

36
PRACTICAL TREATISE

ON THE

Law

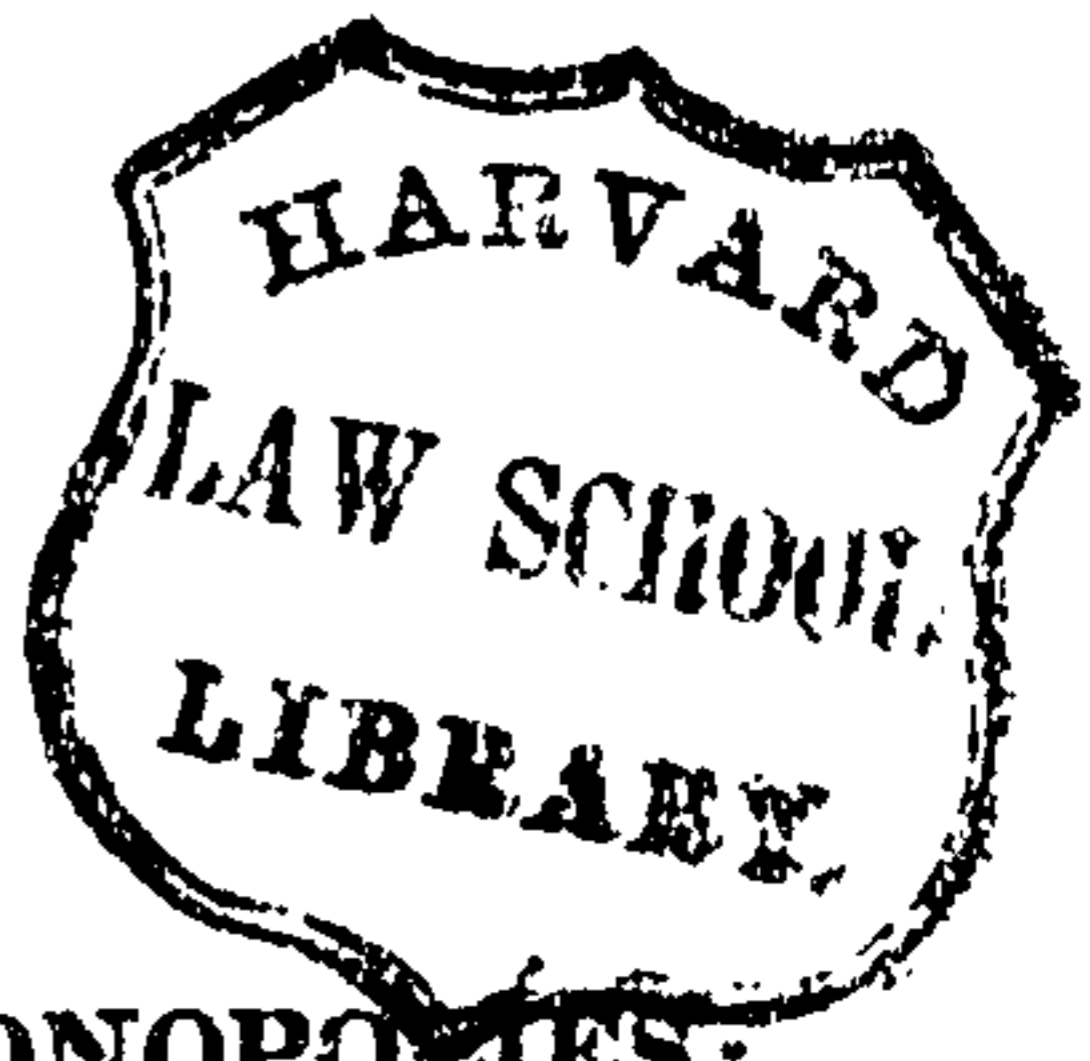
OF

PATENTS FOR INVENTIONS

AND OF

COPYRIGHT;

WITH AN



INTRODUCTORY BOOK ON MONOPOLIES;

ILLUSTRATED WITH

NOTES OF THE PRINCIPAL CASES.

BY RICHARD GODSON,

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

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TO

THE RIGHT HONOURABLE

SIR JOHN LEACH,

VICE-CHANCELLOR

OF

ENGLAND,

&c. &c. &c.

THIS WORK

IS

RESPECTFULLY INSCRIBED.

P R E F A C E.

TO collect and explain the Laws protecting that species of property which arises more particularly from the exertions of *ingenious and learned Men*—to furnish the library of the **ARTIST** with a book wherein he might readily find the rules of law, subject to which he must give publicity to his inventions, if he intend to secure exclusively to himself the benefits accruing from them—and to inform the **SCHOLAR** of the extent and duration of his power over the productions of his mind—was the task imposed on himself by the Author of the following Treatise. How far he has succeeded in the execution of his undertaking, he now leaves to the judgment and candour of the Reader.

The rights conferred by a *Patent for an Invention*, and the *Copy of a Book*, differ in their *Origin*: The one species arising from grants made by the Crown regulated by an Act of Parliament, and the other being at the present day conferred by enactments in several statutes. But they are similar in their *Nature*; and the protection afforded to the labours of the ingenious Artist, and the literary productions of Genius, are therefore subjects which must necessarily interest the same class of readers. It is that circumstance which has induced the Author of this Treatise to include them in the same work.

The laws which prevent persons making machines or printing books, from those in which by purchase they have acquired a property, are in their nature *restrictive*; and give to inventors and authors different kinds of Monopolies: hence it has been necessary to introduce a brief account of Monopolies in general, as they were formerly made by Royal Grants, or created by individuals.

To render the matter as clear as possible, the work therefore begins with Monopolies as they

stood at Common Law, or can be made at this day ; it then proceeds to the developement of the Law of Patents for Inventions. And, because many of the principles of Copyright can be illustrated by the reasoning on Patents, that branch of law is last explained.

Other Monopolies, such as have been granted to *Public Companies* to enjoy an exclusive trade to different parts of the world, belong to the law of Commerce, and come not therefore within the design of the present Work ; and perhaps the third chapter of the first book ought on that account to have been omitted.

In the **TEXT** of this Treatise it has been the anxious wish of the Author to state the Principles of the Law, with examples to explain them, in as concise yet comprehensive a manner as the subject would admit. Aiming at a middle course he has endeavoured to treat the matter with a perspicuous brevity, that the work might not be tedious to the professional reader ; and yet he hopes that it will be found sufficiently full, as not to be obscure to the Artists and Scholars who may be led to peruse

it. The NOTES are subjoined with the intention of affording full information to those persons who may wish to see the cases more at length; and to serve as a Commentary on the text for the use of scientific men who may not have an easy access to a Law library. In the APPENDIX are collected together the necessary forms and the principal Acts of Parliament that have been referred to in the Work. A copious INDEX has been added, by which it is hoped that every point of law in the whole Treatise may readily be found.

On the *Necessity* or *Utility* of a Book, similar to the one now presented to the Public, it is not for the Author to expatiate; though it may be allowed to him to observe, that the Law of Patents for Inventions has never yet been fully and scientifically investigated; that it is so little known among Artists, that it is supposed that not one half of the Patents which have been obtained could bear the test of a legal inquiry; and that the cases of Copyright have never before been formed into a distinct and independent Treatise.

In this attempt to extract the principles upon

which the numerous cases on the Law of Patents for Inventions, and of Copyright, have been decided, and to reduce them into a System—in this endeavour to reconcile apparent inconsistencies, and to arrange the whole in a logical manner—the Author has spent some time, and employed much labour. If the positions of Law should be found in general to be correctly and clearly stated, he hopes to meet with that indulgence which it is usual for the Profession to extend to every one, who attempts to explain any part of our Laws, for any inaccuracies which possibly may be found in his Work.

Hall Staircase, Inner Temple,
21st December, 1822.

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ADDENDA ET CORRIGENDA.

PAGE 46. note (g).—It is mentioned that *the Editor of the Repository of Arts* professes to assist Inventors in making Specifications. On the wrapper of the *Technical Repository* there is an advertisement that *Mr. Thomas Gill, the Editor*, is accustomed to lend every assistance that patentees can require.

Page 64. note (t), and p. 188. note (c).—As to the expenses of making experiments before the trial of a cause, see *Severn v. Olive*, 3 Brod. and Bing. 72. in which case it was decided that they are not to be allowed.

Page 113. note (x).—A patent was taken out for an improved method of making sail cloth without any starch whatever. The improvement or discovery (if any) consisted in a new mode of texture, and not in the exclusion of starch; the advantage of excluding which had been discovered and made public before. Held that the patent was void as claiming, in addition to what the patentee had discovered, the discovery of something already made public. *Campion v. Benyon and Another*, 3 Brod. and Bing. 5.

Page 172. note (a).—And see *Makepeace v. Jackson*, 4 Taunt. 770.

Page 184. line 25.—For “law. It will however in the mean time grant, &c.” read *law before it will grant, &c.*

Page 192. note (h).—And see 3 Inst. 184.

Page 208. line 9.—For “continue in,” read *return to.*

Page 213. note (z).—And see the *New Edinburgh Review*.

Page 271. note (a).—And see 6 Taunt. 522. 2 Marsh. 236.

Page 285. note (q).—*Morris v. Harris*, 1 Maddox Ch. Pr. 153. 2d edition.

Page 286.—In note, after “7 Ves. 617.” read “And see 5 Taunt. 212. 2 Marsh. 551.”

to shew cause why the judgment should not be arrested, inasmuch as regrating was not a crime at common law. It was twice argued ; and the Court being equally divided upon the question, no judgment was ever passed upon Mr. Rusby.

III OF WHAT THINGS IT MAY BE COMMITTED.

With respect to the merchandize or commodities, the purchase of which, in the manner described, constitutes some one of these offences, if a question had not arisen in Waddington's case⁽ⁿ⁾ whether *hops* were included among them, it would have been sufficient simply to observe, that all articles necessary to sustain life, and every thing used as an ingredient in the making or preserving those articles, are comprehended under the terms *provisions* and *victuals*, and are longer which was a declaration of what was the common law on the subject. In consequence of the repeal of that statute, it not only does away with the offence but repealed the explanation : the statute is therefore to be considered as if it had had no existence ; and if so, we are to look to the antiquity of the cases to know whether regrating is so described by the act of Parliament as an offence in Edward III. c. 6. in which the word *regrator* (which was long after the time of legal memory) is not described as an offence—it is used as to other subjects than victuals. That the statute of 14 Rich. II. c. 4. forbids the buying of wool, &c. it is most clear ; that it does not forbid, or restrain, &c. which is the denomination given to it by this particular statute. The 8 Hen. VI. c. 5. says, &c. Here *regrator* is nothing more than a common huckster, and not a *regrator*. It does not mean the resale in the same market, nor can any trace be found in the statutes."

(n) 1 East. 156.

the objects with which the offences of forestalling, engrossing, and regrating, may be committed. In consequence of that discussion it has become necessary to enumerate the different commodities that have been brought before the courts.

It was considered that buying wheat to make starch, and then to sell it again, was not within the statute, because it was not bought for the purpose of sale, but to be first *altered by a trade or science*, and then sold again; although Lord Coke was of a different opinion. (o) In another instance a contrary judgment was given: (p) but a third decision coincided with the first case. (q)

Wheat to
make
starch.

The buying of corn, with an intent to make meal of it, was held not to be within the statute, (r) though there is a decision to the contrary effect. (s)

Corn to
make into
meal.

It is doubtful whether the purchase of excessive great quantities of barley, although with the intention of converting it into malt, be within the statute. There are two authorities *pro* (t) *et contra*. (u)

Barley to
convert
into malt.

(o) Owen, 134. Trin. 9 Jac. I.

(p) 2 Brownl. 108. Mich. 9 Jac. I. 1611. *Ferdinando Crosse, informer, v. Westwood.*

(q) Bridg. 5, 6. Trin. 18 Jac. I. *Davison v. Cullier in the city of Norwich.*

(r) Moor, 595, pl. 810. Pasch. 35 Eliz. Anon. Cro. Car. 231.

(s) Owen, 135.

(t) 3 Inst. 196. Cro. Car. 231.

(u) Owen, 135. See a difference, if done in another man's house. Roll. Rep. 12.

A
PRACTICAL TREATISE
ON THE
LAW
OF
PATENTS FOR INVENTIONS;
AND OF
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BOOK I.
ON MONOPOLIES.

CHAP. I.

INTRODUCTION.—OF MONOPOLIES IN GENERAL.

EACH individual, by the *natural rights* of mankind, is entitled to exercise an uncontrouled power over every kind of property of which he is once legally in possession ; whether obtained by purchase, or produced by labour. The buyer of any *merchandise*, or a *machine*, or a *book*, would therefore be at liberty to dispose of his goods in any way that would be most conducive to his own advantage, or he might increase the number of the machines or books to any magnitude that profit or pleasure might dictate.

A mono-
poly.

This natural right to unlimited freedom in trade has, at different times, been invaded, both by the Sovereigns of States, and by the individuals who compose them.—By the former it is effected when they assume the prerogative of granting an exclusive privilege to particular persons of the sole trade in any article of commerce mentioned in their grants—By the latter, when with nefarious and unfair means, or in excessive quantities, they obtain possession of the necessaries of life, and vend them at exorbitant prices. These innovations and restrictions on trade, which would otherwise be *free*, are called *Monopolies*.(a)

Monop-
olies among
the an-
cients.

The monopolists among the ancients, both in Greece and at Rome, as Thales, Pythocles, &c., and the Roman merchants speculating in olives, were of that description, which, at the present day, would be called *engrossers*, persons benefiting themselves to the injury or ruin of their countrymen, but doing it without the authority or connivance of their governments.

Modern
monop-
olies.

In modern times kings and their subjects have respectively enriched themselves by monopolies, differing in their nature and extent, but attended with the same baneful consequences to the community.

Commer-
cial com-
binations.

After the introduction of the Feudal system into Europe, and during the time it was strictly

(a) *Monopolium*, απο του μονου, και πωλεομαι, quod est cum unus solus aliquod genus mercaturæ universum emit, et solus vendat pretium ad suum libitum statuens. 11 Co. Rep. 86. 3 Inst. 181.

followed, commerce was spurned and rejected as an ignoble employment, far beneath the dignity of a freeman and warrior: but when the fury of the martial spirit had somewhat abated, and the countries became a little settled, the want of the comforts and even necessaries of life, incident to every country where the art of war has been preferred to the occupations of peace, soon urged some of the people, particularly the inhabitants of the different towns, to form themselves into societies for the purposes of carrying on their pursuits in trade with facility and in safety. To them immunities were granted by the Sovereigns in whose states the places were situated. And afterwards the corporate bodies of many cities associated together for the protection of their common interests.

The first combination was the Hanseatic league, formed about the end of the twelfth century, to which many extensive privileges were granted. This confederation, promoting commerce and the interests of each other, soon astonished Europe by the accumulation of wealth which it rapidly gathered, and the immense power, its inseparable concomitant, which it quickly obtained. At length its augmenting influence created an alarm that it would become dangerous to the independence of the sovereign power in Europe. The members of it were commanded by the governments of the several countries forming parts of the league to reside within their native towns; that they might, by

Hanseatic
league.

their commercial pursuits, enrich the dominions of their respective princes. The association thus weakened was gradually reduced to insignificance.

Progress
of com-
merce.

Commerce, having once revived, was not to be destroyed by the dissolution of this league—She continued to spread her beneficial influence over several countries. The monopolies, restrictions, immunities and privileges, which protected her in the earlier stages of her progress were transferred by each prince from the members of the league to the inhabitants of the places within their own states.

Progress
of mono-
polies.

The towns, with the facilities and assistance which exclusive privileges afford, increased in population, and became rich and powerful. At first, the joint efforts of large bodies of citizens were alone capable of supplying to their princes the large sums of money which were necessary to relieve their wants, or to gratify their inclinations. Hence the advantages to be derived from monopolies were first bestowed on corporate bodies.

In this manner commerce arose, and spread her influence. When the opulence of individuals enabled them to advance money for the use of their sovereigns, they too were rewarded with charters and privileges.

Monopolies may thus be traced. They were formerly granted to many towns confederated together—afterwards they were given to separate towns—and ultimately were conferred on

individuals. It is the last species of them which is the immediate subject of the *first book* of this Treatise.

To the Hanseatic league England is in some measure indebted for her wealth. London, however, was the only town which was admitted to form a part of that celebrated confederacy.

Monopolies in England.

The Metropolis, and most of our cities and corporate towns, are indebted to King John for their commercial pre-eminence arising from his endowments, and his gift of their greatest franchises. The privileges of the *cinque ports*, the nursery of the English navy, were first granted by King John upon condition of supplying him with ships in his wars.

From his death to the reign of Elizabeth there is very little variation in the commercial history of this country. Its power kept continually, though slowly, increasing beneath a heavy burden of Monopolies.

The public purse being under the immediate control of the Parliament, the Kings of England often exercised the prerogative of conferring exclusive grants; either to supply the deficiency of their revenues, or to reward their necessitous adherents. It was the policy of Queen Elizabeth never to recur to Parliament for a supply of money, if she could possibly avoid it. To such an alarming height had monopolies accumulated during her reign, that towards the end of it they threatened the destruction of commerce, and the annihilation of the best interests of the country. The people could no longer bear the oppressive

and pernicious effects of them, and they loudly called for some redress. To prevent an abrogation of her power by an act of parliament, she cancelled the patents that were considered to be the most oppressive.

It should, however, be mentioned, that all the grants and exclusive privileges made in her reign were not detrimental to the interests of the nation. It was under the auspices of Queen Elizabeth that the Huguenots settled in Norwich, Sandwich, Colchester, and other places, where they carried on woollen and linen manufactories to the great benefit of the country. It was by her charter that the East India Company was established; which grant, though a very great monopoly, has contributed very largely to the splendour and influence of England in the scale of nations.

Stat. of
James.

At length the Legislature interfered, and, with cautious policy, taking a middle course, between the right of all persons to a free trade, and the assumed power of the Crown, declared by stat. 21 Jac. c. 3., that the Sovereign might make grants of the exclusive privilege of sale to individuals who produced *new inventions*, and to those only; still allowing that common right to take effect if the grants, even for new inventions, were not properly made.

Upon that statute is founded all the law on PATENTS FOR INVENTIONS. It was in vain that King Charles attempted to renew the grievance of monopolies. That statute afforded an insurmountable barrier against every attempt to intro-

duce them, and he did not possess sufficient power to have it repealed.

Whilst the parliament was strenuously exerting itself to confine the prerogatives of the Crown within the limits of the common law, they had also to contend with the malpractices of the subjects, to the monopolist among the people—the *forestaller* (a), the *engrosser* (b), and *regrater* (c). Many statutes were passed to correct the abuses they introduced, which were afterwards repealed, and the matter left to the rules of the common law: to that head of *monopolies* a separate chapter will be devoted.

Monopolies by individuals.

The Statute of James just referred to is merely *declaratory* of the common law. Hence it appears that the monopoly, which can be created by the Crown, arises merely from the grant, conferring on an individual the privilege of the sole making and selling *some article or thing*. It can be made, when thereby, no other

Monopolies by act of parliament.

(a) *Forestel*, *faristel*, *foristellum*, *foristellarius*, is derived from two Saxon words, viz. *far* or *fare* (via or iter) and *stall*, interceptionem, 3 Inst. 195. It may also be derived from the circumstance of thus preventing the articles from coming to the stalls in the market, from *fore* before, and *stalle*, a standing place.

(b) *Ingrosser* is derived from *in* and *gross*, great. “Is in genere dicitur qui integram rei alicujus copiam emendo satagit comparare, ut distrahendo postea carius vendat, a Gall. *le gros*, pro integro vel plenitudine.” Spelman.

(c) *Regrating* is derived from *re*, again, and the French *grater*, to grate or scrape; and signifieth the scraping or dressing of cloth or other goods, to sell them again; or from *regratement*, Huckstery. 3 Inst. 195.

person is restrained in what he had before, or prevented from following his lawful trade (*d*); which grant, at the present day, can only be for a *new Invention*. When, therefore, it is in contemplation to constitute a *new* monopoly, recourse must be had to parliament. This transcendent power of the Legislature has, in several instances, particularly in confining the trade to the East Indies and other parts of the world to different companies, been often and wisely exerted. Under peculiar circumstances, statutes have also been passed to increase the benefits and advantages derived by the inventor from the patent for his invention, either by extending its duration, or by enlarging the number of persons that may at one time be interested in it.

Account
of copy-
right.

By the Legislature other exclusive privileges as COPYRIGHTS in books, engravings, &c. have been conferred. Copyright being the subject of the *Third Book* of this Treatise, it will be unnecessary to make any other observation at present, than merely to remark that it was formerly considered to be founded on common law, but that it can now only be viewed as part of our Statute Law.

The manner in which the laws on monopolies may be systematically arranged, may be collected from an examination of the preceding historical sketch, and the following analysis. The investigation, it is conceived, necessarily leads to the enquiry into monopolies, when made

(*d*) Hawk. I. 470.

By THE KING ; and therein

1. *How they stood at common law.*
2. *Under the Statute of James ; whence arise*

PATENTS FOR INVENTIONS.

By INDIVIDUALS : as to

1. *Forestalling.*
2. *Engrossing.*
3. *Regrating.*

By THE LEGISLATURE :

1. *The Statutes respecting the trade with foreign countries.*
2. *The statute of 8 Ann. whence arises COPY-RIGHT.*
3. *The statutes as to the FINE ARTS.*

The whole matter of this work is, therefore, divided into three parts :—First, *Monopolies in general*, as they are governed by the rules of the common law, are cursorily described :—Secondly, the limited monopoly in *Inventions*, created by patents, is investigated :—and, Thirdly, the statutes giving *Copyrights* in books, and in the productions of the Fine Arts, are explained.

CHAP. II.

OF MONOPOLIES MADE BY GRANTS.

LETTERS Patent, or grants of the Crown, by which the exercise of the natural right of a person to use in any way he pleases every thing by him once legally possessed, is restrained, and monopolies in general created, may be classed for consideration under the following heads:—

1. *Grants that were valid at common law.*
2. *Those that were bad at common law.*
3. *Those that by statute law are permitted to be made.*

 I. GRANTS VALID AT COMMON LAW.

It is clear, that at common law the King could make a patent, to continue for a *reasonable time*, to any person who, at his own charge, or by his own industry, wit, or invention, had introduced any *new and profitable trade* into the realm, or any engine that had never before been used, tending to the furtherance of a trade; by virtue of which the patentee might confine the whole use of it to himself, and enjoy all the benefit accruing from it (*a*).

(*a*) Noy. 182. ; Hawk. P. C. 231.

For in the 9th year of Elizabeth a patent was granted to a Mr. Hastings of the sole trade for several years, of making frisadoes, in consideration that he had brought the method of making them from Amsterdam (*b*). This patent was considered as valid, until it was shewn that some clothiers had before its date made baize of similar workmanship.

A patent was also granted to a Mr. Matthews, a cutler (*c*), because, as was suggested, he had brought the invention from beyond the seas. The grant was supported, until it appeared that other cutlers had, with *a slight difference* only, made similar knives; and then it was declared to be void.

There is another case which illustrates the law as it anciently stood. A patent had been granted for the sole and only use of a seive, or instrument for melting lead. In the Court of Exchequer Chamber (*d*), it was said that the question was, whether it was *newly invented* by the grantee? whereby he might have the privilege of exclusive power over it; or else used before, in which case they were of opinion that he should not have the sole use of it.

It is said to be the better opinion (*e*), that the King may also grant to particular persons the *sole use of some particular employments* (as of printing the Holy Scriptures, and law books, &c.)

(*b*) Noy Rep. 182. 10 Mod. 131. Godb, 125.

(*c*) Noy Rep. 183.

(*d*) Ibid.

(*e*) 3 Bac. Ab. 627.

in the exercise of which an unrestrained liberty might be of dangerous consequence. How far this rule is correct, to what extent it is modified, and how limited, will hereafter be shewn (*f*).

II. GRANTS THAT WERE BAD AT COMMON LAW.

It evidently appears that at Common Law *Novelty* was a necessary incident to the thing, over which an exclusive power was to be given by the patent. On the other hand any institution or allowance by the King, by his grant, commission, or otherwise, to any person or persons, politic or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politic or corporate, were sought to be restrained of any freedom or liberty *that they had before*, or hindered in *their own* lawful trade, was a monopoly, and void at common law (*g*).

Such an Act of the Sovereign was always considered by the Judges to be against the ancient and fundamental laws of the realm ; because it destroyed the freedom of trade, and discouraged labour and industry. John Peachie (*h*) so early as in the reign of Edward III. was severely punished for procuring a licence under the great seal, whereby it was directed that he alone, in London, should enjoy the privilege of selling sweet wines.

(*f*) Post, Book III. Copyright; and see Mod. 256. 3 Keb. 792. 3 Mod. 75. 2 Chan. Ca. 67. Skin. 234. 1 Burn Ex. Law 347. title Colleges.

(*g*) 3 Inst. 181. 2 Inst. 47, 61.

(*h*) 3 Inst. 181.

And the grant of the sole ingrossing of wills (i) and inventories in a spiritual court, or of the sole making of bills, pleas and writs, in a court of law, to a particular person, was held to be void; because it entrenched on the acknowledged privileges of every member of society.

A grant of the King, of the sole making, importing, and selling of *playing cards*, was also adjudged to be invalid (k). It was urged on the consideration of the court, that the playing with them was matter merely of pleasure and recreation, and often abused, and that, therefore, it was proper that the making of them should be restrained. The principal argument which produced the judgment, was the circumstance, that card-making was a *known trade*, and that there was no reason why any subject should be hindered from getting his livelihood by it (l).

(i) 2 Roll. Ab. 212. Jon. 231. 3 Mod. 75. Vern. 120, 130. 10 Mod. 107, 131, 133.

(k) 11 Co. 84. Noy 173. Moor 671. 2 Inst. 47.

(l) Darcy's Case, Noy Rep. 179. The observations of the counsel are very strong against monopolies. Now by this patent, be they good, be they bad, be they false, be they true, be they dear, or good cheap, you must buy all of him and his assigns, in what manner pleaseth him. When before, if any person by his industry had obtained excellent skill in his trade, he might have reaped the fruits thereof, and that hath been thought the surest thing, a man could obtain skill and knowledge, because thieves could not steal it. Now, Mr. Darcy hath devised a means to take away a man's skill from him which was never heard of before, which if others should do the like in other trades, it would discourage men to labour to be skilful in any art, and bring in barbarism and confusion.

And the King's charter to any particular corporation of the *sole importation* of any merchandize was also held to be of no effect, whether the merchandize was prohibited by statute or not (*m*).

A similar charter, empowering individuals or companies to trade to and from a particular place, and in particular articles, is void, so far as it gives such persons an exclusive right of trading, and debarring all others (*n*).

III. GRANTS AS RESTRAINED BY STATUTE LAW.

The doubt which formerly existed as to the legality of the prerogative of confining the exclusive trade in certain articles to particular persons was removed by the stat. 21 Jac. I. by which it was declared (*o*) that all monopolies, and all commissions, grants, licences, charters, and letters patent, &c., granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of any thing within this realm, or Wales, or any other monopolies, &c., and all licences, &c., and all proclamations, &c., and all other matters whatsoever, any way tending to the instituting, strengthening, furthering, or countenancing of the same, or any of them, were altogether contrary to the laws of this realm, and

(*m*) 2 Roll. Ab. 214. 3 Inst. 182. 2 Inst. 61. Style 214.

(*n*) Sandys v. East India Company, Raym. 489. 2 Chan. Cas. 165. Skin. 165. pl. 2. 226, 234.; and see the Company of Merchant Adventurers v. Rebow, 3 Mod. 126.

(*o*) 21 Jac. I. c. 3. s. 1.

so were and should be utterly void and of none effect, and in no wise to be put in use or execution.

All monopolies being, by the prior part of that statute, thus indiscriminately condemned, a clause (*p*), upon which alone the *second Book* of this Treatise is a commentary, was afterwards inserted declaratory of the common law. By it the Sovereign is still permitted to grant *patents for new inventions*, provided they are not made to endure for a longer time than fourteen years.

For a knowledge of the remaining clauses of the stat. 21 Jac. I. which except certain monopolies out of its first general enactments against them, reference must be made to the Act itself: for they are not immediately connected with the present enquiry (*q*).

(*p*) 21 Jac. I. c. 3. s. 6.

(*q*) Post, Appendix.

CHAP. III.

OF MONOPOLIES IN DOMESTIC TRADE.

THERE are monopolies created by individuals (*a*). They take place in *domestic trade*, and consist in obtaining possession of provisions or the necessaries of life, with the *intention* of enhancing the current prices of them in the Market (*b*).

The principles of law, which govern these monopolies, will be more clearly elucidated by the consideration of

I. A STATEMENT OF THE WAYS OF EFFECTING THEM.

1. *A popular description of them.*
2. *The statutes relating to them.*
3. *The common law respecting them.*

(*a*) The difference between monopoly in general, and engrossing, consists in this, that the one is made by patent from the King, the other arises from the acts of the subjects between party and party. Skin. 169.

(*b*) Here the Scholar, who may look into this Treatise, for the laws that preserve to him the fruits of his inventions, or give him the profits of his literary labours, must be informed that this Chapter will not interest him; and that he may pass on to the next book without experiencing any inconvenience. Forestalling, &c. being monopolies, and therefore part of the matter of this Work, I was obliged to introduce them: but the subject will be treated as briefly as is consistent with a perspicuous account of the law.

II. THE NATURE OF EACH OFFENCE IN PARTICULAR.

1. *Forestalling.*

1. *The contracts of a Forestaller.*

2. *His conduct.*

2. *Engrossing*

3. *Regrating.*

III. OF WHAT THINGS THEY MAY BE COMMITTED.

IV. THE PROCEEDINGS TO PUNISH OFFENDERS.

I. A STATEMENT OF THE WAYS OF EFFECTING THEM.

The inhabitants of the country generally bring the produce of their lands to the nearest town to be sold. The citizen relies upon the weekly supply, for the sustenance of his family. It is convenient. The reward of the artificer's labour is exchanged for the fruits of the husbandman's toil. They mutually part with their articles for such prices as they can afford. It becomes the duty of the Magistrate, to see that every facility is given to this barter of commodities; and to take care that the poorer classes of society are not imposed upon.

The avarice of monied men has often stimulated them to step in between these fair dealers. Some of them have *bought up* the merchandize or victuals, before it could reach the towns; others have *dissuaded the people from bringing* their goods or provisions to market; whilst some have

1. A popular description of them.

exerted their influence to *persuade them to enhance* the price of them when there. These acts are in one general term called **FORESTALLING (c)**.

To go about purchasing, collecting, and hoarding up such large quantities of the necessaries of life, so as to produce an artificial famine, or such a scarcity as must evidently increase the price of them to a great and unusual degree, is termed **ENGROSSING**.

Among the Greeks and the Romans, by our Saxon ancestors, and in all countries, have laws been made to regulate the internal trade, and to preserve a free traffic in the articles necessary to sustain life. Hence spring the reasons for granting markets and fairs, to be held at known places at certain fixed times. It is one of the principal regulations of them, that all contracts made therein shall bind not only the parties to them, but all others who may claim any right to the thing sold: upon the supposition, that every transaction is publicly known to the whole market. But if the monied man is to be allowed quietly to insinuate himself, and interpose between the factor and the tradesman—between the grower and consumer in the market-place, he can, by the increased retail price, and apparently under the sanction of the law, force the poorer classes of society to yield up their hard-earned pittance to his lust for gain. Such a

(c) On the law contained in this Chapter see *Illingworth on Forestalling, &c*; *Girdler on Forestalling*; *Russell on Crimes and Misdemeanours*.

buying and selling of any provisions, corn, or other dead victual, has been denominated **REGRATING**.

These transactions, which have been thus generally described, will hereafter be shewn to be offences at common law, in furtherance of which many statutes were enacted that have either been repealed, or are in practice become obsolete. The account to be given of the statutes will therefore be merely a statement of the purposes for which they were made, and the effect which is now given to them.

2. The statutes on forestalling, &c.

The first act of Parliament making mention of forestallers is the 51 Henry III. stat. 6. c. 1. intituled "A Statute of the Pillory and Tumbrel, and of the Assize of Bread and Ale." The lect is directed to inquire if there be any "forestallers that buy any thing afore the due and accustomed hour, against the good state and weal of the town and market, or that pass out of the town to meet such things as come to the market, and buy them out of the town, to the intent that they may sell the same in the town more dear unto regrators," and to doom them to the punishment of the pillory.

This statute still remains unrepealed (*d*) as to forestallers, though it is in part repealed as to the assize of bread, by 8 Ann. c. 18.

(*d*) It is incorrectly stated in 4 Bla. Com. 160. that *all* the prior statutes on this subject were repealed by 12 Geo. III. c. 71. It seems that those statutes only are repealed which are enumerated in that repealing act. See *Rex v. Waddington*, 1 East. 150.

The next Act is intituled An Ordinance for bakers, brewers, victuallers, and for ells, bushels, and *forestallers*, &c. supposed (e) to have been enacted in the 34 Edward I. It is unrepealed, and is very severe in its penalties, which are to be inflicted on all manner of *forestallers*, and likewise upon those who give them *counsel*.

After the plague in 1349 an ordinance was promulgated (23 Edward III. c. 6.) commanding butchers, fishmongers, *regrators*, &c. to sell at reasonable prices, under pain of forfeiting double the value.

In 25 Edward III. an act (stat. 4. c. 3.) was passed against *forestallers* of wine and other victuals. It is confirmed by 2 Richard II. c. 2. and is still in force.

The *statute de stapulis* (27 Edw. III. c. 11.) enacts that the *forestaller* of merchandizes, coming to the cities, towns, or ports within this realm, shall suffer the pains of felony. The capital part of the punishment was taken away by 38 Edward III. st. 1. c. 6.: but the statute as to the forfeiture of goods and chattels, still remains unrepealed.

Then follow the statutes 31 Edward III. st. 1. c. 10., 6 Richard II. c. 10. (repealed by 7 Richard II. c. 11. but revived and enforced by 14 Henry VI. c. 6.) 11 Richard II. c. 7., 13 Richard II. c. 8., (confirmed by 4 Henry VIII. c. 25.) and

(e) It is denominated "*incerti temporis*." See 3 Inst. 196. 4 Inst. 261.

Henry IV. c. 17., which were made to confine the sellers of victuals to reasonable gains.

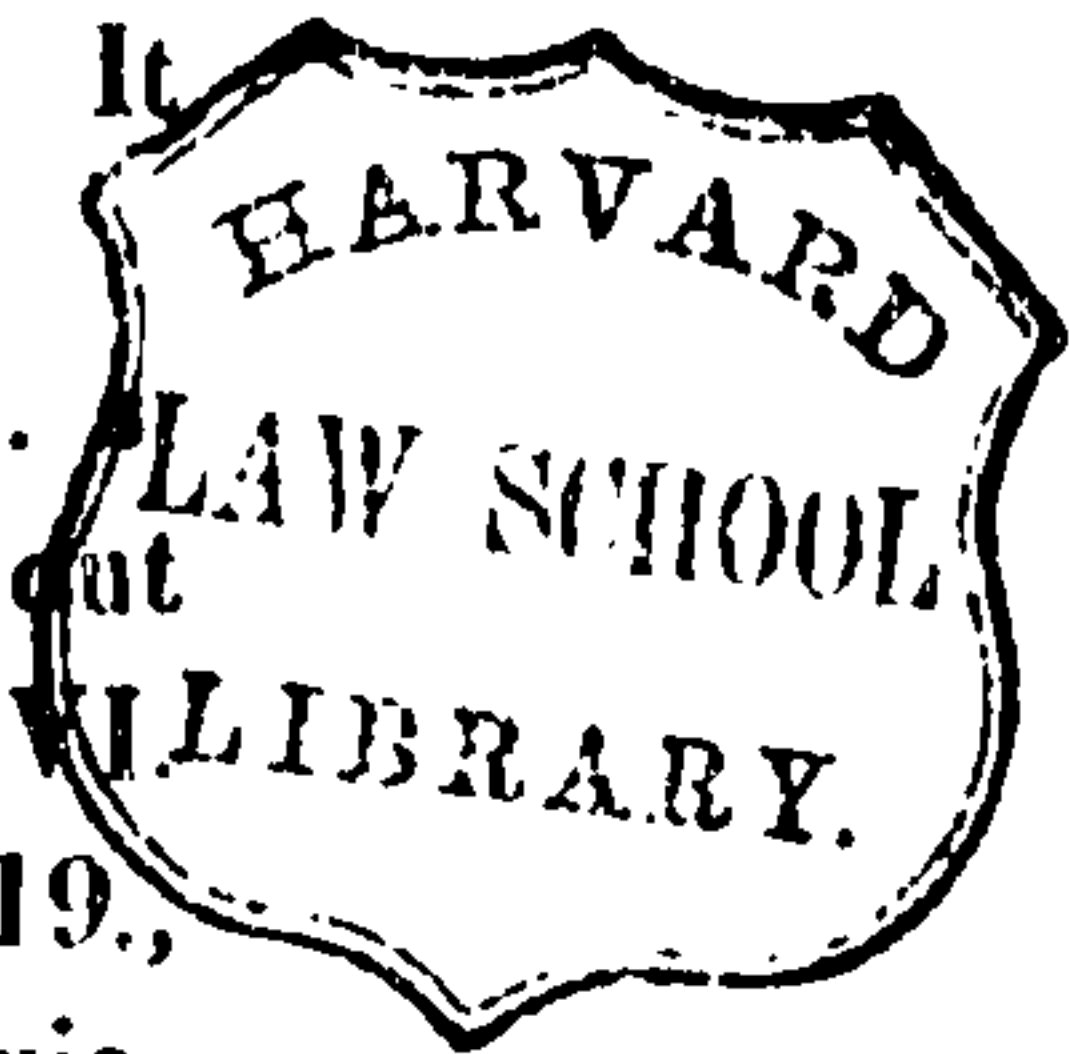
The next statute on this subject is 25 Henry VIII. c. 2., for assessing the price of victuals. Then follows the famous act against ingrossing cattle, and cultivating large tracts of land, 25 Henry VIII. c. 13. (confirmed by 32 Hen. VIII. c. 28. s. 4.) by which it is enacted, that no person shall possess at one time more than two thousand sheep, nor hold above two farms. It is still unrepealed.

The statute 34 and 35 Henry VIII. c. 26. § 105. regulates the method of buying cattle out of the market in Wales; and 2 and 3 Edw. VI. c. 15., confirmed by 22 and 23 Car. II. c. 19., was made to punish conspiracies among victuallers.

In the 3 and 4 of Edward VI. two acts of Parliament were passed; the first, c. 19, (continued by 3 Car. I. c. 4., and 16 Car. I. c. 4., and altered by 15 Car. II. c. 8.) enacts that no cattle shall be bought but in open market, and that the same shall not be sold again alive, which is supposed to be repealed by 12 Geo. III. c. 71., which repealed 15 Car. II., that had altered it. The other, c. 21. s. 1., was passed to prevent the *engrossing* of butter and cheese, and was repealed by 12 Geo. III.

The principal statute against *forestalling*, *engrossing*, and *regrating*, is the 5 and 6 Edward VI. c. 14., confirmed by 13 Eliz. c. 25., and repealed by 12 Geo. III. c. 71. The statute was always considered as *declaratory of the*

5 & 6 Edw.
VI. c. 14.



common law; and therefore its provisions, and the decisions in law which have taken place upon it, will be hereafter noticed.

The statute 5 and 6 Edward VI. c. 15. against regrating and engrossing all kinds of tanned leather was repealed in part by 1 Mary, sess. 3. c. 8. and 5 Eliz. c. 8., and entirely so by 1 Jac. I. c. 22.

The statute 7 Edward VI. c. 7., against regrating woods, coals, and fuel, is still in force, as is also 1 Philip and Mary, c. 7., enacting that strangers shall not *retail* in towns, except in open fairs. But the 2 and 3 Philip and Mary, c. 3., confirmed by 13 Eliz. c. 25., respecting keeping milch kine, is repealed by 12 Geo. III. c. 71.

By 5 Eliz. c. 12., made perpetual by 13 Eliz. c. 25., but repealed by 12 Geo. III. c. 71., enacted to prevent exorbitant prices of victuals, drovers and badgers were ordered to take out a licence.

The statutes 1 Jac. I. c. 22. s. 7., against *forestalling* hides, and *regrating* and *engrossing* bark, and 3 Jac. I. c. 9. s. 3. for selling less than a certain number of coney or lamb skins at one time, are both still in force.

The stat. 21 Jac. I. c. 22, made to explain the statutes of 3 and 4 Edw. VI., and 5 and 6 Edw. VI., as far as they related to butter and cheese, were continued by 3 Car. I. c. 4., and 16 Car. I. c. 4., but repealed by 12 Geo. III. c. 71.

There is an act of the Commonwealth, Oct

23, A. D. 1650, respecting engrossing corn. Scobel, 142.

The statute 15 Car. II. c. 7. s. 4., relating to storing up corn, was repealed by 31 Geo. II. c. 30. s. 2. The statutes 15 Car. II. c. 8. (confirmed by 22 and 23 Car. II. c. 19.) and 5 Ann. c. 34., respecting butchers selling live cattle, are repealed by 12 Geo. III. c. 71.

The stat. 31 Geo. II. c. 40. s. 11. enacts that no salesman or broker employed to buy or sell cattle by commission, shall buy or sell on his own account.

Thus much it has been thought necessary to introduce on the subject of the statute law of *forestalling, engrossing, and regrating*. It must be remarked that when the statute 12 Geo. III. repealed the statute 5 and 6 Edward VI. and all the others dependent upon it, the law would necessarily be again in the same state as it stood before that statute passed. It would be a waste of time to make observations upon the acts of Parliament which were made prior to the reign of Edward VI. Although many of them remain unrepealed, and have recovered their original force, (*f*) yet they are not efficacious in stopping the progress of the crime, and are become so obsolete in practice that they may safely be considered as obliterated from the statute book.

12 G. III.
c. 71.

The statute of 5 and 6 Edward VI. has often been recognized as being merely *declaratory* of

3. The common law on forestalling, &c.

(*f*) 4 Inst. 325.

the common law ; (g) by which law, now revived, the transactions above described in general terms have ever been considered as offences. It will therefore be proper to proceed at once to the second division of this subject ;—to treat *practically* of forestalling, engrossing, and regrating, under separate and distinct heads, as offences at common law. The declaratory statute of Edward VI., and the cases decided upon it, will be used, when they contain principles, or explain and illustrate the subject under investigation.

II. THE NATURE OF EACH OFFENCE IN PARTICULAR.

1. Forestalling.

Forestalling cannot be better described than in the words of the stat. 5 and 6 Edward VI. c. 14., by which it is enacted that Whosoever shall buy or cause to be bought any merchandize, victual, or any thing whatsoever, *coming* by land or by water, *towards any market* or fair to be sold in the same, or coming towards any city, port, haven, creek or road from any parts beyond the sea, to be sold ; or make any bargain, *contract or promise* for the having or buying the same, or any part thereof, so coming as is aforesaid, before the said merchandize, victuals, or other things shall be in the market, fair, city, port, haven, creek, or road, ready to be sold ; or shall make *any motion* by word, let-

(g) Cross v. Westwood, 2 Brownl. 108.

ter, message, or otherwise, to any person for the enhancing of the price, or dearer selling of any thing above mentioned ; or else *dissuade*, move, or stir any person coming to the market or fair, to *abstain or forbear to bring* or convey any of the things above rehearsed to any market, fair, city, port, haven, creek, or road to be sold as aforesaid, shall be deemed a *Forestaller*. (*h*)

Bearing in mind that it is the *intention* to increase the current price of provisions, in order to reap a pecuniary advantage at the expense, and to the serious injury of the public, which forms the principal trait in the character of a *forestaller*, it will be necessary to investigate,—

1. The nature of the *contracts*, by entering into which a man becomes a forestaller ; and
2. The *conduct*, independent of contract, which renders him a forestaller.

The merchandize purchased must, at the time of the contract, be *on its way to a market*. Wherefore an indictment which stated that some lead was bought near Bristol which was to have been sold at Bristol market, was bad, because it did not set forth that the owner was *then coming towards the market* with it. (*i*)

The contract which makes a forestaller.

(*h*) It may be observed that this description of forestalling does not seem to include “persuading a person not to sell in the market unless he can obtain a certain price.”

(*i*) 1 Rol. Rep. 421, Mich. 14 Jac. in B. R. *The King v. Hook*.

A fishmonger, or any person in trade, may be indicted if he buy to enhance the price (*k*) as the fish are being brought to market.

But a contract (*l*) in a market for corn not in the market was holden not to be within the statute 5 and 6 Edward VI., and could not be considered as forestalling or engrossing. It would have been otherwise if the corn had been in the market, although the contract had been made in a house out of the market, and the corn delivered to the vendee out of the market.

And so jealous is the common law of all practices of this description, that it will not suffer corn to be sold in the sheaf. For this reason, says Lord Coke, because by such means the market is in effect forestalled. (*m*)

Although corn cannot be vended in the sheaf, yet a growing crop of wheat may be sold. If the law were otherwise, an incoming tenant could not take to the crops then on the ground. (*n*) Hops are often sold whilst growing. The illegality of the contract consists in buying, with the apparent intention, and for the purpose either of selling them again before they are gathered, or of preventing the planters from bringing them to

(*k*) 1 Roll. Rep. 11, Pasch. 12 Jac. I. in *K. B. King v. Davies*. The offence is there called ingrossing. The three terms were anciently considered as nearly synonymous.

(*l*) Arg. Godb. Rep. 131. Hil. 29 Eliz. C. P. Anonymous. The information was for engrossing seed corn.

(*m*) 3 Inst. 197. Haddain's case. But see *Grant v. Hedding*, Hardr. 380. and *Moyle v. Ewer*, 2 Bulst. 183.

(*n*) *Bristow and Others v. Waddington and Others*, 2

market in the usual manner, and at the accustomed seasons, in order to increase their value.

It was adjudged to be an offence at common law in Mr. Waddington for getting into his hands large quantities of growing hops by *fore-hand* bargains, by contracting with various persons for the purchase of them, with the intention of preventing the same from being brought to market, that he might thereby greatly enhance the price, and resell them at an unreasonable profit.

Upon the whole, it may be observed, that *all contracts* by which it plainly appears that it was the *intention* of the party to enhance the market prices, and not to leave them freely to find their level, are contrary to law ; and that there is an illegality in a person's buying things, even in a market, *before the accustomed hour.* (o)

It would be an irksome task to enumerate all the different descriptions of *conduct, independent of contract*, which would stamp a man a forestaller. A few cases will be sufficient to shew the principle upon which the law rests. It is founded on the evident *intention* of the party whether he wish unwarrantably to increase the market-prices of provisions, or fairly to gain a livelihood by purchasing and selling again, without using any undue means to alter the current value of the commodities.

The conduct of a forestaller.

New Rep. 355. And see Slade's case, 4 Co. R. 92. which was an action of assumpsit for the value of a crop of growing wheat and rye.

(o) 3 Inst. 195, 196. 1 Hawk. P. C. c. 80; and see Cousins v. Smith, 13 Ves. 542., and *ante*, 19.

False rumours.

Of this nature is spreading *false rumours* and reports, in order to affect the markets.

There is a very old case on this part of the subject, given by Lord Coke, which explains the nature of the offence. (p) It was presented that a Lombard had endeavoured to promote and enhance the price of merchandize. He demanded judgment of the presentment for two causes:—1. That it did not sound in forestalling; 2. That of his endeavour or attempt at words, no price was enhanced. It was held that the attempt by words to enhance the price of merchandize was punishable by law, and sounded in forestalment: and that the punishment was by fine and ransom. In that case Knivet reported that certain persons came to Coteswold in Herefordshire, and said, in deceit of the people, that there were such wars beyond the seas that no wool could pass or be carried beyond sea, whereby the price of wools was abated. Upon presentment thereof made, they appeared; and upon their confession they were put to fine and ransom.

And in a modern case, in which *forestalling* was recognized as an offence at common law, Mr. Waddington (q) was accused of declaring

(p) 3 Inst. 196. 43 Ass. p. 38.

(q) King v. Waddington, 1 East. Rep. 143. *Lord Kenyon*. "But without attending to disputed points, let us state fairly what this case really is, and then see if it be possible to doubt whether the defendant has been guilty of any offence. Here is a person going into the market who deals in a certain commodity. If he went there for the purpose of

and publishing that the then present stock of hops was nearly exhausted, and that from that time there soon would be a scarcity of hops, and that before the hops then growing could be brought to market, the then present stock of hops would be exhausted, with the *intent and design*, to induce the dealers in hops *not to send them to* making his purchases in the fair course of dealing, with a view of afterwards dispersing the commodity which he collected, in proportion to the wants and convenience of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shews plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity, to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price: Who can deny that this is an offence of the greatest magnitude? It was the peculiar policy of this system of laws to provide for the wants of the poor labouring class of the country. If humanity alone cannot operate to this end, interest and policy must compel our attention to it. Now this defendant went into the market for the very purpose of tempting the dealers in hops to raise the price of the article, offering them higher terms than they themselves proposed and were contented to take, and urging them to withhold their hops from the market in order to compel the public to pay a higher price. What defence can be made for such conduct; and how is it possible to impute an innocent intention to him? We must judge of a man's motives from his overt acts; and by that rule it cannot be said that the defendant's conduct was fair and honest to the public. It is our duty to take care that persons, in pursuing their own particular interests, do not transgress these laws, which were made for the benefit of the whole community. *I am perfectly satisfied that the common law remains in force with respect to offences of this nature."*

market. And such conduct was declared to be unwarrantable and illegal.

This species of forestalling is included in the description given in the statute of Edward VI. (r) and was noticed in both the cases of *Rex v. Waddington.* (s)

Dissuad-
ing from
selling.

It also consists in *dissuading persons from selling their articles unless they can obtain a certain fixed exorbitant price* : a point also recognized in *Waddington's* case.

Thus, it plainly appears, that every endeavour to enhance the common price of any merchandize, and all *kinds of practices* which have an evident tendency thereto ; in short, all *undue attempts*, by which it plainly appears that the party's sole intention is to enhance the price of victuals to the public, is a forestalling. (t)

2. Engross-
ing.

The second attempt of the monopolist to make the poverty of the lower orders in society a means of obtaining exorbitant gains, is by *engrossing*, sometimes written *ingrossing*.

This offence is also well described in the stat. of Edward VI. (u)—Whosoever shall engross, or get into his hands by buying, contracting, or promise taking, other than by demise, grant, or lease of land or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual whatsoever, to the

(r) Ante, 24.

(s) 1 East. 144, and 1 East. Rep. 169.

(t) 1 East. Rep. 153. 3 Bac. Abr. 261.

(u) 5 & 6 Edward VI. c. 14.

intent to sell the same again, shall be deemed an unlawful *engrosser*.

That engrossing was an offence indictable at common law there is the express authority of my Lord Coke. (x) Indeed, this crime was in the decisions at common law comprehended under the general term of forestalling. (y) Every enhancement of the price was considered an offence; for it was *quasi* a forestalment. (z)

The bare act of buying up a whole commodity with an *intent* to sell it at an unreasonable price, although no sale has taken place, is a common law offence. (a) And an indictment for buying *ex intentione ad revendendum*, is sufficient; for, after verdict, it shall not be intended of a sale by retail. (b)

It is not necessary that the quantity of commodities bought should bear such a proportion to the consumption of the whole kingdom as that it must necessarily affect the general price. If it create an artificial scarcity in some particular town or district, the purchaser is guilty of engrossing: which appears from the case of some persons who conspired to monopolize all the salt at Droitwich in order to raise the price of it. (c)

But every large purchase is not an engrossing, or there would soon be an end to the foreign

(x) 3 Inst. 195. (y) 3 Inst. 196. (z) 3 Inst. 197.

(a) Cro. Car. 231. Hav. P. C. c. 80. s. 3. King v. Maynard, and see 6 Mod. 32.

(b) Cro. Car. 314. Jon. 320. S. C. Fenn's case, 4 Com. Dig. 68.

(c) 1 East. 156, 157, by Lord Kenyon.

commerce of this country. (d) It is correctly laid down in the old books, (e) that any merchant, whether he be a subject or a foreigner, bringing victuals or any other merchandize into the realm, may sell the same *in gross*. (f) But the next position,—“that a person within the realm, buying any merchandize in gross and selling the same in gross, commits an offence of this nature, because the price is enhanced as it passes through several hands,” is certainly not tenable, unless the *intention*—the reason for buying the large quantity, was evidently an endeavour to advance the market price. It was formerly held that although fishmongers came within the statute against engrossers if they bought and sold at their pleasure at *unreasonable* prices, (g) yet they might justly buy all the fish if they sold them at a *reasonable* rate. (h)

If the act of buying be done in the usual way of trade, without any thing appearing which would shew that the purchase was made merely to enhance the value, it would be unimpeachable.

The same case, (i) *The King v. Waddington*, in which it was decided that the common law is still in force against forestalling, must again be

(d) 14 East. 406. 15 East. 511.

(e) 3 Inst. 195. Hale's P. C. 152.

(f) 3 Inst. 196.

(g) 1 Roll. Rep. 11. *The King v. Davies*.

(h) 2 Bulst. 249, per Coke, C. J. in *Suckerman and another v. Sir Henry Warner*.

(i) 1 East. Rep. 157.

referred to in confirmation of the doctrine in general of engrossing; for it was there decided that obtaining large quantities of hops by buying them with the intent to resell the same for an exorbitant profit, was engrossing.

The third means employed by the monopolist to obtain an undue influence over the markets, and to gain an unfair profit, is by *regrating*. 3. Regrating. The offence is also well described in the statute of Edward VI. (*k*)—Whosoever shall by any means regrate, obtain, or get into his hands or possession in a fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or *other dead victual* whatsoever that shall be brought to any fair or market to be sold, and shall *sell the same again* in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof, shall be deemed a *regrator*.

A regrator is sometimes called a chopper, or jobber; and sometimes a bagger, a higler, or huckster.

It is very difficult to say whether a court of justice would now decide that regrating is a crime at common law: I shall therefore merely state the principal case under this head of the subject.

Mr. Rusby (*l*) was indicted for getting into his possession, and selling again on the same day,

(*k*) 5 and 6 Edw. VI. c. 14.

(*l*) Girdler on Forestalling, &c. 255, 256; and see 2 Chit. Cr. Law. 535.

ninety quarters of oats on the corn exchange. At the trial Lord Kenyon is said thus to have expressed himself upon the law of regrating:—

“ The legislature of all countries, and the administration of justice in those countries, are never better employed than when they condescend to look at those who are the greatest distance from them in point of rank : humanity calls for it ; religion calls for it ; and if there are minds which are not affected by humanity and religion, yet their own interests call particularly for it.

“ The law had been stated to you ; and if the acts of Parliament that have been upon the statute books for about one hundred and fifty years are repealed ; and were, in my opinion in an evil hour, without consideration enough, repealed ; yet, thank God, the power which repealed it was not informed of, or did not intend to repeal those provisions made by the common law. That which is called the common law existed undoubtedly after society began to exist ; after society began to be formed : in very ancient times, which we cannot trace to their top, when men looked round them to see what was to be done. And we are not to suppose that wisdom had not considerably advanced when William the Conqueror came over, or about the time when the first statute in Henry III. got upon the statute book : but, by more modern researches, there are among the Saxon laws many traces found from which it is supposed the common law had its first origin among our Saxon ancestors.

But, without minutely tracing it back to the beginning, there is no doubt now, that by the common law of the land provisions are made against the three offences, forestalling, engrossing, and regrating; and it is now given in charge, since the exigencies of the state require it, by the judges to the grand juries; they have been repeatedly informed that though the statute law upon this subject has been repealed, yet that by the common law those offences are provided against."

The Court was afterwards ineffectually moved for a new trial. (*m*) At length they granted a rule

(*m*) This case of *Rex v. Rusby*, as argued in Bank, is not reported: but the substance of the arguments are thus given from a MSS. by Mr. Chitty, in the second volume of his *Criminal Law*, 536, n. "That the Act of Regrating as described in 6 Edw. VI. (now repealed) and mentioned as a crime by that act, is not an offence which now exists, as such, at common law, and that though the word *regrator* occurs in the statute of Edward VI. and other statutes, yet there is no statute to be found which describes a regrator, *per se*, as buying and selling again in the same market, as a criminal, nor can any indictment so framed be found, or that selling again in the same market on the same day was ever recognized as a crime,—that by the statute 31 Hen. III. s. 16. c. 3.; it is nothing more or less than an huckster, and that the reselling in the same market is no where recognized as an ingredient of regrating or is recognized as an offence, but as an huckster mentioned indiscriminately, not as a principal, *eo nomine*, that is a statute against forestallers by selling it again to regrators: they are not describing the offence of regrating as consisting of any thing in the reselling of the article but is understood merely as an huckster, that statute being repealed which mentioned the crime, and which gave it existence,—that statute existing no

to shew cause why the judgment should not be arrested, inasmuch as regrating was not a crime at common law. It was twice argued ; and the Court being equally divided upon the question, no judgment was ever passed upon Mr. Rusby.

III OF WHAT THINGS IT MAY BE COMMITTED.

With respect to the merchandize or commodities, the purchase of which, in the manner described, constitutes some one of these offences, if a question had not arisen in Waddington's case⁽ⁿ⁾ whether *hops* were included among them, it would have been sufficient simply to observe, that all articles necessary to sustain life, and every thing used as an ingredient in the making or preserving those articles, are comprehended under the terms *provisions* and *victuals*, and are longer which was a declaration of what was the common law on the subject. In consequence of the repeal of that statute, it not only does away with the offence but repealed the explanation : the statute is therefore to be considered as if it had had no existence ; and if so, we are to look to the antiquity of the cases to know whether regrating is so described by the act of Parliament as an offence in Edward III. c. 6. in which the word *regrator* (which was long after the time of legal memory) is not described as an offence—it is used as to other subjects than victuals. That the statute of 14 Rich. II. c. 4. forbids the buying of wool, &c. it is most clear ; that it does not forbid, or restrain, &c. which is the denomination given to it by this particular statute. The 8 Hen. VI. c. 5. says, &c. Here *regrator* is nothing more than a common huckster, and not a *regrator*. It does not mean the resale in the same market, nor can any trace be found in the statutes."

(n) 1 East. 156.

the objects with which the offences of forestalling, engrossing, and regrating, may be committed. In consequence of that discussion it has become necessary to enumerate the different commodities that have been brought before the courts.

It was considered that buying wheat to make starch, and then to sell it again, was not within the statute, because it was not bought for the purpose of sale, but to be first *altered by a trade or science*, and then sold again; although Lord Coke was of a different opinion. (o) In another instance a contrary judgment was given: (p) but a third decision coincided with the first case. (q)

Wheat to make starch.

The buying of corn, with an intent to make meal of it, was held not to be within the statute, (r) though there is a decision to the contrary effect. (s)

Corn to make into meal.

It is doubtful whether the purchase of excessive great quantities of barley, although with the intention of converting it into malt, be within the statute. There are two authorities *pro* (t) *et contra*. (u)

Barley to convert into malt.

(o) Owen, 134. Trin. 9 Jac. I.

(p) 2 Brownl. 108. Mich. 9 Jac. I. 1611. *Ferdinando Crosse, informer, v. Westwood.*

(q) Bridg. 5, 6. Trin. 18 Jac. I. *Davison v. Cullier in the city of Norwich.*

(r) Moor, 595, pl. 810. Pasch. 35 Eliz. Anon. Cro. Car. 231.

(s) Owen, 135.

(t) 3 Inst. 196. Cro. Car. 231.

(u) Owen, 135. See a difference, if done in another man's house. Roll. Rep. 12.

Malt (*x*) and *fish* (*y*) were enumerated as articles within the statute of Edward VI. when sold at an unreasonable price.

Salt (*z*) too is now, though not formerly, considered as a victual, as being necessary for the food and health of man, and constantly used to keep wholesome other provisions.

The same change of sentiment has taken place with regard to *hops*, which are now numbered among the necessaries of life. (*a*)

But *apples*, *cherries*, and *fruits*, were not denominated victuals, because they are of a very perishable nature (*b*).

IV. THE PROCEEDINGS TO PUNISH OFFENDERS.

By the old statutes 51 Henry III. &c., the Court Leet is ordered to present forestallers, &c. (*c*). The practice is now obsolete. The present mode of proceeding to punish offenders is by preferring bills of indictment at the sessions or the assizes, or by moving for an information

(*x*) 3 Inst. 196. Hale P. C. 152. Owen. Rep. 135. Roll. Rep. 12.

(*y*) Jones' Rep. 320. Cro. Car. 314. S. C. 2 Bulst. 249. 1 Roll. Rep. 11.

(*z*) 3 Inst. 195. Cro. Car. 231. 1 East. Rep. 157. Contra, per Rolle, C. J. Style Rep. 190. Rex v. Maynard.

(*a*) Cro. Car. 231, and 1 East. 143.

(*b*) 3 Inst. 195. 13 Co. Rep. 189. Baron and Boy's case. Cro. Car. 231. Cro. Jac. 214. Owen Rep. 135.

(*c*) Illingworth on Forestallers, 93.

in the King's Bench. It is usual to proceed by indictment (*d*).

Great certainty is requisite in the indictment; for where a person was indicted for being a common *forestaller*, without stating of what thing with certainty, he had judgment of acquittal (*e*).

It is a question whether, in all cases, it ought not now to be averred and proved that the defendant *intended to injure the public* (*f*); and that the acts complained of were done with an evil design, to raise the price of the article. The weight of reason and authority is certainly in favour of such an averment being absolutely necessary, and consequently that the fact must be proved. For wherever a bad intent is essential to the completion of a crime, it must be averred in the indictment, and proved at the trial. Evidence.

The cases that have been decided upon this subject, which are not of any use in illustrating the positions of the common law, have been collected together in a note (*g*), to make this summary of the law complete.

(*d*) For Precedents, see 2 Chit. Crim. Law, from 527 to 538, and also 1 East 167. Hand. Prac. 166. Cro. C.C. 205. 6 Went. 7 Burn J. Forestalling. Williams J. Forestalling. 2 Starkie 653-656.

(*e*) 29 Assize, p. 48.

(*f*) 2 Chit. Crim. Law, 527. n. and see 6 East, 473. 2 East, P. C. 1021. Andr. 162.

(*g*) Smith *q. t. v* Bointon, Bridg. Rep. 48, 9, technical objections to an information for ingrossing.—The Queen *v*. Ingersell, Cro. Eliz. 309, information on 3 and 4 Edw. VI.,

It will be proper to enumerate those decisions that affect an indictment at common law. It appears by an old case (*h*), that a feme covert could not be an engrosser; and, if indicted, her husband must be joined.

When the *quantity* engrossed was expressed by the word *cumulus* (*i*), or by the words *magnos et excessivos numeros volucrum ferarum mortuarum*, (*j*) and by *magnam quantitatem* stra-

for buying cattle out of the market.—Anon. Latch. Rep. 192. That an action on 3 and 4 Edw. VI. for buying cattle alive cannot be brought in the Sheriff's Court.—Johnson's case, Cro. Jac. 609. Indict. on 13 Richard II. c. 8, and 4 Henry VIII. c. 25, against an innkeeper for selling oats at an unreasonable price.—Anon. Godb. Rep. 131, information on 5 and 6 Edward VI. c. 14, for ingrossing seed corn.—Martia Van Hubeck's case, 2 Leon. Rep. 39, information on that statute bad for not following its words.—On the 5 and 6 Edward VI. c. 14, several other cases now unimportant might be referred to, as that the penalty might be recovered in any court of record, *Arg.* In Robert Scarlet's case, 12 Co. Rep.; that the forfeiture might be mitigated, *King v. Wray*, 1 Roll. Rep. 194; that licences were a justification, *Dawkes v. Hill*, Mod. 879. Anon. Hoy. 27. *King v. Carter*, 2 Roll. Rep. 33, and that it need not be alleged in the information that the defendant had it not by demise, grant, &c. *Bedoe v. Alpe*, Sir William Jones, 156, and see *Hard.* 231. As to the judgment, see Anon. 2 Roll. Rep. 400. Information against a poor woman for buying fish, Anon. 1 Show. Rep. 292. Holt. Rep. 328. s. c.

(*h*) 2 Keb. 468, 9-479, 503. Hil. 20 & 21 Car. 2. in B.R. *K. v. Fenner*.

(*i*) 2 Buls. 317. Hil. 12 Jac. I. in B. R. 1 Roll. Rep. 134. S. C. *K. v. Whider*.

(*j*) *Ld. Haymond*, 475. *Rex v. Foster*, Cro. Car. 380. 6 Mod. 32. Anonymous.

minis et fœni, the proceedings were respectively quashed for uncertainty, although the words *magnam quantitatem frumenti* were in one case allowed to be sufficient (*k*).

The same doctrine was recognized in a later case (*l*), in which the indictment was preferred for engrossing a great *quantity* of fish, geese, and ducks.

To an indictment in 5 and 6 Edward VI., for engrossing, exception was taken that the venue was laid in London, although the sale was in Surry. It was ruled in a special verdict that it was well enough (*m*). Venue.

After conviction and before judgment, if any length of time intervene, the defaulter will be committed, unless the prosecutor consent to his being admitted to bail (*n*).

Different kinds of punishments were, by particular statutes, denounced against forestallers, engrossers, and regrators. These crimes being now punishable by indictment at common law, all offenders are liable to be fined and imprisoned (*o*). Judgment.

Where an information was against several, and one only was found guilty, and the others were acquitted: the judgment, after much discussion, was given against him (*p*).

(*k*) 6 Mod. 32.

(*l*) *K. v. Gilbert*, 1 East, 583. and see 1 Stra. 497. and 2 Hawk. c. 25. s. 74. See Hawk. B. 1. c. 18. s. 25.

(*m*) *K. v. Copland*, Comb. 3. *K. v. Gaul*, 1 Salk. 372.

(*n*) 1 East, 159.

(*o*) 1 Hawk. P. C. c. 80. s. 5.

(*p*) Lane 59. Trin. 7 Jac. 1.

BOOK II.

ON PATENTS FOR INVENTIONS.

CHAP. I.

INTRODUCTION.—OF A PATENT GENERALLY.

THE manner in which our Sovereigns, mistaking the extent of their prerogative, created monopolies, and the pernicious consequences which flowed from those grants, have been explained in the first Book of this Treatise. It was there stated, how the limitation of the power of making grants of exclusive privileges was defined by the common law, and how the exercise of it was moderated by the prudent determinations of the judges.

One species of monopolies, it has been shewn, are those, which, although founded on grants, are allowed by statute law. From that source the **LAW OF PATENTS FOR INVENTIONS** spring: It is a branch of the law, in its nature and consequences as pleasing to consider, as that of the first book was irksome. For although they are monopolies, yet they are very limited ones; and are as beneficial in their effects, both to the inventors and to the community, as the old kind were detrimental to the best interests of the state.

Patents at
Common
Law.

The common law, however, is not altogether silent on the question of Patents for Inventions. All monopolies were declared generally to be void. The grants of the crown were, at common law, construed with the greatest strictness. Yet, even by that law the King had the power of conferring on the *inventor* of any useful manufacture or art the exclusive power of using or vending it for a *reasonable* time (a).

Patents by
Stat. of 21
James.

But the law of patents for inventions, as it now stands, rests for support on the statute of 21 James (b).

After a declaration that all monopolies are void, it is, by the *sixth* and principal section of that act, enacted, "That any declaration before mentioned shall not extend to any letters patents and grants of privilege for the *term* of *fourteen years* or under, thereafter to be made, of the sole working or making of any manner of *new manufactures* (c) within this realm, to the *true and first inventor* (d) and inventors of such manufactures, which *others* at the time of making such letters patents and grants *shall not use*, so as also they be *not contrary to the law*, nor mischievous to the state, by raising prices of commodities at home, or *hurt of trade*, or *generally inconvenient*. The said fourteen years to be accounted from the date of the first letters patents, or grant of such privilege thereafter to

(a) 3 Inst. 181. 2 Hawk. P. C. 293, B. I. c. 79. s. 20. Noy 182. ante. 10.

(b) 21 Jac. I. c. 3. ante. 14.

(c) Post, Chap. 3:

(d) Post, Chap. 2.

be made, but that the same shall be of such force as they should be, if that act had never been made, and of none other."

This statute has always been considered as merely *declaratory* of the common law prerogative of granting patents: but the acknowledged power of the Crown was so seldom exerted in favour of the inventor of a useful manufacture, that the legislature was compelled at once to put an end to the licentious and grievous monopolies, and to hold out encouragement to the ingenious artist.

Encouragement
of artists.

The necessity of some legal provision, to secure a reward to those who would exert their abilities, employ their time, and spend their money in the production of something new and useful to the community, was apparent to every one. But the question as to what kind of protection is the most proper to be afforded to the inventor, has since given rise to much discussion. It seems but just that he, who informs the public of a new method of increasing their wealth, should gather for himself the first fruits of his ingenuity and labour. Hence the great and almost certain remuneration given by the statute of James,—that an inventor shall have a limited monopoly in his own manufacture,—is the most appropriate recompence that can be awarded to him; for, in proportion as the invention is valuable to society, will the amount of his own profits increase.

Upon this statute numerous observations, as to its *policy* and the construction it ought to receive, have been made by learned men, many of them

Policy of
stat. 21
Jac.

differing in opinion. Whilst some have thought it a very wise and useful measure, others have described it as oppressive to inferior tradesmen. Of its policy nothing can be said in a legal treatise. The opinions, as to the kind of *construction* which it ought to receive, will be noticed when those parts of the subject to which they apply are mentioned; and the whole of them will be collected together, when the rules for the construction of the statute of monopolies, as it relates to patents for inventions, are expounded (*e*).

Condition
for the
specifica-
tion.

This important statute, marking out the boundary to which the royal grants should in future extend, left the terms on which they might be obtained, to be settled at the pleasure of the Sovereign. In the reign of Queen Anne a condition was introduced into the patent: that if the inventor did not by an instrument under his hand and seal *particularly describe* (*f*) and ascertain the nature of his invention, and in what manner the same was to be performed, and also cause the same to be inrolled in Chancery within a certain time (generally one month) therein mentioned, then the letters patent, and all liberties and advantages whatsoever thereby granted, should utterly cease and become void.

By thus obtaining an exact statement (*g*) of the nature and use of the invention, the public

(*e*) Post, Chap. 6.

(*f*) Post, Chap. 4.

(*g*) The description must be very correct. Even a slight inadvertent omission will, it appears, (post, ch. 4.) invalidate

are benefited, and have an equivalent for this limited monopoly. The instrument containing this required description is called **THE SPECIFICATION**.

Though the power of the King to create monopolies was closely defined by the statute of James, and grants of them in future were to be made only to the authors of new inventions; yet there is not any clause or enactment, by which the subject can *demand* them as a *right*. This great encouragement to industry, this fruitful source of wealth, is still the free gift of the King. It emanates from him as *the Patron of Arts and Sciences* at the humble request of his subject; and it is as a gracious favour that he extends this protection to the inventor.

No right to demand patent.

All grants from the crown are matters of public record (*h*), as being *the deeds of the first magistrate*; and are next in dignity to the acts of the state. They are either in the form of

The grants of King by letters patent.

the grant. A man, whose thoughts have long dwelt on the same subject, overlooks many things forming part of the manufacture which lead him to the invention. It is therefore often very prudent to call for the skill, experience, and unprejudiced judgment of others, to enable him to make a good specification. The Editor of the **REPERTORY OF ARTS, new series**, a work in which the specifications of new patents are monthly published, and which also contains much useful information respecting new inventions and improvements in the Arts and Sciences, professes, by an advertisement attached to it, to assist inventors in making a correct specification, and to be otherwise of use in obtaining the patent.

(*h*) Dr. and Stud. B. 1. d. 8.

charters, or letters (*i*). These letters are either open, and thence called *Literæ Patentæ*, being addressed to all his Majesty's subjects; or else close, *Literæ clausæ*, addressed to particular persons. It is by the letters patent, that grants of the sole privilege and exclusive property in inventions are made.

Offices for patents.

To prevent grants of this description from being surreptitiously obtained, numerous offices are established, communicating in regular subordination. In them the proceedings are narrowly inspected by the King's law officers, before they are sanctioned by the royal authority; and that the great seal may not be affixed without the utmost caution being used, and due consideration given to the subject of the grant, the letters patent must first pass by the dilatory and expensive method of *bill* (*k*).

The parts of a patent.

The clause in the patent by which the specification is required has been given (*l*). It is thought that a short description of the several parts of the patent will make the different bearings of patent law more readily seen, and the numerous rules respecting it more easily comprehended.

In the patent (*m*), after a recital of the petition and its prayer, it is stated that his Majesty, of his special grace, certain knowledge, and mere

(*i*) 2 Bla. Com. 346.

(*k*) Post, Chap. 5.

(*l*) Ante. 46.

(*m*) For a patent at length with all its clauses see Appendix.

motion (*n*), has given and granted the matter requested by the petitioner. That he, his executors, administrators, or such others as they shall agree with, shall lawfully make, use, and vend the invention, during the time therein expressed, (generally fourteen years,) within that part of the dominions in which the inventor has petitioned to use it. It then goes on to command that all persons, bodies politic and corporate shall not dare to imitate the same, or make any addition to or subtraction from it, without the licence (*o*) of the petitioner, his executors, administrators, or assigns, in writing under his or their hands and seals; disobedience subjecting them to the punishment for a contempt, or to be proceeded against in an action at law (*p*). It also directs that mayors, sheriffs, &c., and all other the King's officers and ministers, shall not molest the patentee in the exercise of his invention.

There are several regulations connected with the grant that are mentioned in the patent, the non-observance of which will render it void (*q*). If it should appear to the King, or any of the privy council, that the grant is contrary to the provisions (particularly the sixth section) of the statute of monopolies, or that it leads to the use of any invention protected by a prior patent, or that the patentee or his representative has transferred or divided it into shares, or declared any

Matters
which
make it
void.

(*n*) In the old grants *speciali gratia, certa scientia, et mero motu*.

(*o*) See post, chap. 7.

(*p*) See post, chap. 8.

(*q*) See post, chap. 9.

trust of it, to or for any number of persons exceeding the number of *five*, or those five have presumed to act as a corporate body, or in any wise contrary to an act of Parliament therein recited, respecting assurances of ships and merchandize, then the patent is to be declared to be void.

In the construction of this proviso executors or administrators, however numerous they may be, are collectively to stand in the place, and to be considered as and for the single person whom they represent (r).

Then comes the proviso for the particular description or specification of the invention to be made in a given time.

And lastly, it is granted that the letters patent shall be *construed* (s) and adjudged in the most *favourable* and beneficial sense for the best advantage of the grantee, notwithstanding any defective and uncertain description of the nature and quality of the invention, and of its materials.

Which instrument the PATENT is the *formal*, as the SPECIFICATION is the *substantial*, part of this limited monopoly.

Division
of matter
respecting
patents.

Whence it appears that the most logical order in which the matter of this book on patents can be arranged, will be to begin with investigating the law respecting the *true and first inventor*, the *subject* of his invention, and the nature of the *description* which he must give to the public to secure his limited monopoly. Having exa-

(r) See post, chap. 7.

(s) See post, chap. 6.

mined the contents of the grant, it will then be the best time to set forth the *mode of obtaining it*. Being once in possession of the patent, the questions as to its *construction* and the *property* in it will arise. And then will follow the *remedies* which may be resorted to by an inventor, if he suffer any injury from an infringement of his right. And lastly, the method by which the public *may deprive him* of the grant, if it be not a good one in law, will be examined.

CHAP. II.

OF THE INVENTOR.

THE most important business of an enquiry into the laws respecting patents for inventions, is to obtain an accurate knowledge of the following questions :—Who is he that has found out something new, or who is the *inventor* of the subject? What is an invention, or a proper *subject* for a patent? How is the thing to be described, or the *specification* to be made? These topics claim particular attention, and therefore a Chapter will be devoted to the examination of each of them.

In prosecuting the investigation of the first question—who is the person that the law will adjudge to be *the true and just inventor* of a manufacture, within the meaning of the statute—the decisions will lead to the consideration of,—

- I. A *discoverer* of a new thing (*a*).
- II. A *publisher* of an invention.
- III. An *introducer* of a foreign invention.

I. A DISCOVERER OF A NEW THING.

That a *discoverer*, or he who *first finds out*

(*a*) Since the word "*inventor*" has in patent-law several distinct meanings, it is thought that this Treatise will be rendered more intelligible if that word is made a *generic term*, and if to each of its meanings a separate name be given.

a thing, of which a limited monopoly may lawfully be granted, should have the advantages accruing from it secured to him by patent, if he apply for it, is one of the fundamental maxims of this branch of the law.

But, to prevent abuse, the protection which the laws afford to this species of monopoly is strictly watched. No person, who has not without assistance formed the original idea of the subject in his own mind, will be enabled to keep any patent which he may have obtained.

If the principle of the invention be taken from a *scientific work* (b), the patentee is not an *inventor*.

Nor will he be entitled to hold the grant, if he has in any manner been *informed of the secret* by another person in England. Mr. Tennant (c) had a part of the process, indispensable in rendering the subject of his patent of any utility, suggested to him by another person. It was therefore determined that he was not the inventor.

In vain it will be urged that the patentee has embodied the principle, that the method of reducing it to practice is his own discovery, and that great genius has been exerted to form the subject.

In the great case of the *King v. Arkwright* (d),

(b) Post, *King v. Arkwright*, printed cas. 182. Dav. Pat. Cas. 129. And see *Hill v. Thompson*, 2 B. Moore 456.

(c) Dav. Pat. Cas. 429.

(d) Mr. Arkwright's machine consisted of ten distinct parts. It may be useful to know the opinion of Mr. Justice Buller on each of them, with references to the printed case.

the point was agitated,—whether the machine for which the patent had been granted, was invented by Mr. Arkwright—it was satisfactorily proved, that every part which was not *old*, or had not been *used* for the same purpose to which it was then applied was either not *material* or not *useful*. It was therefore determined that he was yet the inventor of a new manufacture.

II. A PUBLISHER OF AN INVENTION.

If two persons severally discover the same thing, the one who obtains a patent for it, before the other has made the matter public, will be adjudged to be "*the true and first inventor*," and be entitled to hold the grant. This rule is necessary to insure an early production of the efforts of genius.

An objection was raised to the patent of Dolland (*e*), that he was not the inventor of the

No. 1. The beater, taken from Emerson's book, p. 182. No. 2. The iron frame, not new, if used, p. 182. No. 3. The feeder, invented by John Lees, p. 183. No. 4. The crank, not new, p. 183. No. 5. The filleted cylinder, not new, p. 185. No. 6. The rollers, not new, p. 185. No. 7. The can, if new, not material and useful, p. 186. No. 8. A machine for twisting, and No. 9. A spindle and flyer, never used, p. 186. No. 10. A regulating wheel, not used, p. 187. And see *King v. Murray*, Rep. of Arts, Vol. III. N. S. p. 235. The patent was for improvements in the construction of air-pumps. Messrs. Boulton and Watt proved that they had used every one of the parts which it was pretended were new, and the verdict was given for the Crown to repeal the patent.

(*e*) In *Boulton v. Bull*, 2 Hen. Bla. 487. The patent

new method of making object-glasses, for that Dr. Hall had made the same discovery a long time before. It was held, however, that, inasmuch as the public were not acquainted with it, Mr. Dolland must be looked upon as the inventor. He was not only a *discoverer* of it, as well as Dr. Hall, but he was the *first publisher*.

This doctrine was confirmed in the late case of *Forsyth v. Reviere* (*f*), in which it was held that, if several persons *simultaneously discover* the same thing, the party who first communicates it to the public, protected by a patent, *the publisher*, becomes the legal inventor, and is entitled to the benefits to be derived from the invention.

It is therefore necessary that a *discoverer*, who does not wish that a grant should be obtained, either by himself, or by any other person finding out the same thing, should immediately make his discovery known. But if he has a desire to enjoy the advantages which may arise from the sole use of the invention by himself, he will act with prudence, if he procure

granted to Mr. Dolland, was for an invention of a new method of making the object-glasses of refracting telescopes, by compounding mediums of different refractive qualities; whereby the errors arising from the different refrangibility of light, as well as those which are produced by the spherical surfaces of the glasses, were perfectly corrected. *Buller, J.* The point contested in Dolland's case was, whether he, or Dr. Hall, was the first and true inventor within the meaning of the statute; Hall having first made the discovery in his own closet, but never made it public, and on that ground Dolland's patent was confirmed.

(*f*) Chitty, Jun., *Præc. of Crown*, 182. n.

a patent *immediately* before the matter can be divulged by another person.

III. AN INTRODUCER OF A FOREIGN INVENTION.

The sixth clause, and indeed the whole of the statute of monopolies, being made for the benefit of the subject, has been construed in his favour.

If the objects of patents are new in England, they certainly come within the equity of a statute, by which it was intended to encourage new devices that might probably prove useful and beneficial to the kingdom. Whether the invention was learnt by travel, or produced by study, the intention of the legislature is equally fulfilled; and therefore, soon after the passing of the Act (g), a patent, granted for something which had been practised beyond the sea, was held to be good and valid.

This construction has ever continued to be put upon that clause. It was confirmed by a late case (h), in which it was declared to be good law.

Upon the whole, then, the character of an inventor may be obtained by a person in three ways, by bringing with him and publishing to his countrymen the productions of the genius of foreigners; by publishing what others as well as himself may have found out at home; or by publishing what he alone has discovered.

(g) *Edgeberry v. Stephens*, 2 Salk. 477.

(h) *Wood v. Zimmer*, Holt. N. P. C. 58.

CHAP. III.

**OF A NEW MANUFACTURE; OR, THE SUBJECT OF
A PATENT.**

THE statute of monopolies having been made for the encouragement of commerce, the word "manufacture" has received a very extended signification (*a*). It has not indeed, as yet, been accurately defined; for the objects, which may possibly come within the spirit and meaning of that Act, are almost infinite.

That the principles upon which a great variety of things have been declared to come within the design and to claim the protection of that statute may be clearly understood, it will be proper to divide the manufactures into their several kinds.

An arrangement, at once simple and correct, could not easily be suggested; it is therefore hoped that the following classification of them will assist in the present enquiry, and that it will also be found useful in elucidating the rules for making out the *specification* of patents. There is not any thing which conduces so much towards rendering a description of a manufacture, concise

(*a*) A summary of what things come within the words "new manufacture" will be found given by Eyre, C. J. in 2 H. Bla. 492.; by Dallas, C. J., in 2 B. Moors, 448.; by Eldon, C., in 3 Meriv. 629.; by Abbott, C. J., in 2 Barn. & Ald. 349.

yet clear, as a knowledge of the several objects of patents, in their kinds distinct from each other(*b*).

A new manufacture may be,

- I. A *substance*, or thing made.
- II. A *machine*, or instrument.
- III. An *improvement*, or addition.
- IV. A *combination* or arrangement of things already known.
- V. A principle, *method*, or process, carried into practice by tangible means.
- VI. A *chemical* discovery.
- VII. A *foreign invention*.

I. A SUBSTANCE, OR THING MADE.

A *substance* appears peculiarly to have been contemplated by the legislature, as the most proper object for a patent. "A manufacture," says Lord Kenyon, "is something made by the hands of man." (*c*)

Therequi-
site quali-
ties of a
manufac-
ture.

But it is not for every substance, nor for every thing which is discovered, that a patent can be obtained and supported. It must be *new*, or it will come within the purview of the former part of the statute of James against monopolies. It must, by the words of the act, not have been *used*. It must be *vendible*; or, not being re-

(*b*) It will be noticed that this arrangement is not *strictly logical* as to the several kinds of manufactures; but that it has been formed with a view to illustrate the reported cases, and for the sake of simplicity in the observations on them.

(*c*) 8 T. R. 99.

quired in trade, it cannot be a proper object for protection. It must be *perfect in itself*, and the means must be adapted to the end, or the public will not receive any benefit from it ; at least, the barter between them and the monopolist will be greatly in favour of the latter. In its effects it must be *useful* and beneficial, or it will be unworthy of notice.

These are the *primary qualities*, and are not peculiar to any one species of manufacture, but must be found in every discovery for which a patent is sought. These properties may be considered as the TEST by which the fitness of an invention to support a patent may be ascertained. (*d*)

Before the several kinds of manufactures are particularly described, it will therefore be proper to investigate the exact nature and extent of those qualities which are common to all of them.

Every manufacture within the meaning of the statute must, at least, be

1. *New.*
2. *Not used* before,—neither
 1. By others,—nor
 2. By the inventor.
3. *Vendible.*
4. *Useful.*

Some incidental properties, as that the means must be adapted to the end intended to be produced, will be best understood, if examined when treating of the *specification*.

1. Must
be new.

Not only must the subject be *new*, in the common acceptation of that word, as to the world in general, but it must not be copied from a *scientific work*. The beater in Mr. Arkwright's machine was taken from *Emerson's book*. (e)

Though it may be learned abroad, (f) yet it must not be suggested by a friend at home. (g)

And where the patentee claimed the exclusive liberty of making lace, composed of silk and cotton thread mixed, and not of any *particular mode* of mixing them; upon its being clearly proved and admitted that silk and cotton thread had before that time been mixed on the same frame for lace in some mode or other, the patent was declared to be void. (h) There was not any thing particularized which was a novelty.

A patentee *summed up the principle* (i) in

(e) Ante, 53. *Rex v. Arkwright*, Printed Case, 182. Dav. Pat. Cas. 129., and see *Repertory of Arts*, N. S. 27th Vol. 252. The question of novelty arose in *Manton v. Manton*, Dav. Pat. Cas. 333; see 2 B. Moore, 456. and *Branton v. Hawkes*, 4 B. & A. 541.

(f) *Edgeberry v. Stephens*, 2 Salk. 477.

(g) Ante, 53. *Tennant's patent*. Dav. Pat. Cas. 429.

(h) *King v. Else*, Bull. N. P. 76. Dav. Pat. Cas. 144.

(i) *Rex v. Cutler*, 1 Stark. N. P. C. 354. and see 3 Mer. 629. The defendant stated his invention to consist of a new mode of feeding the fire in a grate. The fuel necessary for supplying the fire was introduced at the lower part of the grate, in a perpendicular or oblique direction. The manner of performing it was set forth in the description and drawings annexed. It was proved that grates had been made prior to the date of the patent upon the same principle, although they did not possess all the advantages of this patent one. The effect was produced in the old ones by con-

which his invention consisted, but did not set forth any instrument, or any new particular mode of applying that principle. The patent was in consequence adjudged to be void for *want of novelty*, although the application of the principle, as described in the specification, was new.

If the subject has been published, though un-remarked, among other things, it is not new; for no man can appropriate the invention of another person. And if the effect has been produced by a similar method, it is known in law. (k) If a contrary rule were to prevail, it would be impossible to say what publication of a fact should take away its novelty, and prevent its becoming the subject of a patent.

When the objects of two grants are substantially the same, they may both be valid, if the modes of attaining the desired effect are essentially different. (l)

It is expressly provided by the statute of James 2. Must not have been used.
that the subject fit for a patent must be one

tracting the grate, whilst in the new ones the grates remained of the same size. In both, the coals were *wound up from below* the grate.

(k) *Hare v. Harford and Taylor*, C. P. 14 July, 1803. *Repertory of Arts, N. S.*, 3d Vol. 232. By the invention, in brewing beer the essential oil of hops was preserved, and the water boiled. The water had been boiled by a *similar method*, which *must necessarily* have preserved the oil, although not intended to do so. And see *Manton v. Parker*, *Dev. Pat. Cas.* 330.

(l) *Huddart v. Grimshaw*, *Dev. Pat. Cas.* 290.

“which others at the time of making such letters patent and grants shall not use.” (m)

It must not have been used, either by *other persons*, or by the patentee himself.

Used by
others.

It has been stated, that if several persons about the same time discover the same thing, that he is accounted the inventor who makes the first communication of it to the public. (n) Thus it was considered by the Court that Dr. Hall had not *used* his discovery of the object-glasses, because he had not made it known; and that the mere knowledge of the fact, without its being published, was not *a using* within the meaning of the statute, so as to render Dolland's patent void, as one granted to a person who was not the real original inventor of the subject of it.

It has been seen (o) that the circumstance of several parts of Arkwright's machine having been *used* before the grant was obtained, weighed very strongly with the judge who tried the validity of his patent.

But if the secret of an invention be known only to a few persons, and one of them put it in practice and make an actual use of it, then a patent afterwards obtained by any one of them is void. This happened to Mr. Tennant, (p) whose grant was declared to be invalid, because

(m) 21 Jac. I. c. 3. s. 6.

(n) Ante, p. 54. And see 2 Hen. Bla. 487.

(o) Ante, p. 53; in note, printed case, 50, 182, 861. Dav. Pat. Cas. 129, 139, and see 2 B. Moore, 452.

(p) Dav. Pat. Cas. 429.

a bleacher, who had not divulged the secret to any other person but his two servants, had however used the same kind of bleaching liquor for several years anterior to the date of the patent.

An example is given by Mr. Davis *(q)* that seems to be a little at variance with this general rule. A person who sought a patent for making spectacles, incautiously told an acquaintance of the principle of the invention; by which means a person of the same trade immediately made a similar pair. The discoverer saw them in the shop window and employed a friend to purchase them for him. The patent passed the Great Seal a few days afterwards, and thus it is said "that his patent was rendered secure." It does not appear that this patent ever came before the Court. There are many reasons which may, it is conceived, be assigned why the grant would not be good in law. By the imprudence of the discoverer himself two persons at least became acquainted with his invention before the patent was sealed, and one actually made the article, and exposed it to sale. The moment the third person bought it, he, as one of the community, took possession of it. It was then made public, if it had not become so by the exposure to sale. It is difficult to imagine upon what principle this publicity could be done away with; certainly not by the gift of it back to the discoverer. There was knowledge of the secret,—an

(q) Dav. Pat. Cas: 445.

actual making,—and a public sale, by a person who was not the patentee. (r)

Used before patent obtained.

Not only is it required that the subject shall not have been *publicly used*, but the patent will be void if the inventor had made any use of it himself prior to the time of obtaining his grant. Thus, the patent for British imperial verdigris, (s) because the inventor had, for four months prior to the sealing of the grant, sold the article under a different name, was, in consequence thereof, declared to be void.

Experiments.

Whether *experiments* made with a view to try the efficacy of an invention, or the full extent of a discovery, are a *using* within the meaning of the statute of James has not yet been decided. (t)

(r) See *Wood v. Zimmer*, 1 Holt. N. P. C. 60.

(s) *Wood v. Zimmer*, 1 Holt. Rep. N. P. 58. S. C. in *Repertory of Arts*, N. S. 27th Vol. 171. under the names of *Wood v. Zimmerman*. This patent was for a new mode of making verdigris, to be called British Imperial Verdigris. It was one objection to it that the article was not new at the time of the patent; inasmuch as the patentee had previously sold it. Gibbs, C. J.—This question is somewhat new. Some things are obvious as soon as they are made public. Of others the scientific world may possess itself by analysis. Some inventions almost baffle discovery: but, to entitle a man to a patent the invention must be new to the world. The public sale of that which is afterwards made the subject of a patent, though sold by the inventor only, makes the patent void. It is in evidence that a great quantity was sold in the course of four months before the patent was obtained, and that the patentees were in the habit of selling his manufacture. His Lordship left it to the jury to say whether the invention was in public use before the patent was granted. The jury found in the affirmative.

(t) See *Hill v. Thompson*, 2 B. Moore, 457. A bill was

It would be very difficult to say how much a substance or machine might be used by way of experiment before the patent is obtained, without running a great risk of invalidating the grant.

The subject of a patent must be *vendible matter*. It seems reasonable that it should be something capable of being bartered in commerce,—or some substance in contradistinction to any thing that is to be learnt by practice. If it cannot be *sold*,—upon what principle can it reasonably claim protection from a statute made for the encouragement of trade and commerce?

s. Must be vendible.

There is not a case expressly decided on this point: but it is a fundamental proposition, which will be of great assistance in ascertaining what *methods* or processes may be denominated *new manufactures*: and therefore the dicta of the judges respecting it have been collected.

Heath J. said (*u*), “The term manufacturer precludes all nice refinements: it gives us to understand the *reason* of the proviso, that it was introduced for the benefit of trade; and that the subject ought to be that which is *vendible*; otherwise it cannot be a manufacture.” “It must be for the *vendible* matter, and not for the principle.”

Kenyon, C. J. “I have no doubt in saying that this is a patent for a manufacture, which I understand to be *something made by the hands*

introduced into Parliament last sessions to protect persons making experiments. It was thrown out on the second reading.

(*u*) 2 Hen. Bla. 482.

of man." An opinion that strongly impresses the idea of its being something *vendible* (x).

And in the *King v. Wheeler* (y) Abbott, C. J. observed, that the word "manufacture" had been *generally* understood to denote either a thing made, which was useful for its own sake, and *vendible as such*, as a medicine, a stove, a telescope, and many other things, or to mean an engine, or instrument, or some part of an engine or instrument, to be employed either in the making of some previously known article, or in some other useful purpose, as a stocking frame, or a steam engine for raising water from mines.

4. Must be material and useful.

The number of patents that have been cancelled for not being *beneficial* to the public is very small; although it is always distinctly left to the jury to say, whether the invention is a material and useful manufacture (z).

(x) 8 T. R. 99.

(y) 2 Barn. and Ald. 349, 350.

(z) *Hill v. Thompson*, 2 B. Moore 450-454. 3 Meriv. 629. and see *King v. Arkwright*, where it is said that the stripes on the fillets, if new, were not material enough to support a patent. Printed Case, 185. Dav. Pat. Cas. 135. and see id. 186. id. 138. *Buller, J.* Then the seventh article is what they call the *can*. *Holt*, (a witness) says, the only difference between the two, the spinning machine, and the present roving machine, is, that the latter has a can; and indeed, that, at one time, was admitted by the counsel for the defendant. If it be so, it brings the case to a short point indeed; for, if nothing else is *new*, the question is, whether it is *material* or *useful*? The witnesses upon the part of the prosecution say, it is of no use at all. In the first place, they had that before which answered the same purpose, though not

An inventor may honestly imagine that there is utility in his discovery when there is not. Few men would risk the expense of obtaining a patent for an article, which they knew to be useless, when it is evident that their reward, depending on the sale, could not possibly be great, unless the manufacture was beneficial to the community. But it is not difficult to conceive that a person might endeavour to monopolize a known article of trade, by a patent for some immaterial alteration or addition to it, on the speculation that the public would give him credit for the patent article being superior to the old one. To prevent such deceit, this general rule is laid down, *that the new manufacture or subject must be material and useful.* It must, *of itself*, be a thing of some consequence in commerce. Although, as Lord Ellenborough observed (a), in

made exactly in the same form; it was open at top, it twisted round, and laid the thread precisely in the same form, and had the same effect this had; so if it was new, it is of no use. But they say it is not new; for, though it was not precisely the same shape, in substance it was the same thing, that is not contradicted.

That part also stands without any contradiction upon the part of the defendant; for the defendant's witnesses satisfy themselves with telling you they think it intelligible, and it might do without the roller, though it might not be so effectual as with the roller. It is admitted by several it could do without, that appeared from the experiment made. They shewed you by one of the engines, how it did with the roller, and how without; and that it was done without, just the same as with it.

(a) *Huddart v. Grimshaw*, Dav. Pat. Cas. 297, 298 See post. 73, n.

every department of science there are some things which are common and cannot be appropriated, and if one elementary thing be substituted for another, and make an important improvement (as if that be done by a tube which was before done by a ring,) a patent for the improvement would be good, for it is a substantive invention: yet in general the substitution of one *material* for another in making a manufacture is insufficient to support a patent (*b*).

(*b*) Walker v. Congreve, Eq. July, 1816. Repertory of Arts, 29th vol. p. 311. Sir J. Leach Vice-Chancellor, said, Though new, the invention, which was a *barrel* for carrying gunpowder, was not of such a nature as to come within the statute of monopolies; and did not exhibit such proof of skill and invention as entitled it to the protection of that law, which encouraged the exertions of genius by enabling its possessors to reap more exclusively its reward.

Every thing was not an invention worthy of a patent; nor could every original former of a machine be called an inventor.

Every novelty was not an invention entitled to the protection of the statute. A new principle must be discovered; skill and ingenuity must be exerted to entitle an inventor to a patent, the making of an old machine of new materials could not be a discovery, and the plaintiff could claim no protection for an invention, the only merit of which consisted in being made of brass instead of wood. When tea was first introduced into this country, earthenware teapots were used;—but could a person, who made the first one of silver, be entitled to a patent, restraining all his fellow-subjects from using silver teapots, except those bought of him.

Next it was said that the form was new: but was the invention of *making a barrel like a cylinder* worthy of being protected by the statute of the monopolies? Well, but said the patentee, my barrel is strengthened with *hoops*. And was it a new thing displaying great ingenuity to strengthen

If a contrary rule were to prevail, a patent might be obtained for a thing, which, in itself, is a mere curiosity. And one great mischief at least would arise; for a person, who, applying this thing, trifling in itself, to an invention of his own, might thus produce something beneficial to the community, would be prevented from availing himself of the use of it for several years.

In the case of *Manton v. Parker* (c), the question of *utility* was considered. By means of a perforation in the hammer of a gun, it was specified, that the air formerly confined, would escape, but that, at the same time, the powder would be secured. On experiment it appeared that the powder passed as well as the air. The *utility* of the invention, and the purpose of the patent thus *failing*, the plaintiff was nonsuited.

The same point was again agitated in the case of *Brunton v. Hawkes* (d), and received the same determination.

a barrel with hoops? Was the *circular aperture* a great invention? No, but the method of shutting was new. And what was the novelty of placing upon a circular aperture a common pot lid? What was new was *unimportant*.

(c) Dav. Pat. Cas. 332, and see *Manton v. Manton*, Dav. Pat. Cas. 348.

(d) 4 Barn. and Ald. 455. and see same Case in REFERT. OF ARTS, N. S. vol. 37. p. 105. *Bayley, J.* Could there be a patent for making in one entire piece what before had been made in two pieces? I think not: but if it could, I think that still this would not be new. In the mushroom and the adze anchors, the shank is introduced into the anchor by a hole in the centre of the solid piece; and in reality, the adze anchor is an anchor with one fluke, and the double fluke anchor is an anchor with two flukes. After having

II. A MACHINE OR INSTRUMENT.

From the consideration of substances, it is easy to direct attention to the means by which some new or old thing may be made. Though a man cannot have a patent for making an article of trade by machinery in general terms, yet any particular *machine, engine, or instrument*, used in the production of a substance, is a new manufacture (e).

Peculiar
quality.

It must possess the *properties* which have been shewn to be necessary not only to a substance, but to every other manufacture. One of its qualities must be pre-eminent—it must be very *useful*. If the article that is produced by the machine be old, it must be furnished to

had a one-fluked anchor, could you have a patent for a double fluked anchor? I doubt it very much. After the analogies alluded to in argument, of the hammer and pick-axe, I do not think that the mere introducing the shank of the anchor, which I may call the handle, in so similar a mode, is an invention for which a patent can be sustained.

(e) *Boulton v. Bull*, 2 Hen. Bla. 492. and see *Brown v. Moore*, Eq. Nov. 1815. *Repertory of Arts*, 28 vol. p.60. *Eyre*, C. J. It was admitted that the word manufacture was of extensive signification; that it applied not only to things made, but to the practice of making, to principles carried into practice in a new manner, to new results of principles carried into practice. Under things made, we may class, in the first place, new compositions of things, such as manufactures in the most ordinary sense of the word. Secondly, all mechanical inventions, whether made to produce old or new effects; for a new piece of mechanism is certainly a thing made.

the public at a much cheaper rate. The community must receive some benefit from the invention ; and when it is not a new article which is introduced, the old one must, in some respect, be rendered a better commodity for trade.

III. AN IMPROVEMENT, OR ADDITION.

AN addition to or improvement of a manufacture, whether it be of a substance or machine, is considered as a new manufacture in law, and is allowed to be the subject of a patent. So early as in the reign of Elizabeth, in Bircot's case (*f*), it was decided, that if the substance was *in esse* before ; an addition, though it made the former article more profitable, was not a new manufacture.

This doctrine was overruled by Lord Mansfield (*g*) ; who said, that the objection that there can be no patent for an addition, would go to repeal every patent that ever was granted : that it was a question open on the record, and the defendant might move in arrest of judgment. No such motion was ever made, and the decision has ever since been recognized as law.

But the patent must be *confined to the addition* or improvement, that the public may purchase it without being encumbered with other things (*h*).

If the grant extend to the whole, it will be

(*f*) 3 Inst. 184.

(*g*) In *Morris v. Branson*, Bull. N. P. 76.

(*h*) 2 Hen. Bla. 463.

invalid; for the property in the addition or improvement can give no right to the thing that has been improved. Thus in *Jessop's* case (i), the patent was held to be void, because it was taken out for the whole watch, when the invention consisted merely of a single movement. *Huddart's* invention differed from that of *Belfour's*, because the thing which was effected with a ring or circle by the latter person was produced by a tube in the mode of making ropes by the former; and therefore he should have taken his patent for that improvement (j).

(i) Cited by Buller, J. in *Boulton v. Bull*, 2 Hen. Bla. 489,

(j) *Huddart v. Grimshaw*, Dav. Pat. Cas. 265, and same case in *Repertory of Arts*, N. S. 4 Vol. 156, and see *Hill v. Thompson*, 2 B. Moore 451, and ante, 68. The patent in this case was for "A new mode or art of making *great cables* and other cordage, so as to attain a greater degree of strength therein *by a more equal distribution* of strain upon the yarns." It appeared that a Mr. Belfour had invented some machinery which he thought would produce the same effect as Captain Huddart's now did: but it failed.

It was contended that the object of the plaintiff and Belfour was exactly the same, the obtaining an equal stress upon each yarn. That Belfour's machine did not succeed, and the plaintiff's was only an *improvement* of it. That the subject of a bad patent becomes public property; and no person *improving it* can have a patent for the *whole*. Even if the first patent were good, leave to use it must be obtained, and then it may be made the *substratum* of another machine: but the second patent should be for the improvement. *Ellenborough, C. J.* In inventions of this sort, and every other, through the medium of mechanism, there are some materials which are common, and cannot be supposed to be appropriated in the terms of any patent. There are common elementary materials to work with in machinery: but it is the

There appears in the case of *Harmer v. Playne* an exception to this rule,—that the patent should be for the addition, and that it should be kept *distinctly* apart by itself, in order that it may easily be distinguished from the *substratum* to which it has been applied. A patent had been granted to Harmer for a machine, of which he afterwards discovered some improvements. The second grant, in which was described the machine as improved, was of the privilege to make use of and vend “*his said invention,*” which evidently appears at first sight to mean a patent for the *whole* machine. Yet, inasmuch as the second patent *recited* the first, it was held that the grant was *merely* for adoption of those materials to the execution of any particular purpose, that constitutes the invention. And if the application of them be new, if the combination in its nature be essentially new, if it be productive of a new end and beneficial to the public, it is that species of invention, which, protected by the King’s patent, ought to continue to the person the sole right of vending it. But if, prior to the time of his obtaining a patent, any part of that which is of the substance of the invention has been communicated to the public in the shape of a specification of any other patent, or is a part of the service of the country, so as to be a known thing, in that case he cannot claim the benefit of his patent.

Now with respect to the tube it does seem to me, with submission to you, an important difference from the mere circle through which it passes, because it keeps it in a degree of confinement for a greater time, and more certainly obtains the end pointed out. In Mr. Belfour’s specification the same end is to be obtained; and had the patent been taken out for that to be done by a tube, which was before done by a ring or circle, I should have thought the patent good, for that is a distinct substantial invention. I

the addition, and was valid. (*k*) Lord Eldon seemed to lean very much against this patent, when it was before him in Chancery prior to its being examined in a court of law (*l*).

Peculiar
kind of
addition.

A person may take for the foundation on which he intends to erect the superstructure of his improvements, either a thing that has been long known, or one that has lately been made public; either the subject of an expired patent, or that of one which is void (*m*) But if the improvement cannot be used without the subject of an existing grant, he must wait until it is expired. He may, however, at once take out a patent for the improvement by itself, and sell it (*n*). In all these cases he must claim nothing more than the mere *addition*; and it is better to protest against considering any other part of the manufacture being taken as his own invention (*o*).

Peculiar
quality.

The general quality most peculiar to an addition, is, that it must be *useful*. It must be a real substantial improvement (*p*). If the manufacture in its new state merely answer as well as it did before, the alteration is not such an invention as is worthy of a patent (*q*). Buller, J. observed that many parts of a machine may have been known before, yet, if there be any thing *material* and new which is an improvement of the

(*k*) 11 East. 109.

(*l*) 14 Ves. 133, 4, 5.

(*m*) Huddart v. Grimshaw, Dav. Pat. Cas. 271.

(*n*) Ex parte, Fox, 1 Ves. and Beam. 67.

(*o*) Post, Chap. IV. Specification.

(*p*) See ante, p. 66. as to the *utility* of the invention.

(*q*) King v. Arkwright. Printed Cas. 182. Dav. Pat. Cas. 129.

trade, that will be sufficient to support a patent. The only difference between Mr. Arkwright's two machines—the old one for spinning, and the new one for roving, consisted in a *can*. Supposing that the new patent had been obtained for an improvement of the old machine, then the question whether the *can* was absolutely necessary for roving would have arisen (r).

IV. A COMBINATION OR ARRANGEMENT OF THINGS ALREADY KNOWN.

*A combination or arrangement of old materials, when, in consequence thereof, a new effect is produced, may be the *subject* of a patent. This effect may consist, either in the production of a new article, or in making an old one in a better manner or at a cheaper rate.*

This manufacture may be made of different substances mingled together; or of different machines formed into one; or of the arrangement of many old combinations. And there can be little doubt that if a person were to combine the different subjects of several expired patents, he would be the inventor of a new manufacture.

Each distinct part of the manufacture may have been in common use; and every principle upon which it is founded, may have been long known, and yet the manufacture may be a proper subject for a patent. It is not for those parts and principles, but for the new and useful

(r) Printed Cas. 185. Dav. Pat. Cas. 138. See ante, p. 66, n.

compound, or thing thus produced by combination, that the grant is made: it is for combining and using things before known with something then invented, so as to produce an effect which was never before attained (*t*).

If to an old machine, consisting of combinations, an *improvement* (*u*) be made by adding a

(*t*) *Manton v. Manton*, Dav. Pat. Cas. 346.

(*u*) *Bovill v. Moore*: For this case at *Nisi Prius*, see Dav. Pat. Cas. 361. In Bank see 2 Marsh. 211. The plaintiff was assignee of a patent granted to John Brown “for a machine for the manufacture of bobbin lace, or twist net, similar to and resembling the Buckinghamshire lace net, and French lace net, as made by the hand with bobbins on pillows.”

At the trial, *Gibbs*, C. J. told the jury that if they thought Browne had invented a perfectly new combination of parts from the beginning, though all the parts separately might have been used before, his specification would be good. But if they should be of opinion that a combination of a certain number of those parts had previously existed up to a certain point, and that Browne had taken up his invention from that point only, adding other combinations to it, then his specification, which stated the whole machine as his invention, was bad. The jury were of opinion that, up to the point of crossing the threads, the combination was not new; and accordingly found a verdict for the defendants.

Gibbs, C. J. I think a little confusion has been made between a *new machine for making lace*, and *lace made in a new method* by a machine partly old and partly new. In order to try whether it be, or be not, a new machine throughout, we must consider what the patent purposes to give to the patentee, and what privileges he would possess under the patent. Now the patentee is entitled to the sole use of this machine; and whoever imitates it, either in part or in the whole, is subject to an action at the suit of the patentee. Suppose it had been a new invention from be-

set of new combinations, the patent must be for the new combinations only; for then, as in the case of a simple improvement, the patent is granted only for the *addition*. If it be taken out for the whole machine thus combined, it will be void. In all instances of this kind of manufacture the ostensible object of the patent must be the *new combined matter*, and not any part of the old article, materials, ingredients, or machine (x).

There may be, said Lord Eldon, a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials. But, in order to its

ginning to end, and after Browne had obtained his patent Heathcote had made a machine like those which he now makes;—is there any doubt that such a machine would have been an imitation, in part, of Browne's invention? Indeed all the defendant's witnesses agreed in stating that, though the same thought might have occurred to two persons, yet if Browne had seen Heathcote's machine, before he made his own, they should have had no doubt but that, up to a certain point, Browne's was an imitation of Heathcote's. It is not immaterial to consider that the drawing or plans of the machine were divided into six different sections¹⁶, each containing a part of the machine in a different stage of its progress; and that as to one of them, which contained all the principles of the warp, the witnesses said that every part of that section existed in the old machine; and that a machine carried no further than that would have been a very useful invention. How then can it be said that Brown's specification, which described from its root a machine containing a part which was common to Heathcote's, does not contain more than Browne himself invented?

(x) 2 Hen. Bia. 487. Dav. Pat. Cas. 267, 8, 9.

being effectual; the specification must clearly express that it is in respect of such *new combination* or *application*, and of that only, and *not* lay claim to the merit of original invention in the *use* of the materials (*y*).

As to the possibility of combinations and proportions of quantities, times, &c., in a process being legal subjects of patents, mention will hereafter be made (*z*).

Peculiar
quality.

The peculiar quality of an arrangement is its *novelty*. It is the new adoption of the old materials to the execution of any particular purpose that constitutes the invention (*a*). It must also be a substantial and *beneficial* alteration. A slight variation or transposition of parts will not sustain the patent.

V. A PRINCIPLE, METHOD OR PROCESS CARRIED INTO PRACTICE BY TANGIBLE MEANS.

THOUGH a philosophical principle, an elementary truth, simply and by itself, unorganized and known only in theory, cannot be monopolized, yet, (it is said,) *that a principle carried into practice* may be the subject of a patent. It is, (as some observe) not for the principle itself, but for the *method*, mode, manner, or process (founded on that principle) by which a

(*y*) 3 Meriv. 629.

(*z*) Post. 84, &c.

(*a*) Huddart v. Grimshaw. Dav. Pat. Cas. 278.

thing new and beneficial is made, that the patent is granted. It is, (say others,) not so much for the method or process (as these words are used in common acceptation), as it is in fact for the device, substance, or thing made, or for the instrument or substantial means of producing the desired effect. In short, that the patent, though taken out for a *method*, is in reality for a *substance* or *machine*, if the thing described in the specification be some composition of *material* parts.

It will be endeavoured to shew, from the rules already laid down and investigated, that neither a principle nor a method, *as such*, can be the subject of a patent. The same conclusion will be deduced from the judgments delivered in several cases; and afterwards it will be the business of this section to attempt to establish, that it is for a principle or method, when it is carried into practice by tangible means, *and then only*, that a patent ought to be granted—that, in fact, it is for the tangible *means*, and not for the *method*; or in other words, that a patent, when it is *said* to be for a method, cannot be supported, unless the thing invented is a substance or machine.

And hence it will be proper to examine an invention of this description, whether it be a proper subject for a patent, when—

1. It is a *principle*.
2. It is a *method* or *process*.
3. Patent for a *method*, but the subject is something material.

1. As to a principle.

That a *mere abstract* principle (*b*) cannot, under any pretence whatever, be monopolized; admits of no doubt. The elements of every science are common property—data—upon which every man may exercise his ingenuity; or otherwise the means of making improvements would be entirely destroyed.

A patent must be for a *vendible* matter,—and how can a principle, be matter, and become capable of being sold? (*c*)

Eyre, C. J. thought that a principle so far embodied and connected with corporeal substances, as to be in a condition to act and to produce effects in any art, trade, or mystery, or manual occupation, might be the subject of a patent. It is the better opinion that a patent for the *application* of a principle must be as bad as one for the principle itself. It seems impossible to specify a principle, or describe its application to all cases, which affords a very strong reason why it cannot possibly be the subject of a patent (*d*).

(*b*) The law on this division will be found in the cases of *Boulton and Watt v. Bull*, C. P. 2 Hen. Bla. 463. *Hornblower v. Boulton*, 8 T. R. 98: and *King v. Wheeler*, 2 Barn. and Ald. 345. and *Hill v. Thompson*, 2 B. Moore, 451.

(*c*) Ante, 65.

(*d*) 2 Hen. Bla. 485. *Buller, J.* The very statement of what a principle is proves it not to be a ground for a patent, it is the first ground and rule for arts and sciences, or, in other words, the elements and rudiments of them. A patent must be for some new production from those elements, and not for the elements themselves. It is admitted that if a man by science were to devise the means of making a double use of a thing known before, he could not have a patent

Though a person cannot have a grant for the discovery of a *double use* of a thing known before, yet it is no objection to a patent that its subject is founded on the *same principle* as another, if the former be for a substance distinctly different from the latter (e). In the case of Cutler (f) it was remarked by Ellenborough, C. J. that if the patentee had claimed a grant for his new instrument, by which he supplied the fire-grate with fuel from below, and had not confined himself to the principle, which was old, his patent might have been supported. An opinion in which it is evidently presumed that two grants might be made for manufactures on the same principle.

And in *The King v. Wheeler*, (g) Abbott, C. J. observed—But no merely philosophical or abstract *principle* can answer to the word *manufacture*. Something of a CORPOREAL and substantial nature, something that can be MADE *by man* from the matters subjected to his art and skill, or *at the least* some new mode of employing practically his art and skill, is requisite to satisfy that word.

Hence it may fairly be concluded, that neither a principle, nor the application or practice of principle, can be the subject of a patent.

for it. *A principle reduced to practice* can only mean a practice founded on principle, and that practice is the thing done or made; or, in other words, the manufacture which is invented.

(e) 2 Hen. Bla. 486.

(f) *King v. Cutler*, 1 Stark. Rep. 354. Ante, 60, 1.

(g) 2 Barn. and Ald. 350.

2. As to a method or process.

That a mere *method of making* a thing, or a *process*, or a *manner of operating*, cannot be the subject of a patent, is not quite so clear. Much discussion has taken place on this rule, which will be laid before the reader, that he may form his own opinion.

The first case which is to be met with on this point is that of Dr. Hartley, who had a patent for a *method* of securing buildings from fire. The invention consisted in disposing plates of iron in buildings so as to produce that effect.

That decision certainly goes the length of proving that a *method*, independent of the thing made, or the things used to produce the article, is a *new manufacture* within the meaning of the statute of James.

And the language of Eyre, C. J. (*h*) is very strong. He said that the effect produced was no substance or composition of things; it was a mere negative quality, the absence of fire: that the effect was produced by a new method of disposing iron plates in buildings; and that in the nature of things the patent could not be for the effect

(*h*) In *Boulton v. Bull*, 2 Hen. Bla. 493. Dav. Pat. Cas. 208. And see 2 Hen. Bla. 492., where the same learned judge observed, that "Under the *practice of making*—all new artificial *manners of operating* with the hand, or with instruments in common use, *new processes* in any art producing effects useful to the public;—*new methods* of manufacturing articles in common use, where the whole merit and effect produced are the *saving of time* and expense, and thereby *lowering the price* of the article, may be said to be new manufactures in one of the common acceptations of the word, and agreeable to the spirit and meaning of the act."

produced. He thought it could not be for the making the plates of iron, which, when disposed in a particular manner, produced the effect ; for they were things in common use. But, that the invention, consisting in the *method of disposing* those plates of iron so as to produce the effect, and that effect being a useful and meritorious one, the patent seemed to him to have been very properly granted to Dr. Hartley for his *method* of securing buildings from fire.

But it is worthy of observation, that Eyre, C. J. was the only judge who spoke in favour of the legality of Dr. Hartley's patent ; and that he was of opinion that *even a principle* might be the subject of a patent (*i*).

Dollond's patent for the *method* of making the object glasses of telescopes comes next in the order of time : but that decision cannot be an authority here ; for Buller, J. in a subsequent case said, (*j*) that "the question whether the *subject*, and specification of that patent were good was not agitated at the time."

Delivering the opinion of the Court in a late case, (*k*) Abbott, C. J. enumerated the different kinds of things which might become objects of a patent, and observed, that "the word manufacture MAY, PERHAPS, extend to a *new process* to be carried on by known implements, or elements acting upon known substances, and ultimately producing some other known substance ; but producing it in a cheaper and more expeditious

(*i*) Ante, 80. (*j*) 2 Hen. Bla. 470. Dav. Pat. Cas. 172.

(*k*) 2 Barn. & Ald. 349.

manner, or of a better and more useful kind." And afterwards he added, "SUPPOSING a new process to be a lawful subject of a patent, the patentee may represent himself to be the inventor of a new process, in which it should seem that the word '*method*' may properly be used as synonymous with *process*."

The doctrine of Eyre, C. J. had long been doubted; and the manner in which Abbott, C. J. expresses himself confirms that doubt, but imposes the duty of giving the point a full investigation. It is conceived that such a device, method, or process, cannot be a manufacture within the meaning of the statute of James, because it is destitute of one of the qualities absolutely necessary to be found in a *new manufacture*, or subject proper for a patent,—*materiality*. The description given by that very learned judge, Eyre, C. J., is not of any thing that can be *made*. There is nothing corporeal,—nothing tangible,—nothing that can be bought or sold; no instrument by which the supposed benefit is produced, and which might, as an article of trade, be purchased and used by another person. (*l*)

(*l*) Ante, 58., and see *Boulton v. Bull*, 2 Hen. Bla. 486. *Buller, J.* This brings us to the true foundation of all patents, which must be the manufacture itself; and so says the statute 21 Jac. I. c. 3. All monopolies, except those which are allowed by that statute, are declared to be illegal and void: they were so at common law; and the sixth section excepts only those of the sole working or making any manner of new manufacture; and whether the manufacture be

When an invention is not of *a thing made*, it can only be known, by being taught by the inventor himself, or by being learnt from *experiments* made on the faith of the description given of it in the specification. With that assistance, however well the method or process may be set forth, some time and experience must necessarily be required before a person can make use of the invention so beneficially as the discoverer. But the public are not bound to make experiments, (*m*) and therefore it seems reasonable to infer that a mere process or method cannot be the subject of a patent.

But, supposing it possible that a new method of operating with the hand, or a new process to be carried on by known implements or elements, might be so described as to be, by bare inspection, made as beneficial to the public as to the discoverer; that neither time nor labour, skill nor experience, are required to put it in practice: still it is not a substance or thing made by the hands of man, it is not *vendible*; which, it has been shewn, is an inherent primary quality of a new manufacture. (*n*)

To permit a *new method* to be a manufacture within the meaning of the statute of James with or without principle, produced by accident or by art, is immaterial. Unless this patent can be supported for the manufacture, it cannot be supported at all. I am of opinion that the patent is granted for the manufacture, and I agree with my brother Adair that verbal criticisms ought not to avail, but that *principle* in the patent, and *engine* in the act of Parliament, mean, and are, the same thing.

(*m*) 2 Hen. Bla. 484.

(*n*) Ante, 59.

would be to establish the rule that if a man could make a *double use* of a thing known before, he might have a patent for it ; a doctrine of which directly the reverse was laid down by Buller, J., and not disputed. (o)

The advantages of a method or process, in truth, arise from the *skill* with which it is performed. Suppose, for instance, that one person can with a certain machine produce a particular article of dress of a certain quality ; and another, with the same machine, by using it in a different manner, can make the same article in half the time, and reduce it to half the price ; however new and ingenious this method may be, still it is nothing substantial or corporeal (p). But suppose, that in *thus* using the machine some *apparently* inconsiderable alteration is made, that would be sufficient to support a patent (q) ; and it is, indeed, difficult to imagine that any beneficial effect could be produced without some *material alteration* in the instrument itself ; and then, why not oblige the inventor to take out a patent for the *improvement* ?

It is expressly enacted in the statute of the 21. James I., that the new manufacture must not be "*hurtful to trade, nor generally inconvenient.*" To monopolize such methods as above enumerated appears to be particularly hurtful to trade. In every branch of it there are workmen who use the machines employed in their respective trades more skilfully than their fel-

(o) In *Boulton v. Bull*, 2 Hen. Bla. 486., and see *Manton v. Manton*, Dav. Pat. Cas. 344.

(p) Ante, 58.

(q) Ante, 67, 8.

lows. This superior skill may be in consequence of a particular method of applying their implements. But it would be carrying the doctrine to a great length to decide that the workmen are entitled to patents for their respective methods of working.

And further, every master is bound to teach his *apprentice* the best way or means within his knowledge of following his trade. If, therefore, a master obtained a patent for fourteen years for a particular *method of operating with known instruments*, to produce a known article in less time than usual, or of making it better and more useful, such apprentice would not be allowed to exercise his hands in the most skilful manner he was able until several years after he had commenced business for himself. Such a patent would, indeed, be “generally inconvenient.” There would be a monopoly in every handicraft trade; (r) one person only in each calling would be allowed to work in the most skilful manner.

For these reasons,—that Dr. Hartley’s case is the only one in support of the doctrine, and he did not first make iron, nor first discover the effect of iron on fire, so that he was not the inventor of any substance or *instrument*,—that a method does not possess the qualities which have been shewn to be inherent in the *subjects* of patents, and can be known only by making

(r) See Repertory of Arts, N. S. 27th Vol. 252, for some pertinent observations on the effect of patents taken out so extensively as to deprive mechanics of the materials used in their trades. And see ante, 68. n.

experiments,—and that it is inconvenient to the public, particularly to masters and apprentices that methods should be monopolized; it might perhaps be fairly inferred that a method or process is not a new manufacture within the meaning of the statute of monopolies. The same inference will hereafter be made from the cases, which shew that a patent for a method may be obtained and supported, provided the subject of it be some material tangible substance(s).

8. Patent for method, but subject is something material.

Though an attempt has been made to prove, that neither a philosophical principle nor a mere method or process can be monopolized, yet a principle, method, or process, when it is connected with corporeal substances, and when it is carried into effect by *tangible means*, may be the subject of a patent (*t*). Such is the technical use that has for a long time been made of the word "*method*" in patents, that it is quite common for inventors to ask for a patent for a method of doing something, and then to set forth a description of some new substance or machine. It is a convenient way to avoid giving a title to the invention. And therefore, it is now clearly established, that if the patentee claim a method, and yet in the specification describe some tangible matter, the grant is valid. In other words, though the patent is for *something called* a method, yet the *real subject* of the grant is either a substance, machine, improvement or combination.

(s) Post, 95.

(t) 2 Hen. Bla. 463. 8 T. R. 101. 2 Barn. and Ald. 350.

This rule rests for support upon the celebrated case respecting Watt's Steam engine. The patent was granted for a "*new method*" of lessening the consumption of steam and fuel in fire engines; thus using the old one with some alterations in a more beneficial manner than was before known. Watt's
patent.

The specification stated that the method was founded on certain principles; and described the mode of applying those principles to the purposes of the invention, which was effected by certain *additions* to the old engine. The novelty consisted in keeping the steam vessel as hot as the steam that entered it; first, by inclosing it in a case of wood, or any other materials that transmit heat slowly; secondly, by surrounding it with steam or other heated bodies; and thirdly, by suffering neither water nor any other substance colder than the steam, to enter or touch it during the time of working. The condensation of the steam was produced in vessels distinct from the steam vessel. This was entirely new, as in the old steam or fire-engines water was admitted into the cylinder or steam vessel to condense the vapour. The remainder of the specification was merely speculative, and had not been carried into practice.

The *manner of making* these alterations was not set forth. An Act of Parliament reciting the patent to have been granted for making and vending certain *engines* invented by Watt, extended to him for a longer term than fourteen years the privilege of making, constructing, and selling the *said engines*.

In the Common Pleas no decision took place, although it was twice before the court. In the first instance, the judges were equally divided in opinion, and at the second time they confirmed the grant, upon an understanding that it should be carried on error into the King's Bench, for the opinion of the judges of that court.

So much doubt having existed, and so much discussion having taken place on this topic, it may be useful to extract a few sentences from the opinions of the learned judges, who expressed their sentiments on the validity of Watt's patent: and to state the judgments more at length in the notes.

Eyre, C. J. supported the grant, because he thought that a principle might be the subject of a patent (*u*).

Rooke, J. (*x*) What does method mean, but mode or manner of effecting? what method can there be of saving steam or fuel in engines, but by some variation in the construction of them. A new invented method therefore conveys to my understanding the idea of a new mode of construction.

Kenyon, C. J. (*y*) The principal objection made to this patent by the plaintiffs in error, is that it is a patent for a philosophical principle only, neither organized, nor capable of being organized; and if the objection were well founded in fact, it would be decisive, but I do not think it is so. No technical words are necessary to explain the subject of a patent. By comparing

(*u*) 2 Hen. Bla. 492.

(*x*) 2 Hen. Bla. 478.

(*y*) 8 T. R. 98.

the patent and the manufacture together, it evidently appears that the patentee claims a monopoly for an engine or machine composed of material parts, which is to produce the effect described ; and that the mode of producing this is so described as to enable mechanics to produce it.

Ashhurst, J. was of the same opinion.

Grose, J. (z) I do not consider it as a patent for the old engine, but only for an addition to, or improvement of, the old engine.

Lawrence, J. (a) The word "engine" may signify *device*, and that Watt meant to use it in

(z) 8 T. R. 103. Taking it, however, as a patent for an engine, it is objected that the thing was made before, and that the patent should have been for the *addition only*, and not for the whole engine : but I do not consider it as a patent for the whole engine, but only for the addition to or improvement of the old engine. The *method* is disclosed in the specification, and it is by the adoption of what is there disclosed, and by managing it in the way described.

The patent, therefore, is only for that additional improvement as described in the specification. It signifies nothing whether the patent be for the engine so made, or for the method of making it, if that method be sufficiently described in the specification.

I incline to think that a patent cannot be granted for a mere principle : but I think that, although in words, the privilege is to exercise a method of making or doing any thing ; yet if that thing is to be made or done by a manufacture, and the mode of making that manufacture is described, it then becomes in effect, by whatever name it may be called, not a patent for a mere principle, but for a manufacture, for the thing so made, and not merely for the principle upon which it is made.

(a) 8 T. R. 106. I should feel great difficulty in deciding that a principle might be the subject of a patent. In

that sense, and the legislature so understood it, is evident from the words "engine" and "method" being used as controvertible terms.

On the other hand Heath, J. (b) observed. No doubt the inventor *might have had* a patent for his *machinery*, but could not have one for a method:

order to see what the invention was, it is necessary to refer to the specification. "Engine" and "method" mean the same thing, and may be the subject of a patent. "Method" properly speaking, is only placing several things and performing several operations in the most convenient order; but it may signify a contrivance or device. So may an engine, and therefore I think it may answer the word method. So principle may mean a mere elementary truth: but it may also mean constituent parts. The clause is not for an improvement to a fire engine for any particular purpose, but generally to an invention for lessening the consumption of steam, applicable to all fire engines for whatever purpose they may be used, and whatever may be their construction, by an alteration of, and addition to, parts which are common to all, and upon which their powers of working depend.

In the argument, the engine to diminish the consumption of steam was confounded with that which it was intended to improve. Some difficulties in the case have arisen from considering the word engine in its popular sense; namely, some mechanical contrivance to effect that to which human strength without such assistance is unequal. But it may also signify device; and that Watt meant to use it in that sense, and that the legislature so understood it, is evident from the word "engine" and "method" being used as controvertible terms. Now there is no doubt but that, for such a contrivance, a patent may be granted as well as for a more complicated machine; it equally falls within the description of a "manufacture," and unless such devices did fall within that description, no addition or improvement could be the subject of a patent.

(b) 2 Hen. Bla. 481. The question is, inasmuch as this invention is to be put into practice by means of machinery,

And Buller, J. said, (c) I consider the patent as granted for the whole engine, instead of an improvement; and void for requiring too much.

Hence it appears, that, of the very learned judges whether the patent ought not to have been for one or more machines; the method is a principle reduced to practice, it is in the present instance the general application of a principle to an old machine. No doubt that the patentee might have had a patent for his machinery. If there may be two different species of patents, the one for an application of a principle to an old machine, and the other for a specific machine, one must be good and the other bad; that which is the subject of a patent ought to be specified, and it ought to be that which is *vendible*, otherwise it cannot be a manufacture. Another objection may be urged against the patent, upon the application of the principle to an old machine, which is, that whatever machinery may be hereafter invented, would be an infringement of the patent if it be founded on the same principle. If this were so, it would reverse the clearest positions of law respecting patents for machinery, by which it has been holden that the organization of a machine may be the subject of a patent, but the principles cannot. If a patent were obtained for a principle, the organization would be of no consequence; the patent for the application of a principle must be as bad as the patent for the principle itself.

(c) 2 Hen. Bla. 488. We are not told wherein the invention consists, whether there be an addition to the old machine, or whether it be only in the application of the old parts of the machine, or in what is called at the bar the principle only, or in what that principle consists. There is nothing new in the engine. I consider this patent as granted for the whole engine. The fire engine was known before; and, though the patentee's invention consisted only of an improvement of the old machine, he has taken the patent for the whole machine, and not for the improvement alone. A patent for an addition is good: but then it must be for the addition only, and not for the old machine too.

who delivered their opinions upon Watt's patent for "A METHOD of lessening the consumption of fuel in the steam engine," and his specification, in which was described the *alterations and additions* of machinery to be made in that engine to produce the intended effect, *six* held that it was good, and *two* thought that it was void.

Among the six learned judges, who thought that this patent was valid, five conceived, that if it were doubtful whether a patent could be granted for a *method*, yet, technical words placed aside, this one was, in reality, for a substantial *improvement* in the steam engine, although it was *called a method*, and that it ought therefore to be supported: whilst the other judge, Eyre, C. J. thought that a principle or method, if reduced to practice, might, of itself, be the subject of a patent. And it may be collected from the expressions of the two learned judges who thought the patent void; that it was their opinion that the invention was a substantial *improvement*, and would have supported a patent for an improvement; but that inasmuch, as the patentee *claimed a method*, and in the specification described *an improved engine*; the latter did not support the former, and therefore that the grant was invalid.

From these opinions it is submitted that a method *as such* cannot be the subject of a patent(*d*)—that when an inventor obtains a patent for a new method, if he does not give to the world some new and useful substance, or ma-

(*d*) Ante, 88.

chine, something material and tangible, the grant is invalid.

Upon this point therefore the law seems to be—that the terms—*mode, manner, method, principle, process, &c.* are to be considered as synonymous. And that a patent for a method is only good, when in the specification there is something of a corporeal and substantial nature properly described.

It is to be lamented that Mr. Watt did not take out his patent for an improvement of the steam engine, as Buller, J. and Heath, J. thought that he ought to have done. Much discussion would then have been prevented, and the anomaly that a method *under any circumstances* could be the subject of a patent, would, in all probability, have never been introduced.

The judges who finally decided this case felt that Mr. Watt deserved to have the full benefit of his invention, and were therefore, perhaps, inclined to think favourably of his specification ; and at last it was declared to be a valid patent because the invention, though *called a method*, was in fact *something substantial* and very beneficial to the public.

The circumstance, that the validity of that grant was questioned, when this part of the law had not been much investigated, accounts for the contrariety of opinions expressed upon it. Lest such a patent or specification should not be able successfully to bear the test of a legal enquiry, an inventor under similar circumstances had much better take out his patent for an improvement.

VI. A CHEMICAL DISCOVERY.

THE discoveries in chemistry have of late been so numerous, and are become so important to the community by the assistance which is derived from them in the improvement of many articles of trade, that it is the opinion of many persons, that if methods or processes in general cannot be the subjects of patents, yet a *chemical process* ought to be considered as a new manufacture within the meaning of the statute of 21 James. It is upon that account that they have been placed in a division by themselves. If distinct rules should ever be laid down by which encouragement might be held out to ingenious men to make experiments in this branch of science; care at the same time must be taken that support and importance are not given to mere curiosities.

Patent
medicines.

However, as the law now stands, a *chemical discovery* (e) comes within the description of a manufacture only when it gives to the community some substance, (f) or compound article, *new and unused, vendible and beneficial.* (g) Of this description are MEDICINES, a fruitful source of patents. They partake of the nature of a substance,

(e) The patents of this description which have come before the Courts, are in the cases of *Turner v. Winter*, 1 T.R. 602.; *King v. Wheeler*, 2 Barn. and Ald. 345.; *Hill v. Thompson*, 2 B. Moore, 424. The latter case at *Nisi Prius*, in 1 Holt. 636; and in Equity, 3 Meriv. 622, &c. neither of which patents could successfully bear a legal enquiry.

(f) *Heath, J.* 2 Hen. Bla. 481, 482., and by *Buller, J.* id. 487.

(g) Ante, 59.

and also of that of a *combination*, or a compound of ingredients.

It is no available objection to a patent for a medicine, that the properties of the several drugs of which the subject is composed were already known, if the grant be for the *specified compound*, and not for the articles or ingredients of which the mixture is made.

On the other hand authorities are not wanted to shew that the *mere process* of a chemical discovery is a new manufacture. Mr. Justice Dallas, in delivering the opinion of the Court on Hill's patent (*h*) for "The Invention of certain Improvements in the smelting and working of Iron," said, "It has not been contended that it is a patent introducing into use any one of the articles mentioned therein, as singly and separately taken; nor could it be so contended, for the patent itself shews the contrary; and if it had been a patent of such a description, it would have been impossible to support it, for slags, as well as mine rubbish and lime, had undoubtedly been made use of before it was passed. But it is said, it is a patent for combinations and proportions, producing an effect altogether new, *by a mode and process*, or series of processes, unknown before, or to adopt the language made use of at the bar, it is a patent for a *combination of processes* altogether new, leading to one end." From whence it might be inferred, that a *chemical process* may be the subject of a patent.

(*h*) Hill v. Thompson, 2 B. Moore 448. ante 82.

Referring the reader to the authorities quoted, and the arguments urged in a former part of this work, to shew that a method or *process in general* is not a *new manufacture*, I shall merely observe that if a new substance is really produced, the grant, by the same reasoning that a method may be claimed when the object is a machine, will be valid (*i*). .

VII. A FOREIGN INVENTION.

THE liberality of the Courts of English Jurisprudence soon gave to the words "New Manufactures" a signification so extensive and general, that, in the oldest case in our reports it was decided, that a patent might be granted for a new manufacture which was "*new in this realm*," although it was originally invented abroad (*k*).

The *foreign article*, if it have the requisite qualities (*l*) when published in this kingdom may, to become a new manufacture within the meaning of the statute of James, belong to any one of the classes of subjects for patents above enumerated (*m*).

From the decision in *Edgeberry v. Stephens* it might be inferred, that if an Englishman publish an invention whilst abroad, he is nevertheless entitled to a patent for it, if he apply for one before it is known in this country.

(*i*) Ante 82 & 88. (*k*) *Edgeberry v. Stephens*, 2 Salk 477.

(*l*) Ante 59.

(*m*) Ante 58.

This construction of the statute has been of the greatest benefit to commerce by thus naturalizing the inventions of other nations. And indeed without such a rule patentees would, upon almost every trial for infringements, be met with evidence that the manufactures or parts of them were not new, because they were known in some distant country.

Though a new manufacture has really been invented, the benefits arising from it will be lost to the inventor, if the patent is not rightly taken out. Yet it is often very difficult to know under which of the divisions of this Chapter inventions ought to be arranged.

General observations on new manufactures.

When the effect is some new *substance* or composition of things, the patent ought to be taken out for the new substance or composition without regard to the mechanism or process by which it has been accomplished ; which, though perhaps also new, can only be useful as producing the new substance.

When the thing discovered is no particular substance, but is the means of producing one ; when it is a *machine*, the patent can only be maintained for the mechanism. But whether it is best in the case of *improved machinery* that the patent should be obtained for the whole, protesting against any claim to the old parts, or whether it should be taken simply for the improvement, be it a single piece or combination, is a question for the judgment of the inventor.

It matters not that two patents profess by their titles to be for the same objects, if the inventions are really different in their nature, and in the effects they produce. Under the title *method*, patents are made for every kind of new manufacture: and several grants are often obtained at the same time with the general title for an *improvement* of a particular article.

CHAP. IV.

OF THE SPECIFICATION.

THE part of the grant most important to the public, and with which the inventor is more immediately concerned, is the SPECIFICATION—the instrument in which is contained the *description* of the new manufacture for the information of the public.

The rules of law respecting the specification of an invention will lead to the consideration of

- I. *Its nature and general properties.*
- II. *Its connection with the patent.*
- III. *The particular description of each kind of manufacture.*

I. THE GENERAL PROPERTIES OF A SPECIFICATION.

IN the specification (*a*) the invention must be

(*a*) King v. Arkwright, printed case 172. Dav. Pat. Cas. 106.

accurately ascertained, and particularly described: it must be set forth in the most minute detail. The disclosure of the secret is considered as the *price* which the patentee pays for this limited monopoly; and therefore it ought to be full and correct, (for the benefits thus secured to him are great and certain,) in order that the subject of his patent may at its expiration be well known, and that the public may reap from it the same advantages as have accrued to him.

The courts of law have ever looked with jealousy on the specification, lest the *bargain* between the public and the inventor, as Lord

Buller, J. Upon this point it is clearly settled, that a man, to entitle himself to the benefit of a patent for a monopoly, must disclose his secret, and specify his invention, in such a way, that others may be taught by it to do the thing for which the patent is granted; for the end and meaning of the specification is to teach the public, after the term for which the patent is granted, what the art is; and it must put the public in possession of the secret in as ample and beneficial a way as the patentee himself uses it. This I take to be clear law, as far as it respects the specification; for the patent is the reward which, under an Act of Parliament, is held out for a discovery; and therefore, unless the discovery be true and fair, the patent is void. If the specification in any part of it be materially false or defective, the patent is against law, and cannot be supported.

It has been truly said by the counsel that if the specification be such that mechanical men of common understanding can comprehend it to make a machine by it, it is sufficient: but then it must be such that mechanics may be able to make a machine by following the directions of the specification without any new inventions or additions of their own. The question is, whether upon the evidence this specification comes within what I have stated to you to be necessary by law in order to support it.

Eldon called it, should be too much in favour of the patentee (*b*) ; and hence more questions have arisen upon it in the courts of law than upon any other part of the grant, and more patents have been declared *void* on this than on any other ground. It therefore behoves the inventor to be very circumspect.

II. THE CONNECTION OF THE PATENT AND SPECIFICATION.

The patent and the specification have always been considered as connected together, and dependent on each other for support. The one may be looked at, to understand the other. If the specification be obscure, the patent may be referred to for an explanation ; and to learn what the patent is the specification may be read (*c*). Still, however, the specification must contain within itself a full description of the invention. When taken together they should be complete, and afford every information that may be required.

The title
of patent.

The patent and specification are linked together by the *title* given to the invention in the patent, and the *description* of it set forth in the specification.

The specification must support the title of the patent. The latter should not indicate one thing, and the former describe another as the subject of

(*b*) Dav. Pat. Cas. 434.

(*c*) 8 T. R. 95.; and see 2 Hen. Bla. 478.

the grant: because if the petitioner had represented himself as the inventor of the matter really discovered, it might perhaps be well known that the thing was of no utility, or was in common use, and he might not have obtained a grant as the inventor (*d*). And therefore a patent taken out for a tapering brush was not supported by the specification of a brush, in which the hairs or bristles were made of unequal lengths (*e*).

This doctrine, with respect to the inventor claiming too much, was illustrated by Lord Eldon, who observed,—“ I will go farther, and say that not only must the invention be *novel and useful*, and the specification intelligible, but also that the specification must not attempt to *cover more* than that which, being both matter of actual discovery, and of useful discovery, is the only proper subject for the protection of a patent. And I am compelled to add, that if a patentee seek by his specification any more than he is strictly entitled to, his patent is thereby rendered in-

Claiming too much in the title.

(*d*) 2 Barn. and Ald. 350, 1.

(*e*) King v. Metcalfe, 2 Stark. N. P. C. 249. The patent was for the manufacture of hair brushes, which were described to be tapering brushes. It appeared that the hair or bristles in each compartment of the brush varied in length from a quarter of an inch to an inch.

Ellenborough, C. J.—Tapering means conveying to a point: according to the specification, the bristles would be of unequal length; but there would be no tapering, no conveying to a point.—His lordship advised the jury to find that it was not a tapering, but only an unequal brush.—Verdict for the Crown.

effectual, even to the extent to which he would be otherwise fairly entitled (*f*).” As if there be a patent for a machine, and for an improvement upon it, which cannot be sustained for the machine; although the improvement is new and useful, yet the *grant altogether* is invalid on account of its attempting to cover too much (*g*).

Indeed the title of the patent being a definition or short description of the patent, should not be very *extensive*, nor yet very *confined*, but should be commensurate with the thing invented, and correctly inform the public of the exact nature of the thing, which they may expect to find described more at length in the specification. A patent was therefore considered as taken too extensively, and consequently void, when, a new *lamp* being the object, the *title* indicated that the invention was an improved mode of lighting cities, towns, and villages (*h*).

(*f*) *Hill v. Thompson*, 3 Meriv, 629. See S. C. in 2 B. Moore, 454.; and 1 Holt, N. P. C. 636. ante 71, 2.

(*g*) *George v. Beaumont*, and others, Eq. Repertory of Arts, N. S. 2 Vol. p. 252., and see 2 Hen. Bla. 489.

(*h*) *Cochrane v. Smethurst*, K. B. 1 Starkie 205.; Same case Repertory of Arts, N. S. 27 Vol. 192. The patent was granted for “A method or methods of more completely lighting cities, towns, and villages.” The novelty consisted in an improvement of Argand’s lamp, in which the flame is placed between two currents of air, by bringing in a current of atmospheric air, whilst the impure air escaped by means of a tube, through the external part of the lamp, which conducts the air to the flame. The most important part of the invention, the exclusion of the foul air from returning, was obtained by the non-absorbing cover, which formed what was called the

And another patent, which was for a new or improved method of drying and *preparing malt*, was considered as incorrectly made, and not sustained by a specification, in which was described a method for heating, &c. *ready made malt (i)*.

line of exclusion. It was contended by defendant, after some technical objections, that the specification was larger than the patent, because it alluded to ship lights, convoy signals, theatres, churches, &c, and to the *generality of the words*, "or otherwise by preserving it in a state of purity."

Le Blanc, J., inquired if there was any specification of the use of the line of exclusion, or a description of what it is.

The Attorney-General contended, that Lord Cochrane had not by his patent claimed too much, although he might have inserted too much in his specification.

Le Blanc, J. Under the general terms of the patent, must it not be taken with reference to the specification; *and if the specification is too large, is not the patent so too?*

The Attorney-General. Bringing in a current of pure atmospheric air is not new: but bringing the current of atmospheric air, and excluding all other air, is new. *Le Blanc, J.* I think the patent cannot be supported: it is in substance a patent for an improvement in street lamps, and should have been so taken. Plaintiff nonsuited.

(i) *King v. Wheeler*, 2 Barn. and Ald. 350. post p. 110. In fact the malt, by being thus exposed to a great degree of heat, would colour more beer than it otherwise would do. But such was not stated to be the object of the patent.

Abbott, C. J. Upon reading the patent and the specification, it appeared to me that the proviso had not been complied with.

It is obvious that if the patentee had not invented the matter or thing, of which he represents himself to be the inventor, the consideration of the royal grants fails, and the grant consequently becomes void; and this will not be the less true if it should happen that the patentee has invented some other

Many patents appear to be for the same thing, a circumstance which sometimes puts the grants in jeopardy. It is better to prevent all objections to the *title* that the patent should be taken out for those parts *by name*, which are new and essentially different from any prior invention.

And moreover if one thing be mentioned in the patent as a new manufacture, and the specification describe the manner of making another thing *quite different* although the patent would be good, if the manufacture claimed had been described, or if on the contrary the subject specified had been claimed, yet for this incongruity, and because the patent is not supported by the specification, it is void. Thus a patent for an invention founded on a principle already known, for lifting fuel into the fire grate from below the grate, in the specification whereof was described new apparatus, was held to be bad for not claiming the new instrument as the thing invented (*k*).

thing, of which upon a due representation thereof he might have been entitled to a grant of the exclusive use.

The language of the patent may be explained and reduced to a certainty by the specification : but the patent must not represent the party to be the inventor of one thing, and the specification shew him to be inventor of another, because perhaps if he had represented himself as the inventor of that other, it might have been well known that the thing was of no use, or was in common use, and he might not have obtained a grant as the inventor of it.

(*k*) *King v. Cutler*, 1 Stark. N. P. C. 354. Ante 60.

III. THE DESCRIPTION OF EACH KIND OF MANUFACTURE.

WITH respect to the description of the thing found out, whilst tracing the several properties of a good specification, the same arrangement of the different kinds of new manufactures will be adopted as that which was followed in the former Chapter. That classification was made to keep the several kinds of subjects distinct, in order that, being viewed apart, *general rules* for describing them might more easily be framed, and more readily understood.

In the specification of a substance the *thing itself* should be accurately ascertained. The *materials* of which it is composed, the *method* by which it is made, and the *use* to which it is to be applied, should be accurately developed, and particularly described; for corporeal substances seldom afford any information of the mode of making, or the manner of using them.

*I. Sub-
stance.*

In the former Chapter under the division *substance* were investigated the qualities that must necessarily be found in every manufacture fit to be the subject of a patent. At a similar and corresponding place in this Chapter will now be enumerated those causes which render all sorts of specifications incorrect, and in consequence make the patents void.

In the divisions appropriated for the rules illustrative of the modes for making proper de-

descriptions of each subject, will hereafter be investigated such mistakes as are likely to be fallen into by persons attempting to describe the subjects of patents.

General
rules.

It is a *fundamental rule*, on which all others for making and judging of a specification depend, that the secret must be disclosed, and the invention described in such a manner, that men of *common understanding*, with a *moderate knowledge* of the art, may be enabled to make the subject of the patent.

The description must be *confined* to the manufacture, that the novelty may be known. Extraneous matter, however learned, must not be introduced to darken it. Though it is addressed to the public in general, it need not be so circumstantial, or so explanatory, that persons entirely ignorant of the elements of the science from which the subject is taken may thereby alone be able to learn and use the invention. Nor, on the other hand, should the description be so concise as to become obscure (*l*).

The *clearness* of the description will of course depend upon the matter of the invention: but upon the whole it may be observed, that if a person of moderate capacity, having a little knowledge of the science which led to the invention, can immediately see the method pointed out, and easily apprehend the purport for which the subject was invented, without study, without any

(*l*) Bull. N. P. 76. Dav. Pat. Cas. 106, 128. 2 Hen. Bla. 484, 496. 11 East. 107, 8. 2 Barn. and Ald. 354.

invention of his own, and without experiments, the disclosure is fully and fairly made.

That this general proposition, as to the requisite description, may be fully understood, the grounds upon which patents have been cancelled for the insufficiency of the specification will now be examined. The specification is bad, when

- I. The terms are *ambiguous*.
- II. Necessary *descriptions are omitted*.
- III. Parts claimed are *not original*.
- IV. Things are put in to *mislead*.
- V. The *drawings* are incorrect.
- VI. *One of different ways*, or different ingredients named, fails.
- VII. *One of several effects specified* is not produced.
- VIII. The things described are *not the best known* to the patentee.

If the *terms* in which the description of the subject is expressed be *ambiguous*; if the words are used in any other sense than that in which they are generally understood, the invention may be wholly or partially concealed: and therefore on that account the grant would be invalid.

1. Terms ambiguous.

It is mentioned in Turner's specification, (*m*) "take any quantity of lead, and calcine it; or minium, or red lead," from whence it was inferred that the lead only was to be calcined; and a doubt would arise whether the minium or the red lead was to be calcined. Such an objection, if the only one, would probably not invalidate a

(*m*) Turner v. Winter, 1 T. R. 602.

grant, though a similar ambiguity is carefully to be guarded against. In that case, however, calcination would not produce the effect; fusion was necessary.

It was objected to the same patent, that the substance intended to be produced, and *called* white lead, could only be applied to a few of the purposes of white lead. The answer, that it was not intended to make white lead, was not sufficient. In the specification the inventor should have stated that the effect produced a substance *similar* to white lead, and then have set forth the useful purposes to which this new substance might be converted; and ought not to have misapplied the *term* white lead.

There was also another word in that specification which was not intelligible. It was directed that *fossil* salt should be used. Now fossil salt is a genus having many species; and only one of the latter *sal gem* would answer the intended purpose.

If a term have a *technical* meaning, or one differing in the usage of trade from the ordinary sense annexed to it, the word may be received in its perverted sense; and, if the manufacture be otherwise intelligibly described, a mere verbal inaccuracy will not vitiate the patent: (*n*) but if a word be not used in its common acceptation, then it should be explained.

Thus, in Wheeler's specification (*o*) it ap-

(*n*) 2 Hen. Bla. 485.

(*o*) King v. Wheeler, 2 Barn. and Ald. 349. ante 105.

peared, that by the word malt the patentee meant barley fully prepared for making beer ; but that the word malt, in its common acceptation, is applied to the grain as soon as it has germinated by the effect of moisture, and before it has been dried : and it was held that he ought to have explained his meaning.

If, in a manufacture something well known be used, and the inventor give a design of it which appears to be of a different thing, though he means that the thing known should be used, the specification is in terms ambiguous ; and it will be considered as being worded with an endeavour to conceal the invention and deceive the public. Thus Mr. Arkwright, although he used the old spiral cylinder in his machine, so managed the drawing and description, that on the face of the specification it appeared that he intended to use a parallel cylinder. (*p*)

The several distinct parts of the subject of a patent may be divided into the *new* and the *old*. In a specification all that is new must of course be clearly elucidated ;—the old parts may be distinguished as they are *material* and *immaterial* in producing the desired effect.

2. Necessary descriptions omitted.

Any particular thing, although in common use, when it is applied in a new manner to the production of a new effect, is material, and becomes a part of the substance of the invention, and must be described. And if it is not mentioned, and its use pointed out, the descrip-

(*p*) Printed Case, 175. Dav. Pat. Cas. 113.

tion will be defective. It is only the *well known and immaterial* old parts that need not be described (*q*).

A material alteration, from rollers in general, had been made in the rollers of Arkwright's machine of which no description was given; and it was considered as wilfully concealed. (*r*)

Mr. Arkwright's machine was intended to prepare for spinning not only cotton but silk, flax, and wool; yet he described all the parts of it as one entire instrument. He did not state, as he should have done, that the hammer in the front of it was *only* to be used in preparing flax (*s*). Other parts, which were put on or off as occasion required, appeared as though they were fixed, and to be used in every stage of manufacturing each of the articles (*t*). Which are omissions that were considered of sufficient importance to invalidate the patent.

But this rule must not be extended to the rudiments of a science, nor to the mere incidents of a subject. If gold were directed to be used in a state of fusion, the manner and *utensils* for putting it in that state need not be mentioned (*u*).

3. Parts claimed, not original.

That the new parts of the subject may be more clearly seen and easily known, the patentee must not only claim neither more nor less than

(*q*) *Hill v. Thompson*, 2 B. Moore, 450, 455, &c. ante 66.

(*r*) Printed Case, 173. Dav. Pat. Cas. 107.

(*s*) *King v. Arkwright*, printed case 175. Dav. Pat. Cas. 117.

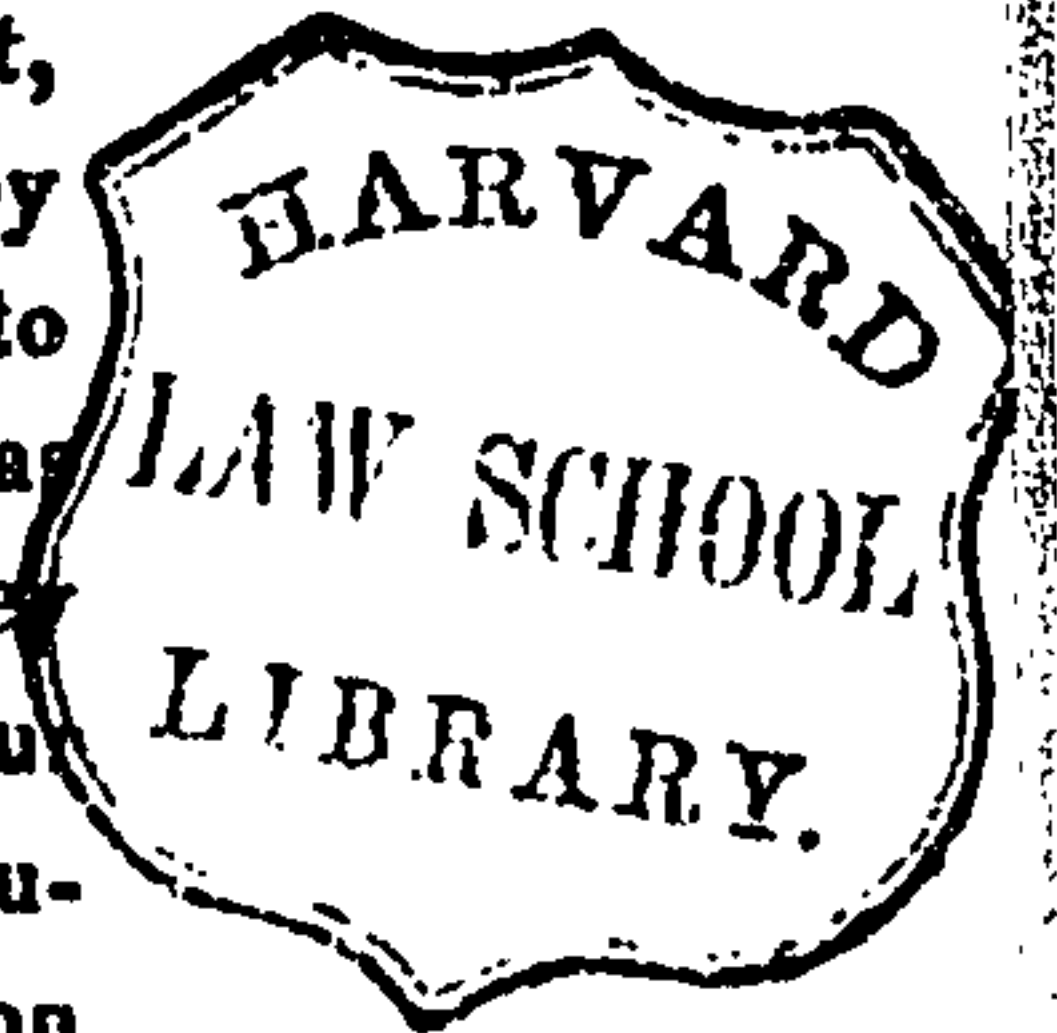
(*t*) *Id.* printed case 173. Dav. Pat. Cas. 109.

(*u*) *Turner v. Winter*, 1 T. R. 602.

his own invention, but he must *not appear* even unintentionally to appropriate to himself any part which is old, or has been used in other manufactures (x). Those parts that are old and

(x) *Huddart v. Grimshaw*, Dav. Pat. Cas. 295. *Ellenborough, C. J.* As to the bobbins, they are not worth mentioning; the springs and tube are the things in which it should seem the principal originality of the invention consists. It is contended that the springs are not an essential part of the invention: if they are enrolled as an essential part, whether they are so or not, it would certainly go to destroy this patent, because no deceptive things are to be held out to the public; those that are material are to be held out as material; according to the evidence of Mr. Rennie they are material. It appears to me that the springs in Belfour and Huddart's machine both produce the same end to regulate the tension. Now if it is a spring to regulate the tension of the yarn, which is essential to be regulated, it does seem to me; but it is for your judgment to say whether it is a material part of the invention, and relied upon as such, as it should seem it is by both; and if it is the same, then that which has been communicated by Mr. Belfour, Mr. Huddart cannot take the benefit of.

It is for you to say, for that is the substance of the case, as to the invention of the patent, *whether any essential part of it was disclosed to the public before.* If you think the same effect in substance is produced, and that the springs in Mr. Belfour's, by producing tension, obtains a material end in the making of ropes in this way proposed, and that it is in substance the same as in the other, this patent certainly must, upon principles of law, fall to the ground. If you think it is not the same, or if you think it is not material, though we have had the evidence of Mr. Rennie upon its materiality—if you think this patent has been for a new invention, carried into effect by methods new, and not too large beyond the actual invention of the party, in that case the patent may



immaterial, or are not of the essence of the invention, should either not be mentioned, or should be named only to be designated as old. The patentee is not required to say that a screw or bobbin, or any thing in common use, is not part of his discovery; yet he must not adopt the invention of another person, however insignificant it may appear to be, without a remark. If any parts are described as essential without a protest against any novelty being attached to them, it will seem, though they are old, that they are claimed as new (*y*). The construction will be against the patentee that he seeks to monopolize more than he has invented, or that, by dwelling in his description on things that are immaterial or known, he endeavours to deceive the public, who are not to be deterred from using any thing that is old by its appearing in the specification as newly invented. They are to be warned against infringing on the rights of the patentee, but are not to be deprived of a manufacture which they before possessed (*z*). It seems therefore to be the safest way in the specification to describe the whole subject, and

be sustained. But if you think otherwise in point of law or expediency, the patent cannot be sustained.

The verdict was for the plaintiff, with nominal damages: but it is evidently at variance with the opinion of Lord Ellenborough.

(*y*) *Boville v. Moore*, Dav. Pat. Cas. 404. and see *Manton v. Parker*, Dav. Pat. Cas. 329.

(*z*) Dav. Pat. Cas. 279. and 3 Meriv. 629.

then to point out all the parts which are old and well known.

Upon the same principles of reasoning, but certainly with much more force, if there be several things specified that may be produced, and *one* of them is *not new*, the whole patent is void. This point underwent a very full discussion in the case of *Brunton v. Hawkes (a)*.

One of several things not new.

(a) 4 Barn. and Ald. 550. *Abbott, C. J.* It seems to me, therefore, that there is no novelty in that part of the patent as affects the anchor; and, if the patent had been taken out for that alone, I should have had no hesitation in declaring that it was bad. Then, if there be no novelty in that part of the patent, can the plaintiff sustain his patent for the other part, as to the mooring-chain? As at present advised, I am inclined to think that the combination of a link of this particular form, with the stay of the form which he uses, although the form of the link might have been known before, is so far new and beneficial as to sustain a patent for that part of the invention, if the patent had been taken out for that alone. But, inasmuch as one of the things is not new, the question arises whether any part can be sustained. It is quite clear that a patent granted by the crown cannot extend beyond the consideration of the patent. The King could not, in consideration of a new invention in one article, grant a patent for that article and another. The question then is, whether, if a party applies for a patent, reciting that he has discovered improvements in three things, and in the result it turns out that there is no novelty in one of them, he can sustain his patent. It appears to me that the case of *Hill v. Thompson*, which underwent great consideration in the Common Pleas, is decisive upon that question.

Bayley, J. I have no doubt that if the patent be bad as to part, it is bad as to the whole. If the patent is taken out for many different things, the entire discovery of all those things is the consideration upon which the king is induced to make

4. Parts or things put in to mislead.

If things useless and unnecessary have been mixed with a substance, or attached to a machine, though the *terms* are intelligible, and every necessary description has been introduced, and the *parts claimed* are only those which have been newly invented, the patent is void. Of this nature are those parts that have *never been used* by the patentee. It is from that circumstance inferred, that they have been introduced to overload the subject, and, by clouding the description, to mislead the public, and conceal the real invention. Thus in Arkwright's machine the introduction of several things (*b*), which were never used by him, was considered as done merely to mislead the public.

If any considerable part of a manufacture be *unnecessary* to produce the desired effect, it will be presumed that it was inserted only with a

the grant. That consideration is entire; and, if it fails in any part, it fails *in toto*. Upon an application for a patent, although the thing may be new in every particular, it is in the judgment of the crown, whether it will or will not, as matter of favour, make the grant to the person who has made the discovery. And when application is made for a patent, for three different things, it may be considered by the persons who are to advise the crown as to the propriety of the grant, that the discovery as to the three things together may form the proper subject of a patent, although each *per se* would not induce them to recommend the grant. It seems to me, therefore, that if any part of the consideration fails, the patent is *void in toto*.

(*b*) Ante, p. 53, 54, n, and see Printed Case 182, 186, 187, and see Dav. Pat. Cas. 129, 139, 140, also Hill & Thompson, 2 B. Moore, 450.

view to perplex and embarrass the enquirer. In the specification to Turner's patent (c) for producing a yellow colour, among other things minium is directed to be used, which it appeared would not produce the desired effect. In the same case, among a great number of salts which were specified, it was left to the public to use those they pleased, without either of them in particular being pointed out, and only one would answer the intended purpose. For either of these reasons the validity of a patent could be impeached.

Although the unnecessary part had *occasionally* been used, it would still be a question whether it had not been put there to mislead the public.

But this rule is not so strictly enforced that a person is compelled to *go on using* every part of his invention to secure and continue his patent-right. If any particular parts have been once fairly introduced, and not laid aside, until, by some discovery or contrivance made subsequent to the date of the patent, they were found to be unnecessary, the patentee may, without prejudice, leave them out; or cease to make use of them. But the presumption is against the inventor, until he give a good reason for the discontinuance (d).

Watts in his specification gave a description of several things which, being incomplete, would not have supported a patent; and yet, inasmuch

Matters of
intention.

(c) *Turner v. Winter*, 1 T. R. 602, ante.

(d) *Boville v. Moore*, Dav. Pat. Cas. 398.

as he did not claim them as part of the subject of his patent, it was considered that they were *matters of intention only*, and that the specification was not rendered less intelligible by introducing them (*e*).

b. The drawings incorrect.

It is not absolutely necessary to annex to the specification a model, diagram, picture, or drawing, descriptive of the manufacture (*f*). If without it the subject is clearly described, it is better omitted. It is however an easy way of illustrating the parts of a machine, and therefore has generally been adopted. It was formerly said that in every instance in which a drawing was introduced, it was indispensable that it should be drawn on a *scale*, &c. (*g*): that in it the diameters of wheels, the lengths of levers, &c., every proportion and relation of the parts, ought to appear in due ratio to each other: and that the whole should be capable of being put together without leaving the length, breadth, or relative velocity, of any of the parts to be found out by conjecture and experiments, or the patent would be void. Arkwright's machine (*h*), though shewn in a perspective drawing, could not be made for want of a scale to determine its dimensions.

This rule has of late been modified. If a

(*e*) *Boulton v. Bull*, 2 Hen. Bla. 480. Dav. Pat. Cas. 187, 8.

(*f*) 2 Hen. Bla. 479. Dav. Pat. Cas. 187. and see *Ex parte Fox*, 1 Ves and Beam. 67.

(*g*) *Harmar v. Playne*, 11 East. 112. 14 Ves. 130. S. C.

(*h*) *King v. Arkwright*, Printed Case 176. Dav. Pat. Cas. 114.

common mechanic can make the subject of the patent from the drawing in perspective, it is not necessary that there should be a scale. It was also formerly considered that the words of the specification ought of themselves to be sufficiently descriptive of the improvement; that the specification ought to contain within itself all the necessary information, without the necessity of having recourse to a diagram; and that, if a diagram were given, it ought to be taken merely as an illustration, and not constituting a principal, or essential part of the specification; and therefore that a person was not bound to look at the diagram to learn the invention. But a very learned judge has however held that if a drawing or figure enable a workman of ordinary skill to construct the improvement, it is as good as any written description (*i*).

The consequences which attend the introduction of any thing into the specification, merely to misguide the public, have been mentioned. The means must be adapted to the end (*j*). The description must not give *several ways* and methods which may or may not answer, according to the skill exercised in the attempt to produce the manufacture. Thus, in the specification of Winter's patent (*k*), a great number of salts were

6. One of different ways fails.

(*i*) Brunton v. Hawkes, 37 vol. Rep. of Arts, N. S. p. 105. and see S. C. 4 Barn. and Ald. 541. 1 Stark. N. P. C. 201. and post. 127.

(*j*) Dav. Pat. Cas. 331. And see Manton v. Parker, Dav. Pat. Cas. 328. 2 B. Moore, 457, 458.

(*k*) Turner v. Winter, 1 T. R. 602.

mentioned, by which it appeared that the public might take either of them to make the subjects of the patent. There was only one of them that would produce the effect, and therefore his patent was void. Even if there be only one thing which will not answer the intended purpose, the specification is incorrect.

7. Some of several effects specified, not produced.

Not only must there not be any unnecessary *means* mentioned in the specification, but *effects* that cannot accurately be produced must not be mentioned and described. The patentee should inform the enquirer of the *exact* nature of the manufacture invented. If the article described have not the qualities, or the machine produce not the results which are set forth in the specification, the grant is invalid.

Such is the law too, if the patentee take his grant for the invention of several things, and he fail in *any one* of them. By Winter's invention (*l*) three things were to be produced: one reason for its being considered void was, that the second article, which was called in the patent "white lead" was, in fact, quite a different substance, and which could be used only for a very few of the purposes for which common white lead is applied. Bainbridge's patent (*m*) for the improvement of the hautboy was for *new notes*;—in the plural number. On proof, it appeared that he had only found out *one* new

(*l*) Turner v. Winter, 1 T. R. 602.

(*m*) Baiubridge v. Wigley, K. B. Dec. 1810. Repert. of Arts, N. S. 18th Vol. p. 127.; and see Brunton v. Hawkes, 4 Barn. and Ald. 451.

note ; and he consequently failed in an action of damages for an infringement of the grant, although great ingenuity had been exerted, and the fingering was rendered less complicated by the invention.

Although the description may be otherwise complete and correct ; although the means may be adapted to the end, and the things specified be produced ; yet, if the subject be not given to the public in the best and *most improved state* known to the inventor, the patent is void. If, at the time of obtaining the grant, he was acquainted with a mode of making his manufacture more beneficial than the one specified, the concealment will be considered fraudulent. Thus Lord Mansfield held a patent for “steel trusses” to be void, because the inventor had omitted to mention that in tempering the steel he rubbed it with tallow, which was of *some use* in the operation. (*l*)

8. Thing described, not the best.

In the specification for a patent for making verdigris, (*m*) aqua fortis, which was used by

(*l*) *Liardet v. Johnson*, Bull. N. P. 76. ; and see 1 T. R. 608.

(*m*) *Wood and Others v. Zimmer and Others*, 1 Holt. 58. S. C. in Rep. of Arts, N. S. 27th Vol. 171. Ante 64. *Gibbs*, C. J. It is said that this patent makes verdigris, and is therefore sufficient. The law is not so.—A man who applies for a patent, and possesses a mode of carrying on that invention in the most beneficial manner, must disclose the means of producing it in equal perfection, and with as little expense and labour as it costs the inventor himself.

The price that he pays for his patent is, that he will enable the public, at the expiration of his privilege, to make it

the inventor, was not mentioned. It appeared that the patentee mixed the aqua fortis with great secrecy, which raised the presumption that he knew of its value when the grant was sealed. The patent was therefore declared to be void.

Nor can any *alteration*, known to the inventor before he procures the patent, be made, however insignificant it may be, even if it were nothing more than the means of working the machine a little more expeditiously, without raising a presumption that the patentee fraudulently concealed the best method. A lace machine, (*n*) for

in the same way, and with the same advantages. If any thing which gives an advantageous operation to the thing invented be concealed, the specification is void. Now, though the specification should enable a person to make verdigris substantially as good without *aqua fortis* as with it; still, inasmuch as it would be made with more labour by the omission of aqua fortis, it is a prejudicial concealment, and a breach of the terms which the patentee makes with the public.

(*n*) *Boville v. Moore*, Dav. Pat. Cas. 400. *Gibbs*, C. J. There is another consideration respecting the specification, which is also a material one; and that is, whether the patentee has given a full specification of his invention; not only one that will enable a workman to construct a machine answerable to the patent, to the extent most beneficial within the knowledge of the patentee at the time; for a patentee, who has invented a machine useful to the public, and can construct it in one way more extensive in its benefit than in another, and states in his specification only that mode which would be least beneficial, reserving to himself the more beneficial mode of practising it, although he will have so far answered the patent as to describe in his specification a machine to which the patent extends; yet he will not have satisfied the law by communicating to the public the most

which Mr. *Boville* had obtained a patent, was worked with greater expedition *by bending together* two teeth of the dividers, or by making one longer than the others, than if it were used as specified. This mode of using it was known to the inventor before he obtained the patent; and, therefore, Gibbs, C. J. thought that the patent was bad on that account.

If the patentee use *cheaper materials* in making the manufacture than those he has enumerated, his grant will not be sustained by his proving that the articles specified will answer the purpose as well. (o) Cheaper materials.

It signifies not in what manner this advantage accrues to the patentee;—it is not necessary that any palpable alteration has taken place; that something has been added or something taken away from the invention as specified, to render the patent void; it will be invalid if *by any means* whatever a benefit is derived by the patentee, which was concealed from the public at the time the patent was obtained, even if it be merely a small part of a machine on which a particular motion is impressed at a given moment in a particular direction. (p)

If this improved manner of using the inven- Inadvertency.
beneficial mode he was then possessed of for exercising the privilege granted to him. And see *Brown v. Moore*, Rep. of Arts, 28th Vol. p. 60.

(o) 1 T. R. 607. 1 Holt's N. P. C. 60. *King v. Wheeler*, 2 Barn. and Ald. 345.

(p) *King v. Arkwright*, Printed Cases, 50. The cylinder in the specification was a parallel one: but that which was used, spiral.

tion be *unintentionally* left undescribed, still the patent is void. "If it was inadvertent," says Gibbs, C. J., speaking of Boville's omission in not describing the bending of the teeth, "if he actually knew and meant to practice that mode, and inadvertently did not state the whole in his specification, he must answer for his inadvertence." (*q*)

Subse-
quent dis-
covery.

But if it appear that this better mode of using the manufacture be a *subsequent discovery*; that the patentee has since the date of the grant found out this new means of carrying on his own invention to a better effect; then the grant will continue valid (*r*): but, as before stated, the presumption of concealment will be against him.

II. *Ma-
chine.*

Upon these grounds, and for these reasons,

(*q*) *Boville v. Moore*, Dav. Pat. Cas. 413. *Gibbs*, C. J. observed to the jury,—You will say whether you think there is any fraudulent concealment in the specification. *A Juryman*.—It might be inadvertent, and not fraudulent. *Gibbs*, C. J.—Certainly; and if it were inadvertent, if he actually knew and meant to practise that mode, and inadvertently did not state the whole in his specification, he must answer for his inadvertence: but it might be a subsequent discovery. Verdict for the defendant.

(*r*) *Boville v. Moore*, Dav. Pat. Cas. 401. *Gibbs*, C. J. If Mr. Brown, since he obtained his patent, had discovered an improvement, effected by bending the teeth or adding a longer tooth, he might apply that improvement; and his patent will not be affected by his using his own machine in that improved state: but if, at the time he obtained his patent, he was apprised of this more beneficial mode of working, and did not by his specification communicate it to the public, that must be considered as a fraudulent concealment, although it was done inadvertently, and will render the patent void.

applicable to the specifications of almost all kinds of manufactures, many patents have been declared to be void. The inventor bearing them in mind, and attending to the nature of each kind of manufacture, whether it be a substance, or machine, &c. as it is distinguished from the rest in the last Chapter, will be able, by avoiding similar errors, to make a correct specification for any invention. Indeed, no further assistance can be given to him than that which may be derived from a few general observations on the description peculiar to each manufacture.

The *description of a machine* must disclose the nature of the invention, and the manner in which it is to be performed. It must be minute without perplexity, and luminous without being overwrought. When it descends to particulars, the elements that are known to all should not be noticed; nor yet, in its fulness, should any thing be included that is not necessary to render it intelligible. It should be such that a common mechanic, with a reasonable degree of skill upon the subject, may comprehend it. Though it need not be so full as to instruct a person ignorant of the first principles of mechanics in the method of its formation and use; yet, on the other hand, a person eminently skilled in the subject must not be required to make it. A reasonable knowledge and skill (of which the jury decide) must be possessed by the person who complains that the specification is obscure, and that he cannot make the machine. No contrivance or addition, no trial or experiment, it is

said, must be resorted to for a full knowledge of the invention (s). This rule must, however, be taken in a limited sense. Though no inventive faculty must be exercised, nor any thing new added, yet trials, if they are not essentially necessary, may be made. If the inventor leave any thing to be found out by experiment, the specification is bad : unless the data, manner of performing, and the expected results are so clearly given that it may easily be done.

Scientific
books.

Reference may be made to the rudiments of that science by which the principles of the machine are explained, but not to scientific books. (t) A proposition, or truth generally known, needs no reference; and that which can be found only in some particular treatise must be explained, but not claimed as new.

If a piece of machinery be contemplated for the purpose of giving a full description of it, the several parts, as wheels, rollers, screws, springs, &c. &c., must be set forth, together with the proportion of their diameters, thickness, tension, &c (u). Then the method by which they are united, and the relative velocities of the moveable parts (x).

If the thing specified be the component parts of two machines, the union of the parts that make up each of them must be clearly shewn (y).

(s) 2 Hen. Bla. 484.

(t) 11 East. 105.

(u) King v. Arkwright, Print. Cas. 174. Dav. Pat. Cas. 111.

(x) Id. Printed Cas. 62. 179. Dav. Pat. Cas. 122.

(y) Id. Printed Cas. 174. and 177. Dav. Pat. Cas. 111, and 117.

If parts of the machine are to be put on and off during some of its operations, in order to produce the desired effect, or if several articles are intended to be worked on, or several manufactures to be produced,—it must be distinctly stated *what* those parts are, their *proportions* for different purposes, and *where* they are to be applied (z).

It has been shewn that the grant must not be more extensive than the invention (a); and that, where the patent is for an improvement or addition, the inventor cannot monopolize the whole subject. The specification will therefore be incorrect, if it contain a description of *more* than the improvement or addition (b); unless it particularly distinguish the new from the old parts.

III. *Improvements or additions.*

The inventor is not bound down to any particular mode of describing his improvement, so that he informs the public *exactly* in what his invention consists. He may describe it by *words*, or by *diagrams* (c): but he must confine himself to his invention.

(z) Ibid.

(a) Ante, 71.

(b) Williams v. Brodie, cited by counsel in King v. Arkwright, Printed Cas. 162., and see Dav. Pat. Cas. 97.

(c) Macfarlane v. Price, 1 Stark. 199. Action for infringement.—The patent was for certain improvements in the making of umbrellas and parasols. The specification professed to set out the improvements as specified in certain descriptions and drawings annexed: but no distinction was made either in the description, or by any marks in the drawings, between what was new and what was old.

Ellenborough, C. J. The patentee in his specification ought to inform the person who consults it what is new and

The patent for the improvement of a thing, or for the thing improved, is in essence for the same manufacture (*d*). The inventor may either accurately describe the addition, and then point out the method by which it is applied to the known parts; or he may describe the whole as one machine, and then particularize the parts newly discovered.

It is not absolutely necessary that the old parts should be described. They may be referred to generally, if the whole is not thereby rendered unintelligible. Thus in Jessop's case (*e*), whose invention consisted of a single movement in a watch, it was said to be sufficient to refer generally to a common watch, and then to give directions how the new part was to be added to it.

There is one decision on an *improvement* which appears to be an anomaly. Harmar (*f*) obtained a what is old. The specification states that the improved instrument is made in manner following. That is not true since the description comprizes what is old as well as what is new. Then it is said, that the patentee may put in aid the figures. But how can it be collected from the whole of these, in what the improvement consists?

(*d*) 2 Hen. Bla. 481, 2.

(*e*) 2 Hen. Bla. 489.

(*f*) Harmar v. Playne, 11 East, 101. The patent was for "a machine invented for raising a shag on all sorts of woollen cloths, and cropping or shearing them, which together come under the description of dressing woollen cloths, and also for cropping or shearing of fustians." There were drawings of the machine. Harmar afterwards invented some improvement of his machine, for which he prayed a patent; which patent was granted upon the usual condition, that he should ascertain the nature of the said invention or the said improvements. The second specification recited the first

patent for a machine. Having very much impatient, and described the *whole* of the machine, without shewing in words or marking in the drawing where the first machine ended, or from what point the improvements began. The improvement could only appear by comparing together the two specifications. It was contended for the plaintiff, that the patent and specification referring to it are to be construed together as one instrument. The first patent being enrolled, the public were bound to take notice of it: and being recited in the second, the improvements easily appeared by comparing them. That it was more convenient to give a description of the whole, than by a literal compliance to state what the improvements were.

For the defendant it was said, that improvements should be distinctly marked and made known by this second specification alone, without further search or trouble.

Le Blanc, J. Suppose the specification had merely described the improvements,—must not the party still have referred to the original specification, or at least have brought a full knowledge of it with him, before he could understand truly to adapt the new parts described to the old machine?

Ellenborough, J. It would lead to great inconvenience, if books of science were allowed to be referred to. A person ought to tell from the specification itself what the invention was for which the specification was granted, and how it is to be executed. If reference may be made to one, why not to many works. It may not be necessary indeed, in stating a specification of a patent for an improvement, to state precisely all the former known parts of the machine, and then to apply to those the improvement: but on many occasions it may be sufficient to refer generally. But however, I feel impressed by the observation of my brother Le Blanc, that the *trouble and labour* of referring to and comparing the former specification with the latter would be fully as great if the patentee only described in this the precise improvements of the former machine. Reference may be made to general science. The court certified to the *Lord Chancellor* in favour of the specification.

proved it, he procured another patent, in which the first was recited. In the second specification, without any reference being made to the description of the former subject, the whole machine so improved was set forth, without the new parts being distinguished from the old ones. The second grant was held to be good, because the second patent by reciting the first referred to its specification, which by the enrolment was matter of record, and therefore supposed to be within every person's knowledge.

It must be here observed that Harmer referred to his own patent. It seems by the same reasoning, that it might be laid down as a general rule, that every person, making a manufacture from the subjects of several expired patents, might recite and refer to the specifications of them, without taking any notice of their contents.

Sometimes it is difficult to determine, whether the improvements be an addition of new parts, properly so called, or the parts of an old machine newly arranged with some material alteration. In the latter case it is safer to claim the whole as a new engine ; and then in the specification to distinguish accurately between the old and new manufacture, shewing the peculiar qualities of each, the improvement effected, the means that produced it, and the use to which it is to be applied.

Different ways of specifying an Improvement.

From these decisions it appears that there are several ways of making a correct specification of an improvement :—

First. By describing the whole manufacture,

and then particularizing with great exactness the addition of the inventor.

Secondly. By a description of the whole manufacture, pointing out the parts that either are old or not material to the invention.

Thirdly. By giving an accurate and intelligent description of the improvement, and the manner in which it is applied to the subject, or parts that are old.

Fourthly. By describing the whole manufacture, if it be an improvement of another for which a patent has been obtained, taking care to refer in the new specification to that of the former patent.

Every combination appears at first sight to be subject to the same rules for describing it, as an improvement or addition. The same end, a clear and intelligent description of the manufacture, without any extraneous matter, is to be obtained: but the manner of attaining it is somewhat different. IV. *Combination.*

If it is only a combination of substances, materials, or parts of machines in common use, previously applied for the same or different purposes, then the specification will be correct which sets out the whole as the invention of the patentee (g): if, he clearly express that it is in respect

(g) *Boville v. Moore*, 2 Marsh, 211. S. C. Dav. Pat. Cas. 411. A patent was taken out by Mr. Brown, for "a machine or machines for the manufacture of bobbin lace, or twist net, similar to and resembling the Buckinghamshire lace net, and French lace net, as made by the hand with bobbins or pillows," who assigned it to the plaintiff.

of such new combination or application, and of that only, without laying any claim to the merit of

Gibbs, C. J. Now, gentlemen, the objections made to this specification upon this part of the case are, that it goes farther than it ought; that it states more to be the invention of Mr. Brown than really was so; and I think I may state generally to you, that they say that all that precedes the crossings of the threads is old, whereas he has stated it as part of his invention; and besides that they state, that the forks and dividers which he has stated as part of his invention are equally old. I think with respect to the principle, if there existed at the time Mr. Brown took out his patent engines for the making of lace, of which his was only an improvement, then his patent ought to have been only for *an improvement*; and certainly, if he could have supported his patent for an *engine*, his specification ought to have pointed out those parts only which were of his invention, as those to which his privilege applied; and if you should be of opinion; that he has in his specification stated more than he is entitled to, as what was his invention, then in my opinion his specification is bad.

Now the answer that the plaintiffs have endeavoured to give to that objection is this:—They say there is nothing in the world that is absolutely new; you may refer it all to first principles. The wheels are well known; and yet you may state them in your specification as one of the means by which you effect your purpose. Levers are well known: but yet you may state them in the same way; that certainly is so. They go on to say, their invention consists not in this or that particular part, of which their machine is composed, as being new, but in the conformation of all the parts of it; the novelty consisting in that conformation: and if the new conformation of all those parts was of the plaintiff's invention, then, although every one of the parts was old, they would be entitled to a patent for a machine composed by that new conformation of the whole; but if you find that another person had combined all those parts up to a given point, and that Mr. Brown took up

original invention in the use of the materials. Nothing more than the invention must be claimed. Every old part which is essential and

his combination at that point, and went on combining beyond that, if the subsequent combinations alone were his invention, the former combinations he will have no right to. Those combinations could not exist before, unless there had existed an engine in which they were found; and if there existed before this time an engine in which they were found, it is for you to say, whether this which Mr. Brown has invented is any more than an improvement of that engine, or whether it is the invention of a new engine. If Mr. Brown has only invented an improvement of the old engine, be it Heathcote's, or be it any one or two engines which existed before, then his specification by which he claims the whole to himself will be bad. If, on the other hand, you think that he has invented an engine, which consists of a perfectly new conformation of parts, although all the parts were used before, yet he will be entitled to support his patent for a new machine.

Now I wish to have what I state upon this subject, observed by the counsel on both sides, that they may be aware how I put it. If a combination of those parts existed before; if a combination of a certain number of these parts existed up to a given point before, and Mr. Brown's invention sprung from that point, and added other combinations to it; then I think this specification, stating the whole machine as his invention, is bad. If on the other hand you think he has the merit of inventing the combination of all the parts from the beginning, then I think the specification is good, and that he is entitled to your verdict.—Verdict for the defendant.

Gibbs, C.J.—Gentlemen, I will just ask you this:—do you find that the combination of the parts up to the crossing of the threads is not new?

Foreman,—Yes, my Lord.

Juryman,—The threads then taking a new direction, and

material in producing the intended effect will be considered as claimed, if it be not designated as old. If the part in common use be even an elementary principle, or a single combination, and effect a new end, it becomes a part of the substance of the invention, and must be protested against as not being claimed.

If the invention consist of a new *set of combinations* added to a manufacture composed of combinations, then, though the effect produced be different throughout, the specification should only describe the new combinations which have been invented, and how they are to be added to the old ones.

If the *combination* consist of the subjects of *several patents* which have expired, or of *some new ones* that have been bought, it would appear from the reasoning of Ellenborough C. J., that a description of the method by which they were combined, with a reference to the several specifications, would be all that was required to sustain the patent (*h*).

V. Method
carried
into prac-
tice.

Pursuing the same order in giving rules for making specifications as was followed in the former Chapter when the different subjects of patents were examined, the necessary description of the fifth kind of new manufactures—principles, or methods carried into practice by tangible means—must now be investigated.

certainly the most valuable part to the plaintiff, is a new invention: but we are of opinion it is nothing more than an improvement.

(*h*) *Harmar v. Playne*, 11 East. 107. ante 129.

It was shewn in the last Chapter that a principle could not be the object of a patent. The impossibility of giving a description of it, in every instance in which it might be used, was urged as a strong argument against its being allowed to be monopolized.

Specifica-
tion of a
principle.

Reasons have also been assigned why a method *merely as such*, is not a proper subject for a patent. If a method can be the subject of a patent, the description of it must indeed be very accurate. It must be so clear and evident that no experiments must be necessary to learn it, and to put it in practice as beneficially as the patentee enjoys it.

Specifica-
tion of a
method.

If neither a principle nor a method can be the subject of a patent within the meaning of the statute of James ; if, when a patent is obtained for a method, it is in fact granted for *the tangible means* of carrying that method into practice (i) ; it is quite evident that the specification of a method is governed by the same rules as if the description was to be given of some one kind of the above mentioned manufactures, whether the *real subject* of the patent be a machine, improvement or combination, and therefore that any further comment would be superfluous.

Specifica-
tion of the
tangible
means of
principle
carried in-
to practice

When a chemical discovery is the foundation of the invention for which the patent has been granted, inasmuch as the substance or thing produced, and not the principle, process, or method, is the legal subject of the patent, it ought to be described. The ingredients, their pro-

VI. Che-
mical dis-
covery.

(i) Ante 80, 82-88.

portions, the times of mixing, &c., ought to be fully stated, and then the beneficial *use* to which the substance can be applied (*j*).

VII. *Foreign Invention.*

A manufacture when first introduced into England, whether it be a substance or machine, an improvement of something already known here, or a combination of native discoveries, still it must be fully and correctly explained. Its specification is regulated by the same laws, and is subject to the same critical examination, as if it were an English invention.

General Observations on Specifications.

Thus it appears that *every part* which is new, however minute, must be clearly described. In the specification of a *substance*, the simplest elements of which it can be formed, and the best modes of making and using it, must be accurately stated. In descriptions of *machines* there must with scrupulous fidelity be set forth the cheapest materials, the most exact proportions of the parts, the most expeditious and the best mode of conducting them, with the precise times of putting on, or taking off, any part of the machine: and an *improvement* or new *combination* must be kept distinctly apart from the old manufacture.

The public must be put in possession of the manufacture in a way as ample and beneficial as the patentee enjoys it.

(*j*) *Turner v. Winter*, 1 T. R. 602. The specification to this patent is what a scientific man, unacquainted with legal strictness, would naturally have made. It contains almost every fault generally found in the descriptions of this class of manufactures. It is therefore given fully in the different parts of the text.

CHAP. VI.

OF THE PRACTICE OF OBTAINING LETTERS PATENT
FOR INVENTIONS.

HAVING pointed out the person, who is the first inventor, and shewn what things are new manufactures within the meaning of the statute of James, and what are the several properties of the specification,—*the practical part*, the mode of obtaining the patent, next demands attention.

That no improvident grant may be obtained from the Crown, the petitioner is required to attend at several offices under government, that the claims set forth in his petition may be carefully scrutinized and fully considered by the law officers of the Crown. Hence many instruments are made preparatory to the patent itself. This course necessarily increases the price of money paid for the patent: but it secures alike the public from imposture, and the Crown from deceit; and prevents the evils arising from an illegal privilege of exclusively making and vending some particular manufacture which may not be worthy of protection.

As many of the instruments are furnished at the public offices, those only are given in the APPENDIX which must be prepared either by the petitioner or his agent. But it is thought that the interest of the enquirer would not be best consulted, nor the fullest information afforded to him, without a full description of the contents of every one of the documents ; as by that means he will be enabled not only to examine whether the instruments are correct, but at once be able to see the whole routine of procuring the patent, and the conditions upon which it is obtained.

The manner in which all letters patent are to be passed is pointed out by the statute 27 Hen. VIII. c. 11. : but it would be useless to shew how the method varies according to the matter of the grant, and therefore this Chapter will be confined to the manner of passing *patents for inventions*.

1. The
petition.

The first step to be taken by an inventor is to present a *petition (a)* (which is written on unstamped paper) to the King, to grant him letters patent.

It recites that he has discovered something (naming it) likely to be of general benefit, of which he is the true and first inventor, and that it has never before been used. He then prays for letters patent to secure to himself the sole use of his invention for fourteen years.

The patent is in general made out for England only : but it will be extended to the Colonies, if they are named in the prayer of the petition.

(a) See Form of the Petition, in the Appendix.

An *affidavit* (b) sworn before a Master, or master extraordinary in Chancery, must accompany and support the allegations of the petition. The affidavit.

The *petition* and *affidavit* are then left at the office (c) of the Secretary of State for the Home Department.

When the petition has lain a few days in the office at the Home Department, an answer, which is a reference of it by the Secretary of State to the Attorney or Solicitor General for his opinion, will be given. It is generally written on the back or margin of the petition, which, when thus marked, is taken to the chambers of either of those crown law officers, from whom in a few days a report thereon may be obtained. 2. Attorney-General's report.

The report, after reciting the reference, the petition, and the affidavit, states, that inasmuch as it is at the hazard of the petitioner whether the invention be new, or will have the desired success, and as it is reasonable that his Majesty should encourage arts and inventions which may be for the public good, it is therefore the opinion of the reporter that the royal letters patent should, as desired, be granted to the petitioner, *provided a particular description* of the nature of the invention should be enrolled within a given time in the Court of Chancery.

It is this opinion that a *particular description* of the invention should be enrolled, which gives rise to that important instrument, the "*specification*."

(b) See Form of the Affidavit in the Appendix.

(c) At the Treasury staircase, Whitehall.

This report is now made as matter of course, and without any trouble to the petitioner, unless a caveat, of which mention will be made hereafter, has been entered.

3. The bill for the patent.

The report is taken from the office of the Attorney General to that of the Secretary of State for the King's warrant.

This warrant is an echo of the report, and gives authority to his Majesty's law officer to prepare a bill containing the grant for the royal signature. In it the exact time in which the specification must be enrolled is mentioned.

The warrant is carried to the patent office (*d*) of the Attorney or Solicitor General for the bill which is to be marked as examined by him. At the bottom his Majesty is informed by his Attorney General that all such clauses, prohibitions, and provisoes, as are therein inserted, are usual and necessary in grants of the like nature.

The bill is the rough draft of the patent, and contains all its allegations. Indeed, it is verbatim the same as the patent, except the attestation to the latter instrument.

When prepared, the bill is carried to the office of the Secretary of State, for the *King's sign manual*, (*e*) from whence it is taken to be passed at the *signet office*. (*f*) The clerk of the signet prepares a warrant to the Lord Keeper of the Privy Seal, whose clerk gives another warrant,

(*d*) No. 4, Old Buildings, Lincoln's Inn.

(*e*) Equity Cas. 54—209 ; and see 2 Inst. 554, 555.

(*f*) In Somerset House.

in which the body of the patent is recited, directed to the Lord Chancellor.

The warrant from the Lord Keeper of the Privy Seal is taken to the patent office of the Lord Chancellor, where the patent is made out and sealed. (*g*)

4. The patent.

When a patent has once passed the great seal, its date cannot be altered. (*h*)

The nature of the description required in the specification, and the manner in which it must be given, have been fully investigated. (*i*) It must be under the *hand and seal* of the inventor ; (*k*) and is sometimes accompanied with a design or drawing in the margin, to which, from the body of the patent, references must be made, to render the whole instrument intelligible.

5. The specification.

Before the invention is particularly described in the specification, a recital is made, that a patent had been granted to the inventor to secure to him the whole benefit arising from it ; and that therein a proviso was inserted requiring a description of the invention, and that in consequence of such requisition the patentee makes the specification. The terms of that proviso are given in the Introduction. (*l*)

(*g*) For an abridgment of the contents of a patent see the Introduction, ante, p. 48. ; and for its parts at full length, see Appendix.

(*h*) Ex parte Beck, 1 Bro. Cha Ca. 578.

(*i*) Ante, Chap. IV.

(*k*) 21 Jac. I. c. 3. sect. 6.

(*l*) Ante, 46. A copy of Mr. Watt's specification will be found in the Appendix.

The time
allowed
for enrol-
ment.

The time formerly allowed for the enrolment of the specification was four months: but it is now generally confined to *one month*, unless the inventor make an affidavit that he intends to apply for patents for Scotland and Ireland, and then it is extended to six months. A few instances have occurred in which a still longer time has been allowed to enrol the specification: but in a late case the Lord Chancellor would not put the great seal to a patent by which the specification was to be concealed for a considerable length of time. The Attorney General will, under special circumstances, enlarge the usual period at any moment before the patent is sealed.

When the patent is once sealed, the *specification* must be *acknowledged* before a Master in Chancery, and lodged in the *Enrolment Office* (*m*) before the expiration of the time therein mentioned. The day is inclusive. If the patent, therefore, be enrolled on the last day of the month, when that is the given time, it is sufficient. (*n*)

The legislature alone can grant relief, if the time has transpired: the Lord Chancellor has refused to interfere on such an occasion. (*o*)

(*m*) Petty Bag Office, Rolls Yard, Chancery Lane.

(*n*) *Watson v. Pears*, 2 Campb. 294.

(*o*) *Ex parte Hoops*, printed by mistake for *Koops*, 6 Ves. Jun. 599. *Ex parte Beck*, 1 Bro. Cha. Ca. 578. Application was made for time to enrol Koop's specification. Lord Eldon, C. I cannot do that; for the patent is void if the proviso be not complied with. You should have applied to the Attorney General before the patent passed for a longer time upon the special circumstances. I cannot take the great

If the time for the enrolment is expired, or any thing else has occurred in suing for the patent, whereby it will be rendered void, it is advisable to conceal the invention, and to begin *de novo* with another petition for a patent. It is a very safe way to remedy all defects in form.

A *certificate* of the enrolment, which is always indorsed on the back of the specification, may be had at the same time. Certificate of enrolment.

The specifications are kept open for the inspection of the public, and copies of them may at all times be obtained. Attempts have been made to induce the Lord Chancellor to dispense with the enrolment of the specification, or to keep it concealed, which have always been unsuccessful (*q*). Inspection of specification. In some cases the legislature

seal from a patent, and repeal it in the most essential point : it is a legal grant, with a proviso for the benefit of all the King's subjects. You can do nothing except by an act of Parliament to enlarge the time mentioned in the proviso.

(*q*) *Ex parte Hoops* (for *Koops*) 6 Ves. 595. The object of the petition was, that the Lord Chancellor would dispense with the enrolment, or that some provision should be made to prevent the specification from being made public : suggesting the danger that foreigners might obtain copies of the specification in consequence of the enrolment.

Lord Eldon. How can I do this? Either upon this or some other case in the last sessions a clause for this purpose was inserted in an act of parliament; and upon the motion of Lord Thurlow, upon reasons applying not only to that, but to all cases, and seconded by Lord Rosslyn, the clause was universally rejected, and rejected as it appeared to me upon very substantial grounds, in which I readily concur. As to the worth of the apprehension suggested, a man has

has however permitted the specification to be concealed. Mr. Lee (*r*) obtained an act of parliament 53 Geo. III. c. 179, by which his specification was ordered to be deposited in the Court of Chancery, to be kept secret from the public for fifteen months; and to be produced only by order of the Lord Chancellor, and by him to be examined whenever occasion required.

6. *Caveat.* The caveat is an instrument by which notice is requested to be given to the person who enters it, whenever any application is made for a

nothing more to do than to pirate your invention in a single instance; and he will then force you to bring an action, and then the specification must be produced.

But, with regard to the king's subjects, a very strong objection occurs, which makes it necessary that the specification should be capable of being produced. They have a right to apply to the patent office to see the specification, that they may not throw away their time and labour, perhaps at a great expense, upon an invention, upon which the patentee might afterwards come with his specification, alleging an infringement of his patent; when, if those persons had seen the specification, they never would have engaged in their project. The enrolment is therefore for the benefit of the public.

(*r*) See Lacy's Case, Rep. of Arts, N. S. 29 Vol. p. 250. The *Lord Chancellor* observed that Mr. Lee's case was a very peculiar one: it was for securing to the state, in the time of war, the benefit of a most important discovery. If Mr. Lacy could make out that the state was to be benefited by his invention in any peculiar way, as in the case of preparing hemp and flax, it might be doubtful whether he might not have a secret specification. His lordship was of opinion, however, that the legislature would pause a long time before they passed such an act in future. He could not put the great seal to a patent without seeing the specification.

patent for a certain invention which is therein described in general terms (s).

One caveat is left at the chambers of the Attorney General, another at those of the Solicitor General. They must be annually renewed.

If application be made for a patent for an invention similar in its nature to that mentioned in the caveat, then all the parties are summoned to attend upon the Attorney or Solicitor General, who separately examines each party. If he thinks that the inventions are not the same, both parties are entitled to patents: but if he should be of opinion that they are the same, then his report shews to whom the patent ought to be granted.

(s) *Ex parte O'Reilly*, 1 Ves. Jun. 112. Several caveats were entered against sealing a patent for a new Italian Opera House. From the whole of this long case, which is very full of facts, the opinion of *Lord Thurlow* respecting caveats may be collected. He declared that he would not sign a patent which did not hold the parties under some controul (if the case required it), even though there should be no caveat against it; and that it was not sufficient merely to answer objections, but that the party petitioning must lay a proper case before him.

Nothing is required from those who oppose a patent, but to shew that they have an interest.

There were many considerations, he observed, which certainly would not rest with him to be determined upon that petition. The use the King might derive from its having been before him, was, that the true state of that part of the case upon which the King's judgment would turn had come out more intelligibly than it had before.

The thing that came nearest to his office was to see that the King was not deceived, and that he did not throw out of his hands that authority which ought to be retained.

If the disappointed party think that he is injured, he should immediately enter a caveat at the *Chancery patent* office ; and when the grant comes for the great seal, the Lord Chancellor will privately examine all the parties concerned, and do justice between them.

Other reasons may induce persons to enter a caveat at the chancery office ; as was done in one case, to prevent the great seal from being put to a patent, wherein the petitioner was allowed *fifteen* months to enrol the specification ; The Lord Chancellor in consequence refused to seal it (*t*). And where a petitioner applied for a patent in respect of certain improvements in steam engines, a caveat was entered under an existing grant, from which, it was alleged, the subject of this new patent was borrowed. The Lord Chancellor sealed the patent, upon reading the affidavits, in one of which, made by an engineer, it was stated that the subjects did not resemble each other (*u*).

Costs of
caveat.

Although the Lord Chancellor is very averse to a caveat, at this late stage of the business ; yet, if he think that the opposition was not unreasonable, he will not give costs (*x*).

Such is a caveat, the manner of entering it, and the practice respecting it.

Of its nature and effect much misconception has arisen. It does not create any right : but is simply a request to be *favoured* with information.

(*t*) *Ex parte Heathcote* in the matter of *Lacy*, Rep. of Arts, N. S. 29 Vol. p. 250.

(*u*) *Ex parte Fox*, 1 Ves. and Beam. 67.

(*x*) *Id.*

If the applicant think that he is unjustly deprived of an invention, after he has been heard before the Lord Chancellor, he has no remedy but a *scire facias*, to repeal that which has been sealed (*y*).

Upon the whole, therefore, the entering a caveat is nothing more than giving information that there is an invention nearly completed; and requesting that, if any other person should apply for a patent for the same thing, the preference may be given to him who entered it. Which request is complied with, by the courtesy of the crown, upon its being satisfied of its reasonableness by the report of the Attorney-General, or the opinion of the Lord Chancellor. And when the patent is granted, it is to be judged of as though no caveat had ever been entered.

The privileges derived from a patent take effect only in England: but if the Colonies are named therein, then it extends to them.

VII. *Patents for other places besides England.*

If it is the wish of the inventor to exercise his invention exclusively all over the united kingdoms, he must take out separate patents for *Scotland and Ireland.*

By Act of Parliament, this exclusive privilege may be preserved to the inventor in any other places, over which this government has authority, as in the West India Islands.

(*y*) Post Chap. IX.

II. THE ACTS OF PARLIAMENT TO ENLARGE PATENTS.

Now that the necessary forms and instruments have been described; the manner of soliciting, and the matter contained in the acts of parliament, which are sometimes passed to give greater utility to the statute of James, shall be stated.

In An Act to prolong the Term of a patent.

An Act to procure the term of a patent is procured in the usual manner, in which private ones are obtained, by notice and petition.

The notice (a) after stating that an application will be made to parliament for an act to prolong the term, or rather to grant a new term to the patentee for the sole enjoyment of the benefits accruing from the invention (naming it) granted to him on a certain day. If the patent has been made for Scotland and Ireland, then the notice must state that the act is to extend its

(a) Order of the House of Commons, 30 June, 1801.

The substance of acts to prolong the term of a patent.

The *substance* of an act to prolong the term of letters patent may thus briefly be described. After reciting that letters patent have been granted for England, Scotland, and Ireland, and setting forth their respective dates, and the clauses for the enrolment of the specification in the respective Courts of Chancery in England, Scotland, and Ireland; the act further recites that the specification has been so enrolled. Then, if *improvements* have been made, the dates of the several patents for them, and the enrolment of their specifications, are recited in the same manner. Then follows an abstract of the assignments of the patent right, if any have taken

authority over those places. If a subsequent patent has been obtained for *improvements* and additions, then it should be stated that it is the patentee's intention to apply for a new term for the use thereof in England, Scotland, and Ireland.

This notice should be *signed* by the solicitor or agent for the patentee, and should be inserted three times in the *London Gazette*. If the patent be also for Scotland and Ireland, then the notice should be inserted three times in one of the *Edinburgh papers*, and three times in the *Dublin Gazette*. These advertisements must appear in the respective months of August and September, or one of them (*b*) preceding the sessions in which the application is to be made.

A *petition*, with a copy of the patent annexed to it, for leave to bring in the bill, is then prepared.

It describes the invention as in the patent (*c*), place. After which it is usual to state the special circumstances that induce the petitioners to ask for an enlargement of the term. The *reasons generally assigned* are, the impossibility of the patentee receiving any reward for his labour and ingenuity, in the short space of fourteen years, arising either from the great expense and length of time taken up before the machine or invention could be beneficially used, the large capital necessarily employed, or that the public will not be much benefited, unless, by a greater length of time, the patentee should be enabled to sell his invention at a lower price. Sometimes the reason given is the heavy expense of suits at law. At another time the patentee asks for these indulgences to avert impending ruin,

(*b*) Order, 30 June, 1801. (*c*) Order, 26 May, 1685.

and gives the dates of the three grants for the use of the inventors in England, Scotland, and Ireland. And if patents for improvements have been obtained for those three kingdoms, then the several dates of those three patents must be stated. Afterwards the special matter, with the reasons for the application (*d*) that may appear to the patentee to be important, should be set forth. Then follows the *prayer* of the petition. It must be signed by the parties who are suitors for the bill.

This petition is referred to a select committee, who examine the *witnesses*, and inspect the newspapers in which the notice has been inserted. The chairman then reports to the house that the committee have examined the matter of the petition, and that the standing orders of the house relative to bills for confirming or prolonging terms of letters patent have been complied with. Leave is then given to bring in the bill, to which a copy of the pa-

caused by the great expense he has been put to in endeavouring to perfect his invention: and he therefore calls on the legislature to assist him, and thus encourage ingenuity that is exercised for the advantage of the public. It is then enacted, that the sole right to the invention, or the improved inventions, be vested for a given number of years, being an addition to the original term, in the patentee; or, if it has been assigned, then in his assignee. If it be a machine, the rules at which it shall be vended are particularly specified; and all contracts for using it remain the same as though the act had not passed.

(*d*) Order, 24 November, 1699.

tent is annexed (e). This bill is read a *first* time, and ordered to be read a *second*. On the second reading, upon being presented, it is referred to a select committee, who hear witnesses, and then report to the house that they have examined the allegations of the bill, and find the same to be true; upon which the house orders the bill to be *engrossed*. On the *third* reading it is passed, and carried up into the House of Lords, by the member who conducted the bill through the House of Commons into that of the Lords.

The usual routine in the House of Lords of passing a private *act*, by which term the bill is there designated, is to read it immediately a first time, and then for the chairman of the select committee to move that it be read a second time, and referred to a select committee; before whom the witnesses are examined by the chairman, who reports to the house that the allegations in the act are true. Upon his motion the act is read a third time, and passed. The Commons are informed of the agreement of the Lords to the act, and it receives the royal assent.

It is provided that nothing therein shall hinder any person from making or using an invention that is different from the one mentioned in the act.

If the subject of the patent has been gradually improved, then the act provides that a specification of the whole invention, in its improved state, shall be enrolled in the Court of Chancery within a given time, which is generally six months.

It is enacted, that *objections*, which would have affected the validity of the patents *before* the passing of the

(e) Order, 13 May, 1690.

II. An Act to enable the patentee to assign to more than five persons.

In an Act of Parliament to enable a patentee to assign to more than five persons: after a recital of the date of the patent for the original subject, and also of that for the improvements (if any have been granted); the proviso by which the patent is declared to be void, if it be transferred to any number of persons exceeding five, is set forth. Then follows the *special circumstances*; as, that the undertaking requires a large capital; and that, to make it beneficial to the public, such large sums of money are required, that rendered it impossible for five persons to use it.

It is thereupon enacted, that the patentee may transfer his right to any number of persons not exceeding the number therein mentioned; with a proviso, that nothing in the act contained shall be construed to confirm or give greater force or validity to the letters patent than they legally possessed before the passing of it.

The act, though private in its nature, is generally made a *public one*, to prevent the expense of pleading it specially. (*f*)

act, shall *afterwards* have the like force and effect in law as before the passing thereof; and that the invention shall not become the property of more than *five* persons. It is generally added that the act (to prevent the trouble and expense of pleading it specially) shall be deemed a public one.

(*f*) See 41 Geo. III. c. 125. Local and personal acts.

CHAP. VI.

OF THE CONSTRUCTION OF LETTERS PATENT.

THE inventor having obtained a patent, it is now time to state the principles, and expound the rules by which it is to be construed. The matter may be divided for consideration into three parts as it respects the construction—

1. Of letters patent in general.
2. Of those for inventions.
3. Of the acts of Parliament enlarging the patent-rights.

“In ordinary cases,” says Mr. Chitty, Jun. in his *Treatise on the Prerogatives of the Crown*, (a) “between subject and subject, the principle of construction is, that the grant shall be construed, if the meaning be doubtful, most strongly against the grantor, who is presumed to use the most cautious words for his own advantage and security. But in the case of the King, whose grants chiefly flow from the royal bounty and grace, the rule is otherwise; and crown grants have at all times been construed most favourably for the King, where a fair doubt exists as to the real meaning of the instrument, as well in the instance of grants from his Majesty, as in the case of transfers to him.”

(a) See page 391, 2, and the Authorities there collected.

“ But the rule that grants shall be construed most favourably for the King,” he adds, “ is subject to many limitations and exceptions. (b)

“ In the first place, no strained or extravagant construction is to be made in favour of the King.

“ If the intention be obvious, royal grants are to receive a fair and liberal interpretation accordingly. And, though the general words of a grant may be qualified by the recital ; yet, if the intent of the crown be plainly expressed in the granting part, it shall enure accordingly, and shall not be restrained by the recital.

“ In the second place, the construction and leaning shall be in favour of the subject, if the grant shew that it was not made at the solicitation of the grantee, but *ex speciali gratiâ, certâ scientiâ, et mero motu regis*. Though these words do not of themselves protect the grantee against false recitals, &c.

“ In the third place, if the King’s grants are *upon* a valuable consideration, they shall be construed strictly for the patentee for the honour of the King.

“ So where the King’s grant is capable of two constructions, by the one of which it will be valid and by the other void, it shall receive that interpretation which will give it effect ; for that will be more for the benefit of the subject, and the honour of the King, which ought to be more regarded than his profit.

“ A decided *uncertainty* (c) will avoid a grant from the Crown, not only as against the pa-

(b) Id. p. 393, 4.

(c) Id. p. 394.

tentee, but also as against the King, because it raises a presumption of deceit." "But the rule *id certum est quod certum reddi potest* obtains, even in case of the Crown; and therefore, if a grant refer or has relation to that which is certain, though it be not matter of record but mere matter of fact, or *in pais*, it is sufficient." "But where a particular certainty precedes, it shall not be destroyed by an uncertainty or a mistake coming after."

"Misrecitals and false suggestions or deceit (*d*) will in certain cases invalidate a grant from the Crown."

Such are the *general rules* for the construction of all kinds of letters patent. It becomes necessary to state the principles upon which the decisions respecting patents for inventions in particular are founded.

2. Construction of a patent for inventions.

The exposition of the patent, whether it regard the invention or other matters connected with it, is in truth nothing more than a statement of the meaning of the statute of monopolies which was made *in favour of the subject*, and ought therefore to be explained most liberally to his advantage.

The formal parts,—the usual covenants, and the provisoes—must be expounded by the *general* rules above laid down.

The patent for an invention contains the expressions *ex speciali gratiâ, certâ scientiâ, et mero motu*; and upon that account the construction

(*d*) Id. p. 396.

must lean in favour of the patentee. Moreover there is a clause inserted, whereby it is expressly declared that the letters patent shall be taken, construed, and adjudged, in the most favourable and beneficial sense, for the best advantage of the patentee, notwithstanding the not full and certain describing the nature and quality of the said invention, or of the materials thereto con-
 ducting and belonging. (e)

Although many of the judges have construed the statute of monopolies in favour of the inventor, (f) yet formerly they inclined to give to the patent and specification, (which must be taken together when considering the proper construction of this grant) a narrow limit; and, in fact, to no greater extent than the literal meaning of its terms. Mr. Justice Buller, however, observed, (g) Whenever it appears that the patentee has made a fair disclosure, I have always had a strong bias in his favour, because in that case he is entitled to the protection which the law gives him. How far that law which authorizes the King to grant patents is politic, it is not for us to determine. When attempts are made to evade a fair patent, I am strongly inclined in favour of the patentee: but, where the

(e) See Form of a Patent in the *Appendix*.

(f) Lord Loughborough—"There is no matter of favour that can enter into consideration in a question of this nature. The law has established the right of patents for new inventions: that law is extremely wise and just." *Dev. Pat. Cas.* 55.

(g) In *Turner v. Winter*, 1 T. R. 606.

discovery is not fully made, the Court ought to look with a very watchful eye to prevent any imposition on the public.

But Kenyon, C. J. observed, (*h*) “ I am not one of those who greatly favour patents; for though, in many instances, the public are benefited by them, yet, on striking the balance on this subject, I think that great oppression is practised on inferior mechanics by those who are more opulent.”

It is said that Lord Eldon, when Chief Justice of the Court of Common Pleas, in the case of *Cartwright v. Amatt*, (*i*) put the question for consideration,—Whether the specification was such that the machinist could make the machine from the description there given, considering the case of a patent not in the light of a *monopoly*, as it had been generally put, but as a *bargain with the public*, and therefore to be construed upon the same principle of *good faith* that regulated all other contracts; and therefore if the description was such that the invention could be communicated to the public, the statute was satisfied.

The extent of signification which has been given to the words “ first inventor ” (*k*) and “ new manufacture,” (*l*) and also by what rules the specification (*m*) is to be judged, have been fully explained; and therefore I shall only add,

(*h*) In *Hornblower v. Boulton*, 8 T. R. 98.

(*i*) In Easter Term, 1800; not reported, but mentioned in argument 11 East. 107, and 14 Ves. 131. His Lordship afterwards said that he adhered to the law as he stated it in that case. 14 Ves. 136., and see *Day. Pat. Cas.* 484.

(*k*) Ante, Chap. II.

(*l*) Ante, Chap. III.

(*m*) Ante, Chap. IV.

that patents now receive a construction more in favour of the grantee than they formerly did, and that the opinion of Lord Eldon is generally adopted; that, as the disclosure of the new invention is the equivalent for which the grant is obtained, letters patent come within that general rule, by which, when a valuable consideration is given, the grant is to be construed strictly in favour of the grantee. (*n*)

3. Of the acts of Parliament to enlarge them.

Statutes, it has been shewn, (*o*) are sometimes made to enlarge the benefits arising from patents for inventions.

It was formerly contended that the view taken of letters patent by the Legislature, as expressed in the act of Parliament extending the term of a grant, supported the validity of the patent itself: but it was considered that the legislative provisions left the patent exactly in the same situation in which it was placed before they were enacted, and that the act could not be looked at as a *legislative reading* of the patent.

An attempt was lately made to put a similar construction upon an act of Parliament, by which the patent of Koops (*p*) was made assignable

(*n*) Ante, p. 50.

(*o*) Ante, p. 148.

(*p*) *Hesse v. Stevenson*, 3 Bos. and Pull. 578. *Lord Alvanley*,—It is contended that the act of Parliament stated in the case vested a legal interest in Koops; for that he must be taken against all the world to have that interest which the act of Parliament recites to be vested in him, that act being a public act. But though the act be public, it is of a private nature. The only object of the proviso for making it a public act is, that it may judicially be taken notice of instead of being specially pleaded, and to save the expense of proving

to sixty persons : but Lord Alvanley on that occasion observed, that he could not look into the act for any explanation of the contents of the patent or specification.

The patent and specification must, in fact, stand or fall by themselves ; and no extraneous matter can be introduced to explain them and establish their legality. If they are bad in themselves, nothing whatever can make them legal instruments.

an attested copy. But it never has been held that an act of a private nature derives any additional weight or authority from such a proviso ; it only affects Koops, and those claiming under him ; and authorizes him to do certain acts which by the letters patent he could not have done. It recites the letters patent, containing a clause which prevents him assigning to more than five persons ; and then enables him to assign to any number of persons not exceeding sixty. It is not possible then to consider this act as giving title to Koops which he had not at the time when it passed. Such has been the construction which has always been put upon acts of Parliament of this nature. We are therefore of opinion that no aid is to be derived to the defendant from the act of Parliament.

CHAP. VII

OF THE PROPERTY IN AN INVENTION.

THE inventor, being possessed of a patent, with a knowledge of the manner in which it must be construed, is next to be informed of the *nature of the property* he has acquired, and the uses to which it may be applied. The grounds upon which assistance is refused, in the courts both of common law and equity, to those persons who conceal their inventions, to relieve them from the effects of any breach of faith, will afterwards be investigated.

I. PROPERTY IN A PATENT.

Its nature generally.
Personal property.

Though the statute merely mentions the "*inventor*;" yet the patent is always granted to him, his executors, administrators, and assigns, and to such others as they at any time shall agree with.

It is a personal chattel (*a*), peculiar in its nature as to

1. Its *duration*, or the time it may be enjoyed.
2. The *number of persons* to whom it may be assigned; or who may at the same moment be interested in it.

(*a*) See 2 Bla. Com. Chap. 27.

3. Being sometimes *enlarged* by an act of the state.

But in every other respect it is to be viewed in the same light as that in which personal property in general is considered.

This privilege, so valuable to an inventor of the sole working or making his new manufacture, is by the statute (b) allowed to be enjoyed for *fourteen years or under*: which term, by express enactment, is to be accounted from the date of the first letters patent or grant of such privilege. Though the king, therefore, when he sees occasion, may grant this right for any time less than fourteen years, yet a patent in which it should be attempted to extend that term would in consequence thereof be void.

1. Duration.

It is one of the most material conditions (c) upon which the grant is made, that, if the person interested in it should make any transfer or assignment of it, or divide it into shares, or declare any trust, or seek public subscriptions, or should presume to act as a corporate body, or do any thing contrary to the Act of Geo. I. so that *more than five persons* should in any manner become interested, and claim a benefit in the patent, it is declared to be void.

2. Number of persons interested.

Executors and administrators are to be *reckoned, accounted, and considered, as and for the single person* whom they represent, as to the in-

(b) 21 Jac. 1. c. 3. s. 6.

(c) Ante 49, 50. and see Appendix for copy of a patent.

terest they shall be entitled to in right of the testator or intestate. (d)

Assign-
ment of
patent.

Subject to the above mentioned restrictions as to its duration, and the number of persons that may, at any one time, be interested in it, a patent may be *assigned* in the same manner as other personal property. (e)

1. *Generally.*

2. *Under Commission of Bankrupt.*

Assign-
ment ge-
nerally.

If the grant be valid, the assignment of it in the usual way is of course good and effectual. Where a patentee, having a lawsuit respecting the validity of his patent, made an absolute grant of it, (reserving to himself the legal right until the disputes were ended) in trust for the assignee, with a covenant to further assign: it was held, that, upon the determination of the suit, the patent vested without such second assignment. (f)

If patent
be void.

But far different is the effect of an assignment of a grant which afterwards appears to be an invalid one.

If he who has a patent-right (g) agree with another person, for a valuable consideration,

(d) 21 Jac. I. c. 3. s. 6.

(e) The property in a patent, and the right to exercise it, should go together. See *Ex parte O'Reilly*, 1 Ves. Jun. 118.

(f) *Cartwright v. Amatt*, 2 Bos. & Pull. 43.

(g) *Hayne and another v. Maltby*, 3 T. R. 438. (and see 14 Ves. 132, 3.) The plaintiffs were assignees of one J. Taylor, of a patent for an engine or machine, to be fixed to a common stocking frame, for making a sort of net or open work, called point net. Permission by an agreement was given to the defendant to use the engine, *provided he worked it according to the specification*, and would not use any other

that the latter may use the manufacture for a certain time, upon certain conditions; yet if the patentee, for a breach of the contract and covenant, bring an action, it may be answered by shewing in any manner that the patent is a bad one, and invalid.

But where an action was brought by the assignee of a grant against the *patentee himself*, for using an invention, *the latter* was not permitted, in violation of his own contract, to infringe the patent-right which he had assigned, and to deny that he had any power to convey,

patent engine for the same purpose. In an action at law on the agreement breaches were assigned upon the latter condition. It was pleaded, amongst other things, that the specification was not enrolled in time: that the plaintiff Taylor was not the inventor, nor was the machine a new one. To which the plaintiffs demurred.

Kenyon, C. J. It is contended that the defendant shall be bound by his covenant, though the consideration of it is fraudulent and void. This is not to be considered as a covenant to pay a certain sum in gross at all events; but to use a machine in a particular way, in consideration of the plaintiffs having conferred that interest on the defendant, which they professed to confer by the agreement. The doctrine of estoppel is not applicable here. The person supposed to be estopped is the very person who has been cheated and imposed upon.

Buller, J. We must consider the intention of the parties. If the plaintiffs had the exclusive right to the machine, they might convey it to any other person. It is now discovered that they had no such right; and therefore the defendant has not the consideration for which he entered into his covenant, and notwithstanding which, they say he is still bound. Judgment for defendant.

by shewing any thing that would invalidate his own patent. (*h*)

On the other hand, if a person, imagining that he has discovered something new, obtain a patent for it; (*i*) and then assign it for a valu-

(*h*) *Oldham v. Langmead*, Sittings after Trin. 1789, coram Lord Kenyon, cited by Mr. Wigley in arg. 3 T. R. 439.

(*i*) *Taylor v. Hare*, 1 New Rep. 260. (and see 13 East. 348. 16 East. 207, 8. 4 M. & S. 37.) The patent was granted for "an apparatus for preserving the essential oil of hops in brewing." The defendant assigned his right to the plaintiff, upon condition of receiving from him and his partner, since deceased, an annuity of 100*l* per ann. during the term of the patent. After the plaintiff had used the apparatus, and paid the annuity to defendant for several years, it was discovered that he was not the inventor. The patent had never been repealed. The plaintiff therefore now brought the action to recover back the money which had been paid to the defendant.

Mansfield, Sir James, C. J. In this case two persons, equally innocent, make a bargain about the use of a patent; the defendant supposing himself to be in possession of a valuable patent-right, and the plaintiff supposing the same thing. Under these circumstances the latter agrees to pay the former for the use of the invention; and he has the use of it. *Non constat* what advantage he made of it. For any thing that appears, he may have made considerable profit. He would never have thought of using this invention, if the privilege had not been transferred to him.

Heath, J. As well might it be said that if a man lease land, and the lessee pay rent, and afterwards be evicted, that he shall recover back the rent, though he has taken the fruits off the land.

Chambre, J. Both parties were mistaken. Both have thrown away their money. In the case of Arkwright's patent, very large sums of money were paid for using the

able consideration to another, who uses it for some time; the assignee, though the grant afterwards prove to be a bad one, cannot recover the sum of money he originally gave for the purchase of it.

There must not however be the least appearance of *fraud* in the transaction. Both must have acted under the mistaken notion that it was a legal patent.

If it were discovered to be an invalid patent before the assignee had made any use of it, according to the rules of equity and good conscience, it would seem that the purchase money ought to be returned.

And where the assignee of certain shares in a patent-right covenanted that he had full power to convey, and that he had not by any means, directly or indirectly, forfeited his right over the same; it was held, that the generality of the former words were not restrained by the latter. (j)

Not only can this property be assigned generally, but it will pass to the assignees of a bankrupt patentee. (k) The grant obtained by an *uncertificated* bankrupt (l) for an invention

Bankruptcy.

patent-right: but no money was ever recovered back after the patent had been cancelled. Judgment of nonsuit.

(j) 3 Bos. & Pull. 565. and see 2 N. R. 71.

(k) See Montag. Bank. Laws.

(l) *Hesse v. Stevenson*, 3 Bos. & Pull. 577. *Lord Alvanley*. It was next contended that the nature of the property in this patent was such, that it did not pass under the assignment. That the fruits of a man's invention do not pass. It is true that the schemes which a man may have in his own

made since the act of bankruptcy is affected by the previous assignment of the commissioners; and, vesting in the assignees, is liable to be seized by them: even in the hands of third persons.

From the case of *Hesse v. Stevenson*,^(m) we dis-
head before he obtains his certificate, or the fruits which he may make of such schemes, do not pass; nor could the assignees require him to assign them, provided he does not carry them into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass as any other property acquired by his personal industry. We are therefore clearly of opinion that the interest in the letters patent was an interest of such a nature as to be the subject of assignment by the commissioners.

^(m) *Hesse v. Stevenson*, 3 Bos. & Pull. 565. This was an action of covenant. It appeared by a case reserved, that in June 1790, one Koops was duly declared a bankrupt. That on the 17th and 18th of May 1801, the said Koops obtained patents. That Koops had assigned a certain share of the patent to the defendant, who had assigned a part of that share to the plaintiff. That an act had passed by which Koops was enabled to assign the use of the said patent to any number of persons, not exceeding sixty; which act was declared to be a public act. On 9th September, 1801, the creditors of Koops executed a deed of composition with him; to which several of his creditors were not parties. The assignees, and most of the creditors, by that deed, did remise, release, and quit claim unto the said Koops, his heirs, executors and administrators, all actions, rents, claims, and demands whatsoever. Koops failed in the performance of the consideration of the said deed; whereupon the assignees entered up judgment upon the warrant of attorney, on 31st March 1802, and on the 14th October following issued a

cover in what manner patents for inventions are viewed by the bankrupt laws. After deciding generally that a composition entered into by the

fieri facias; and, after taking the goods, &c. of Koops, entered upon the premises where the manufactory under the patents and act of parliament was carried on, and took possession of the same. In the deed-poll between the defendant of one part, and the plaintiff of the other, was the usual covenant for good title, that the said defendant had good right, full power, and absolute and lawful authority, to assign and convey the said shares, &c.; and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had or might have had in the said shares. Breach that he had not good title.

Alvanley, C. J. We shall consider the case as though the whole deed were before us. From all the cases upon this subject it appears to be determined, that however general the words of a covenant may be if standing alone, yet if, from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words. The question therefore always has been, whether such an irresistible inference does arise. The warranty in this deed, in the usual and almost daily words, where parties intend to be bound by their own acts only, *viz.* "for and notwithstanding any act by him done to the contrary," omits them altogether; besides which, the defendant covenants that the assignee shall enjoy the property assigned in as ample a manner as the assignor. The omission of the words is almost of itself decisive. We are therefore of opinion, that the covenant for absolute right to convey is not restrained by the other parts of the deed.

It is said, secondly, that the assignees have reconveyed the whole of their interest: but I am of opinion that deed was not intended to convey, nor did it operate in law as a conveyance.

bankrupt, his assignees, and most of his creditors, by which, upon certain terms, the bankrupt had all his goods and chattels attempted to be reconveyed to him, was not a conveyance in law: it was held that the general covenant for good title of a patent-right was not restrained by the covenant in which Stevenson, assignee of Koops the patentee and bankrupt, says that he has not done any act to impeach his title. This decision arose principally from the words "for and notwithstanding any act by him done to the contrary," being omitted.

It may be well to observe that an uncertificated bankrupt, before he attempts to carry his schemes into execution, should obtain from his assignees a renunciation of all benefit of the patent.

A Trust
of patent.

It was doubted by Lord Thurlow (*n*), whether a patent, meaning letters patent generally, could be the subject of a *trust*: but it is humbly conceived that one for an invention might become so, in the same manner as other personal property.

Indeed it is expressly granted (*o*) that it shall not be *assigned in trust* to more than five persons; thus allowing it to be made a trust for the benefit of that number.

There was a trust declared in Cartwright's patent; and no objection was raised to it *on that account*. (*p*)

Proper
for a devise.

It may be bequeathed in any manner the pa-

(*n*) 1 Ves. Jun. 129. Ex parte O'Reily.

(*o*) Form of Patent, Appendix. (*p*) 2 Bos. & Pul. 44.

patentee pleases. If he make not a will, it is assets in the hands of his administrator. (q)

If the patentee does not wish to part wholly with his patent, he may grant *licences* to persons to use it. And it would appear, in the event of an infringement of the patent-right, that all who have licences may maintain actions for damages. (r)

The transcendent power of parliament has, however, often been called forth to give a better effect to the right of patentees for inventions, by extending the term of its duration, or increasing the number of persons that may, at any one time, become interested in a patent.

The extension of the term is made, when it appears that the application, labour, and expense, of the patentee have been so great, that he has not been able to receive, within the time allowed by his patent, an adequate reward from his great undertaking. Other causes have had their due effect upon parliament:—as when the patentee has discovered some improvements which have been attended with great expense, and by which the machine is become much more profitable to him, and beneficial to the community; or where, dying, he has left his family unable to proceed with the manufacture without that indulgence.

And the legislature will also lend its assistance when the undertaking is of such a magnitude

(q) 1 Ves. Jun. 118. and see 3 B. & P. 573.

(r) Ante 49. See *George v. B. Wackerback and another*, Repertory of Arts, N. S. Vol. XXVII. 252.

that five persons are unable by themselves to reap any benefit from the grant, by making an act of parliament, giving power to the patentee to assign the patent-right to any number of persons. The interest in Koops's patent was, by an act of parliament made capable of being divided into *sixty* shares. (s)

In almost every instance in which the legislature has interfered, a proviso is introduced, that every objection in law competent against the patent shall be of the same force against the act to all intents and purposes. (t) But even if that clause is not introduced, yet the patentee, as to the *validity* of the patent, or his *title* to it, is in the same situation as though the act had never been passed. (u)

II. PROPERTY IN DISCOVERIES NOT PROTECTED BY A PATENT.

Some persons, alarmed at the frauds frequently practised upon inventors, and strongly impressed with the difficulty of making a sufficient specification, and perhaps suspicious of the manner in which the patent may be construed, have preferred to keep their discoveries secret, and to use or vend their manufacture without the protection of a patent. No one, however, can have a property—an exclusive right—in

(s) 3 Bos. and Pull. 565.

(t) Ante 152. n.

(u) 3 Bos. and Pull. 578.

such a subject. (v) Injury and remedy are inseparable in law: but as there is not any rule of law, even in equity, to punish or to prevent any one from making use of such manufactures, we may conclude that such discoverers do not sustain an *injury* to any legal property.

Of course, the case is altered, when any *fraud* is practised in getting at the secret. One

(v) *Canham v. Jones*, 2 Ves. & Beam. 221; (and see *Williams v. Williams*, 3 Meriv. 157.) The bill stated that Isaac Swainson was, for upwards of thirty years before his death, the sole proprietor of the secret or recipe for preparing the medicine called *Velno's* vegetable syrup, which he had purchased for 600*l.*, and by his will bequeathed to the plaintiff; who, since his decease, continued to make the same preparation as specified by the recipe; and made great profit; and would have made much greater, if the defendant had not imposed on the public a spurious composition under the same name. Demurrer.

Sir Thomas Plumer, V. C. This bill proceeds upon an erroneous notion of exclusive property now subsisting in this medicine; which Swainson, having purchased, had a right to dispose of by his will; and, as it is contended, to give the plaintiff the exclusive right of sale. If this claim of monopoly can be maintained without any limitation of time, it is a much better right than that of a patentee. But the violation with which the defendant is charged does not fall within the cases in which the court has restrained a fraudulent attempt by one man to invade another's property; to appropriate the benefit of a valuable interest in the nature of good will, consisting in the character of his trade or production, established by individual merit; the other representing himself to be the same person, and his trade or production the same, as in *Hogg v. Kirby*, 8 Ves. 215. combining imposition on the public with injury to the individual. Demurrer allowed.

person must not use the name of another, nor represent his article to be the same as the one thus secretly made; or he will be liable to answer for damages in an action at law; or be restrained from using it by an injunction. (x)

Nor will the court prevent a person from imparting the secret of an invention which had been the subject of a patent long since expired; the specification of which was so incorrect, that the discovery still remained undisclosed. (y)

But a man has such a property in his invention before a patent is procured, that if he agree to inform another person of the secret, who binds himself in a penalty not to avail himself, or take any undue advantage of the communication; he may maintain an action for the breach of that contract. (z)

(x) *Yovatt v. Arnyard*, 1 Jac. & Walk. 394. And the Case of *Day & Martin*, E. T. June 1821, before Abbott, C. J.

(y) *Newberry v. James*, 2 Mer. 446.

(z) *Smith v. Dickenson*, 3 Bos. & Pul. 630. post.

CHAP. VIII.

OF THE INFRINGEMENT OF A PATENT, AND THE
REMEDIES FOR THAT INJURY.

THE patentee having ascertained the nature of the property he has acquired by the grant, the next topic for investigation will be the conduct of persons, when it is considered as an *infringement* of that right, and the necessary *remedies* which the law has prescribed for the injury.

I. WHAT AMOUNTS TO AN INFRINGEMENT.

Whether the act of the defendant is really an infringement of the grant is a question for the jury. (a)

The law cannot be evaded by fraud or deceit of any kind. It has been decided that the making or using of any the *least part* of a manufacture (b) is an infringement. If the article manufactured by the defendant be of a different *form*, (c) or made with slight and immaterial

(a) 2 Hen. Bla. 480.

(b) In *Manton v. Manton*, Dav. Pat. Cas. 348. the alleged infringement consisted in making a perforation in the hammer of a gun, in a direction a little different to that in the patent article.

(c) 2 Hen. Bla. 477. and see *Bovill v. Moore*, Dav. Pat. Cas. 405. *Gibbs, C. J.* I remember that that was the ex-

additions, or by the substitution of things somewhat different from those used by the patentee; yet, if the manufactures are really and substantially the same, the patentee is entitled to a remedy at law. (*d*)

pedient used by a man in Cornwall, who endeavoured to pirate the steam engine. He produced an engine, which, on the first view of it, had not the least resemblance to Boulton and Watt's. Where you looked for the head, you found the feet; and where you looked for the feet you found the head. But it turned out that he had taken the principle of Boulton and Watt:—it acted as well one way as the other; but if you set it upright, it was exactly Boulton and Watts' engine.

(*d*) See the elaborate opinion of the court in *Hill v. Thomson*, 2 B. Moore, 447. *Dallas, J.* Whether the patent be valid or not signifies nothing in this particular case, if the defendants have not worked according to the specification. To prove the infringement of the patent one witness only was called; this part of the case therefore depends entirely upon his testimony; and, before adverting to the evidence in question, it will be necessary to look at the patent, as far as it relates to this part of the subject. It has not been contended that it is a patent introducing into use any one of the articles mentioned therein, as singly and separately taken; nor could it be so contended, for the patent itself shews the contrary; and if it had been a patent of such a description, it would have been impossible to support it; for slags, as well as mine rubbish, and lime, had undoubtedly been made use of before it was passed. But it is said, it is a patent for combinations and proportions, producing an effect altogether new, by a mode and process, or series of processes, unknown before; or, to adopt the language made use of at the bar, it is a patent for a combination of processes altogether new, leading to one end;—and this being the nature of the alleged discovery, any use made of any of the ingredients singly, or used in partial combination, omitting some, and making use of all or some, in proportions essen-

If there are some articles well specified, and others that are only mentioned in the specification, without any intention of their being considered as perfect instruments, but merely as speculative matter, as was done by Mr. Watt in his patent, (e) although the latter cannot be protected, and may consequently be infringed with impunity; yet an infringement of the former parts or articles cannot be excused.

Even if the improvement of a manufacture be so great and important that the *substratum* is insignificant in comparison with it, still no claim can be laid to the whole. The addition may be made and vended by itself. (f)

II. REMEDY AT COMMON LAW.

It is a wise maxim in our law that there is not an injury without its concomitant remedy. Formerly, patent-rights were investigated in the Star Chamber : (g) but, by the statute of Monopolies, it is enacted that a patent shall not be void, if the thing patented be in substance different, and yet producing a result equally, if not more beneficial, will constitute an infringement of the patent. It is scarcely necessary here to observe, that a slight departure from the specification for the purpose of invasion only would of course be a fraud upon the patent; and therefore the question will be, whether the mode of working by the defendants has or has not been *essentially or substantially different*.

(e) Ante 116. It has been doubted whether the insertion of imperfect articles ought not to invalidate the grant. See ante.

(f) 1 Ves. & Beam, 67. and see ante 72 and 126.

(g) 3 Inst. 183.

polies, (h) it was enacted "that monopolies, letters patent, &c., and their force and validity, ought to be, and shall be, examined, heard, tried, and determined, by and according to the *common laws* of this realm, and not otherwise." Hence the remedies for this injury are

An *action at law* for damages; or
Proceedings in Equity for an injunction and account.

When the king has granted a patent for the sole use of any invention, the common law gives a right of action against every person who infringes it. (i) It is in form an action on the case. (j)

Although the patentee has been defeated in one action, still he may maintain fresh suits against other persons: as was done by Mr. Arkwright (k) and by Mr. Watt. For actions

(h) 21 Jac. I. c. 3. s. 2.

(i) Buller, N. P. 76.

(j) 1 Chit. Pl. 142.

(k) *Arkwright v. Nightingale*, Dav. Pat. Cas. 55. *Lord Loughborough*. It has been said that many persons have acted upon an idea that Mr. Arkwright had no right, he having failed to establish it when this cause underwent an examination in another place, in which the event was unfavourable to him. If the question at present were what damages Mr. Arkwright should have received for the invading that right, I would have allowed the parties to have gone into evidence to shew to what extent persons had acted upon the faith of the former verdict: but the question now is upon the mere right; and if the result of this case is in favour of the plaintiff, the verdict will be with one shilling damages. A future invasion of this right would entitle Mr. Arkwright to an action for damages: but in the present case they are not asked.

on the case will lie, notwithstanding the patent is really void, until it has been cancelled. (*l*)

If the patent has been assigned, the assignee may sue alone, or he and the patentee may join in the action. (*m*)

1. The pleadings.
The parties.

When a grant by letters patent is pleaded, it ought to be shewn under *what* seal it is made; (*n*) and therefore, in the declaration for an infringement, the patent must be stated to be under the *great seal*. (*o*)

The declaration.

A profert is made of the letters patent, which are recited: but oyer of them is never allowed, (*p*) because they are matters of record.

The venue in this action must always be laid in the county of Middlesex. In *Cameron v. Gray*, (*q*) a motion was made to change the venue from Middlesex to Northampton. The rule was refused, because the patent, which is the substratum of the action, is tested at Westminster.

Venue.

The usual plea is *not guilty*; which, putting in issue the whole of the declaration, forces the plaintiff to support the grant in all its parts, and gives to the defendant the greatest latitude for evidence. (*r*)

Plea, &c.

(*l*) 2 Ventr. 344. Dav. Pat. Cas. 55.

(*m*) 2 Wils. 423. 2 Saund. 115, 6. a.

(*n*) 2 Inst. 555, 1 Vent. 222. 9 Co. Rep. 18.

(*o*) For precedents of declarations see the record at full length in *King v. Arkwright*, printed case. And see *Boulton v. Bull*, 2 Hen. Bla. 463. Dav. Pat. Cas. 162. 2 Chit. Pl. 355. 8 Went. Pl. 431.

(*p*) *Rex v. Amery*, 1 T. R. 149. 1 Saund. 96. a. 1.

(*q*) 6 T. R. 363. and see *Rex v. Haine*, 2 Cox 235.

(*r*) If the patent be void in itself, it is said that *non con-*

Demurrer. The defendant, for any thing on the face of the declaration, by which it clearly appears that the patent is void, may *demur generally*; as if the grant be of a thing for which a patent ought not to have been obtained.

2. Evidence.
By plaintiff to support the patent.

By the common law (*t*) a *constat* or *inspeximus* of the king's letters patent could not be shewn forth in court, but the letters patent themselves must have been produced: but by statute 3 and 4 Ed. VI. c. 4., explained by stat. 13 Eliz. c. 6., "patentees, and persons claiming under them, may make title in pleading, by shewing forth an exemplification of the letters patent, as if the letters patent themselves were pleaded and shewn forth;" and now they are to be given in evidence in the same manner as if they were pleaded.

It is necessary in this, as in every other case, that the plaintiff should be prepared to prove the material allegations in his declaration;—that the invention in all the parts to which the patent applies is *new* and *useful*; (*u*)—that he is the *inventor*, and that the *specification* is sufficient in law. "I do not agree," said Mr. Justice Buller, (*x*) "with the counsel who have

cessit may be pleaded to it without a *scire facias* to repeal it. 2 Roll. Abr. 191, (s.) pl. 2. 2 W. Saunders, 72. q.

(*t*) Olive v. Gwyn, Hardr. 119. Phil. on Evid. 498. and see 5 Co. 53. Bro. Surrender 51. Co. Lit. 225, b. Dyer 167-179. Att. Gen. v. Taylor, Prec. Ch. 59.

(*u*) Boville v. Moore, Dav. Pat. Cas. 399. Manton v. Manton, *id.* 348, 9.

(*x*) Turner v. Winter, 1 T. R. 606, 7. and see 2 B. Moore, 250.

argued against the rule, in saying that it was not necessary for the plaintiff to give any evidence to shew what the invention was, and that the proof, that the specification, was improper, lay on the defendant; for I hold that a plaintiff must give some evidence to shew what his invention was, unless the other side admit that it has been tried and succeeds. But wherever the patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must shew in what his invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this on his part is sufficient, and it is then incumbent on the defendant to falsify the specification."

It is good *prima facie* evidence that experienced and intelligent men, versed in the art or mystery in which the invention has been made, have never before heard of it; (*y*) yet the novelty of the invention cannot be thus proved if one witness is produced who states that he has used it. (*z*)

After the plaintiff has thus supported his patent, he is required to prove that the defendant has infringed it, to whom it will be open to shew that he has not worked according to the specification. (*a*)

Evidence
of the in-
fringe-
ment.

What amounts to an infringement has been

(*y*) *Manton v. Manton*, Dav. Pat. Cas. 350.

(*z*) Ante, p. 62.; and see *King v. Arkwright*, Printed Case, 183. Dav. Pat. Cas. 135.

(*a*) *Hill v. Thompson*, 2 B. Moore, 447, and ante, 174. n°

considered, (b) from which it is easy to determine what evidence is necessary in each particular case.

Proof by inspection of manufactures.

In several instances it has been very difficult to prove the infringement, especially where it is to be ascertained by the examination of the manufactures. It is possible that two persons might make articles equally good and cheap by machines constructed upon different principles; but it is hardly probable that the manufactures would agree in all their parts.

It was observed to the jury by Lord Ellenborough, in *Huddart v. Grimshaw*, (c) after it was proved that the defendant would not allow his manufactory to be inspected to furnish evidence for the cause,—“When one sees the rope of the defendant agree in all its qualities with a rope actually made upon the plaintiff’s plan, it is *prima facie* evidence, till the contrary is shewn, that it was made upon his method; and therefore, as against him it should seem, supposing the patent in full force and a valid one, it is reasonable fair evidence, in the absence of contrary evidence, to presume that it was made in that way. There is certainly great weight in the observation of the counsel,—Am I to come forward and divulge my mode of making rope, and from which I reap a great advantage? Whether it was necessary to have gone that length in proof does not appear. Persons might have been called upon

(b) Ante, 173.

(c) *Dev. Pat. Cas.* 288, 289.

who might not be privy to the making of strands in the small room : however, whether it puts him to inconvenience or not, the question is, whether it is *prima facie* probable presumptive evidence, in the absence of evidence on the other side ; and it is a competent ground for you, if you think the facts bear you out, to form that conclusion upon."

When the plaintiff has closed his case, the defendant may give any evidence which will shew that the grant is invalid, as that the patentee was not the inventor, or that the subject is not a proper object for a patent, or that the specification is incorrect. Or he may otherwise shew that the plaintiff has no right to sue.

Evidence by the defendant.

The question generally arises on the specification. It is often attempted to be shewn that it was the intention of the patentee, at the time he made the specification, to conceal the invention.

Intention of patentee to conceal invention.

It was proved that Mr. Arkwright said, that his description would operate as a specification, but that he had made it as obscure as the nature of the subject would allow ; (*d*) and also that he had, in a petition to the House of Commons, admitted that he had not properly specified how the machine was to be made, on purpose that foreigners might not use it. (*e*)

A witness may be asked whether the invention might not with ease have been clearly described,

(*d*) King v. Arkwright, Printed Case, 173. Dav. Pat. Cas. 108.

(*e*) *Id.* Printed Case, 176. Dav. Pat. Cas. 115, 116.

and whether he does not think that the description is *very* obscure. (*f*)

To prevent the miscarriage, which will almost always take place, in the endeavour to prove an infringement by comparison of the manufactures, it is prudent first to apply to a court of equity to appoint persons to inspect the manufactories, as was done in several cases. (*g*)

Trial by comparing specification with patent.

The validity of the patent may, however, be questioned upon the putting in and reading of the specification. If they do not support each other: if the description in the latter be palpably at variance with the title of the thing claimed by the former instrument, the plaintiff must fail. In the *King v. Wheeler* (*h*) Abbott, C. J., did not leave any point to the jury, because he conceived that on the face of the record it was clear that the patent was void, whatever evidence might be produced.

New trial in law.

The patentee must be very careful in collecting his evidence; for, after a verdict has once been given, the Court is very anxious not to put the parties to further expense by sending them back to a new trial.

A rule *nisi* for a new trial was refused to Mr. Arkwright, (*i*) although he stated in his affidavits that he did not expect the *originality* of his invention to be attacked; that he was taken by surprise; and that on a future occasion he

(*f*) *Id.* Printed Case, 96.

(*g*) Remedies in Equity, p. 187.

(*h*) 2 Barn. and Ald. 345.

(*i*) Page 188 of the Printed Case. Dav. Pat. Cas. 142.

would adduce evidence to contradict or explain the evidence given against him. That he did not conceive that the point, that some of the articles were immaterial, and inserted only for the purpose of causing misconceptions, would have been litigated.

If judgment be given for the patentee, he may of course bring other actions against every person who has infringed his right. If it be against him, still he may proceed in fresh suits, for no one is at liberty to use and vend the manufacture without subjecting himself to be sued, until the letters patent have been *cancelled*. (*j*) Judgment.

III. REMEDY IN EQUITY.

The jurisdiction exercised by the Court of Chancery over patents for inventions is merely in aid of the common law ; from which, by the delay sometimes arising in its proceedings, some injury might be felt by the patentee. This interference is made between the parties in order to give full effect to the provisions of the statute of James ; and is never allowed to be called for, but upon the supposition, that the property in the patent, generally inferred from his possession of it, belongs to the applicant, and that he has been fraudulently dealt with by the defendant. (*k*) 1. The jurisdiction of a Court of Chancery.

The great advantage gained by commencing

(*j*) 2 Ventr. 344. See *Arkwright v. Nightingale*, Dav. Pat. Cas. 55.

(*k*) *Boulton v. Bull*, 3 Ves. 140 ; and see 14 Ves. 132. 6 Ves. 607. 1 Maddox. Chan. p. 113. and post. Book III. c. 8.

proceedings in equity (*l*) for an infringement, before recourse is had to the common law courts, arises from the power of that court immediately to restrain the party from any further use of the patent-right, and to order him to give an account of his profits.

The grounds on which injunctions are granted.

“The principle,” said Lord Eldon, (*m*) “upon which the Court acts in cases of this description, is the following:—where a patent has been granted, and an exclusive possession of some duration under it, the Court will interpose its *injunction* without putting the party previously to establish the validity of his patent by an action at law. But where the patent is but of yesterday, and upon an application being made for an injunction it is endeavoured to be shewn, in opposition to it, that there is no good specification, or otherwise that the patent ought not to have been granted, the Court will not, from its own notions respecting the matter in dispute, act upon the presumed validity or invalidity of the patent, without the right having been ascertained by a previous trial; but will send the patentee to law, and oblige him to establish the validity of his patent in a court of law. It will, however, in the mean time, grant him the benefit of an injunction.”

Although possession has been distinctly proved; yet, if there be a strong doubt whether the speci-

(*l*) Mitford's Chanc. Plead. 124.

(*m*) Hill v. Thompson, 3 Meriv. 624. and see Prodgers v. Phrazier, 1 Vern. 137. 2 Atk. 286. 391. 485. 1 Vern. 120. *id.* 275. Amb. 406.

fication is not bad in law, the court will *brevi manu* interfere, and put an end to the injunction (*n*).

Of the manner of filing the bill for relief, which in general prays for an injunction and an account, with the method of issuing the subpoena, its service, &c. reference must be made generally to the books of practice (*o*), observing that for each distinct invasion of the patent there must be separate bills filed (*p*).

2. The practice. Filing a bill.

The remedy sought in equity is for INSTANT RELIEF (*q*). It is usual to move for the injunction upon filing the bill before the answer is put in. It is generally granted upon the *ex parte* affidavits. The defendant is commanded *either* to refrain in future from using or vending the manufacture, or to keep an account of the proceeds, until it can be determined whether the patent is valid, and whether it has been infringed by the defendant.

An injunction.

In *Hill v. Thompson* (*r*), Lord Eldon said, “ he doubted whether the injunction ought to have been granted in the first instance, unless the *affidavits* had stated more particularly in what the alleged infringement of the patent consisted ; and that it should have been shewn to be, by working in the *precise proportions* men-

The affidavits.

(*n*) *Harmer v. Playne*, 14 Ves. 132. *Grierson v. Eyre*, 9 Ves. 341.

(*o*) 2 Maddox. Chan. ch. 7. and Edén on Injunctions, ch. 15.

(*p*) *Dilly v. Doig*, 2 Ves. jun. 486.

(*q*) See *ex parte O'Reilly*, 1 Ves. jun. 112., and see 1 Ves. jun. 430. 2 Ves. jun. 486. 3 Ves. 141. 6 Ves. 689. 14 Ves. 130. 1 Ves. and Beam. 67.

(*r*) 3 Meriv. 624. And see *Hill v. Wilkinson*, Rep. of Arts, Vol. XXX. p. 382.

tioned in the specification, as *being* of the essence of the invention. That when, in future, an injunction is applied for *ex parte*, on the ground of a violation of a right to an invention, secured by patent, it must be understood, that it is incumbent on the party making the application to swear, at the time of making it, as to his belief that he is the original inventor; for although, when he obtained his patent, he might very honestly have sworn as to his belief of such being the fact, yet circumstances may have subsequently intervened, or information been communicated, sufficient to convince *him* that it was not his own original invention, and that he was under a mistake when he made his previous declaration to that effect."

The answer.

In the usual time the defendant must bring in his answer to the bill, which generally contains a statement of facts, verified by affidavit, that shew, either that the patent is not a good one, or that the defendant has not infringed it.

Plea.

The defendant may plead any matters, as in other cases in equity, or he may demur. A demurrer, alleging that the right to the patent had not been previously established at law, was immediately overruled (s).

The hearing.

When the answer is read, the plaintiff may move to make the *injunction perpetual*, if one has previously been obtained; or, on the other hand, the defendant may move to have it dissolved. (t) But if, when the bill was filed, an in-

(s) *Hicks v. Raincock*, 2 Dick. 647.

(t) See *Gibbs v. Cole*, 3 P. W. 355.

junction was denied, it may now be moved for (*u*).

The court will exercise its own discretion, and, in continuing it, will perhaps direct *an issue at law* to try the validity of the patent; or, in dissolving it, will leave the party to bring an action for the supposed infringement. In the latter instance the court will, in general, order that the party against whom the application is made shall still keep an account pending the litigation (*v*): but sometimes, when the affidavits are very contradictory, it will dismiss the suit altogether.

It is unnecessary to go into the manner of making the record of a *feigned issue* directed by the Court of Chancery (*w*). 5. Feigned issue at law.

The evidence to be given at the trial is nearly the same as if the suit had been originally commenced at the common law court (*x*). Evidence.

The Lord Chancellor will place the parties under such conditions as will meet the equity of the case. He will order admissions to be made of facts, which, though true, could not easily be proved. If the infringement is done secretly, he will order the *manufactory to be inspected* (*y*).

When a verdict has been given, and the plaintiff moves to revive or to make an injunction per- New trial.

(*u*) 1 Ves. jun. 430.

(*v*) 3 Meriv. 628. And see 1 Stark. N. P. C. 205. Wood v. Cockerell, Aug. 1819. Rep. of Arts, N. S. Vol. XXXV. p. 254.

(*w*) See Tidd's Practice, p. 750.

(*x*) Ante, 178—182.

(*y*) See Huddart v. Grimshaw, Dav. Pat. Cas. 265. and Boville v. Moore, *id.* 361. and see ante, 182.

perpetual; or the defendant having been successful moves to dissolve it, either motion may be opposed on the ground that the verdict is bad, and that it is his intention to move for a new trial.

If the Lord Chancellor thinks that, in point of law, he is not so well satisfied with the patent as to take it for granted that no argument can prevail upon a court of law to let the question be reconsidered in a new trial, then he will not revive the injunction, but direct the account to be kept until that motion has been made. But if he is convinced that a court of law must and will consider the verdict of the jury as final and conclusive, then he will revive the injunction, and make it perpetual. (a)

In one instance (b) in which the judges of the court of common law were equally divided in opinion as to the validity of the grant, the Court of Chancery directed a new trial to be had, but would not impose any terms on the patentee, nor dissolve the injunction in the mean time.

Costs.

At the same time the party that is successful may move for the costs and expenses which he has sustained by an allegation of right which could not be supported. (c)

General
observa-
tions.

Thus it appears that, before a suit is commenced at law, it is often preferable to take proceedings in equity. If the patent is really good, the injunction prevents any further in-

(a) 3 Meriv. 631.

(b) *Boulton v. Bull*, 3 Ves. 141.

(c) 3 Meriv. 629. and see *Tidd's Prac.* 1001.

fringement; and, if it be a doubtful one, the defendant will be restrained from using it until its validity has been examined. The order for an account puts the patentee in a better situation than if he had to depend upon a jury for damages; and, if he wants any indulgence, any alleviation from the strict rules of law as to evidence, &c. it becomes absolutely necessary to sue first in chancery.

CHAP. IX.

OF LETTERS PATENT WHEN VOID, AND THE MANNER OF HAVING THEM CANCELLED.

ALTHOUGH the infringement of an invalid grant may, by shewing its defects, be justified in an action at law, or in an answer to a bill in equity; and the Courts may declare, that, in their opinion, the patent is voidable; yet, until it is actually cancelled, the patentee may go on against different parties, maintaining proceedings upon it in law and equity, (*a*) although the jury, under such circumstances, would of course give their verdict for the defendant. And the reason assigned is, that the patent must for the honour of the grantor,—the King,—be protected; until it is found by inquisition at law, that the grant either ought

(*a*) Ante, 177. 2 Ventr. 344. and see Attorney-General *v.* Vernon, 1 Vern. 277. 370. 2 Chan. Rep. 353.

not to have been made, or cannot with propriety be enforced. It is, therefore, necessary that the public should be provided with means of destroying a bad patent. This object is effected by a *writ of scire facias*.

All the instances in which patents are considered as void will first be enumerated, and then those things will be stated which do *not* vitiate patents; and afterwards the *proceedings* by *scire facias* will be investigated. (*b*)

I. WHAT RENDERS A PATENT VOID.

1. What makes all kinds of patents void.

The construction, which in law is put upon royal grants in general, was considered in a former Chapter. And it was there pointed out, as far as the law of patents in general was necessary to elucidate that of patents for inventions, how all kinds of grants were rendered void for uncertainty, misrecitals, and false suggestions. (*c*)

2. Patent for invention void generally under the statute.

A patent may be void, although the invention be new, either altogether, or for something in particular.

It is expressly provided by the statute of Monopolies, (*d*) that letters patent shall be void altogether, or generally, if they are—

1. Contrary to law; or
2. Mischievous to the state.

(*b*) See *George v. B. Wackerback and Another*, *Repertory of Arts*, N. S. Vol. XXVII. p. 252.

(*c*) Ante, Chap. VI. and see *Chit. jun. Prerog. of Crown*, 391—399.

(*d*) 21 Jac. I. c. 3. s. 6.

The mischief contemplated may, it appears, be done,

1. By their raising the price of commodities at home.
2. Or being hurtful of trade.
3. Or being generally inconvenient.

If an inventor obtain a patent for a proper object, and give a correct specification, and it be otherwise valid ; yet, if it produce the baneful effects by which Lord Coke distinguishes monopolies, as described in Book I. of this Treatise, it will be contrary to law. (e) It will then be void for being a monopoly. It is almost impossible, that, at the present day, a patent, professing to be for a new invention, (which would be invalid on the grounds that grants were formerly declared to be monopolies,) could be *obtained* ; and therefore it is unnecessary to add more on that subject.

Contrary to law.

It has been shewn that by the common law, and the statute of James, all monopolies are illegal. (f) According to the letter of the statute, the exception of patents for inventions, from the consequences attendant on monopolies, goes only to the *sole working and making* ; the sole buying, selling, and using, continue under the general prohibition: and with apparent good reason, for the exclusive privilege of *buying, selling, and using*, could hardly be brought

Mischievous to the state, &c.

(e) 3 Inst. ch. 85. and see the case of *Darcy v. Allen*, 44 Eliz. 11 Co. Rep. 85. Noy. Rep. 179.

(f) Ante, p. 12.

within the qualification of not being contrary to law, and mischievous to the state. (g)

Raising
the price
of com-
modities
at home.

That injurious effect of monopolies in general, of raising the price of commodities at home, will seldom be produced by the limited monopolies of grants for inventions; for one of the objects of almost every patent is to diminish the price of the manufacture; or, by furnishing a better article, to render it, at the same nominal price, of more intrinsic value.

Being
hurtful of
trade.

One of the issues (*h*) to be tried on the *scire*

(*g*) 2 Hen. Bla. 492. by Eyre, C. J.

(*h*) *K. v. Arkwright*, Printed Case, p. 30. Mr. Justice *Buller*.—Mr. *Bearcroft*, what do you understand to be the meaning of the first issue? Mr. *Bearcroft*.—The evidence on our side will be to shew that the grant is prejudicial and inconvenient to his majesty's subjects in general. I mean to say, there is great danger from such a grant as this, that it will go into foreign countries, if the monopoly is permitted. Your lordship will permit me to state it. I mean to say, it is of such a sort that it may be taken into other countries without all doubt; and if you can only work it here, loaded with a monopoly, and in another country it may be worked without, it will be a great danger to the whole trade, as applied to all the cotton manufacturers. Mr. Justice *Buller*.—I dont see, with respect to that issue, you can be permitted to give any evidence at all: it is merely a consequential issue; it is a question of law, whether it is prejudicial or not? When the facts are stated, therefore, if you thought it necessary to attack the patent upon those general words of the Act of Parliament, you should have stated it in what respect it was so then,—the fact would be put in issue. This is such a surprise upon the party, he can never come prepared to answer it. Mr. *Lee*.—It strikes me the prejudice must be, in the nature of it, a matter of fact; and your lordship sees it is a condition annexed to every patent by the terms of the Act

facias to repeal Mr. Arkwright's patent was, whether the grant was not prejudicial and inconvenient to the king's subjects in general. It appeared, from the opening speech of the coun-

of Parliament. Now there is no making any sense, use, or application of that, but upon some idea the patent is to stand or fall upon the ascertainment of that fact. My lord, if the patent is to be void, if proved prejudicial to the public; and good, if no such prejudice arises from it, in the nature of it; then *ex vi termini* there must be some mode of ascertaining it.

Mr. Justice Buller.—That is no answer to my question, Mr. Lee; my idea is, if the patent is void as a question of law, if prejudicial or hurtful to the country, you can only take issue upon some fact that makes it so; therefore your issue should not be in general terms prejudicial to the country: but you should state how, and then the party comes prepared to answer it.

Mr. Bearcroft.—Then, according to your lordship's observation, it is an immaterial issue; and we should state the fact, in order to give notice to the party. Mr. Justice Buller.—Upon that issue, upon this record I must take it thus:—the other three are precise pointed issues; but the first is of consequence to stand or fall as they are proved.

Mr. Lee.—Suppose this principle is assumed, and I conceive it may be fairly assumed, there is no one thing of equal importance in any country to the employing of the inhabitants that compose it. I will suppose any invention, and you have a right to put the most extravagant supposition upon earth. I will conceive all that manufactory which has been for ages carried on by men, women, and children, and the sustenance of them all, to be performed by an invention that does not admit of any human hands at all. It is possible, in the nature of the thing, all those spindles might, for aught I know, be worked by a turnspit dog, and afford no subsistence at all to any human being. I should conceive such a thing upon proof would be directly a public inconvenience, and destructive of the happiness of mankind. And yet it would not be necessary to shew that was the nature of it: but only

sel, that he intended to give evidence to shew that the patent would be hurtful to trade by loading the cotton manufactories of this country with a monopoly. Mr. Justice Buller would not allow him to call any witnesses to prove it, upon the ground that it was merely a consequential issue, and that it was a *question of law*, whether the patent was or was not prejudicial to the community.

The observations of that very learned judge were founded on the circumstance, that no facts shewing the inconvenience were stated in the record to be proved. The defendant was not able to learn by the pleadings from whence the supposed inconvenience arose. Such an investigation would be a surprise upon him. He could not possibly come prepared with evidence to rebut an undefined accusation.

Generally
incon-
venient.

A question of inconvenience arose in an early case, (*k*) whether Mr. Arkwright should obtain

to state that. Mr. Justice *Buller*.—Then you should state the fact upon record. Then he knows what he comes to answer. Whether you attack it upon one ground or the other, as to the inconvenience to the public, it is impossible for a man to come to answer that.

(*k*) *Arkwright v. Nightingale*, Dav. Pat. Cas. 55. Lord *Loughborough*.—It is said, it is highly expedient for the public that this patent, having been so long in public use after Mr. Arkwright had failed in that trial, should continue to be open: but nothing could be more essentially mischievous than that a question of property between A. and B. should ever be permitted to be decided upon considerations of public convenience or expediency. The only question that can be agitated in Westminster Hall is, which of the two parties in law or justice ought to recover.

a verdict after having submitted upwards of three years to a nonsuit on a former trial, inasmuch as many persons had, in consequence of his apparent abandonment of the patent, laid out great sums of money in constructing his machine. Such submission merely prevented him from obtaining damages, because the patent still remained uncanceled.

Hence it is evident, that if an issue were joined on certain facts stated in the record of *scire facias*, which shewed that the patent had a tendency to produce any of the bad effects, of being contrary to law, hurtful to trade, or generally inconvenient, such issue would be capable of trial; and the patent might on that account be declared to be void.

That the grant is invalid when the patentee is not the *inventor*, (*l*) when its *object* is not a manufacture, (*m*) and when the *specification* is not sufficiently correct, (*n*) has already been shewn. If the patent has not been *obtained* (*o*) in the usual mode, or will not bear the *construction* (*p*) that must necessarily be put upon it, it is also void. *Any one* of these circumstances appearing in evidence will be the means of destroying the patent; and it is not necessary to prove more than one objection or cause for cancelling the grant. (*q*)

Grant void in particular under the statute.

Lord *Thurlow* declared that letters patent, even if they were granted in fee, could not stand half an hour, if *abused*, 1 Ves. jun. 118.

(*l*) Chap. II. ante, p. 52. (*m*) Chap. III. ante, p. 57.

(*n*) Chap. IV. ante, p. 100. (*o*) Chap. V. ante, p. 136.

(*p*) Chap. VI. ante, p. 153.

(*q*) *K. v. Arkwright*, Printed Case 187. Dav. Pat. Cas. 141.

II. WHAT THINGS DO NOT VITIATE PATENTS GENERALLY.

There are some instances in which mistakes do not vitiate a grant. (*r*)

1. Every false recital in a thing not material will not vitiate the grant, if the king's intention is manifest and apparent.

2. If the king is not deceived in his grant by the false suggestion of the party, but from his own mistake, upon the surmise and information of the party, it will not vitiate or avoid the grant.

3. Although the king is mistaken in point of law, or of matter of fact, if that is not part of the consideration of the grant, it will not avoid it.

III. PROCEEDINGS BY SCIRE FACIAS TO REPEAL A PATENT.

Upon these grounds letters patent are voidable in themselves, but cannot be treated as of no effect in law until they are cancelled by the legal process of a writ of *scire facias*; in the investigation of which it will be necessary to consider

1. By whom it may be obtained.
2. The necessary instruments.
3. The surrender of the patent.

(*r*) Bull. N. P. 75. and see as to construction, ante, p. 153.

If a patent be void for any of the reasons which have been assigned as sufficient to invalidate the grant, the king, *jure regio*, for the advancement of justice and right, may have a *scire facias* to repeal his own grant. (s)

1. By whom obtained.

A Subject also, who is prejudiced by a grant, may of right petition the king to use his name for its repeal. All persons are injured by the existence of an illegal patent for an invention, and every one is therefore at liberty to petition for a *scire facias* to have it cancelled. (t)

But between subject and subject, if the king has granted a patent to each of them for the same thing, then generally the *first* patentee may have a *scire facias* to repeal the second patent; (u) but the second patentee cannot bring a *scire facias* to repeal the first patent, though the better right should be in him. (x) In the case of two patents for the same invention, supposing the object to have been simultaneously discovered by the patentees, the second grant would necessarily be bad, even if the first were for some informality rendered invalid. (y)

The *scire facias* for repealing letters patent is an original writ, and must be founded on some matter of record. (z) A patent for an in-

2. The necessary instruments.

(s) 4 Inst. 88. For the law and practice of repealing letters patent by *scire facias*, see Tidd. Prac. 7th edit. 1123. 2 Wms. Saund. 72. p. q. Com. Dig. Patent F. 6. *id.* Pleader.

(t) Dyer 276. b. 2 Ventr. 344. 3 Lev. 220. S. C. 6 Mod. 229.

(u) 4 Inst. 88. Dy. 197. b. 198. a.

(x) Dy. 276. b. 277. a.

(y) Ante, p. 61, 2.

(z) 4 Inst. 88. 3 Lev. 223.

vention is a record in Chancery, and therefore the writ must issue out of that court. It is directed to the sheriff of Middlesex, and made returnable in the petty bag office. (y) The record of the proceedings upon the writ is made up in that court, and sent into one of the courts of common law, to be tried. (z)

Memorial. The first step to be taken is to present a petition or *memorial* (a) to the crown for a *scire facias*. The next is to obtain the king's *warrant* to sue; (b) which is directed to the Attorney General, who thereupon grants his *fiat*. (c)

Summons. A summons is then sent to the defendant; which informs him that this writ has been issued against him, and warns him to appear to it. (d)

The *scire facias* in *form* recites the patent, and states the grounds upon which it is meant to be impeached; as that the patentee was not the first and true inventor, but that it had been previously invented or used by others, (e) &c.

Plea. After the defendant has appeared, he may plead either in abatement or in bar. The most usual defence is the *general issue* to force the prosecutor to prove all the allegations in the writ.

Demurrer If the matter be insufficient in law, upon the

(y) *Rex v. Haine*, 2 Cox 235. and see 3 Lev. 223. 6 Mod. 229. and ante p. 177.

(z) See 21 Jac. 1. c. 3. s. 6.

(a) 2 Rich. Prac. C. P. 391.

(b) *Id.* 392.

(c) *Id.* 395.

(d) See Tidd's Pract. 1158-1172.

(e) For precedents, see the printed account of Mr. Arkwright's patent, where the whole record is set out; and Tidd's Pract. Appendix, chap. XLI. § 6. Lil. Entr. 411. 2 Rich. Pr. C. P. 395.

face of the proceedings, to support the writ, the defendant may demur. (*f*)

If there be a demurrer to part and issue on the residue, the whole record is sent by the Lord Chancellor to the court of common law; and judgment is given there upon the demurrer as well as upon the issue. (*g*)

After the defendant has been warned, and *nihil* twice returned, judgment for annulling the patent may be taken by *default*. (*h*) It is obtained by *confession*, if no defence is made after the appearance. (*i*)

Judgment
by default.

The record is delivered to the court of common law by the clerk of the petty bag: (*k*) and it is not necessary that the issue should be tried at bar; it may be at *nisi prius*. (*l*) And the court will not now grant trials at bar, unless some particular reasons are assigned.

The *evidence* is similar to that which must be produced upon the trial for an infringement; (*m*) except that the patentee being here the defendant, he does not want any *prima facie* evidence of the novelty of the invention, and the sufficiency of the specification; but he must be prepared strongly to rebut every allegation in the writ.

Evidence.

If the patentee can, on an application to the court, shew any thing to induce them to believe

New trial.

(*f*) 3 Lev. 221. (*g*) Latch. 3. 1 Eq. Cas. Abr. 128.

(*h*) Dyer 198. (*i*) Dyer 197. b.

(*k*) 1 Eq. Cas. Abr. 128, 9. 2 Wms. Saund. 6. (1.)

(*l*) Cro. Car. 313. (*m*) Ante.

that his case has not undergone the fullest investigation, they will grant a *new trial* : (n) but otherwise they will deny it.

Judgment It is said that after trial the record is to be remanded into chancery, and judgment to be there given ; yet the practice has been to give the judgment in common law courts.

If the verdict be for the *King*, the court adjudges that the letters patent be revoked, and the enrolment be cancelled ; if it be for the *defendant*, then the judgment will be that the letters patent are valid.

This judgment is final. No writ of error, no appeal to another tribunal, can be made. The very nature of the proceedings precludes it.

Costs. Although the statute 8 and 9 Will. III. c. 11. gives costs in suits upon writs of *scire facias* ; yet inasmuch, as this proceeding is criminal, in its nature, that statute does not extend to it ; and therefore *costs* are not payable to the crown, prosecutor, or defendant, on this *scire facias*. (o)

3. Surrender of the letters patent.
Cancelling patent.

When the patent has thus been adjudged to be void, it must be delivered up to be cancelled. For until there is an actual *surrendering*, *cancelling*, or *vacatur*, entered on the enrolment of the patent, it is not sufficiently cancelled as to be of no effect in law.

If a patent be granted to two persons jointly for a simultaneous invention, and the Lord Chancellor, making a duplicate, deliver the ori-

(n) Ante.

(o) *The King v. Miles*, 7 T. Rep. 367.

ginal to one and the duplicate to the other ; if a surrender of the original patent be made, the grant is vacated, although the duplicate be not surrendered or cancelled ; for the duplicate is made by the Chancellor without warrant.

The *surrender* must be enrolled ; for it is then only that the patent is vacated.

Enrol-
ment.

A certificate should be obtained of the *vacatur* having been entered on the roll.

The cer-
tificate.

BOOK III.
ON COPYRIGHT.

CHAP. I.

INTRODUCTION.—OF COPYRIGHT IN GENERAL.

THE history of that right by which authors have an exclusive power over the productions of their minds may be given in a few words; for it would be foreign to the plan of this work to enter into a discussion to shew whether that right existed at common law; upon which topic the most learned men have held different opinions.

It may suffice to say, that it was formerly supposed that the author of a book had, at common law an unrestricted right to dispose, even after publication, of such productions in any manner he pleased; and that the statute 8 Ann. c. 19. was passed merely to *protect* that right, by subjecting those who encroached upon such literary property to severe penalties.

This doctrine was questioned; and underwent a learned discussion in the court of Common Pleas, in the case of *Tonson v. Collins*: (a) but the point was not determined. It was after-

(a) 1 Bla. Rep. 301, 321.

wards agitated in the court of King's Bench, (b) where three judges, among whom was Lord Mansfield, delivered very elaborate opinions to prove the existence of the right. But Mr. Justice Yates, in a most profound and eloquent opinion, declared that an author had not such a common law right. The same question arose for consideration in the case of *Beckett v. Donaldson*, (c) when it was decided without dis-

(b) *Millar v. Taylor*, 4 Burr. 2303. (and see 1 Bla. Rep. 675.) This was an action of trespass in the case. The plaintiff stated in his declaration that he was the true and only proprietor of the copy of a book of poems intituled the SEASONS, by James Thomson; and whilst he was sole proprietor of the said copy, caused 2000 books of it to be printed for sale at his own expense, and had a great number of the said 2000 books remaining in his hands for sale. That the defendant Taylor published and exposed for sale, several other books of the like copy, and bearing the same title; which latter books had been injuriously printed by some person or persons without the licence or consent of the plaintiff Miller; the defendant knowing that they had been so injuriously printed by some person or persons, without such licence or consent; by means whereof the plaintiff was deprived of the profit and benefit of the said copy and book, and of the books, printed at his expense as aforesaid, and then remaining in his hands unsold. Not guilty was pleaded, and the jury found a special verdict.

The question was "whether after a voluntary and general publication of an author's work by himself, or by his authority, such author had a *sole and perpetual property* in that work, so as to give him a right to confine every subsequent publication to himself and his assigns for ever." Lord Mansfield, C. J. Willes, J. Aston, J. were of opinion that an author had such right. Yates, J. contra.

(c) 2 Bro. P. C. 145. and 4 Burr. 2408. In this case,

cussion in favour of the right, in order that it might immediately be carried by writ of Error into the House of Lords: where it was settled that if the right contended for did ever exist, it had been abrogated by the statute of 8 Anne; and that all remedies for any violation of it

which came before the House of Lords, by appeal from the Court of Chancery, the judges were directed to deliver their opinions on the following points.

1. Whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed, published, and sold the same without his consent?

Upon this question, the judges Nares, Ashhurst, Blackstone, Willes, Aston, Perrot, and Adams; and Smythe, C. B. and De Grey, C. J. of the Common Pleas; delivered separately their opinions against Baron Eyre, that, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent.

2. If the author had such right originally,—did the law take it away upon his printing and publishing such a book or literary composition? and might any person afterwards reprint and sell for his own benefit such book or literary composition against the will of the author?

Upon this question, the judges Nares, Ashhurst, Blackstone, Willes, and Aston, and Smythe, C. B., were of opinion against Eyre, Perrot, Adams, and De Grey, C. J. of the Common Pleas, that the law did not take away his right upon printing and publishing such book or literary composition; and that no person might afterwards reprint and sell for his own benefit such book or literary composition against the will of the author.

3. If such an action would have lain at common law—is it taken away by the statute of 8 Ann. c. 19. (See this act).

cease at the expiration of the terms therein mentioned.

Supposing then that no right existed at common law, by the exercise of which an author might prevent others from multiplying the copies of his work, after he had published it: it follows therefore that when a person prints a literary composition—when he publishes a book—he has

And is an author by the said statute precluded from every remedy, except on the foundation of the said statute, and the terms and conditions prescribed thereby?

Upon this third question the judges Eyre, Nares, Perrot, Gould, and Adams, and De Grey, C. J. C. P. delivered their opinions against Ashhurst, Blackstone, Willes, Aston, and Smythe, C. B., that such action at law is taken away by the statute 8 Anne; and that an author by the statute is precluded from every remedy, except on the foundation of the said statute, and the terms and conditions prescribed thereby.

4. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law?

The judges Nares, Ashhurst, Blackstone, Willes, Aston, and Gould, and Smythe, C. B. delivered their opinions (contra Eyre, Perrot, Adams, and De Grey, C. J.) that the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law.

5. Whether this right is any way impeached, restrained, or taken away, by the stat. of 8 Anne?

The judges Eyre, Nares, Perrot, Gould, and Adams, and De Grey, C. J. C. P. delivered their opinions upon this fifth question against Ashhurst, Blackstone, Willes, and Aston, and Smythe, C. B., that this right is impeached, restrained, and taken away, by the stat. 8 Anne.

The Lord Chancellor (Lord Apsley) seconded Lord Camden's motion to reverse; and the decree of the court of Chancery was reversed accordingly.

now no other property in it than that which is recognized or vested in him by legislative enactments.

The rights conferred by the statute of copyright, 8 Ann. c. 19. have, at different times, been altered and enlarged, by the 41 Geo. III. c. 107. and by the 54 Geo. III. c. 156.

There is other property of a literary kind, differing in some degree from that claimed under the copyright acts, given by several statutes; as in prints and engravings, models and statues.

Hence all literary property or copyright is either founded by construction on the statute of 8 Anne, or given by the positive provisions of other acts of parliament.

This chapter being devoted to general matters, I shall proceed to state

1. The *enactments* of the several acts of parliament.
2. The *construction* which they generally have received.
3. The effect of any *obscenity, libels, or immorality*, contained in a work.
4. What in general amounts to a *piracy*.

The excellent statute of 8 Anne (*d*) gave to the author or proprietor of a book, then (10th April 1710) already printed, the sole right of printing it for twenty years. And to the author and his assignee of a work then already com-

1. Statute
Law,
8 Ann.
c. 19.

(*d*) 8 Anne, c. 19. § 1.

posed but not published, or of one that should thereafter be composed and published, the sole liberty to print and reprint it for the term of fourteen years; to commence from the day of first publishing it, *and no longer*.

It was further provided that if the author should be living at the expiration of that term, then the sole right of disposing of the copies of the work should *continue in him* for another term of fourteen years. (e)

15 Geo.
III. c. 56.

Next in chronological order comes the act of parliament (f) giving to each of the Universities a *perpetual* right over the literary property that had been, or might thereafter be, bequeathed to them. This statute will be more particularly noticed under the head of Universities.

41 Geo.
III. c. 107.

Immediately after the union with Ireland, an act of parliament (g) was passed to make the law of copyright in every respect the same all over the united kingdom.

In it were introduced provisions, extending the benefits arising from literary property to authors in Ireland, which are similar to those contained in the statutes of 8 Anne, and 15 Geo. III.

54 Geo.
III. c. 156.

The most important act of parliament on copyright was passed on the 29th July, 1814, in which all the provisions of the former statutes were consolidated, and at the same time considerable alterations were made in the law.

The time of
copyright.

By that act the *time* limited for enjoying the

(e) 8 Ann. c. 19. § 11.

(f) 15 Geo. III. c. 56. and see post, Chap. VII.

(g) 41 Geo. III. c. 107.

fruits of the copyright of a work, then not published, was extended from fourteen to *twenty-eight years*; (*h*) with a further provision, that if the author should be living at the end of that period, then that he should receive the profits accruing from it for the residue of his life. (*i*)

For the benefit of the *families* of those authors who were alive at the time the act passed, but who might die before the first fourteen years, from the day of publishing their works, had expired, a further term of fourteen years was given to their *personal representatives*, without prejudice to the assignees of all or any part of the former term. (*k*)

The *places* of protection for copyright, named in that statute, are the United Kingdoms of Great Britain and Ireland, the Isles of Man, Jersey, and Guernsey, and every other part of the British dominions. (*l*)

Places of protection.

Such are the acts of the Legislature by which the copyright in books is vested in authors and their assigns.

Before entering into the discussion of the law, as it respects each species of literary composition, the matter of this *Third Book* will be rendered more intelligible by first shewing in what manner these statutes, which, in the opinion of Lord Hardwicke, (*m*) are far from creating a monopoly, have generally been construed, and what things affect the property in all kinds of literary works.

2. Construction of the statutes.

(*h*) 54 Geo. III. c. 156. § 4.

(*i*) Id. § 9.

(*k*) Id. § 8. and see post, Assignee, Chap. VII.

(*l*) Id. § 4.

(*m*) 2 Atk. 143.