NEW CASES

IN

The Court of Common Pleas,

AND

OTHER COURTS.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

By PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. III.

FROM TRINITY TERM, 6 WILLIAM IV. 1836, TO
TRINITY TERM, 7 WILLIAM IV. 1837,
BOTH INCLUSIVE.

LONDON:
PRINTED FOR SAUNDERS AND BENNING,
LAW-BOOKSELLERS AND PUBLISHERS,
43. FLEET-STREET.
1837.

JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt. Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir STEPHEN GASELEE, Knt.

The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.

The Right Hon. Sir JOHN VAUGHAN, Knt.

Hon. Sir THOMAS COLTMAN, Knt.

A

TABLE

OF

THE NAMES OF CASES

REPORTED IN THIS VOLUME.

IN THE HOUSE OF LORDS.

(In Error from the Exchequer Chamber in *Ireland*.)

The Lord Bishop of MEATH, and JAMES ALEXANDER, Clerk, Plaintiffs in Error, *v.* The Marquess of WINCHESTER, Defendant in Error.

July 6.

THIS was an action of *quare impedit* brought by the Marquess of *Winchester*, the Plaintiff below, in the Court of Common Pleas in *Ireland*, in *Easter* term 1829, against the Lord Bishop of *Meath* and the Rev. *James Alexander*, to recover the advowson of the parish church of *Killucan*, otherwise *Rathweir*, in the diocese of *Meath* and county of *Westmeath*, in *Ireland*.

The questions arose only on the fifth count, and the pleadings and evidence relating to that count.

The fifth count began by setting out from the year 1544 to the year 1626 the pedigree of the Earls of *Clanricarde*, which the Defendants below admitted. It then alleged that *Richard*, fourth Earl of *Clanricarde*,

1. A case touching the right of presentation to a living by the bishop of *M.*, stated for the opinion of counsel, by a bishop of *M.* in 1695, and found in the family mansion of the *D.*'s, descendants of that bishop, Held evidence against a subsequent bishop of the same see on a question touching the right of presentation to the same living.

2. A plaintiff in *qu. imp.*, after tracing his title through various steps, and averring the death of *W.*, who had been shewn to be a joint tenant with Plaintiff of a term of years in an advowson, alleged, "Whereupon and whereby the Plaintiff became and still is possessed of the said advowson as of an advowson in gross for the remainder of the said term so theretofore granted:" the Defendant pleaded, that he, as bishop of *M.*, was seised of the advowson in gross in right of his see, without this that the plaintiff was possessed of the advowson in manner and form as the Plaintiff had alleged: Held, that a fine of the advowson in question levied in 1 *Jac.* 2. by one whose estate the Plaintiff had, was not admissible in evidence under this or any similar issue.

And if received, it ought not to be left to a jury to say whether it barred the action of *qu. imp.*

3. The statute of 10 *H.* 7., passed at *Drogheda*, avoided grants of advowson by *Ed.* 4., and, where they were appendant to a manor, before the grant, re-appended them.

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

was in 1626 seised in fee of the manor of *Rathweir*, to which the advowson of the church of *Killucan*, otherwise *Rathweir*, was then appendant. That the church became vacant, and that *Richard*, the fourth earl, presented one *Edward Donnellan* his clerk, who was admitted, instituted, and inducted. That in 1635 *Richard*, the fourth earl died seised, leaving *Ulick de Burgh* his only issue male, who became fifth earl, and to whom the manor, to which the advowson of the church was appendant, descended as heir-at-law. That in 1641 the *Irish* rebellion broke out against King *Charles* the First. That, in 1652, the manor to which the advowson was appendant was, on account of the rebellion, sequestered to the use of King *Charles* the Second. That, in 1657, the manor continuing sequestered, *Ulick*, the fifth earl, (called Marquis *Clanricarde*) died without issue male, leaving *Richard* his heir-at-law (whose descent was set out in the declaration and admitted by the Defendants below), who became sixth earl. That by letters patent bearing date the 8th of *April*, 14 *Car.* 2., that King granted to *Richard*, sixth earl, (*inter alia*) the manor of *Rathweir*, with the advowson which was then appendant thereto, to the use of *Richard*, sixth earl, in tail male with remainders over. That the *Irish* act of parliament, 14 & 15 *Car.* 2., confirmed the letters patent, saving the rights of persons claiming paramount the Crown. That, in 1666, *Richard*, sixth earl, died without issue male, leaving *William*, his brother, him surviving, who became seventh earl, and being entitled under the uses limited by the letters patent, became seised of the manor to which the advowson was appendant, in tail male with remainders over. That, in 1670, *William*, seventh earl, by lease and release with warranty conveyed the manor (excepting the advowson) to Sir *Patrick Mulledy* in fee. That *William*, seventh earl, then became seised in tail of the

advowson in gross, with remainders over. That, in 1687, *William*, seventh earl, died so seised, leaving his eldest son *Richard*, who became eighth earl, and was seised in tail of the advowson. That by the act, 2 *Ann.* *c.* 26., advowsons held by persons professing the *Roman* Catholic religion were vested in the Crown, according to the estate of the patron till abjuration. That, in 1708, *Richard*, eighth earl, died seised without issue, leaving his brother *John*, ninth earl, who being entitled in tail under the uses limited but professing the *Roman* Catholic religion, the advowson vested under the act of 2 *Ann.* in Queen *Anne*, and afterwards in King *George* the First. That, in 1722, *John*, ninth earl, died, leaving his son *Michael* tenth earl, who abjuring and conforming, the estate of the Crown in the advowson determined, and *Michael*, tenth earl, became seised in tail. That, in 1726, *Michael*, tenth earl, died seised, leaving *John Smith*, his son, eleventh earl, to whom the advowson descended, and who became seised in tail. That, in 1745, *John Smith*, eleventh earl, granted the advowson to *Eaton Stannard* and *Robert French*, and their heirs, to the use of *John Smith*, eleventh earl, for life, with remainders over. That by an *English* act of parliament, 10 *G.* 3., the advowson was vested in Sir *Francis Vincent* and *William Talbot*, in fee, discharged of the uses of the deed of 1745, to the use of *John Smith*, eleventh earl, for life, remainder to his eldest son Lord *Dunkellyn* for life, with remainders over, and with a power to Lord *Dunkellyn* to create a term for securing a jointure. That thereupon, in 1770, *John Smith*, eleventh earl, became seised of the advowson for life, with remainders over. That, in 1782, *John Smith*, eleventh earl, died seised for life, leaving *Henry* Lord *Dunkellyn*, his eldest son, him surviving, who became twelfth earl, and seised for life of the advowson, with remainders over. That, in 1785, *Henry*, twelfth earl,

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

by a marriage settlement, in exercise of the power given to him by the said act of 10 *G.* 3., demised the advowson for securing a jointure, to *Henry Penruddock Wyndham* and the Plaintiff below, for a term of five hundred years, to commence from the death of himself the said *Henry*, twelfth earl. That *Henry*, twelfth earl, married, and in 1797 died, leaving his wife him surviving and still living. That thereby *Henry Penruddock Wyndham* and the Plaintiff below became possessed of the advowson in gross for the said term. That, in 1810, *Henry Penruddock Wyndham* died, leaving the Plaintiff below him surviving, who thereupon became and was possessed of the advowson for the residue of the term. That, in 1828, by the death of the Rev. *Henry Wynne*, the late incumbent, the church became vacant; that it then belonged to the Plaintiff below to present; and that the Defendants below disturbed him therein.

To this count the bishop pleaded thirteen pleas; the clerk, eight.

The sixth, seventh, eighth, ninth, tenth, and eleventh pleas of the bishop, and the sixth plea of the clerk, were not material to the questions raised on the record.

The bishop's first plea alleging, by way of inducement, that he was seised of the advowson in gross in right of his see, concluded with a special traverse of the appendancy of the advowson to the manor of *Rathweir*.

The bishop's second plea, after the same inducement, specially traversed, that *Richard*, fourth earl, was seised of the manor with the advowson appendant.

The bishop's third plea, after alleging, by way of inducement, that he, the bishop, was seised of the advowson in gross in right of his see, and that *Anthony Dopping*, one of his predecessors, collated *Edward Donnellan*, concluded with a traverse, that *Edward Donnellan* was admitted and instituted on the presentation of *Richard*, fourth earl.

The bishop's fourth plea, after the like inducement as to the first plea, traversed that the manor with the advowson appendant was seised and sequestered to the use of *Charles* the Second.

The bishop's fifth plea, after the like inducement, traversed that *Charles* the Second granted to *Richard*, sixth earl, the manor with the advowson appendant.

The bishop's twelfth plea, after the like inducement, traversed that the Plaintiff below was possessed of the advowson.

The bishop's thirteenth plea, after pleading, by way of inducement, a grant by *Edward* the Fourth of the advowson in gross to the see of *Meath*, and that *Anthony*, bishop, collated the Rev. *Edward Donnellan*, concluded with a special traverse that *Edward Donnellan* was admitted and instituted on the presentation of *Richard*, fourth earl.

The clerk's first plea, alleging, by way of inducement, that he was parson canonically imparsonate on the collation of the Defendant below, Bishop of *Meath*, and that the bishop and his predecessors were seised in fee of the advowson in gross, in right of the bishoprick; that the church became vacant, and that he, the clerk, Defendant below, was collated by the bishop, the Defendant below, concluded like the bishop's first plea, with a special traverse of the appendancy of the advowson.

The clerk's second, third, and fourth pleas, after inducements the same as that in the clerk's first plea, severally concluded with the same special traverse as the bishop's second, third, and fourth pleas respectively.

The clerk's fifth plea, after the same inducement as in the first plea, concluded with a special traverse that Earl *Michael* was seised.

The clerk's seventh plea, after the same inducement as in the first plea, concluded with a special traverse

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

that it now belonged to the Plaintiff below to present a fit person to the church.

The clerk's eighth plea, after the same inducement, concluded, like the bishop's twelfth plea, with a special traverse that the Plaintiff was possessed of the advowson.

On those pleas by the bishop and the clerk, issue was joined.

On the trial of the cause, the Plaintiff below relied on the title of the Earls of *Clanricarde*, who derived the property from *John King*, to whom it had been granted by *James* the First. In support of this title, the Plaintiff below produced, among other evidence, two documents; one, a parchment deed, bearing date the 28th of *March* 1637, purporting to be a grant of *Ulick*, fifth earl of *Clanricarde*, to Dr. *Edward Donnellan* of the then next avoidance of the rectory and vicarage of *Rathweir*, otherwise *Killucan*; and the other, dated the 28th of *February* 1695, purporting to be a case stated for the opinion of counsel on the part of the said *Anthony Dopping*, Bishop of *Meath*, wherein it was, among other things, stated on the part of the said bishop, "that, in the year 1637, *Ulick*, Earl of *Clanricarde*, granted to Dr. *Donnellan*, incumbent of *Rathweir*, his executors and administrators, the next presentation to the rectory and vicarage of *Rathweir*, dated the 28th of *March* 1637; that, in 1642, both rectory and vicarage being void by the death of Dr. *Donnellan*, his widow and executrix presented *pro hac vice tantum William Barry* to both, who was instituted by the bishop *June* 13th, 1642, but not inducted till the 27th of *February* 1660; and that, by a mandate from the bishop's successor, the bishop that instituted being dead before *William Barry*'s induction."

The circumstances under which these documents were found, were stated as follows upon a bill of exceptions: —

1836.

Bishop of MEATH *v.* Marquess of WINCHESTER.

Anthony Dopping, being examined on oath as a witness on the part of the said Plaintiff, deposed that he is a descendant of *Anthony Dopping*, formerly bishop of *Meath*, and that he has in his possession several papers, which were handed to him as coming from *Lowton House*, where the *Dopping* family papers are kept: that *Lowton House* is the family mansion of the *Doppings*: that the papers in his possession were handed to him by *John Darcy* of *High Park*, who is a relation of the *Dopping* family; that the two documents now produced by him — the documents in question, — were handed to him among the said papers by the said *John Darcy* at a Major *Sirr*'s; and that he never saw the said two documents, or any of them, at *Lowton House*. *John Darcy* deposed, that he handed a parcel of papers to *Anthony Dopping*, the last witness; that he got the said parcel of papers from one Sir *William Betham*; and that there was a paper round them. Sir *William Betham* deposed, that he found a parcel of papers at *Lowton House* among other papers, and that the Rev. Mr. *Sirr* was with him; that he found the said parcel of papers in a room with other papers, and that he handed the said parcel of papers to the said Mr. *Sirr*, on or about the 28th of *October* 1828; that *Lowton House* belonged to or is inhabited by a Mrs. *Dopping*, a middle-aged lady; that he put no mark on the said parcel of papers, but that he took copies of them; that at the time of finding the said parcel of papers, he found several visitation books of the diocese of *Meath*, particularly one of the year 1616, by *George* Bishop of *Meath*; that there were in the same room several other papers relating to the see of *Meath*, several of which were in the same parcel which he brought away, and that the said two documents produced by the said *Anthony Dopping* above mentioned were in the said parcel of papers; that he was at *Low-*

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

ton House from two o'clock on *Monday* to two o'clock on the following day; that he went there on the part of said Mr. *Sirr* and *John Darcy*, and that he never informed the said Bishop of *Meath* that the said papers or books, or any of them, were at *Lowton*, but that he shewed copies of some of them to the Plaintiff's agent, and told him the said papers and books were at *Lowton*. *George Brabazon* deposed, that he is registrar in the Registry Office of the diocese of *Meath*, at *Navan*; that there is no register of ecclesiastical or other records except one roll, anterior to the year 1717; that the said Registry Office is the proper place where the visitation books of the diocese, and entry of all presentations, admissions, institutions, and collations to ecclesiastical benefices within said diocese, and various other papers and records relative to the said diocese, and the several ecclesiastical benefices within the same, should be kept, but that such are not to be found, and are not preserved in the said Registry Office relating to a period anterior to 1717, the reason of which circumstances he is unable to explain.

Among various documents which tended to shew that the property originally belonged to the Crown, the Plaintiff below produced an attested and compared copy of an original inquisition, taken before the Barons of the Exchequer of *Ireland* at *Dublin* in the twenty-third year of the reign of King *Henry* the Eighth, whereby it was found that King *Edward* the Fourth was seised in his demesne as of fee, the day on which he died, of the manor *Rathweir* in the county of *Meath*, with all its appurtenances, and had issue *Elizabeth*, *Anne*, *Cecilia*, and *Bridget*, his four daughters; that being so seised he died on the 9th of *April*, in the twenty-third year of his reign; that after his death the said manor, with all its appurtenances, descended to his said daughters in right of heirship; and that afterwards King *Henry* the Seventh, in the first year of his

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

reign, took to wife *Elizabeth*, one of the said daughters, by virtue of which King *Henry* Seventh and *Elizabeth* the queen his wife, as in right and title of the same queen, entered into the same manor, with all its appurtenances, and were thereof seised in their demesne as of fee, as in right of the said *Elizabeth* the queen: and it was thereby further found that the said King *Henry* the Seventh and *Elizabeth* his queen had issue King *Henry* the Eighth, and that the said *Anna*, *Cecilia*, and *Bridget* died without heirs of their body lawfully begotten in the lifetime of the said Queen *Elizabeth*; that afterwards the said Queen *Elizabeth* died, *viz.* on the 18th of *February*, in the eighteenth year of the reign of *Henry* the Seventh, after whose death the said King *Henry* the Seventh continued in possession of the said manor, with all its appurtenances, during his lifetime, and died so seised, *viz.* on 21st *April* in the twenty-fourth year of his reign, after whose death the said manor, with all its appurtenances, descended and ought to descend to the said *Henry* the Eighth as son and heir of the said *Elizabeth* his mother; and further, that one *William Darcy* of *Plattyn*, knight, upon the possession of the said King *Henry* the Eighth in the manor aforesaid, with all its appurtenances, entered, intruded, and had ingress on the 1st of *January*, in the first year of the reign of King *Henry* the Eighth, and the rents and profits of the said manor, arising and growing from the said 1st of *January* to that time, took and levied in contempt of said King *Henry* the Eighth.

The Defendants below relied chiefly on an attested and compared copy of letters patent of King *Edward* the Fourth, dated at *Drogheda*, on the 5th of *January*, in the ninth year of his reign, to *William Sherwood*, Bishop of *Meath*, and his successors, of the advowson as well of the rectory as of the vicarage of the parish church of *Rathweir*, county of *Meath*, in

1836.

Bishop of MEATH *v.* Marquess of WINCHESTER.

the following words: — To all to whom the present letters shall come, health. Know ye that we of our special grace, with the assent of our very dear cousin, *John* Earl of *Wigram*, deputy of our very dear brother, *George* Duke of *Clarence*, and *locum tenens* of our Lord, have given and granted to the Venerable Father in Christ, *William* Bishop of *Meath*, advowson as well of the rectory as of the vicarage of the parish church of *Rathweir*, in the county of *Meath*, to have and to hold the advowson of the rectory and vicarage of the church aforesaid to the aforesaid bishop and his successors for ever, any statute, act, or ordinance to the contrary made, edited, or ordained notwithstanding: in testimony of which we have caused these our letters to be made: witness the aforesaid deputy at *Drogheda*, the ninth day of *January*, in the ninth year of our reign: *Eustace.*

This document was in the same form as one produced by the Plaintiff below, and purporting to be letters patent, whereby *Edward* the Third had granted the manor of *Rathweir*, with all advowsons thereto belonging, to *John D'Arcy* and *Johanna* his wife in tail male.

The Defendants below produced also, an attested and compared copy of a fine *sur con. de droit*, &c., bearing date the morrow of the *Holy Trinity*, in the first year of the reign of King *James* the Second, with proclamations, and levied by *William* seventh Earl of *Clanricarde* and *Hester* Countess of *Clanricarde*, his wife, to *John Brown*, *Gerard Dillon*, and *Anthony Muledy*, Esqs., of, among other things, the disposition and right of patronage of the parish church of *Killucan*, for the consideration of 6200*l.* therein named, and with a warranty by the said earl and countess.

It had appeared, however, on the evidence of the Plaintiff below, that *Richard* the eighth Earl had conveyed the advowson, in 1699, to *John Morgan*; and that, in 1744, *John Morgan* reconveyed it to *John Smith* eleventh Earl.

1836.

Bishop of MEATH v. Marquess of WINCHESTER

The Defendants below produced also an entry in the visitation book of the diocese of *Armagh*, of the collation to the rectory and vicarage of *Killucan*, of the Rev. *Anthony Dopping*, by his father, *Anthony Dopping* Bishop of *Meath*, in 1695, upon the death of *W. Barry* the preceding incumbent.

The Plaintiff below contended that no issue had been raised on the pleadings under which the fine levied by *William* the seventh earl was admissible in evidence; and in answer to the grant of the advowson by *Edward* IV. to the see of *Meath*, relied on an attested and compared copy of an act of parliament passed in a parliament held at *Drogheda*, in the tenth year of King *Henry* VII., in the words following,—Item, prayen the Commons in consideration of the great and divers robberies, murders, burnings, ravishing of wives and maidens, the universal and damnable extortion as to coign lyve and pay, had, used, and continued within the poor land of *Ireland*, with many other intolerable oppressions and extortions over the poor innocent and true subjects, the which cannot be reformed and punished without the King's great and royal provision for the repressing of the same, which cannot be done without great costs and charges; and forasmuch as his Noble Grace intendeth by the grace of Almighty God, to order and reduce the said land to his whole and perfect obeisance, and the great part of his revenues of the said land being adiminished and granted to divers persons, such as for the most part do full little service for the commonweal, for lack of said revenues the land could not be defended for the destruction of the *Irish* enemies; therefore it be ordained, enacted and established by authority of this present parliament, that there be resumed, seized, and taken into the King our Sovereign Lord's hands all manors, lordships, castles, garrisons, fortresses, advowsons of churches, free chapels, messuages, lands, tenements, rents, services,

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

moors, meadows, pastures, woods, rivers, waters, mills, dove-cotes, parks, forests, warrens, customs, cocketts, fees, fee farms, and all other manner of profits, hereditaments and commodities whereof our said Sovereign Lord, or any of his noble progenitors Kings of *England*, was at any time seised in fee simple or fee tail, from the last day of the reign of King *Edward* II. to this present act; and by the same authority all manner of feoffments, gifts in tail, grants, leases for term of life or term of years, releases, confirmations, annuities, fees, pensions, escheats, wrecks, waifs, reversions of all and every of the aforesaid honours, manors, lordships, and of all others as before it is specified, or of any parcel of them, as well by authority of Parliament as by any letters patent made under the great seal of *England* or of *Ireland*, to any person or persons, by whatsoever name or names they be named, jointly or severally, from the said day be resumed, revoked, annulled, and deemed void and of none effect in law.

In a parchment writing attached to the said act, there was a saving to *William Darcy* of *Rathweir*, and his heirs male, of a grant made 9th *Ed.* 3. to *John Darcy* and *Johanna* his wife, of the manor of *Rathweir*, with its appurtenances, and a saving of all grants to the Archbishop of *Dublin*, the Bailiff of *Dundalk*, and others.

As to the presentation by the Bishop of *Meath*,—it appeared that a suit of *quare impedit* had been brought on the collation of *Anthony Dopping*, in 1695, but that it terminated in a compromise on an allegation of popery in the then Earl of *Clanricarde*.

The Defendants below contended that the alleged act of 10 *Hen.* 7. did not revoke the grant by *Edward* IV. to the see of *Meath*, for many reasons, and among others for this, that the alleged act only avoided grants made *jure coronæ*, and that the evidence shewed King *Edward* IV. to have been seised of the property, and to

have made the grant as of his private estate, and not *jure coronæ*.

The evidence from which the Defendants below drew this inference was in substance as follows: — That, after the conquest of *Ireland*, King *Henry* II. granted the land of *Meath* to *Hugh de Lacy* in fee; that, by the forfeiture of the *De Lacy*'s, the manor of *Rathweir*, with the advowson, vested in the Crown, and was granted by King *Edward* II. to *Roger Mortimer* Earl of *March*; that the said *Roger Mortimer*, on his attainder, forfeited to King *Edward* III.; that that attainder was reversed, and the manor revested in *Roger Mortimer*, grandson of the attainted earl; that certain liberties and privileges were confirmed to *Roger*, son of the preceding, by King *Henry* V.; that the last-mentioned *Roger Mortimer* had issue, *Edmond Mortimer*, *Ann*, and *Ellynor*; that *Edmond* and *Ellynor* dying without issue, *Ann* was married to *Richard* Earl of *Cambridge* (son of *Edmond Langley*, Duke of *York*, fifth son of *Edward* III.), who had issue *Richard Plantagenet*, Duke of *York*, father of King *Edward* IV.; that King *Edward* IV. dying seised of the manor, it descended in coparcenery to his four daughters, *Elizabeth*, *Anna*, *Cecilia*, and *Bridget*, the three latter of whom dying without issue in the lifetime of *Elizabeth*, and King *Henry* VII. having married *Elizabeth*, that monarch became seised of the manor in right of the Queen, from whom it descended to King *Henry* VIII. in right of his mother, as appeared by the inquisition put in on the part of the Plaintiff below.

The jury found a verdict for the Plaintiff below on the aforesaid issues.

Both the counsel for the Plaintiff below, and the counsel for the Defendants below, excepted to the opinion of the learned Judge at the trial; — the counsel for the Plaintiff below, to the admission of the fine as

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

evidence for the Defendants below; the counsel for the defendants below, to the admission of the parchment writing and case found at *Lowton House*, and to the direction of the Judge on the effect of the *Irish* act, 10 *Hen.* 7., and of the fine.

The Court of Common Pleas in *Ireland* gave judgment for the Plaintiff below, which being affirmed on error to the Court of Exchequer Chamber in *Ireland*, the Defendants below brought their writ of error returnable in parliament, and assigned for error (besides the common errors),

That the said parchment writing purporting to be a grant by *Ulick*, fifth earl, to Dr. *Edward Donnellan* of the next avoidance, was improperly admitted in evidence.

That the said paper writing, purporting to be a case stated in 1695, on behalf of *Anthony Dopping*, Bishop of *Meath*, for the opinion of counsel, was also improperly admitted in evidence.

That the jury were misdirected as to the operation of the alleged act of 10 *Hen.* 7., on the grant of the advowson by King *Edward* IV. to the see of *Meath*.

And that the jury were misdirected as to the effect of the fine of *Trinity* term, 1 *Jac.* 2.

Sir *J. Campbell*, Attorney-General, Sir *W. Follett*, and *Byles*, were of counsel for the Defendants below; Sir *F. Pollock* and *Miller* for the Plaintiff below.

The opinion of the Judges was requested by the House on the points in question, and delivered at such length as to render it superfluous to insert the argument of counsel.

TINDAL C. J. The first and second questions proposed by your Lordships to his Majesty's Judges are these: — *In quare impedit* to recover the presentation

to the church of *K.*, the advowson whereof is claimed to be part of the temporalities of the Bishop of *M.*, a deed was offered in evidence purporting to be brought from the custody particularly described in the bill of exceptions to which we are referred by your Lordships; and also a case, purporting to be a case stated for the opinion of counsel on the part of a former Bishop of *M.*, and brought from the same custody; and whether such deed and such case were respectively admissible in evidence against the successors to the Bishop of *M.* in that see, are the first and second questions proposed to us by your Lordships.

With your Lordships' permission we shall reverse the order of considering the two questions, and give our answer, first, to the question, whether the case was admissible in evidence; for as the deed and the case were found at the same time, by the same persons, at the same place, and, indeed, in the very same parcel of papers, the question of admissibility, so far as it depends on the custody, is precisely the same with respect to both. But a difficulty which might exist with respect to the deed, but which forms no ingredient in the consideration of the admissibility of the case, will be avoided if the case should be held to be receivable in evidence; and upon the question, whether the case stated for the opinion of counsel is admissible, the judges who have heard the arguments of counsel on this point are of opinion that it would be admissible in evidence on the trial of the *quare impedit* above supposed to be brought. For although two of my learned brethren, Mr. Justice *Park* and Mr. Justice *Coleridge*, did at one time feel doubts as to the propriety of admitting such evidence, I am authorised by them to state that upon further consideration those doubts are removed, and that they agree in opinion with the rest of the Judges.

It is not necessary to determine on the present oc-

1836.

Bishop of MEATH *v.* Marquess of WINCHESTER.

casion whether the supposed Plaintiff in the *quare impedit* could have compelled the bishop, the supposed Defendant, to produce in evidence the case which had been stated for the opinion of counsel by his predecessor, either by any proceeding in a court of equity or otherwise; or whether the counsel or attorney who drew up the statements contained in that case could have been compelled to disclose such statements, either as against their client or the successor of their client. The present inquiry stands unembarrassed with the consideration of that question; for the case stated for counsel has actually come into the possession of the Plaintiff in the *quare impedit*, and the Plaintiff himself produces it at the trial of the cause as part of his evidence; and the question is the same as if a case with opinion of counsel which one party was not bound to produce, had found its way by accident or otherwise into the hands of the other party. Upon this view of the subject it appears to us that the only considerations that arise upon the production of the case are two: first, whether the custody in which it is found is such as to stamp it with authenticity as a genuine document; and, secondly, if it is to be taken to be genuine, whether the statements of the facts contained in it are admissible against the interests of the successor of the former bishop who made, or caused to be made, the statements contained in the case. The first, and, indeed, the principal question is, whether this document was found in such custody, and under such circumstances attending the finding of it, as to give it authenticity, as being a case really stated by the authority and on the behalf of a former bishop of the same see.

Now, before we consider the facts relating to the finding of the case as stated in the bill of exceptions, to which we are referred, we cannot but observe that the statement itself in the bill of exceptions is very loose and inaccurate.

But we think, in construing the statement contained in a bill of exceptions, we are to consider ourselves placed in a situation analogous to that of a jury; and that, like a jury, we are bound to make every legal presumption from the facts stated, and every reasonable inference which those facts will bear. Supposing facts, therefore, are stated by the Plaintiff's witnesses in an uncertain or ambiguous manner, as the Defendant's counsel have neglected by cross-examination, of which they had the opportunity, to render the statement more clear and certain, and to remove any ambiguity of expression, it is not competent for the Defendant below in this advanced stage of the proceedings to make his stand upon the looseness and ambiguity of the testimony of which he is to a considerable extent himself the cause. In such case the Judges can only, as judges of the fact, and with the eyes of common men, endeavour to discover the truth through the vagueness and uncertainty of the statement, and then only to act upon it where they can feel a solid foundation on which they can rely. This observation will dispose of much of the objection which has been made in the course of argument against the testimony of the witnesses who depose to the time, place, and manner of the finding of the case and of the grant; and looking at the statements in the bill of exceptions, we think the fair result of the evidence is, that both the documents to which exceptions have been taken were found tied up together with other papers relating to the see, in a house called *Lowton House*, which was the family mansion house of the *Doppings*, that is, the mansion house of the family of which *Anthony Dopping*, formerly Bishop of *Meath*, was one member, and of which the witness who gave the testimony was another: that this house was occupied by a member of the *Dopping* family at the time the papers were found there; and, lastly, that it was the house in which the *Dopping* family

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

papers were kept. There is not one of these facts, vague as they appear at present, which might not have been cleared from all ambiguity by a very little cross-examination if they are founded in truth; and, on the other hand, not one which would have stood the test of such cross-examination if untrue. Other parts of the bill of exceptions corroborate and confirm the result of the evidence as above stated. That there was an *Anthony Dopping* who had been Bishop of *Meath*, that he had some family, and that he had collated his son to the living now in dispute, is proved by documentary evidence set forth in the bill of exceptions, which documentary evidence was contemporaneous with the fact and cannot mislead. Again, as the original documents do not appear before the judges on a bill of exceptions, but the transcript only is set out upon the record, it is the proper and necessary intendment that there is nothing upon the face or in the condition of the documents themselves which excites suspicion as to their genuineness; for in this stage of the proceedings credit must be given to the court below that they would not have allowed the documents to be read if they had borne upon their face or in their condition any evidence against their admissibility. The result of the evidence, upon the bill of exceptions, we think is this,—that these documents were found in a place in which and under the care of persons with whom papers of Bishop *Dopping* might naturally and reasonably be expected to be found; and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable and

natural under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various, and many that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody which is held sufficiently genuine to render a document admissible appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights where the possession of them has appeared ltogether unconnected with the persons who had any interest in the estate. Thus, a manuscript found in the Herald's Office enumerating the possessions of the dissolved monastery of *Tutbury; Lygon* v. *Strutt* (*a*); a manuscript found in the *Bodleian* Library, *Oxford; Michell* v. *Rabitts*, cited in 3 *Taunt.* 91.; an old grant to a priory brought from the *Cottonian MSS.* in the *British* Museum; *Swinnerton* v. *Marquis of Stafford* (*b*); were held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand, an old chartulary of the dissolved abbey of *Glastonbury* was held to be admissible, because found in the possession of the owner of part of the abbey lands, *though not of the principal proprietor.* This was not the proper custody, which as Lord *Redesdale* observed, would have been the augmentation office; (4 *Dow.* 321); and as between the different proprietors of the abbey lands, it might have been more reasonably

(*a*) 2 *Anstr.* 601. (*b*) 3 *Taunt.* 91.

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

expected to have been deposited with the largest; but it was, as the Court argued, a place of custody where it might be reasonably expected to be found. *Bullen* v. *Michell.* (*a*) So also in the case of *Jones* v. *Waller* (*b*), the collector's book would have been as well authenticated if produced from the custody of the executor of the incumbent or his successor, as from the hands of the successor of the collector. (See also to the same effect the case of *Bertie* v. *Beaumont.* (*c*)

Upon this principle we think the case stated for the opinion of counsel, purporting to be stated on the part of Bishop *Dopping*, and found in the place and in the custody before described, was admissible in evidence. It was a document which related to the private interests of the bishop at the time it was stated, for it bears date in 1695; about which time it appears from other facts found, that *Barry* the late incumbent was dead, and that before 1697, Bishop *Dopping* collated his own son. It related, therefore, to a real transaction which took place at the time; and although it might be said to have related in some degree to the see, for the right of collation was claimed as of an advowson granted to the see, yet it is manifest this case had been stated with reference to the private interests of the bishop in the particular avoidance, and that it was more reasonable to expect it to be preserved with his private papers and family documents, than in the public registry of the diocese. But even considered as a document belonging to the see, it was not unreasonable that it should have been found in the bishop's mansion house; for upon the evidence, there is only one single ecclesiastical record preserved in the registry of the diocese of *Meath* of an earlier date than 1717: and on the other hand, the case and grant are

(*a*) 2 *Price*, 413.
(*b*) 2 *Gwill.* 346.
(*c*) 2 *Price*, 307.

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

found in the same parcel with several papers relating to the see of *Meath*; and in the same room were several visitation books of the diocese, and other papers relating to the same see.

It is objected in argument, that it does not appear by legal evidence what these papers were. But it seems a sufficient answer to that objection, that the papers themselves were not called for at the trial, which they might have been; neither is their non-production made the ground of any exception to the judge's direction at the trial. The case for counsel, therefore, so found, and the reasonableness of its custody being corroborated by so many concomitant circumstances, we think it was properly admitted in evidence.

But it is objected, secondly, that though it might have been admissible against the bishop, for whom it was stated, it cannot be so against his successor, because the facts stated in the case took place long before the bishop had any interest, and before he can be supposed to have had any knowledge of the see. The case, indeed, is dated in 1695. The grant which is set out in it is dated in 1635; the presentation under the grant in 1642; and the induction in 1660. Undoubtedly, if by knowledge is meant a personal knowledge of the facts, it must be held to have been wanting in the present case. But the facts stated were all facts that are evidenced by written documents. The grant itself accompanied the case, being bound up in the same parcel: the presentation and induction are only to be proved by written entries, which were peculiarly within his reach. With such, the best means of knowledge therefore, we think the statement by him or by his attorney of a fact in the case directly against his own interest at the time the case was stated, was not only an admission against him, but against his successors who stood in the same situation.

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

So much having been said about the case, it is scarcely necessary to refer to the grant. It is set forth in the case, and thereby authenticated; and this alone would make it producible. But it is in itself a grant of great antiquity, and we are bound to assume, without any apparent infirmity or defect on the face of it, to render it unworthy of credit.

Upon the whole, therefore, our opinion is, that both the one document and the other were admissible.

Your Lordships next direct the attention of the judges to an act of parliament passed at a parliament held at *Drogheda*, in the tenth year of the reign of *Henry* VII. (set out in the appendix to the bill of exceptions, to which we are referred), and to a certain grant of the advowson of *K.* by King *Edward* IV., whereof he was seised in the same right as of the advowson of *Rathweir* in the said appendix mentioned, which grant was made to the Bishop of *M.*, and is assumed to be in the same terms as that which is contained in the said appendix; and upon these latter documents your Lordships propose the two following questions; viz. first, Did the act of *Henry* VII. avoid the said grant of *Edward* IV.? and, secondly, Did the same statute reappend the advowson to the said manor whereto it was appendant before the grant? And upon these questions we are of opinion, that the statute of *Henry* VII. did avoid the said grant of *Edward* IV.; and that it did also reappend the advowson to the said manor. Several objections have been urged against holding the grant to fall within the operation of the statute. First, it is said that the statute revokes no grants made by any kings except those who were the progenitors of *Henry* VII. in the strict sense of that word; and that *Edward* IV. was not a progenitor of that king. Secondly, that the statute does not extend to grants of which such progenitors

were seised *jure privato* only, and that *Edward* IV. was seised *jure privato* of the advowson in question. Thirdly, that it does not extend to revoke grants to corporations, whether sole or aggregate. And, lastly, that it does not extend to any grants but those under the Great Seal, either in *England* or *Ireland*; and that the grant of the advowson in question is made under neither.

Upon these several objections we shall observe in their order. As to the first objection, if the term progenitors is to be understood in its literal sense, then the only king of *England* who since the last year of *Edward* II. was a progenitor of *Henry* VII. would be *Edward* III.: for *Henry* VI. was no progenitor in the strict sense of the word; but, as he is expressly named in the preamble to the statute 19 *Hen.* 7. *c.* 18., he was the uncle of the king. As, however, the term used in the act is the plural term progenitors, more than one king must have been intended, and it seems not possible to extend it beyond one without allowing it to be synonymous with the word predecessors — a word with which it is often put in apposition in statutes of the same reign. See 11 *Hen.* 7. *c.* 4., and also *cap.* 8. And again, the statute referred to by the counsel for the Plaintiff in error, as set out in *Plowden's Reports* 226., wherein *Henry* IV., *Henry* V., and *Henry* VI., are called the king's noble progenitors, affords itself a proof that the word is used in a wider sense, for those kings were his predecessors, but not his progenitors. Again, the word must either comprise all his predecessors, kings of *England*, or his predecessors who were of the House of *Lancaster* only; but it would lead to an unreasonable result if the word is confined to the latter only; for in that case all the grants made by the House of *Lancaster* to their friends would be annulled, and those made by the House of *York* to the enemies of the House of

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

Lancaster would be confirmed. And when the object of the statute is considered, which was that of bringing money into the king's coffers by the annulling of all former improvident grants of the Crown, there can be no reason to doubt that it was intended to comprise within it the grants made by former kings of *England*, whether of the one house or of the other.

As to the objection secondly above urged, that the statute extends to grants only of such property whereof the Crown was seised *jure coronæ*, no such distinction appears upon the face of the statute itself. The king (*Edward* IV.) was equally seised in fee, whether the advowson belonged to him *jure privato* or *jure coronæ*. "Advowsons of churches" are within the express words of the statute; independently of which the sale of the next presentation, or the sale of the advowsons themselves made them the possible source of profit to the Crown. And whether the advowson in question, supposing there had been no grant by *Edward* IV., would have devolved upon *Henry* VII., as parcel of the possessions of the Crown, or whether he would have taken it in right of his wife by descent to her and his marriage, in either case the advowson would have been valuable to him, though perhaps to a different extent upon the two suppositions. It seems therefore to become unnecessary to determine whether, on the facts stated in the bill of exceptions, this advowson is the property of *Edward* IV. in right of his crown or not. But it appears to follow from the decision of the case of the duchy of *Lancaster*, in *Plowden*, and by what is said by *Holt* C.J. in the *Banker's case*, *Skinner's Rep.* 603., that whatever belonged to *Edward* IV., before he came to the throne, on his accession to the crown belonged to him *jure coronæ* in his politic capacity, and not in his private; and as such it would descend to *Edward* V., be transferred to *Richard* III., on his accession to the

crown, and in like manner devolve on *Henry* VII. In this respect, therefore, the earldom of *March*, and all the lands and tenements belonging to it, would be precisely on the same footing as the duchy of *Lancaster* would have been but for the charter of *Henry* IV. confirmed by parliament, which, according to the doctrine laid down by the judges, would have been otherwise annexed to the Crown. (*Plowden's Rep.* 204.)

As to the third objection, that the statute extends only to the case of grants to private persons, and does not include those to corporations, either sole or aggregate, we think it sufficient to observe, that the words are large enough to extend to both: the very expression "any person or persons by whatever name or names they may be named" pointing as well, or rather more expressly, to a body politic, which is known only by name, than to persons in their individual capacity; and if this were left in doubt, the exception, annexed to the act, of the grant to the Archbishop of *Dublin*, and to the corporation of the bailiffs of *Dundalk*, shews that if not specially excepted, bodies corporate, both sole and aggregate were understood to be included in the operation of the act.

The only remaining objection is that which limits the operation of the statute to grants under the Great Seal of *England* or *Ireland*. Upon this head of inquiry the Plaintiffs in error object that the grant in question does not appear to have been made under the Great Seal, either of the one or the other kingdom. The argument appears to stand thus: that, from the facts stated in the bill of exceptions, *Edward* IV. must be taken to have been seised of his property as Earl of *March*; that by the title deduced in the inquisition, 23 *Hen.* 8. it appears that the *March* property was always kept by *Edward* IV. distinct from property held *jure coronæ*; a course of descent being in that inquisition

1836.

Bishop of MEATH *v.* Marquess of WINCHESTER.

traced from him to *Henry* VIII., quite inconsistent with that of crown land. It is inferred therefore, *à priori*, that *Edward* IV., granting in the right of his earldom of *March* would grant under some seal belonging to him as such; at all events, neither by the Great Seal, nor by act of parliament; that nothing appears on the face of the grant to contradict this presumption, the letters not being stated to be patent, nor any seal now appearing, nor any circumstance from which it can be argued that the grant was originally under the Great Seal in either country. It is further alleged, that by 4 *Hen.* 7. *c.* 14. (*English* act) it is expressly recited, that in *Edward* IV.'s time, all grants of property, parcel of the earldom of *March*, were made under a special seal, called "seal of the *Marches*;" and that for redress of mischiefs ensuing thereupon, it is by that statute enacted, that for the future all such grants shall be made under the Great Seal. Now looking at and examining the grant in question, it appears upon the face of it to relate to a subject-matter which the king held as lord of *Ireland*, and granted as such. No allusion is made to any individual or particular character, but the king grants with the assent, substantially, of the lord lieutenant, who, as such, would have nothing to do but with the property of the king, held *jure coronæ*. Further, the grant is made with a *non obstante* of any statute, act, or ordinance, to the contrary; a clause which the king, granting merely as Earl of *March*, never would assume to have power to add. The teste also is from the year of the reign, a circumstance which would rather indicate the grant to have been made by the king *jure coronæ* than the contrary.

This inference, arising upon the face of the grant itself, is confirmed by the acknowledged principle of law, that, upon the accession of *Edward* IV., to the

crown, his possessions as Earl of *March* would become annexed, in point of government and administration, at least, to the possessions of the Crown. The authority of the judges in the case of the duchy of *Lancaster* (*Plowden* 213) is precisely to the point. Speaking of the mode of passing land held by the king *jure coronæ* by letters patent only, without livery of seisin, they add, "so it has been the practice with regard to the lands which descended to the king from the Duke of *York*, the Earl of *March*, and others, of the king's ancestors, who never were kings." The land, therefore, of the earldom would properly be passable by such form of grant only as would be used by the king in conveying property held *jure coronæ*. This is a well known consequence resulting, not from the title of the property, but the dignity of the holder, in whom the body politic absorbs the body natural.

Whether, therefore, the property of the Earl of *March* were annexed to the Crown at the date of the grant in question or not, seems not very material; for being at all events in the hands of the king for the time being, the legal presumption is, that it would for that time be granted, as if it were held *jure coronæ*. The argument therefore, deduced from the title and course of descent traced by the inquisition relating to the manor of *Rathweir* with its appurtenances, fails in its application, even if we could attach much weight upon a question of fact, to a document which is manifestly inaccurate upon the bare inspection of it, omitting, as it does, all mention of the two sons of *Edward* IV., from the eldest of whom, *Edward* V., and not from the father, the daughters must have inherited. But the difficulty still remains as to the recital in the English statute 4 *Hen.* 7. *cap.* 14. If this had been an inquiry as to property in *England*, that recital would undoubtedly have presented a difficulty almost insurmountable; for a fact is stated therein, and

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

a mischief resulting from it, for redress of which the statute is made. Whatever legal presumptions there may be to the contrary, the recital affords stronger evidence that the irregular practice complained of in the statute had actually taken place. The weight, however, of this evidence, and even its applicability to the subject under discussion, is answered by the consideration, that we are now dealing with property in *Ireland*. The remedy was certainly intended only to apply, and at the time was applicable only to *England* and *Wales*: for *Poyning*'s law had not then passed. There is no ground for presuming that the *English* legislature took notice of any matter passing in *Ireland*; and the seal spoken of in the statute — "the seal of the *Marches*" — seems in terms rather to apply to the border property in *England* and *Wales*, than to patrimonial domains in *Ireland*; and there is *de facto* an improbability, that grants in *Ireland* should have passed under a seal used for, and permanently kept in *England* or *Wales*.

It is further to be observed, that the bill of exceptions expressly states the document in question to be letters patent of *Edward* IV.—a description which *primâ facie* would imply that it was under the Great Seal; and still further, that the description is in the very same terms with that given of the letters patent of *Edward* III., by which he granted the manor and advowson to *John Darcy* and *Johanna*, his wife, in tail male, which letters patent must have been under the great seal, as the property was then vested in the Crown *jure coronæ*, under the escheat from *Roger Mortimer*, Earl of *March*. If, therefore, the letters patent are under the Great Seal in one case, why are we to intend otherwise in the second instance which is now under discussion? Upon examination, therefore, of this question, by the light afforded by the bill of exceptions, and by such legal presumptions as the facts therein stated afford, we think this grant of

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

Edward IV. did fall within the operation of the statute of Henry VII., and that it was avoided by that statute.

Upon the question next proposed to us — whether, by the effect of such resumption of the grant, the advowson became re-appended to the manor, which still remained in the hands of the Crown, we think the words of the statute itself give the answer without entering into the discussion of the various authorities which have been cited in the argument before your Lordships. Nothing but the grant of *Edward* IV. had disappended the avowson from the manor. The resumption act "annuls, makes void, and of none effect in the law" the grant itself. This is not the case of a parliamentary reconveyance, but the cause of disappendancy ceases from the time of passing the act, as if it had never been; and with it all effect of the grant from that time must necessarily also cease. It was urged at your Lordships' bar, that the consequences would be monstrous if the grant were to be held altogether void; that it would avoid and render illegal all intermediate acts founded on a grant legal in itself when made. But we are far from thinking the consequences above stated would follow. A grant which is to be deemed void in law and as if it had never been, from a certain day, may yet be regarded as having had existence at a former period for the purpose only of preventing parties, who have dealt with the property, from being treated as trespassers or wrongdoers, and protecting acts done at an intermediate time.

For the reasons, therefore, above given we think the advowson became reappended to the manor by the legal operation of the statute above referred to.

Your Lordships lastly refer to the pleadings upon the fifth count of a *quare impedit* brought by *C.* against the Bishop of *M.*, and to the issues joined on those pleas; and after premising that on these issues, a fine is tendered in evidence, levied by *B.*, whose estate *C.* hath

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

which fine is set forth in the pleadings to which we are referred, your Lordships propose the three following questions; *viz.* —

First, Whether such fine was admissible in evidence under any of the said issues.

Secondly, Whether, if received, it ought to be left to the jury to say whether it barred the action of *quare impedit;* and,

Thirdly, Whether the fine did bar the action of *quare impedit.*

The fine in question is stated to have been levied in *Trinity* term, 1 *James* 2., by *William*, seventh Earl of *Clanricarde* and *Hester* his wife, to *John Brown*, *Gerald Dillon*, and *Anthony Mulledy*, and the heirs of the said *John Brown*, of the manors of *Rathweir* and *Killucan*, with the appurtenances, and divers quantities of land therein specified, and also of the advowson and right of patronage of the parish of *Killucan;* and in answer to the first of the questions proposed by your Lordships, we are of opinion that the fine, upon the state of pleadings on the record, was not admissible in evidence under any of the issues joined therein. There are only these issues upon which there can be any ground whatever to contend that the fine was admissible: — the issue taken upon the traverse by the Bishop in his twelfth plea (which is precisely the same in terms as the issue taken by the clerk in his eighth plea), and the issue taken upon the traverse by the clerk in his fifth and seventh pleas; all the remaining issues being raised on single points quite unconnected with, and altogether unaffected by, the fine. The traverse of the Bishop is in these terms,— "without this, that the Plaintiff below is possessed of the said advowson of the said church of *Killucan*, otherwise *Rathweir*, in manner and form as the said Plaintiff hath in his said fifth count alleged." That this traverse would have been held bad upon special demurrer, there

can be no doubt. But it is contended, that, as the Plaintiff has, instead of demurring, taken issue upon this traverse, he has waived any objection to it, and must be contented to admit under it all such evidence as by law it is calculated to receive. We must consider the point, therefore, as if this had been the only issue upon the record; and whether it would have been competent in that case to the Defendants to give in evidence the fine by *William* the seventh Earl, and *Hester* his wife, is the question before us.

No authority can be found in the books which will throw any light on the question; for no instance can be brought forward where any parties in a *quare impedit* have proceeded to trial on such an issue. If the precedents given in *Mallony* on *Quare Impedit*, and the more numerous precedents to which he has referred from the best books of entries, are consulted, it will be found that, with scarcely an exception, all of them contain at the conclusion of the count the allegation which is found in this, *viz.* " whereby the Plaintiff became possessed of the advowson," or " of the right to present;" and yet in no single instance is there any traverse of that allegation. What evidence, therefore, may or may not be admitted under the traverse must depend upon principle and analogy to other cases, and cannot be governed by any direct authority. The first inquiry is, to what allegation does the traverse relate? The Plaintiff having in his fifth count distinctly alleged the death of Mr. *Windham*, who had been shewn to be joint tenant with the Plaintiff of a certain term of years in this advowson, proceeds to allege " whereupon and whereby the Plaintiff became and still is possessed of the said advowson as of an advowson in gross for the remainder of the said term so theretofore granted." This is the allegation, and the only allegation, in the count, to which the traverse can possibly apply. And as the traverse is

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

taken upon the precise terms of this allegation, one ground upon which the fine may be held to be inadmissible is, that the traverse is confined to the possession of the Plaintiff by reason of the term for years, and of his surviving his co-joint tenant in the term; such being the fair and natural import of the allegation made by the Plaintiff. It is unnecessary to say that if such be the proper construction of the traverse, the fine is altogether inadmissible. But admitting, for the purpose of the argument, that the averment in the declaration takes a wider range, and that it amounts to an allegation that, by reason of all the various steps in the title of the Plaintiff, which are set out in the fifth count of the declaration, the Plaintiff is possessed of the right to the advowson, and admitting the traverse to be equally extensive, and to put all those steps of the title in issue, still we think, by analogy to the rules of pleading, the utmost effect that can be given to such a traverse is, that it is a simple denial of the different allegations of the descent and of the other steps of the title, so as thereby to put the Plaintiff to the proof of his whole declaration; but that the traverse will not admit of new and affimative evidence on the part of the Defendant, taking the title out of the Plaintiff, and vesting it in another person.

The general principle of pleading is, that the Defendant must either deny, or he must confess and avoid the charge in the declaration: the same plea cannot do both. But supposing this traverse to have the effect of a general denial of each link in the chain of the title, if besides compelling the Plaintiff to prove them, and bringing his own witnesses to contest the truth of their existence, he might prove affirmatively a title in another person, what is that in effect but giving to this anomalous and unheard of traverse the double force of a denial of all the steps of the title, and at the same time

a confession of the existence of the title, but an avoidance of its effect? In the present case there is only one allegation in the count to which the fine could by possibility apply, and that is the allegation which, after stating *William* the seventh earl to have been seised in fee tail of the advowson in gross, by virtue of letters patent and of an act of parliament, and that he continued so seised, avers that "upon his death the advowson descended upon *Richard* the eighth earl, as his son and heir in tail male." And we hold, admitting the traverse to amount to a denial of the steps by which Earl *William*'s title in fee tail is deduced, it will not allow the Defendant to prove, by the fine, that such title ceased before his death: for if the title in fee, or fee tail, is once admitted or proved, in any person, it must be intended to continue in that person, without any allegation that it does, until the contrary is shewn (1 *Lutw.* 357.; *Plowd.* 431.); and the cesser of that estate by conveyance or otherwise, is affirmative matter which ought to be shewn by a special plea on the other side. We, therefore, think ourselves well warranted in the conclusion that the fine was not admissible under the issue above considered.

With respect to the traverse taken by the clerk in his seventh plea, it is in these terms, "that it doth not belong to the Plaintiff to present a fit person to the church in manner and form," &c. This is no more than a precise denial taken by the Defendant of the last words in the Plaintiff's declaration; viz., "and for that reason it now belongs to the said Plaintiff to present a fit person to the said last-mentioned church." It is a mere inference of law, resulting from all the facts stated in the count, and altogether unlike the traverse in the case of the *Grocer's Company* v. *The Archbishop of Canterbury* (*a*), which included a matter of fact material to

(*a*) 3 *Wilson*, 214.

1836.

Bishop of MEATH v. Marquess of WINCHESTER.

the right. But taking it to be a traverse of all the steps by which the title to the advowson is deduced to the Plaintiff from *Richard* the fourth earl, who is averred to have been first seised in fee, the same objection applies to the admissibility of the fine in evidence under this traverse, as under that to the bishop's twelfth plea; and the same observation may also be made with respect to the issue on the fifth plea as to the seisin of *Michael* the tenth earl: and besides, there is another reason why, under the traverses in the fifth, seventh, and eighth of the clerk's pleas, the evidence of the fine should not be admitted, though the same reason does not exist as to the traverse in the twelfth plea of the Bishop, in which he claims to present as patron.

It is clearly established that neither the clerk, nor ordinary, in that character, could counterplead the Plaintiff's title at common law, for neither of them had any interest in the patronage. And under the statute 25 *Ed.* 3. *st.* 3. *c.* 7., the incumbent (as possessor when presented and instituted) could not counterplead the Plaintiff's title, without maintaining his own title, and that of his patron, on which his own depends. This is distinctly laid down by Lord *Hobart* in the case of *Elvis* v. *The Archbishop of Canterbury* (*a*); for the statute only allows the possessor "to have his answer, and shew and defend his right upon the matter." The plea, therefore, which sets out the title of the patron, ought, in order to maintain it, to traverse the Plaintiff's title so far as it is inconsistent with that of his own patron, and so far only; and, in that sense, the traverse in the 5th, 7th, and 8th pleas must be understood, if the pleas are good in substance; that is, it must be taken that the clerk means not to set up the title of a stranger to both the litigant parties, which would cut down the title both of himself and of

(*a*) *Hob.* 315.

his patron, which the law does not permit him to do, but to affirm that the title to the advowson was in the Bishops of *Meath*, or some one under whom they claim, and not in Earl *Michael* or the Plaintiff, at the times respectively mentioned in the 5th count, and referred to in the traverses contained in the 5th, 7th, and 8th pleas of the clerk.

In this mode of construing the traverses, it is clear that the fine which shewed the title to be in third persons, was not admissible in evidence under any of the issues joined on this record.

With respect to the second question lastly above proposed to us, viz. whether, if the fine were received in evidence, it ought to be left to the jury to say, whether it barred the action of *quare impedit*, we all think that the legal effect of such fine as a bar to the action of *quare impedit*, is a matter of law merely, and not in any way a matter of fact; and consequently the judge who tried the cause, should state to the jury whether in point of law the fine had that effect, or what other effect, on the rights of the litigant parties, upon the general and acknowledged principle, "*ad questionem juris non respondent juratores.*"

In answer to the last question proposed to us, we all agree in opinion, that the fine did not, if properly received in evidence, absolutely of itself, bar the action of *quare impedit*. It could not do so on the ground of estoppel, because the parties to this suit did not both claim respectively under the parties to the fine, and the fine is an estoppel only between parties and privies: and though it operates as a conveyance from Earl *William* the seventh earl to *Browne*, *Dillon*, and *Mulledy*, for a valuable consideration, it is possible that this was a conveyance by way of mortgage, which has been paid off, or that these parties might have reconveyed the advowson to Earl *William*, or some subsequent Earl: and there is even some evidence stated in the bill of exceptions to raise a

1836.

Bishop of MEATH *v.* Marquess of WINCHESTER.

presumption that it was so; for in 1699 Earl *Richard* conveyed to *John Morgan*, and in 1744 *John Morgan* re-conveyed the advowson to Earl *John Smith*; and there is no evidence of any dealing with the advowson or presentation by the conusees of the fine, or any one claiming under them.

It cannot therefore be said, that the fine alone, if it had been admissible, was an absolute bar to the action, which is the last question proposed by your Lordships.

Judgment was afterwards affirmed.