REPORTS

OF

CASES

ARGUED and ADJUDGED in the COURTS of

KING'S BENCH

AND

COMMON PLEAS,

In the REIGNS of

The late King *William*, Queen *Anne*, King *George* the First, and King *George* the Second.

Taken and collected

By the Right Honourable *ROBERT* Lord *RAYMOND*, late Lord Chief Justice of the COURT of KING'S BENCH.

VOL. I.

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MDCCXC.

Rex et Regina *v.* Episcopum Cestr. Piers & Scroope.

Error. C. B. Quare impedit. Rot. 705, 706.

S. C. With the arguments of counsel well reported Skinn. 651. Arguments of Counsel. 5 Mod. 297. Declaration post. vol. 3. p. 252.

PLACITA irrotulata coram Georgio Treby milite et sociis suis justiciariis domini regis et dominae reginae, de termino sancti Michaelis, anno regni dicti domini regis et dictae dominae reginae dei gratia Angliae, &c. sexto. Ebor. ff Nicholaus episcopus Cestriensis Richardus Piers armiger, et Richardus Scroope clericus summoniti fuerunt ad respondendum domino regi et dominae reginae nunc de placito quod permittat ipsos dominum regem et dominam reginam praesentare idoneam personam ecclesiae de Bedall quae vacat et ad suam spectat donationem, &c. et unde Edwardus Ward miles attornatus dictorum domini regis et dominae reginae nunc generalis qui pro eisdem domino rege et domina regina in hac parte sequitur pro praedictis domino rege et domina regina dicit, quod domina Elizabetha nuper regina Angliae fuit seisita de advocatione ecclesiae praedictae ut de uno grosso per se ut de feodo et jure in jure coronae suae Angliae, et sic inde seisita existens ad ecclesiam illam vacantem per literas suas patentes sub magno sigillo suo Angliae sigillatas gerentes datum apud Westmonasterium in comitatu Middlesexiae decimo quarto die Februarii anno regni ejusdem nuper reginae duodecimo praesentavit quendam Johannem Tyms clericum suum prout per recordum irrotulamenti dictarum literarum patentium in curia cancellariae dictorum domini regis et dominae reginae nunc apud Westmonasterium praedictum remanens plenius apparet, qui quidem Johannes Tyms ad praedictam praesentationem praefatae nuper reginae fuit admissus institutus et inductus in eodem tempore pacis tempore dictae nuper reginae, praedictaque nuper regina de advocatione ecclesiae praedictae ut praefertur seisita existente, eadem nuper regina postea apud Westmonasterium praedictum de tali statu suo de et in advocatione ecclesiae praedictae ut praefertur seisita obiit, post cujus quidem nuper reginae mortem advocatio ecclesiae praedictae descendebat Jacobo nuper regi Angliae primo, per quod praedictus nuper rex Jacobus primus fuit seisitus de advocatione ecclesiae praedictae ut de uno grosso per se ut de feodo et jure in jure coronae suae Angliae, et sic inde seisito existente, ecclesia praedicta vacavit per mortem praedicti Johannes Tyms, per quod idem nuper rex Jacobus primus ad ecclesiam illam sic vacantem per literas suas patentes sub magno sigillo suo Angliae sigillatas gerentes datum apud Westmonasterium praedictum decimo tertio die Julii anno regni ejusdem nuper regis Jacobi primi Angliae, &c. decimo nono praesentavit quendam Johannem Wilson sacrae theologiae professorem clericum suum, prout per recordum irrotulamenti

Queen Elizabeth seised in gross of the advowson of the church of Bedall.

14 Feb. 12 regni presented Tyms by her letters patents, Prout patet by the inrolment of the letters patent in Chancery; who was admitted, &c.

The queen died seised of the advowson; by which it descended to James I. who was seised in gross. The church became void by the death of Tyms. James I. 13 July 19 regni, presented John Wilson;

menti dictarum literarum patentium ultimo mentionatarum in praedicta curia cancellariae dictorum domini regis et dominae reginae nunc apud Weſtmonaſterium praedictum remanens plenius apparet, qui quidem Johannes Wilſon ad praedictam praeſentationem praefati nuper regis Jacobi primi fuit admiſſus, inſtitutus et inductus in eodem tempore pacis tempore dicti nuper regis Jacobi primi, praedictoque nuper rege Jacobo primo de advocatione eccleſiae praedictae ut praefertur ſeiſito exiſtente, idem nuper rex poſtea apud Weſtmonaſterium praedictum de tali ſtatu ſuo inde ſeiſitus obiit, poſt cujus quidem nuper regis Jacobi primi mortem advocatio eccleſiae praedictae deſcendebat Carolo nuper regi Angliae primo ut filio et haeredi praedicti nuper regis Jacobi primi, per quod praedictus nuper rex Carolus primus fuit ſeiſitus de advocatione eccleſiae praedictae ut de uno groſſo per ſe ut de feodo et jure in jure coronae ſuae Angliae, et ſic inde ſeiſito exiſtente, eccleſiae praedicta vacavit per mortem praedicti Johannis Wilſon, per quod idem nuper rex Carolus primus ad eccleſiam illam ſic vacantem per literas ſuas patentes ſub magno ſigillo ſuo Angliae ſigillatas gerentes datum apud Weſtmonaſterium ſexto die Martii anno regni ejuſdem nuper regis Caroli primi decimo praeſentavit quendam Henricum Wickham ſacrae theologiae profeſſorem clericum ſuum prout per recordum irretulamenti dictarum literarum patentium ultimo mentionatarum in praedicta curia cancellariae dictorum domini regis et dominae reginae nunc apud Weſtmonaſterium remanens plenius apparet, qui quidem Henricus Wickham ad praedictam praeſentationem praefati nuper regis Caroli primi fuit admiſſus, inſtitutus et inductus in eadem tempore pacis tempore dicti nuper regis Caroli primi, praedictoque nuper rege Carolo primo de advocatione eccleſiae praedictae ut praefertur ſeiſito exiſtente, eccleſia praedicta vacavit per mortem praedicti Henrici Wickham, quodque quidam Johannes Piers armiger ad eandem eccleſiam ſic vacantem, jus praeſentandi non habens ad eandem, ſed uſurpando ſuper dominum nuper regem Carolum primum, praeſentavit quendam Willelmum Metcalfe clericum ſuum, qui ad praeſentationem praedicti Johannis Piers fuit admiſſus, inſtitutus et inductus in eadem, poſteaque praedictus nuper rex Carolus primus de advocatione eccleſiae praedictae ut praefertur ſeiſitus exiſtens apud Weſtmonaſterium praedictum de tali ſtatu ſuo inde ut praefertur ſeiſitus obiit, poſt cujus mortem advocatio eccleſiae praedictae deſcendebat Carolo nuper regi Angliae ſecundo ut filio et haeredi praedicti nuper regis Caroli primi, per quod praedictus nuper rex Carolus ſecundus ſeiſitus fuit de advocatione eccleſiae praedictae ut de uno groſſo per ſe ut de feodo et jure in jure coronae ſuae Angliae, et ſic inde ſeiſito exiſtente, eccleſia praedicta vacavit per mortem praedicti Willelmi Metcalfe, per quod praedictus nuper rex Carolus ſecundus ad eccleſiam illam ſic vacantem per literas ſuas patentes ſub magno ſigillo ſuo Angliae ſigillatas gerentes datum apud Weſtmonaſterium viceſimo octavo die Auguſti anno regni ejuſdem nuper regis Caroli ſecundi duodecimo praeſentavit quendam Petrum Samwayes

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Who was admitted, &c.

James I. died.

Whereby the advowſon deſcended to Charles I.

The church became void by the death of Wilſon.

K. Charles I. 10 Mar. 10. regni preſented Dr. Henry Wickham.

Who was admitted.

The church became void by the death of Wickham.

John Piers by uſurpation upon the king preſented William Metcalfe.

Who was admitted, &c. Charles I. dies.

Whereby the advowſon deſcends to Charles II.

The church void by the death of Metcalfe.

Charles II. 28 Aug. 12 regni preſents Peter Samways.

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Who was admitted, &c.

Charles II. dies,

whereby the advowſon deſcends to James II.

James II. abdicates.

Whereby the advowſon devolves upon W. and M.

The church becomes void by the death of Samwayes.

Samwayes ſacrae theologiae profeſſorem clericum ſuum, prout per recordum irrotulamenti dictarum literarum patentium ultimo mentionatarum in praedicta curia cancellariae dictorum domini regis et dominae reginae nunc apud Weſtmonaſterium praedictum remanens plenius apparet, qui quidem Petrus Samwayes ad praedictum praeſentationem praedicti nuper regis Caroli ſecundi fuit admiſſus, inſtitutus et inductus in eadem tempore pacis tempore dicti nuper regis Caroli ſecundi, praedictoque nuper rege Carolo ſecundo de advocatione eccleſiae praedictae ut praefertur ſeiſito exiſtente, idem nuper rex Carolus ſecundus poſtea apud Weſtmonaſterium praedictum de tali ſtatu ſuo inde ſeiſitus obiit, poſt cujus mortem advocatio eccleſiae praedictae deſcendebat Jacobo nuper regi Angliae ſecundo ut fratri et haeredi praedicti nuper regis Caroli ſecundi, per quod praedictus nuper rex Jacobus ſecundus fuit ſeiſitus de advocatione eccleſiae praedictae ut de uno groſſo per ſe ut de feodo et jure in jure coronae ſuae Angliae, qui quidem nuper rex Jacobus ſecundus de advocatione praedicta ut praefertur ſeiſitus de regimine hujus regni Angliae ſe demiſit, per quod advocatio praedicta eiſdem domino regi et dominae reginae nunc devenit, per quod iidem dominus rex et domina regina nunc fuerunt et adhuc exiſtunt ſeiſiti de advocatione eccleſiae praedictae ut de uno groſſo per ſe ut de feodo et jure in jure coronae ſuae Angliae, et ſic inde ſeiſitis exiſtentibus, eccleſia praedicta vacavit per mortem Samways; whereupon it belongs to the king and queen to preſent, and the defendants hindred them, *&c.*

The biſhop claims nothing but an ordinary, therefore judgment is given againſt him with a *ceſſet executio, &c.*

The defendant *Piers* confeſſes by his plea, *quod bene et verum eſt*, that *Charles* I. was ſeiſed of this advowſon in groſs, and that he preſented Dr. *Henry Wickham* his chaplain; but he farther ſays, that *Charles* I. being ſeiſed as aforeſaid, by his letters patent dated the nineteenth of *July* 14th of his reign (which he pleads with a *profert in curia*) *ex ſpeciali gratia et mero motu* granted the ſaid advowſon *Willelmo Theaxton tunc armigero poſtea militi*, to him and his heirs, by virtue whereof *Theaxton* was ſeiſed in groſs, and being ſo ſeiſed the church became void by the death of *Wickham*; whereupon *John Piers* father of the defendant, not having any right, but upon uſurpation upon *Theaxton*, preſented *William Metcalfe*, who was inſtituted and inducted, upon which *Piers* became ſeiſed of the advowſon in groſs by uſurpation, and *William Theaxton*, then being created knight, releaſed to *Piers* and his heirs all his right, intereſt, *&c.* in the ſaid advowſon; that *Piers* being ſeiſed in fee died, whereby the advowſon deſcended to the defendant *Richard Piers* as ſon and heir, whereby he was ſeiſed in groſs, and being ſo ſeiſed, the church became void by the death of *Metcalfe*,

Metcalfe, and continuing void for a year and a half, King *Charles* II. presented Dr. *Samwayes* by lapse, who was instituted and inducted; that Dr. *Samwayes* is dead, upon which the defendant presented the other defendant *Scroope* [who is also since dead] and then he traverses, *absque hoc* that *Charles* I. died seised.

The defendant *Scroope* pleaded the same plea.

The attorney general craves *oyer* of the letters patent, which being entered *in haec verba*, recited that Queen *Elizabeth* by her letters patent dated the 20th of *February* the thirteenth of her reign *inter alia* granted to the earl of *Warwick* and his heirs the manor of *Bedall* and other lands late the possessions of *Simon Digby* attainted of high treason, with all messuages, &c. and among other general words, *omnes advocationes et jura patronatus ecclesiarum in Bedall, et alia dicto manerio de Bedall spectantia vel quoquomodo pertinentia*; then the letters patent recite, that King *James* I. the eighteenth of *August* in the seventh of his reign granted the rent reserved by the patent of Queen *Elizabeth* to Sir *Christopher Hatton* and *Needham*; and then they recite, that all these premisses by good and sufficient assurances were vested in Sir *William Theaxton*; then king *Charles* I. confirms to Sir *William Theaxton* and his heirs the said manor of *Bedall* and the rent, and all advowsons appertaining to the manor; *cumque praedictus Willelmus Theaxton virtute praedictarum literarum patentium eidem comiti Warwick de praemissis ut praefertur factarum advocationem ecclesiae de Bedall praedictam, vel jus praesentandi ad ecclesiam illam secundum tenorem et intentionem earundem literarum patentium habere clamat sibi haeredibus et assignatis suis*; and forasmuch as we before this time presented one *John Wilson* to the said church of *Bedall* by lapse, and afterwards the church being void by the death of *Wilson*, we presented Dr. *Wickham pleno jure*; and then they recite, that *Theaxton* to recover his right and presentation sued a *quare impedit* against the bishop of *Chester* and *Wickham*, in which issue was joined; but that afterwards an agreement was made between *Theaxton* and *Wickham*, that *Theaxton* should desist from his suit, and permit Dr. *Wickham* to enjoy it during his life, and afterwards *Theaxton* and his heirs should present as often as the church should be void; and the king recites that he was informed of this agreement by Dr. *Wickham* his chaplain; *nos igitur volentes*, that the said presentations of *Wilson* and *Wickham*, or of either of them, or their institution and induction, should not prejudice the lawful right of *Theaxton* and his heirs, to present to the said chuch for the time to come; *intentioque nostra ulterius existit*, That *Theaxton* his heirs and assigns should freely and peaceably enjoy the advowson of the said church *secundum tenorem et veram intentionem praedictarum*

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literarum patentium per praedictam nuper reginam Elizabetham praefato comiti Warwick ut praefertur confectarum, aliquo defectu seu aliquibus defectibus in eisdem literis patentibus non obstantibus; sciatis igitur, quod dedimus et concessimus advocationem praedictae ecclesiae de Bedall, necnon medietatem advocationis illius ecclesiae, et totum jus, titulum, et clameum, quaecunque, &c. quae quovismodo habemus, vel habere poterimus, to the said advowson; then follows a general *non obstante* of the omission of the mention of the true value or of any former grant, *&c.*

The traverse of part of a title must be induced by an inconsistent title. Vide 3 Salk. 353. Com. Pleader. G. 20. 2d. Ed. vol. 5. p. 121. A void grant by the owner of an advowson is not a sufficient inducement to a traverse that he died seised.

The attorney general after this *oyer* of the letters patent demurs, and shews for cause, that the defendant *Piers* has not sufficiently induced his traverse. The defendants join in demurrer. And in the common pleas judgment was given for the king and queen, by *Treby* chief justice, *Nevill*, and *Powell senior*, justices. Upon which error was brought *in B. R.* and this case was argued by serjeant *Pemberton* and ——— for the plaintiffs in error, and by Mr. *Place* and the attorney general for the king; and afterwards solemnly argued on the bench, in this term by all the judges; and two points were made in this case.

The truth of an immaterial allegation is not admitted by pleading over. S. C. Salk. 560. 5 Mod. 297. Semb. acc. Salk. 91. Str. 298. and vide ante 18. H. Bl. 62. Com. Pleader. Q. 6. 2d. Ed. vol. 5. p. 139.

In a quare impedit the exact period in a particular reign when a man was seized or presented, is immaterial. S. C. Salk. 560. 5 Mod. 297.

Letters patent may be pleaded in the court in which they are enrolled without a profert. D. acc. 5 Co. 74 b. But not elsewhere. Sed vide Ford v. Burnham. Barnes 4to. Ed. 340. Dougl. 215. 1 Term Rep. 149, 150.

Upon oyer every intendment must be made in favour of the instrument produced. Vide Cro. Jac. 679. pl. 17.

Under a grant from the crown of all advowsons appendant to a manor, an advowson in gross will not pass. Vide Moor. 45. Hob. 323. 2 Mod 2.

Though it has the reputation of appendancy.

Dropping a quare impedit in favour of a person presented by the king without the king's knowledge, is a good consideration for a grant from the crown, though the plaintiff had in strictness no right to the presentation.

Words expressing an intent that the patentee shall enjoy the subject of it at all events, will make a patent of confirmation operate as a grant de novo. S. C. 5 Mod. 297. R. acc. 8 Co. 166. b. See also 8 Co. 167. a. 1 Mod. 195.

A false recital in an immaterial point will not vitiate the king's grant. D. acc. Lane 75. 109. 2 Co. 54. b. Vide Hob. 203. 223. 1 Co. 43. a. 6 Co. 55. b. ante 50.

Under a patent from the crown, reciting that the patentee claimed an advowson under a former patent, that the crown had notwithstanding afterwards presented once by lapse, and then pleno jure; that the patentee had upon the latter presentation brought a quare impedit to recover his right and presentation, and dropped it on an agreement with the person presented by the crown that such person should enjoy during his life, and that from thenceforth the presentation should belong to the patentee and his heirs; of which agreement the crown had afterwards been informed, that the crown was unwilling that its presentation should prejudice the patentee's lawful right, and intended that he should enjoy the advowson according to the true intent of the former patent, any defect therein notwithstanding, and granting the advowson de novo, with all the claim and title of the crown thereto, the patentee shall have the advowson, though it did not pass under the first patent.

The validity of one patent cannot be decided upon from the recital of it in another.

A man may take by the addition of knight, though he is really no knight. S. C. 12. Mod. 185. 187. Carth. 440, 441. Salk. 560. 3 Salk. 236. Holt 493. Semb. cont Bro. Grant. 50. D. cont. arg. 4. H. 6. 1. b. Vide 1 Bulstr. 21. Cro. Jac. 240. Litt. Rep. 181. 197. 223. W. Jon. 215. Cro. Car. 271. Hob. 129.

1. If the letters patent of king *Charles* I. paſſed the advowſon to Sir *William Theaxton* and his heirs.

2. If the grant ſhewn upon the *oyer* can be intended the ſame grant with that which was pleaded.

And as to the firſt point *Turton* juſtice argued, that the letters patent of *Charles* I. could not paſs the advowſon to Sir *William Theaxton* and his heirs.

And he ſaid, that he would conſider the caſe abſtracted from the letters patent.

And ſecondly as it was upon the record with them:

And 1. he was of opinion, that if the defendant had not pleaded theſe letters patent with a *profert in curia*, as he had no need to do, *Cro. Jac.* 317. that then the plea had ſufficiently confeſſed and avoided the plaintiff's declaration, and the alledging of the grant to *Theaxton* in fee had been a good inducement, to traverſe the dying ſeiſed of King *Charles* I. *Jones* 11, 12. *Winch.* 13, 14.

2. He was of opinion, that this advowſon ought to be taken as an advowſon in groſs. 1. Becauſe the king has declared that queen *Elizabeth* was ſeiſed in groſs, which the defendant has not denied, but has admitted it. 2. Becauſe the defendant has not only admitted it, but he has alſo confeſſed it; for he ſays *quod bene et verum eſt, quod Carolus primus devenit ſeiſitus modo et forma*, as is ſpecified in the declaration, and in the declaration it is ſhewn, that the queen was ſeiſed in groſs; ſo that it is as full a confeſſion, as if he had confeſſed it *in terminis*. 3. It muſt be in groſs, becauſe if it had been appendant, it would have paſſed to the earl of *Warwick* by the letters patent of the queen, and then the queen had not died ſeiſed of it, as is alleged in the declaration.

2. He conſidered the caſe as it was upon the record together with the letters patent, and in that conſideration two queſtions ariſe.

1. If the advowſon paſſed by the letters patent of queen *Elizabeth* to the earl of *Warwick*.

2. If not, yet if it paſſed by the letters patent of king *Charles* I. to Sir *William Theaxton*.

And as to the firſt he was of opinion, that this advowſon did not paſs to the earl of *Warwick* by the letters patent of the queen; 1. Becauſe the queen was ſeiſed thereof in groſs, and ſhe grants it as appendant, and ſo ſhe was deceived in her grant. 2. It does not appear that the queen intended, that this advowſon ſhould paſs; for it is compriſed only in the general words *advocationes et jura eccleſiarum, &c.* And probably if the queen had intended, that this advowſon ſhould paſs, the church being of great value, ſhe would have granted it by expreſs name.

Objection. It ſhall be intended to have been appendant.

Anſwer. That intendment cannot be admitted againſt the record.

2. Admit-

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2. Admitting that it did not pass by the letters patent of the queen to the earl of *Warwick*, then if it passed by the letters patent of king *Charles* I. to Sir *William Theaxton*. And he was of opinion, that it did not. 1. Because upon consideration of the recital of the letters patent it appears, that the king's intent was only to confirm the old title of Sir *William Theaxton*, and not to give him a new title, but that he would have such estate as the earl of *Warwick* had of the grant of the queen. For the clause in which the grant is contained is not independant of the precedent clause, but is coupled with it and the recitals by the illative conjunction *igitur*. 2 *Brownl.* 232. And in effect the design of the king seems to be only to prevent any prejudice that his presentations might have done to *Theaxton*'s title under the earl of *Warwick*. 2. One ought to take care that the king be not deceived, for when he is deceived the grant is void. 5 *Co.* 93. *b.* 1 *Co.* 43. *a. b. Lane* 75. 2 *Roll. Abr.* 188, 189. 17 *Vin.* 98. to 108. Now here the king is deceived, for the king imagined, that *Theaxton* had a right to the advowson, when in truth he had none at all; and therefore the grant founded upon such false consideration is void. Besides, that a false recital in letters patent will render the king's grant void, *Hob.* 203, 204. Now it is recited in these letters patent, that *Theaxton* claimed, *&c.* which according to (*a*) 2 *Co.* 90. ought to be intended a lawful claim; whereas it appears before, that he had no title to the advowson; and for this cause the grant is void. 3. No notice is taken in any of the letters patent, that this advowson was in gross; and therefore that vitiates the grant. And for these reasons he concluded, that the letters patent of king *Charles* I. did not pass the advowson to Sir *William Theaxton* and his heirs.

When the king is deceived, his grant is void. Vide Lane, 109. 3 Leon. 119 pl. 170. 1 Mod. 255, 196, 197, ante 50. Com. Dig. Grant. G. 8, 9. 2d. Ed. vol. 3. p. 449, 450.

But against this it was argued by *Holt* chief justice, and *Rokeby* justice, that this grant of *Charles* I. was good. And *Holt* chief justice said, that the principal ground upon which the judges of the common pleas gave their opinion was, that they took it as admitted, that this advowson was in gross in the reign of queen *Elizabeth* at the time of the grant to the earl of *Warwick*.

And as to that he was of opinion, that it is not admitted upon this record, that queen *Elizabeth* was seised in gross at the time of the grant to the earl.

2. Admit that it was then in gross in the queen, yet he was of opinion, that it passed by the letters patent of *Charles* I. to *Theaxton*.

As to the first, the case is thus. The attorney general declares that queen *Elizabeth* 14th of *February*, 12th of her reign, was seised of this advowson in gross, and then presented *Tyms*, *prout* by the inrolment of the letters patent in chancery *nunc apud Westmonasterium remanens plenius ap-*

(*a*) I can find nothing in 2 Co. 90. to warrant this quotation.

paret.

paret. Now though the defendant admits *Charles* I. to have been seiſed of this advowſon in groſs by deſcent, and conſequently that queen *Elizabeth* was ſeiſed in groſs of it at ſome time of her reign; yet he does not admit it at the preciſe time of the 14th of *February*, 12 of her reign; becauſe the alleging of the time and day when queen *Elizabeth* was ſeiſed in groſs is ſurpluſage and immaterial; for it is ſufficient to allege general ſeiſin in a *quare impedit* in time of peace in the reign of ſuch a king. Then though the defendant does not deny a thing, yet he admits by it only things materially alleged, but he does not admit things immaterially alledged. Then if he has not admitted the ſeiſin in groſs, and preſentation of *Tyms* 14th of *February*, 12th of the reign of *Elizabeth*; then the advowſon may have been appendant to the manor of *Bedall* at the time of the grant to the earl of *Warwick*, and ſo might well paſs by the letters patent. The time of the ſeiſin and preſentation is not traverſable, and all the precedents never allege the day of the ſeiſin or of the preſentation. Then if it is ſo immaterial, that one cannot deny it, the not denying it will not amount to an admittance. Beſides, that nothing that is immaterial, though it be admitted, will amount to an eſtoppel. If the defendant had ſhewn another title in his plea, and had traverſed the preſentation of *Tyms*, *modo et forma*, and it had appeared upon the evidence at the trial, that the queen had preſented in the 43d year of her reign; that would have maintained the iſſue, and the verdict muſt have been againſt the defendant. In actions of treſpaſs and battery, where it is neceſſary to ſhew a time in the declaration, evidence of a treſpaſs at any other time before the action brought will maintain the iſſue. *A. fortiori* in this caſe, where there is no need to allege a time; ſo that it would be very unjuſt, to conclude a man by his admittance of a thing which he could not traverſe, or if he could, is not material to be proved. And though it is an admittance of a ſeiſin in groſs in queen *Elizabeth* in ſome time of her reign, yet there was time enough in her long reign for uſurpations after the letters patent, by virtue of which ſhe might have preſented *Tyms*. 2. There is art here in the pleading of the inrolment of the letters patent of preſentation in chancery, for they thought that they could not be denied; but that is of no ſignification, for if the letters patent are inrolled in the ſame court where the plea is, one may plead them without ſhewing them, but if they are inrolled in another court one cannot plead the inrolment, without making a *profert* of an exemplification of them under the great ſeal. Now if the declaration had been without artifice in the uſual manner, *viz.* in the time of peace, *&c.* and the defendant had pleaded as he has done here upon *oyer* of the letters patent, it had been a good

An immaterial allegation cannot operate as an eſtoppel. R. acc. T. Jones, 170. T. Raym. 456. Fitz. Eſtoppel, 69. 247. D. acc. Co. Litt. 352. b. Vide Com. Eſtoppel, E. 6. 2d. Ed. vol. 3. p. 274.

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good title for the defendant, becauſe the defendant would not be obliged to aver that this advowſon was appendant, for the contrary, *viz.* that it was in groſs in the queen at the time of the grant of the earl of *Warwick*, would not appear; and all things upon *oyer* ſhall be intended to make the grant good, if nothing to the contrary appears.

Dyer, 215.

2. Admit that it was not appendant at the time of the grant to the earl of *Warwick*; yet he was of opinion, that this advowſon paſſed by the letters patent of king *Charles* I.

1. By, him, the grant is full and expreſs.

2. No ſuggeſtion in the patent is falſe unleſs that which ſays, that *Wilſon* was preſented by king *Charles* by lapſe; nor it is ſaid, that the advowſon paſſed by the letters patent of the queen.

3. Where it is ſaid that *Theaxton* claimed it by virtue of the patent of the queen, that muſt not be intended lawful claim; for if a man claims an advowſon by colour of a void patent, and the king preſents, and afterwards in conſideration that the other will permit his clerk to enjoy during his life, the king grants the advowſon to the other and his heirs, and the other permits the king's clerk to enjoy it during his life; it is a good conſideration, and the patent is good.

Objection. It is ſaid in the recital of the patent of *Charles* I. that *Theaxton* ſued a *quare impedit*, to recover *ſuam praeſentationem*.

Anſwer. That is only the ſuggeſtion of the writ.

4. It is ſuppoſed and admitted by the letters patent of *Charles* I. that the patent of *Elizabeth* might be void, yet the king declares, that it was his true intent, that *Theaxton* and his heirs ſhould enjoy it notwithſtanding any defects in the letters patent, and then proceeds to the abſolute grant of the advowſon to *Theaxton* and his heirs. There are ſtronger caſes, where the intent of the king has been to confirm letters patent that were void, yet if his intent has alſo appeared, to grant the thing *de novo*, the letters patent have been adjudged good and the grant alſo. *Hil.* 22. & 23 *Car.* 2. *in ſcaccario* in the time of chief baron *Hale*, the caſe between *Atkyns* and *Holford* was thus; king *Edward* 3. by his letters patent, reciting that king *John* had by his charter granted to the abbot and convent of *Thiſtleworth returna brevium*, and reciting that it had been found by inquiſition, that the abbot and convent uſurped the franchiſe of the crown, ſo that the franchiſe was reveſted in the crown; firſt *Edward* III. confirms the charter of king *John*, and then goes on and grants to the abbot and convent *returna brevium*; it was agreed in that caſe, that the charter of king *John* was void; and it might have been objected, that king *Edward* III. eſteemed the charter of king *John* good, and that the inquiſition was falſe, and therefore he intended

intended only to make reſtitution of the franchiſe that was reveſted in the crown; but it was adjudged, that though the grant of king *John* was void, yet the grant of *Edward* III. was good, becauſe the intention of the king appeared to paſs to the abbot and convent the *returna brevium*. And this caſe he cited as a caſe in point.

Objection. This clauſe is qualified by the *ſecundum tenorem et veram intentionem literarum patentium* of the queen, &c.

Anſwer. That intent is not to be underſtood of that which actually paſſed, but of that which was deſigned to paſs; for the patents of *Charles* I. ſuppoſe a defect in thoſe of the queen; ſo that it is not conſtrued a legal intent, but a moral intent. If this advowſon at the time of the queen's grant had the reputation to be appendant, the queen might well have intended to paſs it, though in ſtrictneſs of law if it was in groſs it could not paſs. A manor in reputation may paſs by the name of a manor in grants, between common perſons, 6 *Co.* 63. *a.* 64. *b.* though perhaps the law may be otherwiſe in the caſe of advowſons. If a man ſeiſed of a manor to which an advowſon is appendant, mortgages the manor in fee, excepting the advowſon; if the money is paid at the day, the advowſon is become again appendant; but if the money is paid after the day, it will have the reputation of appendancy, but in truth it is not appendant. It might be that this advowſon was appendant before the queen preſented *Tyms*, and was then ſevered, but retained afterwards the reputation of appendancy; and if in this caſe the grant was of the manor with the advowſon appendant, this reputation might be ſufficient to juſtify the intent of the letters patent, that it was intended to be paſſed. Beſides, that in this caſe it does not appear, that there was any other advowſon but *Bedall* appendant to this manor, which is a foundation of a very ſtrong preſumption of the queen's intent to paſs it. He ſaid farther, that he had ſearched in the hiſtory of this church, and it ſeemed to him, that it was appendant to the manor at the time of Queen *Elizabeth*'s grant. See *Co. Entr.* 477. *b. tit. quare imp. pl.* 2. It appears, that this advowſon was appendant to this manor in the time of *Edward* III. afterwards a man was ſeiſed in fee of the manor of *Bedall*, to which this advowſon was appendant, and it deſcended to two coparceners, ſo that then it was appendant by turns, one time to the one moiety, and the other time to the other moiety; one moiety of it came to the lord *Lovel* in fee, who was attainted of treaſon in the time of *Henry* VII. by which *Henry* VII. was ſeiſed of it in fee; afterwards *Henry* VII. gave this moiety to the anceſtor of *Digby* in tail, from whom it came to *Simon Digby*, who in the time of queen *Elizabeth* committed treaſon, and then the church became void, and the queen preſented, and then *Digby* was attainted:

If an appendant is excepted out of a mortgage of the principal, on the forfeiture of the mortgage, the appendancy is deſtroyed. S. P. 3 Salk. 24. 40. Vide ante 198.

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If a reverſioner puts the particular tenant out of poſſeſſion of an appendant, the appendancy will revive when the particular eſtate determines.

tainted: ſo that the caſe is thus; tenant in tail of a manor, to which an advowſon is appendant, reverſion to the queen in fee; tenant in tail commits treaſon, then the queen in reverſion uſurps, by this the advowſon is in the queen in groſs, afterwards tenant in tail is attainted, the advowſon is become appendant again; for the appendancy was not deſtroyed by the uſurpation, for though it was ſevered from the eſtate tail, yet it was not ſevered from the fee; then by the attainder the eſtate tail is wholly extinct, and the queen is ſeiſed in her *reverter*. As if there is tenant for life of a manor to which an advowſon is appendant, the reverſion in fee to *A. A.* uſurps upon the tenant for life, the advowſon is become in groſs, but if the tenant for life dies, it is become appendant again. *Hob.* 323, Sir *William Elvis*'s caſe. So that though the queen might have been ſeiſed in groſs, when ſhe preſented *Tyms*, yet the advowſon might have been appendant at the time of the grant to the earl of *Warwick*. And the ſurer way here to have come to the right, had been to have taken iſſue upon the traverſes, and not to have laid ſnares to trap men's rights, which judges ought to diſcourage.

Objection. There is a falſe ſuggeſtion, that king *Charles* I. preſented *Wilſon* by lapſe, where in truth king *James* I. preſented him *pleno jure*.

Anſwer. Every falſe recital in a thing not material will not vitiate the king's grant, if it appears that it was his intent to grant the thing; now here the king would not hazard the title of *Wickham*, and therefore took this means to determine the controverſy, by the confirmation of *Theaxton*'s right, if there was any in him, or if he had no right, to give him a right. And the conſideration is ſufficient if *Theaxton* had no right, *viz.* the deſiſting from the ſuit, whether he had right of ſuit or not. And he compared it to 1 *Co.* 43. *a.* 6 *Co.* 55. *a.* ſurrender of letters patent *&c.* It is not material to *Theaxton* whether king *James* I. preſented by lapſe, or *pleno jure*; and every little miſtake in an immaterial point will not avoid the king's grant, if the intent appears, and the ſubſtance is performed.

An immaterial miſtake will not avoid the king's grant if his intent remains apparent. R. acc. 1 Roll. Rep. 23. D. acc. 1 Mod. 196.

Beſides, if the judges adjudge theſe letters patent of *Charles* I. void, it will avoid the letters patent of queen *Elizabeth*, which are not before the court; and one cannot adjudge letters patent void, which appear only by recital. And farther the letters patent of the queen might have words general enough to convey the advowſon in groſs: for the recital ſays, that the queen *inter alia* granted; now it may be, that the letters patent of the queen contain theſe words, *viz. aut exiſtentes in Bedall*; and thoſe words would paſs the advowſon in groſs; and if that had appeared in evidence upon iſſue joined, the verdict would have been for the defendant. 1 *Mod.* 195.

Objection

Objection. The granting part of the letters patent muſt relate to the recitals.

Anſwer. If it appears by the recitals, that the king has intent to paſs nothing in which he had profit, but only what was detained by concealment from him, the recital will qualify the general words of the grant, becauſe it appears that his intent was not to diminiſh the revenues of the crown. But if there are words in the grant which ſhew that the king intended to paſs the land, although it was not concealed, the grant will be good to paſs the land which was not concealed. *Hardr.* 231. *pl.* 7. And for theſe reaſons he was of opinion, that this advowſon paſſed by the letters patent of *Charles* I. *Eyre* juſtice declared that he was of the ſame opinion. But he did not argue this point, becauſe the other point which follows was, as he ſaid, an unſurmountable obſtacle.

As to the ſecond point, whether the grant ſhewn upon the *oyer* can be the ſame grant with that which was pleaded, by reaſon of a variance. For the defendant pleaded a grant *Willelmo Theaxton tunc armigero poſtea militi*, and upon the *oyer* the grant appears to be *Willelmo Theaxton militi. Rokeby* juſtice was of opinion, that there was a ſufficient demonſtration of the perſon, and that nothing appeared in the record to induce the court to intend that *William Theaxton* eſquire and *William Theaxton* knight were two diſtinct perſons, but that they were the ſame perſon; for (by him) the dignity does not change the man; and it is only in this caſe a miſtake in an adverb of time. And as to the objection, that if one makes a grant to a man by the ſtile of knight, who is but an eſquire, the grant is void. He anſwered, that it is a maxim, that *veritas demonſtrationis tollit errorem nominis.*

2. (By him) if a grant be made to a man by the name of knight, if he is not a knight, yet the grant is good, if it may *conſtare de perſona.* And in *Littleton's reports* 181, 197, 223. *W. Jon.* 215. it is the opinion of all, that the miſtake of an addition will not avoid a grant, if it may *conſtare de perſona.* And therefore he was of opinion, that the judgment given in the common pleas ought to be reverſed.

But *Holt* chief juſtice, *Turton* and *Eyre* juſtices, argued againſt *Rokeby* juſtice in this point. For by *Holt* chief juſtice, a grant to *William Theaxton* eſquire, by the name of *William Theaxton* knight, is void; 1. Becauſe knight is part of the name of a man; 2. It is a name of dignity, which is part of the name of a man as much as a *Chriſtian*

3. 23. a. pl. 39. Hutt. 41. D. acc. Bro. Additions, 58. 21 Ed. 4. 72. a. 2 Inſt. 594. poſt. 859. Semb. acc. Bro. noſmes, 33. long quinto. 106. b.

Knight is a title of dignity. D. acc. Bro. Additions, 44. long quinto. 106. b. 2 Inſt. 594. 1 Bl. Com. 403, 404. Semb acc. 9 Co. 49. b. Cro. Car. 271. Hob. 129.

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Where it appears from the recital of a patent that the king means only to convey a right concealed from him, the recital ſhall controul any general words in the patent. S. P. Salk. 560. Skinn. 663. R. acc. 10 Co. 109. a. But it is otherwiſe where a contrary intent appears. S. P. Salk. 560. Skinn. 663.

A title of dignity is part of a man's name. R. acc. 8. Ed.

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name. So that if a man be ſtiled of another dignity than that of which he is, it is ill. And as to the *demonſtratio perſonae* objected by *Rokeby*, *Holt* anſwered, that it ought to appear upon the face of the grant; for otherwiſe the allegation of the party, that he is the ſame perſon, ſignifies nothing. The name of eſquire is merged by the acceſſion of the name of knight, ſo that he who is a knight, can never be called eſquire afterwards, which is but a name of worſhip. 6 *Hen.* 4. 8. *Seld. tit. hon.* 683. 9.

Objection. Sir *William Theaxton* might be a reputed knight, and not a real knight; and a name by reputation is ſufficient for purchaſes.

Anſwer. A knight reputed, and who is not a real knight, is no knight at all, and cannot take by that name. 2 If there was ſuch a reputation, the defendant ſhould have ſhewn it.

In all caſes of reputation there ought to be ſome foundation for ſuch reputation, which could not be in this caſe. It is agreed, that a baſtard in legal underſtanding has no father nor mother; nevertheleſs, ſome of them muſt know their mother well enough; yet a grant to a baſtard by the name of ſuch a woman is ill, unleſs he be reputed the ſon of that woman by all the neighbourhood, not by one or two; and notwithſtanding that there is a ground in nature to raiſe a reputation, for he muſt be the ſon of ſome woman. But if a man be baſtard *eigne*, becauſe by the civil law he is *mutier*, there is a greater foundation for reputation, and he ſhall take by the name of ſon of ſuch a woman, without a general reputation. Then in the caſe of knights, heretofore knights were created by great lords as well as by the king, but that was ſuppoſed to have been by virtue of a charter; but ſince honour is conferred by none but the king, there cannot be any foundation for a reputation to be a knight. The dignity of knights was in great eſteem in the law, and great credit was given to them. In the trial in a writ of right, the law will not intruſt the ſheriff to return the jury, but the panel of the great aſſiſe muſt be made by four knights, *&c.*

A baſtard cannot take under the deſcription of the ſon of a particular woman, unleſs he be either *generally* reputed her ſon. Vide 6 Co. 65. a. or baſtard eigne. Vide 6 Co. 65. a.

Objection. A name of dignity may be ſupported by reputation. For ſuppoſe a grant be made to the eldeſt ſon of an earl, by the name of viſcount of ſuch a place, it would be a good grant.

Anſwer. There is a foundation for ſuch a reputation, for by the law of heraldry the eldeſt ſon of a duke precedes all earls; and conveyancers call them eſquires, commonly known by the name of earls. The eldeſt ſon of an earl precedes, barons, *&c.*

The eldeſt ſon of a duke precedes an earl. acc. 1 Bl. Com. 405.

Objection. *Cro. Jac.* 240, Lord *Ewre v. Strickland.*

Anſwer. The addition of that caſe being of ſuch a dignity, as that one perſon only is capable of it, carried ſufficient certainty in itſelf, and therefore was good according to *Co. Litt.* 3. *a.* which was the reaſon of that caſe, as appears

The eldeſt ſon of an earl, a baron acc. 1. Bl. Com. 405.

pears, 1 *Bulſtr.* 21. where the ſame caſe is better reported than in *Cro.* which is extraordinary, that any thing ſhould be better reported in *Bulſtrode* than in *Croke.*

As to the caſe of the earl of *Pembroke* againſt *Green and Boſtock*, reported in *Littlet. Rep.* 181, *&c.* 1 *Cro.* 172. and 1 *Jones* 215. the caſe is miſtaken in 1 *Cro.* for the iſſue there was not upon the grant to *W. S.* but upon the grant of the next avoidance. But it is the expreſs opinion of three great judges, *Dier* 299. *b. pl.* 35. that if iſſue had been taken upon the grant to *W. S.* the iſſue had been for the defendant. Though that ſeemed to *Holt* chief juſtice difficult to maintain, when the verdict had found him to be the ſame perſon. But there is no reaſon for the opinion of *Hutton* and *Richardſon* chief juſtice in *Littleton's Reports.* For if the law were ſo, names would be uſeleſs, for *John S.* is as much *Thomas S.* as Sir *William Theaxton* knight is *William Theaxton* eſq. It is true, that there are ſeveral perſons who purchaſe by the name of *Thomas John, &c.* who were never chriſtened; but in ſuch caſes thoſe are ſurnames only. 2. If reputation might have been ſufficient, the defendant nevertheleſs ought to have averred it, *viz.* that *William Theaxton* was *revera* eſquire, *ſed tamen cognitus et reputatus* a knight. And ſuch an averment ought to be made in all caſes where a man has acquired a reputation contrary to the truth of the fact. And for theſe reaſons the three judges were of opinion, that this variance was ſo great an obſtacle, that they could not come at the merits of the cauſe, but for this defect the plea was ill; and therefore (by them) the judgment in the common pleas ought to be affirmed, which was done accordingly. Afterwards upon error brought in parliament this judgment was (*a*) reverſed, without any conſideration had of the opinion of the judges.

(*a*) Sho. Parl. Caſ. 212.

Britton *verſ.* Cole.

S. C. Comb. 434. 469. Carth. 441. 12 Mod. 175. Pleadings poſt. vol. 3. 145. 5 Mod. 109.

TRESPASS. The plaintiff declares, that the defendant the twentieth of *May*, 7 *Will* 3. at *Hanap* in *Glouceſterſhire* took and chaſed forty three ſheep and two lambs of the plaintiff, *&c.* The defendant pleads, that 12 *Febr.* 6. *Will* 3. a *levari facias* iſſued out of the exchequer,

A levari facias iſſues only where the party's land is debtor. S. C. Salk. 395. 5 Mod. 112. Skinn. 617. Com. 51. Holt, 421.

Any cattle levant and couchant thereon are iſſues of ſuch land. S. C. Salk. 395. 5 Mod. 112. Skinn. 617. Com. 51. Holt, 421.

And may be ſeized and ſold under ſuch writ. S. C. Salk. 395. 5 Mod. 112. Skinn. 617. Com. 51. Holt, 421.

Upon a levari facias againſt the iſſues of an outlaw's lands, the ſheriff, his officers, or any one acting in his or their aid, may juſtify under the writ alone. S. C. Salk. 408. Vide 1 Lev. 95. 3 Wilſ. 345. 376. Bl. 847. Poſt. 733. Bl. 701. Burr. 2631.

No other perſon can. S. C. Salk. 408. Vide 1 Lev. 95. 3 Wilſ. 376.

In a juſtification under a writ and warrant, it is not neceſſary to ſhew the delivery of the writ to the ſheriff. R. acc. 1 Saund. 298. or of the warrant to the bailiff.

Under a warrant to A. and B. B. and C. cannot act. S. C. cit. poſt. 1531. And if a plea ſets out a warrant to A. and B. and that by virtue thereof (through miſtake) B. and C. did the act directed by the warrant, the court will not after a demurrer and argument permit an amendment.