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TREATISE ON THE LAW

RELATING TO

Patent Privileges

FOR

THE SOLE USE OF INVENTIONS;

AND

THE PRACTICE OF OBTAINING

Letters Patents for Inventions;



WITH AN

APPENDIX OF STATUTES, RULES, FORMS,

&c. &c.

BY

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LONDON:

V. & R. STEVENS & G. S. NORTON, AND W. BENNING & Co.,

Law Booksellers and Publishers.

HODGES AND SMITH, GRAFTON STREET, DUBLIN.

MDCCCLVI.

LONDON:
WILLIAM STEVENS, PRINTER, BELL YARD.
TEMPLE BAR.

P R E F A C E.

THE improved state of the law relating to Patent privileges, and the great and increasing importance of the subject to the profession and the public, seem to demand a treatise exhibiting the law and practice in all its details.

It was with the view of supplying the acknowledged want of such a treatise (*a*), that I commenced this work; but it is not without apprehension as to the success of my performance, that it is now submitted to the public.

The difficulty attending the performance of such an undertaking, however, will be readily acknowledged by all, who have given any attention to this branch of the law; and if I have succeeded in producing a work which throws any additional light upon the subject, or facilitates the labours of the practitioner, I shall be amply repaid for my exertions.

In preparing those parts of the work which relate to the practice in *Scire Facias*, and in the Privy Council, and the practice of obtaining patents, entering disclaimers, &c., I have been favoured with the assistance of the officers by whom

(*a*) This is not intended as any disparagement of the many useful works on Patent Law which have been published.

the various proceedings are conducted or prepared. To each of those gentlemen I have submitted so much of the following sheets, as relates to his particular office or department; and I have not stated any thing on the subject of practice, which has not been approved of by the authorities I have mentioned.

The Forms which I have given in the Appendix, have been prepared with the greatest care, and with very few exceptions, have been actually used in practice. In order to make the use of these forms in practice more readily understood, the blanks have been filled up, and printed in italic letters, so as to represent more accurately the forms of real proceedings.

In conclusion, I beg to tender my best thanks to all my professional friends; and also to all the gentlemen in the public offices, for the valuable information which they have so liberally afforded me respecting the various matters treated of in this work.

7, KING'S BENCH WALK,
February, 1846.

CONTENTS.

	PAGE
CHAPTER I.	
INTRODUCTION	1
CHAPTER II.	
OF THE GRANTOR OF A PATENT, AND THE POWER OF THE CROWN TO GRANT THE SOLE USE OF INVENTIONS	7
CHAPTER III.	
OF THE GRANTEE OF A PATENT PRIVILEGE, OR THE PERSON TO WHOM THE SOLE USE OF AN INVENTION MAY BE GRANTED	19
SEC. I. <i>Of the grantee of a patent privilege</i>	<i>id.</i>
II. <i>Of the true and actual inventor, or discoverer of a new art or manufacture</i>	22
III. <i>Of the true and actual importer of a new art or manufacture</i>	26
IV. <i>Of the first inventor, or first importer of a new art or manufacture</i>	31
V. <i>Of the persons incapacitated from becoming grantees of patent privileges</i>	34
CHAPTER IV.	
OF THE GRANT OF A PRIVILEGE IN AN INVENTION BY LETTERS PATENT, AND THE CONSTRUCTION OF IT	36
1st. <i>Of the address or direction</i>	40
2nd. <i>Of the recital</i>	<i>id.</i>
3rd. <i>Of the granting part</i>	50
4th. <i>Of the prohibition to others</i>	59
5th. <i>Of the conditions, &c.</i>	61

CHAPTER V.

OF THE NATURE AND QUALITIES OF AN ART OR INVENTION,
WHICH MAY BE MADE THE SUBJECT OF A PATENT PRIVILEGE 77

SEC. I. *Of the nature of an invention which may be the
subject of a privilege granted by patent* . *id.*

II. *Of the novelty of an art or invention, which is re-
quired in order to make it a good subject of a
patent privilege* 102

III. *Of the utility of an art or invention, which is
necessary to support a patent privilege* . 132

CHAPTER VI.

OF THE DURATION OF THE PRIVILEGE GRANTED BY A PA-
TENT FOR AN INVENTION, AND THE PROLONGATION OF IT 143

SEC. I. *Of the term in a sole privilege which may be granted
by patent in the first instance* *id.*

II. *Of the extension of the term by new letters patent* 145

III. *Of the prolongation of the term, by Act of Parlia-
ment* 149

CHAPTER VII.

OF THE SPECIFICATION OF AN INVENTION, WHICH IS MADE
THE SUBJECT OF A PATENT PRIVILEGE 151

CHAPTER VIII.

OF THE CONFIRMATION OF PATENTS, AND THE ALTERATION
AND AMENDMENT OF PATENTS, SPECIFICATIONS AND ENROL-
MENTS 199

SEC. I. *Of the confirmation of patents under the Stat. 5 &
6 W. IV. c. 83, s. 2* *id.*

II. *Of the alteration of patents, and specifications by
memorandum or disclaimer, under the Stat. 5 &
6 W. IV. c. 83, s. 1* 203

III. *Of the alteration and amendment of patents, speci-
fications and enrolments, at common law* . 211

CHAPTER IX.

OF THE NATURE OF THE RIGHT OR PROPERTY OF AN INVENTOR IN HIS INVENTION, AND THE DISPOSITION OF IT	. 227
SEC. I. <i>Of the nature of the right or property of an inventor, in his invention</i>	. <i>id.</i>
II. <i>Of assignments of patent rights in fact and in law</i>	234
III. <i>Of licences</i>	. 238
IV. <i>Of the surrender of a patent privilege</i>	. 246

CHAPTER X.

OF THE REMEDIES FOR PATENTEES, AND FOR THE PUBLIC RESPECTIVELY	. 248
SEC. I. <i>Of the various remedies provided by law for patentees, and the public respectively</i>	. <i>id.</i>
II. <i>Of an action at law for the infringement of a patent</i>	. 251
III. <i>Of a suit in equity, to restrain the infringement of a patent, and obtain an account of profits</i>	. 305
IV. <i>Of an action for penalties for counterfeiting the name or device of a patentee</i>	. 366
V. <i>Of other remedies available for patentees</i>	. 372
VI. <i>Of the remedies for the Crown and the public, by scire facias, to repeal void or illegal patents</i>	. 376
VII. <i>Of the revocation of a patent, by the Queen or Privy Council</i>	. 431

CHAPTER XI.

OF THE EVIDENCE TO BE GIVEN IN ACTIONS RESPECTING LETTERS PATENT	. 433
SEC. 1. <i>Of the evidence in actions, for the infringement of letters patent</i>	. <i>id.</i>
1. <i>Of the burthen of proof</i>	. <i>id.</i>
2. <i>Of the competency and examination of witnesses</i>	435
(a) <i>Of the competency of witnesses</i>	. <i>id.</i>
(b) <i>Of the examination of witnesses</i>	. 437
3. <i>Of the evidence to be given under each of the issues in action for an infringement</i>	. <i>id.</i>
Under an issue upon a plea of <i>non concessit</i>	438
Under an issue upon a plea, alleging that the patentee was not the true and first inventor	. 442

	PAGE
SEC. I. <i>Of the evidence in actions, for the infringement of letters patent—continued.</i>	
3. <i>Of the evidence to be given under each of the issues in action, &c.—continued.</i>	
Under an issue taken upon a plea alleging the falsehood of a patentee's representation to the Crown, that he obtained a knowledge of the invention by means of a communication made to him by a foreigner residing abroad	449
Under an issue taken upon a plea alleging the falsehood of any representation made by the patentee's petition to the Queen, respecting the nature of his invention	451
Under an issue upon a plea alleging that the invention was not an invention of any manner of manufacture, or was not of such a nature as could be made the subject of a patent privilege	454
Under an issue respecting the novelty of an invention	455
Under an issue upon a plea alleging that the invention was of no utility	474
Under an issue upon a plea alleging that there is no sufficient specification	475
Under an issue on a plea alleging that the patentee did not cause any sufficient specification to be enrolled within due time	484
Under an issue on the plea of not guilty	486
(a) Upon a breach alleging that the defendant has injuriously made articles, or used the invention in violation of the patent	488
(b) Upon a breach alleging the vending or selling of articles made according to the invention	491
(c) Upon a breach which alleges the making for use, or sale, or the vending of articles, which counterfeit, imitate, or resemble, articles made in pursuance of the invention, or the counterfeiting, imitating, or resembling the invention in any other way	493
SEC. II. <i>Of the evidence in actions of scire facias, to repeal letters patent</i>	498
1. <i>Of the burthen of proof</i>	<i>id.</i>
2. <i>Of the competency of witnesses</i>	499
3. <i>Of the evidence to be given under each of the issues in the action of scire facias</i>	<i>id.</i>

	PAGE
CHAPTER XII.	
OF THE PRACTICE RESPECTING LETTERS PATENT FOR INVENTIONS	503
SEC. I. <i>Of the practice respecting the obtaining of patents, preparing and enrolling specifications, and altering patents and enrolments</i>	<i>id.</i>
1. Of the practice respecting the obtaining of patents for inventions	<i>id.</i>
2. Of the practice respecting the preparation and enrolment of specifications	541
3. Of the practice respecting the alteration and amendment of patents, enrolments, &c.	546
II. <i>Of the practice respecting disclaimers and memorandums of alteration under the stat. 5 & 6 W. IV. c. 83, s. 1</i>	549
III. <i>Of the practice of the Judicial Committee of the Privy Council respecting the confirmation and prolongation of patent privileges</i>	556

APPENDIX.

CHAPTER I.

STATUTES, RULES, AND TABLES OF FEES AND STAMPS	585
SEC. I. <i>Statutes relating to letters patent</i>	<i>id.</i>
18 Hen. VI., c. 1	<i>id.</i>
27 Hen. VIII., c. 11	586
3 & 4 Edw. VI., c. 4	589
13 Eliz., c. 6	590
31 Eliz., c. 5, s. 5	592
21 Ja. I., c. 3	<i>id.</i>
21 Ja. I., c. 4, s. 4	596
5 & 6 W. IV., c. 62, ss. 11, 20, 21, and 22.	597
5 & 6 W. IV., c. 83	598
2 & 3 Vict., c. 67	601
3 & 4 Vict., c. 24, ss. 1 and 2	603
5 & 6 Vict., c. 97, ss. 2 and 6	604
7 & 8 Vict., c. 85	605
7 & 8 Vict., c. 69, ss. 2, 3, 4, 5, 6, 7, and 8	606
II. <i>Rules of practice relating to letters patent for inventions</i>	609
1. Rules of practice before the Attorney and Solicitor-general respecting disclaimers and memorandums of alteration	<i>id.</i>
2. Rules of practice in the Judicial Committee of the Privy Council respecting the confirmation and prolongation of patents for inventions	610

	PAGE
SEC. III. Tables of fees and stamps	612
1. Fees payable by persons soliciting patents for inventions	<i>id.</i>
2. Fees payable by persons opposing the grant of patents for inventions	614
3. Fees payable respecting specifications, enrolments, office copies, &c.	<i>id.</i>
4. Fees payable respecting disclaimers and memorandums of alteration	615
5. Stamp duties payable upon documents and proceedings respecting patents for inventions	616

CHAPTER II.

FORMS AND ENTRIES	617
------------------------------------	-----

SEC. I. Forms of proceedings respecting the obtaining and opposing of patents and the specification of patent inventions	<i>id.</i>
No. 1. General caveat against a patent at the Attorney ney or Solicitor-general's	<i>id.</i>
2. Notice of an application for a patent	618
3. Petition by an actual inventor for a patent	<i>id.</i>
4. Petition for a patent for an imported invention	619
5. Solemn declaration in support of a petition by an actual inventor	<i>id.</i>
6. Solemn declaration in support of a petition for an imported invention	620
7. Reference of a petition to the Attorney or Solicitor- general	<i>id.</i>
8. Note of opposition at the report	<i>id.</i>
9. Summons to attend a hearing upon an opposition at its report	621
10. Solemn declaration of the service of a copy of summons upon an opposing party	<i>id.</i>
11. Attorney or Solicitor-general's report	622
12. Queen's warrant for preparing a bill	623
13. Caveat at the patent bill office	624
14. Notice of a bill being received for signature	<i>id.</i>
15. Note of opposition at the bill	<i>id.</i>
16. Solemn declaration of the service of a copy of summons to attend the hearing of an opposition at the bill	625
17. Bill for letters patent	<i>id.</i>
18. Docket to the bill	<i>id.</i>
19. Signet bill	626
20. Caveat at the Privy Seal	626

FORMS AND ENTRIES—continued.

PAGE

SEC. I. *Forms of proceedings respecting the obtaining and opposing of patents and the specifications of patent inventions—continued.*

No. 21.	Privy Seal bill	627
22.	Caveat at the Great Seal	<i>id.</i>
23.	Note of opposition at the Great Seal	<i>id.</i>
24.	Recepi	628
25.	Docket for a patent, at the Patent Office	<i>id.</i>
26.	Letters patent	<i>id.</i>
27.	Enrolment of patent	632
28.	Specification of a patent invention	<i>id.</i>
29.	Acknowledgment of a specification	634
30.	Enrolment of a specification	<i>id.</i>
31.	Certificate of enrolment of a specification	<i>id.</i>

II. *Forms of proceedings upon obtaining leave to enter disclaimers or memorandums of alteration under the stat. 5 & 6 W. IV., c. 83, s. 1*

No. 1.	General caveat against any disclaimer or alteration	<i>id.</i>
2.	Specific caveat against a particular disclaimer or alteration	<i>id.</i>
3.	Petition for leave to enter a disclaimer or memorandum of alteration	<i>id.</i>
4.	Notice of application for leave to enter a disclaimer or memorandum of alteration, to be advertised	637
5.	Disclaimer or memorandum of alteration	638
6.	Fiat for leave to enter a disclaimer or memorandum of alteration	640

III. *Forms of proceedings for obtaining confirmations and prolongations of patent privileges*

No. 1.	Notice of application for the confirmation of a patent, under the stat. 5 & 6 W. IV., c. 83, s. 2	<i>id.</i>
2.	Notice of application for the prolongation of a patent under the stat. 5 & 6 W. IV., c. 83, s. 4	<i>id.</i>
3.	Notice of opposition to the confirmation of a patent	<i>id.</i>
4.	Caveat against the prolongation of a patent	642
5.	Petition for the confirmation of a patent	<i>id.</i>
6.	Petition for the prolongation of a patent	644
7.	Notice of objections to a petition for a confirmation	645
8.	Notice of objections to a petition for a prolongation	<i>id.</i>
9.	Notice of day appointed for hearing a petition	646
10.	Patent for granting a prolongation to assignees for seven years	647
11.	Patent for granting a prolongation for more than seven years	650

FORMS AND ENTRIES—continued.

SEC. IV. *Forms of entries and proceedings in actions for infringement of patents* 655

(a) *Declarations.*

- No. 1. Declaration by a patentee or his assignee, for the infringement of his patent *id.*
 2. Short form of declaration in an action by a patentee 662

(b) *Pleas.*

3. Commencement of a plea 665
 4. Commencement of a second plea *id.*
 5. Non concessit *id.*
 6. The like in a shorter form *id.*
 7. The like by special traverse, after setting out the patent *id.*
 8. Traverse of assignment of the patent to the plaintiff 666
 9. That the patentee was not the true and first inventor, as alleged in the declaration *id.*
 10. That the patentee was not the true and first inventor, and the patent is therefore void *id.*
 11. That the invention was not such an improvement as alleged in the declaration *id.*
 12. That the patentee falsely represented the invention to be an improvement, and the patent is therefore void 667
 13. That the invention is not useful as alleged in the declaration 668
 14. That the invention is of no use, and the patent therefore void *id.*
 15. That the invention was not new as alleged in the declaration *id.*
 16. That the invention was not new, and the patent therefore void 669
 17. That the invention is not an invention of any manner of manufacture *id.*
 18. That the privilege is not a privilege of making any manner of manufacture *id.*
 19. That the patentee did not by his specification describe the invention as alleged in the declaration . 670
 20. That the patentee did not specify his invention, and that the patent is therefore void *id.*
 21. Plea setting out the specification, and traversing the sufficiency of it *id.*
 22. That the patentee did not enrol a specification as alleged in the declaration 671
 23. That the patentee has not enrolled any sufficient specification, and the patent is therefore void . . *id.*
 24. Not guilty 672

FORMS AND ENTRIES—continued.

PAGE

SEC. IV. *Forms of entries and proceedings in actions for infringements of patents—continued.*(c) *Replications.*

No. 25.	Commencement and similiter	672
26.	The like for a second replication	<i>id.</i>
27.	To a plea alleging that the patentee was not the true and first inventor	<i>id.</i>
28.	To a plea alleging that the patentee made a false suggestion to the Crown	<i>id.</i>
29.	To a plea alleging that the invention is of no use, and the patent void	673
30.	To a plea alleging that the invention was not new, and the patent void	<i>id.</i>
31.	To a plea alleging that the invention is not an invention of any manner of manufacture	673
32.	Special traverse to a similar plea	<i>id.</i>
33.	To a plea alleging that the privilege is not for making any manner of manufacture	674
34.	To a plea alleging the total want of a specification	<i>id.</i>
35.	To a plea that the patentee did not enrol any specification	<i>id.</i>

(d) *Rejoinders.*

36.	Similiter	<i>id.</i>
37.	The like	675

(e) *Objections.*

38.	Notice of objections	<i>id.</i>
39.	Various forms of objections	<i>id.</i>

(f) *Certificates.*

40.	That the action was brought to try a right	677
41.	That the validity of the patent came in question	<i>id.</i>
42.	The last two forms in one	<i>id.</i>
43.	That record in former action was given in evidence	<i>id.</i>
44.	That plaintiff ought only to have ordinary costs	<i>id.</i>
45.	That defendant has proved certain objections, but failed in proving the others	678

V. *Forms of proceedings in suits in Chancery to restrain infringements of patents, and for accounts of profits lost by means of such infringements* *id.*

No. 1.	Bill in Chancery to restrain the infringement of a patent, and for an account of profits made by the infringement	<i>id.</i>
2.	Defendant's answer to a bill for an injunction, and an account of profits	693

	PAGE
FORMS AND ENTRIES—continued.	
SEC. V. <i>Forms of proceedings in suits in Chancery to restrain infringements of patents, and for accounts of profits lost by means of such infringements—continued.</i>	
No. 3. Affidavit by a patentee plaintiff in support of his bill, in order to obtain an interlocutory injunction	698
4. Affidavit respecting the novelty and utility of the invention in support of a motion for an interlocutory injunction	699
5. Affidavit respecting an infringement by the defendant, in support of an application for an interlocutory injunction	700
6. Affidavit that plaintiff has obtained judgment in an action for an infringement in order to obtain an interlocutory injunction	<i>id.</i>
7. Affidavit that defendant has obtained a verdict and judgment in an action for an infringement, in support of a motion to dissolve an interlocutory injunction	701
8. Certificate that the validity of the patent came in question	703
9. Certificate that plaintiff ought not to have more than usual costs	<i>id.</i>
VI. <i>Forms and entries in qui tam actions of debt for penalties under stat. 5 & 6 W. IV., c. 83, s. 7</i>	
No. 1. Declaration	<i>id.</i>
2. Plea of not guilty	707
3. Plea of the statute of limitations	<i>id.</i>
VII. <i>Forms of entries and proceedings in actions of scire facias for cancelling and repealing letters patent</i>	
No. 1. Particulars respecting a patent against which a <i>scire facias</i> is intended to be sued out	<i>id.</i>
2. Attorney-general's fiat	<i>id.</i>
3. Bond to the Senior Clerk of the Petty Bag, for payment of costs to the defendant if the patent is not repealed	<i>id.</i>
4. Writ of <i>scire facias</i> to cancel and repeal a patent	710
5. Testatum writ of <i>scire facias</i> to cancel a patent	715
6. Sheriff's warrant to two of his bailiffs to summon the defendant	716
7. Another form of warrant	<i>id.</i>
8. Rule to return a writ of <i>scire facias</i>	717
9. Declaration	<i>id.</i>
10. Declaration concluding with a <i>nolle prosequi</i> to some of the suggestions in the writ	718

FORMS AND ENTRIES—continued.

PAGE

SEC. VII. *Forms of entries and proceedings in actions of scire facias for cancelling and repealing letters patent—continued.*

No. 11. Rule to answer	718
12. <i>Nolle prosequi</i> after declaration, and before plea to some of the suggestions in the writ	<i>id.</i>
13. Plea in abatement, that defendant assigned the patent before the commencement of the suit, and claims no title to it	719
14. Demurrer to the whole of the declaration	720
15. Demurrer to one of the suggestions in a <i>scire facias</i>	721
16. Special demurrer	<i>id.</i>
17. Joinder in demurrer by the Attorney-general	722
18. Pleas in bar to the suggestions in a writ of <i>scire facias</i>	<i>id.</i>
19. Common joinder by Attorney-general	725
20. The like when there has been a change in the office of Attorney-general	726
21. Second or subsequent joinder	<i>id.</i>
22. Replication by Attorney-general to a plea which alleges the sufficiency of a specification	<i>id.</i>
23. Demurrer to a plea in <i>scire facias</i>	<i>id.</i>
24. Rule to join in demurrer	727
25. Rejoinder	<i>id.</i>
26. Joinder to a demurrer to a plea	<i>id.</i>
27. Issue	<i>id.</i>
28. <i>Venire facias</i> out of Chancery	728
29. Chancery record	<i>id.</i>
30. Record in Queen's Bench of the bringing in of the transcript of the Chancery record, in order to have the issues in fact tried	729
31. Attorney-general's warrant for a <i>nisi prius</i>	731
32. <i>Nisi prius</i> record	<i>id.</i>
33. <i>Alias venire facias</i> out of the Queen's Bench	<i>id.</i>
34. <i>Distringas juratores</i>	732
35. <i>Subpœna ad testificandum</i>	733
36. <i>Subpœna duces tecum</i>	733
37. <i>Postea</i>	<i>id.</i>
38. Record of the <i>postea</i> or verdict in the Queen's Bench, and remand of the record into Chancery for judgment, after verdict for the Crown	734
39. Indorsement on <i>nisi prius</i> record after verdict for the Crown	735
40. Judgment for the Crown in Chancery	<i>id.</i>
41. Continuance to be entered when judgment is not signed in the same term, as the record is remanded into Chancery	736

	PAGE
FORMS AND ENTRIES--continued.	
SEC. VII. Forms of entries and proceedings in actions of scire facias for cancelling and repealing letters patent—continued.	
No. 42. Entry of a day given to the defendant to bring in the patent to be cancelled	736
43. Notice to the defendant of the day appointed for bringing in the patent to be cancelled	737
44. Order that the enrolment of a patent be cancelled in pursuance of a judgment, the patentee being unable to bring in the patent	<i>id.</i>
45. Vacatur of a patent and enrolment	738
46. Writ of error returnable in Parliament to reverse a judgment for the Crown in <i>scire facias</i> for errors in law	<i>id.</i>
47. Rule to transcribe the record	739
48. Return by the Master of the Rolls to a writ of error	<i>id.</i>
VIII. Forms of assignments of patents, and licences to use patent inventions	
1. Assignment of a patent to a purchaser	<i>id.</i>
2. Assignment of a patent by the patentee to a Company in pursuance of an Act of Parliament	744
3. Assignment of a patent by way of mortgage for securing the repayment of a sum of money and interest	747
4. Licence by deed poll in consideration of a sum of money	755
5. Licence by a patentee and assignees of parts of the patent right, to a Company formed by Act of Parliament	757
6. Exclusive licence	764
7. Exclusive and irrevocable licence	767

TABLE OF CASES.

Names of Cases.	Where reported.	Where cited in this Work.
Alcock, <i>in re</i>	Cit. 4 My. & Cr. 511 ; Webs. on Pat. 134, (101)	536
— v. Cook	5 Bing. 340	42, 119
Alten Woods, Case of	1 Co. R. 40, b.	39, 51
Anonymous	1 Chit. 490, n.	411
Arkwright's case;—see R. v. Arkwright		
Arkwright v. Nightingale	Dav. P. C. 37 ; 1 Webs. R. 60	
Astry's case	6 Mod. 123	174, 181, 295, 296
Attorney-general v. Allgood	Parker, R. 1	407
— v. Hungate	Hardr. 231	400 73
Bacon v. Jones	4 My. and Cr. 433	343, 348, 349, 356, 357
— v. Spottiswood	1 Beav. 382	356, 357
Baily v. Taylor	1 Russ. and M. 73	361
Baddeley v. Leppingwell	3 Burr. 1544	438
Bainbridge v. Wigley	Parl. Rep. Pat. 1829, p. 197 ; 18 Rep. Arts, 127	163, 183
Baker's case	5 Co. R. 104, a	412
Barker and Harris v. Shaw	Holroyd. Pat. 60 ; 1 Webs. R. 126	445
Barber v. Walduck	1 C. & P. 567	23
Baird v. Neilson	8 Cl. & Fin. 726	245, 278
Beck <i>Ex parte</i>	1 Bro. C. C. 578 ; 1 Webs. R. 430	215
Bentley v. Fleming	1 C. & K. 587	130, 470, 471
— v. Goldthorp	9 Jur. 470 ; 2 Dowl. & L. 795	276
— v. Keighley	1 D. & L. 944	281, 291
Beddells v. Massey	2 D. & L. 322 ; 8 Jur. 808	264, 271, 275, 280, 451
— v. —	Not reported	345
Bickford v. Skewes, (Q. B.)	1 Q. B. 938 ; 1 Webs. R. 214	176, 179, 180, 295 482, 484
— v. — (Chan.)	1 Webs. R. 211	336, 338
— v. — (—)	4 My. & Cr. 498	344
Bird v. Higgenson	2 A. & E. 696	246
— v. —	6 A. & E. 824	246
Bircot's case	3 Inst. 184 ; 1 Webs. R. 31, n.	15, 16, 121—122
Blackamore's case	8 Co. R. 156, a	212
Blakeston's case	W. Jon. R. 82	402
Blaxton's case	Latch. 3	402
Blofield v. Payne	4 B. & Adcl. 410	373

Names of Cases.	Where reported.	Where cited in this Work.
Bloxam v. Elseo, (K. B.) . . .	6 B. & C. 169; 9 Dow. & Ry. 215 . . .	26, 35, 67, 139, 140, 238, 252
————— (N. P.) . . .	1 C. & P. 558; Ry. & Mo. N. P. C. 187	26, 35, 152, 197, 252, 435, 437, 445, 449
Bodenham v. Hill	7 M. & W. 274	707
Bodmer's patent, <i>in re</i>	1 Webs. R. 740; 2 Mo. P. C. C. 471	557, 559
Boulton and Watt v. Bull, (C. P.)	2 H. Bl. 463; Dav. P. C. 102	6, 12, 16, 39, 69, 81, 84, 86, 87, 88, 98, 101, 122, 123, 124, 135, 153, 181, 183, 189, 252, 313
————— v. ——— (Ch.)	3 Ves. 140	312, 314, 332, 338, 339, 345, 352
Bovill v. Moore	2 Marsh. R. 211; Dav. P. C. 361	121, 124, 135, 153, 155, 156, 166, 168, 173, 190, 196, 455, 468, 474, 484
Bowman v. Rostron	2 A. & E. 278; 4 N. & M. 552	245
Bowman v. Taylor	2 A. & E. 295; 4 N. & M. 264	236, 245, 246, 278
Bozoun's case	4 Co. R. 34, b	73
Brett v. Cumberland	Cro. Ja. 522	70
Brewster v. Weld	6 Mod. 229	382
Bristol, Bishop of, v. Procter	1 Rol. R. 287	405
Brooks v. Ripley	2 Lon. C. J. S. 35; Webs. P. L. 134 (102)	174
Brown v. Annandale	1 Webs. R. 433	28, 56, 57, 63, 70, 199, 446, 468, 510, 517, 535, 619, 630
Brown v. Moore	Cit. 3 Swan. 264	347
Brunton v. Hawkes	4 B. & Ald. 541; 7 D. & R. 703	49, 116, 119, 136, 139, 457, 466
Brunton v. White	7 D. & R. 103	655
Bulmois v. Mackenzie	4 Bing. N. C. 127; 6 Dowl. 215; 1 Webs. R. 260	286, 289, 290
Bunnett and Corpe v. Smith	13 M. & W. 552; 2 D. & L. 380	264, 280, 347
————— v. ——— (Ch.)	Not reported	347
Butler's case; <i>see</i> R. v. Butler		
Cameron v. Gray	6 T. R. 363; Dav. P. C. 220	655
Campbell v. Hall	1 Cowp. 204	57
Campion v. Benyon	3 B. & B. 5; 6 B. Mo. 71	44—46, 119—160, 162—165, 190, 196, 468
Canham v. Jones	2 Ves. & B. 218	229
Carpenter v. Smith, (Exch.)	9 M. & W. 300; 1 Webs. R. 540	22, 33, 110, 111, 112, 115, 449, 460, 461, 465, 466
————— v. ——— (N. P.)	1 Webs. R. 530	110, 114, 131—185, 461, 466, 467

Names of Cases.	Where reported.	Where cited in this Work.
Cartwright v. Amatt	2 B. & P. 43; Dav. P. C. 240	325
_____ v. _____ or Eamer	Cit. 14 Ves. 131, 136; Dav. P. C. 317, 318	249
Chanter v. Dewhurst	12 M. & W. 823	234, 239, 246
Chanter v. Leese	4 M. & W. 295	246
Chester's (Bishop of) case	Y. B. 24 Ed. III. fol. 73, b. pl. 91	416
Chuck v. Harris	1 M. & G. 940	411
Clark v. Kenrick	1 Dow. & Low. 392	281
Clarke's case	2 Q. B. 619	425
Clothworkers of Ipswich case	Godbolt, 252; 1 Roll. R. 4	8, 20, 27, 81, 103, 105
Cochrane (Ld.) v. Smethurst	1 Stark, R. 205; Dav. P. C. 354	46
Collard v. Allison	4 My. & Cr. 487	315, 326, 332
Collinge v. Bowman	1 Webs. R. 294, n.	
Cook v. Caldecot	4 C. & P. 315	414
Cook v. Pearce	7 Jur. 499	46
Cornish v. Keene, (N. P.)	1 Webs. R. 501	24, 106, 107, 110, 131, 444, 447, 449, 451, 452, 456, 458, 460, 465, 473, 481, 489
_____ v. _____ (C. P.)	3 Bing. N. C. 570; 1 Webs. R. 513	101, 459, 473
Cornish and Sievier v. Keene and another	M. S.	326
Crane v. Price and others, (N. P.)	1 Webs. R. 377	22
_____ v. _____ (C. P.)	4 M. & G. 580; 1 Webs. R. 393	25, 66, 84, 85, 86, 124, 125, 136, 489, 491
Crofts v. Peach	2 Hodg. 110; 1 Webs. R. 268	262
Crompton v. Ibbotson	Dan & Lloyd, 33	177, 179, 180, 484
Crossley v. Beverley, (N. P.)	3 C. & P. 513; Mo. & Mal. 283; 1 Webs. R. 106	181, 496
_____ v. _____ (K. B.)	9 B. & C. 63; 1 Webs. R. 112	158, 168, 191, 442, 484, 487
_____ v. _____ (Chan.)	1 Webs. R. 119; 1 Russ. & My. 166	322
Crossley v. Derby Gas-light Company	3 My. & Cr. 428	361
_____ v. _____	1 Webs. R. 119; 1 Russ. & My. 160	322
Cutler, in re	4 My. & Cr. 510; 1 Webs. R. 418	533, 534, 536, 537
Daly, Ex parte	Vern & Scriv. 499	528
Daniel's case	Lyer, 133	586
Darcy v. Allein	11 Co. R. 84, b.	103
_____ v. Allen	Moor, 671	8, 103
_____ v. Allin	Noy, R. 173	7, 20, 81, 104, 133
Dendy v. Chetty	3 A. & E. 319	400
De Rosne's patent, in re	Not yet reported	562
Derosne v. Fairlie (Fairie), (N. P.)	1 Mo. & Rob. 457; 1 Webs. R. 154	436, 482
De Rosne v. Fairie, (Exch.)	5 Tyr. 393; 2 Cr. M. & R. 476; 1 Webs. R. 158	170, 180, 198, 478, 479
Devonshire's (Earl of) case	11 Co. R. 89, a.	39
Digge's case	1 Co. K. 157, a.	420
Digby, Sir K., in re	Beame's Orders, 66	215
Dilly v. Doig	2 Ves. Jr. 486	308

Names of Cases.	Where reported.	Where cited in this Work.
Docker v. Somes	2 My. & K. 655	304
Dolland's case	Clt. 2 H. Bl. 469, 470, 487; Dav. P. C. 170, 171, 172, 199; 1 Webs. R. 43	32, 126, 148, 469
Downton's patent, <i>in re</i>	1 Webs. R. 565	568, 569, 572, 575, 580
Duckworth v. Harrison	4 M. & W. 432	414
Duvergier v. Fellows	5 Bing. 248; 2 M. & P. 384	236
Duvergier v. Fellows (in error)	10 B. & C. 826	68, 233, 234, 236
Dyer, <i>Ex parte</i>	Holroyd. 59; Parl. Rep. Pat. 1829, p. 197	32
East India Company v. Sandys	Skin. 225	36
_____ v. Kynaston	3 Bl. Ap. Cas. 153	347
Eden's case	6 Co. R. 15, b.	438, 439
Edgebury v. Stephens	2 Salk. 447; Holt. 475; Comb. 84; Dav. P. C. 36; 1 Webs. R. 35	6, 27, 81
Elliott v. Aston	1 Webs. R. 222	174, 272, 481
Erard's patent, <i>in re</i>	1 Webs. R. 557	567, 572, 578
Ewre, Lord, v. Strickland	Cro. Ja. 240	70
Eyre v. Taunton	3 Cro. 312	407
Faulkner's case	Not reported	223
Felton v. Greaves	3 C. & P. 611	46, 183, 453, 482
Few v. Guppy	1 M. & Cr. 487	356
Fisher's case	Not reported	223
Fisher v. Dewick	4 Bing. N. C. 706; 6 Dowl. 739; 1 Webs. R. 264	286, 288, 291
Forsyth v. Riviere	Chit. Prerog. Cr. 182	32, 447
Fox, <i>Ex parte</i>	1 V. & B. 67; 1 Webs. R. 431, n.	65, 124, 491, 533, 535
Fradella v. Weller	2 Russ & My. 247	365, 366
Galloway's patent, <i>in re</i>	1 Webs. R. 724	565, 566, 569, 572, 573, 575
Galloway v. Bleadon, (N. P.)	1 Webs. R. 521	106, 130, 165, 173, 287, 449, 456, 457, 473, 480
Gibson v. Brand, (N. P.)	1 Webs. R. 627	445, 449, 461, 469, 474, 480, 489
_____ (C. P.)	4 M. & G. 179; 1 Webs. R. 631	85, 116, 457, 488
Gillett v. Green	7 M. & W. 347; 9 Dowl. 219; 1 Webs. R. 271	298
Gillett, & Another v. Wilby	9 C. & P. 334; 1 Webs. R. 270	261, 295, 303, 457, 497
Glemham's case	Poph. R. 144	400
Green's case	Not reported	223
Griffith's, <i>in re</i>	Not reported	534
Gun Makers, Master, Wardens, and Society of, v. Fell	Willes, R. 388	83
Gunn v. Honeyman	2 B. & Ald. 400	411
Hall v. Franklin	3 M. & W. 259	35
Hall v. Jarvas and Boot	1 Webs. R. 100	85, 95, 97, 490
Harmer v. Playne, (Chan.)	14 Ves. 130	7, 19, 52, 66, 133, 158, 313, 338, 346, 352

Names of Cases.	Where reported.	Where cited in this Work.
Harmer v. Playno, (K. B.)	11 East. 101; Dav. P. C. 311	156, 172, 173, 191, 480, 491
Hasting's case	Noy, R. 182; 1 Webs. R. 6	7, 104, 461
Haworth v. Hardcastle	1 Bing. N. C. 182; 4 M. & Scott, 720	137, 475
Hayne v. Maltby	3 T. R. 438; Dav. P. C. 156	245, 246
Heathcoat, <i>Ex parte</i> , in re Lacy	1 Webs. R. 431	518
Heath v. Unwin	10 M. & W. 684; 2 Dow. & Dowl. 482	287, 290
	13 M. & W. 583	497
Henson, <i>Ex parte</i> , in re Alcock	1 Webs. R. 432	533
Hesso v. Stevenson	3 B. & P. 565; Dav. P. C. 244	76, 237, 238
Heurteloupe's patent, in re	1 Webs. R. 553	108, 201, 562, 566, 643
Hicks v. Raincock	2 Dick. 647	353
Hill v. Thompson, (Chan.)	3 Mer. 622; 1 Webs. R. 229	124, 136, 184, 188, 315, 317, 333, 334, 335, 336, 338, 339, 343
————— (—)	————— 626; ————— 235	85, 162, 325, 467, 476
————— (C. P.)	2 B. Mo. 424; 8 Taunt. 375; 1 Webs. R. 239	22, 32, 44, 49, 107, 116, 118, 119, 121, 123, 139, 184, 448, 453, 455, 475, 487, 490, 494
Hogg v. Kirby	8 Ves. 215	229
Hornblower and Maberley v. Boulton and Watt	8 T. R. 95; Dav. P. C. 221	6, 99, 122, 158, 175, 312, 442, 487
Huddart v. Grimshaw	Dav. P. C. 265; 1 Webs. R. 85	93, 107, 116, 124, 136, 175, 189, 458, 490
Hullett v. Hague	2 B. & Ad. 370	197, 469
Humphrey's case	Noy, R. 183; 1 Webs. R. 7	104
Hunt v. Coffin	Dyer, 197, b.	397
Jefferson v. Dawson	1 Sid. 436; 1 Lev. R. 283	402
————— v. Morton	2 Saund. 23	415
Jessop's case	Cit. 2 H. Bl. 489; Dav. P. C. 182, 203	189, 468
Johnson v. Blackwell	6 C. & P. 236	411
Jones' patent, in re	1 Webs. R. 577	566, 567, 569, 572, 575
Jones v. Berger	5 M. & G. 208; 1 Webs. R. 544	287, 289, 290
Jones v. Heaton	11 Lon. J. C. S.; Webs. P. L. 137 (129)	169, 191
Jones v. Pearce, (N. P.)	1 Webs. R. 122	22, 112, 131, 448, 460, 461, 470, 488, 489, 491 455
Jones v. Ripley	2 Rep. Arts. N. S. 150; 5 L. Journ. C. S. 35; Webs. P. L. 137 (108*)	163
Jupe v. Pratt	1 Webs. R. 145	272, 274, 496, 497

Names of Cases.	Where reported.	Where cited in this Work.
Kay's patent, <i>in re</i>	1 Webs. R. 568; 3 Mo. P. C. C. 24	575, 578
Kay v. Marshall, (Chan. L. C.)	1 My. & Cr. 373	309, 311, 350
----- (M. R.)	1 Beav. 535	94, 463
----- (C. P.)	1 Keen, 190	353
----- (Ho. Lords)	5 Bing. N. C. 492	49, 94, 463
-----	8 Cl. & Fin. 245	94, 463
Knight v. Warren	7 Dowl. 663	213, 215
Kollman's patent, <i>in re</i>	1 Webs. R. 564	575
Keene v. Cornish	M. S.	255
Kelap v. Crews	1 Ld. Ray. 167	271
Knott v. Morgan	2 Keen, 213	375
Kynaston v. East India Comp.	3 Swans. 248	347
Kollman's patent, <i>in re</i>	1 Webs. R., 564	575
Lacy <i>in re</i> ; see Heathcoat		
Lane's Case	2 Co. R. 166	36, 439
Lawrence v. Martin	1 Salk. 7	424
Lester v. Garland	15 Ves. 248	58
Lewis and another v. Davis	3 C. & P. 502; 1 Webs. R. 488	66, 452, 483
Lewis v. Marling, (N. P.)	4 C. & P. 52; 1 Webs. R. 490	109, 112, 138, 297, 444, 448, 460
----- v. ----- (K. B.)	10 B. & C. 22; 4 C. & P. 56; 1 Webs. R. 493	22, 32, 110, 127, 138, 161, 168, 179, 444, 448, 460, 475, 484
Loyfield's (Dr.) case	10 Co. R. 88, a, 94, b.	254
Liardet v. Johnson	Bull. N. P. 76; 1 Webs. R. 53	167, 175, 484
Lincoln College case	3 Co. R. 63, a.	234
Liverpool, Mayor and Burgesses of, v. Lancaster, Chancellor of the county Palatine of	1 Str. 151	380
Losh v. Hague	7 Dowl. 495	299
----- v. ----- (N. P.)	1 Webs. R. 202	24, 95, 96, 114, 141, 189, 275, 453, 462, 463, 465, 467
----- v. ----- (Chan.)	1 Webs. R. 200	321, 338, 340
----- v. -----	Gods. on Pat. 2d. ed. 239	286
Ludford v. Gretton	Plowd. 490	455
Luxford v. Chitty	3 A. & E. 319	400
Lyme Regis, Mayor, &c. of, v. Henley	3 B. & Ad. 77	70
Macfarlane v. Price	1 Stark. R. 199	152, 156, 185, 188, 468
Macintosh v. Everington	6 Rep. Arts. N. S. 317, 365	470
Mackintosh's patent, <i>in re</i>	1 Webs. R. 739	558, 580
-----	Not reported	563
Macnamara v. Hulse	1 Car. & Marsh. 478	171, 177
Magdalen College case	11 Co. R. 74, b.	378
Manton v. Manton	Dav. P. C. 333	135, 174, 184, 433, 455, 457, 474, 478

Names of Cases.	Where reported.	Where cited in this Work.
Manton v. Parker	Dav. P. C. 327	135
Middleton v. Baker	1 Cro. (Eliz.) 751	412
Millar v. Taylor	4 Burr. 2303	227
Minter v. Mower, (K. B.)	6 A. & E. 735 ; 1 Webs. R. 142	121, 126, 189, 196, 465, 467
_____ v. _____ (N. P.)	1 Webs. R. 138	296
_____ v. Wells, (Exch.)	5 Tyr 163 ; 1 C. M. & R. 505 ; 1 Webs. R. 134	23, 26, 31, 90, 445
_____ v. _____ (N. P.)	1 Webs. R. 127	136, 185, 433, 443
_____ v. Williams	4 A. & E. 251 ; 1 Webs. R. 135	258
Mitchell v. Reynolds	1 P. Wms. 181 ; 19 Mod. 130	8, 20, 82, 83, 103, 105
Monopolies, case of ;—see Darcy v. Allein		
Moore's (Sir C.) case	Cit. 1 Str. 153	390
Morgan v. Scaward, (N. P.)	1 Webs. R. 170	136, 137, 153, 157, 161, 162, 166, 168, 172, 173, 175, 176, 177, 474, 479, 481, 484, 487, 489, 490, 495
_____ v. _____ (Exch.)	2 M. & W. 544 ; 1 Webs. R. 187	42, 45, 49, 85, 110, 114, 115, 119, 127, 139, 141, 229, 270, 271, 274, 275, 451, 452, 453, 458, 464, 466, 471, 667
_____ v. _____ (Chan.)	1 Webs. R. 167	318, 326, 331, 346, 347
Morgan's patent, <i>in re</i>	1 Webs. R. 737	567, 569, 570, 575
Morris v. Branson	Bull, N. P. 76 ; 1 Webs. R. 51	122
Muntz v. Foster	1 Dowl. & Low. 742	254, 262, 276, 277, 292
_____ v. Grenfell	7 Jur. 121	317
Myddleton v. Lord Kenyon	2 Ves. Jr. 408	104
Needler v. Winchester, Bp. of	Hob. 220	51
Neilson v. Harford, (Exch.)	8 M. & W. 806 ; 1 Webs. R. 331	46, 136, 176, 180, 188, 198, 277, 286, 294, 476, 482, 500
_____ (N. P.)	1 Webs. R. 295	167, 171, 173, 176, 179, 180, 293, 438, 482, 483, 484, 491
_____ (Chan.)	1 Webs. R. 278, 373	326, 327
_____ v. Thompson (V. C.)	1 Webs. R. 275	319, 334
_____ (L. C.)	1 Webs. R. 278	157, 319, 326, 340, 342
Newbury v. James	2 Mer. 446	172, 230
Nickel's patent, <i>in re</i> (M. R.)	4 Beavan, 563 ; 1 Webs. R. 650	220, 221, 548

Names of Cases.	Where reported.	Where cited in this Work.
Nickel's patent, <i>in re</i> (L. C.) . . .	1 Turn. & Ph. 36 ; 1 Webs. R. 656 . . .	213, 214, 216, 219, 220, 221, 536, 539, 548
— v. Ross	Not reported	438
— v. Haslam	8 Scott, 97 ; 7 M. & G. 378	46
—	8 Jur. 474	163, 183
Oldham v. Longmead	Cit. 3 T. R. 441	236, 244, 277
O'Reilly, <i>Ex parte</i>	1 Vesey Jr. 112 ; 1 Webs. R. 432	69
Owen v. Saunders	1 Ld. Ray. 158	36
Oxford and Cambridge University v. Richardson	6 Ves. 689, 708	313
Page's case	5 Co. R. 53	591
Palmer v. Edwards	1 Doug. 187, n.	241
Parmenter v. Webber	8 Taunt, 593	241
Patteson v. Holland	Not reported	293
Pering, <i>Ex parte</i>	4 A. & E. 949	74
Perry v. Skinner	2 M. & W. 471 ; 1 Webs. R. 250	207, 208, 211, 256, 556
— v. Mitchell	1 Webs. R. 269	261
Power v. Walker	3 M. & S. 7	234
Protheroe v. May	5 M & W. 675 ; 1 Webs. R. 414	241
Pugh v. The Duke of Leeds	Cowp. 714	486
Quarrill's patent, <i>in re</i>	1 Webs. R. 740	575, 579
Ransome v. Bental	3 Law. J. N. S. 161	374
Redmond, <i>in re</i>	5 Russ. 44	223
R. v. Amery	1 T. R. 149	262
— v. Arkwright	Dav. P. C. 61 ; Printed case ; 1 Webs. R. 64	22, 24, 64, 107, 122, 135, 153, 161, 166, 172, 174, 176, 178, 389, 415, 453, 468, 484
— v. Aires	10 Mod. 354	385
— v. Banks	6 Mod. 245	407, 408
— v. Bewdley	1 P. Wms. 207	407, 414, 430
— v. Blage	Dyer, 197, b.	393
— v. Bullock	1 Taunt. 71 ; 2 Leach. C. C. 996	36, 253, 381
— v. Butler	3 Lev. 220	378, 389, 397, 428
— v. —	2 Ventr. 344	384, 402, 428
— v. Capper	5 Price, 261	50
— v. Cary	1 Vern, 131 ; 1 Equ. cas. 129	425, 428
— v. Crauford	Not yet reported	430
— v. Cutler	1 Stark. R. 354	163, 196, 468
— v. Dyde	7 T. R. 661	408
— v. Else	Bull. N. P. 76 ; Dav. P. C. 144 ; 1 Webs. R. 76	188, 196, 468
— v. Eston	Dyer, 198, a.	392
— v. Fleet, Warden of	1 Eq. Cas. Abr. 128, 129	403
— v. Franklin	Cit. 5 T. R. 454	411, 412
— v. Johnson	5 A. & E. 488	414
— v. Hadden	2 C. & P. 184 ; Parl. Rep. 1829, p. 211	437

Names of Cases.	Where reported.	Where cited in this Work.
R. v. Hare	1 Str. 146	381, 390, 397, 407, 409, 429
— v. Hart	1 Cowp. 412	410
— v. Macleod	2 East, 202	408
— v. Metcalf	2 Stark. R. 249	44, 182, 183, 453, 454, 478
— v. Milca	7 T. R. 367	429
— v. Newall	M. S.	390
— v. Newton	Not yet reported	425, 426, 427
— v. Nickels	M. S.	186, 396, 400, 414, 419, 430, 468
— v. Perry	5 T. R. 453	411, 414
— v. Smith	Corn. Cr. Prac. 138	411
— v. Toly	Dyer, 197, b	393
— v. Vane	1 Sid. 84	412
— v. Vaughan	4 Burr. 2500	57
— v. Walton	2 Q. B. 969	288, 290
— v. Wheeler	2 B. & Ald. 345	42, 44, 85, 86, 90, 101, 159, 189, 415, 453, 454, 477, 478
— v. Yandell	4 T. R. 521	36, 253, 381, 655
— v. York, Archbishop of	Willes, 533; Barnes, 353	400
Roberts' patent, <i>in re</i>	1 Webs. R. 573	575
Robertson v. French	4 East, 130, 135	197
Roebuck v. Stirling	1 Webs. R. 45	28
Ross v. Pope	Plowd. 72	379
Rowntree v. —	Parl. Rep. 192	175
Rubery's case	1 Webs. R. 649	223
Russell's patent, <i>in re</i> ; — see Whitehouse's patent, <i>in re</i>		
Russell v. Barnesley	1 Webs. R. 472	307
— v. Cowley, (N. P.)	1 Webs. R. 459	496
— v. — (Exch.)	1 C. M. & R. 864; 1 Webs. R. 463	86, 126, 137, 197, 466, 470
— v. Cowley (Chan.)	1 Webs. R. 457, 471	326, 347
— v. Ledsam	11 M. & W. 647; 1 Dow. & Low. 347	289
— v. —	14 M. & W.	145, 255
Sackvill College case	T. Ray. 178	417
Samuda, <i>in re</i>	Not yet reported	534, 535
Sarnefield's case	Cit. 8 Co. R. 23, a	421
Saunders v. Aston	3 B. & Ad. 881	163, 196
Savory v. Price	1 Ry. & Mo. N. P. C. 1	179, 484
Saunders's, Master and Chaplain, of the, case	3 Leon. 165	591
Severn v. Olive	3 B. & B. 72	301
Sharp's patent, <i>in re</i>	1 Webs. R. 641	207, 223, 225, 226, 556
Simister's patent, <i>in re</i>	1 Webs. R. 721	575
Singleton v. Bolton	3 Doug. 293	374
Smith v. Dickenson	3 B. & P. 630	233
— v. Upton	6 M. & G. 251	293

Names of Cases.	Where reported.	Where cited in this Work.
Soame's patent, <i>in re</i>	1 Webs. R. 729	568, 569, 573, 574, 575, 577, 578
Southerne v. Howo	2 Rol. R. 26	374
Southworth's patent, <i>in re</i>	1 Webs. R. 486	148, 149, 569, 575
Spilsbury v. Abbott	1 Webs. R. 255	273
— v. Clough	2 Q. B. 466; 1 Webs. R. 255	205, 207, 569
Stafford's patent, <i>in re</i>	1 Webs. R. 563	575
Stead v. Williams	8 Jur. 930	34, 448
Steel, <i>dem.</i> , Clennel, <i>ten.</i> , Benn, vouch.	6 Taunt. 145	225
Steward's (Mark) case	9 Co. R. 99, b	420
Stocker v. Rogers	1 Car. & Kir. 99	302
— v. Waller	9 Jur. 136	208, 211
Startz v. Do la Rue	5 Russ. R. 322	46, 330, 385, 509
Stury and Stury	2 Rol. R. 291	404
Swain's patent, <i>in re</i>	1 Webs. R. 559	575, 579
Swann v. Fonnercau	3 Ves. 41	39
Sykes v. Sykes	3 B. & C. 541; 5 D. & R. 292	373
Tailors of Ipswich v. Sherring, see Clothworkers of Ipswich case	1 Rol. R. 4	105
Taylor v. Hare	1 B. & P. N. R. 260	245
Tennant's case	Cit. Dav. P. C. 429; 1 Webs. R. 125	22, 24, 28, 109, 444, 446, 450
Thomas v. Popham	Dyer, 218, b; F. Moor, 40	485
Thompson v. Brown	7 Taunt. 656	240
Tolson v. Kaye	6 M. & G. 536	414
Travell v. Carteret	3 Lev. 135	119
Turner v. Winter	1 T. R. 602; Dav. P. C. 145; 1 Webs. R. 77	135, 139, 161, 162, 165, 177, 178, 433, 455, 477, 483, 484
Vaughan v. Floid	1 Siderfin, 406	392
Walton v. Bateman	1 Webs. R. 613	274, 473
— v. —	3 M. & G. 773	272, 273
— v. Potter, (N. P.)	1 Webs. R. 585	272, 446, 447, 448, 470, 481, 487, 490, 495
— v. — (C. P.)	3 M & G. 411; 1 Webs. R. 597	272, 295
Watson v. Pears	2 Camp. R. 294	58, 70, 485
Webb v. Fairmaner	3 M. & W. 473	58
Well's case, see Westrupp and Gibbins		
Weller v. Bak, (Dipper's case at Tonbridge Wells)	2 Wils. 423	252
Westhead v. Keene	1 Beavan, 309	309, 310
Westrupp and Gibbin's patent, <i>Ex parte</i> Wells, <i>in re</i>	1 Webs. R. 554	202, 566, 580, 643
Whitehouse's case	1 Webs. R. 649, n.	223
— patent, <i>in re</i>	1 Webs. R. 473; 2 Mo. P. C. C. 496	147, 568, 569, 570, 578

Names of Cases.	Where reported.	Where cited in this Work.
Williams v. Brodie	Parl. Rep. 1829, p. 183; Cit. R. v. Arkwright, printed case, 162; Dav. P. C. 96	184, 468
——— v. Williams	3 Mer. 157	19, 231
Wilson v. Tindal	1 Webs. R. 730	348, 355
Winter v. Foweracres	2 Rol. R. 39	240
Wood v. Ledbitter	9 Jur. 187	240
——— v. Zimmer	1 Holt. N. P. C. 158	113, 114, 115, 129, 167, 464, 484
Woodcroft's patent, <i>in re</i>	1 Webs. R. 740; 3 Mo. P. C. C. 172	565, 569
Wright's patent, <i>Ex parte</i> Shuttleworth, <i>in re</i>	1 Webs. R. 561	149, 565, 566, 569, 575
Wright's patent, <i>Ex parte</i> Wright, <i>in re</i>	1 Webs. R. 575	572, 575
Wroth's, Sir T., case	Dyer, 167	591
Wynne v. Thomas	Willes, 563	212
Wynne, <i>dem.</i> , Thomas, <i>sen.</i> , Apperly, <i>vouch.</i>	Willes, 563	225
Yovatt v. Winyard	1 Ja. & W. 394	232
Zouch, Lord, and More's case	Godb. 413	74

ERRATA.

- Page 20, line 16 from the top, after "realm" add inverted commas.
- „ 37, line 5 from the bottom, after "letters" insert the word "patent."
- „ 39, note (c), bottom line, for Earl of Devon's" read "Earl of Devonshire's."
- „ 46, note (m), after "Nelson v. Harford" add "1 Webs. R. 331."
- „ 72, line 9 from the bottom, after "patent" insert "began."
- „ 73, note (i), for "Bozun's case, Co. R." read "Bozoun's case, 4 Co. R."
- „ 86, note (k), for "4 B. & G." read "4 M & G."
- „ 104, side note, near the top, for "of invention" read "if invention."
- „ 114, five lines from the bottom, after "Morgan v. Seaward," for "(f)" read "(b)."
- at the bottom of the page, note (c), after "530" insert "and ;" and *dele* "(f)."
- „ 139, side note, near the bottom, for "awards" read "avoids."
- „ 150, line 9 from the top, after "granted them" add "to inventors."
- „ 196, note (i), for "182" read "163."
- „ 207, line 21 from the top, for "always" read "frequently."
- „ 234, note (p), for "8 M. & W." read "12 M. & W."
- „ 245, note (m), for "Hart" read "Hare."
- „ 295, note (g), for "Beckford" read "Bickford."
- „ 311, line 15 from the top, for "King v. Marshall" read "Kay v. Marshall."
- „ 366, line 20 from the top, after "hearing," insert "or."
- „ 385, line 2 from the top, for "Acres" read "Aires."
- „ 408, note (s), for "3 East" read "2 East."
- „ 452, note (q), for "488" read "502."
- „ 476, line 10 from the top, *dele* "and also enrolled."
- marginal note, *dele* "and enrolled."
- „ 490, line 5 from the top, after "do" insert "not."
- note (i), for "Hill" read "Hall."
- „ 503, line 14 from the top, for "Alterations" read "Alteration."
- „ 616, top line, for "office" read "offices."
- line 5 from the top, for "10" read "4."

A

T R E A T I S E

O N

T H E L A W O F P A T E N T S .

CHAPTER I.

INTRODUCTION.

THE right of property in moveable chattels was recognized in the earliest periods, and is founded on the law of nature (*a*). But it was very different with respect to the sole right to use an invention, which had its origin in an advanced state of society, and not until after improvements in the arts had made considerable progress.

It has often been asserted, that according to the principles of universal equity, an inventor has an exclusive property in his invention. But it is clear, that independent of positive law, he has no such exclusive property, any longer than he keeps it secret; for no one who first makes any discovery can thereby acquire the right to prevent others from *making* and using the same discovery. He may, if he pleases, conceal his discovery from the world, but the moment he publishes it, he abandons his *exclusive* property in it, and others acquire a right to use the invention in any manner they please. The exclusive right to use an invention after it is published, can only have existence therefore by virtue of some positive law, which is made with the actual or implied consent of the whole community.

Every member of the community receives many benefits from the society in which he lives, and he is therefore bound,

(*a*) See Wollaston's Religion of Nature, s. vi.; Locke on Government, b. 2, c. 5; 2 Bl. Com. cc. 1, 24, 25, 26, and the authorities there referred to.

by every means in his power, to advance its interests. And it seems to be but reasonable that he should be expected to promote the public weal by putting the community in possession of any discovery he makes which may be for the public good. But invention is generally the result of much study and labour, accompanied with a considerable expenditure of time and money, and few persons have the requisite ability and inclination, without the hope of reward, to search for improvements in the arts for the benefit of the public.

Inventions beneficial to the public.

The whole community is benefited by the promotion of the useful arts, and, therefore, it is for the public good to hold out the promise of rewards to the inventors of new and useful arts and manufactures, who may first put the public in possession of them.

Public rewards. In some cases, where meritorious inventors could not be otherwise adequately rewarded, sums of money have been granted to them out of the public purse (*b*); but such a mode of recompense, it is clear, could not be generally adopted.

Rewards by patent privileges.

The mode of rewarding inventors, which has been adopted in this country, seems to be the best that could be devised:— it is by granting the inventor a monopoly in his invention for a limited time. It is true that by such a grant every other person is restrained during the continuance of the monopoly from using the patent invention, even if he makes a similar discovery himself. But at the time the grant is made, it is by no means certain that the invention will be given to the public, or even made by any other person, and by the temporary suspension of their right, the people acquire the certainty of being able to use the invention at the expiration of the monopoly. The reward which an inventor thus obtains, will, in general, be in proportion to the benefit which he confers upon the public, for the greater the utility of the invention, the more profitable will it be to the grantee of the monopoly.

Reason why privilege good.

Speaking of such a grant, *Sir Edward Coke* says (*c*), “The reason wherefore such a privilege is good in law is because the inventor bringeth to and for the commonwealth a new manu-

(*b*) See a list of cases in Parl. Rep. or Patents, 1829, App. p. 181.

(*c*) 3 Inst. 184.

facture by his invention, costs, and charges, and therefore it is reason that he should have a privilege for his reward (and the encouragement of others in the like), for a convenient time."

Utility to the public is, in fact, the consideration for every grant of the sole use of an invention, and letters patent, containing such grants, always state the public good to be the motive of the Crown in making the grants (*d*). It is not every thing invented, therefore, to the sole use of which the inventor can become entitled, for the thing itself (although perfectly new) may be of no value whatsoever to the public. And an exclusive right vested in any one to use a thing, which at the time it is given or offered to the public, is of itself of no value, might prevent others from bringing forward useful and profitable inventions, by reason of such otherwise useless thing forming part of their inventions. If an invention is useful to the inventor, and useless to the public, the inventor does not suffer any injury by having no legal right to the exclusive use of it; for no one would infringe the right if he had it, and the legal right could not be any source of profit to him; and if he should fear that he himself would be deprived of the right to use his invention by reason of its being included in a grant to some other person, he might most effectually prevent that by publishing it to the world. Still less will the inventor be injured for want of such an exclusive right if the invention is of no utility either to himself or the public, and he cannot have any right by means of his useless invention to anticipate and appropriate to himself any part of the profit to arise from the subsequent invention of any other person who may be able by his ingenuity to confer an actual benefit upon the public.

Utility the consideration for the grant.

The total absence of utility to the public in any invention will at all times, therefore, vitiate a grant of the sole use of it; but it will not be void on that ground, if the invention was of any utility to the public, although such utility may be very small (*e*).

Total absence of utility.

But an invention may happen to be of some use to the public, and yet it may be so trifling or frivolous that the convenience to the public, arising from the grant of the sole

Frivolous inventions.

(*d*) See c. iv. and c. v. s. 3, *post*, and the Index, tit. Utility.

(*e*) Vide *post*, c. v. s. 3.

use of it, would not be adequately compensated by the benefit which the public would receive from it. The law has deemed it right, therefore, that mere discovery of any new manufacture shall not vest the sole right to use it in the inventor; but that in order to become entitled to such a sole privilege, he must obtain a grant of it from the Crown, in whom the law has vested the power (which it exercises through its ministers) of judging, not only whether the invention is likely to be of so much utility to the public as to render the making of the grant a *matter of public expediency*, but also what duration of privilege (not exceeding fourteen years) the invention merits.

Inventors not entitled to a patent as of right.

Accordingly inventors are *never entitled as of right* to letters patent, granting them the sole use of their inventions, but they must obtain them from the Crown by petition, and *as a matter of grace and favour*, and letters patent always express that the grant is so made.

Prerogative ancient.

It is impossible to ascertain with certainty when such grants of the sole use of inventions were first made in this country, but there is reason to believe that this prerogative of the Crown is very ancient.

Thus in a case decided in the reign of Edward the Third (*f*), it is said that arts and sciences which are for the public good are greatly favoured in law, and the King, as chief guardian of the common weal, has power and authority by his prerogative to grant many privileges *for the sake of the public good*, although *primâ facie* they appear to be clearly against common right.

Patent for philosopher's stone.

And it is stated at the end of the report of the case of *Darcy v. Allen* in Sir Francis Moore's Reports (*g*), that in the time of Edward III., some alchymists persuaded the King that a philosopher's stone might be made, that the King granted a commission to two fryers and two aldermen to enquire if it was feasible, who certified that it was, and that the King granted to the two aldermen a patent of privilege, that they and their assigns should have the sole making of the philosopher's stone.

There is reason to believe that the practice of making grants

(*f*) Year Book, part iv. 40 Edw. III. fol. 17, 18.

(*g*) P. 675.

of the sole use of inventions originated in England, and that the English system of rewarding inventors has since been copied more or less closely by almost every European power.

Patents
originated in
England.

It is quite certain that in England the Crown derives its power to grant such letters patent from the Common Law itself, but restrained by the Statute of Monopolies, which was little more than a declaration of the Common Law on the subject.

Although it seems that the law has at all times permitted the grant of such limited monopolies as the exclusive right to use new inventions (*h*), yet almost all other grants of monopolies by the Crown were contrary to the Common Law, and the legislature in former times frequently interfered to repress them (*i*).

All other
monopolies
illegal.

Notwithstanding the illegality of all monopolies (except those for the sole use of new inventions), they were very frequently granted in former times, but the continual encroachments of the prerogative upon the Common Law in this way, particularly during the reigns of Elizabeth and James I., led at last to the passing of the celebrated Statute of Monopolies in the 21st year of the reign of the latter monarch; by which the Crown was effectually restrained from making such extravagant and illegal grants.

Statute of
Monopolies.

It is by that statute declared, that all monopolies whatsoever are contrary to law, and void; with a saving however of letters patent and grants of the sole privilege of working or making of new manufactures to the first inventors thereof. The provisions of this statute, material to the subject, will be minutely considered in the subsequent chapters of this work.

21 Ja. 1. c. 3.

The 5 & 6 Will. IV. c. 83, the 2 & 3 Vict. c. 67, and 7 & 8 Vict. c. 69, are the only other public general acts relating to patents which have been passed since the Statute of Monopolies. These statutes provide a remedy for many of the deficiencies of the old law, and they also will be considered in the following pages.

For many years after the passing of the Statute of Monopolies the arts and manufactures continued in a low state in this

(*h*) Vide *post*, c. ii.

(*i*) See Mag. ch. c. 30; 9 Edw. III. st. 1, c. 1; Stat. of Cloths, 25 Edw. III. c. 2; *Statutum de Stanulis*, 27 Edw.

III. st. 2; 28 Edw. III. c. 13, s. 3; 31 Edw. III. c. 10; 2 Rich. II. st. 1, c. 1; 7 Hen. VII. c. 9, & 12 Hen. VII. c. 6.

country, few of the inventions for which letters patent were obtained were of any value, and the demand for novelties being very limited, no one was tempted to infringe the rights of patentees. Our law reports, from the time of the passing of that statute, therefore, until the reign of George III., are almost entirely silent respecting such patent privileges; and indeed the case of *Edgeberry v. Stephens*, reported in the second volume of Salkeld's Reports (*j*), is almost the only case to be found during that period.

The first case of importance respecting a patent was an action of *scire facias* brought against Mr. Arkwright, to repeal his patent for an invention of certain instruments or machines for preparing silk, cotton, flax, and wool for spinning, which was tried in June 1785 (*k*).

About ten years afterwards the important cases of *Boulton and Watt v. Bull* (*l*), and *Hornblower v. Boulton and Watt* (*m*) were tried, in which this branch of our law was much discussed, and many of its difficulties and obscurities cleared away.

Since that period the number of causes respecting letters patent has gone on steadily increasing, in consequence of which, and the magnitude of the interests concerned in it, the patent law of this country has become of the greatest importance to the community, more particularly those engaged in trade or manufactures.

There is now, perhaps, hardly any part of the law relating to patents which has not been made the subject of judicial investigation and determination; and this branch of our law may therefore now be said to have at last assumed the form of a regular system, and the relative rights of the public and of patentees, as well as the prerogative of the Crown, to have been determined with at least a very considerable degree of certainty.

There is yet, however, much wanting to render the law any thing like perfect; but the greater part of the deficiencies can only be supplied by the legislature. Unfortunately there is little chance of the required remedies being applied at present, or indeed at all, whilst party strife shall continue to occupy so much of the time and attention of parliament.

(*j*) P. 447.

(*l*) 2 H. Bl. 463.

(*k*) See a report of the case in Davies's Patent Cases, p. 61.

(*m*) 8 T. R. 95.

CHAPTER II.

OF THE GRANTOR OF A PATENT, AND THE POWER OF THE CROWN
TO GRANT THE SOLE USE OF INVENTIONS.

It is quite clear that the prerogative of the Crown to grant the sole use of inventions is derived from the Common Law itself, and not from any statute. Common law prerogative.

This prerogative is vested in the Crown, as the depository of the supreme executive power of the state, to be exercised on the behalf of (*a*), and for the benefit of the public (*b*). It is inseparably annexed to the Crown, and cannot be granted to a subject (*c*), nor can any private person create a legal monopoly (*d*).

There is no statute to be found made prior to the Statute of Monopolies (*e*), which relates to grants of the sole use of inventions, although many acts have been passed for suppressing various illegal monopolies (*f*). There are authorities, however, in our ancient law books, which show that before the passing of the Statute of Monopolies, the Crown had power at the Common Law to make such grants. No statute prior to 21 Ja. I. Common law authorities.

Thus in the case of monopolies, *Darcy v. Allin* (*g*), it is said that "Where any man, by his own charge and industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before: and that for the good of the realm: that in such cases the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth: otherwise not." Darcy v. Allin.

And in the same report (*g*) it is stated, that in the 9 Eliza- Hastings' case.

(*a*) Per Lord Eldon, L. C., in *Harmer v. Playne*, 14 Ves. 132.

(*b*) Bac. Abr. tit. Prerog. and see Year Book, 40 Edw. III. fol. 18.

(*c*) 3 Shep. Abr. Prerog. p. 57, s. (7) and p. 54; Skin. 606; Jenkins, p. 304;

Bro. Pat. 13, and *ibid.* Prerog. 18.

(*d*) Hawk. P. Cr. bk. I. c. 79.

(*e*) 21 Ja. I. c. 3.

(*f*) See those referred to, *ante*, p. 5, n. (*i*).

(*g*) Noy, R. 182.

both, there was a patent granted to Mr. Hastings of the Court, that in consideration that he brought in the skill of making of frisadoes, as they were made in Harlem and Amsterdam beyond the seas, being not used in England; that, therefore, he should have the sole trade of the making and selling thereof for divers years; charging all other subjects not to make any frisadoes in England during that time, under a penalty of 100*l*. The patentee having filed a bill in the Exchequer against certain clothiers of Coxall, for making frisadoes contrary to the intent of the patent, it appeared, upon the examination of the cause, that the same clothiers did make baies very like to Mr. Hastings's frisadoes, and that they used them before Mr. Hastings's patent, for which cause they were neither punished nor restrained from making their baies like to his frisadoes.

Darcy v. Allen. So in the report of the case of monopolies contained in Moore's Reports (*h*), it is said that the Queen could not grant a patent to restrain the people in their usual trades and occupations; and that no occupation could be prohibited or put into a monopoly, but solely such thing as is newly invented by the skill of man, which may be granted by patent.

Clothworkers
of Ipswich
case.

In the *Clothworkers of Ipswich* case (*i*), it is said, "If a man hath brought in a new invention, and a new trade within the kingdom in peril of his life, and consumption of his estate, or stock, &c., or if a man hath made a new discovery of any thing: in such cases the King, of his grace and favour, in recompense of his costs and travail, may grant by charter unto him, that he only shall use such a trade or trafique for a certain time, because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it: but when that patent is expired, the King cannot make a new grant thereof. For when the trade is become common, and others have been bound apprentices in the same trade, there is no reason that such should be forbidden to use it."

Mitchell v.
Reynolds.

In the case of *Mitchell v. Reynolds* (*k*), it is laid down by *Parker, C. J.*, that "the grant of the sole use of a trade is void, but a grant of a trade newly invented and for a time is good; for the public has an advantage in the invention of a

(*h*) *Darcy v. Allen*, F. Moore, 672.

(*i*) Godb. 252, 254; S.C., 1 Rol. R. 4.

(*k*) 1 P.Wms. 181; 10 Mod. 130, S.C.

useful trade, which, after a limited time, is to be public, and the inventor's industry is sufficiently encouraged by the sole use of it secured to him by charter for such a time."

In Sheppard's Abridgment (*l*), it is laid down that it is Shep. Abr. generally held by the Judges, that the King may, for a reasonable time, grant a monopoly patent of that which any man at his own charge, wit, and invention, shall bring in as a new trade or device into the realm; or any new engine tending to the furtherance of it, for the good of the realm.

And Serjeant *Hawkins* says (*m*), "It seemeth clear that the Hawk. P. Cr. King may, for a reasonable time, make a grant to any one, of the sole use of an art invented, or first brought into the realm by the grantee."

And *Sir Edward Coke* says, in his Chapter of Monopolies in 3 Inst. 184. the Third Institute (*n*), that such a monopoly is good, and gives the reasons for it (*o*).

The extent of the prerogative thus vested in the Crown 21 Ja. I. c. 3. having been grossly abused, a declaratory statute was passed in the 21st year of the reign of James I. (1623), by which the power of the Crown to make such grants was confined within certain limits; and all other grants of monopolies were declared to be void (*p*). This Act has been frequently, but erroneously, supposed to *create* the power exercised by the Queen, in making grants of the sole use of inventions; but it will be seen from the statute itself, that such grants are merely excepted out of its provisions, and are left to depend upon the Common Law for their legality.

The statute (*p*) is intituled "An Act concerning mono- Title. polies and dispensations with penal laws, and the forfeitures thereof;" but it is usually called the Statute of Monopolies.

The preamble of the Act contains the following recitals:—

"Forasmuch as your most excellent Majesty, in your royal Preamble. judgment, and of your blessed disposition to the weal and quiet of your subjects, did in the year of our Lord God one thousand six hundred and ten; publish in print to the whole realm and to all posterity, that all grants of monopolies, and of the benefit of any penal laws, or of power to dispense with

(*l*) Part III. tit. Prerog. p. 61.

(*o*) See the passage given at length,

(*m*) Hawk. P. Cr. bk. I. c. 79, s. ante, p. 2.

20. (*p*) 21 Ja. I. c. 3.

(*n*) 3 Inst. 184.

the law, or to compound for the forfeiture, are contrary to your Majesty's laws, which your Majesty's declaration is truly consonant and agreeable to the ancient and fundamental laws of this your realm.

“ And whereas your Majesty was further graciously pleased expressly to command, that no suitor should presume to move your Majesty for matters of that nature. Yet, nevertheless, upon misinformations, and untrue pretences of public good many such grants have been unduly obtained, and unlawfully put in execution, to the great grievance and inconvenience of your Majesty's subjects, contrary to the laws of this your realm, and contrary to your Majesty's most royal and blessed intention so published as aforesaid. For avoiding whereof, and preventing the like in time to come, may it please your excellent Majesty, &c.”

Coke's
Commentary.

Sir Edward Coke says (*q*), “ It appeareth by the preamble of this Act (as a judgment in parliament) that all grants of monopolies are against the ancient and fundamental laws of this kingdom, and therefore it is necessary to define what a monopoly is—

Definition of
monopoly.

“ A monopoly is an institution or allowance by the King, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.”

Case of
monopolies.

In the case of monopolies (*r*), *Coke* says, “ Our Lord the King that now is, in a book which he in zeal to the law and justice commanded to be printed, anno 1610, intituled ‘ A Declaration of his Majesty's pleasure,’ &c., p. 13, has published that monopolies are things against the laws of this realm, and, therefore, expressly commands that no suitor presume to move him to grant any of them, &c.”

And in the Third Institute (*s*) he says, “ That the judgment in the case of monopolies (*t*) was the principal motive for publishing that book, and that the book was a great motive of obtaining the royal assent to the statute.” The second

(*q*) 3 Inst. 181.
(*r*) 11 Co. R. 88, b.

(*s*) 3 Inst. 182.
(*t*) 11 Co. R. 88, b.

recital in the preamble shows that the misinformations or false suggestions, and the untrue pretences of public good upon which grants of monopolies had been obtained, made them contrary to law. And this part of the preamble also shows that the intent of the legislature was to pass an Act for avoiding and preventing "such grants; that is to say, grants obtained upon misinformations and untrue pretences of public good."

After thus reciting the grievances under which the people laboured, in consequence of the illegal grants of monopolies, the first section of the Act proceeds to say that "for avoiding whereof, and preventing of the like in time to come," it was declared and enacted, "That all monopolies, and all commissions, grants, licences, charters, and letters patents heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of any thing within this realm, or the dominion of Wales, or of any other monopolies, or of power, liberty, or faculty, to dispense with any others; or to give licence or toleration to do use or exercise any thing against the tenor or purport of any law or statute; or to give or make any warrant for any such dispensation, licence, or toleration, to be had or made, or to agree or compound with any others for any penalty or forfeitures limited by any statute, or of any grant or promise of the benefit, profit, or commodity of any forfeiture, penalty, or sum of money, that is or shall be due by any statute before judgment thereupon had, and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters and things whatsoever any way tending to the instituting, erecting, strengthening, furthering, or countenancing of the same or any of them, are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in ure or execution."

Sec. 1,
21 Ja. I. c. 3.

By the grant of the sole privilege of using a new manufacture to an inventor, all other persons are restrained from using it during the continuance of the privilege, including every person, who, being ignorant of the prior invention, may himself make a discovery precisely similar. And as the effect

Patent
privilege is a
monopoly.

of such a grant is therefore to restrain persons of a freedom and liberty which they had before, that is to say, a freedom and liberty themselves to invent the art or manufacture, and use it in the way of trade for their own profit and benefit; it follows that such an exclusive privilege is a monopoly within the meaning of the word as defined by *Coke* (u).

In the case of *Boulton and Watt v. Bull* (x), Lord Chief Justice *Eyre* said, that by section one of this statute, a monopoly is defined to be, "the privilege of the sole buying, selling, making, working, or using any thing within the realm." And it is clear that this is so, for the Act, immediately after mentioning "all commissions, grants, licences, charters and letters patents of or for the sale, buying, selling, making, working, or using of anything within this realm," adds the words, "or any *other* monopolies," clearly indicating that all the commissions, grants, &c., previously mentioned are in law deemed to be monopolies.

But even if it were doubtful whether the sole privilege granted to an inventor is a monopoly according, to the Common Law, the words "all commissions, grants, licences, charters and letters patents, of or for the sole buying, selling, making, working or using of anything within this realm," but for the subsequent exception would have been sufficient to include letters patent for inventions.

The first section of the Act concludes by declaring, that the matters and things before mentioned "are altogether contrary to the laws of this realm; and so are, and shall be, utterly void and of none effect, and in nowise to be put in ure or execution." These words plainly show that it was the intention of the legislature to declare what the Common Law was on the subject, and not to introduce any new law.

Sec. 2,
21 Ja. I. c. 3.

By section 2, it is declared and enacted, that all monopolies, and all such grants, letters patents, &c., ought to be and shall be tried by the Common Laws of the realm, and not otherwise.

Sec. 3.

The 3rd section enacts, that all persons shall be disabled and incapable to have or exercise any monopoly, or any such grant, letters patent, &c., as aforesaid.

Sec. 4.

Section 4 provides, that any person aggrieved by any mo-

(u) 3 Inst. 181; vide *ante*, p. 10.

(x) 2 H. Bl. 463.

nopoly, or any such commission, grant, letters patent, &c., shall have a remedy by action to recover treble damages and double costs, and imposes the penalties of premunire upon persons delaying such actions except by authority of the Court.

These four sections of the statute effectually suppressed all illegal monopolies, and deprived the Crown, not only of all claim to grant such monopolies in future, but also of all power to prevent persons aggrieved by them from pursuing their legal remedies; the statute being, as *Sir Edward Coke* observes (*y*), “forcibly and vehemently penned for the suppression of all monopolies:—for monopolies in times past were ever without law, but never without friends.”

Statute suppressed illegal monopolies.

This statute, however, as has been already observed, was only intended to be declaratory of the Common Law respecting monopolies, and as the generality of the terms used in the first and third sections would have extinguished the power of granting to inventors the sole use of their inventions, the authority of the Crown to make such grants is excepted and preserved within certain limits by the fifth and sixth sections of the Act.

Intended to be declaratory of the common law.

The first exception is in favour of letters patent made *prior* to the statute, and it is as follows: section 5. “Provided, nevertheless, and be it declared and enacted, that any declaration before mentioned shall not extend to any letters patent, and grants of privilege for the term of one and twenty years or under, *heretofore made*, of the sole working or making of any manner of new manufacture within this realm, to the first and true inventor or inventors of such manufactures, which others at the time of making of such letters patent and grants did not use, so they be not contrary to the law, nor mischievous to the state by raising of the prices of commodities at home, or hurt of trade, or generally inconvenient, but that the same shall be of such force as they were or should be, if this Act had not been made, and of none other: and if the same were made for more than one and twenty years, that then the same for the term of one and twenty years only, to be accompted from the date of the first letters patents, and grants thereof made, shall be of such force as

Exception in Sect. 5, as to patents already made.

they were or should have been, if the same had been made but for term of one and twenty years only, and as if this Act had never been had or made, and of none other."

2nd exception. The 2nd exception is in favour of letters patent to be made *after* the passing of the Act. It is as follows:

Sec. 6, as to patents to be made afterwards.

Section 6.—“ Provided also, and be it declared and enacted, that any declaration before mentioned shall not extend to any letters patents, and grants of privilege, for the term of fourteen years or under, *hereafter to be made*, of the sole working, or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use, so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters patents or grants of such privilege hereafter to be made, but that *the same shall be of such force as they should be if this act had never been made, and of none other.*”

Ch. Monop.
3rd Inst.

The Chapter of Monopolies in *Sir Edward Coke's Third Institute of the Laws of England* (z), contains the following commentary respecting the exceptions in this statute in favour of letters patent for new inventions; speaking of the proviso in section *five*, he says, “The first is, that this Act shall not extend to any letters patents or grants of privilege heretofore made of the sole working, or making of any manner of new manufacture, but that new manufacture must have seven properties.”

“*First*, it must be for twenty-one years, or under.”

“*Secondly*, it must be granted to the first and true inventor.”

“*Thirdly*, it must be of such manufactures which any other at the making of such letters patent did not use, for albeit it were newly invented, yet if any other did use it at the making of the letters patents, or grant of the privilege, it is declared and enacted to be void by this Act.”

“*Fourthly*, the privilege must not be contrary to law: such a privilege as is consonant to law must be substantially and essentially newly invented; but if the substance was *in esse* before, and a new addition thereunto, though that addition

(z) 3 Inst. c. 85, p. 181, 184.

make the former more profitable, yet is it not a new manufacture in law: and so was it resolved in the Exchequer Chamber, Pasch. 15 Eliz. in *Bircot's* case, for a privilege concerning the preparing and melting, &c. of lead ore: for there it was said, that that was to put but a new button to an old coat, and it is much easier to add than to invent. And there it was also resolved, that if the new manufacture be substantially invented according to law, yet no old manufacture in use before can be prohibited.” Bircot's case.

“*Fifthly*, nor mischievous to the state by raising of prices of commodities at home. In every such new manufacture that deserves a privilege, there must be *urgens necessitas*, and *evidens utilitas*.”

“*Sixthly*, nor to the hurt of trade. This is very material and evident.”

“*Seventhly*, nor generally inconvenient.”

“There was a new invention found out heretofore that bonnets and caps might be thickened in a fulling mill, by which means more might be thickened and fulled in one day, than by the labours of four-score men who got their living by it. It was ordained that bonnets and caps should be thickened and fulled by the strength of men and not in a fulling mill, for it was holden inconvenient to turn so many labouring men to idleness.”

“If any of these seven qualities fail, the privilege is declared and enacted to be void by this Act: and yet this Act, if they have all these properties, set them in no better case than they were before this Act.”

Speaking of section *six*, he says,

“The *second* proviso concerneth the privilege of new manufactures *hereafter* to be granted: and this also must have seven properties; first, it must be for the term of fourteen years, or under; the other six properties must be such as are aforesaid. *and yet this Act maketh them no better than they should have been if this Act had never been made, but only except and exempt them out of the purview and penalty of this law.*”

The cause wherefore the privileges of new manufactures, either before this Act granted, or which after this Act should be granted, having these seven properties, were not declared to be good was, for that the reason wherefore such a privilege

is good in law is, because the inventor bringeth to and for the commonwealth a new manufacture by his invention, cost and charges; and therefore it is reason that he should have a privilege for his reward (and the encouragement of others in the like) for a convenient time: but it was thought that the times limited by this Act were too long for the private before the commonwealth should be partaker thereof, and such as served such privileged persons by the space of seven years, in making or working of the new manufacture (which is the time limited by law of apprenticeship), must be apprentices or servants still during the residue of the privilege, by means whereof such numbers of men would not apply themselves thereunto as should be requisite for the commonwealth after the privilege ended. And this was the true cause wherefore, both for the time past, and for the time to come, they were left of such force as they were before the making of this Act."

In the case of *Boulton and Watt v. Bull* (a), Lord Chief Justice *Eyre* said, respecting this commentary of Coke's, "*Sir Edward Coke* discourses largely, and sometimes not quite intelligibly, upon monopolies, in his Chapter of Monopolies, Third Inst. 181; but he deals very much in generals, and says little or nothing of patent rights as opposed to (illegal) monopolies."

Bircot's case we shall see hereafter is not now law, having been again and again expressly overruled. Nor would a patent be deemed generally inconvenient within the meaning of the sixth section of the Act, because it turned many labouring men to idleness. Indeed, it seems to have escaped the notice of our great commentator, that ordaining "that bonnets and caps should be thickened and fullled by the strength of men," is to give labouring men a monopoly of thickening and fulling bonnets and caps.

Prerogative derived from the common law.

It appears most clearly, both from the words of the statute, and also the Commentary of *Sir Edward Coke*, that the power of the Crown to grant the sole use of an invention is derived from the Common Law, and not, as many persons have erroneously supposed, from the Statute of Monopolies. For the sixth section, respecting letters patent to be made after the passing of the Act, expressly declares (b), that the excepted

(a) 2 H. Bl. 463.

(b) Vide ante, p. 13-14.

grants shall be of such force as they should be if the Act had never been made, *and of none other*; and *Sir Edward Coke* says (c), that the Act makes them no better than they should have been if the Act had never been made, but only excepts and exempts them out of the purview and penalty of it. And all the cases decided in favour of patentees, whether before or since the passing of the Act, are so many authorities that the Crown has power *at the Common Law* to make such grants.

The prerogative of the Crown to make such grants is, however, confined within definite limits, both by the Common Law and the Statute of Monopolies. At the Common Law such grants could only be made by the Crown, by charter, or letters patent under the Great Seal, to the first inventor; the invention must have been new in England, and useful; and the term of the privileges reasonable. The statute seems merely to have further provided that the term shall not exceed fourteen years.

Prerogative limited by common law and statute.

This, like every other prerogative, being vested in the Crown, for the benefit of the people, a discretion is to be exercised with respect to the making of such grants; and that discretion is exercised through the medium of certain officers and advisers appointed by law for that purpose. Thus, the petition for such a grant must be presented to her Majesty, through one of the Secretaries of State, who is always a privy councillor, and bound by his oath to advise her Majesty respecting the expediency of granting the prayer of the petition. The petition is also referred to the Attorney or Solicitor-general, to report upon the petitioner's title, and the propriety of granting him the privilege which he seeks to obtain. And even after it has been decided that the grant shall be made, the proceedings necessary for obtaining it must pass through several public offices before the Lord Chancellor is authorized by writ under the privy seal to make the patent (d); and the making of the patent may be stopped at any stage of the proceedings.

The grant of a patent discretionary.

And although the Queen has determined to make the grant

Command to Chancellor to make a patent is conditional.

(c) *Vide ante*, p. 15.

(d) The various proceedings for obtaining a patent and the offices through

which they pass, will be detailed, *post*, in Chapter XII., respecting the practice upon obtaining patents.

requested by an inventor, and in consequence commands a patent to be made; that command is to be understood as having an implied condition annexed to it; namely, that the making of the grant will not be contrary to law or inconsistent with justice to any others of her Majesty's subjects, and therefore it is that, as we shall see in a subsequent part of this work, the Lord Privy Seal, and the Lord Chancellor exercise judicial authority respecting the making of the writ of privy seal and letters patent (e).

Power to grant not suspended by minority.

The power of the Crown to grant patent privileges is not suspended by the minority, or any other personal incapacity, of the reigning Sovereign (f).

(e) See further on this subject in Chapter IV. respecting the patent, and the practice as stated in Chapter XII. respecting the writ of privy seal and

letters patent.

(f) Co. Lit. 43, b; 5 Co. 27, a; 7 Co. 12, a; 1 Black. Com. 248.

CHAPTER III.

OF THE GRANTEE OF A PATENT PRIVILEGE, OR THE PERSON TO WHOM THE SOLE USE OF AN INVENTION MAY BE GRANTED.

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- SECT. I.—*Of the Grantee of a Patent Privilege, p. 19.*
 II.—*Of the true and actual Inventor or Discoverer of a new Art or Manufacture, p. 22.*
 III.—*Of the true and actual Importer of a new Art or Manufacture, p. 26.*
 IV.—*Of the first Inventor, or first Importer of a new Art or Manufacture, p. 31.*
 V.—*Of the Persons incapacitated from becoming Grantees of Patent Privileges, p. 34.*
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SECTION I.

Of the Grantee of a Patent Privilege.

THE next subject of enquiry is,—to whom may the sole use of an invention be granted? We shall see that a patent granting such a privilege is to be considered as containing a bargain between the public and the grantee (a), the Crown on behalf of the public making the grant in consideration of a benefit conferred upon the public *by the grantee*. And *Sir Edward Coke* says (b), that the reason why such a grant to an inventor is good, is “because the inventor bringeth to and for the commonwealth a new manufacture, *by his invention*, cost and charges, and therefore it is reason that he should have a privilege *for his reward, and the encouragement of others.*”

To whom a patent privilege may be granted.

The object of the law is, therefore, to procure new inventions for the benefit of the public, and letters patent, are

Object of the law to procure inventions by rewards.

(a) *Post*, Ch. IV. and vide *Williams v. Williams*, 3 Mer. 157; and *Harmar v. Playne*, 14 Ves. 131—6.
 (b) 3 Inst. 184.

granted for new inventions for the purpose, not only of recompensing particular grantees, but also of stimulating and encouraging others by the hope of similar rewards to confer similar benefits upon the public.

Patents can be granted to inventors only.

The persons to be rewarded therefore, by such letters patent, are those who *invent, and give to the public the benefit of their inventions*; to such persons, and such alone, is the Crown authorized by law to grant the sole use of inventions; and we shall see that the prerogative of the Crown is limited in this manner, both by the Common Law and the Statute of Monopolies.

Darcy v. Allin.

In the case of monopolies, *Darcy v. Allin* (c), which was decided before the passing of the Statute of Monopolies, it was laid down that such a monopoly may be granted to any man, who, “by his own charge and industry, or by his own wit or invention, doth bring any new trade into the realm. And

Clothworkers of Ipswich case.

in the *Clothworkers of Ipswich* case (d), (also decided before the statute,) it is said that if a man hath brought in a new invention and a new trade within the kingdom, in peril of his life and consumption of his estate or stock, &c., or if a man hath made a new discovery of anything,” the King may grant him the monopoly of his invention for a time.

Mitchell v. Reynolds.

In the case of *Mitchell v. Reynolds* (e), Lord Chief Justice *Parker* states the opinion of the Court of Queen’s Bench at some length respecting monopolies, and he there says, that “a grant of the sole use of a new invented art is good, being indulged for the encouragement of ingenuity, but is tied up by the statute of 21 Jac. I. c. 3, s. 6, to the term of fourteen years.” He also states, that “patents for the sole use of a new invented art” are not within any of the reasons against illegal monopolies, and that “as to a new invented art nobody can be said to have a right to that which was not in being before; and, therefore, it is but a reasonable reward to ingenuity and uncommon industry.” And although this case occurred after the passing of the statute, it is evident from the language of the judgment, that the Court was laying down what was deemed to be the Common Law on the subject.

(c) Noy, 182.

(d) Godb. 252, 254.

(e) 1 P. Wms. 181; 10 Mod. 130, S. C.

In Sheppard's Abridgment (*f*) it is laid down that the King may grant a monopoly "of that which *any man at his own charge, wit, and invention*, shall bring in as a new trade or device into the realm." And the person who brings in the trade or device must of course be the grantee of the monopoly. Shep. Abr.

By the sixth section of the Statute of Monopolies, an exception is made out of the preceding condemnation of all monopolies in favour of future letters patents and grants of privilege for the term of fourteen years, "of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures." It seems that this enactment must be read, as if the grants were permitted to be made to the true and first inventors within the realm, for it will be seen that a valid patent may be granted to a person who imports an invention from abroad, if it be new in this country. Sec. 6, stat. 21 Jac. I. c. 3.

Letters patent for inventions are always framed in such a way as to impose conditions upon the grantee in affirmance of the provisions of the Common and Statute Law upon this subject (*g*). Therefore every patent granting the sole use of an invention to the actual inventor or discoverer, contains a proviso for avoiding the grant if the invention was "not invented or found out" by the grantee (*h*). And in a patent granted for an imported invention, there is a similar proviso for avoiding it if the invention was not first introduced into this kingdom by the patentee. Condition in patent in accordance with the law.

Letters patent always recite the patentee's petition for the grant (*i*), and the recital shows whether the petitioner stated himself to be an inventor or an importer. And if the statement made to the Crown was false, the grant is void by reason of the false suggestion (*k*). Recital of patentee's title.

It is evident from what has been stated, that no person can be the grantee of a privilege in an invention, except the *true* and *first* inventor of the invention. To be capable of supporting such a grant therefore, the patentee must be the person None but true and first inventor can be a grantee.

(*f*) Part. III. tit. Prerog, p. 61.

(*g*) 21 James I. c. 3. s. 6.

(*h*) See this clause, in the patent.

(*i*) See the form of patent, in the

Appendix, Chapter II. s. 1.

(*k*) See Chapter IV. *post*, on this subject.

who has not only actually invented or imported the invention, but who has been the first to give the invention to the public.

SECTION II.

Of the true and actual Inventor of a new Art or Manufacture.

Inventor, who is.

AN inventor is a person who discovers or finds out something new, a framer, contriver, or deviser of what was before unknown. A person who founds his claim to a patent privilege upon discovery, and not importation merely; must be the person who really and actually invented or discovered the invention, which is made the subject of the privilege.

Patentee must himself have invented.

To be an actual inventor or discoverer of a manufacture, a person must himself make the discovery or invention, the idea of it must originate in his own mind (*l*); and must not be suggested to him by another (*m*), or taken from a book (*n*), or from any thing else (*o*); but whether the discovery be the result of accident, of some happy thought, or of great study, labour and expense (*p*), is perfectly immaterial as respects the validity of the bargain made by the patent, between the patentee and the public. If the patentee was enabled by his own discovery to communicate to the public the knowledge of the invention, he is the person whom the law enables the Crown to reward by a patent for the benefit conferred upon the public.

Whether accidental or not immaterial.

Jones v. Pearce.

Thus in the case of *Jones v. Pearce* (*q*), *Patteson, J.*, said, that the plaintiff's patent would be good if the patent "was his own invention."

Tennant's case.

In *Tennant's case* (*r*), it appeared that the principal part of the process claimed by the patentee in his specification had been suggested to him by another person, and therefore it was held that he was not the true inventor, and that his patent was void.

(*l*) *Jones v. Pearce*, 1 Webs. 124.
 (*m*) *Tennant's case*, 1 Webs. 125.
 (*n*) *Arkwright's case*, Dav. P. C. 61; *Hill v. Thompson*, 8 Taunt. 375; 2 B. Mo. 424, S. C.; and vide *post*, Chapter V. s. 3, as to the novelty of an invention.

(*o*) *Carpenter v. Smith*, 1 Webs. R. 535.

(*p*) See *Crane v. Price*, 1 Webs. R. 411.

(*q*) Webs. R. 124.

(*r*) Webs. 125, Davies. P. C. 429.

In the case of *Barber v. Walduck* (s), it appeared that the invention was made by a workman whilst employed in the workshop of the patentee, and it was held that the patent could not be sustained. It must, however, be presumed, that in this case the patentee obtained a knowledge of the invention from his workman, and that the workman when he made the discovery was not employed in carrying out the ideas of his master.

Barber v. Walduck.

In the case of *Minter v. Wells* (t), Mr. Baron Alderson said to the jury, "Minter and Sutton were together about the time the invention took place; which of the two suggested the invention, and which carried it into effect, is a question for you to decide. If Sutton suggested the principle to Mr. Minter, then he (Sutton) would be the inventor. If, on the other hand, Mr. Minter suggested the principle to Sutton, and Sutton was assisting him, then Mr. Minter would be the first and true inventor."

Minter v. Wells.

In the case of *Lewis and another v. Marling* (u), Lord Tenterden, C. J., said, that if the plaintiffs had borrowed their invention from some one else, their patent would fail. And also that if they had seen a model of the invention, or a description of it contained in an *American specification*, that would be an answer to their claim of invention (x). And in the same case Bayley, J., said, "If it had been shown that the plaintiff had seen the model, and had borrowed from it, he would not have been the true inventor."

Lewis v. Marling.

The reason why the grantee of an invention is required to be the true and actual inventor is, that the *consideration* for the grant made to him by or on the behalf of the public, must proceed from the grantee himself (y), and it is intended to reward him for his ingenuity, labour, and expense, and not another who may by any means obtain a knowledge of his invention. It is difficult to prove an actual inventing or discovering by the patentee in any case (z), and, indeed, the only evidence of it which an inventor is ever capable of giving in our Courts of Law is, that he was the first person to give a

Consideration must move from the grantee.

Difficulty of proving an actual inventing.

(s) Cit. 1. C. & P. 567; S. C. nom. *Barber v. Shaw*, Holroyd. Pat. p. 60.

(t) 1 Webs. R. 132.

(u) 4 C. & P. 52; 10 B. & C. 22.

(x) 10 B. & C. 27.

(y) A similar rule of law prevails

with respect to the consideration necessary to support a promise in an action of assumpsit.

(z) See Chap. XI. and Index, tit. Evidence.

knowledge of the invention to the world ; for, according to the rules of evidence which obtain in those Courts, no one can be a witness in his own cause.

Prior invention
may be proved.

But although a patentee may have been the first to put the public in possession of the invention, yet it is open to any one to show that he was not the real inventor, or that he had borrowed it from some other person, or had obtained a knowledge of it (in this country) from some other source than his own actual discovery (a).

Cornish v.
Keene.

Thus, in *Cornish v. Keene* (b), the Lord Chief Justice (*Tindal*) said, " Sometimes it is a material question to determine whether the party who got the patent was the real and original inventor or not ; because these patents are granted as a reward, not only for the benefit which is conferred upon the public by the discovery, but also to the ingenuity of the first inventor : and although it is proved that it is a new discovery so far as the world is concerned, yet if any body is able to show that although that was new,—that the party who got the patent was not the man whose ingenuity first discovered it ; that he had borrowed it from *A.* or *B.*, or taken it from a book that was printed in England, and which was open to all the world,—then although the public had the benefit of it, it would become an important question whether he was the first and original inventor of it."

Patentee must
have invented
every part.
Losh v. Hague.

And not only must the patentee have been the actual inventor, but he must have invented every part of what he claims to have invented (c). Thus in the case of *Losh v. Hague* (d), Lord *Abinger*, C. B., said, " That if a man claims by his patent a number of things as being the inventor of them, whether they consist of improvements or original inventions, and it turns out that some of them are not original, his patent is void."

Not necessary
to show great
labour.

But although the invention must have been the patentee's own invention, it is not necessary to show that it has been the result of great labour, pains, or expense. For, indeed, a patentee would seldom be in a position to prove the extent of his labour or cost in bringing his invention to perfection ;

(a) Vide *post*, Evidence, Chap. XI.

(b) 1 Webs. R. 507.

(c) See *Tennant's case*, 1 Webs. R.

125 ; *Arkwright's case*, Dav. P. C. 61.

(d) 1 Webs. R. 203.

and besides, if there are persons in the world who are capable, without much mental effort, and without the aid of experiment, to make inventions useful to the public, it is very desirable that they should be encouraged and rewarded, by the grant of temporary privileges, to bestow their time and talents in the production of new inventions, which may be of the greatest benefit to the public.

Thus in the case of *Crane v. Price and others* (e), the Crane v. Price. Court of Common Pleas held that it was unnecessary to consider the labour, pains, or expense incurred by the patentee in bringing his discovery to perfection, and that in point of law the labour of thought or experiment, and the expenditure of money, are not the essential grounds of consideration on which the question whether an invention is or is not the subject-matter of a patent ought to depend. And there can be no doubt that the same law is applicable to the question whether a patentee was the true inventor of the invention, for it is sufficient if the patentee was really the inventor, and gave the invention to the public in consideration of the patent. And in the case last cited, the Court said, "If the invention be new and useful to the public, it is not material whether it be the result of long experiment and profound research, or whether by some sudden and lucky thought, or mere accidental discovery."

The law does not prevent an inventor from availing himself of the assistance of workmen or servants in the prosecution of his search after a new manufacture. Many processes cannot be conducted by the unaided exertions of a single individual, and in order to discover any thing new in the arts and manufactures, it is almost always necessary to have recourse to actual experiment in order to discover how any particular object may be best obtained. And indeed the previous ignorance of the world respecting a process or mode of producing a new manufacture, points out the necessity for questioning nature, as it were, by experiments, and thus endeavouring to discover in what way her laws allow us to attain any object we may have in view. It would, therefore, be most impolitic to confine the rewards given to inventors to that class of them only who have entirely and without any assistance whatever brought their inventions to perfection; and indeed

Inventor may
avail himself
assistance.

(e) 1 M. & G. 580; 1 Webs. R. 410, 411.

it may be doubted whether, properly speaking, any such would be found.

Servants considered as inventor's tools.

Our law, therefore, permits an inventor in the prosecution of his discovery to avail himself of the labour of servants, they being in fact considered as mere tools or instruments working by his directions, and carrying out the views which he has formed in his own mind.

Minter v. Wells.

Thus, in the case of *Minter v. Wells* (e), Alderson, B., said, if Mr. Minter suggested the principle to Sutton, and Sutton was assisting him, then Mr. Minter would be the first and true inventor, and Sutton would be a machine, so to speak, which Minter used for the purpose of enabling him to carry his original conception into effect.

Bloxam v. Elsee.

And in the case of *Bloxam v. Elsee* (f), which was an action for the infringement of two patents granted to John Gamble, the first of which was for a new paper machine, and the second for improvements made upon the invention comprised in the first. One ground of defence at the trial was, that these improvements were the invention of Mr. Donkin, an engineer.

Mr. Donkin proved that the improvements were of his invention; but he stated that at the time he invented those improvements he was employed by Mr. Gamble, the patentee, and Mr. Foudrinier, his partner, as an engineer, for the purpose of bringing the machine to perfection, and was paid by them for so doing; and therefore he was acting as their servant for the purpose of suggesting improvements in the machine. For the plaintiff it was contended that the improvements were the patentee's inventions, and that Mr. Donkin was employed by them to carry their ideas into effect in the best manner. And the objection to the patent on this ground seems to have been disregarded.

SECTION III.

Of the true and actual Importer of a New Art or Manufacture.

Importer might at common law be a grantee.

SOME of the old cases respecting monopolies already cited, show that the importer from abroad of an invention unknown in this kingdom was, at Common Law, entitled to maintain a patent for the sole use of the invention.

(e) 1 Webs. R. 132.

(f) 1 C. & P. 558; 6 B. & C. 169.

Thus, in the case of monopolies (*g*), it is laid down that a grant may be made to a man who "doth bring any new trade into the realm." In the same case it appears that a patent had been granted to Mr. Hastings, "in consideration that he brought in the skill of making of frisadoes as they were made in Harlem and Amsterdam." And no objection was made to the patent on the ground, that Mr. Hastings was not the actual inventor. So in the *Clothworkers of Ipswich* case (*h*), it is said that the King may make a grant to a man who "hath brought in a new invention, and a new trade, within the kingdom."

Case of Monopolies.

Hasting's case.

Clothworkers of Ipswich case.

In Sheppard's Abridgment (*i*), it is laid down that the King may grant a monopoly of any new trade or device which any man bring *bring into the realm*. And Serjeant *Hawkins* (*k*) says, that such grants may be made "of an art invented or first brought into the realm by the grantee."

Shep. Abr.

It is clear that the exception contained in the sixth section of the Statute of Monopolies (*l*), was intended by the legislature to be in affirmance of the Common Law upon the subject, with the exception perhaps of the length of the term for which a patent might be granted, and which, before the passing of the statute, was uncertain, and merely required to be reasonable.

Sect. 6, Stat. Monopolies.

And the language of the preamble of the Act plainly indicates that the grants intended to be rendered void, were such only as would be void at Common Law, independently of the statute (*m*). Our Courts have therefore construed this section of the statute as permitting grants of privilege in new arts or manufactures, to be made to the true and first inventors of such arts or manufactures *within the realm*, and therefore patents for foreign inventions, unknown in this country, have been held to be good ever since the passing of the statute, and very many of such patents are continually granted to the importers of such inventions.

Statute construed to permit grants for foreign inventions.

Thus, in the case of *Edgeberry v. Stephens* (*n*), it is held that if an invention be new in England, a patent may be granted though the thing was practised beyond the sea

Edgeberry v. Stephens.

(*g*) Noy. 182.(*l*) 21 Ja. I. c. 3.(*h*) Godbolt, 252, 251.(*m*) See *ante*, p. 10.(*i*) Part 3, tit. Prerog. p. 61.(*n*) 2 Salk. 447; Dav. P. C. 36; and(*k*) Hawk. pl. Cr. bk. i. c. 79, s. 20.

1 Webs. R. 35, S. C.

before; that the Act intended to encourage new devices useful to the kingdom, and whether learned by travel or study, it is the same thing.

This case has ever since been acted upon as law; and indeed there is no subsequent case reported in which the validity of a patent has been questioned on the ground of the invention comprized in it being a foreign invention, and merely imported into this country by the patentee.

Importer may support a patent for a foreign invention.

It is clear, therefore, that if an invention be unknown in this realm, a person who imports a knowledge of it from a foreign country, will be able to support a patent for it as the true inventor of it, within the meaning of the Statute of Monopolies.

Importer from any other part of the realm cannot support a patent.

But it seems that if an invention be publicly known in any part of the realm, as Ireland or Jamaica, for example; a person who afterwards imports the knowledge of it into England cannot be an inventor within the meaning of the law. The case of *Brown v. Annandale (o)* shows, that if an invention be known in any part of the realm, a subsequent patent for it in England or Scotland, would be void on the ground of a want of novelty in the invention, even if it were perfectly new at the date of the patent in that part of the realm for which the patent was granted.

Brown v. Annandale.

There can be little doubt that whenever the question does arise, it will be held that a mere transportation of a knowledge of an invention from one part of the realm to another, will not make a person an inventor within the meaning of the patent law. And in the case of *Brown v. Annandale (p)*, just cited, Lord *Lyndhurst*, L. C., said, "It would be a monstrous thing if an invention having full publicity in one part of the United Kingdom could be made the subject of a patent in another part of it." And in the same case Lord *Campbell* said, that "If the Crown were made aware of that fact the grant would be refused."

Tennant's Case.

In *Tennant's case (q)*, one ground upon which the patent was held to be void was, that the plaintiff (the patentee) was not the inventor of an indispensable part of the process for which

(o) 1 Webs. R. 433; See also *Roe-buck v. Stirling*, 1 Webs. R. 45 and 451.

(p) 1 Webs. R. 444.

(q) Dav. P. C. 429; 1 Webs. R. 125.

he had obtained his patent; it having been shown that it was suggested to him by a chemist at Glasgow. It does not appear from any report of that case *where* the communication was made to the patentee, although from the language of the note of the case in Davies' Patent Cases, it is to be inferred that the suggestion was made in Scotland; but no attempt was made to support the patent on the ground that the communication was made to the patentee by a person residing out of England. Tennant's patent was, however, obtained for an invention by the patentee, and without mentioning it to be an imported or communicated invention, and therefore it may have been thought that the form of the representation to the Crown in that case, excluded the patentee from all right to support his patent as for a communicated invention.

It is quite clear that no patentee can support a patent as inventor of a new manufacture, when it is shown that he obtained a knowledge of the invention from any Englishman residing in his own country (*r*). But it has never been decided whether a communication made from an Englishman residing abroad to a person residing here would be sufficient to support a patent. But the language of some of the old cases already cited, would seem to lay down the law in terms quite large enough to include such a case (*s*).

Nor has there been any decision as to whether the communication made by a foreigner to the patentee may be made in this country, or by a foreigner residing here. The representation which is always made to the Crown in the petition, to obtain a patent for an imported invention, is that the petitioner is in possession of the invention, in consequence of a communication made to him by a foreigner *residing abroad*. And it would seem from this that if the communication was made by a foreigner *permanently* domiciled here, that it would not be sufficient; but if the foreigner at the time of the communication was only temporarily residing here, the communication would most probably be held sufficient to support the patentee's claim to be an inventor within the meaning of the law. For a foreigner is under no obligation of duty to the people of this country to give them the invention,

Whether patent good for communication from an Englishman abroad,

or from a foreigner residing here.

(*r*) Vide *ante*, p. 22, 23.

(*s*) Vide *ante*, p. 7, and p. 20.

either for a reward or without, and a native of this country having by purchase or otherwise acquired from a foreigner temporarily here, the means of giving the public the benefit of a useful invention, would most probably be enabled as importer or introducer to support a patent for the invention. And it is to be observed, that our Courts do not put a patentee to very strict proof of the mode in which he became possessed of the invention. It is sufficient that he appears, *primâ facie*, to have been the inventor or (in the language of a patent for an imported invention) to have been the first to introduce the invention into this country (*t*). There must however be no false representation made to the Crown respecting the nature of the patentee's title, or the patent will be thereby rendered void.

First publisher cannot support a patent unless he be an inventor or importer.

It has been erroneously supposed that there is a class of persons who may become true and first inventors within the meaning of the law, besides actual inventors and importers of foreign inventions. And it has been said, that in addition to discoverers of new inventions and importers of foreign inventions, the first publishers or introducers of inventions may maintain letters patent for them. But it is clear that this supposition is founded in error, for any new invention which a person may possess the knowledge of must either have been discovered by the possessor himself, or by some other person. We have seen that an actual inventor can maintain a patent for his invention (*u*), but no one can support a patent for an invention communicated to him by a fellow-countryman in England (*x*), and therefore it seems that the only other class of inventors within the meaning of the law, besides discoverers, are those who become possessed of foreign inventions, and who we have termed importers.

(*t*) See *post*, Ch. XI. and Index, tit. Evidence.

(*u*) Vide *ante*, p. 22.
(*x*) Vide *ante*, p. 23.

SECTION IV.

Of the first Inventor, or first Importer of a new Art or Manufacture.

It has already been shown that the object of the law is to procure for the public the benefit of new inventions. And it must now be added, that it is equally the object of the law to procure that benefit in every case as speedily as possible.

Object to procure inventions speedily.

The law, therefore, as declared by the Statute of Monopolies (y), requires not only that a patentee shall have been the true inventor, or person who actually invented or imported the invention into this country; but also that he shall have been "the *first* inventor thereof." And therefore, however clearly it might be shown in support of a patent, that the patentee had actually discovered or imported the invention, it would be of no avail, and the patent would be void if it should appear that, at the time when the grant was made, he was not also the *first* inventor.

Patentee must be the first inventor.

But although the patentee is thus in terms required by the statute to be the first inventor, the words of the statute have been construed liberally for the benefit of the public, and so as to carry out the intent of the law; namely, to induce inventors to give the public the benefit of their discoveries and inventions as speedily as possible. And therefore it has been held, that *he* shall be deemed the first inventor of a new manufacture who shall *first* give, or contract by a patent to give, a knowledge of it to the public (z). And the circumstance of a patentee being the first to introduce an invention shows, *primâ facie*, that he was the first inventor (z).

Who is the first inventor.

If two inventors were simultaneously to apply to the Crown for separate patents for the same invention, and both applications were to be referred to the same officer (a), the grant would be made to the person who could show that he had first made the invention. But few, if any, persons are in a position to prove by direct evidence that they have invented any thing,

Simultaneous applications for patents.

(y) 21 James I. c. 21. s. 6.

(a) See the Practice, *post*, Chapter

(z) *Minter v. Wells*, 1 Webs. R. 131.

XII.

much less the time when they made their inventions; and, indeed, if the evidence of the inventor himself be excluded, the only way in which it can be shown that any particular person made an invention, is by proof that he communicated a knowledge of it to some other person; and consequently the only proof which can be given that any person made an invention before any other person, is to show by legal evidence that he was the first to communicate a knowledge of it to some other person.

He who first obtains a grant is the first inventor.

But if the applications should happen to be referred by the Crown to different officers, the applicants might both obtain reports in favour of grants being made to them, and then the applicant who first obtains a grant will be entitled to the sole use of the invention. Thus, in the case of *ex parte Dyer* in Chancery, in 1812 (b), Lord *Eldon*, L. C., held, that in concurrent applications for a patent for the same object, that which obtains the Great Seal first will have the right at Law. And it has frequently been decided that it is no objection to a patent that some one made the same invention prior to the patentee, unless the world was also put in possession of it by its being made public before the date of the patent (c).

Prior invention immaterial.

Dolland's Case.

In *Dolland's case* (d), it was objected that the patentee was not the (first) inventor of the new method of making object-glasses comprised in the patent, but that Dr. Hall had made the same discovery before him. But it was held that as Dr. Hall had confined the discovery to his closet, and the public were not acquainted with it, Dolland was to be considered as the (first) inventor.

Forsyth v. Riviere.

In the case of *Forsyth v. Riviere* (e), on the question of priority of invention, Lord Chief Justice *Abbott* held that, if several persons simultaneously discover the same thing, the party first communicating it to the public under the protection of letters patent becomes the legal inventor, and is entitled to the benefit of it.

Lewis v. Marling.

In the case of *Lewis v. Marling* (f), Mr. Justice *Bayley* said, "If I make a discovery and am enabled to produce an

(b) *Holroyd*, 59.

(c) See *Hill v. Thompon*, 1 Webs. R. 244; and per *Erskine, J.*, in *Gibson v. Brand*, 4 M. & G. 198, 205.

(d) 2 H. Bl. 470, 487, and *Davies'*

P. C. 172.

(e) *Chit. Prerog. Cr.* 182; 1 Webs. R. 97.

(f) 10 B. & C. 22; 1 Webs. R. 496.

effect from my own experiments, judgment and skill, it is no objection that some one else has made a similar discovery by his mind, unless it has become public. So, if I introduce a discovery *bonâ fide* made, I may have a patent for it, though a person might have privately a communication from abroad, which would have enabled him to have made the machine."

In the case of *Carpenter v. Smith* (g), Lord Abinger, C. B., said, that "A man is entitled to a patent for a new invention, and if his invention is new and useful, he shall not be prejudiced by any other man having invented that before, and not made use of it; because the mere speculations of ingenious men which may be fruitful of a great variety of inventions, if they are not brought into actual use ought not to stand in the way of other men equally ingenious, who may afterwards make the same inventions *and apply them.*"

Carpenter v. Smith.

But although a patentee's claim to be the first inventor of his invention will not be defeated by the prior discovery of the same invention by a person who kept it secret, it is otherwise if the invention was known or used by the public at any time before the date of the patent. For the public knowledge or use of an invention shows that some one must have given the invention to the public, and such a public knowledge or use of an invention comprized in a patent before the date of the patent, shows conclusively that the patentee was not at the time of the grant the first inventor of the invention.

Patentee not first inventor, if invention known to the public.

If an inventor himself publishes a knowledge of his invention to the world, the law deems that he thereby dedicates it or gives it to the public; and when once the publication has been made, the act is irrevocable, and the Crown cannot afterwards grant the sole use of the invention either to the same or any other inventor. For the person who thus voluntarily gives the benefit of his invention to the public, becomes so far the true and first inventor of it, as to defeat the claim of any other person to be afterwards considered the true and first inventor of it.

Publication by an inventor is a dedication to the public.

If the public once becomes possessed of an invention by any means whatever, no subsequent patent for it can be granted either to the true and first inventor himself, or any other person, for the public cannot be deprived of the right

Public cannot be deprived of the right to use an invention.

(g) 1 Webs. R. 534.

to use the invention, and a patentee of the invention could not give any consideration to the public for the grant, the public already possessing every thing that he could give.

Stead v. Williams.

Thus in the case of *Stead v. Williams* (*h*), it was held that if an invention has already been made public by a description contained in a work, whether written or printed, which has been publicly circulated, in such case the patentee is not the first and true inventor within the meaning of the statute, whether he himself borrowed his invention from such publication or not, because the public cannot be precluded from the right of rising such information as they were already possessed of at the time the patent was granted (*i*).

SECTION V.

Of the Persons incapacitated from becoming Grantees of Patent Privileges.

What persons are incapable of being grantees.

It has now been shown that the grantee of a patent privilege, must be the person whom the law adjudges to be the true and first inventor of the art which is made the subject of the privilege, or the person from whom the consideration for the grant is obtained by the public. It only remains to be seen what persons are by law incapable of becoming grantees of such patent privileges.

Queen.

And first it seems that the Queen herself could not become the grantee of such a privilege, for she could not grant to herself.

Corporation aggregate.

Nor could a corporation aggregate become a grantee of a privilege for an actual invention, for invention is an act of the mind which clearly could not proceed from such a corporation. And even with respect to an imported invention, it seems difficult to conceive how such a corporation could become a grantee.

Corporation sole.

A corporation sole, *as such*, must also be incapable of becoming a grantee, for he must make the invention by his mind in his natural capacity; and in that capacity alone, therefore, could he become grantee.

(*h*) 8 Jur. 930.

(*i*) See also the cases cited in *Stead v. Williams*.

It may be doubtful whether the exercise of a patent privilege by a beneficed clergyman, would not be a trading within the meaning of the statute 57 Geo. III. c. 99 (*k*), and therefore prohibited by section three of that Act. And if that be so, it may be questionable whether the grant of a patent privilege to such a clergyman would not be void, because the Queen's intent, namely, that the patentee should derive a profit from the exercise of the privilege, cannot take effect.

There seems to be no reason why an alien may not hold Alien. such a privilege as grantee, and there are many instances of such privileges being granted to aliens. In one case (*l*), a question was raised at *nisi prius*, respecting the validity of a grant to a person in trust for an alien enemy; the question was reserved for the determination of the Court of Queen's Bench, but the patent was held to be bad upon a different ground, and the point was not determined.

A married woman might, as an inventor, become the grantee Married woman. of such a privilege; but the privilege, when acquired, would vest in her husband.

It is difficult to say what would be the effect of such a grant Infant. to an infant inventor, he could not exercise the privilege beneficially, for he could not buy or sell; or make any contract to bind himself. It is doubtful whether such a grant would be valid (*m*).

(*k*) See *Hall v. Franklin*, 3 M. & W. 259.

(*l*) *Bloxam v. Elsee*, 1 C. & P. 558; 6 B. & C. 169, *S. C.*

(*m*) For further information respecting persons who may and may not become grantees of any thing, see *Co. Lit.* 2, b; *Shep. Touch.* 234, 235.

CHAPTER IV.

OF THE GRANT OF A PRIVILEGE IN AN INVENTION BY LETTERS PATENT, AND THE CONSTRUCTION OF IT.

Queen's grants must be by record under the great seal.

By the Common Law the Queen can make a good gift of moveable chattels without writing (a), but no other grant by the Crown is available unless it be made by matter of record under the great seal (b); and this is required by reason of the person of the Queen, and the dignity of her office (c).

Charters or letters patent.

The grants of the Queen must be made by *charters* or *letters patent* under the great seal, and they are matters of *public record* (d).

Great seal.

The seal under which these grants of the Crown were formerly made was the great seal of England; after the union with Scotland the great seal of Great Britain; and now since the union with Ireland the great seal of the United Kingdom (e).

Great seal in custody of Lord Chancellor.

Sir Edward Coke calls the great seal *clavis regni*, or key of the kingdom (f); and it is always in the custody of the Lord Chancellor, or of commissioners appointed for the purpose.

Stat. 6 Ann. c. 7. s. 9.

By the statute of 6 Ann. c. 7, s. 9, it was enacted that the great seal and other public seals in being at the time of the demise of her Majesty, or any of her successors, should continue and be made use of as the respective seals of the successor until such successor should give order to the contrary.

All persons bound to take notice of the great seal.

In the case of the *East India Company v. S. idys* (g), it is laid down that "all the King's subjects are bound to take notice of the King's great seal." And, therefore, it is that the

(a) Vin. Abr. Prerog. (M. b. 7.)

(b) Com. Dig. Pat. (C. 2); *Lane's case*, 2 Co. R. 16, b; Moor, 476; 2 Rol. Ab. 182, l. 5; Bro. Ab. Prerog. 70; Noy, Dialog. Tenures, p. 33.

(c) *Owen v. Saunders*, 1 Ld. Ray. 163; Dr. & Stud. Dialog. i. c. 8. p. 34.

(d) Bro. Abr. Prerog. 70, 95; Com.

Dig. Pat. (A.); 3 Lev. 223; 2 Bl. Com. c. 21, s. 2; Noy, Dialog. Tenures, p. 34.

(e) See the case of the *King v. Fullock*, 1 Taunt. 71; and the *King v. Yandell*, 4 T. R. 521.

(f) 2 Inst. 552.

(g) Skin. 225.

great seal shall always be credited (*h*), and can never be denied (*i*).

The saving of the prerogative of the Crown, contained in the 6th section of the Statute of Monopolies, is in accordance with the Common Law upon the subject, for it extends only to letters patent and grants of privilege of the description which form the subject matter of this work (*h*). And, therefore, the sole use of an invention can only be granted within the meaning of the statute (*h*) by letters patent; and as such letters patent must, according to the Common Law, be under the great seal, they must also be written on parchment (*l*).

Saving in Stat. of Monopolies extends only to letters patent.

“Letters patents, that is, open letters, *literæ patentēs*, are so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom, and are usually directed or addressed by the Queen to all her subjects at large” (*m*). And letters patent, or in common parlance, a patent such as forms the subject of this work, may be correctly defined an open record under the great seal, containing a grant of privilege in an invention made by the Crown to an inventor.

Letters patent.

A record in our law is defined to be a memorial of an act or proceeding of a Court of record proceeding according to the course of the Common Law, entered on parchment for the preservation of it (*n*). The Lord Chancellor is the sole judge of the Common Law branch of the Court of Chancery, in which all the Queen’s letters patent are made (*o*); and the making of letters patent by the Lord Chancellor, by affixing the great seal to them, is an act of the Court of Chancery, by which the Court makes a record of the Queen’s grant, that is, makes her letters patent, containing her grant, in pursuance of her command.

Record.

Lord Chancellor sole judge of matters of law in Chancery.

Making a patent a judicial act.

The Queen cannot herself make her letters except by means of her ministers, who act according to her legal commands. The command given to the Lord Chancellor to make a patent for an invention is always made by means of a writ or bill, sealed with the privy seal; and, therefore, when the patent

Queen cannot herself make a patent.

(*h*) Ben. & Dal. 19.

(*i*) 4 Co. R. 71, b; Doct. plac. 352; Plow. 232.

(*k*) 21 Ja. 1. c. 3, s. 6.

(*l*) 3 Shep. Abr. Prerog. p. 93.

(*m*) 2 Bl. Com. c. 21, s. 2.

(*n*) Com. Dig. Record(A.); 3 Inst. 71.

(*o*) 4 Inst. 79, 80, 84; 1 Shep. Abr. 464.

has been written, the words, "By writ of Privy Seal," are subscribed, in order to show by what authority the Lord Chancellor seals the grant (*p*).

Queen's command only extends to what may be done lawfully.

But, notwithstanding the Queen's authority or command to make letters patent, the Lord Chancellor cannot knowingly affix the great seal to a grant which will be contrary to law; for the Queen cannot do, or intend to do, any thing wrong (*q*); and, therefore, the command must be construed to be made conditionally upon the Lord Chancellor deeming the grant to be lawful. And if the Chancellor is of opinion that the proposed grant would be illegal or unjust, or that for any reason it ought not to be made, he will not seal the patent (*r*).

Patent delivered to grantee.

The original letters patent are always delivered out of Chancery to the patentee, as his evidence of his title to the grant which they contain, and therefore they are enrolled; that is, the grants which they contain are entered upon rolls called the Patent Rolls, in order that the records of the Court of Chancery may at all times show what patents the Lord Chancellor has made in pursuance of the Queen's writs (*s*). These rolls are themselves records to which all persons may have access (*t*), and every one is bound to take notice of the grants so enrolled (*u*).

Enrolment.

Rolls are records to which all persons may have access.

Queen protected by law in making her grants.

The Queen in making her grants is under the especial protection of the law, the reason of which seems to be, that she being so much occupied with public affairs, cannot be supposed to give the same attention to her grants as private persons can give to theirs (*x*); and that the whole community has an interest in the Queen, and the grants which she makes, more particularly those which she makes in her public capacity.

Ordinary rules of construction inapplicable.

The ordinary rules which are to be observed in the construction of grants made by private persons do not necessarily apply to the construction of grants by the Crown.

Rules respecting the Queen's grants.

And accordingly we find it laid down in our law books, that,

(*p*) 2 Bl. Com. p. 347; 8 Co. R. 18, b; and see the Forms and Practice in a subsequent part of this work.

(*q*) Vide 3 Shep. Abr. 48; Jenk. Cent. 9, case 16; 1 Co. R. 44, b, 45, b.

(*r*) See 2 Inst. 566; and the Practice, *post*.

(*s*) Vide 3 Shep. Abr. 93 (7); Com.

Dig. Pat. (E.)

(*t*) 1 Co. R. 45, a; 3 Inst. 71; and see the stat. 46 E. III. printed in the Preface to the 3rd part of Coke's Reports, p. vi.

(*u*) 1 Co. R. 45, a.

(*x*) Godb. 295; 1 Co. R. 52, a.

as the Queen's grants proceed chiefly from her own bounty, and her letters patent are records of a high nature, they ought to contain the utmost truth and certainty, and have in all times been construed most favourably for the Crown (*y*), and that contrary to the construction put upon the grants of common persons (*z*); and accordingly in a great variety of cases we find, that uncertainty, misrecitals, false suggestions, and all such matters as show that the King was deceived in his grants, held to be sufficient reasons to vitiate the grants (*a*). But it seems that where the Queen proceeds by and with the advice of parliament, she is not in that situation in respect of which she is under the special protection of the law, that she could be considered as deceived in her grant (*b*).

If the grant of the Queen be founded upon a false suggestion, it will be void, because the Queen has been deceived (*c*). And if the Queen be misinformed (*d*), or be deceived in her grant, and grant more than she lawfully may, the whole grant will be void (*e*). So the grant of the Queen will be void for a misrecital (*f*), or for want of form (*g*), or for uncertainty (*h*), or if too general (*i*).

False suggestion avoids a patent.

The material parts of a patent for granting a sole privilege in an invention will now be considered in the following order:—

- 1st. The address or direction.
- 2nd. The recitals.
- 3rd. The grant to the inventor.
- 4th. The prohibition to others.
- 5th. The conditions of the grant.

(*y*) Plow. 333; 1 Co. R. 45, a; 8 Co. 56, a; Bac. Abr. Prerog. (F. 2), p. 514; Com. Dig. Grant (G. 12).

(*z*) See Bac. Abr. Grant (I. 1); Shep. Touch. 83; 3 Atk. 136; *Stean v. Fonnereau*, 3 Ves. 41, 48.

(*a*) Vin. Abr. Prerog. (G. b. 2); Bac. Abr. Prerog. (F. 2); Com. Dig. Grant (G. 6, 7, 8 and 9).

(*b*) Per Lord C. J. *Eyre*, in *Boulton v. Bull*, 2 H. Bl. 500.

(*c*) Com. Dig. Grant (G. 8 and 9); *Earl of Devon's case*, 11 Co. 90, a;

Vin. Abr. Prerog. (N. b. 1.)

(*d*) 1 Co. R. 52, a.

(*e*) Com. Dig. Grant (G. 8); case of *Alton Woods*, 1 Co. R. 49, a; Vin. Abr. Prerog. (G. b. 2.)

(*f*) Moore, 318; Hob. 224.

(*g*) Hob. 323; Vin. Abr. Prerog. (G. b. 2.)

(*h*) 2 Rol. Abr. 196, l. 30; Com. Dig. Grant (G. 6); Vin. Abr. Prerog. (G. b. 2); per *Heath, J.*, in *Boulton and Watt v. Bull*, 2 H. Bl. 483.

(*i*) 2 Rol. Abr. 193, l. 41.

1st. *Of the Address or Direction.*Commence-
ment.

Letters patent always commence with the style (*k*) of the Queen, and a general direction or address in the following form:—

“Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the faith: to all to whom these presents shall come, greeting.”

Must be in
Queen's name.

Letters patent commence in the name of the Queen, because although they are made by the Court of Chancery, yet they cannot be made without the Queen's writ, and the grant is the Queen's grant, made by her as the head of the executive government, acting with the advice of her ministers, on behalf of the whole community; and the grant must be made in her name in order that the authority by which the privilege or monopoly is created and granted, may be thus announced to all those who reside within that part of the Kingdom to which the patent privilege extends.

Directed to all
persons.

Letters patents are directed to all persons to whom they shall come, because they contain bargains made between the public and the patentees (*l*); they are public records, and all persons are bound to take notice of the grants which they contain (*m*), and no one can excuse himself from the consequences of infringing a patentee's privilege by alleging that he was ignorant of its existence.

Chancery
always open.

The Court of Chancery is always open, and any one upon payment of a small fee may have free access to peruse the enrolment of any patent (*m*), and may also procure an office copy of it.

2nd. *Of the Recital.*

Petition recited.

The recital in a patent always contains a short statement of the substance of the inventor's petition, and the motive of the Queen in making the grant.

(*k*) See as to the styles formerly used by the Kings of England in letters patent, &c., Co. Lit. 7, a, 7, b; 2 Inst. 1.

(*l*) 14 Ves. 121, 126.
(*m*) 1 Co. R. 45, a; 1 Skin. R. 225;
4 Co. R. 71, b; 6 Co. R. 15, b.

It has already been shown that an inventor is not entitled to a patent as of right, but only by the grace and favour of the Crown, acting on behalf of the public (*n*).

Inventor not entitled as of right.

And the Queen cannot have knowledge of an invention having been made until she is informed of the fact by the inventor; for until he applies for a patent, he keeps a knowledge of the invention from all the world.

Queen cannot have knowledge.

Every person, therefore, who desires to secure to himself the sole use of any new manufacture which he has invented, must apply by petition to the Crown for a grant of privilege. The petition is the foundation of the proceedings by which an inventor is to acquire the exclusive privilege which he seeks to obtain, and as the Crown acts and proceeds upon the representations contained in the petition, the petition is always recited or stated in the patent.

Inventors must petition.

The Queen ought always to be correctly informed respecting the subject-matter of her grants, so that she may not be deceived, and so fail in her intent (*o*).

Every petition to the Queen for a grant ought therefore to be strictly correct, and for this reason it has always been the practice to require a petition for a patent to be verified; and as none can know the facts stated but the petitioner himself, no other person can verify them. The verification was formerly by the petitioner's oath; but in pursuance of a recent statute (*p*), it is now by solemn declaration made before a Master in Chancery.

Petition must be correct and be verified.

A petition to the Crown for such letters patent must state the name and addition of the petitioner, the title of the invention, and the grounds upon which the petitioner asks for the favour of the Crown, which is in substance that he has discovered or imported the invention for which he desires a privilege, that he believes it to be of public utility, and new in England (*q*).

What a petition must state.

The effect of the petition is generally recited very shortly in the letters patent, as in the following example:—

“Whereas James Gowland, of Leathersellers Buildings, in the City of London, Chronometer Maker, hath by his petition humbly represented unto us that he hath invented certain

Recital.

(*n*) Vide *ante*, Chapter I. p. 4.

(*p*) 5 & 6 Will. IV. c. 62, s. 11.

(*o*) 1 Co. R. 52, a.

(*q*) See the Practice and Forms, *post*.

improvements in the mechanism of timekeepers, that he is the first and true inventor thereof, and that the same has never been practised by any other person or persons whomsoever to his knowledge or belief: the petitioner, therefore, most humbly prayed that we would be graciously pleased to grant to him; his executors, administrators, and assigns, our royal letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland, for the sole use, benefit, and advantage of the said invention within England, Wales, and Town of Berwick-upon-Tweed, for the term of fourteen years, pursuant to the statute in such case made and provided." And then, after mentioning the motive of the grant, it is stated that the Queen is "graciously pleased to condescend to the petitioner's request."

Misrecital
avoids a patent.

Matters recited
must be deemed
to have been
suggested by
the patentee.

Representations
are made by a
patentee at his
own peril.

It is not every
mistake that
will avoid a
patent.

As a misrecital avoids a patent; if the recital of the inventor's petition be untrue in any material particular, the whole patent will be void (*q*). The patentee being a party to the grant made by the patent, is bound by the recital, and estopped from denying any thing it alleges. And even if it did not appear in the recital itself that the matters recited had been represented to the Crown by the patentee, yet it would be deemed in law that the matters recited had been suggested to the Crown by the grantee (*r*). It is the duty of every petitioner to the Crown for a grant to take care that the Queen is correctly informed respecting the subject-matter of the grant (*s*), for it is a maxim that the Queen cannot deceive, and must not be deceived (*t*). The representations contained in a petition are made at the petitioner's own peril; and if the information or suggestion to the Crown be false, neither the Queen or any one suing in her name is prevented by the recital in the patent from showing that it is so, and the grant made upon such false information will be absolutely void (*u*). And that not only as against the Crown, but as against third persons (*x*).

But it is not every false recital that will vitiate a grant by patent if the Queen's intent sufficiently appears. Thus where

(*q*) Vin. Abr. Prerog. (Q. b.); 1 Co. R. 43, a.

(*r*) 6 Co. R. 55, b.

(*s*) 1 Co. R. 52, a.

(*t*) Jenk. 48.

(*u*) 1 Co. R. 43, a; Com. Dig. Grant (G. 8, G. 9).

(*x*) *Morgan v. Seaward*, 2 M. & W. 544; *Atcock v. Cook*, 5 Bing. 310.

a grant was made to a person as a knight, who in truth was no knight; yet, as the identity of the person of the grantee sufficiently appeared, the grant was good. This was decided by the House of Lords in the case of the King and the Bishop of Chester, reversing the judgment of the Court of King's Bench (*y*).

The recital begins by stating that the patentee has alleged that he has invented the invention described in the title which follows. Or, if the invention has been imported from abroad, that the patentee is in possession of the invention in consequence of a communication from a foreigner, or words of a similar import. Recital states the inventing or importing of invention.

And if either of these representations, being recited in a patent, is untrue in any particular, the patent will be held void in consequence of the Queen having been deceived (*z*).

The title of the invention always appears in the recital, and in no other part of the patent; and the general vague description which the title gives is all the information which can be obtained from the patent respecting the nature of the invention granted. Title is stated in recital only.

In the patents which were granted before the time when a specification began to be required, the nature of the invention was fully recited (*a*), and a patent without such a recital would most probably be held void if it did not contain a proviso dispensing with it by reason of the grant being too general, and not sufficiently certain (*b*). And accordingly we shall see that in all modern patents there is a provision inserted that they shall be good, notwithstanding the want of a full description of the nature of the invention (*c*). Ancient patents described the invention.

The language in which an invention is described in a patent is the language of the patentee himself (*d*). Title is the language of the patentee.

The title of an invention ought accurately to describe the nature of it; it must not be too large so as to include any thing more than the patentee has actually invented, and it must not be too narrow, so as to exclude any part of the invention. Title must accurately describe invention.

(*y*) See the case reported, 2 Salk. 560; 5 Mod. 297; Show. P. C. 212.

(*z*) See Chap. III. p. 21.

(*a*) See one of those patents in 1 Webs. R.

(*b*) See Vin. Abr. Prerog. (C. c.) (F. c.)

(*c*) Vide *post*, in this Chapter.

(*d*) *The King v. Wheeler*, 2 B. & Ald. 349.

Campion v.
Benyon.

Accuracy of description is required in order to prevent either the Crown or the public from being deceived. In the case of *Campion v. Benyon* (e), in the Court of Common Pleas, it was laid down that a patent being a limited monopoly, an infringement on the rights of the public, and operating as a prohibition to persons in future from adopting the precise mode used by the patentee, it should be in precise and unambiguous terms, and describe with accuracy what the inventor claims as his own, as well as the precise extent of the privileges conferred on him by such patent. And that if there be any ambiguity in the patent in any material point, that is of itself a ground for rendering the patent absolutely void. And the same law is laid down in the case of *Hill v. Thompson* (f), in which Mr. Justice *Dallas* said, in delivering the judgment of the Court of Common Pleas, "This, like every other patent, must stand on the ground of improvement or discovery. If of improvement, it must stand on the ground of improvement invented; if of discovery, it must stand on the ground of the discovery of something altogether new; and the patent must distinguish and adapt itself accordingly. If the patent be taken out for discovery, when the alleged discovery is merely an addition or improvement, it is scarcely necessary to observe, that it will be altogether void."

Hill v.
Thompson.

R. v. Metcalf.
A misdescription is fatal.

In the case of the *King v. Metcalf* (g), which was a *scire facias*, brought to repeal a patent obtained by the defendant for the manufacture of hair brushes, which were described to be *tapering brushes*, it appeared, that according to the defendant's mode of manufacturing brushes the bristles would be of unequal lengths, whereas, according to the usual mode, the bristles are of the same length. Lord *Ellenborough*, C. J. held this misdescription in the title of the patent to be fatal, and directed the jury to find a verdict for the Crown, which the Court of Queen's Bench afterwards refused to disturb. A similar objection was fatal to a patent in the case of the *King v. Wheeler* (h), which was a *scire facias* to repeal a patent obtained by the defendant for "a new or improved method of drying and preparing malt." The specification described the invention to consist in so heating malt that it should

R. v. Wheeler.

(e) 6 B. Mo. 81; 3 B. & B. 5, S. C.

(f) 8 Taunt. 394.

(g) 2 Stark. R. 249.

(h) 2 B. & Ald. 345.

become of a deep brown colour, and be readily soluble in hot or cold water. At the trial Lord C. J. *Abbott* thought that the title of the patent showed that it was obtained for a different thing than that stated in the specification, the patent being for a method of preparing malt, which must mean making it from barley, whereas the specification appeared to be for drying malt already made; and his Lordship directed the jury to find a verdict for the Crown. And the Court of Queen's Bench being of opinion that the invention mentioned in the specification was entirely different from that mentioned in the patent, refused to grant the defendant a new trial. It was contended on the part of the defendant in this case, that the process was in truth a preparation of malt to answer a particular purpose (the colouring of beer and porter), and that the purpose need not be noticed in the grant. But the Court said, that although it may be true in general that the purpose need not be mentioned in the grant, yet, if in any particular case the mention of the purpose be necessary to explain the words previously used, to show that they were not used in their ordinary and obvious sense, but in a sense limited and confined to that particular purpose; in such a case the purpose ought to be mentioned. If the patentee had represented himself to be the inventor of a method of preparing malt for the purpose of colouring beer and porter, every person who read his representation, would have understood that the malt prepared, according to his method, was not intended to answer the common and known purposes of that article, *viz.*, the brewing of beer, but was intended only for the special and particular purpose of colouring the liquor, and to be used in addition to common malt. And the Court was of opinion that no person could conjecture that to be the object of the invention mentioned in the patent.

So if the description contained in the title represent the invention to be an improvement in any particular manufacture or process, and it appears it is no improvement at all, or no improvement in the thing named, or in any of several things named, the patent will be void by reason of the Queen having been deceived (i).

Misdescription
as an improve-
ment.

And if the title or description of the invention allege that

Misrepresenta-
tion.

(i) *Morgan v. Seaward*, 2 M. & W. 544.

it is applicable to any particular purpose, and it turns out that it is not applicable in the way suggested, the patent would be void for the same reason.

Felton v. Greaves.

Thus in the case of *Felton v. Greaves* (*k*), the title of the plaintiff's patent described the invention to be a machine for giving a fine edge to knives, razors, seissars, and other cutting instruments; but it appeared that the invention, as described in the specification, was inapplicable for the sharpening of seissars; and Lord *Tenterden*, C. J., therefore held the patent to be void, and nonsuited the plaintiff.

But in the case of *Nichols v. Haslam* (*l*), in which the title of the invention was "improvements in the manufacture of plaited articles," and it appeared that the invention, as described in the specification, consisted of a single improvement only, it was held that the title was sufficient.

Generality of title no objection.

The generality of the terms in which a title describes an invention, appears to be no objection to the patent, if the description is not in any respect inaccurate (*m*). The description must, however, unquestionably give some idea, and so far as it goes, a true idea of the alleged invention (*n*).

Title so large as to be calculated to deceive is bad.

Cochrane v. Smethurst.

It has been held that if a title is so large and indefinite in its terms as to be calculated to deceive any person reading it, as to the extent or object of the grant, it will render the patent void. Thus in the case of *Cochrane v. Smethurst* (*o*), it appeared that the plaintiff's patent was for an improved method of lighting cities, towns, and villages; but his invention really was an improved street-lamp: and it was held by Mr. Justice *Le Blanc* that the title was too general in its terms, and the patent void.

Campion v. Benyon.

So in the case of *Campion v. Benyon* (*p*), it appeared that the plaintiff had obtained a patent for "a new and improved method of making canvas and sail-cloth with hemp and flax, or either of them, without any starch whatever." The invention really was a new mode of preparing and twisting the hemp or flax for making the canvas and sail-cloth, and the Court of Common Pleas held that the title was too extensive, and that the patent was therefore void.

(*k*) 3 C. & P. 611.

(*l*) 8 Scott, 97.

(*m*) *Cook v. Pearce*, 7 Jur. 499; see per Lord *Abinger*, C. B., in *Neilson v.*

Harford.

(*n*) *Sturz v. De la Rue*, 5 Russ. 324.

(*o*) 1 Stark. R. 205.

(*p*) 6 B. Mo. 71.

The generality of the words in a title may be restrained and explained by the specification; and it is clear that for many purposes the specification must be considered as part of the patent itself. Generality of title restrained by specification.

A specification cannot, however, extend the meaning of the title so as to make the grant include any thing not within the natural and ordinary meaning of the language made use of in the patent to describe the invention. And we shall see hereafter (*q*) that the claim in the specification of any thing not within the true extent and meaning of the grant will render the patent itself absolutely void. Specification cannot extend the title.

After giving the title or description of the invention from the patentee's petition, it is generally farther recited that the patentee had represented that he was the true and first inventor; and that the invention was new, or had not been practised before to his knowledge or belief; and it is sometimes added that the petitioner believes the invention to be of public utility. Recital that patentee the true and first inventor.

As the Crown in granting the sole use of an invention acts upon such representations, and confiding in the truth of them makes the grant; if either of those representations be untrue the patent will be void (*r*).

The recital then shows that the patentee humbly prayed for a grant of the patent, and that for the motive or consideration mentioned (and nextly to be considered) her Majesty was "graciously pleased to condescend to the petitioner's request." Prayer for patent.

These words show most clearly that the grant is made (as indeed it necessarily must be) upon the petition and representation of the grantee. And these words diminish the force of the words "of our especial grace, certain knowledge, and mere motion (presently to be noticed) (*s*), for a patent shall not be taken to proceed from the grace of the Queen merely, and so to be taken more strongly against the Queen, and in favour of the patentee, unless it is merely of the motion of the Queen, and without suit of the party (*t*).

The concluding part of a recital in a patent for an invention is, that her Majesty "being willing to give encouragement to Conclusion of recital.

(*q*) *Post*, Chap. VII.

(*r*) *Vide post*, Chap. V. s. 2 & 3.

(*s*) *Vide post*, in this Chapter.

(*t*) *Plew.* 337.

all arts and inventions which may be for the public good," is pleased to grant the petitioner's request for a patent.

Recital shows the motive and intended consideration.

These words show the motive or intent of the Queen in making the grant, and the whole of the recital taken together shows that the consideration which the Queen intended to have was a new and useful invention made by the patentee.

Patent to be construed according to intent.

It is a rule that the letters patent of the Queen are to be construed according to her intent, and that if they cannot take effect, according to her intent expressed in the letters patent themselves, they are void (*t*).

If Queen deceived in consideration, grant void.

And if the Queen be deceived in the consideration which she intends to have, the grant is void (*u*). For it is a maxim that if the consideration, which is for the benefit of the Queen (or of her subjects), be it executed or executory, or be it on record or not on record, be not true or not duly performed, or if any prejudice may accrue to the Queen (or her subjects), by reason of the non-performance of it, the letters patent are void (*x*).

Every part of consideration must be given.

Every part, therefore, of the consideration which the Queen appears by a patent to intend to have for her grant of the sole use of an invention, must be actually given and performed according to the intent of the Queen, as it appears in the patent.

If patentee not inventor patent void.

Thus, if the statement in the petition (as recited) that the patentee had invented the invention mentioned, or that he is true and first inventor thereof, be untrue, the Queen is deceived as to the consideration which she intended to have from the grantee, and the patent will be void (*y*).

So if the Queen be deceived in any of the particulars already mentioned, she does not receive the consideration she intends, and the grants upon such false considerations will be void.

If invention not new, patent void.

And if the allegation that the invention was new, or had not been used in this kingdom, be untrue, the patent cannot be sustained. And if the allegation be untrue in any respect, as if any part of the invention comprised in a patent was not new, although the remainder of it was so, yet the whole grant will be void.

(*t*) 1 Co. R. 46, a.

(*u*) Vin. Abr. Prerog. (M. c.)

(*x*) 5 Co. 94, a.

(*y*) Vide *ante*, Chap. III.

This was determined in the case of *Brunton v. Hawks* (a), Brunton v. Hawks. in which the patent was for improvements in ships' anchors, windlasses, and chain cables; and it having been proved that the alleged improvements in anchors were not new, the Court of King's Bench held that the patent was void, although the other parts of the invention were new. In that case, Lord Chief Justice *Abbott* said (b), "It is quite clear that a patent granted by the Crown cannot extend beyond the consideration of the patent. The King could not, in consideration of a new invention in one article, grant a patent for that article and another." And, speaking of the patent in that case, his Lordship said, "The patent is granted upon the recital that he (the patentee) has made improvements in all the three (articles), and that they are new; and the consideration of the patent is the improvement in the three articles, and not in one; for an improvement in only one of them would render the patent bad. The consideration is the entirety of the improvement of the three, and if it turns out there is no novelty in one of the improvements, the consideration fails in the whole, and the patentee is not entitled to the benefit of that other part of his invention." And in the same case, Mr. Justice *Bayley* said (c), "If a patent is taken out for many different things, the entire discovery of all those things is the consideration upon which the King is induced to make the grant. That consideration is entire, and if it fails in any part it fails *in toto*."

So it was held by the Court of Common Pleas, in the case of *Hill v. Thompson* (d), Hill v. Thompson. that if any part of an alleged discovery comprised in a patent, being a material part, fail, (the discovery in its entirety forming one entire consideration,) the patent is altogether void.

In the case of *Kay v. Marshall* (e), Kay v. Marshall. it was held that whether an invention comprised in a patent is to be considered as one entire invention, or divided into distinct parts, yet if part of what is claimed by the patentee is not properly the subject of a patent, or not new, the whole grant must be void. And the same law was laid down by the Court of Exchequer in the case of *Morgan v. Seaward* (f).

(a) 4 B. & Ald. 541.

(d) 8 Taunt. 401.

(b) 4 B. & Ald. 551.

(e) 5 Bing. N. C. 492.

(c) 4 B. & Ald. 552.

(f) 2 M. & W. 544.

3rd. *Of the Granting Part of the Patent.*

Grant.

After the recital in a patent for an invention follow the words, "know ye therefore that we of *our especial grace, certain knowledge, and mere motion*, have given and granted," &c.

Grants upon petition construed more strictly.

But with words of grace and bounty more favourably.

Grants made by the Crown merely upon the petition of the grantee, have always been construed with much greater strictness than those which proceed from the Crown voluntarily, and without suit from the grantee. For this reason the words "of an especial grace, certain knowledge, and mere motion," have long been inserted in patents in order that they may be construed more favourably for the grantees.

Meaning of words "especial grace."

The words "of our especial grace," import that the grant in a patent proceeds merely from the grace and bounty of the Crown, the grantee having no right or title to the grant except through the favour of the Crown.

"Certain knowledge."

The words "certain knowledge," in a patent, imply that the Queen has knowledge of the subject-matter of the grant, and if there was no recital, these words would show that the Queen was acting upon certain knowledge, which she possessed independent of the representation of the grantee (*g*).

"Mere motion."

And the words of our "mere motion," import that the grant proceeds from the bounty of the Queen of her own mere motion, and without any suit of the grantee (*h*).

Construction of patent with such words.

The words "of our certain knowledge and mere motion," cause the Queen's grants to be taken in the most liberal and beneficial sense, according to the Queen's intent and meaning expressed in the grant (*i*); and a grant with these words is taken more strongly against the Crown, and in favour of the grantee, than other grants are construed to operate (*h*).

Patent cannot be reduced to the same level of construction as a private grant.

But it seems that the words "of our especial grace, certain knowledge, and mere motion," will not reduce a royal grant to the same standard of construction as the grant of a subject, or bring it within the principle that it is to be taken most strongly against the grantor (*l*). For notwithstanding these

(*g*) See Vin. Abr. Prerog. (E. c. 3); 10 Co. 112, b.

(*h*) See 10 Co. 112, b.

(*i*) Bro. Abr. Pat. pl. 80; 6 Co. 56, a.

(*k*) Com. Dig. Grant (G. 12.); 1 Co. R. 45, b.

(*l*) *The King v. Capper*, 5 Price, 261;

1 Co. R. 46, a, 46, b.

words the Queen's grant must be construed according to her intent as it appears in the letters patent, and not in deceit of the Queen, or so that any thing shall pass by the grant against the intent or purpose expressed in the patent, or so as to make any thing pass which is not actually expressed in the grant (*m*). So it is laid down in the case of *Alton Woods* (*n*), that in many cases the King's grants "of his certain knowledge and mere motion," shall be construed beneficially for the patentee, yet such words shall never produce a violent or strained construction, or any construction which is against the intent or purpose of the grant.

It was laid down in the case of *Needler v. The Bishop of Winchester* (*o*), that when the King makes a grant expressed to be of his own mere motion, and yet expresses a consideration, not personal, moving him to make the grant, and the consideration is false,—since these are contrarities and cannot stand together,—the law shall judge upon the consideration, and shall not regard the clause, "of his own mere motion," which is *clausula clericorum*, but shall reject that as the Court does the opinion of the Jury when they find the fact, and conclude upon it contrary to law.

The recital in every patent for an invention, shows that the grant was made upon the petition of the patentee, and this diminishes the force of the words "of our especial grace," &c., for the patent cannot be taken to proceed purely from the grace and favour of the Queen; and a grant by patent cannot be construed more strongly against the Queen and favourably for the patentee, unless it is made merely of the Queen's own motion, and without the suit or petition of the patentee (*p*).

And if the matters recited in the patent are untrue, so that it appears that the Queen was deceived in any respect, either by the false suggestion of the party, or as to the consideration or motive of the grant, the patent will be wholly void. For the words "of our especial grace," &c., are of no effect or operation if the Queen has been deceived, or if the intent or purpose of her grant cannot by law take effect (*q*). These words are words of bounty and of great effect, if the Queen be not

(*m*) 1 Co. R. 46, a, 46, b; Plowd. 333.

(*n*) 1 Co. R. 49, a, 52, b, 53, a.

(*o*) Hob. 221-222.

(*p*) Plowd. 337.

(*q*) 1 Co. R. 51, b.

deceived in the intent or purpose of her grant, but they shall never be of force to maintain a grant in deceit of the Queen (r).

Words of grant. The next material words in the patent for an invention are "have, given, and granted, and by these presents, for us, our heirs and successors, do give and grant unto the said James Gowland, his executors, administrators, and assigns," &c.

The object of inserting the words "for us, our heirs and successors," is to show that the grant is not intended to exist merely during the life of the reigning sovereign, but is to continue in force during the whole of the term granted, notwithstanding the demise of the Crown. The grant would, however, it seems, be binding upon the Queen's successor without those words (s).

Crown acts on behalf of the public.

In making a patent for an invention, the Crown, in pursuance of the prerogative vested in it by law for the general benefit of the community, makes the grant *on behalf of the public* for the consideration which has already been adverted to, and the benefit of which the public are to have (t).

The words "give and grant" are the proper operative words in a patent for an invention not only as respects the Queen, who is the grantor, but also the nature of the thing which is granted (u).

Grant must be made to inventor.

The grant must be made to the inventor of the invention, or to the importer of it, if it be a foreign invention, and to no other person can such a grant be legally made (x).

Subject of grant.

The subject of the grant, as expressed in a patent for an invention, is the Queen's "especial licence, full power, sole privilege and authority, that he the said *J. G.*, his executors, administrators and assigns, and every of them, by himself and themselves, or by his or their deputy or deputies, servants or agents, or such others as he the said *J. G.*, his executors, administrators, or assigns, shall at any time agree, and no others, from time to time, and at all times hereafter, during the term of years herein expressed, shall and lawfully may make, use, exercise, and vend his said invention within that part of our United Kingdom of Great Britain and Ireland, called England, our dominion of Wales, and Town of Berwick-upon-

(r) 1 Co. 53, a.

(s) Com. Dig. Grant (G. 3).

(t) Per Lord Eldon, L. C., in *Har-*

mer v. Plane, 14 Ves. 132.

(u) Shep. Touch. 228.

(x) Vide *ante*, Chapter III. p. 21. 26

Tweed, and also in the Islands of Guernsey, Jersey, Alderney, Sark, and Man, and in all our colonies and plantations abroad, in such manner as to him the said *J. G.*, his executors, administrators and assigns, or any of them shall, in his or their discretions, seem meet; and that he the said *J. G.*, his executors, administrators and assigns shall, and lawfully may have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for, and during the term of years herein mentioned."

The subject of the grant thus made by the patent is a sole and exclusive privilege (*y*) which extends to the using and exercising of the invention or art invented by the patentee; to the making of articles by means of the invention, or the exercise of it;—and to the vending of such articles to the public.

Subject of grant is a privilege.

The patentee does not acquire the privilege of using his invention by means of the grant made to him by his patent, for an inventor would have a right to use his invention independent of the grant contained in the patent. But he could not exercise that right publicly without putting others in possession of his invention, and thus giving them a right to use it; for we have seen (*z*) that a public use of an invention, without previously obtaining a patent for it, amounts to a dedication of it to the public. The use of an invention under the protection of a patent is a dedication to the public only from the end of the term granted by the patent, and the privilege granted by the patent is a right to use the invention to the exclusion of all other persons, or, more correctly speaking, a right to exclude all others from the use or exercise of the invention during the patent term. By means of such a privilege an inventor is enabled to use his invention publicly, and thus acquire the profit intended to be given him as a reward, without giving the public any right to use the invention before the expiration of the term granted by the patent.

According to the terms of the grant contained in the patent the inventor is to have the sole privilege of *making* his inven-

Construction of the word "make" in the patent.

(*y*) As to the nature and disposition of this privilege, see Chapter IX.

(*z*) *Ante*, Chapter III. p. 33.

tion; but it seems clear that the word make must not here be understood in its ordinary sense.

One signification of the word "make," is to practise or to use, put in action (*a*), and the word seems to be used in that sense in the patent. The use of the word in any other sense in this place would indeed be repugnant; for *making* an invention in the other sense of the word *make*, would signify an inventing or discovering, which is clearly not what is intended.

The sole privilege of making the invention as expressed to be granted by the patent, is in truth the same in substance as the sole privilege of using and exercising it; but it is clear that such an exclusive right must necessarily extend to and include the sole privilege of making articles by the use or exercise of art invented by the patentee, and it is most probable that when the form of patent was first drawn, the sole privilege of making an invention was intended to signify the sole privilege of exercising the invention in the making of articles of manufacture.

Statute of
Monopolies,
sec. 1 and 6.

By the first section of the Statute of Monopolies (*b*), patents granting "the sole buying, selling, making, working, or using of any thing," are declared to be void, and the proviso in favour of inventions contained in the sixth section only extends to "grants of privilege of the sole working or making of any manner of new manufactures," leaving the sole buying or selling of any thing within the prohibition contained in the first section of the statute.

Privilege of
vending seems
at first sight to
be contrary to
the statute.

The sole privilege granted by a patent for an invention authorizes the inventor "to make, use, exercise, and *vend*" the *invention* mentioned in the recital; and the grant of the sole right of vending appears at first sight to be contrary to the first section of the statute, and not to be within the meaning of the proviso. But it will be observed, that by the sixth section the sole privilege permitted to be granted is to extend to the "working or making of any manner of new manufactures," and the word "manufactures" signifies things made by art, as well as the art or practice of making such things (*a*). The things produced by the exercise of a patent invention

(*a*) See Johnson's dictionary.

(*b*) 21 Ja. I. c. 3.

must, in fact, be what are popularly termed manufactures, or vendible articles, capable of being made the subject of transactions in trade and commerce.

It has already been shown that the object of the law in permitting these grants to be made, is to reward such inventors as shall give to the public the benefit of useful inventions; and that reward is, the profit to arise from the exercise of the invention during the patent term. That profit is to be produced by the sale of articles made by means of the art invented by the patentee, or in other words, according to the invention; the profit in fact being the sum charged by the patentee to the purchaser of an article beyond the cost of its production. Whether a patentee makes and sells these articles himself, or is merely paid by others for making such articles, it is quite clear that the patentee's reward must be derived from the same source; and as no one can use the invention except the patentee, none besides him can lawfully have such articles for sale. The sole right to vend articles made by means of a patent invention is therefore not only necessarily incident to the privilege granted by the patent, but is also absolutely necessary to enable the patentee to obtain the reward which the law intends for him; and although the exception contained in the sixth section of the Statute of Monopolies does not expressly save the right of the Crown to grant the sole privilege of vending such articles, there can be no doubt that it must be implied; and indeed all patents made since the passing of the statute, have invariably granted patentees the sole privilege of vending their patent articles, and this shows the construction put upon the statute, not only at the time it was made, but ever since.

Every part of the privilege granted by a patent for an invention when thus explained is, therefore, clearly within the meaning of the exception contained in the sixth section of the Statute of Monopolies; and the Common Law authorities already cited (c), as well as the constant practice of making such grants, incontestably prove that the Crown has the prerogative of granting such privileges to inventors.

The privilege thus comprised in the grant, the patentee and those claiming under him (it is declared by the patent) shall

Vending must be deemed to be within the exception in sec. 6 of the stat.

How the privilege is to be exercised.

(c) *Ante*, Chapter II.

use in such manner as to them shall “in their discretions seem meet.” And therefore a patentee is not bound to exercise his privilege in any particular manner, or perhaps at all during the continuance of his right.

A declaration in an action for infringing a patent, always indeed alleges that the patentee has “made, used, exercised, and vended the invention to his great advantage and profit;” but it has never been decided whether a patentee must have exercised his invention in order to enable him to prevent others from infringing his patent right (*d*).

To what parts of the United Kingdom patent privileges may extend.

Although the Lord Chancellor of Great Britain is Keeper of the Great Seal of the United Kingdom, a patent for an invention made under that seal, cannot be extended to Scotland or Ireland. The treaty for the Union of England and Scotland provides that such patents for Scotland shall be made under a seal which is by the treaty ordained to be used in the place of the Great Seal of Scotland. By the treaty for the Union of Ireland with Great Britain, the Great Seal of Ireland is retained, which is in the custody of the Lord Chancellor of Ireland, and under that seal patents for Ireland must be made.

A patent for an invention made under the Great Seal of the United Kingdom in the ordinary form, therefore, only extends to “England, Wales, and Berwick-upon-Tweed.” But if a patent privilege is intended to apply to the Channel Islands, and our colonies, plantations and possessions abroad, the grant must be made under the Great Seal of the United Kingdom; and therefore it is usual to include such a grant in an English patent. The mode of doing this is merely by adding the words, “and also in our Islands of Guernsey, Jersey, Alderney, Sark, and Man, and in all our colonies and plantations abroad,” or such of those words as may be necessary to extend the grant to the places intended to be comprised in the privilege.

Patent may be extended to colonies.

If a patent privilege is made to comprise England only, it may afterwards be extended to the colonies and other British possessions by a separate patent (*e*), which must be made under the Great Seal of the United Kingdom.

(*d*) Vide *post*, Chapter X. and the form of declaration in the Appendix, Chapter II. s. 4.

(*e*) Per Lord Campbell in *Brown v. Annandale*, 1 Webs. R. 433.

So far as a patent relates to some of the colonies, the grant itself seems to be sufficient to entitle the patentee to the privilege comprised in the grant. But as to many of our colonies, it is necessary to have an act of the colonial legislature to make the grant available. For further information respecting these islands and colonies, the reader is referred to the first volume of Blackstone's Commentaries (*f*), the second volume of Peere Williams' Reports (*g*), and the cases of *the King v. Vaughan* (*h*), and *Campbell v. Hall* (*i*).

Effect of patent
in the colonies.

The privilege granted by a patent is usually extended over the whole of England, Wales, and Berwick-upon-Tweed; but there can be no doubt that the privilege might be restricted to any particular part or parts of England and Wales (*k*).

Privilege might
be granted for
part of England.

The patent, it will be seen, mentions all those who may exercise the sole privilege granted to the patentee. They are not only the executors, administrators and assigns of the patentee, but also his and their deputies, servants, agents, and such others as he or they shall agree with. This form of patent seems to have had its origin in ancient times, and indeed patents for inventions are now granted with very little variation, in the same form as they always have been ever since the passing of the Statute of Monopolies. And it seems that the persons authorized to exercise the privilege are mentioned lest any of them should be subject to punishment for monopolizing or creating a monopoly without sufficient authority (*l*).

Who may
exercise the
privilege.

The next clause in a patent is, what is technically called the *habendum*; it is usually in the following form:—

Habendum.

“To have, hold, exercise, and enjoy the said licence, powers, privileges, and advantages hereinbefore granted or mentioned, or to be granted unto the said *J. G.*, his executors, administrators, and assigns, for and during and unto the full end and term of fourteen years from the date of these presents next and immediately ensuing, and fully to be complete and ended, according to the statute in such case made and provided.”

It appears from this clause that the subject of the grant

(*f*) P. 105.

(*g*) P. 75.

(*h*) 4 Burr. 2500.

(*i*) 1 Cowp. 204.

(*k*) See the observations of Lord

Lyndhurst, L. C., and Lord *Brougham*,
in *Brown v. Annandale*, 1 Webs. R.
448, 449.

(*l*) See Bac. Abr. tit. Monop. (A).

which the patentee is to enjoy is the licences, powers, privileges, and advantages before mentioned (*m*).

Limitation of
privilege to
executors, &c.

The privileges granted are always limited to the inventor, his executors, administrators and assigns, and it is clear that they could not be limited to any other person (*n*). The limitation is made to the inventors, executors, administrators and assigns, because without these words the grant would be personal only, and the privilege would cease in case of the death of the patentee during the term. Nor would the privilege be assignable if these words of limitation did not expressly make it so (*o*). The 6th section of the Statute of Monopolies (*p*) excepts grants to inventors only, but the legality of the limitation to the executors, administrators and assigns has never been questioned, and there can be no doubt of its being good (*q*).

Of the term
which may be
granted.

The term usually granted by a patent is fourteen years, being the full extent of the time for which such a privilege is permitted to be granted by the sixth section of the Statute of Monopolies. The Crown has the power however of making the grant for any shorter term; but the full period allowed by law is rarely more than sufficient to enable an inventor to obtain a sufficient reward, and therefore the full term of fourteen years is never refused.

The words, "from the date of these presents," show that the time during which the patent is to run must be computed exclusive of the day of the date of the patent (*r*).

Prolongation
of the term.

The term allowed by law for the duration of a patent being frequently insufficient to remunerate a patentee for his expense and trouble, the Crown was authorized, by a recent statute (*s*), upon the report and advice of the Judicial Committee of the Privy Council, to prolong the term for not exceeding seven years (*t*).

(*m*) Vide *ante*, p. 53.

(*n*) Vide 21 Ja. I. c. 3, sec. 6, and *ante*, Chap. III.

(*o*) Per *Littledale*, J., in *Duvergier v. Fellows*, 10 B. & C. 826.

(*p*) 21 Ja. I. c. 3.

(*q*) See further as to the nature and disposition of the privilege granted by a patent, *post*, Chap. IX.

(*r*) See Co. Lit. 46, b; *Watson v. Pears*, 2 Camp. 294; *Lester v. Garland*, 15 Ves. 248; *Webb v. Fairmaner*, 3 M. & W. 473.

(*s*) 5 & 6 Will. IV. c. 83, sec. 4.

(*t*) See further as to the term granted by a patent, and the prolongation thereof, *post*, Chap. VI.

4th. *Of the Prohibition to all others except the Patentee, his Executors, &c.*

The next clause is what is called the prohibitory part of a patent; it is in the following form:—“And to the end that he, the said *J. G.*, his executors, administrators and assigns, and every of them, may have and enjoy the full benefit, and the sole use and exercise of the said invention, according to our gracious intention hereinbefore declared: we do by these presents, for us, our heirs and successors, require and strictly command all and every person and persons, bodies politic and corporate, and all other our subjects whatsoever, of what estate, quality, degree, name, or condition soever they be within that part of our United Kingdom of Great Britain and Ireland, called England, our dominion of Wales, and town of Berwick-upon-Tweed [and also in the Islands of Guernsey, Jersey, Alderney, Sark, and Man, and in all our colonies and plantations abroad] aforesaid, that neither they nor any of them, at any time during the continuance of the said term of fourteen years, hereby granted, either directly or indirectly do make, use, put in practice the said invention, or any part of the same so attained unto by the said *J. G.*, as aforesaid, nor in anywise counterfeit, imitate, or resemble the same, nor shall make, or cause to be made, any addition thereunto, or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, deviser or devisors thereof, without the licence, consent, or agreement of the said *J. G.*, his executors, administrators, or assigns, in writing, under his or their hands and seals, first had and obtained in that behalf, upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this our royal command; and further, to be answerable to the said *J. G.*, his executors, administrators and assigns, according to law, for his and their damages thereby occasioned.”

The operation of a patent for an invention is not to grant the patentee a mere right to use the invention, but a sole and separate right to the exclusion of all other persons; the effect of the grant is therefore to prevent all persons except the

patentee, and those claiming under him, from using the invention during the term of the patent (*u*).

Object of a prohibition.

We have seen that all persons are bound to take notice of these grants of the Crown (*x*). And the object of the prohibition is to warn all persons of the effect of the grant, and what the law requires them to abstain from doing.

This clause commences with a declaration of the intention of the Crown that the patentee may have and enjoy the full benefit and sole use and exercise of the invention, which shows that the intention is to reward the patentee for the invention which he undertakes to put the public in possession of.

To whom it extends.

The prohibition extends to all persons living within those parts of the realm to which the privilege extends, and during the whole term granted by the patent.

To what it extends.

The persons prohibited are commanded not to “make, use, or *put in practice*” the invention, or any part of it. These words differ from the words of the privilege granted, which authorize the patentee to “make, use, *exercise and vend*” the invention. The words “put in practice” seem to be of essentially the same signification as the word “exercise;” and the declaration of intention at the commencement of the clause uses the word exercise, which shows that the subsequent words intended to have at least as extensive a meaning as the word exercise. It is not easy however to suggest a reason why the word “vend” should be inserted in the granting part of the patent, and not in the prohibitory. The prohibition is however only declaratory of the law, and cannot diminish the effect of the preceding grant.

The clause now under consideration then proceeds to command that the persons prohibited shall not in anywise counterfeit, imitate, or resemble the invention, or make any addition to it, or subtraction from it, whereby to pretend themselves to be the inventors or devisors thereof without the licence of the patentee.

This part of the prohibition, like the preceding part, is only a declaration of what the law commands; and is intended to give notice to all persons what will be an infringement of the patentee's rights, and subject them to punishment (*y*).

(*u*) Vide *ante*, p. 53.

(*x*) *Ante*, p. 38.

(*y*) See further as to what is an infringement of a patent, *post*, Chap. XI.

The licence, consent, or agreement which a person must have in order to take him out of the meaning of this clause, it is provided shall be under hand and seal. This provision seems to render it necessary that licences to use a patent invention should always be granted by deed (z).

The prohibition addressed to all the Queen's subjects is followed by a command to her justices and officers in the following form. "And moreover we do by these presents for us, our heirs and successors, will and command all and singular, the justices of the peace, mayors, sheriffs, bailiffs, constables, headboroughs, and all other officers and ministers whatsoever, of us our heirs and successors for the time being, that they or any of them do not, nor shall at any time hereafter during the said term hereby granted, in any wise molest, trouble or hinder the said *J. G.*, his executors, administrators or assigns, or any of them, or his or their deputies, servants or agents, in or about the due and lawful use or exercise of the aforesaid invention, or any thing relating thereto."

All monopolies (except those preserved by the provisoes in the Statute of Monopolies) are contrary to law, and persons who put them in force may be punished by fine and imprisonment (a). The grant to a patentee of the sole use of his invention being a lawful grant, this clause seems to have been introduced into the patent as a protection to the patentee, so that if he were to be charged before any justices or officers of the Crown, with putting an illegal monopoly in force, he might produce his patent to them in proof of his right, and to show by the command contained in it that they had no power to proceed against him.

5th. *Of the Conditions of the Grant.*

We have already, in a former part of this work, discussed the power of the Crown to grant the sole use of inventions (b), and we have seen in what manner the prerogative is limited by the Statute of Monopolies. But there is nothing either in

(z) See further as to licences, *post*, Chap. IX.

(a) 2 Inst. 61; 3 Inst. 181; Hawk.

P. C. bk. II. c. 79, sec. 2.

(b) Vide *ante*, Chap. II. p. 7.

Licences.

Command to justices, &c.

Reason for the clause being inserted.

Conditions may be annexed to the grant.

our Common or Statute Law, to prevent the Crown from annexing any legal conditions to such grants as those now under consideration; and there can be no doubt that such conditions are valid and binding upon the patentee. Thus in a pardon granted by the Queen under the Great Seal, she may annex any condition to it she may think fit (c).

Proviso for voiding the grant.

The first condition or proviso in a patent for an invention is in the following form:

“ Provided always, and these our letters patent are and shall be upon this condition, that if at any time during the said term hereby granted, it shall be made appear to us, our heirs or successors, or any six or more of our or their Privy Council, that this our grant is contrary to law, or prejudicial or inconvenient to our subjects in general, or that the said invention is not a new invention as to the public use and exercise thereof in that part of our United Kingdom of Great Britain and Ireland, called England, our dominion of Wales, and Town of Berwick-upon-Tweed [and also in the Islands of Guernsey, Jersey, Alderney, Sark, and Man, and in all our colonies and plantations abroad] aforesaid, or not invented and found out by the said *J. G.*, as aforesaid, then upon signification or declaration thereof to be made by us, our heirs or successors, under our or their signet or privy seal, or by the Lords and others of our or their Privy Council, or any six or more of them under their hands, these our letters patent shall forthwith cease, determine, and be utterly void to all intents and purposes, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding.”

If contrary to law.

The first cause for voiding the grant under this condition is in case the grant is contrary to law, or prejudicial or inconvenient to the people of the kingdom in general. This provision is merely in affirmance of the law, which says that the Queen cannot do any thing against the law (*d*), or against right or justice; hence the maxim that the Queen cannot do wrong.

And therefore all her letters patent which are contrary to law or common justice, or which are to the prejudice of the commonwealth, or to the general injury of the people, are null

(c) 2 Hawk, c. 37, sec. 45.

(d) Godbolt, 254.

and void (e). And every grant from the Queen has this condition either expressly or tacitly annexed to it, that it be not a grievance or prejudice to her Majesty's subjects; and if a grant be contrary to this condition it is void (f).

The Statute of Monopolies (g) also provides that patents for inventions shall not be "contrary to the law; nor mischievous to the state, by raising prices of commodities at home; or hurt of trade, or generally inconvenient" (h).

Another cause for avoiding a patent under this proviso or condition, is, if the invention is not new as to the public use of it within that part of the kingdom to which the grant extends. This is in accordance with the law, which requires that every invention which is made the subject of a grant by patent must be new to the public; novelty in fact being a material and necessary part of the consideration for the grant which the Queen makes on behalf of the public (i). The law, however requires much more than this condition in the patent; for the Statute of Monopolies provides that an invention must be new *in this realm*, which since the Union with Scotland and Ireland, includes the whole of the United Kingdom, together with all its colonies and possessions abroad (j). There was indeed formerly a very general opinion amongst the profession, that it was only necessary that an invention should be new in England, Wales, and Berwick-upon-Tweed, but that opinion was exploded by the decision of the House of Lords in *Brown v. Annandale* (k). In that case it seems to have been erroneously supposed that the effect or intent of a patent is to grant a privilege on the terms merely of the conditions comprised in the patent, excluding all others. But that is clearly not so, for it is declared by the habendum (l) in the patent, that the inventor his executors, administrators and assigns, shall have and enjoy the privilege *according to the statute in such case made and provided*, and therefore it is manifest that the grant is intended to be made subject to all the conditions required by the Statute of Monopolies. If the patent had provided that novelty within a smaller district

If invention not new.

The law requires more than the proviso.

Invention must be new throughout the realm.

Brown v. Annandale.

(e) See Shep. Abr. Prerog. 48, sec. 5 & 7, and the authorities there cited.

(f) 11 Co. 86, b.

(g) 21 Ja. I. c. 3, s. 6.

(h) Vide *post*, Chap. V. sec. 3.

(i) See this subject fully discussed, *post*, C. V. sec. 3.

(j) Vide *post*, Ch. V. sec. 2.

(k) 1 Webs. R. 433.

(l) Vide *ante*, p. 57.

than required by law should *be sufficient*, the patent would have been void in that respect, if not *in toto*, for the Crown has no power to dispense with the provisions of an Act of Parliament. But the Crown is not restrained from making conditions which are not *contrary* to law; and a condition which is in accordance with the law, will not be bad or void the patent because it is not so extensive as the law itself. The fact is, that the form of this condition in a patent was adopted at a time when the realm only included England, Wales, and Berwick-upon-Tweed, and the alteration in the law produced by the Union with Scotland and Ireland, not being adverted to, the officers of the Crown have adhered to the old form which was in use prior to the alteration of the law. The condition ought now to require an invention to be new within the realm.

If patentee did not invent.

The last cause for avoiding a patent under this proviso is, in case the invention was not invented or found out by the patentee; or, if the invention was imported, in case it was not first introduced by the patentee. The law respecting the grantees of inventions has already been fully considered in a preceding chapter of this work (*m*), and this clause of the proviso is intended to be in accordance with the law on that subject.

Mode of recalling the grant.

The last clause of the proviso contains a provision, that upon signification made to the Queen of any such cause for avoiding the patent, as before mentioned, the patent shall cease and be void.

The only means which the law provides for the repealing of letters patent, is by action of *scire facias* at the suit of the Queen. This provision, which is contained in the patent itself, however, provides additional modes of determining the patent, and rendering it void. There is no instance in modern times of this provision in a patent having been put in force, although, if the clause were to be framed so as to vest the power of avoiding the patent in the Judicial Committee of the Privy Council, it might be of considerable service to the public.

The second proviso or condition which is always inserted in a patent for an invention is in the following form:—
 “ Provided also, that these our letters patent, or anything herein contained, shall not extend or be construed to extend

Proviso that the patent shall not affect any former grant.

to give privilege unto the said J. Gowland, his executors, administrators, or assigns, or any of them, to use or imitate any invention or work whatsoever, which hath heretofore been found out or invented by any other of our subjects whatsoever, and publicly used or exercised in that said part of our United Kingdom of Great Britain and Ireland called England, our dominion of Wales or town of Berwick-upon-Tweed, [in the islands of Guernsey, Jersey, Alderney, Sark, and Man, or in any of our colonies and plantations abroad,] aforesaid, unto whom like letters patent or privileges have been already granted for the sole use, exercise, and benefit thereof, it being our will and pleasure that the said J. Gowland, his executors, administrators, and assigns, and all and every other person and persons to whom like letters patent or privileges have been already granted as aforesaid, shall distinctly use and practise their several inventions, by them invented and found out, according to the true intent and meaning of the same respective letters patent, and of these presents."

In some cases, letters patent under the Great Seal operate so as to determine the powers or privileges granted by former letters patent. Thus a new commission of the peace, contained in letters patent under the Great Seal, at once determines all the powers and authorities of justices named in previous letters patent, who are not named in the new commission.

Some patents determine prior patents.

The proviso, now under consideration, seems to have been inserted by way of caution, and in order to prevent the rights and interests of different patentees from clashing with each other. And whatever might have been the construction of a patent without such a clause, it is quite clear that the lawful intent of the Crown, as declared in this proviso, is sufficient to control the effect of a grant in a patent, and to confine the effect of it within the true intent and meaning of the Queen, as here declared.

Proviso inserted by way of caution.

In the case of *ex parte Fox* (n), Lord Eldon, L. C., said that a patent might be granted for an improvement upon an invention which was the subject of a prior patent, but that the subsequent patentee would be unable to use the invention of the prior patentee during the continuance of the first pa-

Ex parte Fox.

(n) 1 V. & B. 67.

tent. The same law was laid down by the Court of Common Pleas in the case of *Crane v. Price* (o).

Third Proviso against assignment to more than twelve persons.

The next proviso in a patent for an invention is in the following form :

“Provided likewise nevertheless, and these our letters patent are upon this express condition, that if at any time hereafter these our letters patent, or the liberty and privileges hereby by us granted, become vested in more than the number of twelve persons or their representatives, at any one time, as partners, dividing or entitled to divide, the benefit or profit obtained by reason of these our letters patent, reckoning executors or administrators as and for the single person whom they represent as to such interest, as they are or shall be entitled to in right of such their testator or intestate, that these our letters patent, and all liberties and advantages whatsoever hereby granted, shall utterly cease, determine, and become void, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding : Provided that nothing herein contained shall prevent the granting of licences in such manner, and for such considerations as they may by Law be granted” (p).

We have seen (q) that the privilege granted by a patent cannot be assigned except by virtue of the express provisions of the patent itself. The third proviso in a patent is intended to restrain the previously unlimited power of alienation which is given to the patentee.

Object of restraining alienation.

The object in restraining the alienation of these patent privileges has always been, firstly, to prevent the public being imposed upon by specious projects, under the colour of letters patent, which too often terminate in the ruin of those who are induced to embark in them ; and, secondly, to avoid the oppression which might be practised if large and powerful companies were to be permitted to become possessed of such privileges.

What is necessary to render a patent void under this clause.

In order to render a patent void under this proviso, two things are necessary, firstly, that the privilege granted by the patent shall become vested in more than twelve persons ; se-

(o) 4 M. & G. 580 ; and see *Harmar v. Playne*, 14 Ves. 130 ; 11 East, 101 ; and *Lewis v. Davis*, 3 C. & P. 502.

(p) This clause was first introduced in the year 1832, in the place of a con-

dition against assigning to more than five persons ; see the form of the old clause in the Appendix ; see also Carmichael Law of Patents, 2nd Edit. p. 78.

(q) *Ante*, p. 58.

condly, that more than twelve proprietors of the patent privilege shall, as partners, divide, or be entitled to divide, the benefit or profit obtained by reason of the patent.

As to the number of persons in whom a patent may become vested, the clause itself provides that executors and administrators shall only be reckoned as the single person whom they represent. And it was decided by the court of Queen's Bench in the case of *Bloxam v. Elsee* (r), that the vesting of a patent in the assignees of a bankrupt, in trust for the creditors of the bankrupt who were more than twenty in number, did not avoid the patent, on the ground that the assignees were merely "representatives" of the bankrupt; and that the object of the proviso applied to assignments by acts of parties, and not by operation of Law (s).

It seems also that there is another reason why a bankrupt's patent will not be avoided in consequence of his creditors exceeding twelve in number, which is, that the creditors do not acquire any right to use or exercise the patent privilege, but are only entitled to the proceeds to arise from a sale of the patent. Creditors not entitled to use the invention.

It seems from the form of the proviso in question that however numerous the persons may be in whom a patent becomes vested, it will not be thereby rendered void, if there are not more than twelve proprietors *as partners* dividing, or entitled to divide, the profits obtained by reason of the patent.

If therefore the patent privilege should become vested in more than twelve persons, in any other way than as partners so entitled to divide profits, the patent would not be thereby avoided. Thus if the patent were to be vested in twenty persons, in such a way that each of them should be entitled to use the patent privilege for his own profit and benefit, separate and apart from his co-proprietors, such a disposition of the patent right would not render the patent void within the meaning of this clause.

Where several persons by assignment become entitled to the privileges granted by a patent, it is difficult to determine what is the precise nature or extent of their rights amongst themselves. It seems that without some agreement amongst Co-proprietors not partners.

(r) 6 B. & C. 169.

(s) See further respecting the assign-

ment or disposition of patents, *post*, Chapter IX.

them as partners to work the patent, or jointly to take the profits obtained by means of the patent, they could not be considered as partners dividing profit within the meaning of this proviso. For no proprietor of a share in a patent could be compelled to become a partner to work the invention, or to concur in granting licences to enable others to use it, nor could he be prevented from working the invention himself separate and apart from his co-proprietors (t).

Companies for working patents.

This clause in a patent renders it necessary to apply to Parliament, whenever it is desired to transfer a patent to a company of more than twelve persons. Many Acts of Parliament have been passed for this purpose, but few if any of the companies formed, solely for the working of inventions, have succeeded. It is clear indeed that public companies cannot conduct manufacturing or trading business so efficiently as private persons or ordinary copartnerships, and the machinery necessary for the management and regulation of such companies, swallows up all the profit made by their trade or manufactures.

Licence.

A licence may be considered either as vesting in the licensee some right or interest in the privilege granted by a patent, or as granting him a dispensation from the prohibition contained in the patent, and in order to guard against a licensee being held to be an assignee, in whom a portion of the patent privilege is vested within the meaning of this proviso, it is expressly declared that nothing in the patent shall prevent the granting of legal licences (u).

Proviso requiring a specification.

We now come to the most important proviso in a patent, by which the patentee is compelled to enrol in Chancery an instrument usually called a specification; this proviso is now usually in following form:—

“ Provided also that if the said J. G. shall not particularly describe and ascertain the nature of his said invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in our High Court of Chancery within [six] calendar months next, and immediately after the date of these our letters patent, that then these our letters patent, and all

(t) Vide *post*, Chapter IX.

(u) See further on the subject of

licences in Chapter IX. s. 3, *post*.

liberties and advantages whatsoever hereby granted, shall utterly cease, determine and become void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding."

We have seen that it is not now the practice in a patent to give any further explanation of the invention which is comprised in it, than is contained in the title as mentioned in the recital of the patentee's petition for the patent. But certainty is an essential requisite in every grant, and more particularly so in grants by the Crown (x), which are always construed strictly *against* the grantee (y). And if there was no provision in a patent for obtaining a description of the invention, the subject of the grant would not only be uncertain, but incapable of being reduced to a certainty, and therefore the patent would be void.

Patent does not describe invention.

But certainty is requisite.

Without a specification a patent would not have certainty.

We have already considered the effect of the grant, and of the prohibition contained in patents (z). And it is evident that without some better description of an invention than a title usually affords, the public would have no means of knowing what they are prohibited from doing, during the term of the patent, or what it is they are to have at the end of the term as a consideration for the grant. The Lord Chancellor would not knowingly seal a patent which does not contain some proper provision for the benefit of the public, or, as Lord *Hardwicke*, L. C., said in the case of *ex parte O'Reilly* (a), he would not seal a patent which did not put the parties under some control, even though there should be no caveat against it.

Without a specification the public would not know to what the patent extends.

Patent would not be granted without a proviso for specification.

The practice of requiring a specification first commenced in the reign of Queen Anne, before which time it had been customary to introduce recitals into patents, containing descriptions of the inventions intended to be comprised in them.

Origin of specification.

By adopting the expedient of requiring a specification, at the end of a few months the patentee is benefited by the time and opportunity of completing and perfecting his invention, and producing a proper description of it; and the public have the advantage of a better description than a patentee

Advantage of specification.

(x) Per *Heath*, J., in *Boulton v. Bull*, 2 H. Bl. 483; and 1 Buls. 10.

(z) *Ante*, p. 50, 59.

(a) 1 Ves. Jr. 112.

(y) See *ante*, p. 39.

would be able to give if he were required to make it before or at the time he obtains his patent.

What the proviso requires.

The proviso requires the patentee *particularly* to describe and ascertain the *nature* of the invention, and *the manner in which it is to be performed*. The instrument by which this is required to be done, must be under the hand and seal of the patentee, and this instrument is what is popularly termed a specification.

Specification to be enrolled within a limited time.

The specification is also required to be enrolled within *four* months in ordinary cases, and in *six* months if the patentee declares that he intends to apply for a Scotch patent. This indulgence is granted on the ground that if the specification were to be enrolled before the date of the Scotch patent, the Scotch patent would be void (b).

Time, how computed.

The time within which the enrolment is to be made must be computed exclusive of the day of the date of the patent (c).

Enrolment to be in Chancery.

The enrolment is also required to be in the Court of Chancery, which is the Court in which all the most important public records of the country are kept, to which the public has a right to resort for information. There are three offices for enrolments in the Court of Chancery; they are the Enrolment Office, the Rolls Chapel, and the Petty Bag Office; and an enrolment in any of these offices is a sufficient compliance with the proviso. Since the passing of a recent Act of Parliament (d) there is some advantage in enrolling a specification in the office of the Rolls Chapel for copies obtained in that office, and stamped as the Act directs, are admissible in evidence without further proof.

The proviso amounts to a covenant by patentee.

It seems that this proviso contained in a patent under which the grantee claims, amounts to a covenant by him that he will perform the conditions required of him (e).

If condition not performed the patent will be void.

The clause in question concludes with a declaration, that if the condition it contains is not complied with, the patent shall become void. What is a sufficient compliance with this condition, and the essential requisite of a specification, will be fully discussed in a subsequent Chapter of this work (f).

(b) *Brown v. Annandale*, 1 Webs. R. 433.

(c) *Watson v. Pears*, 2 Camp. 294.

(d) 1 & 2 Vict. c. 94. See s. 12 & 13.

(e) See the case of *Lord Ewre v.*

Strickland, Cro. Ja. 240; *Bratt v. Cumberland*, Cro. Ja. 522; *Mayer, &c. of Lyme Regis v. Henley*, 3 B. & Ad. 77.

(f) Vide post, Chapter VII.

Whenever the officers of the Crown think that an invention may be useful in any department of the public service, a condition is inserted in the patent in the following form,—or to a similar effect:—

“ Provided also, that if the said *J. G.*, his executors, administrators or assigns, shall not supply, or cause to be supplied, for our service all such articles of the said invention as he or they shall be required to supply, in such manner, at such times, and upon such reasonable prices and terms as shall be settled for that purpose by the Master General of our Ordnance, or the principal officers of the Ordnance (or by the Lords Commissioners of our Admiralty, &c.), for the time being, that then, &c.,” the patent shall become void.

Proviso that patentee shall supply the patent article to the Crown at reasonable prices.

In such a case the performance of this proviso is one of the considerations which the patentee is to give to the public for the grant made to him by the Queen on behalf of the public.

Performance of this proviso part of the consideration.

This proviso does not however enable the patentee to compel the officers of the Crown to settle the prices or terms upon which he is to supply articles according to the proviso. Thus in the case of *ex parte Perring (g)*, it appeared that Perring had obtained a patent for an invention of improvement in anchors, and the patent contained a proviso for making the patent void if the patentee should not supply for his late Majesty's service all such articles of the invention as he should be required to supply, in such manner, and at such prices as should be settled by the Lords Commissioners of the Admiralty for the time being. The patentee, upon an affidavit that the Admiralty had constructed anchors according to the invention, and had refused to give him adequate remuneration, moved the Court of King's Bench for a *mandamus* commanding the Lords of the Admiralty to settle the prices and terms according to the patent. But the Court held the application was not warranted by the terms of the patent, and refused the *mandamus*.

Patentee cannot proceed by *mandamus* against the officers of the Crown.

This clause also seems to amount to a covenant on the part of the patentee (*h*).

The last clause in the body of a patent is usually the following:—

“ And lastly, we do by these presents, for us our heirs and

Clause dispensing with a particular description of invention in the patent.

(g) 4 A. & E. 949.

(h) See the cases cited, *ante*, p. 70. n. (e).

successors; grant unto the said *J. G.*, his executors, administrators, and assigns, that these our letters patent, or the enrolment or exemplification thereof, shall be in and by all things good, firm, valid, sufficient, and effectual in the law, according to the true intent and meaning thereof, and shall be taken, construed, and adjudged in the most favourable and beneficial sense, for the best advantage of the said *J. G.*, his executors, administrators, and assigns, as well in all our Courts of Record as elsewhere; and by all and singular the officers and ministers whatever of us, our heirs and successors, in that part of our said United Kingdom of Great Britain and Ireland called England, our dominion of Wales and town of Berwick-upon-Tweed, and in all our colonies and plantations abroad aforesaid, and amongst all and every the subjects of us, our heirs and successors whatsoever and wheresoever, notwithstanding the not full and certain describing the nature or quality of the said invention, or of the materials thereto conducing or belonging."

Reason for inserting the clause.

We have seen that the ordinary rules for construing grants of the Crown require them to be taken most strongly in favour of the Crown, and against the grantee. We have also seen that the words "of our especial grace, certain knowledge, and mere motion," are usually inserted in patents to cause them to be construed more favourably for the patentee. But notwithstanding these words, in consequence of the extremely general and vague terms in which a title usually describes an invention, it is very doubtful whether a patent would not be void for uncertainty, if it did not contain some particular provision such as that now under consideration. The provision follows almost immediately after the proviso requiring a specification of the invention, and the clause seems to have been adopted about the time when a full recital of the nature of an invention granted by patent to be dispensed with, and a condition for a specification substituted in its place.

Lawful intent of patent to prevail.

It is a rule that the intent of a grant, whether made by the crown or any private person, shall always be allowed to prevail as far as it is lawful; and it seems that there is nothing unlawful in making a grant of an invention named and to be afterwards described by the inventor, for the Queen cannot know anything respecting the invention, except from the representation of the inventor; and whether he gives the descrip-

tion of it to the public, before or after the making of the grant cannot be material, if the description is but correct. It is true that the patentee might insert a false description of the invention in his specification, but the consequence of that would be to void the patent, and put an end to the grant, and the public could not receive any substantial injury from such a void grant.

This clause, in effect, provides that the patent, or the enrolment or exemplification thereof, shall be valid and construed in the most favourable sense for the patentee, notwithstanding the patent does not contain a full and certain description of the invention. If a patent, in the form we have been considering, did contain a full description of the invention granted, it would be construed favourably for the patentee; and therefore the object of this clause is to declare the intention of the Queen that that rule of construction is to prevail, and that the grant is to be valid notwithstanding the title in the patent does not fully describe the invention; or, in other words, it is intended to be a dispensation from the rule that the subject of a grant by patent must be described in it with certainty and particularity.

And as this dispensation does not produce any injury to the public, but coupled with the condition requiring a specification is rather beneficial to the public, it seems that the Queen may lawfully grant such a dispensation (i); and indeed there cannot now be any doubt that patents containing this proviso are valid and sufficient in Law.

This dispensation seems to be lawful.

We now come to the formal conclusion of a patent; the first clause of which is—

Formal conclusion.

“In witness whereof, we have caused these our letters to be made patent.” The name “letters patent” is taken from the words of this clause (k), by which it is in effect declared that the Queen makes her grant patent, or known to all persons by the affixing of the Great Seal to it, and publishing it to the world. The publication being the enrolment of the patent in the Chancery Rolls, to which all persons have access (l), and the delivery of the patent to the patentee, to be

(i) See *Borun's case*, Co. R. 35—36; *Attorney-General v. Hungate*, Hardres, 231; Vin. Abr. Prerog. (Y. a.) and (Y. a, 2); and 3 Shep. Abr. Prerog.

p. 95.

(k) 2 Inst. 78.

(l) 1 Co. R. 45 a.

shown a sufficient evidence of his title to the privilege granted by the patent.

The patent then concludes thus, "Witness ourself at Westminster, this _____ day of _____ in the _____ year of our reign." Patents for inventions, like commissions, writs, and Common Law proceedings issuing out of Chancery, are always tested in the name of the Queen herself; but commissions, writs, &c. issuing out of other Courts, are tested in the name of the chief or sole judge of the Court; thus those which issue out of the Queen's Bench are tested, "Witness, Thomas Lord Denman, at Westminster, &c."

Date of patent. In *Lord Zouch and More's* case (*m*), it is laid down that "the King's patent may be without date, for he may resort to the enrolment and privy seal, and so help it."

The deed of a subject has relation only to the time of the delivery, and not to the time of the date; but the Queen's patent has relation to the time of the date, and not to the time of the delivery; inasmuch as matters of record (which letters patent are) by presumption of Law import truth in them (*n*).

Statute 18,
Hen. VI.

In order to prevent the mischievous effect of antedating patents, an Act was passed in the 18th year of the reign of Henry VI. (*o*), by which it is provided that the day of the delivery of every warrant to the Chancellor shall be entered of record, and letters patent are to be made thereupon, bearing date the day of such delivery, and not before, and that letters patent made to the contrary are void.

Every patent for an invention has subscribed to it the words, "By writ of Privy Seal." These words are intended to show that the patent has been made in pursuance of a command contained in the Queen's writ, or warrant under her privy seal (*p*).

Subscription.

And at the bottom is written the name of the clerk of the letters patent thus, "Edmunds," whose duty it is to prepare all patents which pass the Great Seal (*q*).

To the bottom of the patent is affixed an impression of the

(*m*) Godbolt, 416.

(*n*) Plowd. 491.

(*o*) 18 Hen. VI. c. 1; see the Act, Appendix, c. 1, s. 1.

(*p*) See 2 Inst. 555—556, and 8 Co. R. 18, b.

(*q*) The office is now regulated by the Act 3 & 4 Will. IV. c. 84.

Great Seal, as already mentioned (r). It is this seal which gives authority to the document, and all persons are bound to take notice that it is the Great Seal; so that when a patent under the Great Seal is produced, it is admissible in evidence without further proof.

By the statute 5 & 6 Will. IV. c. 83. s. 4. (s) the Queen in Council is enabled to grant an extension of the term comprised in a patent for an invention, and such extension is to be granted by new letters patent.

Prolongation of a patent under statute 5 & 6 Will. IV. c. 83, s. 4.

It is evident from the words of the statute that the effect of a patent for an extension can only be to extend the term granted by the first patent for such an additional term (not exceeding seven years) (t) as may be granted by the second patent; and therefore the second patent must be construed in like manner as the first; and indeed the validity of the second patent must depend upon the validity of the first.

Effect of an extension only to extend the term.

If the first patent was void, the privilege which it purports to grant has no existence, and as a nullity cannot be extended, the second patent cannot have any effect, and will be void also.

If first patent void, second patent void also.

For this reason the Privy Council will not entertain any question respecting the validity of a patent which is sought to be prolonged, unless, indeed, it has been repealed; but if the invention is of sufficient merit, will report in favour of an extension, the petitioner taking it at his own peril, subject to all objections to its validity, and for so much as it may be worth.

Report of Privy Council in favour of a patent subject to all objections.

And it will be seen from the form of a patent for an extension (u) that it contains a proviso for avoiding it for want of novelty, &c., in precisely the same form as the proviso to that effect contained in an original patent.

Second patent contains same proviso as the first.

Before the Queen in Council was enabled to prolong patent privileges, special Acts of Parliament were sometimes passed for that purpose, but such Acts always contained provisions for making the extended privilege liable to all the obligations which were applicable to the original grant of it by patent.

Acts prolonging patents to have the same construction.

(r) Vide ante, p. 37.

Vict. c. 79.

(s) Amended by 2 & 3 Vict. c. 67, and extended by 7 & 8 Vict. c. 79.

(u) See the Form in the Appendix, Chapter II. s. 1.

(t) Or fourteen years, under 7 & 8

Act enabling
assignment does
not vary con-
struction.

An Act of Parliament which merely enables a patentee to assign his patent privilege to a greater number of persons, or in a different mode from that allowed by the conditions contained in the patent, does not in any other way alter or affect the construction or validity of the patent (x).

Confirmation
does not vary
the construc-
tion.

Nor will the confirmation of a patent under the 5 & 6 Will. IV. c. 83. s. 2, have any effect upon the construction of it, or alter it in any way except to give it validity, notwithstanding such a prior publication of the invention as mentioned in the statute, all other objections being left untouched.

(x) *Hesse v. Steenson*, 3 B. & P. 565.

CHAPTER V.

OF THE NATURE AND QUALITIES OF AN ART OR INVENTION WHICH MAY BE MADE THE SUBJECT OF A PATENT PRIVILEGE.

SEC. I.—*Of the Nature of the Art or Invention.*

II.—*Of the Novelty of the Art or Invention.*

III.—*Of the Utility of the Art or Invention.*

SECTION I.

Of the nature of an Invention which may be the Subject of a Privilege granted by Patent.

MUCH confusion has been introduced into Patent Law by the use of words to indicate things not within their proper and ordinary signification. Thus the word "patent" is frequently used instead of the word "invention;" sometimes it is employed to denote the *grant* contained in a patent, and sometimes the *privilege* which is the subject of such a grant. So the word "invention" is occasionally used to signify the act of discovering or finding out something; frequently to signify an art newly invented, and occasionally the article produced by means of such an art. The word "principle" has also been used in several different senses in various cases, so as to make it difficult to understand what is meant by the word.

Confusion produced by improper use of words.

In considering what kind of inventions may, and what cannot be made the subject of patent privileges; it becomes of the utmost importance, in treating of a subject so full of difficulty and so imperfectly understood, to use every precaution in order to guard against the improper use of these words, so as to avoid the confusion and uncertainty which would ensue if they were to be used in any sense at all loose or indeterminate.

Necessity for guarding against improper use of words.

The word "patent" in its proper sense merely signifies an "Patent" an open record

under the great seal. open record made by the Queen in Chancery and under the Great Seal (a); and patents, or more correctly speaking, letters patent, are made for very many purposes besides granting sole rights to use inventions.

A patent contains a grant.

Patents (such as those which form the subject of this work) contain *grants* made by the Crown to meritorious inventors; and in some of the preceding Chapters of this work (b), the policy of the law respecting such grants has been pointed out, and the law considered both as it relates to the grantor and the grantee.

The grant confers a privilege.

A patent grant of this description confers upon the patentee a sole or exclusive *privilege*, the nature of which will be considered in a subsequent part of this work (c). And the question what may be made the subject of such a sole privilege is what is purposed to be discussed in the present Chapter.

Subject of a privilege.

“Invention” is the general and popular name given to any thing which may be made the subject of such a privilege; or which, in the language of some of our old law books, may be *put into a privilege*.

Meaning of “invention.”

The word invention signifies (in its proper sense) something invented, discovered, or found out, a device or contrivance; and therefore it includes many things, such as designs, patterns, models, drawings, &c. (d), which are clearly not inventions within the meaning of the patent law.

Statute of Monopolies.

By the sixth section of the Statute of Monopolies (e), it is declared that the previous clauses condemning all monopolies shall not extend to “any letters patent and grants of *privilege* for the term of fourteen years, or under, of *the sole working, or making of any manner of new manufacture*, within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use, so as also they be not contrary to the law, nor mischievous to the state, by raising prices

(a) Vide *ante*, Chap. IV. p. 36.

(b) Chapters I., II. and III.

(c) See Chap. IX. respecting the nature of a patent privilege and the disposition of it.

(d) The authors of such inventions

derive their privileges from the express provisions of particular statutes by registration merely, and without the aid of any grant from the Crown.

(e) 21 Jas. I. c. 3.

of commodities at home or hurt of trade or generally inconvenient," and that such grants "shall be of such force as they should be if the Act had never been made, and of none other."

The effect of this section of the Act is in substance, that such letters patent, and grants of privilege as it describes, are not on the one hand to be taken to be within the meaning of the preceding sections, which in very general terms declare the illegality of all monopolies whatsoever: nor are they on the other hand to be rendered valid by virtue of the Act: but they are to be of precisely the same force as if the Act had not been passed, and no more. An invention which may legally be made the subject of a patent privilege must, therefore, not only be of such a nature as to come within the meaning of the exception contained in the statute, but it must also be such an invention as at Common Law the Crown possesses the prerogative of granting the sole use of.

The effect of the statute is to leave the excepted patents to the common law.

In order to discover what was intended by this enactment, it will be necessary to consider the words of the enactment itself;—the Common Law which it was intended to preserve;—and the effect which a valid patent must have, which it will be seen, in the sequel, is to make a grant of the sole privilege of using a new ART for making or manufacturing vendible articles, or articles of commerce.

Words of the statute, of the common law, and of the patent to be considered.

The material words of the Act are, "letters patents, and grants of privilege, of the sole working or making of any manner of new manufactures, which others at the time of making such letters patents shall not use" (*f*). The words "letters patents and grants of privilege" show (what has already been stated) that the *subject of the grant* contained in a patent, must be a privilege, and the subsequent words point out what may be made the *subject of such a privilege*.

Words of the statute.

In order to discover what was intended by the legislature, we must have regard not only to the word "manufactures," upon which so much stress has always been laid; but also the prior words "working or making," and the subsequent words "which others at the time of making such letters patents shall not use," and give effect to the whole of them. The subject of such a privilege is to be the "working or

Subject can only be an art

(*f*) See the clause, *ante*, p. 78, and the Act in the Appendix, Chap. I. s. 1.

of working or making.

making of some manner of manufacture," and this indicates that the subject of the privilege must be the means by which some manufactures or articles of commerce are to be produced; and as novelty is required to be a quality in the subject of the privilege, it can only be a *new art* invented by the patentee, by means of which "working or making" is to be applied in the production of articles of commerce.

The words "which others shall not use," are plainly referable to the "working or making," which is to be the subject of the privilege, and not to the articles of manufacture which are produced by means of such a working or making.

Meaning of the word "manufactures."

The meaning of the word "manufactures" in this section of the Act has been much discussed, and almost all the cases decided respecting the subject of a patent privilege have turned upon the construction which is to be put upon *that word*. But in those cases, not only have the other words in this section of the Act, which it has been shown are so material to be considered for the purpose of ascertaining what is to be the subject of a patent privilege, been entirely neglected; but the word "manufactures" has until recently had a much more limited construction put upon it than is warranted either by the context or the signification of the word itself.

The word manufacture in our language as a noun has two significations; firstly, the art or practice of making or constructing any piece of workmanship; secondly, anything made by art (*g*).

It is extraordinary that notwithstanding this double signification of the word, the statute seems almost always to have been construed as if the word bore the latter only of these two significations.

Construction of the Act.

The words "working or making," which are used in connection with the word "manufactures," in the sixth section of the Act (*h*), seem to show that the word manufactures was intended to bear both of those significations. Thus, construed with the word "working" in this section, "manufactures" signifies the arts or processes of making, and the words "working of manufactures" evidently refer to the

(*g*) See Johnson's dictionary, Webster's dictionary, &c.

(*h*) 21 Jas. I. c. 3, s. 6, *ante*, p. 78.

exercise of arts of making or constructing; and it seems indeed that the use of the word working as applied to "manufactures" in any other sense of the word than that of arts or processes of making or manufacturing would be repugnant. Construed with the word "making," the word "manufactures" signifies articles or things made, and the words "making of manufactures" appear therefore to mean the art of making articles or things which, when made, may properly be denominated manufactures. It appears from the words "any manner of," immediately preceding the words "new manufactures," in the sixth section of the statute, that the legislature intended that the word manufactures should not be understood in any narrow or limited sense; but on the contrary, that the word should be taken in the most extensive signification it will bear consistently with the context. And the subsequent words in the sixth section of the statute show that the articles to be produced by an art of working, or making, must be articles of trade or commerce (i).

There were not many Common Law authorities in existence before the passing of the Statute of Monopolies, respecting the subject of such grants by patent; but those which are to be found in our books, are in perfect accordance with the construction which is here put upon the proviso in the Statute of Monopolies. Common law authorities.

In the case of monopolies (k), it is laid down that the Crown may grant a monopoly of "a new trade" or "any engine tending to the furtherance of a trade that never was used before." Case of monopolies.

In the *Clothworkers of Ipswich* case (l) it is said, that "if a man hath brought in a new invention, and a new trade," or "a new discovery of anything," the Crown may grant to him that he only shall use such a trade. Clothworkers of Ipswich case.

In the case of *Edgeberry v. Stephens* (m), it was held that the Act (the exception contained in the Statute of Monopolies) intended to encourage new devices useful to the kingdom. Edgeberry v. Stephens.

In Sheppard's Abridgment (n) it is said, that the King Sheppard's Abridgment.

(i) See per Heath, J., in *Boulton v. Bull*, 2 H. Bl. 463.

(k) Noy, 182.

(l) Godb. 252--254.

(m) 2 Salk. 447.

(n) Part 3, tit. Prerog. p. 61.

may grant a patent for a new *trade* or *device*, or any new *engine* tending to the furtherance of it.

Hawkins P. Cr. And Serjeant *Hawkins* says (o), that the King may grant the sole use of "AN ART invented or first brought into the realm by the grantee."

These authorities, and indeed all the other old authorities on the subject, show that the object of the law in giving validity to patent privileges for new inventions was to encourage the introduction of new *arts* for the employment of the people in manufacturing articles of commerce, and to promote the trade of the country.

Intent of the statute the same as the common law.

And the word "manufactures," coupled with the words "raising prices of commodities at home, or hurt of trade," in the exception contained in the statute, show that the intent of the exception was precisely the same as that of the Common Law.

Mitchell v. Reynolds.

The judgment delivered by the Court of King's Bench, in the case of *Mitchell v. Reynolds* (p), (which occurred about eighty years after the passing of the statute,) contains a most important exposition of the law relating to monopolies in general, in which the Court lays down what they deemed capable of being made the subject of a grant by letters patent.

After stating that other monopolies granted by the Crown are void, the Court said (q), that "A grant of the sole use of a *new invented* ART, is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of 21 James I. c. 3. s. 6, to the term of fourteen years; for after that time it is presumed to be a known *trade*, and to have spread itself among the people." And after stating the reasons why restraints of trade created by grants and charters from the Crown, and by-laws, are generally void (r), the Court proceeds to say, "But none of the cases of customs, by-laws to enforce these customs, and *patents for the sole use of a new invented* ART, are within any of these reasons; for here no man is abridged of his liberty or disseised of his freehold; a custom is *lex loci*, and foreigners have no pretence of right in a particular society exempt from the laws of that society;

(o) Hawk. P. Cr. Part I. c. 79, s. 20.

(p) 1 P. Wms. 181; 10 Mod. 130,

S. C.

(q) 1 P. Wms. 183.

(r) 1 P. Wms. 188.

and as to new invented ARTS nobody can be said to have a right to that which was not in being before; and therefore it is but a reasonable reward to ingenuity and uncommon industry."

The case of *Mitchell v. Reynolds* was cited, and highly approved of by the Court of Common Pleas, in the case of *The Master, Wardens and Society of Gunmakers v. Fell* (s).

The same law is laid down in Bacon's Abridgment under the title Monopoly (t), where it is said, "But it seemeth clear that the King may for a reasonable time make a good grant to any one of the sole use of any ART invented or first brought into the realm by the grantee." Bacon's Abridgment.

And under the title prerogative (u), in the same work, is the following passage to the same effect, "It is agreed that the King may for a reasonable time grant to a person the sole use of any ART first invented by him; and this it seems the King might do at Common Law, and is therefore excepted out of the Statute of Monopolies."

It seems therefore that at Common Law, any new art of producing an article of trade or commerce might be made the subject of a patent privilege; and the grant of such a privilege appears to come precisely within the description of grants of privilege of the sole working or making of any manner of new manufactures excepted in the Statute of Monopolies. Common law authorities agree with the statute.

The law as laid down in the Common Law authorities which have been cited respecting the subjects of patent privileges, appears to have been lost sight of in the cases which have been decided on the subject since the passing of the Statute of Monopolies. Indeed in almost all the subsequent cases the Courts appear to have decided the questions before them, merely upon the construction of the word "manufactures," contained in the sixth section of the Statute of Monopolies. Common law authorities lost sight of since the statute.

The consequence has been a great deal of confusion and uncertainty as to what might be made the subject of a grant by patent, within the meaning of the word "manufactures," much if not all of which might have been avoided if the old authorities had not been so entirely neglected.

According to the reported cases on Patent Law, it was long Long doubtful whether a mode

(s) Willes. R. 388.

(u) Bac. Abr. tit. Prerog. (F. 4.)

(t) Bac. Abr. tit. Monop.

or process could be the subject of a privilege.

doubted whether a mode, method, or process of itself, and apart from its produce or results, could legally be made the subject of a patent privilege; and this point remained doubtful until the question was expressly decided by the Court of Common Pleas, in favour of such a grant, in the recent case of *Crane v. Price* (x).

Dicta in favour of such privileges.

Prior to that decision, however, there were many cases and dicta to be found in our books, which strongly supported the general opinion of the profession that such grants were valid.

Boulton v. Bull.

Thus in the case of *Boulton and Watt v. Bull* (y), the Lord Chief Justice *Eyre* said, "When the effect produced is some new substance or composition of things, it should seem that *the privilege* of the sole working or making ought to be for such new substance or composition, without regard to the mechanism or process by which it has been produced, which though perhaps also new, will be only useful as producing the new substance. When the effect produced is no substance or composition of things, the patent can only be for the mechanism, if new mechanism is used, *or for the process, if it be a new method of operating* with or without old mechanism by which the effect is produced." His Lordship also said, that in the list of patents with which he had been furnished, there were several for new methods of manufacturing articles in common use, where the sole merit and the whole effect produced were the saving of time and expense, and thereby lowering the price of the article, and introducing it into more general use. And his Lordship added, that he thought these methods might be said to be new manufactures in one of the common acceptations of the word, as we speak of the manufacture of glass, or any other thing of that kind. And speaking of the patent in question in that case, the same learned Judge said, "The patent cannot be for the effect produced, for it is either no substance at all, or what is exactly the same thing as to the question upon a patent, no new substance, but an old one produced advantageously for the public. It cannot be for the mechanism, for there is no new mechanism employed: it must then be for the method; and I would say, in the very significant words of Lord *Mansfield*, in the great

(x) 4 M. & G. 580.

(y) 2 H. Bl. 463.

case of the copyright (z), it must be for method detached from all physical existence whatever." And in another part of his judgment his Lordship said, "Under the practice of making we may class all new artificial manners of operating with the hand, or with instruments in common use, *new processes in any art* producing effects useful to the public."

In the case of *The King v. Wheeler* (a), Lord C. J. *Abbott* R. v. Wheeler. said, in delivering the judgment of the Court, that the word "manufacture" might perhaps extend to a new process to be carried on by known implements or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or more useful kind.

In the case of *Hall v. Jarvis* (b), it appeared that the plaintiff's invention was, in substance, the application of the flame of gas instead of the flame of oil to remove the superfluous fibres from lace and other goods; and although it is evident that this is a mere process, yet it was held (at *Nisi Prius*) that the plaintiff's patent for this invention was good. Hall v. Jarvis.

The case of *Hall v. Jarvis* was cited and approved of in the cases of *Losh v. Hague* (c), and *Crane v. Price* (d).

In the case of *Hill v. Thompson* (e), Lord *Eldon*, L. C., Hill v. Thompson. said that there might be a valid patent for a new combination of materials previously in use for the same purpose, *or for a new method of applying such materials*. And in that case the patent was for improvements in the smelting of iron, and the invention consisted only in the use and application of lime and mine rubbish in the manufacturing of iron.

In the case of *Morgan v. Seaward* (f), Mr. Baron *Parke* Morgan v. Seaward. said, in delivering the judgment of the Court of Exchequer, "The word 'manufacture' in the statute must be construed one of two ways; it may mean the machine when completed, *or the mode of constructing the machine*."

And in the case of *Gibson v. Brand* (g), the Lord Chief Justice *Tindal* said, that it was not necessary in that case to go into the question, whether or not a patent can be supported for a *process* only. If the specification were properly prepared,

(z) 4 Burr. 2397.

(a) 2 B. & Ald. 345.

(b) 1 Webs. R. 100.

(c) *Ibid.* 207.

(d) 4 M. & G. 580.

(e) 3 Mer. 626; 1 Webs. R. 237.

(f) 2 M. & W. 544.

(g) 4 M. & G. 179.

(his Lordship said), it probably might be considered a fit subject for a patent. And then his Lordship cited the words of Lord J. C. *Eyre*, in *Boulton v. Bull* (*h*), and of Lord C. J. *Abbott*, in *The King v. Wheeler* (*i*), which have already been given.

Crane v. Price.

A new process is an invention within the meaning of the statute.

The case of *Crane v. Price* (*h*), already mentioned, at length expressly decided, that a mere process may be made the subject of a patent privilege. In that case the plaintiff's invention consisted in the use of hot air blast and stone coal in the smelting of iron. The use of hot air blast in smelting was well known before the date of the patent, and stone coal had also been used in the smelting of iron, but the two things had never been used together before the plaintiff obtained his patent. It was objected for the defendant that this combined process could not be the subject of a grant by patent; but the Court of Common Pleas held that the combination of processes invented by the plaintiff was an invention within the meaning of the statute, and might well become the subject of a patent privilege.

There is another case which, when properly considered, also amounts to a decision, that a process may legally be made the subject of a patent privilege.

Russell v. Cowley.

The case is *Russell v. Cowley* (*l*), decided by the Court of Exchequer, in which the patent in question was granted to C. Whitehouse, for certain improvements in manufacturing tubes for gas and other purposes. According to the invention a long strip of flat iron was to be prepared for welding, by being bent up or turned over at the sides, until the edges met, or nearly met, so as to form a tube. The tube was then to be heated, and to be drawn through a circular hole by which the edges of the iron were pressed together and firmly welded. It appeared that prior to the date of the patent, tubes had been made by the defendants, in a mode precisely similar in principle, but with a stamp or maundril in the centre. In fact, the plaintiff's mode of making tubes was precisely the same as the defendants, with the exception of the stamp or maundril, which according to the plaintiff's invention was entirely dispensed with, and the result was a very considerable saving in the

(*h*) 2 H. Bl. 463.

(*i*) 2 B. & Ald. 349.

(*k*) 4 B. & G. 580.

(*l*) 1 C. M. & R. 864.

expense of manufacturing tubes, and the quality of the tubes was improved. The Court of Exchequer held that the invention was an invention to manufacture tubes without the use of any mandril or internal support, and that being now it was sufficiently distinct from the prior mode used by the defendant, to enable the plaintiff to support the patent (m). The tubes in this case could not be the subject of the patent privilege, for they were not new; nor was there any machine which could be said to be the subject of the privilege. The only thing therefore which could be the subject of the privilege was the new art or process by means of which the edges of the strips of iron were welded together, for the purpose of manufacturing the tubes.

These cases show clearly that a process of manufacturing separate and apart, not only from the substances used in the process, but also from the things produced by means of it, may be made the subject of a patent privilege. Those cases appear however to have been decided upon the construction of the word "manufactures," contained in the sixth section of the Statute of Monopolies, and without considering what the subject of a patent privilege must in every case necessarily be; but it will be seen presently that the subject of a valid privilege must be *an art*, however it may be entitled, by whatever name it may be known. Patentees seem, indeed, to have found that this must be so, for there has been a most extensive use of such words as "mode" and "method" in the titles which have been given to patent inventions.

The meaning of the words mode and method was much discussed in the case of *Boulton and Watt v. Bull* (n). Mr. Justice *Heath* said in that case, "When a mode of doing a thing is referred to something permanent, it is properly termed an engine; when to something fugitive, a method;" and that a "method is a principle reduced to practice." Mr. Justice *Rooke* said, that a new invented method conveys the idea of a new mode of constructing.

The narrow construction of the word "manufactures," as signifying merely things made, at one time caused great doubt

Observations on cases.

Meaning of the words mode and method.

Doubts respecting the validity of a privilege for a method.

(m) The term granted by Whitehouse's patent was afterwards extended by the Privy Council for six years, and

their Lordships highly extolled the invention; see 1 Webs. R. 473.

(n) 2 H. Bl. 463.

Objection that a method is merely a principle.

Watt's invention.

Boulton v. Bull.

to be entertained respecting the validity of a patent, when the title described it as a mode or method, and the difficulty was only got over by disregarding the literal signification of the word used in the title, and construing it as meaning the article produced by means of the invention. The objection taken to a method being made the subject of such a privilege was, that it was a mere principle, and therefore not within the meaning of the word manufactures in the Statute of Monopolies.

The leading case on this subject is *Boulton and Watt v. Bull (o)*, which was an action for an infringement of a patent for an invention, intituled "a method of lessening the consumption of steam and fuel in fire-engines." The specification commenced as follows:—"My method of lessening the consumption of steam, and consequently fuel in fire-engines, consists of the following principles:" and then the patentee proceeded to describe the nature of the invention, according to which the cylinder of the engine was to be kept hot, the steam condensed in a separate vessel, the superfluous air, &c., was to be drawn out of the cylinder and condenser by air-pumps, the expansive force of steam was to be used in some cases instead of the pressure of the atmosphere, &c.

At the trial, a special case was reserved for the opinion of the Court of Common Pleas, in which it was twice argued. The principal objection taken to the patent on behalf of the defendant was that the patent was for a principle, and that a principle is not a manufacture within the meaning of the exception contained in the 6th section of the Statute of Monopolies.

The Court was equally divided in opinion respecting the validity of the patent, two of the Judges being of opinion that the invention was a manufacture within the meaning of the Patent Laws, and the other two, that it was not such a manufacture.

Mr. Justice *Rooke* said, "The term 'principle' is equivocal; it may denote either the radical elementary truths of a science, or those consequential axioms which are founded on radical truths, but which are used as fundamental truths by those who do not find it expedient to have recourse to first principles." Mr. Justice *Heath* said, "The Marquis of Worces-

ter discovered, in the last century, the expansive force of steam, and first applied it to machinery. As the original inventor he was clearly entitled to a patent. Would the patent have been good applied to all machinery, or to the machines which he had discovered? The patent decides the question. It must be for the vendible matter and not the principle. Another objection may be urged against the patent upon the application of the principle to an old machine, which is, that whatever machinery may be hereafter invented would be an infringement of the patent if it be founded on the same principle. If this were so, it would reverse the clearest positions of law respecting patents for machinery, by which it has been always holden; that the organization of a machine may be the subject of a patent, but principles cannot." Mr. Justice *Buller* said, that "The very statement of what a principle is, proves it not to be a ground for a patent: it is the first ground and rule for arts and sciences; or, in other words, the elements and rudiments of them. A patent must be for some new production from those elements, and not for the elements themselves." And Lord Chief Justice *Eyre* said, "Undoubtedly there can be no patent for a mere principle; but for a principle so far embodied and connected with corporeal substances as to be in a condition to act and to produce effects in any art, trade, mystery, or manual occupation, I think there may be a patent."

All the four Judges before whom this case was argued were of opinion, that a principle could not be made the subject-matter of a grant by patent; but they differed in opinion as to the construction of the title and specification, two of them deeming that the intention of the patent was to grant, and of the specification to claim, the sole use of a principle which did not come within the meaning of the law in favour of patents; whilst the other two Judges were of opinion, that notwithstanding the alleged improper use of the words method and principle in the patent and specification, the invention was substantially the engine or machine by which the method or principle was to be carried into effect, and that the misapplication of the terms method and principle did not signify, because it was clear that the words in the patent and specification were substantially intended to describe the machine,

engine, and effect produced, and not merely the principle upon which the invention was founded.

R. v. Wheeler.
Abstract principle not a manufacture.

In the case of *The King v. Wheeler* (*p*), the Court of King's Bench laid it down as law, that no merely philosophical or abstract principle can answer to the word manufactures, in the proviso in the Statute of Monopolies; and that something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or *at the least some new mode of employing practically his art and skill, is requisite to satisfy this word.*

First principles cannot be the subject of patent privileges.

It is clear indeed that first principles, such as the fundamental laws of mechanics, chemistry, or any other science, cannot be made the subject of a patent privilege. First principles are capable of an endless variety of uses or applications, and they are the common property of all men, who are at liberty to make any use of them they may think fit, or apply them in any manner their ingenuity may suggest, provided they do not attempt to appropriate to themselves exclusively any ground preoccupied by any other person. No principle or primary law of science can of itself, and apart from the practical application of it, be capable of producing any vendible article or manufacture; and therefore unless a person who discovers such a principle or law makes some practical use of it, so as to produce some article which the public requires and will purchase, he cannot give the public the consideration which the law requires to be given for the grant of a sole privilege. The object of the law was not to reward mere speculative discovery, but to encourage industry, and procure for the public the benefit of new manufactures.

Every art must adopt principle.

But every art or invention must adopt principle, or include the application of it to some extent (*q*), and the principle of an invention thus becomes an essential part of it; indeed any new art which is made the subject of a grant by the Crown can only be some new practical application of principles or laws, which has been invented by the patentee, for the purpose of producing articles of manufacture useful to the public.

Principle frequently used

The word "principle" is frequently used in such phrases

(*p*) 2 B. & Ald. 349.

in *Minter v. Wells*, 5 Tyr. 165.

(*q*) Vide per Lord *Lyndhurst*, C. B.,

as "principles of the invention," to designate some peculiar mode or method of constructing any thing according to a particular invention. In this sense a principle signifies the particular practical application of some principle or principles, for the purposes of an invention which is properly speaking an art. Thus the principle of an invention of a new machine, signifies the peculiar art by means of which the new machine is constructed. There is nothing improper in this use of the word principle; and when it is so used, that is, when it is used to designate the peculiar mode of constructing anything according to an invention, it is clearly an art which may be made the subject of a patent privilege.

to designate
method of
constructing.

The form of patent for granting privileges in the useful arts, has continued to be the same in all essential particulars ever since the passing of the Statute of Monopolies; and if such a grant be examined, it will be seen that the form and effect of it are in perfect accordance with what has been stated respecting the subject of a patent privilege.

Form of patent
since the
statute.

It has already been shown that the effect of a patent is to grant a sole or exclusive privilege (*r*). The patent itself purports to grant such a privilege in the *invention*, and the question is, what is meant by the word invention, which according to the patent the patentee is to have the sole use of?

What is meant
by the word
invention in a
patent?

It is important to distinguish between the use of an invention which a patentee has thus granted to him, and the articles or results which may be produced by means of the invention. At the time a patent is granted the patentee must have made the discovery or invention to which the grant relates; but an inventing or discovering of any thing is essentially an operation of the mind, and it is not necessary that the inventor should have actually made or produced any thing by means of his invention; and, indeed, one class of inventions, *viz.*, imported inventions, are hardly ever used, even experimentally, in this country before the date of the patent. And if a patentee happens to have produced any article of manufacture by means of his invention prior to the date of his patent, the privilege granted to him by the Crown does not vest in him the sole use of such article; for unless he has transferred it to some other person, he remains the proprietor

Important to
distinguish
between the
use of an
invention and
its products.

Patent does not
grant the use
of articles
produced by
an art or
invention.

(*r*) Vide *ante*, Chap. IV. p. 53, and *ante*, p. 78.

of it, and has the sole dominion over it as being part of his own property; and he alone has the privilege of using it as he pleases, and that wholly independent of the privilege granted to him by his patent. And with respect to articles which are to be made by the patentee after the date of the patent, it is clear that he does not acquire the sole use of them by force of the grant of privilege contained in the patent; for they must necessarily be composed of materials which he must purchase or acquire a right to without the aid of the patent; and they must also be produced by power or labour, which the patentee must pay for or bestow upon those materials in some shape or other.

An infringement consists in a use of the art comprised in a privilege.

If any person, except the patentee, make articles according to the patentee's invention, he commits an infringement of the patent, and yet the privilege granted by the patent did not vest any right in the patentee to make the particular articles which have been made in violation of the patent, for the materials of which they are composed were never his property, and therefore he could not exercise any control over them. But the person who thus makes such articles must necessarily use the art invented by the patentee, and so infringes the patent.

The art is the only subject of a privilege.

The only thing therefore which can be the subject of the privilege granted by a patent, is the art by means of which the articles are made or manufactured; and the privilege granted by the patent not only secures to the patentee the right of using the art himself, but gives him the sole right, or the right to exercise it to the exclusion of all other persons during the term limited by the patent.

And when any one makes any thing contrary to a patentee's privilege, the infringement consists in the use of the art invented by the patentee, and which the patentee has, by virtue of the patent, acquired the sole privilege of exercising for his own profit and benefit (s).

Illustration.

To illustrate the meaning of this, let us suppose a person to have obtained a patent for an invention of a new chair. The patent privilege does not include the sole use of every or any chair made or to be made according to the invention,

(s) See further respecting what is an infringement of a patent, *post*, Chaps. X. and XI.

but it grants the sole use of the art, by means of which such chairs may be produced. That the patent would not in such a case grant the sole use of chairs made according to the invention is evident, because no one could be liable to an action for infringing the patent by merely sitting down upon or using a chair which may have been made by some other person in violation of the patent.

The word invention then in a patent grant means the art which the patentee alleges that he has invented, and therefore that art is the subject of the privilege which is granted by the patent.

"Invention" in a patent means the art invented by the patentee.

If a valid patent be thus construed, the subject of the privilege which it grants, will appear to be an art within the meaning of the Common Law authorities, which have been cited.

This construction of a patent agrees with the common law authorities.

It has been stated already that the object of the proviso contained in the sixth section of the Statute of Monopolies (t) was to preserve the Common Law authority vested in the Crown, and the words of that proviso are in accordance with the construction here put upon the grant of a patent privilege (u).

The Statute of Monopolies also in accordance with this construction of a patent.

The recital which has always been inserted in a patent for an invention, ever since the passing of the Statute of Monopolies, after stating the substance of the patentee's petition for a patent, *pursuant to the statute in such case made and provided*, concludes with these words, "and we being willing to give encouragement to all *arts* and inventions which may be for the public good, are graciously pleased to condescend to the petitioner's request" (x). This shows that the exception in the statute has always been construed to extend to grants of the sole use of useful *arts* and inventions, and that the intent of a grant by patent is to vest in the patentee the sole use of such an art, and not of the articles made according to it.

Recital in a patent shows that the privilege is intended to apply to the art.

The language of Lord *Ellenborough*, in the case of *Huddart v. Grimshaw* (y), strongly confirms the view here taken respecting the subject-matter of a privilege granted by letters patent. His Lordship there said, "In inventions of this sort, and every

Huddart v. Grimshaw. Language of Lord *Ellenborough* confirms what has been said.

(t) 21 Ja. I. c. 3.

(u) Vide *ante*, p. 91.

(x) Vide *ante*, Chap. IV. p. 47, 48.

(y) *Dav. Pat. Cas.* 278.

other through the medium of mechanism, there are some materials which are common, and cannot be supposed to be appropriated in the terms of any patent. There are common elementary materials to work with in machinery, but *it is the adoption of those materials, to the execution of any particular purpose, that constitutes the invention*: and if the application of them be new, if the combination in its nature be essentially new, if it be productive of a new end, and beneficial to the public, it is that species of invention, which, protected by the King's patent, ought to continue to the person the sole right of vending it."

The invention in that case was intituled "a new mode, or art, of making great cables and other cordage so as to attain a greater degree of strength therein by a more equal distribution of the strain upon the yarns." And, according to the construction which it is contended must necessarily be put upon the patent, the privilege it granted was the sole use of the art of making cables and cordage of a particular description; and the cables and cordage produced being clearly manufactures, the subject-matter of the grant was an invention of an art, of making a manufacture within the proviso contained in the Statute of Monopolies.

No patent for a new use of an old thing.
Kay v. Marshall.

There cannot be a valid patent privilege for a new use of an old invention. This was in effect decided by the recent case of *Kay v. Marshall* (z), which was ultimately determined by the highest tribunal in the kingdom. In that case the patentee applied to flax-spinning machinery of a description which had been before applied to the spinning of cotton and other fibrous materials, and it was held by the Court of Common Pleas, afterwards by the Master of the Rolls, and ultimately by the House of Lords, that the patent was void.

The mode of producing the machinery used in that case was really an old art, and so also was the mode of spinning used by the patentee; and therefore neither of those arts could be made the subject of the privilege which the patent purported to grant. And the reason why such a patent is void, is, that there is no new art which can be made the subject of the patent privilege, the patentee having merely applied an old art to a new use.

(z) 5 Bing. N. C. 492; 1 Beavan, 535; and 8 Cl. & Fin. 245.

In the case of *Losh v. Hague* (a), which was an action for *Losh v. Hague*.
 infringing the plaintiff's patent for "improvements in the con- A new use not
 struction of wheels for carriages to be used on railways," the subject of a
 tried before Lord Abinger, C. B., it was contended that wheels patent privi-
 invented before the date of the patent were substantially the lege.
 same as the plaintiff's; and his Lordship, amongst other
 things, said to the jury, that "If the wheels had been made
 and sold to any one individual, the public's not wanting them,
 because there were no railways, their not being adapted to
 any particular use which at that time was open to the public
 to apply them to, makes no difference."

In the same case, Lord Abinger also said to the jury (b),
 "The learned counsel has mentioned to you a particular New contri-
 case (c) in which an argand lamp, burning oil, having been vance for effect-
 applied for singeing gauze, somebody else afterwards applied ing an old ob-
 a lamp supplied with gas for singeing lace, which was a novel ject is the sub-
 invention, and for which an argand lamp is not applica- ject of a privi-
 ble, because gas does not burn in the same way as oil in an argand lege, but not
 lamp. But a man having discovered by the application of gas the application
 he could more effectually burn the cottony parts of the gauze of an old con-
 by passing it over the gas, his patent is good. That was the trivance to a
 application of a new contrivance to the same purpose; *but it new object.*
 is a different thing when you take out a patent for applying a
 new contrivance to an old object, and applying an old contri-
 vance to a new object—that is a very different thing: if I am
 wrong I shall be corrected. In the case the learned counsel
 put, he says, if a surgeon goes into a mercer's shop, and sees
 the mercer cutting velvet or silk with a pair of scissors with a
 knob to them, he seeing that would have a right to take out a
 patent in order to apply the same scissors to cutting a sore
 or a patient's skin. I do not quite agree with that law. I
 think, if the surgeon had gone to him (the mercer) and said,
 'I see how well your scissors cut,' and he said, 'I can apply
 them instead of a lancet, by putting a knob at the end,' that
 would be quite a different thing, and he might get a patent
 for that; but it would be a very extraordinary thing to say,
 that because all mankind have been accustomed to eat soup
 with a spoon, that a man could take out a patent because he

(a) 1 Webs. R. 202.

(b) *Ibid.* 207.(c) *Hall v. Jarvis*, 1 Webs. R. 100.

Applying a well known thing to an operation analogous to what was known before, not the subject of a privilege

says you might eat peas with a spoon. The law on the subject is this; that you cannot have a patent for applying a well known thing which might be applied to 50,000 different purposes, for applying it to an operation which is exactly analogous to what was done before. Suppose a man invents a pair of scissors to cut cloth with, if the scissors were never invented before, he could take out a patent for it. If another man found he could cut silk with them, why should he take out a patent for that?" His Lordship also said to the jury, "If you are of opinion this wheel has been constructed according to the defendant's evidence by the persons who have been mentioned, long before the plaintiff's patent, that although there were no railroads then to apply them to, and no demand for such wheels, *yet that the application of them to railroads afterwards by Mr. Losh will not give effect to his patent, if part of that which is claimed as a new improvement by him, is, in fact, an old improvement, invented by other people, and used for other purposes.*"

Subject of privilege in Losh v. Hague.

The subject of the patent privilege in the case of *Losh v. Hague (d)*, was the art of manufacturing a certain description of carriage wheels, which were described as capable of being used on railways. And if it were shown that this art had been known and used before the date of the patent in the manufacture of wheels *for any purpose whatsoever*, the art was not new when the patent was granted; and therefore notwithstanding the new use or application of the wheels to run on railways instead of common roads, the patent would be void, such a new use, as we have shown already, not being capable of being made the subject of a patent privilege.

The observation made by Lord *Abinger*, in *Losh v. Hague*, that "it is a different thing when you take out a patent for applying a new contrivance to an old object, and applying an old contrivance to a new object," is most important, and shows that what the law requires is, that the art or contrivance, which is *the subject of the privilege, must be new*; and that it is not sufficient that the object or application of a contrivance is new if the contrivance itself be old.

That the invention of a mere process may be made the sub-

ject of a grant by patent, has been established by the case of *Crane v. Price* (e), although the object or produce of the invention is old and well known; but that case shows that the process itself must be new, in order to be the subject of a valid patent privilege. The "applying of a new contrivance to an old object," means a new art invented for the manufacturing articles or producing effects previously known; but the art itself, which (as we have seen) must be the subject of the patent, being new, the want of novelty in the produce of the art is no objection to the patent.

But the "applying an old contrivance to a new object," is merely a new use or application of an art or invention previously well known; and as the art or invention is not new, it cannot be granted by patent; nor, as we have already seen (f), can the new use of it be made the subject of such a grant of privilege.

In the case of *Hall v. Jarvis* (g), referred to by Lord *Hall v. Jarvis*. *Abinger* in *Losh v. Hague* (h), the invention was of a new process of singeing the superfluous fibres of gauze or lace by means of the flame of gas; the flame of oil having been previously applied to a similar purpose; but the flame of gas, which produces a very different effect, had never been applied in the same or in any similar way. This application of gas flame was, therefore, an entirely new art; and being also an art applicable in the manufacture of vendible articles, it was clearly capable of being made the subject of a grant by patent. But if, before the date of Hall's patent, gas flame had been applied to any purpose similar to that of singeing gauze or lace, then the *art* would not have been new, and the patent would have been void.

The same law is also applicable to the produce of any art, or the articles produced by means of the exercise of an art; and, therefore, a new use of such articles cannot be made the subject of a patent privilege, unless, indeed, such new use form an essential part of some other art of working or making vendible manufactures, which may legally be made the subject of a privilege.

No valid privilege for the new use of articles separate from an art.

(e) 4 M. & G. 580.

(f) Vide *ante*, p. 94, 95.

(g) 1 Webs. R. 207.

(h) *Ibid.* 100.

Boulton v. Bull. In the case of *Boulton v. Bull*, Mr. Justice *Buller* said (i), "Suppose the world were better informed than it is how to prepare Dr. James's fever powder, and an ingenious physician should find out that it was a specific cure for consumption, if given in particular quantities? I think it must be conceded that such a patent would be void: and yet the use of the patent (invention) would be new, and the effect of it as materially different from what it is now as life is from death. So in the case of a late discovery, which as far as experience has hitherto gone, is said to have proved efficacious—that of the medical properties of arsenic in curing agues—could a patent be supported for the sole use of arsenic in aguish complaints?"

Observations. In the case of Dr. James's fever powder mentioned by the learned Judge, it is clear that if the original inventor had obtained a patent privilege, the subject of it would have been the new art of manufacturing the powder, which is notoriously a vendible article, and therefore, according to the definition already given, the invention would come within the meaning of the law which authorizes the grant of patent privileges for inventions. The description of the powder, "*fever powder*," would merely point out a use which *may* be made of the article produced by means of the art or invention, which would be comprised in the patent privilege: but such use of the powder would not be any part of the subject of the privilege, which would be merely the art by means of which the powder is manufactured. For the art of using the powder in curing fevers, would not be an art of manufacturing vendible articles, which, as we have seen, is requisite in order to make an art the subject of a grant by patent (k), and the art of using the powder in curing pulmonary consumptions would be an art of precisely the same description, totally inapplicable in the manufacturing of any vendible article, and therefore clearly not such an art as could be made the subject of a patent privilege. The only thing therefore respecting Dr. James's fever powder, which could be made the subject of a patent privilege, was the art by means of which the powder is manufactured or produced; and as that art had been known and

(i) Dav. P. C. 199, 200.

(k) Vide *ante*, p. 55, 81, and *post*, p. 101, 102.

practised in the production of the powder for the purpose of curing fevers, it could not be deemed new merely because some new use of its produce had been discovered, nor could the new use of the powder itself be made the subject of a privilege for the reason already given.

The same observations evidently apply with equal force to the supposed case of a patent for the use of arsenic in curing aguish complaints. The particular use or application of any preparation of arsenic *in curing any disorder*, not being the subject of a patent, and the art of preparing the drug for some use or purpose being known, the sole use of the art of preparing it cannot be made the subject of a patent privilege, merely because some new use or application of it has been discovered, nor could the new use of the drug be made the subject of such a privilege.

If we consider the nature of the articles or manufactures produced by the exercise of an art or invention, we shall find the strongest confirmation of what has been said respecting the subject of a patent privilege. The nature of manufactures.

In the case of *Hornblower v. Boulton (l)*, Lord Kenyon, C. J., said, that he understood a manufacture to be something made by the hand of man. This was doubtless one of the primary significations of the word manufacture at a time when manual labour was the chief, if not the only power applicable in the production of manufactures; but that state of things has long passed away, and very few of the articles which are properly called manufactures, are now produced by the direct or immediate application of manual labour. As, however, all the machinery used in our manufactories is made directly or indirectly by the hand of man, and the machines themselves require the hand of man to direct and regulate them, there does not seem to be any thing improper in the application of the term manufactures, as explained by Lord Kenyon, to signify the products of such machinery (*m*). Lord Kenyon's definition of a manufacture.

In order to produce a manufacture or manufactured article, three things or classes of things only are necessary: *firstly*, The crude or raw material; *secondly*, The power by which the material is operated upon; and, *thirdly*, The art, skill, or Things necessary to produce a manufacture.

(l) 8 T. R. 98; Dav. P. C. 225.

(m) See the double signification of

the word manufacture, mentioned *ante*, p. 80.

cunning; by means of which the power is directed in its operation upon the raw material.

Materials.

Whilst matter remains in a state of nature, and before it has been operated upon, it cannot come within the meaning of the word manufacture; and for the production of many manufactures, the original elements found in nature, which enter into their composition, must be subjected to many, and frequently extremely complicated, processes.

Power.

The power which is applied to matter in its original state in order to render it fit for the use of man, may be of any description sufficient to produce the desired effect, such as manual labour, the power of the steam-engine, water power, &c. And without the requisite physical power it is clear that the raw material could not be transformed into the manufactured state.

Art or skill.

And however numerous and excellent our materials for manufacturing may be, and however great the extent of the physical power we have at command, we shall still be unable to produce any manufacture unless we have also the *art or skill* to direct our power or labour in its operation so as to produce the desired result. But having acquired the art or skill, and having the materials, and also the requisite power within our reach, we have no further difficulty in compassing our object in the production of any desired manufacture.

Materials and power not the subject of a patent privilege.

The raw materials which are used, and the power which is exercised, in the production of manufactures, are things which are well known, and which (apart from the question of property) may be said to be in common with all mankind, to be used or applied in any way they may think fit, and they cannot by themselves be made the subject of a patent monopoly.

An art alone can be made the subject of a privilege.

And therefore, as we have already shown (*n*), it is only the art by means of which a manufacture is produced which can be made the subject of an exclusive privilege; and it is only such an art as this that (when newly discovered) is properly an invention within the meaning of our Patent Law.

The art or invention by means of which articles of manufacture are produced, may be denominated the metaphysical part of the manufacture, for it has its origin in the mind, and by the mind must power always be directed in order to produce a manufacture.

Such arts may properly be termed useful arts, in contradistinction to the fine arts. And the nature of the art which may be made the subject of a patent privilege is well illustrated by comparing it with some of the productions of the fine arts, in which their authors or inventors obtain privileges or copyrights by virtue of the provisions of various statutes.

Distinction between the useful and the fine arts.

Thus the person who first invented the art of copper-plate engraving, or of lithography, might have had a patent privilege for his invention; for it was a new art applicable to the production of prints, according to any design which might be invented by the artist, and such prints are clearly vendible articles, or articles of commerce.

The art of engraving one of the useful arts.

A new design for a print or engraving may be made the subject of a privilege, that is to say, the author may acquire a copyright in it by complying with the provisions of certain Acts of Parliament. But such a design cannot be made the subject of a patent privilege, because, although it is new, it is not a new *art*, nor is it an art of working, or making manufactures, or articles of commerce; but, on the contrary, it is merely the produce of an art, or produced by the exercise of one of the fine arts, the art of designing, which is an old and well-known art.

A design for an engraving the produce of one of the fine arts.

The making of copies to which the privilege in such a design extends, is effected by the exercise of the art of printing, which is a very different art from that by means of which the design, or even the engraving, was produced; but in making articles according to an invention which may be legally comprised in a patent privilege, it becomes necessary to exercise the art of working or making, which has been invented by the patentee, and it may be an art applicable in the making of articles according to an infinite variety of designs.

The art of working or making, which is made the subject of a patent privilege, must (as already stated) be an art for the production of vendible articles, or articles of trade or commerce capable of being bought and sold. That a patent article, or article produced by means of an invention, must be vendible, is laid down in several cases (o), and there are two

The art must be for the production of articles of commerce.

Articles must be vendible.

(o) See per *Heath, J.*, in *Boulton v. Bull*, 2 H. Bl. 463; per *Abbott, C. J.*, in *R. v. Wheeler*, 2 B. & Ald. 349; and the judgment of the Court in *Cornish v.*

Keene, 3 N. C. 570; in which last case the patent article was said to be a vendible article produced by the *art* and hand of man.

reasons why the articles manufactured according to a patent invention must be vendible: *firstly*, Because if such articles cannot be sold, the invention will not be used, and therefore will not give any new employment to the people, and the public will receive no benefit from the invention; and, *secondly*, Because the intent of the patent is to reward the inventor by means of the profit arising from the making and selling the patent articles during the continuance of the privilege.

If patent articles not vendible, the patent is void.

A patent privilege for such an art would be void, because the art is not such as comes within the meaning of the Patent Law (*p*), and therefore is not such an art as could legally be made the subject of a patent privilege.

And it has already been shown (*q*), that if the Queen's grant cannot take effect according to the intent of it, it will be absolutely void; and a patent privilege for an art which is incapable of producing vendible articles must therefore be void for both of the reasons just stated. For the intent of the grant is clearly to benefit the public and reward the patentee; and an art for producing an article not vendible cannot benefit the public, nor can a sole privilege in such an art produce any profit to the patentee.

SECTION II.

Of the Novelty of an Art or Invention which is required in order to make it a good Subject of a Patent Privilege.

Novelty an essential quality.

ONE essential requisite in every art or invention which is made the subject of a patent privilege, is, that it should be new at the time the privilege is granted. This is required for two reasons:—*Firstly*, Because no one can lawfully be deprived of the right to use a known art or trade; and, *secondly*, Because if an invention is known, the public will receive no consideration from the patentee for the grant of the sole right of using it.

Novelty required at common law.

That the grant of a privilege in a known art or trade is illegal, was decided in several cases before the passing of the Statute of Monopolies. Thus in the case of monopolies,

(*p*) Vide *ante*, p. 81, 55.

(*q*) *Ante*, p. 48.

Darcy v. Allein (r), it was determined that a patent granting the sole making of playing cards was void, the art of making cards being known at the time of making the patent. So in the *Clothworkers of Ipswich* case (s), it was laid down that the grant by the King of the sole right to exercise the trade or occupation of a clothworker or tailor, or of any other known art or occupation, was contrary to law, and void. And in the case of *Mitchell v. Reynolds* (t), the Court of Queen's Bench laid down as law that a grant by the Crown of the sole exercise of any known trade is against the Common Law and *Magna Charta*, and is therefore void.

Case of monopolies.

Clothworkers of Ipswich case.

Mitchell v. Reynolds.

The same law is laid down in Sir Edward Coke's third Institute (u), in Bacon's Abridgment (x), Hawkins's Pleas of the Crown (y), and Sheppard's Abridgment (z).

The Queen's prerogative does not extend to any thing which is injurious to her subjects (a). She cannot by her patent do wrong (b), or enable another to do so (c); and we have seen (d) that in granting the sole use of inventions, the Crown acts on behalf of *and for the benefit of the public*.

The Queen cannot do a wrong.

Every person has *prima facie* a right to search for discoveries and improvements in the useful arts, and to use any discovery of such an art which he may make in any manner he pleases (e). The grant of the sole use of an invention to any person restrains every other person from using it, during the term, even if he of himself and unaided should happen to make precisely the same discovery.

Prima facie right of every person.

It would be unjust therefore to deprive any person of his liberty to make and use such inventions, if it were not for some consideration given by the patentee to the public. The only thing which a patentee gives to the public is a knowledge of his invention, and a patent is in effect a bargain between the patentee and the public, in which the public, in consideration of an inventor communicating to them a knowledge of his invention, so that they may afterwards be enabled to practise it,

It is the consideration given to the public, which makes a patent good.

(r) 11 Co. 86 a; Moor. 672.

(s) Godb. 254; 1 Rol. R. 4.

(t) 1 P. Wms. 181.

(u) Chap. 85, p. 181.

(x) Titles Monop. and Prerog. (F. 4.)

(y) Part I. c. 79, s. 2.

(z) Part III. pp. 61, 62.

(a) Finch, 84.

(b) 1 Co. R. 44 b, 45 b; Noy, R. 182; 3 Shep. Abr. 48.

(c) Godb. 254.

(d) *Ante*, Chap. II. p. 7.(e) *Vide ante*, Chap. III.

No consideration of invention wants novelty.

grant to him the sole use of his invention for a limited time (*f*). But if an invention is not new, the patentee does not communicate any thing to the public which they did not know before; and therefore the patentee gives them nothing which can be considered as a consideration for the grant, and therefore the patent is wholly void.

Necessity for a consideration not confined to patents.

The necessity for a consideration to support such a bargain, is not confined to the law of patents; a promise made without consideration is not binding, and no action will lie for the breach of it (*g*); for in every contract there must be some good or valuable consideration between the parties, otherwise the contract is void (*h*).

Myddleton v. Lord Kenyon.

In the case of *Myddleton v. Lord Kenyon* (*i*), Lord Loughborough, L. C., said that "a bargain without consideration is a contradiction in terms, and cannot exist." And as a patent is a bargain between the public and an inventor, it cannot be supported if it be made without consideration.

All the old cases mention novelty as essential.

All the old authorities respecting the prerogative of the Crown to grant patent privileges, particularly mention novelty in the art or invention as essential to render a patent valid.

Darcy v. Allin.

Thus in the case of *Darcy v. Allin* (*k*), already cited, it is said "where any man by his own charge and industry, or by his own wit or invention, doth bring any *new trade* into the realm, or any engine tending to the furtherance of a trade that *never was used before*, and that for the good of the realm; that in such cases the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, *in consideration of the good that he doth bring by its invention to the commonwealth*; otherwise not."

Hasting's case.

In *Mr. Hasting's case* (*l*), it is said that a patent was granted to him in consideration that he brought in the skill of making frisadoes as they were made in Harlem and Amsterdam, beyond seas, *being not used in England*.

Humphrey's case.

In *Humphrey's case* (*m*), a patent was granted to him for the sole use of an invention of an instrument for melting lead.

(*f*) 14 Ves. 131, 136.

(*g*) *Rann v. Hughes*, 7 T. R. 350; *Barrell v. Trussell*, 4 Taunt. 117.

(*h*) Noy, Dialog. p. 44; Max. 87; Dr. & Stu. II. 24; Finch, Law, 34;

and see Dyer, 76 a; Shep. Touch. 285.

(*i*) 2 Ves. Jr. 408.

(*k*) Noy, R. 182.

(*l*) *Ibid.*

(*m*) *Ibid.* 183.

And upon his suing persons for an infringement of the patent, a question was raised whether the instrument was newly invented by him, and the Court held that if a similar instrument had been used before the grant of the patent, Humphrey could not have the sole use of the invention.

In Moore's Reports (n), it is laid down that the King cannot grant a patent to restrain people in their usual trades and occupations; and that no occupation can be prohibited or put in monopoly, *but only such thing as is newly invented* by the skill of man, and that may be appropriated by patent.

So in the *Clothworkers of Ipswich* case (o), also before cited, it is said that "if a man hath brought in a new invention and a new trade within the kingdom in peril of his life and consumption of his estate or stock, &c., or if a man hath made a new discovery of any thing; in such cases the King of his grace and favour, in recompence of his costs and travail, may grant by charter unto him, that he only shall use such a trade or trafique for a certain time, because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it. But when that patent is expired, the King cannot make a new grant thereof; for when the trade is become common, and others have been bound apprentices in the same trade, there is no reason that such should be forbidden to use it." Clothworkers of Ipswich case.

In the case of the *Tailors of Ipswich v. Sherring* (p), it is said that "of a new invention the King can grant a patent," and that "where there is no new invention, the King cannot by his patent hinder any trade." Tailors of Ipswich v. Sherring.

So in the case of *Mitchell v. Reynolds* (q), it is laid down that a grant by patent of the sole use of a new invented art is good. Mitchell v. Reynolds.

In Sheppard's Abridgment (r), it is laid down that a monopoly patent may be granted "of that which any man at his own charge, wit, and invention, shall bring in as a new trade or device into the realm, or any new engine tending to the furtherance of it, for the good of the realm." In Bacon's Abridgment (s), it is said that, "the King may grant to a per- Shep. Abr. Bac. Abr.

(n) P. 672.

(o) Godbolt, 254.

(p) 1 Rol. R. 4, 5.

(q) 1 P. Wms. 183, 188.

(r) Part III. p. 61.

(s) Tit. Prerog. (F. 4.)

Hawk. P. Cr. son the sole use of any art *first invented* by him." And the same law is laid down in Hawkins's Pleas of the Crown (t).

The authorities which have been cited, show clearly that by the Common Law, and independent of the Statute of Monopolies, an invention is required to be new in order to be capable of being made the subject of a valid patent privilege.

Statute of Monopolies.

The proviso in the 6th section of the Statute of Monopolies (u), which saves the prerogative of the Crown to grant patents for inventions, declares that the previous provisions of the Act (avoiding all monopolies whatsoever) shall not extend to letters patents and grants of privilege thereafter to be made of the sole working or making "of any manner of *new* manufacture within this realm," and "which others, at the time of making such letters patent and grants, shall not use."

Recital makes novelty part of the consideration.

We have seen also (x), that every patent recites the material allegations in the patentee's petition for the patent, one of which is, that the invention is new, or that it has not been used in this country, and therefore the novelty of the invention is thus made an essential part of the consideration for the grant made by the patent.

Novelty also required by the patent.

Every patent for an invention also contains (y) a condition for avoiding it in case the invention is not new as to the public use and exercise of it.

The novelty of an art or invention is therefore required, both by the Common Law and the Statute of Monopolies, in order to make it the legal subject of a patent privilege; and the want of novelty in an invention granted by patent also renders the grant void, not only for want of consideration, but also by force of the condition upon which it is made.

Invention to be new to the public only.

But although an invention must be new at the time of the grant of the letters patent (z), it is only requisite that it should be new *to the public*, on behalf of whom the grant of the sole use of an invention is made. And, consequently, unless the public has a knowledge of an invention, or the means of knowing it, at the time a patent is granted for it, it has

(t) Part I. c. 79, s. 6.

(u) 21 Ja. I. c. 3.

(x) *Ante*, Chap. IV. p. 41, 42.

(y) *Vide ante*, Chap. IV. p. 62.

(z) *Galloway v. Bleadon*, 1 Webs. R.

525; *Cornish v. Keene*, 1 Webs. R. 508; and the Statute of Monopolies expressly requires that an invention must be new at the time of the making of the patent in which it is comprised.

sufficient novelty to make it the proper subject of a patent privilege.

The want of this requisite novelty in an art or invention may therefore be established in any way which shows that the public had a knowledge of the invention, or the means of knowing it before the date of the patent.

Public knowledge or means of knowledge shows want of novelty.

Public knowledge of an invention may be shown by the existence of some public record, or the publication of some work or paper before the date of the patent, containing a description of the invention,—or by some public use of the invention prior to the grant of the patent.

Public knowledge shown by published description or a public use.

Therefore if it be shown that an invention comprised in a patent, was described in any published work or paper, or in any public record, before the date of the patent, the invention was not then new as to the public knowledge of it, and therefore the patent is void.

Description in published work.

Thus in the case of the *King v. Arkwright* (a), it appeared that a part of the alleged invention had been described in Emerson's book on mechanics, published long before the date of the patent, and it was held that it could not therefore be made the subject of a grant by patent.

R. v. Arkwright.

And in the case of *Hill v. Thompson* (b), it was held by the Court of Common Pleas, that a book printed and published prior to the grant of the patent, which in substance informed the public of what the specification of the patent professed to inform them, completely negatived the novelty of the alleged invention.

Hill v. Thompson.

So in the case of *Huddart v. Grimshaw* (c), Lord Ellenborough, C. J., said that if prior to the time of a patentee obtaining his patent, "any part of that which is of the substance of the invention has been communicated to the public in the shape of a specification of any other patent, or is a part of the service of the country, so as to be a known thing, in that case he cannot claim the benefit of his patent."

Huddart v. Grimshaw.

And in the case of *Cornish v. Keene* (d), the defendants having put in evidence the specification of former patent of

Cornish v. Keene.

(a) Dav. P. C. 129.

(c) Dav. P. C. 279.

(b) 8 Taunt. 375; and 2 B. Moore, 448, S. C.

(d) 1 Webs. R. 510.

the plaintiff's, the Lord Chief Justice *Tindal* said, in his address to the jury, "Undoubtedly if you could show under the hand of the plaintiff, or any body's hand, that the secret had been publicly communicated to the world which was intended to be covered by the subsequent patent, there is an end to that patent; if the world at large had been informed by this specification of the fabric and manufacture, which is intended to be effected by the subsequent patent, the subsequent patent must fall to the ground, otherwise a man would have nothing to do but to take out patent after patent when the former has nearly expired, and so procure to himself an unlimited privilege."

Publication of foreign work.

The importation of a foreign book into this country, containing a description of an invention, would not be sufficient to defeat a subsequent patent for it, unless the work was actually published and sold to the public here prior to the date of the patent.

Foreign work deposited in a public repository.

If however a single copy of a foreign work is deposited in the British Museum library, or in any other place to which the public can resort to obtain information, the public has the means of knowing the nature of any art or invention which the work describes, and therefore a subsequent patent for such an invention would be void for want of novelty. In *Baron Heurteloup's case* (e), a portion of the invention had been described in a *French* work deposited in the library of the *British* Museum before the date of the patent, and therefore the patentee applied to her Majesty in council for a confirmation of his patent, which was granted accordingly.

Baron Heurteloup's case.

Public use avoids a subsequent patent.

The *public* use of an art or invention at any time before the date of the patent in which it is comprised, will also be sufficient to render the patent void. And a public use of an invention is sufficient to avoid a subsequent patent for it for three reasons: *firstly*, Because the public use of an invention is evidence of a public knowledge of it; *secondly*, Because the Statute of Monopolies (f) expressly requires that an invention granted by patent shall be such as others (than the inventor) at the time of making the patent or grant *do not*

Reasons.

(e) 1 Web. R. 553.

(f) 21 Ja. 1. c. 3, s. 6.

use; and, *thirdly*, Because every patent expressly requires that the invention comprised in it shall be new as to the public use of it (g).

Thus in *Tennant's* case (h), the process invented by the patentee had been used five or six years before the date of the patent, and it was held that it was therefore not a new invention, and that the patent was void. Tennant's case.

In the case of *Lewis v. Marling* (i), it appeared that the patent, dated 15th January, 1818, was for an improved shearing machine, for shearing woollen cloths, by means of rotary cutters shearing from list to list. The defence was that the mode of shearing from list to list, by means of rotary cutters, was not new at the time of the plaintiff's patent; and it was proved that in the year 1811, a specification was enrolled in *America*, for a machine to shear cloth from list to list by means of rotary cutters, and that in that year a model of an exactly similar machine was brought to *England*, and exhibited to three or four persons. It was also proved that in the year 1811, Mr. Thompson, a manufacturer in *Yorkshire*, employed workmen to make a machine from the *American* specification, and that they had set about it, but that in consequence of the Luddite riots, Mr. Thompson was afraid to have it completed. However, in answer to this, it was shown that after the riots had ceased the machine was left unfinished, and Mr. Thompson bought the plaintiff's machine. Lord *Tenterden*, C. J., said to the jury, "To show that the machine was not new, evidence is given that a model has been seen by three or four persons, and that the making of a similar machine was begun; but it appears to me that the defendant has failed to prove that such a machine was *generally* known or *generally* used in *England*, before the taking out of this patent by the plaintiffs;" and there was a verdict for the plaintiffs. Lewis v. Marling.
If the prior use was not public it will not avoid the patent.
General use.

This statement of the case of *Lewis v. Marling* is in accordance with the report of it contained in the fourth volume of the Reports of Messrs. Carrington and Payne (k). But upon a subsequent motion in the Court of King's Bench

(g) Vide *ante*, Chap. IV. p. 62; and in this Chap. p. 106.

(h) Dav. P. C. 429.

(i) 4 C. & P. 52; 1 Webs. R. 490.

(k) P. 52.

Public use.

To avoid a patent, prior use must be public not general.

Lewis v. Marling, an extreme case.

Cornish v. Keene.

Carpenter v. Smith. Meaning of public use.

for a new trial in that case (l), Lord Tenterden, C. J., said that he had left it to the jury to say whether the invention "had been in public use and operation before the granting of the patent;" and it does not appear that any objection was made to the charge of Lord Tenterden to the jury on the ground that the learned Judge used the expressions, "generally known," and "generally used," instead of "publicly known" and "publicly used." There can be no doubt, however, that it would be a mistake to say that an invention must be generally known or used in order to avoid a subsequent grant of it by patent, it is sufficient if it was publicly known or used before the date of the patent (m).

Mr. Baron Alderson, upon the argument of one case (n), said that "the case of *Lewis v. Marling* went to the extreme point of the law." And upon another occasion (o), that in the case of *Lewis v. Marling*, he should have entertained very considerable doubts.

So in the case of *Cornish v. Keene* at Nisi Prius (p), the Lord Chief Justice Tindal told the jury, that if the invention was, at the time the patent was granted, in any degree of general use,—if it was known at all to the world publicly, or practised openly, so that any other person might have the means of acquiring the knowledge of it as well as the patentee, then the patent would be void.

The recent case of *Carpenter v. Smith* shows most clearly the meaning of the expression "public use" when applied to an invention. That case was an action for the infringement of a patent for improvements in locks; and it was shown that a lock substantially the same as the plaintiff's had been put upon a gate in a public place, and used by Mr. Davies for many years before the date of the patent. Upon the trial of the case at Nisi Prius (q), Lord Abinger, C. B., said that "public use" means this—that the use shall not be secret, but public; and that the use of the lock by Mr. Davies on his gate was a public use of it within the meaning of the clause in the

(l) 10 B. & C. 22.

(m) Vide *Carpenter v. Smith*, *infra*; and 9 M. & W. 300.(n) In *Carpenter v. Smith*, 1 Webs. R. 543.(o) In *Morgan v. Seaward*, 1 Webs. R. 190; 2 M. & W. 553.

(p) 1 Webs. R. 508.

(q) 1 Webs. R. 534.

patent, which requires the invention to be new as to the public use and exercise of it.

His Lordship also said, "If a man invents a lock, and puts it on his own gate, and has used it for a dozen years, that is a public use of it. If it were otherwise, see what the consequence would be; Mr. Davies has a lock, which he has directed to be made, and put upon his gate, sixteen years ago at least; if that was not a public use of it which prevented a man from taking out a patent, any man might go and take a model of that lock, and get a patent for it." And the learned Judge also held, that "public use and exercise" does not mean a use or exercise by the public, but a use or exercise *in a public manner*, and that such a use of an invention by *one* person would be sufficient to avoid a subsequent patent for it.

Public use is use in a public manner.

The jury in this case having found a verdict for the defendant, the plaintiff moved for a new trial on the ground of misdirection by the Lord Chief Baron to the jury, but the Court of Exchequer refused to grant even a rule *nisi* (r). Mr. Baron *Alderson* said, in giving judgment in this case, "Public use means a use in public, so as to come to the knowledge of others than the inventor, as contradistinguished from the use of it by himself in his chamber. How then can it be contended that the lock which has been used in public by Mr. Davies for so many years is a new invention? If the plaintiff's doctrine is correct, it would follow that if Mr. Davies were to change his lock to another gate, he would be liable to an action for an infringement of the plaintiff's patent." And Lord *Abinger* again said, that "the public use and exercise of an invention means a use and exercise *in* public, not by the public."

The law thus laid down in the case of *Carpenter v. Smith*, shows accurately the extent of the prior use or exercise of an invention required by law, and the proviso in a patent, in order to avoid a subsequent grant of it. Mr. Davies must have employed a workman to make the lock, and the subsequent successful use of it in public shows that the invention was not intended to be kept secret. It does not appear from the report of the case that the construction of the lock could be

Carpenter v. Smith shows the extent of prior use necessary to avoid a patent.

discovered by the inspection of it upon the gate, but the person who made it had publicly used the art by which the lock was made before the date of the patent, and therefore the art was not one which came within the meaning of the law, so as to be capable of being granted by letters patent.

Jones v. Pearce. In the case of *Jones v. Pearce* (s), it appeared that the plaintiff's patent was granted for an invention of improvements on carriage wheels. It was proved at the trial that two pair of wheels made upon the same principle as the plaintiff's invention, and nearly resembling the plaintiff's wheels, had been publicly used by Mr. Strutt before the date of the patent. Mr. Justice *Patteson* held, that if Mr. Strutt's wheels were on the same principles, and in substance the same as the plaintiff's, and used openly in public so that every body might see them, and were continued to be used up to the time of taking out the patent, then the invention was not new, and the patent was void. The jury in this case gave a verdict for the plaintiff; and it has been generally supposed that the case is one which lays down the law respecting the degree of prior use or knowledge which is sufficient to vitiate a patent, in a way very favourable for patentees. This supposition seems however to be destitute of foundation, for it appears from the charge of the learned Judge that the verdict of the jury must have been given upon the ground that Mr. Strutt's wheels were an experiment only, that he had found it did not answer, and had abandoned it as useless. And Lord *Abinger*, C. B., in the case of *Carpenter v. Smith* (t), said that he had been counsel in the cases of *Lewis v. Marling* (u), and *Jones v. Pearce*, and he recollected that "those cases proceeded on the ground of the former machines being in truth *mere experiments which altogether failed.*"

An art once known for any purpose cannot be made the subject of a privilege for that or any other purpose.

We have seen that the subject of every privilege in an invention granted by patent, is an art by which vendible articles may be manufactured (x). And when we say that an invention granted by patent must be new, the meaning is, that *the subject* of the privilege or *the art* must be new at the date of the patent. Therefore if such an art has once become publicly known, or been publicly used, in any way or for any purpose

(s) 1 Webs. R. 122.

(t) 9 M. & W. 300.

(u) 4 C. & P. 52.

(x) Vide ante, Sec. 1, in this Chapter.

whatsoever, it cannot afterwards be made the subject of a privilege, even for any new application of it.

It has already been shown that a patent privilege cannot be sustained for a new or double use of an old art or invention (*y*). And if the cases which bear upon this subject be examined, it will be seen that the true reason is, that the art which alone can be made the subject of the patent privilege is not new, but only the use or application of it.

And it is necessary, in considering this subject in every case, carefully to distinguish between an art such as we have just defined, and which may be made the subject of a patent privilege, and the various uses and applications of which such an art is capable. An art to be carefully distinguished from the use of it.

If the law permitted a new use or application of a known art or invention to be made the subject of such a privilege, the patent might operate very seriously to the disadvantage of a prior patentee. For however accurately he may have described his new art or invention, if he has not pointed out all its uses or applications, he may be deprived of part of the profit to be made by his invention, by reason of some particular use of it being appropriated by a subsequent patentee. Patent for a new use might injure prior patentee.

A public sale of an article made according to an art or invention will also invalidate a subsequent patent, granting the sole use of such art or invention. Such a public sale seems to be substantially the same as a prior public use or exercise of the invention, and if once a person has commenced the use of an art or invention, and made a profit of it by public sale, it would be unjust to deprive him of the benefit which he is reaping from such an application of his labour or capital (*z*). Prior public sale will avoid a patent.

In the case of *Wood v. Zimmer* (*a*), it appeared that the patent was for a new mode of making verdigrease, to be called *British Imperial Verdigrease*. It appeared also that the patentees had sold an article, composed precisely in the same manner as that for which the patent had been obtained, under the name of *Dutch Imperial Green*. Lord Chief Justice *Gibbs* said to the jury, with reference to the question of novelty, "Some things are obvious as soon as they are made public. Of others, the scientific world may possess itself by analysis." *Wood v. Zimmer.* Prior sale by patentee.

(*y*) See *Kay v. Marshall*, and the other cases, cited *ante*, p. 94 to p. 99.

(*z*) Vide *ante*, p. 34, 35.

(*a*) Holt. N. P. C. 58.

Some inventions almost baffle discovery. But to entitle a man to a patent, the invention must be new to the world. The public sale of that which is afterwards made the subject of a patent, though sold by the inventor only, makes the patent void. It is in evidence that a great quantity was sold in the course of four months before the patent was obtained; and that the bankrupts were in the habit of selling this 'manufacture.' And his Lordship left the question to the jury to say whether the invention was in public sale before the patent, in which case his Lordship thought the patent void, and the jury found the question in the affirmative, and consequently there was a verdict for the defendant. This case was cited and approved of in the case of *Morgan v. Seaward* (b), in which Mr. Baron *Parke* said, in delivering the judgment of the Court of Exchequer, that "If the patentee himself had before his patent constructed machines (made according to the invention) for sale as an article of commerce for gain to himself, and been in the practice of selling them publicly; that is, to any one of the public who would buy, the invention would not be new at the date of the patent. This was laid down in the case of *Wood v. Zimmer* (c), and appears to be founded in reason; for if the inventor could sell his invention, keeping the secret to himself, and when it was likely to be discovered by another take out a patent, he might have practically a monopoly for a much longer period than fourteen years."

One instance of sale may be sufficient to defeat a patent.

In the case of *Losh v. Hague* (d), Lord *Abinger*, C. B., held that a sale to any one individual would be sufficient to avoid a subsequent patent.

The same learned Judge held, in *Carpenter v. Smith* (e), that one instance of a public sale for profit, of articles made according to an invention, is such a public use and exercise of the invention as will invalidate a subsequent patent for it. And in the case of *Morgan v. Seaward* (f), although the Court of Exchequer decided that the transaction proved in that case was not such a sale as would defeat a patent, yet expressly guarded themselves against being understood as deciding that a single instance of a sale of an article, as an

(b) 2 M. & W. 544.

(c) Holt, N. P. C. 58.

(d) 1 Webs. R. 202.

(e) *Ibid.* 530.

(f) 9 M. & W. 300.

article of commerce to any one who chose to buy, might not be deemed the commencement of such a practice, and the public use of the invention so as to defeat a subsequent patent for it.

And whether articles made according to an invention comprised in a patent, and sold before the date of it, were sold for home or foreign consumption, is of no importance, if the sale be public, in this country. Sale of articles for foreign market.

Thus in the case of *Carpenter v. Smith (g)*, Lord Abinger, C. B., held that a sale of locks made according to the plaintiff's invention before the date of his patent for the purpose of being sent to *America*, would be a destruction of the novelty of his invention. And in the case of *Morgan v. Seaward (h)*, the Court of Exchequer, after approving of the law laid down in *Wood v. Zimmer (i)*, that a public sale of an article by an inventor will defeat a subsequent patent for it, said that they were not prepared to say that if such a sale was of articles that were only fit for a foreign market, or to be used abroad, it would make any difference.

And not only must an art or invention granted by a patent be new; but if it consist of several parts, every part of the invention must be new. And it is clear that the reasons already given for the grant of a known art being void, apply as strongly to any part of an invention granted by patent as to the whole of it. Every part of an invention must be new.

And the want of novelty in any part of an art or invention not only invalidates the grant of it by patent as to the part of it which is not new, but renders the grant entirely void even as to those parts of the invention which may be new, and in every respect the legal subject of a grant by patent. The reason for this is, that the consideration for a grant by patent is what is termed in law entire, and if any part of it fail, the consideration is not sufficient to support the grant, and therefore the patent is wholly void. So also the patent is void in such a case on the ground of a false suggestion or representation appearing on the face of the patent, for the patentee, in his petition for the patent, must have represented his invention to be new; and as the petition is always recited in the patent, it appears that the representation respecting the Want of novelty in a part invalidates the whole grant.

(g) 9 M. & W. 300.

(i) Vide *ante*, p. 113, 114.

(h) 2 M. & W. 544.

novelty of the invention is not true, part of the invention being old, and the consequence of the Crown having been deceived in this respect is that the whole grant is void (*k*).

Hill v.
Thompson.

Thus, in the case of *Hill v. Thompson* (*l*), it was held by the Court of Common Pleas that if any part of the alleged discovery, being a material part, failed, (the discovery in its entirety forming one entire consideration,) the patent was altogether void.

Huddart v.
Grimshaw.

In the case of *Huddart v. Grimshaw* (*m*), Lord *Ellenborough*, C. J., said to the jury, that if, prior to the time of the plaintiff obtaining his patent, any part of that which was of the substance of the invention had been communicated to the public, he could not support his patent.

R. v. Else.
Bovill v. Moore.

So in the cases of *The King v. Else* (*n*), and *Bovill v. Moore* (*o*), the patents were held to be void on the ground of the patentees' claims being too extensive, and comprising things which were not new.

Gibson v. Brand.

In the case of *Gibson v. Brand* (*p*), it appeared that the patentees claimed eight several heads of invention, and the Court of Common Pleas held that in order to support their patent they were bound to show that each of the eight parts was new.

Brunton v.
Hawkes.

In the case of *Brunton v. Hawkes* (*q*), it appeared at the trial that the patent was for an invention of improvements in the manufacturing of ships' anchors, windlasses, and chain cables. The mode of manufacturing anchors described in the plaintiff's specification had never been applied before to ships' anchors. But it had been applied to the adze-anchor, and the mushroom-anchor. These anchors are used only for the purpose of mooring floating lights or vessels intended to be stationary; and are never taken on board. The jury having found a verdict for the plaintiff, the defendant obtained a rule nisi for a new trial, which the Court afterwards made absolute. In his judgment the Lord Chief Justice *Abbott* said, "I feel myself compelled to say that I think so much of the plaintiff's invention, as respects the anchor, is not new, and

(*k*) Vide ante, Chap. IV. p. 42 and 48.

(*l*) 8 Taunt. 375; and 2 B. Mo. 448, S. C.

(*m*) Dav. P. C. 265.

(*n*) *Ibid.* 144.

(*o*) *Ibid.* 361; and 2 Marsh. 211

S. C.

(*p*) 4 M. & G. 179.

(*q*) 4 B. & Ald. 541.

that the whole patent is therefore void. The mode of joining the shank to the flukes of the anchor is to put the end of the shank, which is in the form of a solid cylinder, through the hollow and conical aperture, and it is then made to fill up the hollow, and to unite itself with it. Now that is precisely the mode by which the shank of the mushroom-anchor is united to the mushroom-top, by which the shank of the adze-anchor is united to its other parts. It is indeed the mode by which the different parts of the common hammer and the pickaxe also are united together. Now a patent for a machine, each part of which was in use before, but in which the combination of the different parts is new, and a new result produced, is good; because there is a novelty in the combination. But here the case is perfectly different; formerly three pieces were united together; the plaintiff only unites two; and, *if the union of those two had been effected in a mode unknown before, as applied in any degree to similar purposes, I should have thought it a good ground for a patent;* but unfortunately the mode was well known and long practised. I think that a man cannot be entitled to a patent for uniting two things instead of three, *where that union is effected in a mode well known and long practised for a similar purpose.* It seems to me therefore that there is no novelty in that part of the patent as affects the anchor, and if the patent had been taken out for that alone, I should have had no hesitation in declaring that it was bad. Then if there be no novelty in that part of the patent, can the plaintiff sustain his patent for the other part as to the mooring chain? As at present advised, I am inclined to think that the combination of a link of this particular form with the stay of the form which he uses, although the form of the link might have been known before, is so far new and beneficial as to sustain a patent for that part of the invention, if the patent had been taken out for that alone. But inasmuch as one of the things is not new, the question arises, whether any part can be sustained. It is quite clear that a patent granted by the Crown cannot extend beyond the consideration of the patent. The King could not, in consideration of a new invention in one article, grant a patent for that article and another. The question then is, whether, if a party applies for a patent, reciting that he has

discovered improvements in three things, and obtains a patent for these three things, and in the result it turns out that there is no novelty in one of them, he can sustain his patent. It appears to me that the case of *Hill v. Thompson*, which underwent great consideration in the Common Pleas, is decisive upon that question. In that case the patent was granted to the plaintiff for the invention of certain improvements in the smelting and working of iron; and the Court of Common Pleas appear to have considered that the improvement introduced by the plaintiff into what may properly be called the smelting of iron, was the obtaining iron from that cinder and slag which before had been thrown away as refuse, and that that might be considered as new. It appeared, however, that the plaintiff claimed further the merit of having discovered that the application of lime in certain stages of the process would cure a disease common to all iron, not merely to that which he was to produce, but to iron originally manufactured from the fresh ore. Now it turned out that that was not a discovery, for the application of lime to iron made from the cinder, originally used in making ore, was known and practised before. No two things can be more distinct in their nature than the obtaining of iron from a material from which it was impracticable to obtain it before, and the cure or prevention of a disease to which all iron was subjected. In that case, however, the Court of Common Pleas held, that admitting there was novelty in the one, yet, as there was no novelty in the other, the patent was wholly void. The only difference between that case and this is, that here the plaintiff, instead of saying that he has made certain improvements, states the improvements; but still he claims the merit of having invented improvements in all the three, and that they are new; and the consideration of the patent is the improvement in the three articles, and not in one; for an improvement in only one of them would render the patent bad. The consideration is the entirety of the improvement of the three; and if it turns out there is no novelty in one of the improvements, the consideration fails in the whole, and the patentee is not entitled to the benefit of that other part of his invention."

The ground upon which the partial want of novelty in an

invention avoids the whole grant contained in the patent was also clearly explained in the case of *Morgan v. Seaward* (s), in which Mr. Baron *Parke* said, in delivering the judgment of the Court, that "A false suggestion of the grantee avoids an ordinary grant of lands or tenements from the Crown, is a maxim of the Common Law, and such a grant is void, not against the Crown merely, but in a suit against a third person (t). It is upon the same principle that a patent for two or more inventions, when one is not new, is void altogether, as was held in *Hill v. Thompson* (u), and *Brunton v. Hawkes* (x); for although the statute invalidates a patent for want of novelty, and consequently, by force of the statute, the patent would be void, so far as related to that which was old, yet the principles on which the patent has been held to be void altogether is, that the consideration for the grant is the novelty of all, and the consideration failing, or, in other words, the Crown being deceived in its grant, the patent is void, and no action maintainable upon it."

The specification is to be deemed a part of the patent, and the two instruments are to be construed together as one; and if it appears by the patent, or specification, that any thing is claimed by the patentee as part of his invention which is not new, the grant of privilege will be wholly void.

In the case of *Campion v. Benyon* (y), it appeared that the patent was for an invention intituled "a new and improved method of making and manufacturing double canvass and sail cloth with hemp and flax, or either of them *without any starch whatever*." It appeared at the trial that the plaintiff's invention was substantially only a new mode of preparing and twisting hemp or flax for making canvass and sail cloth, and that the manufacturing of canvass and sail cloth had been known and used long before the date of the patent. The Court of Common Pleas held that this patent was void on the ground, that part of what the plaintiff had claimed as his invention was not new, and that the patent was therefore too extensive. The Lord Chief Justice *Dallas* said, "That looking at the description of the invention contained in the patent, a

(s) 2 M. & W. 544.

(t) *Travell v. Carteret*, 3 Lev. 135; *Alcock v. Cooke*, 5 Bing. 340.

(u) 2 Moore, 424; 8 Taunt. 375, S.C.

(x) 4 B. & Ald. 512.

(y) 6 B. Mo. 71; 3 B. & B. 5, S.C.

common person would think, not simply that it was an improvement in the method of making double canvass and sail cloth without starch, pre-supposing that starch had been known before, but that it was an improvement for making them without any starch whatever. From the moment I read the patent, I thought the object of the patentee was to make such canvass or cloth without any starch, and that the exclusion of that article was a new discovery, and adopted by him for the first time; nor do I now see any reason to think otherwise." And after commenting upon the specification, his Lordship said, "As well therefore on the terms of the specification, as of the patent itself, I have no doubt but that the claim of the plaintiff is of too extensive a nature; it is not confined to a new and improved method of making and manufacturing the canvass and sail cloth, either in the weaving or twisting the threads, but of manufacturing them without any starch whatever, which it appears had been done before, and was therefore not a new or original discovery. On this ground, therefore, I am clearly of opinion that the patent in question is void." Mr. Justice *Burrough* said, "The King has, in fact, been deceived in granting the patent to the plaintiff, as he has claimed what was known before, and is consequently not entitled to the discovery or invention he thereby sought to establish." And Mr. Justice *Richardson* said, "The true and sound principle is, that although on the one hand ingenious persons ought to be protected and rewarded for their discoveries, still on the other, care must be taken that others, as well as the public at large, must not be restricted from making improvements on that which is still open to their ingenuity; viz. of doing anything which is not peculiar to the immediate process employed by the patentee. Here the patent itself appears to consist of an improvement in making double canvass and sail cloth without starch. The specification confirms it, by referring to the advantages to be derived from the omission of that article in the manufacture of those cloths. That discovery appears to have been made long since, and therefore the patent cannot be sustained."

An improvement or addition may be the subject of a privilege.

Although every thing which is claimed by a patentee as part of his invention, and which he therefore seeks to make the subject of his patent privilege, must be new at the date of the

patent; that rule has not the effect of avoiding a patent privilege for an art or invention which is an improvement upon, or addition to, some previously known art or invention, or which is only a combination of arts or processes already known to the public.

But the patentee's claim of invention must be confined to the improvement or addition, and the patentee's claim must not extend to any part of the previously known art or invention, or the entire privilege will be rendered void under the rule of law which has just been considered, in consequence of a part of the alleged invention not being new at the date of the patent (z). Or if the invention be of a combination of arts before known, or if the object of the invention be the combination of things previously known to the world, the patent must be limited to the particular combination which the patentee has invented, and must not include any of the elements of the art or invention, or the patent will be entirely void for the reason just given.

Patentee's claim must not include anything beside the improvement, &c. he has invented.

The reason why a patent is good in such a case is, that the art which is comprised in the privilege is quite distinct from that upon which it is an improvement, or from those of which it is a combination. And if an art of this description is sought to be made the subject of a patent privilege, the patent cannot be sustained unless the art be really a distinct substantial art, and different from the previously known art or arts of which the patentee has availed himself.

The art in such a case is distinct from that upon which it is an improvement.

It was formerly doubted whether a patent privilege for an addition or improvement was good, but the validity of such a privilege is now unquestionable.

Validity of a privilege for an improvement, &c. formerly doubted.

Sir Edward Coke, in his commentary on the Statute of Monopolies (a), says, that "Such a privilege as is consonant to law must be substantially and essentially newly invented; but if the substance was *in esse* before, and a new addition reunto, though that addition make the former more profitable, yet it is not a new manufacture in law: and so it was resolved in the Exchequer Chamber, *Pasch.* 15 Eliz. in *Bircot's* case, for a privilege concerning the preparing and melting, &c. of lead of ore:

3 Inst. 184.

Bircot's case.

(z) See *Hill v. Thompson*, 8 Taunt. 375; 2 B. Mo. 448; *Bovill v. Moore*, 2 Marsh. 211; *Dav. P. C.* 361; *Minter*

v. Mower, 1 Webs. R. 142; and the other cases which have been cited.

(a) 3 Inst. 184.

for there it was said, that that was to put but a new button on an old coat, and it is much easier to add than to invent." We are left in ignorance as to the precise nature of the addition in *Bircot's* case, and therefore it may have been such an addition as would not even now be held sufficient to support a grant by patent.

Bircot's case not adhered to.

In the case of *Boulton v. Bull* (b), the Lord Chief Justice *Eyre* mentioned *Bircot's* case, and said that the principle on which it was determined had not been adhered to.

Particular facts of *Bircot's* case unknown.

And in the same case (c), Mr. Justice *Buller*, speaking of *Bircot's* case, says, "What were the particular facts of that case we are not informed; and there seems to me to be more quaintness than solidity in the reason assigned, which is, that it was to put a new button to an old coat, and it is much easier to add than to invent. If the button were new, I do not feel the weight of the objection that the coat on which the button was to be put was old. But in truth arts and sciences at that period were at so low an ebb in comparison with the point to which they have been since advanced, and the effect and utility of improvements so little known, that I do not think that case ought to preclude the question. In later times whenever the point has arisen, the inclination of the Court has been in favour of the patent for the improvement, and the parties have acquiesced where the objection might have been brought directly before the Court."

Buller, J., in R. v. Arkwright.

In the case of *The King v. Arkwright* (d), Mr. Justice *Buller* said, that if there was any thing material and new *which was an improvement* of the trade, that would be sufficient to support a patent.

Laurence, J., in Hornblower v. Bull.

In the case of *Hornblower v. Bull* (e), Mr. Justice *Laurence* said, that the patent must be supported as granted for an improvement and addition to old engines known and in use, and that he thought the patent was good in that point of view.

Morris v. Bransom.

And in the case of *Morris v. Bransom* (f), tried in Hilary vacation, 1776, "The question was, whether an addition to an old stocking-frame was a subject of a patent: Lord *Mansfield*

(b) Dav. P. C. 205; 2 H. Bl. 463, S. C.

(c) Dav. P. C. 201; 2 H. Bl. 463, S. C.

(d) Dav. P. C. 61.

(e) 8 T. R. 98; Dav. P. C. 221.

(f) Bull. N. P. 76, c.

said, if the general question of law, viz., that there can be no patent for an addition, be with the defendant that is open upon the record, he may move in arrest of judgment, but that objection would go to repeal almost every patent that was ever granted. There was a verdict for the plaintiff, and 500*l.* damages, which was acquiesced in."

This case seems to have been subsequently tried again, for in the case of *Boulton v. Bull* (g), Mr. Justice *Buller* said, in giving judgment, that in *Morris v. Bransom*, which was tried at the sittings after Easter Term, 1776, the patent was for making oilet holes or net-work in silk, thread, cotton, or worsted; and the defendant objected that it was not a new invention, it being only an addition to the old stocking-frame. That, Lord *Mansfield* said, after one of the former trials on this patent, he had received a very sensible letter from one of the gentlemen who was upon the jury, upon the subject, whether on principles of public policy there could be a patent for an addition only. That he paid great attention to it, and mentioned it to all the Judges, and said that if there could be no patent for an addition, the point was open upon the record, and the defendant might move in arrest of judgment. And it appears that there was a verdict for the plaintiff, but no motion was made in arrest of judgment. And Mr. Justice *Buller* also said, that though his Lordship (Lord *Mansfield*) did not mention what were the opinions of the Judges, or give any direct opinion himself, yet we may safely collect that he thought, on great consideration, the patent was good, and the defendant's counsel, though they made the objection at the trial, did not afterwards persist in it. And (added Mr. Justice *Buller*) since that time it has been the generally-received opinion in Westminster Hall, that a patent for an addition is good.

For some years past, very many of the patents which have been taken out have been for inventions intituled as improvements in things previously known; and there can be no question now that such a patent is good (h), even when it is for an improvement upon something comprised in a prior

Patent for an improvement good.

(g) Dav. P. C. 202; 2 H. Bl. 463, S. C.

(h) See *Hill v. Thompson*, 8 Taunt. 375; 2 B. Mo. 448.

patent (i); but the second patent must wait until the expiration of the previous patent, until which time the patentee cannot use the prior invention, unless indeed he obtains the licence of the prior patentee.

It is to be observed, that a patent privilege is not obtained merely for an improvement or improved art, in every case in which the word improvement is used in the title of the invention. Thus, an invention may be intituled "improvements in the manufacture of lace," the object of the invention being either the production of lace of a better quality, or at a lower price; and yet the means by which that object is obtained may be some new art or some new machine totally and entirely different from anything before known or used for the manufacture of lace.

Patents for combinations have also been decided to be good.

It will be seen from the cases now to be cited, that it is equally clear that a patent privilege is good for an art or invention which is a combination of several known arts or inventions, or which has for its object the combination of several previously known articles or materials.

Hill v. Thompson.

In the case of *Hill v. Thompson* (h), Lord *Eldon*, L. C., said, that there might be a valid patent for a new combination of materials previously in use for the same purpose.

Boulton v. Bull.

In the case of *Boulton v. Bull* (l), Mr. Justice *Buller* said, that it is no objection to a manufacture that the articles of which it is composed were known and in use before the patent; provided the compound article which is the object of the invention is new.

Bovill v. Moore.

In the case of *Bovill v. Moore* (m), Lord Chief Justice *Gibbs* told the jury, that if the plaintiff had invented an engine which consisted of a perfectly new conformation of parts, although all the parts were used before, yet he would be entitled to support his patent for a new machine.

Huddart v. Grimshaw.

So in the case of *Huddart v. Grimshaw* (n), Lord *Ellenborough*, C. J., said, "I suppose it will not now be disputed that a new combination of old materials so as to produce a new effect may be the subject of a patent." And his Lordship

(i) *Ex parte Fox*, 1 V. & B. 67;
Crane v. Price, 4 M. & G. 580.
 (k) 3 Mer. 622.

(l) Dav. P. C. 199; 2 H. Bl. 487.
 (m) Dav. P. C. 361.
 (n) *Ibid.* 267.

afterwards said to the jury in the same case (o), "In inventions of this sort, and every other through the medium of mechanism, there are some materials which are common, and cannot be supposed to be appropriated in the terms of any patent. There are common elementary materials to work with in machinery, but it is the adoption of those materials to the execution of any particular purpose that constitutes the invention; and if the application of them be new, if the combination in its nature be essentially new, if it be productive of any new end, and beneficial to the public, it is that species of invention which, protected by the King's patent, ought to continue to the patentee the sole right of vending it."

In the case of *Cornish v. Keene* (p), the invention was of a new elastic web, made by combining non-elastic and covered elastic threads in the warp of the web, which was woven in the common way, and in the common loom. Before the date of the patent the manufacture of webs with all the warp threads elastic was well known, and there was nothing new in the invention except the particular combination of elastic and non-elastic materials in the warp of the web. This combination the Court of Common Pleas held was an invention which might be protected by patent.

In *Crane v. Price* (q), it appeared that Crane's patent was for an invention of "an improvement in the manufacture of iron," and the improvement consisted in combining the use of hot air blast with the use of anthracite or stone coal in the smelting of iron. Both hot air blast and anthracite coal had been used in the smelting of iron before the date of the patent, and the patentee claimed the mere combination of the two things, and distinctly disclaimed each of them separately as being well known. The Court of Common Pleas held that the new combination of processes was clearly a good subject of a grant by patent.

There may also be a valid patent for an invention, where every thing used by the patentee is old and well known, and the novelty consists merely in dispensing with one of several things which was before used in any branch of manufacture.

(o) Dav. P. C. 278.

517.

(p) 3 Bing. N. C. 570; 1 Webs.

(q) 1 Webs. R. 393; 4 M. & G. 580.

Cornish v. Keene.

Crane v. Price.

Omission of part of a known process, &c.

Russell v.
Cowley.

Thus, in *Russell v. Cowley* (r), which was an action for the infringement of a patent granted to Whitehouse for improvements in the manufacture of tubes, it appeared that before the date of Whitehouse's patent, iron pipes had been made by turning up the edges of strips of iron plate so as to make them meet, and then by passing them in a heated state upon a maundril, through a circular hole between a pair of dies, to cause the edges of the strips of iron to be welded together, and so to form a tube. The invention comprised in Whitehouse's patent was to manufacture iron tubes in the same manner in every respect as already described, except that the use of a maundril was dispensed with, Mr. Whitehouse having discovered that the edges of the iron could be welded together as well without the maundril as with it, and that by dispensing with the maundril, tubes could be made much longer than with it. The Court of Exchequer held that this new invention might lawfully be made the subject of a grant by patent.

Minter v.
Mower.

And in the case of *Minter v. Mower* (s), the Court of Queen's Bench intimated an opinion that a patent would not be bad merely because the invention consisted in the omission of one of the several component parts of something previously known.

Prior secret use
will not avoid a
patent.

It has been seen that the novelty which the law requires in order to make an art or invention the legal subject of a patent privilege, is novelty to the public; that the public must neither have a knowledge of the art, or possess the means of knowing it. But an art or invention may be new to the public notwithstanding any secret knowledge or use of it prior to the grant of a patent for it, and such a secret knowledge or use of the invention will not affect the validity of the patent.

Dolland's case.

Thus, in *Dolland's case* (t), the invention was of a new method of making object-glasses, and it was objected that Dolland was not the (first) inventor, because Dr. Hall had made the same discovery before him. But it was held that as Dr. Hall had confined his invention to his closet, and the public were not acquainted with it, Dolland was entitled to maintain his patent.

Lewis v.
Marling.

So in the case of *Lewis v. Marling* (u), Mr. Justice Bayle

(r) 1 Webs. R. 463.

(s) *Ibid.* 142; and 6 A. & E. 735.

(t) Dav. P. C. 170.

(u) 1 Webs. R. 496; 10 B. & C. 21

said, that it was no objection to an inventor's patent that any one else had made a similar discovery by his mind, or had received privately a communication from abroad, which would enable him to make it, unless it had been actually made public.

So also if the knowledge of an invention be disclosed by the inventor privately and confidentially to another, such a disclosure will not avoid a subsequent patent: and even if the invention is in consequence of such communication secretly used in the production of an article which is not sold to the public, or published to the world, the patent will not be void.

Prior confidential disclosure or use of invention will not avoid a patent.

This was laid down by the Court of Exchequer in the case of *Morgan v. Seaward* (x), which was an action for the infringement of a patent granted to Mr. Galloway and assigned to Morgan the plaintiff: the jury, by direction of the Judge, gave a verdict for the defendant, upon a plea denying the novelty of the invention, with liberty for the plaintiff to move the Court (which he did) to have the verdict entered for him on that issue. The facts of the case are fully stated in the judgment of the Court, which was delivered by Mr. Baron Parke, who said, "The evidence was, that before the date of the patent, (which was 2nd of July, 1829,) Curtis, an engineer, made for Morgan (the plaintiff) two pair of wheels upon the principle mentioned in the patent at his own factory. Galloway, the patentee, gave the instructions to Curtis, under an injunction of secrecy, because he was about to take out a patent. The wheels were completed and put together at Curtis's factory, but not shown or exposed to the view of those who might happen to come there. After remaining a short time, the wheels were taken to pieces, packed up in cases, and shipped in the month of April on board a vessel in the Thames, and sent for the use of the Venice and Trieste Company, of which Morgan was managing director, and which carried on its transactions abroad, but had shareholders in England. Curtis deposed that 'they were sold to the Company,' without saying by whom, which may mean that they were sold by Curtis to Morgan for the Company; and Morgan paid Curtis for them. Morgan and Galloway employed an attorney, who entered a *caveat* against any patent

Morgan v. Seaward.

(x) 2 M & W. 544.

on the 2nd of March, and afterwards solicited the patent in question, which was granted to Galloway and assigned to Morgan. Upon these facts, the question for us to decide is, whether the jury must have necessarily found for the defendant, or whether they might have found that this invention at the date of the letters patent was new in the legal sense of that word. The words of the statute are, that 'grants are to be good of the sole working or making of any manner of new manufacture to the first and true inventor or inventors of such manufactures, which others at the time of the making such grants did not use;' and the proviso in the patent in question founded on the statute is, that if the invention be not a new invention as to the public use and exercise thereof in England, the patent should be void. The word 'manufacture' in the statute must be construed in one of two ways: it may mean the machine when completed, or the mode of constructing the machine. If it mean the former, undoubtedly there has been no use of the machine, as a machine, in England, either by the patentee himself, or any other person; nor indeed any use of the machine in a foreign country before the date of the patent. If the term 'manufacture' be construed to be 'the mode of constructing the machine,' there has been no use or exercise of it in England, in any sense which can be called 'public.' The wheels were constructed under the direction of the inventor, by an engineer and his servants, with an injunction of secrecy, on the express ground that the inventor was about to take out a patent, and that injunction was observed, and this makes the case so far the same, as if they had been constructed by the inventor's own hands in his own private workshop, and no third person had seen them whilst in progress. The operation was disclosed, indeed, to Morgan, the plaintiff, but there is sufficient evidence that Morgan at that time was connected with the inventor, and designing to take a share of the patent. A disclosure of the nature of the invention to such a person, under such circumstances, must surely be deemed private and confidential. The only remaining circumstance is, that Morgan paid for the machines with the privity of Galloway, on behalf of the Venice and Trieste Steam Company, of which he was the managing director; but there was no proof that he paid

more than the price of the machines, as for ordinary work of that description; and the jury would also be well warranted in finding that he did so with the intention that the machine should be used abroad only by this Company, which, as it carried on its transactions in a foreign country, may be considered as a foreign Company; and the question is, whether this solitary transaction without any gain being proved to be derived thereby to the patentee or to the plaintiff, be a use or exercise in England of the mode of construction in any sense which can be deemed a use by others, or a public use, within the meaning of the statute and the patent? We think not. It must be admitted that if the patentee himself had before his patent constructed machines for sale, as an article of commerce, for gain to himself, and been in the practice of selling them publicly, that is, to any one of the public who would buy, the invention would not be new at the date of the patent. This was laid down in the case of *Wood v. Zimmer* (y), and appears to be founded on reason; for if the inventor could sell his invention, keeping the secret to himself, and, when it was likely to be discovered by another, take out a patent, he might have, practically, a monopoly for a much longer period than fourteen years. Nor are we prepared to say, that if such a sale was of articles that were only fit for a foreign market, or to be used abroad, it would make any difference: nor that a single instance of such a sale, as an article of commerce, to any one who chose to buy, might not be deemed the commencement of such a practice, and the public use of the invention so as to defeat the patent. But we do not think that the patent is vacated on the ground of the want of novelty, and the previous public use or exercise of it, by a single instance of a transaction such as this, between parties connected as Galloway and the plaintiff are, which is not like the case of a sale to any individual of the public who might wish to buy; in which it does not appear that the patentee has sold the article, or is to derive any profit from the construction of his machine, nor that Morgan himself is; and in which the pecuniary payment may be referred merely to an ordinary compensation for the labour and skill of the engineer actually

(y) Holt, N. P. C. 58, cited *ante*, p. 113.

employed in constructing the machine; and the transaction might, upon the evidence, be no more in effect than that Galloway's own servants had made the wheels, that Morgan had paid them for their labour, and afterwards sent them to be used by his own co-partners abroad. To hold this to be what is usually called a publication of the invention in England, would be to defeat a patent by much slighter circumstances than have yet been permitted to have that effect. We therefore think, that as the jury might consistently with the evidence have found this issue (z) for the plaintiff, the verdict ought, pursuant to the leave reserved, to be entered on that issue for him."

Bentley v.
Fleming.

So also in the case of *Bentley v. Fleming* (a), it appeared at the trial that the patent was for a card machine, and the patentee had before the patent lent the machine to a person in order that he might try it. The machine was placed in a room in a mill, in which men were constantly going backwards and forwards; but Mr. Justice *Cresswell* held, that the machine having merely been lent for the purpose of testing it, this did not amount to a publication.

Prior experi-
ments will not
defeat a patent.

Experiments made prior to the date of a patent, will not be any reason for objecting to a subsequent patent on the ground of want of novelty, unless the experiments were actually successful, as well as brought into public knowledge or use before the date of the patent. And the reason of this is very evident; for until the invention of an art is actually completed, a knowledge of it *cannot* be published to the world so as to defeat a patent for it.

Galloway v.
Bleaden.

In the case of *Galloway v. Bleaden* (b), the Lord Chief Justice *Tindal*, in his charge to the jury, laid it down as law, that a mere experiment, or course of experiments, for the purpose of producing a result which is *not brought to completion*, but begins and *ends in experiment*, will not, although known to several persons, prevent a subsequent inventor who brings the invention to perfection from maintaining a patent for it. And in that case the learned Judge observed, that there had been many experiments made, tending almost, if not entirely, to the same result as the patentee's invention, and that those

(z) Respecting the novelty of the invention.

(a) 1 Car. & Kirwan, 587.
(b) 1 Webs. R. 529.

experiments were known to various persons; but his Lordship held that, if they rested in experiment, and in experiment only, and had not attained the object for which the patent was taken out, the patent would not be invalidated for want of novelty in the invention. And his Lordship also held, that mere experiment supposed by the parties to be fruitless and abandoned, because they had not brought it to a complete result, would not prevent a more successful competitor, who might add the last link of improvements in bringing it to perfection, from maintaining a patent for the invention.

So in the case of *Cornish v. Keene* (c), the Lord Chief Justice *Tindal* said, “A man may make experiments in his own closet for the purpose of improving any art or manufacture in public use; if he makes these experiments, and never communicates them to the world, and lays them by as forgotten things, another person who has made the same experiments, or has gone a little further, or is satisfied with the experiments, may take out a patent and protect himself in the privilege of the sole making of the article for fourteen years, and it will be no answer to him to say that another person before him made the same experiments.” Cornish v. Keene.

In the case of *Jones v. Pearce* (d), which was an action for the infringement of a patent for an invention of improvements in carriage wheels, it was proved that Mr. Strutt had made and used wheels similar to the plaintiff's before the date of the patent. And Mr. Justice *Patteson* told the jury, that if they were of opinion that Mr. Strutt's wheel was an experiment, and that he found it did not answer, and ceased to use it altogether, and abandoned it as useless, and nobody else followed it up, and the plaintiff's invention which came afterwards was his own invention, and remedied the defects in Mr. Strutt's wheel, there was no reason for saying that the plaintiff's patent was not good. Jones v. Pearce.

And in *Carpenter v. Smith* (e), Lord *Abinger*, C. B., laid it down as law, that if an invention is new, the inventor shall not be prejudiced by any other man having invented it before, if he never made any use of it; because the mere speculations of ingenious men which may be fruitful of a great variety of Carpenter v. Smith.

(c) 1 Webs. R. 501.

(e) *Ibid.* 534.(d) *Ibid.* 122.

inventions, if they are not brought into actual use, ought not to stand in the way of other men equally ingenious, who may afterwards make the same inventions and apply them. A great many patents (said his Lordship) have been taken out, for example, upon suggestions made in a very celebrated work by the Marquis of Worcester, and many patents have been derived from hints and speculations by that ingenious author. But yet, as he never acted upon them, as he never brought out any machines whatsoever, those patents are good. And his Lordship also held that the meaning of the words public use is this;—that a man shall not by his own private invention, which he keeps locked up in his own breast, or in his own desk, and never communicates it, take away the right that another man has to a patent for the same invention.

SECTION III.

Of the Utility of an Art or Invention necessary in order to support a Patent.

Object of the law is the benefit of the public.

THE chief object of our Patent Law is to promote the benefit of the public by inducing inventors to give to the public a knowledge of their inventions or discoveries in the useful arts.

All the prerogatives of the Crown must be for the advantage and good of the people, otherwise they ought not to be allowed by the law (*f*). Unless therefore the exercise of the prerogative of the Crown, in granting the sole use of an invention, is for the good of the people, it is contrary to law.

The public must have a consideration for the grant.

The Queen cannot charge her subjects, or abridge them of their liberty in any way except for their benefit, or where they shall have a sufficient consideration (*g*). And it is clear that by the grant of the sole use of an invention to any person, all other persons are for a time deprived of the liberty of using the art which is comprised in the privilege granted by the patent; even if they themselves should unaided make an invention precisely similar in every respect (*h*); and in order to procure

(*f*) Bac. Abr. tit. Prerog.

(*g*) Vide 2 Rol. Abr. 172, s. 20.

(*h*) Vide ante, Chap. II. p. 11.

articles made according to the invention, they must also pay whatever the patentee may think fit to charge for them. In making a grant by patent of the sole use of an invention, the Queen acts on behalf of the public (i); and as *the public*, by means of the patent, grants a privilege to the patentee, *the public* ought to have the consideration for the grant.

Unless an invention is of some use, and confers some benefit upon the public, the Crown cannot grant the sole use of it to the inventor or importer; for in order to support such a grant, there must be some consideration given to the public by the patentee; and if it appears that the art or invention which is the subject of a patent privilege, is of no use whatever to the public, the patent is void, and the grant is a nullity (k).

We have already seen that the subject of a patent privilege is the art, by means of which vendible articles of manufacture are made or produced (l). And in speaking of the quality of public utility required by law, it must be understood, that it is the subject of the patent privilege which must be useful or beneficial to the public, that is to say, the art by means of which such articles of manufacture are produced.

The subject of a patent privilege is, however, generally called by the name of an invention, and the word is used in this sense when it is said that an invention is required by law to be useful in order to be legally granted by patent. The benefit or utility which the public receives from an invention, arises from the useful employment of the labour of the people: workmen are benefited by increased means of obtaining employment and subsistence; and the rest of the public are benefited by the production of articles of trade or commerce.

The public utility of an invention is a condition required by the Common Law (independent of the Statute of Monopolies) in order to make the invention a proper subject of a grant by patent.

Thus in the case of monopolies, *Darcy v. Allin (m)*, it is laid down that where a man brings into the realm any new trade, and that for the good of the realm, the King may grant

(i) Per Lord Eldon, L. C., in *Harmer v. Playne*, 14 Ves. 131, 136.

(k) See also the observations in the first Chapter, *ante*, p. 3; respecting the necessity of utility in an invention in

order to make it the subject of a valid patent privilege.

(l) *Ante*, s. 1, p. 77.

(m) *Noy. R.* 182.

Useless invention no consideration for a patent.

The art made the subject of a privilege must be useful.

Subject of privilege usually called an invention.

Utility required by common law.

Case of Monopolies.

him a monopoly for a reasonable time, "in consideration of the good that he doth bring by his invention to the commonwealth: otherwise not."

Shepp. Abr.

In Sheppard's Abridgment (*n*), it is laid down that the King may for a reasonable time grant a monopoly patent of a new trade or device; or any new engine tending to the furtherance of it, *for the good of the realm*.

Statute of Monopolies made no change in this respect.

The Statute of Monopolies (*o*) did not make any change in the law in this respect, and accordingly we shall see that there are numerous cases determined since the passing of that statute, which decide that an invention must be useful in order to be made the subject of a valid patent privilege. The 6th section of the statute, which saves the prerogative of the Crown to make these grants, does not mention utility, but requires that such grants of privilege shall not be "contrary to the law, nor mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient." It is clear that the intention of the statute was not only to confine the prerogative of the Crown within the express limits defined by the 6th section, but also to preserve all the other provisions (*p*) of the Common Law inviolate; for the 6th section of the Act concludes by declaring that such grants shall be of the same force as if the Act had not passed, and of no other. And as the Common Law, which prior to the making of the statute, required an invention to be useful in order to be the subject of a valid grant by patent, yet remains in full force, the grant of the sole use of an invention of no public utility, would clearly be contrary to the Common Law; and contrary to law within the meaning of the statute. Every case therefore which has been determined since the passing of the statute, respecting the utility of an invention, is a decision respecting the Common Law on the subject.

Coke's commentary on the Statute of Monopolies.

Commenting upon the words, "mischievous to the state by raising prices of commodities at home," in sec. 6 of the Statute of Monopolies, *Sir Edward Coke* says (*q*), that "In every such new manufacture as deserves a privilege there must be *urgent*

(*n*) Part III. p. 61.

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

(*p*) The whole statute is clearly de-

claratory of the Common Law.

(*q*) 3 Inst. 184.

necessitas and *evidens utilitas*." And he further states that the reason why such a privilege is good in law, is "because the inventor bringeth to und for the commonwealth, a new manufacture by his invention, costs and charges, and therefore it is reason that he should have a privilege for his reward (and the encouragement of others in the like) for a convenient time.

In the case of *The King v. Arkwright* (r), which was a *scire facias* to repeal a patent for an invention, Mr. Justice *Buller* held, that it was a question for the jury whether the only new part of the machinery described in the specification was *material or useful*, and that if they were of opinion that it was not so, the patent was void. The jury found a verdict for the Crown; and although the defendant moved for a new trial on other grounds, no objection was made against the law upon this point as laid down by Mr. Justice *Buller* at the trial. R. v. Arkwright.

So in the case of *Boulton and Watt v. Bull* (s), Mr. Justice *Rooke* said, that the public had a right to receive a *meritorious consideration* in return for the protection which the patent claims. Boulton v. Bull.

In the case of *Turner v. Winter* (t), Mr. Justice *Ashurst* laid it down as law, that a patent would be contrary to law, were it not for *the advantages which the public derive* from the communication of the invention. Turner v. Winter.

In the case of *Manton v. Parker* (u), Lord Chief Baron *Thomson* held, that the plaintiff's patent was void on the ground of *the utility of the invention having failed*, and nonsuited the plaintiff. Manton v. Parker.

So in the case of *Manton v. Manton* (x), Lord Chief Justice *Gibbs* held, that in order to support a right to the exclusive enjoyment of a patent, it is necessary that the party who takes out the patent should show that the invention is *useful to the public*. Manton v. Manton.

And in *Bovill v. Moore* (y), the same learned Judge held, that it was necessary that the plaintiff should prove that his invention was useful. Bovill v. Moore.

(r) Dav. P. C. 138.

(s) 2 H. Bl. 163; Dav. P. C. 162.

(t) 1 T. R. 602; Dav. P. C. 151.

(u) Dav. P. C. 327.

(x) *Ibid.* 333.(y) *Ibid.* 399.

Huddart v.
Grimshaw.

In the case of *Huddart v. Grimshaw* (z), Lord *Ellenborough*, C. J., held, that in order to support a patent, the invention ought to be *beneficial to the public*.

Brunton v.
Hawks.

In the case of *Brunton v. Hawks* (a), Lord Chief Justice *Abbott* left it to the jury to say whether the invention was useful. And in the case of *Russell v. Cowley* (b), in the Court of Exchequer, Lord *Lyndhurst*, C. B., said that the first question respecting the invention was, whether it was new and *useful*; and the rest of the Court fully concurred in opinion with his Lordship.

Hill v.
Thompson.

In the case of *Hill v. Thompson* (c), Lord *Eldon*, L. C., cited with approbation the ruling of Lord Chief Justice *Dallas* at *Nisi Prius*, that an invention must be useful. So in *Minter v. Wells* (d), Mr. Baron *Alderson* held, that in order to establish his patent, a patentee must show that his invention was useful. And the same learned Judge, in *Morgan v. Seaward* (e), in his address to the jury said, that if the invention was useful it was a subject to be protected by patent; but if it was of no use, then it was not a subject to be protected by patent.

Minter v.
Wells.

Morgan v.
Seaward.

Neilson v.
Harford.

In the case of *Neilson v. Harford* (f), the Court of Exchequer held, that to make the patent valid, a machine constructed according to the invention must be one *beneficial to the public*.

Crane v. Price.

And in the case of *Crane v. Price* (g), the Lord Chief Justice *Tindal*, in delivering the judgment of the Court of Common Pleas, said, (speaking of the labour, pains, and expense incurred by the plaintiff in bringing his invention to perfection,) "If the invention be new and *useful to the public*, it is not material whether it be the result of long experiments and profound research, or whether by some sudden and lucky thought, or mere accidental discovery."

Utility appears
by the patent to

These authorities clearly establish the law to be, that an invention must be useful to the public, in order to make it a good subject of a privilege granted by letters patent. And utility is not only required by law, but appears upon the face

(z) Dav. P. C. 265.

(a) See 4 B. & Ald. 541.

(b) 1 Webs. R. 467.

(c) 3 Mer. 622.

(d) 1 Webs. R. 129.

(e) 2 M. & W. 544.

(f) 8 M. & W. 806; 1 Webs. 331.

(g) 4 M. & G. 580; 1 Webs. R. 393, S. C.

of every patent to be the consideration or motive for the Queen making the grant. For we have seen (*h*), that the recital contained in patents for inventions concludes with these words, "and we being willing to give encouragement to all arts and inventions which may be for the public good, are graciously pleased to condescend to the petitioner's request." It is evident, therefore, that the Queen always intends that the patentee shall give to the public, as a consideration for a grant of this description, some art or invention which shall be for the public good, or in other words, useful to the public.

It has already been shown (*i*), that, if the consideration which the Queen intends to have for such a grant fails, the patent is wholly void. And if it should appear that an invention which is made the subject of a grant by patent is of no utility to the public, then there was no consideration for the making of the grant, and the patent is for that reason entirely void.

The law, however, only requires an invention to be of some utility, and if it is of any use to the public, that is sufficient, provided the Crown does not appear to have been deceived as to the extent of the utility of the invention. Thus, in the case of *Morgan v. Seaward* (*k*), at Nisi Prius, Mr. Baron Alderson held that it was not for the jury to consider to what extent the invention was useful, and that it was sufficient if the invention was of any use. And one part of the invention being an improvement in steam-engines, his Lordship was of opinion that if the new engine was of a different construction from any other steam-engine, and of any use to the public, the utility would be sufficient to support the patent.

So in the case of *Haworth v. Hardcastle* (*l*), which was an action for infringing a patent for an invention of machinery for taking up calicoes, muslins, linens, and other similar fabrics, for the purposes of drying, Mr. Justice Alderson, at Nisi Prius, directed the jury that it was sufficient if the invention was of any use, and the Court of Common Pleas held the direction to be right. The jury, in that case, found that the invention was useful upon the whole, but that the machine was

(*h*) *Ante*, Chap. IV. pp. 47, 48.

(*i*) *Vide ante*, Chap. IV. p. 48.

(*k*) 1 Webs. R. 172, 186.

(*l*) 1 Bing. N. C. 182; 4 Mo. & Sc. 720, S. C., and *vide ante*, Chap. I.

not useful in some cases for taking up goods. And the Court of Common Pleas held (*m*), that this did not invalidate the patent, and therefore discharged a rule nisi for a new trial.

Lewis v.
Marling.

If part of an invention not described as essential turns out to be unnecessary, the want of utility in that part will not avoid the patent.

In the case of *Lewis v. Marling* (*n*), it appeared at the trial at Nisi Prius, that the patent was for an invention of improvements in machines for shearing woollen cloths. One part of the invention described in the specification was a plush brush for raising the wool, which was afterwards found to be unnecessary, and was never used. It was objected, on the part of the defendant, that the patent was void on the ground of the brush being wholly useless; but Lord *Tenterden*, C. J., held that as the patentee did not claim the brush as an essential part of the machine, the want of utility in the brush did not invalidate the patent. This case afterwards came before the Court of King's Bench, upon a motion for a new trial, and the Court laid down the law in precisely the same terms as Lord *Tenterden* had at Nisi Prius. Lord *Tenterden*, C. J., said, "It does not appear that the patentee says the brush is an essential part of the machine, although he claims it as an invention. When the plaintiffs applied for the patent, they had made a machine to which the brush was affixed; but before any machine was made for sale, they discovered it to be unnecessary. I agree that if the patentee mentions that as an essential ingredient in the patent article which is not so, nor even useful, and whereby he misleads the public, his patent may be void; but it would be very hard to say that this patent should be void because the plaintiffs' claim to be the inventors of a certain part of the machine not described as essential, and which turns out not to be useful." Mr. Justice *Bayley* said, "At the period when this specification was made, the plush (brush) was in use, and there is no reason to believe that this patentee did not think it was a useful part of the machine. His patent is for an instrument, where something of that kind was always thought material, and I am of opinion that the subsequent discovery that the plush was unnecessary, is no objection to the validity of the patent. If the party knew that it was unnecessary, the patent would be bad, on the ground that this was a deception; but if he

(*m*) 1 Bing. N. C. 182; 4 Mo. & Sc. 720, S. C.

(*n*) 4 C. & P. 52; 10 B. & C. 22, S. C.

thought it was proper, and only by a subsequent discovery finds out that it is not necessary, I think that it forms a ground of objection."

And in the case of *Morgan v. Seaward* (o), Mr. Baron *Parke* said, in delivering the judgment of the Court of Exchequer, we do not mean to intimate any doubt as to the validity of a patent for an entire machine or subject, which is, taken altogether, *useful*, though a part or parts may be useless; *always supposing that such patent contains no false suggestion.*

But if there are several distinct inventions comprised in a patent, then it is clear that *each* invention must be of *some* utility to the public, or the *whole* grant will be void.

Thus, in the case of *Morgan v. Seaward* (p), at *Nisi Prius*, it appeared that the invention consisted of improvements both in steam-engines and in machinery for propelling vessels. The defendants having pleaded that the invention was of no use, Mr. Baron *Alderson*, in his charge to the jury, said that they could not find a verdict for the plaintiffs unless they were satisfied that both the steam-engine and the machinery for propelling vessels were useful.

The reason for this is stated very clearly by Lord Chief Justice *Dallas*, in the case of *Hill v. Thompson* (q), to be, "That if any part of the alleged discovery, being a material part, fail, (the discovery in its entirety forming one entire consideration,) the patent is altogether void." And the same law was laid down (as to novelty) by the Court of Queen's Bench, in the case of *Brunton v. Hawks* (r).

And if any material part of the representation or suggestion which appears by a patent to have been made in the petition to the Crown, respecting the utility of the invention, shall fail or be untrue, the consideration fails in part, and the grant is totally void (s); and that not only on the ground of the partial failure of the consideration, but because the representation being false the Queen was deceived in her grant (t).

Thus in the case of *Turner v. Winter* (u), in which it ap-

(o) 2 M. & W. 563.

(p) 1 Webs. R. 172.

(q) 8 Taunt. 375; 2 B. Mo. 448, S.C.

(r) 4 B. & Ald. 541.

(s) *Bloxam v. Elsee*, 6 B. & C. 178.

(t) *Morgan v. Seaward*, 2 M. & W. 561.

(u) 1 T. R. 602; Dav. P. C. 145, S. C.

Morgan v. Seaward.

Each invention comprised in a patent must be useful.

Morgan v. Seaward.

Hill v. Thompson.

Misrepresentation respecting utility awards a patent.

Turner v. Winter.