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978-1-108-05168-2 - De Legibus et Consuetudinibus Angliae: Libri Quinque in Varios Tractatus
Distincti: Volume 4

Edited by Travers Twiss

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De Legibus et Consuetudinibus Angliae

The thirteenth-century Latin legal treatise best known as *Bracton* is now thought to be the work of several hands, and Henry de Bracton (d.1268) to have been only the last of these. Work began on it in the 1230s and largely ceased in the early 1250s, but the treatise – an ambitious survey of English law – was never finished. Between 1878 and 1883, the scholar and jurist Sir Travers Twiss (1809–97) edited and published this work in six volumes for the Rolls Series. His text was mainly based on the first printed edition of 1569. Although he provided the first English translation of *Bracton*, Twiss's work has been criticised and since superseded. Volume 4 contains the second part of Book 4. It covers the assizes of darrein presentment, mort d'ancestor and utrum, and related actions and litigation about dower.

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De Legibus et Consuetudinibus Angliae

Libri Quinque in Varios Tractatus Distincti

VOLUME 4

HENRY DE BRACON
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RERUM BRITANNICARUM MEDII ÆVI
SCRIPTORES,

OR

CHRONICLES AND MEMORIALS OF GREAT BRITAIN
AND IRELAND

DURING

THE MIDDLE AGES.

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THE CHRONICLES AND MEMORIALS
OF
GREAT BRITAIN AND IRELAND
DURING THE MIDDLE AGES.

PUBLISHED BY THE AUTHORITY OF HER MAJESTY'S TREASURY, UNDER
THE DIRECTION OF THE MASTER OF THE ROLLS.

ON the 26th of January 1857, the Master of the Rolls submitted to the Treasury a proposal for the publication of materials for the History of this Country from the Invasion of the Romans to the reign of Henry VIII.

The Master of the Rolls suggested that these materials should be selected for publication under competent editors without reference to periodical or chronological arrangement, without mutilation or abridgment, preference being given, in the first instance, to such materials as were most scarce and valuable.

He proposed that each chronicle or historical document to be edited should be treated in the same way as if the editor were engaged on an *Editio Princeps*; and for this purpose the most correct text should be formed from an accurate collation of the best MSS.

To render the work more generally useful the Master of the Rolls suggested that the editor should give an account of the MSS. employed by him, of their age and their peculiarities; that he should add to the work a brief account of the life and times of the author, and any remarks necessary to explain the chronology; but no other note or comment was to be allowed, except what might be necessary to establish the correctness of the text.

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The works to be published in octavo, separately, as they were finished; the whole responsibility of the task resting upon the editors, who were to be chosen by the Master of the Rolls with the sanction of the Treasury.

The Lords of Her Majesty's Treasury, after a careful consideration of the subject, expressed their opinion in a Treasury Minute, dated February 9, 1857, that the plan recommended by the Master of the Rolls "was well calculated for the accomplishment of this important national object, in an effectual and satisfactory manner, within a reasonable time, and provided proper attention be paid to economy, in making the detailed arrangements, without unnecessary expense."

They expressed their approbation of the proposal that each Chronicle and historical document should be edited in such a manner as to represent with all possible correctness the text of each writer, derived from a collation of the best MSS., and that no notes should be added, except such as were illustrative of the various readings. They suggested, however, that the preface to each work should contain, in addition to the particulars proposed by the Master of the Rolls, a biographical account of the author, so far as authentic materials existed for that purpose, and an estimate of his historical credibility and value.

Rolls House,
December 1857.

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HENRICI DE BRACTON
DE
LEGIBUS ET CONSUEUDINIBUS
ANGLIÆ.
LIBRI QUINQUE
IN VARIOS TRACTATUS DISTINCTI.
AD DIVERSORUM ET VETUSTISSIMORUM CODICUM
COLLATIONEM TYPIS VULGATI.
EDITED
BY
SIR TRAVERS TWISS, Q.C., D.C.L.

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## INTRODUCTION.

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THE present volume commences with the Assise of Last Presentation, which forms Bracton's Second Treatise on Possessory Actions. The subject of this assise is the possession of the right of presenting a clerk to a vacant church, and as this right of presentation was originally appurtenant to the possession of a manor, or of a tenement forming part of a manor, within which the church was situated, the discussion of the mode of recovering this right, as an appurtenance of a tenement, follows in natural order the Assise of Novel Disseysine, by which possession might be recovered of the tenement itself. In many cases indeed an assise of novel disseysine might enure to the simultaneous recovery of an advowson as an appurtenance of the tenement recovered by the assise, but in some cases the right of presenting to a church had become severed from the manor or other tenement, to which it was originally appurtenant, and thus there might be occasions for an independent proceeding to recover the right of presenting to a church, irrespective of any right to the manor itself, within which the church was locally situated. Further the right of presenting to a church might be an adverse right in regard to the feoffee of the manor within which the church was situated, who might have succeeded by right of inheritance to a manor of which his ancestor had accepted the donation without its appurtenances, or of which his ancestor had accepted the donation with its appurtenances from a feoffee, who was in seysine of the manor, but from the circumstance that he had never exercised the right of presentation to the church could not transfer

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the advowson with the manor. How this result was brought about may require a few words of explanation. An advowson of a church was an incorporeal thing, and in its early juridical conception was a right appurtenant to a corporeal thing. It was accordingly capable of being transferred with a corporeal thing by a fiction of law, but the transferee was held not to be in true possession of the incorporeal right until he had exercised it. When he had exercised the right he was held to be in true seysine of it, so as to be capable of transferring it to a third person, but he could not legally transfer the incorporeal right before he had enjoyed it. Accordingly if a person in true seysine of a manor gave it with its appurtenances to another person, and amongst those appurtenances was the advowson of a church, if the donor transferred the manor with its appurtenances to a third person before he had enjoyed the right of presenting to the church, the advowson did not pass to the third person with the manor, but fell back as it were to the original donor of the manor, whose seysine of the advowson had not been effectively divested by the exercise of the right of presenting to the church on the part of his donee, in other words the original feoffee of the manor continued to be the advocate of the church, although he had given away the manor.

The juridical character of the right of advowson, as an incorporeal thing, has been discussed by anticipation very fully by Bracton in his Treatise on Acquiring the Dominion of Things (Book II., Ch. XXIII.), and it is evident from the law cases cited by him in that chapter (Vol. I., p. 433), that the law was well established in the reign of Henry III., that the donee of a manor with its appurtenances could not assign the advowson of a church appurtenant to the manor to a third party, before he had exercised the right of presenting to the church itself. How momentous this principle was in extricating the endowments of the manorial churches from the coils

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of feudalism, has not been, I am disposed to think, sufficiently appreciated by writers on the subject of the Right of Advowson. On the other hand the law seems to have been in Bracton's time not quite settled as to the power of the original donor in such a case, after he had resumed the enjoyment of his right of presentation, to give away the advowson by itself without any corporeal thing to a fourth party; but Bracton was himself in favour of the legal power of such a donor to transfer the right of advowson by itself after the likeness of a servitude, and he observes, in support of his view, that the right of presentation might adhere to the church itself, as being a structure of wood and stone, more especially as the right of presenting to the church was termed the advowson of the church.

It may be convenient for the purposes of a more clear understanding of the intricacies of the law touching advowsons to investigate the origin of the office of "Advocatus Ecclesiæ," and thereby to appreciate the meaning of its correlative term "the advocaey or the advowson of a church."

The office of "Advocatus Ecclesiæ" may be traced back to the fifth century after Christ. Van Espen, no mean authority in matters of ecclesiastical law, refers it to a Council of Carthage in the sixth century, but Muratori, whose authority in questions of antiquarian research is perhaps unrivalled, assigns it with more reason to an earlier council of the Church, namely to the second Council of Milevia in Africa, which was convoked to condemn the teaching of Pelagius and of Celestinus under the Pontificate of Innocent I. (A.D. CCCCXVI.) By the sixteenth article of the canons of this latter council, which are printed in the fourth volume of Mansi's Great Collection of Councils of the Church (Florentiæ, 1750-98), it was resolved that the most glorious Emperors (Honorius and Marcianus) should be requested to direct their judges to assign scholastic de-

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fenders (*defensores scholasticos*) to conduct ecclesiastical causes in the Imperial courts, and to defend the churches whensoever they should have need of them. It would appear that by degrees every church of importance came to have its scholastic defender or advocate, who combined the functions of judge for the people with those of legal adviser to the patron of the church, for it had become the established law of the Christian world in the sixth century that the founder of a new church and his heirs should have the patronage of the church, in other words, should have the right of presenting to the bishop a person for his approval to be ordained by him to serve the church. By-and-by the practice grew up that the heir of the founder should not present a person to the bishop for ordination without previous consultation with the advocate of the church, who was appointed by the Emperor in some cases, but in the majority of cases was nominated by the bishop, and in course of time as the kindred of the founders died off, the advocates of the churches came to be the persons whose recommendation of a clerk to fill a vacancy was accepted by the bishops. After the break up of the Western Empire, when the reign of law in Western Europe had become interrupted, bishops came to nominate, and churches came to elect as advocates, men who could protect their clients with the sword in the place of the tongue or the pen, and thus we find in the days of Charlemagne distinguished warriors and not men of the robe filling the office of advocate to the great churches, and the *advocatus ecclesie* is repeatedly mentioned in the Salic laws as well as in the capitularies of the kings of the Franks, who themselves appointed advocates for the most famous churches. England was no exception to this practice, of which we have a signal example, which has been handed down to us in a very curious history of the foundation of the famous Benedictine Abbey of Ramsey; in Huntingdonshire. This abbey was founded in the

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reign of King Edgar, by Aelwin, the Aelderman or Earl of the East Anglians, and in the *Historia Ramesiensis*, of which a MS. was preserved in the Royal Exchequer at Westminster, the text of which has been published by Gale, in his Collection of Early British Histories (fol. Oxon, 1691). Aelwin is styled by the writer, who was evidently a monk of the abbey, *Advocatus noster*. Further Aelwin's functions of advocate are well described by himself in a passage, in which he is represented as protesting against the monks themselves appearing before a secular tribunal, and in which he asserts that he, as their advocate, was in duty bound to defend them and to be their surety in any cause, in which an appearance on their behalf was required by any lay court. Further the same historian in reciting the various endowments conferred upon the abbey, states that a certain matron, Abfara by name, gave to St. Benedict of Ramsey the land of Halliwell and the Church of Ellesworth, of which she was the advocate (*cujus erat advocata*), with a certain portion of the manor of Ellesworth. The historian of this abbey thus supplies us not only with an instance in Saxon times of a great abbey having its advocate, but also with an instance of the owner of a manor being the advocate of a church appurtenant to the manor, and as such entitled to give the church with a portion of the manor to a religious house. We have thus evidence, that the patronage of parish churches was organised in England in Saxon times upon the same principle, which was recognised both in France and in Italy, for the *advocatus ecclesiae* finds a place in the Longobardic laws equally as in the capitularies of the kings of the Franks. Further it was a provision of the laws of Egbert, that no presbyter should be appointed to a church without the authority or consent of the bishop, so that there can be little doubt that Sir William Blackstone was in error in suggesting that before the Conquest all the manorial churches in England were donatives, unless he means

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that the formalities of institution and induction, as regulated in Archbishop Becket's time, were novel.

Lord Coke, in his Commentary on Littleton, takes a much sounder view, when he observes that the word "advocatus," as applied to a church, was of great antiquity, although he did not know where to search for its origin, and he cites a dictum of Sir William Herle in 7 Edw. III., that at that time a man hardly knew what an advowson was, and that, when a man intended to grant the advowson of a church, he would in terms grant the church itself. Such a state of ignorance on the part of the laity in the reign of Edward III. need not be surprising, for Bracton himself speaks of the simplicity of laymen in his time, who when they meant to present to a vacant church gave the church in terms to the presentee (fol. 53 b.), whereas the bishop in fact gave the church, when he instituted the advocate's presentee.

Sir William Blackstone's error in suggesting that the manorial churches in England were all donatives before the Conquest has arisen from his not having sufficiently appreciated the great change in land tenure, which ensued in England after the Conquest, for church lands were infeudated equally with the lands of the laity. It is not too much to say that the church in England was feudalised by William the Norman. There can be no doubt that before the Conquest church lands were all allodial, and that when William the Norman divided the lands of England into a certain number of knights' fees, the estates of the bishops and of the abbeys escaped being carved out into knights' fees by the owners consenting to find so many knights to answer for the military service due from their lands. With regard to the larger manors they were converted into baronies, whilst the owners of the smaller manors ceded their churches with their lands to some powerful lord, and received them back as *beneficia*. The great lords on the other hand dealt with the churches appurtenant to the lands granted

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to them by the Conqueror upon the same principle which they applied to the lands themselves, and granted them freely to clerks of their own choice without troubling themselves to present their clerks to any bishop for his approval. Still further in many cases they kept in their own hands the endowments of the churches, and allowed the service of the church to be altogether neglected. Hence the general condition of the manorial churches when Henry I. came to the throne was that of free donatives, and there is no chapter of English church history which deserves more to be written afresh, than that which would narrate the various steps by which the manorial churches were reconverted from the feudal condition of donatives to that of benefices presentative. Perhaps I should add that I use the term manorial churches here to denote the churches, of which the advowsons were appurtenant to manors, and which were not appropriated to abbeys or cathedrals. The term "parochial churches" might be ambiguous, as, although the manorial churches were also parish churches, many parish churches were appropriated to corporate bodies, and have not recovered even in the present day the *status* of benefices presentative.

The first stage of the arduous process of extricating the church from the coils of feudalism was initiated by Archbishop Anselm in his dispute with Henry I. on the subject of investitures, in which the sagacious mind of the king struck out a line of compromise, and, as Canon Stubbs has justly observed, anticipated by 14 years the principle, upon which the Concordat of Worms was framed between the Pope and the Emperor. The compromise of investitures, as it has been termed, was accomplished two years before the death of the archbishop. The primacy of Rudolph, his successor, seems to have passed away without any effort on his part to advance the cause of ecclesiastical reform, but Archbishop Corbel, who succeeded to the Metropolitan See

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of Canterbury in 1123, convoked a council of bishops at London in 1126, in which it was resolved that the clergy who had churches or benefices should be deprived of them, if they refused to be ordained (though their bishops invited them to it) that they might live more at liberty. It is a fair presumption from this canon, Johnson's Canons, Part II., London, 1720, that the lords of manors were at that time in the habit of giving their churches to clerks in minor orders, without any reference to the bishop, and this inference is confirmed by another canon of the same council, which ordained that no monk or clerk should accept a church, tithe, or ecclesiastical benefice at the hand of a layman without the bishop's consent, and that every such donation should be null, and the offender should be liable to canonical punishment. King Henry I. is said to have assented to all the decrees of this council, which had also the countenance of the Papal Legate. Further we find at the commencement of Stephen's reign among the canons of a Legatine Council held at Westminster in 1138, a canon which ordained that "no one should accept a church or benefice from the hands of a layman," which is evidently to be interpreted as meaning, that a clerk should not accept an ecclesiastical benefice as a donative from a lay hand. It cannot be gainsayed that the progress of ecclesiastical reform had been hitherto in a safe direction, and it is probable that the wise policy of Henry I. was mainly influenced by Bishop Roger of Salisbury, who filled the office of Justiciar of England from 1107 to 1139.

It is not too much to say, that England is more indebted to this famous prelate for the organisation of her judicial system, the main features of which have been preserved to the present day, than to any of the great justiciaries who succeeded him. He created, as it were, the King's Court of Exchequer, and he trained up a body of men distinct from the Norman nobles, who furnished sheriffs to the counties, barons to the Exchequer,

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and justiciaries to the Curia Regis. The capital blunder of king Stephen's reign was his arrest of Bishop Roger, and of his son Nigel, Bishop of Ely, whose son was subsequently Bishop of London, and wrote the *Dialogus de Scaccario*. The effect of this act of short sighted policy was to alienate from the king the whole body of the clergy, who resented the injury done to the bishops, whilst the entire administrative system of the country came to a dead lock. Their arrest, which was followed by the arrest of Bishop Roger's son, also named Roger le Poor, who was the king's chancellor, was the signal for a civil war, which lasted more or less for 14 years, a period of feudal anarchy. Archbishop Theobald of Canterbury held to the Empress Matilda during this troubled period, but his influence over the clergy was, for some time, neutralised by Bishop Henry of Winchester, who stood by the king, and who had obtained the commission of legate from Rome in 1139. His legatine authority, however, terminated with the death of Pope Innocent I. in 1143, but although the two next following successors of Innocent I, were opposed to King Stephen, the office of papal legate was not conferred on Archbishop Theobald before 1150. The bishops of England at last, under the influence of Archbishop Theobald, resumed their unity of action, and they refused their assent to the proposal of King Stephen that his son Eustace should be associated with him in the kingdom. The embers of civil war were soon afterwards fanned once more into a flame by the arrival in England of Henry of Anjou, the son of the Empress Matilda and the nephew of Henry I. in the spring of 1153, but the joint mediation of Archbishop Theobald and Bishop Henry of Winchester was ultimately successful in re-establishing peace. Under the treaty of Wallingford Henry of Anjou was recognised as heir to the kingdom of England. King Stephen's death in the next following year put an end to a reign, which had brought in its train great suffering to the

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people of England, but the anarchy of King Stephen's reign had one good effect; it undermined the foundations of feudalism in England, and it rendered possible the realisation of great legal reforms in the reign of Henry II.

It would appear from a Papal letter addressed from Rome by Alexander III. to the Archbishop of Canterbury and his suffragans, that the practice was still prevalent in the early years of the reign of Henry II. for clerks to accept benefices without requesting the consent of the ordinary. The archbishop according to this papal letter, which is preserved in the Decretals of Gregory IX., Lib. VII., De Institutionibus, had excommunicated all such clerks, and the Pope thought it right to confirm the act of the archbishop, and to forbid the English bishops to absolve any such excommunicated clerks before they had made due satisfaction. How the necessity of the bishop's institution came to be recognised by the king's justiciaries as a condition *sine quâ non* for a clerk to benefit by his presentation to a church does not, as far as I am aware, appear from any canons or constitutions of the reign of Henry II., but the fact is matter of inference from the Constitutions of Clarendon A.D. 1164, by the first article of which it was resolved, that if any controversy should arise about the advocacy and presentation of churches between laymen, or between laymen and clerks, or between clerks, it should be treated of and determined in the court of the king. It was to give effect to this constitution that the assise "De Advocationibus," to which Glanville refers in his fourth book, was drawn up and published by King Henry II. This assise deserves to be carefully studied, for it imposed upon a party claiming the patronage of a church the necessity of showing that either he himself had previously presented a clerk to the church, or that some ancestor of his had presented to the church in the reign of Henry I. or since the coronation of Henry II. In fact, few persons reading Glan-

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ville's chapter on Advowsons of Churches would suppose that the assise "De Advocationibus Ecclesiarum" had been introduced with the object of enforcing indirectly upon the patrons of churches the duty of presenting their clerks to a bishop, inasmuch as it constituted the last presentation the test of the seysine of the right of advowson. The recognition to be made by the jurors of the assise in Glanville's time was thus stated, "Quis advocatus tempore pacis ultimam personam mortuam ad ecclesiam illam præsentaverit?" It would seem that the words "tempore pacis" in the original writ were intended to exclude the reign of King Stephen, although the words were retained in the writ in Bracton's time, and had a more general interpretation given to them, being taken to signify a time free from violence and wrong.

It will be seen on comparing Bracton's treatise De Assisa Ultimæ Præsentationis with Glanville's treatise De Advocationibus Ecclesiarum, that the constitution of the Lateran Council of 1179 on the subject of lapse had been received as law in England in Bracton's time. But it is to be noted that the decree was received only with a certain modification, for whereas the decree of the council allowed a term of six months to a clerical patron, and only four months to a lay patron, this distinction between clerical and lay patronage did not obtain in England, but in all cases, an *utile tempus* of six months was allowed to the patron to present a clerk. This doctrine of lapse was all that was wanting to make the law of advowson once more effective. As long as churches were infeudated, the lord of the manor could retain possession of the church and enjoy personally the fruits of the glebe or the rents with which the church was endowed. It was not enough to revindicate for the churches their presentative character, unless the lord was compellable to present a clerk to the bishop on the vacancy of a church. Pope Alexander III. conferred an unspeakable boon upon Christendom in completing the

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disinfeudation of the parish churches, which were appurtenant to manors, by declaring the patronage of them to be escheated to the bishop, if it were not exercised within six months. What is strange is, that the term "benefice," which is a tradition of a time full of evil for the church, when it was really in chains to the temporal power, has been retained as a title of superiority on the part of churches appurtenant to manors in distinction from churches appropriated to cathedrals and abbeys. So that what was originally a term of reproach has become a term of honour, whilst the word "advowson," which had its origin in the best ages of the Church and of which the maintenance identifies the Church of the Plantagenets with the Church of the Saxon kings, is of little or no repute amongst the clergy themselves, and many would desire to abolish it under the mistaken notion that it is a record of lay usurpation.

There is a passage in Bracton's treatise which seems to throw light upon the time when it was composed, namely where he treats of the difference between the writ of "quare impedit" and the writ of "quare non permittit" in Chapter VI. The latter writ was available to a class of persons, who were not in seysine of the right of presentation, but were for some other reason entitled to the right of presenting to a church. Bracton in the fourth section of the above chapter enumerates three classes of persons so entitled by reason of their temporary possession of a tenement, to which the advowson was appurtenant, first husbands who were in such possession by right of the dower of their deceased wife, under the law of England (*per legem Angliæ*); secondly, lessees who were in such possession in virtue of a grant for a term of years; thirdly, creditors who had such possession of a tenement by way of pledge. Now the law in respect of dower and advowsons underwent a change in 1259 (43 H. 111), which is not noticed by Bracton in this passage, and Britton (L. IV. Ch. vi.) has

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accordingly omitted from his list of persons entitled to an action of “quare non permittit,” husbands holding possession of the dower of their wives after their death under the “Lex Angliæ.” But the silence of Bracton as to the change made in the law by the provisions of Oxford in that year for compelling impeters of presentations to appear and plead, lest the vacant living should lapse to the bishop, is still more significant. Bracton states that William de Raleigh from the necessity of the case had strained the existing law to repress the malice of persons, who designedly impeded presentations in order that lapse might be incurred, and that a new practice had been introduced *per consilium curiæ*, under which impeters who did not appear to the summons of the King’s Court were liable to be distrained by the sheriff. And further Bracton goes on to say that an inhibition ought to issue to the Bishop, that he should not admit a clerk at the presentation of anyone until the plea in the court of the king had been terminated. Under the provisions of Oxford, which were drawn up by the barons and ratified by Henry III. in 1259, which were twice republished by him, and after the general pacification were embodied in the Statute of Marlbridge in 1267, it was provided that in a plea of *quare impedit* if the impeder did not appear on the day assigned nor sent an essoiner, he was to be attached for another day, and if on that day he neither appeared nor sent an essoiner, he was to be distrained by the sheriff, and thereupon if he still made default the court was to write to the Bishop, that the reclamation of the impeder should not be allowed to stand in the way for that turn of the presentation. Bracton would hardly have omitted to notice this important change in the law, if it had been accomplished at the time when he wrote his chapter on the proceedings before the justiciaries, where a party had been summoned to answer to a writ of “quare impedit.”

It is obvious, that the law in respect of the right of advowson had become much more settled before the con-

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clusion of the reign of Henry III. than it was when Glanville compiled his work on the Laws and Customs of England. Thus we find in the case of clerks, who had been tortiously presented to churches and upon such tortious presentation had been instituted by a bishop under a "bonâ fide" belief that the presentation had been made to him by the advocate of the church, that Glanville cites a statute, which had been passed expressly to maintain such clerks during their lifetime in the possession of their churches, whereas in Bracton's time the ordinary, if he had instituted a clerk to a church upon the presentation of a person who was not the true patron, might be adjudged to set the church free, or to make satisfaction to the true patron by collating his clerk to an equivalent church. It would also seem that in Bracton's time endeavours were occasionally made by the losing party to elude the judgment of the King's Court in an assise of last presentation by applying to the Court of Rome for letters from the Lord Pope (*auctoritate litterarum Domini Papæ*) authorising him to commence proceedings afresh before other judges than those of the King's Court, as plaintiff respecting the same church.

Before Glanville's time the practice would seem to have been, where the right of advowson was claimed by adverse parties, for a suit to be instituted between them in the Court of Christianity. Under the Constitutions of Clarendon (A.D. 1164) however it was resolved that all such suits should be commenced and terminated in the Court of the King, and Glanville accordingly lays it down as law in his time that, where adverse parties claimed before a bishop the right of advowson, a writ of prohibition might issue to the bishop from the King's Court at the petition of either party, and the bishop should be forbidden to proceed further in the matter, until the right of advowson had been determined in the King's Court. The proceeding therefore, to which Bracton refers, was a device to elude the provisions of the Constitutions of Clarendon under the authority of letters from the

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Pope, under which the losing party sought to transfer the cognizance of the question from the King's Court to the Court of Christianity, in which case the King's justiciaries were empowered to issue a writ of prohibition to the Court of Christianity. The proceedings in such cases of prohibition are more fully discussed by Bracton in the third and fourth chapters of his Treatise on Exceptions, which concludes his work; and which will form part of a future volume.

The assise of last presentation, as distinguished from the assise of the right of advowson, had obviously a two-fold tendency, in the first place to constrain indirectly the patrons of vacant churches to present their clerks to a bishop for institution, and in the second place to promote the severance of advowsons from the lordships of manors, and so to accelerate the disinféudation of property dedicated to the services of religion. The assise of mortdancer, which follows next in the order of Bracton's treatises, was intended for the protection of heirs against wrongful intrusions made by lords of manors upon lands, of which the ancestors of such heirs had died seised. It has been thought, with some reason, that the proceedings in the King's Court under a writ of mortdancer, which were in use in Glanville's time, had their origin in the reign of Henry II., and were not a modification of a previous form of proceeding for an identical object, as was the case in regard to a writ of right. What happened in the reign of Henry II. was probably a transfer of jurisdiction in such questions from the manorial courts to the King's Court, or at all events, if the cognizance of such questions was not altogether withdrawn from the manorial courts, access to the King's Court was made available on all occasions to the heir, and the King's writ was made returnable "*coram me vel justiciis meis*." These writs might be sued out by the heir in the reign of Henry II., in any one of these cases: (1.) where the ancestor had died within the realm since

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the coronation of the King; (2.) where he had set out on a pilgrimage to the Holy Land or to the shrine of Saint James of Compostella since the coronation of the King, and had died in the course of such pilgrimage; (3.) where he had entered into a religious order since the coronation of the King, such entry into a religious order being held to constitute the civil death of such ancestor. A two-fold alteration in the writ of mortdancerster had taken place before Bracton wrote his Treatise. It was one of the provisions of the Great Charter of King John that the king, or during his absence out of the realm his chief justiciary, should send two justiciaries into every county four times in every year to hold assises of novel disseysine, and mortdancerster, and last presentation, which should only be held in the counties in which the cause of action had arisen. Henry III. on his accession to the throne confirmed this provision of the Great Charter, and accordingly the writ in use in Bracton's time, which was addressed to the viscount, directed him to summon a jury of twelve loyal men of free condition to appear *coram justiciariis nostris ad primam assisam cum in partes illas venerint* (fol. 253 b). A further alteration had been made in the writ as regards the time, within which the recognition before the King's justiciaries should be limited. Under a provision made in the Parliament summoned to Winchester in 21 Henry III. which is recorded in the Annals of Burton (Rolls Edition, p. 252), and of which an entry has been made in the Patent Rolls of 21 Henry III., the recognition was not to extend further back than to the last return of King John from Ireland. The tenor of the King's Letters Patent is as follows: "Quum nuper provisum fuit quod
 " quædam brevia nostra de cursu mutantur in articulis
 " subscriptis, videlicet, in narratione descensus ab antecessoribus in Breui de Recto, quod prius fieri solet a
 " tempore Henrici regis senioris, anno et die quo obiit,