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A
TREATISE

ON

THE LAW OF LETTERS-PATENT,

FOR

THE SOLE USE OF INVENTIONS

IN

THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND;

INCLUDING

THE PRACTICE CONNECTED WITH THE GRANT:

TO WHICH IS ADDED

A SUMMARY OF THE PATENT LAWS IN FORCE IN THE
PRINCIPAL FOREIGN STATES;

With an Appendix

or

STATUTES, RULES, PRACTICAL FORMS, &c.

BY

JOHN CORYTON, Esq.

OF LINCOLN'S INN, BARRISTER-AT-LAW.

~~~~~  
Humani generis progressus, ex communi omnium labore ortus,  
uniuscujusque industriæ debet esse finis.

8°  
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H. SWEET, 3, CHANCERY LANE, FLEET STREET,  
Late Bookseller and Publisher;

HODGES AND SMITH, GRAFTON STREET, DUBLIN.

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*Rec. Oct. 14, 1875*

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## PREFACE.

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THE present will be found to differ in some material respects from other Treatises on Patent Law. Were it not so, I should feel even greater diffidence than I have in venturing on a field, which, so far as learned research and elaborate attention to detail can give a title, Mr. Hindmarch and Mr. Webster may be said to have made peculiarly their own.

Hitherto (and by the authors above mentioned, among others) this subject has been treated as a branch of Royal Franchises conferred through the instrumentality of Letters-patent at the mere motion of the Crown, the grant in this instance flowing from it in its character of Patron of industry, ingenuity and skill.

An entirely different hypothesis has been here assumed to underlie the structure of Patent Law—one which admits of its leading questions being discussed on broad general principles, instead of by reference to rules framed for purposes alien to inventions, and but imperfectly applicable to the contingencies of modern trade. It places the grant on the footing of a privilege, resulting from a contract in restraint of trade, between the Crown (as representative of the public) and the Patentee, and considers its *de facto* character as a Royal grant to influence the question (as will be seen by the decided cases) to a very inconsiderable extent.

If simplicity of arrangement be any criterion of the true

solution, the supposition here proceeded on would appear to be of solid foundation. Referred to it, the "subject matter" (or "invention," the terms being interchangeable), elsewhere so minutely yet variously described, admits of a definition at once comprehensive and concise—as "the material result of an unpublished improvement in the manufacture of articles for public use." It is this which forms the leading feature in the scheme. The person of the Patentee becomes in comparison with it a subordinate idea,<sup>a</sup> as "the first publisher by means of a Specification of the invention." It furnishes, moreover, the key to the questions which have arisen on the sufficiency of the Specification and other points, and which, as hitherto discussed, can hardly be said to have been satisfactorily disposed of.

The theory is no new one. As the compromise of a great contest between Sovereign and people, the Law was settled, on the issue of that contest, with regard to the great principles it involved—principles which, with scarcely any exceptions,<sup>b</sup> have regulated the administration of the grant from the passing of the Statute of Monopolies to the present day.

<sup>a</sup> This was the view entertained of our Law by the late Mr. Justice Story, who, in a case (*Earle v. Sawyer*, shingle-mill, 4 Mas. 8), so long since as 1825, thus expressed himself: "How indeed can it be possible that an English Court should deem some intellectual labour beyond the novelty of the combination necessary for a Patent, when it is the acknowledged Law of England (different in that respect from our own), that the first importer of an invention known and used in foreign parts may be entitled to a Patent as the *inventor* in England? What of intellect is employed in the mere importation of a known machine? An *inventor* in the sense of the English Law is the first maker or constructor or introducer in England."

<sup>b</sup> Contrast, for instance, the language used in the early trials of monopoly cases and that of the present day with such as the following words of a Lord Chancellor—"If the King refused the Patent, it would be upon reasons very unfit for me or any one to dispute, because it rests entirely in his Royal breast, and it cannot be in one more honourable." Per Lord Thurlow, L. C., *Ex parte O'Reily* (1790), 1 Ves. jun. 112.

On the general policy of State guarantees for the exclusive use of new inventions, some remarks will be found in the Introductory Chapter, selected from the leading writers on Political Economy, and the evidence adduced before the Select Committee of the House of Lords in 1851.<sup>c</sup> With reference to the latter and the tone assumed in the discussions of Parliament on this head, public opinion appeared to be equally balanced, assertions the most contrary being very confidently put forward by authorities equally entitled to the highest respect. On all sides the question was felt to be one of considerable importance to the manufacturing interests of the country, and one in which a false step in legislation might be attended with consequences seriously affecting the relative position it occupied

<sup>c</sup> "My general opinion is, that Patents should be granted free of all expense, and that in place of being considered as monopolies which are injurious to the public, they should be regarded as benefits conferred upon it, and therefore encouraged by every possible means. I think that Patents should be readily granted for every new idea, whatever that idea may be, that every encouragement should be given to persons to bring forward such ideas. The history of science shows that such ideas have often led to very great and important results, and hence I am of opinion that to every idea connected with science and art the protection of a Patent should be freely extended." (Evid. 2426, Sir D. Brewster.)

"All just inventions are arrived at by a long series of steps, and those persons who have made the discovery of the great principle upon which they are founded are not the persons who really benefit by them. I think the system defective in principle." (Evid. 2828, Sir J. Romilly, M. R.)

Q. Did not reading the evidence taken before the Committee of the House of Commons in 1829, strongly impress your mind with the multiplicity, the extent and the unavoidable character of the various difficulties and inconveniences which attend the existing Patent Laws.

A. There is no doubt of that.

Q. Did it not also impress you with the conviction of the impossibility of making any effectual struggle towards overcoming those difficulties.

A. I think so.

—(Evid. 2298, Colonel Reid.)

Lord Granville (President of the Select Committee of the House of Lords in 1851) was of opinion "that the whole system was inadvisable for the public, disadvantageous to inventors, and wrong in principle." (118 Hansard, 14, 1 July, 1851.)

among other States. With a single exception,<sup>d</sup> every State of any consequence in modern times had followed our example by adopting the institution, and attributed to its agency a large share of the improvements that had been effected in their manufactures. In this position of affairs, Parliament was unwilling to commit itself to the expression of an opinion to the contrary, or hazard the experiment of a change. The measures it enacted show how much attention had been occupied with the details and effect of the grant in other States, for they consist more in the removal of acknowledged abuses and the remodelling of our Law to meet the objections urged against it from political considerations, than in a general rearrangement of the system upon principle.

Be the difference of opinion, however, on the larger question what it may, there is little room for controversy as to the practical points connected with the grant. To maintain its character as a legitimate interference of the State with trade, there are few who will not allow that it should be far more cautiously conceded and more efficiently protected than is the case under the present system. Patent Agents,<sup>e</sup> as the recognised representatives of inventors, should be made Officers of the Court. A Commission, comprising persons conversant with the various branches of manufacturing art,<sup>f</sup> should decide upon the *novelty* of the

<sup>d</sup> The flourishing state of trade and the very considerable importance of the inventions which had originated in Switzerland (Loosey, 425 (1851), Evid. 2137), which is entirely without a Patent Law, were quoted in support of the argument that the stimulus of exclusive privileges was superfluous, either for the encouragement of manufactures, or as an inducement to invention.

<sup>e</sup> A case was referred to before the Committee of 1851 (Evid. 1437), as within the knowledge of one of the witnesses, in which the same Patent Agent had taken out three Patents for different parties for the same thing within a very short period.

<sup>f</sup> "According to the Report of the Commissioner of Patents (United

invention submitted to them, and suggest the conditions to be imposed upon the Patentee. Such a Commission might also act in the case of Amendment and Disclaimer, the practice with respect to these being open to all the objections urged against that connected with the original grant.

We must not, however, under-rate the importance of the vast improvements introduced by the recent Acts. The movement which effected them was less reformatory than destructive, consisting not so much in the erection of any new theory or system with reference to Patent right, as in the abolition of conditions which had long since ceased to be either necessary, useful, or significant, and which served only to derogate from the strictly commercial character the privilege naturally possessed. Much that is useful in detail has been adopted from the practice of foreign states; not the least important features being the reduction of the duty payable, the provision of a Public Library, and the institution of an authoritative Register<sup>g</sup> of past patented inventions.

The mere substitution of filing for enrolment, and establishment of the Commissioners' Office, has reduced the proceedings to obtain the grant from a wearisome, and oftentimes dangerous formality, to the dimensions of an ordinary business-like transaction. Under the old law, a Patent for an invention passed through nine stages, in

States) the arrearages of business in that office have been well pushed forward *by increasing the number of Examiners*. Since the 1st of January 1,600 Patents have been issued, and the whole number for the year will reach 1,900, or double that in 1853. The principal recommendations of Mr. Mason are that the examining force be permanently augmented; that better provision be made for taking testimony in cases of appeal, and a new rate of fees established." Summary of Statistical Report presented to Congress in 1854.

<sup>g</sup> For the valuable Official Indexes now published, the public is indebted to the exertions of Mr. Bennett Woodcroft, the present Superintendent of Specifications.

seven separate offices, situate in parts of the town distant from each other. The new Act recognized three separate offices, the Great Seal Patent Office, being the ancient Office of Chancery for the passing of Patents; a new Office, the Office of the Commissioners; and the Office of the Law Officer making out the Warrant. With a view to consolidate these several Offices, the Lord Chancellor,<sup>b</sup> by an Order dated 1st October, 1852, appointed the Great Seal Patent Office to be the Office in Chancery for the filing of Specifications, and the Commissioners, by an Order of the same date, directed the Great Seal Patent Office and the Office of the Commissioners to be combined, and the Clerk of the Patents for the time being to be the Clerk of the Commissioners; while by subsequent Orders of the late Attorney and Solicitor-General, the Warrants of the Law Officer, theretofore made in the Office of the Patent Clerk of the Attorney-General, was directed to be made in the Office of the Commissioners.

In consequence of these Orders matters have been very materially simplified, the whole of the duties of the Commissioners, from the reception of the Petition for Provisional Protection to the publication and sale of the Specifications, being discharged in one Office. This Office will be rendered still more complete by the establishment of the Public Library now collecting under the superintendence of Mr. Bennett Woodcroft, to consist of scientific and practical works of all nations on the subject of manufacturing art.

Each Specification filed under the New Act is, together with a lithographed outline copy of the drawings accompanying the same, printed and published by the Commissioners within three weeks of its deposit in the Office. It is sold to the public at the cost price of the printing and

<sup>b</sup> Stat. 15 & 16 Vict. c. 83, s. 28.



paper. The price of a print of the average length, of letterpress and drawings, is 8*d*.

A Journal of a somewhat indefinite character, entitled "The Commissioners of Patents Journal," has, since January, 1854, been published twice a week by the authority of the Commissioners. It contains the various notices appearing in the *Gazette* on the subject of Patents, and a variety of other notices, and useful information and instruction, for the guidance of applicants in proceeding for their Patents. It is proposed to publish in it the names of Patentees, and the titles of Patents granted in other countries: also a notification from time to time of the date of the expiration of each Patent, as it may become void either by non-payment of the stamp duties of 50*l*. and 100*l*., at the expiration of the third and seventh years respectively, pursuant to the Act, or at the full term of fourteen years: and also, from time to time, a list of the inventions provisionally protected, lapsed or forfeited by reason of the applicants having neglected to proceed for their Patents within the six months of provisional protection.

For the Forms of Assignment, Mortgage and Licence, in the Appendix, embracing the experience of long actual practice, I am indebted to the kindness of the able and learned Editor of Jarman and Bythewood's Conveyancing.

To Mr. Charles Cowper, Patent Agent, I am obliged for much of detail as to the practice connected with the grant in Continental States.

I take this opportunity of expressing my sense of the great courtesy of the Officers connected with the Privy Council and Great Seal Patent Office. The information furnished by Mr. Ruscoe of the latter as to the routine of the Office, will, I trust, render the work useful as a manual to inventors.

J. C.

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A

TREATISE

ON

THE LAW OF PATENTS.

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INTRODUCTORY CHAPTER.

LETTERS PATENT<sup>a</sup> for inventions are grants of record under the Great Seal,<sup>b</sup> whereby, in consideration of the improvement effected by such inventions in trade, the exclusive enjoyment of such improved trade for a limited period is assured to the parties first communicating the inventions to the public. Definition.

Few of our existing institutions have passed through so extraordinary a career, and none perhaps have reverted so nearly to their original position. Conceived in the very essence of paternal government, and maintained, notwithstanding its manifest abuses, by arguments now abandoned as fallacious,<sup>c</sup> this species of monopoly is still Vicissitudes of the subject.

<sup>a</sup> So called from the form of the grant, which is in open letters (*literæ patentēs*), addressed by the sovereign to the subjects at large. 2 Bl. Com. 346; Collier on Patents, 64.

<sup>b</sup> Although not common among the Saxons, seals were used as early as the time of Edgar. Impressions on wax were first used by William the Conqueror, and coats of arms as a seal owed their origin to the time of Richard I. (Com. Dig. Pat. C. 2.) For specimens and descriptions of some of the seals in ancient grants, see (1702) Madox, *Formulare Anglicanum*, A Dissertation on Ancient Charters and Instruments.

<sup>c</sup> "Manufactures of moderate expense and quick growth may, in general, safely be left to private adventurers, and run the common

looked upon as politic and just, and compatible with a régime which abandons a protective policy as false in principle, and holds all authoritative interference with trade to be an evil.

Importance of the history of exclusive privileges in trade.

The history of exclusive privileges in trade is interesting from its intimate connection with the progress of our commerce,<sup>d</sup> manufactures and art, and the illustration it affords of the development of our constitutional liberty. In its progress we recognize the action of our national characteristics, the conservative temper that shields obnoxious institutions through times of popular excitement, and the spirit of reform ever busy in moulding them into conformity with, and rendering them subservient to, the requirements of the times. To the former we owe a theory unchanged since the days of the Tudors and Stuarts, to the latter the removal of the abuses that disfigured it, and its appropriation to a purpose almost peculiar to the present day. "By the wisdom of the nation," says a learned writer,<sup>e</sup> "this poison of the state has been deprived of all its pernicious ingredients, and converted into a nutritious aliment applicable to the support of commercial prosperity."

"Inventions" an incident of modern times.

The exclusive use of new inventions, although the origin and the supporting principle of the whole, plays but an insignificant part in the great system of monopolies, which at one time embraced the greater portion of the mechanical arts, and many branches of foreign

chance of success: the finer arts will never flourish but under public protection and noble patronage; no encouragement in the hands of private persons is adequate reward to the man of genius who studies the universal promotion of these more useful arts which give daily bread to millions of the human species, support the dignity of crowns and the magnificence of the great and wealthy. A noble profusion of honours and bounty raised the Gobelines to its present height: the united influence of these two being generally sufficient to call forth whatever human industry can attain to." (Savary (1741), *Dictionnaire Universel de Commerce*.)

<sup>d</sup> 1851, Evid. 2345.

<sup>e</sup> Collier on Patents, 12.

trade. Inventions, indeed, in the sense of the word at the present day, are essentially<sup>f</sup> an incident of a period of great refinement, when the ingenuity of man is directed to the increase of the necessaries and luxuries of life, by rendering science and philosophy subservient to the purposes of commerce.<sup>g</sup>

Freedom of trade, in so far as regards the employment of industry and skill, was a jealously guarded maxim of Common Law, for by it no man was restrained from working at any lawful trade,<sup>h</sup> or using as many arts or mysteries as he pleased.<sup>i</sup>

Freedom of trade at the common law.

So entirely, indeed, was this liberty considered the birthright<sup>k</sup> of Englishmen, that it was considered that by no act of his own could he totally debar himself of it, much less be deprived of it by the king's letters patent.<sup>l</sup> "The liberties of Englishmen," says Blackstone,<sup>m</sup> "are not mere infringements of the king's prerogative extorted from our princes by taking advantage of their weakness, but a restoration of that ancient constitution of which our ancestors had been defrauded by the art of Norman lawyers, rather than deprived by the force of Norman arms."

<sup>f</sup> "When the manufactures are in their infancy," observes Mr. Webster (*Law and Practice* (1851), p. 23), "products which never before existed, results never before obtained, and effects never before produced, will be the subject-matter of letters-patent: this will constitute, as it were, the first era of invention, but ingenuity will then be directed to improvements in the art of producing, to the obtaining the same products or results, and to the producing the same effects in a more economical and beneficial manner: this will constitute the next or more advanced era of invention." See 2 H. Bl. 489, per Buller, J.

<sup>g</sup> Phillips on Patents, 3.

<sup>h</sup> 11 Co. 536; Hob. 211; Com. Dig. "Trade."

<sup>i</sup> Vin. Abr. "Trade"; *Tailors of Ipswich case*, Show. 266.

<sup>k</sup> H. of Com. Jour. 1614—469; 1 W. & M. st. 2, c. 2.

<sup>l</sup> Noy, 182; 3 Mod. 128; Bac. Abr. "Prerog."; per Sir J. Leach, *Bryson v. Whitehead*, 1 S. & St. 74; S. C. 1 L. J. Ch. 42 (1821).

<sup>m</sup> 2 Bl. Com. pt. 1, c. 1.

Crown empowered to grant privileges in trade.

By the Common Law, however, the Crown, as the patron of science and art and guardian of the common weal, had power to grant many privileges<sup>n</sup> in trade, "although *primâ facie*," as it was said,<sup>o</sup> "they appear to be against common right." The consideration was the invention of a new manufacture, or the introduction of a new trade. The grant could be only by Charter or Letters-patent,<sup>p</sup> and the term of privilege was to be "reasonable."<sup>q</sup>

Limits of the power.

The sole selling of articles in common use,<sup>r</sup> or the sole exercise of a known occupation,<sup>s</sup> were held to be improper exercise of the prerogative. The King's Charter to any particular corporation of the sole importation of any merchandize was also held to be of no effect, whether the merchandize was prohibited by Statute or not.<sup>t</sup>

A similar Charter, empowering individuals or companies to trade to and from a particular place, and in

<sup>n</sup> The earliest instance of the exercise of this authority has never been accurately ascertained. (Hindm. 4.) We find, however, in the reign of Edward III. (Sir F. Moore's Rep. 675), that on the representation to him of the feasibility of making a "philosopher's stone," that monarch issued a commission of two friars and two aldermen to inquire into the matter, and on their reporting in its favour, granted to them and their assigns the sole privilege of making the philosopher's stone. See Collier, App. (H.), for authorities On the King's Charter regulating Trade.

<sup>o</sup> Y. B. 4 Edw. III. fol. 17.

<sup>p</sup> For a collection of such grants, see Madox, *Formulare Anglicanum*.

<sup>q</sup> Com. Dig. Pat. R. 2; Co. 16 b; 2 Roll. 182, l. 5; Noy, 182; 1 Hawk. P. C. c. 29, § 20; Chitty, P. C. ch. x. § 2; Godson, p. 10.

<sup>r</sup> *Peachies case* (Edw. III.), 3 Inst. 181; (sweet wines), Noy, 173; 11 Co. 84; H. of Com. Jour. (1614), i. 470; *D'Arcy v. Allen*, 11 Co. 86; Noy, 178; Web. P. R. 1—5 (playing cards).

<sup>s</sup> 2 Roll. Abr. 212; Jon. 231; 3 Mod. 75; Vern. 120, 130; 10 Mod. 107, 131, 133.

<sup>t</sup> 2 Inst. 61; Style, 214. By stat. 19 Hen. IV. the ordinances of trading guilds were made subject to the approbation of the Chancellor, Treasurer, Chief Justice or Judges of Assize (Merewether and Stephens (1835); Grant on the Law of Corp. (1850); Com. Dig. "Bye Law.")

particular articles, is void, so far as it gives such persons an exclusive right of trading.<sup>u</sup>

The earliest form of these privileges was that of conducting exclusively new trades, or dealing exclusively in objects of commerce hitherto unknown, as a reward and encouragement to the parties introducing them. By degrees, however, the powers confided to the executive were perverted<sup>x</sup> from their proper purpose; and, under the pretence of the better government of trade,<sup>y</sup> the prerogative of the Crown was employed in sanctioning, in return for pecuniary aid, individuals and corporations<sup>z</sup> in very oppressive monopolies.<sup>u</sup>

Early form of privileges.

In the reign of Elizabeth this evil had assumed a very formidable appearance.<sup>b</sup> "It is astonishing," says Hume, "to consider the number and importance of those commodities which were thus assigned over to patentees. Currants, salt, iron, powder, cards, calf skins, fells, pouldavies, ox shin bones, train oil, lists of cloth, potashes, aniseseeds, vinegar, sea coals, steel, aqua vitæ, brushes, pots, bottles, saltpetre, lead, accidences, oil, calamine stone, oil of blubber, glasses, paper, starch, tin,

State of privileges in the time of Elizabeth.

<sup>u</sup> *Sundys v. F. I. Company*, Raym. 489; 2 Chan. Cas. 165; Skin. 165, 226, 234, and *Co. of Merch. Adventurers v. Lebow*, 3 Mod. 126.

<sup>x</sup> Collier, ch. II. On the Hist. of Monopoly in England, from the Time of John to that of the Interregnum.

<sup>y</sup> Adam Smith, 138, 142, 150; 3 Hume, 404; (1812) Chitty, App. 7.

<sup>z</sup> (1835) Merewether and Stephens, Hist. of Corp.

<sup>a</sup> Com. Dig, "Trade. Bye-Law;" Hob. 210; 1 Tann. 412, n. 3; 1 Salk. 203; 2 Raym. 1129; 7 T. R. 543; Bac. Abr., "Monopoly;" Bull. N. P. 76; Lingard's Hist., Dolman's ed. ix. 182. In relating the abuse of a similar prerogative (that of knighting), Clarendon uses language very applicable to the case. "The King received a vast sum of money from all persons of quality, or indeed of any reasonable condition; which, although it had its foundation in right, yet in the circumstances of proceeding was very grievous." (Hist. Reb. i. p. 67.)

<sup>b</sup> Ed. Rev. xxv. 43\* (1837); Lord J. Russell on the Eng. Const. 47; Hall. Const. Hist. 3 ed. i. 355.

sulphur, new drapery, dried pilchards, transportation of iron ordnance, of beer, of horn, of leather; importation of Spanish wool, of Irish yarn. These are but a part of the commodities which had been appropriated to monopolists. When this list was read in the House, a member cried, 'Is not bread in the number?' 'Bread,' said every one with astonishment; 'yes, I assure you,' replied he, 'if affairs go on at this rate, we shall have bread reduced to a monopoly before next parliament.' These monopolists were so exorbitant in their demands, that in some places they raised the price of salt from sixteen pence a bushel to fourteen or fifteen shillings. Such high profits naturally begat intruders upon their commerce; and in order to secure themselves against encroachments, the patentees were armed with high and arbitrary powers by the council, by which they were enabled to oppress the people at pleasure, and to exact money from such as they thought proper to accuse of interfering with their patent. The patentees of saltpetre having the power of entering every house, and of committing what havoc they pleased in stables, cellars or wheresoever they suspected saltpetre might be gathered, commonly extorted money from those who desired to free themselves from this damage or trouble; and while all domestic intercourse was thus restrained, lest any scope should remain for industry, almost every species of foreign commerce was confined to exclusive companies, who bought and sold at any price they themselves thought proper to offer or exact."

Lawrence  
Hyde's motion.

Even Elizabeth's House of Commons rang with angry complaints. On the 20th November, 1601, a great debate upon the subject took place on an attempt by Lawrence Hyde to introduce "A Bill for the Explanation of the Common Law in certain Cases of Letters Patent." After much discussion as to whether the proceedings should be by bill or by petition to Her Majesty, but before anything was concluded upon, the Queen sent a message

to the House importing that the monopolies should be revoked. The speech of her Secretary, Cecil, was highly characteristic of the times.<sup>c</sup> “There are no patents now of force,” said he, “which shall not presently be revoked, for what patent soever is granted there shall be left to the overthrow of that patent a liberty agreeable to law. There is no patent if it be *malum in se*; but the Queen was ill apprized in her grant. But all to the generality be unacceptable I take it there is no patent whereof the execution hath not been injurious. Would that they had never been granted. I hope there shall never be more. (All the House said, ‘Amen!’) In particular, most of these patents have been supported by letters of assistance from Her Majesty’s Privy Council. I dare assure you from henceforth there shall be no more granted, they shall all be revoked. And because you may eat your meat more savoury than you have done, every man shall have salt as good and cheap as he can buy it, or make it without danger of that patent which shall presently be revoked. The like benefit shall they have who have cold stomachs, both for aqua vitæ and aqua composita, and the like; and they that have weak stomachs, for their satisfaction, shall have vinegar and alegar, and the like, set at liberty. Train oil shall go the same way; oil of blubber shall march in equal rank; brushes and bottles endure the like judgment. The patent for pouldavy (sail cloth), if it be not called in, it shall be. Woade, which, as I take it, is not restrained either by law or statute, but only by proclamation (I mean from the former sowing); though for the saving thereof it might receive good disputation, yet for your satisfaction the Queen’s pleasure is to revoke that proclamation; only she prayeth thus much, that when she cometh on progress to see you in your counties, she be not driven out of your towns by suffering it to infect the air too near them. They that desire to go sprucely in their ruffs

Speech of  
Cecil.

<sup>c</sup> Lord John Russell, Hist. Eng. Gov. 477.



Revocation of  
some of the  
monopolies.

may at less charge than accustomed obtain their wish. The patent for starch, which hath been so much prosecuted, shall now be repealed.”<sup>d</sup>

Address of the  
Commons.

This victory filled the Commons with joy, perhaps the more from being rather unexpected. An address was voted full of rapturous and hyperbolical acknowledgments.<sup>e</sup> The Queen answered in an affectionate strain, glancing only with an oblique irony at some of those movers in the debate whom, in her earlier and more vigorous years, she would have keenly reprimanded.<sup>f</sup>

The Queen's  
answer.

The following is an extract from her answer: “Since I was Queen, yet never did I put my pen to any grant but upon pretence and semblance made unto me that it was both good and beneficial to the subjects in general, though a private profit to some of my ancient servants who have deserved well: but the contrary being found by experience, I am exceedingly beholden to such subjects as would move the same at first.” . . . “That my grants should be grievous to my people, and oppressions to be privileged under colour of our patents, our kingly dignity shall not suffer it, yea, when I heard it, I could give no rest to my thoughts till I had reformed it.”<sup>g</sup>

Their joy and gratitude were, however, somewhat premature, as it appears that her majesty did not revoke them all.<sup>h</sup> A list of them, dated May, 1603, seems to imply that they were still existing.<sup>i</sup>

Continuance of  
the abuses.

In 1610 we find the people again “extremely uneasy and loud” against these pernicious grants.<sup>j</sup> James consented to revoke them, and in a book which he pub-

<sup>d</sup> New Parl. Hist. (A. D. 1601), i. 934.

<sup>e</sup> Hall. Const. Hist. i. 357, 3rd ed.

<sup>f</sup> “The Queen was so dissatisfied with these proceedings, that she spoke of them peevishly in her concluding speech.” (D’Ewes, i. 619.)

<sup>g</sup> Cobbett’s Parl. Hist. of Eng. i. 923.

<sup>h</sup> Rymer, xvi. 540; Carte, iii. 702.

<sup>i</sup> Lodge, iii. 159; Hall. Const. Hist. i. 357, n.

<sup>j</sup> Anderson’s Deduction of the Origin of Commerce, i. 479.

lished,<sup>k</sup> declared that monopolies were things against the laws of this realm, and expressly commanded that no suitor should presume to move him to any grant thereof. The abuses, however, still continued.

In the 21st year of his reign his necessities compelled him to summon a Parliament, wherein much louder complaints were made than ever before.<sup>l</sup> The famous Statute of Monopolies<sup>m</sup> was passed, the constitutional exercise of this Royal prerogative at the Common Law<sup>n</sup> was declared and defined, and trade monopolies settled on their present footing. The arena on which patent rights were afterwards discussed was that of the courts of law. Public vigilance, no longer watchful of undue assumption on the part of the crown, directed itself to prevent encroachment on the part of the patentee.

By the Statute,<sup>o</sup> it is expressly declared that no declaration therein shall extend to any Letters-patent and Grants of privilege for the term of fourteen years or under, thereafter to be made of the sole working or making of any manner of new manufacture within the realm to the true and first inventor or inventors, which others, at the time of making such Letters-patent and grants, shall not use, so as also they be not contrary to the law nor mischievous to the state, by raising prices of commodities at home, or to the hurt of trade, or generally inconvenient, the said fourteen years to be accounted from the date of the first Letters-patent or Grants of such privileges thereafter to be made, but that the same shall be of such force as they should be if that act had never been made, and no other. An exception was also made of the several Patents enumerated in the act.

<sup>k</sup> 11 Co. Rep. 88 b.

<sup>l</sup> (1837) Ed. Rev. xxv. 43\*; Anderson's Origin of Commerce, ii. 16.

<sup>m</sup> 21 Jac. I. c. 3.

<sup>n</sup> Chitty's P. C. 178, ch. x. § 2.

<sup>o</sup> "A statute," says Coke, "forcibly and vehemently framed for the suppression of all monopolies—for monopolies in times past were ever without law, but never without friends." (3 Inst. 182.)

Policy of patent dependent on two principles.

Tendency of public opinion.

Restraints on trade generally.

In discussing the policy of patents as a limited monopoly created by public authority, it is important to start with a clear apprehension on two points: the general effect of artificial<sup>p</sup> monopoly, and the proper office of government with respect to trade. On both a very remarkable change has passed during the last few years over the public mind,<sup>q</sup> and received expression in recent legislation. The improvements in fact of modern law may be said generally to be owing not more to the extensive reform that has taken place in its administration, than in the change of conviction alluded to as to the principles on which legislation should proceed. That changes far greater than any that have yet occurred will result from the permanent establishment of these principles, no one who carefully considers the question can doubt; and notwithstanding considerable oscillations,<sup>r</sup> the general tendency of popular feeling seems to be to a recognition of the doctrine of *laissez faire* in its integrity.

Considered in its broadest view, the natural right of every person to enjoy his property and exercise his labour at his pleasure is limited only by its interference with similar rights in others.<sup>s</sup> In practice, however, owing to the complicated relations of society, and the indirect methods by which it is compelled to attain its ends, the imposition of numerous restraints upon this right, are found absolutely necessary for the public good.<sup>t</sup> In this country we can happily say of them with Blackstone,<sup>u</sup> they are "so gentle and moderate that no man of sense

<sup>p</sup> Adam Smith, bk. i. ch. 7, p. 536; Ricardo, Pol. Ec. (1821), 465; Mill, Pol. Ec. (1853), bk. iii. ch. 2, § 5.

<sup>q</sup> Mill, Pol. Ec. (1853), pref. v. bk. v. ch. x. § 1.

<sup>r</sup> See the debates on the Payment of Wages in Coin Bill (March, 1854), Hausard, and Payment of Wages (Hosiery) Bill (March 22, 1854).

<sup>s</sup> "Sic utere tuo ut alienum non lædas." (Steph. Com. (1853), ii. 493.

<sup>t</sup> Steph. Com. (1853), iii. 234.

<sup>u</sup> Vol. i. 145.

and probity would wish to see them slackened." The recent changes, however, in the political world have tended greatly to their diminution.<sup>v</sup> Some, as opposed in principle to public conscience, are in course of gradual extinction, while others are retained merely for purposes of revenue or as matters of police.<sup>x</sup>

With regard to Monopoly in general,<sup>y</sup> it is the opi- Effect of  
monopoly.  
 nion of Mill and other writers on the subject, that its effect as an agency influencing the price of produce has been, especially in this country, considerably overrated; and that it is only at a comparatively modern period that Competition has in any degree become the governing principle of contracts.<sup>z</sup> Another and more powerful element is Custom: To the industrious population in a turbulent military community, freedom of competition is a vain phrase; they are never in a condi-

<sup>v</sup> Mill, Pol. Ec. vol. II. pp. 525—569.

<sup>x</sup> Burn's Just. tit. Alehouses, Hawkers, Pedlars; Chitty's Law of Com. ii. 163; Merewether and Stephens, Hist. Corp. 1115.

<sup>y</sup> "A monopoly," says Coke (3 Inst. 181), "is an institution or allowance by the king by his grant, commission or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working or using of any thing whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade. (Com. Dig. "Bye Law," c. 3.)

"For the word monopoly, dicitur ἀπὸ τοῦ μόνου, i.e. solo, καὶ πωλεῖσθαι vendere, quid est cum unus solus aliquid genus mercaturæ universum emit ut solus vendet pretium ad suum libitum statuens. And the law of the realm in this point is grounded on the law of God, which saith, *Non accipies loco pignoris inferiorem et superiorem molam, quia animam suam apposuit tibi.* Thou shalt not take the nether or upper millstone to pledge, for he taketh a man's life to pledge; whereby it appeareth that a man's trade is accounted his life because it maintaineth his life, and therefore the monopolist that taketh away a man's trade taketh away his life, and therefore is so much the more odious, because he is vir sanguinis. Against these inventors and propounders of evil things the Holy Ghost hath spoken, *inventores malorum, &c., digni sunt morte.*" (2 Hawk. P. C. bk. i. c. 79, § 1; 4 Blk. Com. 159.)

<sup>z</sup> (1853) John S. Mill, Pol. Ec. bk. ii. c. iv. § 1.

Practical influences on price of monopolized articles.

tion to make terms for themselves by it; there is always a master who throws his sword into the scale, and the terms are such as he imposes. But though the law of the strongest decides, it is not the interest nor, in general, the practice of the strongest to strain that law to the utmost, and every relaxation of it has a tendency to become a custom, and every custom to become a law. In theory, the price of articles produced under a monopoly is arbitrarily dependent from the will of the<sup>a</sup> monopolist, and limited only by the buyer's extreme estimate of its worth.<sup>b</sup> In practice, however (although the market is seldom or never fully supplied), two reasons incline to lower prices under the strictest artificial monopoly; namely, that reduction in price invariably leads to an increased demand, and that fixing it unreasonably high attracts the attention of piracy or leads the public to find some other substitute for its wants.<sup>c</sup>

The monopolist can fix the value as high as he pleases short of what the consumer could not or would not pay; but he can only do so by limiting the supply. The Dutch East India Company obtained a monopoly price for the produce of the Spice Islands, but to do so they were obliged in good seasons to destroy a portion of the crop.<sup>d</sup>

A very able French writer (le Marquis Garnier<sup>e</sup>) thus explains the action of these causes:—"Les producteurs tendent continuellement à régler la quantité des productions sur la somme des demandes; ils ne resteront pas au dessous de ce point sans être tentés d'accroître la masse de leurs produits, et ils ne peuvent le dépasser sans s'exposer à perdre. Ces deux quantités, celle des produits

<sup>a</sup> (1825) M'Culloch, Pol. Ec. 256.

<sup>b</sup> (1825) Encyc. Met. vi. 171; (1853) Mill, Pol. Ec. bk. iii. c. 2, § 5.

<sup>c</sup> (1851) Evid. 2759.

<sup>d</sup> Mill, Pol. Ec. bk. ii. c. iv. § 1.

<sup>e</sup> Hist. de la Monnaie, i. Introd. p. 62.

et celle des demandes, s'efforcent donc à se mettre en équilibre l'une avec l'autre." "On peut dire," says another writer,<sup>f</sup> "des monopoleurs ce qu'on a dit du Fisc: scavoir, qu'il est à l'égard du corps politique ce que la rate est à l'égard humain: elle ne peut grossir que du déchet des autres parties qui le composent."<sup>f</sup>

Attempts at monopoly<sup>g</sup> are coeval with trade itself, and its repression formed one of the earliest objects of legislative enactment. In Athens, the exporting of corn and even the hoarding it up was punishable with death;<sup>h</sup> and among the Romans, the attempt to raise the price of provisions was placed in the rank of heinous crimes.<sup>i</sup>

Monopoly among the ancients.

In this country public opinion in early times was strongly fixed upon the clandestine bargains of the fore-

In early English history.

<sup>f</sup> Le Geyt, Const. de Jersey (Monopoles), (1846) vol. i. 384. John Peter Willebrand, member of the Supreme Tribunal of Appeals to the King of Denmark, expresses himself thus strongly on the subject: "Les monopoleurs ne sont guères accueillis là où l'on préfère le bien général à l'intérêt particulier, et ce serait très mal connaître le cœur humain de s'imaginer qu'un monopoleur se comporterait mieux qu'un loup auquel on confieroit l'administration de la justice entre les troupeaux." He then adds, rather wickedly, "La police de l'empire agit vis à vis les monopoleurs à peu près comme les papes contre les hérétiques, le Jeudi Saint, mais à mon avis plus utilement."

<sup>g</sup> Cod. lib. iv. tit. 59; Lysias, Or. 21, c. 5; Diod. Sic. lib. 4, c. 3.

<sup>h</sup> Suet. Tib. c. 71; Pliny, 8, 37, 56; Eden, El. Jur. Civ. 296.

<sup>i</sup> For an interesting account of the measures adopted among the ancients for the suppression of Monopoly, see Collier on Patents, ch. i. On the origin and progress of Monopoly in the early history of Europe, Illingworth's Inquiry into the Laws respecting Forestalling, &c. The word *μονοπωλία* occurs in Arist. Pol. (i. 11), where it is used simply in the sense of a man buying up the whole of a commodity so as to be the sole holder of it, and to have the power of selling it at his own price. (See Livy, lib. iv. c. 13.)

The term is used in a constitution of Zeno (Cod. iv. 59) in the sense of what our law understands by forestalling, regrating and engrossing. Zeno declares that no person shall exercise a monopoly of clothing, fish or any other thing adapted for food or use.

staller,<sup>k</sup> the regrator,<sup>l</sup> and the ingrosser,<sup>m</sup> as the cause of

<sup>k</sup> Forestall, or, as it is written in Domesday Book, foristel, is, according to Spelman, derived from two Saxon words signifying *præ* and *statio*. Hence, says he, forstallator is one who bargains for or purchases corn in its way to the market, thereby hindering it from being publicly exposed for sale. (Illing. 9.)

The signification of the word was, however, more probably owing to the following circumstance. In ancient times, the Crown granted to many corporate bodies the right of holding fairs and markets at particular places for the purpose of promoting traffic and preserving order, and for the prevention of frauds and oppression. Some of these markets were free, others were granted with toll, that is, a reasonable payment upon the commodities sold in such market. The grantee, also, if owner of the soil, was entitled to the payment of what was termed *stallage* from every person erecting a stall upon his land. By the obstruction, therefore, of goods or persons coming to such markets, the owners of the market were prejudiced in the profits of their stallage. This kind of obstruction was very early deemed an offence, and termed *forestalling*.

The word has, however, received a statutable interpretation. By 5 & 6 Edw. VI. c. 14 (repealed by 12 Geo. III. c. 71), it is declared "that whoever shall buy or contract for any merchandize, victual or other thing coming in the way to market, to the intent to sell the same again, or persuade any person by any means whatsoever to enhance the price when there, or dissuade any person from bringing their goods or provisions to market, shall be deemed a *forestaller*."

<sup>l</sup> The terms regrator and ingrosser were not known before the reign of Henry III. (3 Inst. 195, 196; 1 Hawk. P. C. c. 80; Brown, Indict. 40; Crompt. 80 b.)

Regrator, according to Minshew, is derived from the French *re iterum* and *grater scalpere*, and "did anciently signify such as bought by the great and sold by retaile."

By the stat. 5 & 6 Edw. VI. c. 14, above alluded to, it is declared that "whoever shall obtain or get into his hands any corn, &c., or other dead victual in any market, and sell the same again in the same market or within four miles thereof, shall be deemed a *regrator*."

<sup>m</sup> "Ingrosser," says Minshew, "is also of French origin, a *gros seur crassitudo*, or *grossier solidarius vendor*; it signifyeth one that buyeth corne growing or dead victuall; howbeit," he adds, "this definition rather doth belong to unlawful engrossing than to the word in generall." Spelman defines the term thus: "Is in genere dicitur qui integram rei alicujus copiam emendo satagit comparare ut distrahendo postea carius vendat a Gall. le gros pro *integro vel plenitudine*." The

dearth,<sup>n</sup> and summary and severe laws were enacted, with a view of promoting publicity<sup>o</sup> in all transactions, the odium almost universally attaching in infant communities to those who supply the public with the necessaries of life, imparting a peculiar severity to this species of legislation.

Fine,<sup>p</sup> imprisonment,<sup>q</sup> the stretch-neck,<sup>r</sup> and even

Severity of the repressive measures.

statute declares that whoever shall ingross or get into his hands by buying, contracting for, or otherwise, "any corn growing or any corn, grain, &c. (otherwise than in the act specified), or other dead victual, with the intent to sell the same again, shall be deemed *en ingrosser*."

<sup>n</sup> Forestallers, ingrossers and regrators," says Pulton, in his *Treatise de Pace Regis et Regni* (tit. "Oppression," 1623), "deserve to be numbered amongst the number of oppressors of the common good and public weal of this realm, for they do endeavour to enrich themselves by the impoverishment of others, and respect not how many do lose so they may gain. They have been exclaimed upon and condemned in parliament from one generation to another, as appeareth by the statute; but especially by the statute 34 Edw. I. it was ordained that no forestaller should be suffered to dwell in any town, for he is a manifest oppressor of the poor and a decayer of the rich, a public enemy of the country, a canker, a moth, and a gnawing worm, that daily wasteth the commonwealth; and the act and name of a forestaller was so odious in that time, that it was moved in parliament to have had it established by law that a forestaller should be baited out of the town where he dwelt by dogs and whipped forth with whips."

<sup>o</sup> In Lombardy, under Pepin, the sale of horses, oxen, &c., was forbidden, except in the presence of witnesses. (Ll. Longobard. tit. 18.) Among the Anglo-Saxons, numerous laws were made restraining sales, "except in the public markets and within the gates of cities and towns, in the presence of the port reeve, town reeve, king's reeve or shire reeve, in the folcmote, or before a priest or an ordeeler." By the laws of Athelstan, all sales above the value of twenty, and by those of Canute all as low as four pence, were required to be made openly. (2 Inst. 713; Bac. Abr. Fairs.) For similar laws among the ancient Swedes and Goths, see Stiern. de Jure Suec. et Goth. Vet. c. 5.

<sup>p</sup> Fleta, lib. ii. ch. 12, § 19.

<sup>q</sup> 34 Edw. I.; Illing. 27.

<sup>r</sup> Callistrigium is the reward of such as buy any flesh of Jews and then sell it to Christians, and also forestallers who buy anything before the due time, or that press out of town to meet such things as come to the market, to the intent that they may sell the same in the town unto regrators." (51 Hen. III. st. 6 (A. D. 1266); 34 Edw. I. (A. D. 1306); 5 & 6 Edw. VI. c. 14, repealed by 12 Geo. 3, c. 71.)



death,<sup>3</sup> among a people not naturally cruel, attest the earnestness of their endeavours to extinguish this crime, productive, however, of no more practical result than that it diverted public attention from the real source of evil influences on trade, the exclusive privileges granted by the Crown.

Prevalence of  
the new  
theory.

In April, 1767, an effectual stand was made by reason against prejudice.<sup>4</sup> Petitions had been presented to the House of Commons complaining of the high price of provisions, which they alleged was due to the practices of jobbers, forestallers and ingrossers. A committee was appointed for inquiry into the matter, and came to the following memorable resolution:—“That it is the opinion of this committee *that the several laws relating to badgers, ingrossers, forestallers and regrators, by preventing the circulation of and free trade in corn and other provisions, have been the means of raising the price thereof in many parts of this kingdom.*”<sup>5</sup>

Argument ap-  
plicable to  
patents.

The extension of the condemnation of Monopolies of trades and articles in common use to that of Patents, is based on the restraint upon the public during the continuance of the privileges.<sup>6</sup> In some cases the mere abstinence amounts to serious self-denial. The tide of manufacturing industry and inventive skill, notwithstanding its apparent irregularities, rolls onward in a settled direction,<sup>7</sup> indicated by the expressed wants of society,<sup>8</sup>

<sup>3</sup> 27 Edw. III. c. 11, repealed by 38 Edw. 3, st. 1, c. 6, as to the penalty of death. See *Laws and Customs of the Turks*, 1768.

<sup>4</sup> Illing. 89.

<sup>5</sup> Com. Jour. 8 Apr. 1767.

<sup>6</sup> As an exemplification of the influence of patent rights in repressing the adoption of recognized improvements, it was mentioned before the Committee (1851), that during the existence of Howard's Patent the invention was not used by above one-fourth of the trade. As soon as the Patent expired it was almost universally adopted. (Evid. 967.)

<sup>7</sup> Evidence of Sir J. Romilly, M.R., Com. H. of Lords (1851), 2828.

<sup>8</sup> Society of Arts, First Report on the Rights of Inventors, 1851.

and within an almost calculable time is certain to achieve some means of satisfying those wants. Some discoveries are made by the pioneers of science, men like Watt, far before their age; to them a monopoly of their invention is but an inadequate reward; while of others the whole body of society is in earnest search; the appropriation therefore by individuals may be looked on almost as an invasion of a right.

The next point to be established is the effect produced by Government interference with trade. In this respect public opinion has of late years been materially changed.<sup>a</sup>

Effect of government interference.

During the period alluded to, Political Economy has become a science, and established, as a deduction from experience, the laws that regulate the distribution of wealth and the principles which should influence legislation. In the commercial as in the material world, these laws are not capable of being speculatively laid down, but are the result only of intelligent deduction from large and accurate observation.<sup>b</sup> Like them, too, when discovered, they are found simpler than those suggested by hasty generalization to account for the phenomena.<sup>c</sup>

Effect of Political Economy as a science.

The effects of this science are perhaps hardly realized except by a contrast of the measures taken formerly and those advocated at the present day for securing the prosperity of trade. For centuries in this country authoritative intervention was looked for by the people and insisted on by kings in points on which private enterprize<sup>d</sup>

Contrast of measures under the two systems for the furtherance of trade.

<sup>a</sup> For a statement of the theory of the so-called mercantile system, see Dic. Univ. Savary. (1751) Commerce; A New Discourse of Trade, Sir Josiah Child (1694). A Discourse on the Protection and Care of Trade. D'Avenant's Political Works, i. 98, v. 452.

<sup>b</sup> Savary, 1751. Translation by Postlethwayt, p. 547.

<sup>c</sup> Byles on the Usury Laws (1815), p. 2, App. 164; (1835) Kelly on Usury Laws, Com. Dig. "Usury."

<sup>d</sup> The most signal instance, perhaps, of this, is the present condition of salmon fisheries. From the reign of John down to the present day, Legislation was busily occupied with their direction. Their regulation

and public opinion are now considered not only more proper, but the only efficient agents for the public good. The early portion of our Law is indeed little else than a record of the efforts of the State<sup>e</sup> to regulate the price of labour<sup>f</sup> and provisions,<sup>g</sup> the employment of capital,<sup>h</sup> the education of skill,<sup>i</sup> and the conditions generally of foreign and internal trade.<sup>k</sup> It even pretended to enforce mo-

forms a prominent clause in Magna Charta (c. 16). The subject of laws by Edward I. of England and Robert the Bruce, in Scotland, it has never long been allowed to rest (for an abridgment of these acts, see Jacob's Law Dict. 1809, Art. "Fish," "Fisheries;" Burn's Justice, "Fisheries"), and has, during the last forty years, been stirred up almost every session by Bills, Committees and Commissions. (Sessional Papers, 1821, 1836; Ed. Rev. 1851, xciii. 341; Qu. Rev. 1852, cxi. 361.) Yet recent experience (Times, 15 Apr. 1854) has shown, in the experiments in Galway and on the Tweed and Tay, that even so precarious an interest as this may safely be left to find its welfare in mere commercial speculation. "Sumptuary laws," says D'Avenant (v. 379), "are the best course of putting a stop to *losing trades*."

<sup>e</sup> "Violent and ineffectual" are the terms applied to them by Hume. (Hist. 403); Paley's remark (p. 400), is—"More is expected of them than laws can do."

<sup>f</sup> For Statutes as to combination of workmen, see (1852) Smith's Law of Masters and Servants, 331; (1854) M'Culloch on the Rate of Wages and Influence of Combinations.

<sup>g</sup> For a list of Statutes and Royal Proclamations, fixing the price of food and imposing some singular restrictions on general dealing (25 Hen. VIII. c. 13; 3 & 4 Edw. VI. c. 19), see Illingworth (1800) on Forestalling.

<sup>h</sup> For a list of Statutes on this head, see Byles on Usury (1845), App. 164, and Kelly (1835) on Usury; Com. Dig. "Usury."

<sup>i</sup> 5 Eliz. 4, stat. "Apprentices," of which Adam Smith (ii. 222) remarks, "it was an encroachment upon natural liberty, without producing any beneficial result to the community." Entick's Hist. of London, i. 207, 212; ii. 8, 9; Rymer, xvii. 526; Tyrwhit and Tynedale's Digest of Statutes (1822), p. 27; Chitty's (1812) Law of Apprentices; Smith's Master and Servant (1852), Introd. xxxi.; (1854) Report, Manning the Navy; Hume, iii. 403; (1854) Mr. Wallis, Special Rep. Ind. Exhib. New York, 3.

<sup>k</sup> Illing. 64; 5 & 6 Edw. VI. c. 14.

rality, industry<sup>l</sup> and honesty,<sup>m</sup> to dictate popular opinion and to repress luxury and eccentricities<sup>n</sup> in domestic life.

The new policy is distinctly opposed to interference of Government with Capital or Labour. In every department of productive industry which has as yet had a fair trial, direct interference by the Legislature has proved detrimental to its interests,<sup>o</sup> and our national prosperity has increased in exact proportion as we have learnt to leave Commerce, where possible, to its own control, and to base what legislation is requisite on principle instead of impulse.<sup>p</sup>

The *laissez faire* doctrine with regard to trade.

In a rude and turbulent condition of Society, when the pursuit of Commerce was considered ignoble<sup>q</sup> and Capital could hardly be said to exist, it was natural, and perhaps<sup>r</sup>

Possible good of state protection.

<sup>l</sup> 5 Eliz. 4, § 31, "to banish idleness."

<sup>m</sup> 7 Geo. II. c. 8.

<sup>n</sup> 3 Edw. IV. c. 4.

<sup>o</sup> Encyc. Met. "Commerce;" Encyc. Brit. "Commerce;" M'Culloch, "Commerce;" Say, i. 201.

<sup>p</sup> Mill. Pol. Ec. bk. v. c. xi. § 7; Ric. Pol. Ec. 3 ed. 355.

<sup>q</sup> Verstegan, in his *Titles of Honour* (p. 367), mentions that in old times if a merchant so thrived that he was able to cross the seas thrice, he was ever after reputed a right worthy *Thein*, and capable of higher advancement.

For an enthusiastic advocacy of the dignity of trade, see the remarks in M. Savary's *Dictionnaire Universel*, art. "Commerce" (1741).

In the commencement of the fourteenth century, the French Government, to encourage the manufacture of glass, ordered that gentlemen or the sons of noblemen might exercise the trade without derogating from their rank. (Encyc. Met. "Manufacturing Processes," vi.)

<sup>r</sup> The inference from the increase of manufactures during the reign of Elizabeth has been warmly contested by those who assert the doctrines of *laissez aller* in their extreme. They attribute it to the accidental circumstance of an influx of foreign merchants and skilled workmen, refugees from the persecutions of the Duke of Alva. It is the observation of Hume, v. 477, that "as her monopolies tended to extinguish all domestic industry, which is more valuable than foreign trade, as it is the foundation of it, so the general train of her conduct was ill calculated to serve the purpose at which she aimed, much less to promote the riches of her people." During the last few years of

No longer  
requisite.

necessary, for the governing power, comprising by far the largest share of the intelligence of the nation, to induce the adoption of trade by special encouragement and take active measures for promoting its prosperity. With the general diffusion of education and the firm establishment of trade, such necessity is at an end. So soon as the arts of peace become popular pursuits, inducements are unneeded; and, at a period like the present, in which capital is abundant and men of Commerce the most intelligent in the State, so far from aiding, they actually hinder the progress of trade. The exotic<sup>1</sup> reared under forced conditions has long been acclimated to our soil. It is at once sensitive<sup>2</sup> enough to shrink from legislative interference, hardy enough to flourish under the free action of natural laws, and vigorous enough to force its way over all the obstacles that oppose its growth.

Principle of  
patents.

It being then the general feeling that authoritative interference with trade is unadvisable—that Monopoly created by such means is a general grievance—and that the practical effect of Letters-patent is to impose a considerable restraint upon the public<sup>3</sup>—nothing but principles of justice or public policy can justify the Crown, as the steward of public rights, in sanctioning such privileges as those awarded to Patentees.<sup>4</sup> The reward of the inventor for the benefit he has conferred on trade, and the obtaining from him for public use the full benefit of the improvement he has effected, are objects which the Executive, as representative of the community, should endeavour to effect with the least possible disturbance of public rights.

her reign it is stated that the shipping of this country diminished to the extent of one-third.

<sup>1</sup> Ure's Dict. "Silk," 1100; "Glass," 572; "Calico printing," &c.

<sup>2</sup> Introd. 2nd ed. Suppl. to Ure's Dict. "Arts and Manufactures."

<sup>3</sup> M'Culloch, "Ships;" Com. Dic. p. 1119.

<sup>4</sup> Adam Smith, W. N. bk. iv. c. 8.

Assuming the policy<sup>w</sup> of rewarding inventors by the State, and this is the side on which the question receives its general support, a judiciously limited monopoly in the advantages of a discovery is not only the most appropriate and economical, but by far the most effectual encouragement in the great majority of improvements.<sup>x</sup> Without such protection it is clearly the interest of every one who has made a discovery available in trade to conceal it from the public, and, notwithstanding the difficulties attending such concealment, they are not insuperable,<sup>y</sup> when the ingenuity of invention is diverted to devise methods of concealment.<sup>z</sup>

Patents most economical form of rewards.

In the words of Bentham<sup>a</sup>—“It is an instance of a reward peculiarly adapted to the nature of the service, and adapts itself with the utmost nicety to those rules of proportion to which it is most difficult for reward, artificially instituted by the Legislature, to confer. If confined, as it ought to be, to the precise point in which the originality of the invention consists, it is conferred with the least possible waste of expense. It causes a service to be rendered, which, without it, a man would not have a motive for rendering; and that only by for-

Bentham's opinion.

<sup>w</sup> Renouard, c. 2, § 2, p. 42; Westm. Rev. xliii. 1835.

<sup>x</sup> “The reasons for recognizing the rights of inventors rest on much higher grounds than the encouragement of invention itself. They are precisely those which induce men to adopt civilized rather than savage life.” Society of Arts First Report on the Rights of Inventors, 1851. “Not to regard a discovery in industry as the property of the discoverer would be to attack the rights of man in their essence.” (Decree of the French National Assembly, 1791; Renouard, 423.)

<sup>y</sup> See Lord Brougham's speech, Hansard, xxviii. 476, and Qu. Rev. sliii.

<sup>z</sup> Turner on Pat. 2 (1851). The lamentable apathy on the part of our Government and want of confidence on the part of inventors, could hardly be more signally illustrated than in the case of the late Captain Warner. However exaggerated his own estimate of its value, there can be no doubt that he possessed the secret of a terribly destructive instrument. Ann. Register, lxxxvi. p. 77, A. D. 1844.

<sup>a</sup> Rationale of Rewards, 92.

bidding others from doing that which, were it not for that service, it would not have been possible for them to have done. Even with regard to such inventions, for such there will be, where others besides him who possesses the reward have scent of the invention, it is still of use by stimulating all parties and setting them to strive which shall first bring the discovery to bear. With all this it unites every property that can be wished for in a reward. It is variable, equable, commensurable, characteristic, exemplary, frugal, promotive of perseverance, subservient to compensation, popular and reasonable.”<sup>b</sup>

Inventors,<sup>c</sup> as a class, are singularly deficient in the qualifications for prosecuting a new trade with a probability of success, if exposed to unlimited competition.<sup>d</sup> Without the encouragement of a Patent, how<sup>e</sup> is any man to engage in a novel and expensive process,<sup>f</sup> if the moment he succeeds, at the cost of all this outlay, he must be sure that his neighbours, who were cautious enough to shun all chances of loss, will come into competition with him and make his remuneration impossible? Notwithstanding the strong opinion expressed to the

<sup>b</sup> Godbolt, 252.

<sup>c</sup> The Marquis of Worcester, in a petition to Parliament in the reign of Charles II., offered to publish the hundred processes and machines enumerated in his very curious “Centenary of Inventions,” on condition that the money should be granted to extricate him from *the difficulties in which he had involved himself by the prosecution of useful discoveries*. The petition does not appear to have been attended to! Many of these admirable inventions were lost. The steam engine and telegraph may be traced among them. (Dis. Cur. Lit. i. 52.) “I consider the inventive mania,” says Professor Woodcroft, in his evidence (1625) before the Committee, “a disease always injurious to the patient, but very often beneficial to the public.”

<sup>d</sup> Sir D. Brewster’s Evid. (1851.)

<sup>e</sup> West. Rev. sliii.

<sup>f</sup> As to the disproportionate cost of the *first* machine in many instances, see Select Committee (1831) of H. of Commons on Machinery, 243. Bobbinet machines after ten years’ practice made at one-third of the expense. Mr. Babbage’s Economy of Manufactures says one-fifth is a fair average. (Turner on Patents, p. 5.)

opposite effect by the noble Chairman (Lord Granville),<sup>g</sup> Parliament has considered that it "is reason," as Lord Coke says,<sup>h</sup> "that he should have a privilege for his reward (and the encouragement of others in the like) for a convenient time."<sup>i</sup>

Although the most appropriate, in the great majority of cases, Letters-patent are not the only means of rewarding persons from whose exertions the public derive benefits, and Parliament has frequently awarded sums of money as the reward or inducement of ingenuity<sup>k</sup> and adventure.<sup>l</sup>

Other modes of rewarding discoveries.

An outline of the special privileges created in one branch of manufactures may show the various forms in which such grants have been created.

Sketch of privileges for inventions in the glass trade.

The first glass houses in this country were those at Crutched Friars and in the Strand, about the middle of the sixteenth century. The art was afterwards encouraged by James I. and Charles I., both of whom prohibited the importation of all foreign glass, except that of the most inferior kinds. The former of these monarchs, as an expedient to raise money, granted to Sir Robert Mansel an exclusive Patent,<sup>m</sup> which was afforded him in consideration of his having established the use of pit coal

<sup>g</sup> 118 Hansard, 1.1 (1 July, 1851), "that the whole system was unadvisable for the public, disadvantageous to inventors, and wrong in principle."

<sup>h</sup> Inst. 154.

<sup>i</sup> Foster, *Sci. Fa.* 239.

<sup>k</sup> Sir M. I. Brunel received a large sum of money for the invention of his very ingenious block machinery. (Web. (1853) Policy and Principles, p. 22; Evid. Mr. Hill, 2761.)

<sup>l</sup> In 1714, an Act (11 & 12 Anne, § 2, c. 16) passed establishing a Board of Longitude, and giving it authority to offer prizes, the largest 20,000*l.*, for a mode of finding the Longitude within certain given limits.

See a list of the Acts thus passed, Webster, *Law of Pat.* p. 37 and p. 35; 15 Car. II. c. 12, Priv.; Marquis of Worcester, Waterwork, A. D. 1663; 11 & 12 Will. III. c. 31, Pri.; Savery, First Practical Steam Engine, A. D. 1699.

<sup>m</sup> Expressly excepted in the Statute of Monopolies. (Web. P. R. 17; Encyc. Met. viii. 471.)



for wood in its manufacture. He was also allowed, on the same ground, the exclusive privilege of importing drinking vessels and every other article of glass from Italy, which could be made of a finer quality than had at that time been produced in England.

The second Duke of Buckingham has the merit of improving the manufacture of British glass by bringing over several workmen from Venice. He established a considerable manufactory for making plate glass at Lambeth, about the year 1670.

In the year 1773 a body of gentlemen obtained a Royal Charter of incorporation, the privileges of which were confirmed to them by Act of Parliament, under the title of "The Governor and Company of British Cast-Plate Glass Manufacturers." The capital consisted of eighty shares, each of 500*l.*, and the works established at Ravenhead, near Prescot, in Lancashire, which still rank among the most important glass works in this country.

Source of the  
privileges.

The power creating these privileges is one of the few surviving branches of the Prerogative of the Crown formerly occupied in regulating the conditions of trade. With the development of the Constitution and the growth of the interest involved, province after province of the Executive has been transferred to the domain of Parliament, and Letters-patent for inventions forms one of the few remaining instances in which it has been deemed desirable to retain in practice the theory on which the right was originally based.

Principles regu-  
lating its exer-  
cise.

The general principles guiding the exercise of this right were early insisted on and never wholly given up.<sup>n</sup> "The King, it was said," might charge the subject, but only where the subject was to have *quid pro quo*; thus

<sup>n</sup> (1819) Bowyer on the Constitution, 240; De Lolme, bk. i. c. 6, p. 65; Bl. Com. i. c. 7, 249; 13 Eliz. c. 1, § 1. Treason to question power of Parliament to alter the succession. Burnet, iii. 382.

<sup>o</sup> 12 Hen. IV. 146; Bro. Pat. 12; Bac. Abr. Pat.; Vin. Abr. Prerog. Ed.: Bl. Com. bk. i. pt. 3, c. i.

the grant of a toll for a ferry was held good, but that of a new office for measuring cloths, with the imposition of a new fee, was declared void by the Parliament,<sup>p</sup> as an undue exaction from the subject.

“The King,” says Sir H. Finch,<sup>q</sup> “hath a Prerogative in all things that are not injurious to the subject; for in them all, it must be remembered, that the King’s Prerogative stretcheth not to the doing of any wrong.” The assertion of irresponsible power and divine right, although early broached,<sup>r</sup> had no practical effect on Legislation. “Eadem præsumitur,” says Coke,<sup>s</sup> “mens regis quæ est juris.” “Nihil enim aliud,” says Bracton, “potest rex nisi id quod de jure potest;” and Fleta, when speaking of the great power of the king, “Verumtamen in populo regendo superiorem habet.”<sup>t</sup>

The following is an extract from the speech, on the 20th Nov. 1601, of Mr. Francis Bacon, the attorney-general, afterwards Lord Chancellor Verulam:—“The Queen, as she is our sovereign, hath both an enlarging and restraining power; for, first, she may by her Prerogative set at liberty things restrained by Statute Law or otherwise; and, secondly, by her Prerogative she may restrain things which be at liberty; and for the first she may grant *non obstante*, contrary to the penal law, which truly, according to my own conscience,” and so struck himself upon the breast, “are as hateful to the subject as Monopolies; for the second, if any man out of his own wit, industry or endeavour find out anything beneficial to the commonwealth, or bring any new invention

<sup>p</sup> 13 Hen. IV.; 2 Inst. 533.

<sup>q</sup> L. 84, 85; Prerog. Mirror; 2 Inst. 37.

<sup>r</sup> For a very learned summary of the authorities on the early state of the Prerogative, see Professor Amos’s Notes on Fortescue; Staunforde’s Exposition of the King’s Prerogative, c. 15, f. 42; Case of Alton Woods, 1 Co. 44 b; Allen (1830), On the Rise and Growth of the Royal Prerogative in England; Hob. 155; Liv. des Assises, Edw. III. 40, pl. 36; Bro. Pat. sci. fa.; Bod. de Rep. 4, c. 6, l. 452; Rastr. Ent. 452; Bowyer (1840) on the Constitution.

<sup>s</sup> Bract. lib. iii. tr. i. c. 9.

<sup>t</sup> Fleta, lib. i. c. 17, § 9.

which every subject of this kingdom may use, yet in regard of his pains and travel therein Her Majesty perhaps is pleased to grant him a privilege to use the same only by himself or his deputies for a certain time: this is one kind of Monopoly. Sometimes there is a glut of things, when they be in excessive quantity, as perhaps of corn, or sometimes there is a scarcity or a small quantity, and accordingly Her Majesty gives licence of transportation or of importation: this is another kind of Monopoly. These and divers of this nature have been in trial at the Common Pleas upon actions of trespass, where, if the judges find the privilege good and beneficial to the commonwealth, they will allow it, otherwise disallow it. And also I know Her Majesty herself hath given commandment to her Attorney-General to bring divers of them, since the last Parliament, to trial in the Exchequer, and at least fifteen or sixteen have been repealed, some by Her Majesty's own express commandment, upon complaint made to her by petition, and some by *quo warranto* in the Exchequer."<sup>u</sup>

Present condition of the Prerogative.

The real complaints against the Prerogative have happily long been matters of history,<sup>x</sup> and no one who forms a due estimate of the present division of the powers of the State can for a moment entertain apprehensions of danger from its encroachments.<sup>y</sup> Its limits have been so strictly defined by Law,<sup>z</sup> and since the Revolution there has been fortunately a succession of princes so little disposed to contend for an illegal extension of it,<sup>a</sup> that the Prerogative at the present day, exercised on the responsibility of the legal advisers of the Crown, may be said to be "the discretionary power of acting for the

<sup>u</sup> Parl. Hist. of Eng. iv. 452.

<sup>x</sup> (1835) Merewether and Stephens, Hist. of Boroughs and Mun. Corp. Introd. lvii.

<sup>y</sup> Montesq. Esp. ii. 51; iii. 10; vi. 5; viii. 6; xxvi. 15; Mill, Pol. Ec. bk. v. c. xi. § 2.

<sup>z</sup> Bl. Com. i. 137.

<sup>a</sup> (1830) Allen, 158.

public good, where the positive laws are silent.”<sup>b</sup> “It is not therefore to the Crown that the continuance of abuses which commenced with the Tudors is to be attributed. It may with more propriety be laid to the account of the House of Commons—the decisions of the courts of law—and the people.”<sup>c</sup>

“In truth,” said the Solicitor-general, Sir J. Mitford, on the trial of Thomas Hardy, A.D. 1794, the person of the King in name is the State itself.<sup>d</sup> All the powers of the State, Legislative and Executive, are nominally in him. Not really, because the King can make no law, but by the advice and with the assent of the Lords and Commons in Parliament. He can execute no law but by his judges and other ministers of justice, according to a formed and regular establishment. He really does nothing, but nominally does everything. The consequence is, that he is to all intents and purposes the sole representative of the State, and in his name every act is done.”<sup>e</sup>

It may be well before entering more fully upon the subject of Patents, to consider for a moment the light in which the Law regards the efforts of individuals to assure themselves by others means than that of Letters-patent, exclusive advantages in manufactures and trade.<sup>f</sup> They are either by secret<sup>g</sup> manufacture of the improved article, or contract with other parties not to engage in the same trade or manufacture.

Legal view of other methods to secure exclusive advantages in trade.

The chief subjects of the former are medicines, a class

Secrets of compounding medicines.

<sup>b</sup> Locke on Government, ii. § 166; De Lolme, i. c. 6, § 65; Blk. i. c. vii. 149; 2 Co. 296; Show. 75; Hard. 106; Vin. Abr. Prerog. T. 2.

<sup>c</sup> Merewether and Stephens, Introd. lvii.

<sup>d</sup> How. St. Tr. xxiv. 1183.

<sup>e</sup> Blk. i. 137.

<sup>f</sup> Godson, 2nd ed., p. 228.

<sup>g</sup> For an instance of this at the present day in the United States, see the account of the Waterbury establishment in Mr. Whitworth's Special Report, p. 23.

of subjects expressly excepted in other countries from the operation of patents.<sup>8</sup>

In the great majority of instances, as we have seen, Letters-patent, guaranteeing to the inventor a limited monopoly, form the best and most appropriate reward of the inventor. There are however others in which remuneration by exclusive sale is either impossible or unadvisable. Medicinal remedies are essentially of this class, and form a proper subject of direct governmental interference.<sup>h</sup>

It seems somewhat difficult to apprehend clearly the principles by which judges have been influenced in their decisions as to secrets of trade. By the Patent Law, the discoverer of any important improvement in manufactures may secure to himself, without secrecy, the entire advantages arising from it. The policy of the State is to encourage the promulgation of such improvements; the active interference therefore of public authority to prevent the disclosure of trade secrets is a step opposed to the direction of general policy.

<sup>8</sup> By a French Decree dated 18 Aug. 1818, the sale of medicines compounded secretly is forbidden. The Government appoints a Commission of five to investigate the merits of, and settle the sum to be awarded to, the inventor, and publishes the secret without delay.

<sup>h</sup> Duvergier, vol. xvii. 142, 18 Aug. 1810, amended 26 Dec. 1810. The motives for such intervention are thus expressed in the 'Decree concerning secret remedies':—"If these remedies are useful for the alleviation of suffering, our constant care for the good of our subjects should lead us to spread their discovery and use, by purchasing from the inventor the receipt of their composition. It is the duty of the possessors of such secrets to lend themselves to their publication, and their readiness to do so should be in proportion to the confidence they have in their discovery. Wishing therefore on the one hand to diffuse the knowledge and augment the means useful for the purposes of healing, and on the other to hinder charlatanism from imposing a tribute on credulity, or occasion fatal accidents by the sale of drugs without virtue or unknown substances, of which use may be made hurtful to the health and dangerous to the lives of our subjects, we have decreed, &c."

The course there prescribed is the submission of the recipe to a

The grounds on which Lord Eldon refused<sup>i</sup> the use of the powers of the Court seem of very solid foundation. Interference refused by Lord Eldon.  
 “So far as the injunction goes,” said his lordship, “to restrain the defendant from communicating the secret on general principles, I do not think the court ought to struggle to protect this sort of secrets in medicine. The court is bound, indeed, to protect them in the case of Patents, to the full extent of what was intended by the grant of the Patent, because the Patentee is a purchaser from the public, and bound to communicate the secret to the public at the expiration of his patent.”

The difficulty was felt strongly in a recent case<sup>k</sup> by Vice-Chancellor Turner, and disposed of on the opposite principle, by the adoption of what has been called the objective view, in its extreme. It was there argued, that the effect of granting an injunction would be to place the plaintiff in a position superior to that of a Patentee, and *Canham v. Jones*<sup>l</sup> was cited in that behalf. “What we have to deal with,” said the learned judge, “is, not the right of the plaintiffs against the world, but their right against the defendant. It may well be that the plaintiffs have no title against the world, and yet have a good title against the defendant.”

In practice the Court has frequently interfered,<sup>l</sup> but

commission of five persons, three of whom were professors of the schools of medicine—1. To examine the composition of the remedy, and determine whether its application in certain cases be dangerous or hurtful; 2. Whether the remedy be in itself good; if it has been and still is productive of good to humanity; 3. To apportion the reward of the discoverer with reference (1) to the merit of the discovery, (2) to the advantages attained or which may be looked for from it for the relief of humanity, (3) to the personal advantages that the inventor has drawn and may draw from it. (Titre 1, § 3.)

<sup>i</sup> *Williams v. Williams*, 3 Mer. 157 (1817).

<sup>k</sup> *Morison v. Moat*, V. C. T. 1851; 15 Jur. 792; upheld on appeal, C. of App. 1851; 18 L. T. 164.

<sup>l</sup> (1813) V. C., 2 V. & B. 221; *Yovatt v. Winyard*, 1 Jac. & Wal. 394; *Green v. Folgham*, 1 S. & St. 398; S. C. nom. *Green v. Church*, 1 L. J. Ch. 203.

mainly on the ground that the knowledge of the secret had been obtained by fraud, or that its communication would involve a breach of trust. In *Bryson v. Whitehead*<sup>m</sup> it was held that, "although the policy of the law would not allow a general restraint on trade, yet a trader might sell a secret of business and restrain himself generally from using that secret. The use of the secret was restrained by the consent of the parties for twenty years, and within fifty miles of S.

The present law with regard to secrets of trade is most elaborately laid down in the judgment of Vice-Chancellor Turner before alluded to :—"That the court has exercised jurisdiction in cases of this nature does not I think admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract; in others again it has been treated as founded upon trust or confidence, meaning as I conceive that the Court fastens the obligation on the conscience of the party and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise, on the faith of which the benefit has been conferred. But upon whatever ground the jurisdiction is founded, the authorities leave no doubt as to the exercise of it. The case of *Green v. Folgham*," where the court decreed an account against a party to whom a secret of this nature had been entrusted, might perhaps be accounted for upon the ground that the defendant in the case had expressly admitted himself to be a trustee of the secret. But there are other cases in which the Court has interfered without any such admission. In *Williams v. Williams*,<sup>o</sup> Lord Eldon, dealing with a case in which a father had divulged a secret to his son and had delivered to him a stock of

<sup>m</sup> (1821, dyers) 1 S. & St. 74: S. C. 1 L. J. Ch. 42, Sir J. Leach.

<sup>n</sup> 1 S. & St. 398 (1823), Sir J. Leach.      <sup>o</sup> 3 Mer. 159 (1817).

medicines upon the faith of a future partnership being formed between them when the son should come of age, puts the case as to confidence in these terms:—‘If on a treaty with the son while an infant for his becoming a partner when of age, the plaintiff had, in the confidence of a trust reposed in him, communicated to him this secret, and at the same time given him the possession of the articles mentioned in the bill, and instead of acting according to his trust the son had taken to himself the exclusive dominion over these articles and began to vend them without permission, it must be said that he had no right so to act, and that he was bound either to abide by or waive the agreement. If then he had intended to abide by the agreement, the injunction (granted by the Vice-Chancellor) was so far right; and if to waive it, he was bound to return the articles, and so far the injunction was also right.’ Here Lord Eldon lays down the doctrine—it does not go very far—that articles delivered over upon the confidence of a future arrangement cannot be used for a purpose different from that for which they were delivered over. The cases however do not stop here. In *Yovatt v. Winyard*,<sup>p</sup> Lord Eldon, upon the express ground of breach of trust and confidence, granted an injunction to restrain the defendant, who had been the plaintiff’s assistant in his business, from using or communicating recipes which he had *surreptitiously* copied whilst in the plaintiff’s service. Referring to *Newberry v. James*<sup>q</sup> and *Williams v. Williams*, his lordship granted the injunction, but confined it so as not to prevent the defendant from administering the medicine to any animals then under a course, it being stated in the paper of directions that a sudden discontinuance would be prejudicial. The question again came before Lord Eldon in *Abernethy v. Hutchinson*,<sup>r</sup> who granted an injunction (to restrain the publication of lectures), on

<sup>p</sup> 1 Jac. & W. 395 (1819).

<sup>q</sup> 2 Mer. 417 (1816).

<sup>r</sup> 3 L. J. Ch. 209 (1824).



the ground of breach of confidence. We have also Lord Eldon's opinion, referred to by Lord Cottenham in *Prince Albert v. Strange*, upon motion to dissolve an injunction granted to restrain the publication of a catalogue of etchings. His lordship, after dealing with the question as a subject of property, says:—'But this case by no means depends solely upon the question of property, for a breach of trust, confidence or contract would of itself entitle the plaintiff to an injunction.' The observations of Vice-Chancellor Wigram in *Tipping v. Clarke* are applicable to this part of the case. He says:—'Every clerk employed in a merchant's countinghouse is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk; and if he availed himself surreptitiously of the information which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract.' "

Contracts in restraint of trade.

The Law with respect to contracts between subjects in restraint of trade<sup>t</sup> is to some extent analogous to that which regulates the supposed contract between the Crown and the subject in the case of Patent grants, and the same tendency is observable towards a minimum of interference with the arrangements of individuals. The theory of a certain amount of indefeasible right<sup>u</sup> in every member of the community to employ his capital and labour as he will, imparted a peculiarity to the construction in law of all such contracts.

Discouraged by the general policy of law.

It is a very ancient part of the policy of the Law to discourage restraints on trade, as being injurious to the public. But no judge has yet carried his abhorrence so

\* 2 Hare, 393.

<sup>t</sup> Hawk. P. C. i. 624; Chitty, P. C. ch. x. § 2; Bac. Abr. Monopoly; Bull. N. P. 76, Brigm. ed.

<sup>u</sup> C. B. (1831), *Horner v. Graves*, 7 Bing. 741, Tindal, C. J.

far as is reported of Hull, J. (Year Book, 2 Hen. V.) A dyer was there bound in a penalty of 100*l.* not to use his craft for a year. Mr. Justice Hull held\* that the bond was void, for that the condition ran counter to the Common Law; "and by God," cried he in an outburst of indignation, "if the plaintiff were here he should go to prison till he had paid a fine to the King." In *Mitchell v. Reynolds*,<sup>y</sup> Parker, C. J., in his admirable exposition of the Law on this subject, excuses this transport of the learned judge on the ground that it was excited by a case of most gross fraud and villany.

"The Law as to restraints on trade," says Lord Campbell in delivering the judgment of the court in a recent case,<sup>z</sup> "has been altered by late decisions. For many years the contract was void unless the consideration was adequate to the restriction. According to Parker, C. J., in *Mitchell v. Reynolds*,<sup>a</sup> the Court was bound to see that it was made upon a good and adequate consideration, so as to be a proper and useful contract. But in *Hitchcock v. Coker*<sup>b</sup> it was held that the court had no judicial perception of the ratio of the consideration to the restriction, and that if there was a legal consideration of value, the contract ought to be enforced without reference to the quantum of that value. Also in *Mitchell v. Reynolds*, 'Wherever such contract *stat indifferenter* and for aught appears may be either good or bad, the law presumes it *primâ facie* to be bad.' But according to the tenor of the later decisions the contract is valid, unless some restriction is imported beyond what the interest of the plaintiff requires, and his interest has been considered to extend very widely. In respect to time,

Effect of recent decisions.

\* 2 Hen. V. 5. See also *Bryson v. Whitehead*, 1 S. & S. 77 (1821), V. C. Sir J. Leach. H. of Com. Jour. A.D. 1614, 473.

<sup>y</sup> 1 P. Wms. 181.

<sup>z</sup> *Tallis v. Tallis* (1853), 21 L. T. 43.

<sup>a</sup> 1 P. Wms. 181.

<sup>b</sup> 1 N. & P. 796, 6 A. & E. 430, Q. B. (1836), chemist.

the restriction may be unlimited, according to *Hitchcock v. Coker*; and though in respect of space there must be some limit, yet contracts have been supported where the area of exclusion was apparently greater than the area of the plaintiff's practice."

The distinction here introduced between time and space is another instance of an arbitrary rule established on isolated cases which, when applied to matters in their nature so variable as the conditions of trade, creates nothing but complexity, inconvenience and confusion. There seems no reason why artificial rules or non-natural interpretation should be adopted for application to this class of contracts more than to any other. The competency of the parties as to the rights involved, and the validity of the consideration being established, there seems no reason to remove this class of cases from the operation of the law established in all other cases of contract.

Contracts to be construed as other contracts.

In construing such contracts much necessarily depends from the instrument creating it and the position of the parties.<sup>c</sup> No contract, however, can be enforced where the consideration involves an offence against public policy.<sup>d</sup>

In *Horner v. Graves*<sup>e</sup> an area of 100 miles round York was considered an unreasonable limit for the exclusive practice of a dentist, and the penalty of 1,000*l.* for its transgression excessive. In *Mallan v. May*,<sup>f</sup> on the other hand, a contract by a surgeon-dentist not to practise in London was held valid, the limit of London not being too large for the profession in question; the annexation of an unreasonable stipulation to the contract was held not to vitiate the entire contract.

<sup>c</sup> (1768) K. B. *Lowe v. Penn*, 4 Burr. 2225; Shep. Touch. 164; *Steel v. Brown*, 1 Taun. 381.

<sup>d</sup> (1808) Q. B. *Hartley v. Price*, 10 East, 22, restraint on marriage; (1727) H. of Lords, *Chesman v. Nainby*, Strange, 739, linendraper.

<sup>e</sup> (1831) 7 Bing. 744, Tindal, C. J.

<sup>f</sup> (1843) 11 M. & W. 653, Exch.

In *Davis v. Mason*,<sup>g</sup> Thetford and ten miles round, in *Hayward v. Young*,<sup>h</sup> Aylesbury and twenty miles around were deemed reasonable limits for a surgeon. In that of an attorney, London and 150 miles round,<sup>i</sup> and in *Proctor v. Sargent*,<sup>k</sup> five miles from Northampton Square, in the county of Middlesex, were held reasonable limits of exclusion for a cowkeeper and milkman.

“It may often happen,” was the observation of Lord Wynford in giving the judgment of the court in *Homer v. Ashford*,<sup>l</sup> “that individual interest and general convenience render engagements not to carry on trade or act in a profession in a particular place proper; that engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it; and that the effect of such contracts is to encourage rather than cramp the employment of capital in trade and the promotion of industry.”

By the decision in *Hitchcock v. Coker*<sup>m</sup> before alluded to, in the Exchequer Chamber (reversing the judgment of the Court of Queen’s Bench), it was established, that a restriction reasonably limited as to space, but enduring for the life of the party restrained, was valid, as the only effectual means of securing to the covenantee the full benefit of the goodwill of his trade. This case was followed by those of *Mallan v. May*,<sup>n</sup> *Rannie v. Irvine*,<sup>o</sup> *Pemberton v. Vaughan*,<sup>p</sup> *Hastings v. Whitley*<sup>q</sup> and *Atkyns v. Kinnier*,<sup>r</sup> in which the principle there established was recognized as beyond controversy. In

*Hitchcock v. Coker.*

<sup>g</sup> 5 T. R. 118 (1793).

<sup>h</sup> 2 Chitty, 407 (1818).

<sup>i</sup> *Bunn v. Guy*, 4 East, 190 (1803).

<sup>k</sup> 2 Man. & Gr. 20; 2 Scott, N. R. 289.

<sup>l</sup> 3 Bing. 326, C. B. (1825), commercial traveller.

<sup>m</sup> 6 Ad. & E. 438; 1 N. & P. 796, 1836.

<sup>n</sup> 11 M. & W. 653, Exch. (1843).

<sup>o</sup> 7 M. & G. 969; 8 Scott, N. R. 674 (1844), C. B., baker.

<sup>p</sup> 10 Q. B. 87 (1847), sale of ginger beer.

<sup>q</sup> 2 Exch. 611 (1848), surgeon.

<sup>r</sup> 19 L. J. Exch. 132 (1850), surgeon.

the case above alluded to, *Tallis v. Tallis*,<sup>8</sup> a covenant restricting the defendant from carrying on the business of a canvassing publisher within 150 miles of the General Post Office, or in any town in which the plaintiff carried on that business, was held not to be an unreasonable restraint on trade. In *Elves v. Crofts*,<sup>9</sup> the covenant of a butcher that he would not at any time thereafter, either by himself or as agent or journeyman for another, exercise the trade of a butcher within five miles of certain premises, was upheld as not unreasonable restraint, either as to time or distance. In *Sainter v. Ferguson*,<sup>10</sup> a restraint as to Macclesfield and within seven miles thereof for the practice of an apothecary was held good, and the 500*l.* named in the covenant to be a penalty, and not as liquidated damages. In *Turner v. Evans*,<sup>11</sup> A. covenanted not to set up or carry on the business of a wine merchant at C. : held, that A. was prohibited from soliciting for or executing orders at C., although he had no stores or place of business at C.

Condition of  
English law  
generally.

From the total absence of elemental<sup>7</sup> system from our Jurisprudence, the present<sup>2</sup> condition of our law is

<sup>8</sup> 21 L. T. 43, Q. B. (1853).

<sup>9</sup> 10 C. B. 241 (1850).

<sup>10</sup> 7 C. B. 717 (1840); Steph. Com. bk. ii. pt. 2, c. 5.

<sup>11</sup> 21 L. T. 153, Q. B. (1853).

<sup>7</sup> Hub. Eng. Univ. pref. Some of our most valuable institutions appear, indeed, rather to be the result of happy accident than deliberate design. Patent Law affords a singular illustration of this. The practice of affixing terms on the extension of patents was a bold step taken in the right direction; yet in *Ledsam v. Russell* (1818, 1 H. of Lords Ca.), opinions were expressed that the Judicial Committee had exceeded their statutable powers.

<sup>2</sup> "The evils are to be traced in text books, in the arguments at the bar, and even in the judgments of the Bench, producing an undue and increasing preference of memory to reason—of technicality to science, and of mere citation of cases to the development of legal principle." (Report Dub. Univ. Com. 1854, p. 36.)

not so much a cause of wonder as regret. The limits between optional and necessary, between the Legislative and Executive functions<sup>a</sup> of government, have never been authoritatively laid down,<sup>b</sup> and in practice are almost altogether disregarded.<sup>c</sup> Patent law, to a certain extent, may be said to illustrate the working of a branch of jurisprudence settled rather on general principles than resting on the prescription of detail, where, as Grotius says,<sup>d</sup> *lex non exactè definit, sed arbitrio boni viri permittit*. Previously to the exertions of Lord Brougham,<sup>e</sup> but one Statute,<sup>f</sup> and that framed for a political rather than commercial purpose, existed on the subject, and with reference to this the whole superstructure has been built. Taking the few words of the Statute for their text, and addressing themselves to the merits of the cases as they arose, our judges have, by a series of decisions, elaborated the law as it at present stands.

Patent law  
example of pe-  
culiar system of  
law.

The predominance of this judicial element has im- pressed a strong peculiarity upon this branch of the law, partly from the somewhat partisan spirit in which the

Effect of its  
constitution.

<sup>a</sup> As an instance of the confusion between the subjects of imperial and municipal regulation, see the recent act, 16 & 17 Vict. c. 33.

<sup>b</sup> Mill, *Pol. Ec.* bk. v. c. 10, § 1.

<sup>c</sup> "I think," says an eminent conveyancer, speaking of the Joint Stock Companies Winding-up Act (11 & 12 Vict. c. 45), "that a very cursory consideration will show that nine-tenths of the act are unnecessary. I believe that most of the things specially enacted might have been done by the Court of Chancery under its existing powers; and certainly all the details as to orders, &c. might have been better done by the court by orders issued from time to time." (Letter by H. Bellenden Kerr to Mr. Ludlow (1849), containing suggestions for remodelling of our jurisprudence.)

Yet this, Mr. Kerr declares, may be taken as a "fair specimen" of a bill well prepared, and which "had received far more attention from persons skilled in the subject than is usual in like cases." (*Joint Stock Companies Winding-up Acts*, by Ludlow, *Introd.* lviii.)

<sup>d</sup> Grotius *de Æquitate*, c. 1, § 2.

<sup>e</sup> 5 & 6 Will. IV. c. 83.

<sup>f</sup> 21 Jac. I. c. 3.

privileges created by the Executive were viewed,<sup>g</sup> and partly from the objective view, if we may so say, which was early adopted with reference to Patent grants. Previously to the time of Lord Eldon, the Patentee was as purely a creature of Royal bounty as the monopolist of the Elizabethan age, and language was employed by judges in the application of the doctrine which would at the present day be considered highly unconstitutional.<sup>h</sup> In addition to all this, a narrow and jealous spirit, characteristic of the Common Law,<sup>i</sup> was suffered to prevail in dealing with the results of commercial enterprize and manufacturing skill, and the conclusions they arrived at may be described as "not so much those of common sense as of professional men."<sup>j</sup>

Disadvantages  
to the patentee.

The nature of the Patentee's privileges drove him frequently into courts of Law, and during this early period almost constantly to his disadvantage. To him alone no margin was conceded for possible error. An unapt title to his invention, an illjudged word in its description, an incautious experiment, the least disclosure<sup>k</sup> of his secret before Letters sealed, and his privileges were at an end. Technical rules, framed with other objects and unsuited to the case, were rigorously applied by those who saw in it only the relation between the Sovereign and the subject, and adjudicated on the maxims of the Common Law as applicable to Royal franchises and grants, while

<sup>g</sup> 4 Inst. 88; *Brunton v. Hawkes*, per Bailey, J., 4 B. & Ald. 552; *Reg. v. E. A. Co.*, 21 L. T. 35, per Campbell, C. J.

<sup>h</sup> *Ex parte O'Reilly*, 1 Ves. jun. 119; Lord Thurlow, (1790.)

<sup>i</sup> Allen on the Prerog. 124; Blk. Com. i. 171, 216; iii. 245; *Maillon de Re Diplom.* l. 2, c. 3; *Com. Dig.* "Usury," "Trade," "Impressment."

<sup>j</sup> Lord Cranworth expressing his opinion of the probable result of transferring the functions of a jury to the judge, H. of Lords, Times, Mon. Feb. 27, 1854.

<sup>k</sup> "We cannot work at all openly," said a witness who had experienced the working under the late system, "even among our own men unless we are protected." (*Evid.* 1249 (1851).)

the merits of the invention, or its effect on public policy, rarely engaged attention. Judges either covertly evaded or openly overruled such portions of the statute as opposed their opinions, and Patent trials by degrees degenerated into dialectic discussions and verbal criticism. Such, however, have been the innate vigour and progressive tendency of our manufactures, that Patent privileges have lived through all the disadvantages of misconception, to find themselves at length recognized on conditions from which alone they should depend in a highly civilized, free and commercial community. Judges no longer look unfavourably on the Patentee, and recent decisions have been distinguished, not more for the able application of principles of law than for kindly sympathy with genius and intelligent appreciations of the state of our manufactures.

Amelioration in position of the patentee.

“We ought not to be astute,” said Alderson, B.,<sup>m</sup> “to deprive persons of the benefit to be derived from ingenious and new inventions;” and Parke, B., in the same case remarked, “In the construction of a Patent, the court is bound to read the specification, so as to support it if it can fairly be done.”<sup>n</sup> “Whenever it appears that the Patentee has made a fair disclosure,” says Mr. Justice Buller,<sup>o</sup> “I have always had a strong bias in his favour.” “The defendant’s counsel,” said Mr. Baron Rolfe, in *Newton v. Grand Junction Railway Company*,<sup>p</sup> “have discussed and scanned the language of the Specification in the same sort of spirit as if it were a plea or replication specially demurred to. This is not the spirit in which a specification should be inspected. The proper mode is to construe it, and see what is the good sense of it, and whether that which the Patentee claims as his invention is there distinctly and clearly explained.”

Good feeling on the part of the Bench.

<sup>m</sup> *Russell v. Cowley* (1835), 1 Cr. M. & R. 864, Exch.

<sup>n</sup> Page 876. See also *Haworth v. Hardcastle*, per Tindal, C. J. (1834); 1 Bing. N. C. 182; Web. P. R. 484.

<sup>o</sup> *Turner v. Winter* (1787), 1 T. R. 602. P 5 Exch. 335 (1815).



Comparison  
with kindred  
branches of  
law.

In treating the Law of Patents as a part of English Jurisprudence, we are naturally led to the consideration of other branches occupied with subjects of property of a kindred class. As the creation of Royal grant,<sup>p</sup> the subject of transfer, subdivision, mortgage and Registration,<sup>q</sup> and as the result of a varied combination of enterprise, intellect and skill,<sup>r</sup> analogy at once enables us to adapt many general principles established in the case of matters exclusively confined to each of these classes. The evil lies in the abuse of this assistance, in insisting on the subject conforming to rules framed expressly with other objects, and in neglecting the combination of causes which have concurred in giving to it a distinctive character of its own.<sup>s</sup> In *Protheroe v. May*,<sup>t</sup> the nature of the property underwent very considerable discussion, but the arguments started from the assumption that the property must have an absolute similarity either to a term or a power, and that a derivative interest, such as a licence, must be either subject to the laws of the former as a subdivision of the estate, or to the latter as a mere franchise. If, says a learned writer, commenting on this case, Letters-patent confer a power and not a legal estate, then an assignment of such Letters-patent is nothing but an assignment of a power.

<sup>p</sup> (1823) Cruise on Dignities, ch. v. § 85; 2 Bl. Com. 316. Privilegia, says Heineccius (Elem. lib. i. tit. 4, p. i. cxvi.), vel rei vel personæ inhærent, a distinction useful in explaining the failure of the analogy.

<sup>q</sup> (1817) Platt on Leases, i. 164; (1853) Maude and Pollock, Law of Merchant Shipping; (1831) Cooper, Registration of Conveyances; (1850) Coote, bk. ii. c. 16, on Mortgage of Chattels Personal; (1826) Powell on Mortgages; (1810) Rigge on the Statutes for registering Deeds.

<sup>r</sup> See Treatises on Powers, Joint Stock Companies, Registered Designs and Copyright.

<sup>s</sup> Leading Articles in 7 Jur. 242 (1843), and 14 Jur. 462 (1850). (1839) Exch. 5 M. & W. 675.

In point of fact, practice, we might almost say accident, has had more to do with the matter than abstract reasoning, and practical dealings have impressed upon this species of property the character of incorporeal personalty,<sup>u</sup> subject to several peculiarities. The right created by the grant is that of the exclusive enjoyment of a trade, secured by the indirect operation of Letters-patent restraining all others from doing what, but for such restriction, they would be entitled to do equally with the Patentee.

Its character determined by practice.

The clearest insight, however, into the peculiarities of this property, is from considering it as the result of a contract\* entered into by the Executive, as representative of the public, with the Patentee.<sup>y</sup> The parties meet on the understanding that the one has a secret to communicate, the other a favour to confer in return. The conditions required from the Patentee are, that he really possesses a secret and honestly communicates it.<sup>z</sup> The grant, *e mero motu* in form, is *ex debito justitiæ* in fact.<sup>a</sup> "Lord Eldon," says Mr. Baron Alderson in a recent case,<sup>b</sup> "has laid down the principle as long since as 1800 that Patents are to be considered as bargains between the inventor and the public, to be judged of on the principles of good faith, and to be construed as other bargains." "You know the object of the Specification," says Tindal, C. J.;<sup>c</sup> "it is the price which the party who obtains the Patent pays for it.

Considered as the result of a contract.

<sup>u</sup> (1853) Steph. Com. iii. 523; Toller's Ex. 142.

<sup>x</sup> Qu. Rev. xliii. 337.

<sup>y</sup> *Hurmar v. Playne*, 14 Ves. 130; 11 East, 141.

<sup>z</sup> *Turner v. Winter*, per Ashurst, J.; 1 T. R. 602.

<sup>a</sup> "There is little doubt," says Mr. Hindmarch (1846), 151, "that a patent without a recital of the specification is absolutely void for want of consideration."

<sup>b</sup> "The Patentee is a purchaser from the public." Lord Eldon, *Williams v. Williams*, 3 Mer. 157.

<sup>c</sup> *Neilson v. Harford* (1841), Web. P. R. 341.

Connexion  
with other  
restraints on  
trade.

To estimate fully the real nature of Patent privileges, we should view them in connexion with the class of interests to which they belong, viz. those created for the self-remuneration of public benefactors.<sup>d</sup> The kindred privileges<sup>e</sup> are those of the capitalist and the author, Incorporated Companies, on the score of large capital or extreme risk on the one hand, and Copyright,<sup>f</sup> including the protection of the Designs Acts, for purely intellectual skill, upon the other. Each, from its mode of creation and the subjects it comprises, possesses distinctive features of its own, yet thus far they have a similarity, as originating in principles of natural justice and public policy, and as being the means of rewarding with the first fruits of their own efforts those by whose industry, enterprize and skill the commerce, manufactures and art of a country originate and improve. In each case the field of adventure must be new: public rights, therefore, can be hardly said to exist,<sup>g</sup> while the prospective advantages to the public from the discovery are such as to reconcile them to the temporary abstinence imposed.

The connexion between the results of purely intellectual labour and that of manufacturing art, is preserved

<sup>d</sup> The term "invention," in the sense in which it is used by Beckman, as comprehending under it police establishments, &c., is applicable in many respects to the consideration afforded by them for the privileges they receive. See Translator's Preface, xiii. Bohn's ed.

<sup>e</sup> Mill, Pol. Ec. bk. i. c. ix. § 2; Steph. Com. iii. 133. By a late Statute (7 Will. IV. & 1 Vict. c. 73), Her Majesty is empowered by her Letters-patent to grant to any Company or body of persons associated for any trading purposes or any purposes whatever, and to the heirs, executors, administrators and assigns of any such persons, although not incorporated by such Letters-patent, any privilege or privileges, which, according to the Common Law, it would be competent to the Crown to grant to any such Company by Charter of incorporation. As to Charters under this act, see *Rutter v. Chapman*, 8 M. & W. 1; *Phillipson v. Egremont*, 6 Q. B. 587.

<sup>f</sup> See opinions of V. C. Wood and Sir J. Romilly, M. R., Evid. 1851; and Webster, Principles and Policy of Patents (1853), p. 9.

<sup>g</sup> Vin. Abr. "Prerog." E a.

through the region of the formative arts. The Statutes creating and protecting this intermediate state are those known as the Registered Designs Acts, 5 & 6 Vict. c. 100 (Ornamental), and 6 & 7 Vict. c. 65 (Non-ornamental). The degrees by which the one blends into the other are so imperceptible, that "inventors oppressed under the late Patent Laws took refuge under the Utility Designs Act, and we have seen many inventions registered as forms or configurations, whereas it was notorious that the object of the claim was a new mechanical action or contrivance."<sup>h</sup> Patent right owes, indeed, no little of the safety it enjoys in theory at the present moment from its connexion with Copyright, the abolition of the latter never having been seriously mooted by the extremest advocates of *laissez faire*.<sup>i</sup>

Joint Stock Companies, with special privileges of trade, are classed by Adam Smith<sup>k</sup> and other writers in the same category with the monopoly of a new machine, and Patent right, previously to the time of Lord Eldon, was distinguished from Copyright only by being less favourably regarded. Lord Hardwicke generally mentions them together.<sup>l</sup> He calls the Statute of Anne "a stand-

<sup>h</sup> Soc. Arts, First Rep. on the Rights of Inventors, 1851. An extreme instance of the disregard of the proper division of this subject is mentioned by Mr. Turner, p. 11, where an American Patent was taken out for a method of making skeins of cotton look larger. The patent was disallowed, and the device subsequently found its appropriate protection under the Designs Act. *Rogers v. Driver* (1850), Q. B.; 20 L. J. 31 (hollow brick); *Reg. v. Bessell* (1850), Q. B.; 20 L. J. Mag. Ca. 177 (ventilator).

<sup>i</sup> The question of Patents, as verging upon licences from their identity of origin, the executive, wears a curious appearance in *Ex parte O'Reily* (1 Ves. jun. 112). Lord Thurlow, L. C., was there applied to, and refused to seal a Patent for thirty-five years exclusive representation of Italian operas. The old Patents of the theatres granted to Killigrew and Davenant in the time of Charles II. were, it appears, in fee.

<sup>k</sup> Ed. Playf. iii. 141; (1847) M'Culloch, 3rd ed. 969. *Duvergier v. Fellows* (1828), C. B.; 2 M. & P. 413.

<sup>l</sup> (1823) Ed. Rev. xxxviii. 289.

ing Patent for authors," and both he and Sir Thomas Clarke treat them as exceptional cases, where, the plaintiff's right appearing upon record or Act of Parliament, he might apply to the Court at once for an injunction, without first establishing his right at law.

"I think," says Lord Campbell,<sup>m</sup> "Letters-patent giving a monopoly for an invention, and Letters-patent creating a trading company, if framed in the same manner, must be construed on the same principle. In the latter class of cases much more caution is likely to be exercised, and the attorney-general will not grant his fiat for the issuing a writ of scire facias without consulting the Board of Trade, by whose advice the Charter is granted."

The condition of a Patent in fine is well expressed by the language used on a recent occasion<sup>n</sup> by Lord Cranworth, when commenting on Lord Eldon's opinion as to the legality of Joint Stock Companies. "It is one of those transactions so consonant to the wants of a growing and wealthy community, which would have forced its way into existence, whether fostered by Law or opposed to it."

Source of misunderstanding with respect to patent rights.

The very general misunderstanding with reference to the rights of Patentees is mainly referable to two causes, — the undue importance attached to the form in which they are created and the insufficient attention paid to the relation in which the patentee really stands to the community at large. Attempts to determine its nature by a reference to the origin of property in the abstract have as yet led to no practical result. The question contains in itself so many variable elements, and is so intimately involved with others, as to render any exact definition of it impossible. The general principles, however, on which it stands may be accepted as sound, since they have been

<sup>m</sup> *Reg. v. Eastern Archipelago Company*, 21 L. T. 35. 1852.

<sup>n</sup> *In re Sea, Fire and Life Association*, Lords Justices. 1854.

adopted by almost every state<sup>o</sup> of modern times of any considerable advancement in civilization and manufacturing art.

The law under this head must be regarded as a compromise. So far as natural right is concerned, the application of a law of nature, a philosophical or abstract principle, is capable of exclusive appropriation only so long as the secret of such application is within the inventor's breast. Once passed, it becomes the property of all mankind, and nothing but principles of justice and public policy can be permitted to restrain the instinctive desire of all men to adopt manifest improvements. Whatever therefore the abstract right<sup>p</sup> of the inventor, in order that such property may be of value, society must interfere by imposing penalties and affixing prohibitions on its infringement. In most countries<sup>q</sup> the duration of such property has been reduced to a term of years, as the course most beneficial to public interests. The remarks of a very able writer on the kindred subject of Copyright<sup>r</sup> apply equally to the case of Patents:—"Society may fairly require as the price of its active protection by stringent enactments that the author should surrender a part of his full right, regarded as a right, according to the principles of natural justice. The great problem of legislation is to determine the point where this surrender

The law to be regarded as a compromise.

<sup>o</sup> Phillips, p. 20; Encyc. Met. viii. 70; Renouard, c. 2, § 3, p. 42. The following European States grant Patents—Austria, Bavaria, Belgium, Bosnia, Denmark, France, Greece, Hanover, Holland, Holstein, Ionian Isles, Lucca, Modena, Moldavia, Norway, Parma, Poland, Portugal, Prussia, Rome, Russia, Saxony, Sardinia, Sweden, Spain, Servia, Sicily, Tuscany, Turkey, Wallachia and Wurtemberg. (Loosey, *Recueil des Lois*, 1849; *Urling on Foreign Pats.*)

<sup>p</sup> Wollaston's *Religion of Nature*, 7th ed. (1750), p. 235.

<sup>q</sup> By the Spanish law, the duration of the privilege is graduated with reference to the merit of the grantee, in connexion with the discovery, as the inventor, improver or importer of the subject-matter of the Patent.

<sup>r</sup> Curtis on Copyright (1847), p. 23.

ought to be made. It is a mixed question of policy and justice with regard to which no positive rule can be laid down."

Patent law essentially based on principle.

The nature of this subject indeed with which Patent Law is connected renders its construction on general principles indispensable. The great object of the Law is the encouragement of trade by rewarding improvements in the useful arts. The merits therefore of the invention itself forms the prominent feature in the inquiry; and rules, having for their end the prescription of conditions on which such rewards are to be conceded, can only be applicable to matters scattered throughout the whole province of manufacturing art, by being based on broad principles and interpreted in conformity with the spirit rather than the letter of Legislation. The Statute Law must contain, as it were, formulæ of verification to which we may recur for the elimination of errors accumulated in the course of successive decisions. Finality in detail is impossible.<sup>r</sup> Revolutions occur in the manufacturing world to all appearance so arbitrarily and lead to conclusions so unforeseen as to remove its subjects from the operation of laws framed on other than immutable principles.

Injustice of a fixed term for all inventions.

The imposition of a fixed term for all inventions is a cause of great injustice to the public or the Patentee. Those who have had experience in the working of Patents are aware that fourteen years is too short a time for the remuneration of the outlay and exertions requisite for the establishment of some of the most important inventions; while in others, where the invention becomes immediately remunerative, it is far too long, operating merely as a clog to further improvement.<sup>s</sup>

<sup>r</sup> Qu. Rev. (1824), Patents.

<sup>s</sup> The privilege conceded to Livingston by act of the Legislature of New York (1798), was that of "constructing, making, using, employing and navigating all and every species and kind of boat or water-craft which might be urged or impelled through the water by the

Another point on which a reform is much needed is the remedy of the Patentee in cases of infringement. The evidence before the Committee showed that in practice his only protection, in a large majority of cases, lay in the honour of those who were interested in infringing it, from the passive nature of the support given by the law to the Patentee. The case of Sir D. Brewster, with reference to the Kaleidoscope, exhibited this very vividly, as one of the rare instances in which a man of science has taken out a Patent for the applications to practical purposes. The Patent ought to have been a source of very considerable wealth. Millions of them were sold in London<sup>†</sup> and cartloads shipped for foreign countries. Had the patent been protected, the patentee's estimate is that he should have received somewhere about 200,000*l.* In reality he hardly made anything. The reason was thus given:—“And the very fact of the number of manufacturers infringing it made it impossible for you to protect yourself? Ans. The men who infringed the patent were Jews generally. It would have been vain to have gone into a court of law. At that time respectable opticians all paid me for the finer class of instruments which they made. Thus, when I resolved not to protect it at all against this class of pirates, of course I made no application to those regular opticians for the payment of the dues which they had paid previously. *Where the infringement is made by a person who has not the means of paying the law expenses which are incurred, no man will think of going into a court of law.*”

Deficient  
remedy for in-  
fringement.

The remedy applied for infringement in the case of Copyright,<sup>‡</sup> might with very great advantage be extended

Suggested im-  
provements.

force of fire or steam, in all creeks, rivers, bays and waters whatsoever, within the jurisdiction of this State, for the term of twenty years.” (Phillips, 1837, p. 45.)

<sup>†</sup> Howard's Patent (sugar), one of the most lucrative ever granted, never even reached Nisi Prius. See Web. on Pat. (1851), Introd. vi.

<sup>‡</sup> 5 & 6 Vict. c. 45, s. 23.



to that of Patents, viz. that all objects for sale made in contravention of the patentee's rights should be deemed the property of the Patentee, and, after demand in writing, he should be entitled to recover the articles themselves in an action of detinue, or damages for their conversion in trover. If palpable infringement be not placed on the footing of a felony, at least some more summary remedy should be supplied. Mr. Duncan<sup>x</sup> relates his experience with regard to the invention of Hansom's cabs. "The question of infringement was tried three different times in the courts of law, and in each case a verdict obtained against the owners of the pirate cabs. The result of the verdict was practically this—I got a verdict against the proprietor of the cab for the infringement, and obtained a judgment and execution against him. *I found him without any property*; the evening before I could sue out execution against him he would sell the cab, and when I take out my execution he would be driven to prison on his own infringement, and I would have next day to attack the fresh owner and go through the same process of obtaining verdict, judgment and execution, and that infringement would continue still in existence and at work in spite of the verdicts. I do not see how the case can be met except by establishing the French process of breaking up the infringer's machinery or delivering it up to the Patentee under a magistrate's warrant."<sup>y</sup>

The late Act an improvement.

That the late Act has effected a vast improvement in the condition of the Patentee can be doubted by no one acquainted with the practice as it was before.<sup>z</sup> The great reduction in cost,<sup>a</sup> the protection from the date of

<sup>x</sup> (1851) Evid. 333.

<sup>y</sup> (1851) Evid. 834.

<sup>z</sup> (1851) Evid. 677, 885, 1239.

<sup>a</sup> Professor Wheatstone, the undoubted inventor of the Electric Telegraph (see Evid. Sir D. Brewster, 2488), paid for his Patent between 500*l.* and 600*l.*, and 50*l.* for the registration of the Specification

application, the consolidation of offices, the grant of one Patent for the whole realm, the abolition of caveats, and the printing of Specifications, constitute a very material boon to the inventor; yet it cannot be said Patent Law is at present in a satisfactory condition. The alterations it requires may appear trifling, but they would place it upon a sure, because equitable footing. Its evils are attributable, not so much to defective Legislation as to a deficiency in administrative machinery. The great source of them is the practical ignorance of the Crown. Nominally the patron of industry and skill, it administers a department exclusively occupied by its products, by means of officers<sup>b</sup> charged with numerous and important other functions, and not necessarily conversant<sup>c</sup> with the condition of manufactures—a subject, be it observed, in Scotland alone. He had not the means of paying for the Patent, had he not been supported by others.

Present evils of  
the Law.

The opinions of the witnesses examined before the Committee of the House of Commons, in 1829, were almost unanimous to the effect, *that Patents should not be too cheap, lest the country should be inundated with them.* One individual only was in favour of the reduction of cost. "I would propose Patents," says Mr. John Isaac Hawkins, "to be put upon the same footing as Copyright, or rather statutory . . . . . If Patents were given free of cost, the public would be benefited by the inventions of the sober minded, and thus a source of permanent wealth to the country would be opened. I am well acquainted with many cases in which a poor inventor has remained poor, while the capitalist has realized a great fortune by the invention . . . . . I firmly believe I am at the present moment the confidential depository of important inventions, which if they could be patented free of cost, and thus become marketable commodities, would immediately occasion employment to thousands of people."

<sup>b</sup> The Commissioners appointed by the Act (§ 1) are the Lord Chancellor, the Master of the Rolls, the six Law officers of the Crown, with "such other person or persons as may be from time to time appointed by Her Majesty."

<sup>c</sup> (1853) *Re Simpson v. Isaac's Patent*, 21 L. T. 81, Cranworth, L. C.; (1853) *Re Stoll's Patent*, 21 L. T. 23—reference to Assistant Commissioner.

which, being in itself progressive, requires constant attention to keep pace with its advances. In theory, the Crown grants Letters-patent to the publisher of a secret important to the community, and apportions its restraints with reference to the value of his services; in practice, nothing of the kind occurs. The Patentee dictates his own terms, and on payment of a small fee receives authoritative sanction to enforce them.<sup>d</sup> The Act, indeed, provides<sup>e</sup> for the efficiency of the Executive, but it is at the expense of the Patentee. Such an arrangement is contrary to all sound principle. Constitutional government is bound to settle and adjudicate upon rights without reference, so far as cost is concerned, to whether such adjustment requires attainments of a scientific or the most ordinary kind. The creation of a monopoly in a country like this is so important a matter, that any question of cost on the part of Government should be treated as one of very secondary consideration.

Evil of Patentees dictating their own terms.

This evil was strongly insisted on before the Committee of the Lords. "The American India rubber shoes," said one witness, "and many other of their articles, are superior to ours. It is in consequence of the Patent held by a wealthy company in Manchester, claiming the *use of India rubber generally* for braces, coats, gloves, shoes and other articles. . . . In America they compel you to be very specific in stating what your proposed improvement is: *if it is in making shoes you must state it to be so.*" With the existence of an illegal and oppressive Patent such as this, who can say that the remedy of *scire facias* is practically available for the defence of public rights? On the trial of Messrs. Cooke and Wheatstone's patent it was contended that the patent conferred an exclusive *right to the reciprocal transmission* of messages between distant places!

<sup>d</sup> Hodge, 596. 1851.

<sup>e</sup> 15 & 16 Vict. c. 83, § 8.

The rapidly increasing number of applications,<sup>f</sup> and the accumulation of conflicting claims consequent on the unhesitating readiness with which they are granted, call urgently for reform. Number of patents.

A strict examination of the invention and the claim by persons competent to estimate their effects upon Society, and empowered in special cases to purchase the invention at once for public use, would be the first step towards putting Patent privileges on a sound and equitable basis, Preliminary examination the great requisite.

<sup>f</sup> The following is a list of Patents granted since 1675 :—

|                              |                  |       |     |
|------------------------------|------------------|-------|-----|
| From 1676 to 1685 inclusive— | Charles II.      | . . . | 46  |
| „ 1686 „ 1689                | James II.        | . . . | 13  |
| „ 1689 „ 1701                | William and Mary |       | 102 |
| „ 1701 „ 1714                | Anne             | . . . | 30  |
| „ 1714 „ 1727                | Geo. I.          | . . . | 95  |
| „ 1727 „ 1760                | Geo. II.         | . . . | 258 |
| „ 1761 „ 1770                | Geo. III.        | . . . | 215 |
| „ 1770 „ 1780                | „                | . . . | 299 |
| „ 1780 „ 1790                | „                | . . . | 556 |
| „ 1790 „ 1800                | „                | . . . | 692 |
| „ 1800 „ 1810                | „                | . . . | 913 |
| „ 1810 „ 1815                | „                | . . . | 551 |

(Rep. of Arts, xxix. 319 (1816).)

In 1829 it was stated that the number of Patents in actual existence was 1855, and the average annual Patents 150. (Qu. Rev. xliii. 335 (1830).) The number granted from 1838—1847 were in—

|            | England.  | Ireland. | Scotland. |
|------------|-----------|----------|-----------|
| 1838 . . . | 407 . . . | 64 . . . | 133       |
| 1839 . . . | 412 . . . | 87 . . . | 160       |
| 1840 . . . | 441 . . . | 69 . . . | 163       |
| 1841 . . . | 440 . . . | 52 . . . | 152       |
| 1842 . . . | 372 . . . | 69 . . . | 135       |
| 1843 . . . | 420 . . . | 64 . . . | 125       |
| 1844 . . . | 449 . . . | 60 . . . | 151       |
| 1845 . . . | 572 . . . | 95 . . . | 205       |
| 1846 . . . | 494 . . . | 90 . . . | 178       |
| 1847 . . . | 498 . . . | 76 . . . | 168       |

(Parl. Papers, 1849, No. 45.)

The number of Patents sealed during the first year of the operation of the Patent Law Amendment Act, Oct. 1852—1853, was 2420.

by securing their arrangement with reference to the state of manufactures, the position of the Patentee, and the benefits likely to accrue to the public from his exertions. By far, however, the more valuable service to be expected from a permanent embodiment of such persons in the Commission would be that an end would be put to the great mass of Patent litigation.<sup>5</sup> It is not improbable that such a change, trifling as it may appear, would draw after it consequences of considerable political importance.

Policy of Patents a commercial rather than legal question.

The policy of Patents in short is a commercial rather than a legal question, and the propriety of any particular grant a subject better suited for the consideration of a Board of Trade than that of the purely legal advisers of the Crown.

Value of Patent rights.

The value of property of this kind in a country where capital is abundant and flows freely into new channels,<sup>6</sup> can hardly be overrated. The protection conferred upon it is of course in direct proportion to the probability of its infringement. In some cases a trade could not be established but by its means; others are but partially affected by it; while in those cases in which there is a

<sup>5</sup> "I can refer to a case which was tried before a special jury. Upon their decision being given, the Patentee went out of court saying that he was a ruined man. If Government had appointed a Board of Examiners to examine his Patent, and show him that it was not quite original, and that there was a little infringement upon another Patent, he would not have had occasion to go to this great cost." (1851) (Evid. 565 and 2522, Rendel, C. E.)

<sup>6</sup> *Pinkus v. Ratcliffe Gas Company* (1846), 1 H. Lds. Cas. 309; Reports, Juries, Exhib. 1851, p. 409; Encyc. Met. viii. 71. The most lucrative Patents have been those of Neilson and Howard. The sum paid by manufacturers for the use of the latter was enormous, being from one shilling to two shillings per hundredweight on all sugar manufactured by the Patent, amounting during the last years of the patent to nearly £50,000 a year. ((1851) Evid. Fairrie, 967; Macfie, 980.)

limited market for consumption or a limited area of supply, it hardly enters as an element at all.

The great difficulty of an inventor is in securing the co-operation of the capitalist. Much of this arises from the present condition of the Law of Partnership; and witnesses examined as to the probable effects of an alteration in that Law, recommended generally the application of the principle of limited liability to the promotion of Patent inventions.<sup>i</sup> The very nature of the transaction would indeed avoid most of the objections brought against the adoption of the principle in general.<sup>j</sup>

The capitalist and patentee.

The question is merely another phase of the relation between Capital and Labour, and all that Government can do is to afford every facility for their co-operation in a well assorted union of capitalists and inventors.<sup>k</sup>

The results of all discoveries are not equally realizable: as a rule, the least important in principle are frequently the most profitable in result;<sup>l</sup> and it is for this reason, as well as from the great increase of applications for Patents, that the subject is one requiring the most careful consideration.

Reasons for patentee requiring protection.

The effect of the extensive employment of machinery in manufactures<sup>m</sup> is another important point, especially in the position matters have at present assumed, in judging of the policy of Patents. The strides of a colossus, only the first in all probability of a giant race, have brought within the compass of a life the most extraordinary con-

Effect of the employment of machinery.

<sup>i</sup> See Ev. Sel. Com. H. of Com. on the Law of Partnership, 1851; Duncan, 968—977; Fane, 526—529.

<sup>j</sup> *Ib.* Cotton, 574; Hawes, 633.

<sup>k</sup> Boulton and Watt. *Pinkus and Paynter*, (*Pinkus v. Ratcliffe Gas Company*, 1 H. of Lords, 311 (1846).)

<sup>l</sup> *Encyc. Met.* xxv. 170. Buttons are, it is said, the best Patents—steam engines the worst. (H. of Com. Rep. 1849.)

<sup>m</sup> As to its effect upon the artizan, by increasing wages and shortening the hours of labour, see Mr. Whitworth's Special Rep. Ind. Exhib. New York, § 64, p. 23.

trasts. Not fifty years ago an incredulous crowd assembled on the quays of New York to witness the first efforts of a power that was to propel a vessel against wind and tide. To-day from those same quays men witness as a mere ordinary occurrence the triumphs of that power, which has stripped ocean travel of its terrors and reduced it to almost mechanical regularity.

Repugnance to its use unfounded.

Its beneficial effects on the community.

Repugnance to the adoption of labour-saving machines in general, as detrimental to the interests of industry, was one of the peculiarities of early prejudice, which found its firmest stronghold on the Bench,<sup>m</sup> but which we may hope at the present day is shown to be utterly unfounded. One of the most striking qualities of machinery is its susceptibility of indefinite improvement,<sup>n</sup> by which the powers of labour and other instruments which produce wealth may be indefinitely increased by using their products as the means of further production. The various bad consequences attributed to the adoption of such improvements apply with equal force to any improvement of the skill or industry of the labourer.<sup>o</sup> If it be advantageous that the labourer, with the same or a less quantity of labour, should produce a vastly greater quantity of commodities, it must also be advantageous that he should avail himself of the assistance of such machines as may most effectually assist him in bringing about such results.

Now generally recognized.

The fact, however, is now generally recognized, that the introduction of machinery for the purpose of simplifying manufacturing processes has had the effect not only of increasing the comforts of the great body<sup>p</sup>—the consumers,—but also of multiplying manifold the demand for labour, even in the particular branches to which the

<sup>m</sup> Com. Journ. 469, A. D. 1614; 3 Inst. 184.

<sup>n</sup> Encyc. Met. (1815), Pol. Ec. 139—188.

<sup>o</sup> (1825) M'Culloch, Pol. Ec. 165, On the Cause of Gluts, Employment of Machinery.

<sup>p</sup> Porter's Prog. of the Nat. § vii c. 4.

machinery is applied.<sup>1</sup> The inconveniences which accompany its introduction are those to which a great mercantile nation, especially an improving one, is constantly exposed in the removal of capital from one employment to another, and bear an insignificant proportion to the benefits resulting on the whole.<sup>2</sup> A remarkable instance of this is furnished by the report of the Select Committee on Machinery (1831) with reference to the bobbin net trade.<sup>3</sup> It there appears, that in the operations of this trade, which twenty years before had no existence, raw material, of the original cost of 120,000*l.*, was annually manufactured to the value of 3,242,700*l.* Probably one of the most valuable inventions ever made (Kay's for flax spinning) was considered insufficient to support a Patent, on the ground of want of novelty. In 1825 (the date of the Patent) the quantity of yarn spun was 40,261 lbs. In 1835 it had increased to 2,613,795, and in 1838, 14,923,332 lbs. in consequence of it.

In conclusion, we may remark, that the circumstances determining the legality of such grants have never been expressed in a form more accurately applicable to the subject at the present day than in the words of Coke in the case of monopolies, *Darcy v. Allen*:<sup>4</sup>—"Now therefore I will show you how the judges have heretofore allowed of monopoly Patents, which is, that where any man by his own charge and industry," or by his own wit

Coke's conditions of Patent privilege.

<sup>1</sup> Ric. (1821), Pol. Ec. On Mach ch. xxxi. p. 467.

<sup>2</sup> Ric. Pol. Ec. xix. 307.

<sup>3</sup> Select Com. on Mach. 1831.

<sup>4</sup> Noy, 178; Web. P. R. 7.

<sup>5</sup> In the case of George Manby's Patent the preamble stated as the consideration, that he had "in long continuance of time, and by his great cost, charges and labour, found out a new invention to prevent the great consumption of coal and wood, and also of iron, lead and copper used for the boiling of all sort of liquors in brew houses, salt works and other works of that kinde, whereby sufficient quantities of



and invention, *doth bring any new trade into the realm,* or any engine tending to the furtherance of a trade that never was used before; and that for the good of the realm, that in such cases the King may grant to him a monopoly Patent for some reasonable time until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth, otherwise not."

salt will be made within a short time to serve this nation without the help of foreiners at much cheaper rates." (Ordinance, 27 Nov. 1650, Scobell, ii. 169.)

## CHAPTER II.

## THE SUBJECT MATTER OF A PATENT.

NOTWITHSTANDING the ingenuity expended by successive writers in classifying and defining the subject matter of Letters-patent, the arrangement is far from satisfactory when regarded from a legal point of view, and altogether inconsistent with the general theory from which Patent rights are considered to depend.

Mr. Godson<sup>a</sup> adopts the following classification—**I. A substance or thing made;** **II. A machine or instrument;** **III. *An improvement or addition;*** **IV. *A combination or arrangement of things already known;*** **V. *A principle, method or process carried into practice by tangible means;*** **VI. *A chemical discovery.*** Mr. Rankin—**I. A thing manufactured;** **II. *A manufacturing process.*** Mr. Holroyd<sup>b</sup>—**I. Things made;** **II. *Practice of making;***<sup>c</sup> the former being again divided into—(1) A thing made which is useful for its own sake and vendible as such or some part of such a thing; (2) A piece of mechanism, engine or instrument for producing either old or new effects by being employed to facilitate or expedite the labour of the making of some previously known article, or in effecting some useful purpose, or a new part of such machine, engine or instrument, whereby it is rendered more efficacious. The “practice of making” he likewise subdivides under two heads—(1) *An artificial manner of operating with the hand or with instruments in common use, or*

<sup>a</sup> 2nd ed. (1840), p. 36.

<sup>b</sup> (1830), p. 33.

<sup>c</sup> See also Jarman's Conveyancing, vii. 486.

*a mode of employing practically art and skill, producing an effect useful to the public ; or an improvement on any known manner of so operating or employing practically art and skill ; (2) A process or combination of processes in any art producing an effect useful to the public.*

Hindmarch.

Mr. Hindmarch<sup>e</sup> defines it as “a new ART for making or manufacturing vendible articles or articles of commerce ;” the word ART being used in the sense of a trade.<sup>f</sup>

Carpmael.

Mr. Carpmael—1. A new combination of mechanical parts or instruments whereby a new machine is produced, though each of the parts be separately old and well known ; 2. *An improvement* on any known machine whereby such machine is rendered capable of performing more beneficially ; 3. Where the vendible substance is the thing produced, whether by chemical or mechanical process, such as a new description of fabric ; 4. Where an old substance is improved by some new working, the means of producing the improvement in most instances is patentable, whether chemical or mechanical ; 5. *The application of a known substance or material to a new purpose*, when there requires art to adapt it, is the subject of a patent. This latter classification, says Mr. Webster,<sup>g</sup> seems unobjectionable, and expresses in a practical manner the various kinds of inventions and the means by which they are to be carried into practice.

Webster.

Subject in foreign States.

The subject of the grants of privilege in foreign countries, although substantially agreeing with our definition a ‘new manufacture,’ differs somewhat in point of form.

America.

In the United States of America it is,<sup>h</sup> “Any new and useful art, machine, manufacture or composition of matter.” In France it is defined<sup>i</sup> as, “Any discovery or

France.

<sup>e</sup> On Patents (1846), p. 79.

<sup>f</sup> Bac. Abr. tit. “Monopoly,” “Prerogative,” F. 4.

<sup>g</sup> Law and Practice (1841), Supp. 1.

<sup>h</sup> Act of Congress, 1836, § 6.

<sup>i</sup> Law of 5th July, 1791.

invention in any branch of industry." In Bavaria<sup>k</sup> it is, Bavaria.  
 "A new or unapplied discovery, invention or improve-  
 ment in the province of trade." In Sardinia,<sup>l</sup> "Inven- Sardinia.  
 tions which have advanced or improved any branch of  
 industry." In Saxony and the Customs-Union,<sup>m</sup> "Truly Zollverein.  
 and properly (eigenthümliche) new objects." In Prussia,<sup>n</sup> Prussia.  
 "A new discovery, re. improvement, or first introduc-  
 tion of foreign inventions." In Austria,<sup>o</sup> "All new dis- Austria.  
 coveries, inventions and improvements in the whole range  
 of industrial pursuits." In the Netherlands,<sup>p</sup> "An in- Netherlands.  
 vention or essential improvement in any branch of art or  
 industry, or the introduction of a foreign invention or  
 improvement." In Parma,<sup>q</sup> "Every discovery or new Parma.  
 invention in any branch of industry." In Portugal,<sup>r</sup> Portugal.  
 "new productions and new discoveries." And in the  
 States of the Church,<sup>s</sup> "A new natural product or a new  
 art."

The conditions of the subject matter are not affected by the new Act.<sup>t</sup> It simply states,<sup>u</sup> that "the expression 'invention' shall mean any manner of new manufacture the subject of Letters-patent and grant of privilege within the meaning of the Act of the 21st year of the reign of King James I. chap. 3."

Lord Coke, who was chairman to the Committee on Coke.  
 the Bill passed in 21 Jac. I., says,<sup>x</sup> that Letters-patent, to come within the proviso of the sixth section of that Statute, must have seven properties.

<sup>k</sup> Law of 11th Sept. 1825, Art. 9.

<sup>l</sup> Law of 28th Feb. 1826, Art. 1.

<sup>m</sup> Proclamation of 31st July, 1843, Art. 1.

<sup>n</sup> Proclamation of 14th Oct. 1815, § 2.

<sup>o</sup> Law of 31st March, 1832, § 1, Art. 1.

<sup>p</sup> Law of 25th Jan. 1817.

<sup>q</sup> Decree of 7th Jan. 1791, Art. 1.

<sup>r</sup> Decree of 16th Jan. 1837, Tit. 1, Art. 1.

<sup>s</sup> Law of 3rd Sept. 1833, § 2.

<sup>t</sup> See, however, sect. 25.

<sup>u</sup> 15 & 16 Vict. c. 83, s. 55.

<sup>x</sup> 3 Inst. 184.

1. They must be “for the term of fourteen years or under.”

2. They must be “granted to the first and true inventor.”

3. They must be “of such manufactures which any other at the time of making such Letters-patent did not use: for albeit it were newly invented, yet if any other did use it at the making of the Letters-patent or grant of the privilege, it is declared and enacted to be void by this Act.”

4. “The privilege must not be contrary to law; such a privilege as is consonant to law must be substantially and essentially newly invented, but if the substance was *in esse* before, and a new addition thereunto, though that addition make the former more profitable, yet it is not a new manufacture in law; and so was it resolved in the Exchequer Chamber, Pasch. 15 Eliz. in *Bircot's case*, for a privilege concerning the preparing and melting, &c. of lead ore, for there it was said that it was but to put a new button to an old coat, and it is much easier to add than to invent;” and it was there also resolved, that if the new manufacture be substantially invented according to law, yet no old manufacture in use before can be prohibited.”

5. “Nor mischievous to the State, by raising the price of commodities at home. In every such new manufac-

<sup>y</sup> The comments of Mr. Justice Buller on this case in *Boulton v. Bull* (1795), 2 H. Bl. 489, dispose very happily of the argument adduced by Coke—“What were the particular facts of that case,” he says, “we are not informed, but there appears to me to be more quaintness than solidity in the reason assigned. If the button were new, I do not feel the weight of the objection that the coat on which the button was to be put was old. But, in truth, arts and sciences at that period were at so low an ebb in comparison with that point to which they have since been advanced, and the effect and utility of improvements so little known, that I do not think that case ought to preclude the question.”

ture that deserves a privilege there must be *urgens necessitas* and *evidens utilitas*.”

6. “Nor to the hurt of trade. This is very material and evident.”

7. “Nor generally inconvenient.” Of this he gives the following example:—“There was a new invention found out heretofore, that bonnets and caps might be thickened in a fulling mill, by which means more might be thickened and fulled in one day than by the labours of fourscore men who got their livings by it. It was ordained” [by Stats. 22 Edw. IV. c. 5; 7 Edw. VI. c. 8; both repealed by 1 Jac. I. c. 25], “that bonnets and caps should be thickened and fulled by the strength of men, and not in a fulling mill, for it was holden inconvenient to turn so many labouring men to idleness.”

And the reason he further states why such a privilege as comes within the proviso is good in Law is, “because the inventor bringeth to and for the commonwealth a new manufacture by his invention, cost and charges, and therefore it is reason he should have a privilege for his reward” (and for the encouragement of others in the like) for a convenient time.”

A distinguishing feature, in all the earlier decisions on the validity of Patents, was the importance attached to the means by which the improvements were effected, and the degree of merit exhibited by the Patentee, points which, as we shall hereafter see, are entirely independent of the question, when considered on the general principles of Patent privileges.

The judgment of Sir John Leach, Vice-Chancellor, in *Walker v. Congreve*,<sup>a</sup> when contrasted with recent decisions, shows the extreme of what has been called the objective view in which the matter has been regarded. The invention was an improved gunpowder barrel. The Court there held, that “the invention, though new, was

The means of improvement.

*Walker v. Congreve*, objective view.

<sup>1</sup> 3 Inst. 184.

<sup>a</sup> (1816), cited in Godson, 2nd ed. 56; 29 Rep. Arts.

not of such a nature as to come within the Statute of Monopolies." "It does not," his Honor observed, "exhibit such proofs of skill and invention as to entitle it to the protection of that law which encourages the exertions of genius, by enabling its possessors to reap exclusively its rewards. Every novelty is not an invention entitled to the protection of the Statute. A new principle must be discovered—skill and ingenuity must be exerted to entitle the inventor to a Patent." \* \* "Next it is said that the form is new; but is the invention of making a barrel like a cylinder worthy of being protected by the Statute of Monopolies? Well, says the Patentee, but my barrel is strengthened with hoops. And is it a new thing, displaying great ingenuity, to strengthen a barrel with hoops? Is the circular aperture in the barrel a great invention? No; but the method of shutting is new. What is the novelty of placing upon a circular aperture a common potlid. What is new is unimportant."<sup>b</sup> That a very important improvement was effected in powder barrels by the invention was a point fully established.

*R. v. Arkwright.* The case of *The King v. Arkwright*<sup>c</sup> was somewhat similar. On a *scire facias* to repeal the Patent granted (1775) to Arkwright "for an invention of certain instruments or machines for preparing silk, cotton, flax and wool for spinning," one of the issues was, that the invention, at the time of granting the Letters-patent, was not new as to the public use and exercise thereof in England. One part of the machine (the beater) was admitted not to be new, and a book was produced of two years earlier date which contained its description. Other parts of the machine were proved to have been in use before. "The only difference between the spinning machine and the present roving machine," said one of the witnesses, "is that the latter has a can." On that

<sup>b</sup> (1816), cited in Godson, 2nd ed. 56.

<sup>c</sup> Dav. Pat. Ca. 61; Buller, J. (1785).

Buller, J., observed, "If it be so, it brings the case to a short point indeed; for if nothing else is new the question is whether it is material or useful. The witnesses on the part of the prosecution say that it is of no use at all." A verdict was given for the Crown, a rule for a new trial was refused, and on the 14th November, 1785, the Court of King's Bench gave judgment to cancel the Letters-patent. Such was the fate of an invention inferior to none perhaps in its claims upon society for the benefits it had conferred. As a mere question of words it dwindled down into an old machine with an additional can. The real fault of Arkwright's Patent lay in the selection of his subject matter; what he wanted was, not the monopoly of the machines he constructed, but that of the products of those machines. His title should have been for the fabrics prepared by the instruments he had invented.

*Sanders v. Aston*<sup>d</sup> is another instance of a like kind. *Sanders v. Aston.* That a very material improvement in buttons had been effected by the Patentee was beyond dispute; "but," said Littledale, J., "neither the button nor the flexible shank is new, and they do not by *merely being put together* constitute such an invention as can support the Patent"—an objection which might with equal force be adduced to deprive a poem of originality, on the ground of the previous use of the language in which it is couched.

As a pendant to these, and exemplification of the subjective view, we have the decision of Sir N. C. Tindal, C. J., in *Crane v. Price*.<sup>e</sup> *Crane v. Price, subjective view.* "In point of law," it was there laid down, "*the labour of thought or experiments, and the expenditure of money, are not the essential grounds of consideration* on which the question whether the invention is or is not the subject matter of a Patent ought to depend. For if the invention be new and useful to

<sup>d</sup> (1832), K. B.; 3 B. & Ad. 886 (flexible button shanks.)

<sup>e</sup> (1842), Web. P. R. 411.



Water tabbies.

the public it is not material whether it be the result of long experiment and profound research, or whether of some sudden and lucky thought or mere<sup>f</sup> accidental discovery.” The case of water tabbies presents a curious instance of purely accidental discovery.<sup>g</sup> The invention owed its rise to a man’s spitting on a floorcloth, and placing a hot iron upon it. He observed that it spread out into a kind of flower. He afterwards tried the same experiment on linen, and found it produced the same effect. This led him to reason on the effect of intermixing water with oil or colours, and led to his taking out a Patent for water tabbies, from which he lived to make a very considerable fortune.<sup>h</sup>

A similar case<sup>i</sup> was that of the steam engine, where a boy (Humphry Potter), in order to shorten his own labour, tied a string, with a knot in it, from one part of the machine to the other, which led to the most important improvement (self-acting valves) that had ever been known.

Objects of Patent Law.

Of the objects proposed to itself by Patent Law, that of procuring the satisfaction of public wants takes precedence of its desire to reward ingenuity and skill. The solution of an equation may involve the exercise of far higher qualifications than the construction of the most elaborate mechanical contrivance, but Society looks at all employments from a material point of view, and has established it as a rule to bestow its favours only in return for material results.<sup>k</sup>

What is a “new manufacture” a question of fact.

The amount of difference from existing things, requisite to constitute the result of the improvement or discovery a “new manufacture,” is in every case a question of fact to be referred to the particular branch of industry

<sup>f</sup> *Liardet v. Johnson*, Bull. N. P. 76.

<sup>g</sup> *Boulton v. Bull* (1795), Buller, J., Dav. P. C. 200.

<sup>h</sup> *Walker v. Congreve* (1816), L. C., 29 London Journ. 317.

<sup>i</sup> Encyc. Met. viii. 160, and cited in *Walker v. Congreve*.

<sup>k</sup> *Ogilvie’s Imp. Dic.* (1850), Patentable.

to which it is applied, and requiring an accurate acquaintance with the state of manufactures rather than a knowledge of general Jurisprudence for its determination.

A clear understanding on this head is the first requisite in the discussion of Patent rights, and demands considerable attention from the fact, that the idea of the "invention" in Law is somewhat metaphysical, being a conventional arrangement to preserve the harmony of the Law and having in some few instances no corresponding expression in fact.

An important point to ascertain.

To the absence of this clear understanding may be referred almost all the difficulties which occur in Patent Law.<sup>1</sup> In assuming that the privilege of the Patentee is a monopoly, these difficulties become very materially reduced, and questions which have from the highest authority received contradictory solutions become explicable on at least intelligible grounds. It has for instance been mooted whether a principle, method or process can be the subject of a Patent? whether a Patent can be maintained for an old thing put to a new use? and to what extent a Patentee's right is affected by an after-discovered property of his invention?

Source of the difficulties of Patent Law.

On the assumption that a Patent confers a monopoly, it follows directly that the subject matter of the Patent must be *a material thing capable of sale*, and cannot be either "an improvement," "principle," "method," "process" or "system;" in other words the subject matter must be, as it was originally defined, a "new manufacture." A thousand evils have arisen from affixing another than the literal interpretation to the terms and from employing indiscriminately the words "discovery" and "invention." The "new manufacture" is the invention in Law, the discovery of principles or matter simply ancillary to it.

Privilege a monopoly; subject therefore must be material.

<sup>1</sup> "Patent rights," says Eyre, C. J., in *Boulton v. Ball* (1795), Dav. Pat. Ca. 205, "are no where that I can find accurately discussed in our books."

The second question receives a similar solution. Is the new use so different as to constitute<sup>m</sup> a *new article of trade*?<sup>n</sup> If so, it forms a fit subject of itself for protection by Letters-patent, but cannot be included under those of any alien subject matter. The third may be put to the same test. The Patentee has a monopoly and certain ancillary rights (the sole making, using, &c.) with respect to certain goods. These, once in the possession of the world, cannot be restricted in their use on any principles of justice. The Patentee is of course bound by the statement of his claim in the Specification; subject to that limitation, however, he is fairly entitled to any profits arising from the unforeseen applicability of his invention, as an equivalent for the risk he incurs of ill success and corresponding losses.<sup>o</sup>

*Boulton v. Bull.* In the case of *Boulton and Watt v. Bull*,<sup>p</sup> the nature of the "invention" or subject matter of a Patent was very fully discussed. The Patent was expressed to be "for a new invented method of lessening the consumption of steam and fuel in fire-engines." The following was part<sup>q</sup> of the judgment of Rooke, J.:—"With regard to the objection that the Patent is not for a fire-engine of a particular construction, but for a new invented method, it presupposes the existence of the fire-engine and gives a *monopoly* to the Patentee of *his new invented*

<sup>m</sup> *Losh v. Hague*, railway wheel, Web. P.R. 207; *E. I. Co. v. Brett*, 10 C. B. 878; 20 L. J. (N. S.) 123, C. B. The question is entirely independent of the principles involved. The principles of a screw propeller (Shorter's Patent, 1800, and Millington's, 1816), a smoke-jack, and a windmill, are identical. Precisely similar machines (on the principle of centrifugal action) have been considered good subjects of Patent, the one for sugar refining, the other for dyeing cloth, although the second Patentee had instituted no experiments, and merely been struck with the idea. (1851), Evid. 934, Fairrie.

<sup>n</sup> *Reg. v. Cutler* (1847), 3 C. & K. 215, hydraulic machines; 6 W., H. & G. 859; *Newton v. Vaucher* (1851), Exch.

<sup>o</sup> *Hancock v. Somervell* (1851), 39 Law Journal, 158.

<sup>p</sup> (1795) Dav. Pat. Ca. 170; 2 H. Bl. 465.

<sup>q</sup> Dav. Pat. Ca. 184.

*method* of lessening the consumption of steam and fuel in fire-engines. The obvious meaning of these words is that he has made an improvement in the construction of fire-engines; for what does *method* mean but mode or manner of effecting? A new invented *method*, therefore, conveys to my understanding the idea of a new mode of construction. I think those words are tantamount to fire-engines of a newly invented construction." . . .

*Boulton v. Bull.*

"Patents for a *method or art of doing* particular things have been *so numerous*, according to the lists left with us, that *method may be considered* as a common expression in instruments of this kind. It would therefore be extremely injurious to the interests of Patentees to allow this verbal objection to prevail." . . . "If this mechanical improvement is intelligibly specified, of which a jury must be the judges, whether *the Patentee calls it a principle, invention or method, or by whatever* other appellation, *we are not bound to consider his terms*, but the real nature of his improvement and the description he has given of it; and we may, I think, protect him without violating any rule of law."

Again, in the same case, Mr. Justice Heath uses very similar language:—"It appears that the invention of the Patentee is original and may be the subject of a Patent; but the question is, inasmuch as the *invention* is to be put in practice by means of machinery, whether the Patent ought not to have been for one or more machines, and whether this is such a Specification as entitles him to the *monopoly of a method*." The use of the word "monopoly" in its secondary instead of its original sense introduces another element of confusion. Throughout, the Bench conceived itself bound by the language *ordinarily used by Patentees*, although fully aware of and clearly pointing out its inaccuracy. "I approve," said Mr. Justice Heath, "of the term 'manufacture' in the Statute, because it precludes all nice refinements; it gives us to understand *the reason of the proviso, that it was in-*

Heath, J.

*Boulton v. Bull.* *troduced for the benefit of trade.* That which is the subject of a Patent ought to be vendible, otherwise it cannot be a manufacture. This is a species of new manufacture, and the novelty of the language is sufficient to excite alarm. It has been urged that other Patents have been litigated and established; for instance, Dollond's, which was for a refracting telescope. I consider that as substantially an improved machine. A Patent for an improvement of a refracting telescope and a Patent for an improved refracting telescope are in substance the same. I asked in the argument for an instance of a Patent for a method, and none such could be produced. I was then pressed with Patents for chemical processes, many of which are for a method, but that is from an inaccuracy of expression, because the Patent in truth is for a vendible substance." . . . "The Marquis of Worcester discovered in the last century the expansive force of steam and first applied it to machinery as the original inventor; he was clearly entitled to a Patent. Would the Patent have been good applied to all machinery or to the machines which he had discovered? The Patent decides the question. It must be for the vendible matter and not for the principle."

Buller, J.

The spirit in which the judgment of Mr. Justice Buller was delivered was rather that of an admirer than a judge; and it is in a regretful tone we should find it difficult to censure, that he proceeded to address himself to "the dry question of Law, whether upon the case disclosed to us the Patent can or cannot be sustained." "Few men," said he, "possess more ingenuity or have greater merit with the public than the plaintiffs on this record; and if their Patent can be sustained in point of Law, no man ought to envy them the profits and advantages arising from it. Even if it cannot be supported, no man ought to envy them the profits which they have received, because the world has undoubtedly derived great advantages from their ingenuity." That a grand

improvement had been effected in a manufacture, viz. a steam-engine, seems to have been but little dwelt on. *Boulton v. Bull.*  
 “The fact of there being *nothing new in the engine*” (in Watt’s engine!) “drove the counsel to argue on very wide grounds and to touch on the possibility of maintaining a Patent for an idea or a principle, though I think it was admitted that a Patent could not be sustained for an idea or a principle alone. The very statement of what a principle is, proves it not to be a ground for a Patent; it is the first ground and rule for arts and sciences, or, in other words, the elements and rudiments of them. A Patent must be for some new production from those elements and not for the elements themselves.” The improvement itself is thus passed over,—“All machines which are worked by steam are worked by the same principle.”

“It would be extremely injurious to the interests of Patentees,” remarked the same eminent judge, “to allow this *verbal objection* to prevail.” The “verbal objection” was that a method was not a ‘new manufacture’ within the terms of the Statute. The reason for proceeding in a course acknowledged to be erroneous was there plainly stated to be simply the fear of disturbing existing interests; yet it is to this misplaced lenity of the Court as to mere “verbal objections” that Patentees of a succeeding age may attribute the great majority of their misfortunes. The admission of evidence *ab extra* to control or explain a document from which considerable accuracy may and ought to be insisted on from the Patentee, is directly contrary<sup>r</sup> to other branches of established Law, and has proved productive of very serious inconvenience.

An unfounded fear of consequences and cautious adherence to precedent, independent of its origin, in pre- *Principle and precedent.*

<sup>r</sup> (1844) 2 Jarman on Wills, 351—358; *Boulton v. Bull*, Dav. Pat. Ca. 184.

Boulton v. Bull. ference to principle in disposing of this case,<sup>4</sup> gave a judicial authority to the various random collection of assertions put forward by Patentees. "We should consider well," said the Chief Justice, "what we do in this case *that we may not shake the foundation upon which these Patents stand*. Probably I do not overrate it, when I state that two-thirds, I believe I might say three-fourths, of all Patents granted since the Statute passed are for methods of operating and of manufacturing, producing no new substances and employing no new machinery. I think these methods may be said to be *new manufactures* in the common acceptance of the word, as we speak of the manufactory of glass or any other thing of that kind."

The evil was conceived by the learned judge to be entirely beyond control. He acquiesces in it as a *fait accompli*, and endeavours to give a colouring of liberality to his acquiescence. "Shall it now be said," he asks, "after we have *been in the habit of seeing Patents granted* in the immense number in which they have been *for methods* of using old machinery to produce substances that were old but in a more beneficial manner, and also for producing negative qualities by which benefits result to the public by a narrow construction of the word 'manufacture' in this Statute, that there can be no Patent for *methods producing this new and salutary effect*, connected, and intimately connected, as it is with the trade and manufactures of this country? This, I confess, I am not prepared to say. Undoubtedly there can be no Patent for a mere principle; but for a principle, so far embodied and connected with corporeal substances as to be in a condition to act and to produce effects in any art, trade, mystery or manual occupation, I think there may be a Patent."

Method.

Principle.

The letter of  
the Law.

The non-natural interpretation of the terms employed by the Statute, in order to suit the circumstances of par-

<sup>4</sup> Dav. Pat. Ca. 211.

particular cases, has, as we have seen, produced great confusion. Patentees in their Specifications had employed language inconsistent with that of the Statute: the general object of the Court seems to have been to strain the latter into conformity with the former. "I observe," said Eyre, C. J., in the same case, "that according to the letter of the Statute the words 'any manner of new manufacture' in the saving fall very short of the words 'any thing' in the first section; but most certainly the exposition of the Statute, so far as usage will expound it, has gone very much beyond the letter"—a deliberate surrender of judicial power in favour of an accumulation of popular errors.

*Boulton v. Bull.*

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"It was admitted," continued the same learned judge, "in the argument at the bar, that the word 'manufacture' in the Statute was of extensive signification; that it applied not only to things made but to the practice of making, to principles carried into practice in a new manner, to new results of principles carried into practice." The admission at the bar seems to have been assumed to establish the fact with the Bench. "Let us pursue this admission. Under things made we may class, in the first place, new compositions of things, such as manufactures in the most ordinary sense of the word; secondly, all mechanical inventions, whether made to produce new or old effects, for a new piece of mechanism is certainly a thing made. Under the practice of making we may class all new artificial manners of operating with the hand or with instruments in common use, and new processes in any art producing effects useful to the public." The plain and inevitable conclusion from departing from the letter of the Statute.

Practice of making.

The error, although underrated in importance, was perfectly clear to the learned judge. "Dollond's Patent," he says, "was perhaps exceptionable, for that was for a method of producing a new object-glass instead of being in the object-glass produced. If Dr. James's

Dollond's Patent.



Boulton v. Bull. Patent had been for the method of preparing his powders, instead of the powders themselves, the Patent would have been exceptionable on the same ground." Such Patents are clearly exceptionable in form, and had they been disallowed would have served to avert the general laxity that succeeded their admission.

The following premiss contains within itself the confutation of the theory it endeavours to establish: "*When the effect produced is no substance or composition of things, the Patent can be only for the mechanism, if new mechanism is used, or for the process, if it be a new method of operating with or without old mechanism.*" Now in every instance, as we shall hereafter see, the subject matter of a Patent, resulting from any improvement whatever, may be made a substance or composition of things. As an illustration of the opposite view the case of Mr. D. Hartley's invention for securing buildings from fire was adduced: "It is no substance," it was said, "or composition of things; it is a mere negative quality, the absence of fire; the effect is produced by a new method of disposing iron plates in buildings. He did not invent those means. The invention wholly consisted in the new method of using, or I would rather say of disposing, a thing in common use, and which therefore every man might make at his pleasure; and which therefore I repeat could not in my judgment be the subject of a Patent. The Patent could not be for the effect produced, because the effect, as I have already observed, is merely negative, though it was meritorious. It cannot be for the mechanism, for there is no new mechanism employed; it must then be for the method; and I would say, in the very significant words of Lord Mansfield in the great case of Copyright,<sup>r</sup> it must be for method detached from all *physical existence whatever*."

D. Hartley's  
case.

Where matters are thus authoritatively laid down by so eminent a judge, it may appear presumptuous to pre-

<sup>r</sup> (1769) *Millar v. Taylor*, 4 Burr. 2397, K. B.

sent as a solution the hypothesis he rejects. Yet David Hartley's case is explicable on general principles of Patent Law. To be consistent with the theory on which Patent protection exists the Patent should have been "for buildings constructed on fire-proof principles." This was the monopoly virtually granted to the Patentee, and necessarily involved all the rights to which he could be considered entitled. The inaccurate use of words has led to a gradual confusion of ideas, and obliterated the broad distinction between a "discovery" in point of fact and an "invention" in point of Law. In this case the "discovery" was that of principles of matter, the "invention" an object of commerce, to which those principles had been applied. And similarly with regard to all cases in which material improvements have been made.

Such language from the Bench had the effect of countenancing and consolidating the errors originating in popular inaccuracy, and later judges following in the same course have striven rather to regulate the inconsistencies they found than to address themselves to the cause and thus prevent the possibility of their recurrence.

Writers on this subject have on this head followed up the course indicated by the Bench. Mr. Godson<sup>†</sup> considers it an open question, whether "*a mere method of making a thing or a process, or a manner of operating, may or may not be the subject of a Patent;*" and gives it as his opinion,<sup>‡</sup> "that although neither philosophical principle nor a mere method or process can be monopolized, yet a principle, method or process, when it is connected with corporeal substances, and when it is carried into effect by tangible means,<sup>\*</sup> may be the subject of a Patent."

Writers on the subject.  
Godson.

<sup>†</sup> On Patents, 2nd ed. 72, 84.

<sup>‡</sup> Ibid. 91.

<sup>\*</sup> 2 H. Bla. 463; 8 T. R. 101; 2 B. & Ald. 350; *Jupe v. Pratt* (1837) Web. P. R. 146; *Neilson v. Harford*, Ib. 355.

Wordsworth.

Mr. Wordsworth<sup>a</sup> adduces *Gibson v. Campbell*<sup>a</sup> to show that "a Patent may be obtained for a mere process. So also for improvements in the mode of doing anything by a known process."

Turner.

Mr. Turner,<sup>b</sup> in treating of the "invention," draws a distinction between the *principle* and the *form* involved in its construction. "In *Crossley v. Beverley*,"<sup>c</sup> he remarks, "it was said that there might be innumerable forms of an invention, but in fact, beyond a limit which is soon reached, variation would make the principle not worth employing. There is always one best form which supersedes its rivals in the race of competition. Deviation from this is injurious in an increasing ratio."

The case of *Lewis v. Davis*<sup>d</sup> is adduced by Mr. Godson<sup>e</sup> as "very important in showing 'what combination or arrangement of things already known,' may be the subject of the grant." Cloth had, previously to the Patent in question, been cut *from end to end* by rotatory cutters. The point in issue was, whether the plaintiffs could have a grant for cutting cloth *from list to list*. The Lord Chief Justice<sup>f</sup> said, "It appears that a rotatory cutter to shear from end to end was known, and that cutting from list to list by means of shears was also known. However, if before the plaintiff's Patent *the cutting from list to list and doing that by means of rotatory cutters were not combined*, I am of opinion that this is such an invention as will entitle them to maintain the present action."

In truth, the difficulties here were, that the subject matter of the grant was not really what the plaintiff sought to enforce. If the cloth made was improved by the alterations, it was that improved cloth of which he claimed to be the monopolist, and that should have

<sup>a</sup> (1853), p. 13.

<sup>a</sup> 11 Law J. (N. S.), 177, C. P.

<sup>b</sup> Turner on Patents, p. 8.

<sup>c</sup> Cited Web. P. R. 146.

<sup>d</sup> (1829) K. B., 3 C. & P., 502.

<sup>e</sup> On Patents, 2nd. ed. 66.

<sup>f</sup> Lord Tenterden.

formed the subject of the grant. If on the other hand the changes were immaterial in their result, the whole was a mere colourable variation, and unpatentable.

The attempts of Lord Abinger, in *Losh v. Hague*,<sup>a</sup> to decide the question by a distinction between applying a new contrivance to an old object and an old contrivance to a new use, proceeded to the length of asking whether 'a purpose' be the thing patented. The illustrations of a surgeon improving a pair of scissors on the one hand, and a man taking out a Patent to eat peas with a common spoon, or common scissors to cut silk instead of cloth, on the other, are perfectly capable of explanation. Improved scissors or an improved spoon are both good subjects of a monopoly; but once sold, they become the property of the public, and no restraint can be put upon their use.

*Losh v. Hague.*

In *Neilson v. Harford*,<sup>b</sup> the discovery consisted in the effects of the hot blast for smelting, by heating the air between the blowing apparatus red hot or nearly so, by the application of heat without the vessel, so as to prevent the loss of oxygen. It was said, *if a specific shape of heating vessel was claimed, then the Patent was good; but if every shape was claimed, then that it was a claim of the principle, for that there was no difference between claiming every application of a principle and claiming the principle itself.* Alderson, B., there said, that the difficulty which pressed upon his mind was, that Neilson had taken out his Patent, like Watts, *for a principle*, but he had not practically described any mode of carrying it into effect. To be consistent with the theory of Patents, Neilson's claim should have been for the iron improved by his discovery.

*Neilson v. Harford.*

In *Boulton v. Bull*,<sup>c</sup> the nature of the subject matter was thus put to the test by Buller, J. "Suppose,"

<sup>a</sup> (1837) Web. P. R. 207.

<sup>b</sup> (1841) 8 M. & W. 806; Web. P. R. 342; *Jupe v. Pratt*, *ib.* 144.

<sup>c</sup> 2 H. Bl. 436.

said he, "an ingenious physician should find out that Doctor James's fever powder was a specific cure for consumption, if taken in particular quantities,—could he have a Patent for the sole use of James's powders in consumption, or given in particular quantities." To this there are two answers; first, that, consistently with the theory of Patents here advocated, medicines are expressly declared unfit subject matter;<sup>m</sup> and, secondly, that this falls within the class of cases in which, after the Patent is at work, some new principle or property of matter is discovered. The "manufacture" is already in the hands of the public, the use it may be led to apply it to cannot be controlled.

*R. v. Wheeler.*

The remarks of C. J. Abbott, in *R. v. Wheeler*,<sup>n</sup> serve to show clearly the mode in which the refinements so fatal to the consistency of the Law were introduced. "The word 'manufacture,' " said the learned judge, "has been generally understood to denote either a thing made which is useful for its own sake and vendible as such, as a medicine, a stove, a telescope, and many others; or to mean an engine or instrument, or some part of an engine or instrument, to be employed either in the making of some previously known article, or for some other useful purpose, as a stocking-frame, or a steam engine for raising water from mines; *or it may perhaps extend also to a new process, to be carried on by known implements or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind.*"

The idea of a "principle," in connexion with the legal subject matter once introduced, has been a continual source of difficulty in Patent litigation, and the Court has been compelled to *approach* at last to the recogni-

<sup>m</sup> *Supra*, p. 28.

<sup>n</sup> 2 B. & Ald. 349, *malt*; *Crane v. Price* (1819), *iron*, Web. P. R. 413; 12 L. J. (N. S.) C. B. 81.

tion of the standard here attempted to be erected, by declaring<sup>p</sup> that "the Patent is not for the principle, but for the mode of carrying that principle into practice." The case of *Minter v. Wells* was remarkable for the confusion into which judges were betrayed by attempting to view Patents from any other than the public point of view. Great anxiety was there evinced to avoid the consequences of declaring the subject of a monopoly to be an idea.<sup>q</sup> "The claim of the plaintiff," said Parke, B., "is not to the principle, but to the *combination of the principle and the machine, the application of the self-adjusting lever* to the construction of a chair. This is not claiming a principle." The Patent was in truth for a monopoly of improved chairs.

*Minter v. Wells.*

As a general rule, wherever a discovery is made of a principle or property of matter applicable to the improvement of manufactures, there is good ground for a Patent, provided the subject matter of it be expressed in the proper form. The original discoverer cannot, however, take out a Patent for its general application.<sup>r</sup> Thus Mr. Justice Heath says,<sup>s</sup> "that a Patent could not be claimed for the use of the power of steam. It must be for the vendible matter, and not for the principle." The inconveniences, consequent on considering principle as subject matter of a Patent, were much dwelt on by the learned judge in that case. It would, he remarked, 'reverse the clearest position of law respecting Patents for machinery, by which it has been always holden that the organization of a machine may be the subject of a Patent, but principles cannot.'

No appropriation of a principle or property of matter.

<sup>p</sup> *Neilson v. Harford* (1841), Web. P. R. 343.

<sup>q</sup> (1834) Exch., chairs, 1 C., M. & R. 507, note (i). See also *Barrett v. Hill*, Story, J., 1 Mason; *Hornblower v. Boulton*, 8 T. R. 95 (1799); 5 Tyr. 163; Web. P. R. 134; Carp. i. 639; Rep. Arts, ii. (N. S.) 234.

<sup>r</sup> A new application of machinery already known is said by M. Renouard (pp. 175, 459) to be a patentable subject in France.

<sup>s</sup> (1795) *Boulton v. Bull*, 2 H. Bl. 482.

Confusion between machine and thing made.

The result of inattention in cases like that of Arkwright, to what was really the subject matter of the Patent in point of Law, is thus pointed out by Gibbs, C. J., in *Bovill v. Moore*<sup>1</sup>—“ I think a little confusion has been made between a *new machine for making lace* and *lace made* in a new method by a machine partly old and partly new. In order to try whether it be or not a new machine throughout, we must consider what the Patent purposes to give to the Patentee, and what privileges he would possess under it. Now the Patentee is entitled to the sole use of this machine, and whoever imitates it either in part or in the whole, is subject to an action at the suit of the Patentee.”

*Bower v. Hodges.*

In *Bower v. Hodges*,<sup>4</sup> the Patent in the deed of licence was expressed to be for “ certain *improvements in machinery or apparatus for manufacturing pipes*,” and the powers conferred by the Patentee purported to be full, free and exclusive liberty, licence and authority to make—not such machinery or apparatus, but—pipes or tubes of iron, *but of no other metal*. The whole thing proceeded on false grounds. If the Patentee had discovered some means of improving iron pipes, his Patent should have been for such improved pipes.

*Cochrane v. Smethurst.*

In *Cochrane v. Smethurst*,<sup>2</sup> the subject matter was expressed to be “ an improved method of lighting cities, towns and villages.” The thing intended to be patented was a lamp. The Patent was declared void. In *Nickels v. Haslam*,<sup>3</sup> a Patent, with title “ improvements in the manufacture of plated articles,” was upheld, although it appeared that the invention comprised one improvement only. In *Campion v. Benyon*,<sup>2</sup> the title was held too extensive, and destroyed the Patent; it was “ a new and improved method of making canvas and sailcloth

*Campion v. Benyon.*

<sup>1</sup> Dav. Pat. Cas. 360; 2 Marsh, 211 (1816).

<sup>2</sup> (1853) Iron tubes, 22 L. J. (N. S.) C. B. 194.

<sup>3</sup> 1 Stark. 205.

<sup>4</sup> 8 Scott, 97.

<sup>2</sup> 6 B. Moo. 71, C. B.

with hemp and flax, or either of them, without any starch whatever." The improvement really effected was in a new mode of preparing and twisting the hemp or flax for making the canvas and sailcloth; and the invention which should have formed the subject matter and title of the Patent was such improved canvas and sailcloth. In *Cook v. Pearce*,<sup>a</sup> the title was "improvements in carriages;" the thing invented was a carriage shutter. The Court of Queen's Bench held that the title was defective, to the extent of avoiding the Patent; a decision subsequently reversed by the Exchequer Chamber. In *Brunton v. Hawkes*,<sup>b</sup> the Patent for "improvements in the construction of ships' anchors, windlasses and chaincables" was reversed, but only from the consideration that one of the articles so claimed was not new. In *Neilson v. Harford*,<sup>c</sup> the Patent was entitled to be for "improved application of air" to furnaces for iron smelting, whereas the article beneficially produced under it, and which it was sought thereby to protect, was iron prepared by such improved application of air. In *Hullett v. Hague*,<sup>d</sup> the Patent purported to be "for certain improvements in evaporating sugar, which improvements are also applicable to other purposes."

*Cook v. Pearce.**Brunton v. Hawkes.**R. v. Newton.*

Again, in *The Queen v. Newton*,<sup>e</sup> the Letters-patent (1841) were for "improvements in the process of and apparatus for purifying and disinfecting greasy and oily substances or other matters, both animal and vegetable." On the principle before stated, it should have been for "greasy and oily substances or other matter, animal and vegetable, purified and disinfecting by the process, &c."

In *Cornish v. Keene*,<sup>f</sup> a Patent "for an improvement or improvements in the making or manufacturing of

*Cornish v. Keene.*<sup>a</sup> (1843) 7 Jur. 764.<sup>b</sup> (1821) 4 B. & Ald. 541.<sup>c</sup> (1841) Exch. Web. P. R. 373.<sup>d</sup> (1831) Sugar, 2 B. & Ad. 370.<sup>e</sup> 26 London Journ. 361 (1845).<sup>f</sup> (1837) C. B. 3 Bing. N. C. 570.



Nature of subject matter.

elastic goods or fabrics applicable to various useful purposes" was held good by the Court of Common Pleas. "That it is a *manufacture*," said Tindal, C. J., "can admit of no doubt; it is a vendible article, produced by the art and hand of man;" which was in effect saying that the subject matter of the grant differed materially from that expressed in the title of the Letters-patent. Numberless other instances might be adduced. A glance at the list of Patents daily granted is sufficient to show how little principle influences the selection of subject matter.<sup>f</sup>

Assailable points in Patents.

To proceed, however, in detail. We shall best form a notion of the requisites of good subject matter under the Law as it at present stands by observing the points to which attacks are directed in the efforts to invalidate Letters-patent in actions for infringement and of *scire facias*. The counts in the latter and pleas in the former,<sup>g</sup> placing the validity of the Patent in issue, reveal the rocks which beset the Patentee in the exercise of his privileges. They may be substantially collected under three heads; first, that the invention is not new; second, that it is not useful; and third, that it has not been sufficiently described. Reserving for further consideration the requisites of the specification or instrument describing

<sup>f</sup> Probably the extreme of such inaccuracy was touched by the American who claimed "the cutting of ice of a uniform size by means of an apparatus worked by any other power than human." (*Wyeth v. Stone*, 1840, 1 Story, Rep. 274; Curtis on Patents, 64.) "Nobody I have ever yet known," says the Master of the Rolls (1851; Evid. H. of Lords, Com.) "has been able to arrive at a satisfactory definition precisely to ascertain what is a new and what a useful invention."

<sup>g</sup> Pleas in *Beard v. Egerton* (1849), phototypes, 8 C. B. 172:—(1), not guilty; (2), non concessit; (3), Letters-patent obtained by fraud; (4), the Patentee was not the true inventor; (5), (6), (7) and (10), demurred to and judgment for plaintiff; (8), not a new manufacture; (9), not a new invention as to public use; (11), title inconsistent and too large; (12), Patentee did not duly specify; (13), did not assign to the plaintiff; (14), leave and licence; (15), invention of no use.

the invention, we proceed to establish the novelty and utility required from the subject matter.

The dictum of Mr. Justice Buller<sup>g</sup> in *R. v. Arkwright* presents an admirable test of the sufficiency of an invention to support a Patent. The *improvement of the particular trade* is the principle upon which the policy of such limited monopolies rested, and, in many cases, the materiality and importance of the change can be judged of only by the effect or the result, which effect is tested by the improvement in the trade in the commercial sense of the term; that is, by the production of the article as good in quality at a cheaper rate,<sup>h</sup> or of a better quality at the same rate,<sup>i</sup> or both these partially combined.<sup>k</sup>

Buller, J.'s definition.

The reference to trade as a sure criterion in determining the identity or diversity of two manufactures, would have saved the decision arrived at in *Brunton v. Hawkes*.<sup>l</sup> The Patentee had invented an improved anchor. The mode in which the improved anchor was constructed was well known, and in use in making the mushroom and adze anchors. Abbott, C. J., remarked that it was "the mode by which the different parts of the common hammer, and the pickaxe also, are united together: formerly three pieces were united together, the plaintiff only unites two; I think a man cannot be entitled to a Patent for uniting two things instead of three, where that union is effected in a mode well known and long practised for a similar purpose: and Bayley, J., "*Could there be a Patent for making in one entire piece what before had been made in two pieces? I think not.*" Here the question is put in its very plainest form; the answer, on the authority of recent cases, is this: If welding in one piece make a materially better or cheaper

Trade, the criterion.

<sup>g</sup> Web. P. R. 71 (1785).

<sup>h</sup> Derosne's Patent.

<sup>i</sup> Daniell's Patent.

<sup>k</sup> Crane's Patent.

<sup>l</sup> 4 B. & Ald. 511 (1821).

anchor than before, such improved anchor is good subject matter of a Patent.

Utility.

*Manton v. Parker*<sup>m</sup> was an action for an infringement of a Patent (1803) for hammers of locks for fowling pieces. The object of the Patent was to let the air pass out of the gun barrel when the wadding was rammed down, but to keep the touchhole always full of powder, in order to prevent flashing or hanging fire. The Court here determined the utility of the invention: "It seems to me," said Thomson, C. B., "that the utility of the invention and the purposes of the Patent wholly fail."

*Jupe v. Pratt.*

In *Jupe v. Pratt*, Alderson, B., upon this point,<sup>n</sup> with reference to *Crossley v. Beverley*<sup>o</sup>: "There never was a more instructive case than that. There never were two things to the eye more different than the plaintiff's invention and what the defendant had done in contravention of his patent right. The plaintiff's invention was different in form, different in construction: it agreed with it only in one thing, and that was, by moving in the water a certain point was made to open either before or after, so as to shut up another, and the gas was made to pass through this opening: passing through it, it was made to revolve it. The scientific men, all of them, said the moment a practical scientific man had got that principle in his head, he can multiply without end the forms in which that principle can be made to operate."

On the theory before proposed the solution of this difficulty is furnished at once. So far as Society is concerned, *improved gas meters* is the only patentable subject recognized, and the question of the alteration in form is wholly subordinate to that of the effect of this alteration on the result.

Improvement  
in the result, the  
test.

Improvement in the result is the only criterion the Law allows; and this, as is evident on the most cursory con-

<sup>m</sup> (1814) (gun locks), Dav. Pat. Ca. 327.

<sup>n</sup> Web. P. R. 146 (1837), Exch. (tables).

<sup>o</sup> *Crossley v. Beverley* (1829) (gas meters), Web. P. R. 106.

sideration of the matter, bears no assignable proportion to the change or improvement in the means<sup>p</sup> employed. It requires, indeed, a more than ordinary acquaintance with the details of manufactures to appreciate at once the result of some apparently insignificant alterations in machinery, or deviations in processes of chemistry. In an established branch of manufactures almost every improvement of importance springs from some trifling alteration in detail, and realizes the saying of an old writer, "that a little thing may make perfection, though perfection is not a little thing."

Some very singular instances of this was given in evidence before the Committee in 1851. "I have known," said one witness,<sup>q</sup> "many machines nearly completed and waiting for some small thing to make the whole of use. I will cite, as an instance, Mr. Roberts' loom for producing plain silk fabrics. They were for years working upon the loom, but they wanted something to give the delicate effect that the hand gives in throwing up the warp. At length the introduction of a very trifling matter, a bit of vulcanized india rubber, effected what they wanted, but they were years waiting for it. \* \* \* Last year having to wait for my passport at Boulogne, I went on board the steamboat which leaves London with goods for Boulogne, and I found that the majority of the packages constituting the cargo was plain silks for Paris, many of them being directed to Lyons. It is

Roberts' loom  
for silk fabrics.

<sup>p</sup> In *Crane v. Price*, Web. P. R. 377 (1840), Tindal, C. J., the alteration in principle was scarcely perceptible, yet the iron was rendered thereby greater in yield, cheaper in cost, and better in quality than that ordinarily made. "If," said Tindal, C. J., "the result produced be either *a new article or a better article, or a cheaper article* to the public than that produced before such a combination of means, is an invention or a manufacture intended by the Statute, and may well become the subject of a Patent." (*Re Morgan's Patent* (1839), tinning, Web. P. R. 737.)

<sup>q</sup> Hodge, Evid. 481.

nothing but the improvements which we have made in the looms for weaving plain silks in Manchester, that gives us that advantage over the French.”

American  
flyer.

I will give another instance.<sup>r</sup>—There is an invention now brought to this country from America, which hangs up in the American department of the Exhibition; it is a flyer for an ordinary throstle frame: the present flyer, being made of solid steel, having a great deal of spring with it, the law of centrifugal force, by driving it at a great velocity, expands the flyer. But this inventor has made the steel flyer a hollow tube; hence he is able to increase the velocity nearly one-third; every spindle, therefore, does nearly one-third more work. In one mill at Manchester they have 70,000 spindles, so that the invention will be seen to be of great national importance.

Improved stop.

Speaking of an invention (an improved stop) which enabled a loom to be driven from a hundred to a hundred and twenty picks per minute, instead of sixty or eighty, Mr. Webster<sup>s</sup> remarked, “It may appear a trifling thing in itself, but I know it made a great change in many establishments.”

Failure and  
success.

The least thing may make the difference between failure and success; and sometimes the principle on which the improvement depends, is only apparent from the observed result of experiment. In *Huddart v. Grimshaw*, the strands of rope (formerly passed through a ring) were passed through a tube, which kept them in confinement for a longer period than the ring, which happened to be a source of material improvement in the manufacture.<sup>t</sup>

Omission may  
improve ma-  
terially.

The mere omission of part of a machine or process may be attended by so beneficial an alteration in the result as to entitle such result to the Protection of Letters-patent.<sup>u</sup>

<sup>r</sup> Evid. 546.

<sup>s</sup> Ibid. 39.

<sup>t</sup> Dav. Pat. Ca. 265, Ellenborough, C. J.

<sup>u</sup> *Russell v. Cowley* (gas tubes), 1 Cr. M. & R. 864.

Simplicity, indeed, in machinery, is the main characteristic of perfection.

Formerly the process of making oxalic acid could only be carried on in glass and earthenware vessels, from the corrosive nature of the nitrous acid employed, and these vessels were necessarily small and inconvenient. It was discovered, that, by adding a small quantity of sulphuric acid, the corrosive character of the nitrous acid was destroyed, and the process could be carried on in large leaden vessels. This simple discovery led to an extraordinary reduction in its price. Some twenty years ago it sold for a guinea a pound—it has lately been as low as sixpence half-penny.<sup>v</sup>

Oxalic acid.

Derosne, by the use of substances well known, but never before used for the purpose (animal charcoal and bituminous schist), cheapened sugar twenty shillings per cwt.<sup>x</sup>

Derosne's Patent.

The immersion of cloth at a particular stage in hot water, Daniell's Patent,<sup>y</sup> is said to have improved its value a guinea a yard.

Daniell's Patent.

The adoption of a specific distance between two parts of a machine,<sup>z</sup> the substitution of one mechanical contrivance for another, apparently identical with it in principle,<sup>a</sup> the employment of an agent almost *ejusdem generis* as that employed before,<sup>b</sup> the assignment of a fixed period to any stage of a chemical<sup>c</sup> or mechanical<sup>d</sup> process, or an alteration in the order of its stages,<sup>e</sup> or

Trifling alterations.

<sup>v</sup> *Smith v. Laing*, Morning Chronicle, 1st March, 1854.

<sup>x</sup> *Derosne v. Fairrie*, 1 Gale, 109.

<sup>y</sup> Webster, Subject-Matter for Patents (1851), p. 26.

<sup>z</sup> *Kay v. Marshall* (2½ inches for reach of flax).

<sup>a</sup> *Huddart v. Grimshaw* (tube for ring).

<sup>b</sup> *Hull v. Boot* (gas flame for oil flame).

<sup>c</sup> *Beard v. Egerton* (1846, photography), 3 C. B. 97.

<sup>d</sup> *Sturtz v. Delarue* (copper plate printing, damping the paper, 1828), 5 Russell, 327.

<sup>e</sup> *Halliwell v. Dearman*, Web. P. R. 401, n. (t).

even the omission simply of some part of what was in use before,<sup>f</sup> may introduce into manufacture improvements so material in their results, and consequently so advantageous to the public, as to render their originator more deserving of the privileges conferred by Letters-patent than the discoverer of the original improved upon.

A distance.

In *Kay v. Marshall*<sup>g</sup> it was held, that the adoption of a specific distance (two and a half inches) between the rollers of a flax-spinning machine, was not a good subject of a Patent, yet it was only in consequence of a very material improvement (that of macerating the flax in the process) that enabled them to spin at the distance. The utility and advantage of the change were unquestioned, and hundreds of pounds had been expended in experiments by the Patentee. Such was the fate of an invention, of which Sir F. Pollock<sup>h</sup> hardly overrated the importance, when he spoke of it as a discovery which “had actually conferred upon this country the benefit of millions, and which opened up a source of national wealth to which no limit could be placed.” Its immediate effect was to put flax-spinning on the same footing with cotton-spinning, and vastly to increase the manufacture of that article.

Gas for oil.

In *Hall v. Boot*,<sup>i</sup> the substitution of gas for oil in singeing the fibres of lace, was held sufficient to constitute a “new manufacture;” while in *Daniell v. Fussell*,

<sup>f</sup> *Russell v. Cowley* (1834), 1 Cr. M. & R. 864 (gas tubes).

<sup>g</sup> H. of Lords (1841), 8 Cl. & Fin. 257.

<sup>h</sup> *Kay v. Marshall* (J. C. of P. C.), Web. P. R. 572 (1839); 5 Bing. N. C. 492; 1 Beav. 535; 8 Cl. & Fin. 245. For other great results from trifling changes, see *Edwards v. De Costa*, Rep. of Pat. In. No. 681; Turner, 17; Web. P. R. 734; *Hill v. Thompson*, *Crane v. Price*.

<sup>i</sup> (1822) lace, Web. P. R. 100. “No one,” said Abbott, C. J., “in this case could tell that gas would answer the purpose of singeing the fibres of lace until he tried, and a man who *tried and succeeded in improving a manufacture is entitled to a Patent.*”

the use of steam in a process of cloth finishing, instead of boiling water, was considered a mere colourable variation from, and an infringement of, a former Patent. The books are full of cases of similar kinds, in which trifling modifications have been supported, and very considerable deviations been judged to be infringements on former rights. Inconsistent, however, as the decisions are, their history is necessary to lead us to a clear view of the stage at which the Law has now arrived. The impossibility of adhering to fixed laws has at length induced the reference of the subject to wider principles, and at present there should be no objection for an invention, provided it be properly described in the Specification, and come fairly within the category of "The material result of an unpublished improvement in the production of articles for public use."<sup>k</sup>

Steam for  
boiling water.

In the case of *Hullett v. Hague*,<sup>l</sup> a Patent had been obtained for a method of evaporating fluids at low temperatures, by blowing air through them by means of a colander placed in the bottom of the containing vessel, or by means of a single coil of perforated pipe immersed in the fluid. A second Patent, for the use of a series of tubes for the same purpose, having all their orifices in the same horizontal plane, was held not to be bad for want of novelty. Both Patents involved the same principle as that employed in the salt manufactories, that of causing the fluid to descend in a shower through the air. The most important of all the considerations, namely, *success* of the latter and *failure* of the former Patent, *owing to the position of the orifices*, does not seem to have been adverted to.

*Hullett v.  
Hague.*

In *Haworth v. Hardcastle*<sup>m</sup> a Patent was upheld for an improved machine, which proved, however, in prac-

*Haworth v.  
Hardcastle.*

<sup>k</sup> (1779) *Hornblower v. Boulton*, 2 H. Bl. 493.

<sup>l</sup> 2 B. & Ad. 370; and Sweet's *Jarman's Conveyancing*, vii. 487.

<sup>m</sup> 4 Moo. & Fin. 720 (1834), C. B., calico drying.



tice inapplicable *to some purposes* discharged by similar machines. The question of degree is here, as elsewhere, the criterion of the validity of the grant.

Frivolous matters within the law.

Some matters apparently frivolous are yet proper subjects of Patent grant, as conducing to public convenience. One such is mentioned by Mr. Rendel before the Committee in 1851.<sup>n</sup> "There was," he said, "an invention some years ago of a file, or rather two files placed at right angles to one another, for sharpening black-lead pencils instead of cutting them: that was patented, and I believe the Patentee sold the Patent for a very large sum of money. The public ran after it for a time and every man carried one of these things in his pocket."

New in this realm.

The invention must be new in this realm.<sup>o</sup> The fact of its publication in other countries is recognized by the Law only in the event of its forming the subject of a foreign Patent. In that case it is provided by the New Act<sup>p</sup> that Letters-patent for such inventions are not to continue in force after the expiration of the foreign Patent. The old rule was more extensive. In the Journals of the House of Commons in 1621 we find, "Sir E. Coke reporteth the Patent for Glasses. The consideration faileth, for no new invention is proved by certificates *from divers countries* and by three witnesses *vivâ voce*."

Difficult to determine amount of public information.

To determine what is, as regards public use, a "new manufacture," involves a very difficult consideration; viz., what amount of information the public may be said to possess upon any particular branch of trade.

On the objection of want of novelty to Zinck's Patent<sup>q</sup> (1812 verdigris), it being proved that an article

<sup>n</sup> Qu. 2532.

<sup>o</sup> *Beard v. Egerton* (1849), photographs, 8 C. B. 207; *Brown v. Annandale*, 8 Cl. & Fin. 437; *Lewis v. Murling*, Web. P. R. 495 (previous use in America).

<sup>p</sup> 16 & 16 Vict. c. 83, s. 25.

<sup>q</sup> *Wood v. Zimmer* (1813), 1 Holt, N. P. C. 58.

precisely similar had been sold under another name, Gibbs, C. J., remarked, "Some things are obvious as soon as they are made public; of others the scientific world may possess itself by analysis, some inventions almost baffle discovery. But to entitle a man to a Patent, the invention must be new to the world; the public sale of that which is afterwards made the subject of a Patent, though sold by the inventor, only makes the Patent void."

There are two modes in which "publication" of an invention may occur: by description in lectures, books accessible to the public, &c., or employment in actual practice of the invention. With regard to the former some qualifications are requisite from the peculiarity of the case. Formerly inventions originated with those engaged in manufactures, and were little known beyond the factory, or at most the trade in which they were employed. Manufacturing art, however, at the present day may be said to have a popular literature of its own. Here, as in every other department of useful knowledge, the press is in advance of the age, and periodicals devoted to chemical and mechanical science, not content with recording the results effected the Patentee, discuss the principle involved in his discovery, and speculate on the still further development of his idea. The intelligence of such writers is, therefore, no fair index of popular apprehension. If suggestions from such a source were suffered to discredit *all* Patents subsequently obtained for inventions carried out upon the principles they lay down, it is evident very few could be maintained. In some instances the practice of such suggestions is so easy as to recommend itself at once to public use; in others the value of them can be ascertained only after long and expensive experiments; and, but for the enterprise of the Patentee, would probably

<sup>r</sup> Encyc. Met. viii. 161.

remain for some length of time without any practical results. The practical questions that arise under this head are what amounts to a description<sup>t</sup> of the invention, and what publicity is requisite to constitute publication.<sup>u</sup>

Publication in specification of former Patent.

The description of the substance of the invention in a Specification of a prior Patent was held to vitiate a Patent before that document was practically accessible to the public, *Huddart v. Grimshaw*;<sup>x</sup> and à fortiori must be held to do so under the present system, which provides for their publication.

In *Stead v. Williams*,<sup>y</sup> the description of the invention (wood paving), as practised in a foreign country, in a book publicly circulated in England and lodged in the British Museum (Transactions of the Society of Arts, for 1833), was held to have deprived the subject of its qualification for Patent sealed 1838.

In *The Queen v. Walton*,<sup>z</sup> it was attempted to repeal a Patent granted in 1834 (improved cards for wool-carding), by producing a passage from the Journal of the Royal Institution, of 1826, but without effect.

User.

Experiment.

The extent of previous employment fatal to Patent Grants is termed "user." The amount requisite to constitute user varies with different subjects. If the previous employment of the invention was by way of experiment only,<sup>a</sup> and the object for which the Patent was taken out was not attained, such experimental use of the invention will not prejudice a more successful competitor, who avails<sup>o</sup> himself of his predecessor's discoveries and

<sup>t</sup> *Tenant's case*, Dav. Pat. Ca. 429; *Makepeace v. Jackson*, 4 Turn. 770; *Barber v. Walduck*, 1 Car. & P. 558; *Bloxum v. Elsee*, 1 Car. & P. 558.

<sup>u</sup> *Godson*, 63; Dav. Pat. Ca. 445.

<sup>x</sup> (1803) Web. P. R. 87; *Davies' Pat. Cas.* 265.

<sup>y</sup> 8 M., G. & Sc. 821; (1844) 12 L. J., N. S., C. P. 218; *Hearteloup's case*, Web. P. R. 553.

<sup>z</sup> Web. P. R. 585.

<sup>a</sup> *Galloway v. Bleaden*, Web. P. R. 521; (1839) Tindal, C. J.

adds the last link of improvements, which brings the whole to perfection.<sup>b</sup>

The abandonment of an invention raises a strong presumption that it failed or was a mere experiment,<sup>c</sup> or not reduced to beneficial practice,<sup>d</sup> and is almost decisive that it was not complete and perfected;<sup>e</sup> although, however, the fact of abandonment, provided it be shown to have attained completion, will not revive its claim to become good subject matter.<sup>f</sup>

Presumption of failure.

In *Galloway v. Bleaden*,<sup>g</sup> the experiments, on the strength of which it was attempted, but without success, to impeach the novelty of the Patent, had been, according to the account of Mr. Field, who conducted them, perfectly successful, and conducted, as was contended, with such publicity as to deprive the Patentee of his title to the privilege. In 1833 he had made a model of a wheel with floats in a cycloidal curve, and left it for a week at the Admiralty. At his factory he showed it to all persons who wished to see it, and to any persons concerned in steam vessels. In the same year he lodged a caveat at the Patent Office, but took no steps towards preventing the Patent granted in 1835 to the plaintiffs, who maintained an action for infringement of it, the proceedings of Mr. Field not being deemed sufficient to deprive the subject matter of its patentable property.

Novelty.

In *Jones v. Pearce*,<sup>h</sup> wheels similiar in principle to

<sup>b</sup> *Wood v. Zimmer*, per Gibbs, C. J., 1 Holt, N. P. 58.

<sup>c</sup> *Lewis v. Marling* (1829), Web. P. R. 495.

<sup>d</sup> *Minter v. Mower* (1835), Web. P. R. 139.

<sup>e</sup> *Househill Co. v. Neilson* (1843), Web. P. R. 692, n. (p).

<sup>f</sup> *Househill Co. v. Neilson* (1843), 9 Cl. & Fin. 788, per Lord Campbell; *Jones v. Pearce* (1832), carriages, Web. P. C. 122, Patteson, J.; *Cornish v. Keene* (1836), elastic fabrics, Web. P. C. 512, Tindal, C. J.

<sup>g</sup> (1839) paddle wheels, Web. P. R. 521. See S. C. 1 M. & G. 247.

<sup>h</sup> (1832) carriage wheels, Web. P. R. 122, N. P., Patteson, J.

those patented had been used publicly in a cart as early as 1814, for carrying heavy loads, during two years. The spokes, however, got bent, and the nave becoming broken, the cart was laid by. A milk cart, on the same principle, although much used, was subject to a similar defect. The deficiency was remedied by the subsequent Patent (1826), which was held good as being successful in remedying the defects in the experimental plan.

Novelty.  
Conflicting  
*dicta.*

The danger of applying a *dictum* in any one case upon this head, as a maxim applicable to the decision of all, is evident from the distinctly antagonistic positions assumed by not a few. Thus, in *Cornish v. Keene*, Tindal, C. J., remarked, with reference to abandoned<sup>i</sup> inventions,<sup>k</sup> that prior use to invalidate a Patent must be public and continuous;<sup>l</sup> whereas, in *Househill Company v. Neilson*,<sup>m</sup> the Lord Lyndhurst, L. C., remarked, "If use or trials have been made of it in the eye and in the presence of the public, it is not necessary that the public use of it should come down to the time when the Patent was granted. If it was discontinued, still that was sufficient evidence in support of the prior use to invalidate the Patent."

Test of novelty  
in public use.

The real test of the novelty of the invention for the purposes of a Patent was that left to the jury by Tindal,

<sup>i</sup> (1832), *Jones v. Pearce*, Gods., 2nd ed. 28; Web. P. R. 124.

<sup>k</sup> As instancing the neglect of Society to avail itself of a valuable principle, even when fully reduced into practice, and of the reappearance of inventions at distant epochs, we may notice two of the articles which excited such attention in the Great Exhibition of 1851—the mechanical reaper (Hussey's) and the revolver (Colt's). Both originated in England, but were not fortunate enough to attract attention. Of the latter invention, two specimens are at this moment in London, of so early a date as the reign of Charles I., one of which, labelled "a many times discharging petronel," identical in principle with Colt's, is exhibited in the Museum of the United Service Institution. (Transactions of the Society of Arts, Jan. 23, 1854.)

<sup>l</sup> Web. P. R. 44.

<sup>m</sup> 9 Cl. & Fin. 788; Web. P. R. 709.

C. J., in *Cornish v. Keene*,<sup>n</sup> who directed them to say *whether the invention was or was not in public use and operation at the time the Patent was granted?* The evidence as to the novelty and utility of the invention being fully before the jury, they are perfectly capable of deciding the general question whether or not it be a proper subject for a monopoly. Whether what has been before done was mere experiment or perfected invention is a question for the exercise of common sense.

The publication of an invention by user previous to its protection by Letters-patent is one of the dangers almost removed from the inventor by the recent amendments in the Law, which confers immediate protection on application of the Patentee. Considerable allowance for the unavoidable promulgation of a discovery during the experiments necessary for its development has been made in recent cases. In *Bentley v. Fleming*,<sup>o</sup> the inventor of a card machine lent it to another person for the purpose of having its qualities tested, and for that purpose it was for some weeks in use in a public workroom. This was however held not to be such publication as to deprive the inventor of his right to obtain Letters-patent. In this case however it is to be remarked, that the machine was one of considerable complexity.

The question of "user" is almost entirely one of fact, to be dealt with according to the circumstances of each particular case. In *Hartley v. Howland*<sup>p</sup> the latitude given to the Patentee was very great. The manufacture was glass, and the publication contended for the open use of the plaintiff's invention by the predecessor of the defendant during the period of three months (March to

Danger of user diminished by new law.

Allowance made for Patentee.

Question of user one of fact.

<sup>n</sup> Web. P. R. 44; *Househill Co. v. Neilson* (1843), 9 Cl. & Fin. 788.

<sup>o</sup> (1844) 1 C. & K. 587, per Cresswell, J.

<sup>p</sup> (1852) London Journal, *Minter v. Wells*, Web. P. R. 132; *Forsyth v. Rivière*, Web. P. R. 97. In *Tennant's case* (bleaching), Dav. P. C. 429, the invention had been used five or six years before the Patent, but as a secret.

May, 1835) in a factory employing seventy men. The question put to the jury by the learned Chief Baron was whether that constituted a sufficient publication to the trade and the world to deprive the plaintiff of the right to take out a Patent. The jury found a verdict for the plaintiff.

The distinction between use and exercise *in public* and *by the public* taken by the Court in *Carpenter v. Smith*<sup>q</sup> is one of which it seems impossible to introduce into general application.

User.

On the trial of *Lewis v. Marling*<sup>q</sup> it was proved that a model of a machine similar to that for which the Patent had been obtained had been brought to England from America before the date of the Patent; but as it appeared that the model was not put to any use or made known to the public, nor any machine made after it, Lord Tenterden thought it ought not to affect the Patent.

Unprosecuted inventions.

In *Househill Company v. Neilson*<sup>r</sup> it was held that the notorious use of an invention, though subsequently abandoned, will vitiate a Patent subsequently obtained. It appeared however that if the public could be deemed to have wholly lost sight of it, a subsequent Patent could be maintained. The fact of its abandonment is important, as determining that what took place was only an experiment which failed and which never attained to a perfected and complete invention.<sup>s</sup> The lapse of time between the successive attempts must necessarily form an essential element in the consideration. "Although," says Cresswell, J. (1844), "a person may have hit upon a thing and tried an experiment in reference to it, yet if that afterwards is laid by and abandoned, so that the

<sup>q</sup> (1842) 9 M. & W. 303, per Abinger, C. B. (door-locks).

<sup>q</sup> 1829 (shearing machine) Tenterden, Lord C. J., 3 C. & P. 502.

<sup>r</sup> Web. P. R. 692, n. (p).

<sup>s</sup> *Newton v. Grand Junction Railway Co.* (1846), 27 London Journ. 223.

public never gets the use of it, the person who afterwards invents and brings it into notice and use may still have a Patent for it.

The circumstances of the case, with reference to the object of the Law, it is evident must form in every instance the grounds of the decision. The effects, as we have seen in the case of apparently trifling alterations in processes or machines, are so disproportionate to the cause, and so many variable elements are necessary to concur in the success of experiments, that an invention may be approached within an almost indefinite distance without giving indications of its being attained. Success is the only proof of its attainment, and abandonment ought, in fairness to others, to be considered constructive failure. Mr. Slaughter, in his evidence before the committee (1851), stated that he had tried nine screw propellers of various diameters, but of constant pitch. Being dissatisfied with the results he tried an increasing pitch, and thus unconsciously stumbled upon Mr. Woodcroft's invention, and finding that, took a licence from him.

Looking to the nature of modern inventions,<sup>u</sup> it is hardly possible to over-estimate the importance of the decisions, originating with that of *Ex parte Fox*,<sup>x</sup> with reference to the progressive improvements in machinery. Our present carding machinery consists of no less than sixty,<sup>y</sup> and cotton<sup>z</sup> spinning machinery of upwards of *eight hundred Patents*, mainly in a regular course of improvement. As to an improvement on a machine or

Progressive improvements.

<sup>t</sup> (1829) *Lewis v. Marling*, Web. P. R. 490; (1835) *Minter v. Mower*, Web. P. R. 139; (1843) *Househill Co. v. Neilson*, H. of Lords, Web. P. R. 692, n. (p).

<sup>u</sup> The great mass of useful inventions is made up and must be, not of what is altogether new, but of improvements on what is already practised. (Westm. Rev. (1835), January.)

<sup>x</sup> 1 V. & B. 67, Lord Eldon, C.      <sup>y</sup> Evid. 542.

<sup>z</sup> Evid. H. of Lords (1851), 545.



process protected by Patent being matter for Patent, his lordship said:—"If the Patentees have invented improvements upon an engine for which a Patent has been granted, and those improvements could not be used without the original engine, at the end of fourteen years the Patentees could make use of a Patent taken out upon their improvement, though before that period expired they would have no right to make use of the others *substratum*."

In *Boulton v. Bull*<sup>a</sup> it had been laid down by Buller, J., "that a Patent for an addition was good; but then it must be for the addition only," and such Patent conferred no right to the use of the *substratum*.

*Stead v. Carey.* In *Stead v. Carey*<sup>b</sup> the question of *substratum* was the material issue in the cause. The plaintiff's Letters-patent contained a clause of avoidance in the event of the Specification not being enrolled within four calendar months from the date of the grant (19 May, 1835). The Specification was enrolled within six, but not within four, months from the date. On the 29th July, 1839, the defendant, having improved on the plaintiff's invention, obtained Letters-patent. In 1841, an act<sup>c</sup> (local and personal, but to be judicially taken notice of as a public Act) was passed, confirming the plaintiff's Patent.

The point mentioned by Mr. Justice Erle is very important. "The Legislature," he says,<sup>d</sup> "has pointed out the mode in which void Patents may be rendered valid, and no exception is made in favour of parties who have taken out Patents in the intermediate time. If the defendant's Patent included the plaintiff's invention it would be void; if it was for an improvement only he is not injured; at all events he is not in a worse position than the rest of the public."

<sup>a</sup> Dav. Pat. Ca. 203 (1795). See *Morris v. Bransom*, cited in *Boulton v. Bull* (1795); Dav. Pat. Ca. 202; Web. P. R. 51.

<sup>b</sup> 1 C. B. 496 (1845).

<sup>c</sup> 4 & 5 Vict. c. xci. § 31.

<sup>d</sup> Page 523.

The metaphor before employed, of an adventurer into the unexplored regions of inventions, is one that serves well to explain, in this respect, the position of the Patentee. Some, in the ardour of scientific research, push forward actively in the van of civilization, while others lead the way only to block it up.<sup>e</sup> From the latter it is clear Society derives no advantage, and any concession of the position gained by the adventurer would be an obstruction, without a corresponding advantage to the public. In a recent case, a Patentee claimed the application of electro-chemical decomposition to electric telegraph purposes; and though the mode of applying it was very slow, and not at all available for the rapid transmission now required, yet that claim would have effectually obstructed, during the continuance of the monopoly, the use of the quickest mode of telegraphic communication now known. Similar instances might be stated in the history of most other important inventions, as every Patentee endeavours, by the multiplicity of his claims, to prevent further improvements in his own branch of manufactures.

Obstructive  
Patents.

With regard to the reservation in the Statute of James, “that the new manufacture be not “hurtful to trade, nor generally inconvenient,” we have seen that Patents, when granted on the principles<sup>f</sup> at present proposed by Patent Law, are highly conducive to the progress of manufactures. The grant of a monopoly, however, for an invention which is incomplete, and which, it must be remembered, our Law at present allows—(see *post*, “Amendment,” “Disclaimer”) is simply an obstruction to the general progress of that branch of trade, and may, indeed, be considered as<sup>g</sup> “mischievous to the State, to the hurt

Not hurtful to  
trade.

<sup>e</sup> Instances cited in which the obstructive Patent had not been used; Evid. (1851), p. 368. See also Mech. Mag. (1852), p. 9.

<sup>f</sup> 3 Inst. 184.

<sup>g</sup> Stat. 23 Jac. I. c. 3.

of trade, and generally inconvenient,<sup>g</sup> within the meaning of the Statute of James the First;" for no addition to or improvement of such an invention could be made by any one during the continuance of the monopoly, without obliging the person using it to purchase the useless invention.<sup>h</sup>

In *R. v. Arkwright*,<sup>i</sup> the point was raised on a *scire facias*, to repeal the Patent, but Buller, J., considered "the issue merely a consequential one; it stated no fact which the defendant could come prepared to answer," and he therefore refused to hear any evidence in support of the allegation.

Prussian Law.

In this respect it is much to be regretted that some provision is not made, as in Prussia,<sup>j</sup> to the effect that, in the event of the Patentee not realizing within a certain time the pretensions put forward in his specification, he should forfeit the privileges conferred on him by the Patent,—laxity in the completion of the idea being exactly the reverse of that forcing process which Patents should produce.<sup>k</sup>

With reference to this point, one French writer<sup>l</sup> is of opinion that an inventor does not lose his right to the privilege by delay while he exercises his invention in secret; while another<sup>m</sup> thinks a distinction is to be made on this point, and that if the inventor delivers the product of his

<sup>g</sup> (1836) Parke, B., *Morgan v. Seaward* (paddle-wheels), 2 M. & W. 544; Web. P. R. 198.

<sup>h</sup> *Palmer v. Wagstaff* (1853), Exch. 1 C. L. Rep. 448 (candles), Pollock, C. B. "It is a fraud on the Law of Patents to take out a Patent with a view to the obstruction of improvements."

<sup>i</sup> (1785) Web. P. R. 71.

<sup>j</sup> (1851) Evid. 2167. Patent must be at work, with satisfactory results, within six months from the date of the grant.

<sup>k</sup> Turner, 29. See as to American Law on this subject, *Evans v. Weiss*, 3 Evans' Law Journal, 180, and *Goodyear v. Matthews*, 1 Paine's Rep. 301.

<sup>l</sup> M. Merlin (1825), Rep. Univ. et Raisonné de Jur., Brevet d'Invention.

<sup>m</sup> Renouard, c. 5, § 1, p. 173.

invention in the mean time, and others by examining and analyzing it detect the secret, he loses the privilege.<sup>n</sup>

In *Palmer v. Wagstaff*<sup>o</sup> it was stated, that, although the Patent dated from 1840, no use had been made of the invention in 1853. The case of *Bentley v. Fleming*<sup>p</sup> established that a machine does not become incapable of being patented by being kept a length of time by the Patentee after it has become complete and workable. The One invention. rules published under the new Act<sup>q</sup> have provided against the necessity of asserting the principle of *Hill v. Thompson*<sup>r</sup> and *Brunton v. Hawkes*,<sup>s</sup> that a Patent for two or more inventions, where one is not new, is void altogether.<sup>t</sup> They provide that “no warrant is to be granted for the sealing of any Letters-patent which contains two or more distinct substantive inventions.” The most extraordinary instance of disregard of the principles of Patent law was evinced in the grant of Mill’s Patent, which, under the title of “Instruments for writing and marking,” included things so heterogeneous as “*penholders, pencils, seals and inkstands.*”<sup>u</sup> A perhaps still stronger was mentioned by Lord Campbell, in a recent judgment.<sup>x</sup> Even so lately as May, 1850, a Patent was enrolled “for improvements in *propelling and ploughing.*”

<sup>n</sup> *Hancock v. Somervell* (1851), 39 Rep. Arts, 158, substance to be used “for shoes, slippers, floorcloth, and for a substitute for leather and other purposes.”

<sup>o</sup> (1853) candles, 1 C. L. Rep. Exch. 448; Evid. H. of Lords (1851), 2167.

<sup>p</sup> (1844) 1 C. & K. 587, Cresswell, J.

<sup>q</sup> 2nd Set of Rules, 15 Oct. 1852.

<sup>r</sup> 8 Taunt. 375; 2 J. B. Moore, 424.      <sup>s</sup> 4 B. & Ald. 541.

<sup>t</sup> See *Beurd v. Egerton* (1849), photographs, 8 C. B. 207.

<sup>u</sup> *Reg. v. Mill* (1850), 10 C. B. 379.

<sup>x</sup> *Crossley v. Potter*, carpets, printed case, 65. “I recollect perfectly well,” said his Lordship, “when I was Attorney-General, a Patent being presented for my approbation, the title of which was ‘Improvements in Locomotion,’ and I said this title embraces every description of assistance from a balloon to a go-cart or a walking-stick. I would not grant the Patent.”

## CHAPTER III.

## THE PATENTEE.

THE legal interpretation of "the true and first inventor" furnishes another instance of the extent to which the subjective treatment of Patent Law has succeeded in infixing a technical meaning upon words, almost subversive of their original signification. Its progress has been similar to that above detailed. As in the subject matter intrinsic merit in the improvement has gradually been postponed to the extent of the improvement effected by successive decisions, so here the practice has by degrees been established of viewing the Patentee merely<sup>a</sup> as the channel through which the public is to be made acquainted with the invention in detail. The decisions on this head, it is true, are unusually conflicting and confused; yet amid the *melée* this principle (the only one reconcilable with the general theory of Patent rights) may clearly be discerned. Subject to the deductions to be hereafter made, the "*true and first inventor, within the terms of the Statute, is the publisher by means of a specification of the invention*" above defined.<sup>b</sup>

"If I discover a certain thing for myself," says Bailey, J.,<sup>c</sup> "it is no objection to my claim for a Patent that another also has made the discovery, provided I first introduced it into public use."

This view of the subject here asserted was adopted by the present Chancellor in a very recent case,<sup>d</sup> on an ap-

Bogue's  
Patent.

<sup>a</sup> Supra, 49, n. (q).

<sup>b</sup> *Stead v. Anderson* (1847), wood paving, 16 L. J. (N. S.), C. B. 251, per Wilde, C. J.

<sup>c</sup> *Lewis v. Marling* (1829), K. B., clothshearing machine, 10 B. & Cr. 27.

<sup>d</sup> *In re Bogue's Patent*, L. C., printing surfaces suitable for type or engraving, April 25, 1854.

plication made by Bogue to seal a Patent for an invention of a French gentleman named Martin. The application dated from October 24, 1853. The warrant of the Attorney-general and the permission of the Solicitor-general, who had assented to the application, had been granted. The application was opposed by Vizetelly, who asserted that Martin had pirated the invention from M. Gillot, who held the French Patent and had disposed of his interest to him, Vizetelly. The Court held that Bogue had purchased the invention *bonâ fide* from Martin, and that the mode in which Martin had become possessed of it did not affect the question. It was quite sufficient that Bogue believed the vendor to be the inventor. The Patent was ordered to be sealed, Vizetelly to pay the costs of the opposition.

The earliest indications of this principle are in the decision of the case of monopolies,<sup>d</sup> and in the provisions of Baker's<sup>e</sup> and Mansell's<sup>f</sup> Patents. In *Edgebury v. Stephens*<sup>g</sup> the point seems to have been first raised upon the wording of the Statute. It was there decided that the introducer into England of an invention in use beyond seas was an inventor within the terms of the Statute, which was "intended to encourage new devices useful to the kingdom, and whether learned *by travel or study is the same thing.*" Subsequent cases have proceeded on the same grounds. In *Beard v. Egerton*<sup>h</sup> the argument that a Patentee must be meritoriously connected with his invention was disallowed; and if the remarks of Lord Brougham in a recent case<sup>i</sup> may be taken to be Law, the necessity supposed to exist for a "communication" from a foreigner to a British subject no longer exists.

*D'Arcy v. Allen.*

*Baker's Patent.*

*Mansell's Patent.*

*Edghury v. Stephens.*

*Beard v. Egerton.*

<sup>d</sup> *D'Arcy v. Allen*, 44 Eliz. (A.D. 1602); Web. P. R. 6.

<sup>e</sup> 4 Feb., 6 Jac. I. malt; Web. P. R. 9.

<sup>f</sup> 22 May, 21 Jac. I., glass; Web. P. R. 17.

<sup>g</sup> 3 W. & M., rollers instead of carriage wheels; 2 Salk. 447.

<sup>h</sup> (1846) 3 C. B. 97, photographs; (1847) 2 C. & K. 667, Wilde, C. J.

<sup>i</sup> *In re Berry's Patent* (1850), 7 Moo. P. C. 189.

Berry's Patent.

"The Patent Law,"<sup>k</sup> says his Lordship in that case, "is framed in a way to include two species of public benefactors; the one those who benefit the public by their ingenuity, industry and science, and invention and personal capability; the other those who benefit the public, without any ingenuity or invention of their own, by the importation of the results of foreign invention. Now the latter is a benefit to the public incontestably, and therefore entitled to be placed upon somewhat, if not entirely, the same footing as inventors."

Principle of French Law.

It is in this spirit the French Law has determined that persons civilly dead, that is, who have abjured, or who by way of punishment have been deprived of the rights of civil society, may, notwithstanding such disability, apply for and take out a Patent; though they cannot pursue any person for infringing it, or otherwise derive any benefit from contracts made respecting the use of it.<sup>l</sup> On the hypothesis that the transaction is one by which society is the gainer, the question of the disqualifications of a Patentee receives a ready solution. Viewed from a legal point he is simply the vehicle for communicating the particulars of an important invention; and, provided he can discharge this duty satisfactorily, it is sufficient.

Minor.

Feme covert.

Nothing prevents a Patent being taken out by an alien,<sup>m</sup> a minor or a married woman, though in the latter case the property in it would, as a matter of course, belong to the husband. An American writer<sup>n</sup> considers the position of the minor as similar to the finding by him of treasure trove.

Bankrupt.

A bankrupt is not disqualified pending the proceedings

<sup>k</sup> *In re Berry's Patent* (1850), 7 Moore, P. C. 189; *Beard v. Egerton* (1849), 8 C. B. 165, photographs.

<sup>l</sup> Renouard, p. 311, ch. 8, § 2.

<sup>m</sup> *Bloxam v. Elsee* (1825), paper, 1 C. & P. 558; *Beard v. Egerton*, (1849), 8 C. B. 165.

<sup>n</sup> Phillips (1837), p. 72.

in bankruptcy, but the Patent when obtained is affected by the previous assignment of the commissioners and vests in the assignees.<sup>o</sup> The interest of an insolvent in Letters-patent will pass under the assignment made by him to the provisional assignee.<sup>q</sup> Insolvent.

*The source whence the Patentee may have drawn his information, provided it be not one open to the public, is a matter of which the Law (except in the particular cases hereafter mentioned) refuses to take cognizance.* The introducer of the invention into actual practice is *prima facie* assumed to be the inventor.<sup>p</sup> The source of invention immaterial.

Here again, although the preponderating authority is clear, we have the opinions of several very able judges and writers to a directly opposite effect. “It is not only necessary,” says Bailey, J.,<sup>r</sup> “that the manufacture for which the Patent may be granted should be new, *but the person to whom the grant may be made must be the true and first inventor thereof;*” thus directly importing the merit of the Patentee into the question. Brunton v. Hawkes.

In *Minter v. Wells*,<sup>s</sup> Alderson, B., thus expressed himself—“If *S.* suggested the principle to *M.*, then *he would be the inventor*; if, on the other hand, *M.* suggested the principle to *S.* and *S.* was assisting him, then *M.* would Minter v. Wells.

<sup>o</sup> *Hesse v. Stevenson* (1803), paper from refuse, 3 B. & P. 565, Alvanley, C. J.; *Nias v. Adamson* (1819), K. B. 3 B. & Ald. 225; *Longman v. Tripp* (1805), C. B., bookseller, 2 N. R. 67; *Coles v. Barrow* (1813), C. B., clothdresser, 4 Taunt. 754; *In re Feaver*, Times, Feb. 20, 1853; *Ex parte Granger*, Evans' Stat. Bank. 64. By the French law, the Patent, if taken out before his discharge, operates for the benefit of the creditors. (Renouard, p. 312, ch. 8, § 2.)

<sup>p</sup> 7 Geo. IV. c. 57, ss. 11 & 57, and 1 & 2 Vict. c. 110.

<sup>q</sup> *Walton v. Potter* (1841), caoutchouc cards for carding wool, &c., Web. P. R. 592; *Cornish v. Keene* (1835), elastic fabrics, Web. P. R. 508; *Minter v. Wells*, chairs, Web. P. R. 131.

<sup>r</sup> *Brunton v. Hawkes*, 4 B. & Ald. 553. See *contra*, *Nickels v. Ross* (1849), C. B. 8 M. G. & S. 679.

<sup>s</sup> Web. P. R. 132



*be the inventor, and S. a machine which M. uses for the purpose of carrying his original conception into effect. They were together at the time of the invention, and it is for the jury to decide which of the two suggested the invention, and which carried it into effect."*

*Gibson v. Brand.*

In *Gibson v. Brand*,<sup>u</sup> Tindal, C. J., expressed himself very much to the same effect. "A man may publish to the world that which is perfectly new in all its use, and has not been before enjoyed, and may yet not be the first and true inventor; he may have borrowed it from some other person; he may have taken it from a book; he may have learned it from a specification, and then the *Legislature never intended that a person who had taken all his knowledge from the act of another, from the labours and assiduity or ingenuity of another, should be the man who was to receive the benefit of that other's skill.*"

*Hindmarch. Corporations.*

Mr. Hindmarch very boldly pushes his theory<sup>v</sup> to its extreme in this regard, and places corporations among the parties incapacitated, because<sup>w</sup> "*invention is an act of the mind, which clearly could not proceed from a corporation.*" "It has been erroneously supposed," he says,<sup>x</sup> "that there is a class of persons who may become true and first inventors within the meaning of the law, besides actual inventors and importers of foreign inventions. And it has been said, that in addition to discoverers of new inventions and importers of foreign inventions, the

<sup>u</sup> (1841), silk spinning, Web. P. R. 628; Dav. Pat. Ca. 61.

<sup>v</sup> A summary of this writer's proposed amendments in the Law of Patents, p. 54 (1851), contains the following suggestions, among others: "No Patent to be granted to any person except the actual inventor or his assignee." "A person to whom an invention shall have been communicated by a foreigner shall not be deemed an inventor;"<sup>y</sup> and "Publication in a foreign country after, say twelve months, to be held equivalent to publication here."

<sup>w</sup> On Patents (1846), p. 34.

<sup>x</sup> *Ib.* p. 30.

<sup>y</sup> *Ib.* p. 22.

first publishers or introducers of inventions may maintain Letters-patent for them. But it is clear that this supposition is founded in error, for any new invention which a person may possess the knowledge of must either have been discovered by the possessor himself or by some other person. We have seen that an actual inventor can maintain a Patent for his invention, but no one can support a Patent for an invention communicated to him by a fellow countryman in England; and therefore it seems that the only other class of inventors within the meaning of the law besides discoverers, are those who become possessed of foreign inventions, and whom we have termed importers. *The Patentee must himself make the discovery or invention; the idea of it must originate in his own mind,<sup>1</sup> and must not be suggested to him by another,<sup>2</sup> or taken from a book<sup>3</sup> or from anything else.”<sup>b</sup> Mr. Godson, too, asserts,<sup>c</sup> that “no person Godson. who has not without assistance<sup>d</sup> formed the original idea of the subject in his own mind will be enabled to keep any Patent he may have obtained.” Practice, however, has firmly established the contrary as a rule. An alien may become a Patentee,<sup>e</sup> prosecute a *scire facias*<sup>f</sup> for a repeal, or petition<sup>g</sup> for the extension of a Patent.*

“If,” says Mr. Williams,<sup>h</sup> “the original inventor Williams.

<sup>1</sup> *Jones v. Pearce*, Web. P. R. 124.

<sup>2</sup> *Tennant's case*, Web. P. R. 125.

<sup>3</sup> *Arkwright's case*, Dav. Pat. Ca. 61; *Hill v. Thompson*, 8 Taunt. 375; S. C. 2 B. Moo. 424.

<sup>b</sup> *Carpenter v. Smith*, Web. P. R. 535.

<sup>c</sup> 2nd ed. 27.

<sup>d</sup> “It was the permitting inventions published in another country to be good subjects of Patents in this, that brought us all our trades.” (1851), Evid. 2365.

<sup>e</sup> *Beard v. Egerton* (1849), photograph, 8 C. B. 165; *Bloxam v. Elsee* (1825), 1 C. & P. 558, as to in trust for an alien enemy (?)

<sup>f</sup> *R. v. Prosser*, 11 Beav. 306.

<sup>g</sup> *In re Berry's Patent* (1850), 7 Moo. P. C. 189.

<sup>h</sup> *On Personal Property* (1853), p. 183.

should sell his secret to another, such other person cannot obtain Letters-patent for the invention in his own name; but the original inventor must obtain the Letters-patent and then assign them to the other"—a proposition involving principles utterly incompatible with practice, and one ultimately detrimental to the interests of the inventor, although put forward with the object of protecting him.<sup>d</sup>

Inventor in fact  
and in law.

The inventor, in point of fact, is, therefore, not identical with the inventor in point of Law. An attempt to discover the former from among the host of claimants to almost every discovery of importance, shows the necessity of avoiding altogether the introduction of an ingredient itself so undecided into a branch of Law in which there are so many varying elements. Those acquainted with the peculiarities of inventive genius know how little reliance can be placed upon their claims—and how apt all are to appropriate *bonâ fide*<sup>e</sup> the results of the labours of others. Mr. Brunel is of opinion,<sup>f</sup> that few valuable inventions have proceeded from schemers or professional inventors—the greater number have been from practical operatives and men of observation. Speaking of the Electric Telegraph,<sup>g</sup> Mr. Brunel says, “Messrs. Cooke and Wheatstone<sup>h</sup> were the first to put it into practical operation; but there are plenty of persons who have claimed, whether rightly or wrongly I cannot say, subsequent modifications, and the vast variety of apparatus which may be patented connected with the Electric Telegraph has led to their being under

<sup>d</sup> In *Hill v. Thompson*, 8 Taunt. 395, it is laid down, that if a servant make an improvement his master is not entitled to take out a Patent for it.

<sup>e</sup> Turner on Patents, 37.

<sup>f</sup> (1851) Evid. 1778.

<sup>g</sup> Evid. (1851), II. of Lords 1784.

<sup>h</sup> As to relative merit of *Cersted* and *Wheatstone*, see (1851) Evid. Sir D. Brewster, 2188.

the necessity of buying up an immense number of Patents. I believe you will find fifty people who say that they invented it also." "In nine cases out of ten," said another witness,<sup>1</sup> "if you conceive the principle of the invention, any intelligent workman may carry out the detail for you."

Attempts to assign the inventorship to the meritorious party have indeed been made in numerous instances, although attempt to view the matter on any narrower consideration than on public grounds has given rise only to confusion. "Though some one else," says Mr. Justice Cresswell,<sup>k</sup> "may have invented it also, although it *may have been in use before, yet if the plaintiff did not derive his information from the former use of it in this country, or from any person in this country, or from any source of information in this country, but in the manner specified, then he is in the eye of the Law an inventor*"—a decision clearly holding out a premium to ignorance. The interests of Society are, however, now admitted to be the leading consideration, and these are benefited more by reduction to practice than the theoretical discovery of principles. The objection to Dollond's Patent (achromatic telescope) was, that he was not the *inventor* of the new method of making object glasses, but that Dr. Hall had made the same discovery before him. But it was holden, that as Dr. Hall had confined it to his closet, and the public was not acquainted with it, Dollond was to be considered as the inventor."<sup>1</sup> "So far as relates to the interests of the public," said Tindal, C. J.,<sup>m</sup> "Berry has all the merits of the first inventor."

Public interest  
the main test.

Dollond's  
Patent.

<sup>1</sup> Evid. 746; F. W. Campin, P. A.

<sup>k</sup> *Newton v. Grand Junction Railway Company* (1845), 27 London Journ. 221.

<sup>1</sup> Buller, J., *Boulton v. Bull* (1795), 2 H. Bl. 470—487.

<sup>m</sup> *Beard v. Egerton* (1846), 3 C. B. 97, photographs.

*Tennant's case.*

In *Tennant's case*,<sup>o</sup> the public derived the benefit through him as completely as though he had himself discovered the principle. It was there endeavoured to upset the Patent, on the ground that some one had "suggested the idea." The admission, for a moment, of such an argument, introduces a whole multitude of difficulties. Occasionally, indeed, by a very pardonable sympathy with genius, judges have lost sight of the theory which refers everything to the interests of the State, in attempting to adjudicate between the conflicting claims of individuals, even where no question of fraud has been raised.

*Cornish v. Keene.*

In *Cornish v. Keene*,<sup>p</sup> the learned judge before-mentioned evinced a similar desire to descend to the personal merits of the Patentee. The Patent, he says, is granted as a reward of merit in the discovery as well as for the benefit received by the public; and although it is proved that it is a new discovery as far as the world was concerned, yet if anybody is able to show that the party who got the Patent was not the man whose ingenuity first discovered it,—that he had *borrowed it from A. or B., or taken it from a book* that was printed in England and which was open to all the world, then, although the public had the benefit of it, it would become an important question whether he was the first and original inventor of it. The connection of the two sources of information shows at once the non-recognition of the principles above laid down as ruling modern decisions. Society now declares that the addition of the wanting link shall be decisive of the claim to the whole chain.

*Howard's Patent.*

One of the most productive Patents ever granted was Howard's, for boiling sugar *in vacuo*. Its history is illustrative of the operation of inventive skill. The idea originated with Mr. Howard, who, with the assistance of

<sup>o</sup> Dav. Pat. Cas. 429; *Minter v. Wells*, chairs, Web. P. R. 131; *Bloxam v. Elsee* (1825), 1 C. & P. 558.

<sup>p</sup> (1835) Tindal, C. J., elastic fabrics, Web. P. R. 508.

Messrs. Boulton and Watt, perfected, as he conceived, its realization. It was tried, and proved an entire failure. A suggestion of a slight improvement by a German workman rendered the whole thing complete after a lapse of some time. The Patent was then worked, and ultimately produced 40,000*l.* or 50,000*l.* a-year.<sup>a</sup>

It is however not a matter of option whether the State will or not allot its favours according to individual merit.<sup>r</sup> Persons most conversant with the subject have declared their inability to decide upon it, and have shown the entire profit, so far as the public is concerned, from some of the most important inventions, to have been the result of improvement in the pettiest detail. It is impossible to define how far the *idea* or the practical realization of it forms the prominent part of the invention.<sup>s</sup>

As a reason for placing the importer on the same footing with the inventor with reference to the first use of new machinery, it was stated before the committee of the House of Lords, 1851,<sup>t</sup> that the first application of it in this country had always involved great outlay, and that, when once established, others can in many instances adopt it at vastly reduced expense. Prejudice against new inventions, although very materially modified by the spread of intelligence at the present day, is still a very material bar to the remuneration of the introducers of some.

Reasons for the law.

M. Say informs us that when the first cotton manu- Say.

<sup>a</sup> Evid. (1851), Fairrie.

<sup>r</sup> Evid. Campin, H. of Lords (1851), No. 746; *Minter v. Wells*, Web. P. R. 131; *Bloxam v. Elsee* (1825), 1 C. & P. 558; R. & M. 187; 6 B. & C. 169; 9 D. & R. 215. The auxiliary labour of Donkin in realizing the invention in the latter case was greater than that of most "inventors."

<sup>s</sup> *Barker v. Shaw*, Web. P. R. 126; *Hill v. Thompson*, 8 Taunt. 394.

<sup>t</sup> Evid. 2377, Prosser, C. E. See also Select Committee on Machinery (1831), p. 243; Babbage on Economy of Manufactures; Turner on Patents, 5.

factures were introduced into France, petitions from all the incorporated large towns, from merchants and silk weavers, were sent to Paris, clamouring in vehement terms against the "ungodly calico prints." Rouen, now the busiest of all the French cotton manufacturing places, was among the foremost; and the petition of the united three corporations of Amiens ended thus:—"To conclude, it is enough for the eternal prohibition of the use of printed calicoes that the whole kingdom is chilled with horror at the news of their proposed toleration. *Vox populi vox Dei.*" We now know that the cotton tissue has become one of the greatest blessings of our race, giving comfort, health and respectability to entire masses of men formerly doomed to tatters, filth and its fearful concomitants,—typhus and vice; and we know too cotton manufacture is one of the most lucrative branches of French industry.<sup>u</sup>

As an instance of the *practical* neglect of manufacturers to inquire into foreign manufactures, a case was cited by a witness, a Patentee (Mr. Roberts, C. E.),<sup>\*</sup> before the Committee in 1851, in which an invention openly used in France was unknown in Birmingham, where the article was largely manufactured. The improvement enabled them in France to do in a minute what in Birmingham could not be done in an hour. "In passing through Birmingham," said this witness, "I called upon a man who is considered the first in the trade there and showed him one of the articles. He seemed much excited. He put up his hand and said, 'If any man will tell me how that is done I will give him 100*l.*' When I afterwards told him it had been done at one blow, he said, 'We could not do such a thing without fifty blows and ten annealings.'"

Discoverer of a principle.

We have seen<sup>y</sup> that on the great preponderance of cases, as well as on general grounds, a "principle" is

<sup>u</sup> Lieber (1853), on Civil Liberty and Self-Government, 365.

<sup>\*</sup> (1851) Evid. 1286.

<sup>y</sup> Ante, p. 70.

not a good subject matter of a Patent. The discoverer of such a principle or property of matter cannot consequently have a right to its exclusive use, further than is necessary to secure him the monopoly of the objects to whose improvement it is applied. To treat this as beyond controversy in the presence of such respectable authority on the other side would be absurd, a very wide diversity of opinion having existed on the Bench upon this point. Such, however, appears to be the principle maintainable on general grounds, and best capable in practice of being fully acted out. "A person who discovers a principle," says Abbott, C. J.,<sup>2</sup> "and also some mode of carrying that principle into practice so as to produce or attain a useful effect or result, is entitled to protection *against all other modes of carrying the same principle into practice* for obtaining the same effect or result."

"*You cannot take out a Patent for a principle,*" says Alderson, B.<sup>3</sup> "You may take out a Patent for a principle coupled with the mode of carrying the principle into effect, provided you have not only discovered the principle, but invented some mode of carrying the principle into effect. But then you must start with having invented some mode of carrying the principle into effect; if you have done that you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated *by the jury* as piracy of your original invention."

An object identical with one already in public use, provided it be produced in an improved manner, may be the subject of a Patent, and the promulgator of the improvement a Patentee. "It has happened to me,"

<sup>2</sup> (1819) *Forsyth v. Rivière* (firearms), Web. P. R. 97; (1836) *Jupe v. Pratt*, Exch. (expanding tables), 144; (1829) *Crossley v. Beverley* (gas apparatus), Web. P. R. 113; (1841) *Neilson v. Harford* (iron), Web. P. R. 341.

<sup>3</sup> *Jupe v. Pratt* (1837), Exch. (expanding tables), Web. P. R. 146.



says Lord Ellenborough,<sup>g</sup> “*in the same morning to give, as far as I was concerned, my consent to the granting of three different Patents for the same thing: but the modes of attaining it were all different, and I thought I was entitled to receive them.*”<sup>h</sup>

Joint stock  
principle.

One important result of modern experience relative to Patents has been to abate the apprehensions formerly entertained of the effect of extensively introducing the Joint-Stock principle into trade. The mischief caused by gambling in transferable shares of bubble companies at the time of the South Sea project (A.D. 1720) was followed by the stat. 6 Geo. I. c. 18 (repealed by 6 Geo. IV. c. 91), reciting, that several undertakings or projects had been contrived and practised which manifestly tended to the common grievance, prejudice and inconvenience of great numbers of his Majesty’s subjects in their trade and commerce, and prohibiting, under severe penalties, the raising or pretending to raise transferable stocks without authority of Charter or Act of Parliament.

To prevent an evasion of the Statute, Letters-patent for inventions were placed under the same restriction; and Patents usually contained a proviso that if the Patentee should transfer and assign the benefit thereof to any number of persons exceeding five<sup>i</sup> (extended in 1832, with the consent of the Board of Trade, to twelve) the Patent should be void. Acts of Parliament were frequently passed for the purpose of relaxing the restrictions.<sup>j</sup>

“It is apparent,” said Best, C. J., in *Duvergier v. Fellowes*,<sup>k</sup> “from the facts disclosed by the conditions of this bond and from the Patents, that the scheme in which the parties to this action were engaged was one

<sup>g</sup> As Sir Edward Law, Attorney-General (1801).

<sup>h</sup> *Huddart v. Grimshaw*, Web. P. R. 92 (1803).

<sup>i</sup> *Bloxam v. Elsee* (1825), paper, 1 C. & P. 567; Holroyd on Patents, 137.

<sup>j</sup> Koop’s Patent (paper) was made assignable to not more than sixty; *Hesse v. Stevenson* (1803), 3 B. & P. 565.

<sup>k</sup> (1828) C. B. 2 M. & P. 413.

of those bubbles by which, to the disgrace of the present age, a few projectors have obtained the money of a great number of ignorant and credulous persons, to the ruin of those dupes and their families, and by which a passion for gambling has been excited that has been most injurious to commerce and to the morals of the people; of which any one must discover from reading these instruments, that the parties to them must be fully informed. It cannot be too well known that there is no place for persons engaged in such transactions in Courts appointed for the decision of civil cases. Although the Statute 6 Geo. I. c. 18, is in part repealed, the Common Law relating to such schemes is expressly reserved by the repealing Statute (6 Geo. IV. c. 91); and no one doubts that if it can be shown, as it easily may, that such schemes are mere traps and injurious to the public welfare, the forming of them is an indictable offence at Common Law."

The late Statute, however, has lightened Patent Law of a tremendous load,<sup>1</sup> and effectually swept away all doubt as to the applicability of this species of capital, by expressly enacting,<sup>m</sup> that "it shall be lawful for a larger number than twelve persons hereafter to have a legal and beneficial interest in Letters-patent."

Some circumstances of the inventor are however noticed by the Law in spite of the rule which directs Patent rights to be viewed only from the public side. By the Patent Law Amendment Act<sup>n</sup> provision is made for securing to the estate of the inventor the fruit of his exertions in the event of his dying during the interval between application and the grant of Letters-patent. Another instance in which the Law takes cognizance of the circumstances of the Patentee, notwithstanding

<sup>1</sup> *Duvergier v. Fellowes* (1828), 2 M. & P. 384; 10 B. & Cr. 826; 1 Cl. & Fin. 89; *Protheroe v. May*, 5 M. & W. 675; *Bloxam v. Elsee* (1825), 1 C. & P. 564; 6 B. & Cr. 169; 1 D. & Ry. 215.

<sup>m</sup> 15 & 16 Vict. c. 83, s. 36.

<sup>n</sup> 15 & 16 Vict. c. 83, s. 21.

its general adherence to larger grounds, is that in which the Patentee has endeavoured to keep the invention secret until secured by a Patent. Disclosure in confidence and under an injunction of secrecy, although the means of laying the matter fully before the public, will not invalidate the Patent<sup>m</sup> either as regards the subject matter or the inventor.

In *Smith v. Dickenson*<sup>n</sup> the defendant agreed, "under the penalty of breach of honour and 1,000*l.*," not to take any undue advantage of a communication made to him of an invention for which the plaintiff intended to take out a Patent, but notwithstanding obtained a Patent for it in his own name. It was afterwards agreed that the Patent should remain in the Defendant's name upon certain terms, which terms, however, the defendant subsequently repudiated, insisting on the invention as his own. In an action of *assumpsit* the jury found a verdict for the plaintiff for 300*l.*, the defendant agreeing to assign the Patent to the plaintiff for the remainder of the term at the defendant's own expense. The Court of Common Pleas was of opinion that the word "penalty" in the agreement effectually prevented them from considering the sum mentioned as liquidated damages.

*Morgan v.  
Seaward.*

In *Morgan v. Seaward*<sup>o</sup> it appeared, that, two months before the date of the Patent, two pair of the wheels were made for the plaintiff (the assignee of the Patent) at his own expense in his own factory, under the directions of the Patentee, who enjoined secrecy on the workmen concerned. The disclosure of the secret was held not to invalidate the Patent, there being sufficient evidence that the Plaintiff was at the time connected with the inventor

<sup>m</sup> *Smith v. Dickenson* (1804), Lord Alvanley, 3 B. & P. 630, C. B.; *Morgan v. Seaward*, 2 M. & W. 544 (confidential sale), Parke, B., Exch.; *Bentley v. Fleming* (1844), 1 C. & K. 587.

<sup>n</sup> (1804) 3 Bos. & P. 630 (spring for saddlegirths), C. B.

<sup>o</sup> (1837) Ex. paddlewheel, 2 M. & W. 562, Parke, B. See also *Bentley v. Fleming* (1844), card machine, 1 C. & K. 587.

and designed to take a share of the Patent. "A disclosure of the nature of the invention to such a person and under such circumstances," said Parke, B., "must surely be deemed private and confidential."

In the event of simultaneous applications the decision of the claims is left to the law officer of the Crown.<sup>1</sup>

Rival applica-  
tions.

As to property in an invention before it has become complete, the Law refuses to interfere. A contract to execute a work of invention cannot, it is clear, be enforced, although it may be negatively withheld from execution for other parties.<sup>2</sup> An inventor may, however, maintain an action for breach of an agreement<sup>3</sup> respecting an invention for which he proposes to take out a Patent.<sup>4</sup>

Incomplete in-  
ventions.

The principal interests in Letters-patent, subordinate to that of the Patentee, are those of the assignee, the licensee, and mortgagee of a Patent. On the principle of the illegality of general monopoly and the legal recognition of the rights of every subject to employ his capital and his labour as he will, the rights created by Letters-patent for inventions are limited to those expressly stated in the deed of grant.<sup>5</sup> The grant of the monopoly is to the inventor, "his executors, administrators and assigns," or, "such others as they shall agree with;" and provides, "that they and no others from time to time and at all times hereafter during the term of years herein expressed shall and may lawfully make, use, exercise and vend" the said invention.

Assignee,  
licencee, mort-  
gagee.

Limitation of  
the rights cre-  
ated by the  
grant.

The New Act imports a fresh, and, it is to be hoped, Registration.

<sup>1</sup> *Re Griffith's Patent ; Re Saunder's Patent* (1845), atmospheric railway tubes, 5 L. T. 141.

<sup>2</sup> *Clark v. Price*, 2 Wils. C. C. 157.

<sup>3</sup> See, as to a somewhat similar case, *Lumley v. Wagner* (1852), contract to sing, 1 De G. M. & G. 601, overruling *Kemble v. Keen*, 6 Sim. 333; and *Kimberley v. Jennings*, 6 Sim. 340.

<sup>4</sup> *Smith v. Dickenson* (1801), 3 B. & P. 630.

<sup>5</sup> *Duvergier v. Fellowes* (1828), 10 B. & C. 829.

very beneficial<sup>u</sup> feature into Patent Law, by the provision,<sup>v</sup> that "there shall be kept at the office for filing Specifications in Chancery a 'Register of Proprietors,' wherein shall be entered, in such manner as the Commissioners shall direct, the assignment of any Letters-patent, or of any share or interest therein, any licence under Letters-patent, and the district to which such licence relates, with the name or names of any person or persons having any share or interest in such Letters-patent or licence, the date of his or their acquiring such Letters-patent, share and interest, and any other matter or thing relating to or affecting the proprietorship in such Letters-patent or licence: and a copy of any entry in such book, properly certified,<sup>w</sup> shall be received in evidence in all Courts and proceedings, and shall be *prima facie* proof of the assignment of such Letters-patent, or share or interest therein, or of the licence or proprietorship as therein expressed." Until such entry, the grantee is to be deemed the sole and exclusive proprietor of the Letters-patent, and of all the licences and privileges thereby given and granted. The efficiency of the Registration, to the principle of which so fair a trial is offered, will depend much upon the first decisions on contested cases, and the extent to which the Registry books are deemed *conclusive* evidence as to the property.<sup>y</sup>

<sup>u</sup> As an illustration of the value of an authoritative register of Patents easily accessible, a witness (Fothergill, Evid. 1433) before the Committee in 1851 stated, that he had found by searching that there had been fifteen Patents taken out since 1843 for the same thing. They were all with regard to the same principle, and some of them the same process of applying the principle.

<sup>v</sup> 15 & 16 Vict. c. 83, s. 35.

<sup>w</sup> Subject to a stamp of five shillings. Erroneous entries in the Register may be expunged by an order of the Master of the Rolls of any of the Courts of Common Law in term time, or any judge thereof in vacation (15 & 16 Vict. c. 83, s. 37).

<sup>y</sup> See as to the somewhat analogous case of shipping, *Ex parte Yallop*, 15 Ves. 60, where the registry books were held to be conclusive

A Patent is assignable by deed or will. If the Patentee die intestate, it is assets in the hand of the executor.<sup>2</sup> It may also be seized and sold in execution by the sheriff under a *fieri facias*.<sup>a</sup>

Assignable by deed or will.

May be sold in *fi. fa.*

The terms of the grant prescribe no peculiar form of alienation of the property it creates, but places, to a certain extent, those whom the Patentee "agrees with," on the same footing with himself. The technical rule cited by some writers,<sup>b</sup> that things, which can only be granted or created by deed, can only be assigned by deed, is clearly inapplicable on analogy. Licences must, by the provisions of the letters, be under "the hand and seal" of the Patentee, and *à fortiori* it is argued, an assignment should be so too.<sup>c</sup> If, however, the licence be by deed, the revocation of it should also be by deed.<sup>d</sup>

The effect of Letters-patent is to put a prohibition upon the public with respect to certain things, subject, however, to a proviso for relaxation by the Patentee of such prohibition in favour of such other "as he may agree with." The effect of a licence is to remove such prohibitions, so far as the licensee is concerned. To impose *à priori* any arbitrary conditions<sup>e</sup> upon the contracts for such relaxation,<sup>f</sup> or to insist on any indefeasible vir-

evidence of the property upon the policy, even against the claims of creditors upon a joint purchase and various acts of apparent ownership within the Bankrupt Act, 21 Jac. I. c. 19, § 11; *Greswold v. Marsham* (1681), 2 Cha. Ca. 170; and see Plowden's *Impartial Thoughts upon the Beneficial Consequences of Inrolling* (1799), p. 36.

<sup>2</sup> *Ex parte O'Reily* (1790), *Italian Opera*, Lord Eldon, C., 1 Ves. jun. 118; *Hesse v. Stevenson* (1803), paper, 3 E. & P. 573.

<sup>a</sup> Webster on Patents (1811), *Law and Practice*, 23.

<sup>b</sup> *Duxergier v. Fellowes*, 10 B. & C. 829; *Hindm* (1846), 234.

<sup>c</sup> *Power v. Walker* (1814), *copyright*, 3 M. & S. 9.

<sup>d</sup> *Noy*, 4; *Winter v. Foweracres*, 2 Rol. 39; *Thompson v. Brown*, 7 Taunt. 656.

<sup>e</sup> *Hindm*. 240—3.

<sup>f</sup> "A licence is not really assignable," says Jervis, C. J. (*Bower v. Hodges* (1853), 22 L. J., C. B., 198). "The assignment acts only as an estoppel between the parties."

tue in the Patentee, is clearly calculated materially to prejudice the Patentee, by depriving his privilege of its marketable quality.

**Assignment.**

The insertion of a covenant by the Patentee to amend and disclaim in the matter of the Patent as and when directed by the assignee, and not otherwise, the assignee on his part covenanting to hold the assignor harmless from all consequences of such amendment and disclaimer, seems to be rendered necessary by the cases of *Fisher v. Dewick*,<sup>g</sup> *Spilsbury v. Clough*,<sup>h</sup> *Wallington v. Dale*,<sup>i</sup> and others, it which it has been held that the Patentee, after assignment, still retains the power of affecting the privilege by amending or disclaiming.<sup>j</sup>

**Covenants.**

In *Hesse v. Stevenson*<sup>k</sup> (Koop's Patent), there was a covenant by the assignor of certain shares in the Patent that he had good right to convey, and that he had not forfeited any right he might ever have had over the same. It was held, that the generality of the former covenant was not restrained by the latter. A Patentee who has conveyed away his interest is estopped in an action of infringement by his assignee from denying his title to convey.<sup>l</sup>

*Bower v. Hodges.*

“Licensing a person and his assigns,” said Maule, J.,<sup>m</sup> “is licensing him and all whom he shall license. You cannot say there is any particular form for passing a licence.” In *Baird v. Neilson*,<sup>n</sup> the agreement between a Patentee and licensee was upheld, notwithstanding the

<sup>g</sup> (1838), lace, Web. P. R. 265.

<sup>h</sup> 2 Q. B. 466.

<sup>i</sup> 19 L. T. 187, Exch. (1852).

<sup>j</sup> In the analogous case of a lease (*Doe v. Bateman*, 2 Barn. & Ald. 168), where the lessee demised the premises for a term co-extensive with his own, reserving rent and subject to certain conditions, no doubt seems to have been entertained that this was an assignment of his whole interest. (Platt on Leases, i. 12.)

<sup>k</sup> (1803), paper, 3 Bos. & P. 595.

<sup>l</sup> *Oldham v. Langmead* (1789), Lord Kenyon, Web. P. R. 291.

<sup>m</sup> *Bower v. Hodges* (1853), 22 L. J. (N. S.), C. B., 194.

<sup>n</sup> (1842), iron, 8 Cl. & Fin. 735.

introduction into it of matter which was not the subject of the Patent.

In a recent case,<sup>n</sup> the question as to the covenants implied by Law in a deed of licence, arose with reference to the assignment of a licence. A., there the Patentee of machinery for making iron pipes, granted by deed to B. and his assigns the exclusive licence to manufacture them, B. yielding a royalty of so much for every ton manufactured or sold by him or his assigns, and to account. B. subsequently assigned his interest in the licence to the plaintiff, who transferred it to M. and R., in trust for the defendants; and the defendants covenanted with the plaintiff to perform the covenants made by B. to A. in the first deed. It was held, that the covenant to account was no qualification of the covenants to pay the royalties, but merely auxiliary to it.<sup>o</sup>

Licence.  
Implied covenants.

In *Tielens v. Hooper*,<sup>p</sup> the deed of licence contained a covenant by the licensee to pay the royalties during the term of licence, and an agreement that in the event of the royalties not being paid, it should be lawful for the said plaintiff, by writing signed by him and indorsed on the said indenture or duplicate thereof, to declare that the said indenture and the powers and licence thereby granted should cease and determine. It was held, that this was not an absolute covenant on the part of the defendant to pay the minimum royalty during the whole term, but an alternative covenant enabling the plaintiff to put an end to the licence on non-payment of the stipulated sum by the defendants. This case would appear to establish the position, that non-payment of the rent by the licensee will not work a forfeiture of the lease, without express stipulation to that effect, a position removed from any assistance that might arise from the

<sup>n</sup> (1853), iron tubes, *Bower v. Hodges*, 22 L. J., C. B., 194.

<sup>o</sup> See also *Line v. Stephenson*, 5 Bing. N. C. 183; S. C. 7 L. J. (N. S.), C. B., 263.

<sup>p</sup> (1850) 5 Exch. 830.



analogy with regard to similar relations between a landlord and his lessee. In the case of a lease, with a condition for re-entry for non-payment of rent, in the event of the rent being in arrear, the lessor may re-enter, but when the lessee pays or tenders upon the land all the arrears, he may enter again. The lessor, however, by such re-entry gains no estate, but an interest by the agreement of the parties to take the profits in the nature of a distress. Here the profits shall not go in part satisfaction of the rent, but it is otherwise if the lessor was to hold the land till he was paid by the profits thereof.<sup>3</sup> Again, if there be a lease for years rendering rent,<sup>4</sup> with condition that if the lessee assign his term, the lessor may re-enter, and the lessee assign without the knowledge of lessor, the acceptance by the lessor of rent from the assignee does not extinguish the right of re-entry in the lessor.

Some writers have attempted to divide licences under various heads, as general, exclusive, revocable and irrevocable, and the like. Such classification, however, seems useless. The nature of the property in the Patentee suggests the conditions on which he can sub-divide the interests it confers. The analogy of a term before remarked, furnishes considerable assistance to our consideration of this part of the subject. A licence of the exclusive use of the invention, over all parts of the realm mentioned in the Patent, amounts to an assignment to the licensee, in the same way that a demise by a lessee of the premises comprised in his lease, for the whole of the term granted to him, amounts to the assignment to the underlessee.<sup>5</sup>

The distinction, says Mr. Turner,<sup>6</sup> as to exclusiveness is material; without it the licence only removes a pro-

<sup>3</sup> Co. Litt. 203.

<sup>4</sup> 3 Rep. 65; Cro. Eliz. 553.

<sup>5</sup> *Palmer v. Edwards*, 1 Day, 187. n.; *Parminster v. Webber*, 8 Taunt. 593; 2 B. Moo. 656; Shep. Touch. 266; Hindm. 241.

<sup>6</sup> On Patents, 68.

hibition, but with it confers a right. Covenants for payment are essential, and for annulling the licence on a certain extent of arrear. A mere licensee cannot, it appears, in any case maintain an action for an infringement of the Patent.<sup>u</sup>

In *Warwick v. Hooper*<sup>x</sup> the plaintiffs, the assignees of a Patent, granted a licence to the defendant to use the Patent upon the terms of his paying an annual rent of 2,000*l.* to be made up at the end of each year, and reserved to themselves the power of determining the licence in the event of default being made in payment of this rent. The defendant failed in paying the rent, but the Plaintiffs notwithstanding for several years allowed the defendant to use the Patent, and received from him a less annual sum than that stipulated. At length, however, they determined the licence, having subsequently to the expiration of the previous year received from the defendant's payment on the footing of the reduced rent:— Held, that by so doing the plaintiffs had elected not to treat the previous breach as a forfeiture of the licence, and that consequently they were not entitled to an injunction restraining the defendant from using the Patent.

*Warwick v.  
Hooper.*

In *Pidding v. Franks*,<sup>y</sup> on a bill by the Patentee against the equitable assignees of a licence, praying an account and an injunction to restrain them from committing breaches of the assignor's covenants in the deed of licence, the assignees admitted their character, but stated that they had discontinued to use the Patent, and that it was invalid. Upon a motion for an injunction, it was ordered to stand over, with liberty for the plaintiff to bring such action as he might be advised. The Court refused to put the equitable assignees of the licence under terms to admit the execution by them of a deed

<sup>u</sup> Per Lord Abinger, in *Derosne v. Fairie* (sugar), Web. P. R. 154.

<sup>x</sup> (1850), knitting machinery, 3 M. & G. 60.

<sup>y</sup> (1819), self-clarifying coffee, 13 Jur., Ch., 593.

containing covenants similar to those by their assignor, or to admit the validity of the Patent.

A Patentee may file a bill against a licensee and his partner for an account and *an injunction* to restrain them from using the invention, if they should dispute his right to the payments reserved by the deed of licence, on the ground that the licence had become void.<sup>2</sup>

Mortgage.

In the case of a bankrupt<sup>a</sup> who had mortgaged his Patent *remaining in the notorious use of it*, Lord Eldon, C., inclined to think the right passed to his assignees, and that the right of the mortgagee was not good as against creditors. A case was directed to be stated for the opinion of the King's Bench, but does not appear ever to have been argued.

<sup>1</sup> *Haddon v. Smith* (1847), railway wheels, V. C., 16 Sim. 43.

<sup>2</sup> *Ex parte Granger* (1812), Evans's Statutes, vol. iv. p. 67, n.; Godson, 2nd ed. 225; Deacon on Bankruptcy, by De Gex, i. 414.

## CHAPTER IV.

## THE SPECIFICATION.

THE consideration for the grant of Patent privileges is, as we have seen, that the invention shall at the expiry of the term become the property of the public; and for this purpose the early Patents contain a clause<sup>a</sup> requiring the inventor "to take apprentices and teach them the knowledge and mystery of the said new invention," a practice which, as Coke suggests, led to the adoption of fourteen years as the term of privilege, "that others might by seven years' apprenticeship and seven years' practice acquire the invention."

The considera-  
tion for the  
grant.

Former prac-  
tice.

Early in the last century a very important change<sup>b</sup> was introduced by the substitution, on the authority of the Law officers of the Crown, of the present channel for affording the public the required information. It consists of an instrument, termed the Specification, under the hand and seal of the Patentee, required to be filed in the Court of Chancery, describing the nature of the invention and the means necessary to its employment.<sup>c</sup>

Modern  
method.

The Act<sup>d</sup> confirming the Patent of the unfortunate Lombe contains a proviso "that his Majesty, under sign manual, may appoint two persons to inspect said three engines, and to take a perfect and exact model thereof,

Lombe's  
Patent.

<sup>a</sup> Scobell's Collection of Acts and Ordinances during the Commonwealth: Buck's Patent (1651); Web. P. R. 36.

<sup>b</sup> Web. P. R. 8, n.; Godson, 2nd ed. 108; Holroyd (1830), 100.

<sup>c</sup> The first Patent in which a specification was required appears to be that of John Nasmyth, 1st April, 1712; (1851) Evid. 1753, Woodcroft

<sup>d</sup> 5 Geo. II. c. 8; Web. P. R. 38 (1719), organzine silk.

and to deposit the same in such place as shall be appointed, to secure and perpetuate the art of making the like engines for the advantage of the kingdom.”

Difficulty of  
preparing  
Specifications.

Two objects.

The difficulty of preparing this important document is very great,<sup>e</sup> and materially increased by the indecision before alluded to as to the prominent features of Patent Law, more especially the nature of the subject matter. The safest guide is to keep the objects of the Specification constantly in view. These, as determined by decisions, are two,—to afford a full disclosure of the invention and to furnish a statement of the claim made upon the public in respect of it by the Patentee. It contains therefore two distinct parts,—a description of the invention as perfected and an account of the means by which the perfection is produced.

For a document of so varying a kind<sup>f</sup> it is evidently impossible to prescribe any but the most general rules. A rough drawing may explain some with perfect accuracy,<sup>g</sup> an elaborate description and reference to esta-

<sup>e</sup> (1851) Evid. Lloyd, II. J. 2721.

<sup>f</sup> The rules here given are for the complete Specification, unless the contrary be expressed.

<sup>g</sup> Models are not received at the Commissioners' Office. In *Bloxam v. Elce* (1825), paper, 1 C. & P. 568, it was contended that a Specification could not be made by drawings alone; it must be made by apt words intelligible to mechanics. “I take it to be clear,” says Lord Eldon (*Ex parte Fox* (1812), steam engine, 1 V. & B. 67), “that a man may, if he chooses, annex to his Specification a picture or a model descriptive of it; but his Specification must be in itself sufficient, or, I apprehend, it will be bad.” In the United States the requisites for the Specification are defined by Statute. “Before any inventor,” says the Act of Congress of 1836, § 6, “shall receive a Patent for any new invention or discovery, he shall deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using and compounding the same, in such full, clear and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, con-

bished principles of science or known rules of trade may be necessary for others.<sup>5</sup> Its object, however, if steadily kept in mind, will serve to point out two qualities indispensable to it. It must be intelligently descriptive, and must be in perfect good faith. *Suppressio veri* or *suggestio falsi* are both fatal to the grant, as obtained by fraud upon the Crown.

The establishment of any one case as a precedent for another is clearly impossible in the interpretation of this instrument. In *Derosne v. Fairie*,<sup>h</sup> it was decided that “an inaccurate use of terms of art will not vitiate the Patent”—a decision manifestly inapplicable to most cases from the very object of the Specification. In *R. v. Metcalfe*,<sup>i</sup> Lord Ellenborough remarked, that “the meaning attached by the usage of trade to the term employed, if differing from its ordinary use, was to be used as the key of the Specification. In its interpretation reference must of course be had to the state of science and general knowledge at the time of its being filed.”<sup>k</sup> Another in-

No set form.

struct, compound and use the same; and in case of any machine he shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions, and shall particularly specify and point out the part, improvement or combination which he claims as his own invention or discovery. He shall furthermore accompany the whole with a drawing or drawings, and written references where the nature of the case admits of drawings, or with specimens of ingredients, and of the composition of matter sufficient in quantity for the purpose of experiment where the invention or discovery is of a composition of matter; which descriptions and drawings, signed by the inventor and attested by two witnesses, shall be filed in the Patent Office; and he shall moreover furnish a model of his invention, in all cases which admit of a representation by model, of a convenient size to exhibit advantageously its several parts.”

<sup>5</sup> *Beard v. Egerton* (1846), photographs, 3 C. B. 97.

<sup>h</sup> (1833) Exch., sugar, 1 Gale, 109.

<sup>i</sup> 2 Stark. N. P. 249; Phillips on Pats. 230.

<sup>k</sup> *Crossley v. Beverley* (gas-meters), 3 C. & P. 513; 9 B. & Cr. 63; M. & M. 283; Web. P. R. 106.

stance of the danger of applying *dicta*, with reference to special facts, to general cases, is that of Tindal, C. J., in *Haworth v. Hardcastle*.<sup>1</sup> "A Patentee is not presumed to claim things which *he must know to be in use*."

State of public knowledge.

The sufficiency of Specifications depends upon the amount of the knowledge presupposed in the public. In recent cases the decisions have proceeded on the grounds of common sense. "The meaning of the Specification," said Lord Mansfield,<sup>m</sup> "is, that persons of *reasonably competent skill* may be enabled therefrom to work the Patent, for probably no sort of Specification would enable a ploughman, ignorant of the whole art, to make a watch." "If," says Grose, J.,<sup>n</sup> "the Specification be such as to enable *artists* to adopt the invention and make the manufacture, it is sufficient." "The modern practice of interpreting a Specification," said the learned Chief Baron in a recent case,<sup>o</sup> "differs from that which recently prevailed. If it is intelligible to workmen, although not logically correct, *as long as no doubt exists as to the meaning of the Patentee*, it must be held to be good."

Specification must be full.

*The invention must be so described as to place the public on a footing of equality with respect to it with the Patentee.*<sup>p</sup> If a machine, it should be capable of construction, if the result of a chemical process, it should be attainable, by all competent persons in the branch of manufactures to which it belongs, by following the Spe-

<sup>1</sup> 1 Bing. N. C. 182; Web. P. R. 481. See also *Beard v. Egerton* (1847), photographs, 2 Car. & Kir. 667.

<sup>m</sup> *Liardet v. Johnson*, 1778, Bull. N. P. 76, cited in *Harmar v. Playne*, 11 East, 107, per Ellenborough, C. J.

<sup>n</sup> *Hornblower v. Boulton (in error)*, 1799, 8 T. R. 95. See also *Neilson v. Harford* (1811), iron, Exch.

<sup>o</sup> *Tetley v. Easton and Amos* (1853), N. P. Rep. Arts (centrifugal pump).

<sup>p</sup> *R. v. Wheeler* (1819), 2 B. & Ald. 345; *Arkwright v. Nightingale* (1778), Web. P. R. 61.

cifications.<sup>9</sup> It must contain every improvement, with regard to the invention, in practice by the Patentee at the date of its execution.<sup>r</sup>

A petition<sup>r</sup> was presented without effect (*Ex parte Koops*<sup>s</sup>) to dispense with the enrolment, or that some provision should be made to prevent the Specification from being made public, suggesting the danger of foreigners obtaining copies of the Specification in consequence of the enrolment. In some instances, however, the Legislature permitted the Specification to be concealed. An Act<sup>t</sup> to this effect was obtained in the case of an invention,<sup>u</sup> purporting to secure to the state in time of war the benefit of a most important discovery. The Specification was thereby ordered to be deposited in the Court of Chancery, to be kept secret for fifteen months, to be produced only by order of the Lord Chancellor, and by him examined whenever occasion required.

Specifications open to the public.

The Commissioners are, under the present Act,<sup>v</sup> to cause true copies of all Specifications to be open to the inspection of the public at their office, and at an office in Edinburgh and in Dublin.

In *R. v. Arkwright*,<sup>w</sup> Mr. Justice Buller lays down the following rules as to Specifications with reference to the

*R. v. Arkwright.*

<sup>9</sup> *Turner v. Winter* (1787), Dav. Pat. Ca. 147; *Morgan v. Seaward* (1836), Web. P. R. 175, Alderson, B. (paddlewheels); *Liardet v. Johnson* (1778), Web. P. R. 54, n.; Carp. i. 35, Mansfield, C. J.; *Campion v. Benyon* (sailcloth), 4 B. Moo. 71; *Bovill v. Moore* (1816), lace, Dav. Pat. Ca. 400.

<sup>r</sup> *Crossley v. Beverley* (1829), gasometers, 9 B. & Cr. 63; *Jones v. Heaton*, Web. P. R. 404, n., per Tindal, C. J.; *R. v. Arkwright* (1785), Dav. Pat. Ca. 61; *Wood v. Zimmer* (1813), verdigris, 1 Holt, N. P. 58; *Savory v. Price* (1823), N. P., seidlitz powders, 1 Ry. & Moo. 1.

<sup>s</sup> (1802), paper, 6 Ves. 599, Lord Eldon.

<sup>t</sup> 53 Geo. III. c. 179.

<sup>u</sup> Godson, 2nd ed. 179. See *Lucy's case*, 29 Law J. (N. S.) 250, a new mode of preparing flax and hemp.

<sup>v</sup> 15 & 16 Vict. c. 83, s. 29.

<sup>w</sup> (1785) Bull. N. P. 77; Dav. Pat. Ca. 61.



first point:—"A man, to entitle himself to the benefit of a Patent of monopoly, must disclose his secret and specify his invention in such a way that others of the same trade, who are artists, may be taught to do the thing for which the Patent is granted, by following the Specification, without any new invention or addition of their own. He must so describe it that the public may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the Patentee himself uses it;<sup>t</sup> and therefore if the Specification describe many parts of an instrument or machine, and the Patentee himself uses only a few of them, or does not state how they are to be put together or used, the Patent is void. If the Specification be in any part of it materially false or defective, the Patent is against Law and cannot be supported.

In a recent case<sup>u</sup> a very dangerous step, which cannot, however, be relied upon, was taken towards relaxing the obligations of the Patentee. It was there held, upon an issue denying the novelty of a patented invention, the plaintiff is not concluded by his Specification, but may *give other evidence* as to what the invention is.

*Bovill v.  
Moore.*

In *Bovill v. Moore*,<sup>v</sup> the maxim of Law was thus stated by Gibbs, C. J.—"A Patentee who has invented a machine useful to the public, and can construct it one way more extensive in its benefit than in another, and states in his Specification only that mode which would be least beneficial, reserving to himself the more bene-

<sup>t</sup> *Liardet v. Johnson* (1778), Bull. N. P. 76; *Turner v. Winter* (1787), 1 T. R. 602; *Boulton v. Bull* (1795), 2 H. Bl. 481; *Harmar v. Playne* (1809), K. B. (woollen cloth), 11 East, 101; *Wood v. Zimmer* (1813), verdigris, Holt's N. P. C. 38; *Bovill v. Moore* (1816), Dav. Pat. Ca. 400; *Hill v. Thompson* (1817), 2 Taunt. 393; *R. v. Wheeler* (1819), 2 B. & A. 345.

<sup>u</sup> *Bateman v. Gray* (1853), Exch. (valves and plugs), 1 C. Law Rep. 512.

<sup>v</sup> (1816), lace, Dav. Pat. Ca. 400.

ficial mode of practising it; although he will so far have answered the Patent as to describe in his Specification a machine to which the Patent extends; yet he will not have satisfied the Law by communicating to the public the most beneficial mode he was then possessed of for exercising the privilege granted to him. \* \* \*

But the validity of the Patent will not be affected by an improvement made after the Patent is obtained, though the Patentee will have added to his original merit of invention, the further merit of being able to use his own invention more beneficially than the Patent points out." In *Electric Telegraph Company v. Brett*<sup>w</sup> it appeared in evidence that after the grant of the Letters-patent it was discovered that a large portion of the wire originally used might be dispensed with; yet the Patent was upheld, and the use of an improvement on it<sup>x</sup> was held to be an infringement on the rights of the Patentees, on the ground apparently that the Patentee had furnished the best means known to him.

<sup>w</sup> (1851) 10 C. B. 838.

<sup>x</sup> The principle of compelling a Patentee to record his improvements or alterations appears to be adopted in the French Law of Patents, 1 Jan. 1791, by the 16 Art., No. 2, of which it is declared, "That every inventor convicted of having used in his manufactures secret means which were not detailed in his description, or of which he shall not have made a declaration to cause them to be added to those given in his description, shall forfeit his Patent;" and the practice of making such declaration of addition is laid down by Arts. 6 & 7, Tit. 2, of the Law of 25 May, 1791. (Rep. Com. Patents, App. 223—226.)

By the American Law, also (Act of 4 July, 1836, § 13), "when a Patentee is desirous of adding the description and Specification of any new improvement of the original invention or discovery which shall have been invented or discovered by him subsequent to the date of his Patent, he may (like proceedings being had in all respects, as in the case of original applications), and on the payment of fifteen dollars" (the tax on an original Patent being thirty) "have the same annexed to the original description and Specification, and the same shall thereafter have the same effect in Law, to all intents and purposes, as though it had been embraced in the original description and Specification."

*Harmar v. Playne.*

In *Harmar v. Playne*,<sup>y</sup> it was objected, that the Specification included, without discriminating it, the improvements effected by a former Patent. The description, however, was upheld as a sufficient conformity with the requirements of the Letters-patent. The Specification being enrolled, was held to be public information, although, until very recently, this source of information was practically inaccessible to the public.

Intention of the legislature.

When we reflect upon the sources of English Legislation, it may seem somewhat whimsical to speak of the *intentions* of the Legislature. The judges are, however, by legal fiction, presumed the depositories of such intention, as well as of the maxims of the Common Law.<sup>z</sup> In the case of Patents, this has been merely synonymous with the private conviction of the judge. "The aim of the Legislature in granting Patents," observes Mr. Justice Grose,<sup>a</sup> "is obvious. On the one hand it was to encourage ingenious artificers and able and studious men to invent and bring forward for the use of the public new manufactures, the produce of their own ingenuity, by holding out to them the reward of fourteen

Grose, J.

<sup>y</sup> (1809) 11 Exch. 101; 14 Ves. 130, K. B. (woollen cloths), Lord Ellenborough, C. J.; *Tetley v. Easton* (1853), Q. B. (centrifugal pump), 22 L. T. 134; *R. v. Else* (1785), ground lace, Bull. N. P. 76; 11 East, 109, n.; *Cochrane v. Smethurst* (lamp), 1 Stark. 205, Le Blanc; *Holmes v. London and North Western Railway Company* (1852), turntables, 20 L. T. 112; *R. v. Metcalf* (1817), brush, 2 Stark. 249, Ellenborough, C. J.

<sup>z</sup> "The rules of the Common Law," says Mr. Baron Parke, "are clear and well understood, and they have the incalculable advantage of being capable of application to new combinations of circumstances perpetually occurring, which are decided when they arise by inference and analogy to them, and upon the principles on which they rest." "To reduce," says Mr. Justice Talfourd, "unwritten Law to Statute is to discard one of the greatest blessings we have for ages enjoyed in rules capable of flexible application." (Sessional Papers, ordered to be printed 9th February, 1854; *Sharman's case* (1854), per Williams, J., Cr. Ca. Res. 228.

<sup>a</sup> *Hornblower v. Bolton*, 8 Term Rep. 97—106 (*in error*), sup. 104.

years' monopoly; on the other hand to secure to the public the benefit of the discovery, by causing to be enrolled a complete description<sup>a</sup> of the thing to be done and the manner of doing it, that others might be fully informed of it, and, at the end of the fourteen years, to be enabled to work or make the manufacture of which the Patentee was the inventor."

The most fatal objection to the claims of the Patentee are however those grounded on the suspicion that he has not made the disclosure in good faith.<sup>b</sup> In *R. v. Arkwright*<sup>c</sup> it was contended that some articles inserted were immaterial and introduced solely for the purpose of puzzling and perplexing. In *Savory v. Price*,<sup>d</sup> Abbott, C. J., remarked :—"By reading the Specification we are led to suppose a laborious process necessary to the production of the ingredients, when in fact we might go to any chemist's shop and buy the same things ready made. The public are misled by this Specification." "Where the disclosure is not fully made, the Court ought to look with a very watchful eye to prevent any imposition on the public."<sup>e</sup>

Good faith indispensable.

Honesty of intention will not however be allowed to remedy material defects in the description, however *bonâ fide* introduced. "It is obvious," said Abbott, C. J., in *R. v. Wheeler*,<sup>f</sup> "that if the Patentee has not invented the matter or thing of which he represents himself to be the inventor, the consideration of the Royal grant fails, and the grant consequently becomes void; and this will not be the less true if it should happen that the Patentee

Good faith not sufficient.

<sup>a</sup> The obscurity of Watt's Specification is said to have secured him for thirty years after the expiration of his Patent in the exclusive enjoyment of his invention. (Smith's Epit. App. 44.)

<sup>b</sup> *Neilson v. Harford* (1841), Web. P. R. 341, Alderson, B.; *Sturtz v. Delarue* (1828), Lyndhurst, L. C., 5 Russ. 322.

<sup>c</sup> (1785) Web. P. R. 71.      <sup>d</sup> 1 Ry. & Moo. 1 (seidlitz powders).

<sup>e</sup> Per Butler, J., *Turner v. Winter*, whitelead (1787); Dav. Pat. Ca. 147.

<sup>f</sup> (1819) 3 B. & Ald. 349.

has invented some other matter or thing of which upon a due representation thereof he might have been entitled to a grant of the exclusive use." "Unlearned men," said Lord Kenyon, C. J.,<sup>g</sup> "look at the Specification and suppose everything new that is there. If the whole be not new it is hanging terrors over them." "If," says Lord Brougham, "the Crown be deceived as to the originality of the grant, the Patent is void; but the Patentee will equally lose the benefit if he honestly but mistakenly claim as original any part that is not so."<sup>h</sup>

Wide claims.

The attempt to include a larger space by mere generality of wording has in many instances proved fatal to the Patentee. In *Crompton v. Ibbotson*<sup>i</sup> the Specification contained these words:—"The invention consists in conducting paper by means of a cloth or cloths against a heated cylinder, which cloths *may be made of any suitable material, but I prefer it to be made of linen warp and woollen weft.*" The Specification was held bad, as tending to mislead, it being proved that no other known substance could be substituted for that which the Patentee said he *preferred*.

Studied ambiguity.

In *Turner v. Winter*<sup>k</sup> an ambiguity in the Specification avoided the Patent. In that case Ashurst, J., says:—"It is incumbent on the Patentee to give a Specification of the invention in the clearest and most unequivocal terms of which the subject is capable; and if it appears that there is any unnecessary ambiguity<sup>l</sup> affectedly introduced

<sup>g</sup> *Bramah v. Harcastle* (1789), Holroyd, 81.

<sup>h</sup> (1821), chain cable, 4 B. & Ald. 541; *Brunton v. Hawkes* (1835, June 3rd), H. of Lords, Hans. 28, 472.

<sup>i</sup> (1828), paper-making, K. B., Dan. & Lloyd, 33.

<sup>k</sup> 1 T. R. 602.

<sup>l</sup> Mr. Hindmarch (*Observations on the Defects of the Patent Law* (1851), p. 39) thus ably discloses the source of this ambiguity. "*Delusive Specifications are enrolled almost daily . . . . It is a very common practice to describe the whole subject to which the invention relates, the particular nature of the invention being mentioned in as general terms as possible. No particular claims are inserted, or, if in-*

into the Specification, or anything which tends<sup>m</sup> to mislead the public, in that case the Patent is void. And Buller, J., adds:—"If the Patentee could only make the colour with two or three of the ingredients specified, and he has *inserted others which will not answer the purpose*, that will avoid the Patent." "A Specification," says Abbott, C. J., "which casts upon the public the expense and labour of experiment and trial is undoubtedly bad."

The publication of Provisional Specifications recently agreed upon introduces another material difficulty into the position of the Patentee, since its harmony with the Title<sup>o</sup> and complete Specification has at one and the same time to be kept constantly in view.

One very important improvement in the Law lately effected in favour of the Patentee, is the removal of the danger to which he was formerly exposed from the logical accuracy required in the Title, and its exact coincidence

Danger of inconsistent Title.

inserted, made as indefinite as possible, and every one reading the Specification is left to put his own construction upon the instrument, and, if he can, discover to what invention the Patent relates . . . . . The difficulty is much increased by Specifications *purposely framed in ambiguous language by persons who devote their attention to the subject*. Patentees may avail themselves of the skill of such persons, so as to give to the public the smallest amount of information which is deemed safe; and if the validity of the Patent or the Specification should ever come into question, *the person employed to draw the Specification becomes a most convenient witness, capable of proving the validity of the Patent in the most satisfactory manner possible.*"

<sup>m</sup> *Hill v. Thompson* (1817), 3 Mer. 622; *Brunton v. Hawkes* (1821), chain cable, 4 B. & Ald. 541; *R. v. Wheeler* (1819), malt, Web. P. R. 622; 2 B. & A. 345; *Walton v. Bateman*, Web. P. R. 622.

<sup>n</sup> *R. v. Wheeler* (1819), *sci. fu.*, 2 B. & Ald. 349.

<sup>o</sup> *R. v. Metcalf* (1817), 2 Stark. 249; *Arkwright v. Nightingale* (1781), Dav. Pat. Ca. 37; Web. P. R. 61; *Cochrane v. Smethurst*, 1 Stark. 205 (lamp); Dav. Pat. Ca. 354; *R. v. Wheeler* (1819), 2 B. & Ald. 349; *Sturtz v. Delarue* (1828), copperplate, 5 Russ. 322. See the recent case of *Hancock v. Noyes* (1854), waterproofing substance, 23 L. J. 110, Exch.

with the Specification of the Patent. If the Title embraced objects<sup>p</sup> which the Specification left undescribed, it was too large; if it excluded<sup>q</sup> any that were mentioned in that instrument, it was too small. In either case, if an inference could by any ingenuity be drawn prejudicial to the nicest agreement of the two, the Patentee was overthrown.<sup>r</sup> Recent cases have, however, relaxed the rigour of the rule. In *Cook v. Pearce*<sup>s</sup> it was established that the inclusion of objects not contemplated by the Specification was not of itself a ground for avoiding the Patent;<sup>t</sup> and in *Neilson v. Harford*<sup>u</sup> it was held, that ambiguity in a Title will not invalidate a Patent, provided it be explained in the Specification. The Title, in fine, should be the expression of the subject-matter, so as fully to cover the invention. "It must give," in the words of Lord Lyndhurst,<sup>x</sup> "some idea, and so far as it goes, a true idea, of the alleged invention, though the Specification may be brought in aid to explain it."

Requisites of Title.

Duty of the Law Officer.

The duties assigned by the Act<sup>y</sup> to the Law Officer are such as, if competently discharged, would relieve the Patentee from the real grievances under which he has

<sup>p</sup> *Cochrane v. Smethurst* (1816), lamp, Dav. P. C. 354.

<sup>q</sup> *R. v. Wheeler* (1819), 2 Barn. & Ald. 349; *R. v. Metcalf*, 2 Stark. 249.

<sup>r</sup> *Gibson v. Brand* (1841), silk, 4 Man. & G. 179.

<sup>s</sup> Q. B. (carriage shutters), 13 L. J. 189, Q. B.

<sup>t</sup> *Cook v. Pearce* (1843), carriage shutters, 7 Jur. 499; *Neilson v. Harford* (1841), per Abinger, C. B. In *Croll v. Edge* (1850, C. B., 14 Jur. 553) the title of the Patent, which was declared void, was for "certain improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." A sugar Patent is said to have escaped the caveat set to watch it by entitling itself "a mode of treating vegetable substances." (Turner, 35.)

<sup>u</sup> (1841) Web. P. R. 341; (1843) 8 M. & W. 806.

<sup>x</sup> *Sturtz v. Delarue* (1828), copperplate printing, 5 Russ. 322; and see per Parke, B., *Newton v. Vaucher* (1851), soft metal packing, 6 Exch. 859; *Househill Company v. Neilson* (1843), iron, Web. P. R. 678.

<sup>y</sup> 15 & 16 Vict. c. 83, s. 8.

hitherto been oppressed, arising from inapt Titles and Specifications. By it he is to “be satisfied that the provisional Specification describes the nature of the invention;” and a proviso is made, that, “in case the Title of the invention or the Provisional Specification be too large or insufficient, it shall be lawful for the Law Officer to whom the same is referred, to allow or require the same to be amended.” The Provisional Specification must state distinctly and intelligibly the whole nature of the invention, so that the Law Officer may be apprised of the improvement, and of the means by which it is to be carried into effect.<sup>2</sup>

The Specification should further, it appears, point out clearly the extent of the improvements claimed to be effected by the Patentee.<sup>3</sup> This is obviously quite different from simply bringing the result of the invention to public knowledge, and is exacted rather as a check upon the Patentee, than for the information of society at large. “Every Patent,” says Dallas, J.,<sup>b</sup> “being a monopoly, that is, an infringement of public right, and the Specification having for its object to give the public warning of the precise extent of the privilege conferred on the Patentee, the Court is bound to require that such warning should be clear, and accurately describe what the inventor claims as his own.”

Claim of the Patentee.

The improvement effected by the Patentee must be accurately described. The Specification must contain such a description of it as shall enable persons versed in the particular branch of art to adopt it in as beneficial a manner as the Patentee himself; and if, on a fair interpretation, its meaning is equivocal, the Patent is void.<sup>c</sup> If the invention be an improved machine, the Patentee must be careful not to claim the invention of the original

Must be accurately stated.

<sup>2</sup> Second Set of Rules and Regulations, dated 15 Oct. 1852.

<sup>3</sup> *R. v. Else* (1785), ground lace, Dav. Pat. Ca. 145.

<sup>b</sup> *Campion v. Benyon* (1821), sail cloth, C. B., 3 B. & B. 5.

<sup>c</sup> *Hastings v. Brown* (1853), windlass, Q. B., 1 E. & B. 454.



machine.<sup>d</sup> “The policy of an inventor,” says Tindal, C. J.,<sup>e</sup> “is to ask for a Patent for what he has invented, and not to fence himself about with wide claims.”

Co-extensive  
with the im-  
provement.

As the description must be co-extensive with the invention, the “claim” must be co-extensive with the improvement. In *Macfarlane v. Price*,<sup>f</sup> the description of the invention was correct, but the claim included improvements larger than those effected by the Patentee.

Principle of the  
improvement.

The importance of the word “principle”<sup>g</sup> is the point which enters into the question when considering the inventor’s “claim.” His claim is not only to the monopoly of the finished article, but all right to the benefit of the discovery he has made, so far as it is applicable to the improvement of that article. His discovery is in general that of a principle or law of matter, a process, mode, method or system; and it is the application of these, in so far as they have reference to the invention, from which the public is debarred. In *Forsyth v. Revière*,<sup>g</sup> the Specification, after describing the improvement, proceeded as follows: “I have hereunto annexed drawings or sketches exhibiting *several constructions*, which may be made and adopted, *in conformity with the foregoing plan and principles, out of an endless variety* which the subject admits of.”

The term “principle,” said Mr. Justice Rooke,<sup>h</sup> “is

<sup>d</sup> *Hill v. Thompson* (1817), 8 Taunt. 375; *R. v. Else* (1785), Dav. Pat. Ca. 144; 11 East, 108.

<sup>e</sup> *Walton v. Potter* (1841), Web. P. R. 594.

<sup>f</sup> *Umbrellas*, 1 Stark. 199.

<sup>g</sup> (1819), *supra*, 93.

<sup>h</sup> *Boulton v. Bull* (1795), 2 H. Bl. 465; Dav. Pat. Ca. 186. “The true legal meaning of the principle of a machine,” says Mr. Justice Story (1828, *Barrett v. Hall*, 1 Mason, 470), “with reference to the Patent Act, is the peculiar structure or constituent parts of the machine. Now the principles of two machines may be the same, although the form or proportions may be different. On the other hand, the principles of two machines may be very different, although their external structure may have great similarity in many respects.

equivocal. It may denote either the radical elementary truths of a science, or those consequential axioms which are founded on radical truths, but which are used as fundamental truths by those who do not find it expedient to have recourse to first principles.”

The question of equivalents in inventions, involving improvements attained by chemical or mechanical means, is another with reference to which the dicta of judges, although very decided, are frequently opposed. In fact, each case must be taken by itself, and it is in general a question submitted to the jury whether, what the defendant has done has been an exercise of his own invention in the use of materials open to all the world, or an infringement on the privileges of the plaintiff.<sup>i</sup> Equivalents.

The Specification of a Patent,<sup>k</sup> for improvements in machinery for raising and impelling water, described part of the machinery as consisting of a hollow wheel, having hollow spokes, into which, the air being exhausted, the water was introduced, and which, being made to rotate, expelled the water in the spokes, and a corresponding portion of water ascending up the pipes to supply its place, a continuous flow of water was thereby maintained. It stated that the Patentee did not confine himself to the number or use of hollow spokes, but in some cases proposed to substitute circular discs, &c. It then stated that the Patentee did not claim the discovery that water might be raised by centrifugal force, nor the sole application of machinery for raising water by that method; but that he claimed as his invention (among other things) the construction of machinery for raising Tetley v. Easton.

It would be extremely difficult to contend that a machine which raised water by a lever was the same in principle with a machine which raised it by a screw pulley or a wedge, whatever in other respects might be the similarity of the apparatus.”

<sup>i</sup> *Crossley v. Potter* (1846), coach lace, printed case, p. 63, Pollock, C. B.; *Heath v. Unwin* (1848), Exch. Ch., steel, 19 L. T. 272.

<sup>k</sup> *Tetley v. Easton*, 18 Jur. 350 (1853), Q. B. (centrifugal pump).

and impelling water by means of introducing it into compressed air in virtue of centrifugal force imported thereto by such machinery, and the application of the before-mentioned inventions both when used in combination and when used severally. The use of a wheel with hollow spokes for raising and propelling water by virtue of centrifugal force was not new; but the plaintiff's improvement consisted in a new combination of the hollow wheel with other machinery. In an action for infringing the Patent, it was held that, "*primâ facie*, the Patentee has as his invention all the machinery which he described in the Specification." The Specification was therefore bad, because it described the wheel as part of the machinery for raising and impelling water, and did not point out that it was old and that it was not claimed.

The introduction of any one objectionable item into the Patent is fatal to the whole. "This was the case with that admirable and useful invention the chain cable. That it was a worthy subject for Letters-patent no one could doubt; but it so happened that the inventor thought he had invented an anchor and included the same in his Patent. It afterwards appeared that some other person had used one before of a similar construction. The whole Patent, as well for the chain cable as for the anchor, was declared void."<sup>1</sup> The objection of there being two distinct inventions<sup>m</sup> under one Patent does not seem to have been pressed.

In *Manton v. Parker*,<sup>n</sup> the invention was a gun, very materially improved by a peculiar construction of lock. The Specification gave reason to suppose that the lip, the groove and the hole, in the arrangement of which the

<sup>1</sup> Lord Brougham (1835), H. of Lords, 28 Hans. 472.

<sup>m</sup> Second Set of Rules and Regulations under the Act 15 & 16 Vict. c. 83.

<sup>n</sup> Infringement (1814), Dav. Pat. Ca. 329. See also *Manton v. Manton* (1815), Dav. Pat. Ca. 333.

improvement consisted, were all new. Witnesses were called to impeach the novelty, who proved that they had constructed locks on the same principle, but *had not made them answer*. Experienced gunsmiths spoke to the efficient condition of the plaintiff's invention. He was, however, nonsuited.

The Patentee is bound to give all the information he possesses to the public, and, as a part of it, necessarily the uses to which his invention may be put. In so doing, however, he must be careful not to include matters to which it has not been ascertained by actual practice to be applicable, or of which the *modus operandi* is not contained in the Specification. As a general rule, if in a Specification the Patentee states that his invention may be carried into effect by either of two modes, and it be shown that one of these modes is impracticable, the patent fails.<sup>n</sup> In *Felton v. Greaves*,<sup>o</sup> the Patent was for a machine "for sharpening knives, razors and scissors." The Specification disclosed a method applicable to knives only. The plaintiff (the Patentee) was nonsuited. In *Heath v. Unwin*<sup>p</sup> it was held (*dissentiente* Alderson, B., and Coleridge, J.), that the *modus operandi* given by the Patentee in his Specification was *only one instance* of the ways in which the invention might be used; and in *Wallington v. Dale*,<sup>q</sup> on similar grounds, a Specification was held sufficient, describing a process (of which a material part consisted in reducing hides to shavings) as commenced by "reducing skins or hides to their shavings or films by *some suitable instrument*. The instrument I have used has been an ordinary carpenters' plane." In *Beard v. Egerton*<sup>r</sup> the process prescribed by the Pa-

Use of the invention.

<sup>n</sup> *R. v. Cutler* (1847), Q. B., tubular flues, 3 C. & K. 215.

<sup>o</sup> 3 C. & P. 61; Web. P. R. 42.

<sup>p</sup> (1852) Exch. Ch., steel carburet of manganese, 19 L. T. 272; (1845) Exch. 13 M. & W. 583.

<sup>q</sup> (1852) Exch. 19 L. T. 187.

<sup>r</sup> (1849), photographs, 8 C. B. 165.

tentee in his Specification was complex, and involved in its success very delicate manipulation. Its sufficiency turned mainly upon the period of the application of the acid. The Court decided that an ambiguous direction was to be interpreted in such a manner as was found to render the process a successful one, it being proved that the application of the acid after the second operation, viz. the coating the plate with iodine, would render the whole process abortive. On the other hand, *Bloxam v. Elsee*<sup>s</sup> and *Hastings v. Brown*<sup>t</sup> are cases in which the Patentee was held rigorously to the terms of his Specification. In *Stevens v. Keating*,<sup>u</sup> the Specification, after stating the mode of using the cement made according to the directions of the Patentee, concluded by stating that "other alkalies and acids besides those before mentioned would answer the purposes of the invention, though not so well." The Specification was held bad, for that *either the inventor claimed all acids and alkalies, or only those which would answer the purpose*. In the former case it was bad, as some acids and alkalies would not answer the purposes of the invention; in the latter it was bad for not specifying those acids and alkalies which would be found to succeed.

#### Drawings.

With regard to drawings, there existed formerly<sup>x</sup> tech-

<sup>s</sup> (1825), paper, 6 B. & C. 169; 9 D. & R. 215; 1 C. & P. 558; R. & M. 187.

<sup>t</sup> (1853) Q. B., windlasses, 1 E. & B. 450.

<sup>u</sup> (1848), plasters, stuccoes and cements, 2 Exch. 772; (1847) Ch., injunction, 2 Phill. 333.

<sup>x</sup> "I take it to be clear," says Lord Eldon, in *Ex parte For* (1812, steam-engine, 1 V. & B. 167), "that a man may, if he chooses, annex to his Specification a picture or a model descriptive of it, but his Specification must be in itself sufficient, or I apprehend it will be bad. At present, however, the drawings form part of and stand on the same footing with the rest of the Specification." *Hastings v. Brown* (1853), windlasses, Q. B., 1 E. & B. 454. Drawings explanatory of the Specification, *Lowe v. Penn* (1848), screw popeller, N. P., Denman, C. J., 32 Lon. Journ. 140.

nical rules inconvenient and unsuited to the subject. At present the relaxation may be said to be complete. The object of the Specification is the full description of the invention, and for this purpose, it is evident, a drawing alone may sometimes be sufficient.<sup>a</sup> In *Hastings v. Brown*,<sup>r</sup> the Court decided that a drawing might be taken to explain an ambiguity in the written description.

The details prescribed with respect to the drawings accompanying the Provisional Specification at present are as follows.<sup>s</sup> They must be on paper, parchment or cloth, with an inch margin all round, and when folded must be of the size of twelve inches by eight and a half. Those with the complete Specification must be on parchment, twenty-one and a half by fourteen and three quarters inches, or twenty-nine and a half by twenty-one and a half, with one inch and a half margin all round. The Commissioners recommend a scale of one inch to a foot for elevation drawings.<sup>t</sup>

Rules as to drawings.

The object of the Specification being considered, the rejection of models and specimens, the clearest source of instruction in the case of mechanical inventions, seems an unfortunate course adopted by the Commissioners—their collection being carefully attended to, and with the best effect, in the United States.

Models not received.

On the discovery of any principle or property of matter capable of being applied so as to effect an improvement in trade, the first requisite is to consider to what articles of commerce it should be applied, with the probability of creating a remunerative demand,<sup>u</sup> the general

First requisite.

<sup>a</sup> *Williams v. Brodie*, cited in *R. v. Arkwright* (1785), Web. P. R. 71; *Bloxam v. Elsee*, 6 B. & Cr. 169 (papermaking); *M<sup>r</sup> Farlane v. Price*, 1 Stark. 199 (umbrellas); (1845) *Newall v. Webster*, 26 Lon. Journ.

<sup>r</sup> 1 E. & B. 454 (1853), windlass, Q. B.

<sup>s</sup> See First Set of Rules under 15 & 16 Vict. c. 83, dated Oct. 15, 1852.

<sup>t</sup> Order of Lord St. Leonards (1852—3), note.

<sup>u</sup> *Uring* (1845), Introd. ix. (1851), Evid. 164, Carpmael.

Differ from  
Copyright.

Inventors' diffi-  
culties.

application of the principle, as before said, not being appropriable. The next is to secure to the discoverer the exclusive profit of trading in those articles. In the great majority of cases, as we have seen, Letters-patent form the means of attaining this monopoly. With the obtaining of such Letters-patent, however, the inventor's task is but begun. Unlike the author of a literary production, the inventor of a new machine, or the discoverer of new arts, cannot<sup>y</sup> dispose of his discovery at once. He must, in many cases, devote himself night and day to the practical application of his principle. Difficulties<sup>z</sup> attend all important inventions in manufactures. Time and outlay are necessary to overcome the prejudice against their novelty, and impress the public with confidence in their worth. Watt, it has been said, lost six years in bringing his invention into a good working state. Lord Norton, of Leith, the inventor of the Patent slip,<sup>a</sup> as a substitute for dry docks, lost the same time before his invention became profitable. A like<sup>b</sup> loss of time, prior to the invention becoming productive, appears to be an almost constant occurrence in important inventions.

The caprice of fashion<sup>c</sup> has ruined some, the uncertainty of the Law many. Lord Ellenborough<sup>d</sup> repealed a Patent<sup>e</sup> for what was allowed to be a new invention, and where the Specification alone communicated to the public the secret of the inventor. In 1778, when an action for infringing<sup>f</sup> Sir R. Arkwright's Patent for spinning machinery was tried in the King's Bench, the

<sup>y</sup> 43 Qu. Rev. (1830), p. 336.

<sup>z</sup> Phillips, 14; (1851) Evid. 204, Carpmael.

<sup>a</sup> Farey's Evid. H. of Com. (1833) on Patents.

<sup>b</sup> 43 Westm. Rev.                      <sup>c</sup> 32 Ed. Rev. (1819), p. 63.

<sup>d</sup> 43 Qu. Rev. 341.

<sup>e</sup> Metcalf (1817), N. P. ("tapering" brush), 2 Stark. 250. A rule for a new trial was refused.

<sup>f</sup> *Arkwright v. Nightingale* (1785), Web. P. R. 61; Dav. Pat. Ca. 37.

obscurity and imperfection of the Specification were urged, and because certain workmen could not make the machinery, a verdict was given against the Patentee. In 1785, when another action<sup>g</sup> was tried in the Common Pleas, a verdict was given for the Patentee on the ground that several witnesses had made the machinery from the Specification alone, and yet in the same year this Patent was repealed! Such was the fate of an invention which produced a saving of several hundred thousand pounds per annum, and has proved one of the richest sources of British wealth. The inventors of this extraordinary machinery were, Hargrave, Arkwright and Crompton. Hargrave's Patent for a spinning jenny, in 1767, was invaded by an association of pirates. Ruined in his circumstances, and persecuted by the mob, he died in poverty and want, in the middle of a population that had grown rich by his inventions. Crompton suffered similar persecutions, but after languishing in poverty through a long life, a reward of 5,000*l.* was at last obtained from Parliament. Sir Richard Arkwright suffered great losses by his Patents: and yet after they were set aside he acquired an immense fortune, along with many others who had availed themselves of his inventions.

In the case of Hardy's Patent for railway axles,<sup>h</sup> the Patentee made his invention known to the different railway companies, but could not succeed in getting it into general use, although his axles were better, and he sold them at a less rate than the common axles, and he ultimately assigned his Patent, having lost upwards of 3,000*l.* by it. Within four years the assignees were enabled to realize about 23,000*l.*

The very difficulties, however, which beset the inventor, act frequently as the motives to invention; Senefelder, the inventor of lithography, was an instance. He was

Sometimes the motive of inventors.

<sup>g</sup> *R. v. Arkwright* (1785), Web. P. R. 71; Dav. Pat. Ca. 61.

<sup>h</sup> (1849) P. C. 14 Jurist, 177.



the son of a poor actor, had written a play and was too poor to get it printed.<sup>1</sup>

Invention.

In spite of the numerous and important inventions for which the world is indebted to lucky accident,<sup>k</sup> such is by no means the source of the majority of those which conduce to the improvement of our manufacture, and which are owing less to fortunate accident than steady application. "Invention," says Buffon, "depends on patience. Contemplate your subject long. It will gradually unfold, till a sort of electric spark convulses for a moment the brain and spreads down to the very heart a glow of irritation. Then come the luxuries of genius."

Buffon.

Wants of Society the motive to invention.

The most powerful and efficient motive to invention of manufactures is, as has been before<sup>l</sup> said, the existing want of them on the part of the public.<sup>m</sup> A remarkable instance of this was furnished by the recent strikes of mill-hands in the north. On this subject the local organ

<sup>l</sup> 43 Westm. Rev. (1835). "Some want arises and men exert themselves to supply it. Take, for example, the case of the Electric Telegraph. The requirements of the Blackwall Railway rendered a communication of that kind essential: so that the introduction of railways led to its establishment in consequence of the want which was created of communicating from end to end of the railway." (1851, Evid. 53, Webster.)

<sup>k</sup> Watt's discovery of parallel motion is said to have been by chance.

<sup>l</sup> Dis. Cur. Lit. i. 45. To a considerable extent prejudices (see supra, 110) against new inventions, *as new*, may be said to have died away, yet the sanguine temperament of inventors should never lead them to forget the saying of a very able writer, "that Fortune has rarely condescended to be the companion of Genius. Those who have laboured most zealously to instruct mankind have been those who have suffered most from ignorance; and the discoverers of new arts and sciences have hardly ever lived to see them accepted by the world."

<sup>m</sup> In the first three months of 1853, the Patents were for

|                                    |    |
|------------------------------------|----|
| Locomotives and railways . . . . . | 42 |
| Weaving . . . . .                  | 31 |
| Spinning . . . . .                 | 31 |
| Steam-engines . . . . .            | 19 |
| Ship propellers . . . . .          | 16 |
| New metals . . . . .               | 9  |

of the Masters' Association says:—"One result of the strike has been to bring into the labour market a few thousand hands, who, in future years, will compete with the turn-outs for work, to the prevention of wages rising. Another result is, that far fewer hand-spinners are now required than were employed when the mills closed. The cessation from work has been taken advantage of by many millowners to convert their hand-mules into self-acting machines. Strikes have been the main cause of the introduction of this labour-saving machine." The strike of 1828 caused the attention of our ingenious machinists to be directed to the subject, and the result was the invention of the 'self-actor;' the strike of 1836 caused its introduction to a large extent in Preston, the strike of 1853 has occasioned its general adoption, and hand-mules are now only used in works where very high numbers are spun."

Strikes.

The real value of Letters-patent, and in fact the possible assistance of legislative enactments in the prosecution of inventions, is by the majority of inventors greatly over-rated, while the exorbitant price and insignificant consumption of many valuable inventions exhibit the lamentable discrepancy between the estimation entertained of it by the public and the Patentee. Mr. Turner humorously suggests,<sup>n</sup> as the only means of realizing the expectations of such persons, an Act by means of which "any invention for which Letters-patent may be obtained shall immediately thereupon come into successful operation, any law of gravitation or rule of arithmetic to the contrary notwithstanding;" and which shall provide "Capitalists to enter upon the speculation on terms to be settled by the Patentee." When a Patent is properly obtained and strenuously put forward, a reasonable price<sup>o</sup> should

Wrong estimate of Patent powers by inventors.

<sup>m</sup> *Roberts' Patent* (1839), P. C., spinning mule, Web. P. R. 573.

<sup>n</sup> *Remarks on the Law of Patents*, Turner (1851), p. 4.

<sup>o</sup> The Belgian Government affixes to its Patent the condition that the Patentee shall allow any one the use of his invention on payment of a reasonable remuneration, determined, in case of dispute, by arbitration.

be asked by the Patentee, or the public is induced to wait for the expiration of the Patent, or devise some cheaper means of obtaining the same end.

Changes in the practice of obtaining Letters-patent.

The changes in the practice of obtaining Patents has been attended with great benefit to the Patentee, by abolishing useless forms and consequent expenses.<sup>o</sup> The

<sup>o</sup> The following is a List of the Official Stages passed through and the Fees paid by an Inventor, unopposed, in obtaining Letters-patent previous to the passing of Stat. 15 & 16 Vict. c. 83:—

|                                                                                                              | £ | s. | d. |
|--------------------------------------------------------------------------------------------------------------|---|----|----|
| 1. Inventor prepared Petition to the Crown.                                                                  |   |    |    |
| 2. Made a Declaration before a Master in Chancery . . . . .                                                  | 0 | 1  | 6  |
| 3. Delivered Petition and Declaration at the Home Office, in Whitehall . . . . .                             | 2 | 2  | 6  |
| 4. Petition signed by Home Secretary referred to Attorney or Solicitor-General . . . . .                     |   |    |    |
| 5. Petition taken to the Attorney or Solicitor-General, at their Chambers. Fees to them and Clerks . . . . . | 4 | 4  | 0  |
| 6. Attorney-General reported in favour of Petition (as a matter of course, unless opposed).                  |   |    |    |
| 7. Report taken to the Home Office.                                                                          |   |    |    |
| 8. Home Office prepared a Warrant, echoing the Report, and . . . . .                                         | 7 | 13 | 6  |
| 9. Sent to the Queen to sign . . . . .                                                                       |   |    |    |
| 10. Returned to Home Office, and . . . . .                                                                   |   |    |    |
| 11. Warrant countersigned by Home Secretary                                                                  |   |    |    |
| 12. Warrant taken to Patent Office, in Lincoln's Inn.                                                        |   |    |    |
| 13. Clerk of the Patents prepared a draft of the Queen's Bill and docquet of the Bill (fees) . . . . .       | 5 | 10 | 6  |
| 14. Engrossing two copies of Bill, one for the Signet Office and one for the Privy Seal Office. . . . .      | 1 | 7  | 6  |
| 15. Stamp Duty on each . . . . .                                                                             | 3 | 0  | 0  |
| 16. Engrossing Clerk of the Patent Office engrossed Queen's Bill for signature . . . . .                     | 1 | 1  | 0  |
| 17. Stamp for the same . . . . .                                                                             | 1 | 10 | 0  |
| 18. Queen's Bill taken to Attorney-General or Solicitor-General, and signed by them . . . . .                | 5 | 0  | 0  |
| 19. Taken to Home Secretary . . . . .                                                                        | 7 | 13 | 6  |
| 20. Sent by Home Secretary to the Queen . . . . .                                                            |   |    |    |
| 21. Signed by the Queen . . . . .                                                                            |   |    |    |
| 22. Returned to the Home Secretary . . . . .                                                                 |   |    |    |
| 22. Queen's Bill taken to Signet Office, in Somerset House                                                   | 4 | 7  | 0  |
| 24. Clerk of the Signet prepared a Signet Bill for the Lord Keeper of the Privy Seal . . . . .               |   |    |    |

great majority<sup>p</sup> of Patents are still however procured through the instrumentality of "Patent Agents." It seems very desirable that steps should be taken to constitute this class efficient and responsible officers of the Court, as a means of preventing the reprehensible practices complained of<sup>q</sup> before the Committee of 1851, as comprising "all sorts of manœuvres and what we understand by racing," and which gave advantages to an unscrupulous over a scrupulous Patent Agent—a system, indeed, well deserving the epithet "scandalous," applied to it by the President of the Board of Trade. Some few Solicitors practise as Patent Agents.

Both Provisional and Complete Specifications are now printed at the expense of the Commissioners, and sold at a very trifling charge; and arrangements are in contemplation by the Commissioners for transferring from the Enrolment Office the enrolment of Patents

Printing Specifications.

|                                                                                                              | <i>£</i> | <i>s.</i> | <i>d.</i> |
|--------------------------------------------------------------------------------------------------------------|----------|-----------|-----------|
| 25. Clerk of the Lord Keeper of the Privy Seal prepared a Privy Seal Bill for the Lord Chancellor, and stamp | 4        | 2         | 0         |
| 26. Privy Seal Bill delivered to the Clerk of the Patents                                                    | }        | 5         | 17        |
| 27. Clerk of the Patents engrossed the Patent                                                                |          |           |           |
| Stamps for the Patent, &c. . . . .                                                                           | 30       | 0         | 0         |
| 28. Clerk of Patents prepared a docquet thereof.                                                             |          |           |           |
| 29. Stamp for the docquet of Patent.                                                                         |          |           |           |
| 30. Boxes for the Patent . . . . .                                                                           | 0        | 9         | 6         |
| 31. Fees to the Deputy Lord Chancellor's Purse-bearer . . . . .                                              | 2        | 2         | 0         |
| 32. Fees to the Clerk of the Hanaper . . . . .                                                               | 7        | 13        | 0         |
| 33. Fees to the Deputy Clerk of the Hanaper . . . . .                                                        | 0        | 10        | 0         |
| 34. Receipt of the Lord Chancellor for the Privy Seal Bill                                                   | 1        | 11        | 6         |
| 35. Fees to the Deputy-Sealer and Deputy-Chaff Wax . . . . .                                                 | 0        | 10        | 6         |
|                                                                                                              | £96 7 8  |           |           |

This was exclusive of the fee for enrolling the Specification, varying with the length of that document, and averaging 5 10 0

<sup>p</sup> By a Rule, dated 15th Oct. 1852, made in pursuance of the Act, all former Rules are annulled, and the practice is declared entirely dependent on the Rules and Regulations to be subsequently issued. The proportion obtained in the year 1852—3, by Patentees or solicitors, to that by Patent agents, was one to fifty.

<sup>q</sup> (1851) Evid. 482, "dodging," 886, 1452, 2319; Turner, 31.

and Specifications made previously to the late Act,<sup>a</sup> with a view to their publication.

Official Index.

By 16 Vict. c. 5, the Commissioners were empowered to purchase Professor's Woodcroft's Index of Patents for 1,000*l.* The facilities afforded for its inspection at the Office of the Commissioners reduce almost incalculably the difficulties to which inventors were exposed of re-patenting old inventions.

Search in the Register and Index of Patents.

Previous to the late Act, no official Record of Patents existed. The Specifications were enrolled in three different Offices, the Petty Bag Office, the Rolls Chapel, and the Enrolment Office in Chancery. No Index existed, and the expense and labour of searching through the Specifications by persons unaccustomed to the handwriting was very great. A witness before the Committee of 1849 stated, that he paid in the Petty Bag Office alone, in one day's search, fees to the amount of 2*l.* 8*s.* So entirely indeed were the Specifications inaccessible for practical purposes, that an attempt was made<sup>t</sup> to establish a Copyright in the list of Specifications published in "The Repertory of Arts, Manufactures and Agriculture." An injunction to enforce the claim was refused. A Copyright was however declared<sup>u</sup> to exist in an engraving made on a reduced scale from a drawing annexed to the Specification; and from the reasoning of the Court on that occasion it would seem that such would have been the decision independently of the scale of the engraving.

First steps.

The caution with which experiments must be conducted in the preliminary stage has been above remarked upon. The invention being fully matured the first step<sup>x</sup> is by Petition<sup>y</sup> to the Crown, to be left by the inventor or his

<sup>a</sup> See 15 & 16 Vict. c. 83, s. 31.

<sup>t</sup> *Wyatt v. Barnard* (1814), 3 V. & B. 77. See Drewry on Injunctions (1849), 213.

<sup>u</sup> *Newton v. Cowre* (1827), C. B., London Journal of Arts and Sciences; 12 Moo. 457.

<sup>x</sup> Rule 9, Second Set (1852).

<sup>y</sup> The Petition (subject to a stamp of five pounds), Declaration and Provisional Specifications, are to be written on sheets of paper twelve

agent at the office of the Commissioners of Patents,<sup>2</sup> who are directed<sup>a</sup> to refer all applications to one of the Law Officers in such manner as they think fit. The following is the form prescribed in the Schedule of the Act:—

PETITION.

No. —

Form of  
Petition.

To the Queen's most excellent Majesty.

The humble Petition of \_\_\_\_\_ for, &c.

Sheweth,

That your Petitioner is in possession of an Invention for

[*the Title of the Invention,*]

which Invention he believes will be of great public utility; that he is the true and first Inventor thereof; and that the same is not in use by any other person or persons, to the best of his knowledge and belief.

Your Petitioner therefore humbly prays, that Your Majesty will be pleased to grant unto him, his executors, administrators and assigns, Your Royal Letters-Patent for the United Kingdom of Great Britain and Ireland, the Channel Islands and Isle of Man, for the term of fourteen years, pursuant to the Statutes in that case made and provided.

And Your Petitioner will ever pray, &c.

*Signature of Petitioner.*

The Petition must be accompanied by a Declaration in the following form:—

DECLARATION.

No. —.

Form of  
Declaration.

I \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, do solemnly and sincerely declare, That I am in possession of an Invention for, &c.

[*the Title as in Petition,*]

which Invention I believe will be of great public Utility; that I am the true and first Inventor thereof; and that the same is not in use by any other Person or Persons, to the best of my Knowledge and Belief, [*where a Complete Specification is to be filed with the Petition and Declaration, insert these words: "and that the Instrument in Writing under my Hand and Seal, hereunto annexed, particularly describes*

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inches by eight and a half, with a margin of one and a-half inches on each side of the page. Lithographed forms may be purchased at the stationers in the neighbourhood.

<sup>2</sup> 15 & 16 Vict. c. 83, s. 6. The office is in Southampton Buildings.

<sup>a</sup> 15 & 16 Vict. c. 83, s. 8.

and ascertains the Nature of the said Invention, and the manner in which the said Invention is to be performed,"] and I make this Declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the Session of Parliament held in the Fifth and Sixth Years of the Reign of His late Majesty King William the Fourth, intituled "An Act to repeal an Act of the present Session of Parliament, intituled 'An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various Departments of the State, and to substitute Declarations in lieu thereof, and for the more entire Suppression of voluntary and extra-judicial Oaths and Affidavits,' and to make other Provisions for the Abolition of unnecessary Oaths."

A. B.

Declared at \_\_\_\_\_, this \_\_\_\_\_ Day of \_\_\_\_\_,  
 A. D. \_\_\_\_\_, before me,  
 A Master in Chancery,  
 or  
 Justice of the Peace.

Specification.

With the Petition and Declaration the inventor must forward either a Provisional or Complete Specification of his invention. We will first suppose them accompanied by a Provisional Specification, the form for which, as prescribed by the Act, is as follows:—

## PROVISIONAL SPECIFICATION.

Provisional  
Specification,  
form of.

No. ———.

I \_\_\_\_\_ do hereby declare the nature of the said Invention for  
 [insert Title as in Petition]

to be as follows:—

[here insert Description.]

Dated this \_\_\_\_\_ Day of \_\_\_\_\_, A. D. \_\_\_\_\_.

[To be signed by Applicant or his Agent.]

Delivery of.

The day of the delivery of every Petition, Declaration and Provisional Specification is to be recorded at the Office, and indorsed on such Petition, Declaration and Provisional Specification, and a Certificate thereof given to the applicant or his agent.<sup>u</sup>

Certificate.

Forwarded to  
the Law Officer.

The papers must be left two clear days in the Office of the Commissioners to be recorded. They are then forwarded by the Commissioners to the Law Officer of the

<sup>u</sup> Stat. 15 & 16 Vict. c. 83, s. 6.

Crown (the Solicitor and Attorney-General alternately), the following indorsement being made on the Petition :—

REFERENCE.

Her Majesty is pleased to refer this Petition to  
to consider what may be properly done therein.

Clerk of the Commissioners.

If the Law Officer finds the Title of the invention or the Provisional Specification insufficient, he will require them to be amended.\*

May require amendments.

If he be satisfied he grants<sup>y</sup> a Certificate of his allowance, which is filed in the Commissioners' Office, and confers upon the applicant what is termed Provisional Protection, which is the right of using the invention during the term of six months from the date of the application, without prejudice to any Letters-patent to be granted for the same.

Provisional Protection.

No alteration of a Provisional Specification at the instance of the applicant will be allowed after the same has been recorded, except for the correction of clerical errors or of omissions made *per incuriam*.<sup>z</sup>

Applicant cannot alter his Provisional Specification.

The allowance by the Law Officer of the Certificate is almost a matter of course. The course of reasoning on his part seems somewhat difficult to follow.<sup>a</sup> It is, as his Warrant expresses it, "*entirely at the hazard of the said petitioner whether the said invention is new or will have the desired success; and, as it may be reasonable,*"

Reference to the Law Officer.

\* 15 & 16 Vict. c. 83, s. 8.

<sup>y</sup> 15 & 16 Vict. c. 83, s. 9. This usually occurs about nine days from the date of application.

<sup>z</sup> Rule 9, Second Set.

<sup>a</sup> In the first year of the operation of the new Act not above half-a-dozen applications were refused, and those mainly on the ground of the want of clearness in the Specification. In America the practice is much stricter. There is a Patent Commissioner, with an appeal, formerly to an extempore Board of Assessors, but now to the Chief Justice of Columbia. The Commissioner appears to be usually present at the appeal. It appears, from the Report of that officer, that in 1848 he *rejected two-thirds* of the applications.



the document continues, "for Her Majesty to encourage all arts and inventions which may be for the public good, I am of opinion that Her Majesty may grant Her Royal Letters-patent," &c.

Alternative course.

The applicant may however proceed otherwise, by depositing with his Petition and Declaration a Complete<sup>a</sup> Specification, which at once confers upon him Provisional Protection.

Proceedings during Provisional Protection.

An action for infringement cannot be maintained during Provisional Protection. It is therefore desirable to proceed as speedily as possible to procure the Letters-patent. So soon as the invention is provisionally protected, or after the deposit of a Complete Specification, the applicant may give notice in writing at the Office of the Commissioners of his intention to proceed with his application for Letters-patent.<sup>b</sup> A Certificate<sup>c</sup> of such notice is granted from the Commissioners' Office.

Notice to proceed.

Certificate.

Advertisement.

The Notice to proceed is advertized<sup>d</sup> by the Commissioners in the *London Gazette*. Twenty-one days from the date of the advertisement are allowed for the delivery of objections to the Patent. At their expiry the Provisional or Complete Specification and Particulars of objection are referred to the Law Officer. This is termed the second reference.

Objections.

Second reference.

The Hearing.

The Hearing takes place before the Law Officer, who has full power<sup>e</sup> at his discretion to order by or to whom costs are to be paid at the opposition. A rule to make such order a rule of Court can be made at chambers, and is absolute in the first instance.

Costs of the opposition.

<sup>a</sup> The number of Provisional Specifications deposited in the first year of the new system was 2,995, and the number of Complete Specifications 50.

<sup>b</sup> Stat. 15 & 16 Vict. c. 83, s. 12, Rule 5, First Set (1852).

<sup>c</sup> Of 3,045 applicants during the first year, 2,420 gave notice to proceed. The Certificate of notice is subject to a stamp of five pounds.

<sup>d</sup> Notices to proceed are in the 'Tuesdays', Allowances of Provisional Protection in the 'Fridays' Gazette.

<sup>e</sup> 15 & 16 Vict. c. 83, s. 14. About eight per cent. of the applications are opposed.

The following fees are payable<sup>f</sup> by the applicant and the person opposing the grant :- -

|                                     | £ | s. | d. |
|-------------------------------------|---|----|----|
| To the Law Officer . . . . .        | 2 | 12 | 6  |
| To his Clerk . . . . .              | 0 | 12 | 6  |
| To his Clerk, for summons . . . . . | 0 | 5  | 0  |

A copy of the summons, sent by post to the address of the party opposing as given in his Particulars of objection, is sufficient service.

The Law Officer will not go into any question of utility. If there is any considerable doubt as to whether two inventions are distinct, the Law Officer will not decline to issue his Warrant.<sup>g</sup>

After the Hearing a Warrant<sup>h</sup> may be granted by the Law Officer, sealed with the Commissioners Seal for

Law Officer's  
Warrant.  
To be sealed.

<sup>f</sup> Order of the L. C. and M. R. 1852. The fees are payable at the Office of the Law Officer at the time of hearing by the opposer, and at the period of taking out the summons for hearing the objections by the applicant.

<sup>g</sup> 15 & 16 Vict. c. 83, s. 16.

<sup>h</sup> Subject to a stamp of five pounds. The Warrant is in the following form :—

WARRANT.

In humble obedience to her Majesty's command, referring to me the Petition of \_\_\_\_\_, of \_\_\_\_\_, to consider what may be properly done therein, I do hereby certify as follows: that the said Petition sets forth that the Petitioner

Form of  
Warrant.

[*Allegations of the Petition.*]

And the Petitioner most humbly prays

[*Prayer of the Petition.*]

That in support of the allegations contained in the said Petition, the Declaration of the said Petitioner has been laid before me, whereby he solemnly declares that

[*Allegations of the Declaration.*]

That there has also been laid before me a Provisional Specification, signed \_\_\_\_\_, and also a Certificate [*or a Complete Specification and a Certificate of the filing thereof*], whereby it appears that the said invention was provisionally protected [*or protected*] from the \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_, in pursuance of the Statute.

That it appears that the said application was duly advertised.

Upon consideration of all the matters aforesaid, and as it is entirely at the hazard of the said Petitioner whether the said invention is new

the sealing of the Patent, and setting forth the tenor and effect of the Letters-patent to be granted, and directing the insertion of all such restrictions, conditions and provisions as he may deem usual or expedient in such grants.<sup>i</sup> No appeal lies from the refusal of the Law Officer to grant a Warrant.<sup>k</sup>

Letters-patent.

The Warrant having been sealed, the Commissioners, when required by the applicant,<sup>l</sup> will cause Letters-patent to be prepared, and forwarded with the Warrant to the Office of the Lord Chancellor, who signs the *recepti* and returns it<sup>m</sup> with the Letters-patent, sealed with the Great Seal<sup>n</sup> of the United Kingdom. The Letters-patent bear date as of the day of application, unless the Law Officer or Lord Chancellor shall otherwise order.<sup>o</sup> If the Letters-patent be destroyed or lost, other Letters-patent will be issued on the authority of the original Warrant.<sup>p</sup>

or will have the desired success, and as it may be reasonable for her Majesty to encourage all arts and inventions which may be for the public good, I am of opinion that her Majesty may grant Her Royal Letters-patent unto the Petitioner, his executors, administrators and assigns, for his said invention within the United Kingdom of Great Britain and Ireland, the Channel Islands and Isle of Man, for the term of fourteen years, according to the Statute in that case made and provided, if Her Majesty shall be graciously pleased so to do, to the tenor and effect following:

[*Form of Letters-patent.*]

Given under my hand this — day of —, A.D. —.

(*Seal of the  
Commissioners.*)

<sup>i</sup> *Wilson v. Northop* (1835), 2 C. M. & R. 326; Chitty's Archbold, 1441.

<sup>k</sup> *Re Cutler's Patent* (1839), 4 M. & C. 511.

<sup>l</sup> Stat. 15 & 16 Vict. c. 83, s. 19, enacts, that such application must be made within three months from the date of the Warrant.

<sup>m</sup> As to the discretion exercised at this period by the Lord Chancellor, see *Ex parte Heathcote, In re Lucy* (1816), lace, Web. P. R. 431, where Lord Eldon, L. C., refused to seal a Patent, giving the Patentee fifteen months to enrol his Specification.

<sup>n</sup> The Officer to whom the duty of sealing Letters-patent is entrusted is the Lord Chancellor's Pursebearer.

<sup>o</sup> 15 & 16 Vict. c. 83, s. 23.

<sup>p</sup> *Id.* s. 22.

With regard to the expressions as to time.<sup>l</sup> In a Legal time. case<sup>m</sup> in which the Patent bore date 10th May, 1808, and contained the usual proviso that a Specification should be enrolled “within one calendar month next and immediately after the date thereof,” Lord Ellenborough, C. J., said :—“It used to be held, that ‘from the date’ includes the day, and ‘from the day of the date’ excludes it. But since the case of *Pugh v. The Duke of Leeds*,<sup>n</sup> these formal distinctions have been done away, and the rule of good sense has been established that such words shall be construed according to the meaning of the persons who use them. . . . The day on which the Patent bears date is not to be reckoned. The month therefore only began on the 11th of May, and included the 10th of June, the day on which the Specification was enrolled.”

By the new Act the powers of the Chancellor,<sup>o</sup> and the Prerogative of the Crown,<sup>p</sup> are expressly preserved. The power of the former to seal Letters-patent as of an earlier day was formerly controlled by the Stat. 18 Hen. VI. c. 1, which enacted, that “the date shall be the day of delivery of the King’s warrant into Chancery, and not before in any wise.” The late Act, however, removes this restriction, by providing,<sup>q</sup> that Letters-patent may (the Act of the 18th year of King Henry the Sixth, chapter one, or any other act to the contrary notwithstanding) be issued in pursuance of this act, to be sealed and bear date as of the day of the application for the same, and<sup>r</sup> such Letters-patent so ante-dated shall be of the same validity as if sealed on the day of date. Stat. 18 Hen. VI. c. 1.

By a subsequent Act<sup>s</sup> it is provided, that where Letters- Powers of the Lord Chancellor in cases of accidental delay.

<sup>l</sup> Woolrych on Legal Time (1851), 125—128, and cases there cited.

<sup>m</sup> *Watson v. Pears* (1809), 2 Campb. 294.

<sup>n</sup> Cowp. 714. See also *Ex parte Fallon and Wife*, 5 T. R. 283; *Clayton’s case*, Hob. 139.

<sup>o</sup> 15 & 16 Vict. c. 83, s. 15.      <sup>p</sup> *Id.* s. 16.

<sup>q</sup> 15 & 16 Vict. c. 83, s. 24.      <sup>r</sup> *Id.* s. 24.

<sup>s</sup> 16 & 17 Vict. c. 115, s. 6.

patent have not been sealed during the continuance of the Provisional Protection on which the same is granted, provided the delay in such proceeding has arisen from accident, and not from the neglect or wilful default of the applicant, the Lord Chancellor may, if he shall think fit, seal such Letters-patent, at any time within one month after the expiration of such Provisional Protection.

Notice of opposition at Great Seal.

A Notice of opposition,<sup>s</sup> entered at the Office of the Commissioners, may, however, even at this stage, although of late much discouraged, afford obstruction to the sealing of Letters-patent. In a case<sup>t</sup> before Lord Eldon, L. C., a *caveat* being entered under an existing Patent, from which it was alleged the subject of the new Patent was borrowed, his Lordship sealed the Patent upon reading the affidavits, one of which, by an engineer, stated that the subjects did not resemble each other.

In a recent case,<sup>u</sup> where a *caveat* was lodged before the Great Seal was affixed to the Patent, Lord St. Leonards, L. C., declined to enter into the merits of the opposition, but referred the matter back to the Attorney-General, with orders to proceed expeditiously, and with leave for Petitioner to apply in case of unreasonable delay, the costs of all parties being reserved. "I cannot," said his Lordship, "take upon myself the duty of entering into an examination of the merits of rival Specifications in Court. Lord Eldon seems to have done it in *Ex parte Fox*, but a more inconvenient practice I cannot well conceive. If there was any danger of stopping the Petitioner's application by my not entering into the merits, I might hear the case myself, but I can see no such ground. Under these circumstances I will not act in opposition to the authorities which have been cited, nor am I

<sup>s</sup> Lithographed forms of Notice to proceed, Objections to the grant, and Objections to the sealing of Letters-patent, are supplied by the Commissioners. The Notice must state the ground of objections.

<sup>t</sup> *Ex parte Fox* (1812), steam engine, 1 V. & B. 67.

<sup>u</sup> *In re Fawcett's Patent* (1852), carpets, 2 D. G. M. & G. 439.

inclined to interrupt the general business of the suitor by introducing a very mischievous practice, and one which would lead parties to delay entering their *caveats* for the mere purpose of compelling the Lord Chancellor to hear the merits."

Where objections were filed<sup>x</sup> to an application for a Patent, and overruled by the Law Officer, who granted his Warrant for the sealing, to which also objections were filed, on Petition, Cranworth, L. C., made an order to affix the Great Seal without directing a reference. Seal. r without  
reference.  
 "I think," remarked his Lordship, "that Lord Eldon was correct in *Dyer's* case. In that case *both parties invented the same thing at the same time*; and the question was, who was to be preferred, the first who applied for or the first who obtained the Patent? His Lordship decided in favour of the latter. In my opinion the question is the same as if under the old Law application were being made to me for Letters-patent to be granted at the time when the application for this Patent was made. This application is resisted on two grounds; first, that the Patentees are not the true inventors; and, secondly, that the invention is not new. I am quite ready to say that *I think there is strong evidence that it was not*; but *I shall not take upon myself so to decide*. If I were to consult my ease, I should be disposed to send the case back to the Law Officers of the Crown; but there must be some end to such references. The Solicitor-General has had the advantage of seeing and hearing the Patentees themselves. He came to the conclusion that there was at least such a *primâ facie* case that the Patentees ought to have their Patent. I think I am bound to decide myself, not whether they have made out that they are the true inventors, and that the invention is new, but whether such a *primâ facie* case has been made, that I ought to put them into a position

<sup>x</sup> *Re Simpson and Isaacs' Patent* (1853), pulp veneer, 21 L. T. 81.

to litigate the question with the public. I am of opinion, therefore, that I clearly ought to order the Great Seal to be affixed on these Letters-patent."

On a Petition<sup>a</sup> to discharge an objection filed by H. against the sealing of a Patent to the Petitioner B., where B. and H. had been partners, and where the late Attorney-General had reported in favour of the Petitioner, but the present Attorney-General had allowed the Patent to H. to be sealed, a compromise was recommended to be settled by the junior conveyancing counsel of the Court—the Patent to the Petitioner to be forthwith sealed and to bear date from the 1st of October last, and the Specification to be filed within one month from the day of the order.

An application for the sealing of a Patent, which, with the consent of the Petitioner and the opposing party (opposing on the ground that he had obtained a Patent for the same or a similar invention), the Lord Chancellor had referred to the Assistant Commissioner in the Patent Office for his opinion as to whether there was an infringement of a Patent already granted, was, upon that officer's opinion<sup>b</sup> being unfavourable to the Petitioner, refused. An order was made for the fee for sealing being returned, subject to cause being shown to the contrary. The Lord Chancellor observed: "The Solicitor-General has, by his Warrant, sanctioned the Petitioner's Patent: he has, therefore, a *primâ facie* right to have his Patent sealed, but before that proceeding takes place the question whether there be any infringement or not should be settled." In *Campbell's Patent*,<sup>c</sup> the opposing party being out of the jurisdiction, service of a Petition, for the sealing, upon his Solicitor was granted.

<sup>a</sup> *Re Brandies' Patent*, 1853, sugar, Cranworth, L. C., 1 Eq. Rep. 121.

<sup>b</sup> *Re Stolls' Patent* (1853), shoes, 21 L. T. 233.

<sup>c</sup> (1854) L. C. 22 L. J. 93.

As to the costs of the opposition at this stage, much will depend from the view taken by the Court of its reasonableness. In *Ex parte Fox*,<sup>d</sup> Lord Eldon refused to grant the costs occasioned by a *caveat*, on the ground that the jealousy was not unreasonable. In *Re Cutler's Patent*,<sup>e</sup> the costs of the unsuccessful opposition were given, but a Petition to review the taxation, which had reduced them by nearly two-thirds, was dismissed with costs. An unreported case<sup>f</sup> was mentioned, in which Lord Brougham is said to have given the Patentee the costs of the *caveat*. In *Re Joyce's Patent*,<sup>g</sup> the costs were given by consent.

Costs of opposition at Great Seal.

The last step to be taken by the Patentee, who has obtained Letters-patent by the deposit of a Provisional Specification, is the filing of the Complete Specification in the Office of the Commissioners. Formerly, as above stated, six months were allowed after the grant within which Specifications might be inrolled,<sup>h</sup> with the object of enabling the Patentee to complete his invention. An attempt was made to remedy the inconveniences of the several offices concerned in the old practice by stat. 11 & 12 Vict. c. 94, s. 14 (*Petty Bag, &c. Offices, Chan-*

Filing Complete Specification.

<sup>d</sup> (1812), steam engine, 1 V. & B. 67.

<sup>e</sup> (1839) 4 M. & Cr. 511; Web. P. R. 422; see supra, 101.

<sup>f</sup> *In re Alcock's Patent* (1832), lace, cited 4 My. & Cr. 511; 2 Lon. Jour. 32.

<sup>g</sup> 20 Dec. 1837, *ib.*

<sup>h</sup> How much this licence was abused may be seen from the evidence before the Committee in 1851. Mr. John Fairrie (Evid. 916) thus describes its effect:—"A man gets hold of an idea; he runs immediately to the Patent Office before he has made any attempt to perfect his process. He gets a protection for six months, and he goes about examining every publication connected with the particular, and getting all the information he can; and when the time for delivering in his Specification comes, he has entirely altered the original view he entertained. I know that by experience." Such abuses may recur under the present system if any material deviation is admitted between the Provisional and Complete Specification.



cery), re-enacted by Stat. 12 & 13 Vict. c. 109, s. 15 (*Petty Bag, &c. Offices Amendment*), which directed their enrolment in the Enrolment Office of the Court of Chancery, and provided (ss. 15 and 16) for the issue of Certificates and Copies of the Enrolments, which should be admissible in evidence. Stat. 15 & 16 Vict. c. 83, s. 27, dispenses with the enrolment and substitutes the filing of the Specification in the Office of the Commissioners (Great Seal Patent Office). A considerable reduction in expense<sup>s</sup> is effected by the substitution<sup>b</sup> of filing<sup>l</sup> for enrolment.<sup>k</sup>

Form of complete Specification.

The contents of the Specification have been already discussed. The formal parts of it prescribed by the Act are as follows:—

SPECIFICATION.

To all to whom these Presents shall come,

I, \_\_\_\_\_, of \_\_\_\_\_, send greeting:

Whereas her most Excellent Majesty Queen Victoria, by Her Letters-patent bearing Date the \_\_\_\_\_ Day of \_\_\_\_\_ A.D. \_\_\_\_\_ in the \_\_\_\_\_ Year of Her Reign, did for Herself, Her Heirs and Successors, give and grant unto me the said \_\_\_\_\_ her special Licence that I the said

<sup>s</sup> Ante, p. 147.

<sup>b</sup> 15 & 16 Vict. c. 83, s. 27.

<sup>l</sup> A file or filace, whereupon process and other matters are filed, is commonly a piece of Cat's Guts twisted hard and dried, and is thrust through anything which is filed, and, being then in the proper Office for that purpose, it becomes a record of the Court. (*Lilly's Pr. Regist. "FILING OF PROCESS," 1735.*) The Filazers of this Court (King's Bench), styled Clerks of our Sovereign Lord the King, were assigned to inroll pleas, &c., that is to say, by original writ only. They made out all Process thereupon, and entered them and all Issues joined thereupon. As Lord Mansfield remarked, however, with reference to the terms "feoffment," "tenure," "seisin" and "freeholder," we have little left us but the names, without any precise knowledge of the thing originally signified by these sounds. (*Jus Filazarii*, by John Trye, of Gray's Inn, Esq., 1684, p. 104.)

<sup>k</sup> Inrollment of a Deed is the entering of it fairly upon the Records of one of the King's Courts of Record at Westminster, or at the Quarter Sessions of the Peace. (*Lilly, INROLLMENT.*)

my Executors, Administrators and Assigns, or such others as I the said \_\_\_\_\_, my Executors, Administrators and Assigns, should at any time agree with, and no others, from time to time and at all times thereafter, during the term therein expressed, should and lawfully might make, use, exercise and vend within the United Kingdom of Great Britain and Ireland, the Channel Islands and Isle of Man, an Invention for

[*Insert Title as in Letters-patent.*]

upon the condition, amongst others, that I, the said \_\_\_\_\_ by an Instrument in Writing under my Hand and Seal, should particularly describe and ascertain the Nature of the said Invention, and in what manner the same was to be performed, and cause the same to be filed in \_\_\_\_\_ within \_\_\_\_\_ calendar months next and immediately after the Date of the said Letters-patent: Now know ye that I the said \_\_\_\_\_ do hereby declare the Nature of my said Invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following Statement (that is to say):

[*Describe the Invention.*]

In witness whereof I the said *A. B.* have heretofore set my Hand and Seal this \_\_\_\_\_ Day of \_\_\_\_\_ A D.

*A. B.*

Where, by reason of objections having been filed to the application for a Patent<sup>m</sup> (Provisional Specification lodged 2nd October, 1852) and to the Warrant for sealing (issued 9th February, 1853), Patentees were unable to file their Specification within the six months, the Lord Chancellor, on a Petition by the original Patentees, extended the time to seven months; his Lordship observing, that the Court clearly had a right to make such order, inasmuch as the time was fixed only in pursuance of a General Order.<sup>n</sup>

Extension of time for filing.

The express power has, however, been conferred by Stat. 16 & 17 Vict. c. 115, s. 6, by which, where the Specification, in pursuance of the conditions of any Letters-patent, has not been filed within the time limited by such

Powers of the Lord Chancellor in cases of accidental delay.

<sup>m</sup> *Re Simpson and Isaacs' Patent* (1853), Cranworth, L. C., pulp venter, 21 L. T. 81.

<sup>n</sup> Rules, 2nd Set.

Letters-patent, provided the delay in such filing has arisen from accident and not from neglect or default,<sup>m</sup> the Lord Chancellor is empowered at his discretion to extend the time for the filing of the Specification by a period not exceeding one month.

Effect of depositing documents with the Commissioners.

No documents can be received conditionally by the Officers of the Commissioners. In a case<sup>n</sup> under the old practice, the Master of the Rolls refused to cancel the enrolment of a Specification which had been left at the Office and had been enrolled, notwithstanding directions not to enrol it until further order.

Copies of Specifications open to the public;

The Commissioners are to cause<sup>o</sup> true copies of all Provisional Specifications left at their Office, to be open to the inspection of the public at such times after the date of the record thereof respectively as the Commissioners shall, by their order, from time to time direct.

must be left by the Patentee.

A true copy,<sup>p</sup> under the hand of the Patentee or applicant, or agent of the Patentee or applicant, of every Specification, and of every Complete Specification, with the drawings accompanying the same, if any, must be left at the Office of the Commissioners.

Certified copies and extracts receivable in evidence.

Printed or manuscript copies or extracts, certified and sealed with the Seal of the Commissioners of Letters-patent, Specifications, Disclaimers, Memoranda of alterations, and all other documents recorded and filed in the Commissioners' Office, or in the Office of the Court of Chancery appointed for the filing of Specifications, shall be received in evidence in all proceedings relating to Letters-patent for inventions, in all Courts whatsoever within the United Kingdom of *Great Britain and Ireland*, the Channel Islands, the *Isle of Man*, and her

<sup>m</sup> *Re Campbell's Patent* (1854), L. C., 22 L. T. 93.

<sup>n</sup> *In re Brough* (1844), 7 Beav. 101, Lord Langdale. See as to similar cases, *Re Sharp's Patent* (1840), Web. P. R. 641; *Nickel's Patent* (1841), caoutchouc, Web. P. R. 650.

<sup>o</sup> 16 & 17 Vict. c. 115, s. 2.

<sup>p</sup> *Id.* s. 3.

Majesty's Colonies and Plantations abroad, without further proof or production of the originals.<sup>9</sup>

Certified printed copies,<sup>r</sup> under the seal of the Commissioners, of all Specifications and Complete Specifications, and fac-simile printed copies of the drawings accompanying the same, if any, Disclaimers and Memoranda of alterations filed under the Patent Law Amendment Act, shall be transmitted to the office of the Director of Chancery in *Scotland*, and to the Enrolment Office of the Court of Chancery in *Ireland*, within twenty-one days after the filing thereof respectively, and certified copies or extracts from such documents shall be furnished to all persons requiring the same, on payment of such fees<sup>s</sup> as the Commissioners shall direct; and such copies or extracts shall be received in evidence in all Courts in *Scotland* and in *Ireland* respectively, in all proceedings relating to Letters-patent for inventions, without further proof or production of the originals.

To be transmitted to Scotland and Ireland.

<sup>9</sup> 16 & 17 Vict. c. 115, s. 4.

<sup>r</sup> Id. s. 5.

<sup>s</sup> See Appendix, Rule III. Second Set.

## CHAPTER V.

## THE GRANT AND ITS CONSTRUCTION.

Reservation by  
stat. 21 Jac. I. of  
the Royal Pre-  
rogative.

THE grant of Letters-patent for inventions is the Prerogative of the Crown. In *Boulton v. Bull*,<sup>a</sup> Mr. Justice Heath observes: "The Statute of 21 Jac. I. prohibits all monopolies, reserving to the King, by an express proviso, so much of his ancient Prerogative as shall enable him to grant Letters-patent, and grants of privilege for the term of fourteen years or under, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures."

Royal grants of  
the present day  
construed as  
grants between  
subjects.

The principles of interpretation with reference to Royal grants of the present day are thus laid down by Mr. Justice Coleridge in a recent case:<sup>b</sup> "Although in the old books not a few cases may be found distinguishing between grants from the Crown and grants from a subject, on grounds, some of them hard to reconcile with justice or common sense—some of them reasonable enough at the time with reference to the then condition and interests of the Crown, but wholly unreasonable now; yet the general principle to be traced in the main current of authority is both a just and reasonable one, establishing *the same guiding principle of construction* for instruments

<sup>a</sup> (1795) *Watts' engine*, 2 H. Bla. 465.

<sup>b</sup> *R. v. Archipelago Company* (1853), Q. B., 21 L. T. 33.

of both kinds. If, indeed, the King has been deceived by any *false suggestion* as to what he grants or the consideration of his grant,—if he appears to have been ignorant or misinformed of his interest in the subject matter of his grant,—if the language of his grant be so general that you cannot in reason apply it to all that would literally fall under it, or if it be couched in terms so uncertain that you could not tell how to apply it with that precision which a grant from one so especially representing the public interest ought in reason to have, or if the grant, *reasonably construed*, would work a wrong or something contrary to Law—in these and such like cases the grant would be perhaps either wholly void or restrained according to circumstances, and equally so whether the technical words *ex certâ scientiâ et mero motu* be used or not. That is applying the same principles of construction on which a grant from a subject is construed, viz., on default of effectuating the intention of the grantor, to hold the grant valid, or to construe it *secundum intentionem domini regis*, and not in *deceptione domini regis*. It is satisfactory to see that this language of good sense,<sup>c</sup> used even in times when the Prerogative was at least suffi-

Grounds of avoidance.

Construed on principles of good sense.

<sup>c</sup> A strong contrast to the language used in the House of Commons on the motion before alluded to of Lawrence Hyde, where “ Mr. Spicer said: ‘ This act may touch the Prerogative Royal, which, as I learned last Parliament, is *so transcendent, that a subject may not aspire thereto.*’ Sir F. Bacon said: ‘ I say, and say it again, that we ought not to deal, or judge or meddle, with Her Majesty’s Prerogative.’ I wish, therefore, every man to be careful of this business. Dr. Bennett said: ‘ He that goeth about to debate Her Majesty’s Prerogative had need to walk warily.’ Mr. George Moore said: ‘ *We know that the power of Her Majesty cannot be bound by any act; why, therefore, should we thus talk? Admit that we make this act with a non obstante, yet the Queen may grant a Patent with a non obstante, to cross this non obstante.*’ On a subsequent day, the subject was again introduced, when Mr. Spicer said, ‘ It is to no purpose to offer to tie Her Majesty’s hands by Act of

ciently favoured in Courts of Law, and in the very books to which reference is made for a strict and inequitable construction, and in the celebrated *Alton Wood's case*,<sup>c</sup> which contains a store of learning on this head, in what Lord Coke calls 'the Treasurer's brief and effectual judgment,' it is laid down that 'no violent or *strained construction is to be made of the King's grant, but his grant shall be taken in its usual and common sense, according to its intent and meaning.*' In *Sir John Molyn's case*,<sup>d</sup> Lord Coke desires the reader 'to note the gravity of the ancient sages of the law to construe the King's grant beneficially for his honour and the relief of the subject, and not to make any strict or literal construction in subversion of such grants.' And Lord C. B. Comyns, in his *Digest*,<sup>e</sup> gives accordingly the substance of this case, and *Beverly's case*,<sup>f</sup> and the *Churchwardens' case*,<sup>g</sup> in these words: '*When the King's grant is capable of two constructions, by one of which it will be valid and the other void, construction must be made to make it valid, for that will be more for the benefit of the subject and the honour of the King, which ought to be more regarded than his profit.*'"

The following is the Form (prescribed by the Patent Law Amendment Act, 1852) of the Letters-patent at present issued.

Parliament, *when she may loosen herself at her pleasure.*' Mr. Davis said: '*God hath given that power to princes which he attributes to himself, Dixi quod Dii estis.*'" D'Ewes, 652.

<sup>c</sup> 1 Co. Rep. 26.

<sup>d</sup> 6 Co. Rep. 6.

<sup>e</sup> Tit. "Grant by the King," G. 12.

<sup>f</sup> 9 Co. Rep. 129.

<sup>g</sup> 10 Co. Rep. 66.

## LETTERS-PATENT.

VICTORIA,<sup>h</sup> by the grace of God of the United Kingdom of Queen's Title.  
Great Britain and Ireland Queen, Defender of the Faith;

To all to whom these presents<sup>l</sup> shall come, greeting:

Whereas                    hath by his Petition humbly represented unto                    Recital of  
Us<sup>k</sup> that he is in possession of an Invention for                    , which                    Petition.  
the Petitioner conceives will be of great public utility;<sup>l</sup> that he is the  
true and first Inventor thereof, and that the same is not in use by any  
other person or persons, to the best of his knowledge and belief:<sup>m</sup> The  
Petitioner therefore most humbly prayed, that We would be graciously  
pleased to grant unto him, his executors, administrators and assigns,

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<sup>h</sup> As to the general powers of the executive in allowing or prohibiting the importation or exportation of particular goods, or the carrying on of any trade, see Heinec. El. Jur. Civ. ii. 169; Puff. iv. 6, 10; Valin, Com. i. 217; Vattel, i. 94; Blk. bk. iv. pt. 3, ch. i.; Chitty, P. C. ch. x. § 2; Hawk. P. C. i. c. 29, § 20; Com. Dig. "Patents;" Noy, 182; Hindm. 7; Foster, Sci. Fa. 237; Godson, 10; Skin. 224; Hard. 55; 1 Rol. 5; Anderson's Hist. and Chron. Ded. i. 478; *Child v. Sands*, 4 W. & M., K. B.; Carth. 295; Dyer, 177. In the Case of Monopolies (*Darcy v. Allein*, Noy, 178), it was said, "Such Charter of a monopoly against the freedom of trade and traffic is against divers Acts of Parliament, as 9 Edw. III. c. 1 and 2, which, for the advancement of trade and traffic, extends to all things vendible, notwithstanding any Charter of franchise granted to the contrary, or usage, or custom, or judgment given upon such Charters, which Charters are adjudged by the same Parliament to be of no force and effect."

<sup>l</sup> The King cannot grant but by matter of record (Com. Dig. "Pre-rog."), and by the Common Law no grant is available or pleadable, unless under the Great Seal. R. 2, Co. 16 b; 2 Rol. 182, l. 5.

<sup>k</sup> The use of the plural form by the King in his grants dates from the reign of John. 2 Inst. 2.

<sup>l</sup> In *Lovell v. Hicks* (1836, 2 You. & Coll. 46), the subject matter of a Patent (economical baking apparatus by means of alcoholic evaporation) turned out a mere bubble. The Patent was set aside, as obtained by fraud upon the Crown, and the money paid under an agreement to purchase a share in the Patent ordered to be returned.

<sup>m</sup> The allegations in the Petition as to the utility and novelty of the invention are the grounds on which the *scire facias* is prosecuted for a repeal of a Patent, as obtained by fraudulent representations to the Crown.



Our Royal Letters-patent for the sole<sup>n</sup> use, benefit and advantage of his said invention within Our United Kingdom of Great Britain and Ireland, the Channel Islands and Isle of Man, for the term of fourteen years, pursuant to the Statutes in that case made and provided:

[And whereas<sup>o</sup> the said *A. B.* hath particularly described and ascertained the nature of the said Invention, and in what manner the same is to be performed by an instrument in writing under his hand and seal, and has caused the same to be duly filed in :]

Concession of  
the Prayer.

And We, being willing to give encouragement to all Arts and Inventions which may be for the public good, are graciously pleased to condescend to the Petitioner's request: Know ye, therefore, that We, of Our especial grace,<sup>p</sup> certain knowledge<sup>q</sup> and mere motion,<sup>r</sup> have

<sup>n</sup> "The Crown has always exercised a control over the trade of the country, and, though restrained by the Common Law and the Statute of Monopolies within reasonable limits, may grant the exclusive right to trade with a new invention for a limited period. The Statute 21 Jac. I. c. 3, did not create, but controlled the power of the Crown in granting to the first inventors the privilege of the sole working and making of new manufactures." Per V. C. Turner (1851), *Caldwell v. Vanvlissingen* (ship-propeller), 9 Hare, 415.

<sup>o</sup> This in the case in which a complete Specification has been filed in the first instance.

<sup>p</sup> "Although the thing may be new in every particular, yet it is in the judgment of the Crown whether it will or will not, as a matter of favour, make the grant." Per Bailey, J., *Brunton v. Hawkes*, 4 B. & Ald. 552.

<sup>q</sup> Sup. 49. The words *ex certâ scientiâ* are said to import that the King has knowledge of that which he grants, and therefore such Charter is called assertive, and not suggestive. 1 Co. 44 a; 10 Co. 112 b; 3 Levinz, 249; Plowd. 502 b. "The Deed of Grant," Mr. Turner very truly observes (1851, Remarks on Patent Law, p. 19), "swells with imposing terms, which are but the shadows of Majesty. The 'certain knowledge and mere motion' turns out to be *clausula clericorum*, the prohibitions aweless to the infringer, the proviso for favourable construction useless to the Patentee."

<sup>r</sup> "Ex mero motu properly imports the honour and bounty of the King, who rewards the Patentee for the merit of his service of the mere motion of the King himself, without any suit of the party." (Vin. Abr. "Prerog.;" Bac. Abr. "Prerog.;" Com. Dig. "Grant.") Hindm. "It is the duty of every one obtaining a grant from the Queen to see that she is correctly informed respecting the grant." 1 Co. R. 52 a.

given and granted, and by these presents for Us, Our heirs and successors, do give and grant, unto the said *A. B.*, his executors, administrators and assigns, Our especial licence, full power, sole privilege and authority that he the said *A. B.*, his executors, administrators and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the said *A. B.*, his executors, administrators or assigns, shall at any time agree with, and no others, from time to time, and at all times hereafter during the term of years herein expressed, shall and lawfully may make, use, exercise and vend his said Invention within Our United Kingdom of Great Britain and Ireland, the Channel Islands and Isle of Man, in such manner as to him the said *A. B.*, his executors, administrators and assigns, or any of them, shall in his or their discretion seem meet; and that he the said *A. B.*, his executors, administrators and assigns, shall and lawfully may have and enjoy the whole profit, benefit, commodity and advantage from time to time coming, growing, accruing and arising by reason of the said Invention for and during the term of years herein mentioned, to have, hold, exercise and enjoy the said licences, powers, privileges and advantages hereinbefore granted, or mentioned to be granted, unto the said \_\_\_\_\_, his executors, administrators and assigns, for and during and unto the full end and term of fourteen years, from the

Words of grant.

Term of the grant.

Extent of the grant.

Day of \_\_\_\_\_, A. D. \_\_\_\_\_ next immediately ensuing, according to the Statute in such case made and provided; and to the end that he the said *A. B.*, his executors, administrators and assigns, and every of them, may have and enjoy the full benefit and sole use and exercise of the said Invention according to Our gracious intention hereinbefore declared, We do by these presents for Us, Our heirs and successors, require and strictly command all and every person and persons, bodies politic and corporate, and all other Our subjects whatsoever, of what estate, quality, degree, name or condition soever they be, within Our United Kingdom<sup>r</sup> of Great Britain

Prohibitory words.

<sup>r</sup> See 15 & 16 Vict. c. 83, s. 23.

<sup>s</sup> Letters-patent obtained in England previous to the late Act conferred exclusive privilege only within England, Wales and the town of Berwick-upon-Tweed, and also within the islands of Guernsey, Jersey, Alderney, Sark and Man, and Her Majesty's colonies and plantations abroad, if so expressed. The privilege for Ireland and Scotland was required to be by separate Letters-patent. An instance of the injustice and grievance this produced is given in evidence by Mr. Macfie, sugar-refiner of Liverpool, Evid. 980. The Letters at present granted

and Ireland, the Channel Islands and Isle of Man, that neither they<sup>u</sup> nor any of them at any time during the continuance of the said term of fourteen years hereby granted, either directly or indirectly do make, use or put in practice the said Invention, or any part of the same, so attained unto by the said \_\_\_\_\_ as aforesaid, nor in anywise counterfeit, imitate or resemble the same; nor shall make or cause to be made any addition thereunto or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, deviser or devisors thereof, without the consent, licence or agreement of the said *A. B.*, his executors, administrators or assigns, in writing under his or their hands and seals first had and obtained in that behalf, upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this Our Royal command, and further to be answerable to the said *A. B.*, his executors, administrators and assigns, according to Law, for his and their damages thereby occasioned; and moreover We do, by these presents, for Us, Our heirs and successors, will and command all and singular the justices of the peace, mayors, sheriffs, bailiffs, constables, headboroughs and all other officers and ministers whatsoever of Us, Our heirs and successors, for the time being, that they or any of them do not nor shall at any time during the said term hereby granted in anywise molest, trouble or hinder the said *A. B.*, his executors, administrators or assigns, or any of them, or his or their deputies, servants or agents, in or about the due and lawful use or exercise of the aforesaid Invention or anything relating thereto: Provided always, and these our Letters-patent are and shall

Proviso for re-  
vocation.

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are valid for the whole of the United Kingdom, the Channel Islands and the Isle of Man. A provision was made with respect to their operation in the Colonies: none, are, however, now granted. A case (*Caldwell v. Vanvlissingen* (1851), screw-propeller, V. C. T., 9 Hare, 415) which, shortly before the passing of the Patent Law Amendment Act, occupied the attention of the Courts, led to the introduction into the bill of the permission (15 & 16 Vict c. 83, s. 26) to use patented inventions on board such foreign ships when within Her Majesty's jurisdiction, where such inventions are not used for the manufacture of any goods to be vended within or exported from Her Majesty's dominions, and where reciprocal advantages are conceded with respect to the Patents of that country.

<sup>u</sup> "The prohibitory words of the Patent, which are addressed only to the subjects of this country, are in aid of the grant, and not in derogation of it." V. C. Turner, *Caldwell v. Vanvlissingen* (1851), ship-propeller, 9 Hare, 415.

be upon this condition,\* that if at any time during the said term hereby granted it shall be made to appear to Us, Our heirs or successors, or any six or more of Our or their Privy Council, that this Our grant is contrary to Law or prejudicial or inconvenient to Our subjects in general, or that the said Invention is not a new Invention as to the public use and exercise thereof, or that the said *A. B.* is not the true and first Inventor thereof within this realm as aforesaid, these Our Letters-patent shall forthwith cease, determine and be utterly void to all intents and purposes, anything hereinbefore contained to the contrary thereof in anywise notwithstanding: Provided also, that these Our Letters-patent, or anything herein contained, shall not be construed to extend to give privilege unto the said *A. B.*, his executors, administrators or assigns, or any of them, to use or imitate any Invention or work whatsoever which hath heretofore been found out or invented by any other of Our subjects whatsoever, and publicly used or exercised, unto whom Our like Letters-patent or privileges have

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\* On the effect of a proviso of this kind—enabling the Crown in a summary way, by writing under the Great Seal or Sign Manual, to revoke or modify Letters-patent granted to Incorporated Companies—upon the power to have them repealed by *scire facias*, the Queen's Bench, in *Reg. v. Eastern Archipelago Company* (21 L. T. 35), was equally divided. "I am of opinion," said Campbell, C. J., "that the proviso in no respect limits the power of proceeding by *scire facias*, and gives only an additional and cumulative remedy by enabling the Crown in a summary manner to revoke the Charter or modify it. The supposition that it takes away all power to proceed by *scire facias* cannot possibly be sanctioned. It is difficult to imagine how such a proceeding would be conducted, as no instance can be discovered, although a similar power of summary revocation has been contained in all Letters-patent granted since the Statute of Monopolies . . . . The grant of a Patent is matter of grace and favour, and therefore the Crown may annex any conditions it pleases to the grant." Mr. Hindmarch (p. 432) suggests that it was under this or a similar proviso that Queen Elizabeth recalled her obnoxious Patents (*supra*, 7). If exercised by the Privy Council, it must be under the hands of six or more of the members of it. In *Ledsam v. Russell* (House of Lords, 1 Cl. & Fin. 687) renewed Letters-patent were granted to B., on his securing to A, the original Inventor, an annuity of 500*l.* as long as the new Letters-patent should last; but if he could not secure such annuity, then upon signification thereof by Her Majesty, the new Letters-patent should cease.