cua.edu/pennington/1140a-b.htm>.

⁴⁶ Landau, *Jus Patronatus* 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).

⁴⁷ *Id.* The theory was developed in the *Glossa ordinaria* to X 1.31.4, v. 'idoneae'. According to the *Glossa ordinaria*, because lay patrons could change their mind between the presentation and institution of a candidate, while clerical patrons could not, a shorter time limit ought to apply in general to presentations by laymen. Boniface VIII subsequently confirmed this interpretation in a decretal, without mentioning Bernard's rationale. See VI 3.19.un.; Landau, *Jus Patronatus* 173-74.

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.⁴⁸ 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. These records leave the impression that the English royal judges interpreted the Third Lateran Council as establishing a fixed 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.⁴⁹ 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.

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

⁴⁸ 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’).

⁴⁹ Such pressure might have taken the form of the writ of *quare incumbravit*, 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 follow 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 incumbravit*.

on persons who can suitably administer them.⁵⁰ 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 III that spoke of a six-month limit, which may even have been interpreted by the English bishops (including the addressee, the archbishop of Canterbury) as a special concession directed to England, even though the decretal itself did not make that clear.⁵¹

What is perhaps most significant about the English interpretation of the Council provisions is that the perspective of the secular courts apparently mattered 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. At the same time, however, the royal judges did not attempt 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 king's courts acknowledged the authority of canon law, but the bishops did not press the issue quite as far as they might have.

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. Judges in each system were forced to balance the conflicting needs of king and church, and work out solutions that were acceptable to both. It was in the interest of the two competing sources of power and judicial authority in England to reach a compromise, however uneasy that compromise may have been. Had the bishops been less flexible with regard to such matters, and the rules of canon law less adaptable, the rising star of the common law might have swiftly eclipsed the English ecclesiastical courts. Instead, the church courts remained a key component of the developing system of national justice.

⁵⁰ '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) = X 3.8.2.

⁵¹ WH 380, 1 Comp 1.8.5 = X 3.38.22 (1179-81).