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THE LAW AND PRACTICE UNDER  
THE PATENTS, DESIGNS AND TRADE MARKS ACTS,  
1883—1888.

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*THIRD EDITION, ENLARGED.*

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THE LAW AND PRACTICE

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UNDER THE

# Patents, Designs & Trade Marks

ACTS, 1883 TO 1888,

WITH

THE PRACTICE IN ACTIONS FOR INFRINGEMENT OF PATENT,  
AND AN APPENDIX OF ORDERS MADE IN  
PATENT ACTIONS, AND FORMS.

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Third Edition

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## PREFACE TO THE THIRD EDITION.

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**T**HIS Edition has been revised on the lines mentioned in the Preface to the Second Edition, and the author has endeavoured to include all the important cases affecting the Law of Patents, Designs and Trade Marks, which have been decided since the publication of that Edition in 1889.

The notes on the Complete and Provisional Specifications, and on Claims, have been re-arranged and enlarged, and it is hoped that they now contain a fairly full statement of the law on those subjects as laid down, or restated, in recent decisions.

An alteration has been made in the manner of printing the Rules. Many of the Patents Rules are repeated in the Designs and Trade Marks Rules. Where this is the case they have not been reprinted in the latter Rules, but a reference is made in the proper place to the corresponding enactment in the Patents Rules.

Further, inasmuch as most of the Forms relate merely to office proceedings, and all can be purchased

for a few pence, it has been thought sufficient to print only those Forms which appear to involve some question of principle, the names of the others being in the Schedule at the end of each set of Rules. These changes have set free a considerable number of pages which have been utilised for the new matter of this Edition.

New Rules, governing the practice of the Judicial Committee of the Privy Council in Prolongation cases, have recently been made, and will be found in their proper place.

Additions have been made to the orders and forms in the Appendix; and by the kind permission of the officials of the Board of Trade the Author has been able to include a form of order under section 22 for compulsory licence, with the form of licence ordered, and a scheme of procedure under the section which has been adopted in some recent cases.

The Author has also to acknowledge, with many thanks, the courtesy of the Attorney-General, SIR RICHARD WEBSTER, in furnishing the note, at pages 611 and 612, on the practice of obtaining the fiat on petitions for revocation of patents. In like manner he has to thank MR. GRIFFIN, the Registrar of Trade Marks, for the important notes on the

practice of the Trade Marks Branch of the Patent Office as to the proof of user which may be required when it is desired to register old marks (page 386), and as to applications to register marks objected to by the Comptroller as similar to or identical with marks already registered (page 426).

Lastly, the Author desires to express his great obligations to his friend and former pupil, MR. CHARLES SEARP, of the Chancery Bar, and his friend, MR. M. D. WARMINGTON. They have rendered him valuable assistance in the preparation of this edition; and they have almost entirely relieved him from the labour of reading and correcting the proof sheets. MR. SHARP also read through very carefully, and revised, nearly the whole of the copy immediately before it was sent to press.

LINCOLN'S INN,  
*August, 1898.*

## PREFACE TO THE SECOND EDITION.

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**T**HE passing of the Patents, Designs, and Trade Marks Act, 1888, appears to afford a convenient opportunity for a New Edition of this Work. This Act has modified the Act of 1883 in many particulars, and has made some important changes in the law.

In the case of patents, the comparison in the Patent Office of rival specifications, and the Examiner's report thereon, with the provisions allowing opposition on the basis of that report, are abolished, and a new ground of opposition is introduced, viz., that the complete specification describes an invention other than that in the provisional, and that such other invention is the subject of an application made by the opponent in the interval between the leaving of the two specifications.

An important change is made in the practice as to the registration of Trade Marks. Hitherto opposed cases have been determined by the Court. Under the new Act the practice in opposed is assimilated to that in unopposed applications, and both will be decided by the Comptroller in the first instance, with an appeal to the Board of Trade, who may refer the appeal to the Court. The new Act (sect. 25) makes provisions for hearing by or for the Board of Trade, but does not appear to confer on the Board, or, except in one very limited case (sect. 13), on the Comptroller, any jurisdiction as to costs.

The practice in actions for infringement of Patents, whereby the plaintiff may, in a second action, obtain, in

certain cases, full costs, charges, and expenses, is now extended to actions for infringement of Trade Marks.

The provisions of the Act of 1883 as to the registration of "fancy words" are now repealed, and instead there is given a right to register "an invented word or words," or "a word or words having no reference to the character or quality of the goods"; and the questions which have been raised as to "geographical names" are settled by a direction that such names shall not be registered.

Under the Act of 1883 permission was given to register certain additions to the essential particulars of the Trade Mark, subject to the condition, where the additions were common to the trade, that the applicant should disclaim any right to their exclusive use. This disclaimer is now required in the case of all added matter, whether common to the trade or not.

Since the publication of the First Edition, a large number of cases have been decided on the Act of 1883, which have settled many important questions as to its construction and effect; and an endeavour has been made in the present Edition to arrange these cases under their proper heads in the notes to the various sections of the Act.

The plan of this Edition is, as a whole, the same as that of the First Edition, but in one respect it has been modified. It was represented to the author that his work would have been more generally useful if it had dealt with the matters of General Patent Law, which were omitted from the First Edition. It is, however, impossible to deal fully with these subjects within the limits necessary to such a work as the present; but the author has attempted to treat shortly some of the salient points of the questions of true and first inventor, novelty, utility, subject-matter, and infringement, and he has also added under its proper heading a note on the subject of claims in specifications. For a complete discussion of these subjects, the reader is still referred to works on the General Law of Patents.



The publication, first by Mr. Griffin, and then by the Board of Trade, of reports of cases before the Law Officers and the Comptroller, has afforded an opportunity of endeavouring to present a much fuller view than has hitherto been possible of the practice in cases of applications for, and oppositions to, the grant of patents and the amendment of specifications.

This Edition also contains the International Convention and the Rules thereunder, and in the Appendix there have been added to the forms of proceedings on applications for extension some forms of accounts which have been actually before the Judicial Committee in cases where extension has been granted, and which, therefore, may be useful as guides in other cases.

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LINCOLN'S INN,  
*June, 1889.*

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EXTRACT FROM  
PREFACE TO THE FIRST EDITION.

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**T**HIS work is not a treatise on the Law of Patents generally, nor on the Law of Trade Marks generally. It deals only with so much of the former as may be said to depend on the legislation of the present and preceding reign, and with so much of the latter as arises out of the Registration Acts.

With regard to the Law of Designs the case is somewhat different. This rests entirely on the Statutes of the early years of the present reign ; and the new Act, with the decided cases (few in number) on the repealed and re-enacted provisions of the old Acts, comprises all the law on the subject. There seemed, therefore, to the writer no sufficient reason, in the case of Designs, for confining his work merely to the practice of registration, and the following pages contain also a statement of the General Law.

The present Act is virtually, so far as regards Patents, a consolidation, with considerable amendments, of the provisions of all the Acts on the subject since 1835. It includes, therefore, oppositions to the grant, disclaimers, amendments, and extensions, with the provisions as to provisional specifications and registration introduced by the Act of 1852, and the various enactments as to particulars of breaches and objections and costs which are contained in the latter Act.

These subjects are all dealt with in the present volume, and the author has endeavoured to collect the decided cases on the various matters above mentioned and arrange them under the corresponding heads in the Act.

\*                      \*                      \*                      \*                      \*

In addition to the special matters above mentioned as comprised in this volume, the following pages contain also a detailed statement of the practice in actions for infringement of patent. The general questions on this subject, such as the commencement of the action, the parties, consolidation of actions, and the nature of the relief to be obtained, are treated of under the heading in the Act "Legal Proceedings"; while, following the order indicated in the Act, the practice as to the mode of trial is dealt with under sect. 28; the questions of statement of claim, particulars of breaches, defence, particulars of objections, evidence, and costs, under sects. 29 and 31; and the practice as to injunctions, inspection, discovery, account, and damages, under sect. 30.

The subject of Trade Marks has been dealt with in the same manner as the Law of Patents. The General Law of Trade Marks has been left untouched, except so far as seemed to be necessary in order to elucidate the practice under the new Act, and the writer has confined himself, apart from the cases on the repealed Acts, to such cases as relate to the definition of trade marks, leaving the question of infringement, and other like questions, to books on the General Law.

The present Act is, as far as it relates to trade marks, a consolidation of the Acts of 1875 and 1876, adopting (with alterations) as part of the Act many provisions of the old Trade Marks Rules; and the cases on those Acts and Rules will, it is conceived, form useful guides to the interpretation of the new Act.

\*                      \*                      \*                      \*                      \*

The notes are placed at the end of each section of the Act. . . . The Rules are printed at the end of the Act,

and there is added an Appendix containing certain orders made in patent cases as to consolidation, inspection, and other matters, which have not, it is believed, been published. In the Appendix will be also found extracts from the "Instructions" relative to the registration of trade marks issued by the Patent Office.

\*                    \*                    \*                    \*                    \*

LINCOLN'S INN,  
*January, 1884.*

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## ABBREVIATIONS USED IN THIS WORK.

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The Act of 1835	...	5 & 6 Will. IV. c. 83 (Patents).
"	1842	... 5 & 6 Vict. c. 100 (Designs).
"	1843	... 6 & 7 Vict. c. 65
"	1850	... 13 & 14 Vict. c. 104
"	1852	... 15 & 16 Vict. c. 83 (Patents).
"	1853	... 16 & 17 Vict. c. 115
"	1858	... 21 & 22 Vict. c. 70 (Designs).
"	1861	... 24 & 25 Vict. c. 73
"	1875	... 38 & 39 Vict. c. 91 (Trade Marks Registration).
"	1883	... 46 & 47 Vict. c. 57 (Patents, Designs, and Trade Marks).
"	1885	... 48 & 49 Vict. c. 63
"	1886	... 49 & 50 Vict. c. 37 (Patents and Designs).
"	1888	... 51 & 52 Vict. c. 50 (Patents, Designs, and Trade Marks).
P. R.	...	Patents Rules, 1890.
D. R.	...	Designs Rules, 1890.
T. M. R.	...	Trade Marks Rules, 1890.
L. O. R.	...	Law Officers' Rules.
J. C. R.	...	Judicial Committee Rules.
C. & E.	...	Cababé and Ellis' Reports.
Eng. Rep.	...	Notes of Cases reported in the "Engineer," reprinted from the "Engineer," 1881.
R. P. C.	...	Reports of Patent, Design, and Trade Mark cases, published under the authority of the Board of Trade.
Times R.	...	The Times Law Reports.
Goodeve	...	Goodeve's Abstract of Patent Cases, 1884.
Griffin, P. C.	..	Griffin's Abstract of Patent Cases, 1887.
Griffin, L. O. C.	...	Griffin's Cases before the Comptroller and Law Officers, 1888.
Higgins	...	Higgins' Digest of the Law and Practice of Letters Patent for Inventions, 2nd edition.
Macr.	...	Macrory's Reports of Patent Cases.
Webst. or W. P. C.	...	Webster's Reports of Patent Cases.
S. C. R.	...	Supreme Court Rules.
Seton	...	Seton on Decrees, 5th edition.
Pemberton	...	Pemberton on Judgments, 4th edition.
Johnson, Pat. Man.	...	Johnson's Patentees' Manual, 6th edition.
Seb. Dig.	...	Sebastian's Digest of Cases of Trade Mark, etc.
S. J.	...	Solicitors' Journal.

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## PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883.

[46 & 47 VICT. c. 57.]

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## ADDENDA.

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Page 9, note (c) for c. 86 read c. 83.

Page 17, add to note (f) *Webb v. Kynoch*, 15 R. P. C. 269.

Page 25, notes (c), (g), (h), *Maxim Nordenfelt Co. v. Anderson*, affirmed by H. L., 15 R. P. C. 421.

Page 26, add to note (q) *Pneumatic Tyre Co. v. Tubeless Pneumatic Tyre, etc. Co.*, 15 R. P. C. 237, 241.

Page 53, add to note (f). *Tattersall's Patent*, 9 R. P. C. 150.

Page 57, add at end of note to sub-s. (2) : After an opposition has succeeded before the law officer, the case will not be re-opened on the ground that the opponent withdraws his opposition and desires the patent to be sealed : *Thomas and Prerosts' Application*, 15 R. P. C. 257. There is, however, power to re-open the case under special circumstances such as fraud, serious mistake, or miscarriage, *ibid.*

Page 79, add to note (i), As to what would be "special circumstances," see *Allison's Patent*, 15 R. P. C. 408, 411.

Page 85, line 9, for s. 8, read sub-s. (8).

Page 99, line 13, for s. 3, read s. 2.

Page 108, add to note (k). *McLean's Patent*, 15 R. P. C. 418.

Page 109, add to note (l), *Hughes' Patent*, 15 R. P. C. 370.

Page 169, line 8 from bottom, for 4 & 5 Will. 4, read 5 & 6 Will. 4.

Page 191, add to note (c), See observations of ROMER, J. in *Miller's Patent*, 15 R. P. C. 205, 213.

Page 200, note (b), see also same illustration, *Bailey v. Robertson*, 3 App.Cas. 1079.

Page 206, add after line 28, Where the combination performs no function not performed by the parts separately, and no new function is performed, there is no subject-matter : *Allen v. Oates*, 15 R. P. C. 298.

Page 212, *add* after (r), line 14, But evidence offered merely to contradict statements of a witness as to prior users not mentioned in the objections is inadmissible : *Haggenmacher's Patents*, [1898] 2 Ch. 280.

Page 217, *add* after (q), line 4, And where the specification claimed the introduction of metallic zinc in a powdered state into steam boilers for a specific purpose, it was held that the sale of powdered zinc with instructions to use it in such a way as to infringe the patent was an infringement : *Innes v. Short*, 15 R. P. C. 449. And see *Incandescent Gas Light Co. v. New Incandescent, etc. Co.*, 15 R. P. C. 81.

Page 218, *add* to note (g), *Murchland v. Nicholson*, 10 R. P. C. 417.

Page 237, note (q) }  
 Page 239, note (f) } *add Hudson v. Chatteris Engineering Co.*, 15 R. P. C. 438.

Page 239, *add* to note (k), *Hipkins v. Plant*, 15 R. P. C. 294.

Page 292, *add* to note (t), *Saccharin Corporation v. Haines, Ward & Co.*, 15 R. P. C. 344.

Page 307, line 9 from bottom, *for 2 read 42*.

Page 309, *add* to note (o), *Pneumatic Tyre Co. v. Puncture Proof, etc. Co.*, 15 R. P. C. 405.

Page 351, note (g) }  
 Page 353, note (h) }  
 Page 355, note (d) } *Hollason's Design*, affirmed by H. L. on appeal, 15 R. P. C. 441 ; 14 Times R. 478.  
 Page 361, note (m) }  
 Page 373, note (k) }

Page 355, *add* after line 8, Mere collaboration between the intended proprietors and the author of the design with a view to its being put in a suitable shape is not publication : *Nevill v. Bennett*, 15 R. P. C. 412, 414.

Page 375, *add* to note (q), *Nevill v. Bennett*, 15 R. P. C. 412.

Page 382, *add* to note (r), See also under the present Act, *Eastman Photographic Materials Company's Trade Mark*, 15 R. P. C. 476, 487 ; and where the decision of the court of first instance and of the Court of Appeal was reversed by the House of Lords the costs paid to the comptroller under the decision of the Court of Appeal, but not those paid to him under the decision of the court of first instance, were returned : *Ibid.* p. 488.

Page 408, *add* to note (y) *Gordon and Dilworth's Trade Mark*, 13 R. P. C. 634.

Page 428, *add* to note (c) And see *Re Hill's Trade Mark*, 10 R. P. C. 113. *Sphincter Grip, etc. Hose Company's Trade Mark*, 10 R. P. C. 84.

Page 428, *add* to note (c) See also *Eastman Photographic Materials Co. v. Griffith's Cycle Corporation*, 15 R. P. C. 105.

Page 439, note (u) } *Batt & Co.'s Trade Marks*, affirmed by C. A., 14 Times R. 538;  
 Page 480, note (o) } [1898] W. N. 77 (8).

Page 444, line 12. *add* And the injunction may be granted to restrain the use of name of a place without distinguishing defendant's goods from plaintiff's goods bearing same name: *Bowlay v. Hughes*, 15 R. P. C. 290.

Page 461, *add* to note (k) *Day v. Millbay Engineering Co.*, 15 R. P. C. 233.

Pages 465, 466, *parol licence revocable by grantor*: *Coppin v. Lloyd*, 15 R. P. C. 377.

Page 469, *add* at line 7 from bottom of page, But where persons having express notice of an agreement by owners of Letters Patent to assign them for value took a licence and registered the licence before the agreement was registered, it was held that they took the licence subject to the agreement: *New Lion Tyre and Cycle Co. v. Spilsbury*, [1898] 2 Ch. 137; 15 R. P. C. 380; 46 W. R. 567; 78 L. T. (N.S.) 513; affirmed [1898] W. N. 77 (6).

Page 474, note (g) *Re Wright, Crossley & Co.*, affirmed on appeal, 15 R. P. C. 377.

Page 501, line 15 from bottom, *for* divided, *read* decided.

Page 503, line 2 from bottom, *for* 53 & 31, *read* 53 & 54.

Page 605, *add* after paragraph numbered 31, The office also refuses to register pictorial representations of goods to which the trade mark is to be applied (see, however, as to this, *James's Trade Mark*, 33 Ch. D. 392); or the names of persons in the possessive case in combination with the names of goods (*Pirie v. Goodall*, [1892] 1 Ch. 35, 43; *Gianaclis' Trade Mark*, 6 R. P. C. 467): see *Trade Marks Journal*, No. 570, p. 220.

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THE  
Patents, Designs, and Trade Marks Acts,  
1883—1888.

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**PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883.**

(46 & 47 VICT. c. 57.)

*An Act to amend and consolidate the Law relating to Patents  
for Inventions, Registration of Designs, and of Trade  
Marks.* [25th August 1883.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

PART I.

PRELIMINARY.

1. This Act may be cited as the Patents, Designs, and Trade Marks Act, 1883. Short title.

2. This Act is divided into parts, as follows :—

Part I.—Preliminary.

Part II.—Patents.

Part III.—Designs.

Part IV.—Trade Marks.

Part V.—General.

Division of  
Act into  
parts.

3. This Act, except where it is otherwise expressed, shall commence from and immediately after the thirty-first day of December one thousand eight hundred and eighty-three. Commence-  
ment of Act.



## Sect. 4.

## PART II.

## PATENTS.

*Application for and Grant of Patent.*

Persons  
entitled to  
apply for  
patent.

4.—(1.) Any person, whether a British subject or not, may make an application for a patent.

(2.) Two or more persons may make a joint application for a patent, and a patent may be granted to them jointly.

## SUB-SECTION (1).

“Any person.”—“Person” includes a body corporate. Section 117, *post*, and see also 52 & 53 Vict. c. 63, s. 19.

“Whether a British subject or not.”—A patent might always be granted to an *alien amicus* (a), even though resident abroad (b).

## SUB-SECTION (2).

Joint  
grantees.

Sub-s. (2), so far as it relates to joint *inventors*, is only a statement of the existing law. It has been the common practice in such a case to grant patents to two or more persons jointly (c), and the fact that one of the joint grantees is an infant will not affect the validity of the patent (d).

In *Mathers v. Green* (e), it was held by Lord CRANWORTH, C., on the words of the grant in the patent, reversing the decision of Lord ROMILLY, M.R., that each one of three joint grantees might use the invention without the consent of the others, and without liability to account to them for the profits made by such use. In the same case Lord ROMILLY had held (f) that one of such grantees was bound to account to the others for royalties received under licences, but this point was left undecided on the appeal.

The decision in *Mathers v. Green* has been recently upheld in the House of Lords, and rests upon the true nature of the right conferred by letters patent, which was thus stated by Lord HERSCHELL: “Letters patent do not give the patentee any right to use the invention, they do not confer on him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all; only in that case all the world would equally have the right. What the letters patent confer is the right to exclude others from manufacturing in a particular way and using a particular invention” (g).

(a) *Beard v. Egerton*, 3 C. B. 130; citing *Chappell v. Purday*, 14 M. & W. 318.

(b) *Re Wirth's Patent*, 12 Ch. D. 303.

(c) See *Mathers v. Green*, L. R. 1 Ch. 29.

(d) *Per* BACON, V.-C., *Cheavin v. Walker*, 5 Ch. D. 858.

(e) L. R. 1 Ch. 29.

(f) 34 Bea. 170.

(g) *Steers v. Rogers*, [1893] A. C. 232, 235.

There is no decision as to the power of one grantee to grant a valid licence without the consent of his co-grantees. It appears, however, to be doubtful whether, except for the authority conferred by the granting and prohibitory clauses of the patent, any licence could be granted at all (*h*), and it will probably be found, therefore, that the question will in all cases turn on the words of the patent itself.

The grant in the patent in *Mathers v. Green* was to the grantees, their executors, administrators, and assigns, that they and every of them, by themselves, their servants and agents, *and such others as they may agree with*, and no others, may use the invention.

The form of letters patent now in use in the case of joint grantees is a grant to the patentees (which word by the terms of the patent includes executors, administrators, and assigns) that the "patentees by themselves, their *agents or licencees*, and no other," may use the invention. And the prohibitory clause forbids the use of the invention "without the covenant, licence, or agreement of the said patentees in writing under their hands and seals." It would seem, therefore, that no valid licence can be granted in the case of a joint patent without the concurrence of all the patentees (*i*). See further as to co-owners of a patent, section 87, *post*.

Where two persons are joint applicants for a patent, and lodge a provisional specification in their joint names, the comptroller has no jurisdiction to determine which of the applicants is entitled to file the complete specification (*j*).

**5.—(1.)** An application for a patent must be made in the form set forth in the First Schedule to this Act, or in such other form as may be from time to time prescribed (*k*); and must be left at, or sent by post to, the Patent Office in the prescribed manner (*l*).

**(2.)** An application must contain a declaration to the effect that the applicant is in possession of an invention, whereof he, or in the case of a joint application, one or more of the applicants, claims or claim to be the true and first inventor or inventors, and for which he or they desires or desire to

Sect 4.

NOTE.

(*h*) "Hindmarch on Patents," p. 238. See Schedule I, Form D., *post*.

(*i*) See also judgment of M.R. in *Powell v. Head*, 12 Ch. D. 690, a

copyright case.

(*j*) *Apostoloff and Freudenberg's Application*, 13 R. P. C. 275.

(*k*) P. R. rr. 5, 6, 8, 9, 10, *post*.

(*l*) P. R. r. 16A.

Sect. 5 (2) obtain a patent; and must be accompanied by either a provisional or complete specification.

(3.) A provisional (*m*) specification must describe the nature of the invention, and be accompanied by drawings, if required (*n*).

(4.) A complete (*o*) specification, whether left on application or subsequently, must particularly describe and ascertain the nature of the invention, and in what manner it is to be performed, and must be accompanied by drawings, if required.

(5.) A specification, whether provisional or complete (*p*), must commence with the title, and in the case of a complete specification must end with a distinct statement of the invention claimed (*q*).

#### SUB-SECTION (1).

Applications must be signed by the applicant: all other documents may be signed by an agent (*r*. 8), but in that case the applicant must sign an authority to the agent. (P. R., Forms A., A1, note.)

Foreign applications under s. 103 (*post*) are governed by P. R., rr. 24—29.

As to correction of clerical errors in or in connection with an application for a patent, see s. 91 (*a*), and P. R., r. 16.

#### SUB-SECTION (2).

**“Declaration.”**—By the Stamp Act, 1891 (*r*), a statutory declaration forming part of an application for a patent in conformity with the present Act, is exempted from the stamp duty of 2*s.* 6*d.* charged on statutory declarations; and by s. 2 of the Act of 1885 (*s*), the declaration mentioned in this sub-section may be either a statutory declaration under the Statutory Declarations Act, 1835, or not, as may be from time to time prescribed.

The forms of application for patents, A., A1, and A2, now in use, are prescribed by the Patents Rules (*post*), and are declarations not under the Statutory Declarations Act, 1835.

Form A. is not applicable to the case of a British or foreign corporation applying alone as true and first inventor. Form A1 is intended to be

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(*m*) *Post*, p. 8.  
 (*n*) P. R. rr. 30—33, *post*.  
 (*o*) *Post*, p. 9.  
 (*p*) *Post*, p. 11.

(*q*) P. R., Forms B. C., Sched. 2.  
 (*r*) 54 & 55 Vict. c. 39 (Sched. 1).  
 (*s*) 48 & 49 Vict. c. 63, *post*.

used in the case of a communication from abroad (see *post*, p. 7), whether the communicator is a corporation or a private person (*t*). **Sect. 5 (2).**

NOTE.

The manner in which and the person before whom declarations are to be taken and made are prescribed by the Patents Rules, rr. 17, 17A (*u*).

As to declarations on behalf of infants or persons under disability, see s. 99, *post*.

**“Whereof he . . . claims,” etc.**—If the patentee has not invented the matter or thing of which he represents himself to be the inventor, the consideration for the royal grant fails, and the grant consequently becomes void (*v*). And where, in an action for infringement of a patent for improvements in making hats, one of the witnesses of the plaintiffs (the patentees) proved that he had made the improvement while employed in their workshop, the plaintiffs were nonsuited (*w*).

**“Or in the case of a joint application, one or more of the applicants claims or claim,” etc.**—These provisions were introduced by the present Act. Previously, patents could only be granted to the true and first inventor, that is, either the actual inventor or inventors, or the first importer of the invention into this kingdom (*x*).

Doubts having arisen whether under this Act a patent might lawfully be granted to several persons jointly, some or one of whom only are or is the true and first inventors or inventor, it was enacted by the Act of 1885, s. 5 (*post*), that it has been and is lawful under this Act to grant such a patent.

Where the invention included distinct and separate parts invented by separate inventors, it was held before the Act that there should be two patents (*y*). This case does not seem to be touched by the present section or by the Act of 1885.

When the “idea” is communicated by one person to another who works on it, both should be patentees of the resulting invention, otherwise the patent will be void (*z*). And where the actual inventor, before applying for a patent, had verbally agreed to give the benefit of his invention to the applicant, who had taken no part in the invention, and the patent agent, on the joint instructions of the inventor and the applicant, applied for the patent in the name of the applicant only, it was held that no patent could be granted (*a*).

(*t*) *Application of La Société Anonyme du Générateur du Temple*, 13 R. P. C. 55.

(*u*) See also 54 & 55 Vict. c. 50, s. 1; 52 & 53 Vict. c. 10, s. 11.

(*v*) *R. v. Wheeler*, 2 B. & Ald. 345; *R. v. Arkwright*, 1 W.P.C. 64, 72.

(*w*) *Barker v. Shaw*, 1 W. P. C. 126, n. See also *Heald's Application*, 8 R. P. C. 429.

(*x*) *Hindmarch on Patents*, c. 3, ss. 2, 3.

(*y*) *Craig and Macfarlane's Patent*, Johnson, Pat. Man. 165; Coleridge, S. J.

(*z*) *Elias v. Grovesend Tinplate Co.*, 7 R. P. C. 455. See also *Minter v. Wells*, 1 Webst. 127; *Bloxam v. Elsee*, 1 C. & P. 558; 6 B. & C. 169.

(*a*) *Marshall's Application*, 5 R. P. C. 661.

**Sect. 5 (2).**

First inventor  
is he who first  
discloses to  
the public.

**“The true and first inventor.”**—These words are taken from the Statute of Monopolies (x), and upon them it was observed by Lord LYNTHURST, C., “He is not called the inventor who has in his closet invented it, but who does not communicate it; the first person who discloses that invention to the public is considered as the inventor. The party must be an inventor; you need not say the inventor, because another may have invented it and concealed it” (y).

Thus in *Dollond v. ———* (z), where Dollond had obtained a patent for a new method of making the object glasses of telescopes, and it was objected that one Dr. Hall had made the same discovery before him, the patent was upheld, because, “as Dr. Hall had confined it to his closet, and the public were not acquainted with it, Dollond was to be considered the first inventor.”

But in *Kurtz v. Spence* (a), as between rival patentees, one of whom had applied for his patent on the 10th, and the other on the 11th, August, and where the law officer had directed the patent of the first applicant to bear date August 12th, it was held that, it being proved that the second applicant had, in fact, perfected his invention on August 8th, he was to be considered the first inventor.

And in *Rose’s Patents Co. v. Braby* (b), the complete specification of a patent prior in date to plaintiff’s patent was admitted in evidence, though it was not left till one month, nor accepted till two months, after the date of the application for plaintiff’s patent.

When the jury found that the alleged invention comprised in a patent was a mere colourable imitation of and an attempt to evade the invention of a previous patentee, and that the second patentee was not the true and first inventor, his patent was revoked (c).

Communica-  
tions from  
abroad.

First  
importer is  
true and first  
inventor.

The words “true and first inventor” are, by what has been described as “a sort of anomalous decision which has acquired by time and recognition the force of law” (d), held to include not merely the actual inventor but also the first importer of the invention into this country from abroad, even though not the actual inventor; and such an importer is entitled to take out a patent, and if not in a confidential relation to the actual inventor, may hold it for his own benefit (e). The invention comprised in such a patent is therein described as “communicated from abroad,” and it is required that the name, address, and calling of the person by whom the same was communicated

(x) 21 Jac. 1, c. 3, s. 5.

(y) *Househill Co. v. Neilson*, 1 Webst. 719.

(z) 1 Webst. 43.

(a) 5 R. P. C. 161.

(b) 11 R. P. C. 198.

(c) *Edge v. Harrison*, 8 R. P. C. 74.

(d) Per JESSEL, M.R., *Marsden v. Saville Street, etc. Co.*, 3 Ex. D. 203, 205.

(e) *Steedman v. Marsh*, 2 Jur. (N.S.) 391; *Nickels v. Ross*, 8 C. B. 679, 723.

should appear in the application (P. R., Form A1). If a person takes out a patent as for an original invention, when, in fact, it was communicated to him from abroad by the inventor in order that he might obtain a patent for the inventor, the patent has been said to be void. (f) A declaration by a person applying for a patent that he is the first and true inventor, though, in fact, the invention was communicated to him from abroad, may, however, well be held to be true in point of law, and it may be that a patent honestly obtained under such circumstances may be valid. But the point has not been decided (g). The law officer will not, on an application for a patent, entertain an objection that the invention has been obtained from some person abroad (h).

Sect. 5 (2).

NOTE.

It is not necessary that the person taking out the patent should be the *meritorious* importer; he may be the mere clerk or agent of the foreign inventor (i), and may himself be an alien resident abroad (k).

The patent may be (l), and generally is, obtained by the agent as trustee for and on behalf of the actual inventor, and the latter is, in the eye of the law, a mere stranger. And so strictly has this distinction been observed, that when it was objected that the inventor, a foreigner, for whom the patent was held by his English patent agent, to whom it had been granted as a communication from him, was possessed of knowledge which it was alleged ought to have been but was not embodied in the specification, and that therefore the patent was bad, it was held that, inasmuch as it was not suggested that this knowledge was possessed by the actual patentee, the objection failed altogether (m).

Patentee may be agent of inventor.

On question of specification, knowledge of the patentee, not of the inventor, is looked to.

So also it was held that the fact that in the specification of a patent for a communication from abroad the patentee had stated all that had been communicated to him was no answer to an objection that the specification did not sufficiently describe the invention (n).

It was, however, held that the privilege thus granted to the importer of a foreign invention could not be extended so as to include a communication made in England from one British subject to another, and that the legal personal representative of an inventor deriving his knowledge only from the inventor's papers could not take out a patent (o). (See now, however, s. 34, *post*.) But if a man from abroad

Rule as to communication from abroad not extended to communication in this country.

(f) *Milligan v. Marsh*, 2 Jur. (N.S.) 1083. The head-note appears incorrect.

(g) See *Arery's Patent*, 36 Ch. D. 307, 318, 324.

(h) *Edmund's Patent*, Griffin, P. C. 281. See *post* under s. 11.

(i) *Beard v. Egerton*, 3 C. B. 129.

(k) *Re Wirth's Patent*, 12 Ch. D. 303.

(l) *Beard v. Egerton*, 3 C. B. 97.

(m) *Plimpton v. Malcolmson*, 3 Ch. D. 531, 582.

(n) *Wegmann v. Corcoran*, 13 Ch. D. 66; 41 L. T. (N.S.) 357.

(o) *Marsden v. Saville Street, etc. Co.*, 3 Ex. D. 203. See also *Tennant v. ———*, 1 Webst. 125, n.

**Sect. (5) 2.** communicates to A., who communicates to B., it seems that B. may take out the patent (*p*); and letters patent can be granted to an alien resident abroad for an invention communicated to him by another alien also resident abroad (*q*). The Patent Office, however, now refuses to grant patents to agents abroad for communications from foreigners also residing abroad (*r*).

**NOTE.**

In *Renard v. Levinstein* (*s*) it was said that when an invention is partly original and partly communicated from abroad, it is an arguable question whether it is or is not incumbent on the patentee to distinguish his own part from the rest of the invention. But in *Moser v. Marsden* (*t*), when the invention was described as a communication from abroad, it was held by the Court of Appeal that the fact that the patentee had made improvements on the invention communicated to him without distinguishing such improvements on the face of the specification, was no objection to the patent. "The patentee is the true and first inventor within the meaning of the Patent Law whether he invents himself or whether he simply imports a foreign invention. He is not anything but a true and first inventor if he does both, that is, if he both imports a foreign invention and improves it himself" (*u*).

**SUB-SECTION (3).**

**Provisional specification.**

The provisional specification need not enter into all the minute details as to the manner in which the invention is to be carried out (*c*). It is only to disclose the invention in the rough state (*y*). It need not describe the manner in which the invention is to be carried into effect (*z*), nor need it describe the nature of the invention otherwise than roughly, but it ought to do so fairly and honestly (*a*). See also under sub-s. (4), *post*.

**Insufficiency of provisional specification does not invalidate the patent.**

Under the Act of 1852, it was held that the insufficiency of the provisional specification did not invalidate the patent, and that the only use which could be made of such insufficiency would be on the question, whether the patentee really had, at the time of his application, invented the invention which he afterwards claims as within his

(*p*) *Per* JESSEL, M.R., *Plimpton v. Malcolmsen*, 3 Ch. D. 552.

(*q*) *Re Wirth's Patent*, 12 Ch. D. 303.

(*r*) See notice of April 21st, 1884 (Patent Office Journal, May 9, 1884).

(*s*) See *per* KNIGHT-BRUCE, L.J., 10 L. T. (N.S.) 177; *Avery's Patent*, 36 Ch. D. 307.

(*t*) 10 R. P. C. 350.

(*u*) See *per* LINDLEY, L.J., *Moser v. Marsden*, 10 R. P. C. 359.

(*x*) *Re Newall and Elliot*, 4 C. B.

(N.S.) 269; *Penn v. Bibby*, L. R. 2 Ch. 127, 132.

(*y*) *Per* JESSEL, M.R., *Stoner v. Todd*, 4 Ch. D. 58, 60.

(*z*) See *per* COTTON and LINDLEY, L.J.J., *Woodward v. Sansum*, 4 R.P.C. 175, 177.

(*a*) *Per* FRY, J., *United Telephone Co. v. Harrison*, 21 Ch. D. 747. See also *per* COTTON, L.J., *Woodward v. Sansum*, 4 R. P. C. 166, 174; and see *Siddell v. Vickers*, 39 Ch. D. 92.

patent (b). And this is the case also under the present Act. The real question is not whether the provisional specification is defective, but whether the complete specification is excessive (c). See also under s. 9 (1), *post*, p. 32.

Sect. 5 (3).

NOTE.

## SUB-SECTION (4).

Every patent for a new invention has hitherto, at least since the time of Queen Anne, contained a condition making the same void if a specification were not filed within a definite time, or, in case a complete specification had been filed before the grant of the patent, then avoiding the patent if that specification were insufficient. Such a condition was not required by the common law or the Statute of Monopolies, but it was the practice to insert it in patents, and the practice was expressly recognized in s. 10 of the Act of 1852 (d).

Complete specification.

The present sub-section alters the old rule, and makes the leaving a complete specification a condition precedent to the grant of the patent.

The old condition required that the specification should "particularly describe and ascertain the nature of the invention, and in what manner the same is to be performed," and these words have been followed in this sub-section.

"**Must particularly describe and ascertain,**" etc.—It will be observed that the language of the Act (which in this particular is the same as the Act of 1852) (e) differs as regards the provisional and complete specification. While the former is required only to *describe the nature* of the invention, the latter must *particularly describe and ascertain* the nature of the invention, *and in what manner it is to be performed*. These are two quite different things. The object of requiring the patentee to state the nature of his invention is to let the public know what is the prohibited ground, and what they are not to do—what the patentee has got his grant for. The object of the requirement that he shall also particularly ascertain the means of performing the invention, is to prevent patentees getting patents for an invention, and keeping to themselves the means of performing it, so that, after they had prohibited the public from using it for fourteen years, and had got the monopoly given to them by the letters patent, they could still keep on using the thing by keeping secret the mode in which they did it (f).

Difference of requirements in provisional and complete specification.

(b) *Curtis v. Platt*, Griffin, L. O. C. 53; 5 R. P. C. 87, n.

(c) *Siddell v. Vickers*, 39 Ch. D. 92, 97. (Judgment of KEKEWICH, J.)

(d) See "Hindmarch on Patents," p. 151, and the Schedule to 15 & 16 Vict. c. 83.

(e) 15 & 16 Vict. c. 86, s. 6.

(f) *Per GROVE, J., Philpott v. Hanbury*, 2 R. P. C. 38. See also *per* the same learned judge, *Westinghouse v. Lancashire and Yorkshire Rail. Co.*, 1 R. P. C. 238. See also *per* LINDLEY, L.J., *Woodward v. Sansum*, 4 R. P. C. 176.



**Sect. 5 (4).****NOTE.**

In complying with the first condition, *i.e.*, in describing the nature of his invention, the patentee does all that is necessary if he makes the nature of his invention plain to persons having a reasonably competent knowledge of the subject, though from want of skill they could not themselves carry out the invention. In complying with the second condition, *i.e.*, in describing in what manner the invention is to be performed, the patentee does all that is necessary if he makes it plain to persons having reasonable skill in doing such things as have to be done in order to work the patent, what they are to do in order to perform his invention. If, as may happen, they are to do something the like of which has never been done before, he must tell them how to do it if a reasonably competent workman would not himself see how to do it on reading the specification or on having it read to him. The principle to be applied to the language used to comply with the two conditions is the same for both, but one class of persons may understand only one part of the specification and another class only the other, and yet the patent may be valid (*g*).

Where there was in the complete specification no separate description of the nature of the invention, which was only described by a reference to the title and by the preliminary words of the description of the mode of carrying the invention into effect, the nature of the invention was held to be sufficiently described (*h*).

To whom  
specification  
is addressed.

The specification should be so framed as to enable a workman of ordinary skill and intelligence, conversant with the business, to carry out the invention (*i*). The specification will be a bad specification if only eminent engineers, or managers of great manufactories, or foremen, being men of superior intelligence, would understand it, and if an ordinary workman, using that amount of skill and intelligence which may fairly be expected of him, would not understand it (*k*). But if the specification is framed so as to enable an ordinary workman "possessed of knowledge in the particular industry," to carry out the invention, it is sufficient (*l*). And it is not necessary that such a person should be able to do the work without any trial or experiment, which, when it is new or especially delicate, may frequently be necessary, however clear the description may be (*m*).

(*g*) *Per* LINDLEY, L.J., *Edison, etc. Co. v. Holland*, 6 R. P. C. 243, 280.

(*h*) *Shaw v. Jones*, 6 R. P. C. 329, 334.

(*i*) *Per* CHITTY, J., *Moseley v. Victoria Rubber Co.*, 4 R. P. C. 253. See also *Morgan v. Seward*, 1 Webst. 174; *Philpott v. Hanbury*, 2 R. P. C. 43; *Leonhardt v. Kalls*, 12 R. P. C. 117.

(*k*) See *per* JESSEL, M.R., *Plimpton v. Malcolmson*, 3 Ch. D. 530, 568. See also *Neilson v. Harford*, 1 Webst. 314.

(*l*) *Badische Anilin und Soda Fabrik v. Levinstein*, 12 App. Cas. 710, 713; *British Dynamite Co. v. Krobs*, 13 R. P. C. 190, 192.

(*m*) *Per* COTTON, L.J., *Edison, etc., Co. v. Holland*, 6 R. P. C. 278.

And a mistake in the drawings of the specification, which an ordinary skilled workman would put right, was held not to invalidate the patent (n). Sect. 5 (4).  
—  
NOTE.

When, however, it is said that an error in a specification which any workman of ordinary skill and experience would perceive and correct, will not vitiate a patent, it must be understood of errors which appear upon the face of the specification or the drawings it refers to, or which would be at once discovered and corrected in following out the instructions given for any process or manufacture, and the reason is because such errors cannot possibly mislead. But that proposition is not a correct statement of the law if applied to errors which are discoverable only by experiment and further inquiry. Neither is the proposition true of any erroneous statement in a specification amounting to a false suggestion, even though the error would be at once observed by a workman possessed of ordinary knowledge of the subject (o). How far errors in specification vitiate patent.

And, therefore, when a specification for a process for making a dye described the mixing of aniline with dry arsenic acid and allowing the mixture to stand for some time, and added "or I accelerate the operation by heating it to, or near to, its boiling point," and it was shown that unless heat was applied the process was ineffectual, the patent was held invalid (p).

So also, when a specification directed certain materials to be heated in an "autoclave," and it was shown that at the date of the specification iron and enamelled autoclaves were both known, and that the process would not produce the desired result if an enamelled autoclave were used, it was held that the specification was insufficient, although it was proved that at the date of the patent the fact that enamelled autoclaves were inapplicable was not known to the patentee or to scientific persons, and was not discovered till late in the progress of the trial (q).

In the case of a joint application for a patent, the complete specification need not be signed by both applicants (r).

Some observations on the subject of "claims" will be found *post*, p. 13, under sub-s. (5).

"Drawings."—By the Act of 1886, s. 2, this requirement is not to be deemed insufficiently complied with by reason only that, instead of being accompanied by drawings, the complete specification refers to the drawings which accompanied the provisional specification, and this provision is retrospective (s). As to the preparation of drawings accompanying provisional or complete specification, see P. R., rr. 30—33.

(n) *Otto v. Linford*, 46 L.T. 35, 40.

(o) *Per Lord WESTBURY*, L.C., *Simpson v. Holliday*, 5 N.R. 340, 341.

See also *Monnet v. Beck*, 14 R.P.C. 777.

(p) *Simpson v. Holliday*, 5 N. R. 340; L. R. 1 H. L. 315.

(q) *Budische Aniline und Soda Fabrik v. La Société Chimique des Usines du Rhône*, 15 R. P. C. 359.

(r) *Grenfell and McEvoy's Patent*, 7 R. P. C. 151.

(s) 49 & 50 Vict. c. 37, s. 2, *post*.

## Sect. 5 (5).

## SUB-SECTION (5).

## NOTE.

“Title.”—See *post*, under ss. 6 and 7.

“Distinct statement of the invention claimed.”—Prior to the present Act, a “claim,” though usual, was not a necessary part of a specification (*t*); its object was not to claim anything which is not mentioned in the specification, but to disclaim something which is in it, and which the patentee does not profess to have invented (*u*).

Meaning of  
“distinct  
claim.”

In *Smith's Patent* (*v*), it was held by the law officer that if the specification ended with a statement of the invention claimed, distinct from the description of the invention contained in the specification, this sub-section is complied with, and that there is no power in the Patent Office to examine into the conformity of the claims put forward by the patentee with the description of the invention which he has given. But in *Siddell v. Vickers*, it was held by FRY and LOPES, L.JJ. (CORRON, L.J., *diss.*), that a “distinct statement” means something more than a separate paragraph, and that it should be a concise statement of the main features of the invention, something to which the reader might readily refer and learn therefrom, without referring to the body of the specification, what the characteristic features of the invention claimed were (*w*).

A claim of “the general construction, adaptation, or application, and the combination and use of the several parts, in the whole constituting improved, more simple, and efficient appliances, or means for working or operating on iron or steel forgings substantially as hereinbefore set forth, and as illustrated on the accompanying drawings,” was held by the majority of the Court of Appeal not to be a “distinct” statement within this section (*x*).

Requirements  
of s. 5  
directory  
only.

This sub-section and the other sub-sections of s. 5 are merely directory, and non-compliance with them does not, by force of the section, vitiate the patent (*y*). Although there are contained in the section certain requirements the non-observance of which would be fatal to the patent (as for instance those of sub-s. (4)), that result flows not from the section, but either from the nature of the requirements or the other provisions. See s. 26 (3) of the statute (*z*).

The requirement that the complete specification shall end with a “distinct claim,” is one of the requirements which are directory only, and the patent is not bad because it has not been complied with (*a*).

(*t*) *Per* WILLIAMS, J., *Lister v. Leather*, 8 E. & B. 1004.

(*u*) See judgment of JAMES, L.J., *Plimpton v. Spiller*, 6 Ch. D. 426; *Edison Bell Phonograph Co. v. Smith*, 11 R. P. C. 148, 389.

(*v*) *Griffin*, P. C. 268.

(*w*) 39 Ch. D. 92, 109, judgment of LOPES, L.J.

(*x*) *Siddell v. Vickers*, 39 Ch. D.

92. See also *per* HERSCHELL, S.G., *Smith's Patent*, *Griffin*, P. C. 268.

(*y*) *Siddell v. Vickers*, 39 Ch. D. 92.

(*z*) *Siddell v. Vickers*, *ubi supra*. See judgment of FRY, L.J.

(*a*) *Siddell v. Vickers*, *ubi supra*: affirmed 15 App. Cas. 426; *Edison Bell, eto. Co. v. Smith*, 11 R. P. C. 148, 163, 389.

## Claims.

## Sect. 5 (5).

## NOTE.

In *Foxwell v. Bostock* (b), it was held by Lord WESTBURY, C., that in a patent for an improved arrangement or new combination of machinery (c), the specification must describe the improvement and define the novelty otherwise and in a more specific form than by the general description of the entire machine, and that it must assign the *differentia* of the new combination. This decision has been interpreted to mean "that where there is a patent for a combination, there must be a discovery or explanation of the novelty, and that the specification must show what is the novelty." But this view is not correct; and in *Harrison v. Anderston Foundry Co.* (d), it was held by the House of Lords that if there is a patent for a combination, the combination is *ex necessitate* the novelty; and the claim of the combination is of itself a sufficient description. As explained by this case, the decision in *Foxwell v. Bostock* amounts to no more than this: "that when a claim is made for a general combination and arrangement of the different parts of a machine, if the court sees that the whole combination is not new, but that there is some particular improvement in some particular part, it will not do to claim the whole combination as new, but the patentee must condescend on that which is improved. For example, if a particular improvement, say in the arrangement of a cog, or of some other portion of an old combination which was new and useful, had been made, the general combination remaining the same, then, according to the decision in *Foxwell v. Bostock*, by describing it as a new combination you would be misdescribing it, because, indeed, the thing discovered would be a particular improvement upon a particular part of the combination" (e). Or, to use an illustration adopted by JAMES, V.-C., in *Parkes v. Stevens* (f), and quoted with approval by Lord HATHERLEY (g) if a man had invented a compensation pendulum, it would not do to patent improvements in clocks in general terms, and give a specification of the whole machinery of a clock, introducing somewhere in the course of description the mode of making a compensation, and then end by claiming the arrangement and combination aforesaid.

In an action on a patent under the old law, it was held that the new improvement might be pointed out either in the body of the specification

(b) 4 D. J. & S. 298, 313.

(c) As to patents for combinations, see also *post*, p. 261.

(d) 1 App. Cas. 578, 580. See also *Proctor v. Bennis*, 36 Ch. D. 740, 752, 762.

(e) *Per* Earl SELBORNE, C., *Moore v. Bennett*, 1 R. P. C. 129, 143. See

also *Cartsburn Sugar, etc., Co. v. Sharp*, 1 R. P. C. 181, 185; *Perry v. Société des Lunetiers*, 13 R. P. C. 664.

(f) L. R. 8 Eq. 366.

(g) *Harrison v. Anderston Foundry Co.*, 1 App. Cas. 584.

*Foxwell v. Bostock.*

In patents for combinations *differentia* of the new combination to be shown.

True effect of decision in *Foxwell v. Bostock.*

**Sect. 5 (5).** or in one of the claims. It need not be pointed out in the claim (*h*).  
**NOTE.** But under the present Act it would seem that the improvement ought to be specified in the claim (*i*).

There can only be an improvement of a combination by having all the elements of the first combination and adding something more. In that case, the proper course is to claim for the improvement, and to point out what the improvement is. If the elements of the combination are altered, a different combination has been made, and there is no question of improvement (*k*).

Form of claim to combination.

If the invention is for the combination only, the specification must make it clear that it is the combination, and not any of the specific parts making up the combination, which is claimed (*l*). Thus a claim for "the construction of framework for spring mattresses substantially as hereinbefore described, and illustrated in the accompanying drawing," or any mere modification of the same (*m*), was held to be insufficient as a claim to a combination. But a claim for "the arrangement and construction of parts herein set forth for cutting clay into brick. I claim particularly cutting the clay into the form of bricks by pressing the clay forward by means of a pushing board, or otherwise, against a series of fixed wires so arranged that the clay is pushed or forced past the wires on to a movable board provided with handles, so that twelve or any other convenient number of bricks may be removed at the same time," was held to be a claim to a combination (*n*). So also claims for "the combination of the guided brake levers A 2 with the diagonal cross-ties G and D, and the brake beds B" (*o*), and for "the application of a tip van or waggon on two or four wheels, by means of the side slot or groove-guards with parts hereinbefore described, and figure 2, and letters A, B, C, and J, or any modification thereof" (*p*), have been held to be good claims for the combination.

"Subordinate integers," as well as entire combination, may be claimed.

A patentee of an improvement in machines may claim not only the whole combination which makes up the machine, but also the subordinate combinations which together as integers make up the entire machine (*q*).

(*h*) Per LINDLEY, L.J., and BRETT, M.R., *Nordenfelt v. Gardner*, 1 R. P. C. 69, 74.

(*i*) Section 5 (5), *ante*, p. 11; *Siddell v. Vickers*, 39 Ch. D. 92.

(*k*) See per BRETT, M.R., *Nordenfelt v. Gardner*, 1 R. P. C. 69.

(*l*) *Rowcliffe v. Morris*, 3 R. P. C. 17. See also *Incandescent Gaslight Co. v. De Mare, eto., System*, 13 R. P. C. 301, and, on appeal, 559.

(*m*) *Rowcliffe v. Morris, ubi supra*.

(*n*) *Murray v. Clayton*, L. R. 7 Ch. 570, 578.

(*o*) *Westinghouse v. L. & Y. Rail. Co.*, 1 R. P. C. 229, 241.

(*p*) *Walling v. Stevens*, 3 R. P. C. 39.

(*q*) Per COTTON, L.J., *Cropper v. Smith*, 1 R. P. C. 87; *Clarke v. Adie*, 2 App. Cas. 315; *Harrison v. Anderston Foundry Co.*, 1 App. Cas. 574, 582.

It is often material to determine whether these "subordinate integers" (r) are claimed merely as parts of the general combination, or whether they are separately claimed as independent inventions. **Sect. 5 (5).**

**NOTE.**

When the subordinate integer constitutes something which the patentee was bound to give to the public as a means of working his invention, and which may be considered merely as appendant to the invention, as, for instance, in *The British Dynamite Co. v. Krebs* (s), where, in the specification of a patent for making dynamite, there was, in addition to a claim for the manufacture, a claim for the means of explosion, the subordinate claim will not be read as claiming a separate invention. **Claim of subordinate integer not always read as claiming a separate invention.**

In *The British Dynamite Co. v. Krebs*, the subordinate combination was incorporated into and formed part of the first claim in the specification. In *Plimpton v. Spiller* (t), however, a similar construction was adopted where the subordinate claim formed a distinct head of claim in the specification, and it was held by the Court of Appeal that a mode of securing the runners in certain roller skates, which mode had been included in the general description of the skates, and, was claimed in the second claim, was to be read as applicable only to the runners of the particular skate described.

But in *Cropper v. Smith* (u), it was said that *Plimpton v. Spiller* was to be taken merely as an authority for the construction to be placed on the specification in that particular case, and that where a claim contains particular sub-divisions, namely, first, second, and third, it was not right to say that when the first was as to a general combination, the second and third were only to be considered as pointing out what the patentee considered material, and accordingly, there being three separate claims, of which the first was for the general combination, and the second and third for subordinate parts, the latter were held to be separate and independent claims to the subordinate combination. **Where subordinate integer read as separately claimed.**

If, however, the principal invention is new and useful and properly described, the patent is not invalidated by the addition of a claim for a further combination with it of something which is not new and useful, and which is not claimed except in that combination (x). If, in short, a claim is merely subsidiary, and does not increase the monopoly of the patent, it has no effect, and raises no objection to the patent (y). **Claim merely subsidiary.**

(r) *Clarke v. Adie*, 2 App. Cas. 321.

(s) *Goodeve*, 88, 93; S.C. 13 R. P. C. 190. See also *United Telephone Co. v. Harrison*, 21 Ch. D. 720, 741.

(t) 6 Ch. D. 412.

(u) 1 R. P. C. 88, 90, 91.

(x) *Per* WRIGHT, J., *Edison Bell Phonograph Co. v. Smith*, 11 R. P. C. 148, 163; affirmed 11 R.P.C. 389.

(y) *Per* BRETT, L.J., *Plimpton v. Spiller*, 6 Ch. D. 412, 434. See *United Telephone Co. v. Harrison*, judgment of JESSEL, M.R., *Goodeve*, 481; *Edison Bell Phonograph Co. v. Smith*, *ubi supra*; *Pneumatic Tyre Co. v. Casswell*, 13 R. P. C. 164; *Adamant Stone Co. v. Mayor of Liverpool*, 14 R. P. C. 11.

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## NOTE.

Thus, where a specification described a process and a material, and claimed the material as the result of that process, the addition of a claim to a particular user of the material was held to be no ground for vitiating the patent (z).

Where the claim is for a combination, and not for subordinate parts included in that combination, then, if the combination is new, it is not necessary to specify the subordinate parts as new, or to show in the combination what is new and what is old (a).

Claim for combination of complex parts.

How far there may be a good claim for a combination of complex parts is often a question of considerable difficulty. Thus, where there were three separate arrangements for producing three separate effects in a horse clipper, which were now alleged to be combined for the first time in one clipper, and the claim was for a general arrangement, construction, and combination of parts, whereby certain objects were effected, it was said by JAMES, L.J., in *Clark v. Adie* (b), that combination "was not a term applicable to such improvements in such an apparatus. The general arrangement, construction, and combination, is not a combination in any sense except that in which every one of several improvements may be said to combine with every other in making the machine a better one. Take a screw steamship, in which the whole locomotive apparatus is one which, by means of fuel set on fire under a boiler at one end, sets in motion a screw at the other end. Improvements may be made in every part of that apparatus, but it would be absurd to talk of a combination of an improved steam generator, of an improved arrangement for economising the steam, and of an improved method of attaching and moving the screw." And when the case came before the House of Lords, Lord CAIRNS, C., said that he desired to leave, without any observation, the question whether such a combination would be a good patent (c).

So, also, the mere combination of a known interlocking apparatus of railway signals with a known means of actuating such apparatus (d), and an alleged invention of an improved mincing machine, which consisted merely in the combination of an old mincing machine and an old filling machine (e), were held not sufficient to support a patent.

(z) *Neilson v. Betts*, L. R. 5 H. L. C. 21. See also *British Dynamite Co. v. Krebs*, Goodeve, 94, S. C. 13 R. P. C. 190; *Ehrlich v. Ihlee*, 5 R. P. C. 437.

(a) *Moore v. Bennett*, 1 R. P. C. 129, 143, 149.

(b) L. R. 10 Ch. 677.

(c) 2 App. Cas. 325.

(d) *Saxby v. Gloucester Waggon*

*Co.*, 7 Q. B. D. 305; affirmed by the Court of Appeal, June 23rd, 1882, and by the House of Lords, Griffin, L. O. C. 57. See also *Willis v. Davison*, 1 N. R. 234.

(e) *Williams v. Nye*, 7 R. P. C. 37, 62. See also *Gaulard and Gibbs Patent*, judgment of Lord HALSBURY, L. C., 7 R. P. C. 379, 382.

But a patent may be sustained though each principle or process in it was previously well known, provided the mode of combining those processes is new, and produces a beneficial result, and provided also the specification claims not the old processes or any one of them, but only the combination. And therefore a patent for improvements in glass making, which consisted in adopting and combining some previous improvements, viz., suppressing the fire-pots and placing the materials within the furnace itself in a tank or chamber, and forming the sides of the tank or chamber hollow, so that a refrigerating current of air might circulate, and prevent excessive heating of the sides which enclosed the fused material, was held good (*f*). And a claim of a particular method of weaving wire, the result of which was to produce a new and useful article, was upheld, although the weaving machinery employed was old (*g*).

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NOTE.

And in the well-known case of *Crane v. Price* (*h*), the combination of the previously-known hot air blast with the previously-known use of anthracite in the manufacture of iron, was held a good subject of a patent.

And a claim for the "manufacture of a new kind of weighing-machine, such as herein described, in which, on a coin or the like being placed in the apparatus, the weight of a person or body being weighed will be indicated on a dial or the like substantially as hereinbefore described," was upheld, although weighing-machines were old, and machines in which a coin could be inserted, so as to produce a certain mechanical effect, were old, it being shown that the two had never been combined before in such a manner as to produce the result mentioned in the claim (*i*).

Where there is a good claim for a particular mechanism, a further claim for the combination of that mechanism with other specified machines may be good, although the method of that combination is not described except by a drawing, if the combination is in fact sufficiently shown by the drawing. Such a claim is not too wide, since the purchaser of the improved mechanism has the right of using it as he thinks fit, and therefore with the specified machine, though he must not so use it unless he has purchased it (*k*).

(*f*) *Cannington v. Nuttall*, L. R. 5 H. L. 205. See also *Bovill v. Smith*, Griffin, L. O. C. 51; *Fawcett v. Homan*, 13 R. P. C. 398, 405.

(*g*) *Dowling v. Billington*, 7 R. P. C. 191.

(*h*) 1 Webst. 377, 408. As to this case, see remarks of JAMES, L.J.,

*Murray v. Clayton*, 7 Ch. 584, and of Lord BLACKBURN, *Clark v. Adie*, 2 App. Cas. 335.

(*i*) *Automatic Weighing Machine Co. v. Knight*, 6 R. P. C. 113; affirmed, 6 R. P. C. 297.

(*k*) *Arnold v. Bradbury*, L. R. 6 Ch. 706, 715.



## Sect. 5 (5).

NOTE.  
Anything not  
claimed is  
disclaimed.

Popular  
meaning  
sometimes  
given to tech-  
nical words.

As to con-  
struing claim  
so as to sup-  
port patent.

Whatever is not claimed is to be treated as disclaimed (*l*), and therefore where a particular device was mentioned in the early part of the specification, but was omitted from the claiming clause, it was held not to be claimed (*m*). So also where a patentee claimed a general combination, and afterwards by separate claims claimed certain subsidiary parts, the claim to those particular parts was held to exclude the possibility of a claim for any other parts (*n*).

A specification is to be construed like all written documents, taking the words and seeing what is the meaning of the words when applied to the subject matter (*o*). And on this principle a word may be construed in its popular sense, and the word "parallel," as used in relation to the teeth of a horse-clipping machine, was construed in its popular and not its purely mathematical meaning (*p*).

A question sometimes arises as to how far, when of two possible constructions of a claim one would invalidate, and the other support, the patent, the Court is bound to take the latter.

It was held that, as between patentee and licensee, the licensee may, in such a case, and in order to show that he is not within the patent, insist upon that construction which will give validity to the claim (*q*). And, in *Clark v. Adie* (No. 2) (*r*), it was urged that, when the specification included matters which were, and which were generally known to be, old at the date of the patent, it should be construed so as not to include them. But it was there held by Lord HATHERLEY and Lord BLACKBURN (*s*) that such a course was contrary to decision and to principle, and would be a simple recipe for saying that no patent could ever be upset on the ground of want of knowledge. *Clark v. Adie* was a case of patentee and licensee, but the same rule, notwithstanding expressions apparently to the contrary which may be found in the cases (*t*), applies to actions for infringement, and the argument of absurdity cannot be used when the words of the specification are clear (*u*).

But when the judge sees that there is a real substantial invention of great merit, and the description is fairly made, so that a competent workman can make the invention, it is not the duty of the Court to endeavour to construe the patent so as to make it claim that which it is

(*l*) See *per* Lord CROMPTON, *Harrison v. Anderston Foundry Co.* 1 App. Cas. 580. See also *per* JESSEL, M.R., *Hinks v. Safety Lighting Co.*, 4 Ch. D. 607, 612; *United Telephone Co. v. Harrison*, 21 Ch. D. 721, 741.

(*m*) *Jackson v. Wolstenhulmes*, 1 R. P. C. 105.

(*n*) *Harrison v. Anderston Foundry Co.*, 1 App. Cas. 574, 578.

(*o*) *Per* Lord BLACKBURN, *Clark*

*v. Adie* (No. 2), 2 App. Cas. 423, 437.

(*p*) *Clark v. Adie* (No. 2), *ubi supra*.

(*q*) *Trotman v. Wood*, 16 C. B. (N.S.) 479, 504; *Ashworth v. Roberts*, 9 R. P. C. 309, 312.

(*r*) 2 App. Cas. 423.

(*s*) *Ibid.*, pp. 433, 437.

(*t*) *Haworth v. Hardcastle*, 1 Webst. 484.

(*u*) *Cropper v. Smith*, 1 R. P. C. 81, 90, BOWEN, L.J.

utterly absurd to suppose would be claimed, because it is so well known as a matter of public notoriety that no one would think of claiming it (x), and such an absurdity will be avoided if this is possible by any legitimate construction of the words (y).

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NOTE.

The Letters Patent (see 1st Schedule, *post*), contain a clause directing that they are to "be construed in the most beneficial sense for the advantage of the patentee." These words mean that the Court is to ascertain the real meaning of the specification and construe it so as to uphold the patent if it can be reasonably done (z). This appears to be, in effect, all that is meant by the "benevolent construction," which it is said to be the duty of the Court to give to a specification. This, which applies not to specifications only, but to all written documents (a), may be described as construing a specification fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction (b). It is a caution against excessive formalism (c). But beyond this it does not go (d). It is a guide to help to construe a document; it is not an excuse to justify misconstruction (e). It has nothing to do with infringement (f).

"Benevolent construction."

"The duty of the Court is fairly and truly to construe the specification, neither favouring the one side nor the other, neither putting an unfair gloss or construction upon the specification for the purpose of saving a patent if it is said that the patent is void, nor putting an unfair gloss or construction upon it in order to extend the patent and make it take in something which you may think was an unhandsome taking of the fruits of his invention from the patentee if it is not really an infringement of the patent" (g).

Another question on this subject is, whether the Court, in construing a claim, can look at antecedent specifications. In *Adie v. Clark* (h), the defendant, a licensee, proposed to put in evidence certain specifications with a view to show that, on one construction, the patent was bad for want of novelty, and that, therefore, another construction, which would make the patent good, ought to be adopted. The Court of Appeal held

How far antecedent specifications can be looked at in construing claims.

(x) *Per* JESSEL, M.R., *Plimpton v. Spiller*, 6 Ch. D. 412, 423, approved by JAMES, L.J., *ibid.* 427.

(y) *Adie v. Clark*, 3 Ch. D. 134, 143.

(z) See *per* LINDLEY, L.J., *Automatic Co. v. Knight*, 6 R. P. C. 307.

(a) *Per* BOWEN, L.J., *Cropper v. Smith*, 1 R. P. C. 89.

(b) *Per* JESSEL, M.R., *Hinks v. Safety Lighting Co.*, 4 Ch. D. 612.

(c) *Per* BOWEN, L.J., *Cropper v. Smith*, *ubi supra*.

(d) *Per* JESSEL, M.R., *Hinks v.*

*Safety Lighting Co.*, *ubi supra*.

(e) *Per* BOWEN, L.J., *Cropper v. Smith*, *ubi supra*.

(f) *Per* LINDLEY, L.J., *Needham v. Johnson*, 1 R. P. C. 58.

(g) *Per* Lord BLACKBURN, *Dudgeon v. Thomson*, 3 App. Cas. 53.

See also *Leadbeater v. Kitchin*, 7 R. P. C. 235, 244; *Harrison v. Anderson Foundry Co.*, 1 App. Cas. 574,

581; *Parkinson v. Simon*, 12 R.P.C. 411.

(h) 3 Ch. D. 134.

**Sect. 5 (5).** the evidence inadmissible for the purpose of construing the patent ; but the House of Lords, while considering the evidence, even if admitted, immaterial in the particular case, refused to lay down any general rule, and Lord CAIRNS, C., said it might be open to the patentee or licensee to refer, in launching his case, to the state of manufacture up to and at the time when the patent was granted (i).

NOTE.

In *Westinghouse v. Lancashire and Yorkshire Rail. Co.* (k), DENMAN, J., said that it was necessary to look at the state of knowledge at the time of the publication of the specification in order to decide whether a particular claim was a claim to a combination or a claim to several distinct inventions. In *Couchman v. Greener* (l), it was said by BRETT, M.R., that if there be any doubt on the construction of the plaintiff's patent, you may look at former patents for the purpose of seeing what is the proper construction of the plaintiff's patent.

And in *Morris v. Young* (m), it was held in the House of Lords that in order to interpret the plaintiff's specification the Court may inquire what was the state of public knowledge at the time when he obtained his patent.

But in *Crossthwaite v. Steel* (n), it was held by MANISTY, J., in an action by a licensor against a licensee, that evidence of the state of public knowledge at the date of the plaintiff's patent is admissible only for the purpose of explaining the specification, and the specification being clear the evidence was not received.

Where a patentee in his specification refers to an earlier patent of his own, he is entitled in an action on the second patent to have both specifications read together (o).

When claim limited to specific device claimed.

The case of *Seed v. Higgins* (p) is very important on the question of the extent of a claim. In that case, where the claim had originally claimed the application of centrifugal force for the purpose of producing a hard and evenly-compressed bobbin, and afterwards by disclaimer the patentee disclaimed all application of centrifugal force, except by the particular means described, it was held that the claim was strictly limited to these particular means. This case is to be taken as laying down the rule "that if you find a specific mechanical improvement claimed, then you must hold the person strictly to that particular mechanical device which he has claimed for effecting the object in view ; and if he says it is to be done in one precise and particular way,

(i) *Clark v. Adie* (No. 2), 2 App. Cas. 423, 431.

(k) 1 R. P. C. 98, 101. See also per FRY, L.J., *Ellington v. Clark*, 5 R. P. C. 325.

(l) 1 R.P.C. 197, 199. See also *Ashworth v. Roberts*, 9 R. P. C. 309, 312.

(m) 12 R. P. C. 455, 461. See also *Nobel's Explosives Co. v. Anderson*, 11 R. P. C. 519, 523.

(n) 6 R. P. C. 190.

(o) *Parke v. Sterens*, L. R. 8 Eq. 358, 366.

(p) 8 H. L. C. 550.

to that precise and particular way he must be held, and those who have *bonâ fide* employed a different system and a different way must not be held to have infringed" (q). Sect. 5 (5).

Thus, where in machines for making screws by rolling, cylindrical dies and also straight dies were known, it was held that a claim for the use in such machines of a cylindrical die having formed on its periphery certain ribs of a peculiar construction was to be confined to cylindrical dies, and that the defendants who used straight dies had not infringed (r).

And where a specification claimed an explosive material prepared by mixing certain named substances, "which substances are heated after being mixed together, so that the solid bi- or tri-nitro carburetted hydrogen melts, and after solidifying, completely surrounds the unmelted nitrate substantially as above set forth," and the defendants, though they used the specified substances, did nothing to which the latter words of the claim were applicable, it was held by the House of Lords that there was no infringement (s).

But a claim for "the preparation of a tri-sulpho acid of alpha naphthol or of such sulpho acids of alpha naphthol, which upon treatment with nitric acid will retain one or more of these sulpho groups, and become changed into nitro sulpho acids, and chiefly into the sulpho acids of di-nitro naphthol as hereinbefore described," was held to be a claim not only for a particular chemical substance, but a claim for the preparation of that substance (t).

The narrow construction of the claim may be applied in favour of a patentee as against an alleged anticipation (u).

Where the patentee claimed "the mode of manufacturing a candle by the application of two or more plaited wicks as described," it was held that the patent was for the mode of making the candle, and not for the candle itself (x). Claim of mode of manufacture.

A claim may be so wide as of itself to invalidate the patent, as in the American case of *Wyatt v. Stone* (y), referred to by Lord HATHERLEY, L.C., When claims too wide.

(q) *Per* Sir W. P. WOOD, V.-C., *Curtis v. Platt*, 3 Ch. D. 135, n., approved by Lord WESTBURY, C., *ibid.* p. 139. See also *Palmer v. Wagstaff*, 9 Ex. 501; *Proctor v. Bennis*, 36 Ch. D. 740; *Ehrlich v. Ihlee*, 5 R. P. C. 437, 453; *Hooking v. Hooking*, 6 R. P. C. 69; *Ticket Punch, etc. Co., v. Colley*, 12 R. P. C. 171; *Morris v. Young*, 12 R. P. C. 455 (H. L.); *Lancashire Explosives Co. v. Roburite, etc. Co.*, 14 R. P. C. 303, 311.

(r) *Nettlefolds v. Reynolds*, 9 R. P. C. 270.

(s) *Lancashire Explosives Co. v. Roburite Explosive Co.*, 14 R. P. C. 303, 311. See also *Nobel's Explosives Co. v. Anderson*, 11 R. P. C. 115, 519; 12 R. P. C. 164.

(t) *Badische Anilin und Soda Fabrik v. Dawson*, 6 R. P. C. 387. See also *Nuttall v. Hargreaves*, 8 R. P. C. 273, 276.

(u) *Daw v. Eley*, L. R. 3 Eq. 502, n.; *Morris v. Young*, 12 R. P. C. 455, 464.

(x) *Palmer v. Wagstaff*, 9 Ex. 494.  
(y) 1 Story, 273.

**Sect. 5 (5).** in *Arnold v. Bradbury* (z), where the patentee claimed every method of cutting ice except human power, or where the claim is to a principle to be carried into effect in any way you will (a).

**NOTE.**

But it must be very large and vague indeed to justify the court in saying that it is impossible to sustain a patent based upon it (b), and it would seem that exception cannot be taken to a claim on the ground of its being wide or general without evidence to show that it includes something old or useless (c).

It is not desirable, and it has not been the rule in more recent times, that specifications should be construed with the same rigour and severity as, perhaps, was formerly done (d).

Where the patentee of an invention for "improvements in type or blocks for printing posters and the like" described a certain method of building up geometrical pieces of wood so as to produce the printing surfaces and claimed "the production of printing surfaces, etc., etc., by the combination of type high geometrical squares, curves, angles, etc., with plain or ornamental surfaces for typographical poster printing," it was held that the "etc., etc." meant "or such like or *ejusdem generis*," and did not make the claim too vague (e).

Of course, upon the evidence a claim may be too wide; as where iron frames for ships being known the claim was construed to include every ship with an iron frame (f); or where the claim was a mere enunciation of a known chemical truth (g); or was for the use of a particular solution for preserving meat without any description of the way in which it was to be applied, it having been applied for this purpose before (h); or was a claim for making belts for driving machinery of a particular kind of canvas, it being shown that belts thus made would only do for machinery of a particular size (i). So also where the claim was for obtaining gold from ores by treating the powdered ore with a solution containing cyanide, and it was shown that, unless the solution was used in a limited manner, it was ineffective, the claim was too wide (k).

Every claim must be read and construed with reference to the

(z) L. R. 6 Ch. 706, 711.

(a) *Per* ALDERSON, B., *Neilson v. Harford*, 1 Webst. 355.

(b) *Arnold v. Bradbury*, *ubi supra*.

(c) See *per* WRIGHT, J., *Edison Bell Phonograph Co. v. Smith*, 11 R. P. C. 163; affirmed on appeal, *ibid*, 389, 405.

(d) *Per* Lord SHAND, *Goddard v. Lyon*, 11 R. P. C. 354, 364.

(e) *Shaw v. Jones*, 6 R. P. C. 328.

(f) *Jordan v. Moore*, L. R. 1 C. P. 624.

(g) *Patterson v. Gaslight and Coke Co.*, 2 Ch. D. 812, 833.

(h) *Bailey v. Robertson*, 3 App. Cas. 1055, 1067.

(i) *Gandy v. Reddaway*, 2 R. P. C. 49, 52.

(k) *Cassel Gold Extracting Co. v. Cyanide Gold Recovery Syndicate*, 12 R. P. C. 232.

specification, and not as if it was an isolated sentence having no connection with or reference to what precedes it (l). Sect. 5 (5).

Therefore if the specification as containing the description be sufficiently precise, it is of no consequence that expressions are used in the claim which would be too general if they professed to be part of the description (m). NOTE.  
Wide expressions in claims may be cut down by body of specification.

Thus, where a patentee in his specification professed to make by machinery ruffles or frills which had never been before made by machinery, and described the necessary machinery, and then claimed the production of the article by machinery; and where the patentee described an improved ruffle and the machinery by which it was to be made and fastened to a plain fabric by a single series of stitches, and claimed "the production by machinery of ruffles, and the simultaneous attachment of them to a plain fabric by a single series of stitches"; in each case the claim was, upon reading the specification alone and without evidence, held not to be too wide (n).

And a claim for a method of preparing the illuminating part of an electric lamp consisting of electrically heating the same while it is surrounded by a "carbon gas or liquid," was held not to be too wide, although the latter words would include carbonic oxide or carbonic acid, which would not answer the purpose, it being clear from the body of the specification that gases such as the two latter were to be avoided (o).

And where in the specification of a patent for improvements in waistbands and the method of weaving webs suitable for such uses, the patentee described the method of weaving the waistbands, and claimed (1) the waistband of the formation substantially as set forth, and (2) certain arrangements of machinery; it was held that the claim was not a claim to the waistband alone, but to a waistband made in the way pointed out by the patentee (p).

And the construction of a claim too wide on the face of it may be modified by evidence. Thus, if the claim on the face of it includes a whole class of articles, yet it could be shown that no ordinary workman of ordinary skill and knowledge would think of taking any more than one part of the class, the true construction of the claim may be held to be only for that part which an ordinary workman might take (q). Construction of claim, how far modified by evidence.

And if a man is patenting a product it is absolutely necessary to

(l) *Edison, etc. Co. v. Woodhouse* (No. 2), 4 R. P. C. 99, 107; *Lead-beater v. Kitchin*, 7 R. P. C. 235, 244; *Edison Bell Phonograph Co. v. Smith*, 11 R. P. C. 148, 389.

(m) *Kay v. Marshall*, 2 Webst. 36, 39. See also *Beard v. Egerton*, 8 C. B. 215.

(n) *Arnold v. Bradbury*, L. R. 6

Ch. 706; *Edison Bell Phonograph Co. v. Smith*, 11 R. P. C. 148, 389.

(o) *Edison, etc. Co. v. Woodhouse*, (No. 2), 4 R. P. C. 99, 107.

(p) *Vorwerk v. Evans*, 7 R. P. C. 265, 271.

(q) See per BRETT, M.R., *Gandy v. Reddaway*, 2 R. P. C. 52; *Edison, etc. Co. v. Woodhouse, ubi supra*.

**Sect. 5 (5).** describe in the specification a mode of making that product, otherwise his patent is bad (r).

**NOTE.**  
Mere claim  
for principle  
bad.

A mere claim for a principle is bad ; the patent must be for a mode of carrying the principle into effect (s).

If a patentee has a new principle or a new idea, and then shows a mode of carrying that into practice, he may patent that, though he could not patent the idea alone, and very likely could not patent the machine alone, because the machine alone would not be new (t). Thus in the hot blast patent (u), where there was nothing new at all except the idea that the application of hot air instead of cold air to the mixture of iron-ore and fuel would produce economy, it was held sufficient that the patentee stated that the air was to be heated in a closed vessel next the furnace (v).

In *Minter v. Wells* (x), a claim for "the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight acted as a counter-balance to the pressure against the back of the chair, as above described," the arrangement being described in detail in the body of the specification, was held to be not a claim for a principle, but of an invention of applying the principle.

And in *Otto v. Linford* (y), where the patentee claimed in a specification of improvement in gas engines, "admitting to the cylinder a mixture of combustible gas or vapour with air, separate from a charge of air or incombustible gas, so that the development of heat, and the expansion or increase of pressure produced by the combustion, were rendered gradual, substantially as and for the purposes set forth," the specification having elaborately described the arrangements by which this object was effected ; an objection that the claim was a mere claim for a principle was not sustained.

And in the *Edison Bell Phonograph Co. v. Smith* (z), a claim in the following terms : "In a phonograph attaching both the recording point and the reproducing point to the same diaphragm, means being provided whereby either of the points may be brought into operative position on the surface of the "phonogram," was held not to claim a principle, but to be a claim for a particular arrangement of essential parts.

"Sub-  
stantially as  
described."

It is very common practice in the claim for a particular arrangement described in the specification to use the words "substantially as

(r) Per KAY, L.J., *Nobel's Explosives Co. v. Anderson*, 11 R. P. C. 530.

(s) *Boulton v. Bull*, Dav. P. C. 112; *Jupe v. Pratt*, 1 Webst. 145, 146.

(t) Per JESSEL, M.R., *Otto v. Linford*, 46 L. T. (N.S.) 39.

(u) *Neilson v. Harford*, 1 Webst. 370.

(v) See per JESSEL, M.R., *Otto v. Linford*, *ubi supra*.

(w) 1 Webst. 127, 134.

(y) 46 L. T. (N.S.) 39.

(z) 11 R. P. C. 148, 389, 398.

described." But the word "substantially" is useless, because the law gives it to the patentee without his using it. The law says that if a man, although not literally infringing a patent, yet substantially infringes it, it is an infringement (a). So also the addition in a claim of the words "or any mechanical equivalent," is generally useless, and may be mischievous, because, if taken in the largest sense, the claim must be too large (b).

Sect. 5 (5).

NOTE.

A person who takes out a patent for an invention which consists in the use of certain proportions, is not bound to say, "I limit my claim to these precise proportions" (c). Nor is it an objection to the specification that the proportions in which certain alternative materials are to be used are not shown, if from the examples given in other materials a chemist could have no difficulty in ascertaining the proportions for the alternative substances (d).

"Proportions."

But though a specification may be good which describes some out of many kinds of means or sets of proportions, yet if all are claimed, the patent will be invalidated on proof that extended experiments and research are necessary to discover what kind of means or proportions other than those described will produce any useful effect (e).

As to the words "may be varied," see observations of Lord HATHERLEY in *Clark v. Adie* (No. 2) (f).

"May be varied."

Where a specification of a patent for a new dye stated that a number of oxidisable substances mentioned could be used, and also others, and gave certain examples of the process as carried out with particular oxidisable substances, and claimed "the process . . . by the action of suitable oxidisable substances and free alkalis . . . substantially as described," it was held to be no objection to the patent that the specification showed no means for ascertaining what oxidisable substances were not suitable (g).

"Suitable."

Inventors are not required to know or to point out the reasons or causes why beneficial results are produced by the means which they describe and claim as effective, and which are effective in causing them, nor to know or point out all the beneficial effects which may result (h).

Statement of theory of process.

But where the patentee of a method of obtaining new dyes claimed in effect the creation of a new metallic salt, and the substitution of an

(a) *Per* GROVE, J., *Young v. Rosenthal*, 1 R. P. C. 29, 33; *Westinghouse v. Lancashire and Yorkshire Rail. Co.*, 1 R. P. C. 229, 241.

(b) See *per* WOOD, V.-C., *Curtis v. Platt*, 3 Ch. D. 137, n.

(c) *Per* Sir W. PAGE WOOD, V.-C., *Patent Type Foundry Co. v. Richard, Johnson*, 384.

(d) *Leonhardt v. Kallé*, 12 R. P. C. 103.

(e) *Per* WRIGHT, J., *Maxim Nordenfelt Co. v. Anderson*, 14 R. P. C. 371, 385; affirmed, *ibid*, 671.

(f) 2 App. Cas. 433.

(g) *Leonhardt v. Kallé*, 12 R. P. C. 103. See also *Maxim Nordenfelt etc. Co. v. Anderson*, 14 R. P. C. 671.

(h) *Per* WRIGHT, J., *Maxim Nordenfelt, etc. Co. v. Anderson*, 14 R. P. C. 371, 385, 386. See also *Leonhardt v. Kallé*, 12 R. P. C. 103, 117.



## Sect. 5 (5).

## NOTE.

alcoholic radicle for the metal of that salt, and it was shown that the supposed salt was not only non-existent but impossible, it was held that the patent was bad, on the ground that the claim was for an impossible process, or for a process which was not described (i).

In a second action on a patent, the Court of Appeal is bound by the construction placed on the specification in the first action by the Court of Appeal (k). But different considerations may apply if the patent is attacked by a petition for revocation (l).

## Product claims.

The question how far a claim for a new product, apart from the mode of making, can be sustained, has given rise to considerable differences of opinion.

In *Jupe v. Pratt* (m), it was said by ALDERSON, B., during the argument of counsel, that if a patentee has discovered a principle, and described some mode of carrying the principle into effect, he is entitled to be protected against all other modes of carrying the same principle into effect. This *dictum* was also laid down in the case of *Househill Co. v. Neilson* (n), and, on the authority of these cases, it was held by PEARSON, J., in the *Badische Anilin und Soda Fabrik v. Levinstein* (o), that when a patent is taken out for a new result not known before, and there is one process described which is effectual for the purpose of arriving at that new result at the time when the patent is taken out, the patentee is entitled to protection against all other processes for the same result, and no person can, without infringing upon his patent, adopt simply a different process for arriving at the same result.

But this view of the law has been lately dissented from in the Court of Appeal. It has been pointed out that ALDERSON, B., in a later case (p), used language which showed that his *dictum* above quoted went too far. And in *Automatic Machine Co. v. Knight* (q), COTTON, L.J., stated the rule to be: "You can prevent anyone from using the same method of carrying that principle into effect, and you can prevent anyone from using only the same thing with a colourable difference." And in *Nobel's Explosives Co. v. Anderson* (r), the law was said by KAY, L.J., to be clearly settled, that if the result of the patent is entirely new, and one method of arriving at that result is described on the face of the specification, the patentee cannot say "that enables me to treat every other method of arriving at that result as an infringement"; but the question

(i) *Monnet v. Beck*, 14 R. P. C. 777.

(k) *Edison v. Holland*, 6 R. P. C. 243, 276. See also *Otto v. Steel*, 2 R. P. C. 109, 114.

(l) See *Lewis and Stirokler's Patent*, 14 R. P. C. 24, 35.

(m) 1 Webst. 146.

(n) 1 Webst. 685. See also *Easter-*

*brook v. G. W. Rail. Co.* 2 R. P. C. 207, 208.

(o) 24 Ch. D. 171.

(p) *Neilson v. Harford*, 1 Webst. 355. See also 342, n.

(q) 6 R. P. C. 297, 304.

(r) 11 R. P. C. 519, 527.

is in every case, whether the method, which he says is an infringement, is so like the method which he has himself described as to be substantially the same, or, in other words, only colourably different (s).

In *Vorwerk v. Evans* (t), where the patented article was a waistband of a peculiar formation, the question was raised whether if the claim were read so as to be a claim for the waistband however made, it would be good. The Court of Appeal decided that the claim was only to the waistband when made in the way pointed out by the specification; but COTTON and BOWEN, L.JJ., intimated an opinion that if the claim had been for the waistband alone, it would have been a good claim.

Sect. 5 (5).

NOTE.

6. The comptroller shall refer every application to an examiner, who shall ascertain and report to the comptroller whether the nature of the invention has been fairly described, and the application, specification, and drawings (if any) have been prepared in the prescribed manner (u), and the title sufficiently indicates the subject-matter of the invention.

Reference of application to examiner.

“Fairly described.”—See under s. 5 (3), *ante*.

“Title.”—See the cases collected in Hindmarch on Patents, pp. 43—47; Johnson Pat. Man., 91—93; Agnew on Patents, pp. 143—149; Higgins' Digest of Patent Cases, (2nd ed.), 559—563; and see *post*, under s. 7 (1).

7.—(1.) *If the examiner reports that the nature of the invention is not fairly described, or that the application specification or drawings has not or have not been prepared in the prescribed manner, or that the title does not sufficiently indicate the subject-matter of the invention, the comptroller may require that the application specification or drawings be amended before he proceeds with the application.*

Power for comptroller to refuse application or require amendment.

(2.) *Where the comptroller requires an amendment, the applicant may appeal from his decision to the law officer.*

(3.) *The law officer shall, if required, hear the applicant and the comptroller, and may make an order determining*

(s) And see judgment of Lord HALSBURY, V.-C., in H. L., 12 R. P. C., at p. 167.

(t) 7 R. P. C. 265, 272, 274. See also *Riekman v. Thierry*, 14 R. P. C. 105, 116, 121, 122.

(u) P. R. *post*, rr. 30—33. The acceptance of an application is to be advertised and notice of acceptance is to be given to the applicant. P. R. r. 21.

**Sect. 7 (3).** *whether and subject to what conditions, if any, the application shall be accepted.*

(4.) *The comptroller shall, when an application has been accepted, give notice thereof to the applicant.*

(5.) *If after an application has been made, but before a patent has been sealed, an application is made, accompanied by a specification bearing the same or a similar title it shall be the duty of the examiner to report to the comptroller whether the specification appears to him to comprise the same invention; and, if he reports in the affirmative, the comptroller shall give notice to the applicants that he has so reported.*

(6.) *Where the examiner reports in the affirmative, the comptroller may determine, subject to an appeal to the law officer, whether the invention comprised in both applications is the same, and if so he may refuse to seal a patent on the application of the second applicant.*

By the Act of 1888 (x), the following is substituted for this section :—

Section 7, as  
to applica-  
tions.

“ 7.—(1.) If the examiner reports that the nature of the invention is not fairly described, or that the application, specification, or drawings has not, or have not, been prepared in the prescribed manner, or that the title does not sufficiently indicate the subject-matter of the invention, the comptroller may refuse to accept the application, or require that the application, specification, or drawings be amended before he proceeds with the application; and in the latter case the application shall, if the comptroller so directs, bear date as from the time when the requirement is complied with.

“ (2.) Where the comptroller refuses to accept an application or requires an amendment, the applicant may appeal from his decision to the law officer (y).

“ (3.) The law officer shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions (if any), the application shall be accepted.

(x) Section 2, *post*.

(y) Law Officers Rules, *post*.

“(4.) The comptroller shall, when an application has been Sect. 7 (4). accepted (z), give notice thereof to the applicant.

“(5.) If, after an application for a patent has been made, but before the patent thereon has been sealed, another application for a patent is made, accompanied by a specification bearing the same or a similar title, the comptroller, if he thinks fit, on the request of the second applicant, or of his legal representative, may, within two months of the grant of a patent on the first application, either decline to proceed with the second application or allow the surrender of the patent, if any, granted thereon.”

#### SUB-SECTION (1).

“The comptroller may . . . require that the application, specification, or drawings be amended.”— The report of the examiner is not to fetter the judgment of the comptroller, but to assist him, and if upon the face of the specification, the comptroller saw, apart from the report of the examiner, that the specification was insufficient, it would be in his power to require an amendment . . . The amendment to be required is to be determined by the judicial act of the comptroller with an appeal to the law officer. It is not intended to relegate to the examiner the function of deciding what the amendment is to be, though undoubtedly if the examiner reports that there is a full and fair description, the application goes on (a).

If in the opinion of the comptroller the title does not sufficiently indicate the invention described in the provisional specification, the comptroller may, under this section, require the title to be amended (b). Amendment  
of title.

But on an application for a patent for “improvements in casks and tubs,” with a complete specification filed in the first instance, in which, though it was stated that the invention was applicable to barrels or other casks, and also to tubs and analogous vessels in which the staves are formed with a croze or groove for receiving the head or bottom,” the claims were specific, and did not relate to the vessels themselves, but to a mode of fastening in the heads or bottoms of the vessels, it was held that the title was sufficient and that the Patent Office could not

(z) Whether with a provisional or complete specification (P. R., *post*, r. 21), and the acceptance is to be advertised. *Ibid.*

(a) *Per* Sir R. WEBSTER, Att.-Gen., *C.'s Application*, 7 R. P. C. 250.

(b) *Dart's Patent*, Griffin, P. C. 307.

**Sect. 7.** require the title to be amended by the addition, after the word "tubs," of the words "and analogous vessels" (c).

**NOTE.**

Course where applicant desires to omit part of the invention covered by the title.

If, prior to the time when the complete specification has been accepted, the applicant merely desires to omit part of the invention as covered by the original title and provisional specification, no amendment of the title and provisional specification is of necessity required. The applicant may either leave the title untouched, and insert a disclaiming clause in the complete specification, indicating that part only of the invention originally covered by the latter was intended to be claimed, or, if he prefers it, he may lodge a complete specification, omitting the part desired to be left out, and the Patent Office may then, under the powers of this section and s. 9, permit the original title and provisional specification to be amended. Such an amendment must, however, be confined to excision only, and to such excision as does not extend the scope of the title (d).

"And in the latter case the application shall . . . bear date," etc.—This provision is an addition to the corresponding parts of the repealed section.

**SUB-SECTION (2).**

"When the comptroller refuses to accept an application . . . the applicant may appeal," etc.—This is an addition to the corresponding part of the repealed section.

**SUB-SECTION (5).**

Sub-section (5) differs entirely from the provisions in the 5th and 6th sub-sections of the repealed section. The comparison in the Patent Office of rival provisional specifications, and the examiner's report thereon, are abolished, and the corresponding provision in s. 11, *post*, p. 39, allowing opposition on the basis of the examiner's report, is repealed.

Time for leaving complete specification.

**8.—(1.)** If the applicant does not leave a complete specification with his application, he may leave it at any subsequent time within nine months from the date of application.

**(2.)** Unless a complete specification is left within that time the application shall be deemed to be abandoned.

"Nine months."—By the Act of 1885 (e), the comptroller may extend this time by one month.

(c) *Brown's Application*, Griffin, L. O. C. 1.

(d) *Dart's Patent*, Griffin, P. C. 307.

(e) 48 & 49 Vict. c. 63, s. 3, *post*.

The time is to be reckoned exclusively of the day of the date of the application. The usual course in recent times has been to "construe the day (of the date) exclusively, wherever anything was to be done in a certain event after a given event or date" (*f*); and see note to First Schedule, P. R., *post*, and s. 98.

Sect. 8.  
NOTE.

Month means calendar month (*g*).

A provisional specification which has been abandoned does not become public by abandonment; and therefore, when an applicant on April 10th obtained, under the Act of 1852, provisional protection for four heads of invention, one of which formed the subject of a provisional specification lodged on the previous March 17th, which latter he thereupon abandoned and completed his patent on the provisional specification of April 10th, before that of March 17th was made public by the Office, it was held that there was no publication of the invention sufficient to invalidate the patent (*h*). And if a provisional specification contain an incomplete description which is omitted in the complete specification, the publication of the provisional specification is not necessarily such a publication as will invalidate a subsequent patent for the omitted part (*i*).

Abandoned provisional specification not made public by abandonment so as to vitiate subsequent patent for same invention.

Incomplete description in a provisional specification of part omitted in final.

By the Act of 1885, s. 4, *post*, where an application for a patent has been abandoned, or become void, the specification or specifications and drawings (if any) accompanied or left in connection with such application, are not to be open to public inspection or be published by the comptroller.

But the court can order the production of the specification for the purposes of justice (*k*).

9.—(1.) Where a complete specification is left after a provisional specification, the comptroller shall refer both specifications to an examiner for the purpose of ascertaining whether the complete specification has been prepared in the prescribed manner, and whether the invention particularly described in the complete specification is substantially the same as that which is described in the provisional specification.

Comparison of provisional and complete specification.

(2.) If the examiner reports that the conditions hereinbefore contained have not been complied with, the comptroller may refuse to accept the complete specification unless and

(*f*) *Per PARKE, B. Russell v. Led- sam*, 14 M. & W. 582; *Williams v. Nash*, 28 Beav. 93.

(*g*) 52 & 53 Vict. c. 63, s. 3.

(*h*) *Oxley v. Holden*, 8 C. B. (N.S.) 666.

(*i*) *Stoner v. Todd*, 4 C. L. D. 58.

(*k*) *Pneumatic Tyre Co. v. English Cycle Co.*, 14 R. P. C. 851.

**Sect. 9 (2).** until the same shall have been amended to his satisfaction ; but any such refusal shall be subject to appeal to the law officer.

(3.) The law officer shall, if required, hear the applicant and the comptroller, and may make an order determining whether and subject to what conditions, if any, the complete specification shall be accepted.

(4.) Unless a complete specification is accepted within twelve months from the date of application, then (save in the case of an appeal having been lodged against the refusal to accept) the application shall, at the expiration of those twelve months (*l*), become void.

(5.) Reports of examiners shall not in any case be published or be open to public inspection, and shall not be liable to production or inspection in any legal proceedings, *other than an appeal to the law officer under this Act*, unless the court or officer having power to order discovery in such legal proceeding shall certify that such production or inspection is desirable in the interests of justice, and ought to be allowed (*m*).

#### SUB-SECTION (1).

"Whether the invention . . . in the complete specification is substantially the same as that . . . in the provisional specification."—The object of the provisional specification, which was first introduced by the Act of 1852, was to ascertain the identity of the invention, and to make it certain that the patentee should ultimately obtain his patent for that invention which he presented to the Attorney-General in the first instance (*n*). This being so, it was held that the provisional and complete specification of a patent ought not so to differ as that the nature of the invention as described in the one shall be materially different from the nature of the invention as described in the other (*o*); and an objection that there is a material variation between

(*l*) See Act of 1885, s. 3, *post*.

(*m*) This section is amended by the Act of 1888, s. 3 of which provides that the words "*other than an appeal to the law officer under this*

*Act*," shall be omitted in sub-s. (*5*).

(*n*) *Per* POLLOCK, C.B., *Newall v. Elliott*, 10 Jur. (N.S.) 955.

(*o*) *Foxwell v. Bostock*, 4 D. J. & S. 298.

the provisional and complete specification was, and (notwithstanding the new machinery of this section) still is (p) a good objection to the validity of a patent. It has, however, been said, that having regard to the provisions of the present section the court ought not to decide against the validity of a patent on this ground unless the two inventions are unmistakably different, and that if a case is on the border line, the patent ought to be held good rather than bad (q).

The general rule is thus stated by Lord ESHER, M.R. (r): "If the complete specification sets out and claims an invention independent of that which is in the provisional specification, besides also describing that invention which is in the provisional specification, then the complete specification is bad. It would be equally bad if the invention described in the complete specification were a wholly different invention from that described in the provisional specification, because, as has been said, the patent is not given then for the invention which is described in the provisional specification. Therefore, if there were only one invention described in the provisional application, and only one in the complete specification, but those two inventions were wholly and substantially different, the patent would be bad. So if an invention is described in the provisional specification, which invention is also described in the complete specification, but in the complete specification another and distinct invention is described and claimed, then it is bad, because, with regard to the second invention so described and claimed in the complete specification, there would be no provisional specification to cover it."

Therefore, where a provisional specification of an invention of "improvements in preserving animal substances" described the use for this purpose of gelatine mixed with bisulphite of lime, and in the complete specification described and claimed several solutions, one being a solution of bisulphite of lime alone, as to which no directions for using were given, it was held in an action to restrain the use of bisulphite of lime alone, that if the complete specification were construed so as to include the use of bisulphite of lime alone, the claim was larger than, and different from, that disclosed in the provisional specification, and the patent would be invalid (s).

And where the complete specification for an invention of an electrical telephone included an invention of a phonograph which was not

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NOTE.

(p) See *per* Lord HALSBURY, C., *Vickers v. Siddell*, 15 App. Cas. 499; *Nuttall v. Hargreaves*, [1892] 1 Ch. 23.

(q) *Per* LINDLEY, L.J., *Gadd v. Mayor, etc., of Manchester*, 9 R. P. C. 527. And see *Chadburn v. Mechan*, 12 R. P. C. 120, 134.

*Cassell Gold Extracting Co. v. Cyanide Gold Recovery Syndicate*, 12 R. P. C. 232, 257; *Shoe Machinery v. Cutlan*, 12 R. P. C., 342, 357.

(r) *Watling v. Stevens*, 3 R. P. C. 151.

(s) *Bailey v. Robertson*, 3 App. Cas. 1055.



## Sect. 9 (1).

## NOTE.

sufficiently described in the provisional, the patent was held void (t). So, also, where the provisional specification described a process of treating oils and fats in a particular manner for the purpose of oxidising or thickening them, and the complete specification claimed this process, and also claimed the combining of oxidised or thickened oils with mineral oils, it was held this latter claim was for a different invention from that disclosed in the provisional specification, and that the patent was invalid (u).

And where in a patent for an improved method of tapping barrels the only feature distinguishing the plaintiff's tap from others was the substitution of a gauze for a perforated metal strainer and this was not in the provisional specification, the patent was held invalid (x).

But where a patentee of improvements in apparatus for laying down telegraph wires described in his provisional specification a cable passed round a cone so that the cable in being drawn off the coil was prevented from kinking by means of the cone, and also described a cylinder outside which prevented the coil shifting, and the complete specification mentioned and claimed in addition certain rings placed round the cone with the object of preventing the bight of the rope from flying out when going at a rapid speed, and so preventing kinking, it was held that the omission of the rings from the provisional specification did not invalidate the patent (y).

And again, where a provisional specification of an invention of "an improvement in the bearings and bushes of the shafts of screw and submerged propellers," described the invention as consisting in employing wood for such bearings and bushes, and the complete specification gave a detailed description showing how the wood was to be arranged in the bearings, and included the application of wood to the shaft so as to revolve therewith, there was held to be no material variance between the provisional and complete specification (z).

So also where a provisional specification described an arrangement which was claimed in the first claim of the complete specification, it was held that the addition to the latter of a second claim for an arrangement which was substantially equivalent to that in the first claim, and which, though differing from it in the arrangement of parts, resembled

(t) *United Telephone Co. v. Harrison*, 21 Ch. D. 746. See also *Crossley v. Potter*, Macr. P. C. 240, 255; *Horrocks v. Stubbs*, 3 R. P. C. 221.

(u) *Hutchison v. Pattullo*, 5 R. P. C. 351. See also *King v. Anglo-American Brush Corporation*, 6 R. P. C. 414; *Lane Fox v. Kensington,*

*etc., Co.*, [1892] 2 Ch. 66; 3 Ch. 424.

(x) *Nuttall v. Hargreaves*, [1892] 1 Ch. 23.

(y) *Re Newall and Elliott*, 4 C. B. (N.S.) 269.

(z) *Penn v. Bibby*, L. R. 2 Ch. 127, 135.

it in that the mechanical parts were equivalent in each, did not make the complete go beyond the provisional specification (a).

And where a provisional specification described printing "in colours on the surface of a farina coated fabric by suitable means" as part of a process for producing designs on waterproof fabrics, and the complete specification described certain special media as "suitable media" for printing the colours, it was held that the omission of the suitable media from the provisional specification was no ground for upsetting the patent (b).

Where after amendment the specification was held to describe an invention different from that in the provisional specification the patent was held bad and was revoked (c).

If the provisional specification describes a way of carrying the invention into effect, the patent is not bad because a different way is described in the complete specification if both are really within the same invention (d).

This arises from the rule laid down in *Crossley v. Beverley* (e), that it is not only the duty of the inventor to state what he knew at the time of the patent, but the public have a right to be put in possession of all that he knows at the time of the specification. "A patentee putting in a provisional specification shewing the nature of his invention is not bound to describe the way in which that can be carried into effect and operation, but if he does describe the way of doing it, and, before he files his complete specification, he either finds out improvements in that way or a different way of carrying into effect that which is described as his invention in the provisional specification, he is bound to give the public the benefit of what he has discovered as regards the mode of carrying the invention, the nature of which must be described in the provisional specification, into effect, even although there may be improvement, and even invention which was not known to him at the time" (f).

A patentee is not bound in his provisional specification to detail the advantages of his invention, and in stating at the beginning of the

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NOTE.

Patent not bad because complete specification describes a different way of carrying invention from that in provisional. Patentee bound to disclose his latest knowledge at time of complete specification.

(a) *Watling v. Sterens*, 3 R. P. C. 33, 42. See also *Gadd v. Mayor, etc., of Manchester*, 9 R. P. C. 516.

(b) *Moseley v. Victoria Rubber Co.*, 4 R. P. C. 241.

(c) *Re Gaulard and Gibb's Patent*, 6 R. P. C. 215; *Lane Fox v. Kensington, etc. Co.*, [1892] 2 Ch. 67; 3 Ch. 424.

(d) *Woodward v. Sansum*, 4 R. P. C. 166, 175.

(e) 1 Webst. 117.

(f) Per COTTON, L.J., *Woodward v. Sansum*, 4 R. P. C. 175. See also *Moseley v. Victoria Rubber Co.*, 4 R. P. C. 241; *Plimpton v. Malcolmson*, 3 Ch. D. 531, 580; *Siddell v. Vickers*, 39 Ch. D. 92, 105; *Gadd v. Mayor, etc., of Manchester*, 9 R. P. C. 516, 526; *Miller v. Scarle Barker & Co.*, 10 R. P. C. 106, and per FRY, J., *United Telephone Co. v. Harrison*, 21 Ch. D. 720, 747.

**Sect. 9 (1).** specification his chief objects, he cannot be held to have implied that he obtains all those objects in every part of his invention or that some parts may not have other advantages (g).

NOTE.

What may be added to provisional in complete specification.

And generally when something is found out during the period of provisional protection "to make the invention work better, or with respect to the mode in which the operation is performed, a thing which is very likely to happen, when in carrying out his invention the inventor finds that some particular bit will not work so smoothly as he expected, and it is necessary to add a little supplement to it, still the nature of his invention remains the same, and it is no objection that in the complete specification which comes afterwards the invention or application is described more particularly and in more detail, or even if it be shown that there has been more discovery made and so as to make the invention which he has described in the provisional specification really workable. If nothing more is done than that," the patent is good (h).

Therefore, "improvements in the arrangement of the mechanism, in the relative position and adaptation of the different parts, with a view of producing the same results, the substitution of mechanical equivalents and modifications and developments within the scope of the invention set out in the provisional specification are allowable, and cannot be successfully relied on for the purpose of invalidating a patent for disconformity" (i)

Details invented after provisional specification.

Thus where the provisional specification described a bicycle lamp as consisting of certain parts, and an additional detail having been invented before the complete specification was filed, the patentee in his complete specification claimed a combination consisting of the parts described in the provisional with the additional detail, it was held that there was no variance between the provisional and complete specification which would invalidate the patent (k).

Development of original invention.

So also where the provisional specification of an improved clip for mounting lamps of velocipedes described only one clip and one action, and the final specification added two clips and a double action, it was held by BOWEN, L.J., that the addition was a development which the patentee was bound to disclose to the public, and that the patent was good (l).

(g) *Pneumatic Cycle Co. v. East London Rubber Co.* 14 R. P. C. 77, 99.

(h) *Per Lord BLACKBURN, Bailey v. Robertson*, 3 App. Cas. 1055, 1075. See also *Crompton v. Patents Investment Co.*, 5 R. P. C. 382, 397; 6 R. P. C. 287.

(i) *Per LOPES, L.J., Woodward v. Sansum*, 4 R. P. C. 178.

(k) *Lucas v. Miller*, 2 R. P. C. 155.

(l) *Miller v. Scarle Barker & Co.*, 10 R. P. C. 106, 111.

And where the complete specification of an invention for producing Sect. 9 (1).  
 ornamental and other designs upon waterproof fabrics described as part  
 of the process a certain method of vulcanization called the cold vapour  
 process, as well as another method called the cold roller process, the  
 only method described in the provisional specification having been  
 there called the "well-known cold vulcanizing process," if was held that,  
 even assuming that the latter expression only referred to the cold roller  
 process and did not include the cold vapour process, the addition of the  
 latter in the complete specification did not cause such a difference from  
 the provisional as to vitiate the patent (m).

NOTE.

Addition of a  
new process  
for carrying  
out invention

A patented invention may, owing to subsequent discoveries of others,  
 prove more valuable and have a wider field of usefulness than what was  
 contemplated by the patentee at the time of his invention, and yet the  
 patentee is entitled to the full benefit of the use of his invention if  
 taken and applied for the purpose of those subsequent discoveries, and if  
 the subsequent discoveries take place after the provisional and before the  
 final specification, there would be nothing improper in referring to them  
 in the final, and there showing the manner in which the invention could  
 best be applied to them (n).

Where between the provisional and final specification of an invention Rule in *Cross-*  
 of an electric lamp with a carbon filament, made in a particular manner, *ley v. Beverley*  
 the patentee lodged a provisional specification of an invention for held not to  
 another method of making the carbon filament, it was held that it was apply.  
 no objection to the validity of the patent for the first invention, that  
 the patentee did not in the complete specification filed in respect of it  
 disclose the method of making the filament (o).

It may be a fair test of the difference between the provisional and Test of dis-  
 complete specifications to inquire whether, in the opinion of practical conformity  
 men, one mode of manufacture is or is not the natural outcome of the between  
 other, so that a competent workman having the one before him might, provisional  
 without any process of invention, produce the other (p). and final  
 specification.

A complete specification may omit something which is described in Complete  
 its provisional specification if there is no fraud, and the effect of the specification  
 remainder is not altered (q). But if there is such an omission, the pro- may omit  
 visional specification cannot afterwards be read for the purpose of from pro-  
 supplying a defect in the complete specification (r). visional.

(m) *Moseley v. Victoria Rubber Co.*,  
 4 R. P. C. 241; See also *Morgan v.*  
*Windover*, 4 R. P. C. 422, on appeal,  
 5 R. P. C. 295.

(n) *Pneumatic Tyre Co. v. East*  
*London Rubber Co.*, 14 R. P. C. 77,  
 101.

(o) *Edison & Swan, etc., Co. v.*  
*Woodhouse*, 32 Ch. D. 520.

(p) Per KEKEWICH, J., *Morgan v.*  
*Windover*, 4 R. P. C. 423.

(q) *Thomas v. Welch*, L. R. 1 C. P.  
 192; *Penn v. Bibby*, L. R. 2 Ch. 127,  
 134; *Pneumatic Tyre Co. v. East*  
*London Rubber Co.*, 14 R. P. C. 77  
 98.

(r) *Mackelcan v. Rennie*, 13 C. B.  
 (N.S.) 52.

**Sect. 9 (1).** In *Everitt's Patent*, No. 8403, of 1886 (t), the application was for a patent for "an apparatus for the delivery of a given quantity of liquid in exchange for an equivalent in coin or the like," and the provisional specification stated that the inventor adapted to any suitable measuring tap an arrangement whereby in its normal condition the tap was locked, but on insertion of the coin the tap was unlocked and delivered a definite quantity of liquid, the tap automatically closing when that definite quantity had run out; the complete specification, however, described special apparatus, and claimed "the combination with a suitably constructed measuring tap of mechanism, such as is herein described and illustrated in the accompanying drawings." The Patent Office refused to accept the complete specification on the ground that the invention described in the provisional specification was a general principle, while the invention in the complete was simply special means for carrying the principle into effect, not described in the provisional. On appeal, however, Sir R. WEBSTER, Att.-Gen., without expressing any opinion as to the validity of the patent, held that the provisional specification sufficiently described the nature of the invention, and ordered the complete specification to be accepted.

If the additions to provisional specification are not inventor's own, the complete specification will not be allowed.

In the above case, there was no opponent other than the Patent Office, but it was intimated, in the judgment of the law officer, that if it had been shown that the person filing the complete specification had had access to other persons' inventions, or had made use of other persons' specifications, or had made use of any invention derived from any source not his own, the complete specification would not be allowed.

There is nothing in the Act which makes the acceptance of the complete specification conclusive as to its sufficiency in point of law. Objections to the validity of a patent on the ground of insufficiency of specification may be taken as before the Act by way of defence to an action for infringement. This was one of the grounds of *scire facias*, and is therefore a ground of defence under s. 26 (3), *post* (x). See also under s. 29 (2), *post*.

#### SUB-SECTION (4).

"Within twelve months."—The time may be extended by three months. See Act of 1885, s. 3, *post*.

Advertisement on acceptance of complete specification.

**10.** On the acceptance of the complete specification the comptroller shall advertise the acceptance; and the application

(t) Griffin, L. O. C. 27.

(x) See *Siddell v. Vickers*, 39 Ch. D. 92; judgments of COTTON and FRY, L.JJ.

and specification or specifications with the drawings (if any) shall be open to public inspection (z). Sect. 10.

11.—(1.) Any person may at any time within two months from the date of the advertisement of the acceptance of a complete specification give notice at the Patent Office of opposition to the grant of the patent on the ground of the applicant having obtained the invention from him, or from a person of whom he is the legal representative, or on the ground that the invention has been patented in this country on an application of prior date, or on the ground of an examiner having reported to the comptroller that the specification appears to him to comprise the same invention as is comprised in a specification bearing the same or a similar title and accompanying a previous application, but on no other ground (a). Opposition to grant of patent.

(2.) Where such notice is given the comptroller shall give notice of the opposition to the applicant, and shall, on the expiration of those two months, after hearing the applicant and the person so giving notice, if desirous of being heard, decide on the case, but subject to appeal to the law officer.

(3.) The law officer shall, if required, hear the applicant and any person so giving notice and being, in the opinion of the law officer, entitled to be heard in opposition to the grant, and shall determine whether the grant ought or ought not to be made.

(4.) The law officer may, if he thinks fit, obtain the assistance of an expert, who shall be paid such remuneration as the law officer, with the consent of the Treasury, shall appoint.

This section is amended by the Act of 1888, by s. 4 of which it is provided in the above sub-s. (1), the words from "or on the ground of an examiner" to "a previous application," both inclusive shall be

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(z) P. R. rr. 21, 22, *post*.  
 (a) Proceedings on oppositions are regulated by the Patent Rules (*post*, rr. 34—44), and Law Officers' Rules, *post*.

**Sect. 11.** omitted, and there shall be added in lieu thereof the following words, namely—

**NOTE.**

“Or on the ground that the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification” (b).

**SUB-SECTION (1).**

Opposer must have an interest.

“**Any person.**”—Section 12 of the Act of 1852 limited opposition to persons “having an interest in opposing the grant of letters patent.” In the present section, the first and third grounds of opposition imply of necessity an interest in the opposer; but the second ground is, on the face of it, available to any one of the outside public. Sub-s. (3), however, limits this right to persons “being in the opinion of the law officer entitled to be heard in opposition to the grant.” The old rule requiring an interest in the opposer, therefore, in substance still prevails. See notes to sub-s. (3), *post*, p. 57.

There is a similar limitation in the case of opposition to amendment of the specification, s. 18 (4), but there is no such limitation on opposition to extension of the term of a patent, s. 25.

Prior user—non-utility—no subject-matter, not now grounds of opposition.

Prior public user (c)—want of utility (d)—or an objection that the invention is not subject-matter of a patent (e), were formerly, but are not now, grounds of opposition to the grant, which can now be opposed only on the three grounds mentioned in this section. And since the Act, it has been expressly decided that the law officer has no jurisdiction to determine whether the applicant's invention is or is not good subject-matter for a patent (f). But it may still be necessary for him to consider the point indirectly. See *post*, p. 49.

Under the new practice, the comptroller fills very much the same position in regard to the grant of patents as that formerly occupied by the law officer, while the law officer performs the duties formerly belonging to the Lord Chancellor, whose jurisdiction as to patents,

(b) *Post*, p. 55.

(c) *Re Adamson's Patent*, 6 D. M. G. 420; *Re Samuda and Griffiths*, cited Hindmarch on Patents, p. 534; *Re Tolhausen's Patent*, 14 W. R. 551.

(d) *Re Cutler's Patent*, 1 Webst. 426.

(e) *Re Spence's Patent*, 3 De G. & J. 523.

(f) *Jones' Patent*, Griffin, L. O. C. 34.

specially reserved by s. 15 of the Act of 1852, is not mentioned in the present Act, and appears no longer to exist, unless, perhaps, under s. 116, *post*. **Sect. 11 (1).**

NOTE.

It may be, therefore, useful to examine the principles which appear to have guided the decisions on oppositions under the old practice, but it must be remembered, in considering these cases, that some of them are cases in which the patent had not been opposed before the law officer, and was opposed for the first time at the Great Seal, and in such cases opposition was in the discretion of the Lord Chancellor(*g*) and a matter of indulgence (*h*), whereas, by the present Act, there is a distinct right of appeal from the comptroller to the law officer. **Cases under old practice.**

Several cases under the old practice before the law officers not elsewhere reported will be found in Johnson's Patentee's Manual, 6th ed., pp. 159—169.

When the law officer had, after hearing the parties, allowed his warrant to issue, the Lord Chancellor would not interfere with his decision unless a case were made of surprise or fraud, or unless some material fact which, if brought before the law officer, would probably have led him to decide differently, had subsequently come to the knowledge of the party appealing (*i*); nor would the Lord Chancellor interfere on the ground that some fact which was in the knowledge of the opponent at the time was not brought before the law officer (*k*); nor was the opponent allowed to adduce before the Lord Chancellor evidence which he might have brought before the law officer, or to raise before the Lord Chancellor an argument on those facts which he did not raise before the law officer (*l*). **Lord Chancellor would not interfere with law officer's decision unless in special cases.**

In *Re Russell's Patent* (*m*), Lord CRANWORTH, C., said that, as a general rule, when the matter was in much doubt it was better to run the risk of putting the party opposing to the costs of making out his case in some ulterior proceedings than to withhold the Great Seal from the patent in the first instance, for the obvious reason that the one course would create a remediable and the other an irremediable injury. And this rule was approved and acted on by Lord CHELMSFORD, C., in *Re Spence's Patent* (*n*), where it was objected that there was no novelty in **In doubtful cases rule was to seal patent.**

(*g*) *Ex parte Henson*, 1 Webst. 432.

(*h*) *Ex parte Manceaux*, L. R. 5 Ch. 518; *Re Mitchell's Patent*, L. R. 2 Ch. 343.

(*i*) *Re Vincent's Patent*, L. R. 2 Ch. 341; see also *Re Daines' Patent*, 26 L. J. Ch. 298; *Re Simpson and Isaacs' Patent*, 21 L. T. 81.

(*k*) *Re Vincent's Patent*, cited above.

(*l*) *Ex parte Sheffield*, L. R. 8 Ch. 237; *Re Simpson and Isaacs' Patent*, 21 L. T. 81.

(*m*) 2 De G. & J. 130, 132. See also *Re Simpson and Isaacs' Patent*, 21 L. T. 81; *Re Spence's Patent*, 3 De G. & J. 523; *Dance's Patent*, Johnson, Pat. Man. 161.

(*n*) 3 De G. & J. 523. Not now a ground of opposition.



**Sect. 11 (1).** the alleged invention, and that it consisted merely in the application of a well-known process to an equally well-known manufacture; and in

**NOTE.** *Ex parte Sheffield (o)*, Lord SELBORNE, C., said that the burden lies on the opponent of showing that the proposed grant is wrong. The question is not whether the proposed patent will be good, but merely whether the applicant can be allowed to proceed.

On this principle letters patent have been sealed even where on the evidence there appeared to be considerable similarity between the alleged invention and one already patented (*p*); and where the evidence of prior user was contained in only one affidavit proving a sale, which was not corroborated by the person alleged to have sold the goods (*q*).

The above rule has been fully recognized under the new practice (*r*).

*Vivâ voce*  
evidence.

The Lord Chancellor would sometimes hear *vivâ voce* evidence on an application for the Great Seal (*s*), but in general the evidence was taken by affidavit, though declarations were used before the law officer. The evidence is now to be by declaration (P. R., rr. 37, 38). Power is given to the law officer to examine witnesses on oath (s. 38), and they may be cross examined (Law Officers' Rules, *post*, r. IX.).

Mere formal  
objections  
not admitted.

Upon the hearing of a petition for the Great Seal the Lord Chancellor would not give effect to an objection founded on a mere matter of form, such as an objection to the jurat to a declaration (*t*). The Lord Chancellor could impose terms on the parties applying for a patent (*u*).

As to costs in opposition cases, see notes to s. 38, *post*,

### Grounds of Opposition.

Grounds of  
opposition  
under this  
Act.

(i.) "That the applicant obtained the invention from the person giving notice of opposition, or from a person of whom he is the legal representative."

"Obtained the invention."—These words refer to the identity of the invention, not the right of the person from whom it was obtained to be regarded as first and true inventor. And effect may be given to an opposition under this sub-section, without considering whether the person

(o) L. R. 8 Ch. 237.

(p) *Re Tolson's Patent*, 6 D. M. & G. 422.

(q) *Re Tolhausen's Patent*, 14 W. R. 551. This is not now a ground of opposition.

(r) *Chandler's Patent*, Griffin, P. C. 274; *Cumming's Patent*, Griffin, P. C. 277; *Welch's Patent*, Griffin,

P. C. 300; *Jones' Patent*, Griffin, L. O. C. 34.

(s) *Re Gotting*, L. R. 9 Ch. 633.

(t) *Re Wirth's Patent*, 12 Ch. D. 303.

(u) *Re Daines' Patent*, 26 L. J. (N.S.) 296; *Re Russell's Patent*, 2 De G. & J. 130.

giving notice of opposition is, as between himself and a third person, Sect. 11 (1).  
entitled to take out letters patent for the invention (v).

The question under this sub-section is not whether there is a balance of evidence on one side or the other. If there is any evidence on either side to be considered and adjudicated upon, it is not the duty of the law officer to stop the issue of the patent. The law officer is only entitled to stop the patent, having examined all the evidence given on one side or the other, if he is so clearly of opinion that the opponent has made out his case that he would, if a jury were to find in favour of the applicant, refuse to accept it, and overrule the decision on the ground that it was perverse and contrary to the obvious weight and effect of the evidence (w).

NOTE.

Where on cross applications for a patent it appeared that the inventions were substantially the same, but that one applicant had obtained the invention from the other, the Lord Chancellor refused to seal a patent to the former (x).

Where the grant of a patent was opposed on the ground that the invention was only an improvement on a previously-patented invention, not the invention of the applicant, but in which he was interested, and which he and the patentee had assigned to the opponent, who had thereupon granted a licence to the applicant to use the patented invention,—the new patent was ordered to be sealed, but (the Lord Chancellor being of opinion that the applicant had obtained his knowledge while working the original patent) only on the terms that it should be assigned to the owner of the first patent, to be subject, however, to the same arrangement as to licence and otherwise in favour of the applicant; the cost of obtaining the second patent to be considered as part of the costs of working the first patent (y).

Where it appeared that the opponent and applicant were really joint Where  
inventors, the law officer allowed the grant upon both parties filing an opponent and  
agreement at the Patent Office giving the opponent the rights of a applicant are  
joint patentee, the opponent undertaking not to take proceedings to in effect joint  
inventors.  
revoke the patent when granted. If the applicant refused these terms, the grant was not to be made, and the appeal was to be dismissed with costs. If the opponent refused, the grant was to be made, and he was to pay the costs of the appeal (z).

In *Garthwaite's Patent* (a), a similar case, separate patents were granted

(v) *Thwaite's Application*, 9 R. P. C. 515.

(w) *Stuart's Application*, 9 R. P. C. 452. See also *Thwaite's Application*, 9 R. P. C. 515.

(x) *Hadden's and Lott's Applications*, Johnson, Pat. Man. 168. See also *Marshall's Application*, 5 R. P.

C. 661. *Griffin's Application*, 6 R. P. C. 296.

(y) *Re Daines' Patent*, 26 L. J. (N.S.) 298.

(z) *Lukes' Patent*, Griffin, P. C. 294.

(a) Griffin, P. C. 284.

**Sect. 11 (1).** upon each application, but on condition that each party assigned half his patent to the other, and paid half the fees for keeping it in force.

**NOTE.** In this case the comptroller offered to grant a joint patent, but the parties preferred separate patents.

Where it was proved that a material part of the invention had been obtained from the opponent, the patent was granted to the applicant and the opponent jointly (*b*).

In *Evans and Otway's Patent* (*c*), where the opponent had already obtained letters patent for an invention substantially the same as that for which the applicant sought letters patent, and it appeared that the applicant and opponent had known each other for some time, and had been jointly experimenting in the invention, the applicant's patent was refused, but on the condition that the opponent executed an assignment to the applicant of half the opponent's patent. In this case, provision was to be made in the assignment that each party should pay half the fees for keeping up the patent, and that in default of either party paying such fees the other party might pay them, and the patent should become the property of the party paying the whole fees. A like provision was made in the case of *Garthwaite's Patent* (*d*).

Master and servant.

**Master and servant.** — If a servant discovers the invention while in the employ of his master, the servant and not the master is the person to take out the patent, and a patent granted to the master will be void (*e*); if the servant suggests the principle he is the inventor. If, on the other hand, the master suggests the principle, and the servant is employed to perfect the details, or carry into execution the original design of the master, that which the servant suggests, while so employed, is in law the invention of the master (*f*).

Where a master and his foreman had both invented improvements, for which the master sought letters patent, they were granted only on the terms of the master and foreman being treated as joint grantees, the letters patent being vested in two trustees for their joint benefit, and each party to have a free licence for himself and his partners (*g*).

Master has no right to invention of servant.

The mere fact of relationship of master and servant gives no right to the master to the invention of the servant (*h*). But where a workman is employed by an inventor to make a model for the inventor, and he

(*b*) *Eadie's Patent*, Griffin, P. C. 279.

(*c*) Griffin, P. C. 279.

(*d*) *Ubi supra*.

(*e*) *Barker v. Shaw*, 1 Webst. 126; *Minter v. Wells*, 1 Webst. 127, 132.

(*f*) *Minter v. Willis, ubi supra*. See also note 1 Webst. p. 126, under *Barker v. Shaw*, and *Bloxam v.*

*Elsec*, 1 C. & P. 558, and Hindmarch on Patents, p. 26.

(*g*) *Re Russell's Patent*, 2 De G. & J. 130.

(*h*) *Saxby v. Gloucester Wagon Co.*, Griffin, L. O. C. 56, judgment of JESSEL, M.R.; *Heald's Application*, 8 R. P. C. 429.

suggests improvements in details of the machine, which are adopted in the machine or model as completed, those suggestions are the property of his employer, and the workman cannot afterwards take out a patent for them (*i*). So, also, where the invention sought to be patented resulted from investigations or experiments directed and paid for by the employers, and on their instructions, and with their assistance, and in their laboratory, and with their materials (*j*).

Sect. 11 (1).

NOTE.

But when the invention was based on suggestions made by two persons employed by a company, which had been experimented upon in the company's works under the superintendence of their manager, an application by the manager for a patent was refused (*k*).

Where a man is trying experiments for the purpose of himself taking out a patent, all that he and his servants do together is confidential, and if when he has made his invention complete he takes out a patent, all that he has done confidentially does not affect his patent (*l*). But the question whether the relation between the parties was such as to make the communication confidential, must depend on the whole circumstances of the case (*m*).

This confidence of the servant is, however, a confidence only as regards the secrets of the master, and not as regards the secrets of the fellow-servants; and therefore, where a superintendent in the employ of the London and North-Western Railway Co. invented, but did not patent, a signalling apparatus, the drawings for which were openly prepared in the office of the company, and were seen by several of their draughtsmen, it was held that there was no confidentiality existing between the company and its servants, and that the facts above mentioned were publication sufficient to avoid a subsequent patent obtained by another person for the invention (*n*).

The fact that another person has been making experiments and working towards the same invention as the applicant is no ground for refusing the Seal (*o*).

This section applies only to communications between persons in the United Kingdom and the Isle of Man, and not to communications made abroad, and in the case of an imported invention the comptroller has no

Section 11 does not apply to communications made abroad.

(*i*) *David and Woodley's Patent*, Griffin, L. O. C. 26; *Minter v. Wells*, 1 Webst. 132.

(*j*) *Kurtz v. Spence*, 5 R. P. C. 181; *Healey's Application*, Johnson, Pat. Man. 165.

(*k*) *Macfarlane's Patent*, Johnson Pat. Man. 163.

(*l*) See per Lord BLACKBURN, *Saxby v. Gloucester Wagon Co.*,

Griffin, L. O. C. 57; *Homan's Patent*, 6 R. P. C. 104.

(*m*) *Humpherson v. Syer*, 4 R. P. C. 407, 413.

(*n*) *Saxby v. Gloucester Wagon Co.*, Griffin, L. O. C. 56.

(*o*) *Ex parte Henry*, L. R. 8 Ch. 167. See also *Saxby v. Gloucester Wagon Co.*, judgment of Lord BLACKBURN, Griffith, L. O. C. 57.

**Sect. 11 (1).** jurisdiction to inquire into the circumstances under which the invention was obtained by the importer (p).

**NOTE.**

And, therefore, where an application for a patent for an invention partly communicated to the applicant by A., and partly the applicant's own invention, was opposed on the ground that A. had in fact obtained the invention, wholly, or in part, from B., who was the actual inventor abroad; the opposition was not allowed, and the patent was sealed (q). And the rule applies equally where the applicant alleges that the whole invention for which he seeks a patent was communicated to him from abroad (r). And it makes no difference whether the applicant is the person against whom the fraud is alleged, or is the innocent communicatee from such person (s).

But where the importer was not applying for a patent as inventor but as a communication from abroad by A., and it appeared that the invention was not in fact communicated by A., and that the applicant had no authority from A. to apply for the patent, A. having instructed some one else to apply, the patent was refused (t).

**"Legal representative."**—These words mean executors and administrators of a deceased person, and do not include a person holding a power of attorney (u); nor a person claiming to be entitled by virtue of an assignment of a patented invention and improvements thereon to the particular improvement for which the applicant is seeking a patent (v).

(ii.) **"That the invention has been patented in this country on an application of prior date."**

**Old practice**

Under the old practice, if the opponent could show that the proposed patent was for an invention, part of which was clearly identical with the subject of an existing patent, the Great Seal would not (w), at all events where both parties were *bond fide* inventors and there was no fraud (x), be affixed to a patent for that part, even though the validity of the original patent was disputed (y). And in *Ex parte Bates and Redgate* (z) this principle was applied where the owner of the existing

(p) *Edmund's Patent*, Griffin, P. C. 281; *Adolph Spiel's Patent*, 5 R. P. C. 281; *Bairstow's Patent*, 5 R. P. C. 287; *Higgins' Patent*, 9 R. P. C. 74. See also *Abel's Application*, reported Johnson, Pat. Man. p. 169, a case under the old law.

(q) *Edmund's Patent*, *ubi supra*.

(r) *Lake's Patent*, 5 R. P. C. 415.

(s) *Higgins Patent*, 9 R. P. C. 74; *Bairstow's Patent*, 5 R. P. C. 287.

(t) *Fiechter's Patent*, Griffin, P. C. 284.

(u) *Edmund's Patent*, Griffin, P. C. 281.

(v) *Adolph Spiel's Patent*, 5 R. P. C. 281.

(w) *Ex parte Bates and Redgate*, L. R. 4 Ch. 577; comp. *Ex parte Scott and Young*, L. R. 6 Ch. 274.

(x) *Ex parte Manceaux*, L. R. 6 Ch. 272.

(y) *Ibid*.

(z) L. R. 4 Ch. 577.

patent was, in fact, the second applicant for the patent, but had first obtained the Great Seal (a). See notes under s. 13, *post*. **Sect. 11 (1).**

But in *Re Vincent's Patent* (b), where the opposer brought forward a prior patent of his own, and the applicant alleged that he was the real inventor, and had confidentially communicated the invention to the opposer, who had applied for and obtained a patent in fraud of the applicant's rights, it was held that the case being thus within s. 10 of the Act of 1852 (s. 35 of the present Act), the applicant's patent ought to be sealed in order that he might have the opportunity of trying the question before a jury.

NOTE.

And on this principle the patent was sealed when the only ground of opposition was that the invention was borrowed from an existing patented invention, it being an improvement thereon (c).

But where, in a case of rival applicants, each opposed the other, and it appeared that the alleged invention was the subject of a previous patent, both applications were refused (d).

Where the law officer certified against an application, which was objected to on the ground that the invention was a mere colourable limitation of an invention comprised in an existing patent, the application was refused, with costs (e).

**New practice.**—The question under this branch of the section is whether the invention has been already patented, not whether it is an infringement of an existing patent (f). A patent for an improvement on an invention, already the subject of a patent, may be a good patent if confined to the improvement, though the use of the improvement during the existence of the former (or, as it has been called, the substratum (g) patent) without licence would be an infringement (h). **Not a question of infringement.**

A patent will not be stopped on the ground that the invention for which it is sought has been previously patented, unless it is shown that the inventions are identical (i); and notices of opposition, alleging that the invention was the same, or *substantially the same*, as the **Patent not stopped unless inventions identical.**

(a) See also *Ex parte Bailey*, L. R. 8 Ch. 61; *Re Simpson and Isaacs' Patent*, 21 L. T. 81.

(b) L. R. 2 Ch. 341. See, however, as to this, *Stuart's Application*, 9 R. P. C. 452.

(c) *Ex parte Fox*, 1 Webst. 431; 1 V. & B. 67.

(d) *Re Samuda and Griffiths*, Hindmarch on Patents, p. 534.

(e) *Ex parte Yates*, L. R. 5 Ch. 1. See also *Re Stoll's Patent*, 21 L. T. 233.

(f) See *Jones's Patent*, Griffin, L. O. C. 34; *Sielaiff's Application*, 5 R. P. C. 486.

(g) *Ex parte Fox*, 1 Webst. 431.

(h) See per Lord CAMPBELL, C.J., *Lister v. Leather*, 8 E. & B. 1017; *Fox v. Dellestable*, 15 W. R. 195. See also *Crane v. Price*, 4 M. & G. 580.

(i) *Stubbs' Patent*, Griffin, P. C. 298; *Jones's Patent*, Griffin, L. O. C. 34; *Newman's Patent*, 5 R. P. C. 271, S.C. Griffin, L. O. C. 40.

**Sect. 11 (1).** invention patented by the opponent (*k*), or that the invention or *material parts thereof* have been patented or application of prior date (*l*) have been held to be wrong in form (*k*). So, also, a notice of opposition on the ground that the invention is "a direct infringement of the opponent's patent," is informal (*m*).

NOTE.

Differences immaterial, patent refused.

But where, though the inventions are not actually identical, the difference between them is immaterial, the patent will be refused.

Thus, where on an application for a patent for an invention of "an improved method of blasting and shot-firing in mines," it appeared that the only difference between the applicant's and the opponent's invention was, that the latter inserted the explosive in a case, and surrounded it completely with water in an outer case, and the former dispensed with the case, and surrounded the explosive itself with water contained in a waterproof bag, it was held that there was not a sufficient difference between the two inventions to entitle the applicant to a patent (*n*).

So, also, where, in an application for a patent for an invention of an improved screw stopper, the only alleged difference between the inventions was the position of a washer in a groove in the stopper, the patent was refused (*o*).

And where, in an application for a patent for an apparatus for enriching gas by admixture of hydro-carbon vapour, it appeared that in the opponent's invention certain tubes conveying gas to a heating chamber were placed inside the carburetting apparatus, and the heating chamber had partitions, and in the applicant's invention the conveying pipes were outside the carburetter, but might be protected by a shield, and the heating chamber had no internal partition, the difference was considered immaterial, and the law officer declined to grant the patent (*p*).

And where a previous specification claimed the use of any soluble salts of chromium and iron, an application for a patent for an invention, selecting for the same purpose one particular salt of each of these classes of salts, no special advantage being shown, was refused (*q*).

It is a question whether the patent can be stopped if the allegation that the invention has been previously patented can only be supported

(*k*) *Jones's Patent*, Griffin, L.O.C. 34; *Re Weloh*, Goodeve, Patent Practice, 10.

(*l*) *Re Fawcett*, Goodeve, Patent Practice, 10.

(*m*) *Daniels' Application*, 5 R.P.C. 413.

(*n*) *Heath and Frost's Patent*, Griffin, P. C. 311.

(*o*) *Aire and Calder, eto. Works and Walker's Application*, 5 R.P.C. 345. See also *Daniel's Application*, 5 R. P. R. 413; *Whittakers' Application*, 13 R. P. C. 580.

(*p*) *Wallis and Ratoliff's Application*, 5 R. P. C. 347. See also *A. H. Smith's Application*, 13 R.P.C. 200.

(*q*) *Wylie and Morten's Patent*, 13 R. P. C. 97.

by combining the claims of the prior specifications, but assuming that such an opposition could be entertained, it would require a very strong case to stop a patent on such a ground (r). Sect. 11 (1).  
NOTE.

That, however, only is patented which an inventor claims in his specification (s. 5), and, therefore, the fact that certain arrangements are described in a prior specification is not, if they are not claimed therein, any ground for refusing a subsequent patent for the same arrangement (s). Only that is patented which is claimed in prior specification.

Inventions which have only received provisional protection have not been patented within the meaning of this section (t). But if the provisionally protected invention is the subject of a pending application for a patent, and the complete specification has been accepted, the person whose specification has been so accepted is by s. 15 entitled to oppose under this sub-section as if he had already obtained his patent (u). Provisionally protected inventions are not "patented."

The law officer, on an opposition under this sub-section, will not consider whether the opponent's complete specification does or does not go beyond his provisional specification (v). But when the opposition was based on a patent in which the provisional specification was filed before and the complete specification after the date of the application by the applicant, and it was not clear that the invention alleged to have been patented by the opponent, which was said to be similar to that of the applicant, was in the opponent's provisional specification, it was held that it would not be just to the applicant to refuse his application (x).

Although the law officer has not, under the present law, to consider whether there is or is not subject-matter for a patent, yet where there is a previous anticipatory patent, it is necessary to consider indirectly the differences, and, without saying whether those differences form subject-matter or not, to decide whether the differences are sufficient to differentiate that which has gone before from that which is now claimed (y). How far the law officer can consider subject-matter.

And a patent was refused where after eliminating matters which were mere repetitions of matters claimed in the opponent's specification nothing remained which could properly form the subject-matter of a patent (z).

- |   |   |
|---|---|
| (r) <i>Ross' Patent</i> , 8 R. P. C. 477.                         | (x) <i>Bartlett's Application</i> , 9 R. P. C. 511.   |
| (s) <i>Von Buch's Application</i> , Griffin, L. O. C. 40.         | (y) <i>Todd's Application</i> , 9 R. P. C. 487, 488; <i>McHardy's Patent</i> , 8 R. P. C. 431. See also <i>Boult's Application</i> , 10 R. P. C. 275. |
| (t) <i>Bailey's Patent</i> , Griffin, P. C. 269.                  | (z) <i>Hedge's Application</i> , 12 R. P. C. 136.   |
| (u) <i>L'Oiseau and Pierrard's Patent</i> , Griffin, L. O. C. 36. |   |
| (v) <i>Haythornthwaite's Application</i> , 7 R. P. C. 70.         |   |



**Sect. 11 (1).****NOTE.****Disclaiming clauses.**

Although there may be no ground for refusing the patent altogether, the law officer has always recognized that where there is an existing patent, and he sees ground for supposing that the later specification might interfere with the rights under the existing patent, the existing patentee is entitled to protection, and this is commonly done by a disclaiming clause inserted in the applicant's specification (a). Similarly, the law officer is bound to protect the public, so that they may not be misled by specification which, on the face of it, might be held to have a wider scope or include a wider kind of invention than that to which the patentee is on the evidence entitled (b). And these clauses are equally in the interest of the applicant (c).

The principles on which the law officers act in allowing disclaiming clauses are—first, if it appears clear that upon the invention claimed by the prior patentee there will be repetition of the claim to the earlier invention in the later patent; and, secondly, if it is clear that the public would be misled by the later specification without disclaimer (d).

But the law officer will not interfere with the applicant's specification where there is no ground for supposing that the owners of the prior patent will be prejudiced or the public misled by the specification as framed by the applicant (e). And, therefore, where it was held that no one reading the applicant's claim fairly and referring to his specification could assume that he intended to claim certain mechanism which was comprised in a prior patent (f); and where there were substantial differences in the arrangement of the parts of the applicant's and opponent's machines (g), a disclaiming clause was refused. In all cases, however, the applicant frames his specification at his peril (h).

It is not every prior patentee who has a right to have a disclaiming clause inserted in the applicant's specification; and, therefore, where the law officer considered that it was not absolutely necessary for the opponent for his own protection to insist on such a clause, but the law officer inserted it to protect the public and prevent the applicant's patent from covering more ground than it really ought to cover, an appeal from the comptroller, who had decided to make the patent without any disclaimer, was allowed but without costs (i).

And where the comptroller had ordered the insertion of a disclaiming clause, referring to a prior patent which would have had the effect of

(a) *Newman's Patent*, 5 R. P. C. 271, 277; *S.C.*, Griffin, L. O. C. 40; *Lake's Patent*, 6 R. P. C. 548.

(b) *Lorrain's Patents*, 5 R. P. C. 142; *Guest and Barrow's Patent*, 5 R. P. C. 315.

(c) *Hoskin's Patent*, Griffin P. C. 292; *Newman's Patent* (No. 2), 5 R. P. C. 280.

(d) *Stell's Patent*, 8 R. P. C. 235.

(e) See *Lorrain's Patents*, 5 R. P. C. 142.

(f) *Ibid.*

(g) *Anderson and McKinnell's Patent*, Griffin, L. O. C. 23.

(h) *Lorrain's Patents*, *ubi supra*.

(i) *Newman's Patent* (No. 2), 5 R. P. C. 279, 281.

indicating that the applicant's claims might be construed so as to include something covered by the prior patent, and this might under the circumstances prejudice the applicant, the law officer disallowed the disclaimer and directed the insertion in the specification of a simple reference to the fact that the prior patent covered a similar type of machine (*k*).

Sect. 11 (1).

NOTE.

A prior patentee is not, because he has made a broad claim, entitled to have limiting words inserted in the applicant's specification, unless he can show upon the fair view of the evidence that such words are really necessary to protect him (*l*), and the onus of proving such necessity is on the prior patentee (*m*).

The law officer has nothing to do with the question of infringement in deciding on the propriety or impropriety of inserting a disclaiming clause (*n*).

Although the comptroller may be of opinion that the invention embodied in the particular construction of the apparatus described in the applicant's specification has not been patented by the opponent, he may nevertheless require the insertion of a clause disclaiming the principle underlying this construction (*o*). And if an applicant by his specification discloses a new element and then proceeds to use that in an old way without indicating any invention in the mode of use, he may be compelled, on the opposition of a person interested in a patent for the old way, to strike out from the specification a claim for the use (*p*). But the comptroller has no authority to strike out a claim because it invites people to infringe, or because it claims more than the patentee is entitled to (*q*).

Where in a specification for an invention of smokeless gunpowder the applicant stated his discovery to be a mixture of the soluble and insoluble varieties of nitrated cotton with nitro-glycerine, and it was not clear that the words of the claim would not be satisfied by the use of one variety alone, and the specification of a prior patent claimed for a like purpose the combination of the insoluble variety with nitro-glycerine with or without the soluble variety, it was held that the claim must be modified or a disclaiming clause added (*r*).

The question often arises whether the disclaiming clause should refer to the prior specification by name and number. Such a mode of

When prior specification ought to be

(*k*) *Van Gelder's Patent*, 9 R. P. C. 325.

(*l*) *Guest and Barrow's Patent*, 5 R. P. C. 312, 315; *Newman's Patent* (No. 2), 5 R. P. C. 279, 281; *Adam's Application*, 13 R. P. C. 548.

(*m*) *Stell's Patent*, 8 R. P. C. 235.

(*n*) *Stell's Patent*, 8 R. P. C. 235

(*o*) *C. K. Welch's Patent*, 8 R. P. C.

443.

(*p*) *Webster's Patent*, 6 R. P. C. 165.

(*q*) *Webster's Patent*, *ubi supra*.

(*r*) *Curtis and André's Application*, 9 R. P. C. 495.

**Sect. 11 (1).** reference has been said to be undesirable (s), and was refused where the applicant had, in compliance with the decision of the comptroller, inserted a disclaimer of certain specific parts of his description, which sufficiently covered the matter alleged to have been infringed by the applicant's specification (t). And it has been held that a prior patentee, opposing the grant of a patent under this sub-section, has no right to be specially named in a disclaiming clause in the applicant's specification, unless the applicant is willing to name him, and unless it is clear there is no other prior publication than the specification of the opponent (u).

**NOTE.**  
referred to by name and number.

A special reference to a particular prior patent ought not to be inserted unless there is, practically speaking, no question that the earlier patent is what may be called a "master patent" (x), or unless it is practically admitted by the applicant that the governing principle was for the first time discovered or disclosed in the opponent's specification (y). And to be entitled to such a disclaiming clause the opponent must show that the description in the applicant's specification in terms includes and purports to claim a part of the invention described in the prior specification (z).

And speaking generally, a special reference to a prior patent ought not to be directed unless the law officer or the comptroller comes to the conclusion that without such a reference the patent ought not to be sealed at all (a).

If the applicant's and opponent's patents are practically concurrent, a disclaiming reference will not be inserted except by mutual consent (b).

Other specifications besides those of the opponent's may be referred to for the purpose of showing that the opponent's patent is not a master patent (c).

A disclaiming reference to a prior patent as being the master patent may be inserted, even though under a decision of the Court of Appeal this could no longer be so considered, the time for appealing to the House of Lords against the decision of the Court of Appeal not having expired (d).

(s) *Per* Sir E. CLARKE, Sol.-Gen., *Anderson and McKinnell's Patent*, Griffin, L. O. C. 25; *Wallace's Patent*, 6 R. P. C. 134.

(t) *Cooper and Ford's Patent*, Griffin, P. C. 275.

(u) *Guest and Barrow's Patent*, 5 R. P. C. 312, 315; *Teague's Patent*, Griffin, P. C. 298; *Brownhill's Patent*, 6 R. P. C. 135.

(x) *Hill's Application*, 5 R. P. C. 601.

(y) *C. K. Welch's Patent*, 8 R. P. C. 443.

(z) *Hill's Application*, *ubi supra*.

(a) *Marsden's Patent*, 13 R. P. C. 87; *Marsden's Patent* (No. 2), 14 R. P. C. 174.

(b) *Gaunt's and Greenhalgh's Applications*, 14 R. P. C. 387.

(c) *C. K. Welch's Patent*, 8 R. P. C. 443.

(d) *Hoffman's Patent*, 7 R. P. C. 92.

Where the applicant had in his specification described but not claimed **Sect. 11 (1)** certain parts, which were described in the specification of a previous patent granted to the opponent, the patent was only sealed upon the terms that the applicant should, at his option, specifically, and by reference to number and date of the prior specification, disclaim the parts therein described or omit from his specification the description of those parts (e).

NOTE.

And where the applicant's specification claimed his invention in general terms, but it was in fact only an improvement on the invention comprised in the opponent's previous patent, the law officer required a disclaimer to be inserted in the applicant's specification referring specifically by name and number to the prior patent, and stating explicitly that the applicant only claimed his invention as an improvement (f).

And where a provisional specification includes an invention which is within a prior specification of the opponent's, it seems that the latter may require the applicant to insert in his complete specification a formal disclaimer of the prior invention (g).

Where the previous patent is referred to by name in a disclaiming clause inserted in the applicant's specification, it would seem that the latter ought not to refer to or point out defects in the prior patented invention, though it is otherwise if the earlier invention is only mentioned in general terms (h). And the applicant ought not to put his own construction on the particular specification referred to. He may give his own statement of the prior knowledge, and say that he refers in support to the prior specification (i).

Disclaiming clause not to point out defects in or put construction on prior specification.

Where in the specification of a former patent granted to the applicant there had been a reference by name and number to a previous patent of the opponent, and in the specification of the applicant's proposed new patent his former specification was referred to, it was held that the protecting reference must be repeated in the specification of the new patent (k).

Where the prior patent is referred to, the disclaiming clause should not merely disclaim the mechanism *described* in the previous specification, but should disclaim the mechanism therein *described and claimed* (l).

Form of disclaiming reference.

(e) *Teague's Patent*, Griffin P. C. 298. See also *Newman's Patent*, 5 R. P. C. 271; *S. C.*, Griffin, L. O. C. 40; *Adam's Application*, 13 R. P. C. 548.

(f) *Hoskins' Patent*, Griffin, P. C. 291; *Newman's Patent* (No. 2), 5 R. P. C. 279; *Welch's Patent*, Griffin, P. C. 300. *Thornborough and Wilks' Patent*, 13 R. P. C. 115.

(g) *Hookham's Application*, Griffin, L. O. C. 32.

(h) *Guest and Barrow's Patent*, 6 R. P. C. 313, 316.

(i) *Atherton's Patent*, 6 R. P. C. 547. And see *Van Gelder's Patent*, 9 R. P. C. 325.

(k) *Wallace's Patent*, 6 R. P. C. 134.

(l) *Gozney's Application*, 5 R. P. C. 597.

**Sect. 11 (1).** Forms of reference to prior patents will be found in *Hoskins' Patent* (*m*), *Newman's Patent* (*n*), *Welch's Patent* (*o*), *Airey's Application* (*p*), *Lynde's Patent* (*q*), and *Wallace's Patent* (*r*).

NOTE.

An appeal lies to the law officer against the comptroller's decision refusing to require a reference to a prior specification, even though the appellants do not appeal against the allowance of the patent (*s*).

Amendment  
not always  
allowed at  
hearing.

Where the applicant's invention is similar to an invention comprised in a prior patent he may be allowed, at the hearing of the opposition, to amend his specification by inserting words more clearly defining his own invention (*t*). But this is not a matter of course (*u*). And where the applicant's specification made a claim manifestly the subject of previous patents, he was not allowed to amend so as to limit his claim to the improvement which was alleged to be the real subject of the invention, and the patent was refused (*x*).

Where a particular construction of the complete specification, limiting the invention to something not within the opponent's patent, was agreed upon by the applicant and opponent before the law officer, the patent was allowed, the agreed construction being placed upon record (*y*).

Where the parties had come to an arrangement before the comptroller as to the form of the disclaiming clause, and the applicants not having adhered to this arrangement, the opponent appealed to the law officer against the clause as inserted by the applicants, but was unsuccessful, the law officer, in the absence of explanation from the applicants as to their departing from the arrangement, dismissed the appeal without costs (*z*).

It is no ground for granting a patent which will comprise matter described and claimed in the specification of a prior patent that this matter was not included in the provisional specification of the prior patent (*a*).

If there is a prior patent for the invention it is sufficient ground for opposition, whether it has expired or not (*b*), and a reference to the expired patent by name and number may be required (*c*).

(*m*) Griffin, P. C. 292.

(*n*) 5 R. P. C. 281.

(*o*) Griffin, P. C. 302.

(*p*) 5 R. P. C. 350.

(*q*) 5 R. P. C. 663.

(*r*) 6 R. P. C. 134.

(*s*) *Brownhill's Patent*, 6 R. P. C. 135.

(*t*) *Fletcher's Application*, Griffin, L. O. C. 30.

(*u*) *Whittaker's Application*, 13 R. P. C. 580.

(*x*) *Lupton and Place's Application*, 14 R. P. C. 261.

(*y*) *Anderton's Patent*, Griffin, L. O. C. 25.

(*z*) *Guest and Barrow's Patent*, 5 R. P. C. 312, 316.

(*a*) *Green's Patent*, Griffin, P. C. 286.

(*b*) *Lancaster's Patent*, Griffin, P. C. 293; *Glossop's Patent*, Griffin, P. C. 285; *Stewart's Application*, 13 R. P. C. 627.

(*c*) *Hall and Hall's Patent*, 5 R. P. C. 283.

The only persons who can oppose, under this part of the section, are those who have made an application in the United Kingdom of prior date to the applicant's patent. And, therefore, although two foreigners, who had patented an invention in France, and had applied in England for a patent subsequently to an Englishman's application for a patent for the same invention, were held entitled (under s. 103, *post*) to have an English patent granted to them as of the date of their French application, they were not allowed to oppose the grant of the patent to the Englishman (*d*).

Sect. 11 (1).

NOTE.

Foreigners having patents ante-dated under s. 103 cannot oppose later patent.

The state of knowledge prior to and at the date of the opponent's patent is material on the question of what is the opponent's invention, and for this purpose prior specifications may be admitted in evidence (*e*). And where in his specification a patentee refers to an earlier specification of his own, he is entitled to have the two specifications read together (*f*).

On an opposition the law officer may take into consideration the question of mechanical equivalents (*g*).

(iii.) "That the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification."

This ground of opposition is introduced by the amending Act of 1888. Under the Act of 1883 there was no jurisdiction to stop a patent at the instigation of an opponent, merely on the ground of disconformity between the complete and provisional specification (*h*).

In this respect there is no alteration in the practice. The objection of disconformity cannot be taken by itself (*i*). It is, however, now made available when it concurs with the fact that the invention which gives rise to it is the subject of an application made by the opponent under the particular circumstances mentioned in the new sub-section. As to the question of disconformity, see *ante*, p. 32.

The sub-section does not refer to a mere development of the invention comprised in the provisional specification, and a fair development may

(*d*) *Everitt's Patent*, No. 10,680 of 1886, Griffin, L. O. C. 28.

(*e*) *Jones' Patent*, Griffin, L. O. C. 34. See also observations of Lord CAIRNS, C., *Clark v. Adie* (No. 2), 2 App. Cas. 431.

(*f*) *Parke v. Stevens*, L. R. 8 Eq. 358, 366.

(*g*) *Haythornthwaite's Application*, 7 R. P. C. 70; *A. H. Smith's Patent*, 13 R. P. C. 200; *Whittaker's Application*, 13 R. P. C. 580.

(*h*) *Newman's Application*, Griffin, L. O. C. 40; *S. C.*, 5 R. P. C. 271.

(*i*) *Haythornthwaite's Application*, 7 R. P. C. 70.

**Sect. 11 (1).** still be made by the applicant in the interval between the leaving of the provisional and complete specifications (*k*).

**NOTE.**

The duty of the law officer is to ascertain what is the real and proper construction of the language of the provisional specification, and not to allow the applicant to construe his provisional specification as meaning something which he did not mean. And therefore where the law officer was not satisfied that the applicant at the date of his application contemplated the arrangement which he contended was in his provisional specification the applicant was allowed to produce evidence on the point subject to cross-examination (*l*).

**“And that such other invention forms the subject of an application,” etc.**—Under the Act of 1852, where two parties applied for a patent, and each opposed the other on the ground that he alone was the inventor, and the evidence on this point was conflicting, the patent of the first applicant was sealed (*m*).

Where there were concurrent applications for the same invention, and the first application having been delayed, the second applicant was in a position to seal his patent first, Lord ELDON, O., held that the applicant who first obtained the Great Seal was to be preferred, and said, “I can see no other mode of deciding than by awarding the patent to him who runs the quickest through the process” (*n*). And this rule was subsequently recognized by Lord CRANWORTH (*o*).

As to applications on the same day in respect of the same invention, see *In re Dering's Patent* (*p*), *post*, p. 63.

**SUB-SECTION (2).**

The comptroller may in certain cases refuse to seal a patent unless the specification be previously amended. Thus, if the provisional specification contains any reasonably direct indication of the actual improvement which it is ultimately desired to protect by the patent, then any amendment which will put the particular description of the invention absolutely beyond doubt is within the comptroller's power (*q*).

And on a cross opposition the comptroller, if satisfied that part of the invention is the sole invention of one of the applicants, has required

(*k*) *Edwards' Patent*, 11 R. P. C. 461.

(*l*) *Birt's Application*, 9 R. P. C. 489.

(*m*) *Re Lowe's Patent*, 25 L.J.Ch. (N.S.) 454.

(*n*) *Ex parte Dyer*, Hindmarch on Patents, p. 535.

(*o*) *Re Simpson and Isaac's Patent*, 21 L. T. 81.

(*p*) 13 Ch. D. 393.

(*q*) *Chandler's Patent*, Griffin, P. C. 270, 274.

the other applicant, as a condition of obtaining the grant, to amend his specification so as to confine it to the part actually invented by him (r). **Sect. 11 (2).**

But the comptroller cannot require the claim to be amended merely to make it conform to the description of the invention contained in the specification, provided the claim is a real statement of the invention claimed, and not a mere colourable compliance with the statute (s).

NOTE.

Under the old practice it was the duty of the law officer to hear and determine which of two rival applicants was entitled to a patent, and the question was not to be remitted to the Lord Chancellor by directing warrants upon both patents (t). **Law officer was bound to decide between rival applicants.**

But in a case under the present Act, where the grant of a patent to the applicant was opposed on the ground that he had obtained the invention from the opponent, and the evidence was conflicting, and the comptroller not being able to have the declarants cross-examined was unable to decide which side was speaking the truth, the patent was sealed in order that the matter might go before the law officer, and the witnesses be examined *virâ voce* and cross-examined (u). And in a similar case the comptroller, at the request of the parties, allowed the patent to be sealed without prejudice to the opponent's appeal to the law officer (x).

Where the opponent did not appear, and the comptroller heard the case and decided in favour of the applicant, and the opponent subsequently explained that he had not received notice of the appointment for hearing, and asked to be heard, the comptroller refused to re-open the case; but on the suggestion of the comptroller the opponent appealed with a view to the case being sent back to the comptroller for rehearing, and this course was adopted by the law officer (y).

On an opposition before the comptroller the applicant begins.

But in a case of opposition on the ground of fraud, the law officer directed the evidence of the opponent to be taken first, the *onus probandi* being on him (z).

As to the evidence before the law officer, see *post*, p. 76, under s. 18 (4).

#### SUB-SECTION (3).

**"Entitled to be heard in opposition."**—The only class of persons who are entitled to be heard in opposition before the law officer are **Only persons having an**

(r) *Paterson's Patent*, Griffin, P. C. 297. See also *Craig and Macfarlane's Application*, Johnson, Pat. Man., p. 165.

(s) *Smith's Patent*, Griffin, P. C. 262.

(t) *Ex parte Henry*, L. R. 8 Ch. 167.

(u) *Hatfield's Patent*, Griffin, P. C. 288. See also *Liddell's Patent*, Johnson, Pat. Man., p. 161, a case under the old practice.

(x) *Luke's Patent*, Griffin, P. C. 294.

(y) *Warman's Application*, Griffin, L. O. C. 43.

(z) *Luke's Patent*, Griffin, P. C. 294.



**Sect. 11 (3).** persons who are interested with a legitimate and real interest in the prior patent upon which an application is opposed, or persons who, while they have not patented the invention, have yet been the originators of it, from whom the person seeking the patent has obtained it (a).

**NOTE.**  
interest in the prior patent can oppose.

On this ground the agent of the patentee, under a prior patent, was not allowed to oppose, and leave to amend the notice of opposition by substituting the name of the patentee for that of the agent was refused (b).

Where, however, the agent who had signed the notice of opposition died before the hearing, the comptroller allowed the notice of opposition to be amended by inserting the name of the actual opponent, and allowed, upon payment of costs, an adjournment for this purpose (c).

It has been also held that prior patentees had a right to oppose on the ground of their own patent, but not on the ground of a patent in which they had no interest (d).

A person, however, who is entitled to appear and oppose may rely upon prior specifications other than the particular specification in which he is interested (e).

Opposition on expired patent.

The assignee of a prior patent which has lapsed, who has worked the invention under that patent, is entitled to be heard in opposition to the grant of a new patent for what is alleged to be the same invention (f). But a person who has merely manufactured under an expired patent, having no interest in it (g), or a person who merely alleges that he is about to work the invention, and that it is included in expired patents (h), has no right to oppose.

The law officer has no wider jurisdiction than the comptroller in opposition cases, and the words "being in the opinion of the law officer entitled to be heard in opposition to the grant," refer back to the persons allowed to oppose under sub-s. (1) (i).

The objection as to *locus standi* can therefore, it seems, be taken before the comptroller as well as the law officer. If, on the opposition before the comptroller of a person whom the law officer afterwards on an appeal by the applicant holds to have no *locus standi*,

(a) *Per CLARKE, Sol.-Gen., Heath and Frost's Patent*, Griffin, P. C. 290. See also *Glossop's Patent*, Griffin, P. C. 285; *Hookham's Patent*, Griffin, L. O. C. 32; *Hill's Application*, 5 R. P. C. 599 (a case of licenses).

(b) *Heath and Frost's Patent*, *ubi supra*.

(c) *Lake's Application*, Griffin, L. O. C. 35.

(d) *Hookham's Patent*, Griffin, L. O. C. 32.

(e) *Stewart's Application*, 13 R. P. C. 627.

(f) *Glossop's Patent*, Griffin, P. C. 285.

(g) *MacEvoy's Patent*, 5 R. P. C. 285.

(h) *Bairstow's Patent*, 5 R. P. C. 286.

(i) *Stewart's Application*, 13 R. P. C. 627.

the comptroller orders an amendment of the specification, the law officer must still be satisfied that the comptroller's decision is wrong before he interferes with it (*k*).

Sect. 11 (3)

NOTE.

When the comptroller has allowed the patent, the law officer ought not to interfere with the decision unless it is clearly wrong (*l*).

And therefore where in a difficult chemical case the comptroller had come to a conclusion in favour of the applicant as the result of conflicting chemical evidence, the law officer, having come to the same conclusion on the declarations as the comptroller, declined to hear *viva voce* evidence, and dismissed the appeal with costs (*m*).

Where the applicant who had succeeded before the comptroller did not appear at the hearing of an appeal by the opponent, the law officer allowed the opponent to explain the mechanism, and reserved his decision; and the applicant having subsequently applied *ex parte* to be heard, and having accounted satisfactorily for his previous non-attendance, the law officer directed him to pay the opponent's costs of the adjournment, and upon this being done another hearing was fixed (*n*).

Where the opponent had applied for a patent, but his application had not reached the opposition stage, and it was agreed that if the opponent withdrew his opposition the applicant would not oppose the other application, the law officer, without sanctioning the terms, adjourned the hearing in order to enable the arrangement to be carried out, and stated that in sealing the applicant's patent it was to be understood that he did not decide in his favour (*o*).

The appeal to the law officer is a rehearing (*p*).

Models which are not made exhibits are not evidence, but may be used by the law officer to enable him to understand the drawings and specifications (*q*).

## SUB-SECTION (4).

**"May . . . obtain the assistance of an expert."**—Where there was a strongly controverted question of scientific anticipation, such that the law officer, even if advised by an expert, would refuse to stop the patent, but could leave the question to be discussed elsewhere, the law officer refused to act under this sub-section (*r*).

(*k*) *Heath and Frost's Patent*, Griffin, P. C. 290.

(*l*) *Glossop's Patent*, Griffin, P. C. 286.

(*m*) *Pitt's Patent*, 5 R. P. C. 343.

(*n*) *Ainsworth's Patent*, Griffin, P. C. 269.

(*o*) *Hatfield's Patent*, Griffin, P. C. 288; and see *Re Gething*, L. R. 9 Ch. 633.

(*p*) *Stubb's Patent*, Griffin, P. C. 298. See however, *Bairstow's Patent*, 5 R. P. C. 286; *Hill's Application*, 5 R. P. C. 599.

(*q*) *Lancaster's Patent*, Griffin, P. C. 294. And see *Boyd v. Horrocks*, 6 R. P. C. 152, 154.

(*r*) *Lake's Patent*, 6 R. P. C. 548.

**Sect. 12 (1).**Sealing of  
patent.

**12.**—(1.) If there is no opposition, or, in case of opposition, if the determination is in favour of the grant of a patent, the comptroller shall cause a patent to be sealed with the seal of the Patent Office.

(2.) A patent so sealed shall have the same effect as if it were sealed with the Great Seal of the United Kingdom.

(3.) A patent shall be sealed as soon as may be, and not after the expiration of fifteen months from the date of application, except in the cases herein-after mentioned, that is to say—

(a.) Where the sealing is delayed by an appeal to the law officer, or by opposition to the grant of the patent, the patent may be sealed at such time as the law officer may direct.

(b.) If the person making the application dies before the expiration of the fifteen months aforesaid, the patent may be granted to his legal representative and sealed at any time within twelve months after the death of the applicant.

“As if it were sealed with the Great Seal of the United Kingdom.”—That is, it will prove itself and cannot be denied (*s*).

“Fifteen months.”—By s. 3 of the Act of 1885 (*post*), the term may now be extended four months.

Under s. 20 of the Act of 1852 it was held that when the delay was caused by opposition, the patent might be sealed, even though the hearing took place after the expiration of the provisional protection, and the additional month allowed by s. 6 of the Act of 1853 (*t*).

On the analogy of this case it would seem that under similar circumstances the patent may be sealed though the hearing does not take place till after the fifteen months.

Sub-s. (3)(b) is a re-enactment with modifications of s. 21 of the Act of 1852.

“Where the sealing is delayed,” etc.—Under special circumstances, and when a complete specification had been filed with the application, the patent was sealed, although the applicant had not filed his declaration

(*s*) Hindmarch on Patents, pp. 37, 264, 438.

(*t*) *Re Johnson's Patent*, 13 Ch. D. 398, n.; *Re Somerset and Walker's Patent*, *Ibid.* 397.

in reply till nearly eight months after the last extension of time given to him for that purpose (*u*).

Sect. 12.

NOTE.

“**Delayed.**”—Delay in complying with the requisition of the comptroller requiring the insertion of a disclaimer in the specification is not delay caused “by opposition to the grant of a patent” within this sub-section (*x*).

**13.** Every patent shall be dated and sealed as of the day of the application: Provided that no proceedings shall be taken in respect of an infringement committed before the publication of the complete specification: Provided also, that in case of more than one application for a patent for the same invention, the sealing of a patent on one of those applications shall not prevent the sealing of a patent on an earlier application. Date of patent.

“**Dated and sealed as of the day of the application.**”—This provision was introduced by this Act. Under the Act of 1852, s. 23, the Lord Chancellor or the law officer had a limited discretion as to the date of the patent. And under this section it was sometimes made a condition of sealing the patent that it should bear a particular date (*y*).

But where, in a case of rival applicants, the law officer had granted a patent to the first applicant on condition that it bore date after the patent granted to the second applicant, it was held in a subsequent action between the two patentees that the Court was not bound by this condition, and could, as against the patentee, under the first dated patent, go into the question whether, in fact, he or the patentee under the second dated patent were the first and true inventor (*z*).

The patent will, subject to the first proviso of the section, take effect as from the day of application, whatever be the day when the seal is actually affixed (*a*).

Where under the International Convention a patent is granted for any invention in respect of which a foreign application has been made, the patent is to be entered in the register of patents as dated of the date on which the first foreign application was made (*b*).

“**Provided that no proceedings,**” etc.—The result of this and the proviso at the end of s. 15, appears to be that until the patent is actually

(*u*) *Kitson's Patent*, 7 R. P. C. 388.

(*x*) *A. and B.'s Application*, 13 R. P. C. 63.

(*y*) *In re Johnson's Patent*, 13 Ch. D. 398, n.; *Ex parte Bailey*, L. R. 8 Ch. 60; *In re Harrison*, L. R. 9 Ch. 631.

(*z*) *Kurtz v. Spence*, 5 R. P. C. 161, 178.

(*a*) See *Sarby v. Hennett*, L. R. 8 Ex. 210; *Holste v. Robertson*, 4 Ch. D. 9.

(*b*) P. R. r. 29, *post*.

## Sect. 13.

## NOTE.

granted, no proceedings for infringement can be instituted at all, nor even then in respect of infringements committed before the publication of the complete specification (see s. 10), but that in an action brought after the grant of the patent, relief may be had in respect of infringements committed between the date of the publication of the complete specification and the time of the grant, as well as in respect of infringements after the grant.

Rival applications at different dates for same invention.

**“Provided also that in case,”** etc.—Certain expressions in the judgment of Lord HATHERLEY, C., in *Ex parte Bates and Redgate* (c), and of Lord SELBORNE, C., in commenting on that case in *Ex parte Bailey* (d) and *Ex parte Henry* (e), appear to throw doubt on the power of the Crown, in the case of rival applications on different dates for patents for the same invention, to seal both patents. On the other hand, in *Saxby v. Hennett* (f), KELLY, C.B., said that in such case of the competency of the Crown to seal both patents there could be no doubt, and this appears also to have been the view of Lord CAIRNS, C., in *Re Dering's Patent* (g). The doubt is now removed as to the case mentioned in this proviso. But the proviso is only permissive and not obligatory, and it is therefore necessary to consider what was the old practice on this point.

Rule in *Ex parte Bates and Redgate*.

It was at one time considered that under the Act of 1852 the provisional specification secured the invention for six months, and that the letters patent would be dated as of the date of the provisional specification; and the ordinary practice was to wait until the expiration of four months (h) before giving notice of intention to proceed with the patent, and then to wait two months more before obtaining the Great Seal (i).

But in *Ex parte Bates and Redgate* (k) it was held by Lord HATHERLEY, C., that leaving a provisional specification and obtaining provisional protection did not prevent a second applicant from leaving a provisional specification of a similar invention, and obtaining valid letters patent for his invention before the expiration of the first provisional protection, and that in such a case letters patent would not be granted to the first applicant for any part of his invention which was covered by the letters patent already obtained by the second applicant.

The ground of this decision was that a person could not, by filing a provisional specification only, not choosing to file a complete

(c) L. R. 4 Ch. 580.

(d) L. R. 8 Ch. 63.

(e) L. R. 8 Ch. 169.

(f) L. R. 8 Ex. 213.

(g) 13 Ch. D. 395.

(h) The period allowed by the Rules of December 12th, 1853.

(i) *Lee v. Walker*, L. R. 7 C. P. 121, 126. Judgment of BRETT, J.

(k) L. R. 4 Ch. 577.

specification, obtain anything more than a right to be protected against the consequences of his own publication, and did not obtain a right to priority over any other person who had independently and originally hit upon the same idea, and, in anticipation of the other, first gave the world the benefit of it (l).

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NOTE.

In *Ex parte Manceaux* (m), Lord HATHERLEY, C., again acted on this principle, and refused to seal the patent of a first applicant when the law officer had reported that part of the invention for which the patent was sought was comprised in a patent which had, before the expiration of the first applicant's provisional protection, been granted to a second applicant. His lordship pointed out the inconvenience of granting two patents for the same invention arising from the fact that the question is not between the patentees only, but affects the public, who will be at a loss to know with whom to deal. In this last case the circumstances that the invention had been previously published abroad, so that neither of the parties was in the position of an original inventor, and that there was no case of fraud, nor was the first patentee a servant of the applicant, were considered as bearing on the question of affixing the Seal.

In *Ex parte Scott and Young* (n), however, a case where servants had filed a provisional specification, after which the master filed a provisional specification of a similar invention, and before the servants had obtained their patent, filed a complete specification, and had his patent sealed, and the evidence disclosed grounds for serious suspicion that the master had derived his knowledge from the servants, the same learned judge held that *Ex parte Bates and Redgate* did not apply, and ordered the servants' patent to be sealed and dated as of the date of their provisional specification.

But in *Ex parte Bailey* (o) Lord SELBORNE, C., treated the case of *Ex parte Bates and Redgate* as laying down the rule that if an application to seal a patent is made after the sealing of another, care shall be taken that the new patent does not cover the ground which is covered by the earlier patent, and when a second applicant had first obtained the Great Seal, refused to ante-date the patent of the first applicant, and ordered it to be dated as of the day of his application for the Seal, and this notwithstanding the conduct of the first applicant was alleged to be fraudulent.

Where, however, rival applicants had applied on the same day for patents for inventions alleged to be identical, and had afterwards

Rival applications on same day.

(l) *Per* Lord HATHERLEY, C., *Ex parte Scott and Young*, L. R. 6 Ch. 274.

*parte Yates*, L. R. 5 Ch. 1; *Re Stoll's Patent*, 21 L. T. 233.

(n) L. R. 6 Ch. 274.

(m) L. R. 6 Ch. 274. See also *Ex*

(o) L. R. 8 Ch. 60.

**Sect. 13.****NOTE.**

mutually agreed to withdraw opposition, and one of the applicants having obtained his patent, opposed the other at the Great Seal, and stated that the agreement only extended to proceedings before the law officer, Lord CAIRNS, C., being of opinion that the parties had agreed to withdraw opposition at all stages, treated both patents as having been unopposed, and sealed the second patent, dating it also the day of application (*p*).

And in similar circumstances, where, however, there had been no mutual agreement, the same learned judge sealed both patents as of the day of the date of their respective applications; and after holding that the case was distinguishable from *Ex parte Bates and Redgate*, thus stated his objection to that case: "It has always seemed to me that if Parliament held out to inventors the advantage they should get from provisional protection, the inventor should have the enjoyment of that advantage for the six months given to him. Parliament intended the six months to be for the completion of the invention, and for the perfecting the specification, and never said that the applicant should be deprived of that advantage by want of any due diligence on his part." And again: "*Primâ facie* the Crown ought to seal both patents. The contract with each of them on provisional protection was that he should have six months' protection. Now, if it is true that both have acted in good faith, what right have I to confiscate the invention of one, because it happens to be identical with the invention of the other? . . . Why should they not have become joint proprietors of this invention by agreement between themselves? I cannot see any reason why they should not, and if so, why cannot they in effect be made co-proprietors by the grant of separate letters patent?" (*q*).

Effect of the rule in *Ex parte Bates and Redgate*.

After the decision in *Ex parte Bates and Redgate* it was necessary to get a patent sealed as soon as possible in order to prevent a rival inventor from stepping in and obtaining a patent, and in a case where a patent agent retained to obtain a patent for an applicant had, in ignorance of this decision, followed the old practice, and the result had been that a rival inventor had first obtained the Great Seal, and the applicant was refused a patent, the agent was held liable in an action for negligence (*r*).

Infringement when two patents for same invention.

If two patents have been sealed for the same invention, acts done by virtue of the patent dated last are infringements of the first-dated patent (*s*).

(*p*) *Re Gething*, L. R. 9 Ch. 633.

(*q*) *In re Dering's Patent*, 13 Ch. D. 393.

(*r*) *Lee v. Walker*, L. R. 7 C. P. 121.

(*s*) *Saxby v. Hennett*, L. R. 8 Ex. 210.

*Provisional Protection.*

Sect. 14.

**14.** Where an application for a patent in respect of an invention has been accepted, the invention may during the period between the date of the application and the date of sealing such patent be used and published without prejudice to the patent to be granted for the same ; and such protection from the consequences of use and publication is in this Act referred to as provisional protection.

This provision is substantially the same as the corresponding provision in the Act of 1852, s. 8, except as to the time of duration of the provisional protection.

The effect of provisional protection was thus stated by Lord HATHERLEY, C. (1) (referring to the Act of 1852) :—

“Under section 8,” the patentee “may use his invention for six months (u) without prejudice to his patent by that user, but he obtains no rights against the public until his patent has been sealed, and even then the patent will not relate back to acts done in the interval. He is only protected against the consequences of his own publication, and thus may employ workmen and obtain machinery without the risk of being betrayed. But that is all, and he has no right or privilege against any other person.”

When a provisional specification under the Act of 1852 was abandoned, and the applicant, before six months from the date of that provisional specification, lodged another provisional specification for the same invention, it was held that public user of the invention between the dates of the two provisional specifications did not invalidate a patent granted as of the date of the second provisional specification (x).

Provisional protection.

Provisional protection.

Public user between abandonment of one provisional specification, and the lodging of another for same invention.

*Protection by Complete Specification.*

**15.** After the acceptance of a complete specification and until the date of sealing a patent in respect thereof, or the expiration of the time for sealing, the applicant shall have the like privileges and rights as if a patent for the invention had been sealed on the date of the acceptance of the complete

Effect of acceptance of complete specification

(1) *Ex parte Bates and Redgate*, L. R. 4 Ch. 578.

date of application and date of sealing.

(u) Now, for the period between

(x) *Lister v. Norton*, 3 R.P.C. 199.



**Sect. 15.** specification : Provided that an applicant shall not be entitled to institute any proceeding for infringement unless and until a patent for the invention has been granted to him.

The first clause of this section is a re-enactment with modifications of part of s. 9 of the Act of 1852, which authorized the filing of a complete specification with the petition for letters patent.

Under that section it was held that the principle of *Ex parte Bates and Redgate* could not be applied to enable an applicant who lodged a complete specification to acquire the rights of a patentee so as during the term of protection to prevent any other person who had previously applied for a patent for a similar invention from obtaining a patent (*y*).

Under the present section a person whose complete specification has been accepted is, for the purpose of opposition to a grant of patent, in the same position as a person who has already got a patent upon which he can oppose (*z*).

“**Provided that an applicant,**” etc.—A re-enactment with modifications of the last clause of s. 24 of the Act of 1852. See note under s. 13, *ante*.

### *Patent.*

**Extent of patent.**

**16.** Every patent when sealed shall have effect throughout the United Kingdom and the Isle of Man.

The Channel Islands, which under the Act of 1852, s. 18, were included in letters patent, are omitted from the patents granted under the present Act. See First Schedule, Form D.

**Term of patent.**

**17.—(1.)** The term limited in every patent for the duration thereof shall be fourteen years from its date.

(2.) But every patent shall, notwithstanding anything therein or in this Act, cease if the patentee fails to make the prescribed payments within the prescribed times.

(3.) If, nevertheless, in any case, by accident mistake or inadvertence, a patentee fails to make any prescribed payment

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(*y*) *Ex parte Henry*, L. R. 8 Ch. 167.

(*z*) *L'Oiseau and Pierrard's Patent*, Griffin, L. O. C. 86.

within the prescribed time, he may apply to the comptroller **Sect. 17 (3).**  
for an enlargement of the time for making that payment (a). —

(4.) Thereupon the comptroller shall, if satisfied that the failure has arisen from any of the above-mentioned causes, on receipt of the prescribed fee for enlargement, not exceeding ten pounds, enlarge the time accordingly, subject to the following conditions :

(a.) The time for making any payment shall not in any case be enlarged for more than three months.

(b.) If any proceeding shall be taken in respect of an infringement of the patent committed after a failure to make any payment within the prescribed time, and before the enlargement thereof, the court before which the proceeding is proposed to be taken may, if it shall think fit, refuse to award or give any damages in respect of such infringement.

“**The term limited,**” etc.—The term includes the day of the date, therefore the patent will expire at midnight of the 14th anniversary of the day before the date of the patent (b).

“**Within the prescribed times.**”—See notes to s. 8 (1), and First Schedule, Patents Rules, *post*. Sub-ss. (3) and (4) were introduced by this Act.

#### *Amendment of Specification.*

**18.**—(1.) An applicant or a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of such amendment and his reasons for the same (c). Amendment  
of specifica-  
tion.

(2.) The request and the nature of such proposed amendment shall be advertised in the prescribed manner (d), and at

(a) P. R., *post*, rr. 49, 50, 51. By r. 51, the time for doing any act or taking any proceeding under the Rules may be enlarged, and by r. 16 irregularities in procedure may be corrected.

(b) *Russell v. Leedsam*, 14 M. & W. 574.

(c) P. R. *post*, rr. 52—59.

(d) P. R. r. 52.

**Sect. 18** (2). any time within one month from its first advertisement any person may give notice at the Patent Office of opposition to the amendment (*e*).

(3.) Where such notice is given the comptroller shall give notice of the opposition to the person making the request, and shall hear and decide the case subject to an appeal to the law officer (*f*).

(4.) The law officer shall, if required, hear the person making the request and the person so giving notice, and being in the opinion of the law officer entitled to be heard in opposition to the request, and shall determine whether and subject to what conditions, if any, the amendment ought to be allowed.

(5.) Where no notice of opposition is given, or the person so giving notice does not appear, the comptroller shall determine whether and subject to what conditions, if any, the amendment ought to be allowed.

(6.) When leave to amend is refused by the comptroller, the person making the request may appeal from his decision to the law officer.

(7.) The law officer shall, if required, hear the person making the request and the comptroller, and may make an order determining whether, and subject to what conditions, if any, the amendment ought to be allowed.

(8.) No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before amendment.

(9.) Leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall in all courts and for all purposes be deemed to form part of the specification.

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(*e*) The notice is to state the grounds of opposition. P. R., r. 52, 53.  
 (*f*) The evidence is to be by declaration (*Ibid*, 55), and before the law officer witnesses may be cross-examined. L. O. R. *post*, r. ix.

(10.) *The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is pending.* Sect. 18 (10)

By the Act of 1888, s. 5, *post*, the following is substituted for sub-s. (10) of this section.

“(10.) The foregoing provisions of this section do not apply when, and so long as any action for infringement or proceeding for revocation of a patent is pending.”

#### SUB-SECTION (1).

“**An applicant.**”—If the patent has not been sealed, the proceedings under this section should be the only proceedings taken by any one asking for amendment within the section (*h*).

The section applies to the amendment of specifications after they have become public property. Any other amendment must be dealt with under ss. 7 and 9 (*i*). Therefore, where a complete specification was filed after a provisional, the full time allowed by the Act for so doing being taken by the applicant, and subsequently, and before acceptance of the complete specification by the Patent Office, the applicant applied to amend, it was held by the law officer that the proceedings under this section must be taken (*k*).

But if, before the complete specification has been accepted, the applicant desires to omit a part of his invention as covered by his original title, it is open to him to lodge a complete specification omitting the part desired to be left out, and open to the Patent Office, under the powers of ss. 7 and 9, to permit the original application and provisional to be amended by striking out the part which it is no longer desired to retain (*l*). Such an amendment, however, must be confined to excision only, and not to amendment or other explanation, and the excision must be such as does not extend the scope of the title (*m*).

Where s. 18 applies to any proposed amendment of the specification before the grant of the patent, it is immaterial whether the Patent Office has or has not signified its acceptance of the complete specification as lodged (*n*).

“**Or a patentee.**”—The word “patentee” means the person for the time being entitled to the benefit of a patent. (Section 46, *post*). An assignee of the whole patent may, therefore, apply to amend.

(*h*) *Gare's Patent*, 25 Ch. D. 105.

(*i*) *Jones' Patent*, Griffin, P. C. 308.

313.

(*k*) *Jones' Patent*, *ubi supra*.

(*l*) *Dart's Patent*, Griffin, P. C.

(*m*) *Dart's Patent*, *ubi supra*.

(*n*) *Jones' Patent*, Griffin, P.C. 313.

**Sect. 18 (1).** Under the old law, the grantee of a patent could disclaim even after wholly (o) or partially assigning his interest (p), but now it would seem, in order to satisfy the definition in s. 46, the assignee, in such a case, must also be a party to the application to amend.

NOTE.

It has been held that the mortgagee of a patent ought, as the legal owner, to be a party to a petition by the beneficial owners for extension (q), and it would seem, in like manner, that the mortgagee should be a party to an application by the beneficial owner to amend.

By analogy to the above, it would appear that a mortgagee alone could not apply to amend without making the beneficial owner a party.

It requires a stronger case to amend a specification late in the life of a patent than when the application is made earlier (r).

**“From time to time.”**—A second disclaimer might, under the old law, be entered after a portion of the specification had been previously disclaimed, and, under these words, this may still be done. Second disclaimers are, however, not to be encouraged if they can possibly be avoided (s); and, therefore, where the comptroller had allowed a second disclaimer, and his decision was affirmed on appeal, the law officer, instead of following the usual practice of awarding costs against the unsuccessful party, made no order as to costs (t).

Where an application to amend was refused by the comptroller, and there was no appeal from his decision, the law officer, not being satisfied that any sufficient reason existed why proceedings were not taken to question the comptroller's decision, refused to entertain an application two years later for substantially the same amendment (u).

Disclaimers  
under old  
law.

**“Disclaimer, correction, or explanation.”**—The power to amend a specification or drawings by way of correction or explanation was first introduced by the present Act. The only amendment previously allowed, except in the case of clerical errors, was under the Act of 1835 (x), s. 1, which gave power to file, with the leave of the law officer, “a disclaimer of any part of the title of the invention or of the specification,” or to enter with the like leave “a memorandum of any alteration in the said title or specification not being such disclaimer

(o) *Wallington v. Dale*, 7 Ex. 888.

(p) *Spilsbury v. Clough*, 1 Webst. 255.

(q) *Church's Patents*, 3 R. P. C. 95, 100.

(r) *Johnson's Patents*, 13 R. P. C. 659, 663. See also *Beck and Justice's Patent*, Griffin, L. O. C. 10;

*Morgan's Patent*, Griffin, L. O. C. 18; *Nordenfelt's Patent*, Griffin, L. O. C. 19, 20.

(s) *Haddan's Patent*, Griffin, L. O. C. 12.

(t) *Haddan's Patent*, *ubi supra*.

(u) *Arnold's Patent*, Griffin, L. O. C. 5.

(x) 5 & 6 Will. 4, c. 83.

or such alteration as should extend the exclusive right granted" by **Sect. 18 (1)**.  
the letters patent.

Under this Act the only authority conferred on the patentee was "the power of rejecting" (*y*). The invention might be "reduced or diminished, but it must not be extended or enlarged" (*z*). But slight additions, required to render intelligible what remains after something had been cut out of the specification, were always admissible in a disclaimer (*a*): such, for instance, as the addition or transfer from a disclaimed part of the specification of the words "herein described" (*b*).

From the case of *Re Pullan's Patent* (*c*), it seems that drawings omitted by inadvertence from, and which were not described in the filed specification, could not be added to it afterwards; and it may be a question whether the words of the present section are wide enough to include such an amendment. But under the present section the New law  
comptroller may allow any amendment whether of the letterpress of the specification, or of the drawings, or by way of adding drawings, if drawings have not been appended in the first instance to the specification, necessary to define the disclaimer which it is desired to make (*d*).

The function of an explanation under this section is to explain more clearly what is necessary to understand the meaning of the patentee at the time he patented the invention. It was not intended that he should put in subsequently-ascertained knowledge (*e*), or simply turn an insufficient into a sufficient description (*f*).

Therefore, where a patent was for improvement in nozzles for the escape of steam or gases under pressure, and the patentee proposed to amend his specification by adding a rider containing certain detailed measurements relating to gas engines, and there was no mention of gas engines in the original specifications, leave to add the rider was refused (*g*).

The defect in the specification which can be remedied by amendment is one which must be consistent with the patentee intending to fulfil the condition of the grant by properly describing his invention; and therefore, where in a specification of improvements in the manufacture of castings of wrought iron and steel, which consisted in adding aluminium to the molten metal, the patentee proposed to

NOTE.

(*y*) *Per* LORD WESTBURY, C., in *Ralston v. Smith*, 11 H. L. C. 245.

(*z*) *Foxwell v. Bostock*, 4 D. F. J. 298, 306.

(*a*) *Per* LORD WESTBURY, C., *Ralston v. Smith*, 11 H. L. C. 245.

(*b*) *Thomas v. Welch*, L. R. 1 C. P. 192, 195.

(*c*) Reported Johnson, Pat. Man., p. 107.

(*d*) *Per* Sir E. CLARKE, Sol.-Gen., *Lang's Patent*, 7 R. P. C. 469, 471.

(*e*) *Beck and Justice's Patent*, Griffin, L. O. C. 10.

(*f*) *Johnson's Patent*, 13 R. P. C. 659, 661.

(*g*) *Beck and Justice's Patent*, *ubi supra*.

**Sect. 18 (1).** amend by stating certain proportions, and by adding statements as to the character of an alloy in which the aluminium might be introduced if not introduced pure, were not allowed (*h*).

NOTE.

And when a patentee has described and claimed an improved method apart from particular means he will not be allowed to re-write his specification by inserting all the particular means (*i*).

The fact that a complete specification has been left with the application for a patent will have weight with the law officer in considering whether he will allow an amendment based upon an allegation that the patentee desires his invention to be fully understood (*k*). So also the law officer will take into consideration the fact that the application is made late in the life of the patent when the object is to correct what is alleged to have been inserted in error at the time of filing the specification (*l*).

But where the claim without the context, and without reference to other parts of the specification, is ambiguous, it may be amended, so as to make clear what, upon the true construction of the claim, read with the context and drawings, appears to have been the real meaning of the patentee. Thus, where the claim was "the manufacture of the dents or teeth of cards from a continuous length of *hardened and tempered steel wire*, as set forth and indicated hereinbefore and in the accompanying drawings," and it appeared by the context and from the drawings that the construction intended by the patentee was steel wire hardened and tempered in the manner set forth, he was allowed to amend his claim, so as to read "the manufacture of the dents, etc., from a continuous length of steel wire *hardened and tempered in the manner substantially as set forth, etc.*" (*m*).

And where the specification is capable of more than one construction, it is open to the applicant to satisfy the law officer, or the comptroller, on the face of the specification, that he desires to limit the claim to one or more constructions to which the specification is open (*n*).

And where there were in form three claims to separate parts in a specification, but looking at the three together and to the whole specification it was clear that the patentee had intended to claim the combination of the parts as amendments, striking out the three claims and

(*h*) *Nordensfelt's Patent*, Griffin, L. O. C. 18.

(*i*) *Nairn's Patent*, 8 R. P. C. 444.

(*k*) *Nordensfelt's Patent*, Griffin, L. O. C. 18, 20.

(*l*) *Johnson's Patent*, 13 R. P. C. 659, 663. See also *Beck and Justice's Patent*, Griffin, L. O. C. 10; *Mor-*

*gan's Patent*, Griffin, L. O. C. 17; *Nordensfelt's Patent*, Griffin, L. O. C. 18, 20.

(*m*) *Ashworth's Patent*, Griffin, L. O. C. 6. See also *Johnson's Patent*, 13 R. P. C. 659, 662.

(*n*) *Ryland's Patent*, 5 R. P. C. 668.

inserting a claim for the combination, is held to be a valid correction or explanation within the Act (*o*). **Sect. 18 (1).**

In the case of a patent coming from abroad, if the real inventor satisfies the comptroller or the law officer that there has been a mistake in writing out his description at the time, that is one of the matters which were intended to be dealt with by this section (*p*).

An amendment which is in its language vague and indefinite will not be allowed (*q*).

Mere clerical errors in a specification could be corrected on application to the Master of the Rolls, as Keeper of the Records, on obtaining the consent of the law officer (*r*). See the cases collected in 1 Webst. p. 647, in a note to *Re Sharp's Patent*, and Hindmarch on Patents, c. viii. s. 3. **Clerical errors.**

In *Dixon's Patent* (*s*), where the errors were said to be material, the order for correction was only made on the undertaking of the petitioner not to sue any person in respect of infringements committed previously to the date of the order. But this undertaking was not required in the subsequent case of *Re Johnson's Patent* (*t*).

In the case of *Abel's Specification*, A.D. 1876, No. 2081, where it was proved on the trial of the action of *Otto v. Linford* (*u*), that the drawing filed with the specification contained draughtsman's errors, and that in the parts where these errors occurred the drawing was not in conformity with the description, but that a competent workman following the description could easily find out the errors and put them right; Sir George JESSEL, M.R., on the petition of the agents for the patentee praying that they might be permitted to substitute for the drawing filed with the specification a new drawing in which the errors were corrected, allowed the new drawing to be filed in addition to the original drawing. (6 Mar. 1883.)

In *Re Blamond's Patent* (*x*), an application to amend a clerical error was refused on the ground of delay.

The Master of the Rolls has always required evidence that the error is really "clerical," and for this purpose it has been usual to produce, where possible, the original draft of the specification, and to explain, as far as possible, the manner in which the mistake in the filed copy has

(*o*) *Kelly v. Heathman*, 45 Ch. D. 256.

(*p*) Per Sir R. WEBSTER, Att.-Gen., *Johnson's Patent*, 13 R. P. C. 659, 662.

(*q*) *Parkinson and Another's Patent*, 13 R. P. C. 509, 514.

(*r*) *Johnson's Patent*, L. R. 5 Ch. D. 503; *Sharp's Patent*, 1 Webst.

641, and cases cited in the notes to that case.

(*s*) Eng. Rep. Jan. to Mar. 1881, xvi.

(*t*) Eng. Rep. Ap. to June, 1881, xiii.

(*u*) 46 L. T. (N.S.) 39; Goodeve's Abstract of Patent Cases, pp. 343-347.

(*x*) 3 L. T. (N.S.) 808.

NOTE.



**Sect. 18 (1).** arisen. In all cases notice of the correction was required to be given to the Commissioners of Patents (*y*).

**NOTE.**

The above jurisdiction of the Master of the Rolls was not transferred to the High Court of Justice (*z*), and has not been affected by the present Act (*a*); and it would seem that recourse to it will still be necessary if the amendment of a clerical error would bring the specification within the mischief of sub-s. (8). Except in such a case a clerical error in a specification can be corrected under this section, or by the comptroller under s. 91 (*a*), and the P. R. r. 16, (see Second Schedule, Form P.).

The above-mentioned jurisdiction of the Master of the Rolls applies to specifications which are to be considered as records under his authority. So long as the specification is in the Patent Office and before the patent is sealed, the proceedings under s. 18 should be the only proceedings taken by any one asking for amendment within that section (*b*).

**“Reasons for the same.”**—An amendment will not be disallowed merely because the reasons given for it are insufficient (*c*). The reasons form no part of the specification as amended (*d*).

A statement that the patentee desires the principle on which his invention is based to be fully understood, is not a proper reason for amendment. If the condition of the grant requiring the patentee properly to describe his invention has been fulfilled, no such amendment is required (*e*).

#### SUB-SECTION (2).

This and the following two sub-sections relate to opposed applications; unopposed cases are dealt with in sub-ss. (5), (6), and (7).

**“Any person.”**—It is not stated in the sub-section whether the applicant for leave to amend can object before the comptroller, that the opposer is not a person entitled to be heard in opposition. But in *Bell's Patent* (*f*), the comptroller dealt with the question of interest in the opponent. And see *Stewart's Application*, cited *ante*, p. 58, on the corresponding words in s. 11 (3).

(*y*) *Re Dixon's Patent*; *Re Johnson's Patent*, *ubi supra*; see also *Sharp's Patent*, 1 Webst. 649.

(*z*) Jud. Act, 1873, s. 17 (6). And see *Re Morgan's Patent*, 24 W. R. 245.

(*a*) *Re Gare's Patent*, 26 Ch. D. 105.

(*b*) *Gare's Patent*, *ubi supra*.

(*c*) *Ashworth's Patent*, Griffin, L. O. C. 7.

(*d*) *Cunnington v. Nuttall*, L. R. 5 H. L. C. 205, 228.

(*e*) *Nordenfelt's Patent*, Griffin, L. O. C. 18, 21.

(*f*) Griffin, L. O. C. 11.

## SUB-SECTION (3).

Sect. 18 (3).

“**Hear and decide.**”—The comptroller has power to impose conditions in giving liberty to amend (*g*), and can impose such conditions as the law officer on appeal could impose (*h*).

NOTE.

When after notice of opposition to the grant of a patent, and before the opposition was heard, the applicant applied for leave to amend, which was opposed by the opponent of the grant, and the two oppositions came on for hearing together, the hearing of the opposition to the grant was postponed till after the decision on the amendment (*i*).

“**Subject to an appeal,**” etc.—Under the Act of 1835 there was no appeal on the question of leave to file a disclaimer (*k*). Under this sub-section either party may appeal from the comptroller to the law officer. An appeal from the comptroller in unopposed cases is given by sub-s. (6). There is no provision, however, for any appeal from the law officer, and his decision, it would seem, is final.

Under the Act of 1835 the circumstance that the disclaimer had been suggested by the court before which an action had been tried, and that the law officer's decision was final, was considered by Sir R. BETHELL, in a case of difficulty, as being in favour of allowing the disclaimer (*l*).

## SUB-SECTION (4).

The limitation of opposition in this sub-section was introduced by Opposition. the present Act. See the Act of 1835, s. 1.

Where one of the grounds of opposition was that the specification if amended as proposed would make it the same invention as was described in the specifications of certain prior patents which had expired, and in which the opponent had no interest, it was held that they were not entitled to be heard with regard to those patents (*m*).

The law officers may now examine witnesses on oath (see s. 38, *post*, and Law Officers' Rules, IX., X., *post*). For the practice under Rule IX., when it is desired to obtain an order for the attendance of declarants for cross-examination, see Griffin, P. C., p. 319.

Law officers may examine witnesses.

Appeals to the law officer are re-hearings (*n*).

(*g*) *Hearson's Patent*, 1 R. P. C. 213, 214; Griffin, P. C. 309; *Andrew v. Crossley*, [1892] 1 Ch. 492, 497.

(*h*) *Pietschmann's Patent*, Griffin, P. C. 314.

(*i*) *Cochrane's Patent*, Griffin, P. C. 304.

(*k*) *Medlock's Patent*, Johnson, Pat. Man. p. 187. (4th ed).

(*l*) *Bateman and Moore's Disclaimer*, Macr. P. C. 116.

(*m*) *Bell's Patent*, Griffin, L. O. C. 10.

(*n*) *Stubb's Patent*, Griffin, P. C. 298.

**Sect. 18 (4).** The evidence before the law officer is to be the same as that before the comptroller, and no further evidence is to be given save as to matters which have occurred or come to the knowledge of either party since the date of the decision appealed against, except with the leave of the law officer (*d*).

NOTE.

Evidence before law officer.

Where an application to amend, which included four amendments, was allowed by the comptroller with the exception of a part of one amendment, and this decision was accepted by the applicants, they were not, on an appeal by the opponent, allowed to introduce fresh evidence (*e*).

Where certain words in the title to a specification, the omission of which was not asked by the application to amend, were, on the opponent's objecting to their retention, struck out by the comptroller, the opponents were not allowed before the law officer to object to their omission as making the amendment different from what had been advertised (*f*).

A prior patentee may oppose the allowance of certain proposed amendments on the ground that they will have a prejudicial effect upon his rights under his patent (*g*).

A later patentee will not be allowed to state by way of amendment to his specification that an invention for which a prior patent exists has certain disadvantages (*h*). Nor will the later patentee be required to insert in his amendment any acknowledgment of a prior patent (*i*).

Doubtful cases.

It has been the rule in doubtful cases that the amendment should be allowed, since the decision of the law officer against the application is final, and the consequences may be very serious to the patentee: whereas, if the fiat is wrongly granted, the public have other remedies (*j*). But it may be a question whether since the decision in *Moser v. Marsden* (*k*) (see *post*, under sub.-s. (9)) this rule will continue to prevail (*l*).

Law officer may now give costs.

There was, under the Act of 1835, no power to give costs in disclaimer cases (*m*), but now, by s. 38, *post*, the law officer is empowered to order payment of costs.

Where the original specification was loosely framed and an amendment was opposed, the law officer, although allowing the amendment, refused to give any costs (*n*).

(*d*) L. O. R. r. viii. *post*.

(*e*) *Hampton and Facer's Patent*, Griffin, L. O. C. 13.

(*f*) *Cheesebrough's Patent*, Griffin, P. C. 303.

(*g*) *Hampton and Facer's Patent*, Griffin, L. O. C. 15.

(*h*) *Hampton and Facer's Patent*, Griffin, L. O. C. 15.

(*i*) *Ibid*.

(*j*) *Bateman and Moore's Disclaimer*, Maer. P. C. 116; *Lake's Patent*, Griffin, L. O. C. 16.

(*k*) 13 R. P. C. 24.

(*l*) See *per* FINLAY, Sol.-Gen., *Parkinson and Another's Patent*, 13 R. P. C. 509, 512.

(*m*) *Kynock v. National Small Arms Co. Limited*, 37 L. T. (N.S.) 31.

(*n*) *Ashworth's Patent*, Griffin L. O. C. 9.

Where after leave had been obtained under s. 19, in a pending action, the patentees applied to amend, and afterwards discontinued the action and made a fresh application to amend, and subsequently withdrew their first application, the comptroller, while allowing the amendment, refused to impose any condition as to payment of costs incurred by the opponents in respect of the first application (o). Sect. 18 (4).

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NOTE.

The comptroller has no power as to costs. It was at one time considered that, indirectly, the comptroller might give costs by making the payment of costs a condition of the allowance of the amendment (p); but in *Pietschmann's Patent* (q), it was held that the comptroller has no jurisdiction to impose such a condition.

**"Subject to what conditions, if any."**—Under the Act of 1852, it was provided (s. 39) that no action should be brought on any letters patent in which a disclaimer had been filed in respect of any infringement prior to the disclaimer, without the leave of the law officer certified in his fiat. Under this section the law officers were accustomed to impose conditions as to the user by opponents of apparatus in use before the disclaimer. The above provision is not contained in the present Act, but is replaced by s. 20, *post*. It appears, however (see note to sub-s. (9), *post*, p. 85), that, subject to ss. 19 and 20, amendments will have a retrospective effect. Conditions limiting retrospective effect of amendment.

Under the old practice it was said by Sir A. E. COCKBURN, Att.-Gen., that the cases where the disclaimer should be made retrospective and give the patentee power to proceed against those who have infringed before the disclaimer was filed, are the exception and not the rule, and that it lies on the party applying for a certificate giving a disclaimer that retrospective power, to make out a case entitling him to that certificate (r). Conditions under old practice.

The law officer has also imposed terms preventing a patentee from suing in respect of continued infringements by the use of certain specified machines actually in use before the disclaimer (s); and in one case this principle was extended so as to prohibit suits in respect of new infringements committed by particular persons by the continued use of a process employed by them at the date of the disclaimer (t).

(o) *Bell's Patent*, Griffin, L. O. C. 11.

(p) *Cald's Patent*, Griffin, P. C. 305.

(q) Griffin, P. C. 314.

(r) *Per* Sir A. E. COCKBURN, Att.-Gen., *Lucas's Patent*, Macr. Pat. Cas. 234, 239.

(s) *Harrison's Patent*, Macr. Pat. Cas. 31; *Crabtree's Patent*, Eng. Rep. Jan. to March, 1881; *Westinghouse's Patent*, Griffin, P. C. 315;

*Fox's Patent*. A.D. 1878, No. 3988 (Queen's printer's copy of disclaimer of Anglo-American Brush Electric Light Company).

(t) *Re Medlock's Patent*, Newton's "London Journal," vol. 22 (N.S.) p. 69. See, however, the earlier case of *Lucas's Patent*, cited above, where Sir A. E. COCKBURN, Att.-Gen., said he ought not to impose a condition that the opponent should have a licence to continue his manufacture.

**Sect. 18 (4).** And in *Smith's Patent (u)*, Sir A. E. COCKBURN, Att-Gen., said that the undertaking not to sue in respect of past infringements must be general enough to include not only those who appeared and opposed the allowance of the disclaimer, but every one. However, in the same case he refused to prohibit the patentee from suing in respect of infringement after the disclaimer committed by persons who had previously entered into contracts for the supply of the patented article, and who asked that their immunity from suit should extend up to the termination of those contracts.

NOTE.

Where the patent has been allowed to remain in its imperfect state for a long time, and manufacturers have embarked large capital in the trade, the law officer has imposed conditions for their protection (x).

Disclaimers  
sometimes  
retrospective.

There are some cases in which it is proper that a disclaimer should be retrospective.

"It is not right that a person should gain his information from a patentee, and, acting on that information, copy and use his invention. He must not pre-sume upon some defect in the specification and infringe upon the valuable part of the patent" (y). And where this appeared to have been done, and the opponent had worked in secret, and had otherwise acted unfairly, the Attorney-General considered it right that the opponent should pay for his past infringement, and imposed on him the payment of a definite sum as a condition of the patentee not being allowed to bring an action for infringements prior to the disclaimer (z).

Where the law officer imposed as a condition that actions should not be brought in respect of certain specified apparatus of railway brakes, the opponents were ordered to file statements of the locomotives and vehicles fitted with the protected apparatus, with numbers and other distinguishing marks, and to give notice from time to time of any change in the apparatus so fitted (a).

Sometimes the condition extended to permit the use of machines made under specified contracts (b). And the instruments allowed to be used have been ordered to be marked with identifying marks (c).

The method of identifying the protected machines will of course vary in each particular case. The parties should agree upon a form applicable to the special business, and submit it to the comptroller rather than leave the language to be settled by him (d).

(u) *Macr. Pat. Cas.* 232, 234.

(x) *Tranter's Patent, Jones's Patent*, reported in *Johnson, Pat. Man.* 181.

(y) *Per* COCKBURN, Att-Gen., *Lucas's Patent*, *Macr. P. C.* 238.

(z) *Lucas's Patent, ubi supra.*

(a) *Westinghouse's Patent*, *Griffin, P. C.* 315. See also *Haddan's Patent*,

*Griffin, L. O. C.* 12; *Crabtree's Patent, ubi supra.*

(b) *Fox's Patent*, A.D. 1878. No. 3988 (HERSCHELL, Sol.-Gen.)

(c) *Edison's Patent*. A.D. 1877, No. 2909, JAMES, Att-Gen.)

(d) *Haddan's Patent*, *Griffin, L. O. C.* 12.

Under a condition that no action is to be brought for infringements prior to a particular date, the continued use after that date of the alleged infringing articles, and also the sale of those made previously and then unsold, are protected (e). Sect. 18 (4).  
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NOTE.

Where, on the allowance of a disclaimer, the Attorney-General exempted in general terms 800 specified instruments from actions for infringement at the suit of the patentee, and it was proved that these instruments also infringed another patent belonging to the patentee, it was held that the patentee was entitled in respect of these instruments to an injunction restraining infringement of this latter patent (f).

Under the present Act it was held by the law officers that, as a general rule, and apart from exceptional circumstances, a condition should, when desired, be imposed that no action should be brought or other proceeding taken in respect of any infringement prior to January 1st, 1884 (the commencement of the Act) (g). Conditions  
under new  
practice.

The above rule, however, applied only to patents granted under the old law. In the case of patents under the present Act, no condition as to not bringing actions for infringement prior to amendment will be imposed, but the case will be left to be dealt with by the Court under s. 20(h). The law officers may impose conditions, but very special circumstances will be required to justify them (i).

Where the application to amend was made in a pending action in pursuance of leave obtained under s. 19, and the Court granting the leave had imposed no condition as regarded the use of the amended specification in, or the proceeding with, the action, *HERSCHELL*, Sol.-Gen., refused to impose any such condition (k).

It is a convenient and reasonable course on the part of the Patent Office to obtain an assent in writing from the patentee before making the actual amendment (l).

If a patentee is dissatisfied with the condition imposed, he may decline to allow his specification to be amended, and might, by notice to the Patent Office, require that no amendment should be made (m).

#### SUB-SECTION (7).

On an appeal to the law officer from the decision of the comptroller on an unopposed application to amend, the comptroller neither pays

(e) *Cheesebrough's Patent*, Griffin, P. C. 303.

(f) *United Telephone Co. v. London and Globe Telephone Co.*, 26 Ch. D. 766.

(g) *Hearson's Patent*, 1 R. P. C. 213; Griffin P. C. 309. See also *Westinghouse's Patent*, Griffin, P. C. 315; *Ashworth's Patent*, Griffin, L. O. C. 7; *Haddan's Patent*, Griffin, L. O. C. 12.

(h) *Allen's Patent*, Griffin, L. O. C. 3.

(i) *Ainsworth's Patent*, 13 R. P. C. 76.

(k) *Hearson's Patent*, *ubi supra*.

(l) *Per CHITTY, J., Andrew v. Crossley*, [1892] 1 Ch. 498.

(m) *Per CHITTY, J., Andrew v. Crossley*, *ubi supra*.

**Sect. 18 (7).** nor receives costs (*n*). Where, on an unopposed application to amend the specification of a patent which was ten years old, the comptroller refused an amendment which, on appeal, was allowed by the law officer, an application for a return of the stamp on the notice of appeal was refused (*o*).

NOTE.

#### SUB-SECTION (8).

Amended specification not to claim invention larger than or different from that in original specification.

**“Substantially larger than, etc.”**—These words, it will be observed, are considerably wider than the corresponding words of the Act of 1835, but under that Act it was held that a patentee could not by disclaimer convert a bad specification, in the sense of its containing no description of any useful invention at all, into a good specification by adding words that would convert “a barren and unprofitable generality” into a specific and definite and practical description. Nor, when the original description was wholly bad, and contained no new invention, could it be converted into a description containing a good invention; nor could the patentee by disclaimer make material additions to the original specification, so as, by the aid of the corrected form of words, and the additions so made, to introduce into the specification an accurate and perfect description of an invention which was sought for in vain in the original specification (*p*).

Thus, where a patentee of improvements in embossing fabrics claimed the use of grooved, fluted, or indented rollers of metal, wood, or other suitable material, driven at a greater speed than the bowl or bowls connected with them, so as to exert a rubbing action on the fabric, and thereby produce an indefinite variety of pattern, and afterwards disclaimed the use of any pattern rollers except metal rollers with circular grooves, and it appeared that only circular grooves would produce the effect required, and further, that the making the roller and bowl revolve at different speeds was not new, it was held that the disclaimer extended the exclusive right granted by the patent, and that the patent was therefore bad. These rollers not being specifically described in the original specification, but merely involved in the general terms used, the patentee had not sufficiently described his invention; and therefore when by disclaimer he confined his claim to circular grooved rollers as his sole invention, though in one sense he might be said to narrow a right, yet he really extended it, because he thereby described his invention sufficiently to enable him to assert a right which he never

(*n*) *Lake's Patent*, Griffin, L. O. C. 16.

(*o*) *Morgan's Patent*, Griffin, L. O. C. 17.

(*p*) *Per Lord WESTBURY, C., Ralston v. Smith*, 11 H. L. C. 243 244.

could have successfully maintained upon the original specification alone (*q*). **Sect. 18 (8)**

**NOTE.**

But when a specification of a patent for an improvement in machinery for roving cotton described a particular method of the application of centrifugal force, and claimed the "application of the law or principle of centrifugal force to the particular or special purpose above set forth," and by a disclaimer the patentee declared that he intended to claim only the application of centrifugal force in a particular manner described in the specification, the specification thus amended was held good (*r*).

So under a patent for "improvements in instruments used for writing and marking, and in the construction of inkstands," a patentee disclaimed four out of eleven parts of his invention, the parts disclaimed relating to pens and to instruments used for marking with a stamp, the parts which remained untouched by the disclaimer being for improvements relating to penholders, pencil-cases, and in the construction of inkstands; it was held that the specification as amended satisfied the title of the letters patent, and that the patent was good (*s*).

Where patentees had in their specification described and claimed several parts of an apparatus, and there appeared on the face of the specification some evidence that the patentees intended to claim the several parts conjointly, they were allowed to alter the specification by disclaiming the words "firstly," "secondly," and "thirdly," before the claims, and substituting the word "or" for "secondly," and "and" for "thirdly," but they were not allowed to insert the words "in combination with" between the second and third claiming clauses (*t*).

And where the claim was, "the use of pipes of novel form, constructed of earthenware, to form, as herein above stated and described, a connection" with the main drain, it was held that substantially it claimed the arrangement of the pipes, and not the form of the particular pipes, and the patentee was allowed to amend by inserting a statement that he did not claim the pipes as novel, and to alter the claim to "the use of pipes of the *above* form, constructed of earthenware, etc." (*u*).

Where a specification claimed all angular or wedge-shaped slag boxes, and the applicants desired to amend by adding words confining the claim to wedge-shaped boxes having a particular configuration, which was described in the specification, the amendment was allowed, since

(*q*) *Ralston v. Smith*, 11 H. L. C. 223, 254. And see under the present Act, *Goulard and Gibb's Patent*, 6 R. P. C. 215.

(*r*) *Serd v. Higgins*, 8 H. L. C. 550.

(*s*) *R. v. Mill*, 10 C. B. 379.

(*t*) *Bateman and Moore's Disclaimer*, Macr. P. C. 116. See also *Kelly v. Heathman*, 45 Ch. D. 256.

(*u*) *Allen's Patent*, Griffin, L. O. C. 3.



**Sect. 18 (8).** the invention was thereby confined to a particular class of slag box, which was included with a number of other slag boxes in the original claim (*x*).

**NOTE.**

The addition of the words "substantially as set forth and indicated," to a general claim for hardening wire for cards by drawing it through a gas flame, and passing it instantaneously through a bath of oil, was held to restrict the claim, and not to enlarge it or make it different from the original invention (*y*).

So, also, where the specification directed the introduction of aluminium into molten metal shortly before it was to be poured, and stated, "the addition might, however, be made earlier," the omission of these words was held to limit the claim to the putting in the aluminium at the melting point, and the words were allowed to be struck out by amendment (*z*).

Where a specification of a patent for the manufacture of colouring matters was for a range of colours by combining a tetrazo body therein described with two molecules of certain substances, of which a list was given, the patentee was allowed, by way of amendment, to add words showing how the series of colours might be increased by mixing two of them together, or by employing instead of two molecules of one substance one molecule of one and one of the other, both molecules being successively combined with the tetrazo body; but the amendment was considered to be doubtful, and was to be taken at the peril of the patentee (*a*).

Where one of the figures in the drawings to a specification had been misdescribed, and the figure was clearly included in the provisional, and covered by the claim of the complete specification, the patentee was allowed to amend by inserting a proper description of the figure but was not allowed to add anything to his claim (*b*).

But when a patentee claimed in effect a combination of certain devices, and desired to amend by saying that he did not claim broadly the use of those devices, but only when arranged in combination with other parts of the apparatus, it was held that the amendment was for a new combination, and must be refused (*c*).

And where before the grant of the patent the applicant proposed to amend his specification by disclaiming the main part of the invention, so as to claim an obvious alternative, which rested on the part proposed

(*x*) *Cochrane's Patent*, Griffin, P. C. 304. See also *Ryland's Patent*, 5 R. P. C. 665.

(*y*) *Ashworth's Patent*, Griffin, L. O. C. 6.

(*z*) *Nordensfelt's Patent*, Griffin, L. O. C. 18.

(*a*) *Lake's Patent*, Griffin, L. O. C. 16.

(*b*) *Morgan's Patent*, Griffin, L. O. C. 17.

(*c*) *Parkinson and Another's Patent*, 13 R. P. C. 509, 514.

to be left out of the specification, it was held that the specification so amended would be substantially different from the original specification, and the application was refused (*d*). And where the specification of a patent for improvements in cotton-spinning machinery claimed "the construction and application to the class of machinery referred to of an inclined bearer or bearers to support the top clearing rollers substantially as set forth," an amendment adding the word "*adjustable*" before the term "bearer or bearers," wherever it occurred in the description or claim, was disallowed (*e*).

Sect. 18 (8).

NOTE.

When the original claim was the method of making wire ropes, "that the strands be laid up into the rope same lay as the wires in strand," and it having been discovered that a rope thus made was old, the patentee sought to amend by claiming "the improvement in the construction of wire ropes such as are made by machinery as at present employed, that the strands be laid up into the rope same lay as the wires in strand" (*f*) leave to amend as proposed was refused.

When the amended specification claimed an invention different from that described in the provisional specification, it was held that the patent was bad (*g*).

So also, when in the specification of an invention relating to electric lighting the original specification claimed a regulator for regulating automatically the dynamo which generated the current, and by another claim claimed the employment of secondary batteries as reservoirs of electricity, and it appeared that at the date of the patent the patentee believed that regulation was required for the purpose of the invention as well as storing, it was held that an amendment which disclaimed the regulator essentially changed the nature of the invention, and that the patent was bad (*h*).

Where in a specification of a patent for making saccharin, words were used which, in the opinion of the law officer, pointed to obtaining the article in a pure state, the patentee was not allowed to amend his specification by inserting corrections showing that the product was in fact a mixture of the pure article with other substances (*i*).

Where there is a distinct claim with no claim to any arrangement of the subordinate parts, the patentee cannot amend by striking out the whole of his claim and inserting an independent claim to a subordinate part (*k*).

(*d*) *Heath and Frost's Patent*, Griffin, P. C. 311.

(*e*) *Walker's Patent*, Griffin, L. O. C. 22.

(*f*) *Lang's Patent*, 7 R. P. C. 469.

(*g*) *Gaulard and Gibb's Patent*, 6 R. P. C. 215. See *S. C.* in H. L.

7 R. P. C. 367; *Lane Fox v. Kensington Co.*, [1892] 3 Ch. 424.

(*h*) *Lane Fox v. Kensington, etc.*, Co., [1892] 3 Ch. 424.

(*i*) *Johnson's Patent*, 13 R. P. C. 659.

(*k*) *Serrell's Patent*, 6 R. P. C. 101.

**Sect. 18 (8).** The law officer will, on an application to amend, take into consideration a declaration which has been made by the patentee as to the way in which he drew up his specification, and as to his intention (*l*); and will also, as against the patentee, give weight to the fact that a complete specification was left with the application, so that the invention might then be considered in an advanced stage (*m*).

NOTE.

Claiming clauses might formerly be struck out on disclaimer.

Under the old law all the claiming clauses might be struck out of the specification if there remained in the body of the specification words sufficiently distinguishing what invention the patentee claimed (*n*).

(But it would seem that, having regard to s. 5, sub-s. (5) of the present Act, this could not be done now.)

Jurisdiction of Master of the Rolls as Keeper of Records.

In *Re Sharp's Patent* (*o*) it was held that the Master of the Rolls had no authority as Keeper of the Records to remove from the records of the Court of Chancery a memorandum of alteration which had been enrolled, the application being grounded on an allegation that the memorandum of alteration extended the exclusive right granted by the patent.

But where a disclaimer was filed without the consent of the patentee, it was held that the Master of the Rolls, as Keeper of the Records, had jurisdiction, on the motion of the patentee, without bill filed, to take it off the file (*p*).

Effect of disclaimer.

The effect of a disclaimer is merely to strike out from the specification those parts of the machinery which are disclaimed. It cannot operate by way of a claim of the residue, nor can what remains of the specification be construed by the disclaimer (*q*).

The reasons for the disclaimer form no part of the specification as amended by it, and ought not to be referred to in construing such amended specification (*r*); but, in construing the latter, reference may be made to the original specification (*s*).

The mere fact of entering a disclaimer as to part of a specification does not necessarily import that the patent is bad (*t*).

The law officer is not a court, and no prohibition lies to prevent him allowing an amendment which is forbidden by this sub-section (*u*).

(*l*) *Allen's Patent*, Griffin, L. O. C. 3.

(*m*) *Nordenfelt's Patent*, Griffin, L. O. C. 19.

(*n*) *Thomas v. Welch*, L. R. 1 C. P. 192.

(*o*) 1 Webst. 641.

(*p*) *Re Berdan's Patent*, L. R. 20 Eq. 346.

(*q*) *Per* CRESSWELL, J., *Tetley v. Euston*, 2 C. B. (N.S.) 730.

(*r*) *Cannington v. Nuttall*, L. R. 5 H. L. C. 205, 228.

(*s*) *Dudgeon v. Thomson*, 3 App. Cas. 40, 55; *Moser v. Marsden*, 13 R. P. C. 24, 31.

(*t*) *Per* TINDAL, C.J., *Stocker v. Warner*, 9 Jur. 136, 138; 1 C. B. 148.

(*u*) *Van Gelder's Patent*, 6 R. P. C. 22; reported also as *Ex parte Simon*, 4 Times Rep. 754.

## SUB-SECTION (9).

## Sect. 18 (9).

## NOTE.

**‘Shall be conclusive,’ etc.**—A re-enactment of part of s. 39 of the Act of 1852. Under the former Acts, the fact that the law officer had allowed the disclaimer did not prevent its validity being questioned in subsequent proceedings (x). And in *Van Gelder’s Patent* (y) it was held by the Court of Appeal that although the present sub-section contains the words “and for all purposes,” which were not in the corresponding part of the Act of 1852, the law has not been altered, and if the law officer allows an amendment which under s. 8 ought not to be made, it can still be questioned in any future action brought upon the patent.

In *Moser v. Marsden* (z), however, it was held in the House of Lords that after an amendment has been allowed the court is not now at liberty to entertain an objection based upon an alleged discrepancy between the terms of the amended and original claim, and that the object of the Act is to make an amended claim, when admitted by the proper authorities, a complete substitute to all effects and purposes for the claim originally lodged by the patentee, and that the claim as it stood before amendment cannot be competently referred to except as an aid in the construction of its language after amendment.

After an amendment has been made the court will not entertain an objection that it was not the amendment advertised, or that it was made pending an action for infringement without an application to the court (a).

Under the Act of 1835 it was doubted whether, when the disclaimer violated the statutory condition, it was not itself void (b). There was no express enactment that the disclaimer, if it transgresses the statutory limit by extending the exclusive right, shall be void to all intents and purposes, but it was said that it might be proper to hold that the disclaimer is inoperative for the excess only (c). This would appear to apply also to amendments under the present Act.

**“Except in case of fraud.”**—Such, for instance, as where leave was given to file a disclaimer on certain conditions which the patentee refused to accept, and the disclaimer was afterwards filed without his consent (d).

**“Shall in all courts and for all purposes,” etc.**—A re-enactment, with the addition of the words “for all purposes” (as to which, see

(x) See the cases cited under sub-s. (8), and *Dudgeon v. Thomson*, 3 App. Cas. 34; *Bateman and Moore’s Patent*, Macr. P. C. 118.

(y) 6 R. P. C. 22.

(z) 13 R. P. C. 24, 31, 32, 33.

(a) *Farbenfabriken v. Bowker*, 8 R. P. C. 389.

(b) *Foxwell v. Bostock*, 4 D. F. & J. 298.

(c) *Foxwell v. Bostock*, *ubi supra*.

(d) *Re Berdan’s Patent*, L. R. 20 Eq. 346.

**Sect. 18 (9).** *Moser v. Marsden* cited above), of the corresponding part of the Act of 1835. That Act contained a proviso that no disclaimer should be receivable in evidence in any action pending at the time the disclaimer was enrolled.

NOTE.

Amendments retrospective.

Under the Act of 1835 it was held, in *Perry v. Skinner*, that a disclaimer was not retrospective, so as to enable an action to be brought in respect of an infringement committed prior to the disclaimer (e). But in *R. v. Mill* (f) the correctness of the decision in *Perry v. Skinner* was doubted, and it was held that the disclaimer was to be considered as part of the original specification as from the date of the letters patent, except in pending actions. And one ground of the decision was that otherwise the above-mentioned proviso would be inoperative. This present Act does not contain the above-mentioned proviso as to pending actions, nor the proviso of s. 39 of the Act of 1852, mentioned *ante*, p. 77, nor any restriction on the retrospective effect of amendments, except sub-s. (10), *post*, and ss. 19 and 20. The ground of the decision in *R. v. Mill*, above mentioned, appears to apply equally to the last-mentioned sections, and it is therefore submitted that the words at the head of this note will receive the construction given in *R. v. Mill* to the corresponding words of the Act of 1835, and that, subject to the provisions of sub-s. (10) and ss. 19 and 20, and in the absence of conditions to the contrary imposed by the law officer or comptroller, actions may be brought in respect of infringements committed prior to the amendment.

#### SUB-SECTION (10).

This must be read in connection with s. 19, *post*, which applies by way of proviso and mitigation of the general words of the sub-section (g). And the effect is that, in a pending action for infringement or proceeding for revocation, the patentee may apply to the comptroller to amend his specification, if leave be given him for that purpose by the court or judge (h).

“So long as any action for infringement or proceeding for revocation of a patent is pending.”—In *Gaulard v. Lindsay* (i), where an action for infringement and a petition for revocation were proceeding at the same time, and leave to apply to the Patent Office to amend had been given in the petition, it was suggested in the Court of Appeal, but

(e) 1 Webst. 250; *Stocker v. Warner*, 1 C. B. 148. 121, 124; *Cropper v. Smith* (No. 2), 28 Ch. D. 148, 151.

(f) 10 C. B. 379.

(g) *Singer v. Stassen* 1 R. P. C.

(h) See *Re Hall*, 21 Q. B. D. 137, judgment of A. L. SMITH, J.

(i) 5 R. P. C. 192, 196.

not decided, that the leave given in the petition would not be effectual unless leave was granted in the action. The practice in the Patent Office had been in accordance with the view here suggested ; and where there were two actions for infringement the comptroller had refused to entertain the application to amend, unless liberty to make the application had been obtained in both actions (*k*). But in *Re Hall* (*l*), where an action for threats under s. 32, and an action for infringement were pending at the same time, and liberty to apply at the Patent Office for leave to amend had been given in the infringement action alone, it was held, without deciding whether the action for threats was “a legal proceeding in relation to a patent” within the words of the sub-section as they stood in the Act of 1883, that the judge in the infringement action had jurisdiction to make the order notwithstanding the pendency of the threats action, and a prohibition to the comptroller to prevent him from hearing the application was refused. This decision appears to overrule the above-mentioned practice in the Patent Office. Sect. 18 (10).  
—  
NOTE.

The meaning of the sub-section is that the patentee is not to take proceedings for amendment while an action for infringement is pending. It does not say that when before an action is commenced the patentee has got leave to amend, and when everything is done except the actual mechanical amendment of the specification, that mechanical part shall not be done because the action is pending. And therefore where leave to amend had been given on a condition which was verbally accepted, an action for infringement brought two days after the leave was given was held to be properly brought though the applicant (the plaintiff) had not signed a formal undertaking subsequently required by the comptroller accepting the condition, and though the amendment in the specification was not actually made till some time afterwards (*m*).

When the comptroller by his decision imposes a condition, a written assent subsequently given relates back to the decision, and the giving of such assent does not fall within the true meaning of the words “the foregoing provisions of this section,” and is not a step which is prohibited while an action for infringement is pending (*n*).

“**Proceeding for revocation of a patent.**”—These words are substituted by the Act of 1888 for the more general words “other legal proceeding in relation to a patent.” The latter were held to include proceedings for revocation (*o*), but not proceedings before the

(*k*) *Codd's Patent*, Griffin, P. C. 305.

(*l*) 21 Q. B. D. 141.

(*m*) *Andrew v. Crossley*, [1892] 1 Ch. 492, 502.

(*n*) *Per* CHITTY, J., *Andrew v. Crossley* [1892] 1 Ch. 499.

(*o*) *Cropper v. Smith* (No. 2), 28 Ch. D. 148.

**Sect 18(10).** comptroller (*p*), and the question had been raised, but not decided, whether they included an action for threats under s. 32 (*q*).

**NOTE.**

If a petition for revocation is presented after the commencement of proceedings for amendment, it seems that the latter are suspended, and the leave of the court is necessary before they can be renewed (*r*).

Where in an action for infringement certain claims of a specification were held bad by the judge of first instance, and his decision was affirmed except with regard to the first claim, as to which the Court of Appeal gave no decision, it was held that an application to amend by striking out the claims held bad by the Court of Appeal might be allowed to proceed notwithstanding the pendency of a petition for revocation, the patentee desiring to have an opportunity of taking the opinion of the Court of Appeal as to the first claim (*s*).

“**Pending.**”—This means an action before judgment, and, therefore, the sub-section was held not to apply where final judgment had been given, and the case was under appeal to the House of Lords (*t*). The sub-section applied to actions pending at the commencement of the Act (*u*).

Power to  
disclaim part  
of invention  
during action,  
&c.

**19.—(1.)** In an action for infringement of a patent, and in a proceeding for revocation of a patent, the court or a judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the court or a judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed (*v*).

A disclaimer could, under the express terms of the Act of 1835, be received in evidence in an action of *scire facias* commenced before it was filed (*x*), and when after the disclaimer the action failed, the prosecutor had to pay all the costs subsequent to the disclaimer (*y*).

But where a disclaimer had been filed after the commencement of a suit for injunction, it was held (on the words of the Act, s. 1), that the suit could not be continued by amendment of the bill, but a fresh bill must be filed (*z*).

(*p*) *Cochrane's Patent*, Griffin, P. C. 30.

(*q*) *Re Hall*, *ubi supra*.

(*r*) See *Deeley's Patent*, 11 R. P. C. 72, 74, 76.

(*s*) *Deeley's Patent*, *ubi supra*.

(*t*) *Cropper v. Smith* (No. 2), *ubi supra*; *Lawrence v. Perry*, 2 R. P. C.

177, 188; and see *Haslam Co. v. Hall*, 5 R. P. C. 1, 24.

(*u*) *Singer v. Stassen*, *ubi supra*.

(*v*) P. R., r. 58.

(*x*) *R. v. Mill*, 10 C. B. 379.

(*y*) *R. v. Mill*, 14 Bea. 312.

(*z*) *Lister v. Leather*, 1 De G. & J. 361; 3 Jur. (N.S.) 433.

And a patentee having obtained an injunction and then altered his specification by disclaimer, was held not entitled to enforce the injunction (a). Sect. 19 (1).  
—  
NOTE.

Now, however, all pending proceedings, whether for infringement or for revocation of the patent (*post*, s. 26), will be governed by this and the preceding section (*ante*, p. 86); and in a proper case the court may order the amendment, when made, to be given in evidence. See *post*, p. 91.

This section is by way of proviso to s. 18, sub-s. (10), and applies to the same action (b). It applies to actions pending at the commencement of the Act (c), and to actions in the Palatine Court of Lancaster (d).

In order to obtain the benefit of this section in a pending action the application for leave to apply to the Patent Office must be made before judgment (e). Applications under this section may be made in chambers (f).

The judge has jurisdiction under this section to give liberty in an infringement action to apply to the Patent Office, notwithstanding the pendency of an action for threats under s. 32, or apparently any other action for infringement (g). It will be observed that the court is only authorized to give liberty to apply to amend by way of *disclaimer*. There appears to be no jurisdiction to allow an application to amend by way of "correction or explanation." See s. 18 (1), and s. 20.

Granting or refusing leave under this section is a matter for the judicial discretion of the court (h). But this discretion must be exercised on grounds which can be stated and therefore the patentee must show a case (i).

The case of *Moser v. Marsden*, (cited *ante*, p. 85) has in no way interfered with this discretion nor made it necessary for the court on an application for leave to apply at the Patent Office to go into the question whether the proposed amendments are or are not within the Act (k).

(a) *Dudgeon v. Thomson*, 3 App. Cas. 34.

(b) *Singer v. Stassen*, 1 R. P. C. 121 (judgment of BRETT, M.R.); *Re Hall*, 21 Q. B. D. 137.

(c) *Singer v. Stassen*, *ubi supra*; *Winter v. Baybut*, 1 R. P. C. 76.

(d) *Winter v. Baybut*, *ubi supra*.

(e) See *ante*, p. 88, under s. 18 (10).

(f) *Singer v. Stassen*, 50 L. T. (N.S.) 326; W. N. (1884), p. 83.

(g) *Re Hall*, 21 Q. B. D. 137.

(h) *Deeley's Patent*, 11 R. P. C. 72; *Lang v. Whitecross Co.* 7 R. P. C. 389 (H.L.)

(i) *Per* CHITTY, L.J., *Armstrong's Patent*, 14 R. P. C. 747, 755.

(k) *Dellwick's Patent*, [1896] 2 Ch. 705. See also *Armstrong's Patent*, *ubi supra*, judgment of CHITTY, L.J.



**Sect. 19 (1).** Where the judge had refused leave to apply at the Patent Office the Court of Appeal declined to interfere with the exercise of his discretion not being clearly of opinion that the discretion had been wrongly exercised (*l*).

NOTE.

“**The court.**”—That is, by s. 117 (*post*), the High Court of Justice. It would seem, therefore, that the House of Lords has no original jurisdiction under this section (*m*). The court referred to is the judge who tries the action or hears the petition for revocation (*n*).

“**Terms as to costs and otherwise.**”—This section gives the widest discretion to the judge as to the terms to be imposed (*o*).

If leave is given under this section, conditions in favour of the defendant will be imposed as to costs.

Thus in *Winter v. Baybut* (*p*), the plaintiff was ordered to pay the costs of the action up to and including the motion for leave.

In *Singer v. Stassen* (*q*) it was ordered that the costs of and occasioned by the application should be the defendant's costs in any event; and in *Codd v. Bratby* (*r*) it was admitted that the plaintiff must pay the costs of the application and all the costs thrown away in the action.

In *Fusee Vesta Co. v. Bryant & May* (*s*), it was ordered that the costs of the defendants of the action up to and including the application for leave and consequent upon the amendment, should be borne by the plaintiffs in any event. In this case very little had been done in the action beyond the writ. But in the case of *Haslam Foundry and Engineering Co. v. Goodfellow* (*t*), when the pleadings were completed at the time when the application for leave to apply to the Patent Office was made, the plaintiffs were ordered to pay in any event the costs of the application and the costs of the action up to and occasioned by the disclaimer, except only so far as the proceedings in the action might be utilised for the purpose of the trial under the leave thereby given, all other questions of costs being reserved.

In *Gaulard v. Lindsay* (*u*), when the action was founded on several patents, and the plaintiff sought leave to apply at the Patent Office to amend the specification of one patent to which the others were

(*l*) *Armstrong's Patent, ubi supra*.  
See also *Allen v. Doulton*, 4 R. P. C. 377.

(*m*) See *Cropper v. Smith* (No. 2.) 28 Ch. D. 148.

(*n*) *Armstrong's Patent, ubi supra*, judgment of LINDLEY, L.J.

(*o*) *Lang v. Whitecross Co.* 6 R. P. C. 570, 7 R. P. C. 389 (H.L.)

(*p*) 1 R. P. C. 76.

(*q*) 1 R. P. C. 121.

(*r*) 1 R. P. C. 211.

(*s*) 34 Ch. D. 458. The order is printed 37 Ch. D. 120 and 4 R. P. C. 73. See also *Lang v. Whitecross Co.*, 6 R. P. C. 570; 7 R. P. C. 389.

(*t*) 37 Ch. D. 118. The order is given on p. 123; and see also *Gaulard v. Lindsay*, 38 Ch. D. 38.

(*u*) 38 Ch. D. 38.

subsidiary, the payment of the costs of the action up to the time of the leave being given was imposed as one of the terms on which the leave was granted. In this case it appears, from another report (x), that the action was set down for trial at the time the application was made.

Sect. 19 (1).

NOTE.

The Court of Appeal has refused to direct the taxation upon the higher scale of the costs which the plaintiff is directed to pay as a condition of obtaining leave to amend (y).

The court will not give any directions as to the costs before the comptroller of obtaining the disclaimer (z).

Where, however, there had been a previous application to the comptroller which had been refused because the action was pending, it was held, on an application to the court, that as a condition of obtaining the leave asked, the plaintiff must pay the costs of the application before the comptroller (a).

When there were two actions pending, and an order under this section having been obtained in one only, the application to the comptroller was dismissed, on the ground that the leave of the court should be obtained in both actions; and on this being done in the second action the application was renewed, it was held, that the leave given in the first action was not exhausted, the application not having been dismissed on its merits, but only on a technical point (b).

In an action for infringement instituted before the commencement of this Act it was held by the Court of Appeal that leave to apply to amend should only be given on the terms that the specification, as amended, should not be given in evidence in the action (c). And in another similar case it was conceded, in addition to the above condition, that no evidence of infringement prior to the amendment should be given (d). But in granting leave under this section the court will not, unless under special circumstances, impose on a plaintiff the condition that he shall not in any way sue the defendants on the amended specification (e). A condition, however, preventing any action for infringements committed before the commencement of the Act has, in general, been imposed by the law officers (f).

Whether amended specification can be given in evidence in the action.

In *Fusee Vesta Co. v. Bryant & May* (g), it was held in an action commenced since the Act, and where no statement of claim or defence

(x) 5 R. P. C. 194.

(y) *Gaulard v. Lindsay*, 5 R. P. C. 192, 197.

(z) *Fusee Vesta Co. v. Bryant & May*, 34 Ch. D. 458, 461.

(a) *Codd v. Bratby*, cited above.

(b) *Codd's Patent*, Griffin, P. C. 305.

(c) *Singer v. Stasson*, 1 R. P. C.

121. See also *Codd v. Bratby*, 1 R. P. C. 210.

(d) *Codd v. Bratby. ubi supra.*

(e) *Codd v. Bratby, ubi supra.*

(f) *Hearson's Patent*, 1 R. P. C. 213.

(g) 34 Ch. D. 458. See also *Haslam Foundry and Engineering Co. v. Goodfellow*, 37 Ch. D. 118.

**Sect. 19 (1).** had been delivered, that the proper terms to be imposed on the plaintiff asking leave under this section, in addition to terms as to costs (*h*), were that no further proceedings should be taken till the disclaimer had been properly made, that the plaintiff should undertake forthwith to take proceedings for disclaimer, and then to amend the action by stating the disclaimer, founding the action on the specification as amended ; failing this, the action to be dismissed.

NOTE.

But in *Bray v. Gardiner (i)*, which was also an action commenced since the Act, it was held by the Court of Appeal that under ordinary circumstances, and as a general rule, the condition should be imposed that the amended specification shall not be receivable as evidence in the action. It was said, however, in this case that there is no form of order which is invariably to be followed in all applications under this section, and there may be cases in which the amended specification ought to be allowed to be given in evidence. And in the subsequent case of *Allen v. Doulton (k)* it was held by the Court of Appeal that *Bray v. Gardiner* did not lay down any hard and fast rule with regard to the manner in which the discretion given by s. 19 should be exercised. The condition that the amended specification shall not be given in evidence in the action may, however, be a reasonable one to impose in some cases. Thus, in *Allen v. Doulton (l)*, where very little had been done in the action, and it was clear that the particulars of breaches would require considerable amendment in order to support the action on the amended specification, and there were other special circumstances in the case, the Court of Appeal itself exercised the discretion and imposed this condition as a term on which the leave to apply at the patent office should be granted. And in *Gaulard v. Lindsay (m)*, the plaintiffs were only allowed to give the amended specification in evidence in the pending action upon the terms (in addition to terms as to costs and amendment of pleadings) of their not claiming damages for any infringement prior to the amendment.

In *Allen v. Doulton*, the Court of Appeal considered that as the judge at Chambers had thought himself bound by *Bray v. Gardiner*, and the Divisional Court was divided in opinion, there had been, in fact, no exercise of judicial discretion. In cases, however, where the judge below has exercised his discretion, the Court of Appeal will not interfere unless they can clearly come to the conclusion that, in their view, the discretion was exercised absolutely wrongly (*n*).

(*h*) *Ante*, p. 90.

(*i*) 34 Ch.D. 668 ; 4 R.P.C. 40. See also *Gaulard v. Lindsay*, 38 Ch.D. 38.

(*k*) 4 R. P. C. 378. See judgment of FRY, L.J. See also *Gaulard v. Lindsay*, 5 R. P. C. 192, 197 ; *Lang*

*v. Whitcross, etc., Co.*, 6 R. P. C. 570 ; 7 R. P. C. 389 (H.L.)

(*l*) 4 R. P. C. 378.

(*m*) 38 Ch. D. 38.

(*n*) *Per* Lord ESHER, M.R., *Allen v. Doulton*, 4 R. P. C. 384. See

The general principle in these cases is that liberty to amend or disclaim pending the action ought not to be given unless the court can see that no injustice will be done to the defendant in the action (o). Sect. 19 (1).  
—  
NOTE.

In *Haslam Foundry, etc. v. Goodfellow* (p), where the application was made after the pleadings were closed, and the action was set down for trial, the amendment was allowed upon the terms (in addition to the terms as to costs mentioned, *ante*, p. 90), that the plaintiffs and defendants should have leave to make all necessary amendments in their pleadings after disclaimer, the plaintiffs undertaking forthwith to amend their pleadings, confining the action to the amended specification, or consent to the action being dismissed with costs and the judge reserved the power of dealing with any point which might be raised under ss. 18 or 20.

When the judge at the close of the defendant's case intimated that he was pressed with the point that a certain part of the invention was not patentable, and the trial was then, at the plaintiff's instance, postponed in order that the plaintiff might apply for leave to disclaim, reserving all questions of costs, and the disclaimer having been allowed, the plaintiff subsequently applied to amend his pleadings, it was held that this leave would not be given at that stage of the proceedings, and that the only course was to dismiss the action with costs. This was affirmed in the Court of Appeal, with an intimation that the order should have been with a reservation to the plaintiff of the right to bring a fresh action if so advised (q). In this case it appeared that the defendants had not infringed since the trial, and did not intend to make according to the amended specification.

Leave under this section has been given without imposing terms, except as to costs, proceedings in the action being stayed till after the result of the application to the Patent Office (r).

Where no terms had been imposed by the court which granted leave under this section, the law officer refused to impose any condition relating to the action (s).

As to conditions imposed by the law officer under the old practice, see *ante*, p. 77.

Where the application was made by the patentees pending a petition for revocation of the patent, it was held that the proper terms to be

also *Lang v. Whitecross, etc., Co.*, 7 R. P. C. 389; *Armstrong's Patent*, 14 R. P. C. 747.

(o) *Gaulard v. Lindsay*, 38 Ch. D. 38; *Bray v. Gardiner*, 34 Ch. D. 668. See also *Lang v. Whitecross Co.*, 6 R. P. C. 570; 7 R. P. C. 389.

(p) 5 R. P. C. 28; 37 Ch. D. 118.

(q) *Meyer v. Sherwood*, 7 R. P. C. 283.

(r) *Winter v. Baybutt*, 1 R. P. C. 76. See also *Hearson's Patent*, 1 R. P. C. 213; *Fusee Vesta Co. v. Bryant & May*, 34 Ch. D. 458; 4 R. P. C. 71.

(s) *Hearson's Patent*, 1 R. P. C. 213.

**Sect. 19 (1).** imposed on granting leave were, that the patentees should pay all the costs of the petition up to and including the application for the liberty to apply to the Patent Office, and should also undertake to prosecute their application with diligence; and it was further ordered that within fourteen days after the amendment, or after it had been ascertained that no amendment would be made, the petitioner ought to have leave to discontinue by notice, or if he did not do that, to have the same fourteen days to amend the petition and particulars of objections (*t*).

NOTE.

And where the court had revoked a patent, and the order of revocation had been entered on the Register of Patents, and the House of Lords varied the order by directing that the patent should be revoked unless the patentee within a certain time obtained leave to amend, a condition was imposed that no action should be brought in respect of infringements committed before the date of the conclusion of the hearing of the appeal (*u*).

“**By way of disclaimer.**”—The amendment here referred to is by way of disclaimer as distinguished from s. 18, which relates to amendment before the commencement of legal proceedings, and allows a patentee to amend by way of disclaimer, correction, or explanation (*v*).

And where it appeared by the evidence on the trial that the patent could not be improved by disclaimer, leave to apply at the Patent Office for amendment was refused under this section (*w*).

Where leave has been given under this section to apply to the Patent Office, the provisions of s. 18 apply as if that section stood without the words “correction or explanation” (*y*).

Restriction  
on recovery  
of damages

**20.** Where an amendment by way of disclaimer, correction, or explanation, has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill and knowledge.

This provision was first introduced by the present Act. It will probably render it unnecessary on allowance of an amendment of a

(*t*) *Re Gaulard and Gibbs' Patent*, 5 R. P. C. 189.

(*u*) *Deeley v. Perkes*, [1896] A. C. 496, 499.

(*v*) See *per* LINDLEY, L.J., *Armstrong's Patent*, 14 R. P. C. 747, 753.

(*w*) *Armstrong's Patent*, 13 R. P. C. 501; 14 R. P. C. 747.

(*y*) *Per* CLARKE, S.G., *Lang's Patent*, 7 R. P. C. 471.

clerical error in a specification, to require the condition imposed in *Dixon's Patent* (z). It does not appear to limit in any way the power of the law officer or the comptroller to impose conditions as to actions in respect of infringements committed before amendment, or to fetter the court as to the terms on which it will grant leave under s. 19 (a).

Sect. 20.

NOTE.

Where the specification claimed substantially a method of joining metal to metal by rivetting or soldering, it was held that as the method was notorious, the specification was not framed with reasonable skill and knowledge, and that under this section no damages could be given after the specification had been amended by striking out this claim (b).

For a form of order in an action for infringement on an amended specification when the defendant makes default in delivering a defence, see *Wenham v. Carpenter* (c).

**21.** Every amendment of a specification shall be advertised in the prescribed manner (d).

Advertisement of amendment.

*Compulsory Licenses (c).*

**22.** If on the petition of any person interested it is proved to the Board of Trade that by reason of the default of a patentee to grant licenses on reasonable terms—

Power for Board to order grant of licences.

- (a.) The patent is not being worked in the United Kingdom ; or
- (b.) The reasonable requirements of the public with respect to the invention cannot be supplied ; or
- (c.) Any person is prevented from working or using to the best advantage an invention of which he is possessed,

the Board may order the patentee to grant licenses on such terms as to the amount of royalties, security for payment, or otherwise, as the Board, having regard to the nature of the invention and the circumstances of the case, may deem just, and any such order may be enforced by mandamus.

Proceedings under this Act by or before the Board of Trade are regulated by s. 102A, added by the Act of 1888, s. 25, *post*.

(z) Eng. Rep., Jan. to Mar. 1881, xvi., *ante*, p. 73.

(a) See *Lang v. Whitecross Co.*, 6 R. P. C. 570 ; 7 R. P. C. 389 (H. L.).

(b) *Meyer v. Sherwood*, 7 R. P. C. 283.

(c) 5 R. P. C. 69.

(d) P. R., *post*, r. 59.

(e) See notes under P. R., *post*, rr. 60—66.

**Sect. 22.** A new patent granted after the Act by way of extension of the term of an existing patent is subject to the provisions of this section (*e*).

NOTE.

### *Register of Patents.*

Register of patents.

**23.**—(1.) There shall be kept at the Patent Office a book called the register of patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licenses under patents, and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed (*f*).

(2.) The register of patents shall be *primâ facie* evidence of any matters by this Act directed or authorised to be inserted therein.

(3.) Copies of deeds, licenses, and any other documents affecting the proprietorship in any letters patent or in any license thereunder, must be supplied to the comptroller in the prescribed manner for filing in the Patent Office.

See *post*, ss. 85, 87, 88, 89, 90, 91, 93.

The Act of 1852 provided (s. 34) for a register of patents, and (s. 35) for a register of proprietors. Under the present Act there is no separate register of proprietors, but all the matters included in that register are entered on the register of patents.

Under the Act of 1852 it was held that the register of proprietors was to contain not merely a register of documents, but any other fact which the court or the commissioners might think it desirable should be entered on the register (*g*).

It was not the practice of the Patent Office to enter on the register of proprietors documents affecting provisional protections only (*h*), and this rule still prevails. It will be observed that this and the other sections of the present Act refer in terms to "patents," that is, by s. 46, "letters patent."

The Patent Office registers mortgagees not as proprietors but only as mortgagees, and this practice is right (*i*).

(*e*) *Wastney Smith's Patent*, 2 R. P. C. 14.

(*f*) P. R., *post*, rr. 67—79.

(*g*) *Re Morey's Patent*, 25 Beav. 583.

(*h*) Johnson, *Patentees Manual* 4th ed., p. 221.

(*i*) *Van Gelder v. Sawyer, etc. Society*, 44 Ch. D. 374, 389.

The office would formerly register deeds of trust (*j*).

When, under the International Convention, a patent is granted for an invention in respect of which a foreign application is made, the patent is to be entered on the register of patents as dated of the date of the first foreign application (*k*).

“**Affecting the validity or proprietorship of patents.**”—Under the present Act the Patent Office refuses to register any document dated before the grant of the patent, but it is not decided, though the question has been raised, whether the office is justified in such refusal (*l*).

But a document signed by two persons proposing to form a syndicate to take up patents for certain countries, including England, *in re* a patent process which was not patented in England but which had been patented in a colony in the name of one of the signatories to the document, and which was by one of the parties presented for registration after a patent for the process had been granted in England, was held not to be a document capable of registration under this section (*m*).

An equitable assignment may be registered as being a document affecting the proprietorship (*n*). But a letter agreeing to grant a licence on payment of royalties to be mutually agreed upon, is not a document capable of registration, even assuming that the royalties were subsequently agreed by parol, as the document itself conferred no legal or equitable interest (*o*).

There is nothing in this section to make the registration notice of the documents registered (*p*).

### *Fees.*

**24.—(1.)** There shall be paid in respect of the several instruments described in the Second Schedule to this Act, the fees in that schedule mentioned, and there shall likewise be paid, in respect of other matters under this part of the Act, such fees as may be from time to time, with the sanction of the Treasury, prescribed by the Board of Trade; and such fees shall be levied and paid to the account of Her Majesty's

Fees in  
schedule.

(*j*) Johnson, *Patentees Manual*, 4th ed., p. 221.

(*k*) P. R., r. 29, *post*.

(*l*) *Parnell's Patent*, 5 R. P. C. 127.

(*m*) *Ibid*.

(*n*) *Casey's Patents*, [1892] 1 Ch. 101.

(*o*) *Fletcher's Patent*, 10 R. P. C. 252.

(*p*) *Heap v. Hartley*, 5 R. P. C. 603. This point was left undecided on the appeal, 42 Ch. D. 461.



**Sect. 24** (1). Exchequer in such manner as the Treasury may from time to time direct (*q*).

(2.) The Board of Trade may from time to time, if they think fit, with the consent of the Treasury, reduce any of those fees.

*Extension of Term of Patent.*

Extension of term of patent on petition to Queen in Council.

**25.**—(1.) A patentee may, after advertising in manner directed by any rules made under this section his intention to do so, present a petition to her Majesty in Council, praying that his patent may be extended for a further term ; but such petition must be presented at least six months before the time limited for the expiration of the patent.

(2.) Any person may enter a caveat, addressed to the Registrar of the Council at the Council Office, against the extension.

(3.) If Her Majesty shall be pleased to refer any such petition to the Judicial Committee of the Privy Council, the said Committee shall proceed to consider the same, and the petitioner and any person who has entered a caveat shall be entitled to be heard by himself or by counsel on the petition.

(4.) The Judicial Committee shall, in considering their decision, have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case.

(5.) If the Judicial Committee report that the patentee has been inadequately remunerated by his patent, it shall be lawful for Her Majesty in Council to extend the term of the patent for a further term not exceeding seven, or in exceptional cases fourteen, years ; or to order the grant of a new patent for the term therein mentioned, and containing any restrictions, conditions, and provisions that the Judicial Committee may think fit.

(6.) It shall be lawful for Her Majesty in Council to make, from time to time, rules of procedure and practice for

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(*q*) P. R., r. 4, and P. R., 1892, r. 4, *pcat.*

regulating proceedings on such petitions, and subject thereto such proceedings shall be regulated according to the existing procedure and practice in patent matters of the Judicial Committee. Sect. 25 (6).

(7.) The costs of all parties of and incident to such proceedings shall be in the discretion of the Judicial Committee; and the orders of the Committee respecting costs shall be enforceable as if they were orders of a division of the High Court of Justice.

The powers of the judicial committee to grant extensions were conferred by the repealed Acts, 5 & 6 Will. 4, c. 83, s. 4, and 2 & 3 Vict. c. 67.

By the first of these Acts (s. 3) power was also given to the judicial committee to confirm letters patent in certain cases where the patentee, though a real inventor, was not the first inventor. The jurisdiction was very little exercised, and is not re-enacted in the present Act. The right to apply for a confirmation was, however, a "right accrued" within the meaning of s. 113, and was therefore preserved as to "existing patents" within s. 45, subject, however, to all the liabilities to which the patent was subject before the Act of 1883 (*r*). See s. 113, *post*.

The judicial committee may now call in an assessor in extension cases. See s. 28 (2), *post*, p. 146.

By an Order in Council, dated November 26th, 1897, rules for regulating the practice of the judicial committee under this section have been made, to take effect on and after January 1st, 1898. Hitherto the practice has been regulated by the rules in force at the date of the commencement of the Act which are printed in former editions of this work. The new rules embody substantially the existing practice with some additions. See Judicial Committee Rules, *post*.

#### SUB-SECTION (1).

"**Patentee.**"—This word (s. 46) includes the person for the time being entitled to the benefit of a patent. An assignee can, therefore, as he could under the old Acts (*s*), obtain an extension. For the considerations affecting applications by assignees, see *post*, p. 112.

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(*r*) *Jablochkoff's Patent*, [1891] A. C. 293; see also *Brandon's Patent*, 9 App. Cas. 589.

(*s*) 5 & 6 Will. 4, c. 83; 7 & 8 Vict. c. 69; *Russell v. Ledam*, 14 M. & W. 588; affirmed 1 H. L. C. 687.

**Sect. 25 (1).** So, also, a petition may be presented by the administrator of a deceased patentee (*t*).

NOTE.

In *Noble's Patent* (*u*), upon an objection that a person to whom assignees of the patent had agreed to assign it had no *locus standi* on a petition, it was said to be immaterial whether a party had a legal or equitable interest. But in *Church's Patents* (*v*), where the patent had been mortgaged, it was held that the mortgagee, as the legal owner, ought to concur in the petition; and in *Willacy's Patent* (*x*), where it appeared on the face of a petition by a person claiming as equitable owner, who had purchased the patent from the assignee of the trustee in bankruptcy of the patentee, but had not obtained an assignment, that it was possible that the legal personal representative of the patentee might have interest in the patent, the petition was ordered to stand over in order that such legal personal representative might be added as a co-petitioner, and the legal owner of the patent was also joined as a co-petitioner when the petition was amended.

**"After advertising," etc.**—See Judicial Committee Rules, r. 1, *post*.

Requisites  
of petitions.

**"Petition."**—Prolongation is a matter of favour and not of right (*y*), and a petitioner seeking the grace and favour of the Crown is bound to strict truth, to *uberrima fides*, in his statements (*z*); and in *Pitman's Patent* (*a*) the judicial committee stated that for the future they would invariably act on the principle that a petition which failed to state everything belonging to the patent fairly and fully should therefore be dismissed.

What should  
be stated.

Among the matters which should be thus stated in the petition were the names and dates of, and material facts affecting, any foreign patents obtained by the English patentee. This was mainly in regard to s. 25 of the Patent Act, 1852 (now repealed and not re-enacted in the present Act, see *post*, under s. 45), which made the duration of an English patent depend in certain cases on the date of the foreign patent (*b*). But the petitioner is also bound to state in his petition and accounts the remuneration which the patentee has derived from his foreign patents, as well as from his English patent (*c*).

(*t*) *Downton's Patent*, 1 Webst. 565; *Heath's Patent*, 2 Webst. 247.

(*u*) 7 Moo. P. C. C. 191.

(*v*) 3 R. P. C. 95.

(*x*) 5 R. P. C. 690.

(*y*) *Adair's Patent*, 6 App. Cas. 178.

(*z*) *Clark's Patent*, L. R. 3 P. C. 421, 426; *Johnson's Patent*, L. R. 4 P. C. 75, 83.

(*a*) L. R. 4 P. C. 86; see also *Adair's Patent*, 6 App. Cas. 178.

(*b*) *Johnson's Patent*, L. R. 4 P. C. 82; *Pitman's Patent*, L. R. 4 P. C. 84; *Adair's Patent*, 6 App. Cas. 178.

(*c*) *Johnson's Patent*; *Adair's Patent*, *ubi supra*; *Bower-Barff Patent*, [1895] A. C. 675.

TRADE MARKS ACT, 1883.

So, also, where the petition was nominally by one company, but really was for the benefit of another company, to whom the shares in the first company had been transferred, and no statement of this fact appeared in the petition, and the real facts were only brought forward by the Attorney-General, the omission to state the real circumstances was held sufficient ground for refusing the petition (*d*). Sect. 25 (1).  
—  
NOTE.

And where on the face of the petition it appeared that the petitioners were a company who had purchased the patent, and it turned out that no company, in a commercial sense, had ever been formed at all, but that the persons really interested were the petitioner and a creditor of his, the requirements of the Companies Acts having been met by giving one share to each of seven persons, and these facts were not stated on the petition, extension was on that ground refused (*e*). And every petition by a company ought to state whether there have been any, and if any, what, dealings with the shares (*f*).

So, also, where one of several joint patentees had by contract with the other patentees carried on business in the patented article, and had carried on its manufacture in combination with the manufacture of other articles, and this fact did not appear on the petition, and there was nothing in the accounts to show that there was any other manufacture except that of the patented article, the petition was dismissed (*g*).

In *Livel's Patent* (*h*), it was said on the part of the Crown, that the patentee ought to show the state of knowledge at the time of his patent. And in the same case, where an earlier specification which had a considerable bearing on this point was known to the patentee, but was not referred to in the petition, the judicial committee, though not dismissing the petition on that ground, stated that it would have been better if it had been brought forward, although the petitioner (the patentee) said that he had considered the claim of the earlier patent to be a futile claim.

In *Hutchinson's Patent* (*i*), a petitioner was allowed to amend his petition, but the rules above stated had not then been expressly laid down. A petitioner, however, who had, in ignorance of their lordships' rule, omitted in his petition to give the proper information as to his foreign patents, was allowed, on application made before the hearing, to add a supplementary paper giving the necessary information (*k*). Amendment  
of petition.

(*d*) *Reece's Patent*, Eng. Rep. Jan. to Mar. 1881, xiv.

(*e*) *Horsey's Patent*, 1 R. P. C. 225.

(*f*) Per Lord WATSON, *Barff's and Bower's Patent*, 12 R. P. C. 383, 385.

(*g*) *Yates and Kellett's Patent*, 12 App. Cas. 147.

(*h*) 9 R. P. C. 327, 331; see also *Standfield's Patent*, 15 R. P. C. 17.

(*i*) 14 Moo. P. C. 364.

(*k*) *Reece's Patent*, Eng. Rep. Jan. to Mar. 1881, xiv.

**Sect. 25 (1).** Where the patents are cognate patents, or the inventions have been worked together, application for the extension of more than one patent may be included in one petition (*l*).

NOTE.

“**Such petition must be presented,**” etc.—Under the repealed Acts (*m*), the presentation of the petition six months before the expiration of the patent was only required in cases where the petition was not prosecuted with effect during the existence of the patent. The requirement is now general. It did not, however, apply to patents existing at the commencement of the Act, the right to present a petition for extension at any time before the expiration of the patent being “a right or privilege accrued” under the repealed Acts, and therefore saved by s. 113 of this Act (*post*) (*n*). But this right was subject to all the liabilities incurred under the repealed Acts, and therefore, where a petition not in time under the Act of 1883 was presented, asking for an extension of the patent, and it appeared that the case was within s. 25 of the Act of 1852 (see *post*, p. 346), the petition was dismissed (*o*). So also, when the petition was presented so late that the condition of the repealed Acts requiring the petition to be prosecuted with effect before the expiration of the patent could not possibly be complied with (*p*).

#### SUB-SECTION (2).

Opposition.

“**Any person.**” —There is no requirement of interest in the opponent as in the case of opposition to the grant of patents or the amendment of specifications (s. 11 (3) and s. 18 (4)) (*q*). See *post*, under sub-s. (7), “*Costs.*”

“**Caveat.**” —The caveat must be entered in the name of the actual opposer, not in that of his agent (*r*).

The statutory provisions as to particulars of objections were held not to apply to proceedings for extension under the old Acts, and opponents who had objected on the ground of want of novelty were allowed to give evidence of instances not mentioned in their objections (*s*). The present Act, like the repealed Acts, contains no provision requiring particulars of objections in extension cases. In a case, however, where the opposition succeeded in an instance of prior user not mentioned in the objections no costs were given to the opponents (*t*).

(*l*) *Johnson and Atkinson's Patents*, L. R. 5 P. C. 87; *Clarke's Patent*, L. R. 3 P. C. 421; *Church's Patents*, 3 R. P. C. 95. See also *Erard's Patent*, 1 Webst., 557.

(*m*) 5 & 6 Will. 4, c. 83, s. 4; 2 & 3 Vict. c. 67, s. 2.

(*n*) *Brandon's Patent*, 9 App. Cas. 589.

(*o*) *Jablochkoff's Patent*, [1891] A. C. 293.

(*p*) *Marshall's Patent*, [1891] A. C. 430.

(*q*) *Lowe's Patent*, 8 Moo. 1.

(*r*) *Lowe's Patent*, *ubi supra*.

(*s*) *Ball's Patent*, L. R. 4 App. Cas. 171.

(*t*) *Stewart's Patent*, 3 R. P. C. 7

## SUB-SECTION (3).

Sect. 25 (3).

NOTE.

The judicial committee had, under s. 4 of the Act of 1835, jurisdiction to entertain a petition referred to them by the Crown, seeking to revoke an Order in Council made on their recommendation, on an application by patentees for a prolongation of letters patent, and to recall the warrant for sealing (*u*).

“**By counsel.**”—The judicial committee will not hear in opposition more than two counsel in the same interest (*x*). The Attorney-General always appears, whether the extension be opposed or not, to watch the case on behalf of the Crown (*y*), and he so far represents the Government and the public generally that a Government Department who had not entered a caveat in time were not allowed, the Attorney-General being present, to enter a caveat and be heard in opposition (*z*). See also Judicial Committee Rules, under r. VIII., *post*.

The Attorney-General is not required to give notice of the grounds of any objection he may think fit to take or of any evidence which he may think fit to place before the Lords of the Committee (*a*).

## SUB-SECTION (4).

The rules adopted by the judicial committee in extension cases have not been altered by this sub-section (*b*). Those rules have been thus stated: “The general object of the statutable jurisdiction of the committee, in respect to advising an extension of the terms of the letters patent, is the reward of the inventor in cases where there has been extraordinary merit in the invention, but where, from circumstances, he has failed to reap any adequate remuneration for his invention during the currency of the term of the letters patent” (*c*).

“**Nature and merits of the invention in relation to the public.**”—It is, of course, not easy to define the degree of merit which will justify the extension of a patent. Merit of invention.

An invention “may have been the successful result of long and patient labour, and of great and unaided ingenuity, without which, for

(*u*) *In re Schlumberger*, 9 Moo. P. C. 1.

(*x*) *Woodcroft's Patent*, 3 Moo. P. C. 172 n.

(*y*) 1 Webst. 557 n.

(*z*) *Pettit Smith's Patent*, 7 Moo. 133.

(*a*) Judicial Committee Rules, r. viii., and see, under the old rules, *Ball's Patent*, L. R. 4 App. Cas. 171; *Stewart's Patent*, 3 R. P. C. 7;

*Church's Patents*, 3 R. P. C. 95, 101; *Livet's Patent*, 9 R. P. C. 327.

(*b*) *Newton's Patents*, 9 App. Cas. 592.

(*c*) *Per Sir J. COLVILE, Pitman's Patent*, L. R. 4 P. C. 87. See also *Honiball's Patent*, 9 Moo. P. C. 393; *Markwick's Patent*, 13 Moo. P. C. 313; *Derosne's Patent*, 2 Webst. 4; *Norton's Patent*, 1 Moo. P. C. (N.S.) 339; *Beanland's Patent*, 4 R. P. C. 489.

**Sect. 25 (4).** all that appears, the public would never have had the benefit of the discovery ; or it may have been but a happy accident or a fortunate guess ; or it may have been very closely led up to by an earlier and, in a true sense, more meritorious but still incomplete experiment. Different degrees of merit must surely be attributed to an inventor under these different circumstances (*d*).”

NOTE.

The smallness of the step made is not to lead to any inference against the merit of the invention (*e*), nor is it any objection that great improvements have been made on the original invention (*f*), or that the invention is an improvement on a former patent taken out by the patentee in consequence of a communication from abroad (*g*), or that some alteration has since the patent been made in the actual working of the invention (*h*).

But if the original invention was a failure, there is no ground for extension, although the defect has since been remedied (*i*).

So, also, where the invention as described in the specification succeeded to a limited extent, but was only rendered a success by improvements introduced from abroad by persons other than the patentee (*k*).

And where the invention was beneficial, but it was not shown that there was any special or peculiar advantage in it in relation to the public, an extension was refused (*l*).

The fact that the patent may tend to fetter the public in the use of known sanitary agents has been considered a reason for refusing extension (*m*).

Utility in  
relation to  
merit.

The public utility of the invention is an essential element to be taken into account on the question of extension (*n*).

The utility to be considered is not that amount of utility which would be necessary to support a patent, but that kind of utility which might more properly be described as merit (*o*). In order to obtain an extension there must be in the patented invention merit beyond that ordinary merit which would be sufficient to sustain a patent in the

(*d*) *Per* COLERIDGE, J., *Hills' Patent*, 1 Moo. P. C. (N.S.) 265.

(*e*) *Soames' Patent*, 1 Webst. 735 ; *Derosne's Patent*, 4 Moo. P. C. 418 ; *Hazeland's Patent*, 11 R. P. C. 467, 470.

(*f*) *Galloway's Patent*, 1 Webst. 727.

(*g*) *Bovill's Patent*, 1 Moo. P. C. (N.S.) 348.

(*h*) *Heath's Patent*, 2 Webst. 257.

(*i*) *Bell's Patent*, 2 Webst. 160.

(*k*) *Woodcroft's Patent*, 1 Webst. 740.

(*l*) *Bailey's Patent*, 1 R. P. C. 1, 3 ; *Beanland's Patent*, 4 R. P. C. 489.

(*m*) *McDougal's Patent*, L. R. 2 P. C. 1 ; *McInnes' Patent*, L. R. 2 P. C. 54 ; *Sillar's Patent*, reported Goodeve, Pat. Cas. p. 581.

(*n*) *Woodcroft's Patent*, 2 Webst. 29 ; *Betts' Patent*, 1 Moo. P. C. (N.S.) 49 ; *McDougal's Patent*, L. R. 2 P. C. 1.

(*o*) *Saxby's Patent*, L. R. 3 P. C. 294. See also *Betts' Patent*, *ubi supra*.

first instance, that is to say, there must be something beyond that merit which, if there were a plea of invalidity on the ground of the inutility of the invention, would support a patent against such a plea (*p*). **Sect. 25 (4).**

So, also, an invention, whether or not it may have sufficient novelty to sustain a patent, may have been so far anticipated as to deprive it of that degree of novelty which is necessary to justify a prolongation (*q*). **NOTE.** Novelty in relation to merit.

Where, however, there was no evidence that the previous invention (which was patented) had produced a workable machine, or had ever been worked at all, though it resembled the patentee's invention in many respects, and the patentee's invention was undoubtedly useful, the objection on the point of novelty was not allowed to prevail, the other considerations being in favour of the patentee (*r*).

Where the invention has not been brought into use notwithstanding the efforts of the patentee, there is a very strong presumption against its utility (*s*). But this presumption may be rebutted (*t*), as where the subject of the invention has a limited market (*u*), or is an article which would not be used by the public generally, as a soldier's knapsack (*x*), or was of such a nature as not to be likely to come into immediate use (*y*), or where the article would not be likely to be remunerative within the ordinary term of a patent (*z*), or was an article which the public viewed with distrust (*a*). So, also, where, from circumstances beyond the control of the patentee, the merits of the invention have not been sufficiently appreciated (*b*), or where, from illness extending over several years, the result of an accident, the petitioner has been incapacitated from pushing forward his invention (*c*). And the presumption arising from non-user was held to be rebutted where the invention was one of absolute originality and a high degree of merit, and the non-user had arisen from the conviction of the patentee himself that he had not brought his principle into such practical action as would justify him in offering a machine to the public or to the trade (*d*). **Invention not brought into use.**

(*p*) *Per* Sir W. GROVE, *Stoney's Patent*, 5 R. P. C. 520.

(*q*) *Stewart's Patent*, 3 R. P. C. 7.

(*r*) *Church's Patents*, 3 R. P. C. 95, 102.

(*s*) *Allan's Patent*, L. R. 1 P. C. 507; *Simister's Patent*, 1 Webst. 723; *Bakewell's Patent*, 15 Moo. P. C. 385; *Hall's Patent*, 12 R. P. C. 401; *Dolbear's Patent*, 13 R. P. C. 203.

(*t*) *Allan's Patent*, L. R. 1 P. C. 507; *Bakewell's Patent*, 15 Moo. P. C. 385; *Hughes' Patent*, 4 App. Cas. 174.

(*u*) *Herbert's Patent*, L. R. 1 P. C. 399; *Ruthven's Patent*, Johnson Pat. Man. 213.

(*r*) *Berrington's case*, cited in *Hughes' Patent*, 4 App. Cas. 179, and *Higgins' Digest*, p. 274.

(*y*) *Southworth's Patent*, 1 Webst. 487; *Semet and Solvay's Patent*, [1895] A. C. 78, 81.

(*z*) *Jones' Patent*, 1 Webst. 579.

(*a*) *Payne's Patent*, cited *Higgins' Digest*, p. 266.

(*b*) *Kollman's Patent*, 1 Webst. 565.

(*c*) *Roper's Patent*, 4 R. P. C. 201.

(*d*) *Southby's Patent*, [1891] A. C. 432.



## Sect. 25 (4).

## NOTE.

So, also, effect will be given in favour of extension to the circumstance that the invention had been violently resisted in the trade (e), that litigation had prevented the patentee and his assignees from receiving remuneration (f), or that the patentee had been in embarrassed circumstances (g).

And in every case where the invention has not been actually used the question is whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility, and where there was strong and unanswered evidence of utility an extension was granted, although the invention had not been used in England during the whole term (h).

But it is not enough to rebut the presumption of inutility to allege that the invention can only be carried on by a company, and that existing companies would not adopt it (i).

“Profits made by the patentee as such.”—An applicant for prolongation has always been required to produce to the judicial committee accounts showing in the clearest manner the profit and loss of working the patent (k), and the *onus* is upon him of satisfying the committee, in a manner which admits of no controversy, what has been the amount of remuneration which, in every point of view, the invention has brought to him, and it is his duty to frame his accounts in such a shape as to leave no doubt on this point (l).

For this purpose the patentee should be prepared to give the clearest evidence of everything which has been paid and received on account of the patent, and should keep distinct and separate patent accounts (m). And the fact that a patentee has for sufficient reasons destroyed his books will not relieve him from the consequences of being unable to furnish proper accounts (n). And where the accounts were not statements which appeared in the books but were only the accountant's corrections of the books, and the books had been so kept that it was impossible without a very long, minute, and laborious investigation to say whether the patentee had or had not been adequately remunerated, the accounts were held insufficient, and the petition was dismissed (o).

(e) *Roberts' Patent*, 1 Webst. 573; *Stafford's Patent*, 1 Webst. 563.

(f) *Pettit Smith's Patent*, 7 Moo. P. C. 133; *Heath's Patent*, 2 Webst. 257.

(g) *Wright's Patent*, 1 Webst. 575; *Southworth's Patent*, *ubi supra*.

(h) *Hughes' Patent*, 4 App. Cas. 174.

(i) *Bakewell's Patent*, 15 Moo. P. C. 385.

(k) *Trotman's Patent*, L. R. 1 P. C. 118; *Betts' Patent*, 1 Moo.

P. C. (N.S.) 49; *Hills' Patent*, 1 Moo. P. C. (N.S.) 258.

(l) *Saxby's Patent*, L. R. 3 P. C. 292; *Clark's Patent*, L. R. 3 P. C. 421.

(m) *Betts' Patent*, 1 Moo. P. C. (N.S.) 61; *Adair's Patent*, 6 App. Cas. 178.

(n) *Yates and Kellett's Patent*, 12 App. Cas. 149.

(o) *Lake's Patent*, [1891] A. C. 240.

Profits of patent to be shown.

Necessity of accurate accounts.

Circumstances in favour of extension.

Where the only evidence of utility was as to one part of the invention, Sect. 25 (4). and the accounts did not show that the expenditure charged related only to that part, they were considered unsatisfactory, and an extension was refused (p). It is a question to be considered in each particular case whether it is or is not justifiable for a patentee to state his items of expense in a lump, or whether it is necessary to disentangle them so that they may be judged of separately (q).

NOTE.

Under the old practice the balance sheet was to be handed over to the Solicitor for the Treasury before the hearing (r). By the new rules, three copies of the balance sheet are to be furnished for his use at least fourteen days before the day fixed for hearing, and he is to have facilities for inspecting and taking extracts from the petitioner's books of accounts (s).

It must be remembered that the question is not what the patentee has received, but what has been made, or by proper judgment and application might have been made, by the patent, and therefore the profits made by licensees must appear in the accounts (t). There may be circumstances under which the petitioner may not be bound to show the profits of licensees who have paid royalties. But the case of persons having a free licence stands on an entirely different footing, and their profit must be shown (u).

Profits of licensees to be included.

The applicant must also show what are the profits derived from any foreign patents he may have for the invention, as well as the profits from the English patent (x), and also the profits from the sale of the patented article for exportation (y). In strictness these should be stated in the petition (z).

And of foreign patents.

Although the words "profits of the patentee as such" specify one particular class of profits as absolutely necessary to be considered, there is nothing in the section to intimate that the committee are not to look at other classes of profits, and the accounts relating to foreign patents must still, as hitherto, be produced (a).

And when the patent rights have been transferred wholly or in part to a company, it is essential that there should be deposited, not only the patentee's accounts of his profits, but also the account of the profits of

(p) *Willaooy's Patent*, 5 R. P. C. 690.

(q) *Thomas and Gilchrist's Patent*, 9 R. P. C. 367, 372.

(r) *Perkin's Patent*, 2 Webst. 14.

(s) *Judicial Committee Rules*, r. iii. *post*.

(t) *Trotman's Patent*, L. R. 1 P. C. 123; *Sawby's Patent*, L. R. 3 P. C. 298; *Hills' Patent*, 1 Moo. P. C. (N.S.) 258, 268; *Lane Fox's Patent*, 9 R. P. C. 411.

(u) *Thomas and Gilchrist's Patent*, 9 R. P. C. 367, 372.

(x) *Johnson's Patent*, L. R. 4 P. C. 82 (disapproving of *Poole's Patent*, L. R. 1 P. C. 517); *Adair's Patent*, 6 App. Cas. 178; *Bower-Barff Patent*, [1895] A. C. 675.

(y) *Hardy's Patent*, 6 Moo. P. C. 441.

(z) *Bower-Barff Patent*, *ubi supra*.

(a) *Newton's Patents*, 9 App. Cas. 592.

**Sect. 25 (4).** the company to whom the patent has been transferred (*b*). So, also, where a third share in the patent had been assigned to persons to whom a free licence was given, it was held that the profits made by virtue of the assignment of the third share, so far as the manufacturing profits were assignable to the patent, and also the profits made by the use of the free licence as compared with the profits made by other persons who had paid royalties, ought to appear in the accounts (*c*).

**.NOTE.**

Where the patentee had in consideration of a sum of money paid by a company, assigned the patent to the company subject to a licence, and the company paid the consideration money not to the patentee but to the licensee, and worked the patent and granted licences and afterwards re-assigned to the patentee, it was held that the accounts ought to show an account of the original transaction and of the licence, and of the working of the patent in the hands of the company, and this not having been done, the petition was dismissed (*d*).

And where the patent was assigned by the petitioner to a company subject to certain mortgages which the company undertook to pay off, the omission of any reference to the transaction in the accounts was held a fatal objection to the petition (*e*).

The remuneration from the patent as a whole is to be looked to (*f*). And for this purpose the prices received on sales of the patent by the patentee and successive assignees may be added together (*g*).

**Allowances  
in accounts.**

An allowance may be made in the accounts to a patentee who is a manufacturer for his personal superintendence of the business of the patent (*h*), and a patentee may deduct his personal expenses for the exclusive devotion of his time in bringing the invention into practical operation and public notice (*i*). But if such allowances or deductions are claimed, the claim must appear on the petition or the accounts, otherwise no evidence can be given or argument addressed to the judicial committee in support of them (*k*).

So, also, when the petitioner desires to claim that certain of his profits should not be considered "profits of the patentee as such," notice should be given either in the petition or the accounts, that such a claim is to be made (*l*).

(*b*) *Deacon's Patents*, 4 R. P. C. 119; *Lane Fox's Patent*, 9 R. P. C. 411.

(*c*) *Thomas and Gilchrist's Patent*, 9 R. P. C. 367.

(*d*) *Lane Fox's Patent*, 9 R. P. C. 411.

(*e*) *Lane Fox's Patent*, *ubi sup.*

(*f*) *Perkin's Patent*, 2 Webst. 9. See also *Furness' Patent*, 2 R. P. C. 175.

(*g*) *Carmont's Patent*, 14 R. P. C. 239.

(*h*) *Perkin's Patent*, 2 Webst. 8, 17; *Roberts' Patent*, 1 Webst. 575.

(*i*) *Carr's Patent*, L. R. 4 P. C. 539; *Newton's Patent*, 14 Moo. P. C. 156; *Roberts' Patent*, 1 Webst. 575.

(*k*) *Bailey's Patent*, 1 R. P. C. 1.

(*l*) *Bailey's Patent*, *ubi supra*.

But where the patentee did not manufacture but only granted licences, a charge for expenses in visiting and superintending the licensees' establishments was disallowed (*m*). Sect. 25 (4)  
—  
NOTE.

An allowance may also be made for the expenses of taking out and defending the patent (*n*), and for experiments (*o*).

But though deductions for law expenses in defending the patent are in general a fair head of deduction, still, if the patentee has compromised actions and given up claims to costs to which he had an apparent title, it is not proper to deduct these expenses in an unexplained lump (*p*).

A foreign patentee residing abroad may also be allowed to deduct moneys paid by him to an agent for the purpose of getting the patented article into use in England (*q*).

Where a patentee has sold his patent for a small sum when it was thought to be of little value, and afterwards bought it back at an increased value, the item was not allowed in the accounts as one of loss (*r*).

In *Darby's Patent* (*s*), where the patentee had clearly suffered a very heavy loss in endeavouring to introduce his invention, a prolongation was granted although the accounts had not been accurately kept during the first three years of the patent.

The judicial committee also require that the profits made by the patentee as manufacturer, although not in a strict point of view profits of the patent, should be taken into consideration on the question of remuneration. It may be that possession of the patent virtually secures to the patentee his power of commanding orders as a manufacturer (*t*). In such a case it was held that the two heads of profit could not be severed, and a very considerable sum having been in fact received, an extension was refused (*u*). And this principle was applied to manufacturing profits arising from the manufacture of the materials of which the patented article was made (*x*). Manufacturers' profits to be taken into account.

(*m*) *Trotman's Patent*, L. R. 1 P. C. 125.

(*n*) *Roberts' Patent*, 1 Webst. 575; *Kay's Patent*, 1 Webst. 572; *Galloway's Patent*, 1 Webst. 729; *Betts' Patent*, 1 Moo. P. C. (N.S.) 49.

(*o*) *Kay's Patent*, 1 Webst. 572.

(*p*) *Hills' Patent*, 1 Moo. P. C. (N.S.) 258, 268.

(*q*) *Poole's Patent*, L. R. 1 P. C. 514.

(*r*) *Wield's Patent*, L. R. 4 P. C. 89.

(*s*) 8 R. P. C. 380, 384.

(*t*) *Saxby's Patent*, L. R. 3 P. C. 295; *Betts' Patent*, 1 Moo. P. C. (N.S.) 49; *Hills' Patent*, 1 Moo. P. C. (N.S.) 258; *Johnson's Patent*, L. R. 4 P. C. 75; *Willans and Robinson's Patent*, 13 R. P. C. 550.

(*u*) *Muntz's Patent*, 2 Webst. 121. See also *Saxby's Patent*, L. R. 3 P. C. 292.

(*x*) *Newton's Patent*, Eng. Rep. Jan. to Mar. 1881, xvi.

**Sect. 25 (4).** Where a considerable profit on the sale of the patented article had been made, the judicial committee refused to consider the difference between the actual cost of the article and the receipts on the sale (which difference was large) as mere profit made by the patentee as salesman, but considered that a great portion of that sum was profit which the patentee received, because having the patent he was able to sell the article (*y*).

NOTE.

Salesman's profits.

But deductions for these sometimes allowed.

The principle, however, was not to be pushed to an unreasonable extreme (*z*), and in some cases the profits as manufacturer have been deducted in ascertaining the profits of the patent (*a*). But the committee refused to accept as reasonable, without explanation, an estimate by the patentee that the manufacturing profits were two-thirds of the total profits (*b*).

When the patent is worked as part of a general manufacturing business, the accounts should be so kept as to show every thing which would apply to the patent business, and when this had not been done and the accounts did not show satisfactorily that the various items charged were attributable to the patent part of the business only, and not to the factory portion, extension was on that ground refused (*c*).

Practice when accounts imperfect.

The hearing of a petition has been adjourned for the purpose of enabling the petitioner to produce further evidence as to his profits, but this was only as an indulgence (*d*), and would probably not be now allowed (*e*). An adjournment was refused when the objection was the absence of accounts of certain foreign patents, and the attention of the petitioner had in the grounds of objection delivered by the opponents been called to the omission (*f*). And where accounts were unsatisfactory, extension was refused even though the committee considered the invention meritorious, and were not satisfied that the petitioner had been sufficiently remunerated (*g*).

If the accounts are on the face of them unsatisfactory, the committee will adjudicate on the accounts without reference to the merits of the invention (*h*); but if the accounts are *prima facie* satisfactory, the

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|--|---|
| ( <i>y</i> ) <i>Bailey's Patent</i> , 1 R. P. C. 1.  | ( <i>e</i> ) See <i>Clark's Patent</i> , L. R. 3 P. C. 421.   |
| ( <i>z</i> ) <i>Hills' Patent</i> , 1 Moo. P. C. (N.S.) 258, 270.                                    | ( <i>f</i> ) <i>Newton's Patents</i> , 9 App. Cas. 592; 1 R. P. C. 177.   |
| ( <i>a</i> ) <i>Betts' Patent</i> , 1 Moo. P. C. (N.S.) 49; <i>Galloway's Patent</i> , 1 Webst. 729. | ( <i>g</i> ) <i>Adair's Patent</i> , 6 App. Cas. 178.   |
| ( <i>b</i> ) <i>Hills' Patent</i> , <i>ubi supra</i> .   | ( <i>h</i> ) <i>Saxby's Patent</i> , L. R. 3 P. C. 292; <i>Clark's Patent</i> , L. R. 3 P. C. 421; <i>Wield's Patent</i> , L. R. 4 P. C. 89; <i>Newton's Patents</i> , 9 App. Cas. 592. |
| ( <i>c</i> ) <i>Duncan and Wilson's Patent</i> , 1 R. P. C. 257.                                     |   |
| ( <i>d</i> ) <i>Perkin's Patent</i> , 2 Webst. 17; <i>Heath's Patent</i> , <i>Ibid.</i> 256.         |   |

petitioner will be allowed to prove the merits without going first into **Sect. 25 (4)**.  
the accounts (i).

Opposers have not been allowed production and inspection of the petitioner's accounts prior to the hearing (k), but under the Judicial Committee's Rules they can obtain copies of the accounts lodged by the petitioner. See Judicial Committee Rules, r. V., *post*.

Some forms of accounts will be found in the Appendix, *post*.

**"All the circumstances of the case."**—It has been considered that it is no objection to an extension that during the existence of the patent an Act of Parliament has been passed which might in effect compel the use of the patented article (l).

The applicant must show that he has used his best endeavours to introduce his invention (m). If he has slumbered on his rights and permitted parties to infringe with impunity (n), or if there has been intentional delay on his part in bringing out the invention (o), or the proper working the invention has been postponed by reason of disputes between the co-owners of the patent (p), extension may be refused. The petitioner ought also to be able to show that he has been ready to give the public the benefit of his invention by granting licences on fair terms (q). And in any case he must prove that the circumstances have ceased which prevented the invention being lucrative, and that it is really coming into use (r).

The fact that the petitioners had taken out a patent for an improved machine which had almost shut out the use of the original patent has been taken into consideration against the petitioners (s).

The costly experiments of the inventor should be taken into account (t).

The merit of an importer is less than that of an inventor (u), but in Imported  
a proper case an importer may obtain an extension (x). inventions.

The circumstances, however, that the invention was imported, and that the owners of the English patent were foreigners, who made the

(i) *Houghton's Patent*, L. R. 3 P. C. 461.

(k) *Bridson's Patent*, L. R. 7 Moo. P. C. 499.

(l) *Fvarde's Patent*, 9 Moo. P. C. 376.

(m) *Honiball's Patent*, 9 Moo. P. C. 393; *Norton's Patent*, 1 Moo. P. C. (N.S.) 339.

(n) *Simister's Patent*, 1 Webst. 723.

(o) *Norton's Patent*, 1 Moo. P. C. (N.S.) 339.

(p) *Patterson's Patent*, 6 Moo. P. C. 469.

(q) See *Stewart's Patent*, 3 R.P.C. 7, 10.

(r) *Woodcroft's Patent*, 2 Webst. 29.

(s) *Nussey and Leachman's Patent*, 7 R. P. C. 22.

(t) *Per Lord WATSON, Davies' Patent*, 11 R. P. C. 28.

(u) *Soames' Patent*, 1 Webst. 733; *Johnson's Patent*, (Willcox & Gibbs), L. R. 4 P. C. 75; *Bell's Patent*, 2 Webst. 160; *Claridge's Patent*, 7 Moo. P. C. 394.

(x) *Berry's Patent*, 7 Moo. P. C. 187; *Claridge's Patent*, *ubi supra*.

**Sect. 25 (4).** article abroad and sent it over to England for sale, were considered as being against a prolongation (*y*).

**NOTE.**

The fact that the patentee at a late period of the patent disclaimed part of the invention has been urged, and apparently successfully, against an extension, as if granted, it would interfere with what others had been doing in reliance on the invalidity of the patent (*z*).

A patent granted to an English inventor may be renewed though a foreign one taken out by the same inventor for the same invention has been allowed to expire (*a*).

Expiry of  
foreign  
patent.

Section 25 of the Act of 1852 (see *post*, p. 346), repealed by the present Act, and not re-enacted, provided that where a foreign patent had been granted before the date of the English patent, the rights under the latter should determine with the determination of the foreign patent. And the judicial committee were accustomed to act on the spirit of this enactment in cases which were not actually within the letter of the statute, and where the patentee in England was a foreigner, would refuse extension if the foreign patents, even though subsequent in date to the English patent, had expired or were on the point of expiring (*b*).

Now, however, applications under the present Act are to be dealt with on the footing that the above-mentioned enactment has been repealed, and extensions may be granted in all cases notwithstanding the expiry of foreign patents for the invention (*c*).

But the lapse on expiry of foreign patents is still one of the circumstances to be taken into consideration (*d*).

The circumstance that the patent sought to be prolonged is the last survivor of several patents, the others of which were foreign, is a great obstacle to granting a renewal of it. And in such a case when the patent had not been pushed in the earlier part of its existence, and the invention was not of rare or exceptional merit, extension was refused (*e*).

Where the foreign and English patents represented concurrent and independent inventions by different inventors and the foreign patent was shortly about to expire, it was held that no prolongation of the English patent would be granted (*f*).

Applications  
by assignees.

An assignee has not been viewed with the same favour as the original patentee (*g*), and applications by assignees when no benefit could come

(*y*) *Johnson's Patent*, L. R. 4 P. C. 80; *Pitman's Patent*, *Ibid.* 88.

(*z*) *Simister's Patent*, 1 Webst. 723.

(*a*) *Adair's Patent*, 6 App. Cas. 176; *Johnson's Patent*, L. R. 4 P. C. 75.

(*b*) *Winan's Patent*, L. R. 4 P. C. 93; *Blake's Patent*, L. R. 4 P. C. 535; *Newton's Patent*, 15 Moo. P. C. 176; *Normand's Patent*, L. R. 3 P. C. 193.

(*c*) *Semet and Solvay's Patent*, [1895] A. C. 78.

(*d*) *Semet and Solvay's Patent*, *ubi supra*.

(*e*) *Pieper's Patent*, 12 R.P.C. 292.

(*f*) *Hills' Patent*, 1 Moo. P. C. (N.S.) 258.

(*g*) *Norton's Patent*, 1 Moo. P. C. (N.S.) 339; *Claridge's Patent*, 7 Moo. P. C. 394; *Normand's Patent*, L. R. 3 P. C. 193.

to the patentee have been refused (*h*). So, also, when the patentee would have no legitimate interest in making the application, as for instance, when he has been sufficiently remunerated at the expense of the public (*i*).

Sect. 25 (4).

NOTE.

Conditions for the benefit of the patentee have, where extension has been granted to assignees, been inserted in the new letters patent (*k*).

And when a petition was presented by a patentee and his mortgagees extension has been granted to the patentee alone (*l*). Where, however, the patent had been mortgaged and the mortgagee was not a party to the petition, extension was only granted on the terms that the petitioner should undertake to give to the mortgagee the same security over the new letters patent as he had over the existing patent (*m*).

But extension may be granted to an assignee without any such conditions as above, if the patentee has ceased to have any connection with the working of the patent (*n*), or has received a large sum from the assignee (*o*).

An agreement by a patentee to grant an exclusive licence to a company, and to obtain an extension of the patent, was held to be against public policy, and an application for extension by the patentee was refused (*p*).

Exclusive licence.

The grant of an exclusive licence during the term is a point not in favour of the prolongation of a patent, but this circumstance was not considered in a case where the invention was of great merit and the patentee had suffered heavy loss and the licensee claimed no benefit under the new patent if granted (*q*), nor where the patentee had granted an exclusive licence because he could not otherwise introduce his invention into use and the exclusive licensees agreed to waive all rights under their licence (*r*).

In applications by assignees the judicial committee have considered in some respects the expenses incurred by the assignee in bringing the patent into notice, and the merit of the assignee in patronizing the patentee, but the general rule is, as was stated by Lord BROUGHAM in *Morgan's Patent* (*s*), that "they are, though not directly, yet mediately and consequentially, as it were, giving a benefit to the inventor, because, if the assignee is not remunerated at all, it might be said that

Considerations in favour of assignees

(*h*) *Norton's Patent, ubi supra* ;  
*Pitman's Patent*, L. R. 4 P. C. 87.

(*i*) *Bower-Barff Patent*, [1895] A. C. 675 ; *Hopkinson's Patent*, [1897] A. C. 249.

(*k*) See post, p. 119.

(*l*) *Borill's Patent*, 1 Moo. P. C. (N.S.) 348.

(*m*) *Church's Patents*, 3 R. P. C. 95.

(*n*) *Napier's Patent*, 13 Moo. P. C. 543.

(*o*) *Bodmer's Patent*, 6 Moo. P. C. 469.

(*p*) *Cardwell's Patent*, 10 Moo. P. C. 488.

(*q*) *Darby's Patent*, 8 R. P. C. 380.

(*r*) *Shono's Patent*, 9 R. P. C. 439.

(*s*) 1 Webst. 738.



**Sect. 25(4).** the chance of the patentee of making an advantageous conveyance to the assignee would be materially diminished, and consequently his interest diminished." (t).

NOTE.

Company assignees.

And there appears to be no reason why, where a patentee assigns to a company, not being himself able to bring out the patent, the company should not have the benefit (u).

Extension was granted to a company which had bought the patent for a lump sum paid to the patentee and the allotment to him of a certain number of paid-up shares, and had spent, in trying to introduce the invention, considerable sums without profit either to the company or to the patentee who had received no dividends on his shares (x). So, also, where the company had owned certain other patents and the patent sought to be prolonged had been assigned to them under a covenant to assign future improvements and the patentee was a considerable shareholder in the company (y).

And where a patentee had suffered great loss in trying to introduce his invention and had entered into an agreement with three persons who had agreed to assist him in presenting a petition and to give him further assistance in the event of the patent being prolonged on the terms that the patentee should have a third share of the profits, an extension was granted (z).

But where the assignees were a company who bought the patent for the purpose of trading with it, and not for any purpose by which any benefit could come to the inventor, who had long since died, extension was refused (a). So, also, where the assignees were a company who having bought the patent made a considerable sum of money by selling their shares at a premium to stockbrokers on the Stock Exchange, and it was considered that the company took over the invention and carried on their operations for the purpose of speculating rather than benefiting the public (b).

Where a company is petitioner, the petition should always contain a statement as to whether any, and, if so, what dealings have taken place in its shares (c).

(t) *Per* Sir J. COLVILLE, *Pitman's Patent*, L. R. 4 P. C. 87. See also *Berry's Patent*, 7 Moo. P. C. 187.

(u) See *per* Lord WATSON, *Davies' Patent*, 11 R. P. C. 27; 28. See also as to this, *Berry's Patent*, 7 Moo. P. C. 187.

(x) *Houghton's Patent*, L. R. 3 P. C. 461. See also *Davies' Patent*, 11 R. P. C. 27.

(y) *Davies' Patent*, 11 R. P. C. 27.

(z) *Darby's Patent*, 8 R. P. C. 380.

(a) *Re Electric Telegraph Co.*, cited in *Norton's Patent*, 1 Moo. P. C. (N.S.) 329; *Bower-Barff Patent*, [1895] A. C. 675; *Hopkinson's Patent*, [1897] A. C. 249.

(b) *Sillar's Patent*, Goodeve, P. C. 581. See also *Lane Fox's Patent*, 9 R. P. C. 411.

(c) *Per* Lord WATSON, *Barff's and Bower's Patent*, 12 R. P. C. 383, 385.

When the patent has been mortgaged by assignment, the mortgagee, as the legal owner, ought to concur in the petition (d). Sect. 25(4):

The assignee's title must be strictly proved, whether admitted or not (e). An equitable assignee cannot appear as co-petitioner unless his name has been inserted in the advertisements (f).

NOTE.

It has never been the practice of the judicial committee to decide on the validity of a patent, though they would abstain in any case from prolonging a patent which was manifestly bad (g). A *prima facie* case of validity was all that was required, the question being left to the determination of the Courts of Law (h), and consistently with this view, applications for extension have been entertained while proceedings impeaching the patent were actually pending (i). Validity how far considered.

The committee have, however, where on the face of the specification it appeared doubtful whether the alleged invention was proper subject-matter of a patent, refused, in the exercise of their discretion, to grant a prolongation (k); and they will also consider the question of novelty in reference to the merit of the invention (l).

And where the specification of a patent for expanding flues for boilers was framed so as to make success dependent on "certain scientific proportions" or on "certain mathematically determined proportions" without any definition of those proportions, and it was shown that the petitioner's profits had been derived from building furnaces and that there was no instance of the grant of a licence under which the licensee had constructed his own furnace, an extension was refused (m).

#### SUB-SECTION (5).

"Inadequately remunerated," etc.—The question is whether, having regard to the merit of the invention, the judicial committee are able to report to Her Majesty that the patentee has been inadequately remunerated by his patent, and unless their lordships can make such a report Her Majesty has no power to extend the term of the patent (n). Remuneration.

When there was a doubt as to the merit of the invention and the profits of the patent had been 12,000*l.*, an extension was refused (o).

(d) *Churoh's Patents*, 3 R. P. C. 95.

(e) *Galloway's Patent*, 1 Webst. 725; *Wright's Patent*, 1 Webst. 561.

(f) *Noble's Patent*, 7 Moo. P. C. 191.

(g) *Hills' Patent*, 1 Moo. P. C. (N.S.) 262; *Sazby's Patent*, L. R. 3 P. C. 294; *Cooking's Patent*, 2 R. P. C. 153; *Erard's Patent*, 1 Webst. 557.

(h) *Kay's Patent*, 1 Webst. 568.

(i) *Kay's Patent*, *ubi supra*; *Heath's Patent*, 2 Webst. 257; *Lane Fox's Patent*, 3 R. P. C. 411.

(k) *McDugal's Patent*, L. R. 2 P. C. 1; *McInnes' Patent*, L. R. 2 P. C. 54.

(l) *Stewart's Patent*, 3 R. P. C. 7, 10.

(m) *Livet's Patent*, 9 R. P. C. 327.

(n) *Per Lord MONKSWELL, Furness' Patent*, 2 R. P. C. 175.

(o) *Lawrence's Patent*, 9 R. P. C. 85.

**Sect. 25 (5).****NOTE.**

Statements in a prospectus issued on the formation of the petitioning company were held binding on the question of remuneration, for if untrue, they would bring an amount of discredit into the case which would prevent a prolongation being granted (*p*).

On the question whether a patentee has been adequately remunerated, the judicial committee will take into consideration, in favour of the patentee, the benefit which has resulted to the public as compared with that which the patentee has received (*q*).

If the invention be meritorious, the facts that no profit has been made (*r*), or that from want of capital and means (*s*), or by reason of the costliness of the manufacture, and the consequent necessity of large sales in order to earn profit (*t*), the inventor has not obtained an adequate return, or that a loss has resulted to the petitioner (*u*), or that the remuneration is insufficient having regard to the expense incurred (*x*), are grounds for extension, subject, of course, to the limitations above mentioned, that the want of profit has not arisen from the non-utility of the invention or the default of the owner of the patent (*y*). But extension was refused to an assignee who had purchased the petitioner's stock-in-trade at a fair value and had not lost by the transaction (*z*).

If the remuneration is adequate, it is no ground for extension that it was made only during the last few years of the patent (*a*).

Where the invention was of no great public utility, and the profits of the patentee had been 700*l.*, and those of his licensees between 300*l.* and 400*l.*, and it was not shown that the patentee had incurred any great expense or great labour in relation to the invention, and it had not interfered with his private business, it was held that the remuneration was not so inadequate as to justify a prolongation (*b*).

**"Extend the term of the patent," etc.**—Where a loss had been incurred by the patentee, and there appeared to be no reasonable chance of that loss being counteracted by profit unless seven years'

(*p*) *Lawrence's Patent, ubi supra.*

(*q*) *Derosne's Patent, 2 Webst. 4; Newton's Patent, 14 Moo. P. C. 156; Mallet's Patent, L. R. 1 P. C. 175.*

(*r*) *Houghton's Patent, L. R. 3 P. C. 461.*

(*s*) *Downton's Patent, 1 Webst. 557.*

(*t*) *Mallet's Patent, L. R. 1 P. C. 175.*

(*u*) *Swaine's Patent, 1 Webst. 560; Stafford's Patent, 1 Webst. 564; Jones' Patent, 1 Webst. 579; Napier's Patent, 6 App. Cas. 174;*

*Morton's Patent, Eng. Rep., April to June, 1881, vii.; Currie and Timmis' Patent, 15 R. P. C. 63.*

(*x*) *Martin's Patent, Eng. Rep., Jan. to March, 1881, xiii.; Bates' Patent, 1 Webst. 739.*

(*y*) *Ante, pp. 105, 111.*

(*z*) *Quarrill's Patent, 1 Webst. 740.*

(*a*) *Ryder's Patent, cited Johnson Pat. Man. 213.*

(*b*) *Beanland's Patent, 4 R. P. C. 489.*

Term of extension.

extension were granted, the patent was extended for that term (c). So also, where pending litigation would be likely to prevent the parties availing themselves of the extension (d). Sect. 25 (5).  
NOTE.

The general considerations which guide the judicial committee as to the term of extension are mentioned in *Stoney's Patent* (e).

“In exceptional cases.”—Under the Act of 1844, which allowed extension for fourteen years if a petition was presented setting forth that the patentee had been unable to obtain sufficient remuneration, and that seven years' extension would not suffice, it was held that the petition ought to contain the latter averment in order to obtain an extension of more than seven years, and leave to amend at the hearing by adding this averment was refused (f).

Where the invention is one which is not likely to be used except by the Government, the judicial committee rely very much on what is said in favour of the invention by those who represent the Crown (g).

When the Attorney-General admitted the merit of the invention and stated that the view of the Crown was in favour of a moderate prolongation, the judicial committee required the evidence of one engineer and of the patentee to be given (h).

But it is not a matter of course that a patent should be extended, even though the Attorney-General offers no objection, and the application is otherwise unopposed (i).

A detailed statement of several cases of application for prolongation, showing in each instance the remuneration made and the term of extension granted, will be found in *Johnson's Patentees' Manual*, 6th edition, pp. 209 to 215, from which it will appear that the usual practice of the judicial committee has been to grant extensions only for periods of less than seven years. This limit has, however, occasionally been exceeded, as in *Ruthven's Patent* for water-propellers, and in *Darby's Patent* (k) and *Stoney's Patent* (l), when an extension for ten years was granted. In the latter case, the invention was one which could only be profitably applied in certain large undertakings, which must be few and far between, and in *Darby's Patent*, the invention was of exceptional merit and there was great difficulty in introducing the

(c) *Jones' Patent*, 1 Webst. 579;  
*Bischof's Patent*, 1 R. P. C. 162.  
See also *Darby's Patent*, 8 R. P. C. 380.

(d) *Heath's Patent*, 2 Webst. 257.

(e) 5 R. P. C. 518, 523.

(f) *Newton's Patent*, Eng. Rep. Jan. to Mar. 1881, xv.

(g) *Hughes' Patent*, 4 App. Cas. 179, citing *Berrington's Case* and *Ruthven's Patent*.

(h) *Joy's Patent*, 10 R. P. C. 89.  
See also *Darby's Patent*, 8 R. P. C. 380, 383.

(i) *Cardwell's Patent*, 10 Moo. P. C. 490.

(k) 8 R. P. C. 380. See also *Currie and Timmis' Patent*, 3 R. P. C. 63.

(l) 5 R. P. C. 518.

**Sect. 25 (5).** machines into use, and the patentee had, in endeavouring to push his invention, suffered heavy losses which it was not likely he could recover in any short space of time.

**NOTE.**

**New patent.** "Grant of a new patent."—It is the practice of the judicial committee to confer the extension by ordering the grant of a new patent (*m*). The order fixes a term within which application for the new patent is to be made (*n*).

The grant of a new patent under the repealed Acts did not preclude a contention in a court of law that the Crown had, under the circumstances, no power to grant an extension (*o*), and there is nothing to alter the law in this respect in the present Act.

Under the Act of 1835, it was held that renewed letters patent were not void if granted after the expiration of the term, if the preliminary steps required by s. 4 of that Act were taken before the term ended (*p*), and this seems to be still the law if the provisions of sub-s. (1) are complied with.

Under the old practice new letters patent must be granted to parties having a legal interest in the existing letters patent (*q*), as a mortgagee (*r*), or the administrator of a deceased patentee (*s*), or the executors of a surviving assignee (*t*), or to trustees of a company (*u*) or the patentee being the agent for the foreign inventor (*x*).

Where an annuity to the patentee is part of the terms of the extension, the new letters patent may recite the conditions and contain a proviso avoiding the same if the annuity be not paid (*y*); or the letters patent may be withheld until the petitioner has executed a proper annuity deed (*z*).

Every new grant of letters patent was under the repealed Acts a graft on the original grant, and had no existence apart from the parent grant (*a*). This appears also to be the case with a new grant under the present Act, and accordingly no new specification need be filed (*b*).

(*m*) *Stoney's Patent*, 5 R. P. C. 524.

(*n*) Seton, 1984.

(*o*) *Russell v. Ledam*, 14 M. & W. 583; 1 H. L. C. 687. See also *Bovill v. Finch*, L. R. 5 C. P. 523.

(*p*) *Russell v. Ledam*, 14 M. & W. 575; 1 H. L. C. 687.

(*q*) *Southworth's Patent*, 1 Webst. 488.

(*r*) *Southworth's Patent*, *ubi supra*; but see *Church's Patents*, 3 R. P. C. 95.

(*s*) *Heath's Patent*, 2 Webst. 247; *Downton's Patent*, 1 Webst. 565.

(*t*) *Bodmer's Patent*, 6 Moo. P. C. 469.

(*u*) *Pettit Smith's Patent*, 7 Moo. P. C. 133.

(*x*) *Newton's Patent*, 14 Moo. P. C. 156.

(*y*) *Whitehouse's Patent*, 1 Webst. 476, note (*h*). See also *ibid.* 723.

(*z*) *Morton's Patent*, Eng. Rep., Apr. to June, 1881, vii.

(*a*) *Bovill v. Finch*, L. R. 5 C. P. 523, 533.

(*b*) *Wastney Smith's Patent*, 2 R. P. C. 14.