

COMPULSORY LICENCES

UNDER

THE PATENTS ACTS.

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THE PATENTS ACTS.

BY
J. W. Gordon
J. W. GORDON,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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PREFACE.

THIS volume represents an attempt to elucidate the two-and-twentieth section of the Patents Act of 1883 by a collection of authorities and other materials for its discussion. Recent events have illustrated in a very striking manner the great importance for the industrial community of this enactment and the experience gained in dealing with some half dozen petitions under the Act has shown that the necessary inquiries at the Board of Trade are of a magnitude fully proportionate to the importance of the interests involved. It seems not unreasonable to suppose that in these circumstances the public concerned with this subject, whether as practitioners assisting, as parties litigating or as persons interested in a vaguer sense in the expression and administration of the law, will find it convenient to have the available information presented in the compass of a book.

In point of fact although the present publication is thus suggested by the circumstances of the hour there is more of coincidence than of causal connection in that fact. The volume now before the reader is in truth a supplement to a treatise upon Monopolies by Patents which was published two years ago. It was my intention when that earlier book was put in hand to deal exhaustively with the remedies provided by statute for the mischief of monopolies arising out of patents for inventions. But I found, having completed my task so far as the remedy provided by the Act of 1623 was concerned, when I turned to the Act of 1883 that so large a research was necessitated by the very singular form of the new enactment that I was fain to publish what results I had secured and to take time to work up the remaining branch of the subject. That decision proved to be a fortunate one for it has happened that the bringing of several petitions under the

Act to a hearing within the past six months has greatly facilitated my work and enabled me to add to my book a set of reports which give to it a value such as entirely to exonerate me from the task of writing an apology for its appearance.

This reference to the connexion between the present volume and the earlier one just referred to is not wholly gratuitous. It serves to explain,—what no doubt require explanation,—the frequent references occurring in the following pages to my book upon Monopolies. It will, I hope, be found that whatever is necessary to the practical ends, to subserve which this volume has been compiled, is here reproduced, but in reference to many points of collateral interest I have taken the liberty of referring to my own published work with the same freedom with which, under the like conditions, I have referred to the published work of others.

The materials here placed at the reader's service will be found to comprise in addition to a full account of the jurisdiction and practice of the Board of Trade, the complete set of reports already referred to of proceedings had under the section in the form of an Appendix (App. I.) and a discussion, illustrated by a pretty full collection of rules, of the very difficult questions which arise upon the clause prescribing mandamus as the remedy for enforcing the order of the Board.

For the practitioner's convenience who may have occasion to conduct proceedings in the nature of mandamus to compel obedience on the part of a patentee a selection has been made from the Rules of the Supreme Court and the Crown Office Rules of such as bear more directly upon this proceeding and they have been somewhat re-arranged and consolidated. It is hoped that in this way the intricacy of these two concurrent systems of rules has been somewhat diminished and that the plan of indexing adopted will have done something more to facilitate their use.

A point upon which especial attention has been bestowed in the following pages is the drafting of the licence, and with this view a collection of precedents has been made in the Appendix of Forms (App. IV.). The settling of the terms of the agreement between licensor and licensee is a matter which up to the present time has received very inadequate attention at the inquiries conducted by the Board of Trade, and it seems probable that an explanation of this somewhat singular fact may be found in the difficulty which all concerned have so far encountered in the search for precedents. Bearing this in mind I have borrowed freely from the most approved sources, supplementing the authority of the conveyancers whenever possible from the reports. One cannot often in a matter of this kind, where numerous writers have drawn upon a common fund, discern the original sources of the accepted texts, but those of my readers who may desire to verify the formulas here given will find no difficulty in tracing them to the books from which I have derived them and in identifying such as, failing authoritative texts, I have ventured to supply. It is hoped that in this way the draughtsman will be furnished not only with texts but also with the criteria by which to judge when he may place implicit reliance and when only a more discriminating confidence upon the materials with which he is supplied.

In the preparation of the Appendix of Reports a question has arisen as to the mode of entitling the various cases in which respect I have been compelled to depart from the mode at present employed in the Patent Office Reports. The title there adopted makes mention only of the petitioner's name without alluding to the patent in respect of which the petition is lodged. As the present collection of reports contains two petitions by Levinstein Limited this was clearly an inconvenient way of referring to them and I have reason to think that the inconvenience is felt at the office from which the official reports emanate. How it will be corrected in the official publications in future I do not

know but being obliged to make choice for present purposes of a new formula I have with the advice of some of my friends, whose judgment I much rely upon, adopted the formula which here appears, in which the name of the patentee stands first and that of the petitioner follows. This formula is an abridgment of the title of the cause as it appears upon the papers and has that at least to recommend it, while it promises to suffice for the purpose of distinguishing the various matters.

In the collection of materials for this book I have become indebted to many friends to whom my very sincere thanks are tendered with great respect. I pay this tribute in particular to Mr. Ivan Levinstein and Messrs. Heys & Son of Manchester, to Messrs. W. J. and E. H. Tremellen of London, to the Solicitor of the Board of Trade and to Mr. Edwin Gillett of the Solicitor's Department. My acknowledgments to the Editor of the Patent Office Reports and to the Comptroller-General are reserved for another context and the recurrence to mind of the name of my learned friend Mr. R. J. Drake makes me aware that I have drawn upon the good offices of many personal friends whose assistance has been of a character to call for my more private thanks.

The writer whom they have aided is not unaware that his work is marred by imperfections due in part to the insufficiency of his leisure for a task of the magnitude of the present one but he has the satisfaction of reflecting that even imperfect work is useful work in an uncultivated field and that much will be forgiven to the writer of a law book who does the pioneer work upon a subject of such vast public importance as that of the compulsory licensing of patent rights.

J. W. GORDON.

11, KING'S BENCH WALK,
20th June, 1899.

LIST OF ABBREVIATIONS.



A. C.	.....	Law Reports—Appeal Cases.
A. & E.	}	.....Adolphus and Ellis.
Ad. & E.		
Archæologia	.....	Archæologia of the Archæological Society.
B. & Ad.	.....	Barnewall and Adolphus.
B. & Ald.	.....	Barnewall and Alderson.
B. & C.	.....	Barnewall and Cresswell.
B. & S.	.....	Best and Smith.
Ba. Ab.	.....	Bacon's Abridgment.
Beav.	.....	Beavan.
Bing.	.....	Bingham.
Bl.	.....	Blackstone.
Burr.	.....	Burrows.
Car. & P.	.....	Carrington and Payne.
Carth.	.....	Carthew.
C. B.	.....	Common Bench.
C. B. N. S.	.....	Ditto New Series.
Ch.	.....	Law Reports—Chancery Appeal Cases.
Ch. Div.	}	.....Law Reports—Ch. Div.
C. D.		
C. M. & R.	.....	Crompton, Meeson and Roscoe.
Comm.	.....	Blackstone's Commentaries.
Co. Lit.	.....	Coke on Littleton.
Co. Rep.	.....	Coke's Reports.
C. O. R.	.....	Crown Office Rules.
Cowp.	.....	Cowper.
C. P.	.....	Law Reports—Common Pleas Cases.
Cr. & J.	.....	Crompton and Jervis.
De G. M. & G.	.....	De Gex, Macnaghten and Gordon.
De G. J. & S.	.....	De Gex, Jones and Smith.
Doug.	.....	Douglas.
Dqw	.....	Dow's Reports.
D. P. C.	.....	Dowling's Practice Cases.
E. & B.	.....	Ellis and Blackburn.
Esp.	.....	Espinasse.
G. & D.	.....	Gale and Davison.
Goodeve	.....	Goodeve's Patent Cases.
Hare	.....	Hare's Reports.
H. L. Cas.	.....	House of Lords Cases.
H. & M.	.....	Hemming and Miller.
H. & N.	.....	Hurlstone and Norman.
H. & W.	.....	Harrison and Wollaston.
Inst.	.....	Coke's Institutes.
Jur.	.....	Jurist Reports.

K. & J.	Kay and Johnson.
L. J. (Ch.) (K. B.) &c.	Law Journal Reports—(Chancery) (King's B.) &c.
Ld. Raym.	Lord Raymond.
L. R.	Law Reports.
L. R. (H. L.)	Law Reports, English and Irish Appeals.
L. T.	Law Times Reports.
Lee t. Hard.	Lee's Rep. of Ca. in the time of Lord Hardwicke.
M. & Cr.	Mylne and Craig.
M. & G.	Manning and Granger.
M. & W.	Meeson and Welsby.
Mod.	Modern Reports.
Moore (B.)	Moore's Reports, King's Bench.
Morris	Morris' Patents Conveyancing.
Mur. & H.	Murphy and Hurlstone.
N. & M.	Neville and Manning.
Noy	Noy's Reports.
P. R.	Patents Rules, 1890 and 1892.
P. Wms.	Peere Williams.
Q. B.	Queen's Bench Reports (Adolphus and Ellis N. S.).
Q. B. D.	Law Reports—Queen's Bench Division.
Remembrancia	Remembrancia of the City of London—Overall's Analytical Index to.
Rep.	Coke's Reports.
R. P. C.	Official Reports of Patent Cases.
R. R.	Revised Reports.
R. S. C.	Rules of the Supreme Court.
Ry. } Ry. Fœd. }	Rymer's Fœdera.
Salk.	Salkeld.
Sav.	Savile's Reports.
Scott N. R.	Scott's New Reports.
Sid.	Siderfin's Reports.
Sim.	Simons.
Sm. L. C.	Smith's Leading Cases.
Str.	Strange.
T. R.	Term Reports.
Touchstone	Shepherd's Touchstone.
V. & B.	Vesey and Beames.
Vent.	Ventris.
Ves.	Veszy.
Vin. Ab.	Viner's Abridgment.
W. Bl.	Sir Wm. Blackstone's Reports.
W. N.	Weekly Notes.
W. P. C.	Webster's Patent Cases.
W. R.	Weekly Reporter.
Y. & O. C. C.	Younge and Collyer's Chancery Cases.
Y. & J.	Younge and Jervis.

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<i>York (Mayor of)</i> : see <i>R. v. Mayor of York.</i>				

COMPULSORY LICENCES.

CHAPTER I.

INTRODUCTORY.

Dormancy of the enactment—Commercial value of patent rights—The High Court superseded—Will the experiment succeed?—Abandonment of jurisdiction by the High Court—Innovations—The rights of patentees—The consideration for the patent grant—Scope of a patentee's rights—The penalty of default—The old law and the new—The interests of patentees and the new jurisdiction—Expense of proceeding at the Board of Trade—Oppressive inquiries at the Board of Trade—Practical effect of the new remedy.

It is only within the past twelve months that the public have become at all aware of the importance attaching to the provisions introduced into the Patents Act of 1883 concerning the compulsory licensing of patents under the authority of the Board of Trade. The fact that for upwards of fifteen years the 22nd section of that Act, which gives this remedy against the misuse of patent rights, has remained a dead letter has been not a little used as a handle for criticism as if it afforded a demonstration of failure. That criticism, however, is vitiated by an oversight. It was provided by the 45th section of the Act that patents granted before the 1st January, 1884, should remain unaffected by its provisions relating to compulsory licences (a). There was consequently at the

Dormancy
of the
enactment.

(a) 46 & 47 Vict. c. 57, s. 45 (2).

time when the Act, and with it the clause, came into operation nothing upon which the new remedy could take effect. In fact it could hardly be the case for some years thereafter that any subsisting patent right should be of sufficient importance either to the public at large or to other inventors to call for the putting in operation of the new powers entrusted to the Board of Trade. Some considerable delay in bringing the experiment to bear was therefore to be expected and the fact that such has been the case affords no presumption of any kind against the utility of the enactment in question. It may indeed be said that the delay is longer than might have been expected: that five, six or perhaps ten years might have elapsed in that way without producing a single case in which it would be worth while for a petitioner to come forward and face the certain expense and doubtful issue of the new proceeding, but that a suspense of fifteen years points to some more radical defect in the law than mere defect of opportunity. That argument may be dealt with when it is put forward and it will not then be difficult to deal with it for the simple fact is that during the period of enforced suspense lawyers had lost sight of the dormant clauses of the Act. The operative clauses had come to be very familiar by reason of a large body of litigation which since 1883 had arisen about patent rights and in proportion as the effective clauses became matters of common legal knowledge the non-effective clauses dropped out of notice. Thus it was not until an agitation set on foot by the manufacturing community for some effective protection against the mischief of patents which had proved prejudicial to the State and generally inconvenient reached the Board of Trade that serious attention was directed to the provision against this evil which Parliament had newly made in 1883 and lawyers had newly forgotten ten years later. It is perhaps matter for congratulation from the point of view of the public that the period of suspended animation should have been terminated in this way. The

legislative experiment was a bold one and might easily have miscarried altogether if the authorities entrusted with carrying it out had taken an inadequate view of the importance of their duties. It may fairly be doubted whether the ministry and the Parliament which launched this experiment fully appreciated how very bold it was. British patent rights have in recent years increased enormously in aggregate value and in popular estimation they have appreciated in a still greater degree. With the principal rights the subordinate privileges, such as licences under patents, have risen in value at least *pari passu*. Of the estimation in which they are at present held many striking instances might doubtless be collected with a little well-directed industry. One, which came recently unsought to the present writer's knowledge, is sufficiently striking. It is a case in which a premium of 70,000*l.* was paid for a licence to manufacture bicycle tyres at a heavy *pro rata* royalty, the licence not being a strictly exclusive one. Such an example will, no doubt, strike the imagination of those to whom the subject is unfamiliar but no one who has been much concerned in recent years with the business arrangements and litigation that have grown within that period out of patent rights can have any doubt that they represent a vast and rapidly increasing property.

Now the boldness of the experiment of 1883 consists in this that the entire body of British patent rights, greatly augmented in number and value by that Act, has been withdrawn from the protection of the High Court and placed, so far as it is affected by licensing, in the hands of the Board of Trade. The wisdom of that course has still to be vindicated for we are as yet at the beginning of our experience of justice as administered by the department and the fact that a good beginning has been made must in large measure be ascribed to the great public interest which the launching of the new jurisdiction has awakened. The Board has acted under a keen sense of

Commercial
value and
patent rights.

The High
Court
superseded.

responsibility and has made careful choice of its agents in performing its functions under the Act while the referees selected, upon whom has devolved the difficult duty of interpreting and administering a very imperfect enactment, have brought to their task a loyal and most resolute purpose to make the jurisdiction a success. No conditions could have been more propitious and the underlying condition, from which as from their source the rest can be traced, is a lively public interest in the securing of the relief aimed at by the Act. Had this been wanting to the first proceedings it is very conceivable that the new measure would have been stifled in its cradle.

Will the
experiment
succeed?

The wisdom of thus placing the administration of justice in the hands of the Board of Trade rather than of the Courts has still to be demonstrated as we have already pointed out and indications are not wanting that it will be seriously called in question. To discuss such questions is no part of the present undertaking but it has not been found possible wholly to avoid the topic in these pages. The chapters upon the Tribunal and Procedure, which form an integral part of the present book, though written with no polemical purpose, would have fallen short of a full and necessary exposition of the machinery available for carrying out the law if they had been framed in such a way as to conceal the obvious defects which that machinery exhibits. As they stand, however, they are liable to produce an impression which is no less unfair than unfavourable to the Board of Trade unless it is borne in mind that the High Court has in recent years proved itself to be a very unsatisfactory forum in which to defend the common law rights of unprivileged traders against the encroachment of patentees. This is a topic which does not fall within the compass of the present work and to which therefore it is impossible to do justice in this connection but it has been worked out in a recent treatise; and by way of warning to any who may be tempted to urge in a spirit of impatience that the High Court

should be invested with the jurisdiction created by the Act of 1883 it may be useful to enumerate here some of the positions which have been made good in the book referred to (*b*).

In the first place, then, the High Court already has full authority—were it minded to exercise that authority—to impose terms such as are now imposed by the Board of Trade. The authority arises in this way. No patentee can assert his patent right against an infringer except by coming to the Court for relief and the relief most commonly sought is an injunction to restrain the infringement. Now the Court has a discretion to grant or to withhold the injunction and in a case in which it is manifest that the patentee is using his patent right unreasonably and to the prejudice of other persons the Court ought to refuse the injunction and even to dismiss the action. The ground for this conclusion is to be found in the Statute of Monopolies which declares all patents to be “void and of none effect and in nowise to be put in ure or execution” which are “mischievous to the State by raising prices of commodities at home or hurt of trade or which are generally inconvenient.” It is to be found also in the patent itself which incorporates this provision of the Statute Law in a defeasance by the proviso that the grant shall “determine and be void to all intents and purposes” if it be made to appear to the Crown or to the Privy Council that it is “prejudicial or inconvenient to our subjects in general.” Plainer or more stringent provisions for securing the public against the strained or unreasonable assertion of patent rights it would be difficult to devise but the High Court has wholly abandoned this branch of its jurisdiction. It has even formally declined to entertain any question of the public convenience as against the pretensions of a patentee and language stronger in this sense than the language of the judgment in *The Incandescent Gas Light*

Abandonment
of jurisdiction
by the High
Court.

(*b*) Monopolies by Patents.

Company, Ltd. v. Cantelo (c) it would be impossible to devise.

Innovations.

But it is not alone in respect of the somewhat vague interest represented by "prejudice to the public" and "general inconvenience" that the High Court has sacrificed to patentees of the Crown the common law rights of the "free" trader. It has equally and with the lightest of light hearts abandoned to the same fate the most definite and most explicitly guaranteed rights of ordinary property. No doctrine is more fundamental to our constitution than the doctrine asserted even when Tudor autocracy was at its height that "no forfeiture can grow by patent" (d). But the High Court, having acted consistently upon this principle from the dawn of legal history down to the last five-and-twenty years, has within that period abandoned the doctrine without so much as discussing it and now makes without hesitation the order for delivery up to the patentee of infringing goods (e). In fact its arbitrary exercise of authority has not even stopped at this point. Within the past three years a further and most dangerous novelty has been introduced and carried through in the privacy of judges' chambers of dealing with small infringers by committing them to prison upon the thin pretext of contempt of court for breach of injunctions against infringement couched in the most general terms. Such are some of the shortcomings of the High Court in reference to the administration of the law of patents and they may well give pause to those who advocate the transfer to that jurisdiction of the discretion now vested in the Board of Trade.

(c) 12 R. P. C. 264, 266; and see below, p. 22. Even in a case in which the public inconvenience caused by enforcing the injunction is so serious as to induce an enlightened plaintiff to waive some part of his claim to it, the Court will grant the injunction without imposing conditions for the pro-

tection of the public: *Hopkinson v. St. James*, 10 R. P. C. 62.

(d) *Walsham v. Austin*, cited in the *City of London's case*, 8 Co. Rep. 125a, 127b; 2 Inst. 47; *Horne v. Icy*, 1 Sid. 441; 1 Vent. 47; *Hastings' Patent*, Noy, 183.

(e) This subject is discussed in *Monopolies by Patents*, pp. 45—50.

These considerations lead naturally to the discussion of a question; namely, what is the precise nature of a patentee's rights in respect of the patented invention? the determination of which is a necessary preliminary to the exercise of the discretion vested in the Board of Trade. The question is by no means easy to answer for although it has been much considered in the Courts the views of the judges have varied considerably from time to time. It is not easy, not even possible, to reconcile the earlier utterances with the later and from what has been already noted it results that the latest utterances are by no means the most convincing. Even if there were not this conflict of authorities in the reported decisions it would by no means follow that the Board of Trade would for the purposes of its new jurisdiction be bound by the definitions which, for wholly different purposes, have been adopted by the Courts. As matters stand the investigation of this point is certainly incumbent upon the Board and its advisers.

The rights of patentees.

See below, p. 51.

As with most other British institutions, so with patents, the easiest way of arriving at an understanding of their nature is to inquire into their history and in this case the teachings of history will be found to be instructive in an unusual degree. Our patents for inventions date for practical purposes from the reign of Queen Elizabeth for although some instances—like the patent for the philosopher's stone—can be adduced from an earlier age these are rather forerunners than beginnings of our present system. But the most modern patent grant bears the stamp of Elizabethan draughtsmanship and can only be expounded by reference to the state of industry in this realm in that monarch's time. The main substance of the patent is a grant of power, liberty and licence to carry on a new trade. That is to say it was in its origin an enabling grant which authorized the grantee to carry on a trade to which he had never been apprenticed and in towns where he was not free of the guild merchant; all statutes, franchises and trade privileges to the contrary notwithstanding. With the gradual decay of the old guilds this grant of privi-

See below, p. 31.

lege lost *pari passu* its importance and with the abolition of the corporations and the setting free of all trades in all parts of the realm in the year 1835 it ceased to be of any importance at all (*f*). But to this day the Crown confers, for whatever it is worth, "especial licence, full power, sole privilege and authority . . . to make, use, exercise, and vend the invention." The law officers of the Crown when they were called upon in the sixteenth century to frame a deed which would confer such rights upon the inventor of a new manufacture turned most naturally for a precedent to the trade charters by which the Crown had been accustomed time out of mind to erect local guilds for the regulation of trades and industries. The analogy was obvious. The manufacture, being a new one, could not be covered by any of the existing trade charters. The inventor, as being the only craftsman of that trade, was to be invested with powers corresponding to those of a brotherhood. He was to take apprentices and by himself and his servants (including apprentices) and no others he was to have power to set up and carry on the new manufacture. So strictly was the idea of a trade charter carried out that Sir Edward Coke, who must himself as a law officer of the Crown have settled many of these grants, tells us that a scruple was entertained in his time as to whether a grant could be valid that allowed the inventor to exclude his apprentices from the free pursuit of the trade as brother craftsmen when the term of their apprenticeship was over (*g*). In accordance with this idea the patent was drawn up as nearly as possible in the words of a trade charter the points of difference being almost entirely such as resulted of necessity from the fact that in this case the freedom of the trade was conferred as a sole privilege upon the inventor instead of being conferred as a joint privilege upon the fraternity (*h*). To this power

See below,
p. 33.

(*f*) By 5 & 6 Will. 4, c. 76, s. 14.
Steers v. Rogers, 10 R. P. C. 251.

(*g*) 3 Inst. 184.

(*h*) This exposition of the patent grant has been more fully worked

out in *Monopolies by Patents*, pp. 116—122, and 249—262, to which work the reader interested in the investigation of the topic is referred. It is illustrated by

to engage in the new trade there was added—still upon the analogy of a trade charter—power to exclude strangers from engaging in it but in the case of an inventor, whose manufacture was “new within the realm,” this power was naturally a greatly extended power in respect of its geographical limits. The trade corporations were established for the regulation of trades in particular townships—the inventor’s township was the realm and he accordingly could not only go anywhere to set up his factory and vend his wares but he could also enforce the prohibition anywhere and everywhere and treat the craftsmen of London or Norwich or Lynn as “foreigners” in their own towns so far as his manufacture was concerned. The privilege was a large one but it was not exorbitant; it was justly and carefully admeasured to the public service which the inventor was expected to render (*i*).

This public service was, of course, the introduction and establishment within the realm of the new manufacture. The privileges conferred upon the patentee were strictly proportioned to this service. His independence of the trade guilds was conferred upon him in order that he might not be suppressed by the discipline of jealous trade rivals; his monopoly in order that he might be able to bear the “costs and charges” incidental to the establishment of the new industry. A little later, when experience had shown that upon misinformations and untrue pretences of public good many such grants had been unduly obtained and unlawfully put in execution, a defeasance was introduced providing that if the grant should prove prejudicial to the public it should thereupon determine and become void to all intents and purposes. Thus the benefit was

The consideration for the patent grant.

See below, p. 24.

an annotated reprint of Gilbert’s Patent (A.D. 1618) which first appeared in the Appendix to that book and is for the convenience of the curious reader reprinted as Appendix VI. of the present volume. See below, p. 395.

(*i*) Of course I am aware that the judgment in *Caldwell v. Fan-*

vlissingen, 9 Hare, 427, affords from a certain point of view an answer to this argument and, equally of course, I am aware that that judgment has not yet been adopted by a Court of Appeal. *Steers v. Rogers*, 10 R. P. C. 251, is an authority upon the effect not upon the form of the grant.

strictly conditional and even at the earliest date, before the introduction of the express defeasance, it was usual to introduce a recital of the public utility of the invention into the deed. Such a recital in a royal grant had by virtue of the doctrine of the effect of the king's having been deceived (*j*), the same result as a defeasance so that from the very first the conditional tenure upon which the patentee held his privileges was clearly expressed in his grant.

This condition has never been released. It is true that dicta may be found from which it is possible to argue that when a patentee has lodged a proper specification he has fulfilled his whole duty with regard to the public. But the language of the statute and of the grant is clear and cannot be overruled by dicta even if the conclusion now supposed to be deducible from them had been present to the minds of the judges, as probably it was not. It would be a highly scandalous proposition to allege that the Crown had conferred upon any grantee the privilege of putting the public to an inconvenience, and the ministers of the Crown—whether ministers of justice or others—are bound no less in duty than in reason to put such an interpretation on the grant as will render it consistent with the common weal.

Scope of a
patentee's
rights.

The true view of a patentee's rights seems then to be deducible by considering him in the light of a public officer charged with the promotion of a particular manufacture within the realm. If he performs this duty successfully he is entitled, as to his fee, to the profit which he can make out of that manufacture. But he must not stint its use. That would be the plainest violation of his duty, a violation as plain as if a judge should refuse to administer justice or a soldier to proceed to battle. In the one case as well as in the other the default, if wilful, merits the dismissal of the officer from his post and the resumption of his grant of privilege. And in accordance with this view the Statute of Monopolies and the patent

(*j*) 4 Ba. Ab. 210 (orig. Ed.); 6 Ba. Ab. 514 in the 7th Ed.; and see below, p. 38.

grant both denounce the penalty of forfeiture in such a case. The Act of 1883 has introduced a milder remedy and empowered the Board of Trade to proceed by way of correction and to guide the patentee into the proper discharge of his functions without exacting the extreme penalty of his offence.

The Patents Act of 1883 mitigates the penalty of default.
See p. 26.

A phrase in the Act which, considered from this point of view, is most felicitous confers jurisdiction on the Board of Trade in case "by reason of the default of the patentee to grant licences" certain consequences are proved to have ensued. The word "default" has given occasion to much discussion though happily, as yet, to no difficulty (*h*). If the patentee were really under no duty towards the public it might be difficult in any case to convict him of a default but if his duty be to make the best of his invention in the interest equally of the public and of himself then he commits a default whenever he misses an opportunity of extending its use and nothing could more happily than the word "default" in this sense express what was manifestly the intention in the draughtsman's mind when clause 22 was drawn up. It is curious and interesting to note how under the teaching of experience the law of England circles about certain fixed points. In the beginning of the seventeenth century the pretensions of patentees grew insufferable and were retrenched by a stringent Act of Parliament and a lofty doctrine of the duty which privileged persons owe to the Commonwealth. For something like two hundred and fifty years the law as so settled served to determine the rights of patentees and to guide the judgment of the Courts. But during the past twenty or five-and-twenty years; a period within which learning has languished and adroitness has largely replaced it in the administration of justice; the lesson of Coke's times has lain forgotten and patentees have procured in their own interest a revival of the doctrines which

See below, p. 37.

Coincidence between the old law and the new.

(*h*) *Meister Lucius Patents*—*Levinstein's Petition*, 15 R. P. C. 739, and below, p. 230; *Dunlop Patent*—

Gormully & Jeffery's Petition, below, p. 259; *Dunlop Patents*—*Wolverhampton Petition*, below, p. 267.

in the autocratic period of English history were the speciality of the Star Chamber and the Council Board. Smarting under the new oppression the manufacturers of this country have procured from Parliament a new remedy for the new mischief and this, when closely scrutinised, turns out to be a reproduction, though clearly undesigned, in slightly altered form of the old doctrine. The new remedy is not so stringent and the new doctrine not so clear and explicit as the old but that might be expected having regard to the interval of time and to the fact, which may be remembered without disparagement to the framers of the Patents Act of 1883, that the Statute of Monopolies was in a large measure the work of Sir Edward Coke.

The interests of patentees as affected by the new jurisdiction.

This view of patent right and of the province of the Board of Trade in administering the 22nd section of the Patents Act suggests an observation which it is worth while to make concerning the interest of patentees. It is perhaps too easily assumed that the section and the jurisdiction which it has created are in the nature of an attack upon patent rights and of necessity therefore adverse, even if not distinctly hostile, to patentees. Now it is obvious to remark that this view depends entirely upon what is probably an erroneous conception of patent rights and that in truth the enactment should be regarded rather as a mitigation of the old strictness than as a diminution of any well-founded claims of right. To that remark, however, the apologist of the patentees would reply with undeniable force that the old strictness has long been practically obsolete and that, whatever the theoretical limits of patent right, the Courts have in fact extended to patentees facilities for enforcing claims upon which the new procedure makes a serious encroachment. So much must be admitted. But a further consideration still remains. The practical outcome of the intervention of the Board of Trade in these matters will depend mainly upon the temper in which it intervenes. That it will intervene in the public interest goes without saying. There can be no

See below, p. 21.

other inducement to the department to intervene at all. But if the view here taken be correct it will intervene for the purpose not of curtailing the patent but for the purpose of giving it effect. It may be taken for the purposes of the argument that in every case in which a default is proved to the satisfaction of the Board the patentee will have been insisting not wisely but too well upon his patent rights. He may have been too grasping in his demand of royalty, too exigent in his proposal of conditions, too exclusive in his scheme of exercising the invention, too modest in his estimate of the public demand for it or otherwise blind to some branch either of his interest or of the duty with which his interest is inseparably bound up. There is the history of the trade guilds to prove, if proof were needed, that privileged persons are sometimes capable of greatly mistaking the best way of bringing privileges to bear fruit. What, in such a case, does the power of correction now vested in the Board of Trade imply? Does it imply a wish or even a tendency to visit the defaulter with penalties? By no means. The penalty, as we have seen, is forfeiture of the patent. That penalty the Board of Trade is not authorized to exact. Its province is to find out what in the given circumstances a wise and upright patentee would do and then to prescribe that course of action to the patentee within its jurisdiction. Its functions are not punitive nor should its administration be vindictive. It is there to reconcile the public interest with the private interest of the patentee, to find out the golden mean in which the patentee's interest and his duty meet. In this respect it occupies a position analogous to that of the old Court of King's Bench—a jurisdiction now vested in the High Court of Justice—when issuing mandamus and prohibition to subordinate tribunals. The jurisdiction is corrective purely and though it is exercised upon the footing of a proved default it is exercised not by way of punishment, not even by way of censure, but purely by way of instruction and correction, setting aside

See below
p. 83.

what has been done amiss and providing an opportunity for that to be done at last which should have been done at first. It will be found upon an examination of the decisions already taken by the Board that it is quite in this temper that the administration of the new law has been approached. There has not been the least disposition to curtail the profits of patentees or to limit unnecessarily their exclusive rights of user (*k*). If the department by a fuller publicity in the actual drawing up of its decisions and by investing with full judicial authority the officer who hears the arguments would assimilate its procedure to that of the Courts of Law so as to give the public an assurance of continuity in its practice; above all, if by a well-devised system of appeals it would provide for the formulating and maintenance of a body of doctrine there would be no reason whatever for patentees as a body to view this tribunal with any distrust. Indeed in these days of sentimental legislation it is no small advantage to a body of persons so very assailable as the owners of patent rights to be protected against the public displeasure which the extravagant claims and reckless self-seeking of the baser sort in their own ranks is ever tending to arouse.

Expense of proceedings at the Board of Trade.

From this point another reflection forces itself into notice. The uncertainty naturally and inevitably incidental to the exercise of a new jurisdiction have caused the litigation which has so far arisen at the Board of Trade to be extremely hard fought. Applicants for licences have been in "dead" earnest in their applications and patentees have been in tremulous fear for their privileges with the result that the proceedings up to the present time have been attended by inordinate expense. Now expense though not, in questions of such great consequence as have hitherto come under consideration, a matter of life and death importance is a matter the significance of which

(*k*) See *Dunlop Patent—Gormully & Jeffery's Petition*, below, p. 261; *Dunlop Patents—Wolverhampton Petition*, below, p. 279.

cannot be overstated with reference to the extended application of the new remedy. The principal cause of this great expense so far has, as above intimated, been uncertainty. Nobody knew how the Board would interpret "default" as applied to a patentee and what therefore would be the range of its jurisdiction. Nobody could tell what principles it would act upon in fixing royalty rates and so with other matters. Every party was therefore desirous to present as strong a front as possible and to be furnished with overwhelming evidence on every debatable point and preparations had to be made upon a commensurate scale with but little regard to the expense of making them. The same influences have caused the inquiries to be very protracted. No better informed than other people the referees, to begin with, have felt compelled to make exhaustive inquiries and full reports. Incidentally this condition of things has given rise to another inconvenience severely felt and deeply resented by litigants, namely this, that they have been exposed, both applicants and patentees, to harassing cross-examination in reference to the conduct of their business. For this vexation no blame can be attached to the referees who have presided on these occasions or indeed to any other person. It is an inconvenience inseparable from the proceedings of a tribunal where one person takes the evidence and another decides upon it. If the officer who can give effect to his views were present to say when cross-examination had gone far enough, "I want to hear no more on that subject"—the annoyance might be reduced to a minimum although perhaps where questions of manufacturing cost come in it cannot be wholly avoided. But a referee whose duty is to report the evidence as well as his conclusions from it is helpless. If it is relevant it can hardly be immaterial and although he may see how, if he could act upon his own responsibility, he might cut the Gordian knot he cannot be sure that his discretion would be approved by the Board. Under these conditions the tribunal cannot be really efficient and inefficiency

Oppressive
inquiries at
the Board of
Trade.

Costs.

means to all parties concerned causeless annoyance and unnecessary expense. It was my intention when first this book was put in hand to give some practical hints and useful information upon this subject of costs and by the kindness of some of my friends I was able to procure some extremely valuable materials for the purpose. But further consideration has convinced me that it is better to omit that topic at the present time. The cost as exhibited in my materials is so clearly due in a large measure to circumstances such as are above alluded to; circumstances which must be looked upon as serious blots upon the present administration of the law which will no doubt be cured—indeed which must be cured at an early date unless the whole enterprise is to miscarry—that no useful end would be served by discussing this phase of the procedure in the light of present information. In fact such a discussion would be apt to deviate into criticism of the Board—a reproach from which I feel that the last few sentences are not wholly free (1).

Practical effect of the new remedy.

It will not, of course, be supposed that the utility of the new jurisdiction can be measured by merely summing up the instances in which the Board actually makes an order against a patentee. The knowledge that such a remedy is open, when it comes to be generally diffused, will prevent the rise of the mischief which the remedy is designed to cure. This is constantly the case with all successful jurisdictions. They accomplish more indirectly than directly towards attaining the practical ends of good government. In the present case the indirect benefits which may be reasonably looked for are of the most far-reaching and important character. Not only may patentees be expected to bestir themselves with fresh energy in order to secure the full benefit of their own inventions but a very serious obstacle will be removed from the path of those leaders of industrial enterprise whose merit lies not in the direction

(1) I do not see how to mend the passage in question if it stands and think upon the whole that it ought to stand.

of inventive ingenuity but in that of organising faculty. Many a man is highly qualified to exploit an invention who is wholly incapable of originating it. Wealth, business connections and *savoir faire* count for much in this direction and they are not in any marked degree characteristic of the species, inventor. To men who have these facilities for turning useful inventions to account the danger of a patent action is a very serious concern. The expense of putting down a large plant, for example, is not a thing to be lightly incurred if there is any chance that the operation of the plant, when erected, will be stopped by injunction. It is commonly enough said that as compared with Americans the British manufacturers are slow to appreciate the merits of an invention and stupidly given to continuing in the old grooves. There may be truth in the accusation but at least those who make it seldom take into account how seriously the British manufacturer is handicapped by the doctrine which the Courts have adopted of British patent rights. Divorced from the duty of pushing the invention the privilege of exclusive rights in it has become an economic beast of prey, and it is nowise surprising that the industrial shepherd should be timid of exposing his property to its attack. It is quite true that in theory British patent rights, even as expounded by the Courts of law, are not more absolute than the rights of American patentees. But the British rights are incomparably more available. An action which in the United States would be protracted for several years can be disposed of in this country in a quarter of the time and at much less expense. Hence it is much easier, even after action brought, to make terms with an American than with a British patentee and the man who is deliberating as to whether he shall spend money in taking up and working a new invention pays heed naturally and properly enough to considerations of that kind (*m*). Let it once be

British and
American
patent rights.

(*m*) See the case of *Badische Anilin v. Levinstein*, cited below, p. 21.

generally understood that a just royalty is all that the patentee can claim in any case and that the danger to any new enterprise from latent patent rights is bounded by that not very formidable risk and it will then appear that British capitalists and British manufacturers are not so inferior as is now commonly supposed to their transatlantic competitors. It is not a little to their credit that they have maintained a high standard of efficiency in a very competitive age under the hard conditions created by recent developments in the doctrines of patent law and if the Board of Trade succeeds in re-establishing the old principle that no patent right can be insisted on to the prejudice or inconvenience of the "subjects in general" it will give to British industrial enterprise a new start commensurable with the impetus which it has from time to time received from some great discovery or some invention of capital importance.

CHAPTER II.

THE MISCHIEF.

*Classes of grievances—Destruction of British industries—Clause (a)—Dictum in *Badische v. Levinstein*—Dictum in *Incandescent v. Cantelo*—The dicta considered—Mr. Moulton's argument—The condition of the patent grant—The patentee's duty—Clause (b)—Unsatisfied public demand—Lord Eldon's dictum—Clause (b) in old patents—Clause (c)—The oppression of a later inventor—Protection of "our subjects in general"—Licence to carry on a new manufacture—"Sole" privilege—The patentee's duty to later inventors—The Crown's intention in making successive grants—Not necessarily a patented invention—Possession of the invention—General view of a patentee's public duty—Section 22 deduced—What is default?—What is mandamus?—Recapitulation.*

THE mischief against which section 22 was intended to provide may be shortly described as the obstructive maintenance of patent rights. The Act itself prescribes three conditions any one of which suffices to give jurisdiction to the Board of Trade. Two of these have reference to the public demand for the invented article, the third serves to protect the interests of another inventor. Thus, if the invention is (a) not being worked at all; or (b) not being worked on a sufficiently large scale, having regard to the public demand for it; or (c) if the patent right controls the use by another person of another invention; in any of these cases the Board of Trade may, upon proof of default by the patentee to grant licences upon reasonable terms,

order the granting of licences upon such terms as the Board may consider to be just (a).

Classes of
grievances.

Destruction
of British
industries.

The classification here appears to have been well considered and the categories happily chosen. The first and second may seem at the first glance to have much in common but in truth they cover perfectly distinct cases even if it be a fact, as probably it is, that some instances that might be cited fall within both categories. But a case may arise in which the public demand is adequately supplied from a *foreign source* and in that case condition (a) would not be satisfied. One of the main objects of the legislature in this enactment was to provide against that very contingency and to secure the manufactures of this country against strangulation by foreign patentees who take British patents for the precise purpose of suppressing a British industry. This point may be illustrated by an extract from the speech of Mr. Joseph Chamberlain when moving the second reading of the Bill which subsequently became the Act of 1883. He said that the position of the government which promoted the Bill was that “ while the
“ inventor was entitled to a reward he was not entitled to
“ anything in the nature of unreasonable monopoly ; and
“ it had been pointed out especially in an interesting
“ memorial presented on behalf of the chemical industry
“ that under the present law it would have been possible,
“ for instance, for the German inventor of the hot blast
“ furnace, if he had chosen to refuse a licence in England,
“ to have destroyed almost the whole iron industry of this
“ country and to have carried the business bodily over to
“ Germany. Although that did not happen in the case of
“ the hot blast industry it had actually happened in the
“ manufacture of artificial colours connected with the coal
“ products and the whole of that had gone to Germany
“ because the patentees would not grant a licence in this
“ country. In this and similar matters the patentee was

(a) Pat. Act, 1883, s. 22.

“ only the first discoverer. Others were working on the
 “ same lines and it was only a question of time which
 “ would arrive first at a satisfactory result. It was all
 “ very well to reward the first inventor; but it was not
 “ necessary or just to give to the first inventor an absolute
 “ right of monopoly which might be used for purposes of
 “ extortion or to the injury of the country which granted
 “ these rewards for invention ” (b). This was the view
 taken by the minister responsible for the Bill and although,
 of course, his opinion is not conclusive as to the object
 which the legislature may have had in mind the proposition
 embodied in this statement is one which is not at all likely
 to be called in question. The employment of patent rights
 to destroy British industries is manifestly a gross abuse of
 the privilege and one for which this remedy is provided.

Mr. Chamberlain was speaking in April 1883, and put
 his statement concerning the effect of the law as it then
 stood rather as matter of inference and conjecture than as
 an authoritative or authorised dictum. But in June of
 the same year this astounding proposition in its crudest
 form was laid down by Pearson, J., as being undoubted
 law in the case of *Badische Anilin v. Levinstein* (c).

There, the judge, after defining and considering the
 points in which it had been proved that Levinstein's pro-
 cess of manufacture differed from those which had been
 patented, continued thus:—

“ Then the result at which I arrive is this : the processes
 “ employed by Mr. Levinstein are processes deserving of
 “ great praise but they are simply processes which produce
 “ exactly the same results from the same materials which
 “ are produced by this patent. The same object is pursued,
 “ the same materials are employed, the same result is
 “ attained. I cannot do otherwise than come to the con-
 “ clusion that those are merely processes, that they are not
 “ a new invention differing from the patent, but are in

Dictum in
Badische v.
Levinstein.

(b) Vol. 278, Hansard, 360.

(c) 24 Ch. D. 175.

“ reality the manufacture of the sulpho acids of oxyazonaph-
 “ thylamine by a process differing in some respects from
 “ the process employed according to the patent.

“ I cannot come to this conclusion, I must honestly say,
 “ without some regret. I think Mr. Levinstein has em-
 “ ployed great knowledge, great skill and great perseve-
 “ rance in finding out these processes but I am sorry to
 “ say that the law compels me to inform him that these
 “ processes cannot be used in the production of this colour-
 “ ing matter, seeing that the production of this colouring
 “ matter is protected by a patent.”

Here then was Mr. Chamberlain's view of the law indorsed and enforced by all the emphasis derivable from the fact that the law resulted in an admitted hardship and a grievous wrong inflicted by the unwilling hand of a judge whose sympathies were avowedly with the defendant whom he restrained by injunction and visited with costs.

The concurrence of these two authorities is not perhaps entirely accidental. Mr. Chamberlain refers pointedly to a memorial submitted in behalf of the chemical industry. The draughtsman of that document is certain to have known of the Levinstein litigation and to have had it in mind so that in all probability Mr. Chamberlain, when he described the paralysing effect of the patent law upon the British chemical industry, was relying more or less consciously upon opinions expressed by Levinstein's legal advisers as to the probable outcome of his litigation. In any case these two utterances indicate with unmistakable clearness what was at that time generally supposed to be the extent of a valid patent right.

Dictum in
Incandescent,
&c. v. Cantelo.

Even more astonishing in its assertion of the unconditional nature of patent rights is the language of the learned judge who decided the more recent case of *The Incandescent Gas Light Co. v. Cantelo*. He says: “The
 “ patentee has the sole right of using and selling the
 “ articles and he may prevent anybody from dealing with
 “ them at all. Inasmuch as he has the right to prevent

“ people from using them or dealing in them at all he has
 “ the right to do the lesser thing, that is to say, to impose
 “ his own conditions. It does not matter how unreasonable
 “ or how absurd the conditions are. It does not matter
 “ what they are if he says at the time when the purchaser
 “ proposes to buy, or the person to take a licence ‘Mind
 “ ‘ I only give you this licence on this condition ’ and the
 “ purchaser is free to take it or leave it as he likes. If he
 “ takes it he must be bound by the condition” (*d*); and in a
 later passage in the same judgment—dealing with the
 question of costs—the same judge speaks of an attempt by
 the patentee to establish an exclusive trade in an unpatented
 article—the gas burner—by making the purchase of it
 from himself and at his own price a condition of the sale
 of his patented article—the mantle to be used with the
 burner—as “ a reasonable attempt on the part of the
 “ plaintiffs” and one by means of which, if they could
 carry it out successfully, to sell their burners (*e*).

This result, when it is borne in mind that patents are and always have been granted for the encouragement of British industry, is sufficiently startling and it is cause for hardly less surprise that somebody should not have felt prompted to inquire whether so strange a conclusion could be sound. Even at the present time that inquiry has its uses. The remedy given by the statute is strictly limited in scope and application. It cannot be administered by courts of law but only by the Board of Trade. It is available only to a litigant bold enough to launch a petition and carry on litigation in a region cut off from the ordinary course of law, where no appeal lies from a mistaken decision, and no authoritative dicta exist to guide the Court. If the remedy be nothing but an isolated and exceptional instance of relief capriciously granted in a case of exceptional hardship then its importance may be measured by the frequency of recourse to the Board of Trade. But if it be a new

The dicta considered.

(*d*) 12 R. P. C. 264.

(*e*) *Ibid.* p. 266.

remedy given in furtherance of an old right then the right itself may prove to be a matter of even greater importance than the remedy. It is therefore worth while to inquire how far the right in support of which this remedy is given can be traced in the common law.

See above,
p. 9.

This is a point which was much discussed recently in connection with the Levinstein application for a compulsory licence (*f*). The petitioners' case, under this head, was that the patentees had made no attempt to introduce their patented industries within the realm. That on the contrary it was their settled commercial policy to prevent the introduction and use of their processes here, that they carried on their manufactures in Germany importing the manufactured goods into this country and taking advantage of their patent rights for no other purpose than to exclude other manufacturers from the British market and so to raise the price of their own products. Mr. J. Fletcher Moulton, Q.C., who argued on behalf of the petitioners, and whose authority when speaking upon such a point will be at once recognised, contended that clauses (a) and (b) of the 22nd section of the Patents Act of 1883 were not new law so far as the principles upon which they are based are concerned (*g*). "If you look"—said he—"at the history of letters patent and consider how letters patent came to be excepted from the general condemnation of monopolies you will see what a comical inversion of the fundamental principles of patent law is established by the respondents in this case. When monopolies were condemned by the whole of the English Courts in Elizabeth's reign and in the reign of James the First, the exception was made in favour of patents for new inventions because the patentee had at his own trouble

Mr. Moulton's
argument.

(*f*) *Re Meister Lucius (Imray's) Patents — Levinstein's Petition*, 15 R. P. C. 732, below, p. 230.

(*g*) Mr. Moulton's argument upon this point is taken with only so much modification as is necessary

to free it from interspersed comments from the official shorthand note of the proceedings. The argument took place on the 28th February 1898.

“ and cost introduced a new industry into England and it
 “ was in view of the benefits derived by the people of this
 “ realm from the introduction of new manufactures which
 “ would give employment to the labour in the kingdom
 “ that this form of reward to the inventor was approved.
 “ And from this history comes the peculiarity which reigns
 “ dominant in English law, namely, that you do not heed
 “ whether or not the man invented the invention himself
 “ or introduced it from abroad. The inventor and the
 “ importer are alike meritorious in the eyes of our Courts.
 “ Why? Because the merit consisted in the introduction
 “ of a new trade into England. The consideration of
 “ telling the public how they can work the invention after
 “ the expiry of the term, by means of the specification is
 “ a part, but a small part only, of the patentee’s merit. So
 “ little was that thought of at the time of the great debate
 “ as to what should be the period of a patent that it was
 “ then contended that the period ought to be seven years
 “ because seven years was the period of apprenticeship and
 “ that it would be wrong to keep journeymen who had
 “ passed through their term of apprenticeship for seven
 “ years longer out of the exercise of their craft. Let me
 “ read in support of that position from a book not without
 “ authority—Coke’s Institutes (*h*).

“ ‘The cause wherefore the privileges of new manufac-
 “ ‘ tures either before this Act granted, or which after this
 “ ‘ Act should be granted, having these seven properties
 “ ‘ were not declared to be good was for that the reason
 “ ‘ wherefore such a privilege is good in law is because the
 “ ‘ inventor bringeth to and for the commonwealth a new
 “ ‘ manufacture by his invention, costs and charges and
 “ ‘ therefore it is reason that he should have a privilege for
 “ ‘ his reward (and the encouragement of others in the
 “ ‘ like) for a convenient time: but it was thought that the
 “ ‘ times limited by this Act were too long for the private

(*h*) 3 Inst. 184.

“ ‘ before the commonwealth should be partaker thereof
 “ ‘ and such as served such privileged persons by the space
 “ ‘ of seven years in making or working of the new manu-
 “ ‘ facture (which is the time limited by law of apprentice-
 “ ‘ hood) must be apprentices or servants still during the
 “ ‘ residue of the privilege by means whereof such numbers
 “ ‘ of men would not apply themselves thereunto as should
 “ ‘ be requisite for the commonwealth after the privilege
 “ ‘ ended. And this was the true cause wherefore both
 “ ‘ for the time passed and for the time to come they were
 “ ‘ left of such force as they were before the making of this
 “ ‘ Act.’ ”

Recapitulating, Mr. Moulton added “ Now if I
 “ am right the sanction for section 22 sub-section (a) rests
 “ in the fundamentals of patent law although the particular
 “ statutory remedy which has enabled us to take advantage
 “ of a failure on the part of the patentee of the perform-
 “ ance of the meritorious cause of the grant is novel.”

Then after discussing the application of this principle to
 the facts of the particular case he stated his point thus ;—
 “ I should put it in this way that sub-section (a) shows
 “ that the patentee has forfeited the right—the absolute
 “ right to his patent rights because he has kept this from
 “ being worked in the United Kingdom whereas the very
 “ reason why he got his patent granted was that it might
 “ be worked and that it might give rise to a new manu-
 “ facture.”

The condition
 of the patent
 grant.

This argument may perhaps be considered conclusive
 on the point but it is nevertheless of interest to observe
 that it is strongly corroborated by the language of the
 patent grant itself. The last of the recitals in the deed is
 in these terms. “ And whereas we being willing to en-
 “ courage all inventions which may be for the public good
 “ are graciously pleased, &c.” (i). In strict conformity
 with this position the first of the provisoes reads “ Provided
 “ that these our letters patent are on this condition that if

(i) 46 & 47 Vict. c. 57, Sch., Form D. See below, p. 388.

“ at any time during the said term it be made to appear
 “ to us, our heirs or successors or any six or more of our
 “ Privy Council that this our grant is contrary to law or
 “ *prejudicial or inconvenient to our subjects in general*
 “ these our letters patent shall forthwith determine and be
 “ void to all intents and purposes notwithstanding any-
 “ thing hereinbefore contained.”

It would probably not be difficult to bring a case of such abuse of patent right as was imputed to the patentees by Mr. Moulton's argument within the terms of this proviso. That a patent right used by the patentee solely for the purpose of keeping an industry out of the realm and maintaining the price of products within the realm at an artificial figure is “prejudicial or inconvenient to our subjects in general” is too plain for argument. The exact meaning of the proviso has been called in question and will be considered later on (*j*) but without doubt it covers this case and deals at least with the principal evil at which clause (a) was aimed. No doubt the clause goes in terms somewhat beyond the proviso for it applies in a case of simple non-user of the invention and there would seem to be no need to prove actual inconvenience or prejudice to the public. But this probably is a question rather of words than of substance for “default” must be brought home to the patentee in order to found the jurisdiction of the Board of Trade and it is not easy to imagine that a patentee could be shown to be in default in a case in which nobody had been inconvenienced or prejudiced by his not having granted licences. In substance therefore the doctrine of the common law, of the patent grant and of the Patents Act may perhaps be said to be identical. That doctrine is that no patentee is entitled to deny to the people of this kingdom the use of his invention. His privilege, although its limitations have been somewhat overlooked by the judicature in recent years, has always

See p. 11.

The patentee's duty.

See above, p. 9: below, p. 37.

(*j*) See below, p. 30.

been a limited privilege—limited by reference to the superior and unchartered right of the public and of every member of the public to follow any lawful trade. Fettered and regulated this common law right is by numerous privileges of one kind and another, privileges growing out of custom, statute and prerogative but no act of Crown or subject, however coloured with authority, can suffice in law to put a lawful trade into such restraint that no Englishman can lawfully use it (*k*).

Clause (b).
Unsatisfied
public
demand.

Lord Eldon's
dictum.

Passing now to the second clause (b) we meet with a provision which is, in a sense, more novel since it never has been a doctrine of common law that a patent could be forfeited by reason only of the failure of the patentee to supply the reasonable requirements of the public with respect to the invention. The only reported decision in a court of law in which any such ground of invalidity has been recognised—so far as my reading goes—is the *Universities of Oxford and Cambridge v. Richardson* (*l*). That was an action upon a copyright patent to restrain the printing of bibles by unauthorised persons and Lord Eldon said that if an unreasonable price should be put upon the patented books the patents themselves would be put in considerable hazard. That dictum rested, however, on the view that the position of printer of bibles was in law a public office the duties of which the officer was bound to discharge for reasonable fees and it probably would not cover the case of a patent for a new manufacture granted by way of royal bounty to the true and first inventor.

Clause (b) in
old patents.

But although this form of mischief was overlooked by the common lawyers it has from the earliest times been present to the mind of the king within whose cognisance in his capacity of *parens patrie* it peculiarly lies. This may be illustrated by the well-known case of the Smalt

(*k*) *Mitchel v. Reynolds*, 1 Sm. L. C. 391; *Maxim-Nordenfeldt v. Nordenfeldt*, (1894) A. C. 541.
(*l*) 6 Ves. 712.

Patent granted in 1609 to Abraham Baker. An abridged text of the patent is given by Webster (*m*) from which the following extract will serve our present purpose. It may be premised that the blue pigment known as smalt had apparently all been imported from abroad before the date of the original Smalt Patent in continuation of which the present grant was made but that as an article of commerce it was well-known within the realm at that time. “ And whereas the said Abraham Baker hath pro-
 “ mised and undertaken from time to time, during the
 “ term hereafter mentioned, to make sufficient quantity
 “ of the said smalt to serve for the use of this our Kingdom
 “ and to serve the same with smalt as good and as cheap
 “ as the like brought from beyond the seas within the space
 “ of seven years next before the date of the said former
 “ letters patent was usually sold for : Know ye now, that,
 “ as well in consideration thereof as also ” &c. Here we have the most specific reference to the reasonable requirements of the public in respect of quantity, quality and price. A still later grant, being the Smalt Patent which was expressly excepted from the operation of the Statute of Monopolies (*n*), provided for the same interests by taking a covenant from the patentee that he would every year produce and store smalt in sufficient quantities “ as
 “ good perfect and merchantable as the smalt heretofore
 “ brought from beyond the seas hath usually been ” and that he would sell it at as easy and reasonable prices as those at which the foreign manufactured smalt had usually been sold. In the same spirit the glass patent issued in a revised form to Sir Robert Maunsell in 1623 was saddled with an express proviso that it should not operate to restrain the importation of foreign made glass because such a restraint under an earlier glass patent had been found to occasion a raising of the price of glass ware (*o*).

(*m*) 1 W. P. C. 11.(*n*) 21 Jac. 1, c. 3, s. 14.(*o*) 1 W. P. C. 26.

Clause (c).

The oppres-
sion of a later
inventor.

The third case arises when any person is prevented from working or using to the best advantage an invention of which he is possessed. This provision is of great interest and importance for it accords recognition to private as distinct from public rights. In order to bring a case within this clause the petitioner does not need to show any public inconvenience or any manifest breach of duty on the part of the patentee. He shows only that the grant is injurious to himself—that it prevents his *working to the best advantage* an invention of which he is possessed. Here is a recognition of the individual's common law right to liberty of action in the pursuit of his trade which is quite in the spirit of Sir Edward Coke and stands almost alone among recent developments of the law relating to industry. It will be recognised at once as marking a revolutionary departure from the whole trend of judicial utterances in modern times upon the scope of patent rights and it is therefore doubly interesting to connect it with the doctrine of earlier jurists.

See above,
p. 7.

Upon this point the most instructive authority is the form of the patent grant itself. This form in its main features has descended to us as above-mentioned from Elizabethan times and reflects the temper of the age which enacted the Statute of Monopolies. Particularly significant is the following defeasance contained in the patent grant. “ Provided that these our letters patent are on this con-
“ dition, that, if at any time during the said term it be
“ made to appear to us, our heirs, or successors, or any six
“ or more of our Privy Council, that this our grant is
“ prejudicial or inconvenient to *our subjects in*
“ *general* these our letters patent shall forthwith
“ determine, and be void to all intents and purposes, not-
“ withstanding anything hereinbefore contained.” Reference has already been made to this clause and it has been taken for granted that it would apply in a case in which general and public inconvenience could be shown to result from the existence of the patent grant. But the words

See above,
p. 27.

“our subjects in general” are not necessarily to be understood in a collective sense and as equivalent to “the public.” They may also be interpreted in a distributive sense and to mean exactly what they say *i.e.* “our subjects not specially privileged.” The relevancy of this distinction between subjects in general and subjects specially privileged can only be fully appreciated upon considering the conditions under which industrial occupations were organized at the date—end of the 16th and beginning of the 17th centuries—when patents for inventions came into existence in this country. It will then be found that handicrafts in those days were carried on by fellowships and guilds having exclusive privileges which were jealously guarded and that the inventor of a new industry could only obtain the right to set it up and carry it on—if he happened not to be a member of the craft to which his invention had reference—by obtaining special licence from the Crown so to do. This point has been habitually overlooked in the discussion of patent rights both by the judges and text-book writers of recent years. The prevailing impression undoubtedly is that an English patent is, like any foreign patent, a mere grant of monopoly which binds the hands of other subjects in the interest of the patentee. In form and legal theory a patent grant is almost the exact reverse of this. It is a grant setting free the hands of the patentee from the restrictions imposed upon him by the privileges of guilds and trade fellowships. The language of the grant itself suggests this view. It is in terms a grant of “especial licence, full power, sole privilege and authority . . . to make, use, exercise and vend the invention.” These words were undoubtedly settled with great care and much circumspection. They are enabling words pure and simple. They comprise no prohibition disabling others from exercising the same invention. Such a prohibition there is in the patent but it is to be sought in a later clause. The expression “sole privilege” may perhaps be thought to point

Protection of
“our subjects
in general.”

Licence to
carry on the
new manu-
facture.

See above,
p. 7.

“Sole”
privilege.

to an exclusive right but that may be a mistaken construction. The word "sole" in law does not mean "exclusive"; that is but a loose and colloquial employment of the word. It properly signifies unshared—not joint. A *sole* right is a right which a plaintiff can assert without joining any other person as co-plaintiff. A corporation *sole* is a corporation subsisting of one person. A *feme sole* is a woman who can at common law plead and be impleaded without the joinder of another (*i.e.* of a husband) as co-plaintiff or co-defendant, as the case may be. A *sole* owner is an owner who has an unshared interest in property, the subject-matter of his ownership and stands opposed to a co-owner. In the same way *sole* tenant and *joint* tenant are antithetic expressions. A property held in joint tenancy is not held by any less exclusive title than a property held in sole tenancy. The tenure may be exactly the same, the only difference being that in the one case the title is complete in one person,—the sole tenant; whereas in the other case it is complete in two or more persons,—the joint tenants. In both cases, and in both cases equally, the rights of property are absolutely exclusive rights.

See p. 8

The true meaning of this expression "sole privilege" becomes clear when we consider that in the 16th and 17th centuries the right to follow a handicraft in any given locality was a privilege conferred usually by charter and conferred upon a fraternity of craftsmen. The privilege was held in common by the brotherhood or guild and was a joint not a sole privilege in any of its members. A patent granted for an invention conferred similar liberty to work at the handicraft to which the invention related but, unlike a trade charter, it did not create and was not intended to create a rival brotherhood or guild. It was intended that after the expiration of the patent the privilege of working the patented invention should enure for the benefit of existing craftsmen. Hence, as distinguished from the liberties conferred upon the trade fellowships by

trade charters, the privilege conferred by the patent grant upon an inventor was a *sole privilege*. The chartered rights were held in joint tenancy by all the freemen of the fraternity—the patent right was held in sole tenancy by the sole patentee or his assigns. In other respects the patent right bore a very close resemblance to the rights conferred by charter upon the trade fellowship (*p*) but in this respect the difference was sharply defined and fundamental and it was one which it was most fit and even most necessary to mark by words defining it as a *sole* and not a *joint* or *common* right.

Considered as a grant of authority to carry on a trade the grant is now indeed superfluous and hence the difficulty of construction which probably explains the notable absence of judicial comment in modern times upon the language of this passage in the patent. But it is only in very modern times that a royal licence has become unnecessary to the handicraftsman. At the time at which these words were first put into the patent such a protection to the patentee who proposed to work his invention was most necessary. Not only were the exclusive privileges of the trade guilds and fellowships in full force and jealously vindicated but unlicensed craftsmen were put down by Act of Parliament. A statute passed in 1562 (*q*) prohibited the use of any manual occupation except to persons who had undergone an apprenticeship to the craft which they proposed to follow. There is abundant evidence that in former times these trade privileges placed a serious obstacle in the way of inventors or others who proposed to introduce new manufactures. Thus the smalt patent granted in 1605 to Twynyhoe and others granted power, licence and authority to make smalt in “all and every county, city, town corporate and other

New industries hampered by trade regulations.

See above, p. 8.

(*p*) The analogy between a patent granted for an invention and a trade charter is really most striking. The subject demands too much discussion to be dealt with in this place

and has been already worked out in *Monopolies by Patents*, pp. 249—259. See also below, App. VI., p. 395.

(*q*) 5 Eliz. c. 4, s. 24.

“ towns, villages, hamlets and other places exempt as not
 “ exempt any law, statute, Act of Parliament,
 “ proclamation, restraint or any other matter cause or
 “ thing whatsoever to the contrary notwithstanding ” (r).
 An obvious reference this to the Elizabethan statute concerning apprenticeship and the numerous municipal and other privileges by which the manufacture and sale of pigments were in those days regulated. Even more explicit on the point are the following instances which are probably typical of an unlimited number of examples that might be discovered by an exhaustive search. In the year 1369 there is an entry on the Parliament roll of a complaint by the citizens of London that aliens are enabled by virtue of the King’s charter to carry on trade within the city and elsewhere notwithstanding the ancient franchises of London and other boroughs (s).

Merchants
 privileged
 under the
Carta Mercatoria.

Woodde’s
 patent.

There is preserved in the library of the corporation of London a complaint by the Stationers’ Company of the patent granted to Richard Woodde for printing on parchment, the gravamen of which complaint is that the patent enabled the patentee to set at naught the company’s charter and encroach upon its privileges (t).

Buckell’s
 patent.

Rymer has preserved a patent of the year 1631 granted to Thos. Buckell who had succeeded to the business of a draper in Cambridge and was carrying it on in defiance of the Statute of Elizabeth without having served any apprenticeship to the trade (u).

This subject has been curiously neglected by writers upon patent law and it is consequently impossible to marshal any large body of precedents. The foregoing gleanings of a very partial investigation of the available materials will serve to make it plain that at least there was in Elizabethan and Stewart times abundant reason for the inventor of a new manufacture to seek “ especial licence, “ full power, sole privilege and authority ” to embark upon

(r) 1 W. P. C. 10.
 (s) Vin. Ab. tit. Prerogative of the King (U.c) 5. See also Monopolies by Patents, p. 252.

(t) Remembrancia, 101. See also Monopolies by Patents, 122.

(u) XIX. Ry. Food. p. 304.

the working of his invention even apart from any idea that he may have had of obtaining an exclusive privilege.

If this view of the essential nature of English patent right be correct it is granted in aid of the inventor's common law rights and not primarily at all in derogation of the common law rights of the public. If it works out to the detriment of other people that must be regarded as a mischance and if the detriment be so serious that the grant becomes "inconvenient or prejudicial to our subjects in general" then the grant itself must fall.

It is eminently consistent with this theory of patent right that the patentee should be expected to give his licence to any person who is in possession of another invention and prevented by his grant from using it to the best advantage. The whole object of the Crown in granting patents is to promote industry by the aid of invention and it would be an extremely curious result of the policy adopted with this object if it enabled one inventor to paralyse another. It is quite true that in *Badische v. Levinstein (x)*—already referred to above—a Court of first instance came to the conclusion that such was the outcome of the patent law. But it may be pointed out that that case was argued and decided without reference to the history of patents and without any critical discussion of the terms of the patent grant. It went upon general impressions of the doctrine of patent right so vaguely put as to leave large room for error and that even if it were correct in its exposition of the then state of the law it shows only that the law had been corrupted in recent years and has no bearing upon the authorities above cited or the earlier state of the law which for the purpose of that decision it was not thought necessary even to investigate.

There is another line of argument which may be relied upon to show that this third case under the section involves no real departure from the traditions of English patent law. The Crown has from the very first acted upon the

The patentee's duty to later inventors.

See above, p. 21.

The Crown's intention in

(x) 24 Ch. D. 175.

making successive grants.

view that a subordinate invention was good subject-matter for a patent grant. If it be answered that the Crown, which makes grants at the patentee's risk, gives itself little or no concern as to the validity of its grants when made then it may be pointed out that the Courts have unequivocally decided in favour of the validity of such a grant (*y*). Except, therefore, upon the assumption that the Crown is ready to make ineffective grants and makes them with frivolous facility one is driven to the conclusion that it always has been the theory of the advisers of the Crown that it was the duty of an earlier patentee, if need were, to licence a later. Indeed there is some ground for saying that it was at first held that a later grant would overrule an earlier and enable the later patentee to set the earlier at defiance. The cases above cited in which patents were taken to set aside privileges conferred by charter are manifestly in point (*z*), and early patents can be adduced into which an express proviso was introduced in order to save still earlier grants from being abrogated in this way (*a*). It must on the other hand be admitted that so great a lawyer as Lord Eldon was quite prepared to treat the earlier patentee as enjoying a paramount right and entitled to prohibit the use of his own invention absolutely during the term of his patent (*b*). The Act of 1883 has fortunately reduced the question as to which of these two views is sound law to the level of an academic discussion. There is no doubt that a later inventor is now entitled to work his own invention upon reasonable terms of arrangement with the earlier patentee and it may at least be argued with some force that the principle which this regulation embodies is fundamental in our patent law.

See above, p. 31.

Not necessarily a

In the course of the preceding discussion the aggrieved

(*y*) *Crane v. Price*, 1 W. P. C. 412; *Lister v. Leather*, 8 El. & B. 1017; *Ralston v. Smith*, 11 H. L. Cas. 246.

(*z*) *Carta Mercatoria. Woodde's Patent, Remembrancia*, 101; *Buckell's*

Patent, XIX. Ry. Fœd. 304.

(*a*) *Dudley's Patent* (1622), 1 W. P. C. 15; *Gilbert's Patent* (1618), XVII. Ry. Fœd. 102, and below, p. 405.

(*b*) *Ex parte Fox*, 1 W. P. C. 431.

person of this last case has in one or two places been spoken of as a later patentee. It is to be observed that the statute does not require the invention in respect of which he qualifies to be a *patented* invention. It ought perhaps to be a *patentable* invention for the word *invention* is so defined in the 46th section of the Act, and this must no doubt be accounted a slip in drafting for it is eminently undesirable that any question as to the patentability of the petitioner's invention should be imported into the discussion before the Board of Trade. But on the other hand it may in a rough and inaccurate sense be said that the case of a patentable,—*i.e.* a new,—invention is the only one that needs to be provided for inasmuch as an old invention if covered by the patent would render the patent itself invalid for want of novelty. This however is a superficial and wholly insufficient answer. Moreover it may be contended that the petitioner could not be “in possession of” an invention that had been already published to the world. This however does not seem quite conclusive. The expression is a figurative one and borrowed from the first recital in the patent (*c*). In the recital it seems to signify that the patentee had such control of the invention that he could bind or loose it. Probably the exact interpretation intended was given to the phrase by Mr. Bousfield when he said “I think I must take this on the footing that “unless these people” (the petitioners) “succeed this particular tyre, with a chain in the edge, will not be made “and sold” (*d*).

patented
invention.

Possession of
the invention.

It will be convenient at this point to make a slight digression for the purpose of observing that a patentee occupies to some extent, indeed occupies in a very real sense, the position of a public officer. Reference has been already made to the language of the recital in the patent in which the encouragement of inventions for the public good is set out as an inducement for the making of the grant. This formula is itself unmistakable but in some of

General view
of a patentee's
public duty.

See above,
pp. 27, 28.

(*c*) Below, p. 388.

(*d*) See *Dunlop Patents—Wolverhampton, &c. Petition*, below, p. 277.

the earlier grants it was expanded in a fuller form of words. Thus in Gilbert's patent, (anno 1618) drawn up at a time when the grievance of monopoly patents was being very hotly discussed, it appears in the following terms " And whereas it is supposed that the said several engines " are likely to prove of good and necessary use for " the service and benefit of this our realm ; Know ye " therefore that we, tendering the common good and " benefit that may redound hereby to our said realm and " subjects &c." (c). To the like intent Dudley's patent (anno 1622) recites " We finding that the working " and making of the said iron, by the means aforesaid, " within this kingdom will not only in itself tend to " the public good thereof but also thereby the great " expense and waste of timber and wood converted into " charcoal and consumed upon ironworks will be much " abated and the remnant of wood and timber within this " land will be much preserved and increased; of the want " whereof not only ourself, in respect of provision for our " shipping and otherwise, but also our subjects for many " necessary uses are very sensible" &c. (d). Examples might easily be multiplied but their multiplication would serve little purpose since it is undeniable and never has been doubted that the public good is the final cause of the grant of patent rights in respect of new manufactures. The only importance to the present argument of pointing out that this consideration is clearly stated in the deed itself arises from the fact that according to the accepted rules of construction applicable to grants from the Crown the recital is equivalent to a condition and is binding as such on the patentee. That is to say if the Crown is deceived in the consideration of the grant the grant itself is void (e).

Now what are the responsibilities of a patentee who has taken from the Crown a grant made for the encouragement

(c) See App. VI., below, p. 396.

(d) 1 W. P. C. 14.

(e) *Gledstones v. Sandwich*, 5

Scott, N. R. 719. See also *Morgan v. Seaward*, 1 W. P. C. 196, and above, p. 10.

of “an invention that may be for the public good”? (f) Clearly to see that the invention does in fact yield fruit of the public good. Otherwise the object of the grant fails and the Crown is shown to have been deceived in the consideration for the grant. Hence the patentee is in the position of a person invested with authority in respect of the patented manufacture which authority he is in duty bound to exercise for the public good as well as for his own private advantage. This is precisely the position of an officer who is entitled to demand fees for the discharge of his duties—of a registrar of births for instance. It was at one time the position of almost every officer in the kingdom when even the judges were paid from the fees of their courts and the King himself received the profits of wardship. It is surely no extravagance to speak of a patentee as owing in this sense a public duty and no more than an allowable figure of speech to call him a public officer.

Another line of argument which leads to the same conclusion arises from the consideration that there is no privity between the parties to a petition to the Board of Trade. This is a self-evident proposition. The petitioner does not and cannot allege as any part of his case a private obligation subsisting between himself and the patentee. He has given the patentee no consideration, nothing in the nature of a *quid pro quo*. He has received from the patentee no promise, he relies upon no representation made by the patentee. His claims upon the patentee are grounded, so far as they are grounded in principle and not merely in the arbitrary provisions of the Act of Parliament, solely in the fact that the patentee is a grantee from the Crown and that certain duties having respect to his, the petitioner's, interest only in the same way as to the interest of every other member of the commonwealth are annexed to the enjoyment of the grant. Thus the only ground of principle

Sect. 22 based
on a public
duty.

(f) See form of patent below, p. 388.

which it is possible to assign to the private claim is a public right.

What is
default?
See below,
p. 171.

What is
mandamus?
See below,
pp. 141, 147.

This point has its importance, in two respects, for the ensuing discussion. In the first place it must largely colour the interpretation to be put upon the reference in the enactment to the patentee's "default" and in the second place it has a curious bearing upon the obscure question as to what is meant by "mandamus" in the clause relating to the enforcement of the Order of the Board of Trade when made.

Recapitula-
tion.

To recapitulate. It is and always has been the law of this country that a patentee is bound to introduce his invention within the realm. An obstructive patent which causes inconvenience or prejudice to the public is by its terms void but this provision has in recent years been lost sight of and by reason of long disuse has become so uncertain and difficult of application as to be practically inoperative. To remedy the inconvenience thence arising;—since patentees, relieved of any real danger of forfeiture, grew unreasonable and oppressive in the assertion of their patent rights;—a further remedy has been provided and lodged in the hands of the Board of Trade which in a proper case may order the patentee to grant licences. The following positions must be established in order to bring a case within the jurisdiction of the Board of Trade :—

- (1) The interest of the petitioner in the relief sought.
- (2) A default on the part of the patentee to grant licences on reasonable terms.
- (3) As a consequence of that default one or more of the following inconveniences :—
 - (a) That the patent is not being worked in the United Kingdom.
 - (b) That the reasonable requirements of the public with respect to the invention cannot be supplied.

- (c) That some person is prevented from working or using to the best advantage an invention of which he is possessed.

The proof of (2) and (3) must be "to the Board of Trade" an expression which probably imports to the satisfaction of the Board of Trade. But the first position must be absolutely made out and presumably therefore it must be established by admission or by such evidence as would satisfy a Court of Law. Assuming the three positions to be duly established the mischief is proved and the Board of Trade, upon being satisfied as to the terms which the justice of the case demands, can act.

CHAPTER III.

THE TRIBUNAL.

Theoretical constitution of the Board of Trade—The effective Board of Trade—Tendency of the Privy Council to split up into committees—Jurisdiction of the High Court over administrative departments—Over the Board of Trade—Board of Trade; how far bound by case law—Reasons for following—Subordination—Solidarity—Custom—Deference—Position of the Board of Trade—Bound by cases as to jurisdiction—Secus ultra—Principle of solidarity does not apply—Custom does not bind in this case—Principle of deference applied.

THE nature of the relief granted by this enactment is so exceptional that doubts are sure to arise as to the limits within which the jurisdiction is to be exercised and these doubts will probably have to be resolved upon the authority of very general principles and somewhat far-fetched analogies. Into such a discussion the character of the tribunal which is invested with the jurisdiction must of necessity enter as a fact of no small significance and hence a very practical interest attaches to the subject of the present Chapter.

Theoretical
constitution
of the Board
of Trade.

The name Board of Trade is a parliamentary title for a committee of the Privy Council constituted under the style of A Committee of Privy Council appointed for the Consideration of Matters relating to Trade and Foreign Plantations (a). This committee was appointed by an

(a) 24 & 25 Vict. c. 47, s. 65; 52 & 53 Vict. c. 63, s. 12 (8).

Order in Council in the year 1786 the date commonly assigned to the order being 23rd August in that year (*b*). It appears however from the London Gazette of the 9th September in that year that the order was made at St. James' on the 6th September (*c*). The order was made by virtue of powers conferred upon the Crown in that behalf by an Act of Parliament of the year 1782 (*d*) under a proviso that no salaries should be paid to the members of the committee in respect of their offices as such members. This arrangement probably did not work very well for in 1817 Parliament made provision for the payment of a salary to the Vice President of the Committee (*e*) and nine years later a salary was attached also to the office of President of the Committee (*f*). The consequence was that these two members of the Board of Trade became the only effective members of the Board,—which has long discontinued the practice of meeting in conclave,—and so continued until the abolition of the office of Vice President in 1868. Since that time the President has discharged upon his own responsibility all the functions of the committee except indeed those of which he has been relieved by the Colonial Secretary and perhaps by some other *ex officio* member of the Board whose official duties compel him to share the functions of the Board of Trade. In these cases, however, the President escapes altogether from the delegated duty so that the one function which the Board of Trade has now wholly ceased to discharge is that of deliberating in conference. Sometimes one member, sometimes another, usually the President, fulfils the duties assigned to the Board while the Board itself has for the purposes of consultation practically ceased to exist.

The effective
"Board of
Trade."

(*b*) Thomas—Notes of Materials for the History of the Public Departments, p. 79.

(*c*) As this authority is now somewhat difficult of access the passage in question has been ex-

tracted from the London Gazette and is reprinted as Appendix V. to this volume. See p. 392.

(*d*) 22 Geo. 3, c. 82, s. 15.

(*e*) 57 Geo. 3, c. 66.

(*f*) 7 Geo. 4, c. 32.

This disintegration of the committee is an exceedingly anomalous circumstance for its functions have always been of great importance and it is in one of the principal departments of the public service the representative of the Privy Council or rather it is the Privy Council itself. It is a well known and highly characteristic feature of the Privy Council that it invariably acts by committees, never as a whole. Its most important functions are of course entrusted to the Cabinet; a committee reflecting the prevailing political complexion of the House of Commons for the time being. But the Cabinet is only one of a number of committees into which the Privy Council is split up. Thus, to say nothing of the obsolete Council Board, Star Chamber and Court of Requests or even of the Exchequer and Chancery which equally took their rise by a fissiparous process in the Council, there are at the present time the following committees in addition to the Board of Trade which divide the duties of the Privy Council between them; The Judicial Committee, The Committee of Public Health, The Education Board, The Scotch Education Board, The University Committee and the Board of Agriculture.

Tendency of the Privy Council to split up into committees.

This tendency to split up into committees is not of recent development in the Privy Council. So early as the year 1390 there are to be found in a set of regulations drawn up for the conduct of business at the Council Board provisions that all matters brought before the Council which touch the common law shall be sent to be determined before the justices; that all matters touching the office of the Chancellor shall be sent to be determined before him in the Chancery and similarly that matters within the province of the Treasurer should go before him in the Exchequer while the Dukes of Guyene and Deverwyk of Gloucester together with the Chancellor are constituted a special committee of three with a quorum of two to consider all questions of royal gifts or grants that may turn to the disadvantage of the King. One hundred years later (in 1487) the Chancellor, the Treasurer and the

Keeper of the Privy Seal were by Act of Parliament constituted a Judicial Committee of the Privy Council with power to summon certain other privy councillors and judges to their assistance and adjudicate upon certain crimes and misdemeanours (*g*) a jurisdiction which under the title of the Court of Star Chamber they exercised for nearly two hundred years. In the year 1553 King Edward VI. drew up a series of regulations for the despatch of business in the Council and divided it up for the purpose into five committees which are termed "councils" and ordered to sit apart (*h*). The arrangements made by Edward VI. were probably soon obsolete since great changes in the Council marked the accession of his sister Mary to the throne but nearly a hundred years later Sir Edward Coke is able to assign to the principle of distribution among committees the rank of a recognised method of conducting business at the Council Board for he says "Some rules of the Council, which in Council we have observed we will add fifthly it is a mean of prosperous success when the question is debated with a few, not that he should rely upon them but that thereby the state of the question may be well understood to the end the same may be plenary and fully propounded to the whole Board" (*i*).

Again after a further interval of little more than a hundred years Sir Wm. Blackstone, summarising the history of the Privy Council and noting the fact that in his time its numbers were greatly increased as compared with earlier times remarks "No inconvenience arises from the extension of the numbers of the Privy Council, as those only attend who are specially summoned for the particular occasion upon which their advice and assistance are required" (*h*). What Blackstone described in 1765

(*g*) 3 Hen. 7, c. 1 (c. 10 in Statutes of the Realm, 1816).

(*h*) Burnet, Hist. of Refm., vol. ii., part 2. King Edward's Remains, No. 6. These commit-

tees are enumerated by Prof. Dicey in "The Privy Council," p. 81.

(*i*) 4 Inst. 57.

(*k*) 1 Comm. 230.

has continued to be the course of procedure in the Privy Council down to the present time so that it is manifest that the Legislature when in 1782 it authorized the appointment of a committee of the Privy Council for the consideration of matters relating to trade must have been well aware that it was conferring jurisdiction upon the Privy Council itself and authorizing that body to act in the only way in which it ever does act in its collective capacity.

Jurisdiction
of the Courts
over ad-
ministrative
departments.

These considerations are of importance when the relations between the Board of Trade and the Law Courts come to be considered. If the Board of Trade were, like the Treasury Board, merely a body of officials acting under the authority of a Royal Commission there can be no doubt that the High Court would in a proper case exercise jurisdiction over such a body and control its action. Thus in *The King v. The Lords of The Treasury* (l) a mandamus actually issued to compel the payment of appropriated money and in *The Queen v. The Lords of the Treasury* (1851) Lord Campbell gave unhesitating expression to the opinion that the Court of Queen's Bench had jurisdiction to issue a mandamus against the Treasury in a proper case (m). It is true that the decision in *The King v. The Lords of the Treasury* was disapproved in *The Queen v. The Lords Commissioners of the Treasury* (1872) but in the course of a judgment disapproving of that decision Blackburn, J., said "The question remains whether there
" is any statutable obligation cast upon the Lords of the
" Treasury to do what we are asked to compel them to do
" by mandamus namely to issue a minute to pay that
" money, because it seems to me clear that we ought to
" grant a mandamus if there is such a statutory obliga-
" tion " (n). The case of the Lords of the Treasury is a particularly strong case from the circumstance that they have been repeatedly sheltered from the jurisdiction of the

(l) 4 A. & E. 286.

(m) 16 Q. B. 360, 361.

(n) L. R. 7 Q. B. 397. See also the observations of the M. R. in *In re Nathan*, 12 Q. B. D. 475.

Courts upon the doctrine that they were mere servants of the Crown having no duty save towards the Crown. If in their case a duty towards a third party as soon as it can be detected brings them within the jurisdiction of the Supreme Court there can be no doubt that any other department of the public service would in like manner be held responsible to the Court for the discharge of its duty towards individual members of the public. If the Board of Trade is to escape from such responsibility it can only be because the Board of Trade is the Privy Council and as Sir Edward Coke says "a most noble, honourable and reverend assembly." The difficulty sufficiently appears in the case of *Ex parte W. H. C. Smyth (o)*. There an attempt was made by a litigant dissatisfied with a decision of the Judicial Committee to compel the committee by mandamus to receive his petition for a rehearing. In that case the rule *nisi* was refused upon the express ground of want of jurisdiction in the King's Bench. It is quite true that the circumstances were special inasmuch as the Court was asked to require the committee to rehear a question already heard and decided and the decision seems to have proceeded partly at least upon the ground that it could not be reasonable to call upon a tribunal to embark upon a second examination of a matter already fully considered. But the Court evidently felt a difficulty about entertaining the application at all. Counsel applying for the rule was pressed by the Court to show jurisdiction and did not succeed in discharging himself of that obligation and the opening words of Denman, C.J., in giving judgment are highly suggestive of an opinion that the application was ill-conceived in respect of much more than the merits shown for he says "Upon the statement of the learned counsel himself, it is perfectly clear that we have no power to do what is prayed. Here is a Court of the highest authority at all events of competent jurisdiction

“ to decide. They have decided and it is not for us to
“ call upon them to rehear and to redecide.”

In the report of what is apparently the same application given in 3 A. & E. there is indeed a hint that the Court would in a proper case grant a mandamus to the Judicial Committee. Thus Patteson, J., says “ This Court will “ undoubtedly take care that other Courts shall do justice “ but ” &c. (*p*). These words can hardly signify less than that if the Judicial Committee were to refuse to receive a petition properly presented to them the King’s Bench would grant a mandamus to compel them so to do. But the dictum is obiter and expressed in general terms.

The applicant in the case just cited was very persistent in his endeavour to induce the Common Law Courts to interfere for his protection in the litigation pending before the Judicial Committee in which he was interested and having failed to obtain his mandamus he applied for prohibition first (apparently) to the King’s Bench afterwards to the Court of Exchequer. In both Courts his application was entertained but dismissed upon the merits so that both Courts must be taken to have considered that there was power to prohibit the Judicial Committee if they exceeded their jurisdiction, and in the Court of Exchequer Parke B. appears not only to have taken it for clear law that the Common Law Courts could prohibit the Judicial Committee but also to have reached this conclusion by classing the Judicial Committee among inferior Courts (*q*). These decisions although they strongly favour the view that the Common Law Courts can entertain a question as to whether the Judicial Committee has exceeded its jurisdiction are perhaps not quite conclusive upon the point. That some difficulty was felt about asserting such an authority against the Privy Council is abundantly clear from the course of the reported argument in the Court of Exchequer. It was there contended that because the Court had and had

(*p*) 3 A. & E. 722.

(*q*) 2 C. M. & R. 754. For the

prohibition proceedings in the K. B. see 3 A. & E. 723.

exercised a power of issuing prohibition to the Court of Delegates—which was not a committee of the Privy Council but a specially constituted Court of Chancery—and because the Judicial Committee had been substituted by Act of Parliament (r) for the Court of Delegates and because that Act had not in express terms ousted the jurisdiction of the Common Law Courts till then exercised in ecclesiastical causes—therefore the Court had the same authority in this case, which was an ecclesiastical matter, to prohibit the Judicial Committee as formerly to prohibit the Court of Delegates. The judgments given upon Mr. Smyth's various applications are not explicit upon the extent and nature of the jurisdiction in terms asserted but not exercised by the Common Law Courts and it cannot be affirmed that they amount to more than the assertion that in the special circumstances of the case the Court was entitled to exercise against the new tribunal the same controlling authority which it had exercised against the old. If so the decision may be regarded as establishing an exception from the rule and as pointing to a general conclusion that the Courts of Common Law cannot upon a point of jurisdiction any more than upon a point of practice overrule the decision of the Privy Council (rr).

But this conclusion, if it be doubtful when the Judicial Committee is in question, can hardly be less than very doubtful when the Privy Council is embodied in the Board of Trade. For practical purposes the Board of Trade has long been indistinguishable in point of organisation from the other departments of the Civil Service. The language used by Sir Edward Coke, and already quoted, about the Privy Council sounds strangely overstrained when applied to the Board of Trade. A “most noble honourable and reverent assembly” is language which no serious person would apply to any “President” of the Board and if attention be directed to the effective

Jurisdiction
over the
Board of
Trade.

See above,
p. 47.

(r) 2 & 3 Will. 4, c. 92.

(rr) See *Martin v. Mackonochie*

and *Mackonochie v. Lord Penzance*,
cited below, p. 211.

tribunal, that is to say, to the referee who hears and reports upon the evidence and to the "secretary or assistant secretary" who actually wields the authority of the "Board" (s) the anomaly becomes an absurdity. In the choice of referees the Department has manifested the clearest determination to secure the assistance of persons highly qualified by special experience and ability but it would seem preposterous to contend that the High Court cannot presume to pass in review the conclusion upon a question of jurisdiction or the rights of parties which a practising barrister may take however eminent in his profession and however specially conversant with the branch of law involved that barrister may be. It may be probably taken for granted that the Court in dealing with a jurisdiction which, whatever the theory may be, is in fact exercised in this way will be strongly influenced by the considerations advanced by James, L.J., in *Att.-Gen. v. The Great Western Railway (t)* as to the importance of keeping special jurisdictions within their statutable limits.

Another consideration points to the same conclusion if the question of jurisdiction be raised upon an application for mandamus to enforce an Order made by the Board. In the cases above cited the proposition before the Court has always been that the Court should in some way interfere *pendente lite* with the action of the Judicial Committee. Whether the interference took the form of mandamus or prohibition, in either case it would be a control exercised by the Court which would of necessity be brought to the notice of the other tribunal and, unless the jurisdiction were repudiated by the Privy Council, would affect the conduct of the Council in reference to the matter in question. This is a very different case from that which arises under the provision in the present statute for enforcing an Order of the Board.

(s) 51 & 52 Vict. c. 50, s. 25.

(t) 4 Ch. D. 743, quoted below,

p. 54. See also *Reg. v. Loc. Gov. Board*, 10 Q. B. D. 321.

The Board at that stage is *functus officio* and the Court is asked to set in motion its own machinery of compelling compliance. Even if doubt be entertained as to the propriety of its setting limits to the jurisdiction of the Board in a pending matter that doubt can hardly be pressed so far that the Court must refuse to investigate the grounds upon which it is to act of its own initiative. It may well be that the Court will enter for the purpose of controlling its own proceedings upon an enquiry which would lie outside its competence if the question were of controlling the proceedings of another tribunal. The granting of *habeas corpus* supplies a familiar illustration of the distinction. No judge would entertain for a moment the suggestion that he should prohibit another judge of co-ordinate jurisdiction from entertaining and dealing with an application for the writ but if, after its refusal by a brother judge, the application is renewed to himself he does not and must not refuse to consider the application upon its merits for his own guidance and if he is satisfied that a proper case is made he must order the writ to go notwithstanding that it may have been refused by any number of judges having jurisdiction to grant it.

It seems probable therefore that the Court will assert a discretion to grant the mandamus under this enactment and will require to be satisfied *inter alia* that the order sought to be enforced was properly made. How much this enquiry involves is a question which falls to be considered in the chapter upon the enforcement of the Order (u).

See below,
p. 151.

There is another way in which the character of the tribunal affects the proceedings under this enactment, that is to say a question of great practical importance arises if it be asked to what extent and on what principle, if at all, is the Board of Trade bound by decisions in the High Court upon points of law?

Board of
Trade, how
far bound by
case law.

(u) Below, pp. 135 *et seq.*

The grounds upon which the decisions of the Courts acquire legislative authority so as to constitute a body of case law are not very well understood and the want of recognised authorities dealing with the subject in an exhaustive manner makes it difficult to apply the established practice to new cases. But it is not difficult to discover the main grounds of the English doctrine.

Reasons for following.
Subordination.

1. In the first place all Courts which are subject to have their decisions reviewed upon appeal are bound to take account of the law as laid down in the Courts of Appeal because otherwise their judgments would be set aside with wholly unnecessary expense to litigants.

Solidarity.

2. All Courts which administer one body of law are bound to aim at uniformity in the interpretation of the law and for that purpose to consider *inter alia* precedents established in other Courts of co-ordinate jurisdiction.

Custom.

3. When a decision has been sanctioned by extensive recognition and has become an accepted authority upon the faith of which people have acted and interests have been built up it assumes a position analogous to that of a custom with reference to which parties will be presumed to have acted and in this way the decision of an inferior tribunal may come to have binding force even for a Court having jurisdiction to review the decision itself had it come up for review in the way of appeal.

These three grounds suffice perhaps as foundations for the authority attributed in English law to reasons upon which a Court has actually based the decision of a disputed case—the *ratio decidendi*. And the rule itself is sometimes stated in such a way as to import that such utterances alone have binding force. But it is very clear that *obiter dicta* sometimes have weight scarcely if at all less than that attaching to the most formal decisions.

Deference.

In such a case the real ground of submission is respect

for the learning and reputation of the author of the dictum relied upon. In a case covered by one or another of the more explicit forms of authority already considered there is no occasion and indeed no room to have recourse to this less peremptory form of authority. But where the law is left in doubt by want of decisions precisely in point the defect may be supplied in this way.

We thus obtain four distinct grounds upon which the authority attributed to decisions can be rested. These may be conveniently recapitulated thus :—

1. Subordination.
2. Solidarity.
3. Custom.
4. Deference.

To develope and discuss these various heads would involve too wide a survey of the law and constitution for our present limits and we shall therefore take this result for granted without attempting to establish it and proceed at once to the enquiry : How far do these principles bind the Board of Trade to observe the decisions of the Courts of Law ?

The first head—that of subordination—presents great difficulty. There is no doubt that the Board of Trade is not in any proper sense of the word a tribunal subordinate to the High Court. From its decision no appeal lies to the Court and over the exercise of its discretion the Court cannot and will not exercise any control. This point was decided in *Att.-Gen. v. Great Western Railway* where an order having been made by the Board of Trade under the Railways Regulation Act (5 & 6 Vict. c. 55, s. 6) the Court granted an injunction in furtherance of the order. The M.R. (Jessel) after considering what were the matters which by the Act the Board was required to take into account in arriving at a decision, observed “It is not “intended that a judge should decide judicially upon “these matters; it is left to the Board of Trade, they “having the means of informing themselves and means of

Position of
Board of
Trade.

“ inquiry which are not at the disposal of the Judicature
 “ and it was assumed that the Board of Trade would
 “ exercise it in a reasonable manner and that was no
 “ doubt the ground on which the jurisdiction was con-
 “ ferred upon them. Being of opinion that that juris-
 “ diction has been conferred upon them and that the pre-
 “ liminaries required by the Legislature are complied with
 “ I think it is beyond my functions to inquire whether
 “ the Board of Trade have or have not properly exercised
 “ their discretion which discretion, as I understand, has
 “ been vested in them by the Acts of Parliament and there-
 “ fore I shall grant the injunction ” (x).

In dismissing an appeal from this decision James, L.J., said “ It is very important, no doubt, that all these special
 “ jurisdictions and powers which are given to departments
 “ of the government and other similar bodies should not
 “ be exceeded and that such bodies should keep themselves
 “ within the jurisdiction which is given to them. But, as
 “ it appears to me, it is no less important that we should set
 “ them the example of keeping ourselves within our proper
 “ jurisdiction and I am of opinion that we have no juris-
 “ diction to sit as judges on appeal from a finding of
 “ the Board of Trade on the facts properly brought before
 “ them in this matter and that we ought not to try to
 “ find reasons for substituting our judgment and decision
 “ for theirs ” (y). So again Baggallay, L.J., concludes an elaborate examination of the nature of the proceedings leading up to the decision of the Board of Trade thus
 “ and, therefore, though with much doubt and hesitation,
 “ I have arrived at the conclusion that we must consider
 “ the report as one made within the provisions of the
 “ 6th section of the Act of Parliament and if it is a
 “ report so made the jurisdiction of the Board of Trade
 “ arises and over that jurisdiction we have no control ” (z).
 Even more striking as an assertion of the doctrine that the

(x) 4 Ch. D. 740.

(y) *Ibid.* 743.(z) *Ibid.* 747.

Court has in such a case no appellate jurisdiction is the concurring judgment of Bramwell, L.J., for he declared himself sorry for the conclusion to which he came because he thought that the officer upon whose report the order of the Board had been made had "misconstrued the Act of Parliament and found that which the facts did not justify him in finding" (*a*). The same doctrine had been laid down as being the rule of the Court of Chancery in *Att.-Gen. v. Oxford, Worcester and Wolverhampton Rail. Co.* (*b*) but in that case the Master of the Rolls (Romilly) thought that the Court of Queen's Bench would have jurisdiction to consider upon an examination of the inspector's certificate whether the Board of Trade had properly made the order and to direct it by mandamus to do whatever it would be right to do. The later case shows that no such power of review belongs even to the Queen's Bench Division of the High Court and that in the exercise of the jurisdiction conferred by Parliament the Board is a supreme and uncontrollable tribunal. Indeed it is no new doctrine but a well-established principle that although the Court of King's Bench—and now the High Court of Justice—has a duty to correct the errors of inferior tribunals yet it cannot interfere in a case in which exclusive jurisdiction is given to a particular tribunal. The visitatorial jurisdiction is a case in point (*c*). The power to elect to the fellowship of a college is another (*d*). The discretion of the justices to regulate the supply of food to prisoners in a gaol is another (*e*) and many other examples might be cited (*f*) but the rule cannot be stated in clearer or more general terms than by Lord Tenterden in *R. v. Mayor of London* when he says "if a matter is left to the discretion of any individual or body of men who are to decide according to their own conscience and

(*a*) 4 Ch. D. 748.

(*b*) 2 W. R. 330.

(*c*) *R. v. Ely*, 2 T. R. 336; *R. v. Cambridge*, 6 T. R. 104.

(*d*) *Reg. v. Hertford College*, 3 Q.

B. D. 698.

(*e*) *R. v. N. Riding*, 2 B. & C. 290.

(*f*) See Shortt, *Inf. Mand. & Proh.* pp. 260 *et seq.*

“ judgment it would be absurd to say that any other
 “ tribunal is to inquire into the grounds and reasons on
 “ which they have decided and whether they have exercised
 “ their discretion properly or not ” (g).

It may be taken then that in respect of matters falling within the discretion of the Board of Trade it is not subject to any review of its decisions by the Courts of law and to that extent is free from the obligation which lies upon a subordinate tribunal to observe the decisions of the appellate Court to which its own jurisdiction is subordinate. But the principle of subordination must be understood in a larger sense than this. The ground of the obligation lies in the power of the unsuccessful litigant in the inferior Court to procure elsewhere a reversal of its decision. When this can be done it is manifestly improper for the Court to compel parties to incur the expense of an appeal. So in the present case it would manifestly be improper for the Board of Trade to make an order which the Courts of law would not enforce unless indeed there were some reason—and nobody would suggest any such reason in the present case—for precipitating a conflict of authorities. If therefore the Court will enquire when an application for a mandamus is made into the jurisdiction of the Board to make the order which it is sought to enforce then the clear logic of circumstances shows that upon the principle of subordination, broadly understood, the Board is bound to consider and respect the rules as to its jurisdiction laid down by the High Court. But so far as this ground of authority is concerned there is no obligation on the part of the Board to consider the decisions of the Court on any point except jurisdiction for all other matters are left to its discretion to be decided according to the “ judgment and conscience ” of the Lords of the Committee or, as the case may be, of the assistant secretary of the Board.

Board of
 Trade bound
 by cases as
 to jurisdic-
 tion.

Secus ultra.

The remaining heads may be disposed of in a more summary way. The question of solidarity can hardly arise for the jurisdiction by the present section conferred upon the Board of Trade is manifestly given to cure defects which the practice of the Courts has introduced into the administration of the law. It has been already pointed out that patent right has in this country always been subject to the condition that any grant shall be accounted void which is prejudicial to the state or generally inconvenient. If Courts of law had held this fundamental principle in view they would never have assigned to patent rights the exaggerated value which has enabled patentees of late to treat the public as if grantees of the Crown were entitled to prevent people from using their inventions and by necessary consequence were entitled to fetter the use with any conditions they might choose to impose how unreasonable or how absurd soever those conditions might be. But the Courts of law, losing sight of the public rights secured by common law and exaggerating the privileges conferred by royal grant, have fostered a species of oppression by patentees which it is the specific aim of this enactment to correct and it would be a fantastic error to assume that in applying the remedy the new tribunal was bound by those lines of misguided authority which have issued in the mischief to be cured. Clearly the doctrine of solidarity does not apply in a case like this.

Principle of solidarity does not apply.

See above, p. 26.

The same considerations apply to the doctrine of custom. No doubt patentees have come to look upon their privileges as unconditioned rights, granted for their own exclusive benefit and paramount to all rights of unprivileged persons founded only in the common law. Nor can there be any doubt that this view has been largely acted upon in recent years. Licences have been granted and accepted on the faith of it and interests have been created upon which the reassertion of public right must have a very mischievous effect. If the consideration of such matters were allowed to fetter the Board of Trade its powers would forthwith

Custom does not bind in this case.

Exclusive licences.

become a dead letter. The Legislature has treated this whole excrescent growth of monopoly interests as a mischief to be pruned away by the discriminating action of the Board of Trade and hence, although it is impossible to say that the existence of interests of this kind is not a fact to be weighed and considered in any given case when the Board is arriving at its decision, it is at least clear that any matters of that kind are to be dealt with as matters of fact not as matter of law—that is to say: the Board may consider what is a fair way of dealing with this or that particular interest in this or that given case but it must not treat these interests, considered as a class, as interests entitled to respect or cut down its conception of the public and common right for the purpose of making room for the growth of such private interests. Hence it seems correct to say that as a matter of law the Board is bound to treat as unreasonable custom any practices which have grown up upon a view of patent right different from that which the Board adopts for its own guidance and that it is no more bound upon this principle than upon that of solidarity to follow decisions in the Courts of law (*h*).

Principle of
deference
applied.

The principle of deference presents no difficulty. The advised utterances of a person who speaks with the personal authority due to learning and judgment will always carry weight and help to shape the opinion of any tribunal in dealing with controversies to which they may apply. Upon this point it is unnecessary to enlarge and impossible to enlarge to any purpose. But one remark may be hazarded. Deference, as such, is due to the individual, not to the office. Judges sometimes act as skilled expositors of the law and in this capacity their opinions are sought, for example, in cases of great difficulty by the House of Lords. In America the right of exposition, so

(*h*) See further on this point *Taylor's Patent—Hulton & Bleakley's Petition*, 15 R. P. C. 749, and below, p. 246; *Dunlop Patent—Gormully & Jeffery's Petition*, below, p. 256; *Dunlop Patents—Wolverhampton Petition*, below, p. 268.

far at least as the constitution is concerned, is admittedly a part of the supreme judicial office (*i*) and in our own country the power of the House of Lords as final Court of Appeal to declare the law has been laid down in terms which challenge a degree of deference hardly distinguishable from plain submission (*j*). But in this case the meaning is that subordinate Courts, and individuals in respect of matters which may be adjudicated upon by a subordinate Court are bound to submit to the decisions of the House of Lords. It is a case therefore of the authority attaching upon the principle of subordination not on the principle of deference to decisions of the House of Lords. Indeed if this were not so it would follow that *obiter dicta* in that House had the coercive force of law—a proposition which is manifestly absurd and excluded by the language of Lord Campbell's dictum above referred to. For the principle of deference operates in precisely the same way upon a mere *dictum* and upon a *ratio decidendi*, allowance being of course made for the greater precision of one utterance as compared with the other.

But apart from the duty which lies upon a judge to ascertain the law which he is called upon to administer it is no part of the judicial office in this country to expound the law. Even Courts of final appeal with us do not, strictly speaking, expound the law although exposition forms in fact a large part of the judgment actually delivered. The capital distinction of which the English Courts never lose sight between *obiter dictum* and *ratio decidendi* shows that even the highest Court of Appeal is *ascertaining* rather than *expounding* the law in stating reasons for a judgment given. For if exposition were the function of the Court then abstract propositions of law, in other words, the *obiter dicta* would be authoritative but if the function of the Court is to ascertain the law then only those propositions

(*i*) 1 Kent's Commentaries, 296.

(*j*) See *Beamish v. Beamish*, 9 H. L. C. 339.

which are adopted as certain grounds for its own decision will be authoritative in the full sense and this is precisely the view of all English Courts.

The deference due to a judicial decision is to be proportioned therefore to the learning of the judge, his familiarity with his subject and the care bestowed upon the discussion of his point; in a word, to precisely the same matters which determine the weight of authority attaching to the opinion of any other lawyer; and has no relation to his judicial office for the judicial office does not endue him with infallibility nor, with the possible exception of the Courts of final appeal, does it invest his errors with the force of law.

Upon the whole, then, it seems that the Board of Trade is not bound by precedents created in the Courts of law except in so far as these serve to define the jurisdiction of the Board. The exception will demand consideration in another Chapter (*k*).

(*k*) See Enforcement of the Order, below, p. 135.

CHAPTER IV.

PARTIES.

*Person interested—Who may be made respondent—Mortgagee
— Interveners — Licensees — Joinder of parties — Re-
capitulation—Terms to be imposed on parties intervening.*

THE remedy provided by the Act of Parliament is in the nature of a contract and accordingly the parties to the proceedings for obtaining the remedy must be qualified in respect of the contract contemplated. The petitioner must be a “person interested” and the respondent must be the patentee. We will deal with these qualifications separately.

any person interested.

The ellipse here may be supplied by a reference to the relief, that is to say, any “person interested” signifies “any person interested in the relief sought.” The alternative construction, “any person interested in respect of “the mischief complained of,” is plainly untenable. For one thing it would be nonsensical in the first of the three cases for which the section expressly provides. If the mischief complained of were that the invention was not being worked within the realm, it would be difficult to say that any one person was interested rather than any other. The plantation of the patented industry is a matter of policy—of common concern—in which we are all and every one interested and interested equally in proportion to our joint interest in the prosperity of the realm. Judged by this test therefore everybody would be an interested person

Person
interested.
See below,
pp. 164, 166.

See below,
p. 167.

and the qualification plainly superfluous. But if some representative capacity be required and a person be sought in whom the public interest is, so to speak, embodied then by a clear analogy we must fall back upon the Attorney-General and say that he is a necessary party in any proceedings under this clause.

Either of these conclusions is a *reductio ad absurdum* and any intermediate position between the two extremes which would recognise a special interest in special classes of petitioners upon the analogy of the rule that a private person who personally suffers can abate a public nuisance—any such position will be found upon examination to yield the same result as the mode of interpretation here proposed; namely that the person interested must be interested in the relief sought and that is probably the more convenient way of expressing it.

But subject to this qualification, that the interest relied upon must be an interest in the relief sought, it would seem that any interest will do. There is no limitation in respect either of kind or degree of interest and the weight of authority favours a liberal construction of these words. Thus the Regulation of Railways Act 1873 provides that the Railway Commissioners may make certain orders concerning the keeping of traffic rate books by the companies and the exhibition therein of the tabulated rates in dissected form “on the application of any person “interested” (a). In the case of *Pelsall v. London and North Western Rail. Co.* it was held by the Commissioners (Wills, J.) that these words must be construed in a large sense in order to give full effect to the provisions of the Act. The decision on this point runs as follows “The “London and North Western Company contend that “no one is ‘interested’ within the meaning of the “section, except the person who has to pay the rate in “respect of which the order is sought. There was a good

(a) 36 & 37 Vict. c. 48, s. 14.

“ deal of verbal criticism on both sides as to the meaning
 “ of this word and reference was made to other sections
 “ and to other Acts in which the expression has been used.
 “ To my mind it seems much more satisfactory to say that
 “ the expression used in sect. 14 occurs in one of a series
 “ of Acts of which one of the main purposes (if not the
 “ most important purpose of the first of them) was
 “ to put a stop to undue preferences and that the useful-
 “ ness of this section would be destroyed and its aim
 “ paralysed by putting upon it any such narrow construc-
 “ tion. In my opinion any person who makes out by
 “ proper evidence that the rates which he seeks to have
 “ dissected are really and substantially competitive rates
 “ with his own is a ‘person interested’ within the meaning
 “ of the section ” (b).

Similarly in *Carr v. The Metropolitan Board of Works* the meaning of similar words came under discussion in the interpretation of the Artisans’ and Labourers’ Dwellings Improvement Act 1875 (c). The schedule of that Act contains a provision that an arbitrator shall hold a certain meeting “ and thereat hear and determine any objections
 “ which may then and there be made to such provisional
 “ award by any person interested therein.” Sir George Jessel M.R. held that any person was “interested therein” who was “interested in seeing that the award is right” (d).

In accordance with this principle the Board of Trade has already entertained petitions from interested persons of the following classes:—

1. Later inventors (e).
2. A proposing employer of the patented invention (f).

(b) 23 Q. B. D. 545.

(c) 38 & 39 Vict. c. 36, Sch., sub-s. 11.

(d) 14 Ch. D. 815. See also *Tomlinson v. L. & N. W. Rail. Co.*, 63 L. T. 89, and below, p. 161.

(e) *Re Meister Lucius (Imray's) Patents—Levinstein's Petition*, 15

R. P. C. 732, below, p. 219; *Re Casella's Patents—Levinstein's Petition*, below, p. 234; *Re Dunlop Co.'s (Bartlett's) Patent—Gormully's Petition*, below, p. 249; *Re Incandescent Gas Co.'s (Thompson's) Patent—Continental Gluhlicht Petition*, 15 R. P. C. 727, below, p. 214.

(f) *Re Taylor's (Buxton's) Patent*

The rules made under the Act provide that the nature of the petitioner's interest shall be clearly shown in the petition (*g*) and it is also necessary that the interest should be proved or admitted and be substantial. On the hearing of the petition of the Continental Gas Gluhlicht Co. and another against the Incandescent Gas Light Co. Limited one of the petitioners withdrew from the application, the discontinuing petitioner being the company which had proposed to undertake the manufacture under the licence. Leave to amend the petition in a sense that would have placed the continuing petitioner in the shoes of the one retired was refused whereupon the application lapsed apparently upon the ground that there was no party before the Board who could take up the licence if granted (*h*).

the Board may order the patentee.

Who may be made respondent.

From this it follows that the patentee must be made a party respondent. By the interpretation clause of the Act "patentee" is defined to mean "the person for the time being entitled to the benefit of a patent" (*i*) and by the terms of the patent grant itself the patentee is not only the original grantee of the patent but also his executors administrators or assigns or any of them (*j*). These two definitions appear to be not exactly coincident. In the case, for example, of a mortgage by assignment there can be no doubt that the mortgagee is an assign and therefore a patentee according to the tenour of the grant. But he is not "the person entitled to the benefit of the patent" within the 46th section of the Act. Such at least appears to have been the view of the Court of Appeal in *Van Gelder v. Sowerby* (*k*) for in that case it was held not only that a mortgagor was, notwithstanding the mortgage,

Mortgagee.

See below, p. 68.

—*Hulton & Bleakley's Petition*, 15 R. P. C. 749, below, p. 242; *Re Dunlop (Bartlett & Welch) Patents—Wolverhampton Co.'s Petition*, below, p. 262.

(*g*) Pat. Rules, 1890, r. 60, below, p. 345.

(*h*) 15 R. P. C. 731, and below, p. 219.

(*i*) 46 & 47 Vict. c. 57, s. 46.

(*j*) *Ibid.* Sch., Form D.

(*k*) 7 R. P. C. 211.

“the person for the time being entitled to the benefit of
 “the patent” within this section but also that it was a
 sound practice at the Patent Office to refuse to register the
 mortgagee as *patentee*. The language of Lord Justice
 Cotton’s judgment at this point may be usefully quoted.
 He says; speaking of the Register of Patents; “on the
 “register, copies of which are given to us the plaintiff is
 “mentioned as assignee. . . . Then we find on the same
 “date there was a registration of the mortgage which was
 “granted to the Banking Company . . . and we hear
 “from the officer . . . that that was an intentional differ-
 “ence of language, that they did not register a mortgagee,
 “even though he took by assignment, as assignee of the
 “patent and I think that is right as I understand
 “the officers do not register an assignee if he is only
 “assignee by way of mortgage—as proprietor in any way
 “—and I think that is right because, we should
 “not consider here, knowing what we do of equity, that
 “the mortgagee was to be considered as the proprietor of
 “that which is comprised in his mortgage” (1).

The distinction thus drawn between an assignee of the
 patent and the patentee can probably not be maintained
 with reference to the language of the patent grant itself.
 It is to be observed that the grant is made to the assigns
 no less than to the inventor himself. The word “patentee”
 having been defined as follows; “the said inventor
 “(hereinafter together with his executors administrators and
 “assigns or any of them referred to as the said patentee)”
 the grant is in terms made to “the said patentee” and
 the inventor as distinct from the other grantees disappears
 entirely from the language of the patent. The assigns
 therefore take from the Crown as directly and immediately
 as does the inventor. It would probably be found im-
 possible to apply to the patent the same line of argument
 by which the distinction has been drawn as above stated
 between the mortgagee and the patentee. In the case

(1) See also *Heap v. Hartley*, 42 Ch. D. 468; 6 R. P. C. 500.

just cited the question arose simply upon the right of a mortgagor to maintain an action upon the patent against an infringer and it was disposed of by the Court of Appeal apparently without regard to any other consequences than those which the actual dispute between the parties brought into view. But in any discussion of the meaning of the word "patentee" in the grant itself it would hardly be possible for the Court to lose sight of the very different question "Who is privileged under the grant?" For instance if the case should arise of a mortgagor who should seek to restrain his mortgagee by way of assignment from infringing the patent it is hardly conceivable that the Court would in that case hold that the assignee was not a "patentee" and entitled from that point of view to the benefit of the patent *i.e.* to the licence to work the patented invention (*m*).

If this view be correct a doubt may very well arise whether the word "patentee" in the 22nd section of the Act ought not to be understood in a larger sense than that of the interpretation clause as construed in *Van Gelder v. Sowerby* (*n*).

See below,
pp. 163 and
179.

It is elementary justice that every person whose rights are liable to be affected by the decision of the Board of Trade should be warned of the hearing and admitted to attend the proceedings. If there be mortgagees whose security is liable to be diminished in value or even an exclusive licensee whose monopoly is liable to be cut down or destroyed in the course of these proceedings it is plainly right and even necessary that they should have a *locus standi* to oppose (*o*).

Their interests cannot properly be left in the enforced custody of the "proprietor of the patent" because his interests may very well in such a controversy be wholly divergent from theirs. If therefore it is to be assumed

(*m*) This decision is further discussed from a slightly different point of view below at p. 76.

(*n*) Above, p. 64, and below,

p. 76.

(*o*) *Capel v. Child*, 2 Cr. & J. 579, quoted below, p. 195; *Reg. v. JJ. of West Riding*, 7 Ad. & E. 592.

that the parties appearing before the Board of Trade are to be the parties mentioned in this section and no others then it will be a matter of some practical importance that the word "patentee" should receive the widest possible construction in order to secure as nearly as possible the presence of all necessary parties before the tribunal. It may in this connection become important to consider the question above discussed as to the freedom of the Board of Trade to consider *de novo* a point which has been decided in a Court of law. See above,
p. 53.

But is the assumption justified that none but "patentees," whatever the definition of that word may be, can be respondents? There is something to be said for that view since the jurisdiction is limited to the making of orders against "patentees," and it may be contended that a person against whom no order can be made ought not to be admitted as a party to the proceedings. But this objection cannot go the length of shutting out a willing respondent who consents to abide by the decision. A question thus arises as to whether in addition to parties strictly speaking respondent there may not be others to whom the Board ought to require notice of the petition to be given. The question is one of great importance and will be considered more in detail in another chapter (*p*). It must suffice here to say that it appears to have been overlooked as yet for no provisions dealing with it are to be found either in the Act of Parliament or in the Patents Rules. Interveners.

The question has arisen as a practical question in two instances while this book has been going through the press. In the *Wolverhampton Petition* and the *Gormully & Jeffery Petition* exclusive licensees were admitted to oppose the petitions. In the latter case two companies appeared in this capacity a certain number of licences, limited by contract to three, having been issued to independent licensees. In these cases, however, the licensees

(*p*) See Chapter on Procedure, below, pp. 163, 179.

were admitted unconditionally to intervene and some difficulty consequently arose as to the exact position in which they stood before the tribunal, one of them claiming to take part "without prejudice," that is to say after having submitted evidence, cross-examined and argued against the petition, raising the objection that there was no jurisdiction in the tribunal to make an order binding upon the licensee. Mr. W. R. Bousfield intimated that if an application were made to amend the petition by adding the exclusive licensee as a party he would advise the Board of Trade that it would be proper to allow such an amendment to be made. Nothing, however, came of this suggestion for the petition was in the end dismissed. But it is submitted that the word "patentee" cannot possibly include a licensee as such. It is clear, for example, that a judgment invalidating the patent cannot be obtained against an exclusive licensee (q) and in *Heap v. Hartley* it was expressly held that an exclusive licence does not any more than a concurrent licence confer an interest in the patent upon the licensee (r). It seems therefore difficult to suppose that the Courts will recognise in the Board of Trade any statutable jurisdiction over persons whose position is only that of licensees and of course the special jurisdiction will not be extended beyond the language of the statute. The language of James L. J. in *Att.-Gen. v. Great Western Railway* is very significant upon this point. "It is very "important no doubt" said the learned judge "that all "these special jurisdictions and powers which are given to "departments of the government and other similar bodies "should not be exceeded and that such bodies should "keep themselves within the jurisdiction which is given "them" (s).

See p. 255.

Licensee.

See p. 54.

Joinder of parties.

A question of joinder of some practical importance may arise in the case in which it may be necessary to obtain

(q) *Per* Cotton, L. J., in *Heap v. Hartley*, 6 R. P. C. 498.

(r) *Ibid.* p. 500. See also *Van Gelder v. Sowerby*, 7 R. P. C. 211.
(s) 4 Ch. D. 743.

licences under two or more patents as to whether the two or more patentees can be made respondents to the one petition in respect of their separate patent rights. There are no rules bearing upon this point and it has not yet arisen in practice. It is discussed on the ground of principle below and reason is there shown for the conclusion that a petitioner may join as many parties in his petition as are necessary to enable him to state a complete case to the Board of Trade. See below,
p. 161.

Another way in which a question of joinder may arise is when the petitioner desires that the licence to manufacture may be granted to some third person. Thus in *Meister Lucius Patents—Levinstein's Petition* a puisne patentee and a manufacturer were joined as co-petitioners the manufacturer being already licensed by the puisne patentee (*t*) and in *Incandescent Patent—Continental Gluhlicht's Petition* the petition failed as a consequence of the withdrawal of the co-petitioner who was the intending manufacturer under the licence and the petition came to nothing (*u*). See below,
p. 166.

The principles upon which joinder of parties should be required and allowed and upon which notice should be given to parties not joined are well understood in the practice of the High Court and it may be conjectured that the Board of Trade will ultimately adopt the principles of the High Court practice or perhaps the practice itself in its own proceedings. But at present there are no rules bearing on this point and therefore no doctrine can be delivered. What it has seemed becoming for the present writer to advance by way of suggestion on these points has been incorporated in the Chapter on Procedure (*x*). Here it may suffice to draw the reader's attention to the Rules of the Supreme Court and especially to Orders 16 and 52. See below,
pp. 322, 333.

To recapitulate;—the necessary parties to a proceeding Recapitulation.

(*t*) 15 R. P. C. 732, and below, p. 219.

(*u*) 15 R. P. C. 731, and below, p. 219.

(*x*) See below, p. 161.

Petitioner's
interest.

at the Board of Trade are, as petitioner, some person interested in the relief sought and, as respondent, the patentee *i.e.* the person for the time being entitled to the benefit of the patent. With regard to the petitioner it would seem not possible either to define the nature of the interest required or to state any minimum value for the interest. But it must be substantial in this sense that the petitioner must be in a position to utilise the licence if he gets it. The Board may in its discretion refuse to make an order in favour of a petitioner who desires it merely for promotion or other speculative purposes. No rule to that effect has as yet been formulated but the discretion of the Board was exercised in this way in *Continental Gas Gluhlicht Case (y)*. The following interests have proved sufficient to sustain petitions.

Of a manufacturer having a *puisne* patent right the exercise of which is admittedly covered by the patent in question (z).

Of a manufacturer having a *puisne* patent right which he is restrained from exercising by injunction in favour of "the patentee" (a).

Of a newspaper proprietor who desires to use the patented invention to facilitate the production of his paper (b).

Parties
respondent.

With regard to the party respondent the law is not so clear. It is plain upon the statute that the patentee, being the person for the time being entitled to the benefit of the patent and registered as its proprietor, must be made respondent. It is open to question whether a mortgagee or other person holding in trust and so registered must be made a party and it is doubtful whether persons; however substantial their interests, as for example exclusive licensees;

Mortgagee.

Licencee.

(y) Below, p. 219. But see the observations of the referee in *Dunlop Patents — Wolverhampton Petition*, below, p. 271.

(z) *Re Meister Lucius, Levinstein's Petition*, 15 R. P. C. 732, and below, p. 220.

(a) *Re Dunlop Tyre Co.'s Patent, Gormully & Jeffery's Petition*, below, p. 250.

(b) *Re Taylor's (Buxton's) Patent, Hulton & Bleakley's Petition*, 15 R. P. C. 750, and below, p. 243.

who are not patentees can be joined although they can be allowed to intervene in the proceedings and have actually been so allowed to intervene even without first submitting to the jurisdiction.

It may be considered not only sound in principle but now a recognized practice that as far as possible all persons interested as patentees, whether in the narrower or the more extended meaning of that word, should be made respondents and that all others who have interests in the patent right liable to be adversely affected by the order if made should have notice of the petition and leave to attend and take part in the proceedings. It is submitted however that parties so admitted by leave of the Board should be required as a condition of such leave to submit to the jurisdiction and to undertake to abide by the order when made. Moreover it would seem that in such a case it would be proper to place the intervener under terms as to any additional costs thereby occasioned.

Terms to be imposed on parties intervening.

The discretion vested in the Board of Trade as to the making of an order upon such a petition enables the Board to deal effectively with any resistance that the petitioner may offer to the introduction of fresh parties whose presence before the tribunal may be necessary to enable the Board to do complete justice.

CHAPTER V.

THE RELIEF.

Form of the Order—The language of the Act—Who are persons benefitting by a patent?—The patent register not conclusive—Licensee—Date of licensing—Terms of licence—General considerations—What are just terms?—The Siddell v. Vickers margin—Royalty not to be measured by damages in infringement—The analogy of voluntary licensing arrangements—The rule of divided profit—Applied to case (a)—The Levinstein royalty rate—Just royalty rate—The point of view defined—The case under clause (b)—Royalty rate in case (b)—The case under clause (c)—Merits of the invention—The criterion of comparative merits of inventions—The conclusion extended to new articles of manufacture—When should the presumption be in favour of the one party or of the other?

Relief.

THE Board has authority in a proper case to order the patentee "to grant licences." The language of the Act is very vague. An order to grant licences might obviously be an order couched in general terms made once for all and prescribing the terms upon which any person qualifying under the order might obtain a licence. Or it might be an order directed to the special circumstances of a particular case and requiring the patentee to grant a specific licence to an individual applicant. An order in the first form would tend to minimise applications to the Board since when once made it would cover all cases falling under the patent affected but probably few applicants would come forward, at any rate under clauses (a) and (b) of the section, if they had to bear the burden of settling terms of

which other people equally with themselves could take advantage. An order in the second form is much more advantageous to the applicant because it can be drawn up so as to leave nothing except matters of pure form to be done in fact so as to be automatically operative and to render practically unnecessary the machinery of mandamus by which it is provided that the order may be enforced. It is in this second and, from the petitioner's point of view, more advantageous form that the Board has actually elected to draw up its orders and the decision is probably sound. Certainly it has made an enormous difference in the public interest to the value of the relief granted for, although according to this plan one order can only cover a single case, there can hardly be a doubt that where a patented invention is in such large request that a number of applications can be made for licences by different petitioners the patentee when he sees what terms the Board of Trade gives him will prefer to conduct his business by direct negotiation. *C'est le premier pas qui coûte.*

Form of
the order.
See below,
p. 110.

But this question of the form of the order is important under another point of view. Not only does it affect the practical value of the result reached it has an important bearing also upon the scope and nature of the enquiry. This will be considered in detail in another chapter. Here it may suffice to point out that an enquiry which is intended to eventuate not in a declaration of rights—not indeed in anything in the nature of a judgment—but in an actual contract between the parties ought to be conducted in a very special manner in many respects very unlike the proceedings of a Court of law.

See below,
p. 132.

This last consideration leads naturally to the reflection that this question of the form of the order is one of really very great and far reaching importance and one which ought to be determined only after most careful deliberation. If the question be asked Has it been deliberated on? no perfectly satisfactory answer can be given. There is internal evidence that the order made in the *Meister Lucius (Levin-*

stein) *Case* had been very carefully thought out but it certainly was not at all adequately discussed before the referee and the form in which it was eventually drawn up was not so much as suggested by or in the presence of the parties. The question therefore should not perhaps be considered to have been as yet disposed of although the *Levinstein Order* undoubtedly creates a precedent and as is above suggested a precedent which is probably a very valuable one from the point of view of the public interest.

The language
of the clause.

But, reverting to the question, What was the intention of the Legislature? the enquirer approaches a very difficult investigation. If it were possible to apply strict rules of textual criticism to the Act of Parliament the expression "on the petition of any person . . . the Board may order the patentee to grant *licences*" would seem to point to an order in general terms covering more than the particular case proved: for, otherwise, the singular number "the Board may order the patentee to grant a licence" would be more appropriate and if the limitation of the authority to a single licence seemed dangerous all necessary liberty of action could have been secured for the Board by phrasing the clause thus,—“to grant a licence or licences to such person or persons on such terms” &c. The exclusive use of the plural form “licences” and the absence of any reference to the persons licensed among the particulars of the licences enumerated in the clause, if they were intentional, would import that orders in general terms were under contemplation. But the day has gone by when literary canons of interpretation could be applied to Acts of Parliament and if manifest inaccuracy can protect any statute from a severe rule of construction then the Act of 1883 will be entitled to the largest measure of liberal interpretation. On the other hand a practical consideration of great weight is that the order is to be drawn up with “regard to the nature of the invention and the *circumstances of the case*.” Now it probably is not too refined a criticism to suggest that the “circumstances of the case,”

being facts additional to the nature of the invention, are to be understood as including the facts disclosed by the petitioner and *inter alia* the facts which go to show what his position is and so to indicate the kind of security to be prescribed, also what his claims and abilities are and so to show what rate of royalty, terms of payment and covenants it would be proper to impose upon him individually. If that be so then the Legislature must of course have intended that the order should be special in its terms and application and the form adopted by the Board is not only the more useful but also the more regular under the provisions of the Act.

may order the patentee.

It has been already pointed out that the word "patentee" has two meanings, one derived from the statute by an interpretation adopted by the Patent Office and endorsed by the Court of Appeal the other derived from the patent itself (*b*). There can hardly be a doubt that the meaning to be assigned to the word in this place is that given in the definition clause (46) of the Patents Act. If therefore the interpretation, which excludes a mortgagee, be correct it would seem that there is no jurisdiction in the Board of Trade to make an order against a mortgagee who has not foreclosed. This would amount to a very serious limitation of the power of the Board of Trade for it is obvious that the Board could not make a proper order in the case of a mortgaged patent without taking the mortgagee's interest into account and if the Board were to adopt the rule that it would make no order in such a case unless with the consent of the mortgagee it would at once lose for practical purposes its entire jurisdiction, since nothing would be easier than to protect a valuable patent in that case by a fictitious mortgage. It is, therefore, not immaterial to point out that the dictum in *Van Gelder v. Sowerby* (*c*)

See above,
p. 64.

(*b*) See above, p. 65. See also *Van Gelder v. Sowerby*, 7 R. P. C. 211; and *Heap v. Hartley*, 42 Ch. D. 468. (*c*) 7 R. P. C. 212.

that an assignee by way of mortgage is not "a proprietor in any way" is an *obiter dictum* and probably not very accurately expressed. The point actually decided was that the mortgagor did not lose "the benefit of the patent" by mortgaging. The question now in point, *i.e.* whether the mortgagee acquires the benefit of the patent before foreclosure, was not before the Court and one of the illustrations used by Cotton, L.J., to support his conclusion, namely the doctrine that the assignee of part of a patent can sue for infringement goes to show that the Court did not really intend to deny to the mortgagee the character of being a joint- or co-patentee.

It will probably then be considered that the question as to how far persons having an interest in the patent right as distinct from the patentee, *e.g.* mortgagees and licensees, can be bound by the order of the Board is an open question and in that case it will be material to consider *de novo* whether the definition of a patentee given in sect. 46 includes a mortgagee or part owner of a patent and an exclusive licensee. The question was mooted in the hearing of the application of Gormully & Jeffery for a licence from the Dunlop Co. and the referee—Mr. W. R. Bousfield, Q.C., said "It appears to me that, however complicated the interests in a patent may be there is ample power to deal with a matter of this sort having regard to the fact that the patentee means, as defined in sect. 46, a person for the time being entitled to the benefit of a patent. It does not matter how complicated that person is or what the interests may be. They can all be brought before the Board of Trade and the matter can be dealt with compendiously" (*d*).

It may with great submission be suggested that this conclusion is of very doubtful validity as regards licensees—even exclusive licensees—but would be clearly sound with respect to mortgagees or other persons interested in the patent.

(*d*) Below, p. 257. See also *Dunlop Patents—Wolverhampton Petition*, below, p. 268.

The words are “ ‘ Patentee ’ means the person for the time “ being entitled to the benefit of a patent.” The word “ person ” here of course includes “ persons ” by virtue of the Interpretation Act 1889 (e). Now the benefit of the patent is first the “ especial licence, full power, sole privilege and authority to make, use, exercise and vend the “ invention ” which is the principal subject of the grant (f). In the second place it includes the profit which the grantee can make by way of royalty or by the monopoly of manufacture which he can secure by enforcing against others the prohibition which occurs later in the deed and whereby the subjects of the Crown are strictly commanded not to “ make use of or put in practice the said invention or any “ part of the same.” The Act says that those persons who are entitled for the time being to these benefits (and the number will of course include all who are jointly entitled or entitled in common to these benefits or who hold divided shares in them) are within the meaning of the word “ patentee.” The patent defines the word in exactly the same way for it confers the whole benefit of the patent upon “ the patentee ” *co nomine*. Upon this view therefore there is no discrepancy between Clause 46 and the patent grant and seeing that the patent grant is itself a part of the Act (Form D of the Schedule) it is clear that the meaning must be the same in both places. Upon these grounds then it is submitted that the “ patentee ” here includes all persons whether holding by a legal or equitable title and whether by a defeasible or indefeasible right who enjoy for the time being either the royal licence to carry on the manufacture or the practical commodity of

Who are persons benefitting by a patent.

(e) 52 & 53 Vict. c. 63, s. 1, sub-s. 1 (b).

(f) 46 & 47 Vict. c. 57, Sch., Form D. These words have now become obscure by reason of the change which has supervened in modern times upon the conditions under which handicrafts are carried on in this country. In legal theory the royal licence to carry on a

manufacture is far from being a matter of small account and in the times from which our British system of patenting inventions dates the facts fitted precisely into the theory. This subject has been worked out in Monopolies by Patents. See pp. 121 and 251. See also below, App. VI. p. 395.

The Patent Register not conclusive on this point.

Licensee.
See above,
p. 68.
Below,
p. 80.

being able to restrain others by force of the patent in respect of their freedom of trade. If this view be correct then it would seem to follow that the class of patentees is not limited to proprietors registered as such in the Patent Register but comprises also mortgagees who are in that book distinguished and entered in a class apart (g).

It is worthy of note that the Board has no jurisdiction to deal with an exclusive licensee and it is quite possible that from this circumstance a difficulty may arise. It would clearly be a breach of contract for a patentee to grant a second licence in conflict with the licence once granted to an exclusive licensee. The question must sooner or later arise What is to be done with a patentee whose hands are fettered in this way?

The answer would seem to be that the action of the Board of Trade must depend upon the conduct of the exclusive licensee. If he submits to the jurisdiction and claims to be heard in opposition to the petition then it is clear that he must be admitted on proper terms to take part in the proceedings. He has substantial interests which may be prejudicially affected by the order. If on the contrary he refuses to submit to the jurisdiction his case may quite properly be ignored. The patentee cannot be allowed to escape from the jurisdiction of the Board by setting up his licensee—his own creature. And although the order made by the Board may oblige the patentee to commit a breach of contract neither party to that contract can complain as against the Board or the public. Every patent to which this clause applies has been granted subject to the condition that the patentee might be compelled to grant licences and if in contracts subsequently made the parties have chosen to ignore this feature of the patent grant they have only themselves to thank for the consequences of the oversight. An absolute covenant not to grant any other licences is a covenant which no patentee can properly give

(g) *Van Gelder v. Sowerby*, 7 R. P. C. 211.

and no licensee can properly rely upon. Both parties know that any such undertaking is liable in certain events to be brushed aside by an order of the Board of Trade. In this case therefore, as in the case of a mortgagee, the Board has, it is submitted, full power to act. Truly in this case it cannot, save with the licensee's consent, make an order which shall bind him (*h*) and therefore if he holds aloof it cannot afford any protection to the patentee from the consequences of his breach of contract. But, on the other hand, it can deal with the patent right in such a way that if the exclusive licensee's interests are substantial it will be better worth his while to intervene than to stand aloof. From this it seems to follow that the Board ought as a matter of policy to follow a very strict rule with regard to exclusive licensees. Obviously they should have notice of the proceedings. If then they do not submit to the jurisdiction all consideration of their interest should be rigidly excluded from the enquiry. That is to say the patentee should not be permitted on any pretext to argue the case of his exclusive licensee. If he is at liberty to do so it will plainly be his duty to do so and to minimise to the best of his ability the consequences of a breach of his own covenant for exclusive enjoyment. But the fact that he has done so will be no answer to an action founded on the breach unless his efforts are more or less successful, in which case they would *pro tanto* diminish the *quantum* of damages. In mercy therefore to patentees who may have placed themselves in this false position the Board should interpose its authority and by unswervingly refusing to consider the interest of any person not bound by its order it should put pressure on exclusive licensees to submit to its jurisdiction. Of course the submission upon which a licensee should be admitted to take part in the proceedings should be a full submission to be bound by the result

See below,
p. 163.

(*h*) But a different opinion upon this point has been expressed by Mr. Bousfield sitting as referee

since these words were written. See *Dunlop Patent—Gormully & Jeffery's Petition*, below, p. 256.

as between himself and his licensor. If a licence be granted to the petitioner the consent of the exclusive licensee can make no difference to the puisne licensee.

Since the foregoing paragraph was written the case contemplated has actually arisen in *Gormully & Jeffery's Petition* against the Dunlop Company (*i*). There unconditional leave was granted to the exclusive licensees—there were two—to oppose the order and at one stage of the proceedings great embarrassment was occasioned by the fact that although admitted to oppose, they had not submitted to the jurisdiction. It was proposed to solve the difficulty by adding them as parties and the discussion of this proposal made it very evident that there was no machinery for effecting such an amendment of the proceedings and grave doubt as to the jurisdiction to allow the proposed amendment. The discussion was not pressed to an issue and did not greatly elucidate the point. At a later stage the difficulty was again experienced and this time by the exclusive licensee himself who desired to put in an offer to manufacture and supply goods as an alternative to the proposed additional licence but was afraid that by so doing he would compromise his rights by a constructive submission to the jurisdiction. It seems a secure conclusion to deduce from this case that licensees should only be admitted to oppose upon the express condition above suggested of submission to the jurisdiction.

See below,
p. 255.

See below,
p. 258.

to grant licences.

It has been already pointed out that this expression has been so construed as to empower the Board to order the granting in a particular case of a particular licence in a prescribed form (*k*).

The terms of the licence form a part of the order made (*l*) and for the discussion of those terms the reader

(*i*) Below, p. 256. See also *Dunlop Patents—Wolverhampton Petition*, below, p. 268.

(*k*) See above, p. 73.

(*l*) *Meister Lucius Patents—Levinstein Petition*, 15 R. P. C. 742, and below, p. 110; *Taylor's Patent—Hulton & Bleakley's Petition*, 15 R. P. C. 753, and below, p. 248.

is referred to the Chapter upon the Order to be found below (*m*).

on such terms as to amount of royalties, security for payment or otherwise as the Board having regard to the nature of the invention and the circumstances of the case may deem just.

The enquiry which must be undertaken to enable the Board to discharge its duty under this part of the clause differs very widely, as has been pointed out in a previous chapter, from the enquiry necessary to satisfy the Board that a case for a licence has been made. See above,
p. 56.

Here it is eminently necessary to fall back upon fundamental principles. No tribunal can properly assess the royalty to be paid or lay down the conditions to be imposed without having the clearest view as to the nature and extent of the privilege which forms the subject matter of the grant. An attempt has been made in the introductory chapter of this book to elucidate the principles upon which the Board of Trade proceeds and they will be assumed in the present commentary. In what follows points of detail only will be considered. General
consideration.

See above,
p. 13.

on such terms as the Board may deem just.

It has been assumed that these words give the Board authority to settle the terms of the licence and also to introduce additional terms into the order. Thus in the *Levinstein Case* a term as to the execution of the licence by the petitioners before a certain date was introduced into the order but not embodied in the deed itself (*n*). The words of the section are perfectly general and will no doubt, bear this construction. It is probably not possible to lay down limits to the jurisdiction of the Board in imposing terms. Some indication is given by the words which follow as to the nature of the terms to be settled by

(*m*) See below, pp. 116 *et seq.*

(*n*) 15 R. P. C. 742, and below, p. 362.

the Board but it cannot be supposed that these words define the full scope of such an order as the Board is empowered to make. The only express direction given to the Board is that the terms are to be such as it deems "just." This however is of considerable importance for obvious as it appears upon a casual reading it is by no means certain that the tendency of an arbitrator not specially selected and instructed would in a case like this be to consider what is *just*. He would tend rather to consider what was reasonable and reasonable as an act of grace to the licensee. Patent rights in recent years have been rated so high not only by patentees but also by Courts of Law and common trading rights have been so much overlooked that it is perfectly reasonable for a patentee at the present time to insist upon most unjust terms. The passage already quoted from judgment in the case of *The Incandescent Gas Light Co. v. Cantelo* affords a striking illustration of this point (o).

See above,
p. 20.

Now if the Board were directed to make such terms as might be reasonable it would be very difficult to put limits to the pretensions of the patentee since it has been judicially declared that it is perfectly reasonable for him to push his claims to the limit of extravagance.

In place of this judicial doctrine the Act of Parliament substitutes the rule of justice between the parties. It recognises that the applicant for a licence is not a beggar destitute of claims except upon the compassion of the patentee, that the grant has not been made by the Crown in a spirit of improvident disregard of consequences and that, apart altogether from the terms of the grant, the prerogative of making the grant has been controlled by statutable provisions having regard to the good of the commonwealth. In directing the Board of Trade to settle terms between petitioner and patentee Parliament has; perhaps unwittingly but, if unwittingly, then by an

(o) 12 R. P. C. 264, and see above, p. 22.

instinct the more strikingly sure in its operation; resorted to the older and fundamental principles of patent law and laid upon the Board the duty of ascertaining just terms of arrangement between parties both of whom have rights, founded in the Common Law and in the Patent Grant respectively.

That the word "just" here involves the consideration of what is just *inter partes* admits of no doubt. But a question may arise as to whether it also includes the administration of retributive justice to the patentee in default, in other words whether, having found the patentee to be in default, the Board should devise terms of licence to punish him for that default. The word "default" alone lends colour to this suggestion and it is submitted that even in dealing with a defaulter the Board ought not to inflict penalties. Two considerations afford strong support to this conclusion. (1) Another penalty, namely, forfeiture of the patent, is provided both by the Statute of Monopolies and in the patent grant itself in the like case *i.e.* if the patent proves to be prejudicial or generally inconvenient (*p*). (2) The tribunal, a Committee of the Privy Council, is not one that the Legislature can be readily supposed willing to entrust with the jurisdiction to inflict penalties having regard to the terms of the Act (*q*) still unrepealed upon the statute book, by which the jurisdictions of the Council Board and the Star Chamber were taken away. The suggestion that a defaulting patentee is a fit subject for disciplinary treatment has actually been introduced *arguendo* into these discussions at the Board of Trade but it is submitted that the proper position for the tribunal to take up is that default is only to be considered for the purpose of trying the question of jurisdiction and, that point once settled, the nature or magnitude of the fault are purely irrelevant considerations. If this principle

What is
"just"?

See above,
p. 13.

(*p*) 21 Jac. 1, c. 3, ss. 1, 6; 46 & 47 Vict. c. 57, Sch., Form D.

(*q*) 16 Car. 1, c. 10.

were clearly laid down it would incidentally have the effect of materially facilitating and simplifying the enquiry. So long as a patentee thinks that the gravity of his fault may affect the terms which he will secure from the Board of Trade he feels compelled to deny it and as far as possible to explain it away. Time and money are thus wasted upon the discussion of an immaterial point whereas if the patentee could safely say I admit a default sufficient to found the jurisdiction and by that admission close his adversary's mouth upon the details of the default it may reasonably be supposed that in many cases—eventually in most cases that would be submitted to the Board—an admission of this sort would be made and the issues reduced proportionately. This line of argument leads up naturally to a practical suggestion as to the amendment of Rule No. 60 of the Patents Rules 1890. That rule prescribes the contents of the petition and *inter alia* that the petitioner shall show clearly the grounds upon which he claims to be entitled to relief. In the statement of these grounds the petitioner of course alludes to the default which he proposes to prove and if he thinks that a strong case and one tending to the prejudice of the patentee before the Court can be made under this head he puts it in the foreground and states it strongly. The Levinstein petition, in which the patentee's default is depicted in very vivid colours, affords a striking example. It is worth consideration whether it would not be an excellent plan to prohibit any such polemical statement in the petition of this point. Anything more than a bare statement, introduced for form's sake, that the patentee had committed a default by reason whereof &c.—should be disallowed in the petition as scandalous and allowed only in evidence if the patentee on his part denied the statement made in general terms. In any case this, if it is submitted, represents the attitude which should be taken up by the Board when once the question of jurisdiction to deal with a given case is set at rest. From that point onward the Board should abso-

See below,
p. 353.

lutely decline to hear anything more of the default or to consider it in any way (r).

When these points have been set at rest there is another consideration of a general character which will come into view in determining what is just; that is to say the question on what principle the shares are to be allotted to the patentee and licensee respectively in the profit which is available for division. The Act does not speak of any division of profit and it may perhaps seem to be a long step from the adjustment of rates of royalty to the sharing of profits. But the relation between the two things is perfectly well known and has been often recognised. It comes to the front in every case in which an account of profits is ordered instead of damages to a successful patentee in an infringement action. The leading case is *Siddell v. Vickers* (s) in which the Court of Appeal expressed an opinion that the true test of what profit is attributable to the use of a patented invention is to compare with the invention what the infringer would have been likely to use for the purpose if he had not used the invention. This therefore is the full amount which a patentee can recover by way of profits against a wrongdoer and this is therefore the extreme value which can be set upon the invention. The real question will be;—Should the Board assign the whole of this profit to the patentee in the shape of royalty or should the profit be divided between the patentee and the manufacturer?

In behalf of the patentee it will, of course, be contended that the Board of Trade should extend to him the same measure of consideration as the Courts of Law and give him in account with his licensee;—the full inventor's profit as defined in *Siddell v. Vickers*. Indeed this position has already been taken up in more than one of the proceedings

(r) This of course does not mean that the Board should disregard evidence of animus in considering what terms if any are to be introduced into the licence for the

protection of the licensee from disloyalty on the part of the patentee. See below, p. 130.

(s) 9 R. P. C. 162.

The *Siddell v. Vickers* margin.

that have been taken at the Board of Trade. But the principle has not been acted upon and it is submitted that it does not apply in this case (*t*).

The difference between a petitioner to the Board of Trade and an infringer in a patent action should here be considered and it will be at once apparent that the same measure cannot be applied to both. The infringer is a tortfeasor (*u*) and therefore on the principle *omnia presuntur contra spoliatorem* the account is taken upon a view of the facts in all particulars most favourable to the patentee and indeed with exclusive regard to his interest. This is manifestly and admittedly so when a verdict goes for damages but it has been said that by taking an account of profits the patentee condones the infringement (*v*). This however is a very technical distinction and for present purposes quite meaningless. The successful patentee in a patent action has in every case his choice of damages or an account and if he choose the latter it is practically because he expects it to yield a larger sum than he could prove by way of damage. The account therefore is not taken in the interest of the infringer in any sense and if in a technical sense he escapes from the reproach of having committed a particular tort he is nothing bettered by that fact; on the contrary he is held to account as a defaulting trustee and made responsible in a larger sum than would be exigible as damages. Moreover the waiver of the tort is very partial or even imaginary for the patentee whether his relief in respect of the past takes the form of damages or the account is equally entitled to the relief of an injunction to prevent the continued use of the invention. This last point shows in an unmistakeable way the radical difference between the case of an infringer and that of an applicant to the Board. The Court acts to prevent the

Royalty rate
not to be
measured by
rules of Court
having refer-
ence to
infringement.

(*t*) Royalty on a liberal scale was allowed to the patentees in the Hulton & Bleakley order. See below, pp. 247, 248.

(*u*) *Watson v. Holliday*, 20 Ch. D. 784.

(*v*) *Neilson v. Betts*, L. R. 5 H. L. 22.

continued use of the invention, the Board of Trade acts to promote it. To say that the Board should *promote* the use by the selfsame arrangement between the parties which the Court makes in order to *prevent* the use is a full blown absurdity. And that, put shortly, is the proposition against which we are here contending.

But the *Siddell v. Vickers* margin—if the expression may be allowed—although it does not afford a measure of the patentee's rights under a Board of Trade licence does afford a measure of the fund from which both inventor and manufacturer must in fact draw what profit they can in theory collectively get out of the patented invention. It may therefore in any case analogous to *Siddell v. Vickers*; that is to say, in any case where the patented invention is some advantageous alternative to an invention previously known;—be regarded as affording a measure of the benefit which it is the business of the Board to distribute in equitable proportions between these two collaborateurs and some gain in clearness of idea may be secured by regarding them as if they were partners and the *Siddell v. Vickers* margin the divisible profits of the partnership. This is the root idea upon which a voluntary arrangement between an inventor and a manufacturer is usually built up and for that reason if for no other it should be as far as possible adopted at these enquiries, the object of which is to accomplish what the parties would voluntarily arrange if they were perfectly reasonable and both adequately well informed. The Board of Trade comes in to supply defects of temper and understanding and the inference therefore is irresistible that it should be guided as far as possible by the principles which reasonable men act upon when they are negotiating voluntarily. Hence the rule of damages or of a penal account may be confidently set aside and as the result of that conclusion and also by analogy to the ordinary course of voluntary licensing we arrive at an equitable division of the *Siddell v. Vickers* margin as being ideal justice. The analogy of partnership carries us one step farther and points to the conclusion that apart

The analogy of voluntary licensing arrangements.

See above, p. 13.

from special considerations the rule of division should be that of equal shares in the dividend sum (*x*). This however cannot amount to more than a very vague suggestion—a mere starting point for deliberation—for it is clear that the circumstances of different cases will vary very widely. The licensee in one case may be a rival who will cut into the trade of the patentee and press him hard by competition so that the licence can hardly be a source of profit to the patentee or, on the other hand, the applicant may be extending the use of the patented invention to an entirely new field of industry and cultivating in the interest of the patentee a region that the owner of the patent right could never have cultivated for himself.

We may now pass from these more general propositions to consider the modifications of the problem as it is presented under the three statutory cases (a) (b) and (c).

The rule of divided profit applied to Case (a).

(a) This is the simplest case. The patent has not been worked at all within the realm. It must therefore have proved for all legitimate purposes worthless to the patentee and, apart from considerations pointing to the conclusion that he will probably do better with it in the future than in the past, it would seem that no terms which could be proposed could injure him. In other words a case can be imagined in which any royalty at all would be something to the good for the patentee.

Such a case actually presented itself in *Re Meister Lucius (Imray's) Patents—Levinstein's Petition (y)*. There the patentee had enjoyed his patent (*z*) for nine years but had never manufactured or attempted to manufacture the patented article—an improved dyestuff—within the realm. He not only had not licensed the manufacture in fact but he abstained from licensing it on principle for his factory being situated in Germany where the manufacture was carried on upon a large scale, he preferred to keep the

(*x*) *Robinson v. Anderson*, 7 De G. M. & G. 239; *Peacock v. Peacock*, 16 Ves. 56.

(*y*) 15 R. P. C. 732, and below, p. 225.

(*z*) There were in fact two patents in question in this petition but for the sake of simplicity one only is referred to in the text.

British market supplied from that source. His interest in the patent therefore was indirect. It served to enable him not to introduce the manufacture upon advantageous terms but to keep it entirely out of the country. This was to him even more advantageous than setting up a privileged manufacture within the realm since while it gave him the full control of the British market it enabled him at the same time to carry on his manufacturing operations with exclusive regard to his own convenience. This, however, was obviously an advantage of which the Board of Trade could take no account. It was not an advantage legitimately flowing from the patent grant but one derived from its oppressive use and therefore the patent, notwithstanding that it had been of great commercial value to the patentee, was deemed to be one from which no profit had been derived and from which no profit was likely to be derived and in the result the Board compelled the patentee to accept terms of royalty offered by the petitioner. It should, however, be added that the terms offered by the petitioner were not simply taken as such. On the contrary they were fully discussed in argument and no doubt carefully considered by the referee. They were adopted by the Board undoubtedly because they were considered to be fair terms. This case serves to show that the question of royalty terms may in certain cases be one of extraordinary simplicity.

See above,
p. 24.

The Levin-
stein
royalty rate.

But on the other hand it is quite obvious that the conditions of the problem might very easily have been much more difficult. The age of the patent and the period during which it had remained dormant might have been less; there might have been a story of ill health on the part of the patentee or of ill success with his efforts to bring the invention into use to excuse his delay; there might have been a prospect of his bringing the thing to bear at an early date with the prospect of larger profit to himself than the petitioner would be disposed to guarantee. In these and in many other ways that might be suggested the issues before the Board might have been complicated

and the difficulty of fixing fair terms of licence almost indefinitely augmented. And, worst of all, it might easily happen that both parties should urge impracticable proposals in opposite senses upon the Board and advocate them respectively with such intemperate partisanship that neither should in effect give the Board any real assistance in fixing terms. Upon these various complications it would be idle to expatiate. The last mentioned difficulty,—that arising from the impracticable temper of the parties in controversy,—may perhaps be to a considerable degree if not altogether obviated by a well devised system of procedure designed to drive the parties to narrow the issues and to compete for the advantage of appearing reasonable upon their pleadings.

But as to the remainder it would be hopeless to do justice to them within the limits of a treatise like the present. The most that can be done is perhaps to suggest that the solution of the problem, however complicated, may be approached along certain general lines and that the tribunal, having ascertained the facts of the case should seek first an answer to the question in the following form. Supposing the patentee to be a prudent man whose pecuniary interest is bound up with the successful working of this British patent what course in these circumstances would such a man voluntarily take? That course will be the right one under certain limitations for the Board to sanction. But the Board must ask in the next place, assuming that a licence to the petitioner would be the course so recommended, How ought the *Siddell v. Vickers* margin to be divided between patentee and petitioner? In other words, having by the first test decided the question of licence or no licence in favour of the petitioner the Board should settle the royalty rate upon the broad principles of industrial co-operation between the parties which have been above laid down not bending them in an individual case upon a vague idea of compounding for rigour at one stage of the discussion by laxity at the next. Justice in the broad sense and in the long run is only attainable by strict

Just royalty
rate.

The point of
view defined.

adherence to intelligible and clearly enunciated principles. Lastly, there will probably remain outstanding when the soundest rules have been applied some small question which is involved in insoluble doubt. The benefit of such a doubt should unhesitatingly be given to the licensee and for this peremptory reason. A patentee who has licensed his patent is sure of some profit from it and probably in all the cases that will come before the Board of Trade he will be reasonably sure of a substantial and even an adequate profit. But not so the licensee. If the terms are put too high the result may be, not that his profit is merely reduced—as happens in the reverse case to the patentee—but that it disappears altogether and that in consequence he is unable to take advantage of the licence at all. In that case both parties lose their expected benefits and the work of the Board of Trade itself comes to naught. This is a much more serious consequence than the other. Some miscalculations and hard cases occur even under voluntary arrangements and it would be idle to expect the Board to attain to a nicer appreciation of conflicting interests than voluntary parties themselves can compass by direct negotiation. The idea therefore that justice in the sense of this section cannot be weighed out in golden scales need give no occasion for scandal. But it would indeed be a serious reproach if it could be laid at the door of the Board of Trade that it had “by deciding more embroiled the fray.” In cases therefore under this clause of the section in which the parties cannot be coerced into agreement or driven into what is for present purposes the same thing, that is a position in which one party or the other has adopted a contention that is manifestly factious; the last step, which must be taken upon the responsibility of the Board alone, should be strongly biassed in favour of the licensee.

(b) The second case is one in which the patent is being worked but on an insufficient scale so that “the reasonable requirements of the public with respect to the invention

The case
under
Clause (b).

“cannot be supplied.” This ground was made the foundation of the petition in *Re Taylor’s (Buxton’s) Patent—Hulton & Bleakley’s Petition* the facts of which case are highly instructive. There the patented invention related to an improved attachment to newspaper printing machines for facilitating the printing of late news and the use of this attachment was monopolised by a particular evening paper in the city of Manchester. The exclusive command of the invention was of course of great commercial importance to the conductors of the privileged paper since it enabled them to “cut out” their rivals. This, however, it was contended placed an undue restriction upon the public enjoyment of the benefits of the invention since the readers of other newspapers could get no advantage from the added facilities in the dissemination of news. The referee—Mr. W. R. Bousfield Q.C.—adopted this view and upon his report an order was made by the Board of Trade for the licence asked for (a).

The special interest of this case centres in the fact that the public interest was discerned in the results of using the invention and not directly in the use of the invention itself. The most obvious case falling into this category (b) would be one in which the public were actual consumers of a patented article and could not obtain it in sufficient quantities. A patented fuel, for example, might easily be supposed to be in great demand and supplied intermittently or in wholly insufficient quantity or of varying quality. To any such case the language of the clause would obviously apply and if by a narrow interpretation it had been confined to such cases the scope of the remedy would have been proportionately restricted. But the decision on Hulton’s petition has put the law upon a different and much more satisfactory footing. If a patent right is used to bolster a monopoly it is plain that it is being abused and the Board is but following an excellent line of pre-

(a) 15 R. P. C. 753, and below, p. 217.

cedent in so construing the remedial statute as to make it cover the whole mischief which it was intended to cure (*b*).

The question of terms of royalty in such a case as this will probably present no greater difficulty than in the first case but it wears a somewhat different aspect. On the one hand the patentee's demands will probably be to some extent defined and moderated by reason of the terms already conceded voluntarily by the patentee to his licensees (*c*) or of the profit with which he has been content if working the invention on his own account. On the other hand a new claim will certainly be put forward in his behalf, and probably with reason, for additional compensation on the ground that the new licensee will be a competitor or otherwise will injure his existing profits. In the case of a patent exclusively licensed the grant of a further licence in breach of the original covenant in that behalf might involve the patentee in a very serious liability for damages as has been pointed out above. As the Board has no power in these cases to compel the exclusive licensee to submit to a revision of his contract (*d*) it must evidently make it worth his while to do so and therefore must show a disposition to respect such arrangements as far as possible and to protect the interests of a licensee who will submit to the jurisdiction and defend them.

Royalty rate
in Case (b).

See above,
p. 79.

Hence it will no doubt be proper to adopt a more liberal scale of remuneration to a patentee who has brought his invention into use, although on an insufficient scale, than to a patentee who has lain by and never brought his invention into use at all. Moreover in this case the actual employment of the invention is not bound up, as in the

(*b*) See *St. Peter v. Middleborough*, 2 Y. & J. 215; *Johnes v. Johnes*, 3 Dow. 15; *Atcheson v. Everitt*, Cowp. 391.

(*c*) See *Dunlop Patents—Wolverhampton Petition*, below, p. 276.

(*d*) It must however be borne in mind that Mr. Bousfield, Q.C.,

sitting as referee appointed by the Board of Trade in the case of *The Dunlop Patents—Gormully & Jeffery Petition* expressed the opinion that the Board has jurisdiction to add a licensee (one of a limited number—three—of licensees) as a party to the proceedings. This opinion is considered above, p. 76.

See above,
pp. 88, 91.

first case, with the success of the licensee. It is as necessary to avoid injuring the existing trade as it is to promote the new industrial development and there is therefore no such underlying presumption in favour of the proposing licensee as when he is the only person engaged in exercising the invention. It is not possible therefore in this case to get rid of an insoluble doubt at the end of the enquiry by giving to the licensee the benefit of it. In fact a renewed attempt to solve it would seem to be more consistent in this case with the direction to settle such terms as shall be just. But if when enquiry has been carried as far as is at all practicable, there should still be an outstanding point which can only be disposed of by an exercise of discretion it would seem that the discretion should be biassed in favour rather of the voluntary than of the compulsory licensee if the former has done nothing to forfeit the claim upon consideration which he has earned by priority in bringing the invention to bear. Where the invention has been worked by the patentee himself the same considerations will apply and the bias should be in his favour rather than in that of the petitioner.

Since the above passage was written a question of this kind has been actually decided at the Board of Trade upon the *Hulton & Bleakley Petition*. In that case—in which Mr. W. R. Bousfield, Q.C., acted as referee—the principle developed in the text appears to have been adopted. The royalty rate actually prescribed was 20% per annum in respect of each machine. The highest rate of royalty that had been received by the patentees in respect of their voluntary licences was 15% (e).

Thus it appears that although in the two cases (a) and (b) the same general principles will obtain there are clearly marked differences between them, differences of a kind to put the patentee in a markedly better position before the tribunal in the second case than in the first and

(e) 15 R. P. C. 753, and below, pp. 247, 248.

this not upon any vague doctrine of retribution but upon as precise an estimate of the material facts bearing upon the promotion by means of patents of industrial enterprise as the circumstances of the case allow.

The third case provided for in the statute is that of a person who is unable without a licence to work or use to the best advantage an invention of which he is possessed. This probably will be by much the most prolific source of applications for compulsory licences. It has been illustrated by several of the cases which have already come before the Board of Trade. Thus it was the second ground alleged for the Levinstein application (*f*). And it was the substantial ground of the application made by Continental Gluhlicht against the Incandescent Gas Light Co., Ltd. (*g*). So also in Wolverhampton petition against the Dunlop Co. and in the Gormully & Jeffery petition against the same respondents (*h*).

The difficulty which arises in those cases of determining what is an invention within the meaning of the section has been discussed in an earlier chapter. For our present purpose it must be assumed that the "invention" is made out as such to the satisfaction of the Board. It is very difficult even then to avoid a discussion of the merits of the petitioner's invention and of its comparative merits in relation to those of the patented invention for such a discussion appears to have a very direct bearing upon the question of royalty rate. Thus one of the Meister Lucius patents (*i*) was a patent for a sulpho acid having at the date of its invention, and for many years after, no known industrial application. At length the petitioner discovered a way of using it as the raw material of a new dyestuff of great commercial importance. Hence arose the application for the licence and in the discussion of terms a vast amount

The case
under
clause (c)

See above,
p. 37.

Merits of the
"invention."

(*f*) 15 R. P. C. 735, and below,
p. 224.

(*g*) 15 R. P. C. 728, and below,
p. 214.

(*h*) Below, pp. 263, 250.

(*i*) 15 R. P. C. 732, and below,
p. 224.

of ingenuity was employed on both sides in belittling each invention in its turn. The value of the finished product could be pretty accurately ascertained and the available margin of profit upon its manufacture. The petitioner contended that there was but little merit in devising a new acid which nobody wanted to use and that the really valuable invention, which was entitled to liberal recognition by the Board, was made when the petitioner discovered how this new acid could be turned to industrial account by being worked up into an useful dye. The patentee on the other hand contended that there was but small merit in making the second half of the invention, that the pioneer was the man to whom society was chiefly indebted, that it was his work which had placed a new agent with previously unknown possibilities of use at the command of the manufacturer and that to him therefore was due the principal merit and the larger share of the pecuniary reward. Now all this is perfectly true except the conclusions and the reason why the conclusion arrived at on either side does not follow from the premisses stated is simply that the major premiss which warrants any such conclusion is that the reward should be proportioned to the comparative importance *for the end in view* of the two inventions which come into competition. Now this premiss may be accepted without reserve but it will not enable the tribunal to assign comparative importance to two steps *each of which is indispensable*. It is plain that upon these lines each party can triumph in his turn. That involves no contradiction of his adversary's case it involves only the power of ignoring it, a faculty seldom wanting to the forensic orator. However specious arguments of that class may be it is certain therefore that they are entirely inconclusive for the argument on one side does not weaken the argument on the other and the apparent preponderance of one or other at any moment is merely due to the advocate's art or artifice. It is not, therefore, by an investigation of that sort, however

laboriously conducted, that a satisfactory conclusion can be reached.

But if that be an unsatisfactory way of conducting the discussion it is nevertheless plain that there must be some sort of criterion by which to gauge the comparative merits of two constituent inventions in a new manufacture for it is quite incredible that all novelties which contribute to the result should be equally important even although each should be indispensable. A compass and a steam engine are equally indispensable to an ocean greyhound but nobody would suggest that each should therefore bear the same price. In the same way if both the compass and the engine were patented articles no one would suggest that both patentees should receive the same remuneration for it would be very surprising if the royalty upon the engine did not exceed the entire cost of the compass. And this remark suggests what will probably in the end prove to be the true solution in a case like this. The royalty must bear some relation to the value of the thing produced. Experience has shown that the most satisfactory way of settling the amount of an architect's remuneration is by paying him a percentage upon the cost of the building which he designs. It would be no very strained analogy to speak of a patentee as the architect of his invention and probably no more satisfactory way can be devised of settling his remuneration than by making it correspond more or less to a percentage of the value of the thing which he has invented. In that view the discussion of such abstruse questions as relative scientific importance or comparative ingenuity as between two inventions each of which is indispensable to the desired result, may be altogether dispensed with. The question will no longer be how ingenious; or how subtle; or how suggestive is the invention? The inventor will be paid on the same general principle upon which professional men are paid for their services. A large transaction carries a large fee, a small one, a modest fee and subject to modifications a proportion

The criterion of comparative merit of inventions.

can be stated between the one and the other. The rule will apply equally well to the determination of an inventor's royalty if it be only postulated that the cost of carrying out the process comprised in the invention or of producing the patented article is to be taken, subject to all proper allowances, to be a measure of the magnitude of the transaction.

See above,
p. 87.

The rule just illustrated is intended to meet the difficulty of a case to which the rule of *Siddell v. Vickers* will not apply. It is not in any sense at variance with that rule although by force of circumstances it is incapable of being stated with the same precision. In the *Siddell v. Vickers* case you take for comparison another process which yields the same result as the patented process, you then compare the two processes in respect of cost of working and find what saving the patented process secures as against the unpatented and upon the amount of this margin you base the calculation of the patentee's remuneration. Now in this case a much more precise measure of the value of the invention is arrived at than any arbitrary percentage of the total cost of working the process can afford. But on the other hand it is quite clear that the *Siddell v. Vickers* margin will bear some relation in point of magnitude to the magnitude of the whole transaction. In the first place the margin cannot conceivably exceed the whole cost of the operation;—that is, in a mathematician's sense, its limiting value. In the second place in two transactions of the same kind differing from one another only in respect of magnitude the *Siddell v. Vickers* margin will vary strictly as the magnitudes of the whole transactions vary and will to that extent conform precisely to a percentage. In the last place even when the transactions differ not in magnitude alone but also in kind so that the margins will amount to different proportions of their respective transactions even so in the vast majority of cases the margins will range around an average figure. They cannot be very small percentages or they would not be worth fighting

for and they can seldom be very large percentages for inventions that revolutionise an industry are extremely rare. Progress by small but not inconsiderable stages is the recognizable law of industrial development and it obviously tends to assimilate the *Siddell v. Vickers* margin to an architect's fee or to an accountant's percentage.

In the foregoing discussion we have for simplicity's sake put forward the case of a patent for a process. It will be obvious that the principles discussed will apply equally in the case of a patent for an article, if the cost of producing the article be substituted for the cost of working the patented process. The substitution is in point of fact very easy to make but constant reference to the change, or to the additional step in the calculations which the change involves, would much have encumbered the enunciation of the rule.

It will, of course, be apparent that this third case introduces a new principle of classification. The second case (b) differs from the first case (a) in respect of the position of the patentee as well as in respect of the position of the public, indeed the difference in position of the patentee is the leading feature of difference between them. From this circumstance there arises a presumption in favour in the one case of the petitioner and in the other case of the patentee which has to be taken into account and serves to bias the tribunal when, having exhausted the process of enquiry, it is called upon to exercise a discretion. In this third case it is plain that the position of the patentee is equivocal and may correspond to that either of (a) or of (b). In this case therefore it cannot be laid down in general terms that in exercising discretion the Board should certainly lean either to the one party or to the other. But still the general principle will hold. The Board acts for the promotion of industry and the industry must be its first care. If the petitioner represents the industry and the patentee nothing but patent right then the Board must lean towards the petitioner. But if the patentee

The conclusion extended to new articles of manufacture.

When should the presumption be in favour of the one party or of the other?

The principle enunciated.

represents a subsisting industry whereas the petitioner represents only a projected industry then the Board should clearly lean towards the patentee for fear of doing mischief in the attempt to do good. In the case of a small and languishing industry and of a project of great promise this presumption may not count for much but even so it will afford an useful starting point for discussion and tend to confine criticism to definite and profitable lines,—a service which the experience so far gained at the Board of Trade proves to be of great importance.

CHAPTER VI.

THE ORDER AND THE LICENCE.

Terms of the licence—Date of execution—Preparation of the deed—Protection of the licensee—The official form of order—Recitals—of patent—of petition—Improved recital in Hulton & Bleakley licence—Discrepancy between recital and order—Recitals continued—of the action of the Board of Trade—The order made—on patentee—on licensee—Defeasance—The order, considered as a whole—Deposit of deeds with the Board of Trade—The patentee without remedy—Is the patentee's deed an escrow?—Is the petitioner's deed an escrow?—In what capacity does the Board of Trade receive the deposit of deeds?—Recapitulation—A practical conclusion—Signature of the order—The deed of license—Recitals—Licensor's title—The testatum—No implied warranty of title—Not assignable—Licence co-extensive with patent—Secus in Hulton & Bleakley licence—Consideration—Habendum—The term of the licence—Reddendum—Covenants—for royalty—an assignable covenant—Proviso for minimum royalty—Covenants continued—Accounts—Inspection—Power of revocation by licensor—Notice to repair breaches—Additional covenants for licensor's protection—Not to dispute validity—Power of revocation by licensee—"Declared by a Court of law"—Additional covenants for the licensee's protection—To grant most favourable terms—To defend patent rights—Mr. Morris' covenants—Mutual covenants—Improvements—Arbitration.

It has been pointed out above that the Act of Parliament has been construed as authorising the Board of Trade to make an order prescribing the issue of a single licence

See above,
p. 72.

upon terms intended to apply only to a particular case. Two such licences have so far been granted and in both cases the same formula has *mutatis mutandis* been employed. It is probably intended to adopt this or some modified formula as a type to which as far as possible all compulsory licences shall be assimilated. This formula is given below in connexion with the report of *Re Meister Lucius' Patents—Levinstein's Petition (a)*. It is proposed in the present chapter to discuss it and to make use of the various clauses of the Levinstein licence as texts for the discussion.

Terms of the licence.

It will however be convenient first to draw attention to one or two points which derive especial significance from the fact that the licence is in this instance negotiated between parties one of whom is or may be an unwilling participator in the transaction.

I. *The Dates of Commencement and Execution.*

Date of execution.

The importance of these dates arises from the fact that the licensor will probably be slow to perform his part of the arrangement and eager to fix the licensee with a default. Hence care should be taken to fix a limit of time within which each of the parties must execute the licence and a date from which the licence may begin to run.

See below, p. 111.

The importance of fixing a limit of time for execution by the patentee is that until such a limit has been passed the petitioner cannot obtain his mandamus to compel execution. There is, as will presently be shown, a certain advantage in ordering the patentee to execute the licence "forthwith." But it is doubtful whether the greater precision of a definite time limit is not preferable even to the direction that the licence shall be "forthwith" executed. In the case of the licensee the time limit must of necessity be placed after a reasonable interval because it is

(a) 15 R. P. C. 742, and below, pp. 361, 363.

a natural and proper proviso to add to the order that if the petitioner does not take it up and satisfy it within a reasonable time he shall lose the benefit of it altogether. It would manifestly be improper to direct him under such a penalty to execute the licence "forthwith."

The two events—commencement of the term of the licence and execution of the deed—should be separately provided for because if the term begins to run independently of the execution of the licence by the patentee, he (the patentee) will gain nothing by delaying or refusing to execute it. Thus the Board has in its own hands an instrument probably more effective and certainly cheaper and prompter than the remedy of mandamus for compelling an unwilling patentee to obey the order made.

In the Levinstein order which owes its form to the ingenuity of some gentleman in the office of the Board of Trade these matters are arranged as follows:—

See below,
P. 233.

1. The licence runs from the date of the order.
2. The execution by the patentee is to take place forthwith.
3. The execution by the licensee is to take place within a month.

The licence and counterpart, when executed, are to be severally lodged at the Board of Trade.

This extremely ingenious arrangement promises to be very efficient for its purpose and to add greatly to the practical value of an order made, as this one was, against a very unwilling patentee. It may nevertheless be submitted for consideration whether it would not be even more proper to make the commencement of the licensed term date from the day of lodgment by the licensee of the executed counterpart with the Board of Trade. A case can be imagined in which a licensee might take advantage of the period of grace given for the execution of the counterpart to act upon the licence and afterwards cheat the patentee by refusing to execute the licence at all. The Courts would probably know how to deal with such a

fraud if it occurred but there seems no reason for placing in the way of a petitioner any, even the smallest, temptation to commit it.

II. *The Duty of preparing the Formal Documents and the Obligation to Stamp them.*

Preparation
of the deed.

This is of consequence for the same reason which points to the necessity of fixing a time at which default can be definitely made, namely, the importance of providing the aggrieved party with a clear ground of complaint in case of negligent or wilful omission on the part of the other party negotiating to obey the order when made. The proper course no doubt would be to order the applicant to prepare the engrossment and defray the cost of stamping. It is, however, a very useful provision that the licence shall be drawn up in two parts one to be signed sealed and delivered by either party and to direct them both when so executed to be lodged with the Board of Trade. This expedient goes far to render the order automatic in its operation and to that extent independent of the not very satisfactory remedy by way of recurrence to the High Court to enforce obedience which is given by the Act.

See p. 135 *et seq.*

III. *Protection of the Licensee against unfair dealing by the Licensor.*

Protection of
the licensee.

This is a point which does not often arise in the case of a voluntary contract for a licence unless the licence is to be exclusive. In such a case the licensee takes from the licensor a covenant not to exercise the invention and not to license its exercise to other persons. But it may be taken that the Board of Trade will never sanction an exclusive licence. To do so would be to cut down its own jurisdiction in a manner wholly unwarrantable for it is plain that the Board may later on be called upon to order additional licences to other applicants. A compulsory

licensee, especially if his ground of complaint has been that the invention has not been worked in the United Kingdom or that the reasonable requirements of the public with respect to the invention have not been supplied, will be placed in an entirely novel position. Such a licensee will have compelled the patentee to cultivate ground which he did not wish to cultivate, which probably he had a personal motive for keeping fallow. It will probably be an object with the patentee in pursuit both of his interest and of his resentment to render the licence worthless in the hands of the licensee. He will therefore be tempted to promote and to undertake damaging competition and it is most necessary that in such a case the licensee should be protected against unfair treatment on the part of the licensor. Of course there will be cases in which there will be no reason to apprehend any disposition on the part of the patentee to interfere with the working of the licence and in which therefore the ordinary precautions will be quite sufficient to meet the case. But, on the other hand, the circumstance that the parties are at arm's length in this negotiation puts the transaction into a category apart and necessitates attention to the possibility of disloyalty in the carrying out of the enforced contract which the draughtsman in the case of a friendly negotiation would not bestow upon that contingency.

Coming back to the official form, the licence constitutes a schedule to the order itself and this latter may be usefully considered by way of introduction to the discussion of the terms in which the licence is expressed.

The order opens with a recital of the 22nd clause of the Patents Act 1883 of which the *ipsissima verba* are transcribed. The importance of this recital is that it shows precisely in what capacity the Board acts and to what jurisdiction it lays claim in making the order. This practical end might be served by a more compendious reference to the section and perhaps, from a conveyancer's point of view, a more compendious reference would be

See below,
p. 130, and
App. IV.,
pp. 376, 377.

The official
form of order.

better. Thus the words "and any such order may be enforced by mandamus" at the end of the recital are pure surplusage. Yet there is a practical advantage in giving the whole clause since the provisions of the section in their entirety are thus brought to the knowledge of that section of the public which is most interested in these arrangements.

On the other hand, since it is quite possible that the law may be amended before the expiry of the licence it is perhaps not altogether desirable to recite the text of the Statute.

Recital of patent.

The next recital refers to and identifies the patent in respect of which the order is made and the third traces the devolution of the title by assignment to the respondents. Two more recitals deal in the same manner with the second patent, and its ownership, in respect of which the petition was presented. These last four recitals are for identification merely and call for no comment.

Recital of the petition.

The sixth recital relates to the presenting of the petition and is expressed in the following words: "And whereas the petitioners presented a petition to the Board of Trade for an order that the patentees, under the said Letters Patent No. 9642 of the 11th June 1889 and No. 15176 of the 26th of September 1889 should grant to the petitioners a licence under or in respect of the inventions described and claimed in and by the specifications of the said respective letters patent."

This recital is of importance because it discloses by reference to the clause and to the petition matters in which the jurisdiction of the Board is founded. It challenges therefore a somewhat precise scrutiny of its terms. So examined, it is manifestly inaccurate. In the first place it is even ungrammatical "a licence . . . under the inventions described" &c. is an expression without meaning. The intention obviously was to refer to a licence under the *patents* which would be the same thing as a licence in respect of the patented inventions. The draughtsman

evidently had these two forms of expression in his mind and by a slip of the pen combined them in the perplexed phrase "a licence under or in respect of the inventions described" &c. But it is not simply in the form of words employed that the recital is inaccurate it is an imperfect as well as an incorrect statement of the prayer of the petition. The petitioners had desired "a licence under the two patents mentioned" and "such other relief in the premisses as the Board of Trade might deem just." Now, if the jurisdiction of the Board is circumscribed by the prayer of the petition, it is a matter of great consequence that the prayer should be correctly recited, and in any case it can hardly be good drafting to omit the petition for relief in general terms (a).

The inaccuracy of the wording above noted would seem to have attracted the notice of the draughtsman to the Board of Trade, for in the *Hulton & Bleakley* order the recital runs as follows;—"And whereas on the 13th day of November 1897 the petitioners presented a petition to the Board of Trade under the said section for an order that the patentees under the said letters patent No. 5470 of April 20th 1886 and No. 5989 of 23rd April 1888 should grant to the petitioners a licence to use the inventions described and claimed in and by the specifications of the said respective letters patent" (b). This much improved form may probably be regarded as superseding the *Levinstein* form of the recital but it may be submitted that it might perhaps still be retrenched with advantage. The date of the petition seems to be superfluous and the repetition of the numbers and dates of the patents. It will be observed that in this instance the licence asked for is to *use* only. In the deed scheduled to the order the licence actually granted is licence to *make and use*, a discrepancy which marks

Improved
recital in
*Hulton &
Bleakley
order.*

Discrepancy
between
recital and
order.

(a) See *Dunlop Patents—Wolverhampton Petition*, below, p. 266.

(b) Below, p. 248.

the danger that lurks in these recitals. It appears from the order that the Board of Trade has jurisdiction under the petition to order a licence to *use*. It could certainly be argued and might probably be held that it had no jurisdiction to order a licence to *make*. When it is borne in mind, as has been pointed out above, that the actual order is drawn up in the office and on the responsibility if not actually by the hand of an officer who has not heard the parties, it will be seen that a discrepancy of this sort cannot be regarded as unimportant. If an application had been made, for example, for a mandamus to enforce this order how could it possibly have been granted when it appeared on the face of the order itself that the Board had of its own motion directed the patentees to grant a licence to *make* the patented appliance which the petitioner had not even asked for by his petition? It is obvious that in drawing up the order the greatest care will have to be taken to make it coherent as a whole and in particular to see that the relief granted falls within the prayer of the petition as stated in the recital.

Recital of the
action of the
Board of
Trade.

The seventh, and last, recital shows the exercise by the Board of the jurisdiction conferred upon it by the Act and reads as follows:—“And whereas, on consideration of
“the said petition and of the matters therein mentioned,
“it has been proved to the Board of Trade that the said
“petitioners are persons interested in the matter of the
“said petition and that by reason of the default of the
“patentees to grant licences on reasonable terms the said
“patents are not being worked in the United Kingdom
“and that by reason of the default aforesaid the said
“petitioners are prevented from working and using to the
“best advantage certain inventions of which they are
“possessed.”

Of patentee's
default.

There is here obviously a very singular and serious omission, for there is no allegation that the parties have been heard. It does appear that the Board has taken into consideration the petition and the matters mentioned in

the petition but it does not appear that the Board has paid any attention to the evidence adduced before the referee nor does it appear that the parties have been heard by the Board. In point of fact the parties had not been so heard and this, as is pointed out elsewhere, is the most serious defect in the procedure which has been devised for carrying out the Act. It is not however with the merits of that discussion that we are now concerned. The recital is so faulty that it does not even give the Board credit for having taken the judicial course of receiving and considering the evidence. And it is to be observed that this omission seems to have escaped the notice of the draughtsman who corrected the last recital, for in the *Hulton & Bleakley* order this recital follows, *mutatis mutandis*, precisely the same form of words as in the *Levinstein* order. It is plain that until the procedure is amended it is not possible that this clause of the order should be brought into a satisfactory form for however it may be drawn up the fact must appear that there has been no such hearing of the parties as would satisfy the rule in *Re Brook & Delcomyn* that the tribunal which is to decide must hear both sides (c). This therefore touches a vital question but it is one which is more appropriately discussed in another connexion.

See below,
p. 195.

Then comes the operative part of the order in the following terms:—

“Now therefore the Board of Trade, in exercise of the power conferred upon them by section 22 of the Patents Designs and Trade Marks Act 1883 and of all other

The order.

(c) 16 C. B. N. S. 417. It may perhaps be thought that this use of the dictum of Erle, C. J., in *Re Brook & Delcomyn* amounts to a misquotation since the point of the judge's criticism was that the umpire had heard the one party in the absence of the other and the emphatic word in the passage is consequently the word “both.” And this may be enforced by the fact that the L. J. report does

not contain the words “the tribunal which is to decide”—so material for the present purpose. Nor shall I attempt to meet this comment save by adding that both points were probably in the judge's mind for both were suggested by the circumstances of the case and both are equally elementary principles of justice in the administration of the law.

“ powers enabling them in this behalf do hereby order as follows ” :—

The general reference to “ all other powers ” in this clause would no doubt cover the power given by sect. 25 of the Patents Act of 1888 to the President, Secretary or Assistant Secretary to act for and with the authority of the Board but it is a little curious that this last mentioned section should not be more pointedly referred to.

The order made is in two parts ; the first, relating to the duty of the patentee, is in the following terms :—

Duty laid on patentee.

“ (1.) That a licence, to take effect from the date of this order and in the form set forth in the schedule hereto, be forthwith granted by the patentees to the petitioners to make, use, exercise and vend within the United Kingdom the inventions described and claimed in and by the specifications of the said letters patent Nos. 9642 and 15176 of 1889 for the unexpired residues of the respective terms of the said letters patent at a royalty of one halfpenny for each pound weight avoirdupois of products made by the licensees under the said letters patent or either of them but so that in each year a minimum royalty of £250 per annum shall be paid by the licensees and the patentees shall forthwith deposit such licence duly executed by them with the Board of Trade.”

The second part is as follows :—

Duty laid on licensee.

Defeasance.

“ (2.) The said petitioners, before the 6th day of August 1898 shall execute and deposit with the Board of Trade a counterpart licence in the form aforesaid and in default of their so doing this order shall be of no effect.”

The order considered as a whole.

The scheme of procedure here disclosed is manifestly intended to facilitate the formal execution of the licence and to remove as far as possible all temptation to delay or to refuse obstinately to execute the licence from the path of the patentee. It is useful to note that there are three provisions of the order directed to this end. First, the licence is to run from the date of the order and consequently the patentee cannot delay its operation by delaying the execution of the deed. Next, the deed is settled so that no controversy can arise as to the terms in which it is to be drawn up. In the third place, the patentee

is ordered to execute the licence forthwith so that he cannot protect himself by pleading the consequences of any, even the most venial, delay on his own part.

The correlative duty on the part of the petitioner is to execute and deposit with the Board of Trade his counterpart licence within a limited period—one month. This definite period of grace is necessary because failure on the petitioner's part to comply with the order strictly according to its exigency involves a defeasance of the order itself and a forfeiture of all his rights and immunities thereunder. The defeasance affords a complete protection to the patentee against a fraudulent refusal by the petitioner to take up the licence after having worked under it, since should he fail to take it up duly he can be attacked for infringement of the patent right inasmuch as the defeasance takes effect not by way of determination of the licence but by way of avoidance of the order. The delivery of the deed by each party to the Board of Trade completes the scheme and precludes all difficulty about the exchanging of the parts.

There is here a most carefully thought out and ingeniously devised procedure but the arrangement by which the deeds instead of being delivered to the parties are deposited with the Board of Trade is one the results of which are not easy to discern. The question naturally arises Are they to be deposited in escrow or as fully executed deeds? The order seems to contemplate the deposit of fully executed deeds. Thus, the patentee is to "grant forthwith" and forthwith to deposit a licence "duly executed." And the petitioner is to "execute and deposit" the counterpart; a description which suggests execution first and deposit afterwards. But the force of this argument from the language of the order is greatly weakened by the consideration that in the case at least of the patentee the requirement as to depositing is inconsistent with the absolute execution of the deed. For by virtue of the defeasance the petitioner has an option to take or to decline the licence and a month in which to exercise that

Deposit of
deeds with the
Board of
Trade.

The patentee
without
remedy.

option. As has been pointed out if he fails to deposit his counterpart within the period of grace the order does not simply determine it becomes "of no effect." Consequently after the lapse of the month the patentee could not take advantage of the order and indeed an order in this form could not be at all enforced by the patentee. Until the expiration of the period of grace his application for a mandamus would be premature. After its expiration there would be no order to enforce.

Is the
patentee's
deed an
escrow?

Now in these circumstances it would be manifestly inequitable to require the patentee to execute the deed of licence otherwise than as an escrow and probably it would be held, in spite of the seemingly precise language used, that the meaning of the words "deposit such licence duly executed" means deposit it as an escrow. The rule laid down in *Bowker v. Burdekin* (e) that if from the circumstances attending the execution it can be inferred that the document delivered is not to take effect as a deed until a certain condition is performed the delivery will operate as a delivery as escrow only (f) would probably apply in these circumstances.

Is the peti-
tioner's deed
an escrow?

In the case of the petitioner more complex considerations present themselves. It may of course be said that he too cannot be expected to execute the counterpart except upon the condition of getting a duly executed deed of licence in exchange and there is much ground for concluding that this is the real nature of the understanding in the apparent symmetry of the order. But the arrangement is symmetrical much rather in appearance than in effect. The deposit by the patentee of the executed deed of licence with the Board of Trade makes, as we have seen, in any case no difference whatever to the rights of either party. It is a mere security to the applicant for the carrying through of the whole transaction without trouble-

(e) 11 M. & W. 147.

(f) See also *Gudgeon v. Besset*, 6

E. & B. 986; *Millership v. Brookes*,
5 H. & N. 860; *Watkins v. Nash*,
L. R. 20 Eq. 266.

some recourse to the Courts of law. But the deposit by the licensee of the counterpart makes all the difference in the world to the rights of both parties. It entitles him, the licensee, to call for the deed executed by the patentee and to have a mandamus to enforce the order. It entitles the patentee, upon satisfying the order on his own part, to enter upon his own rights under the order and enforce the licensee's covenants. This great discrepancy cannot be got rid of in any way and it serves to show that the apparent symmetry is not a matter of substance. In effect and legal consequences the deposit by the licensee is an act wholly unlike the deposit by the patentee. Probably therefore no reliance can be placed upon the analogy of delivery by the one party in discussing whether delivery by the other is full execution or mere delivery as escrow.

If then the case of the licensee be considered on its merits and apart it will be difficult to find any very cogent reason for treating his counterpart as an escrow. To test this let it be considered what consequences ensue from depositing the counterpart as an escrow. Clearly the effect upon the validity of the order is the same—it being of course assumed that deposit in that form is a compliance with the terms of the order. That is to say, the order at once becomes indefeasible and may be enforced by mandamus. The result, so far as the patentee is concerned, is that he cannot take the deed away from the Board of Trade without delivering his own deed in exchange. This circumstance may make a great practical difference if the patentee is disposed to be tricky and if the licensee is for any reason anxious to be put in actual possession of the formal deed. But in contemplation of law it makes no material difference whatever for if the licensor seeks to use or to rely upon the deed he will be estopped from denying his own execution of it or bound in equity to abide by the covenants as if he had executed it (*g*).

(*g*) *Rossiter v. Miller*, 3 A. C. (1896) 2 Ch. 742. See also *Coke v. 1137, 1149, 1151*; *Filby v. Hounsell*, *Brummell*, 2 B. Moore, 495; *Wilson*

Moreover as the licensee has a right to compel the patentee by mandamus to execute the deed he may well enough be supposed content to rest upon that right and this the more because his refusal to deliver the counterpart cannot serve to put any pressure upon the patentee. *Ex hypothesi* the patentee does not desire to conclude the contract and therefore he cannot, save for some improper purpose, desire to receive the counterpart. The only purpose therefore which the deposit of the counterpart by the licensee upon condition of its being delivered only in exchange for the deed executed by the patentee could serve would be to prevent its being dealt with fraudulently by the patentee and it may well be supposed that if a suspicion of that sort were present to the licensee's mind he would at the time of depositing the counterpart give to the Board of Trade express notice of his intention to insist upon the condition of exchange. In the absence of such express notice it is difficult to find any manifest reason for the presumption that a condition is attached to the delivery.

These abstract considerations are not however quite conclusive. The simple fact that the delivery is made not to the other party but to a stranger is itself an indication that the deed is delivered in escrow (*h*). It is indeed not quite certain that the Board of Trade is a stranger. It might well enough be held that the Board was the agent of the party to accept delivery and the fact that the party cannot deliver direct but is restricted to deliver in this way is a strong, perhaps conclusive, argument that the Board does occupy this position. Clearly if the Board is not the agent for this purpose of the party accepting delivery it must be the agent of the other party to effect delivery. Now this can hardly be so in the case of the patentee. For if the Board is an agent to effect delivery its authority

In what capacity does the Board of Trade receive the deeds?

v. Leonard, 3 Beav. 377; *Exchange Bank of Yarmouth v. Blethen*, 10 A. C. 299; *Witham v. Fane*, 32

W. R. 617.

(*h*) *Hudson v. Revett*, 5 Bing. 387.

can be revoked at any time until delivery has actually been effected. But it seems too strong a thing to say that the patentee, if he delivers his deed according to the exigency of the order "forthwith," can nevertheless take it back again at any time before its delivery over to the licensee. A similar difficulty arises in the case of the licensee if at the time when he deposits the counterpart the Board of Trade is already in possession of the deed executed by the patentee. Can he call one day at the Board, deposit his counterpart, take away the deed executed by the patentee and the next day revoke his authority and if the Board has actually not delivered the counterpart to the patentee get back the counterpart into his own possession? It seems impossible that the Board should consent to act as depository of the deeds in any other capacity than as agent of each party in turn to take delivery from the other party.

If then the delivery be delivery to the agent of the patentee and if nothing be said about any condition the only ground that can be assigned for importing the condition of exchange of deeds is that delivery was made upon the faith that the other party would deliver in exchange. Execution in such circumstances that is to say in the expectation that another necessary party would execute seems to have been held in *Peto v. Peto* (i) to be equivalent to delivery in escrow. But in that case it was known to all the consenting parties that the absent party had not executed the deed at the time and could not execute it until subsequently whereas the licensee, unless he makes enquiry at the time of depositing his deed with the Board of Trade, will have no reason to suppose that the patentee, whose duty under the order to execute matures for performance more promptly than that of the licensee, has not already performed that duty.

These considerations serve to show that extremely diffi-

Recapitulation.

(i) 16 Sim. 610.

cult questions may arise as to the result of delivery in the mode prescribed by the order. To recapitulate:—In a normal case the patentee would first deposit the licence and his deposit would probably be held to be deposit in escrow. The licensee, depositing later, would without doubt make by so depositing an unconditional delivery of the counterpart and the order would there and then be satisfied and the contract embodied in regular form. But in an abnormal case, in which the licensee came first with the deposit of the counterpart, a very perplexing question might arise as to whether the licensee had deposited an escrow and left to the patentee the function of perfecting the transaction or whether, relying on his remedy of mandamus and the equitable rights accruing to him from his own execution of the deed, he had delivered it unreservedly. One conclusion of practical significance stands out however very clearly and that is that if the licensee desires to attach any condition to the delivery of the counterpart it will be expedient for him to signify his intention by clear words at the time of depositing it with the Board of Trade and to place no reliance for this purpose upon any supposed implication of law until such implication has been authoritatively declared by a Court of competent jurisdiction.

A practical conclusion.

Signature to the order.

The order is signed by Sir Courtenay Boyle the permanent secretary to the Board. This is probably evidence that the matter has been dealt with by him personally under the provisions of sect. 102a of the Patents Act 1883 (*k*). By sub-sect. (2) of the same section the signature is to be judicially recognized.

See below, p. 309.

It is worthy of remark that the order makes no provision for the modification in so much as a single word of the scheduled form of licence.

The deed of licence.

The scheduled deed which, when executed by the parties, satisfies the order and becomes the contract between licensor and licensee is drawn up in the form of an indenture.

(*k*) Added by 49 & 50 Vict. c. 37, s. 25 (1).

This is necessary to satisfy the requirements of the patent (*l*) which prohibits all the Queen's subjects from using the invention "without the consent licence or agreement of the said patentee in writing under his hand and seal." It was held in *Chanter v. Dewhurst* that a valid licence might be granted without the formality of a deed but it was recognised in that decision that the licence in this form was irregular and it was only held to be effectual for the purposes then under consideration (*m*). For the same reason the deed in this case must be executed by signing as well as by delivering it. The proviso which comes later in the patent that nothing therein contained shall prevent the granting of licences "in such manner as they may by law be granted" does not make the unsealed licence regular and perhaps does not make it more available than it was at the date of *Chanter v. Dewhurst*.

The deed contains two recitals, being a recital of the order in abstract form and a recital that the licensor is entitled to the benefit of the patent. A little reflection will show that serious questions arise concerning the form and effect of this second recital. Mr. Morris indeed expresses the opinion that a covenant in the sense of this recital is now practically of little value on account of the system of registration (*n*). That consideration is not however conclusive in a case such as the present where there may be a strenuous opposition on the part of one or other of the contracting parties to the performance of the order. For example there is no provision in the law as it stands to prevent a patentee against whom a petition has been lodged from selling his interest in the patent. It is probable that in some cases patentees will actually take this course for defeating the

Recitals.

See below,
p. 363.Licensor's
title.See below,
p. 366.

(*l*) See below, p. 389.

(*m*) 12 M. & W. 825.

(*n*) Morris, 114. I may take this opportunity of saying that throughout the discussion of the

form of licence I have relied almost entirely upon Mr. Morris' highly authoritative Patents Conveyancing for the groundwork of my observations.

Board of Trade procedure. A position will then arise in which such a recital would be of the greatest consequence. The patentee having, whether *bonâ fide* or *malâ fide*; in either case quite lawfully; divested himself of the power to grant a licence ought certainly not to execute the deed. It is due both to the intending licensee and to his assignee that he should refuse to do so and should refuse on the ground of his inability for want of interest in the patent. Now a recital that he is the owner of the patent brings this question forward. If the patentee executed the deed with such a recital he would be bound by it and it might be so moulded as to amount to a representation by the patentee that he was in full possession of the patent at the date of the licence and so to convict him of fraud if he executed the deed (u). For this reason it would seem eminently desirable to introduce the recital as a protection against bad faith or oversight. It may be said that oversight could hardly occur, that a patentee who had assigned pending the petition would be sure to be keenly alive to the fact and certain, unless acting in extreme bad faith, to disclose it. But this answer does not meet the real difficulty. The difficult case will arise when an alien resident abroad is the patentee and he refuses to accept service of any process of the English Courts. The only practicable way of enforcing the order in such a case will be for the Court to authorize some other person to execute the deed in the patentee's behalf; if indeed that be practicable. In that case the question whether the title to grant licences was still vested in the respondent to the petition might easily be overlooked unless it were brought prominently forward by the recital or by a covenant for title. In both cases therefore of voluntary and enforced performance of the order there is a distinct advantage in having in some form a warranty of the respondent's title to grant the licence at the time when it is actually granted.

See below,
p. 343.

(u) See Form 11 in Appendix IV., below, p. 366.

But, on the other hand, would the Court grant a mandamus to compel the respondent to execute the licence if it contained such a recital and contrary to the fact (o)? Of course it may be said that the same difficulty would arise quite apart from the recital if the title had passed out of the respondent but there may be a difference here. An assignment to a trustee for the assignor might suffice to falsify the recital but it may be that the Court would have no difficulty in such a case in ordering the *cestui-que-trust* to execute the deed without the recital (o). The subject must not, however, be pursued farther in this place. It is clear that the question involved is one of importance and one which cannot easily be answered in general terms. It is probable that in some cases it would be desirable to introduce the recital and in others to omit it but that in any case the question of putting it in or leaving it out should be considered with a view to all the facts of a given case.

The testatum clause is couched in the following words:—

“Now this indenture witnesseth that in pursuance of
 “the said order the patentees do hereby grant to the
 “licensees licence within the United Kingdom to make, use,
 “exercise, and vend the inventions described and claimed
 “in and by the specifications of letters patent Nos. 9642
 “and 15176 of 1889 mentioned in the said order.”

The testatum.
 See below,
 p. 367.

It is remarkable that in this clause there is no reference to any consideration beyond the order and it will be necessary to consider the effect of this omission.

See below,
 p. 121.

But it will be convenient first to consider the clause as it stands. The most material words evidently are the two words “grant licence.” The scope of the grant is commonly expressed with more exuberance of language as, for example, by saying that the licensor grants “liberty, right, licence, power and authority” (p). Whether these added words afford any additional security to the grantee may be doubted although it may be said that a grant of

(o) See *Hartley v. Burton*, L. R. 3 Ch. 368.

(p) See *c.g. Morris*, p. 254.

No implied warranty of title.

“right, power and authority” to do a thing implies on the part of the grantor the possession of a valid and uncontrolled patent right since no patentee could confer right power or authority to exercise an invention over which the patentee under an earlier grant had overriding rights. This point in the case of a patent for an improvement upon an invention itself the subject of an earlier patent might be a matter of importance. The answer probably would be that the patentee was making a contract with reference only to his own rights of interference with the licensee’s trade and purporting only to grant a part of what he had himself received from the Crown. In that view the words referring to right and authority add nothing to the effect of the word “licence” and are better omitted. But on the other hand if they do add anything whatever over and above the effect of the word “licence” they ought to be omitted on the more peremptory ground that the Board of Trade has no jurisdiction to order anything but a licence to be granted. A strict adherence to the language of the statute itself is clearly necessary in this place since otherwise the order would certainly not be enforceable against an unwilling party.

Not assignable.

The licence is not extended to the assigns of the licensees and therefore confers no power upon the licensees to transfer their rights or sub-licence the use of the invention (r).

Licence co-extensive with the patent.

The licence in this case is to “make use exercise and vend the invention” being in this sense co-extensive with the patent itself. It will be borne in mind that the petition in this case was presented under Clause (a) and that a case of default on the part of the patentee to work the patent (s) within the United Kingdom was proved at the hearing. It was therefore proper in this case to give the licensee unrestricted power of introducing the manufacture and the licence is accordingly neither limited to specific claims under the patent nor to any particular use of the

(r) *Bower v. Hodges*, 22 L. J. C. P. 198; *Lawson v. Macpherson*, 14 R. P. C. 696.

(s) Such is the phraseology of the Act.

invention. This part of the deed must of course be moulded according to the circumstances of the particular case. In the *Hulton & Bleakley* licence, for example, the power is limited to making and using the patented invention (t) and in a proper case it would, no doubt, be restricted to particular parts of the invention, as for example to so much as might be covered by particular claims in the specification, or to user within particular geographical limits. The nature of these various limitations need not be examined here at large since they are familiar to all persons who have experience in the drafting of licences under patents.

*See in
Hulton &
Bleakley
licence.*

One of the inconveniences resulting from the absence of any recital defining the patent in respect of which the licence is granted becomes apparent in this place, where the patents have to be identified by a reference to the order. In point of fact the recital of the order in the deed does not identify the patents save as the patents "hereinafter mentioned" so that the deed itself becomes involved in a kind of vicious circle from which escape is only possible by reference to the full text of the order. This importation of an extraneous document is manifestly an inconvenient and unnecessary complication of the contract.

We may now pass to note the effect of the omission to state in this clause what is the valuable consideration in respect of which the contract is made. The omission is highly unusual and although it would not preclude a Court from ascertaining what the consideration really was (u) it would certainly give rise to conjecture as to possible reasons for the absence of the customary statement. The usual form is "in consideration of the royalties hereinafter reserved and of the covenants on the part of the licensee hereinafter contained" and it is difficult to see why such a clause should not be introduced into this

*Consideration.
See below,
p. 367.*

(t) See below, p. 365.

(u) *Hartopp v. Hartopp*, 17 Ves. 192; 11 R. R. 48. See also *Clif-*

ford v. Turrell, 14 L. J. Ch. 390; *Rex v. Scammonden*, 3 T. R. 474.

deed. It may be that as there is no *reddendum* clause it would not be strictly correct to speak of the royalties as *reserved* and perhaps if they are not reserved but are only secured by covenant it would not be correct to speak of them,—being *in futuro*—as forming a part of the consideration, apart from the covenant. But the licensee's covenants are certainly a part, and a principal part, of the consideration to the licensor for the grant of the licence and should, presumably, be mentioned as such. There is even a very special reason for saying so in this case. It has been pointed out above that the patentee is called upon by the order to deposit his deed at the Board of Trade, in advance of the deposit by the licensee of the counterpart and from this circumstance an inference has been drawn that the patentee's deed should until the delivery of the counterpart be looked upon as an escrow. But this question of escrow is beset with difficulty and what is at least certain is that the patentee who has executed his deed in obedience to the order of the Board ought to be able to claim rescission if the contemplated licensee fails to make due delivery of the counterpart and ought for this purpose to have the benefit of a clear statement in the deed itself that the covenants which *ex hypothesi* the licensee refuses to give were the consideration for the grant.

The habendum clause next claims attention; expressed in the following words:—

Habendum.
See below,
p. 369.

“To hold, exercise and enjoy the said licence for and
“during all the residues now to come and unexpired of
“the respective terms of the said letters patent and during
“any further term for which the said letters patent or
“either of them may be extended.”

The term of
the licence.

It is noteworthy that in this clause the licensee is protected not only for the unexpired residue of the original terms of the patents but also for the period of any extended terms if they or either of them should be prolonged. It might be supposed that here, as in the *testatum* clause, the Board had resolved to give the licensee every possible facility for carrying out the new manufacture

because of the nature of the default established against the patentee. This however does not seem to be the true reason, for the same extended term is conceded in the Hulton & Bleakley order (u) in which no gross default was established, or even alleged, against the patentee. The concession is the more remarkable because in neither case was the extended term asked for by the applicants and in the *Lerinstein Case* the prayer of the petition was rendered very precise by a schedule appended to the petition which set out the heads of the proposed agreement. In that schedule the period was precisely defined to be the unexpired terms of the patents so that the licensee got more than he had asked for (v). Now, quite apart from the question whether the Board has power to order a patentee to grant more than the petitioner asks for (w), there is a serious question to be considered whether it is just to impose these terms upon the parties. The licensee may very probably consider that it will better suit his purpose to be released from his covenants at the end of the term of the patent than to be held for the whole extended term. If he is working under a licence at the time when any application is made for an extension he will be allowed to attend the hearing and oppose the application, if so disposed, and can negotiate with the patentee on very advantageous terms for a renewal of the licence. The Privy Council would, no doubt, protect him in case the patentee were unreasonable and he may very reasonably choose to rely upon that protection and to reserve his liberty to renew or resign the licence when that time comes. This is especially worthy of note in a case in which a minimum royalty is covenanted to be paid since such a covenant may in certain circumstances become very onerous for the licensee. Probably therefore it must not be assumed that a licence to include an extended term is a matter of course in these cases.

(u) See below, p. 365.

(v) Nor is this all, for in both cases the *habendum* is at variance with the order itself which limits the term of the licence to the un-

expired residue of the term of the patent. See above, p. 110.

(w) See *Dunlop Patents—Wolverhampton Petition*, below, p. 266.

Reddendum.
See above,
p. 122; below,
p. 370.

The deed next proceeds to the covenants, there being no reddendum clause. It has been pointed out above that the absence of this clause affects the nature of the consideration at least in theory, but this probably is not a matter of great consequence. In any case a reddendum clause seems more appropriate to a case in which, as in a lease, there is privity of estate between the parties than to a case, like the present, where there is only privity of contract. It is certain that whatever words be used the grantor could not secure payment of his royalty either by any proceeding in the nature of distress or by the appointment of a receiver and in such a case it can hardly be apposite to aver that anything whatever is "reserved out of the grant." It would seem therefore to be good draughtsmanship to omit this quaint and probably inappropriate clause (*r*).

Covenant for
royalty.
See below,
p. 370.

We come now to the covenants, the first being the licensee's covenant for the payment of royalty in the following terms "and the licensees hereby covenant with the patentees that the licensees will during the continuance of the licence pay to the patentees half-yearly on every 6th day of January and 6th day of July royalties at the rate of a half-penny for each pound weight avoirdupois of product made by the licensees under the said letters patent or either of them in the half-years then ending respectively Provided always that if the royalties payable in any year ending on the 6th day of July shall not have amounted to the sum of 250*l*. the licensees shall on such 6th day of July pay to the patentees such further sum as with the said royalties shall amount to the said sum of 250*l*. hereinafter called the yearly rent."

An assignable
covenant.

It is to be observed that this covenant is not expressed to be made with the assigns of the licensor but, that notwithstanding, it is conceived that the benefit of the covenant would be assignable by virtue of the Judicature Act

(*r*) See further as to this point, Morris, p. 194.

1873 (*y*). But it does not follow that the benefit of the licence would be so assignable. For example it might well be held that the third covenant; which gives a very formidable right of inspection to the licensor; not being expressly made with the licensor's assigns, was not transferable but a right conferred only on the assignor personally for the protection of a right of which he was personally enjoying the benefit. The proviso as to a minimum royalty of 250% would probably be construed as a further covenant to the effect of the proviso and indeed there seems to be no doubt that this is the intention although that intention might perhaps have been more aptly expressed in the direct form of a covenant than in the indirect form of a proviso. It is a very common thing when a minimum royalty is provided for to introduce an average clause allowing the licensee to set off excess royalties above the minimum in one period against short royalties in another period. As the proviso does not occur in this model form it may be presumed that it must be specially stipulated for at the hearing by an applicant who desires to get the benefit of it in his licence (*z*).

Is the licence assignable?

Proviso for minimum royalty.

See below, p. 382.

The next covenant relates to the keeping and rendering of accounts and calls for no comment except that it gives a somewhat large power of inspection to the patentee who is to be at liberty to call for production of the books "at any time" without limitation to business hours or other reasonable limits. In other respects it follows the usual form for such a covenant and is in fact somewhat more accurate than that given in Mr. Morris' book (*a*).

Covenant as to accounts.
See below, p. 372.

The third covenant—if covenant it be—provides for the inspection by the licensor of the factory in which the licensee carries on the licensed manufacture. It is remarkable in more respects than one and must be quoted *in extenso*. It reads as follows:—

“ And it is hereby agreed and declared that the patentees Declaration as

(*y*) 36 & 37 Vict. c. 66, s. 25 (6). and below, p. 382.
(*z*) See Morris, pp. 193 and 230, (*a*) Morris, p. 246.

to inspection of factory.
See below, p. 374.

“ shall be at liberty at any time during the continuance
“ of this licence to enter upon any factory or place of
“ business of the licensees in which the manufacture of
“ the said products shall be carried on at any reasonable
“ hour with a view of obtaining all such information as
“ may be material for the purpose of ascertaining the
“ amount of royalty payable to them under this licence.”

This clause shows manifest signs of having been written *currente calamo* as for example in the curious displacement of the words “ at any reasonable hour ” from their natural context into a connection where they suggest an attempt at dry humour. But what is much more puzzling is to ascertain the effect of the sudden transition here made from the form “ doth hereby covenant ” to the use of the words “ it is hereby agreed and declared.” The compact established in these words is no less a covenant than if the express word “ covenant ” were used (*b*).

It would be a declared agreement in any case and it is difficult to imagine that any change in its effect is brought about by the changed words in which it is embodied. Possibly the alteration is the result of mere inadvertence.

Coming now to the substance of the declaration, the power given by the clause to a licensor to enter and inspect is one which, although in many cases it would give rise to no difficulty, cannot be regarded as a matter of course since in other cases there would be the strongest possible objection on the part of the licensee to such supervision. This is one of the points in the drafting of the licence which should be thought out from the first and as to which the Board should be fully informed concerning the views of the parties.

Power of revocation by licensor.
See below, p. 380.

Then follows a power to the licensor to revoke the licence upon notice and with the consent of the Board of Trade for a breach of covenant not made good after fourteen days from written notice to make it good or for default

(*b*) Touchstone, 162.