THE ADVOWSON: THE HISTORY AND DEVELOPMENT OF A MOST PECULIAR PROPERTY

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The right of patronage has for many centuries played a most significant role in the life of the English Church. In many ways it is a remarkable concept. What could be more spiritual than the right to present a clerk who is to have the care of the souls of a parish to the bishop for admission and institution? Yet from around the twelfth century this right has been regarded in England as a piece of secular property, and disputes concerning this right cognisable in the common-law courts. Coke tells us that it is an 'incorporeall inheritance',[2] or, to use a more modern term, an 'incorporeal hereditament',[3] which is real property capable of devolving to heirs on intestacy and yet takes no tangible form: an invisible right which gives substantial power to those who possess it.

Christianity, it must be remembered, began in the cities of the Roman Empire. There the bishops first set up their households of clerical assistants and officials to help in the administration of their sees. At first, the bishop's pastoral care and authority was confined to the area of the city,[4] but in Gaul, during the fourth and fifth centuries, as a part of the evangelisation of the countryside, baptismal churches were established by the bishop in villages away from the city.[5] These were usually substantial foundations, collegiate in character,[6] which served the people living within a considerable area around them. By the end of the eighth century, the territory belonging to each country church generally came to be called a *plebs*, or in Italy, a *pieve*.[7]

At much the same time, it would seem that additional churches and chapels were also being built by individual landowners in villages on their own estates. It is possible that the first to do so were the bishops themselves to provide for their lands in other dioceses,[8] but their example appears to have been soon followed by lay proprietors.[9]

It would appear that at first attempts were made to keep the control over these churches in the hands of the bishop in whose diocese they lay,[10] and to ensure that the

[1] This article is based on a paper given to the Private Patrons Consultative Group, Grimsthorpe Castle, on 27 September 1997.

[2] Sir Edward Coke, *First Part of the Institutes of the Laws of England or a Commentarie upon Littleton...* (ed. London, 1628), lib. i, cap. 7, sec. 58, fo. 47.

[3] Blackstone, *Commentaries on the Laws of England* (14th edn) (London, 1803), II, 21; *Mirehouse and Mirehouse v Rennel* (1833) 7 Bli NS 241 at 317, per Lord Lyndhurst.

[4] Ulrich Stutz, *Die Eigenkirche als Element des mittelalterlich-germanischen Kirchenrechtes* (Berlin, 1895), p 12; in translation, G. Barraclough (ed), *Medieval Germany, 911–1250* (Oxford, 1938), pp 35–70 at p 39.

[5] See e.g. First Council of Toledo, AD 398, c. 5 (Mansi, *Sacrorum Conciliorum nova et amplissima collectio* (Paris, 1759–1798) (reprint Graz, 1960–1962), III, 999); Council of Riez, AD 439, c. 4 (Mansi, V, 1193). See also E. Griffe, 'Les paroisses rurales de la Gaule', *Maison-Dieu*, Paris, 36 (1953), pp 33–62 at p 44.

[6] See Council of Vaison, AD 529, c. 1 (*Monumenta Germaniae Historica: Legum, Section III, Concilia*, I, *Concilia Aevi Morovengici*, ed F. Maassen (Hanover, 1893), p 56).

[7] Catherine E. Boyd, *Tithes and Parishes in Mediaeval Italy: The Historical Roots of a Modern Problem* (New York, 1952), p 50. See Stephen of Tournai, *Die Summa des Stephanus Tornacensis über das Decretum Gratiani*, ed J. F. von Schulte (Geissen, 1891), p 218.

[8] K. Baus, H.-G. Beck, E. Ewig and H. J. Vogt, *The Imperial Church from Constantine to the Early Middle Ages*, trans. Anselm Biggs (*History of the Church*, II, ed H. Jedin and J. Dolan) (London, 1980), p 647. See the Synod of Orange, AD 441, c. 10 (Mansi, VI, 437–438).

[9] See note 8 above. See e.g. permission of Galasius I, dated c. AD 495–496, to bishops to consecrate such churches: Andreas Thiel, *Epistolae Pontificum Romanorum Genuinae* (Braunsberg, 1867) (reprinted New York, 1974), I, 448–449, ep nos. 34 and 35. The early existence of such *villae* churches is evident from the First Council of Toledo, AD 398, c. 5 (Mansi, III, 999).

[10] See e.g. Synod of Orange, AD 441, c. 10 (Mansi, VI, 437–438).

founder would take nothing from the church. This might be made a condition of consecration.[11] Financial independence was to be ensured by requiring that the church had to be properly endowed.[12] Gradually, however, and perhaps inevitably, these churches, remote from the influence of the city administration and largely financially self-supporting, began to achieve a degree of autonomy free from the bishop's immediate control[13].

Between the seventh and the tenth centuries, the Frankish Church was to witness a vast growth in the building and founding of such private churches.[14] New church building was encouraged by both the secular rulers and the bishops with the aim of providing every village with a church and its own priest.[15]

The seigneurs who erected and endowed such churches to serve their estates and local communities, however, claimed to exercise proprietory rights (*dominium*) over them and their possessions in much the same way in which they owned any other manorial property. They had built them, they had paid for them, they therefore owned them! So a church might be sold, exchanged, devised, leased, mortgaged, etc.[16] By the early eighth century, therefore, the system of the proprietory church, the *Eigenkirche*,[17] had become firmly established north of the Alps.[18]

The power of a local seigneur as founder and proprietor of a church could be considerable. In some cases these might be bishops who had built and endowed a private church, or a monastic house which founded and became the proprietor of a church or a number of churches.[19] But more often the churches were erected by lay seigneurs so that ownership was predominantly in lay hands.

The rights of ownership which accrued to the founder of a church included the right to present his clerk to the bishop to serve in his church, and the canon law came to recognise that a person who erected a church thereby acquired a *jus patronatus*[20] as one of the rights derived from the founder's property in his church.

But there was here an inherent conflict between the power of the proprietor over the clergy of his own foundation and the spiritual authority of the bishop with respect to the manner in which such clergy were to exercise their cure of souls.[21] Lay proprietors now asserted that these proprietorial rights enabled them to appoint and dismiss the priest at will, to use (and abuse) him like any other serf serving on their estates, and to administer the church's endowments, often for their own benefit. The danger posed to the welfare of the diocese by the proliferation of private churches and chapels which sucked away power, financial support and alms, was therefore becoming all too clear.[22]

Faced with this decline in episcopal authority, attempts were made by the Frankish rulers Carloman and Pepin, with the assistance of Archbishop Boniface,

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[11] See e.g. Thiel, *Epistolae Pontificum*, I, 448–449.

[12] See Council of Orléans, AD 541, c. 33 (*M. G. H., Concilia*, I, 94–95). In a letter of Pope Gregory I to the Bishop of Fermo, AD 598, permission was to be given for the consecration of a privately built church only on condition that specified provision was made for the maintenance of the priest (*M. G. H., Epistolarum, Gregorii I Papae Registrum Epistolarum*, II, ed L. M. Hartmann (Berlin, 1957), p 90).

[13] Imbart de la Tour, *Les paroisses rurales dans l'ancienne France du 4e au 11e siècle* (Paris, 1900), p 63.

[14] Stutz, *Die Eigenkirche*, p 18; Barraclough, p 45.

[15] See e.g. Willibrord in AD 692: Alcuin, *Opera Omnia*, II, pt. v, opusc. iv, *De Vita S. Willibrordi Trajectensis Episcopi*, lib. i, p 188, c. 11 (Mansi, CI, 701).

[16] Stutz, *Die Eigenkirche*, pp 16–17; Barraclough, p 43.

[17] Stutz, *Die Eigenkirche*, p 17.

[18] Stutz, *Die Eigenkirche*, p 18; Barraclough, p 45.

[19] David Knowles, *The Monastic Order in England* (2nd edn) (Cambridge, 1963), p 564. See Imbart de la Tour, *Les paroisses*, p 90.

[20] X. 3. 38. 25; William Lyndwood, *Provinciale* (*seu Constitutiones Angliae*) (Oxford, 1679), lib. iii, tit. 21, c. 1, *Cum secundum*, gl. ad v. *jus patronatus*, p 216.

[21] This conflict was already apparent in c. 26 of the Council of Orléans, AD 541 (*M. G. H., Concilia*, I, 93).

[22] See the recital in c. 3 of the Council of Pavia, AD 845 x 850 (*M. G. H., Concilia*, III, *Concilia Aevi Karolini 843–859*, ed W. Hartmann (Hanover, 1984), pp 211–212).

to restore the power of the bishops over the country clergy.[23] Both Carloman and Pepin decreed that every priest was to be subject to the bishop in whose diocese he lived,[24] and a synod was to be convened annually for the purpose of clerical discipline.[25]

The ninth and tenth centuries were to witness considerable reforms in the Frankish Church, particularly under Charlemagne. A hierarchical structure of administration was established in the dioceses with defined territories administered by officials under the bishop, of which the archdeacon was to become the most important[26]. In the countryside, the basic pastoral unit became the parish, much as we know it today, which was confined to a particular village or small community, each with its church and its priest supported by its own endowments.[27] With the parish having become part of the diocesan structure, a concerted attempt was made to strike a balance between the authority of the bishop (his *gubernatio*[28]) and the interests of the lay proprietor derived from his *dominium*.[29] Although the seigneur's ownership of the church was recognised, he was not to be permitted to interfere in the spiritual care exercised therein, and all churches were to be subject to the bishop's authority.[30] Effectively, this meant that a priest had to be approved by the bishop as being fit for office, and it came to be generally established that no priest could receive a church from a layman without episcopal consent,[31] nor could he be removed other than with the leave of the bishop.[32]

The whole question of the relationship of the laity with the administration of the Church and the control of its clergy was in due course swept up in the Hildebrandine reforms of the eleventh century,[33] and one important element of this was the desire to

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[23] Imbart de la Tour, *Les paroisses*, pp 131–132.

[24] *Capitularia Maiorum Domus*, AD 742, c. 3 (*M. G. H., Capit.*, I, 25) (promulgated by Boniface in the Council of the German Church, c. 3 (*M. G. H., Concilia*, II, pt. i, 3)); Council of Soissons, AD 744, c. 4 (*M. G. H., Concilia*, II, pt. i, 35); Council of Vernon, AD 755, c. 8 (*M. G. H., Capit.*, I, 34–35).

[25] *Capitularia Maiorum Domus*, AD 742, c. 1 (*M. G. H., Capit.*, I, 25) (Council of the German Church, c. 1 (*M. G. H. Concilia*, II, pt. i, 3)).

[26] See the Council of Cabillonum, AD 813, c. 15 (*M. G. H., Concilia*, II, 277) (*Decretum Grat.*, D. 94, c. 3).

[27] Imbart de la Tour, *Les paroisses*, p 109; G. W. O. Addleshaw, *The Development of the Parochial System from Charlemagne (768–814) to Urban II (1099–1099)* (Borthwick Institute of Historical Research, St Anthony Hall Publications No. 6) (London, 1954), p 6. The breaking up of the city parish into smaller parochial units was not to occur until the eleventh century: Addleshaw, p 6. In Northern Italy, the extended parish of the older form, with its collegiate baptismal church and dependent chapels, remained the fundamental rural unit well into the high middle ages: Boyd, *Tithes and Parishes*, pp 155–156. See Stephen of Tournai, *Summa*, p 218.

[28] I.e. as signifying authority in Roman Law: see e.g. *Codex Justinianus*, 3, 13, 7, 1, *Corpus Iuris Civilis*, vol. ii, ed P. Krueger (Dublin and Zürich, 1970), p 128; *Corpus Iuris Civilis*, vol. iii, *Novellae*, ed R. Schoell and G. Kroll (Dublin and Zürich, 1972), nov. 131, c. 14, p 663. For an early use of this term in the context of episcopal authority, see the Synod of Orange, AD 441, c. 10 (Mansi, VI, 437–438).

[29] Addleshaw, *Development of the Parochial System*, p 9. See the Synod of Frankfurt, AD 794, c. 54 (*M. G. H., Capit.*, I, 78); Capitulary of Louis the Pious, AD 818–819, cc. 6, 9, 10–12, 29 (*M. G. H., Capit.*, I, 276–277, 279–280); Council of Trosley, AD 909, c. 6 (Mansi, XVIIIA, 279–283 at 281).

[30] Council of Trosley, AD 909, c. 6: 'designamus denique gubernationem episcopi, non nobis vindicamus potestatem domini' (Mansi, XVIIIA, 279–283 at 281).

[31] Capitulary of Louis the Pious, AD 818–819, c. 9 (*M. G. H., Capit.*, I, 277); Report of the Bishops to the Emperor Louis, AD 829, § 18 (*M. G. H., Capit.*, I, 35); Council of Rome, AD 826, c. 21 (*M. G. H. Concilia*, II, 576); Capitulary of Worms, AD 829, § 1 (*M. G. H., Capit.*, II, 12); Council of Trosley, AD 909, c. 6 (Mansi, XVIIIA, 279–283 at 281); Council of Ingelheim, AD 948, c. 3 (*M. G. H., Concilia*, VI, 160); Council of Augsburg, AD 952, c. 9 (*M. G. H., Legum*, II, p 28); Synod of Rome, 1059, c. 6 (*M. G. H., Constits.*, I, 547); Council of Rome, 1078, c. 2 (Mansi, XX, 509), also in *Register of Gregory VII*, VI, 5b, § 3 (*M. G. H., Epistolae Selectae*, II, 403); Third Council of Lateran, 1179, c. 14 (*Decrees of the Ecumenical Councils*, ed Norman P. Tanner (Georgetown University Press, 1990), I, pp 218–219; Stutz, *Die Eigenkirche*, p 21; Barraclough, p 48.

[32] Capitulary of Louis the Pious, AD 818–819, c. 9; Capitulary of Worms, AD 829, § 1; *Allocutio Missi cujusdam Divionensis*, AD 857, § 1 (*M. G. H., Capit.*, II, 291–292); Council of Trosley, AD 909, c. 6; Council of Ingelheim, AD 948, c. 3; Council of Augsburg, AD 952, c. 9; Stutz, *Die Eigenkirche*, p 21; Barraclough, p 48.

[33] See Gerd Tellenbach, *Church, State and Christian Society at the time of the Investiture Contest*, trans R. F. Bennett (Oxford, 1940), pp 89–125; Walter Ullmann, *The Growth of Papal Government in the Middle Ages* (3rd edn) (London, 1970), pp 294–299.

ensure that the parish churches were taken out of seigneurial control and placed firmly under episcopal authority. Central to this was a reiteration of the general principle already recognised[34] that no priest or cleric was to receive a church from the hands of a layman, but was to be appointed by his bishop,[35] for those things which concerned the cure of souls belonged to the bishop.[36] By the end of the following century much of the battle against the lay proprietor had been won, with ownership (*dominium*) having largely given way to the bishop's *gubernatio*, leaving only the *jus patronatus* in lay hands.[37] A new procedure thus came into being which required presentation by the patron to the bishop, followed by admission and institution, and finally induction into the corporal possession of the church.

THE ENGLISH CHURCH

A similar process of development took place in England. Mission churches and private churches began to spring up in the sixth century. Many of the latter were of royal foundation, and evidently enjoyed a particular eminence appropriate to the status of the founder.[38] These were the ancient royal minsters. When later in the tenth century the country began to be divided into the secular administrative areas of shire and hundred, a new generation of minsters came into existence with parishes congruent with a secular hundred or group of hundreds[39] to serve as the mother church of that area.

Within their extensive parishes, there might be a number of villages or centres of population.[40] As on the continent, other smaller churches and chapels were erected to serve these villages,[41] though remaining dependent on the minster as the mother church.[42] Much of the impetus for the building of new churches resulted from the fragmentation of large royal and ecclesiastical estates into smaller self-contained local manors and communities which took place between the ninth and the mid-eleventh centuries.[43]

A manorial lord might then seek to erect a church on his estate not only for the convenience of himself and his family but also for use by his tenants. The possession of a church was also a matter of status. It seems, for example, to have been a part of the property qualification necessary for a churl to become a thegn, for, we are told, he must have five hides of land, and a church and a kitchen, a bell-house and a gate-house, and have a seat and a special duty in the king's hall.[44] In this way, churches came to be built by monastic houses, priests, kings, earls, thegns, and communities themselves,[45] and this building or rebuilding of churches continued right up to the conquest.[46]

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[34] See note 31 above.

[35] See the Synod of Rome, 1059, c. 6; Council of Rome 1078, c. 2; Council of Nîmes, 1096, c. 8 (a clerk was not to receive a church from a layman 'quia non intravit per ostium, sed ascendit aliunde sicut fur et latro ...') (Mansi, XX, 936); First Council of Lateran, 1123, c. 18 (*Ecumenical Councils*, I, p 194); Third Council of Lateran, 1179, c. 14 (*Ecumenical Councils*, I, pp 218–219).

[36] *Decretum Grat.*, C. 16, q. 2, c. 6.

[37] See P. Thomas, *Le droit de propriété des laïques sur les églises et le patronage laïque au moyen âge* (Paris, 1906), pp 105–128.

[38] G. W. O. Addleshaw, *The Beginnings of the Parochial System* (Borthwick Institute of Historical Research, St Anthony Hall Publications No. 3) (2nd edn) (London, 1959), p 12.

[39] Frank Barlow, *English Church, 1000–1066* (2nd edn) (London, 1979), p 184.

[40] Addleshaw, *The Beginnings of the Parochial System*, p 12.

[41] See Addleshaw, *The Beginnings of the Parochial System*, p 14.

[42] See Douglas, ed, *Domesday Monachorum*, pp 12–13, 78–79. II Eadgar, 1, § 1, refers to the payment of tithes to the old church (*ealdan mynstre*) to which obedience was due: F. Liebermann, *Gesetze der Angelsachsen* (Halle, 1903–1916) (reprint Leipzig, 1935), I, 196/197. The Quadripartitus (1113 x 1118) version has it: 'ad matrem ecclesiam cui parochia adiacet': ibid, 197.

[43] John Blair, ed, *Minsters and Parish Churches: the Local Church in Transition 950–1200* (Oxford, 1988), p 7.

[44] *Textus Roffensis*, Rochester Cathedral Library MS A.3.5, fo. 93r, ed Peter Sawyer (Copenhagen, 1952), Early English Manuscripts in Facsimile, vols. vii and xi, pt. 1 (vol. vii); Liebermann, *Gesetze*, I, 456/457, § 2.

[45] Barlow, *English Church, 1000–1066*, p 185.

[46] Barlow, *English Church, 1000–1066*, p 184.

The proprietory nature of many of these churches is abundantly evident.[47] They were clearly feudal in character,[48] and it is apparent from a reading of the Domesday survey that to the commissioners recording the land tenures and the value of associated feudal dues, a church was no more than another kind of property within the feudal structure. Like any other property, a church belonged to some lord who expected to exploit it for profit, and like a mill, a wood, salt-pans or fishing rights, it was a private right appurtenant to his manor or estate. It might therefore, for example, be split into fractions and dealt with like any other feudal possession.[49] Thus, at Linwood in Lincolnshire we may see one Durand Malet with a third part of the church and a third part of the mill;[50] at Elkington not far away there is half a church and half the site of a mill held by Ivo Tallboys,[51] and so on, for there are many such examples. The power wielded by the lord was therefore considerable: his was the power to grant or take away a church, even to the extent of making the church hereditory.

The need for episcopal control over the priests in the diocese was therefore crucial. This might be achieved in a number of ways. For example, letters of commendation were required as a precondition to the exercise of priestly functions by those coming into the diocese in order to give the bishop knowledge of those ministering there.[52] By laws reminiscent of those of the Carolingian Church,[53] the churches were not to be oppressed by their lay proprietors and the clergy were to be subject to the authority of the bishop: once put into possession of a church, a priest was not to be removed other than with the bishop's consent.[54]

In the eleventh and twelfth centuries, the legislation of the Roman Church, which enjoined that no clergyman might accept a church from a layman,[55] was introduced into England by means of national and legatine councils,[56] and, as elsewhere, the rights of the lay seigneur over his church were for the most part reduced to those of a patron, who was obliged to present his clerk to the bishop for admission and institution.[57] However, this right to present a clerk to the bishop for admission and institution was regarded as itself a form of property which the law called an *advocatio* or advowson.[58] Perhaps it took some time for the subtlety of this change to be fully ap-

[47] See William Page, 'Some remarks on the Churches of the Domesday Survey', Archaeologia, 66 (1915), pp 61–102 at p 98.

[48] Barlow, *English Church, 1000–1066*, p 187.

[49] Addleshaw, *Development of the Parochial System*, pp 10, 15. See Reginald Lennard, *Rural England 1086–1135* (Oxford, 1959), p 320, and Page, 'Some remarks on the Churches of the Domesday Survey', pp 87–88.

[50] *Domesday Book*, I, gen. ed. John Morris, vol. 31, *Lincolnshire*, ed Philip Morgan and Caroline Thorn (Chichester, 1986), pt. ii, fo. 365a § 10, p 44; Lennard, *Rural England*, p 320.

[51] *Domesday Book*, pt i, fo. 351c § 84, p 14; Lennard, *Rural England*, p 320.

[52] Egbert, Archbishop of York, AD 734–766, *Dialogus Ecgberti*. Thorpe, *Ancient Laws and Institutes of England*, P. R. C. (London, 1840), II, 90–91.

[53] See notes 30 and 32 above.

[54] Æthelred, V, c. 10 § 2 (Liebermann, *Gesetze*, I, 240–241; *Laws of the Kings of England from Edmund to Henry I*, ed. and trans. A. J. Robertson (Cambridge, 1925), p 83); Æthelred, VI, c. 15 (Liebermann, *Gesetze*, I, 250–251; Robertson, *Laws*, p 97). See the *Laws of the Northumbrian Priests*, cc. 20–22 (Liebermann, *Gesetze*, I, 380–381); Thorpe, *Ancient Laws*, II, 292–295.

[55] See note 35 above.

[56] Council of Winchester, 1072, c. 5 (D. Whitelock, M. Brett and C. N. L. Brooke, *Councils and Synods* (Oxford, 1981), I, pt. ii, 606); Council of Westminster, 1125, c. 4 (Whitelock et al, *Councils*, I, pt. ii, 739); Council of Westminster, 1127, c. 10 (Whitelock et al, *Councils*, I, pt. ii, 749); Council of Westminster, 1138, c. 5 (Whitelock et al, *Councils*, I, pt. ii, 775).

[57] G. W. O. Addleshaw, *Rectors, Vicars and Patrons* (Borthwick Institute of Historical Research, St Anthony Hall Publications No. 9) (London, 1956), pp 17, 18. See Lyndwood, *Provinciale*, lib. iii, tit. 2, c. 1, *Ut clericalis*, gl. ad v. *beneficiati*, pp 125–126.

[58] See *Glanvill (Tractatus de legibus et consuetudinibus regni Angliae qui Glanvilla vocatur)*, ed G. D. G. Hall (London, 1965), iv, ch. 7, p 47, and xiii, ch. 19, p 161; Bracton, *De Legibus et Consuetudinibus Angliae*, ed George E. Woodbine, translated with revisions and notes by Samuel E. Thorne (Harvard University Press, Cambridge, Mass. and London, 1968–1977), f. 248b (III, 234); William Watson, *The Clergy-Man's Law: or the Complete Incumbent* (London, 1725), p 64. Patrons were called *advocati* because they were bound to defend the rights of the church: Lyndwood, *Provinciale*, lib. ii, tit. 2, c. 2, *Circumspecte*, gl. ad v. *advocatus*, p 97; Edmund Gibson, *Codex Juris Ecclesiastici Anglicani* (2nd edn) (Oxford, 1761), II, 757.

preciated. Even Bracton, writing his *De Legibus et Consuetudinibus Angliae* somewhere between about 1230 and 1250, may be heard complaining that laymen were still speaking of giving a church when what they really meant was giving an advowson.[59]

There were, of course, exceptions. Although even those parish churches founded by the Crown were generally made subject to episcopal jurisdiction, so that with respect to such churches the king retained no more than his right of patronage, certain secular collegiate foundations in the possession of the Crown managed to remain exclusively under its control, independent of any ordinary jurisdiction, and were known as royal free chapels.[60] These were privileged foundations subordinate to no other church, and which might themselves have parishes belonging to them.[61] These exempt royal free chapels and their dependent churches might be described as royal peculiars.[62]

There were also non-parochial private chapels on the king's manors or in royal castles, also often described as 'free chapels'.[63] The collegiate chapel of St George's, Windsor Castle, founded in 1348, obtained a papal grant of exemption from ordinary jurisdiction in 1351,[64] though this exemption did not extend to any of the churches appropriated to the chapel.[65] Similar 'free chapels' belonging to others, however, were not so successful in keeping their independence.[66]

The English Crown, it seems, was strong enough to resist the Pope and the Church in respect of its proprietory rights. Papal protection in the form of confirmations and licences might be sought by the Crown,[67] though frequently these fell short of actually conferring the privileges which were later asserted, particularly with respect to dependent parishes.[68] Nevertheless, the Crown continued to claim the total exemption of its free chapels and their possessions from all ordinary jurisdiction,[69] and to a significant extent continued in effect to exercise *dominium* over these foundations. Not surprisingly, the common law recognised the right of the Crown to create foun-

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[59] Bracton, *De Legibus*, f. 53 (II, 160). See also *Bracton's Note Book*, ed F. W. Maitland (London, 1887), III, 373, pl. 1418.

[60] See J. H. Denton, *English Royal Free Chapels 1100–1300* (Manchester, 1970), pp 2–3.

[61] Bracton, *De Legibus*, f. 241b (III, 215): 'capella domini regis quae nulli subiecta est ecclesiae nec ad aliquam pertinet, sed ecclesia poterit esse pertinens ad capellam talem'.

[62] John Ayliffe, *Parergon Juris Canonici Anglicani* (2nd edn) (London, 1734), p 418; Richard Burn, *Ecclesiastical Law* (9th edn) (London, 1842), III, 92.

[63] Denton, *English Royal Free Chapels*, p 9.

[64] William Dugdale, *Monasticon Anglicanum*, ed J. Caley et al (London, 1819–1830), VI, 1355–1356.

[65] The grant of exemption included only the 'capellam, collegium, canonicos, presbyteros, clericos, milites et ministros': ibid; Denton, *English Royal Free Chapels*, pp 116–117. That the peculiar character of the chapel was confined to the foundation itself is evident from the visitation of 1378: David Wilkins, *Concilia Magnae Britanniae et Hiberniae* (London, 1737), III, 132–134.

[66] A. Hamilton-Thompson, in *Visitations in the Diocese of Lincoln, 1517–1531*, I (Lincoln Record Society, vol. 33 (1940)), p xi, refers to the castle chapel of the Earl of Leicester as a 'free chapel' which was appropriated to the Abbey of St Mary in 1143.

[67] E.g. Bull of Innocent III to King John, 1215 (Wilkins, *Concilia*, I, 546); Bull of Gregory IX, 1236 (*Les Registres de Grégoire IX*, ed Lucien Auvray, Bibliothèque des Ecoles Françaises d'Athènes et de Rome (Paris, 1884–1921), no. 3133; *Calendar of Entries in the Papal Registers relating to Great Britain and Ireland: Papal Letters*, vol. I, 1198–1304, ed W. H. Bliss (London, 1893), p 153; Denton, *English Royal Free Chapels*, App iv, p 159); Bull of Innocent IV, 1245 (*Annales Monastici*, ed H. R. Luard, Rolls Series 36 (London, 1864–1869), I, 275; *Foedera, Conventiones, Litterae ...*, ed Thomas Rymer (Record Comm.) (London, 1816–1830), I, i, 261; *Regesta Pontificum Romanorum* (1198–1304), ed A. Potthast (Berlin, 1896–1908), II, 998, no. 11738.

[68] Denton, *English Royal Free Chapels*, p 95.

[69] Letter of Henry III to the prelates assembled in the Council of Oxford, 1250 (F. M. Powicke and C. R. Cheney, *Councils and Synods, with other Documents relating to the English Church*, II (Oxford, 1964), pt. i, 446–447). For later examples, see *Calendar of Close Rolls, 1256–1259* (H.M.S.O., London, 1932), p 427; *Calendar of Patent Rolls, 1258–1266* (H.M.S.O., London, 1910), p 126; Council of Lambeth, replies to the complaints of the clergy (Powicke and Cheney, *Councils*, II, pt. i, 688); *Calendar of Close Rolls, 1288–1296* (H.M.S.O., London, 1904), p 423.

dations exempt from ordinary jurisdiction,[70] so that it might visit its own free chapels to the exclusion of all others.[71]

Whatever jurisdiction the Pope might have possessed over the king's royal free chapels was annexed to the Crown by the Ecclesiastical Licences Act 1533[72] and the Supremacy of the Crown Act 1534.[73] The Crown thus came to enjoy undeniable authority over its free chapels both as patron and supreme ordinary. Peculiars, including a number of royal free chapels, remained a part of the ecclesiastical scene well into the nineteenth century,[74] but an active process of abolition was begun by the Ecclesiastical Commissioners Acts of 1836[75] and 1858.[76] By means of schemes made under these Acts, most peculiars were ultimately abolished. Today, the most important of these which continue to survive as royal peculiars exempt from any ordinary jurisdiction other than that of the Crown are St George's Chapel, Windsor, and Westminster Abbey.[77]

In some cases, however, although a full exemption from ordinary jurisdiction could not be sustained either by the Crown or its subjects, a sort of compromise seems to have been reached where the patrons managed to cling on to the right not only to nominate the incumbent, but also to admit and institute the clerk themselves into the living without having to present to the bishop.[78] Commonly described as 'frank' or 'frée' chapels in the Year Books,[79] such churches came to be known as donatives[80] to reflect this essential characteristic.[81] The patrons of these donatives were able to exercise powers with respect to the church considerably in excess of those possessed by the patron of a normal presentative advowson. For example, the patron possessed the right to visit his donative church to the exclusion of the bishop.[82] The church itself was outside the bishop's jurisdiction,[83] and the patron alone was empowered to deprive the incumbent.[84] Donatives have now ceased to exist, a process which began with the Queen Anne's Bounty Act of 1714[85] and ended with the Benefices Act 1898.[86]

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[70] Y.B. 21 Edw 3, Mich., fo. 60, pl. 7; Sir Anthony Fitzherbert, *The New Natura Brevium* (9th edn) (London, 1794), I, 42A.

[71] Y.B. 27 Edw 3, Mich., fo. 8, pl. 25, at fo. 9; Fitzherbert, I, 42A.

[72] Ecclesiastical Licences Act 1533 (25 Hen 8, c 21), s 20.

[73] Supremacy of the Crown Act 1534 (26 Hen 8, c 1).

[74] See *The Report of the Commission into Ecclesiastical Courts* (1832), p 21.

[75] Ecclesiastical Commissioners Act 1836 (6 & 7 Will 4, c 77).

[76] Ecclesiastical Commissioners Act 1858 (13 & 14 Vict, c 94), s 24.

[77] See Ecclesiastical Law Society Working Party on Peculiars, Provisional List (3 Ecc L J (1993–1995), 310).

[78] 'Et mettons que un qui est seigniour de un frée chapel, a quel il doit mesme faire collacion sans ascun fois present de son clerk ...': Y.B. 22 Hen 6, Mich., fo. 25, pl. 46, at fo. 26, per Newton CJ and Paston J. See Y.B. 8 Edw 3, Lib. Ass., fo. 18, pl. 31; *Deane & Chapter de Fernes* (1607) Davis 42 at 46.

[79] See e.g. Y.B. 8 Edw 3, Lib. Ass., fo. 18, pl. 31; Y.B. 6 Hen 7, Hill., fo. 13, p 2; and the references in note 78 above.

[80] E.g. *Fairchild v Gaire* (1605) Yelv 60, *sub nom Farchild v Gayre* (1605) Cro Jac 63; *Deane & Chapter de Fernes* (1607) Davis 42.

[81] Simon Degge, *Parson's Counsellor* (6th edn) (London, 1703), pt. i, ch. 13, p 197; Watson, *Clergy-Man's Law*, p 170; Sir Robert Phillimore, *The Ecclesiastical Law of the Church of England* (2nd edn) (London, 1895), I, 252–253.

[82] Y.B. 8 Edw 3, Lib. Ass., fo. 18, pl. 31; Y.B. 6 Hen 7, Hill., fo. 13, pl. 2 at fo. 14; Sir Robert Brooke, *La Graunde Abridgement*, (ed Richard Tottell, London, 1576), pt. i, fo. 217, no. 10, and pt. ii, fo. 141, no. 21; *Fairchild v Gaire* (1605) Yelv 60, *sub nom Farchild v Gayre* (1605) Cro Jac 63; *Allane v Exton* (1672) 1 Mod Rep 90; 'Donative', 3 Salk 140; Coke, *First Part of the Institutes*, lib. iii, cap. 11, sec. 648, fo. 344; Ayliffe, *Parergon*, p 231.

[83] *Allane v Exton* (1672) 1 Mod Rep 90; 'Donative', 3 Salk 140.

[84] *Fairchild v Gaire* (1605) Yelv 60 at 62, *sub nom Farchild v Gayre* (1605) Cro Jac 63. But the incumbent was otherwise subject to the supervision of the ecclesiastical ordinary with respect to personal offences: *Finch v Harris* (1701) 12 Mod Rep 640; *Colefatt v Newcomb* (1705) 1 Ld Raym 1205.

[85] Queen Anne's Bounty Act 1714 (1 Geo 1, St 2, c 10), s 14.

[86] Benefices Act 1898 (61 & 62 Vict, c 48), s 12.

THE FORMS OF ADVOWSON

It may therefore be readily appreciated that the advowson of a rectory was originally derived from the property which the founder once had in the church or the land on which it was built,[87] and for this reason the law of the thirteenth century generally regarded the advowson as being appendant to some manor[88] or other land,[89] in which case the advowson normally passed as incident to any grant or inheritance of that manor.[90] Of course, this might not always remain the case, for the manor might be sold and the advowson retained, or the advowson sold and the manor retained.[91] The latter was common: the right to present to a particular church might be especially desirable and had a monetary value. The effect of such a disposition was to sever the advowson from the land to which it originally attached, and it then came to be described as being 'in gross',[92] that is, something standing by itself which enjoyed an existence independent of any land holding and which was possessed by the patron personally in his or her own right.[93] There were indeed quite extensive rules of common law as to when an advowson might or might not cease to be appendant.[94]

But an advowson might also have originated out of an appropriation. The rectory of a church was often a valuable commodity inasmuch that the rector received the fruits and income from the endowments of his church. Frequently during the middle ages rectories were transferred or appropriated to monastic or other spiritual foundations, which would thereby obtain the income of the rectory for their own use and support. A vicar or deputy would be put into the benefice in order to minister to the spiritual needs of the parishioners, at first, it would seem, being drawn from the members of the religious house to which the appropriation had been made.[95] As a result, the appropriator acquired the right to present the vicar,[96] and that right also constituted an advowson. It can readily be appreciated that the effect of such an appropriation was to oust the original patron of the rectory,[97] for the rectory was then vested in perpetuity in the house or college etc, so as never to fall vacant,[98] and the right of presentation of the vicar to the living was exercised by the appropriator.[99] The potential for conflict was therefore great and, at least in theory, the process of appropriation required an agreement to have been concluded between all the inter-

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[87] Gibson, *Codex*, II, 756; Watson, *Clergy-Man's Law*, pp 64, 66, 72.

[88] F. Pollock and F. W. Maitland, *The History of English Law before the time of Edward I* (2nd edn) (reissued Cambridge, 1968), II, 136. See Coke, *First Part of the Institutes*, lib. ii, cap. 11, sec. 184, fo. 122; Watson, *Clergy-Man's Law*, pp 65, 66; *Tyrringham's Case* (1584) 4 Co Rep 36b at 37a.

[89] Henry Rolle, *Un Abridgment des plusieurs Cases et Resolutions del Common Ley* (London, 1668), I, 231, § 17.

[90] Sir Edward Coke, *Second Part of the Institutes of the Lawes of England* (ed. London, 1628), lib. iii, sec. 541, fo. 307; Gibson, *Codex*, II, 758; Watson, *Clergy-Man's Law*, p 65; William Cruise, *Digest of the Laws of England* (London, 1804–1806), III, *Advowson*, p 4, § 8. See the gloss (*Casus*) on X. 3. 38. 7, 'jus patronatus transit cum universitate nisi specialiter excipiatur': *Decretales D. Gregorii Papae IX, suae integritati una cum glossis restitutae* (ed. Lyon, 1606), II, col. 1319.

[91] Y.B. 21–22 Edw 1 (*Year Books of the Reign of King Edward the First, 21 and 22*, ed. A. J. Horwood, Rolls Series 31A (London, 1873)), p 604/5 at p 608/9; Pollock and Maitland, *History of English Law*, II, 136.

[92] Watson, *Clergy-Man's Law*, p 66; Pollock and Maitland, *History of English Law*, II, 136. See e.g. Y.B. 21–22 Edw 1 at p 609.

[93] See Coke, *First Part of the Institutes*, lib. ii, cap. 11, sec. 181, fo. 120v.

[94] See Watson, *Clergy-Man's Law*, pp 66–67, 68–71; Phillimore, *Ecclesiastical Law*, I, 264–267. These commonly arose with respect to sales of part of the land to which the advowson was appendant, or the creation of various kinds of limited or reversionary interests. E.g. Y.B. 33 Hen 6, Hill., fo. 11, pl. 17.

[95] Ayliffe, *Parergon*, p 510.

[96] Degge, *Parson's Counsellor*, pt. i, ch. 13, p 195.

[97] Sir Anthony Fitzherbert, *La Graunde Abridgement* (ed. 1516), III, fo. 55v, 5 Edw 3, *Quare impedit* 165.

[98] Rolle, *Abridgment*, II, 341, (S) § 3; Watson, *Clergy-Man's Law*, p 195.

[99] See Y.B. 17 Edw 3, Mich., fo. 51, pl. 25, per Shardelow CJ (with which the court agreed); Cottesmore J in Y.B. 11 Hen 6, Hill., fo. 18, pl. 11.

ested parties, including both the bishop[100] and the original patron of the rectory,[101] as well as the permission of the Crown by means of a royal licence.[102] The formalities required might at times be complex and somewhat opaque.

An interesting late medieval example is afforded by the appropriation in 1446 of the church of St Edward in Cambridge to Trinity Hall,[103] though the position here was slightly exceptional because of the direct interest of King Henry VI, who was wanting to erect his own college (which was to become King's College) on the nearby site, then occupied by the church and parish of St John Zachery. With the houses and the inhabitants having been removed to make way for the new college, the church of St John was to be demolished, and the parish amalgamated with St Edward's. Following negotiations involving the Chancellor of the University, it was also agreed that St Edward's should be appropriated to Trinity Hall.[104] First, the advowson of the church of St Edward was granted by letters patent of Henry VI to Trinity Hall,[105] which also included the licence to appropriate in the form required by statute.[106] The patrons of both St Edward's and St John's had been Barnwell Priory, and they had been persuaded (or coerced) by royal command to transfer their advowsons to the king[107] by the promise of tithes and an appropriation of a church to them.[108] Later in the year, once all the preliminaries had been concluded, Bishop Bourgchier of Ely executed his charter whereby the church of St Edward incorporating the former parish of St John was appropriated to Trinity Hall.[109]

Any newly created vicarage would generally be endowed out of the income of the rectory,[110] though occasionally the living might be held by a perpetual curate or a vicarage without endowment,[111] particularly when it might be served by a member of the appropriator's own house, or where the income of the rectory was not sufficient to support a vicar.

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[100] *Grendon v Bishop of Lincoln* (1576) 2 Plow 493 at 497; Rolle, *Abridgment*, I, 238, § 4; Watson, *Clergy-Man's Law*, p 190; Ayliffe, *Parergon*, p 87. Or the Crown as successor to the Pope as supreme ordinary: *Grendon v Bishop of Lincoln* at 497–498; Watson, *Clergy-Man's Law*, p 190.

[101] Fitzherbert, *La Graunde Abridgement*, III, fo. 55v, 5 Edw 3, *Quare impedit* 165; *Grendon v Bishop of Lincoln* (1576) 2 Plow 493 at 497, 498; Rolle, *Abridgment*, I, 238 § 2; Watson, *Clergy-Man's Law*, p 190; Ayliffe, *Parergon*, p 87. See Y.B. 29 Edw 3, Hill., fo. 9, pl. 3.

[102] Appropriation of Benefices Act 1391 (15 Rich 2, c 6); Appropriation of Benefices Act 1402 (4 Hen 4, c 12); Y.B. 17 Edw 3, Mich., fo. 51, pl. 25, per R. Thorpe sjt; *Grendon v Bishop of Lincoln* (1576) 2 Plow 493 at 497, 498–499; *Anon* (1617) Poph 144 at 145; *Anon* (1649) Style 156; Watson, *Clergy-Man's Law*, p 190; Ayliffe, *Parergon*, p 87.

[103] See Daphne H. Brink, *The Parish Church of St Edward King and Martyr, Cambridge, a Later Mediaeval Appropriation*, Cambridge Antiquarian Society Occasional Publications no. 3 (1992).

[104] See J. W. Clark, 'History of the Church of S John Baptist, Cambridge, commonly called S John Zachary', *Cambridge Antiquarian Communications*, Cambridge Antiquarian Society, vol. 4, 1876–1880 (Cambridge, 1881), Comm. xxvi, App A, pp 358–359; Brink, *Parish Church of St Edward*, App 1(4), pp 75–76.

[105] *Warren's Book*, ed A. W. W. Dale (Cambridge, 1911), p 59; Clark, 'History of S John Baptist', App C, p 360; Brink, *Parish Church of St Edward*, App 1(6), pp 76–77.

[106] See note 102 above.

[107] Clark, 'History of S John Baptist', App B, p 359. Doubts, however, appear to have arisen as to the validity of this transaction, so that it seems that a later confirmatory grant was required from the prior and convent, this time directly to Trinity Hall: see the bond entered into by the prior (Clark, App H, pp 365–366).

[108] See Bishop Bourgchier's commission to inquire concerning the appropriation of Kingston Church to Barnwell Priory: Brink, *Parish Church of St Edward*, App 1(11), pp 78–79.

[109] *Warren's Book*, pp 54–56; Clark, 'History of S John Baptist', App J, pp 366–369; Brink, *Parish Church of St Edward*, App 1(14), pp 80–84. I am indebted to Mrs Brink for originally bringing this history of St Edward's to my attention.

[110] See the Appropriation of Benefices Act 1391 (15 Rich 2, c 6); Appropriation of Benefices Act 1402 (4 Hen 4, c 12); *Anon* (1649) Style 156.

[111] See *Duke of Portland v Bingham* (1792) 1 Hag Con 157 at 165–166. This was the arrangement with respect to the appropriation of St Edward's, above, in which the royal licence gave express permission to depart from the requirements of the Acts cited in note 110 above. Bishop Bourgchier's charter permitted the college to appoint a stipendiary chaplain without reference to the bishop, thereby creating a kind of donative, which may have given rise to the erroneous view that St Edward's is or was a peculiar.

Of common right, therefore, such advowsons of vicarages which had resulted from an appropriation were appendant to the rectory from which they had been created,[112] though they might be severed so as to become appendant to a manor,[113] or simply become 'in gross'.[114]

At the Reformation, many of the rectories appropriated to suppressed houses were granted to laymen or to lay collegiate foundations etc (which then technically became known as *impropriate* rectories),[115] and these therefore constitute yet another source from which the right to present to a living came to be vested in lay patrons.

It may thus be appreciated that there were formerly two kinds of advowson: the advowson of a rectory, and the advowson of a vicarage derived from an appropriation. These were capable of a further sub-division, namely an advowson which was appendant and one which was in gross. The determination of the title to an advowson appendant, however, had over the years become highly intricate, especially where parts of a manor had been sold off into different ownership, and for most practical purposes the distinction had in any event become otiose. The distinction between advowsons appendant and in gross has now virtually all gone, for, by Section 32(1) and (2) of the Patronage (Benefices) Measure 1986, all advowsons which before 1 January 1989 were appendant to any land or manor were severed from the land, and any advowson appendant to a rectory, other than a rectory with cure of souls, was likewise severed from the rectory, so that they have now all become advowsons in gross belonging to the fee simple landowner, the manorial lord, or the rector, in his or her personal capacity.

Transfers of advowsons may still be made today, although the advowson cannot now be sold.[116]

ENFORCEMENT

Until comparatively recently, the actions of patrons lay exclusively in the secular courts.

The right to present to a living was easily usurped, and, as with the title to any property, disputes frequently arose as to who possessed the right of patronage. It must be borne in mind that as well as full assignments of the right to present to a living, *ad hoc* grants of the right might be made,[117] and the existent of such a limited grant might not have been readily apparent to any inquest, which would have had access only to public knowledge and the history of former presentations from which to make its determinations.[118] Nor was it sometimes easy to deduce the title to an advowson. Titles to land and other real property might be highly intricate due to the possibility of different interests or 'estates' in one piece of land co-existing at the same time. For example, a tenant in possession of land might only have a life interest in it, or a fee tail which would subsist only so long as it could be passed on directly by inheritance to lineal descendants and would end on the death of the tenant if he or she was childless. At the base of the title to every piece of land was the fee simple which would pass to an heir of whatever kind or quality so that it was virtually per-

[112] *Sherley v Underhill and Bursey* (1618) Moore KB 894; *Code v Hulmed* (1623) 2 Roll Rep 304; Rolle, *Abridgment*, I, 231, § 13, and II, 59(Z), § 4; Gibson, *Codex*, I, 719. See Y.B. 17 Edw 3, Mich., fo. 51, pl. 25; *Anon* (1576) 3 Dyer 350b.

[113] *R v Bishop of Norwich, Cole and Saker* (1615) Cro Jac 385; *Sherley v Underhill and Bursey* (1618) Moore KB 894; *Reynoldson v Blake and the Bishop of London* (1697) 1 Ld Raym 192 at 200; Degge, *Parson's Counsellor*, pt. i, ch. 13, p 195; Watson, *Clergy-Man's Law*, p 67.

[114] Watson, *Clergy-Man's Law*, pp 68–71.

[115] Ayliffe, *Parergon*, p 90; *Duke of Portland v Bingham* (1792) 1 Hag Con 157 at 162–163 and at 162n.

[116] Benefices Act 1898 (Amendment) Measure 1923 (14 & 15 Geo 5, No 1) (repealed); Patronage (Benefices) Measure 1986 (No 3), s 3(1).

[117] E.g. the grant of the right of presentation on the next avoidance.

[118] See below.

petual, but where tenants were in actual occupation by virtue of a lesser estate such as the entail, then the fee simple lay dormant, i.e. in reversion, and would revive only when the lesser estate or estates came to an end, so that it might be necessary to go back many generations to ascertain the heir then entitled to take. No wonder that landed families kept detailed family trees! It is not appropriate now to indulge in the complexities of ancient land law, but suffice it to say that title to land could at times be extremely difficult to deduce: it is this in fact which led to the great reform of land law which took place in England in 1925.[119] Title to an advowson was no exception, for a person might have the same variety of interests in an advowson as in any other real possession.[120] In addition, where an advowson was appendant to a particular manor or estate, it was subject to all the intricacies of title which might affect that land. There was, for example, the possibility that land to which an advowson was appendant might escheat to the lord from whom the land was held, or that the husband of a patron might possess the right to present during the subsistence of the marriage and even after her death as the tenant by curtesy, notwithstanding that there may be heirs.[121] So the room for error and dispute was indeed great, and over the years the advowson has been the subject of a mass of litigation, which has given rise to a consideration body of law.

OF TEMPORAL COGNISANCE

It is evident that there were significant areas of jurisdiction which, though the Church might have regarded them as being broadly spiritual in nature and therefore within the purview of the canon law, were either never accepted as such in England, or came to be removed into the ambit of temporal control and supervision. It is this uncertain area which the legal historian, Maitland, described as 'that debatable land which is neither very spiritual nor very temporal'.[122] Nor were the jurisdictional boundaries certain and constant, but shifted over time with the vagaries of practice and the relative strengths of the protagonists.

There are numerous examples in the English Church of such 'spiritual' matters being brought within the cognisance of the temporal courts, though it may be remarked that the English Church was by no means unique in this respect, and the competing claims of Church and State resulted in similar compromises of jurisdiction throughout the Western Church. For example, contrary to almost universal practice elsewhere and a decision of the Roman Rota in 1370 that the English practice was unlawful, the English temporal courts rather than the church courts exercised the jurisdiction over all civil suits involving clerics.[123] Nor would the barons at the Parliament of Merton in 1236 accept the Church's ruling[124] by which illegitimate children might be legitimated by the subsequent marriage of their parents,[125] for it may be surmised that they foresaw the uncertain effect that such recognition might have on the rights of heirs to the succession to land.[126] Statutes also sought to make detailed provisions to remedy perceived defects in matters normally associated with ecclesiastical supervision where royal or other temporal interests were involved, for

[119] Law of Property Act 1925 (15 Geo 5, c 20).
[120] Cruise, *Digest*, III, 8, § 23; Phillimore, *Ecclesiastical Law*, I, 270.
[121] Watson, *Clergy-Man's Law*, p 75.
[122] F. W. Maitland, *Roman Canon Law in the Church of England* (London, 1898), p 56.
[123] R. Helmholz, *Roman Canon Law in Reformation England* (1990), pp 10–11.
[124] See X. 4. 17. 6, addressed by Pope Alexander III to the Bishop of Exeter.
[125] Sir W. S. Holdsworth, *History of English Law* (7th edn, revised) (London, 1956–1966), II, 218: 'et omnes Comites et Barones una voce responderunt quod nolunt leges Angliae mutare quae usitatae sunt et approbatae'. See *Bracton's Note Book*, I, Introduction, pp 104–108.
[126] The concern that a determination of legitimacy by an ecclesiastical court might affect inheritance to property was evidently one of which the Papacy was aware: see X. 4. 17. 7, where Alexander III conceded in letters to the Bishops of London and Worcester that though the Church might decide questions of legitimacy, any question involving property rights was to be left to the king's courts.

example the granting of benefices to aliens,[127] the Crown's right of presentation to a benefice,[128] and appropriations.[129] There was, of course, some movement of jurisdiction the other way. By custom, the Church possessed jurisdiction over wills and probate[130] and the right to determine the validity of a marriage, even in circumstances which would impact on temporal rights, such as legitimacy and the succession to land. Similarly, the church courts enjoyed the right to hear actions of defamation.[131]

But the right of patronage, though claimed by the Church and recognised by the canon law as spiritual,[132] came to be treated by the English common law courts as a form of lay property of temporal cognisance, and the right of the king's courts to determine disputes concerning advowsons was conceded to Henry II by the English Church in the Constitutions of Clarendon in 1164.[133] Despite the condemnation of Pope Alexander III,[134] Henry's will prevailed, and by the use of prohibitions developed during the early years of the thirteenth century to prevent the church courts from entertaining any suits concerning patronage,[135] successive monarchs were able to impose the settlement on the English Church. Although the Church continued to maintain a theoretical opposition to the perceived infringement of its jurisdiction,[136] in practice it seems to have quietly acquiesced.[137] Church dignitaries appear to have been content to use the royal courts,[138] and in 1231 the Bishop of London may be seen defending himself without protest in an action of right of advowson brought in the king's court.[139] Even Archbishop Boniface appears to have accepted the jurisdiction of the royal courts in a constitution of the Council of Lambeth 1261.[140] Legislative weight was thrown behind this by the Statute of Praemunire 1393,[141] which declared that 'the cognisance of plea of the presentee whereof belongeth only to the King's court of the old right of his crown; used and approved in the time of all his progenitors Kings of England ...' and forbade any papal interference in the execution of a judgment of the royal courts concerning a right to present.[142] In the light of the origins of the advowson in the private property which a founder possessed in a church, the claim of the secular courts to this jurisdiction was perhaps not unduly surprising.[143]

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[127] Farming of Benefices for Aliens Act 1379 (3 Ric 2, c 3); Holding of Benefices by Aliens Act 1383 (7 Ric 2, c 12).

[128] King's Presentation to Benefice Act 1389 (13 Ric 2, St 1, c 1).

[129] Appropriation of Benefices Act 1391 (15 Ric 2, c 6); Appropriation of Benefices Act 1402 (4 Hen 4, c 12).

[130] Y.B. 11 Hen 7, Hill., fo. 12, pl. 1.

[131] This was recognised by the composition *Articuli Cleri* 1315 (9 Edw 2, St 1, c 4).

[132] See X. 3. 38 (*De iure patronatus*), especially c. 21.

[133] Cap. 1, Stubbs, *Select Charters* (9th edn) (Oxford, 1913), p 164.

[134] X. 2. 1. 3.

[135] See G. B. Flahiff, 'The Writ of Prohibition to Court Christian in the Thirteenth Century', Mediaeval Studies, 6 (1944), pp 261–313, at pp 274–275. There are a number of examples to be found in *Bracton's Note Book*, index, I, 187. For an interlocutory form of a writ in an action between two clerks, see *Glanvill*, iv, ch. 13, p 52.

[136] Roberti Grosseteste, *Epistolae*, ed H. R. Luard, Rolls Series 25 (London, 1861), ep. no. 72, pp 205–234 at p 228; Maitland, *Roman Canon Law*, p 64. See Athon, Constits. Othobon, c. 9, *Sacrorum canonum*, gl. ad v. *collatio*, p 96; Lyndwood, *Provinciale*, lib. v, tit. 2, c. 4, *Nulli liceat*, gl. ad v. *regia*, p 281.

[137] Flahiff, 'Writ of Prohibition', p. 275. See J. W. Gray, 'The Ius Praesentandi in England from the Constitutions of Clarendon to Bracton', English Historical Review, 67 (1952), pp 481–509, at p 487.

[138] In 1202 the Abbot of Lessay brought an action to recover an advowson from the Abbot of Peterborough: *Select Civil Pleas*, I, ed W. P. Baildon, Selden Society vol. 3 (1889), p 97, case 245.

[139] *Bracton's Note Book*, II, 427, pl. 551.

[140] Powicke and Cheney, *Councils*, II, pt. i, 674, c. 6.

[141] Statute of Praemunire 1393 (16 Ric 2, c 5).

[142] This statute amplified the Statute of Provisors 1351 (25 Edw 3, St 4) (Ruffhead edn and *Statutes at Large* 25 Edw 3, St 6) and the Statute of Praemunire 1353 (27 Edw 3, St 1, c 1).

[143] Lyndwood conceded that this jurisdiction belonged to the temporal court, but on the foot of custom: *Provinciale*, lib. v, tit. 15, c. 1, *Eternae*, gl. ad v. *jure patronatûs*, p 316.

Yet the common law clearly had some difficulty dealing with this incorporeal, invisible, intangible thing. Bracton speculates how such property could be seized by the sheriff if the tenant was in default, for, he suggests, there could be no right without a body.[144] But having rejected the argument that the manor to which the advowson adhered should be seized on the ground that the right to present belonged to the estate only through the medium of the church which received the benefit of the presentment, he is then obliged to conclude that the advowson must in some way be attached to the church to which it related, and that consequently the church itself must be seized. The need for such a tenuous argument may perhaps be indicative of a struggle to rationalise a concept which the common law was not yet fully capable of comprehending.

ACTIONS FOR RECOVERY

The earliest form of action in the royal courts for the recovery of an advowson where the ownership or right to the advowson was in dispute was the writ of right of advowson.[145] This took the same *Praecipe quod reddat* form as the writ of right to recover land,[146] of which it was a species. Like the latter, it might involve trial by battle as the mode of trial, or the defendant might elect for trial by means of the grand assize in which twelve knights would act as a jury of witnesses or recognitors.[147] This writ to test the title to an advowson could be brought at any time, particularly (and most usually) when the church was full. This would then safeguard the next presentation. Any removal of the incumbent pursuant to a judgment of the court as to the right of presentation, however, would have to be carried out by the ecclesiastical authorities subject to the constraints of the canon law and only in accordance with its rules and procedures.[148]

But in the twelfth century this manner of proceeding came to be largely replaced by a new action called the assize of darrein presentment, which lay only when the church had actually become vacant.[149]

This was one of a cluster of new associated actions for the recovery of land introduced by Henry II in the latter half of the twelfth century.[150] These actions did not attempt to establish right, but were based on the medieval concept of possession or seisin of land, and since they were therefore concerned only with external evidence, the trial might be by means of a jury of witnesses or recognitors drawn from the locality to whom factual questions might be put. Foremost of these was the assize of novel disseisin which was to revolutionise English land law. Here the plaintiff's claim was that he had been in occupation (seisin) of the land, but had recently been violently forced out of possession (disseised) by the defendant. Pending the resolution of the case, the sheriff would put the plaintiff back into possession to maintain the *status quo ante*,[151] the benefits of which must not be underestimated at a time when a plaintiff may have been wholly dependent on his land to support himself and his family: there was no social security net available then! Nor could the many formal excuses for delaying the trial (*essoins*) be raised as in the older actions, and in the closing years of the century, a power to award damages for any injury caused to the land by the disseisin

[144] Bracton, *De Legibus*, f. 378b (IV, 185).
[145] See *Glanvill*, iv, chs. 1–6, pp 45–47.
[146] *Glanvill*, i, ch. 6, p 5.
[147] *Glanvill*, ii, ch. 13, p 32; iv, ch. 6, p 47.
[148] See Gray, 'Ius Praesentandi', p 488.
[149] For the various forms of the writ, see Elsa de Haas and G. D. G. Hall, ed., *Early Registers of Writs*, Selden Society, vol. 87 (1970) (London, 1970), pp 4, 28 ('que vacat ut dicitur ...'). See also *Glanvill*, xiii, ch. 19, p 161.
[150] Known as the 'petty assizes', they were the assizes of novel disseisin, mort d'ancestor, *utrum*, and darrein presentment.
[151] For the general early form of the writ in a number of registers, see Haas and Hall, *Early Registers of Writs*, pp 2, 22, 83, 258.

came to be built into the action.[152] The essence of novel disseisin was that it could give a plaintiff a speedy remedy. Novel disseisin was therefore a much more modern streamlined form of proceeding which had many very significant advantages over the older writ of right actions, and its procedures were patently far more civilised and appropriate to the new developments in jurisprudential thought of the later twelfth and early thirteenth centuries. It is not surprising, therefore, that this action largely displaced the older *praecipe* form of action for the recovery of land.

The generally accepted view is that the ordinance introducing the new action of novel disseisin was probably first promulgated in the Council of Clarendon of 1166, the text of which is now lost.[153] But there are distinct similarities between novel disseisin and the interdict *unde vi* of the ancient civil law of Rome,[154] and interestingly this action to recover possession of land may be seen to have come into being at a time when the canonists were formulating the general principle that any man dispossessed other than by a judgment of a court should be restored.[155] It is therefore not beyond the bounds of possibility that the Roman law, either directly or indirectly, may have influenced the development of this action.[156] Whether it was hammered out and invented here as a result of 'many wakeful nights', as Bracton suggests,[157] is perhaps open to question, and in my view it seems at least possible that the writ was brought in some form by Henry II from France and adapted to English use.

Darrein presentment itself came slightly later.[158] The timing may not have been entirely coincidental, for the Third Lateran Council of 1179, chapter 17, provided that the bishop should fill the church if within three months[159] any questions of patronage had not been settled.[160] It has been suggested that it was probably modelled on the assize of mort d'ancestor of 1176.[161]

The procedures for the assize of darrein presentment therefore accord with those appropriate to this class of possessory action,[162] though to apply this action to the concept of seisin or possession cannot have been easy. There was never possession in the formal sense, but rather the exercise of the right from time to time as the church fell vacant. The action therefore sought to protect the right of the person who last presented the parson to the church, hence the name of the action 'darrein present-

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[152] Woodbine, 'The Origins of the Action of Trespass', Yale Law Journal, 33 (1923–1924), 799–816, at 807–808.

[153] Pollock and Maitland, *History of English Law*, I, 145; S. F. C. Milsom, *Historical Foundations of the Common Law* (2nd edn) (London, 1981), p 138; Donald Sutherland, *The Assize of Novel Disseisin* (Oxford, 1973), p 7; M. Cheney, 'Litigation between John Marshal and Archbishop Thomas Becket in 1164: a Pointer to the Origin of Novel Disseisin?' in *Law and Social Change in British History*, ed. J. A. Guy and H. G. Beale (London, 1984), pp 9–26, at pp 22–24.

[154] D. 43. 16. 1 (*Digest of Justinian*, ed. Theodor Mommsen, Paul Krueger and Alan Watson (Pennsylvania, 1985), IV, 582–586).

[155] *Decretum Grat.*, C. 2, q. 2; C. 3, q. 1.

[156] See Sutherland, *Novel Disseisin*, pp 22–23.

[157] Bracton, *De Legibus*, f. 164b (III, 25).

[158] Probably 1179–1180: R. C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill*, Selden Society vol. 77 (London, 1959), 333; *Glanvill*, p 160, n. 1. A very early reference may be seen in a final concord dated 1180 which recites a recognition in the king's court 'de presentatione persone que ultimo in ea obiit ...': *Cartulary of Oseney*, ed. H. G. Salter, IV, Oxford Historical Society vol. 97 (Oxford, 1934), 478, no. 439. Possibly the oldest surviving writs dated 1199 are in *Pleas before the King or his Justices 1198–1202*, I, ed. Doris M. Stenton, Selden Society vol. 67 (1948) (London, 1953), 373, no. 3497; 402, no. 3533; and 403, no. 3534.

[159] Four months in some versions.

[160] *Decrees of the Ecumenical Councils*, ed Norman P Tanner (Georgetown University Press, 1990), I, 220; X. 3. 38. 3. The canon law ultimately permitted a lay patron four months and the clerical patron six months: *Sext*, 3. 19, un; Lyndwood, *Provinciale*, lib. iii, tit. 21, c. 1, *Cum secundum*, gl. ad v. *neutri*, p 216. It is not clear how the six-month period came to be universally applied in England by the secular courts, but it seems to have been in the belief that this was the period required by the Council: Maitland, *Roman Canon Law*, 77. See Bracton, *De Legibus*, f. 241 (III, 214).

[161] Van Caenegem, *Royal Writs*, 333.

[162] See *Glanvill*, iv, ch. 1, pp 43–44; xiii, chs. 18–22, pp 160–163.

ment', or, in latin, 'de ultima presentatione', that is, concerning the last presentment. The question which was addressed to the recognitors of the assize was therefore:

> who was the patron in time of peace presented the last parson, who is now dead, to the Church of ..., which is said to be vacant, and the advowson of which the plaintiff says belongs to him?[163]

It may be appreciated that this question was very crude; perhaps too crude, for strictly speaking it did not take into account any transactions involving the advowson since the last presentation. The plaintiff (***A***) might, for example, have granted the advowson to the defendant (***B***), but the recognitors would nevertheless be obliged to answer in favour of ***A***. However, it was open to ***B*** to put at issue the true position by pleading specially by way of an *exceptio*,[164] and this form of special pleading became very common.[165]

Of course, ***B*** could always bring a writ of right of advowson to determine the question of right definitively,[166] but this would not have the effect of ousting any clerk who had already been instituted as a result of a judgment given in an action of darrein presentment.[167] But because of the protracted nature of the proceedings, the writ of right action was of little use to ***B*** where a vacancy had already occurred and an institution was imminent following a presentation by ***A*** as the person who had made the last presentation. Nor, as has already been observed, were its archaic forms of procedure likely to make it particularly attractive to litigants.

In the interim period pending a presentation, therefore, ***B***'s position was comparatively weak, for though he clearly possessed the right to present as a result of the grant, he could not claim actual seisin but was recognised as having only some sort of 'quasi-seisin',[168] and could not as a result avail himself of the assize.

For such people, another action appears to have come into existence a short time later called *quare impedit*,[169] by which ***B*** would be able to enforce the right of patronage which he had obtained from ***A***, against ***A*** or any other person, by invoking the aid of the secular court to order the bishop to admit his nominee or show cause why not. But ***B*** must act quickly, for if ***A*** or any other usurper got in first and made his presentation, so that his clerk was put into possession by institution and induction, then seisin would pass to the usurper as the person having made the last presentation, and ***B*** would have lost his right of presentation. Even a droital action would be denied him, for he could not show, as was required,[170] that he or one of his ancestors had been seised of the advowson.[171]

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[163] Bracton, *De Legibus*, f. 238 (III, 206) (There is a translation error in the Thorne edition: 'talis' must refer to the plaintiff rather than the 'parson'). This largely follows the form of the writ in *Glanvill*, xiii, ch. 19, p 161, though reference to the time of peace is there omitted, but clearly contemplated in iv, ch. 1, p 44.

[164] *Glanvill*, xiii, ch. 20, p 162.

[165] Pollock and Maitland, *History of English Law*, II, 138. It may have been because of this added complication of pleading that although novel disseisin might be determined by local justices of assize, it was required by Magna Carta that darrein presentments should be reserved for the justices of Common Pleas: Magna Carta 1217, c. 15, amending the original Magna Carta 1215, c. 18, and becoming Magna Carta 1224–1225 (9 Hen 3), c 13. The distinction was preserved until the Statute of Westminster II 1285 (13 Edw 1), c 30 (justices of nisi prius), which provided that the assize of darrein presentment and inquests of *quare impedit* were to be determined in their own county.

[166] As to the general relationship of possessory actions to those higher actions to try right, see *Ferrer's Case* (1598) 6 Co Rep 7a.

[167] *Glanvill*, xiii, ch. 20, p 161; Gibson, *Codex*, II, 784.

[168] Bracton, *De Legibus*, ff. 54, 55, 247 (II, 162, 164, III, 230).

[169] The action appears to be settled by the time of *Bracton's Note Book*, e.g. II, 28, pl. 34; 99–100, pl. 111; 148, pl. 182; 325, pl. 395; 371, pl. 474 etc. Bereford CJ tells us that 'en auncien temps il ny avoit nul brief de advowson, sinoun brief de droit, et l'assise de darrein presentment, per qui le Quare Impedit fuit ordine ou l'assise ne poet servir': Y.B. 10 Edw 2, Mich., fo. 300, *Quare Impedit*, at fo. 301. For the various forms of the writ, see Haas and Hall, *Early Registers of Writs*, pp 31, 50, 128.

[170] *Glanvill*, iv, ch. 6, p 46.

[171] Bracton, *De Legibus*, f. 54 (II, 162); arg. per Vavasour sjt, Y.B. 22 Edw 4, Pasch., fo. 8, pl. 25 at fo. 9; Pollock and Maitland, *History of English Law*, II, 139–140.

Some alleviation to the strictness of this position was given by the Statute of Westminster II in 1285[172] which allowed a patron six months after a usurpation had occurred to bring a *quare impedit*, but if he failed to do so in time, then his right was lost for ever.[173] It was not until legislation of Queen Anne's time[174] that a patron's rights were prevented from being lost in this way.

Since *quare impedit* was available whether or not the patron had made a previous presentation, whereas the writ of darrein presentment would lie only where a person or his or her ancestors had presented on the last vacancy, *quare impedit* came to be used in preference to the writ of darrein presentment for most practical purposes. Darrein presentment was finally abolished in 1833.[175]

APPEALS AGAINST A REFUSAL

As has been observed, the nature and form of the advowson has been shaped and determined by its origins. Fundamental is the right of the patron to nominate a clerk to serve in a particular living, but this is tempered by the right of the bishop to refuse such a nominee presented to him if he does not consider him a fit and proper person,[176] and it is this balance between the two rights which is an essential characteristic of the advowson.

The bishop might therefore refuse a clerk presented to him as unsuitable only for good cause, for example that the presentee is not in holy orders, is not of sufficient learning, is not of the canonical age, or is not fit in morals or behaviour to hold office.[177]

At one time, a clerk who after presentation had been refused admission and institution was always able to challenge the refusal and obtain a remedy from the bishop to compel him to do his duty by means of a suit of *duplex querela* brought in the archbishop's court.[178] The quarrel was double, because the action was against both the bishop for refusing and the other party for usurping.[179]

A new procedure, however, was introduced by the Benefices Act of 1898, which allowed an appeal by either the clerk or the patron against the refusal of the bishop to admit a presentee on the grounds of unfitness as defined in the Act.[180] As amended by the Patronage (Benefices) Measure 1986, the appeal is now heard by the archbishop of the province and the Dean of the Arches.[181] Provided that the bishop observes the correct procedures, no *duplex querela* action or proceedings in the nature of *quare impedit* are now possible for a refusal within the provisions of the

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[172] Statute of Westminster II 1285 (13 Edw 1), c 5 (recovery of advowsons).

[173] Y.B. 43 Edw 3, Pasch., fo. 14, pl. 6, per Thorp CJ, at fo. 15; arg. per Skrene sjt, Y.B. 1 Hen 4, Mich., fo. 1, pl. 3, at fo. 2; *Read and Redman's Case* (1612) 10 Co Rep 134a at 134b.

[174] Advowsons Act 1708 (7 Anne, c 18).

[175] Real Property Limitation Act 1833 (3 & 4 Will 4, c 27).

[176] *Bishop of Exeter v Marshall* (1868) LR 3 HL 17.

[177] 'First, concerning the person, as bastardy, villenage, outlawry, excommunication, a lay-man, under age, and the like: Secondly, concerning his conversation, as if he be *criminous*, etc. Thirdly, concerning his inability to discharge his pastorall duty, as if he be unlearned, and not able to feed his flocke with spirituall food, etc.': Sir Edward Coke, *Second Part of the Institutes of the Lawes of England* (ed. London, 1642), ch. 13, fo. 632. See *Bishop of Exeter v Marshall* (1868) LR 3 HL 17 at 39, per Willes J. This is not an exhaustive list: *Heywood v Bishop of Manchester* (1884) 12 QBD 404 at 418. Further grounds for refusal were added by the Benefices Act 1898 (61 & 62 Vict, c 48), s 2(1), and the Benefices Measure 1972 (No 3), s 1(1). See the Revised Canons Ecclesiastical, canon C 10, paras 2A, 3. Where the refusal is on the ground of lack of orthodoxy, learning or moral unfitness, the bishop must state in what respect the person presented is not *idoneus* with sufficient particularity for a court to judge whether his objection is valid: *Specot's Case* (1590) 5 Co Rep 57a; *Bishop of Exeter v Marshall* (1868) LR 3 HL 17; *Willis v Bishop of Oxford* (1877) 2 PD 192.

[178] Watson, *Clergy-Man's Law*, p 230.

[179] The basis of the *duplex querela* was a complaint by a clerk that the ordinary had delayed giving justice, which lay both against the judge and him at whose instigation justice was delayed: John Rastell, *Termes de la Ley* (ed. London, 1721), p 278.

[180] Benefices Act 1898 (61 & 62 Vict, c 48), s 3(1).

[181] Benefices Act 1898, s 3(1) (amended by the Patronage (Benefices) Measure 1986 (No 3), s 18(1)).

1898 Act.[182] But the Act does not extend to a refusal to institute or admit on the ground of unfitness in respect of doctrine or ritual, nor does the Act cover actions where the title to the right of patronage is in dispute, and in those cases the *duplex querela* and the action in the nature of *quare impedit* still survive, the former in the Court of Ecclesiastical Causes Reserved,[183] and the latter in the Chancery Division of the High Court. It is described as being 'in the nature of' *quare impedit*, because all the old writs have now been swept away, and the former writ of *quare impedit* has now been replaced by an ordinary writ of summons under the Rules of the Supreme Court.[184] Such procedures are, however, now very infrequent, and the existence of a definitive register of patrons should largely obviate disputes as to title in the future.

THE *JURE PATRONATUS*

The bishop, however, might be faced not with an unsuitable clerk but with two competing patrons each purporting to present their clerk to him for admission. What was he to do? He could not admit one clerk, for he might admit the wrong one and find himself to be a disturber.[185] In these circumstances the church was said to be litigious,[186] and in order to safeguard himself, the bishop might award a *jure patronatus* on his own initiative[187] or on the prayer of one or both of the parties,[188] to make inquiries and determine the right of presentation.[189] Such an inquest was very ancient in origin and form.

At one time it appears to have been the practice for such an inquest to have been undertaken as a matter of course as a preliminary to every institution,[190] and episcopal registers of the thirteenth century abound with such inquests. Whenever a presentation was made, an inquest of the clergy of the deanery would be held to establish that the benefice was indeed vacant, that the person who had made the presentation of the next incumbent was entitled so to do, and that the clerk presented was a fit and proper person.[191] Since one of the dangers which the inquest sought to avoid was the fraudulent introduction of new incumbents to benefices which were still occupied, Archbishop Pecham decreed that such inquests were always to be held publicly in open chapter.[192]

But by the early years of the fourteenth century special juries of recognitors, drawn from both the local clergy and laity, were being employed to answer as to their

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[182] Benefices Act 1898, s 3(5).
[183] Ecclesiastical Jurisdiction Measure 1963 (No 1), s 10(1)(b).
[184] RSC Ord 6, r 2.
[185] *Elvis v Archbishop of York, Taylor and Bishop* (1619) Hob 315 at 317; Degge, *Parson's Counsellor*, pt. i, ch. 3, p 14.
[186] Rolle, *Abridgment*, II, 384 (P) § 1; Degge, *Parson's Counsellor*, pt. i, ch. 3, p 11; Watson, *Clergy-Man's Law*, p 227.
[187] 'Mes nienobstant jeo entende que l'evesque doit faire cest inquest a son peril': Y.B. 34 Hen 6, Mich., fo. 11, pl. 22, per Moyle J.
[188] Y.B. 35 Hen 6, Mich., fo. 18, pl. 27, per Prysot CJ; Y.B. 8 Edw 4, Hill., fo. 24, pl. 6; Watson, *Clergy-Man's Law*, p 111. Degge suggests that this is the accepted practice and that the better view is that the bishop is not bound to award a *jure patronatus* at his own cost and risk: *Parson's Counsellor*, pt. i, ch. 3, p 12. See Brooke, *La Graunde Abridgement*, 'Costes', pt. i, fo. 186, § 2.
[189] Watson, *Clergy-Man's Law*, pp 111, 227. See Newton CJ in Y.B. 22 Hen 6, Mich., fo. 28, p 48, at fo. 29.
[190] Gibson, *Codex*, II, 778.
[191] Lyndwood, *Provinciale*, lib. iii, tit. 21, c. 3, *Per nostram*, gl. ad v. *inquisitionem*, p 217. For an example of a standard form of articles of inquiry, see *Register of John de Halton, Bishop of Carlisle, 1292–1324*, ed. W. N. Thompson (with introduction by T. F. Tout), Canterbury and York Society, vol. 12 (1913), I, f. 1v, pp 4–5, substantially repeated at ff. 29–29v, 39v, 41, 42v, pp 162–163, 221, 227, 233. See also e.g. *Newington Longville Charters*, ed. H. E. Salter, Oxford Record Society, vol. 3 (1921), pp 87–88, no. 114. Gray, '*Ius Praesentandi*', gives some early fourteenth-century forms in an appendix, pp 508–509. Although this was the usual form, the inquiry concerning idoneity might be held separately. The inquest *de iure patronatus* had to be held in the church concerned: Gray, p 492, n. 6.
[192] Council of Lambeth, 1281, c. 14; Powicke and Cheney, *Councils*, II, pt. ii, 909–910.

knowledge of the situation of the church and the right of presentation.[193] Eventually it came to be established that this jury was to comprise at least six clerks and six laity,[194] and these were summoned to appear by those commissioned by the bishop to conduct the inquiry. Attendance, whether of the clergy or the laity, might, it seems, be enforced by means of ecclesiastical censures.[195]

Pending the outcome of the inquiry, the bishop might suspend admitting either clerk.[196] The bishop was then safe to proceed to admit and institute the clerk in whose favour the inquest found, and could not be adjudged to be a disturber even if the patron against whom the verdict was found later recovered his right in a *quare impedit* or any other action.[197]

A *jure patronatus* might also be awarded when the church was not litigious if the bishop was unsure of the patron's title.[198] Indeed it would seem that the bishop might cause inquiries to be made of every presentation to him by means of a *jure patronatus*.[199]

But this proceeding on a *jure patronatus* was not capable of determining the title to the advowson.[200] It might protect the bishop who followed the verdict of the inquest from proceedings as a disturber, and it gave a clerk refused admission an immediate remedy in the spiritual courts, but it could not determine the question of title as between competing patrons.[201] Nor could it oust any clerk who had been inducted into the church as the result of the exercise of a pretended patronage against the right of the true patron.

If a bishop has a doubt as to the title of a patron claiming to present, or if the church is litigious, the bishop or one or more of the parties may still institute a process of *jure patronatus*, now conducted in the consistory court,[202] but this too has been rare in recent years and is likely to become virtually obsolete in the light of the new system of registration.

LEGISLATION

As we have seen therefore, much of the law of advowsons is now enshrined in legislation, and this has been an ongoing process over many years.

One abuse which attracted the attention of the legislature in Queen Anne's reign was the practice of clergy purchasing the next presentation in order to present themselves to the living. Not a bad idea if you wanted a lucrative preferment, but of course it smacked of simony, and the statute against simony in 1713[203] declared this to be

[193] This transitional stage in the development of the inquest may be seen in the Register of John de Sandale, dated 1314, where the inquiry was made 'per viros fidedignos, clericos et laicos': *The Registers of John de Sandale and Rigaud de Asserio, Bishops of Winchester, 1316–1323*, ed. F. J. Baigent, Hampshire Record Society (volume for 1893) (London, 1897), ff. 43, 43v, p 143. Similarly, in the *Registers of Roger Martival, Bishop of Salisbury, 1315–1330*, II, ed. C. R. Elerington, Canterbury and York Society, vol. 57 (Oxford, 1963), fo. 26, p 105, the mandate is to cite a number of inhabitants from three local villages who were 'viros fidedignos libere condicionis' as well as the incumbents of six neighbouring churches.

[194] Francis Clarke, *Praxis* (2nd edn) (London, 1684), tit. xcviii, pp 129–130; Gibson, *Codex*, II, 779; Watson, *Clergy-Man's Law*, p 236.

[195] See Paston J in Y.B. 22 Hen 6, Mich., fo. 28, pl. 48, at fo. 29.

[196] *Brickhead v Archbishop of York* (1617) Hob 197 at 201. See Council of Oxford, 1222, c. 10, *Cum secundum apostolum*: Powicke and Cheney, *Councils*, II, pt. i, 109.

[197] Y.B. 34 Hen 6, Mich., fo. 11, pl. 22; *Gerrard's Case* (1584), 2 Leon 168; *Elvis v Archbishop of York, Taylor and Bishop* (1619) Hob 315 at 317–318; Degge, *Parson's Counsellor*, pt. i, ch. 3, p 18; Watson, *Clergy-Man's Law*, p 111.

[198] *Elvis v Archbishop of York, Taylor and Bishop* (1619) Hob 315 at 318; Watson, *Clergy-Man's Law*, p 236.

[199] Watson, *Clergy-Man's Law*, p 236.

[200] Degge, *Parson's Counsellor*, pt. i, ch. 3, p 12.

[201] Degge, *Parson's Counsellor*, pt. i, ch. 3, p 12. See Y.B. 34 Hen 6, Pasch., fo. 38, pl. 9, particularly the argument of Littleton sjt at fo. 38 and Prysot CJ at fo. 40. Nevertheless, this would be strong evidence in a *quare impedit*, and would also have the advantage of putting the successful party into possession: per Littleton sjt.

[202] Ecclesiastical Jurisdiction Measure 1963 (No 1), s 6(1)(c).

[203] Simony Act 1713 (13 Anne, c 11).

a simoniacal contract, with the consequence that all that followed from it, including admission, institution, etc would be rendered void.

The nineteenth century saw a considerable restructuring of advowsons. With the changes in population and the creation of new dioceses, an attempt was made by a number of Acts of Parliament to rationalise the possession and distribution of advowsons by means of exchanges.[204] Schemes were drawn up by the Ecclesiastical Commissioners under the legislation to give effect to this. Particular attention was to be given to ensure the better provision of clergy in those populous parishes which were often under-endowed.[205]

As new parishes and districts were being created, so provision was made in the numerous Church Buildings Acts[206] and the New Parishes Acts[207] for the patronage of these new churches, chapels and benefices, and to deal with existing rights of patronage.

This process has continued throughout this century. After 1943, all new parishes and districts were formed in accordance with the New Parishes Measure 1943,[208] and common rules were established for the surrender, exercise or transfer of existing rights of patrons, and the patronage of a new church. The post-war period witnessed a further decline in the incomes of most benefices, and the shortage of clergy and lack of funds made further reorganisation of parishes necessary, including the need to keep some unfilled when they fell vacant. As a result, yet more limitations were placed on the rights of patronage. With respect to new parishes, the Pastoral Measure of 1968[209] provided that whenever new parishes were to be formed by means of pastoral schemes under the Measure, the scheme might make provision for vesting the patronage in a patron and the manner in which the rights of patronage were to be exercised.[210] In the absence of any special provision in the scheme, the diocesan board of patronage was to be the patron.[211]

The position today has been considerably modified by the Patronage (Benefices) Measure 1986[212] which has considerably restricted the powers of patrons. It introduced a number of significant changes into the law and practice of patronage, of which three are of most importance. First, a new system of registration of patrons was established, and this register is conclusive, so that, except where otherwise provided by the Measure, only a registered patron may exercise any of the functions of the patron of a benefice.[213] Secondly, the right of presentation may be exercised only by a person who is an actual communicant of the Church of England or of a Church in communion with it.[214] Lastly, long and somewhat involved preliminary consultations are now required, including if requested a joint meeting of the parochial church council with the bishop and the patron,[215] and the approval of the patron's choice is required from both the bishop and the parish representatives.[216] The bishop it seems

[204] Ecclesiastical Commissioners Act 1836 (6 & 7 Will 4, c 77); Ecclesiastical Commissioners (Exchange of Patronage) Act 1853 (16 & 17 Vict, c 50).

[205] Ecclesiastical Commissioners Act 1840 (3 & 4 Vict, c 113), s 73; Ecclesiastical Commissioners Act 1841 (4 & 5 Vict, c 39), s 22.

[206] These began with the Church Building Act 1818 (5 Geo 3, c 45) and continued until the New Parishes Acts and Church Building Acts Amendment Act 1884 (47 & 48 Vict, c 65). The Church Building Acts 1818 to 1884 were listed in the Schedule to the 1884 Act.

[207] These began with the New Parishes Act 1843 (6 & 7 Vict, c 37) and continued until the New Parishes Acts and Church Building Acts Amendment Act 1884 (47 & 48 Vict, c 65). The New Parishes Acts 1843 to 1884 are listed in the Short Titles Act 1896 (59 & 60 Vict, c 14), Sch 2.

[208] New Parishes Measure 1943 (6 & 7 Geo 6, No 1).

[209] Pastoral Measure 1968 (No 1).

[210] Ibid, s 32(2) (consolidated in the Pastoral Measure 1983 (No.1), s 32(2)).

[211] Pastoral Measure 1968, s 32(3) (consolidated in the Pastoral Measure 1983, s 32(3)).

[212] Patronage (Benefices) Measure 1986 (No. 3). It came into force on 1 January 1989.

[213] Ibid, s 1(1), (2).

[214] Ibid, s 8.

[215] Ibid, s 12.

[216] Ibid, s 13.

therefore has two bites at this cherry, though it would appear strange indeed if the bishop having approved a nomination for presentation to him should then refuse to institute or admit the presentee to the benefice!

We have therefore come a long way from the days of absolute ownership of churches. Yet the essential characteristic of the right of patronage has changed little since the twelfth century, and lying not far below the surface is the secular influence of the common law over many generations, which to a very considerable extent has shaped the nature of that very peculiar property which we call an advowson.