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THE
LAW AND PRACTICE
RELATING TO
PATENTS, TRADE MARKS
AND
DESIGNS

BY
DAVID FULTON
OF THE MIDDLE TEMPLE AND NORTHERN CIRCUIT
BARRISTER-AT-LAW
(Assoc. Mem. Inst. Civil Engineers)

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PREFACE TO THE THIRD EDITION.

SINCE the last Edition of this book was published

The Patents Act of 1902 has been passed, and new Patent Rules have been issued. In the present Edition those portions of the work which have been affected have been re-written and all changes in the Law and Rules have been carefully noted. The successive Statutes from 1883 to 1902 have been codified and consolidated—the respective sections of the amending Acts being interpolated in different type at the appropriate places, and the same plan has been adopted in printing the Rules.

As in former Editions, the contents have been arranged in their relative order of importance. PART I. relates to Patents; PART II. to Trade Marks; and PART III. to Designs. The corresponding Rules are printed at the end of each division.

Over three hundred additional Cases are cited, some of them of considerable importance.

A separate and independent Index has been prepared for each division, so as to facilitate reference.

The publication of this Edition has been delayed in order that all available information upon the practical working of the new system of Examination of Patent Applications (which came into force on the 1st of January, 1905), might be included. Many apprehensions as to the possibly hurtful effects of that system have been set at rest by the careful and discriminating use of their powers by the Patent Office authorities, and there is little doubt that the beneficial effects of this portion of the Statute of 1902 will in time become apparent even to those who were opponents of the innovation.

The Author has again to acknowledge his obligation to the learned Comptroller-General of Patents, C. N. DALTON, Esq., C.B., and to RALPH GRIFFIN, Esq., the learned Registrar of Trade Marks, for much valuable information and assistance.

DAVID FULTON.

1 GARDEN COURT, TEMPLE,

June, 1905.

CONTENTS.

TABLES OF CASES CITED:		PAGE
PART I.—Patents		xi
PART II.—Trade Marks		xxxii
PART III.—Designs		xlii
KEY TO ABBREVIATED REFERENCES TO REPORTS		xliv
INTRODUCTION		1

PART I.—PATENTS.

CHAPTER

I. The Origin and History of Patent Law.—The Patent Law Amendment Act, 1852.—The Patents, Designs, and Trade Marks Acts, 1883 to 1902	3
II. Procedure in Obtaining Patents	13
III. Who may be a Patentee	22
IV. Subject-Matter of Patents	26
V. Essentials in Subject-Matter: Invention	55
VI. Essentials in Subject-Matter: Novelty	60
VII. Essentials in Subject-Matter: Novelty as Affected by Prior User	64
VIII. Essentials in Subject-Matter: Novelty as Affected by Prior Publication	68
IX. Remaining Essential in Subject-Matter: Utility	72
X. The Specification: Title	75
XI. The Provisional Specification	77
XII. The Complete Specification	80
XIII. Claims	93
XIV. Opposition to Grant of Patent	105
XV. Sealing of the Patent: Nature of the Property so Created	128
XVI. Amendment of Specification	134
XVII. Action for Infringement	146

PART I.—PATENTS—continued.

CHAPTER	PAGE
XVIII. Revocation of Patents	174
XIX. Action to Restrain Threats	181
XX. Prolongation of Patents	188
XXI. Assignments of Patents	196
XXII. Licences: Compulsory Licences	200
XXIII. Agreements	212
XXIV. The Register of Patents	214
XXV. Miscellaneous: Offences and Penalties: Patent Medicines: Patent Agents	219
XXVI. Foreign and Colonial Patents, and the International Convention	223
PATENT RULES, 1903 to 1905 (CONSOLIDATED)	229
SCHEDULE I.—List of Fees payable on and in connection with Letters Patent	252
SCHEDULE II.—List of Forms	254
„ Text of Patent Grant	255

PART II.—TRADE MARKS.

CHAPTER	PAGE
I. Introduction	257
II. On the Nature and Definition of a Trade Mark	261
III. Procedure in Registering a Trade Mark	293
IV. Rectification of Register by the Removal or Limitation of Registered Marks	302
V. Transfer and Devolution of Trade Marks	315
VI. Action for Infringement	318
VII. Common Law Trade Marks, Trade Names, and the Action for “Passing Off”	332
VIII. Criminal Prosecution: The Merchandise Marks Acts, 1887, 1891, and 1894	354
TRADE MARKS RULES, 1890 to 1898 (CONSOLIDATED)	362
SCHEDULE I.—Fees	379
SCHEDULE II.—Forms	381
SCHEDULE III.—Classification of Goods	382

PART III.—COPYRIGHT IN DESIGNS.

CHAPTER	PAGE
I. Introduction	387
II. Procedure in Registering Designs	391
III. Persons Qualified to Register and to be Registered as Proprietors	399
IV. Subject-Matter of Designs	402
V. Novelty	412
VI. Marking the Goods	416
VII. Action for Infringement	421
DESIGNS RULES, 1890 to 1898 (CONSOLIDATED)	438
SCHEDULE I.—Fees	447
SCHEDULE II.—Forms	448
SCHEDULE III.—Classification of Articles of Manufacture and Substances	449

APPENDIX A.

INTERNATIONAL CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY (1883), AS AMENDED 14TH DECEMBER, 1900 (CONSOLIDATED)	450
FINAL PROTOCOL TO INTERNATIONAL CONVENTION	456

APPENDIX B.

PRECEDENTS OF AGREEMENTS, ASSIGNMENTS, LICENCES, MORTGAGES, &c.

FORM	
Introductory	458
1. Agreement Prior to Application for Patent	458
2. Agreement to Acquire Half Share of Intended Patent	461
3. Agreement Defining Interests of Joint Inventors	463
4. Agreement for Purchase after Issue of Patent	465

APPENDIX B.—continued.

FORM	PAGE
5. Agreement for Sale to Trustee	466
6. Absolute Assignment of Patent	468
7. Assignment of Half Share of Patent	469
8. Assignment of a Patent to Trustees	471
9. Non-exclusive Licence in Consideration of Royalties to be Paid Half-yearly	474
10. Exclusive Licence for a Single County at Rent and Royalties	476
11. Notice by Licensor to Terminate Licence	480
12. Mortgage of a Patent	480

APPENDIX C.

**THE PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883 to 1902
(CONSOLIDATED).**

	PAGE		PAGE
Arrangement of Sections	483	PART III.—Designs	514
PART I.—Preliminary	489	PART IV.—Trade Marks	520
PART II.—Patents	489	PART V.—General	533

INDEXES.

PART I.—PATENTS	549
PART II.—TRADE MARKS	616
PART III.—DESIGNS	651

TABLES OF CASES CITED.

PART I.—PATENTS.

	PAGE
A. B.'s Application, [1902] 19 R. C. P. 403, 556 (<i>Collusive Opposition</i>)	127, 128, 227
Abel's Patent, <i>Re</i> , [1881] Lawson, 3rd Ed., p. 73 (<i>Gas Engine</i>)	135
Acetylene Co. v. Midland Syndidato, [1900] 17 R. P. C. 534 (<i>Metallic Carbides</i>)	170
Acetylene Co. v. United Alkali Co., [1904] 22 R. P. C. 152 (<i>Metallic Carbides</i>)	42, 45, 168, 170
Aukroyd v. Thomas, [1904] 21 R. P. C. 737 (<i>Lamp</i>)	53, 96
Action Gesellschaft v. Temler, [1900] 18 R. P. C. 6 (<i>Cardboard Bores</i>)	196
Adair's Patent, [1881] L. R. 6; App. Cas. 176 (<i>Pumps</i>)	192
Adam's Patent, [1898] 16 R. P. C. 1 (<i>Fanlights</i>)	189
Adams v. Stevens, [1898] 16 R. P. C. 225 (<i>Fanlights</i>)	84
African Gold Co. v. Sheba Co., [1897] 14 R. P. C. 660 (<i>Gold Extraction</i>)	201
Ainsworth's Patent, [1895] 13 R. P. C. 76 (<i>Curling Hair</i>)	138
Airey's Patent, [1888] 5 R. P. C. 348 (<i>Automatic Machine</i>)	107
Allen v. Duckett, [1893] 10 R. P. C. 397 (<i>Closet Pipe</i>)	85
Allen v. Oates, [1898] 15 R. P. C. 298 (<i>Closet Pipe</i>)	168
Allen's Patent, [1885] Good. O. C. 64; Griff. A. P. C. 3 (<i>Closet Pipe</i>)	139, 145
Allison's Patent, [1898] 15 R. P. C. 408; [1900] 17 R. P. C. 513 (<i>Duplicator</i>)	138, 142, 143
American Braided Wire Co. v. Thomson, [1889] 6 R. P. C. 518; [1890] 7 R. P. C. 152; L. R. 44 Ch. D. 274 (<i>Bustles</i>)	41, 44, 58, 59, 73, 166
American Steel Co. v. Glover, [1902] 19 R. P. C. 111 (<i>Rail-bonds</i>)	168
Anglo-American Brush Co. v. King, Brown, [1892] 9 R. P. C. 313; A. C. 367 (<i>Electric Generator</i>)	70
Anti-Vibration Light Co. v. Crossley, [1904] 22 R. P. C. 157 (<i>Lamp Support</i>)	172
Appleby's Chain Co. v. Eadie, [1899] 16 R. P. C. 318 (<i>Driving Chains</i>)	184, 186

	PAGE
Armstrong's Patent, [1897] 14 R. P. C. 747 (<i>Propeller</i>) . . .	141
Arnot v. Dunlop, [1904] 22 R. P. C. 105 (<i>Driving Aprons</i>) . . .	58
Ashworth's Patent, [1886] Good. O. C. 66; Griff. A. P. C. 6 (<i>Wire Cards</i>)	136
Ashworth v. English Card Co., [1902] 19 R. P. C. 470, 21 R. P. C. 353 (<i>Wire Cards</i>)	47, 161, 167
Ashworth v. Roberts, [1890] 7 R. P. C. 451; L. R. 45 Ch. D. 623 (<i>Wire Cards</i>)	33, 162
Automatic Machine Co. v. Combined Machine Co., [1889] 6 R. P. C. 367 ((<i>Coin-freed Machine</i>))	185
Automatic Machine Co. v. Fearby, [1893] 10 R. P. C. 442 (<i>Coin-freed Machine</i>)	52
Automatic Machine Co. v. National Exhibitions Association, [1891] 9 R. P. C. 41, 345 (<i>Coin-freed Machine</i>)	39, 52, 170
Automatic Retort Co. v. Mayor of Salford, [1897] 14 R. P. C. 450 (<i>Retorts</i>)	166
Automatic Weighing Machine Co. v. Knight, [1889] 6 R. P. C. 297 (<i>Coin-freed Machine</i>)	51, 99
Automatic Weighing Machine Co. v. International Society, [1889] 6 R. P. C. 475 (<i>Coin-freed Machine</i>)	169
Avery's Patent, [1887] 4 R. P. C. 152, 322 (<i>Generating Gas</i>) . . .	176, 179
Badische Anilin Fabrik v. Levinstein, [1887] 4 R. P. C. 449 (<i>Dyes</i>) . .	43, 47
Badische Anilin Fabrik v. Société Chimique, [1897] 14 R. P. C. 875 (<i>Dyes</i>)	158, 170
Badische Anilin Fabrik v. Thompson, [1904] 21 R. P. C. 473 (<i>Dyes</i>) . .	158
Bailey's Application, [1884] Griff. P. C. 269; Good. O. C. 25 (<i>Door Knobs</i>)	110, 114, 115
Bailey v. Robertson, [1878] 3 App. Cas. 1055; Good. P. C. 26 (<i>Preserving Meat</i>)	81
Baird v. Moule, [1876] L. R. 17 Ch. D. 139 (<i>Earth Closets</i>) . . .	159
Bairstow's Application, [1888] 5 R. P. C. 286; Good. O. C. 15 (<i>Weaving</i>)	115
Bamlett v. Picksley, [1875] Griff. P. C. 40 (<i>Reaping Machines</i>) . .	42
Barcroft v. Smith, [1896] 14 R. P. C. 172 ("Ageing" Machine) . .	164
Barff & Bower's Patent, [1895] 12 R. P. C. 383 (<i>Rustless Iron</i>) . .	193, 194
Barrett v. Day, [1890] 7 R. P. C. 54 (<i>Bottle Opener</i>)	183

	PAGE
Baxter v. Marsden, [1904] 22 R. P. C. 18 (<i>Stone Breaker</i>) . . .	57
Bayer v. Connell, [1897], 14 R. P. C. 275 (<i>Irish Jurisdiction</i>) . . .	217
Beavis v. Rylands, [1900] 17 R. P. C. 704 (<i>Bottle Stopper</i>) . . .	56
Beck and Justice's Patent, [1886] Good. O. C. 72; Griff. A. P. C. 10 (<i>Exhaust Nozzle</i>)	136
Bell's Patent, [1887] Good. O. C. 13; Griff. A. P. C. 10 (<i>Vestas</i>) . . .	140
Benno Jaffé v. Richardson, [1893] 10 R. P. C. 136 (<i>Lanoline</i>) . . .	162
Berchom v. Wren, [1904] 21 R. P. C. 683 (<i>Drain Valve</i>)	197
Betts v. De Vitre, [1864-73] L. R. 3 Ch. 429; L. R. H. L. 319 (<i>Capsules</i>)	148
Betts' Patent, [1862] Good. P. C. 548	189
Betts v. Menzies, [1857-62] 10 H. L. Cas. 117; Good. P. C. 45 (<i>Capsules</i>)	64
Birch v. Harrop, [1896] 13 R. P. C. 615 (<i>Sewing Machine</i>)	36
Birmingham Tyre Syndicate v. Reliance Co., [1900] 17 R. P. C. 277 (<i>Tyres</i>)	138, 158
Bishop v. Inman, [1900] 17 R. P. C. 749 (<i>Paper Boxes</i>)	185, 186
Blakey v. Latham, [1889] 6 R. P. C. 184 (<i>Boot Protectors</i>)	56, 58
Blank v. Footmann, [1888] 5 R. P. C. 653 (<i>Design</i>)	65
Bloxam v. Elseo, [1825-27] 1 C. & P. 558; 1 Web. P. C. 132 (<i>Paper Making</i>)	23
Borrowman's Patent, [1902] 19 R. P. C. 159	179
Booth v. Kennard, [1856-57] 26 L. J. Ex. 23, 305; Good. P. C. 68 (<i>Gas</i>)	51, 59
Boulton v. Bull, [1795] 2 H. Bl. 463; 3 Ves. 140; Good. P. C. 70; Dav. Pat. Cas. 162 (<i>Steam Condenser</i>)	27, 50, 53
Bovill v. Crate, [1865] L. R. 1 Eq. 388 (<i>Flour Making</i>)	152
Bowden Syndicate v. Herbert Smith, [1904] 21 R. P. C. 438 (<i>Brake</i>) . . .	151
Bowden's Patent, [1904] 22 R. P. C. 49 (<i>Transmitting Power</i>)	96
Bower v. Hodges, [1853] 22 L. J. C. P. 194 (<i>Pipes</i>)	200
Bown v. Sansom, [1888] 5 R. P. C. 510 (<i>Bicycle Bearings</i>)	163
Boyd v. Farrer, [1887] 5 R. P. C. 33 (<i>Yarn Doubling</i>)	155
Boyd v. Tootal Broadhurst, [1894] 11 R. P. C. 175 (<i>Yarn Doubling</i>) . . .	166
Brand's Application, [1895] 12 R. P. C. 102 (<i>Galvanizing</i>)	108
Bridge's Application, [1901] 18 R. P. C. 257 (<i>Sliding Partitions</i>) . . .	124
Britain v. Hirsch, [1888] 5 R. P. C. 226 (<i>Toy</i>)	56

	PAGE
British Dynamite Co. v. Krebs, [1879] 13 R. P. C. 190; Good. P. C. 88	
(<i>Explosives</i>)	61, 86
British Motor Syndicate v. Andrews, [1901] 18 R. P. C. 85	
(<i>Gas Motors</i>)	101
British Motor Syndicate v. Taylor, [1900] 17 R. P. C. 723	
(<i>Gas Motors</i>)	146
British Mutoscope Co. v. Homer, [1901] 18 R. P. C. 177 (<i>Mutoscope</i>)	148, 201
Brooks v. Lamplugh, [1897] 14 R. P. C. 597; 15 R. P. C. 33	
(<i>Cycle Saddles</i>)	81, 157
Brooks v. Lycett, [1904] 21 R. P. C. 651 (<i>Cycle Saddles</i>) .	139, 141, 142
Brooks v. Steele, [1896] 14 R. P. C. 46 (<i>Cycle Saddles</i>) .	163
Brown v. Hastie, [1904] 22 R. P. C. 85 (<i>Steering Engines</i>) .	52
Brunton v. Hawkes, [1820] 4 B. & Ald. 541; Good. P. C. 97	
(<i>Anchors</i>)	35, 61
Bunge v. Higginbottom, [1901] 18 R. P. C. 201 (<i>Sifting Machine</i>) .	39
Burlingham's Patent, [1898] 15 R. P. C. 195 (<i>Chaff Machine</i>) .	194
Burroughs Wellcome, Re, [1904] 22 R. P. C. 164 (<i>Trade Marks</i>) .	167
 Campion v. Benyon, [1821] 6 B. Moo. 71; Good. P. C. 103 (<i>Canvas</i>)	 76
Carez's Application, [1889] 6 R. P. C. 552	22
Carter v. Leyson, [1901] 18 R. P. C. 508 (<i>Candlesticks</i>) .	82
Cartwright v. Amatt, [1799] 2 Bos. & P. 43 (<i>Wool Combing</i>) .	196, 213
Case v. Cressy, [1901] 18 R. P. C. 419 (<i>Shore Groynes</i>) .	57
Cassel Gold Co. v. Cyanide Syndicate, [1895] 12 R. P. C. 232	
(<i>Obtaining Metals</i>)	62, 73
Castner-Kellner v. Commercial Co., [1900] 17 R. P. C. 593 (<i>Electric</i>	
<i>Decomposition</i>)	81
Cera Light Co. v. Dobbie, [1892] 11 R. P. C. 10 (<i>Lamps</i>) .	81
Challender v. Royle, [1887] 4 R. P. C. 363; L. R. 36 Ch. D. 425	
(<i>Taps</i>)	182, 183, 185
Chamberlain v. Mayor of Bradford, [1903] 20 R. P. C. 673 (<i>Electricity</i>	
<i>Meters</i>)	27, 51, 99, 168, 171
Chamberlain v. Mayor of Huddersfield, [1901], 18 R. P. C. 454	
(<i>Electricity Meters</i>)	168
Chambers v. Crickley, [1864] 33 Beav. 374; Good. P. C. 112	
(<i>Stores</i>)	165

	PAGE
Chanter v. Dewhurst, [1844] 12 M. & W. 823; 13 L. J. Ex. 198	
(Furnaces)	201
Chatwood's Patent, [1899] 16 R. P. C. 370 (Safes)	143, 179
Cheetham v. Nuthall, [1893] 10 R. P. C. 321 (Hats)	202
Chemische v. Badische Anilin Fabrik, [1904] 21 R. P. C. 539	150
Churches' Patents, [1886] 3 R. P. C. 95 (Piston Packing)	135, 185, 192
Chollett v. Hoffman, [1857] 7 El. & B. 686; Good. P. C. 115	151
Clark's Patent, [1899] 16 R. P. C. 433 (Retorts)	189
Clifton's Patent, [1904] 21 R. P. C. 515	180
Cochrane v. Smethurst, [1816] Good. P. C. 124 (Public Lighting)	76
Cocking's Patent, [1885] 2 R. P. C. 151 (Splints)	193
Codd v. Bratby, [1884] 1 R. P. C. 209 (Bottle Stoppers)	142
Cole v. Saqui, [1888] 5 R. P. C. 489 (Toys)	72
Colley v. Hart, [1890] 7 R. P. C. 101 (Toilet Paper)	185, 186
Cooper's Application, [1901] 19 R. P. C. 53 (Newspaper)	15
Combined Weighing Co. v. Automatic Co., [1889] 6 R. P. C. 502	
(Coin-freed Machine)	183
Compagnie Générale &c., [1891] 8 R. P. C. 446 (Service)	217
Corrigall v. Armstrong, [1903] 20 R. P. C. 523 (Ordnance)	144
Continental Gas Glühlicht Petition, [1898] 15 R. P. C. 727 (Incandescent Burner)	206
Cooper v. Baedeker, [1899] 16 R. P. C. 363 (Bicycle Handles)	58
Cornish v. Keene, [1835-7] Good. P. C. 127 (Elastic Fabrics)	65
Cowie v. Herbert, [1897] 14 R. P. C. 436 (Scotch Jurisdiction)	217
Crampton v. Patents Co., [1888] 5 R. P. C. 380 (Electric Bells)	183
Crane v. Price, [1842] 1 Web. P. C. 393; 12 L. J. C. P. 81; 4 M. & G. 580; Good. P. C. 131 (Iron Smelting)	27, 47, 57
Crist's Application, [1903] 20 R. P. C. 475 (Switchback)	124, 125
Crompton v. Anglo-American Co., [1887] 4 R. P. C. 200 (Dynamo)	156
Cropper v. Smith, [1884] 1 R. P. C. 81; 26 Ch. D. 700; 10 App. Cas. 249; 2 R. P. C. 17 (Lace Machine)	61, 92, 165
Crossley v. Beverley, [1829] 3 C. & P. 513; Good. P. C. 136; 9 B. & C. 63 (Gas Manufacture)	86, 165
Crossley v. Dixon, [1863] 10 H. L. Ca. 293 (Looms)	201, 202

	PAGE
Cumming's Application, [1884] Griff. P. C. 277 (<i>Bracelets</i>) . . .	119
Currie and Timmis's Petition, [1897] 15 R. P. C. 63 (<i>Signals</i>) . . .	192
Curtis v. Platt, [1863-4] 35 L. J. Ch. 852; 11 L. T. N. S. 245; Good. P. C. 144 (<i>Spinning Mules</i>)	33
Daniel's Application, [1888] 5 R. P. C. 413 (<i>Kettles</i>)	107
David and Woodley's Application, [1886] Griff. A. P. C. 26; Good. O. C. 32 (<i>Sewing Machines</i>)	24, 118
Davies's Petition, [1893] 11 R. P. C. 27 (<i>Feed Water Injector</i>) . . .	194
Daw v. Eley, [1865-7] L. R. 3 Eq. 496; Good. P. C. 160 (<i>Cartridges</i>)	66, 165
Day v. Davies, [1904] 22 R. P. C. 24 (<i>Oil Engine</i>)	73, 150
Deeley's Patent, [1895] 12 R. P. C. 192 (<i>Gun Mechanism</i>)	34, 179
Deeley v. Perkes, [1896] 13 R. P. C. 581 (<i>Gun Mechanism</i>)	143
De Falbe, <i>Re</i> ; Ward v. Taylor, [1901] 1 Ch. D. 523	166
Dege's Patent, [1895] 12 R. P. C. 448 (<i>Breeches</i>)	175
De La Rue v. Dickinson, [1857] 7 E. & B. 738; Good. P. C. 164 (<i>Copyright</i>)	162
Dellwik's Patent, [1896] 13 R. P. C. 591 (<i>Gas Burners</i>)	144
Dowrance v. Fletcher, [1899] 16 R. P. C. 150 (<i>Gauge Glasses</i>) . . .	65
Dick v. Ellam, [1900] 17 R. P. C. 196 (<i>Duplicator</i>)	95
Dolbear's Patent, [1896] 13 R. P. C. 203 (<i>Electrical Cables</i>) . . .	194
Dolland's Case, [1776] Good. P. C. 175 (<i>Object Glasses</i>)	65
Douglas v. Pintsch, [1896] 13 R. P. C. 673 (<i>Gas Buoys</i>)	183
Dover, Limited v. New Townend Co., [1904] 21 R. P. C. 135 (<i>Trade Mark</i>)	152
Dowling v. Billington, [1890] 7 R. P. C. 191 (<i>Wire Mattresses</i>) . . .	147
Dowson v. Drosophore, [1894] 11 R. P. C. 536; 12 R. P. C. 95 (<i>Humidifier</i>)	183, 184
Dredge v. Parnell, [1899] 16 R. P. C. 625 (<i>Cutting Fabrics</i>)	41
Duckett v. Whitehead, [1895] 12 R. P. C. 187, 376 (<i>Water Closets</i>) . . .	59
Dudgeon v. Thompson, [1877] L. R. 3 App. Cas. 34 (<i>Tube Expander</i>) . . .	152
Dunlop v. Actien Gesellschaft, [1902] 19 R. P. C. 46 (<i>Tyres</i>)	150
Dunlop v. British Car Co., [1901] 18 R. P. C. 313 (<i>Tyres</i>)	148
Dunlop v. Buckingham, [1901] 18 R. P. C. 423 (<i>Tyres</i>)	204

	PAGE
Dunlop v. Cresswell, [1901] 18 R. P. C. 473 (<i>Tyres</i>) . . .	204
Dunlop v. Excelsior, [1901] 18 R. P. C. 209 (<i>Tyres</i>) . . .	148
Dunlop v. Holborn Tyre Co., [1901] 18 R. P. C. 222 (<i>Tyres</i>) . . .	148
Dunlop v. Moseley, [1904] 21 R. P. C. 274 (<i>Tyres</i>) . . .	147
Dunlop v. Neal, [1899] 16 R. P. C. 247; [1899] 1 Ch. 807; 80 L. T. 746 (<i>Tyres</i>)	148
Duncan v. Wilson's Patent, [1884] 1 R. P. C. 257 . . .	189
Dunncliffe v. Mallet, [1859] 7 C. B. N. S. 209, 227 (<i>Lace</i>) . .	196, 199
Easterbrook v. Great Western Railway Co., [1885] 2 R. P. C. 201 (<i>Signals</i>)	72
Edison-Bell, Limited v. Columbia Phonograph Co., [1900] 18 R. P. C. 4 (<i>Phonograph</i>)	155
Edison-Bell, Limited v. Smith, [1894] 11 R. P. C. 389 (<i>Phonograph</i>)	99, 164, 166
Edison-Bell, Limited v. Waterfield, [1902] 19 R. P. C. 329 (<i>Phonograph</i>)	171
Edison-Swan v. Woodhouse, [1887] 4 R. P. C. 99 (<i>Electric Lamps</i>)	59, 66
Edison Telephone Co. v. India Rubber Co., [1881] L. R. 17 Ch. D. 137 (<i>Telephones</i>)	159
Edlin v. Pneumatic Tyre Agency, [1893] 10 R. P. C. 311 (<i>Tyres</i>) .	186
Edmond's Patent, [1889] 6 R. P. C. 355 (<i>Tool Holder</i>) . . .	178
Edmund's Application, [1886] Griff. P. C. 281; Good. O. C. 27 (<i>Telephone</i>)	117
Edward's Application, [1894] 11 R. P. C. 461 (<i>Tyres</i>) . . .	127
Ehrlich v. Ihlee, [1887] 4 R. P. C. 115; 5 R. P. C. 37, 198, 437 (<i>Musical Instrument</i>)	42, 73, 159, 160
Electric Construction Co. v. Imperial Tramway Co., [1899] 16 R. P. C. 631; 17 R. P. C. 537 (<i>Motor Car</i>)	62, 69, 92, 100
Electrolytic Co. v. Holland, [1901] 18 R. P. C. 521 (<i>Electroplating</i>) .	64, 66
Elmslie v. Boursier, [1869] L. R. 9 Eq. 217; 39 L. J. Ch. 328; Good. P. C. 190 (<i>Tinfoil</i>)	47
English and American Co. v. Union Boot Co., [1894] 11 R. P. C. 367 (<i>Boot Machine</i>)	156
Evans and Otway's Application, [1884] Griff. P. C. 279 (<i>Steam Engines</i>)	118
Evans v. Hoskins, [1904] 21 R. P. C. 675 (<i>Mattress</i>) . . .	172
Everitt's Application, [1886] Griff. A. P. C. 28 (<i>Electric Battery</i>) .	115

	PAGE
<i>Fabriques Chimiques v. Caspers</i> , [1897] 15 R. F. C. 94 (<i>Musk</i>)	170
<i>Fawcett v. Homan</i> , [1896] 13 R. P. C. 398 (<i>Fireproof Buildings</i>)	36, 171
<i>Fawcett's Application</i> , [1889] Good. O. C. 10 (<i>Fireproof Flooring</i>)	107
<i>Felton v. Greaves</i> , [1829] Good. P. C. 193 (<i>Sharpening Appliance</i>)	76
<i>Ferranti's Petition</i> , [1901] 18 R. P. C. 518 (<i>Electric Railways</i>)	189, 195
<i>Finch's Petition</i> , [1898] 15 R. P. C. 674 (<i>Bottle Stopper</i>)	193
<i>Fletcher's Patent</i> , [1893] 10 R. P. C. 252 (<i>Labelling Bottles</i>)	196, 215
<i>Fox v. Dellestable</i> , [1866] 15 W. R. 194; Good. P. C. 198 (<i>Umbrellas</i>)	30
<i>Foxwell v. Bostock</i> , [1863-4] 4 De G. J. & S. 77, 298; 9 L. T. N. S. 362, 528; 10 L. T. N. S. 144; Good. P. C. 200 (<i>Sewing Machine</i>)	38, 90
<i>Frearson v. Loe</i> , [1878] L. R. 9 Ch. D. 48; 26 W. R. 138 (<i>Screws</i>)	146
<i>Frentzell v. Dongill</i> , [1904] 21 R. P. C. 641 (<i>Traction</i>)	213
<i>Fuseo Vesta Co. v. Bryant & May</i> , [1887] 4 R. P. C. 71 (<i>Wax Vestas</i>)	142
<i>Gadd v. Mayor of Manchester</i> , [1892] 9 R. P. C. 249, 516 (<i>Gas Holders</i>)	43, 58, 82
<i>Gale's Patent</i> , [1891] 8 R. P. C. 438 (<i>Boiler Tube Stopper</i>)	176, 179
<i>Gandy v. Reddaway</i> , [1885] 2 R. P. C. 49 (<i>Belting</i>)	97
<i>Garnett's Application</i> , [1899] 16 R. P. C. 154 (<i>Tyre</i>)	125
<i>Garthwaite's Application</i> , [1886] Griff. P. C. 284 (<i>Poultry Food</i>)	118
<i>Geipel's Patent</i> , [1904] 21 R. P. C. 379 (<i>Steam Trap</i>)	179
<i>General Electric Co. v. Safety Lift Co.</i> , [1903] 21 R. P. C. 109 (<i>Motors</i>)	161
<i>Germ Milling Co. v. Robinson</i> , [1884] 1 R. P. C. 217; 3 R. P. C. 254 (<i>Milling</i>)	64, 160
<i>Gibson v. Brand</i> , [1841-2] 1 Web. P. C. 627; Good. P. C. 211; 11 L. J. C. P. 177 (<i>Silk</i>)	46, 89
<i>Glossop's Application</i> , [1884] Griff. P. C. 285; Good. O. C. 12 (<i>Steam Hammer</i>)	115
<i>Goddard v. Lyon</i> , [1894] 11 R. P. C. 354 (<i>Disinfecter</i>)	30, 36, 91
<i>Gormully and Jeffery, Re Dunlop</i> , [1899] 16 R. P. C. 641 (<i>Tyre</i>)	211
<i>Goucher v. Clayton</i> , [1864] Good. P. C. 214 (<i>Thrashing Machine</i>)	165
<i>Goulard and Gibbs's Patent</i> , [1888] 5 R. P. C. 189 (<i>Electricity</i>)	179
<i>Graham v. Eli</i> , [1898] 15 R. P. C. 259 (<i>Patent Agents</i>)	221

	PAGE
Green's Application, [1885] Griff. P. C. 286 (<i>Fuel Economisers</i>) .	126
Greenhalgh's Application, [1897] 14 R. P. C. 387 (<i>Garment Patterns</i>)	123
Guest and Barrow's Application, [1888] 5 R. P. C. 313; Good. O. C. 38 (<i>Velocipedes</i>)	121
Guilbert-Martin v. Kerr and Jubb, [1887] 4 R. P. C. 18 (<i>Steam Gauge</i>)	66
Guyot v. Thomson, [1894] 11 R. P. C. 541 (<i>Boilers</i>) . . .	202, 204
 Haddan's Patent, [1885] 2 R. P. C. 218; Good. O. C. 62; Griff. A. P. C. 12 (<i>Infants' Food</i>)	135, 177
Haggenmacher v. Watson, [1897] 14 R. P. C. 349, 631 (<i>Sifter</i>) .	65, 164
Halden v. Hall, [1904] 21 R. P. C. 609 (<i>Printing Photos</i>) . .	57
Hall v. Conder, [1857] 2 C. B. N. S. 22, 533; Good. P. C. 216 (<i>Boilers</i>)	197
Hall's Application, [1888] 5 R. P. C. 283 (<i>Leather</i>) . . .	123
Hamilton's Application, [1901] 19 R. P. C. 33 (<i>Printing</i>) . .	123
Hampton and Facer's Patent, [1887] Griff. A. P. C. 13; Good. O. C. 71 (<i>Casting Ingots</i>)	113, 137
Harmar v. Playne, [1807] Good. P. C. 219; 14 Ves. 130 (<i>Cropping Cloth</i>)	85
Harrild and Parkin's Application, [1900] 17 R. P. C. 617 (<i>Printing Machine</i>)	124
Harris v. Rothwell, [1886] 3 R. P. C. 243; 4 R. P. C. 225; L. R. 35 Ch. D. 416 (<i>Knitting Machine</i>)	69, 155
Harrison v. Anderston Foundry Co., [1876] L. R. 1 App. Cas. 574; Good. P. C. 222 (<i>Looms</i>)	38, 90, 94
Harwood v. Great Northern Railway Co., [1860-65] 2 B. & S. 194, 222; 11 H. L. Ca. 654; 31 L. J. Q. B. 198; 35 L. J. Q. B. 27; Good. P. C. 224 (<i>Fish-plate</i>)	42, 57
Haskell v. Hutchison, [1904] 21 R. P. C. 497 (<i>Golf Ball</i>) . .	185
Haslam Foundry Co. v. Goodfellow, [1887] 5 R. P. C. 28; L. R. 37 Ch. D. 118 (<i>Refrigerator</i>)	142
Haslam v. Hall, [1887] 4 R. P. C. 203; 5 R. P. C. 1 (<i>Refrigerator</i>)	61, 154, 170
Haslett v. Hutchinson, [1891] 8 R. P. C. 457 (<i>Motors</i>) . .	131, 214, 215
Hassall v. Wright, [1870] L. R. 10 Eq. 509; Good. P. C. 229 .	151
Hattersley v. Hodgson, [1904] 21 R. P. C. 517 (<i>Dobby</i>) . .	88, 138
Hattersley's Patent, [1904] 21 R. P. C. 233 (<i>Dobby</i>) . . .	137
Haythornthwaite's Application, [1890] 7 R. P. C. 70 (<i>Sprinklers</i>) .	119, 126

	PAGE
Hayward v. Hamilton, [1881] Griff. P. C. 115 (<i>Pavement Lights</i>) .	34, 57
Hazeland's Petition, [1894] 11 R. P. C. 467 (<i>Wood Planing</i>) .	192
Hazlehurst v. Rylands, [1891] 9 R. P. C. 1 (<i>Bottle Tap</i>) . .	57
Heald's Application, [1891] 8 R. P. C. 429; Good. O. C. 25 (<i>Gas Lamp</i>)	24, 118
Heath and Frost's Application, [1886] Griff. P. C. 288; Good. O. C. 13 (<i>Blasting Cartridges</i>)	115
Heath v. Smith, [1854] Good. P. C. 238 (<i>Steel Making</i>) . .	65
Heathfield v. Greenway, [1893] 11 R. P. C. 17 (<i>Coating Metals</i>) .	155, 156
Hedge's Application, [1895] 12 R. P. C. 136 (<i>Bottle Stopper</i>) .	124
Heidemann v. Smokeless Powder Co., [1898] 15 R. P. C. 305 (<i>Explosives</i>)	171
Heine v. Norden, [1904] 21 R. P. C. 513 (<i>Gas Lighter</i>) . .	152
Henderson's Petition, [1901] 18 R. P. C. 449 (<i>Aluminium</i>) .	189, 194
Henser v. Hardie, [1894] 11 R. P. C. 421 (<i>Training Machine</i>) .	154
Herrburger v. Squire, [1888] 5 R. P. C. 581; 6 R. P. C. 194 (<i>Piano</i>)	69, 182, 184, 185
Hetherington's Application, [1890] 7 R. P. C. 419 (<i>Carding Engine</i>)	126
Higgins' Application, [1891] 9 R. P. C. 74; Good. O. C. (1st Appendix) 33 (<i>Type Setting</i>)	117
Hill's Application, [1888] 5 R. P. C. 599; Good. O. C. 15, 42 (<i>Wire Rope</i>)	115, 120, 121
Hill v. Evans, [1862] 31 L. J. Ch. 457; Good. P. C. 248 (<i>Gas</i>) .	70
Hill v. Thompson, [1817] 1 Web. P. C. 229; Good. P. C. 241 (<i>Iron Smelting</i>)	46, 61
Hinde v. Osborne, [1885] 2 R. P. C. 45 (<i>Hair Curlers</i>) . .	173
Hinks v. Safety Lighting Co., [1876] L. R. 4 Ch. D. 607; 46 L. J. Ch. 185; Good. P. C. 252 (<i>Lamp</i>)	59, 58
Hoffman v. Postill, [1869] L. R. 4 Ch. 673 (<i>Interrogatories</i>) .	161
Hoffnung v. Salisbury, [1899] 16 R. P. C. 375 (<i>Cycle Lamp</i>) .	187
Holliday v. Heppenstall, [1889] 6 R. P. C. 320 (<i>Dyeing Yarns</i>) .	155
Holophone v. Berend, [1898] 15 R. P. C. 18 (<i>Globe</i>) . .	152
Hookham v. Johnson, [1897] 14 R. P. C. 525 (<i>Electricity Meters</i>) .	91
Hopkinson's Petition, [1896] 13 R. P. C. 114; 14 R. P. C. 5 (<i>Electric Lighting</i>)	188, 189, 193, 195
Hopkinson v. St. James Lighting Co., [1892] 10 R. P. C. 46 (<i>Electric Lighting</i>)	144

	PAGE
Horsley's Patent, <i>Re</i> , [1869] L. R. 8 Eq. 475; 39 L. J. Ch. 157 .	132, 133
Hoskin's Application, [1884] Griff. P. C. 291 (<i>Folding Cots</i>) .	121
Household v. Neilson, [1842-3] Good. P. C. 265; 9 Cl. & F. 788 (<i>Iron Smelting</i>)	66
Howes v. Webber, [1895] 12 R. P. C. 465 (<i>Carriage Lamps</i>) .	166
Huddart v. Grimshaw, [1803] 1 Web. P. C. 85; Good. P. C. 266 (<i>Cables</i>)	61
Hudson's Application, [1904] 22 R. P. C. 218 (<i>Trams</i>) . . .	126
Hulton and Bleakley's Petition, [1898] 15 R. P. C. 749 (<i>Printing</i>) .	206, 211
Ihlee v. Henshaw, [1886] 3 R. P. C. 15 (<i>Unregistered Assignee</i>) .	151
Incandescent Co. v. Brogden, [1899] 16 R. P. C. 179 (<i>Gas Mantles</i>)	148
Incandescent Co. v. Cantello, [1895] 12 R. P. C. 262 (<i>Gas Mantles</i>)	148
Incandescent Co. v. New Incandescent Co., [1898] 15 R. P. C. 81 (<i>Gas Mantles</i>)	146
Inglis v. Buttery, 3 App. Cas. 552 (<i>Commercial Contract</i>) . .	138
Institute of Patent Agents v. Lockwood, [1894] 11 R. P. C. 374; [1894] App. Cas. 347 (<i>Patent Agents' Rules</i>)	221
J. & J.'s Application, [1902] 19 R. P. C. 555 (<i>Persons entitled to oppose</i>)	107
Jandus Arc Lamp Co. v. Arc Lamp Co., [1904] 21 R. P. C. 115 (<i>Lamp</i>)	144
Jandus Arc Lamp Co. v. Johnson, [1900] 17 R. P. C. 361 (<i>Lamp</i>)	213
Jenkins v. Hope, [1895] 13 R. P. C. 57 (<i>Innocent Infringer</i>) .	147
Johnson's Application, [1901] 19 R. P. C. 56 (<i>Reply Missives</i>) .	15, 54
Johnson's Patent, [1896] 13 R. P. C. 659 (<i>Sweets</i>)	136, 137
Johnson v. Edge, [1892] 9 R. P. C. 142 (<i>Washing Blue</i>) . .	182
Jones' Application, [1885] Griff. A. P. C. 33; Good. O. C. 11, 21 (<i>Slate Frame</i>)	107, 109
Jones v. Pearce, [1832] Good. P. C. 269 (<i>Wheels</i>)	66
Jupe v. Pratt, [1837] 1 Web. P. C. 145; Good. P. C. 274 (<i>Table</i>) .	51, 99
Kane v. Boyle, [1901] 18 R. P. C. 325 (<i>Candy</i>)	144, 170
Kay's Petition, [1839] Good. P. C. 516; 1 Web. P. C. 568 (<i>Spinning</i>)	6, 195
Kay v. Marshall, [1836-41] 2 Web. P. C. 36, 71, 79; 8 L. J. C. P. 261 (<i>Spinning</i>)	33

	PAGE
Kelly v. Heathman, [1890] 7 R. P. C. 343 (<i>Ladder</i>) . . .	94, 136
Kensington Electric Co. v. Lane-Fox, [1891] 8 R. P. C. 277; [1891] 2 Ch. 577 (<i>Electric Lighting</i>)	187
Klabor's Patents, 22 R. P. C. 10 (<i>Duplicator</i>)	138
Knight's Application, [1887] Griff. A. P. C. 35; Good. O. C. 26 . . .	117
Kopp v. Rosenwald, [1902] 19 R. P. C. 205 (<i>Braided Whalebone</i>) . . .	45
Kurtz v. Spence, [1886] 3 R. P. C. 368; 4 R. P. C. 427; 5 R. P. C. 161, 368; L. R. 33 Ch. D. 579 (<i>Chemicals</i>)	97, 183
Kynoch v. Webb, [1899] 17 R. P. C. 100 (<i>Sulphuric Acid</i>)	62, 91, 100
Lake's Application, [1888] 5 R. P. C. 415; Good. O. C. 28 (<i>Locomotive</i>)	107, 117, 118
Lambert v. International Co., [1904] 21 R. P. C. 247 (<i>Records</i>) . . .	33
Lancashire Explosives v. Roburite, [1895] 12 R. P. C. 470 (<i>Explosives</i>) . .	35
Lancaster's Application, [1884] Griff. P. C. 293; Good. O. C. 21 (<i>Piston Packing</i>)	109, 115
Lancaster's Application, [1902] 20 R. P. C. 366 (<i>Barrel Dryer</i>) . . .	125
Lane-Fox's Petition, [1892] 9 R. P. C. 411 (<i>Electric Lighting</i>) . . .	189
Lane-Fox v. Kensington Co., [1892] 9 R. P. C. 413 (<i>Electric Lighting</i>)	48, 55, 72, 81
Lang's Patent, [1890] 7 R. P. C. 469; Good. O. C. (1st Appendix) 17 (<i>Wire Ropes</i>)	135, 136
Lang v. Gisborne, [1862] Good. P. C. 278; 31 Beav. 133 (<i>Target</i>) . . .	69
Lawrence v. Perry, [1885] 2 R. P. C. 179 (<i>Crayon Holder</i>)	87
Lawson v. Macpherson, [1897] 14 R. P. C. 696 (<i>Solvent Supply</i>) . . .	201
Leonhardt v. Kallé, [1894] 11 R. P. C. 534 (<i>Dyes</i>)	152
Levinstein's Petition, [1898] 15 R. P. C. 732 (<i>Dyes</i>)	211
Lewis v. Marling, [1829] Good. P. C. 281; 1 Web. P. C. 490; 4 Car. & P. 52, 57 (<i>Cropping Machine</i>)	74
Lister v. Leather, [1857-8] 8 E. & B. 1004; Good. P. C. 283; 27 L. J. Q. B. 295 (<i>Wool Combing</i>)	30, 37, 103
Lister v. Norton, (1885) 2 R. P. C. 68; 3 R. P. C. 199, 203 (<i>Imitation Sealskins</i>)	40, 66, 92, 162
Livet's Petition, [1892] 9 R. P. C. 327 (<i>Boilers</i>)	195
L'Oiseau and Pierrard's Application, [1887] Griff. A. P. C. 36; Good. O. C. 75 (<i>Battery</i>)	107, 116

	PAGE
London Hosiery Co. v. Griswold [1886] 3 R. P. C. 251 (<i>Knitting Machine</i>)	197
London and Leicester Co. v. Higham, Lawson, 3rd ed., p. 172 (<i>Knitting Machine</i>)	155
Longbottom v. Shaw, [1891] 8 R. P. C. 333; L. R. 43 Ch. D. 46 (<i>Cloth Frame</i>)	33
Lorraine's Application, [1888] 5 R. P. C. 142; Good. O. C. 35 (<i>Clocks</i>)	120
Losh v. Hagne, [1837-9] 1 Web. P. C. 200; 8 L. J. Ex. 251 (<i>Wheels</i>)	57
Lucas v. Miller, [1885] 2 R. P. C. 155 (<i>Bicycle Lamp</i>)	74, 82
Luddington Cigarette Co. v. Baron Cigarette Co., [1900] 17 R. P. C. 745 (<i>Cigarette Machine</i>)	143
Luke's Application, [1886] Griff. P. C. 294 (<i>Spinning</i>)	118
Lupton and Place's Application, [1897] 14 R. P. C. 261 (<i>Loom Dobbies</i>)	125
Lycett v. Brooks, [1904] 21 R. P. C. 656 (<i>Threats</i>)	183, 187
Lyon v. Mayor of Newcastle, [1894] 11 R. P. C. 218 (<i>Disinfector</i>)	149, 151
Lyon v. Goddard, [1893] 10 R. P. C. 334; 11 R. P. C. 354 (<i>Disinfector</i>)	56, 59
Lyon's Petition, [1894] 11 R. P. C. 537 (<i>Disinfector</i>)	194
MacEvoy's Application, [1888] 5 R. P. C. 285; Good. O. C. 14 (<i>Cement</i>)	115
Macfarlane v. Price, [1816] 1 Web. P. C. 74; 1 Stark. 199; Good. P. C. 294 (<i>Umbrellas</i>)	90
McCormick v. Gray, [1861] 2 H. & N. 25; 31 L. J. Ex. 42; Good. P. C. 292 (<i>Harvester</i>)	61
McLean's Petition, [1898] 15 R. P. C. 413 (<i>Moulding Slabs</i>)	193
Mandelberg v. Morley, [1893] 11 R. P. C. 1 (<i>Waterproofs</i>)	169
Marsden's Application, [1896] 13 R. P. C. 87 (<i>Cotton Feeding Machine</i>)	123
Marshall and Naylor's Patent, [1900] 17 R. P. C. 553 (<i>Water Tap</i>)	24, 113, 176
Mathers v. Green, [1865] L. R. 1 Ch. 29; 34 Beav. 170; 35 L. J. Ch. 1; Good. P. C. 298 (<i>Lawn Mower</i>)	130, 198
Medland, Re, [1889] 41 Ch. D. 493 (<i>Shorthand Notes</i>)	166
Meyer's Application, [1899] 16 R. P. C. 526 (<i>Looms</i>)	116
Mica Insulator Co. v. Electrical Co., [1898] 15 R. P. C. 489 (<i>Insulators</i>)	157

	PAGE
Millar and Miller's Application, [1898] 15 R. P. C. 718 (<i>Tanning</i>) .	126
Mills' Application, [1901] 18 R. P. C. 322 (<i>Saccharin</i>) . . .	124, 125
Mills v. Carson, [1892] 10 R. P. C. 9 (<i>Lamp</i>)	203
Minter v. Mower, [1837] 6 A. & E. 735; Good. P. C. 304 (<i>Chair</i>) .	95
Montgomery v. Peterson, [1894] 11 R. P. C. 221, 633 (<i>Bread</i>) .	176
Morgan's Patent, [1888] 5 R. P. C. 186; Good. O. C. 70; Griff. A. P. C. 17 (<i>Carriage Spring</i>)	136, 175
Morgan v. Seaward, [1837] 1 Web. P. C. 107; 2 M. & W. 544 (<i>Paddle Wheel</i>)	64
Morgan v. Windover, [1890] 7 R. P. C. 131; 5 R. P. C. 295 (<i>Cec Spring</i>)	42, 57, 72
Morrison v. Asplen, [1904] 21 R. P. C. 557 (<i>Road Breaker</i>) . . .	33
Moseley v. Victoria Rubber Co., [1886] 3 R. P. C. 351; 55 L. T. N. S. 482; 4 R. P. C. 241 (<i>Waterproofs</i>)	66, 70, 163
Moser v. Marsden, [1893] 10 R. P. C. 350; 13 R. P. C. 34; 73 L. T. N. S. 667 (<i>Raising Machine</i>)	29, 136, 137
Moss v. Mallings, [1886] 3 R. P. C. 373 (<i>Bats</i>)	158
Muirhead v. Commercial Cable Co., [1894] 12 R. P. C. 39, 64 (<i>Electric Transmission</i>)	171
Mullins v. Hart, [1852] 3 Car. & K. 297; Good. P. C. 311 (<i>Penholders</i>)	65
Muntz v. Grenfell, [1842] 2 Web. P. C. 88 (<i>Metal Sheathing</i>) . .	165
Murchland v. Nicholson, [1893] 10 R. P. C. 417 (<i>Milking</i>) . . .	60
Nairn's Patent, [1891] 8 R. P. C. 444 (<i>Floorcloth</i>)	136
National Co. v. Gibbs, [1899] 16 R. P. C. 339; 2 Ch. 289; 48 W. R. 499 (<i>Electric Battery</i>)	130, 213
Neilson v. Forman, [1841] 2 Coop. Ch. Ca. 61 (<i>Iron Smelting</i>) . .	152
Neilson v. Harford, [1841] Good. P. C. 321; 1 Web. P. C. 295; 11 L. J. Ex. 20; 8 M. & W. 806 (<i>Iron Smelting</i>)	49, 50, 51, 99
New Conveyer Co. v. Edinburgh Gas Commissioners, [1904] 21 R. P. C. 147 (<i>Conveyer</i>)	171
Newall v. Elliott, [1858] Good. P. C. 326; 27 L. J. C. P. 337 (<i>Telegraph Wires</i>)	78
Newman's Application, [1888] 5 R. P. C. 271, 279 (<i>Door Check</i>) . .	119, 120
New Ixion Co. v. Spilsbury, [1898] 15 R. P. C. 567 (<i>Tyres</i>) . . .	214
New Ormonde Cycle Co., <i>Ex parte</i> , [1896] 13 R. P. C. 475; 2 Ch. 523 (<i>Cycles</i>)	132, 216
Newsam v. Mann, [1890] 7 R. P. C. 307 (<i>Printing Machine</i>) . . .	34

	PAGE
Newton's Application, [1899] 17 R. P. C. 123 (<i>Looms</i>) . . .	121
Newton's Petition, [1884] 1 R. P. C. 177 (<i>Sand Blast</i>) . . .	192
Nicoll v. Swears, [1893] 10 R. P. C. 240 (<i>Ladies' Habits</i>) . . .	56
Nobel v. Anderson, [1894] 11 R. P. C. 519; 12 R. P. C. 164 (<i>Explosives</i>)	47, 73, 96
Nobel v. Jones, [1882] 8 A. C. 5	149
Nordenfelt's Patent, [1887] Good. O. C. 70; Griff. A. P. C. 18 (<i>Castings</i>)	136
North British Co. v. Gormully Co., [1894] 12 R. P. C. 17 (<i>Tyres</i>) .	152
Norwood's Patents, [1895] 12 R. P. C. 214 (<i>Coating Walls</i>) . . .	176
Nuttall v. Hargreaves, [1891] 8 R. P. C. 273, 450; 61 L. J. Ch. 94; [1892] 1 Ch. 23 (<i>Beer Tap</i>)	81
Oldham v. Langmead, [1789] 3 T. R. 439; Good. P. C. 342 . . .	165
Osmonds v. Balmoral Cycle Co., [1898] 15 R. P. C. 505 (<i>Cycles</i>) .	32, 83
Osmonds v. Mutual Cycle Co., [1899] 2 Q. B. 488	167
Otto v. Linford, [1881] 46 L. T. N. S. 35; Good. P. C. 343 (<i>Gas Engine</i>)	50, 57, 88, 99, 135
Otto v. Steel, [1885-6] 3 R. P. C. 109; L. R. 31 C. D. 241 (<i>Gas Engine</i>)	69
Oxley v. Holden, [1860] Good. P. C. 350; 8 C. B. N. S. 666 (<i>Window Sashes</i>)	66
Parker v. Maignen, [1888] 5 R. P. C. 207 (<i>Filter</i>)	159
Parker v. Satchwell, [1901] 18 R. P. C. 299 (<i>Hair Grip</i>) . . .	101
Parkes v. Stevens, [1869] L. R. 8 Eq. 358; 38 L. J. Ch. 627; Good. P. C. 355 (<i>Lamps</i>)	37
Parkinson v. Simon, [1894] 11 R. P. C. 493; 12 R. P. C. 403 (<i>Grain Sieves</i>)	73, 99, 100, 102
Parnell's Patent, <i>Re</i> , [1888] 5 R. P. C. 126 (<i>Pyrites Process</i>) . . .	131, 212, 215
Patent Exploitation v. Siemens, [1904] 21 R. P. C. 549 (<i>Battery</i>) .	57, 91, 92
Patent Type Co. v. Richards, [1860] 6 Jur. N. S. 39; Johns. 381; Good P. C. 360 (<i>Type Metal</i>)	87
Patterson v. Gas Light Co., [1875-6] 3 App. Cas. 239; 47 L. J. Ch. 402 (<i>Gas Manufacture</i>)	68
Peach's Petition, [1901] 19 R. P. C. 65 (<i>Grinding</i>)	192
Peck v. Hinde, [1898] 15 R. P. C. 113 (<i>Hair Curlers</i>)	181, 185

	PAGE
Pegamoid v. British Leather Co., [1901] 18 R. P. C. 317 (<i>Proofed Paper</i>)	168
Penn v. Bibby, [1866] L. R. 1 Eq. 548; Good. P. C. 366; L. R. 3 Eq. 308; L. R. 2 Ch. 127; 36 L. J. Ch. 277, 455 (<i>Shaft Bearings</i>) . . .	43, 166
Perry v. Société des Lunetiers, [1896] 13 R. P. C. 664 (<i>Cameras</i>) .	59
Pethor v. Shaw, [1893] 10 R. P. C. 293 (<i>Feed Water</i>) . . .	61, 97
Pharmaceutical Society v. Piper, [1893] L. R. 1 Q. B. 686 (<i>Medicine</i>) .	220
Philpott v. Hanbury, [1885] 2 R. P. C. 33 (<i>Dress Patterns</i>) . . .	70, 73
Pieper's Petition, [1895] 12 R. P. C. 292 (<i>Valves</i>)	194
Pigott v. Anglo-American Telegraph Co., [1868] 19 L. T. N. S. 46 (<i>Cables</i>)	160
Pilkington v. Massey, [1904] 21 R. P. C. 696 (<i>Hammer</i>) . . .	33, 168
Pilkington v. Yeakley Hammer Co., [1901] 18 R. P. C. 459 (<i>Power Hammer</i>)	172
Pirrie v. York Street Flax Co., [1893] 10 R. P. C. 34; 11 R. P. C. 429 (<i>Spinning</i>)	43, 58, 76, 158
Pitt's Patent, <i>Re</i> , [1901] 18 R. P. C. 478 (<i>Cigarette Machine</i>) .	145
Plating Co. v. Farquharson, [1879] L. R. 17 Ch. D. 49; Griff. P. C. 187 (<i>Plating</i>)	160
Plimpton v. Malcolmson, [1875-6] L. R. 20 Eq. 37; Good. P. C. 374 (<i>Skate</i>)	69
Plimpton v. Spiller, [1877] L. R. 4 Ch. D. 286; 20 Sol. J. 860; Good. P. C. 380 (<i>Skate</i>)	61
Pneumatic Tyre Co. v. Chisholm, [1896] 13 R. P. C. 488 (<i>Tyre</i>) . . .	153, 167, 169
Pneumatic Tyre Co. v. Dunlop, [1896] 13 R. P. C. 553 (<i>Tyre</i>) . . .	197
Pneumatic Tyre Co. v. East London Co., [1896] 14 R. P. C. 77, 573 (<i>Tyre</i>)	79, 82
Pneumatic Tyre Co. v. English Cycle Co., [1897] 14 R. P. C. 851 (<i>Tyre</i>)	79
Pneumatic Tyre Co. v. Leicester Pneumatic Co., [1898] 15 R. P. C. 159 (<i>Tyre</i>)	169
Pneumatic Tyre Co. v. Puncture Proof Co., [1899] 16 R. P. C. 209 (<i>Tyre</i>)	166
Pneumatic Tyre Co. v. Tubeless Tyre Co., [1898] 16 R. P. C. 39 (<i>Tyre</i>)	48
Presto Gear Co. v. Orme, [1900] 18 R. P. C. 17 (<i>Gear Case</i>) . . .	98
Preston Davies v. Black, [1894] 11 R. P. C. 574 (<i>Tyre</i>) . . .	53
Proctor v. Bailey, [1889] 6 R. P. C. 538 (<i>Stoker</i>)	147
Proctor v. Bennis, [1887] 4 R. P. C. 333; L. R. 36 Ch. D. 740; 56 L. J. Ch. 11 (<i>Stoker</i>)	37, 52, 63, 84, 103

	PAGE
Ralston v. Smith, [1860] 11 H. L. Ca. 250	27
Ramsome v. Graham, [1882], 51 L. J. Ch. 903 (<i>Trade Mark</i>)	219
Redges v. Mulliner, [1892] 10 R. P. C. 21 (<i>Carriages</i>)	202
Reg. v. Comptroller, <i>ex parte</i> Tomlinson, [1899] 16 R. P. C. 233 ; [1899] 1 Q. B. 909 ; 68 L. J. Q. B. 568 (<i>Looms</i>)	106, 116, 140
Reg. v. County Court Judge of Halifax, [1891] 8 R. P. C. 338 ; 60 L. J. Q. B. 550 (<i>Beer Jug</i>)	149
Reg. v. Crampton, [1886] 3 R. P. C. 367 (<i>Electric Bell</i>)	219
Reg. v. Cutler, [1816] Stark. 354 ; 1 Web. P. C. 76 <i>note</i> (<i>Firegrate</i>)	96
Reg. v. Townsend, [1896] 13 R. P. C. 265 (<i>Goods marked "Patent"</i>)	219
Reg. v. Wallis, [1885] 3 R. P. C. 1 (<i>Lamp</i>)	219
Renard v. Levinstein, [1864-5] 11 L. T. N. S. 79, 505 ; 2 H. & M. 628 ; Good. P. C. 400 (<i>Dyes</i>)	150, 204
Rex v. Metcalf, [1829] 1 Web. P. C. 141 <i>note</i> (<i>Artists' Brush</i>)	76
Reynolds v. Herbert Smith, [1902] 20 R. P. C. 123 (<i>Tyre</i>)	55
Richmond v. Wrightson, [1904] 22 R. P. C. 25 (<i>Printing Machine</i>)	24, 118, 177
Rickmann v. Thierry, [1896] 14 R. P. C. 105 (<i>Eyelets</i>)	45, 56, 58, 173
Risden v. Medart, [1895] 71 Off. Gaz. (U.S.) 751 (<i>Mechanical Process</i>)	228
Roper's Petition, [1887] 4 R. P. C. 201 (<i>Raft</i>)	194
Rose v. Braby, [1894] 11 R. P. C. 198 (<i>Lighting</i>)	41, 155, 157
Russell's Application, [1857] 2 De G. & J. 130 ; Good. P. C. 589 (<i>Tubes</i>)	118
Russell v. Cowley, [1835] Good. P. C. 406 ; 1 C. M. & R. 864 (<i>Gas Tubes</i>)	47
Rylands v. Ashley, [1890] 7 R. P. C. 175 (<i>Bottles</i>)	162
Saccharin Corporation v. Anglo-Continental, [1900] 17 R. P. C. 307 ; [1901] 1 Ch. 414 (<i>Saccharin</i>)	148
Saccharin Corporation v. H. Dawson, [1902] 19 R. P. C. 169 (<i>Saccharin</i>)	171
Saccharin Corporation v. Haines, [1898] 15 R. P. C. 344 (<i>Saccharin</i>)	162
Saccharin Corporation v. Reitmeyer, [1900] 2 Ch. 659 ; 17 R. P. C. 606 (<i>Saccharin</i>)	146
Saccharin Corporation v. Sitos, [1900] 17 R. P. C. 536 <i>note</i> (<i>Saccharin</i>)	170
Sacho's Application, [1900] 18 R. P. C. 221 (<i>Gas Mantles</i>)	123
Sadow v. Szalay, [1904] 21 R. P. C. 333 (<i>Spring Dumb-bell</i>)	78
Savage v. Harris, [1896] 13 R. P. C. 90, 364 (<i>Hair Fastener</i>)	59, 71, 87

	PAGE
Saxby v. Gloucester Wagon Co., [1880-3] L. R. 7 Q. B. D. 305;	
Good. P. C. 417; 50 L. J. Q. B. 577 (<i>Signals</i>)	32
Saxby's Petition, [1870] Good. P. C. 565 (<i>Railway Points</i>)	189
Scott's Patent, [1902] 20 R. P. C. 257 (<i>Condenser</i>)	88, 177
Somet and Solvay's Petition, [1894] 12 R. P. C. 10 (<i>Distillation</i>)	192
Serrell's Patent, [1889] 6 R. P. C. 101 (<i>Solenoid</i>)	137
Shaw v. Barton, [1895] 12 R. P. C. 282 (<i>Ring Joint</i>)	41
Sheehan v. Great Eastern Railway Co., [1880] Good. P. C. 425	150
Shillito v. Larmuth, [1884] 2 R. P. C. 1 (<i>Stoves</i>)	152
Shoe Machine Co. v. Cutlan, [1895] 12 R. P. C. 530; 65 L. J. Ch. 44	
(<i>Shoe Machinery</i>)	158
Siddell v. Vickers [1887-9] 5 R. P. C. 81, 416; 6 R. P. C. 464;	
[1892] 9 R. P. C. 152 (<i>Sling for Forgings</i>)	34, 166
Siddell's Patent, [1887] Griff. P. C. 320 (<i>Slings for Forgings</i>)	175
Sielaff's Application, [1888] 5 R. P. C. 484 (<i>Coin-freed Machine</i>)	123
Simpson v. Holliday, [1865] 12 L. T. N. S. 99; Good. P. C. 425;	
L. R. 1 H. L. 463 (<i>Dyes</i>)	86, 91, 97
Singer v. Rudge, [1894] 11 R. P. C. 463 (<i>Bicycle</i>)	41
Sinnette's Patent, [1898] 15 R. P. C. 761 (<i>Anchor</i>)	66
Sirdar Rubber Co. v. Wellington, [1905] 22 R. P. C. 257; W. N. 37	
(<i>Rubber Tyres</i>)	72, 86, 147, 148
Skinner v. Perry, [1892] 9 R. P. C. 406; 10 R. P. C. 1 (<i>Camera</i>)	182, 183
Slazenger v. Feltham, [1888] 6 R. P. C. 130 (<i>Racquet</i>)	58
Smith's Application, [1886] Griff. P. C. 268 (<i>Form of Claim</i>)	94
Smith's Application, [1896] 13 R. P. C. 200 (<i>Water Heater</i>)	126
Smith's Patent, [1904] 22 R. P. C. 57 (<i>Cotton Gins</i>)	24, 119
Southwell and Head's Application, [1899] 16 R. P. C. 361 (<i>Carpets</i>)	122
Spencer v. Ancoats Co., [1888] 6 R. P. C. 46 (<i>Springs</i>)	165
Spencer v. Holt, [1903] 20 R. P. C. 142 (<i>Boot Heel</i>)	152
Spencer v. Jack, [1862-4] 3 D. J. & S. 346; Good. P. C. 434	
11 L. T. N. S. 242 (<i>Steam Engines</i>)	33
Stanfield's Petition, [1897] 15 R. P. C. 17 (<i>Pontoons</i>)	193
Starey v. Graham, [1899] 1 Q. B. 406; 16 R. P. C. 106 (<i>Patent</i>	
<i>Agents</i>)	221
Stead v. Williams, [1843-4] Good. P. C. 437; 13 L. J. C. P. 218	
(<i>Paving</i>)	68

	PAGE
Steers v. Rogers, [1893] 10 R. P. C. 245; [1893] App. Cas. 233; 63 L. T. 726 (<i>Gas</i>)	130
Stell's Application, [1891] 8 R. P. C. 235 (<i>Doubling Fibres</i>) . . .	120
Steven's v. Keating, [1847] 2 Web. P. C. 182; 19 L. J. Ex. 57; Good. P. C. 443 (<i>Marble</i>)	47, 95
Stewart v. Casey, [1891] 9 R. P. C. 9 (<i>Carboys</i>)	131, 196, 214, 216
Stewart's Application, [1896] 13 R. P. C. 627 (<i>Boiler Furnace</i>) . .	107, 116
Stewart's Petition, [1885] 3 R. P. C. 7 (<i>Sugar Mills</i>)	191
Stohwasser v. Humphreys, [1900] 18 R. P. C. 116 (<i>Gaiter</i>) . . .	58
Stuart's Application, [1892] 9 R. P. C. 452 (<i>Nets</i>)	157
Sunlight Incandescent Co. v. Incandescent Gas Co., [1897] 14 R. P. C. 757 (<i>Gas Lamp</i>)	73, 170
Sutcliffe v. Abbott, [1903] 20 R. P. C. 50 (<i>Separator</i>)	156
Tatham v. Dania, [1869] Griff. P. C. 213 (<i>Breaker</i>)	55
Taylor v. Annand, [1900] 18 R. P. C. 53 (<i>Type Roller</i>)	35
Taylor's Patent, [1896] 13 R. P. C. 482 (<i>Fireplace</i>)	65, 178
Taylor's Trusts, [1904] 21 R. P. C. 715 (<i>Merger of Patent</i>) . . .	23
Thomas v. Hunt, [1864] 17 C. B. N. S. 183; Good. P. C. 462 (<i>Soap</i>)	148, 200
Thomas and Provost's Application, [1898] 15 R. P. C. 257; 16 R. P. C. 69 (<i>Mercerising</i>)	125, 127
Thompson v. James, [1863] 32 Beav. 570; Good. P. C. 465 (<i>Crinolines</i>)	41
Thomson v. Hughes, [1890] 7 R. P. C. 187 (<i>Compass</i>)	163
Thomson v. Macdonald, [1890] 8 R. P. C. 5 (<i>Boilers</i>)	70
Thornborough's Application, [1896] 13 R. P. C. 115 (<i>Partition</i>) . .	120, 122
Ticket Punch Register Co. v. Colley, [1895] 12 R. P. C. 171 (<i>Punch</i>)	164
Todd's Application, [1892] 9 R. P. C. 487 (<i>Stoppers</i>)	124
Townsend v. Haworth, [1875] 12 Ch. D. 831 <i>note</i>	147
Travis v. Gem Hammock Co., [1899] 75 Off. Gaz. (U.S.) 678 . . .	228
Tubeless Tyre Co. v. Trench, [1899] 16 R. P. C. 291 (<i>Tyres</i>) . . .	72, 81
Tubes, Limited v. Perfecta Tube Co., [1902] 20 R. P. C. 77 (<i>Tubes</i>)	100, 102
United Horse Nail Co. v. Stewart, [1885] 2 R. P. C. 122; 3 R. P. C. 139; 5 R. P. C. 269; 13 App. Cas. 401 (<i>Nails</i>) . . .	69, 150
United Horse Nail Co. v. Swedish Nail Co., [1888] 6 R. P. C. 1 (<i>Nails</i>)	73
U.S. v. Allen, [1904] 109 Off. Gaz. (U.S.) 549 (<i>Process and Apparatus</i>)	228

	PAGE
United Telephone Co. v. Dale, [1893] 25 C. D. 778 (<i>Telephone</i>)	147
United Telephone Co. v. Equitable Telephone Co., [1888] 5 R. P. C. 233 (<i>Telephone</i>)	152
United Telephone Co. v. Harrison, [1882] Good. P. C. 472; L. R. 21 C. D. 720 (<i>Telephone</i>)	78
United Telephone Co. v. Walker, [1886] 4 R. P. C. 63; 56 L. T. 508 (<i>Telephone</i>)	166
Vaisey's Patent, [1894] 11 R. P. C. 591 (<i>Medicine</i>)	178
Van Gelder v. Sowerby Bridge, [1890] 7 R. P. C. 208 (<i>Separator</i>)	132, 199
Vavasseur v. Krupp, [1870] L. R. 9 Ch. D. 351; Good. P. C. 483 (<i>Projectiles</i>)	165
Vicker's Petition, re Siddell, [1887] Griff. P. C. 320 (<i>Sling for Forgings</i>)	175
Vickers v. Siddell, [1890] 7 R. P. C. 292; 15 App. Cas. 496 (<i>Sling for Forgings</i>)	36, 80, 94
Viola v. Sharpe, [1904] 22 R. P. C. 24 (<i>Caveat on Register</i>)	133
Von Buch's Application, [1887] Griff. A. P. C. 40; Good. O. C. 17 (<i>Gas Mantle</i>)	117
Von Heyden v. Neustadt, [1880] L. R. 14 Ch. D. 230; 50 L. J. Ch. 126 (<i>Chemicals—Mosaic Anticipations</i>)	69
Vorwerk v. Evans, [1890] 7 R. P. C. 265 (<i>Waistband</i>)	44
Waite v. Johnson, [1900] 18 R. P. C. 1 (<i>Die Press</i>)	187
Walker v. Hydro-Carbon Co., [1884] 2 R. P. C. 3 (<i>Liquid Fuel</i>)	177
Wallington v. Dale, [1851] Good. P. C. 487; 23 L. J. Ex. 49 (<i>Gelatine</i>)	47, 59
Ward v. Livesey, [1888] 5 R. P. C. 102 (<i>Dobbies</i>)	202
Washburn Manufacturing Co. v. Cunard Co., [1889] 6 R. P. C. 398 (<i>Wire</i>)	149, 151
Webb Lamp Co. v. Atkinson, [1902] 19 R. P. C. 599 (<i>Lamp</i>)	170
Webb v. Lovinstein, [1898] 15 R. P. C. 78 (<i>Sulphuric Acid</i>)	183
Welch's Application, re Martin, [1887] Griff. P. C. 320 (<i>Tyre</i>)	175
Welch's Application, [1889] Good. O. C. 10 (<i>Tyre</i>)	107
Welsbach v. Krumm, [1901] 18 R. P. C. 211 (<i>Gas Mantle</i>)	170
Welsbach v. New Incandescent Co., [1900] 17 R. P. C. 237 (<i>Gas Mantle</i>)	73
Welsbach v. New Sunlight Co., [1900] 17 R. P. C. 401 (<i>Gas Mantle</i>)	162

	PAGE
Wenham v. May, [1887] 4 R. P. C. 303 (<i>Lamp</i>) . . .	38
Werner v. Gamago, [1904] 21 R. P. C. 621 (<i>Motor Cycles</i>) . . .	2, 53
Whittaker's Application, [1896] 13 R. P. C. 580 (<i>Drill</i>) . . .	124
Wilcox v. Janes, [1897] 14 R. P. C. 523 (<i>Sewing Machine</i>) . . .	168, 169
Williams v. Nye, [1890] 7 R. P. C. 62 (<i>Sausage Machine</i>) . . .	31, 58
Willoughby v. Taylor, [1893] 11 R. P. C. 45 (<i>Tyres</i>) . . .	183
Wilson v. Wilson, [1899] 16 R. P. C. 315; [1902] 20 R. P. C. 1 (<i>Bobbins</i>)	74, 103, 142, 159, 162
Wood v. Raphael, [1897] 14 R. P. C. 496 (<i>Pince-nez</i>) . . .	34, 58
Wood v. Zimmer, [1815] 1 Web. P. C. 44; Good. P. C. 502 (<i>Verdigris</i>)	64
Woodward v. Sansum, [1887] 4 R. P. C. 166 (<i>Pencils</i>) . . .	82
Woolfe v. Automatic Picture Gallery, [1902] 19 R. P. C. 425 . . .	142, 163
Woolley v. Broad, [1892] 9 R. P. C. 208, 492 (<i>Lace</i>) . . .	142, 159
Worthington v. Moore, [1902] 20 R. P. C. 41 (<i>Pumps</i>) . . .	25
Worthington v. Weir, [1894] 11 R. P. C. 657 (<i>Anti-corrosive</i>) . . .	176
 Yates and Kellett's Petition, [1887] 4 R. P. C. 150 (<i>Wire Cards</i>) . . .	 195
Young v. Rosenthal, [1884] 1 R. P. C. 29 (<i>Corsets</i>) . . .	72, 98

PART II.—TRADE MARKS.

	PAGE
Accident Insurance Co. v. Accident, Disease, and General Insurance Co., [1884] 54 L. J. Ch. 104 (<i>Firm Name</i>)	352
Adam's Trade Mark, [1892] 9 R. P. C. 174 (<i>Label</i>)	313
Aerator, Limited v. Tollit, [1902] 19 R. P. C. 418 ("Aerator")	351
Allen v. Richards, [1882] 26 Sol. J. 658 (<i>Bottle Label</i>)	322
Altman's Application, [1904] 21 R. P. C. 753 ("Cominco")	301
American Tobacco Co. v. Guest, [1892] 9 R. P. C. 218 ("Chancellor")	323
Anglo-Swiss v. Pearks & Co., [1904] 21 R. P. C. 261 ("Milkmaid")	300
Anglo-Swiss Milk Co. v. Metcalf, [1886] 31 Ch. D. 454; 3 R. P. C. 28 ("Dairymaid")	307
Apollinaris Co., <i>Re</i> , [1891] 2 Ch. 186; 8 R. P. C. 136 ("Apollinaris")	260, 275, 305, 309, 313
Apollinaris Co. v. Herrfeldt, [1887] 4 R. P. C. 478, 483 ("Apollinaris")	308, 320, 328
Apollinaris Co. v. Norrish, [1875] 33 L. T. N. S. 242 ("Apollinaris")	260
Arbenz, <i>Re</i> , [1887] 4 R. P. C. 143 ("Gem")	309
Army and Navy Co-operative Society, Limited v. Junior Army and Navy Stores, [1879] Seb. Dig. 393 (<i>Firm Name</i>)	352
Army & Navy Co-operative Society v. Army, Navy, and Civil Service Co-operative Society of South Africa, [1902] 19 R. P. C. 574 (<i>Firm Name</i>)	353
Atkin's Mark, [1886] 3 R. P. C. 164 (<i>Device</i>)	281
Australian Mortgage, Land, and Finance Co. v. Australian and New Zealand Mortgage Co., [1880] W. N. 6 C. A. (<i>Firm Name</i>)	352
Australian Wine Importers Co., <i>Re</i> , [1889] 6 R. P. C. 311; 41 Ch. D. 278 (<i>Label</i>)	260
Automatic Weighing Machine Co. v. Hygienic Society, [1889] 6 R. P. C. 475 (<i>Patent Case Validity Certificate; subsequent action</i>)	330
Baker v. Rawson, [1890] 8 R. P. C. 89 (<i>Device</i>)	304, 308
Balfour v. Kilburn, [1862] 1 Hyde 270 (<i>Device</i>)	320

	PAGE
Barlow v. Johnson, [1890] 7 R. P. C. 395 ("Osman")	302, 306
Barnett v. Leuchars, [1865] 13 L. T. N. S. 495 ("Pharaoh's Serpents")	322
Bass, Ratcliff's Marks, [1902] 19 R. P. C. 529 ("Triangle")	307, 313
Batt v. Dunnett, [1899] 16 R. P. C. 411; A. C. 428 ("Butterfly")	294, 309
Bayer v. Connell, [1897] 14 R. P. C. 275 ("C. B." for Corsets)	314
Bell and Black v. Bell, [1876] Seb. Dig. 514 ("Bell")	320
Bewlay v. Hughes, [1898] 15 R. P. C. 290 ("Dindigul")	340
Blanchard v. Hill, [1742] 2 Atk. 484 ("Great Mogul")	258
Bodega Co. v. Owens, [1889] 7 R. P. C. 31 ("Bodega")	350
Boulnois v. Peake, [1868] 13 Ch. D. 513 note ("Carriage Bazaar")	350
Bourne v. Swan & Edgar, [1902] 26 R. P. C. 105 ("Swan")	322
Bovril Trade Mark, [1896] 13 R. P. C. 382 ("Bovril Extract")	271
Bow v. Hart, [1905] 22 R. P. C. 222 (County Court Jurisdiction)	318
British Electrozone Co.'s Application, [1896], 13 R. P. C. 447 ("Electrozone")	271
Brooks v. Brookes, [1899] 16 R. P. C. 523 (Trader's Name)	263
Brown's Marks, Re, [1894] 11 R. P. C. 365 (Label)	313
Budd v. Lucas, [1891] Div. Ct. 1 Q. B. 408 (Merchandise Marks Act)	360
Burgess v. Burgess, [1853] 3 De G. M. & G. 896; 22 L. J. 675 ("Burgess's Essence of Anchovies")	263, 264, 344, 349
Burgoyne's Trade Mark, [1889] 6 R. P. C. 227 ("Emu")	308
Burke's Trade Marks, [1891] W. N. 2 (Label)	312
Burland v. Broxburn Co., [1889] 6 R. P. C. 482 (Label)	277, 279, 309
Burroughs Wellcome's Marks, [1904] 21 R. P. C. 217 ("Tabloid")	270
Californian Fig Syrup Co.'s Mark, [1888] 6 R. P. C. 126 (Label)	288
Cameron v. Wiggins, [1900] Div. Ct. W. N. 253; [1901] Q. B. 1 (Merchandise Marks Act)	360
Carter Medicine Co.'s Trade Mark, [1892] 9 R. P. C. 401 ("Little Liver")	288
Caruncho v. Highmoor, [1883] 27 Sol. J. 199 (Copyright)	325
Carver v. Pinto Leite, [1871] L. R. 7 Ch. 90 (Cotton Mark)	328
Cash v. Cash, [1901] 18 R. P. C. 211 (Trading Name)	264, 345
Cellular Clothing Co. v. Maxton, [1899] 16 R. P. C. 397 ("Cellular")	383
Cheavin v. Walker, [1877] 5 Ch. D. 850 (Descriptive Tablet)	292
Cheseborough Manufacturing Co.'s Marks, [1902] 19 R. P. C. 342 ("Vaseline")	339

	PAGE
Chivers v. Chivers & Co., [1900] 17 R. P. C. 420 (<i>Trading Name</i>) -	345
Christie v. Cooper, [1900] Div. Ct. 2 Q. B. 522 (<i>Merchandise Marks Act</i>) -	359
Christy v. Murphy, [1893] 12 How. Pr. 77 (<i>Trading Name</i>) . .	350
Christy v. Tipper, [1904] 21 R. P. C. 755 (" <i>Absorbine</i> ") - .	271
Churton v. Douglas, [1859] Johns. 174 (<i>Trading Name</i>) . .	349
Clark v. Sharp, [1898] 15 R. P. C. 141 (" <i>Eiffel Tower</i> ") - .	341
Clarke v. Hudson's Executors, [1901] 18 R. P. C. 310 (" <i>Cogent</i> ") -	323, 326
Clement's Mark, [1899] 16 R. P. C. 611 (<i>Label</i>) -	227, 279, 281
Cockle's Mark, [1903] 20 R. P. C. 353 (<i>Label</i>) -	313
Colburn v. Simms, [1843] 2 Hare 543 (<i>Copyright</i>) -	325
Coleman v. Brown, [1899] 16 R. P. C. 619 (" <i>Wincarnis</i> ") - .	308, 320
Colley v. Hart, [1888] 44 Ch. D. 179; 6 R. P. C. 17 (<i>Label</i>) -	331
Colley's Patents, Limited v. British Paper Co., [1904] 21 R. P. C. 689 (<i>Label</i>) -	343, 348
Colman v. Farrow, [1897] 15 R. P. C. 198 (" <i>Bull's Head</i> ") -	320
Colman's Marks, [1891] 8 R. P. C. 209 (" <i>Bull's Head</i> ") - .	313
Condy v. Mitchell, [1877] C. A. 37 L. T. N. S. 766 (" <i>Sanitas</i> ") -	317
Cooper v. MacLachlan, [1901] 19 R. P. C. 27 (<i>Name of Premises</i>) -	350
Coppen v. Moore, [1898] Div. Ct. 2 Q. B. 300 (<i>Merchandise Marks Act</i>)	360
Coulson v. Coulson, [1887] 3 T. L. R. 740 (<i>Label</i>) -	331
County Chemical Co. v. Frankenburg, [1904] 21 R. P. C. 722 (<i>Patch Box</i>) -	341
Cowie v. Herbert, [1897] 14 R. P. C. 436 (<i>Label</i>) -	314
Croft v. Day, [1843] 7 Beav. 84 (" <i>Day and Martin</i> ")	353
Curtis v. Pape, [1888] 5 R. P. C. 146 (" <i>Diamond and K</i> ") -	320
Daimler Motor Car Co. v. British Motor Traction Co., [1901] 18 R. P. C. 465 (<i>Trading Name</i>) -	346, 351, 352
Dale v. Smith, [1882] W. N. 145 (<i>Copyright</i>) -	330
Dausman v. Ruffner, 15 U. S. Patents Gazette 559 (<i>Lines for Sub-division of Article</i>) -	266
Davis, Re, [1897] 14 R. P. C. 903 (" <i>Compactum</i> ") -	309
Davenport's Mark, [1904] 21 R. P. C. 723 (<i>Label</i>) -	312
Dewar v. Dewar, [1900] 17 R. P. C. 341 (" <i>Dewar's Whisky</i> ") -	308, 344

	PAGE
Eastman Photographic Co.'s Application, [1898] 15 R. P. C. 476	
("Solio")	269
Eastman Photographic Materials Co. v. Griffiths Cycle Corporation, [1898] 15 R. P. C. 105 ("Kodak")	306, 309
Edge, <i>Re</i> , [1891] 8 R. P. C. 207 ("Edge's Filtered Blue")	309
Edwards v. Dennis, [1885] 30 Ch. D. 454 ("Neptune")	286, 294, 309, 315
Edwards v. Elkan, [1888] 5 R. P. C. 70 ("Our Boys")	328
Ellis & Co.'s Marks, [1904] 21 R. P. C. 617 ("Quaker")	305
Eno v. Dunn, [1890] 7 R. P. C. 311 ("Eno's Fruit Salt")	308
Ermen and Roby's Mark, [1897] 4 R. P. C. 70 ("Lion")	312
Escount v. Escount Hop Essence Co. [1875] L. R. 10 Ch. 276 ("Escount's Hop Bitters")	337
Faber v. Faber, [1867] 49 Barb. 357 ("A. W. Faber")	263
Farbenfabriken Application, [1894] 1 Ch. 645; 11 R. P. C. 84 ("Somatose")	268
Farina v. Silverlock, [1858] 1 K. & J. 509; 24 L. J. Ch. 632 (<i>Label</i>)	321
Faulder's Trade Mark, <i>Re</i> , [1901] 18 R. P. C. 535; W. N.; [1901] 235 (<i>Firm Signature</i> ; "Siverpan")	278, 279, 280
Fennessy v. Day & Martin, [1886] 55 L. T. 161 (<i>Blacking Label</i>)	326
Field v. Wagel, [1899] 17 R. P. C. 266 ("Saronol")	270, 308, 341
Foot v. Lea, 13 Ir. Eq. 484 (<i>Trading Name</i>)	349
General Omnibus Co. v. Lavell, [1900] 18 R. P. C. 74 (<i>Get-up</i>)	350
Gianacelis, <i>Re</i> , [1889] 6 R. P. C. 467 ("Gianacelis' Cigarettes")	309
Goodall's Trade Mark, [1889] L. R. 42 Ch. D. 566 ("Parchment Mark")	285
Goodwin v. Ivory Soap Co., [1900] 17 R. P. C. 689 ("Trig")	273, 308
Grand Hotel v. Wilson, [1904] 21 R. P. C. 117 ("Caledonia Springs")	275, 340
Great Tower Tea Co. v. Smith, [1889] 6 R. P. C. 165 ("Tower Tea")	303, 308, 330
Grossmith, <i>Re</i> , [1889] 60 L. T. N. S. 612 ("Emo-fio")	300
Guinea Coal Co. v. Pall Mall Guinea Coal Co. (<i>Lee v. Haley</i>), [1869] L. R. 6 Ch. 155 (<i>Trading Name</i>)	352
Guinness & Co.'s Trade Mark, [1888] 5 R. P. C. 316 ("Guinness")	313
Haines' Trade Mark, [1888] 5 R. P. C. 669 ("Stanch")	308
Hall v. Barrows, [1863] 4 De G. J. & S. 150 ("B.B.H.," with Crown)	316
Hanson v. Game Harrison, [1892] 9 R. P. C. 186 (<i>Labels</i>)	317
Harness's Trade Mark, [1899] 17 R. P. C. 40 ("Koptica")	310

	PAGE
Harrison & Crossfield, <i>Re</i> , [1900] 18 R. R. C. 34 ("Nectar")	272
Hart's Mark, [1902] 19 R. P. C. 569 ("Rose")	294
Hayward, <i>Re</i> , [1885] 54 L. J. Ch. 1003 ("Coker")	308
Hayward & Son's Marks, [1896] 13 R. P. C. 729 ("Coker")	312
Hedley's Marks, [1900] 17 R. P. C. 719 ("Red Cap")	273
Hendriks v. Montague, [1880] 17 Ch. D. 638 (<i>Trading Name</i>)	349, 351
Henry Clay's Trade Mark, [1892] 9 R. P. C. 449 ("La Paz")	312
Hill, <i>Re</i> , [1893] 10 R. P. C. 113 ("Forrest, London")	309
Hoby v. Grosvenor Library, Limited, [1880] 28 W. R. 386 (<i>Trading Name</i>)	352
Holbrook's Marks, [1901] 18 R. P. C. 447 ("Labels")	312
Holloway v. Holloway, [1850] 13 Beav. 209 ("Holloway's Pills")	264, 349
Holt & Co.'s Trade Mark, [1896] 13 R. P. C. 118 ("Trilby")	272
Hommel v. Gebrüder Bauer, [1904] 22 R. R. C. 43 ("Hæmatogen")	270
Hubbock v. Brown, [1900] 17 R. P. C. 638 (<i>Stencilled Brand</i>)	292
Hudson's Mark, <i>Re</i> , [1886] 3 R. P. C. 155 ("Dolly")	281, 303
Hudson v. Osborne, [1870] 39 L. J. Ch. 79 (<i>Trade Name of Premises</i>)	350
Hughes and Young, <i>Re</i> , [1893] 10 R. P. C. 369 ("Anchor")	284, 286, 303, 306, 309
Humphries v. Taylor, [1888] 59 L. J. 820 ("Herbalin")	310
Hyde, <i>Re</i> , [1878] 7 Ch. D. 724 ("Bank of England")	308
Imperial Tobacco Co. v. Parnell, [1904] 21 R. P. C. 598 (<i>Narrow Red Band</i>)	343
Isaacson v. Thompson, [1871] 41 L. J. Ch. 101 (<i>Trading Name</i>)	324, 327, 351
James' Trade Mark, <i>Re</i> , [1886] 33 Ch. D. 392; 3 R. P. C. 340 (<i>Device</i>)	290
Jamieson v. Jamieson, [1898] 15 R. P. C. 169 (<i>Trading Name</i>)	263, 344
Jay v. Ladler, [1889] 6 R. P. C. 136 ("Bear")	322
Jenkins v. Hope, [1895] 13 R. P. C. 57 (<i>Patent Case; Innocent Infringer</i>)	326
Jones's Trade Mark, [1885] 53 L. T. N. S. 1 ("Britannia")	317
Jones v. Hallworth, [1897] 14 R. P. C. 225 ("Selvyt")	341
King v. Gillard, [1904] 21 R. P. C. 589; 22 R. P. C. (<i>Get-up</i>)	329, 335, 342
Kirshenboim v. Salmon & Gluckstein, [1898] Div. Ct. 2 Q. B. 19 (<i>Merchandise Marks Act</i>)	360
Knight v. Crisp, [1904] 21 R. P. C. 670 (<i>Passing-off</i>)	347
König & Ebhardt, <i>Re</i> , [1896] 13 R. P. C. 449 (<i>Crown</i>)	287

	PAGE
Langley v. Bombay Tea Co., [1900] Div. Ct. W. N. 141; [1900] 2 Q. B. 460 (<i>Merchandise Marks Act</i>)	360
Lawrence & Co., <i>Ex parte</i> , [1878] 44 L. T. N. S. 98 <i>note</i> (<i>Device</i>)	309
Lazenby v. White, [1870] 41 L. J. Ch. 354; L. R. 6 Ch. 89 (<i>"Harvey's Sauce"</i>)	330, 345
Leaf's Application, [1887] 4 R. P. C. 30 (<i>"Electric"</i>)	268
Lenhy v. Glover, [1893] 10 R. P. C. 141 (<i>"Two D." Cigar</i>)	260, 326
Leather Cloth Co. v. American Leather Cloth Co., [1863-5] 4 De G. J. & S. 137; 33 L. J. Ch. 199 (<i>"Stamp"</i>)	306, 323
Leather Cloth Co. v. Hirschfold, [1863] 1 H. & M. 295 (<i>"Stamp"</i>)	329
Lee v. Haley, [1869] L. R. 5 Ch. 155 (<i>Trading Name</i>)	352
Lever v. Bedingfield, [1898] 16 R. P. C. 3 (<i>"Sunlight"</i>)	342
Lever v. Goodwin, [1887] 4 R. P. C. 492 (<i>Wrapper</i>)	342
Liebig's Extract Co v. Chemists' Co-operative Society, [1896] 13 R. P. C. 736 (<i>"Label"</i>)	342
Linoleum Co. v. Nairn, [1878] 7 Ch. D. 834 (<i>"Linoleum"</i>)	339
Linotype Co.'s Application, [1900] 17 R. P. C. 380 (<i>"Tachytype"</i>)	270, 303
London Assurance v. London & Westminster Assurance Corporation, [1863] 32 L. J. Ch. 664 (<i>Trading Name</i>)	352
London Omnibus Co. v. Lavell, [1899] 18 R. P. C. 74 (<i>Omnibus</i>)	347
Louise v. Gainsborough, [1902] 20 R. P. C. 61 (<i>"Duchess"</i>)	266, 303
Lucke v. Webster, [1879] unreported	266
Lyndon's Trade Mark, [1886] 3 R. P. C. 102; 32 Ch. D. 109 (<i>Helmeted Head</i>)	308
MacSymon v. Shuttleworth, [1897] 15 R. P. C. 748 (<i>Baking Powder</i>)	301
McAndrew v. Bassett, [1864] 10 L. T. 65 (<i>"Anatolia"</i>)	326
McCaw v. Nickols, [1903] 21 R. P. C. 15 (<i>"Seccotine"</i>)	308, 341
Magnolia Metal Co.'s Trade Mark, [1897] 14 R. P. C. 621 (<i>"Magnolia"</i>)	274
Manchester Brewery Co. v. North Cheshire and Manchester Co., [1898] 1 Ch. 539; [1899] App. Cas. 83 (<i>Trading Name</i>)	349, 352
Maréchal v. M'Colgan, [1901] 18 R. P. C. 262 (<i>"G. B. D."</i>)	307
Maw's Mark [1902], 19 R. P. C. 260 (<i>Label</i>)	313
Meaby v. Triticine, Limited, [1897] 15 R. P. C. 1 (<i>"Triticumina"</i>)	271, 308
Meeus' Application, [1891] L. R. 1 Ch. D. 41; 8 R. P. C. 25 (<i>Device</i>)	285
Mellin v. White, [1895] App. Cas. 154 (<i>Infants' Food</i>)	331

	PAGE
Merchant Banking Co. of London v. Merchant Joint Stock Bank, [1878] 9 Ch. D. 560 (<i>Trading Name</i>)	352
Meyerstein's Application, [1890] 7 R. P. C. 114 (<i>"Satinine"</i>)	268
Millington v. Fox, [1834] 3 M. & Cr. 338 (<i>"Brand"</i>)	258, 325
Milner v. Reed, [1870] Seb. Dig. 328 (<i>Trading Name</i>)	350
Montague v. Moore, [1865] Seton, 5th ed. 539 (<i>Trading Name</i>)	350
Montgomery v. Thomson, [1891] 8 R. P. C. 361 (<i>"Stone Ale"</i>)	335
Morgan v. McAdam, [1866] 36 L. J. Ch. 228 (<i>"Plumbago Crucibles"</i>)	292
Mouson v. Boehm, [1884] 26 Ch. D. 398 (<i>Kangaroo and "Colonial"</i>)	300, 302
Nähmaschinen Fabrik v. Singer, [1893] 10 R. P. C. 310 (<i>"Singer"</i>)	331
National Biscuit Co.'s Application, [1902] 19 R. P. C. 281 (<i>"Uneeda"</i>)	271
Neostyle v. Ellams, [1904] 21 R. P. C. 569 (<i>"Neostyle"</i>)	340
Now Ormondo Cycle Co.'s Mark, [1896] 13 R. P. C. 475 (<i>"Ormondo Bicycle"</i>)	312
Nicholson v. Buchanan, [1900] 19 R. P. C. 321 (<i>"Black Swan"</i>)	350
Orr-Ewing v. Johnston, [1882] 7 App. Cas. 219 (<i>"Elephant"</i>)	320, 321, 334
Paine v. Daniels, [1892] 10 R. P. C. 217; 2 Ch. 567 (<i>"John Bull"</i>)	322
Palmer, Re, [1883] 24 Ch. D. 504 (<i>"Braided Fixed Stars"</i>)	304, 308, 309
Panhard v. Panhard, [1901] W. N. 153 (<i>Trading Name</i>)	353
Payton v. Snelling, [1899] 17 R. P. C. 48 (<i>"Red, White, and Blue" Tins</i>)	341
Phillips' Trade Marks, [1891] 8 R. P. C. 469 (<i>"Labels"</i>)	313
Pinet v. Pinet, [1897] 15 R. P. C. 65 (<i>Trading Name</i>)	263, 349, 350
Pinto v. Badman, [1891] 8 R. P. C. 181 (<i>"El Destino"</i>)	316, 327, 328
Pirie v. Goodall, [1892] 1 Ch. 35 (<i>"Pirie's Parchment Bank"</i>)	309
Player & Son's Application, [1900] 18 R. P. C. 65 (<i>"Sailor's Head"</i>)	285
Pneumatic Tyre Co. v. Chisholm, [1895] 13 R. P. C. 488 (<i>Costs</i>)	330
Pomril's, Limited Application, [1901] 18 R. P. C. 181 (<i>"Pomril"</i>)	307
Powell, Re, [1894] App. Cas. 8 (<i>"Yorkshire Relish"</i>)	305
Powell v. Birmingham Brewery, [1897] A. C. 710; 66 L. J. Ch. 763; 14 R. P. C. 720 (<i>"Yorkshire Relish"</i>)	336
Price's Candle Co. v. Jeye, [1901] 19 R. P. C. 17 (<i>"Ship"</i>)	322

	PAGE
Raddo v. Norman, [1872] L. R. 14 Eq. 348 ("Kainit") . . .	260
Ralli v. Fleming, Ind. L. R. 3 Calo. 417 ("Heading") . . .	260
Ralph, <i>Re</i> [1883] 25 Ch. D. 194 ("Home Washer") . . . 300, 302, 306, 309	
Ransome v. Graham, [1882] 51 L. J. Ch. 397 ("Patent") . . .	259, 292
Read v. Richardson, [1881] 45 L. T. N. S. 54 ("Dog's Head") . . .	321
Reddaway v. Ahlers, [1901] 19 R. P. C. 12 ("Camel") . . .	334
Reddaway v. Banham, [1896] A. C. 199; 13 R. P. C. 218 ("Camel") .	333
Reddaway v. Bentham, [1892] 9 R. P. C. 503 ("Camel") . . .	333
Reddaway v. Frictionless Co., [1902] 19 R. P. C. 505 ("Camel") .	334
Reddaway v. Stevenson, [1902] 20 R. P. C. 276 ("Camel") . . .	334
Reg. v. Ellinger, [1893] <i>Manchester Guardian</i> ("Rupee") . . .	358
Reg. v. Hughes, [189] <i>Daily Chronicle</i> , 24th October (Epps' Label) .	358
Reinhardt v. Spalding, [1879] 49 L. J. Ch. 57 ("Family Salve") .	328
Rex. v. Stoneham, [1905] <i>Daily Telegraph</i> , 19th January ("Untearable Linen")	360
Reiss' Trade Mark, <i>Re</i> , [1888] 5 R. P. C. 291 (<i>Device</i>) . . .	312
Ripley's Application, [1898] 15 R. P. C. 151 ("Pirle") . . .	271
Rivière, <i>Re</i> , [1884] 26 Ch. D. 48 ("Label")	305
Robinson v. Finlay, [1878] 9 Ch. D. 487	317
Rodgers v. Rottgen, [1888] 5 T. L. R. 678 ("Rodgers") . . .	320
Rose v. Evans, [1879] 48 L. J. Ch. 618 ("Limetta")	305
Rose v. Loftus, [1878] 47 L. J. Ch. 576 (<i>Name and Mark</i>) . . .	322
Rowland v. Michell, [1897] 14 R. P. C. 37; [1897] 1 Ch. 71 (<i>Label with Portrait</i>)	265, 342
Royal Baking Powder Co., <i>Re</i> , [1899] 14 R. P. C. 425 ("Royal Baking Powder")	308
Royal Baking Powder Co.'s Application, [1902] 19 R. P. C. 261 ("Royal")	279, 280, 281
Royal Baking Powder Co. v. Wright, Crossley & Co., [1900] 18 R. P. 95 ("Royal Baking Powder")	331
Rutter v. Smith, [1900] 18 R. P. C. 49 ("Mitcham")	326, 329
Sanitas Co. v. Condry, [1887] 4 R. P. C. 195, 530 ("Sanitas &c.") .	320
Savin's Trade Mark, [1895] 13 R. P. C. 21 (<i>Device</i>)	313
Seizo v. Provezende, [1866] L. R. 1 Ch. 192 (<i>Crown Brand and "Seizo"</i>)	320

	PAGE.
Sen-Sen Co. v. Britten, [1899] 16 R. P. C. 137 ("Sen-Sen")	301
Shipwright v. Clements, [1871] 19 W. R. 599 ("Zingari Bouquet")	315
Siogert v. Findlater, [1878] 7 Ch. D. 801 ("Angostura Bitters")	337
Singer Manufacturing Co. v. Loog, [1882] 18 Ch. D. 395; 8 App. Cas. 15 ("Singer")	332
Singer v. Spence, [1893] 10 R. P. C. 297 ("Singer")	333, 346
Singer v. Wilson, [1875-7] 2 Ch. D. 434; 3 App. Cas. 376 ("Singer")	323, 346
Slazenger v. Feltham, [1889] 6 R. P. C. 531 ("Demon")	308
Slazenger v. Pigott, [1895] 12 R. P. C. 439 ("Demon")	326
Smith v. Carron Co., [1896] 13 R. P. C. 108 ("Trafford")	340
Smokeless Powder Co.'s Mark, [1892] 9 R. P. C. 109 ("Target" and "added matter")	277, 279
Southern v. How (temp. Eliz.), Popham 144 (Cloth Mark)	258
Spratt's Patent v. Ward & Co., [1879] 11 Ch. D. 240 ("Fibrine Dog Cakes")	323
Steinway v. Henshaw, [1888] 5 R. P. C. 77 ("Steinway")	308, 320
Stephens, ex parte, [1876] 3 Ch. D. 659 ("Acilyton")	266
Stock Owners of New South Wales, Re, [1897] 14 R. P. C. 733 ("Garter")	312
Suter, Hartmann's Marks, [1901] 19 R. P. C. 42 (Device)	294
Sykes, Re, [1880] 43 L. T. N. S. 626 ("Shield and Swan")	260
Sykes v. Sykes, [1824] 3 B. & Cr. 541 ("Sykes' Patent")	258, 323
Schweppes v. Gibbens, [1904] 22 R. P. C. 113 (Soda Label)	343
Talbot's Trade Mark, [1894] 11 R. P. C. 77 ("Molliscorium")	308, 309, 310
Taylor v. Taylor, [1854] 23 L. J. Ch. 255 ("Taylors' Persian Thread")	319
Thewlis and Blakey's Mark, [1893] 10 R. P. C. 369 ("Ancross")	284, 314
Thompson v. Montgomery (see Montgomery v. Thompson), [1891] 8 R. P. C. 361 (Stone Ale)	308
Thorley's Cattle Food Co. v. Massam, [1880] 14 Ch. D. 763 (Thorley's Food)	331
Thwaites v. McEvilly, [1903] 20 R. P. C. 663; [1904] 21 R. P. C. 397 (Bottle Label)	322, 356
Trade Mark of Clement and Cie, Re, [1899] 16 R. P. C. 611 (Label)	
Turton v. Turton, [1888] L. R. 42 Ch. D. 128 (Trading Name)	263, 344
Tussaud v. Tussaud, [1890] 44 Ch. D. 678 (Trading Name)	352

	PAGE
Upmann v. Elkan, [1871] L. R. 12 Eq. 140 (<i>Cigar Label</i>) . . .	325, 329
Upmann v. Forester, [1883] 24 Ch. D. 231 (<i>Cigar Label</i>) . . .	322, 323
Valentine Meat Juice Co. v. Valentine Meat Extract Co., [1900] 17 R. P. C. 673 (<i>"Valentine's Meat Extract"</i>) . . .	264, 344
Van Duzer, <i>Re</i> , [1887] 4 R. P. C. 30; 34 Ch. D. 623 (<i>"Melrose"</i>) .	267, 274
Verity's Mark, <i>Re</i> , Hall and Woodhouse, [1901] 19 R. P. C. 58 (<i>"Badger"</i>)	303
Warsop v. Warsop, [1904] 21 R. P. C. 481 (<i>Stamp</i>) . . .	329, 335
Warwick Co. v. Urban, [1904] 21 R. P. C. 240 (<i>Bioscope</i>) . . .	270
Wheeler and Wilson v. Shakespeare, [1869] 39 L. J. Ch. 36 (<i>Trading Name</i>)	346
Weingarten v. Bayer, [1903] 20 R. P. C. 649; [1905] 22 R. P. C. (<i>"Erect Form"</i>)	337
Whitstable Oyster Co. v. Hayling Oyster Co., [1901] 18 R. P. C. 434 (<i>"Whitstable Oysters"</i>)	340
Williams v. Williams, [1817] 3 Mer. 157 (<i>Secret of Manufacture</i>) .	337
Wills's Trade Mark, [1892] 9 R. P. C. 346; 10 R. P. C. 269; 3 Ch. 201 (<i>"Star"</i>)	314, 328
Winser v. Armstrong, [1899] 16 R. P. C. 167 (<i>"Winser Interceptors"</i>)	346
Wood v. Burgess, L. R. 24; Q. B. D. 162	356
Wood v. Lambert & Butler, [1886] 32 Ch. D. 247; 3 R. P. C. 81; 55 L. J. Ch. 377 (<i>"Eton Cigarettes"</i>)	306, 309, 317
Worthington's Trade Mark, [1880] 14 Ch. D. 8; 49 L. J. Ch. 646 (<i>Triangle</i>)	307
Wotherspoon v. Currie, [1872] L. R. 5 H. L. 508 (<i>"Glenfield Starch"</i>)	336, 340
Wragg, <i>Re</i> , [1885] 29 Ch. D. 551 (<i>Syphon and Glass</i>) . . .	303, 306, 308
Wright and Crossley's Mark, [1898] 15 R. P. C. 377 (<i>"Wright, Crossley & Co."</i>)	305
Wright and Crossley's Application, [1900] 17 R. P. C. 386 (<i>"Lion"</i>)	285

PART III.—DESIGNS.

	PAGE
Adams v. Clementson, [1879] 12 Ch. D. 714 (<i>Portrait on Pottery</i>) .	408, 409
Bach's Design, <i>Re</i> , [1889] 6 R. P. C. 376 (<i>Lamp Shade</i>) .	410, 413, 415
Batley v. Kynoch, [1874-5] L. R. 20 Eq. 632 (<i>Patent Case</i>) .	431
Bayer v. Connell, [1897] 14 R. P. C. 275 (<i>Jurisdiction</i>) .	434
Birkin v. Pratt, [1895] 12 R. P. C. 371 (<i>Lace</i>) .	433
Blank v. Footmann, [1888] 5 R. P. C. 653 (<i>Lace</i>) .	413, 416, 433
Cheetham v. Oldham, [1888] 5 R. P. C. 617 (<i>Inspection</i>) .	431
Clarke's Design, [1896] 13 R. P. C. 351 (<i>Electric Lamp</i>) .	410, 412, 413
Cooper v. Symington, [1893] 10 R. P. C. 264 (<i>Corset</i>) .	404, 405
Cowie v. Herbert, [1897] 14 R. P. C. 436 (<i>Jurisdiction</i>) .	434
Drake v. Muntz Metal Co., [1886] 3 R. P. C. 43 (<i>Inspection</i>) .	430
Edison Telephone Co. v. India Rubber Co., [1881] L. R. 17. Ch. D. 137 (<i>Terms on amending particulars</i>) .	430
Fielding v. Hawley, [1833] 48 L. T. N. S. 639 (<i>Butter Dish</i>) .	419
Germ Milling Co. v. Robinson, [1884] 1 R. P. C. 217 (<i>Inspection</i>) .	431
Gillard v. Worrall, [1904] 22 R. P. C. 76 (<i>Baker's Gas Jet</i>) .	407
Grafton v. Watson, [1884] 51 L. T. N. S. 141 (<i>Calico Prints</i>) .	423
Grocott's Design, [1899] 17 R. P. C. 139 (<i>Not Reported</i>) .	400, 436
Guiterman's Design, [1886] 55 L. J. Ch. 309 (<i>Toys</i>) .	400
Harper & Co. v. Wright & Butler, [1895] 12 R. P. C. 483 (<i>Stove</i>)	410, 418, 422, 423
Harrison v. Taylor, [1859] 29 L. J. Ex. 3; 4 H. and N. 815 (<i>Fabric</i>) .	406
Hecla Foundry Co. v. Walker, [1889] 6 R. P. C. 554 (<i>Range Fire Door</i>) .	389, 403, 422

	PAGE
Heinrich's Design, [1891] 9 R. P. C. 73 (<i>Writing Table</i>) . . .	401, 436
Heinrichs v. Bastendorff, [1893] 10 R. P. C. 160 (<i>Writing Table</i>) .	413, 416
Hoffmann v. Postill, [1869] L. R. 4 Ch. 673 (<i>Interrogatories</i>) .	432
Holden v. Hodgkinson, [1904] 22 R. P. C. 102 (<i>Tombstone</i>) .	422
Holdsworth v. McCrea, [1867] L. R. 2 H. L. 380 (<i>Woven Fabrics</i>) .	422
Holliday v. Heppenstall, [1889] 6 R. P. C. 320 (<i>No particulars of common knowledge</i>)	429
Hothersall v. Moore, [1891] 9 R. P. C. 27 (<i>Dusters</i>) . . .	406, 415, 417
Hunt v. Stevens, [1878] W. N. 79 (<i>Chandelier</i>)	414
Ingram v. Edwards, [1904] 21 R. P. C. 463 (<i>Gas Bracket</i>) . . .	419
Jan v. Grossman, [1895] 12 R. P. C. 537 (<i>Powder Puff</i>) . . .	425, 433
Jewitt v. Eckhardt, [1878] L. R. 8 Ch. D. 404 (<i>Toys</i>) . . .	400, 401, 426
Johnson v. Bailey, [1893] 11 R. P. C. 21 (<i>Teapot</i>)	418
Lazarus v. Charles, [1873] L. R. 16 Eq. 117, 122 (<i>Card Basket</i>) .	399, 401
Le May v. Welch, [1884] 28 Ch. D. 24; 54 L. J. Ch. 279 (<i>Collar</i>)	407, 412
Lea v. Price, [1904] 22 R. P. C. 122 (<i>Lamp</i>)	419
McCrea v. Holdsworth, [1848] De G & Sm. 496, 12 Jur. 820; [1870] L. R. 6 Ch. 418 (<i>Damasks</i>)	422, 425
McDougall v. Partington, [1890] 7 R. P. C. 472 (<i>Inspection</i>) .	431
Moody v. Tree, [1892] 9 R. P. C. 233 (<i>Basket</i>)	404, 405
Morris Wilson v. Coventry Machinists' Co., [1891] 8 R. P. C. 353 (<i>Procedure in Designs Actions same as in Patent Actions</i>)	426, 427, 430
Morton's Design, [1900] 17 R. P. C. 117 (<i>Cuff Link</i>)	389, 404, 412, 418
New Ormonde Cycle Co.'s Mark, [1896] 13 R. P. C. 475 (<i>Trade Mark Case</i>)	437
Norton v. Nicholls, [1859] 1 E. & E. 765; 5 Jur. N. S. 1203; 28 L. J. Q. B. 225 (<i>Mantilla Shawls</i>)	424
Oliver v. Thornley, [1896] 13 R. P. C. 490 (<i>Lace</i>)	422
Plackett's Design, [1892] 9 R. P. C. 436 (<i>Lace</i>)	413
Plating Co. v. Farquharson, [1883] Griff. P. C. 187 (<i>Inspection</i>) .	431
Potter & Co. v. Braco de Prata Co., [1891] 8 R. P. C. 218 (<i>Calicos</i>)	398

	PAGE
Read and Grosswell's Design, [1889] 6 R. P. C. 471 (<i>Candle Shade</i>)	413, 415
Rivett v. Grimshaw, [1894] 11 R. P. C. 351 (<i>Bassinet</i>)	406, 430
Rollason's Design, [1897] 14 R. P. C. 909; [1898] 15 R. P. C. 441 (<i>Coffin Plates</i>)	406, 411, 412, 417, 418
Sarazin v. Hamell, [1863] 7 L. T. N. S. 660 (<i>Lace</i>)	420
Saunders v. Wiel, [1892] 9 R. P. C. 459; 10 R. P. C. 29 (<i>Spoons and Forks</i>)	409, 413, 427, 431
Sherwood's Design, [1892] 9 R. P. C. 268 (<i>Globes</i>)	414
Sherwood v. Decorative Tile Co., [1887] 4 R. P. C. 207 (<i>Tiles</i>)	412, 423, 424, 432
Smith v. Hope Bros., [1889] 6 R. P. C. 200 (<i>Scarf</i>)	407
Smith v. Roberts, [1888] 5 R. P. C. 611 (<i>Muslin Goods</i>)	424, 433
Smout v. Slaymaker, [1890] 7 R. P. C. 90 (<i>Fire Screen</i>)	414
Tyler v. Sharpe, [1893] 11 R. P. C. 35 (<i>Closet Basin</i>)	408
Varley v. Keighley Iron Works, [1896] 14 R. P. C. 169 (<i>Mangle Presser Bar</i>)	411
Walker v. Falkirk Iron Co., [1887] 4 R. P. C. 390 (<i>Range Door</i>)	404, 413
Walker v. Hecla Foundry Co., [1887] 5 R. P. C. 71 (<i>Range Door</i>)	430
Walker v. Scott, [1892] 9 R. P. C. 482 (<i>Oil Can</i>)	404, 411
Wedekind v. General Electric Co., [1897] 14 R. P. C. 190 (<i>Telephone</i>)	419
Welsbach Co. v. New Sunlight Co., [1900] 17 R. P. C. 401 (<i>Interrogatories</i>)	432
Werner v. Gamage, [1904] 21 R. P. C. 621 (<i>Motor-cycle Frame</i>)	405, 414
Wilson v. Wilson, [1899] 16 R. P. C. 315 (<i>Amendment of Particulars</i>)	430
Winfield v. Snow, [1890] 8 R. P. C. 15 (<i>Silk Lace</i>)	414, 433
Wittmann v. Oppenheim, [1884] 27 Ch. D. 260 (<i>China Lamp</i>)	418
Woolley v. Broad, [1892] 9 R. P. C. 208, 429 (<i>Lace</i>)	401, 419, 426, 430

KEY TO ABBREVIATED REFERENCES TO REPORTS.

App. Cas. (<i>or</i> A. C.)	-	Law Reports (New Series), Appeal Cases.
Atk.	-	Atkyn's Reports.
B. & Ald.	-	Barnewall & Alderson's Reports.
Barb.	-	Barbour's American Reports.
Beav.	-	Beavan's Reports.
B. & Cr.	-	Barnewall & Cresswell's Reports.
Bos. & P.	-	Bosanquet & Puller's Reports.
B. & S.	-	Best & Smith's Reports.
C. & P. (<i>or</i> Car. & P.)	-	Carrington & Payne's Reports.
Car. & K.	-	Carrington & Kirwan's Reports.
Cart. T. M. C. A.	-	Cartmell's Trade Mark Cases (1876 to 1892).
C. A.	-	Court of Appeal.
C. B. N. S.	-	Common Bench Reports (New Series).
Ch. D.	-	Law Reports (New Series), Chancery Division.
Ch.	-	Chancery (Appeal).
Ch. Ca.	-	Cases in Chancery.
Cl. & F.	-	Clark and Finnelly's Reports.
C. M. & R.	-	Crompton, Meeson & Roscoe's Reports.
Coop. Ch. Ca.	-	Cooper's Chancery Cases.
Dav. Pat. Cas.	-	Davies's Patent Cases.
De G. J. & S. (<i>or</i> D. J. & S.)	-	De Gex, Jones & Smith's Reports.
De G. & J.	-	De Gex & Jones's Reports.
De G. M. & G.	-	De Gex, Macnaghten & Gordon's Reports.
De G. & Sm.	-	De Gex & Smale's Reports.
E. & B.	-	Ellis & Blackburn's Reports.
E. & E.	-	Ellis & Ellis's Reports.
Good. O. C.	-	Goodeve's Patent Practice before the Comptroller and Law Officer, with Appendix to end of 1892. (1893.)
" " (1st Appx.)	-	
Good. P. C.	-	Goodeve's Patent Cases, Vol. I. (Reports to end of 1883).

Griff. A. P. C.	-	-	Griffin's Additional Cases—for 1887.
Griff. P. C.	-	-	Griffin's Patent Cases (1884 to 1886).
Hare	-	-	Hare's Reports.
H. Bl.	-	-	H. Blackstone's Reports.
H. of L. C.	-	-	House of Lords Cases.
Hyde	-	-	Hyde's Indian Reports.
How. Pr.	-	-	Howard's Practice (U.S.).
H. & M.	-	-	Hemming & Miller's Reports.
H. & N.	-	-	Hurlstone & Norman's Reports.
Ir. Eq.	-	-	Irish Equity Reports.
Ind. L. R. (Calc.)	-	-	Indian Law Reports, Calcutta.
Johns.	-	-	Johnson's Reports.
Jur. N. S.	-	-	Jurist (New Series).
K. & J.	-	-	Kay & Johnson's Reports.
L. J. Ch.	-	-	Law Journal Reports (New Series), Chancery.
L. J. C. P.	-	-	" " " Common Pleas.
L. J. Ex.	-	-	" " " Exchequer.
L. J. Q. B. or K. B.	-	-	" " " (Queen's Bench or King's Bench.
L. R. App. Cas.	-	-	Law Reports, Appeal Cases.
L. R. Q. B. D.	-	-	" " Queen's Bench Division.
L. R. Ex.	-	-	" " Exchequer.
L. R. Ch. D.	-	-	" " Chancery Division.
L. R. Ch.	-	-	" " Chancery Appeals.
L. R. Eq.	-	-	" " Equity Cases.
L. R. C. P.	-	-	" " Common Pleas.
L. R. P. C.	-	-	" " Privy Council Cases.
L. R. H. L.	-	-	" " House of Lords.
L. T.	-	-	Law Times.
L. T. N. S.	-	-	Law Times Reports (New Series).
Law. Pat.	-	-	Lawson on Patents &c., 3rd Edition.
M. & G.	-	-	Manning & Grainger's Reports.
M. & Cr.	-	-	Mylne & Craig's Reports.
Mer.	-	-	Merivale's Reports.
M. & W.	-	-	Meeson & Webster's Reports.
New. L. Jon.	-	-	Newton's London Journal.

O. G.	.	.	Official Gazette of United States Patent Office.
Popham	.	.	Popham's Reports.
Q. B.	.	.	Queen's Bench.
R. P. C.	.	.	Reports of Patent, Design, and Trade Mark Cases.
Sol. J.	.	.	Solicitor's Journal.
Stark.	.	.	Starkie's Reports.
Seton	.	.	Seton's Reports.
Seb. Dig.	.	.	Sebastian's Digest of Trade Mark Cases.
Taunt.	.	.	Taunton's Reports.
T. L. R.	.	.	<i>Times</i> Law Reports.
T. R.	.	.	Term Reports (Durnford & East).
U. S. Pat. Gaz.	.	.	United States Patent Gazette.
Ves.	.	.	Vesey's Reports.
Web. P. Cas.	.	.	Webster's Reports of Patent Cases.
W. N.	.	.	Weekly Notes.
W. R.	.	.	Weekly Reporter.

The correct citations of the Law Reports, from and including 1891, are as follows:—

[Date] 1 or 2 Ch.	.	.	Chancery Division, 1st or 2nd Vol.
[Date] 1 or 2 Q. B. (or K. B.)	.	.	Queen's Bench (or King's Bench), 1st or 2nd Vol.
[Date] A. C.	.	.	Appeal Cases.

INTRODUCTION.

AT THE present day Patents, Designs, and Trade Marks are granted and registered under the provisions of The Patents, Designs, and Trade Marks Acts, which are dated respectively 1883, 1885, 1886, 1888, 1901, and 1902. These Acts will be referred to generally throughout this Work as "The Patents, Designs, and Trade Marks Acts, 1883 to 1902." The union of the three species of property in the title of these Acts seems to imply a closeness of similarity which does not really exist. A few words will serve to differentiate them.

Patents
Trade
Marks, and
Designs
compared.

When a Patent has been granted, say for a new description or construction of lamp, the manufacture and sale of the lamp become a monopoly, and every lamp of the same or substantially the same construction which is made and sold by others, without leave or licence, is an infringement of the rights of the Patentee.

Patent.

But where a trader has registered a Trade Mark for a lamp which is not the subject-matter of a Patent, all the world may make and sell precisely the same lamp, with this restriction only—that they must not sell it under the registered Trade Mark, for this would be to represent the article as having been made by the owner of the Trade Mark.

Trade
Mark.

Design.

A Design, on the other hand, like a Patent, has reference to the specific substance or *corpus* of an article, but rather from an artistic or configurative than from a functional point of view. Thus the patented portion of the lamp might relate to a new automatic safety extinguisher, which might be made and applied and be operative in several forms and still be within the scope of the Patent, while the Design Copyright might refer to the shape of the lamp or to the decorative stand, which could not be varied from the registered design without going outside the limit of protection.

Co-
existence of
Patent and
Design
Copyright.

In some instances it might even happen that the improved fixed shape or configuration of an article might render it patentable as well as the subject-matter of a Design, in which case the two rights might co-exist independently of each other (see *Werner v. Gamage*, [1904] 21 R. P. C. 621). Such instances are not unknown, but are likely to be rare.

Arrange-
ment of
volume.

To follow the subjects of this Work in their relative order of importance it is proposed to treat—First, of PATENTS; Secondly, of TRADE MARKS; and, Thirdly, of DESIGNS.

PART I.—PATENTS.

CHAPTER I.

THE ORIGIN AND HISTORY OF PATENT LAW.—
THE PATENT LAW AMENDMENT ACT, 1852.—
THE PATENTS, DESIGNS, AND TRADE MARKS
ACTS, 1883 to 1902.

TO ASSIST the reader to a proper understanding of Patent Law as now existing, it may not be unprofitable to give a short sketch of its earlier history.

Letters Patent for Inventions are the survival of the ancient Royal Grants of Monopoly. From the earliest times it was recognised that the Sovereign was at liberty to exercise the prerogative of making special grants to subjects.

Origin of
Letters
Patent for
Inventions.

These grants were made known by "Open Letters," or *Litteræ Patentes*, addressed to all subjects of the realm, so that the privileges granted should not be questioned from want of knowledge. It is evident that from the first, although existing manufactures and the supply of certain products and goods, both natural and artificial, were the chief objects of the older grants of monopoly, new inventions, new manufactures, and advances in arts and sciences were considered favourable subjects for protection by Royal Grants.

Crown
Grants.

There is a tradition, not founded on any evidence the writer can find, that a Patent was issued by King Edward III. in respect of an alleged discovery of the Philosopher's Stone; but this may be dismissed as an idle tale. It is, however, a matter of record that the same

Alleged
early
Patent for
Invention.

Monarch granted a Patent to one John Kempo in respect of the introduction of a new manufacture or industry of cloth-making, and also issued similar grants for clock-making to three men of Delft. But these and other grants made by Henry VI. for the manufacture of salt and in respect of mining operations were grants in respect of trade monopolies or new industries not hitherto known in the realm, and not for patents for inventions.

Early trade monopolies and their abuse.

With lapse of time the perverted custom of granting monopolies in the exercise of trades and in the sale of goods grew to such an outrageous extent that in the reign of Elizabeth a vast number of commodities, representing in some cases the merest necessities of life, were in the hands of patentees or monopolists, who used their powers in the harshest and most arbitrary manner to enforce their rights. The supplies of coal, salt, vinegar, iron, steel, bottles, glass, lead, oil, tin, sulphur, pots, brushes, currants, and numbers of other products, natural and artificial, home and foreign, were governed by monopolists, who stood so little on conscience that in certain places that prime necessary of life, salt, rose from sixteen pence to fifteen shillings a bushel. According to the historian Hume, a list of these things, read in the House of Commons, brought to his feet an indignant member, who vowed to his astounded hearers that if things were allowed to go on at this rate "bread itself would be reduced to a monopoly."

Statute of Monopolies (21 Jac. I. c. 30), 1624. Monopolies abolished.

But the foregoing represents the high-water mark of monopolies, and in the succeeding reign of James I. the whole vicious system was done away with by the famous *Statute of Monopolies*. At one stroke of the pen the bulk of these unjust and restrictive privileges was declared "utterly void and of none effect, and in no wise to be put in use or execution."

Sections 5 and 6 reserve patents for inventions and become the basis of modern patent rights.

One of the exceptions to the general extinction of monopolies was made by Sections 5 and 6 of the Statute of Monopolies in favour of patents for inventions then in force and thereafter to be granted, and this is still the basis upon which patent rights stand at the present day. For example, by Section 6 of that Statute the term of

a patent was limited to fourteen years, and the subject-matter is shortly defined as "any manner of new manufactures which others at the time of making such letters patent and grants shall not use." The patent must be granted to the true and first inventor; the invention must be novel; the privilege must not be contrary to law, nor mischievous to the State, nor hurtful to trade, nor generally inconvenient. The term of fourteen years seems to have been fixed by doubling the usual period of apprenticeship—*i.e.* seven years.

Subject-matter and conditions of patents defined.

Probably the draftsman of the section reasoned that if the inventor of a new manufacture trained an apprentice in the art for seven years, it was but just that he should have the services of the skilled workman, at skilled workman's wages, for another seven years, before the pupil should be at liberty to exercise the art for his own personal advantage. Indeed, under the earliest practice it was customary to insert a proviso in the grant, requiring the inventor to take apprentices during the last seven years of the term, if he had not done so before.

Reasons for fixing duration of patents.

The privilege of Letters Patent for inventions having been thus saved from the general wreck of monopolies brought about by the Statute of James I., thereafter passed through a long period of comparative obscurity, to endeavour to trace which would only weary without instructing the reader.

After-history of Patent Law.

As to the procedure in obtaining a patent this became a model of circumlocution.

Petitions, declarations, reports, references, warrants, stamps, bills, and seals were bandied about from office to office, existing apparently only for the extraction of fees from the patentee. The Home Office, the Law Officers' Chambers, the Patent Bill Office, the Signet Office, the Privy Seal Office, the Letters Patent Office, and finally the Lord Chancellor's Office, each appeared in turn with mystic powers and itching palm. Nor must the Enrolment Office, the Petty Bag Office, and the Office of the Rolls Chapel be forgotten, although these were chiefly repositories of the enrolments and beyond the immediate purview of the patentee.

Circumlocutive procedure in early times.

Lord Coke's
apology.

Lord Coke instances the multiplication of fee-exacting offices as an example of "the wisdom of prudent antiquity, that whatsoever should pass the Great Seal should come through so many hands to the end that nothing should pass the Great Seal . . . that was against law or inconvenient." But we moderns may be pardoned for surmising that institutions for which so clever an apologist could only find so meagre an excuse were ripe for removal.

Separate
patents for
England,
Scotland,
and Ireland.

England, Scotland, and Ireland had each its separate patent, the fees for protection in all three amounting to about £300. With the addition of attorneys' and other charges the entire cost to the patentee of a patent covering the United Kingdom could not in those days have been less than from £500 to £700. In *re Kay's Patent* (1 Web. P. C. 568) the accounts showed the patent to have cost £500. Up to the reign of Queen Anne no specification seems to have been required, but about the year 1730 the enrolment of a specification became compulsory.

Enrolment
of specifica-
tions.

Abolition of
necessity of
working
patent.

As a consequence of this enforced deposit of an exact description of the invention, the conditions in the grant requiring the establishment of the new industry and the instruction of others in its mysteries—in other words, the commercial working of the invention within the realm—appears to have fallen into abeyance during the latter half of the eighteenth century. Apparently the presence on record of the exact description contained in the specification was held as a warrant that on the expiry of the patentee's monopoly, whether he worked it or not, others would be able to put the invention in practice. From this it followed that the question of construction and sufficiency of the specification became then, as now, one of the tests by which it was ascertained whether this part of the consideration for the grant had been fulfilled by the patentee.

It may be interesting to point out that the consequence of this departure from the spirit of the Statute of Monopolies, which, as is clear from the wording of Sections 5 and 6, was intended to further "the *working or making* of any manner of new manufacture within the realm," is at the root of the modern complaint, that

nowadays foreigners obtain patents in this country with no intention of working them here, but merely for the purpose of preventing competition by tying the hands of British manufacturers and enabling the patentees to manufacture abroad and import to England at prices which are often exorbitant. It is indisputable that under the Statute of Monopolies patents were not granted to inventors as a reward for being ingenious, but for the purpose of introducing new manufactures into the country and to create increased employment for the working classes. It is equally indisputable that under existing conditions many a patent granted to a foreigner, so far from being an encouragement to native industry, is a positive fetter upon the wrists of those who would otherwise find profitable employment were working in this country made compulsory. The most important commercial combinations in England, strongly supported by the working classes, have more than once pressed upon the Government the advantages of reverting to the original purposes of the Statute of Monopolies, viz. that, so far at least as concerned patents granted to foreigners, working in this realm should be made compulsory. But these proposals did not find general acceptance, and the only result has been a compromise represented in its latest form by the Compulsory Licence Clauses of the Patents Act of 1902.

Abuses arising from non-working.

Compulsory licences.

To return from this digression: As time went on, and as the volume of patent business increased, the attention of legislators was directed more and more to projected improvements in the Patent Law. Slight changes in the procedure were made, and the power of entering a disclaimer of any part of his specification was granted to the patentee by 5 & 6 Will. IV. c. 38, the same Act providing for a seven years' period of extension. By 7 & 8 Vict. c. 69 the possible period of extension was increased to fourteen years. Following these Acts there came—

Disclaimer allowed (5 & 6 Will. IV. c. 38).
Further extension allowed (7 & 8 Vict. c. 69).

THE PATENT LAW AMENDMENT ACT, 1852.

Patent Act, 1852.

The changes effected by this Act were important.

One patent covered Great Britain and Ireland, the Channel Islands, and the Isle of Man. The whole

One patent for United Kingdom.

Steps in
obtaining
a patent.

business of the Commissioners of Patents was conducted in one office under a responsible head. The stages of procedure were reduced to—(1) The Application, with Provisional or Complete Specification; (2) The Giving Notice of Intention to Proceed with the Application; (3) The Applying for the Warrant and Seal (which latter step has been practically revived under the Patents Act of 1902) and, (4) if it had not been done at the time of application, The Filing of the Complete Specification. This option of filing a Provisional description of the invention at the time of application, and following it up within six months afterwards with a Complete Specification, was a new element in patent procedure which has proved extremely satisfactory in practice.

First intro-
duction of
Provisional
Specifica-
tion.

Fees under
Act of 1852.

Under the Act of 1852 the mere stamp duties payable on obtaining a patent amounted to £25, and the sums payable at the end of the third and seventh years respectively were £50 and £100, so that the total amount payable in stamps alone on a patent obtained and kept in force for the full term of fourteen years was £175.

Agitation
for altera-
tions in
Patent Law.

Examina-
tion of
Applica-
tions.

During the operation of the Act of 1852 considerable agitation was carried on among Patent Law reformers, whose chief objects were the reduction of the fees and the introduction of some system of examination. The former result was to some extent obtained under the Act of 1883, but the Examination of Applications only dates from the 1st of January, 1905, and is the result of the coming into operation of the Patents Act of 1902. As will be seen later on, this examination is not of the most complete character, but is decidedly a step in the right direction.

THE PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883 TO 1902.

Act of 1852
not an
originating
Act.

If the reader has followed the foregoing historical *résumé*, he will doubtless have noticed that the Act of 1852 made no real change in the principles of Patent

Law. It was merely an amending Act by which the procedure was simplified, the cost decreased, the United Kingdom placed under the scope of one patent, the principle of the Provisional Specification adopted, and sundry regulations promulgated relating to the conduct of litigation.

No change was effected in fundamental principles, and no attempt made to define afresh the subject-matter of patents. For a definition of the expression "invention" the reader of the Act was referred to the old Statute of Monopolies.

As in the case of the Patent Law Amendment Act of 1852, so it is with the Patents, Designs, and Trade Marks Act of 1883. By this Act the procedure was still further simplified. The fees and stamps on the obtaining of a patent were reduced from £25 to £4 (now, under the Act of 1902, increased to £5), while the fees for maintaining the patent in force during the full term of fourteen years have, under recent Rules, been reduced from £150 to £95. This sum, added to the £5 payable as fees on the obtaining of the patent, makes exactly £100 as the cost in Government fees of obtaining and keeping in force a patent for fourteen years.

Patents,
Designs,
and Trade
Marks Act,
1883.

Procedure
simplified
and fees
reduced.

The foregoing and sundry additional provisions having reference to the regulation of legal proceedings, restriction to one invention only, the amendment of specifications, oppositions, &c., represent the bulk of the changes made by the Acts of 1883 to 1902. As regards the restriction to "one invention only," Rule 5 of The Patents Rules, 1905, provides that when a specification comprises several distinct matters they shall not be deemed to constitute one invention by reason only that they are all applicable to or may form parts of an existing machine, apparatus, or process.

One inven-
tion only.

The Patents Act of 1901 (1 Edw. VII. c. 18), which came into operation on the 1st January, 1902, relates solely to international arrangements. It constitutes an amendment of Section 103 of the Act of 1883, and extends from seven months to *twelve months* the time within which persons who have applied for protection of

Patents Ac
of 1901.

Extension
of period
of priority
under Con-
vention.

Convention application to be accompanied by Complete Specification.

an invention in a country other than the United Kingdom, and being subjects, citizens, or domiciled inhabitants of or in a State which has adhered to the International Convention or with which reciprocal arrangements may have been made by the British Government, are entitled to apply for a similar privilege in the United Kingdom. Sub-section 2 of Section 1 provides that any such application, when made in this country, must be accompanied by a Complete Specification, with drawings (if any); and provides, further, that the said Complete Specification, "if it be not accepted within the period of twelve months," shall be open to public inspection at the expiration of that period.

If not accepted within twelve months from date of foreign application, Complete to be open to public inspection.

The Act of 1901 did not make it plain from what period the twelve months for acceptance of the Complete Specification were to run. But Rule 15 of The Patents Rules, 1903 (see Consolidated Rules, page 235), says that if the Complete Specification left with the application be not accepted *within twelve months from the date of the first foreign application*, it shall, with the drawings (if any), be open to public inspection at the expiration of that period. As Section 104 of the Act of 1883 provides for the admission, by Order in Council, of British Possessions to the benefits of Section 103, the word "foreign" in the Rule is to be read as "foreign or colonial" (see Rule 3 of The Patents Rules, 1903).

Patents Act, 1902.

The Patents Act of 1902, all of the provisions of which are now in force, and which will be found consolidated with the original and succeeding Statutes in Appendix C, page 483, deals with three important amendments, which are as follows:—

Examination.

- (1) Applications are now subject to an examination as to novelty, the investigations dealing only with British Complete Specifications published and dated within fifty years prior to the date of the application.

Restriction on anticipation.

- (2) When a patent has been granted under the Act of 1902: that is to say—on any application

made after the 1st January, 1905—no British Specification older than fifty years back from the date of the patent, and no published Provisional Specification whatsoever, can be deemed an anticipation of the patent so granted.

- (3) The hearing of Petitions for the Grant of Compulsory Licences, which was formerly in the hands of the Board of Trade, is now transferred to the Judicial Committee of the Privy Council. The Petition still requires to be presented to the Board of Trade; but unless the Board can effect an arrangement between the parties the Petition is referred to the Judicial Committee, who will hear the parties and decide whether a licence is to be granted or not.

Compulsory
Licences.

The amendment dealing with Compulsory Licences came into operation on the 18th December, 1902. The rest of the Act of 1902 became operative on the 1st January, 1905.

Operation
of Act of
1902.

Having thus glanced broadly at the origin and development of patents for inventions up to the present day, the present Patent Law can now be discussed with greater profit. It will be found that almost every phase of the subject which need be touched upon can be grouped under one of the following headings:—

Headings
under
which
contents
are
arranged.

1. Procedure in Obtaining Patents.
2. Who may be a Patentee.
3. Subject-matter of Patents, including Invention Novelty, and Utility.
4. The Specifications (Provisional and Complete).
5. Opposition to Grant of Patent.
6. Sealing of the Patent.
7. Amendment of Specifications.

Headings under which contents are arranged—continued.

8. Action for Infringement.
 9. Petition for Revocation.
 10. Action to Restrain Threats.
 11. Prolongation of Patents.
 12. Assignments, Licences, &c.
 13. Register of Patents.
 14. Miscellaneous.
 15. Foreign and Colonial Patents, with a reference
to the International Convention.
-

CHAPTER II.

PROCEDURE IN OBTAINING PATENTS.

SO FAR as the merely formal steps are concerned, an application for a patent is a very simple matter. The respective forms and stamps are on sale at all postal money order offices in the United Kingdom, and when filled in can be delivered or posted direct to the Patent Office in London. The application papers consist of a declaration (Form A) stamped with £1, in which the applicant must insert his full name, address, and occupation, and give the title of the invention. He must declare that he is the true and first inventor, and that the invention is not in use by any other person or persons to the best of his knowledge and belief, and he must sign his name at the foot of the form. Form A1 is to be used in the case of inventions communicated from abroad to an agent in this country, and Form A2 where application is made under the International Convention.

Application
for patent.How to fill
in forms.Communi-
cation
form.Convention
form.Provisional
protection.

If the applicant wishes to apply for provisional protection only, he will receive with the application form two unstamped copies of Form B, upon which he should write and sign his Provisional Specification. The declaration, with the two copies, may then be posted to the Comptroller-General at the Patent Office, and the business is complete. By return of post the applicant will receive his certificate of filing, and in the next week's issue of the *Illustrated Official Journal (Patents)* the application is advertised. In about three weeks or a month afterwards (provided that his specification is sufficiently intelligible, and that his papers have been filled up according to the instructions given) he will receive the certificate of acceptance. The specification itself is kept secret during the term of provisional protection. No examination as to novelty takes place with regard to the Provisional Specification.

Certificate
of filing
Provisional.Advertise-
ment and
acceptance
of applica-
tion.

Complete
Specifica-
tion

Must agree
with Pro-
visional.

Claims.

Drawings.

Certificate
of filing
Complete.

Comparison
by
Examiners
of
Provisional
and
Complete.

At any time within six months from the date of his application the applicant may file his Complete Specification. The form for this (Form C) can also be purchased at a postal money order office. These forms are supplied in duplicate, and one copy bears a £3 stamp. The Complete Specification must be prepared in accordance with this form and upon the lines and limits laid down by the Provisional. It should conclude with a clear statement of what the inventor claims as new. It should be noted that Form C, issued under the Patents Rules of 1905, has a marginal note referring to Rule 4 and urging clearness, curtness, and simplicity of language in preparing the claim or claims. The Complete should, when necessary or desirable, be accompanied by line drawings executed in absolutely black ink, and without the use of colour or brush shading, so as to be suitable for reproduction by photo-lithography or zincography. Such drawings are to be made on pure white hot-pressed drawing paper of smooth surface and good quality, each sheet to be in duplicate, size 13 inches in length by 8 to $8\frac{1}{4}$ inches in width, or, if this is too small, 13 inches in length by 16 to $16\frac{1}{2}$ inches in width. On one of the copies of the drawing (marked "Original") the reference lettering should be in black ink; the other copy, which may be on tracing linen, should be marked "True copy," and the lettering should be in black-lead pencil. Both copies should be signed. The drawings must be delivered at the Patent Office either in a flat state or on rollers, so as to be free from folds, breaks, or creases.

When the Complete Specification has been dispatched to the Patent Office, a certificate of filing will in due course be received by the applicant.

The Complete Specification is now taken in hand by the Examiner in the Patent Office, who first of all compares it with the Provisional and satisfies himself that the documents are in order, that they describe the same invention, and are properly prepared in compliance with the Rules.

If the Complete does not sufficiently clearly ascertain and claim the invention, the Comptroller may, under Rule 6 of 1905, require amendment, and he may also, under the same

Rule, alter the date of the application so as to give sufficient time for subsequent procedure. The examination is also directed towards ascertaining that one invention only is included in the specification (see Rule 5 of 1905), and if more than one invention is included the applicant may be allowed to make a separate application for the surplus invention bearing the same date as the original application.

Comptroller
may alter
date.

One
invention
only.

Apparently also the Examiner, in fulfilling these duties, if the subject-matter appears to him to be unpatentable—that is to say, something which is not an “invention” within the meaning of Section 46 of The Patents Act, 1883—may report to that effect to the Comptroller, who, after hearing the applicant, may refuse the patent outright (*Cooper's Application*, [1901] 19 R. P. C. 53; *Johnson's Application*, [1901] 19 R. P. C. 56).

Unpatent-
able
inventions.

These preliminary points disposed of, should they crop up, the Examiner then addresses himself to the further investigations prescribed by the Act of 1902, *i.e.* to ascertain the novelty of the invention described and claimed. The field of examination is confined to all Complete British Specifications deposited and published or accepted in pursuance of any application for a patent made in the United Kingdom within fifty years next before the date of the application under consideration. Outside this limit the Examiner has no power to go. Provisional Specifications unaccompanied by a Complete (such, for instance, as were accustomed to be published under the old Act of 1852) are of no effect.

Examina-
tion as to
novelty.

Limits of
examina-
tion.

If the Examiner can find nothing to affect the novelty of the invention, he reports this to the Comptroller, who, in the absence of any other lawful ground of objection, will accept the specification, and such acceptance is notified to the applicant and advertised in the *Official Journal*.

Acceptance
of specifica-
tion.

If, on the other hand, the Examiner reports that the invention has been wholly or in part claimed or described in any such prior specification, the Comptroller advises the applicant of the objection, and specifies a time (two months according to Rule 8 of 1905) within which the application must be amended and returned to the Comptroller. If the amendment submitted is not to the

Examiner's
report.

Hearing the applicant.

satisfaction of the Comptroller, he may require further amendments or will appoint a hearing, giving ten days' notice, to allow the applicant or his agent or counsel to attend and urge orally the merits of his case; or the applicant might be asked to attend to make oral explanations; or he may be required to send an explanatory statement in writing.

Inserted reference to prior patents.

Unless the amendments of the specification are such as to meet the objections of the Comptroller, he has power, after hearing the applicant, to decide what references to prior patents must be made in the specification by way of notice to the public (Section 1, Sub-section 6, of the Act of 1902).

Terms of reference.

The exact wording of the inserted reference is given in Rule 10 of 1905. It runs thus: "Reference has been directed in pursuance of Section 1, Sub-section 6, of The Patents Act, 1902, to the following specification of Letters Patent No. , granted to ."

Reference under Rule 7.

The reference is inserted after the claims. Where the reference is under Rule 7, viz. to the effect that the reference is consequent upon a provisional report based on a partial and not exhaustive search by the Examiner, who has come to the conclusion that the invention has been wholly disclosed by the indicated prior patents, a statement to that effect is added to the reference (see Rule 10 of 1905).

No power of refusal.

The Comptroller has no power to refuse a patent on the ground of want of novelty, no matter how amply lack of novelty may have been shown by the examination. All that he can do is to add to the specification the reference to the patent which in his opinion anticipates it.

Avoidance of references.

The applicant may so amend his specification as not to require any references to prior patents; but if he declines to do so, and insists on retaining or objects to disclaiming portions which the Comptroller regards as lacking in novelty, then the Comptroller will require references lest the public should be misled or left in the dark as to what prior patentees have described or claimed. But so far as present practice is a guide, it is evident that references are not to be indiscriminately made. Thus the mere fact that a specification contains

one or more elements already described in prior patents will not call for a reference to these patents so long as it is made indisputably plain that the applicant does not claim these elements.

An appeal lies from the decision of the Comptroller to the Law Officer, who will appoint a hearing and either uphold, modify, or reverse the Comptroller's decision.

On the acceptance of the Complete, such acceptance is notified to the applicant and is advertised in the *Official Journal*. About three weeks afterwards the Complete Specification, together with the Provisional, is printed and published. Within two months from the date of the *Journal* in which such advertisement appears, any person interested in so doing and being entitled to oppose, may give notice of opposition to the application; but if these two months should pass without opposition being offered, the applicant may then pay the sealing fee of £1, whereupon the patent is sealed and issued to the applicant.

The foregoing is an exact account of the procedure when a Provisional Specification only is filed with the application, and is afterwards followed up within six months by a Complete Specification. But it should be said here that the applicant has the option of filing a Complete Specification in the first instance instead of a provisional description. Each course has its advantages, and the simpler plan will be to lay these in order before the reader.

First.—If application is made for provisional protection only in the first instance, the advantages are that the preliminary cost is less—viz. £1 instead of £4—while the applicant has six months during which he may, without fear, test the value of his invention either publicly or privately, improve upon the details, make searches as to its novelty, sell or agree to sell his discovery or its products, and, in short, deal with his invention just as if he had a patent, except in this respect, that he has no right of action against infringers until he has obtained his patent, and then only in respect of infringements committed after publication of his Complete Specification (Patents Act, 1883, Section 13). To these should be added the consideration

Appeal.

Acceptance of Complete and publication.

Period for opposition.

Sealing of patent.

Provisional Specification may be dispensed with.

Advantages of provisional with application.

Applicant may work invention during Provisional Protection.

Infringements after publication of Complete.

Renewal of
abandoned
application.

that, as the Provisional Specification may be a document much less exact in its terms than a Complete Specification, an application for provisional protection may be filed at a stage in the conception of the invention when it might be impossible or injudicious to give full details. Lastly, if the invention should prove disappointing, the application may be abandoned without incurring further expense, and without rendering the invention public property, seeing that the specifications of all abandoned applications are never published, but remain secret. Therefore, if the applicant should afterwards be able to remedy the defects in his invention, there is nothing to prevent him from renewing and completing his application, provided that he has not in the meantime published his idea, or that some other inventor has not crept in after the date of his first, but before the date of his second, application. In practice the great majority of applications for patents are accompanied in the first instance by a Provisional Specification only.

Filing
Complete
with
application.

Only recom-
mendable
where
invention
is perfect.

Applica-
tions under
the
Convention.

Secondly.—If application is made accompanied by a Complete Specification, the advantages which exist are much less obvious. Where an agent is employed there is no doubt some slight saving in agency fees. The total stamp amounts are the same in both cases: viz. £4. The acceptance and publication of the Complete Specification at once places the applicant in a position to deal with infringers as soon as he gets his patent into his hands. On the whole, it may be said that a Complete Specification should only accompany the application in those cases in which the details of the invention are fully worked out, and where the applicant has no reasonable doubt of the novelty, utility, and assured practical success of his invention.

The preceding remarks are intended chiefly for the guidance of British inventors and applicants. The conditions governing applications for patents by foreigners and others under the International Convention differ in some respects from home applications, and are governed by The Patents Act, 1901, and The Patents Rules, 1903

and 1905. An application under the Convention must be made on Form A2, and, according to Rule 13 of The Patents Rules, 1903, the declaration must specify the Foreign States or British Possessions in which applications have already been made, setting out the official dates. The application must be made within twelve months of the first foreign application; must be accompanied by a Complete Specification and drawings (if any); must be in the English language, and must be signed by the foreign applicant. A copy of the specification and drawings of the first foreign application must accompany the papers, and these must be certified by the official head of the Foreign Patent Office. If in a foreign language, a translation of the documents, verified by statutory declaration, must accompany the application. If not accepted by the Comptroller within twelve months from the date of the first foreign application, the Complete Specification and drawings are thrown open to public inspection at the expiration of that time. Subject to these preliminary conditions, Convention applications are then dealt with exactly as in the case of British Complete Specifications, except that the date of the British Patent will be the same as that of the first foreign application.

Conditions
to be
observed
by Appli-
cants under
Convention.

Rules 13, 14, 15, 16, and 52 of The Patents Rules, 1903, govern these Convention applications, and these Rules are set out in full after Chapter XXVI. of this division of the work. The Rules of 1903 as printed are consolidated with the Patent Rules of 1905, and readers are advised to supplement their perusal of this chapter by an examination of the Rules.

Patent
Rules.

In the foregoing description of the mode of procedure it has been assumed that the Provisional and Complete Specifications are prepared by the inventor himself. But if the writer may be allowed to express an opinion, grounded upon long experience, the preparation of the specification by the inventor himself is not a course to be recommended. No prudent man attempts to draw a conveyance, mortgage, will, or other legal instrument without the assistance of a properly qualified adviser, and such care is no less essential in the case of Patent Specifications,

Some
reasons
for the
employment
of patent
agents.

especially in view of the increased difficulties and responsibilities thrown upon an applicant by the advent of the examination system under the Act of 1902. The fatal facility with which any person, fired by some crude idea, can enter a post-office, buy a form, scribble down his inspiration, and incontinently post the whole to the Comptroller, is by no means an unmixed benefit, and has its result in a flood of rubbish poured into the Patent Office every year. Probably a very large proportion of the applications thus made would never have been filed if they had been submitted in the first instance to the calmer judgment of an experienced and properly trained patent agent or solicitor.

Specifica-
tion must
be prepared
with reason-
able skill
and
knowledge.

But, apart from this, should the invention really contain some valuable subject-matter, the assistance of a professional adviser would in many instances enable the inventor to reap results of which his own precipitancy and self-confidence deprive him. Undoubtedly there are many inventions so simple that a plain man using plain language can express the gist of his invention sufficiently well to satisfy requirements; but in all cases the burden is laid upon the applicant that the specification and claims shall be prepared with "reasonable skill and knowledge," and if these essentials are wanting nothing can save the patent from being upset should it come to be tested in a Court of law.

Extension
of time to
complete
application.

It has been said that, where a Provisional Specification has been first filed, the Complete Specification should be lodged before the expiration of the succeeding six months. If from any excusable cause this term should elapse without the Complete Specification being filed, it may be filed within one month after, on payment of a fine of £2. If it be not filed within the extreme time allotted—that is, within seven months from the date of application—the application is considered to be abandoned. This extension is not granted as a matter of course, and the Comptroller under the Rules of 1903 has discretion to inquire narrowly into the circumstances, and to refuse the extension of time if he thinks fit. Under Sub-section 4 of Section 9 of the amended Act

of 1883, the Complete Specification must be accepted within twelve months from the date of the application, except when the delay arises from a cause beyond the applicant's control: but the time for acceptance may be extended from one to three months on good cause for the delay being shown to the Comptroller, and on payment of the fee, which amounts to £2 for one month, £4 for two months', and £6 for three months' extension. Here also the Comptroller has power to inquire fully into the circumstances and to refuse the extension if he thinks fit.

Extension
of time for
acceptance
of Com-
plete.

Oppositions will be treated under the heading specially devoted to that subject (see Chapter XIV.).

Opposition.

If no opposition is entered, or if the opposition is unsuccessful, the applicant may give notice at any time on or before the last day on which the patent can lawfully be sealed that he desires a patent to issue on his application. This notice is given on Form X. bearing a stamp of £1, and on receipt of the notice the patent is sealed and issued as of the date of the application.

Date of
patent.

The patent is granted for fourteen years, and covers the United Kingdom of Great Britain and Ireland and the Isle of Man. The Channel Islands no longer appear in the grant.

Duration.

The question of Amendments of Specifications will be treated under its proper heading (see Chapter XVI.).

Amend-
ments.

CHAPTER III.

WHO MAY BE A PATENTEE.

Persons
entitled to
become
patentees.

ANY person, of either sex, whether a British subject or an alien, may be a patentee. Even those who are generally considered under legal disabilities, such as infants and lunatics, may become patentees, so long as the necessary documents are prepared in the prescribed manner. No inquiry is made by the Patent Office as to the age, sanity, or coverture of the applicant. Applicants must apply in their real names, and not under assumed or trade names.

Corporate
bodies.

A corporate body is a person within the Statute and may be a patentee (Section 117). But a corporate body alone could not make the necessary declaration, not having the mind to invent, but must be coupled with the true inventor. Foreign corporations owning patents abroad and desirous of obtaining British patents frequently communicate the invention to a representative or agent in this country, who thus becomes the grantee on behalf of his foreign correspondents. Under the Convention, where a foreign corporation has applied for a patent abroad—in one of those countries where a patent can be granted to a corporate body—the corporation may apply for and obtain a patent in this country in its corporate name alone (*Clarez's Application*, [1889] 6 R. P. C. 552).

Firms.

A firm as such cannot obtain a patent. The application should be made jointly by the individual members of the firm.

Exceptions.

It is submitted that the general rule—viz. that any person may be a patentee—is subject to exception in the case of the Sovereign, on the principle that the Crown cannot make a grant to itself. It follows from this that should the legal estate in a patent become vested in the

Crown as *bona vacantia*, apparently as the Crown cannot be a patentee under its own grant, the patent ceases to exist by merger (*per* Buckley, J., in *Taylor's Trusts*, [1904] 21 R. P. C. 715). Further, although many such patents exist, some authorities have doubted whether a beneficed clergyman can legally become a patentee, in view of the prohibition from trading under 1 & 2 Vict. c. 106, Sections 28 to 30. The question whether an alien enemy is incapacitated as a patentee was raised, but not decided, in *Bloxam v. Elsee* ([1825-7] 1 C. & P. 558; 1 Web. P. C. 132). The probability is that he would not be ousted on that account alone.

Crown.

Clergyman.

Two or more persons may make a joint application for a patent, and it is provided that a joint application may legally be made by the inventor or inventors in conjunction with another individual or with persons who are not joint inventors. Thus an invention may be patented in the joint names of the inventor and a capitalist with whom he has agreed to associate himself. The name or names of the actual inventor or inventors must, however, be specified in the declaration.

Joint patentees.

The "true and first inventor" is, in the eye of the law, the first legitimate applicant for a patent. If another person has previously discovered the invention, but has neither disclosed it in a manner sufficient to constitute publication nor applied for a patent, he cannot prevent a subsequent independent inventor from obtaining a valid patent. *A fortiori*, where two people simultaneously and independently evolve the same invention, the true and first inventor is the first applicant for a patent.

True and first inventor.

Independent inventors.

Neither is the term "inventor" under the Act confined to a person who evolves an invention from his own mind. The term is also used to designate one who first introduces or imports an invention from abroad. A patent granted to such an applicant would be perfectly valid if it could be shown to be unknown and unpublished in this country at the date of the application, and if no fraud within the jurisdiction and as against the true inventor has been practised. However, if the invention

Importers.

Rights of
foreign
inventors
under Inter-
national
Convention.

has been previously patented or protected abroad, the foreign or other inventor has the privilege, in those countries which have become parties to or share in the privileges of the International Convention, of making an application here within twelve months and obtaining the same date as that of the original patent abroad. Such foreign applications under the Convention must, when made in this country, be accompanied by a Complete Specification (see Section 1, Sub-section 2, of The Patent Act, 1901), and if not accepted within twelve months from the date of the earliest foreign application will be thrown open to public inspection.

Position of
persons
assisting an
inventor to
perfect his
idea.

A person who originates the fundamental idea of an invention, and then takes it to a skilled man and employs him to work out the details, is entitled to include the suggestions of his assistant in his specification, and the assistant has no right to patent in his own name the improvements he may have made (*re David & Woodley*, Griff. A. P. C. 26; *Smith's Patent*, [1904] 22 R. P. C. 57).

Master and
servant.

A servant or paid assistant taking out patents in this improper manner at home and abroad may be declared trustee of the patents for the benefit of the rightful owner (*Richmond v. Wrightson*, [1904] 22 R. P. C. 25). But if an employer merely tells his servant to devise something to fulfil a specific function, without telling him how it is to be done, and pays him for doing so, the servant is the inventor, and he alone can properly patent it (*Marshall & Naylor's Patent*, [1900] 17 R. P. C. 553). On the other hand, the mere relationship of master and servant does not justify the master in patenting the servant's invention, even when made in the master's time and with the master's tools (*re Heald*, [1891] 8 R. P. C. 429). But when the relationship between employer and employed is of an intimate and confidential nature, and the servant has allowed his masters to use the patent in their business, the subsequent severance of their connection might not justify the ex-employé in holding and using the patent as against his former employers, much less prevent them from continuing the use of the invention in

their business (*Worthington v. Moore*, [1902] 20 R. P. C. 41). But the actual circumstances of each case of this description must be carefully considered.

If an inventor should die before applying for a patent his legal representatives may make the application, and if his death should occur after the application, but before completing, his legal representatives may proceed and obtain the grant of the patent.

Rights of
deceased
inventor's
representa-
tives.

A person resident in this country may patent in his own name an invention communicated to him by the actual inventor abroad. In such case it is usual, though not essential, to indicate the source from which the knowledge has been derived.

Communi-
cated inven-
tions.

CHAPTER IV.

SUBJECT-MATTER OF PATENTS.

Definition
of "Inven-
tion."

Section 6 of
Statute of
Monopolies.

"Inven-
tion"
means new
manu-
facture.

"Manu-
facture"
means both
method of
making and
product.

IT HAS been said that neither in the Patent Law Amendment Act of 1852 nor in the more recent Acts of 1883 to 1902 has any attempt been made to define the meaning of the term "Invention." In both instances the reader is referred back to the ancient Statute of Monopolies. Turning, then, to Section 6 of that Statute, we find that Letters Patent and Grants of Privilege are limited in favour 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 Patent and Grant, 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."

Therefore, the subject-matter of Letters Patent must be some "*manner of new manufactures*." It is very unlikely that the old draftsman in setting down this definition of subject-matter had any glimpse of the magnitude of the interests that would be created by this Section 6 of his Bill. The clause was the earliest effective legislative recognition of the public policy of allowing temporary privileges to the inventors of new manufactures. It is the basis of our present law and the cradle of the gigantic patent system in force across the Atlantic.

The discussions that have taken place upon the true meaning of the "working or making of any manner of new manufactures" only prove how unintentionally well chosen and comprehensive the expression really is. "Manufacture" has been held to be synonymous with "invention," and to mean not only the process of making, but also the thing produced. For example, "manufacture"

as applied to hatting might mean (a) the machinery by which the hat is made, or (b) the successive steps or processes to which the hat body is subject, or (c) the hat itself. "It was admitted," says Chief Justice Eyre, in *Boulton v. Bull* ([1795] 2 H. Bl. 463; 3 Ves. 140), "that 'manufacture' is applicable not only to things made, but to the practice of making; to principles carried into practice in a new manner; to new results of principles carried into practice." Thus the term excludes a mere barren principle, no matter how great the discovery may be, so long as no immediate practical result useful to individuals or to trade is brought about. And apart from a principle the term also excludes any mere scientific discovery which does not result in the production of some useful tangible thing or process of manufacture. Said Lord Cranworth in *Ralston v. Smith* ([1860] 11 H. L. Ca. at p. 250): "It is not every useful discovery that can be made the subject of a patent, but you must show that the discovery can be brought within a fair extension of the words 'a new manufacture'" (see also Lord Davey in *Chamberlain & Hookham v. Mayor of Bradford*, [1903] 20 R. P. C., at p. 687). In other words, the mere laying bare of a physical law or force which has been in existence since the world began, no matter how tremendously it may increase the scope of our knowledge and the sum of our wealth, cannot be patented. Thus, to instance extreme cases, Newton could not have patented his discovery of the laws of gravity; nor Harvey his of the circulation of the blood; nor Franklin his of electricity. But lesser minds coming after these great intellects may, by special devices, put these newly-discovered forces into harness, so that they shall grind corn, pump water, or carry messages, and for these devices patents will be granted.

But does not include bare principle.

Discovery not "invention."

At one time it was doubted whether the language of the Statute extended to processes; but by a long series of decisions, of which *Crane v. Price* ([1842] 1 W. P. C. 393; 12 L. J. C. P. 81; 4 M. & G. 580) is one of the oldest, it has been placed beyond controversy that a process, whether it be chemical or mechanical, is good subject-matter for a patent.

"Manufacture" includes "process."
Crane v. Price.

To those having any knowledge of the varied stand-points from which patentable inventions can be surveyed it need hardly be said that it is impossible to cut up and label the legitimate subject-matter of patents into a distinct and exhaustive number of areas. One portion of any such arbitrary division is sure to be found overlapping or trenching upon the others. But for the sake of convenience it might be found profitable in a work of this nature to consider patentable inventions as being roughly divided into the following six classes: viz.—

Classes of
subject-
matter.

1. New and useful machines for new or old purposes, and improvements in existing machinery.
2. New and useful combinations of mechanical parts and of materials.
3. Improvements in existing manufactures, processes, or parts of processes.
4. Novel and useful results and products of manufactures and processes.
5. New or improved processes for which special machinery may or may not be necessary.
6. New principles, coupled with a mode of carrying the same into practical effect.

A short examination of each of these heads, with a few annexed practical examples, will assist the reader to understand them more fully.

1. *New and Useful Machines for New or Old Purposes, and Improvements in Existing Machinery.*

New and
improved
machinery.

A new machine or contrivance may be for an entirely new purpose, or it may be for use in connection with an old purpose. The first is an extremely rare class of invention. The second is most common. As an example of the first, take the subject of the transmission of speech over long distances by electricity. Here was a new purpose,

and the telephone, with its vibrating plates, transmitter, and receiver, formed a new apparatus for this new purpose. Therefore the telephone was a patentable invention of the highest order—namely, a new apparatus for a new purpose. Wireless telegraphy, where the atmosphere is made to perform the duties of the usual connecting and conducting wires, might also be cited as an epoch-making advance upon the existing electric telegraph; and the electric wave-collectors with their later synchronising and syntonising developments would all constitute new apparatus for this new purpose.

Example of
the highest
type of in-
vention.

As an example of the employment of machinery to effect for the first time by a mechanical operation what had hitherto been done by hand, the original sewing machine might be instanced. Sewing is among the oldest of arts. But the first sewing machine was an absolutely new contrivance for this old purpose: therefore it formed patentable subject-matter, though of a less high class than the telephone, seeing that the purpose to which it was applied was old.

Example of
a lower
type.

Improvements in existing machinery may be said to form the bulk of patented inventions. For example, there are hundreds of patented improvements on the original sewing machine. Indeed, in all classes of machinery of which large quantities are used, an improvement which to an outsider may seem but a very slight advance is often the source of fortune to its inventor, and is patentable subject-matter.

Improve-
ments in
existing
machinery.

In *Moser v. Marsden* ([1893] 10 R. P. C. 350) Lopes, L. J., said that a new mode of using an old machine by altering it, involving the exercise of invention and ingenuity in its application, is good subject-matter for a patent. In the above case, in which the Court of Appeal and the House of Lords ([1895] 13 R. P. C. 24; 73 L. T. N. S. 667) affirmed the validity of the patent for the well-known Moser "raising" machine, the evidence showed that the advance effected by the patentee upon prior inventions for the same object, although apparently slight, had *practically* been exceedingly successful, and this had great weight with the Court in supporting the patent.

Instances of
apparently
slight
advance.
Moser v.
Marsden.

Instances
of very
slight
advance.
*Goddard v.
Lyon.*

In *Goddard v. Lyon* ([1894] 11 R. P. C. 354) the only essential difference between the plaintiff's disinfecting machine and similar disinfecting apparatus made before the date of the patent was, according to Lord Watson, "That in the plaintiff's, the purifying chamber is fitted with a door capable of resisting, and therefore enabling the process to be carried on with, high pressure steam. If the 'Aberdeen'" (*i.e.* the alleged anticipation) "had been made with a door to the inner chamber which would have permitted the use of high pressure steam, the plaintiff's invention would, in my opinion, have been thereby anticipated." It may be said that, in spite of the apparent obviousness of the improvement, the patent was sustained.

Obvious
alteration
not
invention.

To multiply examples of what have been held to be patentable improvements in existing machinery (no change being made in the purposes for which such machines are used) would be to cite more than half of all decided patent actions, and the two foregoing cases have been selected as examples of comparatively slight improvements in existing mechanism which have been upheld as patentable matter. Still, let it be noted that obvious alterations and additions such as might occur to a man of average intelligence in constructing a machine, are not as a rule patentable. The advance must betray *invention* as well as involve *utility*. What these expressions have been held to mean will be discussed under their proper headings.

Improve-
ments upon
existing
patents.

Additions to or improvements on existing patented machinery or things, may also be made, and in their turn patented (see *Fox v. Dellestable*, [1866] 15 W. R. 194; *Lister v. Leather*, [1857-8] 8 E. & B. 1004; 27 L. J. Q. B. 295). If the improvement is separable from, and is no essential part of, the existing patented machine or thing, it may be made and sold separately. But if it forms an integral part of the machine or thing, and is useless apart from it, it would evidently be of little advantage to the inventor, as he could not make use of the original invention without the sanction of the original patentee. On the other hand, the original patentee could not make use of the improvement

without the permission of the second patentee, and, as a consequence, the second patentee might find his reward in selling or licensing to the original patentee.

2. *New and Useful Combinations of Mechanical Parts and of Materials.*

Although patents are granted for combinations, it must be said at the outset that a combination to warrant a patent should show invention. Obvious combinations are not good subject-matter. Therefore, in every case it is necessary to take the merits into consideration to decide whether or not the effecting of the combination shows the exercise of invention. All engineers have at their disposal a certain number of well-known parts and motions which are the *disjecta membra* of the mechanical arts. In building a machine for a certain purpose he may make use of these known parts and motions, and by combining them produce an apparatus fit to perform a certain function. So long as he merely exercises judicious selection and puts the different parts to their obvious uses, he does not *primâ facie* exercise invention but only ordinary workman's skill, and in that case the machine, although perhaps the first of its kind, is not necessarily a patentable invention. Take as an example the simplest form of combination: viz. the mere coupling together of two well-known things which have heretofore acted separately, but which on being connected give a continuous operation. A good illustration of this is to be found in *Williams v. Nye* ([1890] 7 R. P. C. 62). The plaintiff in this case had merely taken a well-known mincing-machine and an equally well-known machine for filling skins and connected them together, so that the mincing and filling operations were continuous instead of being interrupted as before. The result was a sausage-making machine which was proved to be most useful, meritorious, and economical. Nevertheless, the Judges of the Court of Appeal expressed themselves as satisfied that there had been no such exercise of the *inventive* faculty as to make the plaintiff's machine subject-matter for a patent. Even where the combination was apparently not

Patents for combinations.

Mere judicious arrangement not patentable.

Mere putting together two known things not invention.
Williams v. Nye.

*Saaby v.
Gloucester
Waggon Co.*

quite so easy to effect, the patent could not be upheld. In *Saaby v. Gloucester Waggon Co.* ([1880-3] L. R. 7 Q. B. D. 305; 50 L. J. Q. B. 577) a decision adverse to the patent was grounded on the same objection. As was pointed out by Field, J., the evidence showed that any person conversant with the subject could, by placing the two known parts side by side, effect the patented combination without further experiment or information.

But mere
coupling
together if
invention is
required is
patentable.

Still, even this simplest type of combination—viz. the connecting of two well-known machines—might be patentable if the method and means used to connect them required invention. For example, merely to place a folding machine in line with a printing machine so as to print and fold continuously, instead of separately as before, would not be invention if nothing more were done. But if the continuous printing and folding involved some necessary transmitting mechanism, requiring design and the exercise of invention, to pass each printed sheet separately to the folders, then the combination would be patentable subject-matter.

Combina-
tion of a
concretion
and
abstraction
not
patentable.

It is impossible to patent the combination of a concrete thing with an abstract property or qualification. Chief Baron Pollock, in trying to express this, once said: "You cannot have a valid claim for the combination of 2½d. with a pound of butter." An example will help the point to be better understood. We will suppose that rollers covered with porcelain were well known as being the best rollers that could be used for crushing grain. Suppose it were afterwards discovered that to make one roller run a little faster than the other produced a grinding as well as a crushing effect, which vastly improved the result by separating the germ from the starch part of the grain. Here is a real invention. It cannot be said that the idea is unpatentable. But, at all events, the claim that was really made—viz. "The combination of porcelain rollers with *differential velocity*"—proved to be untenable. Neither is it possible to patent a combination of two things between which no real combination exists. In criticising a faulty claim of this nature in *Osmond's Limited v. Balmain Cycle Co.* (1898; 15 R. P. C. 505) Chitty, L. J., remarked

that the patentee might as well have said: "I claim that gear with a hat on a man's head." Mere improved adjustment of the parts of a machine was held not to be patentable in *Kay v. Marshall* ([1836-41] 2 W. P. C. 39, 71, 79; 8 L. J. C. P. 261).

Almost the largest class of patented inventions is that of combinations of known mechanism. In *Spencer v. Jack* ([1862-4] 3 D. J. & S. 346; 11 L. T. N. S. 242) Lord Westbury took occasion to say that "it is impossible to deny that if there be a combination of several things previously well known, which combination is attended with results of such utility and advantage to the public that the combination itself is rightly denominated a *substantial improvement*, it is, I say, impossible to deny that that is the subject of a patent."

Combina-
tions of
known
parts.

Such combinations may consist of arrangements of known mechanical parts or groups of parts. The combination may consist of mere rearrangement, addition, or subtraction. The known parts or groups must not be independent of each other, nor must the connection of the groups be known or obvious. The combination may consist entirely of old parts or groups, and in such a case the patentee is usually tied somewhat closely to the arrangement shown and described. Therefore, another inventor might, by changing the combination to a greater or less extent, place himself outside of the scope of the patentee's claims (see *Ashworth v. Roberts*, [1890] 7 R. P. C. 451; L. R. 45 Ch. D. 623; 60 L. J. Ch. 27; *Curtis v. Platt*, [1863-4] 35 L. J. Ch. 852; 11 L. T. N. S. 245; Good. P. C. 144; *Lambert Co. v. International Record Co.*, [1904] 21 R. P. C. 247; *Morrison v. Asplen*, [1904] 21 R. P. C. 557). An interesting example of a non-infringing deviation from the plaintiff's claimed arrangement is also to be found in *Pilkington v. Massey*, [1904] 21 R. P. C. 696.

Patents for
mere com-
binations
of known
parts
usually
narrow.

*Curtis v.
Platt.*

As examples of combinations of old parts too obvious to constitute subject-matter reference might be had to *Longbottom v. Shaw* ([1891] 8 R. P. C. 333; L. R. 43 Ch. D. 46), where hooks, formerly attached separately to a cloth winding frame, were, according to the patent, attached first in rows to a carrying strip of metal, and this strip with

Examples
of obvious
combina-
tions.

its attached hooks then secured to the reel. This was held not patentable. In *Newsom v. Mann* ([1890] 7 R. P. C. 307) a patent was held bad where the invention consisted of combining in one casting several parts of a frame which had hitherto been cast separately. In *Deeley's Patent* ([1895] 12 R. P. C. 192) a combination of old parts in gun mechanism under the first claim was held to show no invention and no substantial advantage, and to be bad. In *Wood v. Raphael* ([1897] 14 R. P. C. 496) the patent was upset on proof that the patentee had only combined in double eyeglasses certain features—viz. a rigid bridge, pivoted placquets, and spring arms—which had before been separately used in double eyeglasses. The admitted advantages of the combination did not save it, no new function being performed.

Wood v. Raphael.

Examples of combinations held not too obvious.

Siddell v. Vickers.

But, on the other hand, combinations of old parts for old purposes are generally sustained where, in addition to increased utility, it is obvious that ingenuity is present. In *Hayward v. Hamilton* ([1881] Griff. P. C. 115) the combination of the old prism with the old pavement light was upheld, the Court coming to the conclusion that ingenuity had been exercised in effecting the combination. In *Siddell v. Vickers* ([1887-9] 5 R. P. C. 81, 416; 6 R. P. C. 464) the combination of an endless chain, chain-wheel, and ratchet arrangement for turning large forgings was upheld, notwithstanding that the endless chain and chain-wheel had been in common use for this very purpose, and the internal ratchet teeth and pawl constituted a mechanical appliance of the commonest knowledge, although not before used for this specific purpose. It must be said, however, that Lord Herschell, in his judgment, admitted that this case was near the border line, and that no great exercise of the inventive faculty had been required. A difference between this and the *piece-acc.* case is, that in *Wood v. Raphael* (*supra*) all of the parts of the combination had before been used separately in a *piece-acc.*, whereas in *Siddell v. Vickers*, one of the elements of the combination had not been used for such a purpose before, and in addition a new functional advantage was gained by the combination. It would be unsafe, however, to deduce any

Combina-
tions of
known
parts not
known to
be functional
advantages.

general rule that no combination the parts of which had been separately used for the same purpose could, as a combination, be patentable subject-matter.

Rigby, L. J., in discussing the essentials of a combination of old parts, said, in *The Lancashire Explosives Co. v. The Roburite Co.* ([1895] 12 R. P. C. 482): "Invention consists in many cases in putting together items of common knowledge which no one else has ever thought of combining." Abbott, C. J., also, in *Brunton v. Hawkes* ([1820-21] 4 B. & Ald. 541; Good. P. C. 97) said that "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."

Rigby, L. J.
on inven-
tion in com-
binations.

It should be said at this point that the tendency of the Court under recent practice is rather in favour of sustaining combination patents without enquiring too narrowly into the *quantum* of invention, if it is clear that a public want has been met and a considerable commercial success obtained.

Commercial
success.

Thus, in *Taylor & Scott v. Annand et al.* ([1900] 18 R. P. C. 53), the plaintiffs' patent was for apparatus to print late racing and other news in successive editions of a newspaper. Previously the ordinary method in use was to cut out a portion of the stereo. plate, or to leave a gap in the plate which was filled in when required by a small fudge-box, containing the late news set up in type. The objections to these methods were the time consumed and the difficulty of securing the type in the small box. The plaintiffs' appliance consisted of an auxiliary short baby-roller carried on an eccentrically mounted shaft, and moveable to any position along the shaft. The short baby-roller carried the late news type, and could be shifted on the shaft so as to bring the type opposite to the blank left in the earlier edition to receive this late news. Evidence showed that auxiliary rollers for printing matter other than or additional to the matter on the main cylinder had been previously used in printing machines, but those rollers had been of equal length with the main printing cylinder. A baby-roller or short drum adjustable on

*Taylor &
Scott v.
Annand.*

Halsbury,
L. C., on
combina-
tions.

a shaft was *per se* of common knowledge for other purposes, and shafts carried in eccentric bearings are quite usual in other machinery: for instance, in throwing toothed wheels in and out of gear. In short, as far as the immediate claim of the plaintiffs against the defendants was concerned, there was no single item of the arrangement which was not old in machinery generally, and certainly invention was not strikingly evident. The Court of First Instance felt this so much that the patent was declared bad, *inter alia*, for want of subject-matter. But this judgment was reversed and the patent sustained by the Court of Appeal and House of Lords. Lord Halsbury, L. C., in his judgment, admitted that "there is nothing more difficult when one is dealing with a mechanical combination than to keep one's mind free from the impression created by the fact that all the elements or most of the elements are old," and further quoted with approval the dictum of Lord Herschell in *Vickers v. Siddell* ([1890] 7 R. P. C. 304) on the difficulty of applying the law relating to combination patents to particular cases. The deft manner in which the apparent simple and obvious appliance of the plaintiffs coped with the particular requirement of adding late news in a hurry to successive editions of a paper, and the fact that many newspapers had taken licences, were pointed to as indicating utility, novelty, and commercial success. "And," said the learned Lord Chancellor in concluding, "to say that it is so obvious that it requires no invention seems to me to be absolutely contrary to the reasonable inference to be drawn from the condition of facts to which I have referred."

Examples of
slight com-
bination
patents.

Instances of very slight advances in combination patents are to be found in *Parrett v. Homan* ([1890] 13 R. P. C. 398), which related to concrete flooring; *Goddard v. Lyon* ([1891] 14 R. P. C. 351), where the invention, broadly speaking, consisted in strengthening a steam door in an otherwise old discharging machine; and *Birch v. Harrop* ([1890] 13 R. P. C. 616), where the plaintiff, although unsuccessful in proving infringement, nevertheless successfully upheld the validity of his patent for a combination in which the only new feature appears to have been a not very striking variation

in the mode of moving the feed ring of a piece goods sewing machine. Although the defendant used an apparently obvious mechanical equivalent, the Court of Appeal said the patent was too narrow to allow them to go into the question of mechanical equivalents.

Birch v. Harrop and the often quoted case of *Curtis v. Platt* (*supra*) are, therefore, instances of the narrowest type of combination patent in which the patentee is practically tied down to what he has shown and described, and a patent of this limited range is always liable to be infringed if the infringer can change or modify the details sufficiently to place himself outside of the scope of the claim.

Narrow nature of mere combination patents.

But this evasion is not so easy when a combination, otherwise old, includes an essentially new element, although this may depend for its utility entirely upon its connection with the combination. Here the patentee is in a better position, and although an infringer may vary the arrangement and details of the combination, so long as he uses the novel element, or a colourable imitation of it, he will be held liable. In *Lister v. Leather* ([1857-8] 8 E. & B. 1004; 27 L. J. Q. B. 295) Lord Campbell said: "A valid patent for an entire combination for a process gives protection to each part thereof *that is new and material for that process*." James, V.-C., in *Parkes v. Stercus* ([1869] L. R. 8 Eq. 358; 38 L. J. Ch. 627) also says: "The cases establish that a valid patent for an entire combination for a process gives protection to each part thereof that is new and material for the process, which is nothing more than stating in other words that you not only have no right to steal the whole, but you have no right to steal any part, of a man's invention; and the question in every case is a question of fact—Is it really and substantially a part of the invention?"

Combination containing a new feature.

Lister v. Leather.

Parkes v. Stercus.

This reasoning was followed in *Proctor v. Heald* ([1857] 4 R. P. C. 333; 16 R. 36 Ch. D. 740; 57 L. J. Ch. 11), where the plaintiff had patented a combination forming an improved mechanical stoker. Every part of the combination was old for the purpose except a pivoted flap or shutter, which threw the coal with a circular sweep into the furnace. This swinging flap replaced the old horizontally moving

Proctor v. Heald.

pusher or ram. The evidence showed that the circular sweep of the flap had many advantages over the old fuel pusher in more evenly distributing the coal on the grate and reducing the shocks and strains on the tappets and springs. The swinging flap was not specifically pointed out as the novel part, and the claim was simply for the combination of the tappets, the shafts, the springs, and flaps as described and shown.

Relying upon the opinion of Lord Westbury in *Forwell v. Bostock* ([1863-64] 4 De G. J. & S. 77, 298; 9 L. T. N. S. 362, 528; 10 L. T. N. S. 144), that where there is a patent for a combination the specification must point out wherein the novelty and merit of the invention lies, the defendant, who used the flaps with a different combination of springs and tappets, took the objection that the combination only was claimed, and that the plaintiff could not pick out the flaps as if these had been separately claimed or discriminated. But Cotton, L. J., corrected the reading of Lord Westbury's dictum, by the after-expressed opinion of Lord Cairns, in *Harrison v. The Anderston Foundry Co.* ([1876] L. R. 1 App. Cas. 574), that the discrimination between what is new and what is old in a combination is *a matter for evidence*. In *Proctor v. Bennis* the Court of Appeal decided that in using the swinging flap the defendant had taken the "pith and marrow" of the plaintiff's combination and had infringed.

In *Wenham v. May* ([1887] 4 R. P. C. 303) the patentee had invented a gas lamp in which wire gauze screens were used in certain specified positions, the said gauze screens being claimed "as described and shown." The defendants also used gauze screens, but not in the same positions as in the plaintiff's lamp, their defence being, practically, that they had not infringed the specific combination claimed. It was held that, both upon the evidence and the specification, the object of the plaintiff's invention was to equalise and regulate the regenerative air currents by means of wire gauze screens, irrespective of the specific arrangement, and that the defendants by adopting such gauze screens had infringed the essence

In a combination differentiation of old from new is matter for evidence.

Harrison v. Anderston Foundry Co.

If essential of combination is taken the patent is infringed.

of the plaintiff's patent. A lesson on the essential of an apparatus or combination may also be had from a consideration of *The Automatic Weighing Machine Co. v. National Exhibitions Association, Limited* ([1891] 9 R. P. C. 41).

But, on the other hand, if someone makes use of the combination, omitting an element which the patentee has described and claimed as an essential part of the combination, there is no infringement, though the evidence of the plaintiff may bring into prominence the utility and importance of the parts actually taken by the alleged infringer (*Bunge v. Higginbottom*, [1902] 19 R. P. C. 187).

But no infringement if part described as essential, but not really so, is not taken.

In passing from mechanical combinations to those of materials we enter another field. A number of possible examples could be easily suggested. Thus, different materials may be mechanically mixed so as to produce new and useful results, such as linoleum floorcloth for example. New compositions of colours, varnishes, and cements might be so produced. In the same manner the combination of two materials, viz. caoutchouc with a woven fabric, results in a new product: *i.e.* a waterproof cloth; or the combination of two or more metals results in a new alloy. All of these are patentable.

New compositions of materials.

3. *Improvements in Existing Manufactures, Processes, or Parts of Processes.*

In order to differentiate the selected heads that have been set down as representing the main divisions of subject-matter, and so to avoid repetition, it will be necessary to consider the word "manufacture," not always in the broad and general terms extracted from the Statute of Monopolies, but sometimes in its narrower and more generally understood sense.

"Manufacture," under the present heading, must therefore be taken to represent the "making of anything by hand or by art," such, for instance, as the weaving of cut pile fabrics, the making of lead piping, or the production of paper.

Restricted meaning of "Manufacture."

For example in the manufacture of pile fabrics, instead of the usual plan of weaving the pile in loops and

Examples.

cutting these loops by an after operation, an inventor might produce a new method of weaving pile fabrics face to face in a double web, and cut the pile by the after operation of separating one fabric from the other, thus saving time both in the weaving and in the pile-cutting. Another inventor might propose to cut the pile in the very act of weaving, each pick as it is beaten up being severed by a series of knives worked from the beards. Both of these inventions would be patentable improvements in that special manufacture.

Again, take the production of lead piping. For many purposes, although it makes so convenient and cheap a tubing, lead is unsuitable. Metals of a higher cost have therefore to be used. But suppose a cheap and easy method were invented of thinly lining the interior of the lead pipe in the course of manufacture with this superior metal, so that all the advantages of the more expensive metal were obtained at the cost of only a slight increase in the price of the lead tubing. Here would be a patentable improvement in the manufacture of such tubing, based both upon the mechanism, if new mechanism had been devised, and also in respect of the new product—viz. the lined lead tubing.

Then to glance at a supposititious improvement in the manufacture of gas. The improvement might relate to the retorts, or to the purifiers, or to the materials distilled in the retorts; or the inventor might make an entire change in the process, and, as has been lately done, manufacture gas from a mixture of decomposed steam or water gas and vaporised oil.

Just as an inventor may effect a radical change in the whole of a mechanical or chemical manufacture or process, so the invention may relate to a part only of the process.

With this general introduction a few of the decided cases bearing on the present division of subject-matter may now be considered.

Example of
improvement in
existing
manufacture

In *Lister v. Norton* (1890; 3 R. P. C. 139) the plaintiff had patented an improvement in the manufacture of imitation rat silk, which consisted in blending silk with the mohair fibre before spinning. The silk gave smoothness and brilliancy and the mohair elasticity. Before the date

of the patent, imitation seal skins were well known, and silk and mohair, blended before spinning, had been used in the production of dress goods. Nevertheless, as an improvement in that particular manufacture (*i.e.* imitation seal skins) the patent was upheld.

But the mere substitution of one known material for another in the production of a known article—as, for instance, the substitution of steel for whalebone and cane in crinolines—was, in *Thompson v. James* ([1863] 32 Beav. 570), held not to be subject-matter. But where the substitution of one material for another requires adaptation and shows some ingenuity, the patent may be upheld. Thus, in *American Braided Wire Co. v. Thomson* ([1899] 6 R. P. C. 518; L. R. 44 Ch. D. 274), woven wire was for the first time used to make ladies' bustles, which had formerly been made of cushions and of elastic pads of horsehair and whalebone. The House of Lords upheld the patent not with any great enthusiasm, but because they believed some thought and ingenuity had been expended on it. Great commercial success attended the patent, and this, no doubt, had its effect on the decision.

Substitution of one known material for another analogous purpose.

If invention required, such substitution is patentable.

American Braided Wire Co. v. Thomson.

The application of a known article or apparatus to a purpose analogous to that to which it has been already applied is seldom subject-matter, and is never so held if the extension to this analogous purpose appears obvious. Thus an old form of locking apparatus formerly used in cycles when in motion was held, in *Singer v. Rudge* ([1894] 11 R. P. C. 463), not to be subject-matter when applied to lock the head of a bicycle at rest. In *Rose's Patents Co. v. R. Braby & Co.* ([1894] 11 R. P. C. 108) the use of steam pressure in a manner analogous to the well-known oil vapour pressure in lighting apparatus of the "Wells" type was held not patentable. So the use of a common mode of joining the abutting ends of wires by a split tube and solder for the specific purpose of connecting the joined ends of the inextensible wire rings of tyre covers was held in *Shaw v. Burton* ([1896] 12 R. P. C. 282) to be bad subject-matter. In *Hodge v. Percell* ([1899] 16 R. P. C. 620) an apparatus for cutting necktie linings by clamping several layers of material between templates and cutting through the

Obvious analogous user not patentable.

Examples of obvious analogous user.

mass with a band-knife, the knife being guided by the conformation of the templates, was held bad. The evidence showed that cutting piles of cloth with a band-knife was old, and also the use of guiding templates for the same purpose. There certainly were difficulties to be overcome in dealing with such soft and fluffy material, but the House of Lords, sustaining the Courts below, held that the alleged invention was merely a more skilled application of well-known tools and processes. The Judges were not unanimous either in the Court of Appeal or in the House of Lords.

Harwood v. Great Northern Railway Co.
The Fish-plate Case.

An old and frequently quoted case on the point of analogous use is *Harwood v. Great Northern Railway Co.* ([1860-5] 2 B. & S. 194, 222; 11 H. L. Cas. 654; 31 L. J. Q. B. 198; 35 L. J. Q. B. 27), where the plaintiff had patented a channelled fish-plate for securing together the abutting ends of rails. The patent was upset on proof that plates having the same characteristics had been used to fish together the ends of wooden beams.

Morgan v. Windover.

The "Cee" Spring Case.

Another case bearing on the same point is that of *Morgan v. Windover* ([1890] 7 R. P. C. 131), where a "cee" spring, long in use at the rear of a carriage, was claimed when applied to the front. The plaintiff failed on the ground that it was a mere analogous user, and that no sufficient invention was apparent. In *Acetylene Co., Limited v. United Alkali Co., Limited* ([1904] 22 R. P. C. 152), Lord Halsbury, referring to these two cases, said: "Whether you look at the cases of the fish-plates or the 'cee' springs, the principle has been established beyond all doubt that, under each circumstances, finding out that a thing which is known and practically used can be applied to another purpose is not the subject-matter for a patent."

Example by Blackburn, J., of patentable analogous user.

Sometimes, however, when the user is apparently analogous, invention may be so apparent as to support the patent. Blackburn, J., in considering the case of *Beckett v. Pickaley* ([1875] 11 R. P. C. 40), gave an example of what he considered could be a patentable analogous user by supposing the apparatus commonly in use for the making of numerous pipes of paste, adapted so as to be used for the manufacture of metal tubing: just as in *Phillips v. Hely* ([1875] 11 R. P. 437) the Jacquard

principle was used for the production of musical sounds and harmonies instead of for weaving patterns in a loom. But instances of much closer analogous user have been sustained as patentable. Thus in *Pirrie v. York Street Flax Spinning Co.* ([1894] 11 R. P. C. 429), although the use of thin paper cop-tubes in the dry spinning of cotton was of ordinary common knowledge, the plaintiff, who claimed the employment of similar thin paper tubes in the spinning of *wet* flax fibre, had his patent sustained. The facilities in removing the tubes with the wound-on flax from the wooden bobbins after the drying process, and the better preservation of the form of the wound-on flax by reason of the presence of this thin paper core, were points in the evidence which induced the Court to find increased utility and invention. In *Gadd v. Mayor of Manchester* ([1892] 9 R. P. C. 516) the plaintiff's mode of supporting gasometers had been previously used in connection with docks and pontoons, but in spite of this alleged analogous prior user the patent was sustained. The old case of *Penn v. Bibby* ([1866] L. R. 1 Eq. 548; L. R. 3 Eq. 308; L. R. 2 Ch. 127; 36 L. J. Ch. 455), sometimes quoted as a case of analogous user, was only so to a small degree. The plaintiff's wooden bearings for propeller shafts, with the spaces for the free circulation of water, had little in common with the rough wooden chocks used to support the bearings of grindstones and the like, which were advanced as anticipations. The Court sustained the patent.

Examples
of users
held not
to be
analogous.

In chemical inventions the rule of law against mere analogous user is not so strong. As was said by Lord Herschell, in *Badische Anilin Fabrik v. Ierustein* ([1887] 4 R. P. C. 449), "analogy does not go a long way in chemistry."

The rule
against
analogous
user not so
strong in
chemical
inventions.

A just consideration of the cases only shows how dangerous it would be to attempt to lay down any general rule. Each case must be decided on its own merits, and evidence alone can decide whether or not in the application of old things to analogous or apparently analogous uses such invention and experiment have been required, and such increased utility proved, as will entitle the patentee to have his patent upheld.

No general
rule
applicable.

4. *Novel and Useful Results and Products of Manufactures and Processes.*

Products
good
subject-
matter for
patents.

The Courts seem to be still in doubt as to whether a new product *per se*, and apart from the process or means used to produce it, is good subject-matter for a patent. The most reliable writers on Patent Law lean rather against the proposition. The point has never been directly and in terms decided. On the other hand some strong expressions of opinion from the highest authorities might be quoted in favour of the suggestion that a product *per se* may be validly patented. Of course it is not, and never has been, disputed that when claimed as the result of a particular process or mode of manufacture, itself new, the product so produced is protected. In *Vorwerk v. Evans* ([1890] 7 R. P. C. 265) the patentees had invented a new mode of weaving ladies' waistbands to the required curved shape, each waistband being woven, lined, and turned out by the loom as a finished article. Before the date of the patent such waistbands had been cut from woven material to the required curve and then lined and finished, the whole process entailing considerable waste of material and expenditure of time. The new apparatus comprised a specially designed loom with the warp in separate sections and conical warp drawing rollers. The waistband produced was something perfectly new in construction, and in addition to the claim for the apparatus a specific claim for the product—*i.e.* the curved woven waistband—was made. The defendants attacked this claim, saying that a mere product was not patentable. But Cotton, L. J., although not feeling called upon to adjudicate on the claim as for a mere product apart from the method of production, intimated that in his opinion, even considered as a claim for the product *per se*, it might be sustained. The learned Lord Justice referred to the case of *American Braided Wire Co. v. Thomson* ([1889] 6 R. P. C. 518), where the patented product was a lady's bustle, and said: "If there is a new thing produced, and that is useful and

complies with other requirements, then in my opinion there could be a thoroughly good patent taken out for that."

In *Riekmann v. Thierry* ([1896] 15 R. P. C. 105) Lord Chancellor Halsbury said: "The learned counsel, when asked what the invention was, stated that it was the product itself, and there can be no doubt that the product itself may be good subject-matter of a patent."

Halsbury,
L. C., in
Riekmann v.
Thierry.

So also Lord Davey in *Acetylene Co., Limited v. United Alkali Co., Limited* ([1904] 22 R. P. C. 145), plainly stated that if an inventor discovers a new material having valuable commercial qualities, the material *per se* is good subject-matter; and that although the patentee is bound to describe some process by which the material can be produced, the process would matter nothing "because the merit and novelty of the invention would consist in the substance produced itself."

Lord Davey
in *Acetylene*
Co. v.
Alkali Co.

One would suppose that in view of these expressions of opinion, it might reasonably be contended that when a product is new and useful and complies with other requirements, it can be claimed by itself and apart from any process or mode of manufacture. But apparently considerable hesitation still exists in the minds of able Judges whose doubts cannot be ignored. For example, in *Kopp v. Rosenwald* ([1902] 19 R. P. C., at p. 211) Mr. Justice Buckley says: "I doubt myself whether in the strict sense of the word an article can ever be treated as being *in itself* the subject of a patent."

Judicial
doubt as to
patent
ability of
products.

But, with the greatest deference to this *obiter dictum*, surely there are cases where a mere product apart from the particular mode of manufacture would be the subject of a patent? What, for example, of a new metal alloy where the mere selection of the ingredients was the invention, not the melting and casting? Or a new artificial stone or floorcloth depending purely for its novelty upon the selection of the components?

There is no authority for saying that one may patent the mere production by machinery of something which has heretofore been produced only by hand. Nor is it possible to patent as a new product something which, although old

No patent
for produc-
ing by
machinery
a formerly
hand-made
article.

as produced by hand, has for the first time been put upon the market as made by machinery. A man could not patent as a new product and by itself a machine-made cigarette as against the old hand-made cigarette.

New compositions of materials.

In examples of mechanical admixtures of materials, resulting, for instance, in a new artificial stone or a new cement, where there is no invention in the process of mixing or making, but only in the selection of the materials, clearly the materials separately and apart from each other cannot be claimed as destined for that purpose. It is only when amalgamated and formed into the new and useful thing, whether artificial stone or cement, that they become appreciable subject-matter. Therefore the proper object to which to direct the claim is the product. In the same manner the novel result of a chemical process, such as a new dye, is a product capable of being patented. But the results of mere changes or variations in operations capable of indefinite change are doubtful subject-matter, even when the product is something appreciably different from what has been produced before. For example, although a number of patents are taken out for so-called new cloths, produced merely by a rearrangement of the ordinary operations of a weaver's loom, it is more than doubtful whether any such patent could be sustained, unless the result exhibited an advance of such importance as to justify the maintaining of the patent.

5. *New or Improved Processes with or without Special Machinery.*

Process patents.

Old cases on process patents.

If the result or product of a process is good subject-matter for a patent, it is clear that a new or improved process itself, whether applied to the making of a new product or to the manufacture of an old product, is equally good subject-matter. Lord Eldon, L. C., in *Hill v. Thompson* ([1817] Good. P. C. 241; 8 Taunt. 375), where the process related to the manufacture of iron, said that a new combination of old materials is patentable; and in *Gibson v. Brand* ([1841-2] Good. P. C. 211; 11 L. J. C. P. 177), where the patent related to a new process in the manufacture

of silk. Coltman, J., said that a process is good subject-matter. James, V.-C., in *Elmslie v. Boursier* ([1869] L. R. 9 Eq. 217; 39 L. J. Ch. 328), said that one of the most useful of inventions is that of a process by which a common article may be made more economically than it was before. The old authority usually cited in maintaining that a process is good subject-matter is the case of *Crane v. Price* ([1842] Good. P. C. 131; 4 M. & G. 580). But at the present time, when process patents are sustained every year, it would be thrashing a dead horse to cite the modern cases where process patents have been upheld.

Elmslie v. Boursier.

Crane v. Price.

A patentable invention may of course be constituted by an *addition* to an existing process. As was said by Stirling, L. J., in *Ashworth v. English Card Co.*, [1902] 19 R. P. C. 470, "A new additional step in an old process by which a better article is produced may, we think, be the subject-matter of a patent." It has also been held, as in *Russell v. Cowley* ([1835] Good. P. C. 407; 1 C. M. & R. 864) and *Wallington v. Dale* ([1851] Good. P. C. 487; 23 L. J. Ex. 49), that the *omission* of one or more steps from an existing process is patentable subject-matter. Where both process and product are new, both may be claimed; where the product is old and the process new, the process can be claimed. Thus in *Stevens v. Keating* ([1847] 2 Web. P. C., p. 182), Pollock, C. B., said: "The real invention may not be so much for the thing when produced as for the mode in which it is produced, and its novelty may consist not so much in its existence as a new substance as in its being an old substance produced by a different process."

An addition to or subtraction from a process is patentable.

A new process producing an old thing is patentable.

In the case of *Badische Anilin Fabrik v. Ierenstein* ([1887] 4 R. P. C. 449) it was held that the prior use of an analogous chemical invention will not go far as an anticipation of an after-invention. The cause of this is, probably, that analogy and deduction in chemistry are not so obvious as in mechanical operations. The same rule holds good in cases of alleged infringement. Thus, in *Nobel's Explosives Co. v. Anderson* ([1895] 12 R. P. C. 164), the plaintiffs, who had claimed the use of a *soluble* nitro-cellulose in the manufacture of a certain explosive, were

Cases illustrating the dictum that analogy does not go far in chemistry.

unable to succeed against the defendant, who used *insoluble* nitro-cellulose.

Patent
might be
for process,
product,
and
apparatus.

A process may be new and the product may be new, yet the process may be worked by apparatus which has been in common use before, and cannot be claimed merely because of its application to a new purpose. But in some cases the apparatus for carrying out the process may require to be specially devised, and then it may constitute a separate invention.

Thus there might be an invention in which apparatus, process, and product may all be new, and in such a case each may constitute subject-matter for a separate claim.

6. *A New Principle Coupled with a Mode of Carrying the Same into Practical Effect.*

A bare
principle
not
patentable.

It has again and again been laid down by the highest authorities that a principle *per se* cannot be patented. Thus Lord Chancellor Halsbury, in *Pneumatic Tyre Co. v. Tubeless Tyre Co.* ([1898] 16 R. P. C. 77), said: "You cannot appropriate to yourself a mere principle; you can only appropriate the application of the principle." In practice one of the difficulties attending the general application of the rule is whether the particular invention under consideration is or is not within the vague lines which define a principle.

"Discovery," not
invention.

It is undoubtedly true that the discovery of an abstract and fundamental law of nature or of a natural or scientific truth—such, for example, as the law of gravity, the circulation of the blood, the principles of electricity—cannot be validly patented. For, although our knowledge of these things is the result of logical reasoning, thoughtful observation, and well-weighed deduction, nevertheless they are in no sense inventions. Columbus, although he discovered America, did not invent it. "An invention is not the same thing as a discovery. When Volta discovered the effect of an electric current from the battery on a frog's leg, he made a great discovery, but no patentable invention" (*per* Lindley, L. J., in *Lane-Fox v. Kensington Lighting Co.*, [1892] 9 R. P. C. 416).

But, passing from these landmarks in human progress to the consideration of smaller issues, it is questionable whether it is not too much the custom to seek to narrow down the field of invention, by describing as principles, and therefore as unpatentable, matters which are really improvements legitimately due to invention, and relating rather to practice than to principle. Take, for example, the well-known "Hot-blast" Case of *Neilson v. Harford* ([1841] 1 Web. P. C. 295; 8 M. & W. 806; 11 L. J. Ex. 20), which is quoted so often as a test case on this very matter of principle. The action was tried in 1841, at a time when patent actions were remarkably rare, and when Judges had but little opportunity of making acquaintance with technical matters. The invention was simple. Prior to the date of Neilson's patent, iron-smelters had used a blast of *cold air* to blow up the smelting furnaces. Neilson's improvement was that he *heated* the blast. The advantages which have been derived by the iron industry of this country from this simple advance have been held to be incalculable. Fortunately for the patentee, the Court held that his claim was not for the principle of using a hot blast *per se*, but for the hot blast in conjunction with the means by which the blast was heated. Otherwise it is perfectly plain, from the observations of the Judges, that had it been construed that Neilson claimed "heating the air-blast of smelting furnaces" irrespective of any air-heating means, his patent would have been considered bad, as laying claim to a principle.

Principles
and their
practical
application.

*Neilson v.
Harford.*

It was not and cannot be pretended that the air-heating means involved any invention at all. Neilson briefly alluded to a heating box as a suitable means. But the invention lay altogether in the use of a hot blast. The least intelligent of ironmasters, when once told in three words what the object of the invention was—viz. to "heat the blast"—would have had no difficulty in constructing at once a more or less efficient heating means, such as a heating box, or a cylinder, or a heating coil, or a jacketed flue. He would have been astounded if he had been told that the patentable part of the invention lay, not in the grand secret of heating the air-blast, but in the self-evident heating means at his feet, although this had scarcely

given him any trouble to devise, and had called for the exercise of no invention at all. During the hearing of the above case of *Neilson v. Harford*, Alderson, B., said: "I take it that the difference between a patent for a principle and a patent that can be supported is, that you must have an embodiment of the principle in some practical mode, described in the specification, of carrying the invention into practical effect, and then you take out your patent not for the principle, but for the mode of carrying the principle into effect." It is useless to speculate whether the Court, constituted as it is to-day, might not, in the case of *Neilson v. Harford*, have given a different ruling upon the question as to whether the mere heating of the blast fell within the domain of principle. The precedent has been established, and all that can be said is, that wherever it is a question of claiming anything which seems to be of the nature of a principle, the rule is to claim it in conjunction with and as effected by the means for carrying the principle into effect, however simple and self-evident such means may be.

*Boulton
& Watt v.
Bull.*

Practically the same conclusions were arrived at in the case of *Boulton & Watt v. Bull* ([1795] 2 H. Bl. 463; 3 Ves. 140; Good. P. C. 70), the plaintiffs being the patentees of the separate condenser in steam engines. This difference, however, might be noted, that the means for carrying into effect the principle or plan of separate condensation were not self-evident, like the air-heater, but might have called for the exercise of the inventive faculties. Still more so was this the case in *Otto v. Linford* ([1881] 46 L. T. N. S. 35). One of the chief features of this invention was what Jessel, M. R., called the "idea," or principle, of putting a cushion of air between the explosive mixture and the piston of a gas engine so as to regulate or make gradual what would otherwise be a sudden shock. "Of course," said his Lordship, "that could not be patented. I do not read the patent so; I read the patent as being to the effect that the patentee tells us that there is the idea which he wishes to carry out; but he also describes other kinds of machines which will carry it out, and he claims to carry it out substantially

*Otto v.
Linford.*

by one or other of these machines. That is the subject of a patent." It will, however, be evident to the reader that the mere "idea" of interposing this elastic fluid cushion in the cylinder would be but a half-told tale if the ingenious mechanism for carrying it into effect were not also described and shown.

In *Booth v. Kennard* ([1856-7] Good. P. C. 68; 26 L. J. Ex. 23, 305) a general claim for making oil gas direct from seeds, without reference to apparatus, was held to be in effect a claim for a principle, and the patent was declared invalid.

Example of principle claimed without apparatus.

Alderson, B., whose remarks in *Neilson v. Harford* have already been quoted, said in the later case of *Jupe v. Pratt* ([1837] 1 Web. P. C. 145), "You cannot take out a patent for a principle. You may take out a patent for a principle coupled with a mode of carrying the principle into effect. . . . If you have done that, then you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as a piracy of your original invention." This dictum of the learned Baron was quoted with approval by Lord Davey in the comparatively recent case of *Chamberlain & Hookham v. Mayor of Bradford* ([1903] 20 R. P. C. 684). To claim all possible ways of carrying a principle into effect would be bad and equivalent to claiming the principle *per se*.

Alderson, B., in *Jupe v. Pratt*.

A distinction should be drawn between inventions entitled to the broad term "principle" and those which are rather of the nature of a quasi-principle. In *Automatic Weighing Machine Co. v. Knight* ([1889] 6 R. P. C. 297) the quasi-principle disclosed was the existence of a "break" between the weighing and the indicating apparatus, which break was keyed together or bridged over so as to make the machine operative when a coin was inserted. The defendant submitted that a claim for this would be a claim for a principle, but the Court of Appeal held it to be merely a patentable peculiarity in the arrangement of mechanism, rendering *all* arrangements of mechanism with this peculiarity an infringement. Later actions

"Principle" as compared with "essence" of invention.

Automatic Machine Co. v. Knight.

by the same plaintiffs against *The National Exhibitions Association* ([1891] 9 R. P. C. 41) and against *Fearby* ([1893] 10 R. P. C. 442) were successful upon this reading of the claim.

Master
patents.

Another example, where the claimed essence or quasi-principle of an invention was held to constitute the patent a master or pioneer patent in respect of that essence, occurred in the case of *Brown v. Hastie* ([1904] 22 R. P. C. 85). The plaintiff's patent was for a means of preventing leakage past the controlling valve of a steam steering engine. The improvement consisted of an auxiliary double beat valve placed in the steam supply passage in front of the controlling valve. The opening of the auxiliary valve was effected by the opening of the controlling valve. The auxiliary valve, though old in form for other purposes, was new for this specific purpose. The defendants had applied an auxiliary valve for the same purpose and in the same position, but differing structurally and in the mode of operation. The Court held in substance that the plaintiff's was a pioneer patent in respect of this new notion of shutting off the steam automatically from the controlling valve when closed, and that any auxiliary valve in this position for the indicated purpose was an infringement, no matter what differences in detail might exist. The vibrating flap, in *Proctor v. Bennis*, is another instance of essence or quasi-principle, or pith and marrow in an invention, constituting the patent a master or pioneer patent in respect of this essence.

Distinction
between
"principle"
and
"essence."

The indicated distinction between the broad term "principle" and its narrower subdivision of "essence" or "quasi-principle" was briefly referred to by the writer in former Editions of this book. That it has forced itself upon the notice of other authorities is evident from the remarks on the subject which are to be found in the scholarly brochure by Dr. W. Martin, of His Majesty's Patent Office, on *The Construction or Interpretation of Specifications of Letters Patent*, published in 1900. The learned Author says, on page 19 of his work: "That there is a principle in every invention would seem to be somewhat contradicted by the popular statement—an echo of the

Courts—that ‘you cannot patent a principle.’ The seeming contradiction simply arises from the ambiguity in the word ‘principle.’ That a mere philosophical abstraction or elementary maxim or truth cannot be the subject of a valid grant admits of no doubt; for such an abstraction is not a manner of manufacture within the meaning of the Statute of Monopolies. That protection merely issues for the manner, as some would contend, in which the principle is to be carried into effect is contradicted by facts; for when after the enunciation of a new principle, the subject of an invention, the method of its performance is clear to the juridical expert, it is highly probable that no such method need of necessity appear in the specification (*Boulton v. Bull*, [1795] Dav. Pat. Cas. 162, at p. 214). If a method does appear, its presence in these circumstances is simply a guarantee that the essence of the invention is not a mere philosophical abstraction, but is indeed a workable manufacture. The workable manufacture which may be stated in the form of a principle is what is indeed protected.”

Nevertheless, if there is an essence or quasi-principle disclosed in the specification which the patentee desires to claim, apart from the actual operating means shown, the claim should make such intention reasonably clear (*per* Cozens-Hardy, L. J., in *Ackroyd v. Thomas*, [1904] 21 R. P. C. 750), and the addition of a limiting phrase such as “substantially as set forth” to the claim might defeat so wide an interpretation of the claim.

If quasi-principle exists it should be claimed.

7. Unpatentable Subject-matter.

A valid patent cannot be obtained for the external design or form of an element of mechanism apart from the use to which it is applied (*Preston Davies v. Black*, [1894] 11 R. P. C. 80). But a patent may be obtained for an article the *shape* of which enables it to fulfil a useful purpose (*Werner v. Gamage*, [1904] 21 R. P. C. 621).

No patent for mere external design.

A mere scheme or system is not good subject-matter for a patent, however new or useful it might be. It is

Mere schemes and systems not patentable.

within the province of the Comptroller to refuse a patent for such a thing. Thus in *Johnson's Application* ([1901] 19 R. P. C. 56) a system of business correspondence or, as the Law Officer called it, "a plan for the conduct of business in a particular way," was held not to be fit subject-matter within Section 46 of The Patents Act, 1883, although the claim sought to disguise the real invention as a printed envelope constituting a new article of manufacture.

No patent
for illegal
or immoral
objects.

Inventions having illegal or immoral objects are unpatentable. Thus an improved burglar's jemmy or an instrument or medicine for procuring abortion would be refused protection.

CHAPTER V.

ESSENTIALS IN SUBJECT-MATTER.

INVENTION.

THE remaining essentials in patentable subject-matter are Invention, Novelty, and Utility.

First, as to Invention: This has been to some extent treated under the foregoing chapter on subject-matter; but something still remains to be said. According to Section 46 of The Patent Act, 1883, "Invention" means any manner of new manufacture the subject of Letters Patent and Grant of Privilege within Section 6 of the Statute of Monopolies. This dry husk of information teaches us but little, and therefore to acquire a just conception of this most elusive quality in subject-matter it will be necessary to devote some consideration to the question of what constitutes "invention" in accordance with the authorities.

Definition
of "Inven-
tion" in
Statute of
Monopolies.

Broadly speaking, invention in Patent Law means the using of a man's intelligence, reason, and brains in such a manner as to evolve, or recognise, or find, or make known a something out of the beaten track, and not noticeable or known to the ordinary mind. "Something," as Willes, J., said in *Tatham v. Dania* ([1869] Griff. P. C. 213), "which requires some exertion of mind that would properly be called 'invention.'" Or, as Lindley, L. J., said in *Lane-Fox v. Kensington Co.* ([1892] 9 R. P. C. 413): "A patentee must so use his knowledge and ingenuity as to produce a new result." *Per* Buckley, J., in *Reynolds v. Herbert Smith* ([1902] 20 R. P. C., at p. 126), "Invention necessarily involves also the suggestion of an act to be done, and it must be an act which results in a new product or a new result, or a new process, or a new combination for producing an old product or an old result." Unfortunately, there is no recognised and constant mete or measure we can apply to discover whether a man's device contains a sufficiency of

Attempts to
define
invention
by the
Bench.

the quality of invention. As Bowen, L. J., said in *Lyon v. Goddard* ([1893] 10 R. P. C. 334): "The question whether there is any ingenuity in the subject-matter of a patent is a question of fact which depends on a true view of all the circumstances."

The alleged obvious nature of an invention may be rebutted by evidence.

Thus the argument that the improvement was obvious and the advance slight may be successfully met, or at least combated, by showing that rival manufacturers had never thought of the so-called obvious modifications in an article of which very large quantities were made every year, and especially if substantial advantages in utility and convenience had been obtained under the invention.

Mere novelty does not imply invention.

It does not follow that because a thing has never been done before, the element of invention is necessarily present. Said Cotton, L. J., in *Blakey v. Latham* ([1889] 6 R. P. C. 184): "A thing is not to be called new simply because it has never been done before; there must also be invention." The same learned Lord Justice also expressed a similar opinion in *Britain v. Hirsch* ([1888] 5 R. P. C. 226). In *Rickmann v. Thierry* ([1896] 14 R. P. C. 105) Lord Halsbury said: "A thing may be new, but unless it has some invention it is not patentable."

Mere adaptive modification is not invention.

In *Nicoll v. Smeears* ([1893] 10 R. P. C. 240) Wright, J., decided that the mere prolongation of a burstable seam in a lady's habit for the whole length instead of for a portion of the length only as before, was not a patentable invention. Mere adaptive skill and judgment in modifying an existing thing so as to make it more useful is not invention (*Beavis v. Rylands*, [1900] 17 R. P. C. 704).

An invention might be accidental.

An invention might be accidentally made, as is said to have been the case with watered silks or "tabbies." But even then, a man's observation and thought must be exercised to recognise and utilise the idea he has accidentally hit upon.

Amount of invention not material where novelty and utility are apparent.

As to the *quantum* of invention, where a device is new and useful very little invention will suffice to support the patent. As Lord Halsbury said in *Rickmann v. Thierry* (*supra*): "No smallness or simplicity will prevent a patent from being valid"; and *per* Lord Davey in

Patent Exploitation, Limited v. Siemens & Co. ([1904] 21 R. P. C. 549): "It may be that the invention is a small one, but slight differences in these cases sometimes produce large results." For similar expressions of opinion on simplicity in inventions the reader is referred to the *dicta* of Tindal, C. J., in *Crane v. Price* ([1842] 1 Web. P. C. 393); Jessel, M. R., in *Otto v. Linford* ([1881] 46 L. T. N. S. 35); and Bramwell, L. J., in *Hayward v. Hamilton* ([1881] Griff. P. C. 115), where a combination of pavement light and prism, differing very little from what had been used before but giving materially increased useful results, was upheld as involving invention. "It is an invention," said the learned Lord Justice, "and not the less an invention because it requires small inventive powers to enable the patentee to do it."

As has already been pointed out in the preceding chapter, mere analogous application is not invention. A wheel well known before the introduction of railways cannot be patented for specific use on a railway (*Losh v. Hague* ([1837-9] 1 Web. P. C. 200; 8 L. J. Ex. 251). A fishplate, used before the date of railways to connect wooden beams, cannot be patented for connecting iron rails on a railway (*Harwood v. Great Northern Railway Co.*, [1860-65] 11 H. L. Cas. 654; Good P. C. 224). There is no invention in applying an ordinary water tap to a beer bottle (*Hazlehurst v. Rylands*, [1891] 9 R. P. C. 1); nor in using a spring in front of a carriage which has been long used at the rear (*Morgan v. Windover*, [1890] 7 R. P. C. 131). Driving the screen of a stone breaker from the top was held not to constitute a patentable alternative to the old bottom driving (*Baxter v. Marsden*, [1904] 22 R. P. C. 18). A method of fixing posts in concrete, old as used in structures on land, cannot be considered new as applied to the construction of groynes on the seashore (*Case v. Cressy*, [1901] 18 R. P. C. 419). But the application of trunnions to a cylinder used in the production of photo-prints so as to secure rotation on its transverse axis was held good subject-matter, although the combination of trunnions and cylinders for other purposes was well known (*Halden v. Hall*, [1904] 21 R. P. C. 609).

Analogous application not invention.

Examples of patents held bad as mere analogous users.

Example of patentable analogous user.

The
"Puttee
Gaiter"
Case.

*Stohwasser v.
Humphreys.*

Commercial
success does
not prove
invention.

Examples of
apparent
analogous
user
sustained.

Examples of
patents not
saved by
commercial
success.

The principle enunciated in *Morgan v. Windover* and other cases, that if a known article is applied to an analogous purpose the application is not patentable simply because it produces advantages not produced before, received a new illustration in the well-known "Puttee Gaiter" Case (*Stohwasser v. Humphreys*, [1900] 18 R. P. C. 116). Here the spirally-wound strap or puttee combined with the gaiter for protecting the leg (both having been previously used separately for an analogous purpose) was held not to show invention. The patent was therefore declared invalid, although enormous commercial success was shown and the advantages of the combination were beyond question.

On the other hand, many instances of apparently analogous user have been supported, as, for example, in the cases already referred to of *Pirrie v. York Street Flax Spinning Co.* ([1894] 11 R. P. C. 429), *Gadd v. Mayor of Manchester* ([1892] 9 R. P. C. 516), *American Braided Wire Co. v. Thomson* ([1889] 6 R. P. C. 518), and *Arnot v. Dunlop* ([1904] 22 R. P. C. 105). In the last case the application of pocket footholds, old in driving bags, to ordinary driving aprons was upheld as valid subject-matter.

Mere evidence of commercial success, and even of increased utility, will not excuse the absence of invention (see *Stohwasser v. Humphreys*, *supra*). Thus in the "Boot Protector" Case of *Blakey v. Latham* ([1889] 6 R. P. C. 184) both of these adjuncts were overwhelmingly proved, but the patent was upset for want of subject-matter. In *Williams v. Nye* ([1890] 7 R. P. C. 62) the same fate befell the patent for a combined mincing and filling sausage machine, although great utility and commercial success were shown. In *Rickmann v. Thierry* ([1896] 14 R. P. C. 105), celluloid eyelets; *Wood v. Raphael* ([1897] 14 R. P. C. 496), pince-nez; *Slazenger v. Feltham* ([1888] 6 R. P. C. 130), tennis racquets; and *Cooper v. Biedeker* ([1899] 16 R. P. C. 363), felt bicycle handle covers; the patentees were all unsuccessful through (*inter alia*) lack of invention, although utility and commercial success were proved.

Whenever the Court finds a real or appreciable germ of invention, however small, it will uphold the patent. Thus the substitution of a round wick in a lamp for a flat wick was approved as patentable in *Hinks v. Safety Lighting Co.* ([1876] L. R. 4 Ch. D. 607; 46 L. J. Ch. 185). In *Perry v. Société des Lunetiers* ([1896] 13 R. P. C. 664) the addition of a hinge to the folding sides of a camera previously unhinged was held to show invention. Another example of very slight invention is to be found in *Lyon v. Goddard* ([1894] 11 R. P. C. 354), the "Disinfecting Machine Case." Even the modification of one element in an old arrangement was upheld in *Edison-Swan v. Woodhouse* ([1887] 4 R. P. C. 99); and the omission of a step in a process was held good subject-matter in *Wallington v. Dale* ([1851-2] 7 Ex. 888), and in *Booth v. Kennard* ([1856-7] Good. P. C. 68) was approved as such, although for other reasons the patent was not sustained.

Examples of patents upheld though showing small invention.

Ehrlich v. Ihlee ([1888] 5 R. P. C. 437) and *American Braided Wire Co. v. Thomson* ([1889] 6 R. P. C. 518) have been advanced as arguments that where an invention clearly meets a want long unsupplied the patentee must be taken to have exercised invention. According to Kay, L. J., in *Savage v. Harris* ([1896] 13 R. P. C. 364), such a test is, however, anything but conclusive.

Long felt want supplied strong argument for invention.

The fact that alleged anticipations were useless, and that the plaintiff's invention was extremely useful, has been held, in *Duckett v. Whitehead* ([1895] 12 R. P. C. 187, 376), to be strong evidence of the exercise of invention.

Uselessness of alleged anticipations.

CHAPTER VI.

ESSENTIALS IN SUBJECT-MATTER.

NOVELTY.

Novelty an essential in subject-matter.

THE next essential of valid subject-matter in a patent is that it shall be novel. The grant of a patent being upon the assumption that it is *a new manufacture* which the inventor is giving to the public, anything which disproves this view militates against the validity of the grant. "Novelty" means novelty within the United Kingdom, for anything done abroad and not published or made known here does not affect a British patent.

Methods of ascertaining novelty.

It is therefore of the utmost importance that the novelty of an invention should be inquired into by a careful search among the Patent Records and other sources of information before the expense of taking out a patent is incurred. Under the system of examination now in force at the Patent Office, inventions of doubtful novelty are not so likely to be patented as formerly. But it must not be forgotten that not only do the authorities take no responsibility and give no assurance that the patent is valid, but the field of examination is restricted to published British Specifications of prior date, and no investigations among other published sources of information are undertaken. Therefore, although the provisions for preliminary examination are most valuable they are by no means exhaustive.

The whole of the claimed matter must be novel.

The novelty of every part claimed must be sustained in an action for infringement, and if it should transpire that any portion of the claimed matter is old, the whole patent is invalid, at least until amendment of the specification. In *Murchland v. Nicholson* ([1893] 10 R. P. C. 417), for example, it turned out that the plaintiff's fifth claim for quite an unimportant detail was bad for want of novelty. The whole patent thereby became invalid, and Lord Chief Justice Clerk, in delivering judgment, said: "I cannot but regret

that the complainer, who, I think, has a good and patentable invention, should have made a claim, which is bad, for an unimportant detail of his apparatus. Unfortunately, the law is, as stated by the Lord Ordinary, that this claim being bad the whole patent must fall."

This rule in Patent Law is founded on the older cases of *Huddart v. Grimshaw* ([1803] 1 Web. P. C. 85); *Hill v. Thompson* ([1817-18] 1 Web. P. C. 229; 8 Taunt. 375); and *Brunton v. Hawkes* ([1820-1] 4 B. & Ald. 541; Good. P. C. 97), and has been followed in later cases, such as *McCormick v. Gray* ([1861] 2 H. & N. 25; 31 L. J. Ex. 42); *Haslam v. Hall* ([1887] 5 R. P. C. 1); *Pether v. Shaw* ([1893] 10 R. P. C. 293), and is the rule in present practice.

Cases
establishing
the rule.

The universal application of this rule, however, is relaxed if it can be shown that the matter claimed in the doubtful subordinate claim is meant to be used only with and as part of the main invention. Thus, in *Plimpton v. Spiller* ([1877] Good. P. C. 380; L. R. 4 Ch. D. 286; 20 Sol. J. 860), the second subordinate claim, looked at by itself, was clearly bad for want of novelty; but, as the Court was of opinion that the subordinate matter claimed was meant to be claimed only for use in and as a part of the roller skate, which was the real invention, the patent was upheld. In *British Dynamite Co. v. Krebs* ([1879] Good P. C. 88; also reported as an Appendix in 13 R. P. C. 190) the patentee appeared to claim something separately (means for exploding), which, outside of his patent, was certainly old. The House of Lords held that this subordinate claim was intended to be appurtenant to the real invention, and was surplusage which might be disregarded: the patent was therefore upheld. But the patentee who depends upon this benevolent construction of his faulty subordinate claim is in a very risky position; and unless it is clear that the presence of this subordinate integer in a separate claim can only be explained on the supposition (supported by the specification) that it was meant as an adjunct to and as part and parcel of the real invention, then the rule will be let in and the patent will be held invalid. In *Cropper v. Smith* ([1884] 1 R. P. C. 81) the plaintiff's third

Occasional
relaxation
of the rule
in the case
of sub-
sidiary
claims.

*Plimpton v.
Spiller.*

*British
Dynamite
Co. v. Krebs.*

Examples
where rule
was not
relaxed.

*Cropper v.
Smith.*

claim was for a bed-plate connecting the end standards of a lace-making machine. This was manifestly old, but Pearson, J., in the Court of First Instance, thought that such a claim came under the ruling in *Plimpton v. Spiller* (*supra*), and upheld the patent. The Court of Appeal, however, was of a different opinion, and held that the third claim was a separate claim, and had no functional connection with the rest, and that being for an old thing the patent was invalid. Again, in *Cassel Gold Co. v. Cyanide Gold Syndicate* ([1895] 12 R. P. C. 232), the first claim was for any strength of cyanide of potassium solution "substantially as described," while the second was for a solution of a given strength. Strong efforts were made to get the Court to read the first claim (which, as it stood alone, was bad) as if it were limited by the specification and therefore the same as the second claim, which was good. But the Court of Appeal decided that they must be considered as independent claims, and the patent was held bad. In *Electric Construction Co. v. Imperial Tramways Co.* ([1900] 17 R. P. C. 537) an attempt was made to read a separate claim, bad from want of novelty, into the main invention, but without success. In the report of this case there appears an interesting discussion on the principles which guided the decision in *Plimpton v. Spiller* (*supra*). According to Lord Alverstone, M. R., the benevolent view of a claim, on the face of it bad from want of novelty, can only be taken when the specification contains such a statement of the existing state of knowledge as to lead the Court to the conclusion that it would be manifestly absurd to suppose that the patentee really meant to claim as novel what at first blush he appears to have claimed. But in this connection it would be wise to note the warning of Lord Davey in *Kynoch v. Webb* ([1899] 17 R. P. C. 100), where he says: "You are not to put a forced construction on the specification as not intending to claim something that is old, because it is foolish or suicidal of the patentee to claim it."

*Cassel
Gold Co. v.
Cyanide
Gold
Syndicate.*

*Electric
Construction
Co. v.
Imperial
Tramways
Co.*

*Kynoch v.
Webb.*

*Process
claims.*

Where the invention is a process, the novelty is in the whole process, not in part; and where the patent is for a mere combination, the novelty must be sought for in the

general construction and arrangement, not in the integers. But where an absolutely new and useful feature is included in a combination (like the swing flap in *Proctor v. Bennis*, [1887] 4 R. P. C. 333) a mere re-arrangement of the combination, or even a new combination which included the novel feature, would be an infringement.

Combina-
tion claims.

The broad rule with regard to novelty is that if the invention has by any means whatever become known in this country to one or more members of the public not under any obligation of secrecy, either by prior use or by prior publication, no patent can be afterwards granted for it. The reason is that in such circumstances the patentee has nothing to give to the public in return for the grant from the Crown; nor can any such grant deprive the public of the right freely to use what they already possess.

General
rule as to
novelty.

CHAPTER VII.

ESSENTIALS IN SUBJECT-MATTER.

NOVELTY AS AFFECTED BY PRIOR USER.

Mere
experi-
mental
use or
confidential
disclosure
is not
publication.

Must not be
used even
experi-
mentally
for profit.

But other-
wise if
goods not

PRIOR use by members of the public (or even by the inventor himself), if effected in a sufficiently public manner, will destroy the validity of any patent granted after the date of such user. As to prior use by the inventor himself, such use to prevail against his right to a patent must be open and unquestionable. Mere experiment in his own closet or workshop, or mere confidential disclosure to or experimental user on his behalf by another, will not destroy the inventor's right (*Electro-Plating Co. v. Holland*, [1901] 18 R. P. C. 521). For example, in *Morgan v. Seward* ([1837] 1 Web. P. C. 170; 2 M. & W. 544), the inventor of a paddle-wheel had two pairs of such wheels made for him before the grant of his patent by an engineer whom he had cautioned to keep silence. The wheels were made, packed, and exported before the date of the patent; nevertheless the patent was upheld so far as this issue was concerned. The authorities go to show that the inventor is allowed a reasonable latitude in proving the utility and practicability of his invention before making application for a patent, so long as these experiments do not discover the invention to others who are not in confidential relationship to him. But this doctrine must not be pushed too far. The inventor must not, even experimentally, *use his invention for profit* before protecting it. Thus, in *Germ Milling Co. v. Robinson* ([1886] 3 R. P. C. 254) the plaintiff while under cross-examination acknowledged having sold some flour treated according to his patent process about three weeks before the date of his patent. No one could say that the flour disclosed the process, but the admission of the patentee showed that before the invention had been protected it had been used for profit, and on this ground the patent was held invalid. The same circumstances vitiated the patent in *Wood v. Zimmer* ([1815] 1 Web. P. C. 44, 82). In *Betts v. Menzies* ([1857-62] 10 H. L. Cas. 117; Good. P. C. 45) the patent was held

good although a quantity of the capsules forming the invention had been made in the plaintiff's own works by his own workmen, *but none sold or sent out*. Even absolutely secret user by the inventor personally for profit would avoid a patent subsequently obtained by him or by another. In *Dolland's Case* (Good. P. C. 175, decided in 1776) the patent was upheld because the prior secret user which was proved to have taken place had been confined to the closet and had never been used for the purposes of profit. The reason why even secret user by one person for profit destroys the novelty of some subsequent patent of another is, that were it otherwise the later inventor could under his grant prevent the former secret user from continuing to do what he had formerly freely done (see the cases of *Heath v. Smith*, [1854] Good. P. C. 238; and *Cornish v. Keene*, [1835-7] Good. P. C. 127).

sold before
date of
application.

Secret user
not for
profit.

Public user might be brought about by sending round the article constituting the invention as a sample (*Blank v. Footmann*, [1888] 5 R. P. C. 653), and by offering for sale even although no sales were effected; or by manufacturing the article and storing it in a warehouse for the purposes of sale, as in *Mullins v. Hart* ([1852] 3 Car. & K. 297). In *Taylor's Patent* ([1896] 13 R. P. C. 482) revocation followed on proof that the petitioner had used in his own private house, and before the date of the patent, a fireplace similar to that of the respondent.

Circulation
as sample.

Single user
in private
house.

Prior user which had been discontinued for a long period of years would, if fully proved, avoid a subsequent patent. In *Deurance v. Fletcher* ([1899] 16 R. P. C. 150) it was proved by three witnesses, one of them a man over eighty, that one water gauge similar to the plaintiff's had been used for a few weeks on a boiler about thirty years before the date of the patent. The works had been broken up, and no vestige of either gauge or boiler remained, so that the proof depended entirely upon the memory of the witnesses. But Romer, J., held the proof to be sufficient, and declared the patent to be invalid. In *Haggenmacher v. Watson* ([1897] 14 R. P. C. 349, 631) the evidence of a witness, who spoke to certain alterations he had effected about eight years before the date of the patent, corroborated by two witnesses who had not a perfectly clear idea of

Discon-
tinued prior
user.

Examples of
cases where
anticipating
goods were
no longer in
existence.

Abandoned
experi-
ments not
anticipa-
tions.

Prior user
might be
clumsy in-
fringement
after
patent, but
no anticipa-
tion before.

Publication
during
provisional
protection
afterwards
abandoned.

*Oxley v.
Holden.*

*Lister v.
Norton.*

what they had seen, was held to invalidate the patent, although in this case also the anticipating apparatus was no longer in existence. *Household v. Neilson* ([1842-3] Good. P. C. 265; 9 Cl. & F. 788), *Guilbert-Martin v. Kerr & Jubb* ([1887] 4 R. P. C. 18), and *re Sinnette's Patent* ([1898] 15 R. P. C. 761) are cases bearing on the same point. But if such prior user was simply of the nature of an abandoned experiment, and especially if the prior user failed in something accomplished by the subsequent invention, the patent will be sustained. This was held in *Jones v. Pearce* ([1832] Good. P. C. 269), *Edison-Swan v. Woodhouse* ([1887] 4 R. P. C. 79), *Moseley v. Victoria Rubber Co.* ([1886] 4 R. P. C. 241; 55 L. T. N. S. 482), and *Electro-Plating Co. v. Holland* ([1901] 18 R. P. C. 521). It was said in *Daw v. Eley* ([1865-7] L. R. 3 Eq. 496), by Wood, V.-C., that an unsuccessful or only partly successful prior user, which if it had come after the patent would have been held to be a clumsy infringement, might, nevertheless, be no anticipation of the patent.

Another incident of prior user or publication affecting the patent arises where the applicant, after having obtained provisional protection for an invention, and after having under such provisional protection sold and advertised articles in accordance with the invention, drops the first Provisional, and, incorporating some important addition or alteration, applies afresh for a patent. The question is, Does user of the original invention during the currency of the first unpublished and abandoned Provisional affect the validity of the patent obtained under the second? The answer is, Not if the patent, on the second application, is granted *within the original period of provisional protection*. This was decided in *Oxley v. Holden* ([1860] Good. P. C. 350; 8 C. B. N. S. 666), and was followed by Chitty, J., in *Lister v. Norton* ([1886] 3 R. P. C. 199). The learned Judge, in the latter case, said that such a conclusion might very fairly be drawn from the wording of Section 8 of the Act of 1852, which is practically repeated in Section 14 of the present Act. It is true that Section 8 of the Act of 1852 said that during provisional protection the invention might be "used

and published without prejudice to *any* Letters Patent to be granted for the same"; whereas Section 14 of the present Act (which allows of publication under the current application) says "without prejudice to *the* Patent to be granted for the same." It is a nice point whether the use of the definite article in the present section would affect decisions on this question under the present Statute. As to the period of time which represents "provisional protection," Section 8, Sub-section 1, of the Act of 1883 (now modified by Section 1, Sub-section 8, of the Act of 1902) says that the applicant must leave his Complete within six months from the date of the application, and that (Sub-section 2) unless he does so the application shall be deemed to be abandoned. Section 3 of the Act of 1885 provides for the extension of time for leaving the Complete to seven months instead of six. It would therefore appear that in the case of patents dated after the 1st of January, 1905, the period of "provisional protection" is six months, capable of extension to seven months if application for extension of time for filing the Complete is made. In the case of patents of earlier date the old period of provisional protection would hold good.

Possible reading of present section.

Abandonment of Provisional.

Present period of provisional protection.

All circumstances considered, it would apparently be the best course to file the new and amplified Complete Specification accompanying the new application within six (or with extension seven) months from the date of the original application, and, if need be, by pressing representation of the facts to the Comptroller, get him to seal the patent on the new application within twelve months from the date of the original application. Such a course would seem to fulfil the requirements under the above-mentioned decisions. But in the case of important inventions it would be more prudent to eliminate risks by completing the original application and making a fresh application for the improvements.

In no case is it possible to maintain or keep alive one's claim to an invention which has been published or publicly used under the original provisional protection by a series of over-lapping provisional applications.

Over-lapping provisional applications.

CHAPTER VIII.

ESSENTIALS IN SUBJECT-MATTER.

NOVELTY AS AFFECTED BY PRIOR PUBLICATION.

What
constitutes
publication.

HAVING shown in the last chapter that undoubted prior public user of an invention destroys the validity of any subsequently granted patent for the same invention, some consideration may now be devoted to the effect of prior publication as distinguished from prior user in the United Kingdom. An invention is held to be published when a description or drawing of it has appeared in any book, newspaper, pamphlet, or specification accessible to the public, and conveying to the minds of persons skilled in the art clear and full information regarding the invention. By such publication the public become possessed of the invention, and no subsequently granted patent for the same thing is valid. Publication might even take place in a Government report, not printed but open to two or three members of the public, as in *Patterson v. Gaslight Co.* ([1875-6] 3 App. Cas. 239; 47 L. J. Ch. 402), where information known only to three co-referees, and embodied in a report, unpublished at the date of the patent, was held to anticipate a patent taken out in the interim between the preparation of the report and its issue.

Publication
by public
lecture.

A lecture delivered to the public and fully describing an invention afterwards patented would constitute prior publication.

Tindal, C.J.,
on what
constitutes
publication.

Without citing the innumerable authorities on prior publication it will be sufficient to state the law as crystallised by Tindal, C. J., in *Stead v. Williams* ([1843-4] Good. P. C. 437; 13 L. J. C. P. 218): "If the invention has already been made public in England by a description contained in a work, whether written or printed, which has been publicly circulated—in such a case the patentee is not

the first and true inventor within the meaning of the Statute."

It is not necessary that the publication should have been printed or issued in this country. It might be a foreign book or journal, and be printed in a foreign language. In *Lang v. Gisborne* ([1862] Good. P. C. 278 ; 31 Beav. 133) a patent for a self-registering target was upset by prior publication in England of a French book ; and in *Harris v. Rothwell* ([1887] 4 R. P. C. 225 ; L. R. 35 Ch. D. 416) a knitting machine patent was held invalid because of the presence in the Patent Office Library of a German specification which described a similar invention. But the prior publication must be in a language ordinarily known to educated Englishmen. Apparently a book or specification in Arabic or Chinese would not do.

Publication might be in a foreign language.

Granted that the prior publications are accessible to the public it is not necessary to prove that they have ever been consulted (*United Horseshoe Nail Co. v. Stewart & Co.*, [1885] 2 R. P. C. 122). But if, instead of being shelved and catalogued, the book has lain away in some chest or back room, its presence unsuspected until rooted out in a search for anticipations, it has been held that this could hardly be called prior publication—*Plimpton v. Malcolmson* ([1875-6] Good. P. C. 374 ; L. R. 20 Eq. 37) ; *Otto v. Steel* ([1885-6] 3 R. P. C. 109 ; L. R. 31 C. D. 241). A drawing published prior to the patent and clearly illustrating the subject-matter, though without any description, would anticipate the patent. This was held in *Herrburger v. Squire* ([1889] 6 R. P. C. 194), and in the more recent case of *The Electric Construction Co. v. The Imperial Tramways Co.* ([1900] 17 R. P. C. 537).

If open to public, not necessary to prove actual perusal of publications.

Publication by drawing.

In any case of prior publication the alleged anticipation must be sufficiently full and clear to enable a person skilled in the art to carry the invention into practical effect without requiring to make experiments. Nothing less will do, and a patent cannot be upset by choosing a portion from one prior publication and a portion from another, and combining them so as to make up the invention it is desired to assail. In *Von Heyden v. Neustadt* ([1880] L. R. 14 C. D. 230 ; 60 L. J. Ch. 126) James, L. J., said : "If it requires this

Mosaic of anticipations.

mosaic of extracts from annals and treatises spread over a series of years to prove the defendant's contention, that contention stands thereby self-condemned." Chitty, J., was of a similar opinion in *Moseley v. Victoria Rubber Co.* ([1887] 4 R. P. C. 241; 55 L. T. N. S. 482).

"Paper anticipations."

Where a prior specification or publication has been brought forward by the defendant, but which does not appear to have been carried commercially into effect, and does not exactly describe the plaintiff's invention, one frequently hears the depreciatory remark that it is "a mere paper anticipation," as if this were a separate kind of anticipation not subject to the rules holding good in other classes of prior discovery to the public. But granted that this alleged "mere paper anticipation" substantially discovers the invention, the phrase is meaningless, and the prior publication, although only on paper, is as effective as if the invention had been made commercially. Speaking on the subject of so-called paper anticipations Lord Westbury said, in *Hills v. Evans* ([1862] Good. P. C. 248; 31 L. J. Ch. 457), "The antecedent statement must be such that a person of ordinary knowledge of the subject would at once perceive, understand, and be able practically to apply the discovery without the necessity of making further experiments and gaining further information." Groves, J., in *Philpott v. Hanbury* ([1885] 2 R. P. C. 33), went a little further than this, and was of opinion that if the prior publication is read and understood by "the highest class of skilled workman" to indicate the subsequent invention, it will suffice as an anticipation. Kekewich, J., in the later case of *Thomson v. Macdonald* ([1890] 8 R. P. C. 5), seems independently to have adopted the same view, and said that a prior specification, even although not so full and complete in its directions as the subsequent specification, and even although it had never been used practically, might nevertheless be sufficient for the purposes of anticipation. Then, in *The Anglo-American Brush Electric Co. v. King, Brown* (9 R. P. C. 313; [1892] A. C. 367), Lord Watson said of a so-called "paper anticipation": "The sufficiency or insufficiency of the prior specification for that purpose does not afford a crucia

Hills v. Evans.

Philpott v. Hanbury.
Skilled workman test.

A specification less complete than the plaintiff's and never used might be an anticipation.

Even an insufficient specification might anticipate.

test of prior publication"; i.e. it may be insufficient as a specification but sufficient as an anticipation (see also Lindley, L. J., in *Savage v. Harris*, [1896] 13 R. P. C. 364).

Thus an analysis of the cases dealing with so-called paper anticipations yields the result that if the prior publication instructs "the highest class of skilled workmen" (to quote Groves, J.) sufficiently to carry out the invention, even although it has never been used practically, and even although the specification as a specification may show defects in sufficiency, it may nevertheless constitute an anticipation.

*Resumé
deduced
from the
cases.*

For those who are not content to rely absolutely on the investigations of the examiners in the Patent Office, the field which should be most carefully scanned in searches to fortify or break down claims to novelty in a specification is that afforded by the Patent Records and published specifications of British and Foreign patents. The classified indexes and abridgements of subject-matter which, together with the specifications, may be consulted at the Patent Office Library and at the public libraries of most large towns, render such a task comparatively easy.

*Patent
Office
abridg-
ments.*

By Section 2 of The Patents Act, 1902, no British specification of a date more than fifty years prior to the date of any patent granted, on an application made on or after 1st January, 1905, can be deemed to be an anticipation of a patent so granted and published. Provisional specifications of any date are absolutely barred as anticipations. But it must be remembered that the foregoing privilege attaches only to patents applied for since the 1st of January, 1905.

*Limitation
of antici-
patory
specifica-
tions.*

CHAPTER IX.

REMAINING ESSENTIAL IN SUBJECT-MATTER.

UTILITY.

Meaning of
"Utility."

Utility
alone not
sufficient.

Must be
useful for
the
indicated
purpose.

Failure of
utility
avoids the
patent.

Subsequent
improve-
ment
cannot be
called in to

THE remaining element in subject-matter is Utility. By "Utility" is not meant the mere capacity to be put to a useful or profit earning purpose. Thus, as Kekewich, J., pointed out in *Cole v. Sargi* ([1888] 5 R. P. C. 489) (a Toy Case), "the amusement of children is a useful thing." But utility is not in itself sufficient to impart patentability to a new analogous arrangement of an old thing (*Morgan v. Windover*, [1890] 7 R. P. C. 131); invention also is required. Utility, according to Groves, J., means "an invention better than the preceding knowledge" (*Young v. Rosenthal*, [1884] 1 R. P. C. 29), and means usefulness for the purpose indicated by the inventor. As was said by Lindley, L. J., in *Lane-Fox v. Kensington Co.* ([1892] 9 R. P. C. at p. 417), "Utility is often a question of degree, and always has reference to some object. Useful for what? is the question which must be always asked; and the answer must be: Useful for the purposes indicated by the patentee." Thus, in *Easterbrook v. Great Western Railway Co.* ([1885] 2 R. P. C. 201), it was demonstrated that the plaintiff's railway signal lock was liable, in certain circumstances, to such error as to make it a possible source of danger. The patent was, on these grounds, held void for want of utility. In *Sirdar Rubber Co. v. Wallington* ([1905] W. N. 37) the directions given in the specification failed to produce a tyre sufficiently firm in the rim to give a useful result. In *Tubeless Tyre Co. v. Trench* ([1899] 16 R. P. C. 291) it was shown that, without the use of a subsequently invented soft soap seal (which was not indicated in the specification), a claimed form of the split tyre cover leaked under air pressure. Byrne, J., in giving judgment for the defendants said (see page 311 of Report): "You must have utility in the sense of the article being useful for the purpose for which the inventor designed it." Incidentally, this case establishes the proposition that a patentee cannot call in subsequent invention to make

useful that which, according to and at the date of his original specification and claim, was not useful. In other words, as was said by Lord Esher in *Nobel v. Anderson* ([1894] 11 R. P. C. 519), "The specification must be construed as of the day after publication" (see page 523, line 10).

make up
absent
utility.

The utility of an invention is always a question of fact and a matter of proof. The satisfying of a public demand and the commercial success of a patent are strong, although not conclusive, evidence of utility (*Ehrlich v. Ihlee*, [1888] 5 R. P. C. 198; see also *Cassel Gold Extracting Co. v. Cyanide Gold Syndicate*, [1895] 12 R. P. C. 232, and *per Wills, J.*, in *Sunlight Incandescent Gas Lamp Co. v. Incandescent Gas Light Co.*, [1897] 14 R. P. C. 757). The amount of utility in an invention may be very small, but yet enough to support the patent. This was held in *The American Braided Wire Co. v. Thomson* (*supra*), and in *Day v. Davies* ([1904] 22 R. P. C., at page 44). In *Philpott v. Hanbury* ([1885] 2 R. P. C. 33) Grove, J., said that "the slightest amount of utility—I will not say an infinitesimal scintilla, but a very slight amount of utility—is sufficient to maintain a patent."

Utility
a question
of fact.

Commercial
success not
conclusive.

Amount of
utility may
be small yet
sufficient.

A patent may even be supported for something which seems on the face of it retrogressive rather than an advance. Thus, in *Welsbach Incandescent Gas Light Co. v. New Incandescent Co.* [1900] 17 R. P. C. 237, a mantle of higher illuminating power was replaced by a mantle of lower illuminating power but of greater durability than the former mantle. Buckley, J., expressed himself that the advantage of durability, though combined with less lighting power, constituted such utility as would support the patent.

Utility not
always
evidenced
by an
advance in
the same
direction.

Care should be taken in preparing the specification to keep the claims confined only to those parts of the invention which carry utility, remembering that non-utility in the subject-matter of one claim will wreck the whole. In *United Horse Shoe Nail Co. v. Swedish Horse Nail Co.* ([1888] 6 R. P. C. 1) the plaintiff's patent was declared void because the sixth claim referred to a mode of punching nail blanks which the evidence demonstrated could not be carried out in an economical and useful manner. In *Parkinson v. Simon* ([1895] 12 R. P. C. 403) non-utility in the sense of not being effective for the indicated purpose

Non-utility
in one claim
invalidates
the whole.

Non-utility
in respect of
ear-marked
advantage.

caused the subject-matter of two claims, and consequently the whole patent, to be held bad. In *Wilson v. Wilson* ([1902] 20 R. P. C. 1) the invention consisted in folding over upon itself the upper edge of a spun metal bobbin ferrule, which folded over edge, in applying the ferrule to the bobbin, was forced by pressure into the wood of the bobbin so as to hold the ferrule on by the sunken edge. Stress was laid in the specification on the advantage gained by not needing to nick or recess the hobbin with any tool to receive the folded over edge. A folded over edge at the other end of the ferrule had existed prior to the date of the patent, and a knife edge projecting at right angles at exactly the same point on the ferrule had been previously patented by the plaintiffs themselves. In practice it was found that the folded edge of the ferrule could not be forced into the substance of the bobbin, and a tool had to be used to recess the hobbin to receive the edge. It was held that non-utility for the chief indicated purpose had been established, and the patent was declared invalid. Lord Robertson said that "the invention as described in the specification had not only not been used by the alleged infringer, but it had not been used by the inventor, or, as far as appeared, by anyone else."

Old case on
non-utility
of one
subordinate
claim.

Lewis v. Marling (Good. P. C. 281; 1 Web. P. C. 493; 4 Car. & P. 52, 57) is apparently a ruling that if a subordinate and *non-essential* part of an apparatus has been claimed and should afterwards turn out to be unnecessary surplusage, the patent would not be held invalid on the ground of want of utility. *Per* Lord Tenterden: "It would be very hard to say that this patent should be void because the plaintiffs claim to be inventors of a certain part of the machine not described as essential, and which turns out not to be useful." But this is an old case (1829), and should be considered with caution.

Infringe-
ment as
evidence of
utility.

The mere attempt of the defendant to infringe has been construed as evidence of the utility of the thing infringed. As Kay, J., said in *Lucas v. Miller* ([1885] 2 R. P. C. 155): "Better evidence of the utility of an invention cannot possibly be had than the fact that the defendant has attempted to infringe it."

CHAPTER X.

THE SPECIFICATION (TITLE).

HAVING reviewed in the preceding chapters the essentials of subject-matter in patentable inventions, we may now proceed to consider the preparation of the specification and claims which constitute the instrument whereby the invention is described and ascertained.

The origin of the specification has already been indicated, and an attempt made to contrast the advantages and disadvantages of filing a Provisional or a Complete Specification with the application (see Chapter II.). In dealing with the specification it will be assumed that the usual course of filing a Provisional Specification with the application is followed. The present and the three following chapters will deal successively with the Title, the Provisional Specification, the Complete Specification, and the Claims.

TITLE.

In making an application for a patent the first thing that requires to be settled is the Title of the invention. This is an important point, and care should be taken to choose a title which will be properly descriptive. Fortunately, under present practice there is little chance of going wrong in this particular. The Patent Office Examiners will decline to accept a title which is not in their opinion sufficiently descriptive, and the Comptroller has power to decline to date and number any such imperfect application. It might therefore happen that the applicant would find himself delayed and hampered by defects in his title.

Title to be properly descriptive.

In choosing a title the applicant should seek to make it wide enough to cover all that he has invented without trying to spread his net over too large an area. Vague generalities are to be avoided, but on the other hand the

Title should be neither too wide nor too narrow.

inventor must not run to the other extreme of making his title too narrow. The supervision exercised by the Comptroller is, as a rule, so discreetly carried out that very few questionable titles are passed. Even where the title is not all that could be desired, a defect in the title is seldom seriously urged in legal proceedings. Hence it has arisen that the old cases of *Cochrane v. Smethurst* ([1816] Good. P. C. 124); *Felton v. Greaves* ([1829] Good. P. C. 193); *Ree v. Metcalf* (1 Web. P. C. 141 n.); *Campion v. Benyon* (6 B. Moo. 71; Good. P. C. 103), and others, where patents were held bad on account of defects in the title, are now to some extent of academic interest only.

Example of
objection to
title.

In *Pirrie v. York Street Flax Spinning Co.* ([1893] 10 R. P. C. 34) the defendants took objection to the title of the plaintiff's invention, "Improvements in wet spinning for flax or yarns," on the ground that it was actually winding and not spinning that took place on the cop. But the Court rebutted the objection, pointing out that the spinning took place simultaneously with the winding.

Objections
to defective
title still
hold good.

But it must on no account be forgotten that where, in spite of the indicated safeguards, it turns out that the specification and claims contain matter clearly outside of the title, the validity of the patent will be in the greatest jeopardy. For example, if the title were "Improvements in apparatus for the manufacture of paper," and the specification and claims referred also to a process appurtenant to the invention but not absolutely hingeing on the use of the described mechanism, it would no doubt be a grave question whether the patent could be upheld. The proper title in such a case would be "Improvements in the process of and in apparatus for manufacturing paper."

No "fancy"
titles
accepted.

The applicant may not use a fancy name in the title to designate his invention. In examining the *Official Journal* one frequently comes upon such titles as "The 'Simplex' Bottle Stopper," "Smith's 'Triumphal' Cue Tip," or "The 'Nokorko' Screw Tap." This is ingenuity wasted, for all such titles are disallowed by the Comptroller, and the applicant requested to amend his papers in this respect. The proper title would be "An Improved Bottle Stopper"; "Improvements in Billiard Cues," &c.

CHAPTER XI.

THE PROVISIONAL SPECIFICATION.

SINCE its introduction under the Amendment Act of 1852 the Provisional Specification accompanying the application has been made use of in the bulk of cases, in so far at least as the applications of British inventors are concerned. Under the present Act the conditions governing the Provisional Specification are practically the same as before. Now, as then, the Provisional must sufficiently ascertain the nature of the invention. This does not mean that a mere intimation of the inventor's object will suffice. Suppose, for instance, the applicant had invented some improvement in friction clutches, it would not suffice to say in his Provisional Specification: "My invention relates to friction clutches," and stop there. He must go a little further, and state what the invention is, in as general terms as he pleases, but at least he must say enough to earmark the invention and enable it to be identified with the apparatus to be afterwards more fully described and illustrated in his Complete. It is a vice in a Provisional Specification to describe the invention so minutely that it only needs the insertion of the letters of reference on a drawing to transform it into a Complete Specification. In a properly framed Provisional sufficient elasticity is left to include and admit of after modifications in detail, and even of general arrangement. In too precise and detailed a Provisional the inventor often finds himself bound hand and foot when preparing his Complete, and if he includes modifications and additions to any extent he may well fear the creation of apparent disconformity between the Provisional and Complete Specifications.

The object of the period of provisional protection is to enable details and improvements to be made and elaborated by means of practical experiment, but that privilege may

The Provisional Specification should simply ascertain the nature of the invention.

It should not describe the invention too fully.

Room should be left for modification.

Object of provisional protection.

Fry, J., on
the office
of the Pro-
visional.

Necessity
for careful
drafting of
Provisional
under Act
of 1902.

Feature
mentioned
in
Provisional
but dropped
in Com-
plete not
within
claims.

be wholly defeated by being too precise in the Provisional description. As Byles, J., said in *Newall v. Elliott* ([1858] Good. P. C. 326; 27 L. J. C. P. 337): "The office of the Provisional Specification is only to describe generally and fairly the nature of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out." And again, *per* Mr. Justice Fry, in *United Telephone Co. v. Harrison* ([1882] Good. P. C. 472; L. R. 21, C. D. 720): "In a Provisional Specification you must find the nature of the invention described, though it need not be described otherwise than roughly, so long as it is fairly described."

It is apparent, in view of cases that already have occurred under the examination system now in force by virtue of the Act of 1902, that greater care and more forethought will have to be exercised in preparing Provisional Specifications than has hitherto been the case. The invention must be more precisely ascertained, and the actual advance clearly earmarked. Already in many instances the results of examination or of opposition have shown the dangers of both over laxity and over particularity in the Provisional. For example, if an applicant omits specific mention of what he might at the time consider an obvious modification of his invention, he might find himself unable successfully to oppose an after application by another inventor for that modification, or might himself be prevented from including it in his Complete by the opposition of an applicant interposing between his Provisional and Complete. On the other hand, if he mentions a modification in his Provisional and omits, or fails to elaborate it, in his Complete, he might be unable to stop an infringement based on this modification if the defendant makes capital of the fact that the modification appears to have been discarded in the Complete and therefore left derelict. An instance of this occurred in *Sandow v. Szalay* [1904] 21 R. P. C. 333). Here the inventor of the well-known spring dumb-bell mentioned in his Provisional "compressed air springs" as an obvious alternative to his flat or spiral metal springs. In the Complete he confined himself to a description of flat and

spiral metal springs, but the claims were in general terms for a divided dumb-bell with "springs or resilient means." Common sense would indicate that an inflated rubber ball was a mere equivalent for a spiral spring; but the Court of Appeal held otherwise, and thought that the inference to be drawn from the Patentee's omission to mention air springs in the Complete was that he did not intend to claim them, and had in fact discarded them. Apparently, had the patentee said nothing in his Provisional about air springs, these would have been held mere equivalents coming within the scope of his Complete and general claims.

According to Mr. Justice Romer, in *Pneumatic Tyre Co. v. East London Rubber Co.* ([1896] 14 R. P. C. 77): "It is not necessary in the Provisional to detail the advantages of the invention."

Advantages
need not
be set out.

The Provisional Specification remains a secret document until published with the Complete. If no Complete is filed the Provisional is deemed to be abandoned, but the Patent Office apparently preserves the Provisional for some time, as in *Pneumatic Tyre Co. v. English Cycle Co.* ([1897] 14 R. P. C. 851) an official of the Patent Office produced on behalf of the plaintiffs, and on being called for by the Judge, a Provisional Specification filed nearly seven years previously.

Provisional
a secret
document.

CHAPTER XII.

THE COMPLETE SPECIFICATION.

The Complete must particularly describe the invention.

THE Provisional Specification having broadly set forth the invention, it remains for the inventor in his Complete Specification to “particularly describe and ascertain the nature of the invention and in what manner the same is to be performed” (Act of 1883, Section 8, Sub-section 4).

Must not extend beyond scope of Provisional.

In considering a Provisional Specification upon which it is proposed to found a Complete Specification, the first duty of the draftsman is to ascertain and digest the title and contents of the Provisional, and then to see that the matter of the Complete upon which it is proposed to found claims does not extend beyond the true scope of the Provisional—that is to say, does not describe and claim an invention not fairly indicated in the Provisional. If it does, disconformity would be the result, and disconformity between the Provisional and Complete Specification is fatal to the validity of the patent.

Disconformity fatal to patent.

Said Lord Halsbury, in *Vickers v. Siddell* ([1890] 7 R. P. C. 292; 15 App. Cas. 496): “It is suggested that the new machinery of the Comptroller and the Examiners has superseded the power of raising any objection to the conformity of the Complete and Provisional Specifications. I am unable to take that view. I think it is an essential condition of a good patent that the invention described in the Provisional should be the same as that in the Complete Specification, and I think that the third sub-section of Section 26 preserves that as a ground upon which a patent may be revoked.”

Examples of disconformity.

Thus the present practice follows the old, and, as a matter of fact, disconformity between the Provisional and Complete Specifications is a not infrequent cause of the

invalidity of patents. The following are examples of cases in which disconformity was held to have been proved.

In *Bailey v. Robertson* ([1878] 3 App. Cas. 1055) the Provisional described a meat preservative, as made from gelatine mixed with bisulphite of lime. In the Complete not only was this composition claimed, but also a solution of bisulphite of lime *alone*. Patent held invalid. *Bailey v. Robertson.*

In *Nuttall v. Hargreaves* ([1891] 8 R. P. C. 273, 450; 61 L. J. Ch. 94; [1892] 1 Ch. 23) a gauze strainer for a beer tap, not mentioned in the Provisional, was claimed in the Complete. Patent held invalid. *Nuttall v. Hargreaves.*

In the *Cera Light Co. v. Dobbie* ([1892] 11 R. P. C. 10) the Provisional described a metallic conductor of heat in a lamp as placed *near* the wick holder. The Complete described and claimed it as in *metallic contact* therewith. The patent was held bad for disconformity. *Cera Light Co. v. Dobbie.*

In *Brooks v. Lamplugh* ([1897] 15 R. P. C. 33) the Provisional of one of the plaintiff's patents described a cycle saddle carrier radially adjustable on a pin. The Complete claimed an eye with trunnions where the radial adjustment had no place. The patent was held bad. *Brooks v. Lamplugh.*

The Provisional Specification in *Castner-Kellner v. Commercial Development Co.* ([1900] 17 R. P. C. 593) described a *stationary* mercury cathode with moveable bells. The Complete claimed a *moveable* mercury cathode. The patent was held bad. *Castner-Kellner v. Commercial Development Co.*

In *Tubeless Tyre Co. v. Trench Tyre Co.* ([1899] 16 R. P. C. 291) the Provisional detailed various forms of automatically sealed joints in split tubeless tyres, the joints being all made by contact of rubber with rubber. The Complete claimed a modification, where the seal was made between the rubber and the metal of the rim. The patent was held invalid both for disconformity and non-utility. *Tubeless Tyre Co. v. Trench.*

The case of *Lane-Fox v. Kensington &c. Co.* ([1892] 9 R. P. C. 413) may also be referred to as an example of disconformity. *Lane-Fox v. Kensington &c. Co.*

But it is only where the substantial purpose of the inventor has been departed from or exceeded and something like a new invention introduced that disconformity *Legitimate development not disconformity.*

holds good. Improvements in details, so long as these are not of the nature of separate inventions but are directed towards and confined to the main object of the improvement, are not causes of disconformity (*Carter v. Heyson*, [1901] 18 R. P. C. 508).

Examples
of discon-
formity not
made out.
Lucas
v. Miller.

Thus, in *Lucas v. Miller* ([1885] 2 R. P. C. 155), which related to a patent for a bicycle lamp, the inventor in his Complete described certain clip washers which were important improvements in his method of suspending the lamp to the wheel hub. These washers were not referred to at all in his Provisional, but were claimed as part of his combination in the Complete Specification. The defendant pleaded disconformity, but Kay, J., held that, by virtue of their close functional connection with the lamp, these washers constituted an improvement which the inventor was right in describing and justified in claiming. Again, in *Woodward v. Sansum* ([1887] 4 R. P. C. 166), where the patentee had included in his Complete Specification and claims features which were admittedly improvements not referred to in his Provisional, but which made his pencil more useful, the patent was upheld, Cotton, L. J., saying that "A patentee putting in a Provisional Specification showing the nature of his invention is not bound to describe therein any mode of carrying it into effect; but if he does so, and before filing his Complete discovers an improvement upon such mode, or discovers a different mode, he is bound to give to the public in his Complete Specification the benefit of what he has discovered as to the mode of carrying the invention into effect."

Welch-
Dunlop
Tyre Case.

The well-known Welch tyre patent was challenged on the ground of disconformity in *Pneumatic Tyre Co. v. East London Rubber Co.* ([1897] 14 R. P. C. 573). There is no doubt that at the date of the Provisional the inventor contemplated the application of his improved wire-edged cover to solid rubber treads only. In his Complete he claimed it as applied to pneumatic tyres also, and the Court of Appeal held he was justified in so doing.

Gadd v.
Mayor of
Manchester.

Objections on the ground of disconformity were also raised to the plaintiff's patent in *Gadd v. Mayor of Manchester* ([1892] 9 R. P. C. 249, 516), the patentee having described

and claimed mechanism for supporting gasometers which, as far as concerned Fig. 16 of the drawings, was not in the Provisional. But the Court of Appeal dismissed the objection and upheld the patent. Lindley, L. J., in delivering judgment, said: "The whole object of provisional protection is to enable a patentee to work at and improve his invention. The only limit set to what he can do in this respect is that the invention as finally specified must not be a different invention from that provisionally protected."

But an additional improvement of this sort should always be claimed as part of or combined with the main invention. If claimed *per se*, and especially if claimed as applicable to other apparatus, it is a separate invention and would create disconformity.

Post-provisional improvement should not be separately claimed.

When proposing to claim any such post-provisional addition or improvement let the patentee be sure that it properly arises out of and is a legitimate development and part of the original invention, not a mere incident to it. In *Osmonds, Limited v. Balmoral Cycle Co.* ([1898] 15 R. P. C. 505) the patentee having by his improved chain-adjusting gear displaced the ordinary footstep on the rear axle, placed the footstep on another convenient part, no invention being required to do so. This rearrangement of the footstep was not mentioned in the Provisional. Nevertheless, in preparing his Complete Specification the inventor claimed the chain adjusting gear in combination with the step in its new position. Chitty, L. J., remarked that the patentee might as well have said: "I claim that gear with a hat on a man's head." The step had clearly nothing to do with the chain-adjustment gear, and if instead of the step the inventor had devised some post-provisional improvement in the handle bar he might as logically have claimed this in combination with the chain adjustment. The patent was held bad.

Example of faulty claim.

Osmonds, Limited v. Balmoral Cycle Co.

But let this be noted, that a part not mentioned in the Provisional, and forming an essential or the essential element in a combination as described and claimed in the Complete, would, even as part of a combination claim,

An essential even in a combination may create disconformity.

*Nuttall v.
Hargreaves.*

create disconformity. For example, if in *Proctor v. Bennis* ([1887] 4 R. P. C. 333) the pivoted swinging flap had not been mentioned in the Provisional, but had been described and claimed in the Complete, even as a part of the combination, there is no doubt that as soon as the essential nature of the pivoted flap became apparent in the light of the evidence, disconformity must have been held. In *Nuttall v. Hargreaves* (*supra*) the Court, in compliance with the arguments of the plaintiff, read the combination claim as including a wire-gauze strainer not mentioned in the Provisional but described in the Complete, and which turned out to be the essential feature of the whole tap. The result was that the Court held that, even when an essential feature not in the Provisional was wrapped up in a combination claim in the Complete, disconformity followed. This also was held in the later case of *Adams v. Sterens* ([1898] 16 R. P. C. 225).

*Adams
v. Sterens.*

Complete
must be
sufficient
and full.

Another point to be observed in preparing the Complete Specification is that it must be sufficient and full.

When an applicant files his Complete he is fulfilling his part of a contract with the public. On the one hand he gains the exclusive monopoly of his invention for a fixed period of fourteen years. For that privilege he undertakes, by means of his specification, so to instruct the public that at the end of his monopoly they will be able to use his invention as fully and advantageously as himself. Therefore, any ambiguity, suppression, or misdirection is a breach of faith, which only requires to be laid bare to destroy the privilege.

Complete
must be
prepared in
good faith.

Accordingly, all specifications should be prepared in as transparently honest a manner as possible, and with all the marks of anxiety on the part of the patentee thoroughly to instruct his readers in the best methods known to him at the time, of carrying his invention into effect. He should also see to it that his Specification clearly indicates and claims just what he has invented and no more, remembering the ordeal of examination as to novelty to which Complete Specifications are now subjected. Reasonable skill and knowledge must be apparent in the preparation of the specification, and a

Reasonable
skill and
knowledge.

patentee will not be excused for shortcomings on account of ignorance. Specifications and drawings must be prepared so as to be intelligible and complete, and the Court will not study to piece together what it was the duty of the inventor to make plain. In *Allen v. Duckett* ([1893] 10 R. P. C. 397) the specification turned out to be so badly prepared that the Court was satisfied that the nature of the invention had not been properly ascertained. "Can anybody," said Hawkins, J., "reading this specification, form any judgment as to what the object of the invention is? . . . The more I look at it the more satisfied I am that both the Provisional and the Complete Specifications are absolutely wanting in the essential features which ought to present themselves upon both Provisional and Complete Specifications, and I therefore hold that it is bad for that reason."

Example of
bad speci-
fication.

*Allen
v. Duckett.*

The specification is addressed to persons who are competent to understand and carry out processes or manufactures akin to the subject-matter of the patent. As Lord Eldon said in *Harmar v. Plagne* ([1807] Good. P. C. 219; 14 Ves. 130): "No sort of specification would probably enable a ploughman, utterly ignorant of the whole art, to make a watch." Therefore it is not necessary that technical terms and trade expressions should be explained, unless they are more than ordinarily obscure or uncommon. Thus, if the invention deals with electricity, the inventor may use the scientific and accepted terms common among electricians; if with chemistry, those terms which are common knowledge with chemists. So in an invention connected with a loom, for example, the patentee may safely pre-suppose an acquaintance on the part of his readers with the ordinary mechanism and operations of weaving. For it would be insufferable that a chance mention of a shuttle, reed, picking-stick, or weft fork, should be a signal for the writer to stop and carefully explain to the reader what these were.

Specifi-
cation
addressed
to skilled
persons.

As a development of this implied knowledge on the part of the reader the Courts have in turn come to assess the sufficiency of a description by what is known as "the ordinary working test."

Construc-
tion of
sufficiency
of speci-
fication.

This means that a Complete Specification will be held to be sufficient in law if the directions are plainly enough given to enable a person of average intelligence, and conversant with that particular industry, to carry the invention into effect.

Lord
Cairns on
sufficiency.

As was said by Lord Cairns in *British Dynamite Co. v. Krebs* ([1879] Good. P. C. 88; 13 R. P. C. 190): "When the nature of the invention is ascertained by the Court as a matter of construction, the Court has then to enquire whether the manner in which the same is to be performed is sufficiently described in the specification to the comprehension of any workman of ordinary skill in the particular art or manufacture; and this the Court can best do by the evidence of workmen of that description and by the evidence of what workmen of that description have actually done under the patent."

Skilled
workman
test.

The reader is not to be called upon to exercise extraordinary intelligence or invention, or to fill in evident gaps left by the patentee. But he must duly exercise his trade knowledge and trained intelligence as a workman in interpreting the instructions of the patentee. In *Crossley v. Beverley* ([1829] 3 C. & P. 513; Good. P. C. 136) the defendants asserted that the description of a gas-making apparatus was incomplete because no mention was made of the condenser. Lord Tenterden, C. J., brushed this objection aside, saying that "a workman who was capable of making a gas apparatus would know that he must put in a condenser." But lack of exactness in the description which leads to a result short of the full useful effect contemplated by the patentee will vitiate the patent on the ground of insufficiency (*Sirdar Rubber Co. v. Wallington*, [1905] W. N. 37).

Evident
errors not
fatal.

Where a patentee in his description makes an error which is on the face of it an error, and which could not possibly mislead anyone acquainted with the subject-matter, such error will not vitiate his patent.

But not so
with errors
non-
evident.

This was the opinion of Lord Westbury, L. C., in *Simpson v. Holliday* ([1865-6] 12 L. T. N. S. 99; Good. P. C. 425). But his Lordship nevertheless went on to say that this was not a correct statement of the

law when applied to errors which were only discoverable by experiment and further inquiry.

In a Complete Specification a patentee is not tied down to exact and definite proportion or detail if the nature of the invention reasonably admits of variation. Thus, in the description of a new alloy, the proportions of metal to form the alloy should be stated specifically; but where variations might be made in these proportions without essentially affecting the nature or utility of the alloy, it is quite permissible for the patentee to say so and to indicate the limits within which such variations might be made (*Patent Type Founding Co. v. Richards*, [1860] 6 Jur. N. S. 39; Johns. 381; Good. P. C. 360). On the same grounds a combination claim, consisting of several parts, would not be defeated by mere variation or substitutes where the characteristics of the combination were preserved. In short, whether in mechanical or chemical combinations or processes, a reasonable latitude will always be allowed in construing the specification.

Provision
may be
made for
reasonable
variation.

Wherever a Complete Specification can be made more easily understood by the addition of drawings these should be incorporated.

Drawings.

It was said by North, J., in *Lawrence v. Perry* ([1865] 2 R. P. C. 179), that drawings are not an absolute necessity even for the explanation of mechanical patents. But the patent in question was under the Act of 1852, and Subsection 4 of Section 5 of the present Act says that a Complete Specification *must* be accompanied by drawings if required. Nevertheless, a specification dealing with an appliance improvement has been held by Chitty, J., to be sufficient, though no drawings were annexed (*Savage v. Harris*, [1896] 13 R. P. C. 90). There is little doubt, however, that it is, if not essential, extremely desirable that drawings should be used wherever possible. Language is at the best a very poor and misleading substitute for a representation of the thing itself, and, besides, a faithful and careful drawing is of use in explaining what might otherwise be an ambiguity in the description. Thus, if the descriptive part were to tell the reader something which is absurd—perhaps something so misleading that if it stood alone

Advantages of
drawings.

Hinks
v. Safety
Lighting Co.
Otto
v. Linford.

the very validity of the patent might be imperilled—if that misleading statement is coupled with a reference to the drawing, the error in the description can be explained and neutralised, so long as the drawing is so unmistakably clear and correct that a competent person can at once see for himself that a mistake has been committed. An omission in the drawing of one small air hole, which was an essential of the invention, upset the patent in *Hinks v. Safety Lighting Co.* ([1876] L. R. 4 Ch. D. 607; 46 L. J. Ch. 185; Good. P. C. 252); but in *Otto v. Linfield* ([1881] 46 L. T. N. S. 35; Good. P. C. 343) an obvious error in the drawing which would not have deceived an engineer was not allowed to prejudice the patent.

Ambit of
wide claim
not limited
by drawing.

But where the description and claim are in general terms, and so wide as to include different types of apparatus, the fact that the drawing illustrates one particular type of apparatus will not entitle the patentee to contend that his claims must be limited to the use of the particular apparatus he illustrates. Thus, in *Scott's Patent* ([1902] 20 R. P. C. 257) the description and the first claim referred to condensers generally, while the drawing showed a multi-tubular water condenser. The Court refused to limit the claims to condensers of this type only, and declared the patent invalid from want of novelty, condensers of other types having been used for the same purpose prior to the date of the patent.

Essential
feature
illustrated
but not
described
held within
claim.

On the other hand it has been held that where an essential feature of the invention is clearly shown in the drawings, but not referred to at all in the specification, a general claim for the combination includes and protects this essential feature (*Hattersley v. Hodgson*, [1904] 21 R. P. C. 517). In this case Mathew, L. J., said: "I should be loth to accept for a moment the suggestion that has been made that although a drawing may be sufficient to indicate what the patentee intended, unless he incorporated in his letterpress what he intended to convey by his drawing, his patent is invalid. There is no such rule, and I have not the least anticipation that such a rule will ever be laid down."

Object of
drawings.

In making a drawing the great object should be to clearly illustrate the subject-matter of the invention. This

is sometimes so far lost sight of, that an inventor, in illustrating an improvement in locomotive furnace bars for example, is content with nothing less than giving several complete views of an entire locomotive engine and tender. The result is, that the illustrations of the improved bars are dwarfed, and the specification encumbered by the presence of matter that has nothing to do with the invention.

Hints on
the prepara-
tion of
drawings.

Perspective drawings or isometrical projections are much in evidence in American specifications, and should be used where possible, as these appeal to the understanding of a much wider class than is the case with purely mechanical drawings.

Perspective
drawings.

As the drawings attached to the specification are now reproduced by zincography, and generally to a reduced scale, it is incumbent upon the patentee to see that his drawings are neat, black, clear, and distinct, and to as large a scale as the prescribed sizes of sheet will conveniently hold. The lettering should be large and carefully formed, and each letter should unmistakably indicate the part referred to.

Repro-
duction of
drawings
for publi-
cation.

It should be mentioned that under Sub-section 4 of Section 5 of the Consolidated Act (Section 2 of the Act of 1886) it is provided that when drawings have been filed with the Provisional Specification, these drawings can be referred to in the Complete Specification without the necessity for filing fresh copies of the drawings.

Provisional
drawings
may serve
for
Complete.

In pursuance of the advice already given as to the exercise of absolute good faith in preparing the Complete Specification, it might be useful also to point out the advantage of differentiating the old from the new in a specification, especially where a combination is concerned. As Cresswell, J., said in *Gibson v. Brand* ([1841-2] 1 Web. P. C. 627; 11 L. J. C. P. 177; Good. P. C. 211): "Every party is bound to tell the public clearly by his specification what he claims, and what they may do or may not do without risk of an action for infringing his patent."

Differen-
tiating old
from new.

In view of the powers given to the Comptroller under the present examination system the differentiating of the old from the new is desirable if the applicant desires to escape the disagreeable necessity of having references to one or more prior patents endorsed on his specification.

Present-day
necessity of
differen-
tiating new
from old.

*Macfarlane
v. Price.*

In *Macfarlane v. Price* ([1816] 1 Web. P. C. 74; 1 Stark. 199; Good. P. C. 294) certain improvements in umbrellas and parasols were described, no distinction being made as to which of the details were new and which were old. The patent was alleged to be infringed by the use of a certain part shown in the drawing, and admittedly of the essence of the invention. But Lord Ellenborough, C. J., nonsuited the plaintiff on the ground that no one could be fairly expected to gather from the specification what the novel parts really were.

*Foxwell
v. Bostock.*

So in *Foxwell v. Bostock* ([1863-4] 4 De G. J. & S. 298; 10 L. T. N. S. 144; Good. P. C. 200) certain improvements in a sewing machine were so described that Lord Westbury held that no one could properly distinguish between what was new and what was old, and on that account declared the specification insufficient. Again, in

*Harrison
v. Anderston
Foundry Co.*

Harrison v. Anderston Foundry Co. ([1876] Good. P. C. 221; L. R. 1 App. Cas. 574), in which *Foxwell v. Bostock* was discussed, Lord Hatherly laid it plainly down that where the improvement was merely in an *integer* in an otherwise known combination, it was the duty of the patentee to lay his finger on the new part and tell the public that this was his improvement. This differentiating of the new from the old need not, of course, be carried out where common knowledge or the knowledge of the ordinary skilled workman is sufficient to identify the old parts.

Where
differen-
tiation may
be un-
necessary.

For example, if the invention refers to a new equilibrium valve for governing the passage of steam to the valve chest of a steam engine, and the specification describes the valve in connection with an ordinary ball governor, it would not be necessary to disclaim the governor, for every one knows how old that is. But if the valve itself were partly old, it might be necessary to point out what parts of the valve were new and constituted the improvement. As regards any improvement upon a foregoing invention or existing patent, it will be sufficient, for the purposes of differentiation between old and new, to indicate the specification of the first invention.

Examples
where
differen-
tiation

Before leaving the question of differentiating the old from the new, it must *per contra* be pointed out that the

newer practice does not always adhere to the older precedents. For instance, in *Goddard v. Lyon* ([1894] 11 R. P. C. 354) Lord Watson said that a "patentee is not bound to state what is new and what is old," and *per Wills, J.*, in *Hookham v. Johnson* ([1897] 14 R. P. C. 525), "a patentee is not bound in a combination claim to distinguish between new and old parts in the combination." In *Patent Exploitation, Limited v. Siemens* ([1904] 21 R. P. C. 547) Lord Davey said: "In a patent for a combination of well-known elements there is no room for the common objection that the patentee has not sufficiently distinguished the old from the new, the combination itself constituting the novelty."

held not
to be
obligatory.
*Goddard
v. Lyon.*

*Hookham
v. Johnson.*

New combi-
nation of
well-known
parts.

Nevertheless, the old and useful rule cannot always be safely disregarded, as was shown in *Kynoch v. Webb* ([1899] 17 R. P. C. 100), where the plaintiff's patent was upset in the House of Lords mainly on the ground that the specification did not distinguish the new from the old in a combination.

But *contra*
in *Kynoch
v. Webb.*

When two or three methods of carrying an invention into effect are described in the specification, and one of them turns out to be useless, the patent is invalid. In *Simpson v. Holliday* ([1865-6] Good. P. C. 425; 12 L. T. N. S. 99; L. R. 1 H. L. 315) a cold and a hot process for the production of a dye were described in the specification and claimed. The cold process turned out to be useless, and the patent was held invalid on that account.

Inutility of
alternative
method
avoids
patent.

In construing specifications of Letters Patent for inventions the practice of the Courts seems to have gone through a pendulum-like swing before settling down to the present rule of reasonable and fair construction. In former times Letters Patent for inventions suffered from the vestiges of that odium which attached to the bad old monopolies. As a result, when a patent came into Court it was subject to the most keen and searching scrutiny. The leaning of the Court was always dead against the patentee and in favour of the public. This might be termed the period of *malevolent* construction of specifications. But early in the present century more liberal conceptions concerning the inventor and his mission began

Construc-
tion of
specifica-
tions.

Former
modes of
construc-
tion.

to prevail, and the practice of the Courts swung into what has been called the *benevolent* construction.

Present
practice in
construing
specifica-
tions.

That, in its turn, has been succeeded by a very evident determination on the part of the Court to allow itself to be influenced neither by the benevolent nor the malevolent theory of construction, but to give fair consideration to the meaning of the language employed, and to decide accordingly.

Chitty, J.,
on con-
struction.

In *Cropper v. Smith* ([1884] 1 R. P. C. 81; 26 Ch. D. 700; 10 App. Cas. 249) Bowen, L. J., gives an excellent exposition of the rules governing the Courts at this date. Chitty, J., in *Lister v. Norton* ([1886] 3 R. P. C. 203), speaking of the construction of a specification, said: "It ought to be construed, like any other legal document, as a whole. It certainly ought not to be construed malevolently; I will not say it ought to be construed benevolently; I do say it ought to be construed fairly. It must be read by a mind willing to understand, not by a mind desirous of misunder-

Cozens-
Hardy, J.,
on con-
struction.

standing." Cozens-Hardy, J., in *Electric Construction Co. v. Imperial Tramway Co.* ([1899] 16 R. P. C. 631), said: "A specification ought, I apprehend, to be regarded in the same manner as any other document which has to be interpreted by the Court—it must be looked at as a whole. The claims must not be looked at as if they stood alone. A strained and unnatural interpretation must be avoided." The whole modern principles of construction were crystallised by Lord Davey in *Patent Exploitation, Limited v. Siemens* ([1904] 21 R. P. C. 549): "My lords, I disclaim putting either a benevolent or malevolent interpretation on the specification, or being astute either to uphold or invalidate the patent. I am of opinion that a specification, like any other document, should be construed by the Court according to the fair meaning of the language used, after being informed by evidence of the nature of the subject-matter, the state of knowledge at the date of the patent, and the meaning of any scientific or technical words that are found in it."

Lord Davey
on modern
principles
of construc-
tion.

Any part of the invention which has been indicated in the Provisional Specification may be abandoned or disclaimed in the Complete.

CHAPTER XIII.

CLAIMS.

NEXT to a clear and comprehensive setting forth of the invention in the body of the Complete Specification the most important task of the patentee is the framing of the claims, by which he points out and fences off the real fruits of his brain. Prior to the present Act of 1883 it was not necessary to conclude the specification with claims, although, for their own sakes, patentees usually did so. Now, however, every Complete Specification must end with "a distinct statement of the invention claimed" (Section 5, Sub-section 5).

Claims
required
by the Act
of 1883.

The requirement of that Statute is reinforced by the Rules of 1905, which under Rule 4 (9B of Consolidation) require that "The statement of the invention claimed, with which a Complete Specification must end, shall be clear and succinct as well as separate and distinct from the body of the specification." A marginal note on Form C (which is the Form for the Complete) draws attention to this Rule 4, and asks that "any unnecessary multiplicity of claims or prolixity of language should be avoided."

Claims must
be clear and
succinct.

Simple as these requirements may seem, it is sometimes a matter of considerable difficulty to select and limit in clear and comprehensive language not only the pith and gist of the invention, but also the subsidiary and collateral claims that may spring from the main trunk.

The Comptroller has power to require that something in the shape of a claim shall be appended to the Complete, and apparently, if the Rules of 1905 are to be construed as one with the Statute, these powers are to be exercised more stringently than heretofore. It is therefore to be expected that patents granted after the 1st January, 1905, will have

Powers
of Comp-
troller to
require
claims in
Complete.

claims much less difficult of construction than those of earlier and existing patents. But even under present conditions, if the applicant presses for the acceptance of his claim in the form he prefers, the Comptroller has apparently no power to refuse acceptance. The utmost he can do is to insert such reference to prior patents as in his judgment would neutralise the unacceptable form of claim. Therefore to some extent, even in the case of present-day specifications, the old authorities would hold good, and, of course, in the case of patents dated prior to 1st January, 1905, these authorities are undisturbed.

Herschell,
S.-G., on
form of
claim.

Claim must
refer to in-
vention as
described.

But, *per*
Lord Hals-
bury, ab-
sence of
claim not
fatal to
patent.

Object of
claim is to
define in-
vention.
Harrison v.
Anderston
Foundry Co.

Danger of
"fishing"
claims.

It appears that in any case there must be some attempt to indicate the scope of the invention in the claim. Herschell, S.-G., in *re Smith's Patent* (Griff. P. C. 268), expressed an opinion that to say "I claim the invention described in the specification" would not be a claim that should be accepted by the Comptroller. But he also said that if the claim read, "I claim the improved bicycle substantially as described," such a phrase might be accepted, as it clearly pointed to a particular machine. But even if it were possible to pass a specification through the Patent Office without any claim, it seems that this would not vitiate the patent. Lord Halsbury, in *Vickers v. Siddell* ([1890] 7 R. P. C. 292; 15 App. Cas. 496), held that the provision as to the appending of a claim to the specification is directory only, and that non-compliance would not render the patent invalid. This was followed in *Kelly v. Heathman* ([1890] 7 R. P. C. 343).

The primary rule in drawing a claim is to take care that the claim shall not cover anything more than the actual invention. "The object of a claim," said Lord Chelmsford in *Harrison v. Anderston Foundry Co.* ([1876] L. R. 1 App. Cas. 574), "is to define and limit with precision what it is that is claimed to have been invented and therefore patented." In working out an invention and preparing the Complete Specification it is often the case that extensions of the uses of and changes in the apparatus begin to suggest themselves more or less vaguely to the inventor, some of which he thinks might possibly lead to evasion if hit upon by other inventors. In this

state of mind claims are prepared in which, not content with claiming the substance of the invention, the patentee endeavours also to secure some foothold in case of possible developments of his idea by others. With this object the claim is drawn in vague terms, which the patentee flatters himself not only cover the design originated by himself, but would trip up anyone who might come within measurable distance of his domain. As was said by Lindley, M. R., in deciding against the validity of the patent in *Dick v. Ellam* ([1900] 17 R. P. C. 196), "the invention might have been patentable if the patentee had not thrown his net too wide as patentees constantly do to catch people who do not infringe the real invention."

*Dick v.
Ellam.*

This ambition has often proved fatal, and in thus snatching at the shadow the patentee runs great risk of losing the substance.

In *Sterens v. Keating* ([1847] 2 Web. P. C. 175; 19 L. J. Ex. 57; Good. P. C. 443) the patentee had described a mode of making a new cement by the use of sulphuric acid with limestone or chalk. The gist of the invention was the employment of the acid for the purpose. Not content with having proved the usefulness of sulphuric acid for his purpose, the patentee said, in the body of his specification, that other acids might be used, and claimed the process in combination with the use of acids "as hereinbefore described." This was held to be a claim for every acid, and as it was proved that certain acids would not do, the claim was upset as being too wide.

Claims
must not be
too wide.
*Sterens v.
Keating.*

Again, in *Minter v. Mower* ([1837] 6 A. & E. 735; Good. P. C. 304), the patentee of an automatically self-balancing chair, instead of claiming his own construction of the chair, which was both novel and useful, claimed "the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counter-balance to the pressure against the back of the chair, as above described." It was shown at the trial that a form of chair acting upon this claimed principle, but infinitely less cleverly constructed than the plaintiff's, had been made and sold before the date of his patent. It was held that

*Minter v.
Mower.*

Minter's claim, instead of being confined to his own invention, was wide enough to cover the anticipatory chair also, and was therefore bad. The same error of claiming a useful appliance in such broad terms as to cover a principle in mechanics which was shown to be old caused the patent to be declared invalid in *Bowden's Patent* ([1904] 22 R. P. C. 49).

Court will not extend claims beyond their reasonable construction.

On the other hand, if the claim as drawn is narrower than it need have been, the Court will not expand the ambit of the claim so as to cover the ground which might have been but was not claimed. *Per* Romer, J., in *Nobel's Explosives Co., Limited v. Anderson* ([1894] 11 R. P. C. 128): "In order to make out an infringement it must be established to the satisfaction of the Court that the alleged infringer, dealing with what he is doing, as a matter of substance, is taking the invention claimed by the patent, not the invention which the patentee might have claimed if he had been well advised or holder, but that which he has in fact and substance claimed on a fair construction of the specification." So if the invention really involves a novel essence or principle, but the claim covers only the actual construction described, the Court will not stretch the claim to cover the principle. *Per* Cozens-Hardy, L. J., in *Ackroyd v. Thomas* ([1904] 21 R. P. C. 737): "If a patentee intends to claim a general principle, it is his duty to make that intention reasonably clear by his specification."

Non-utility in part of combination claimed makes the whole bad.

Or failure in alternative arrangement.

If an essential part of a combination, operation, or process, or an alternative arrangement or process, described and claimed should turn out to be useless, the patent is bad. The first would put an entire stop to the useful function of the machine or would nullify the process, and is clearly a fatal defect (see Lord Denman's remarks in *Reg. v. Cutler*, [1816] 1 Stark. 354; 1 Web. P. C. 76 n.). The second—viz. the failure of an alternative arrangement or process—is also a reason for upsetting a patent. The principle seems to be that the Court says: "Here you have two methods presented to you as equally useful. You are told that one is as good as the other. Having nothing to serve as a guide, you may

choose the useless method. It fails. Practically, therefore, you are put to experiment to prove what is useful and what is useless, and that is distinct failure of a patent."

In *Simpson v. Holliday* ([1865-6] Good. P. C. 425; 12 L. T. N. S. 99) two methods of preparing dyes were described. The method first described was perfectly

*Simpson v.
Holliday.*

successful; the second (an alternative method) was a failure. The patent was held invalid on that account.

Similarly, in *Pether v. Shaw* ([1893] 10 R. P. C. 293), Kekewich, J., held the plaintiff's patent bad because, of

*Pether v.
Shaw.*

two alternatives suggested in the claim, one was of no use, although the other had proved highly successful.

In *Kurtz v. Spence* ([1886-8] 5 R. P. C. 161; L. R. 33 Ch. D. 579) the patentee claimed as an agent in

*Kurtz v.
Spence.*

a process, peroxide of manganese, whether hydrated or anhydrous. The latter proved to be useless for the pur-

poses of the invention, and the patent was held bad. It must be remembered that the claim is always read together

with the specification; therefore where a claim is made, and direct qualifying reference is had to the specification,

the claim is limited thereby, and the reader must go to the specification to learn the extent of the limits. But as this

course is very apt to lead to doubt and uncertainty, it is unquestionably better to formulate in the claim itself the

feature which it is desired to secure.

Claim may
be limited
by specifi-
cation.

Sometimes the interpretation of the true meaning of a claim is a matter for settlement by evidence; that is

to say, that though a claim may seem too wide to an outsider, it may have a more restricted meaning to a

person well acquainted with the industry in question. Thus, in *Gandy v. Reddaway* ([1885] 2 R. P. C. 49), the claim

True mean-
ing of claim
sometimes
matter for
evidence.

was for "constructing belts or bands, for driving machinery, of cotton, canvas, or duck woven hard," &c. It was shown

that at least ten classes of "hard woven" canvas were known in the market. Of these, numbers two, three, and

four only were suitable for the purposes of the invention. The other classes were useless. The plaintiff endeavoured

to show that a workman acquainted with this class of manufacture would, without further instructions, have

*Gandy v.
Reddaway.*

used number two, three, or four, and would never have thought of using any of the other numbers. It is to be gathered from the judgment that if this had been established on evidence, the Court might have upheld the patent. But no such evidence was forthcoming, and, consequently, the patent was held invalid.

Grove, J.,
on the use
of the word
"substan-
tially."

Lord
Alverstone
on
colourable
alterations.

"Substantially as hereinbefore described" is a phrase often appearing as the termination of a claim. The words are used sometimes with the intention of giving increased breadth to a claim, sometimes for the purpose of narrowing it. In *Young v. Rosenthal* ([1884] 1 R. P. C. 29) Mr. Justice Grove gave it as his opinion that it was unnecessary to use any such word as "substantially" to qualify a claim. The elasticity sought to be obtained in a claim by such a qualification, either by increasing or limiting its ambit, is already given by the law. "The law says if a man although not literally infringing the letter of the patent yet substantially infringes it, it is an infringement." As was said by Lord Alverstone in *Presto Gear Case Co. v. Orme* ([1900] 18 R. P. C. 17): "In my judgment, be it a combination claim or be it not, you are only allowed to follow the words of the claim, but you are not to permit mere mechanical equivalents or mere colourable alterations to prevent a thing being an infringement, having regard to what the meaning of the claim is." It is certainly reasonable to consider that all expressions which mean that anything practically or substantially the same will be deemed an infringement of the described invention, are unnecessary and might as well be left out. They do no good, for it is always for the Court to decide what is and what is not an infringement, and no amount of fencing with such expressions as "mere mechanical equivalents," or "substantially the same arrangement of parts," &c., so commonly found in specifications, will influence the Court in any way. Nevertheless, where the claim is not intended to be broad and general but to refer to something the same, or practically the same, as the thing described and claimed, it is better to add the words "as described and shown" or "substantially as described and shown."

The subject of how far it is safe to claim anything savouring of a principle has already been referred to in the foregoing pages (see Chapter IV., on "Subject-Matter"). It seems proper, however, at this point to repeat the rule already laid down, that although a bare principle *per se* cannot be patented, yet, if the principle is new and a method of carrying it into effect has also been devised, the principle, coupled with the mode of carrying it into effect, may be patented. If this is done, any other substantially similar mode of carrying the principle into effect which another person might seek to use will be very narrowly scrutinised, and if possible held to be within the limits of the patent. The chief expressions of judicial opinion most favourable to the first exploiter of a new principle are to be found in *Neilson v. Harford* ([1841] Good. P. C. 321; 8 M. & W. 806); *Otto v. Linford* ([1881] Good. P. C. 343; 46 L. T. N. S. 35); and *Jupe v. Pratt* ([1837] Good. P. C. 274). But as Farwell, J., pointed out in *Chamberlain v. Mayor of Bradford* ([1900] 17 R. P. C. 493), in recalling the dictum of Cotton, L. J., in *Automatic Weighing Machine Co. v. Knight* ([1889] 6 R. P. C. 297), the usual reading of Baron Alderson's opinion in *Jupe v. Pratt* is much too wide. Said the learned Judge: "If the claim is in general terms for every mode of carrying the principle into effect, it becomes a claim to the principle itself, and therefore fails." This was already noted by Lord Abinger in *Neilson v. Harford* (*supra*).

Principles.

Claim should be for principle, coupled with mode of carrying into effect.

Claim must not be generally for every mode of carrying into effect.

It seems reasonable to submit that a claim which the patentee would not venture to make for himself will not be made for him by the Court, and that a claim for a new mode of carrying out a new principle will be confined substantially to that mode, and will not extend to all other modes as one might judge from a perusal of Baron Alderson's words.

According to Smith, L. J., in *Edison-Bell Phonograph Co. v. Smith* ([1894] 11 R. P. C., 404), a claim is also a disclaimer; but, *per* Lord Herschell, in *Parkinson v. Simon* ([1895] 12 R. P. C., 406), "it is no longer correct to speak of a claim as a disclaimer."

A claim is not a disclaimer.
Parkinson v. Simon.

Apparently
but
subsidiary
claim not
necessarily
fatal.

The question as to how far a subordinate claim, *prima facie* bad by itself for want of novelty or utility, ought to be considered as annexed to and forming part of the good claim or claims, so as to be capable of being held valid in accordance with the ruling in *Plimpton v. Spiller* and *British Dynamite Co. v. Krebs*, has been already discussed in Chapter VI., to which the reader is referred.

When
evidently
separate
and inde-
pendent
a bad
subsidiary
claim is
fatal.
Kynoch
v. Webb,
Electric
Construction
Co. v.
Imperial
Tramways
Co.

The risk and uncertainty attending the interpretation of a claim of this dubious nature is well exemplified by the sometimes apparently contradictory character of the decisions. It is true that a claim is not to be read as an isolated sentence but together with the specification (*per Kay, L. J., in Parkinson v. Simon, [1894] 11 R. P. C. 493*). But a patentee who has deliberately made a separate and independent claim for a part of his invention which is *ab initio*, or afterwards turns out to be, not good subject-matter, will not be assisted by the Court, because it was "foolish or suicidal" of him to do so (*per Lord Davey in Kynoch v. Webb, [1899] 17 R. P. C. 100*). In *Electric Construction Co. v. Imperial Tramways Co. ([1900] 17 R. P. C. 537)* it was plain from the specification that spring suspension of a motor in a car was the object of the invention. But Claim 1 detailed an arrangement in which the spring suspension was absent, and which, in the absence of the springs, turned out to be old. The plaintiffs contended that the Court should read the claim with the specification, and construe it as referring only to apparatus in which spring suspension was used. *Plimpton v. Spiller* was quoted as an authority for this, but without effect, the Court declining to amplify the claim in such a manner as to assist the plaintiffs. In *Electric Construction Co. v. Imperial Tramways Co. (supra)* the part left out of the claim in dispute (*i.e.* the spring suspension) was not an essential or necessary part of the motor and car; that is to say, they were complete, as a working combination, without the springs. Where the feature omitted from the claim is an essential and necessary part of the mechanism, or necessary to the continuity of an operation, the omitted feature may be read into the claim by the Court (*Tubes, Limited v. Perfecta Tube Co., [1902] 20 R. P. C. 77*).

Tubes,
Limited v.
Perfecta
Co.

Where a claim, although susceptible of being construed to have been made in gross, is plainly subsidiary to the main invention, and intended to be used only in combination with it, lack of novelty as a separate and independent thing will not cause invalidity (*per* Farwell, J., in *Parker v. Satchwell*, [1901] 18 R. P. C. 299). In this case the learned Judge was guided by the decision in *British Dynamite Co. v. Krebs*, already referred to.

Examples where apparently bad subsidiary claim was upheld.

Parker v. Satchwell.

If any principle can be deduced from the decisions in *Plimpton v. Spiller* and *British Dynamite Co. v. Krebs*, it might be fairly stated to consist in this: That where it is undeniable that it would be absurd and ridiculous to suppose from the then state of common knowledge and from the contents of the specification that the patentee could have intended to claim *per se* something which is notoriously old or not fit subject-matter, the Court may, in the exercise of its discretion and common sense, construe the faulty claim as being intended to include or be combined with the portion of the invention which is clearly novel and useful, and so cure the defect. But this benevolent view of a *prima facie* bad claim will not be taken when it is arguable that the patentee might reasonably have thought at the time that the subject-matter of the claim was sustainable.

Principles deducible from the cases.

A fortiori, if two methods of carrying an invention into effect are stated in the specification, and only one method is claimed, the claim cannot be stretched to include the absent modification. In *British Motor Syndicate, Limited v. Andrews & Co., Limited* ([1901] 18 R. P. C. 85), the plaintiff's specification referred to two methods of igniting the explosive mixture in the cylinder of a gas engine: First, by reduction of pressure at an efflux nozzle through the operation of a cock; and, secondly, by the alteration of the richness of the issuing jet of mixture, the result in either case being that the flame at the proper times had access to the contents of the cylinder. The first method only was claimed—viz., the variation of the velocity of outflow. Strenuous efforts were made to show that this claim was meant to include the variation of the richness of the outflow, and the argument succeeded in the Court of Appeal. But the House of Lords, in restoring the decision

Where a portion of the invention although novel is not specifically claimed, it will not be construed as claimed.

British Motor Syndicate, Limited v. Andrews & Co., Limited.

of Kekewich, J., held that the claim covered no more than it actually expressed. Referring to an observation of Romer, L. J., that the patentee had *intended* to cover the second modification in his claim, Lord Davey said: "With great respect to the learned Lord Justice, that is a *petitio principii*, and assumes the very point to be decided." The result was that the defendants, who were using the second but not the first method, were held not to have infringed.

Omitted
part may be
read with
claim where
essential to
continuity
of opera-
tion.

The Court of Appeal may have had this direction in mind when dealing with an apparently similar question in *Tubes, Limited v. Perfecta Tube Co.* ([1902] 20 R. P. C. 77). Here the Court of Appeal held the patent bad because they thought there was no ground for inferring that the water cooling and expelling apparatus was *intended* to be included in the claim, there being no specific mention of such apparatus in the claim. But the House of Lords differed from them, and held that this apparatus, being an essential step in the process, was intended to be included in the claim, and upheld the patent.

The apparent contradiction is, however, susceptible of explanation. In the "Gas Engine" Case there were two independent modes of ignition, of which one only was claimed; whereas in the "Tubes" Case the water cooling and expelling were essential and constant elements in the continuity of the process, which would have been incomplete without them.

The pre-
sumption is
that no two
claims
are co-
extensive.

It is presumed that no two claims are co-extensive (*per* Lord Esher, M. R., and Kay, L. J., in *Parkinson v. Simon*, [1894] 11 R. P. C. 493). Therefore, when a patent has several claims, these claims must be construed so as to give an effective meaning to each. But if a claim, when exhaustively construed, evidently covers and means no more than a preceding claim, what is its effect? The answer seems to be found in the dictum of Brett, L. J., in *Plimpton v. Spiller* (*supra*): "If you can say that the subsidiary claim cannot under any circumstances increase the monopoly of the patent, it seems to me that the subsidiary claim is unimportant, is futile, has no effect, and therefore does not raise any objection to the patent." It follows, then, that a claim which is practically a repetition of a preceding claim is to be treated as surplusage and of no effect.

Brett, L. J.,
on repeat
or surplus
claims.

Where a part of a combination is claimed separately and *per se*, that part by itself being useless and fulfilling no useful function, the claim is bad (*per* Smith, M. R., in *Wilson v. Wilson*, [1900] 18 R. P. C. 152).

Claim for separate part of combination useless by itself is bad.

Combinations, whether chemical or mechanical combinations of materials, or combinations of parts or motions in machinery, or combinations of methods in industrial processes, are all fit subject-matter for claims.

Combinations may be either of moving parts or of chemical agents.

When the invention refers to a combination of materials mechanically mixed or combined so as to produce a new concrete or a new alloy or a waterproof fabric, or where the combination is chemically effected so as to produce a new dye or agent, the proper claim to frame is for the special product made from the materials and in the manner described.

Combination of materials.

When the invention refers to combinations of machinery not only should the combination as a whole be claimed, but those parts of the combination which are new should also be separately claimed for the specific purpose. It has, however, been held that where a part of a combination which is undoubtedly new has not been so separately claimed, but figures only as an *integer* in the combination, such part cannot be taken and used for a similar purpose, even though wrapped up in a different combination.

Novel parts of combinations.

This was the dictum of Lord Campbell in *Lister v. Leather* ([1857-8] Good. P. C. 283; 8 E. & B. 1004), and a similar view was taken in *Proctor v. Bennis* ([1887] 4 R. P. C. 333). It is, however, much safer not to depend upon such rulings, but to make a positive claim for the novel element as an essential part of the particular combination in which it figures.

Differentiation of essential novel part.

The following rules may be useful as guides in the preparation of claims:—

Rules for the preparation of claims.

- (1) The claim should not embrace more than the actual invention, but should specifically claim all that is novel.
- (2) A claim should be expressed in the clearest and most concise language; should refer unmistakably to the invention described in the specification; and should not contain any vague and speculative phrases.

- (3) If the invention discloses a new principle, the claim should be for the principle, coupled with the means for carrying it into effect.
 - (4) If the invention relates to a new thing or product, the claim should be for the product as described, and the method of producing it should also be claimed if that also involves invention and is novel.
 - (5) In combination claims, if the invention consists purely of a combination of old parts, the combination only should be claimed. If the combination contains new parts, or parts new as applied to the purposes of the invention, these parts also should be separately claimed for the indicated purposes.
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CHAPTER XIV.

OPPOSITION TO GRANT OF PATENT.

IT HAS already been said that the Provisional Specification during the period of provisional protection is a secret document. Its tenor is unknown to the public, and opposition thereto is not contemplated by the Act. It has also been said that when the Complete Specification has been filed, examined, and accepted, the fact of acceptance is advertised in the *Official Journal*. This advertisement is accompanied by a notification that all persons interested in opposing the grant of a patent on the indicated application may, at any time within two months from the date of the *Journal*, give notice of opposition. At the same time, the specification and drawings are thrown open to public inspection at the Patent Office, and the printing of the specification is usually effected within three weeks after acceptance.

Provisional
Specifica-
tion a secret
document.

Advertise-
ment of
acceptance
of Complete
Specifica-
tion invites
opposition
to grant of
patent.

In all cases the specification is published and placed on sale in ample time to give an intending opponent, not resident near the Patent Office, every opportunity of examining it at his leisure, before filing his notice of opposition.

Publication
of specifica-
tion.

There is no doubt that the system of examination as to novelty now in force under the Act of 1902 has affected and will materially affect cases of opposition to the grants of patents. The cutting down of specifications to the actual invention concerned, and the introduction of general statements as to public knowledge, with, if need be, special references to prior patents, are enforced by the Comptroller in such a manner as to satisfy many persons interested, who would otherwise have entered opposition.

Effect of
examina-
tion system
on opposi-
tions.

Nevertheless the provisions in the Statute as to oppositions remain unaltered, and the practice is untouched

except in this respect that the Comptroller and Law Officer may possibly hold themselves relieved from the reluctance they formerly had to insert special references to an opponent's patent if reasonable grounds for such special reference exist outside of the matter disclosed by the Comptroller's examination. The determination of the Office is that the general public must not be hoodwinked or left in the dark as to the true meaning and ambit of the applicant's claims. It is right that it should be so, and the Patent Act of 1902 has this for its chief object.

With this explanation and reminder, the questions of who may oppose a grant, and upon what grounds opposition can be based, may now be considered.

Persons
entitled to
oppose.
*Reg. v.
Comptroller,
ex parte
Tomlinson.*

The words of the Act (Section 11) are that "any person" may oppose, but it has now been finally settled by the Court of Appeal in *Reg. v. Comptroller, ex parte Tomlinson* ([1899] 16 R. P. C. 233; [1899] 1 Q. B. 909), that only those having a real interest in a prior patent or some other substantial interest as will be hereinafter defined are entitled to oppose. The grounds of opposition are as follows:—

Grounds of
opposition.

- (1) That the applicant has obtained the invention from the opponent, or from a person of whom he is the legal representative.
- (2) That the invention has been patented in this country on an application of prior date.
- (3) That the Complete Specification describes or claims an invention other than that described in the Provisional Specification, and that such other invention forms the subject-matter of an application made by the opponent in the interval between the leaving of the applicant's Provisional Specification and the filing of the Complete Specification.

Person
entitled to
oppose may
quote other
patents
besides his
own.

An opponent once entitled to oppose under the second ground may include in his grounds of opposition not only the prior patent or patents in which he may be personally

interested, but also any other patents in which he has no beneficial or personal interest (see *Stewart's Application*, [1896] 13 R. P. C. 627).

But where a grant is opposed upon the ground that the applicant has obtained the invention from the opponent, and also upon the ground that the invention has been patented on an application of prior date, the opponent must be able to show an interest in the prior patent, or one of the prior patents, upon which his second ground of opposition is based (*J. & J's Application*, [1902] 19 R. P. C. 555).

Opponent on first ground cannot include patents in which he has no interest.

The notice of opposition (which bears a ten shilling stamp) must set forth the grounds upon which the opponent intends to rely. The Patent Rules of 1903 provide that the notice must be signed by the opponent, be accompanied by an unstamped copy, and give an address for service in the United Kingdom. If one of the grounds of opposition should be that the invention has been already patented in this country, the number and date of the patent should be given. It may be noted that a person whose Complete Specification has been accepted, but not yet sealed, is on the footing of a patentee in thus opposing (*re L'Oiseau and Pierrard*, [1887] Griff. A. P. C. 36; Good. O. C. 75). So long as the notice of opposition undeniably places the applicant in possession of the real grounds of opposition, quibbling objections to mere informalities in the notice will not affect its validity, and the Comptroller has power, under Rule 76 of the Patents Rules 1903 to amend either before or at the hearing (see *re Airey*, [1888] 5 R. P. C. 348; *re Lake*, [1887] Griff. A. P. C. 35; Good. O. C. 10; *re Fawcett*, [1889] Good. O. C. 10; *re Daniel*, [1888] 5 R. P. C. 413; Good. O. C. 9; *re Welch*, Good. O. C. 10; *re Jones*, Good. O. C. 11; Griff. A. P. C. 33).

Notice of opposition.

Applicant whose Complete Specification has been accepted may oppose.

Practice in amending slight defects in notice of opposition.

On receiving the notice of opposition the Comptroller transmits the unstamped copy to the applicant. If the opponent intends to follow up his notice of opposition by declarations in support, which might or might not be necessary, he must do so within fourteen days after the expiration of two months from the date of the advertisement

Declarations by opponent in support of opposition.

of the acceptance of the applicant's Complete Specification. On leaving these declarations at the Patent Office he must send copies of them to the applicant.

Declarations by applicant in support of application.

Declarations by opponent in reply.

Within fourteen days from the date of receiving this list the applicant may leave declarations in answer, delivering also copies to the opponent; and within a further period of fourteen days the opponent may leave declarations in reply, again sending copies to the applicant. These last declarations must be confined strictly to reply. In some cases further declarations or rejoinders might be filed by the parties, but only by special leave of the Comptroller, and in most instances the declaratory evidence is closed by the opponent's reply.

Time for filing declarations may be extended; but never to opponent who alleges fraud.

Declarations should be concise.

The discretionary power of the Comptroller to extend the time for filing declarations, or to give leave for the filing of additional declarations or evidence, is, by Rule 33 and by special direction of the Law Officers, never exercised in favour of an opponent who alleges that the applicant has obtained the invention from him—that is where fraud is either asserted or inferred. Declarations should be as few and concise as possible: otherwise if the opposition goes to appeal, the Law Officer may mulct the diffuse declarant in costs (*Brand's Application*, [1895] 12 R. P. C. 102).

Declarations not always necessary.

As to the advisability or non-advisability of filing declarations, it may be said that this depends greatly on the grounds of opposition. Where the grounds are simply a reference to a prior patent, declarations are seldom necessary, as the question will, after all, be decided upon a comparison of the two specifications. But where the grounds are that the applicant obtained the invention from the opponent, or wherever fraud is alleged, declarations are absolutely necessary as evidence in support. If no evidence under this head is filed within the time stated, then under Rule 33, the opposition is deemed to have been abandoned. Under Rule 77 an enlargement of time for filing evidence other than that referred to in Rule 33 may be obtained. Rule 34 provides that where the ground of opposition is that the applicant has obtained the invention from the opponent or his legal representative, the Comptroller

Power of Comptroller to request attendance of declarants.

may request or allow any person who has made a statutory declaration in the matter to attend before him at the hearing of the case and make oral explanations with respect to such matters as the Comptroller may require.

Where the grant of a patent has been opposed on the ground that the invention has already been patented in this country, the applicant may produce any evidence of public knowledge or prior patents which will tend to limit the ambit of the opponent's specification.

Applicant may cite prior specifications or public knowledge to limit opponent's claim.

Thus, in *re Jones* (Griff. A. P. C. 33; Good. O. C. 21), the applicant sought to minimise the scope of the opponent's patent by citing several specifications prior to the opponent's. The opponent objected, but the Law Officer intimated that it was material that he should be informed of the state of public knowledge; and such is now the well-established practice before the Comptroller and Law Officer. Without pretending to try the validity of the opponent's patent, it is the practice to admit all anticipatory specifications and publications quoted by the applicant for the purpose of seeing from what standpoint of public knowledge the opponent's patent must be regarded. Notice of these prior publications should be given to the opponent and to the Comptroller before the hearing, or copies might be attached as exhibits to the applicant's declarations, if such are filed. All models or samples referred to in the declarations of both sides should be constituted exhibits. But merely illustrative samples or specimens of the inventions under consideration, or of matters imputed in the declarations, may be produced and shown to the Comptroller or Law Officer at the hearing to assist explanations. Thus, in *re Lancaster's Application* (Griff. P. C. 293; Good. O. C. 21), the applicant sought to demonstrate the action of his spring piston packing at the hearing, to the Law Officer by means of a specimen. The opponent asked that this should be barred, but the Solicitor-General (Gorst) said it assisted him very much to see the specimen, and he would look at it to better his understanding of the drawings.

Exhibits.

Illustrative samples.

Re Lancaster also decided the point that an opponent may oppose on an expired patent.

Opposition may be founded on expired patent.

Hearing
before
Comptroller.

When the evidence is complete one of the parties may apply for a hearing, and the Comptroller appoints a time, at least ten days' notice of the hearing being given to the parties. A hearing fee of £1 is payable by each side. At the hearing, the parties themselves may appear, or their agents or solicitors, or they may be represented by counsel. As a rule the applicant begins, the opponent follows, and the applicant replies: but where the *onus probandi* lies on the opponent—as, for example, where the applicant is charged with fraud—the opponent should begin, although in practice, the Comptroller is not accustomed to vary the order of beginning, even where fraud is alleged. At the hearing, the opponent must confine himself strictly to the grounds of opposition stated in his notice. Fresh grounds of opposition cannot be sprung without notice upon the applicant (*re Bailey*, Griff. P. C. 269; Good. O. C. 25). Generally the hearing is little more than an oral urging of the chief points made in the declarations when such are filed.

Opponent
confined to
grounds of
opposition
in notice.

Notice of
additional
publica-
tions.

According to Rule 41 of 1903, if either party intends to refer at the hearing to any publication other than a specification mentioned in the notice of opposition, or in any statutory declaration filed in the case, he must give five days' notice to the other party and to the Comptroller of his intention, and must specify the publication to which he means to refer.

Decision.

The Comptroller, who is generally assisted by one or two of the Chief Examiners, seldom gives his decision at the hearing, but notifies the parties in writing. The attendance of the parties or their representatives at the hearing before the Comptroller is not an absolute necessity. If either should not desire to be heard he should let the Comptroller know this as soon as possible. But either of the parties may attend in the absence of the other, in which case the Comptroller will hear him. After hearing the party or parties desirous of being heard, or if neither party desires to be heard, then without a hearing the Comptroller will decide the case and notify his decision to the parties. (See Rule 41.)

If either or both of the parties should be dissatisfied with the Comptroller's decision, appeal can be made to the Law Officer. Notice of such appeal must be filed at the Patent Office within fourteen days from the date of the decision.

Appeal to
Law Officer.

The Rules regulating the practice and procedure on appeals to the Law Officer are as follows:—

Rules
regulating
appeals to
Law Officer.

1. When any person intends to appeal to the Law Officer from a decision of the Comptroller in any case in which such appeal is given by the Acts, he shall within fourteen days from the date of the decision appealed against file in the Patent Office a notice of such his intention.

2. Such notice shall state the nature of the decision appealed against, and whether the appeal is from the whole or part only, and if so what part, of such decision.

3. A copy of such notice of intention to appeal shall be sent by the party so intending to appeal to the Law Officer's clerk at Room 549, Royal Courts of Justice, London; and when there has been an opposition before the Comptroller, to the opponent or opponents; and when the Comptroller has refused to seal a patent on the ground that a previous application for a patent for the same invention is pending, to the prior applicant.

4. Upon notice of appeal being filed, the Comptroller shall forthwith transmit to the Law Officer's clerk all the papers relating to the matter of the application in respect of which such appeal is made.

5. No appeal shall be entertained of which notice is not given within fourteen days from the date of the decision appealed against, or such further time as the Comptroller may allow, except by special leave upon application to the Law Officer.

6. Seven days' notice at least of the time and place appointed for the hearing of any appeal shall be given by the Law Officer's clerk, unless special leave be given by the Law Officer that any shorter notice be given.

7. Such notice shall in all cases be given to the Comptroller and the appellant; and, when there has been an opposition before the Comptroller, to the opponent or opponents; and, when the Comptroller has refused to seal a patent on the ground that an application for a patent for the same invention is pending, to the prior applicant.

8. The evidence used on appeal to the Law Officer shall be the same as that used at the hearing before the Comptroller, and no further evidence shall be given, save as to matters which have occurred or come to the knowledge of either party, after the date of the decision appealed against, except with the leave of the Law Officer upon application for that purpose.

9. The Law Officer shall, at the request of either party, order the attendance at the hearing on appeal, for the purpose of being cross-examined, of any person who has made a declaration, in the matter to which the appeal relates, unless in the opinion of the Law Officer there is good ground for not making such order.

10. Any person requiring the attendance of a witness for cross-examination shall tender to the witness whose attendance is required a reasonable sum for conduct money.

11. Where the Law Officer orders that costs shall be paid by any party to another, he may fix the amount of such costs, and if he shall not think fit to fix the amount thereof, he shall direct by whom and in what manner the amount of such costs shall be ascertained.

12. If any costs so ordered to be paid be not paid within fourteen days after the amount thereof has been so fixed or ascertained, or such shorter period as shall be directed by the Law Officer, the party to whom such costs are to be paid may apply to the Law Officer for an order for payment under the provisions of Section 38 of the Act.

13. All documentary evidence required, or allowed by the Law Officer to be filed, shall be subject to the same regulations in all respects as apply to the procedure before the Comptroller, and shall be filed in the Patent Office, unless the Law Officer shall order to the contrary.

14. Any notice or other document required to be given to the Law Officer's clerk under these Rules may be sent by a prepaid letter through the post.

The proceedings before the Law Officer amount to a rehearing of the case, and if the successful or partly successful party before the Comptroller has by his premature unqualified acceptance of the decision practically acceded to the exclusion or to a certain reading of parts of his evidence, he may be precluded from reproducing or giving effect to these before the Law Officer. At all events, he will have deprived himself of the power to file new evidence which may have come to his knowledge since the hearing before the Comptroller.

In *re Hampton and Facer* (Griff. A. P. C. 13; Good. O. C. 71), which was an amendment case, the successful applicants accepted the Comptroller's decision in their favour without qualification. The unsuccessful opponent appealed to the Law Officer. The applicants then applied under L. O., Rule 8, for leave to file evidence to show that the opponent's invention had been in use by others before the date of his patent; but, as they had accepted the Comptroller's decision *in toto*, Clarke, S.-G., refused leave. When the Comptroller decides partly in favour of the applicant and partly in favour of the opponent, cross notices of appeal should be filed if each intends to question that part of the decision which is in favour of his opponent.

Appeal a
rehearing.

A party
accepting
Comp-
troller's
decision *in
toto* not
allowed new
evidence
before Law
Officer.

Cross
appeal.

When notice of appeal has been given, the Comptroller transmits all the papers in the case to the Law Officer's clerk. When the date of the hearing has been appointed, seven days' notice is given to the parties and to the Comptroller.

Proceedings
before Law
Officer.

Rules as to
further
evidence.

The hearing before the Law Officer is limited to the points raised in the notice of appeal. The whole or a part only of the Comptroller's decision may be questioned; and if the party upon whom the appeal is served wishes to do so, he may question other parts of the Comptroller's decision by counter-appeal. The evidence before the Law Officer must be the same as that used before the Comptroller, and no further evidence will be admitted save as to matters which have occurred or come to the knowledge of either party since the date of the decision appealed against, except with the leave of the Law Officer upon application for that purpose. In *re Bailey's Patent* (Griff. P. C. 269; Good. O. C. 25) Davey, S.-G., decided that this rule related to evidence pure and simple, and refused to allow the opponent to put in the specification of a prior patent which had come to his knowledge since the hearing. The Law Officer held that such was not evidence, but an additional ground of opposition.

The applicant may, however, with leave, add to his evidence of prior knowledge before the Law Officer.

Further
considera-
tion of
persons
entitled to
oppose.

The question of who is entitled to oppose deserves at this point to receive some further consideration. Section 11, Sub-section 1, of the Act, when dealing with opposition *before the Comptroller*, says "any person" may oppose. Of course, as regards "any person" opposing on the first and third grounds of opposition—viz., that the applicant had obtained the invention from the opponent, or that the applicant's Complete contained something which the opponent had protected between the dates of the applicant's Provisional and Complete, the opponent's *locus standi* is unquestionable. But this is not so clear when the second ground of opposition is considered—viz., that the invention had already been patented in this country. Seeing that the expression "any person" is unqualified in the first sub-section, it appeared to be open to any person to oppose

on this ground. Sub-section 3 of the same section, which relates to appeals to the Law Officer, makes it clear that any person applying to be heard by the Law Officer must be some person, to quote the sub-section, "in the opinion of the Law Officer entitled to be heard." But no such qualification appears to attach to opponents before the Comptroller.

The matter was soon raised when the Act came into force. In *re Glossop* (Griff. P. C. 285; Good. O. C. 12), where the opponent was the assignee of and a manufacturer under a lapsed patent, Herschell, S.-G., held him entitled to be heard, and, on the general question of *locus standi*, the learned Law Officer intimated that in his opinion it was not competent for any member of the public to oppose a patent.

Assignee of
or manufac-
turer under
lapsed
patent.

In *re Heath and Frost* (Griff. P. C. 288; Good. O. C. 13) it was held that a patent agent could not oppose in his own name on behalf of the grantee of a prior patent.

Patent
agent on
behalf of
patentee.

In *re Lancaster* (Griff. P. C. 293; Good. O. C. 14) it was decided that the grantee of a prior expired patent could oppose.

Grantee of
expired
patent.

In *re MacEroy* ([1888] 5 R. P. C. 285; Good. O. C. 14) the opponent was a manufacturer under one of the prior patents relied on in the notice of opposition, but Clarke, S.-G., held him not entitled to oppose. But see now the more recent case of *re Meyer* ([1899] 16 R. P. C. 526).

Manufac-
turer under
prior
patent.

In *re Bairstow* ([1888] 5 R. P. C. 286; Good. O. C. 15) the opponent, who alleged he was about to manufacture under the prior patent, was held not to have sufficient interest to entitle him to oppose.

Persons
about to
manufac-
ture under
prior
patent.

In *re Hill* ([1888] 5 R. P. C. 599; Good. O. C. 15) a licensee under a prior patent was held entitled to oppose.

Licensee.

In *re Everitt* (Griff. A. P. C. 28) a French patentee who, under the Convention, had his British application antedated, to be of the same date as his prior French patent, and thus got in front of an English applicant, was held not entitled to oppose.

Foreign
grantee of
antedated
patent
under
Convention.

In *re Bailey* (Griff. P. C. 269) decided that a person having merely prior provisional protection cannot oppose.

Applicant
under
provisional
protection.

But *re l'Oiseau and Pierrard* (Good. O. C. 16, 75; Griff. A. P. C. 36), decided that an applicant whose Complete Specification has been accepted is in a position to oppose.

Comp-
troller's and
Law
Officer's
Courts alike
in deciding
who is
entitled to
oppose.

In *re Stewart* ([1896] 13 R. P. C. 627) an important advance was made when Webster, A.-G., decided that in respect of the qualification of the opponent there was no distinction between the Comptroller's Court and that of the Law Officer, and that the persons entitled to be heard in opposition before the Comptroller are the same as those entitled to be heard on appeal before the Law Officer.

Ruling in
Reg. v.
Comptroller,
ex parte
Tomlinson.

Finally, in *Reg. v. Comptroller, ex parte Tomlinson* ([1899] 16 R. P. C. 233), the Court of Appeal approved of the ruling in *re Stewart*, and decided further that a member of the public having no interest is not entitled to oppose the grant of a patent on the ground merely that the invention has been patented by another person in this country on an application of prior date; and, *per Smith, L. J.*, that the Law Officer is also the final authority to decide whether a person is entitled to be heard before the Comptroller or Law Officer in opposition to a request for leave to amend a specification.

Law Officer
the final
authority.

In deciding
who is
entitled to
oppose, the
Law Officer
will con-
sider each
case on its
merits. But
an interest
of some sort
must be
apparent.

Thus, the decision as to who is the proper person to oppose either the grant of a patent or the amendment of a specification lies with the Law Officer, and his decision is final. The cases already given show upon what points the Law Officer has pronounced, and by these the Comptroller will be guided. But it would be useless to say that the class of persons entitled to oppose can even now be exhaustively specified. Special circumstances will always be considered. Thus, in *re Meyer* ([1899] 16 R. P. C. 526), which was the application forming the basis of the proceedings in *Reg. v. Comptroller, ex parte Tomlinson*, the opponent (although he had no actual interest in the prior patents cited in opposition) nevertheless succeeded in obtaining a hearing before the Law Officer. The facts were that the opponent had undertaken the manufacture of looms in accordance with one of the prior patents (A), in virtue of which he opposed. But finding he could not proceed without a licence he stopped further

work, and an earlier patent (B), prior to (A), was brought to his notice, which, as well as the patent (A), he alleged to cover the subject-matter of the new patent (C), which he opposed. Webster, A.-G., held that he had established sufficient interest to entitle him to oppose, and laid down the rule that "where there has been a *bond fide* attempt to carry out the invention sought to be protected by the person who desires to be heard in opposition, and proof is shown that he may be damnified or affected by the application which he desires to oppose, he is entitled to be heard."

A person who has attempted to carry out commercially the applicant's invention may oppose.

Opposition cannot be founded upon mere description in a prior specification. The invention must be *claimed* (*re von Buch*, Griff. A. P. C. 40; Good O. C. 17). The Comptroller-General has no power to award costs, but the Law Officer usually allows a sum for costs to the successful party. The average allowance is from five to ten guineas, but considerably larger sums have been awarded where costs have been heavy. An appellant who withdraws, without reason given, before the hearing is liable to pay costs (*re Knight*, Griff. A. P. C. 35; Good. O. C. 26).

Opponent must show that invention has been claimed.

Costs.

Proceeding now to the grounds of opposition the first is—That the applicant has obtained the invention from the opponent, or from a person of whom he is the legal representative.

First ground of opposition: Invention obtained from applicant.

This ground of opposition only holds good in respect of transactions in this country. If the information has been acquired abroad, and no fraud has been practised within the jurisdiction, the applicant being the first importer is, according to the Statute of Monopolies, the true and first inventor (*re Edmunds*, Griff. P. C. 281; Good. O. C. 27; *re Lake*, [1888] 5 R. P. C. 415; Good. O. C. 28; *re Higgins*, [1891] 9 R. P. C. 75; Good. O. C. 33, Appendix).

Only transactions in this country considered.

In supporting an allegation that the applicant has obtained the invention from the opponent the evidence requires to be very strong, especially if fraud is alleged.

Neither the Comptroller nor the Law Officer will stop a patent except upon evidence so conclusive that in their

Test of evidence in fraud.

Patent
might be
issued
jointly to
applicant
and
opponent.

estimation no jury could fail to find for the opponent (*re Stuart*, [1892] 9 R. P. C. 452). There have been cases following the precedent laid down by Lord Cranworth in *re Russell* (2 De G. & J. 130), where the facts were such as to lead the Law Officer and Comptroller to issue the patent to a trustee on behalf of both parties, or jointly to the applicant and opponent, as, for instance, in *re Luke* (Griff. P. C. 294), *re Garthwaite* (Griff. P. C. 284), and *re Evans and Ottway* (Griff. P. C. 279).

Declarants
may be
cross-
examined
before Law
Officer.

Although Rule 34 of the Patent Rules, 1903, enables the Comptroller to "request or allow" a declarant to attend at the hearing and "make oral explanations" the Rule gives him no power to compel such attendance and no power to subject the declarant to cross-examination. Accordingly when the evidence is conflicting the Comptroller usually adopts such a course (but always in the form of giving a decision) as will cause the parties to go to the Law Officer, before whom cross-examination is permissible (*re Evans and Ottway, supra*).

Master and
servant.

Re Heald.

The relationship of master and servant does not give the master any rights in the servant's invention, even if the servant works out the invention in his master's time and with his master's tools. Thus, in *re Heald* ([1891] 8 R. P. C. 429; Good. O. C. 25), Clarke, S.-G., said: "I am not aware of any authority which lays down that the invention of a servant, even made in the employer's time, and with the use of the employer's materials, and at the expense of the employer, thereby becomes the property of the employer, so as to prevent the person employed from taking out a patent for it." But where an inventor employs a workman to work out an invention, improvements in detail invented or suggested by the workman become the property of his employer, and the workman cannot afterwards take out a patent for these improvements. This was very plainly stated by Davey, S.-G., in *re David and Woodley* (Griff. A. P. C. 26). Said the Solicitor-General: "I am of opinion that if a workman is employed by an inventor to make a model for the purpose of carrying out his invention, and the workman suggests improvements in detail of the machine which are adopted in the machine or model as

*David and
Woodley.*

completed, these suggestions are the property of his employer, and the workman cannot afterwards take out a patent for them." In the later cases of *Richmond v. Wrightson* ([1904] 22 R. P. C. 25), and *re Smith's Patent* ([1904] 22 R. P. C. 57), the same principle was upheld. The relationship of master and servant in the evolution of an invention was also considered in the revocation case of *Marshall and Naylor's Patent* ([1900] 17 R. P. C. 553). In this case the petitioner was a workman in the employment of a company of which the two patentees were directors. The petitioner had been asked by one of the patentees to invent a tap which, by the introduction of steam, would give hot, warm, or cold water as desired. The petitioner did so, and perfected the invention. For his services he was paid £10. The Court held the invention was the petitioner's, and that the patentees had no right to the patent, which was revoked.

*Marshall
and Naylor's
Patent.*

When the opposition is based upon the second ground, viz., that the invention has been patented in this country on an application of prior date, the similarity between the inventions must be very close to stop the patent. All the reported cases show that in most instances of refusal to seal a patent the inventions have been practically identical, so that it would serve no useful purpose to instance specific causes of refusal.

Second
ground of
opposition:
On prior
patent.

When the differences between the interfering inventions are at all appreciable, or if sufficient cause is shown to make it a matter of reasonable doubt, the patent is usually granted. For instance, in *re Cumming* (Griff. P. C. 277), although, as James, A.-G., said, "the two inventions were very nearly the same," the patent was sealed. The Comptroller and the Law Officer are guided in this lenity by the consideration that from the refusal of a patent there is no appeal, and that if the applicant's patent turns out to be really an infringement of the opponent's, the opponent has his remedy in a Court of Law, or by petition for revocation.

Resem-
blance to
prior patent
must be
very close.

The question of the validity of the opponent's patent is never considered (*per Webster, A.-G., in re Newman*, [1888] 5 R. P. C. 271). Clarke, S.-G., in *re Haythornthwaite* ([1889] 7 R. P. C. 70), held that the applicants could not be

Validity of
opponent's
patent
never con-
sidered.

allowed to contend that the opponents' patents were bad for disconformity; or, as in *re Thornborough and Wilks* ([1896] 13 R. P. C. 115), that the opponent's patent was invalid from prior user.

Disclaimer
sometimes
required in
applicant's
specifica-
tion.

Special
reference to
master
patent.

Object of
disclaimers
to protect
the public.

Slight
alteration
may serve
in lieu of
disclaimer.

But although the opponent may not succeed in stopping the applicant's patent he may nevertheless compel the insertion in the applicant's specification of a short paragraph indicating generally, if need be, the state of the art at the date of the application, or, it might be, disclaiming generally such parts of the invention as the hearing may have shown to be claimed in the opponent's or other prior patents, but without any specific reference to the opponent's name or patent. Or if the circumstances warrant it, and especially if the opponent's is a pioneer or master patent, the applicant may be compelled by the Comptroller or Law Officer to insert in his specification a special reference by name and number to the opponent's patent, with an intimation that he disclaims anything covered thereby.

These disclaiming clauses, and particularly the special references, are seldom pleasing to applicants, and special disclaimers were formerly difficult to obtain from the Comptroller or Law Officer. As was said by Webster, A.-G., in *Stell's Application* ([1891] 8 R. P. C. 235), the true principles upon which the Law Officers act are—First, that there must be no repetition of the claim to the earlier invention in the later patent; and, secondly, it must be clear that the public are not misled. Therefore, in many cases a slight alteration in the specification or claim, or a short reference to the then existing state of the art, without anything of the nature of a disclaimer, may be sufficient to meet the opposition. Although no doubt the opponent is apt to regard the insertion of a special reference to his name and patent in the applicant's specification as a personal advantage gained, the Law Officer has been careful in a number of cases to lay down that these disclaimers are not inserted solely in the interests of either opponent or applicant, but chiefly to protect and inform the public (*re Lorraine*, [1888] 5 R. P. C. 142; *Good. O. C.* 35; *re Newman*, [1888] 5 R. P. C. 279; *re Hill*, [1888] 5 R. P. C. 599). Now that the insertion of special

references under the existing examination system are so common and so beneficial, the Comptroller or Law Officers will probably insert such a reference even where the opponent's patent is not a master patent, if it should seem advisable for the guidance or protection of the public.

The insertion of a general disclaiming clause, besides being a protection to the public, is rather an advantage than otherwise to the applicant (*per* Webster, A.-G., in *re Guest and Barrow*), and in proper cases is readily ordered and inserted. But, as already observed, the special reference has hitherto been sparingly used. As was said by Webster, A.-G., in *re Guest and Barrow* ([1888] 5 R. P. C. 313; Good. O. C. 38): "I have never considered that a prior patentee has any right to be specially named unless the applicants are willing to name him, and unless it is clear that there is no other publication except the one that is mentioned." But under present practice the general applicability of this rule is likely to be largely relaxed unless the applicant is willing to make such concessions as will make special references unnecessary.

When a special reference may be ordered.

One of the principles still governing the insertion of such special references is that if the applicant's invention is no more than an improvement upon the prior patent, and is in no sense an independent invention (as in *re Hoskins*, Griff. P. C. 291), a special reference will be ordered. Webster, A.-G., practically adhered to this rule in the case of *re Newton* ([1899] 17 R. P. C. 123), although in that case, in view of certain circumstances, he did not insist on a specific reference to number, name, and date, but adopted the middle course of requiring a disclaimer following the exact terms of the opponent's claim. The learned Law Officer said: "I have often laid down the rule as to cases in which I think specific references are right—viz., where there is substantial identity between the fundamental parts of the two inventions, but a difference *which can only be justified on the ground of improvement.*" So also if the opponent's patent is a pioneer or master patent, or describes and claims something the like of which has not been done before, a specific reference is inserted. Webster, A.-G., in *re Hill* ([1888] 5 R. P. C. 599),

Where applicant's invention is an improvement on opponent's.

Where opponent's is master patent.

Alleged master patent may be narrowed by references to prior specifications &c.

But the mere validity of opponent's patent cannot be gone into.

Opponent alleging master patent must support by evidence.

But limits of master patent deducible from claims.

said: "It is not prudent or desirable to insert special references to particular prior patents unless there is, practically speaking, no question that the earlier patent is what I may call a master patent." In construing the alleged master patent of the opponent, although prior specifications and other prior publications and evidence of common knowledge may be referred to by the applicant for the purpose of limiting the opponent's claim and rebutting the contention that it is a master patent, instances of alleged prior user or disconformity or other causes of invalidity will not be considered. The gist of the remarks of Finlay, S.-G., in *re Thornborough and Wilks* ([1896] 13 R. P. C. 115), is that even if it be alleged that to read the opponent's patent so widely as to constitute it a master patent, would invalidate it in a Court of Law, that contention will not avail to protect the applicant from a special reference.

When an opponent represents his patent to be a master patent "it is his duty," said Webster, A.-G., in *re Southwell and Head* ([1899] 16 R. P. C. 361), "to support such a claim before the Comptroller by evidence, unless the parties agree as to the existing state of knowledge." The present practice is for the opponent in such a case to file a declaration that a careful search has been made among patent records and publications generally, and that nothing has been found to destroy the opponent's claim to a master patent. If anything is found in the slightest degree affecting such a claim, it must be produced to the Comptroller. Such a declaration may be made by the opponent himself if he made the search, or by some skilled person who made the search on his behalf. The applicant may, of course, make an independent search, and produce whatever evidence he may find to rebut the contention that the opponent's is a master patent.

But even when all this is done the limits of the opponent's patent may be deducible from the claim, for it is clear that a claim originally intended to be limited cannot afterwards be alleged to be broader than its terms, simply because subsequent knowledge shows that it might without danger have been drawn in wider terms. Indeed, the

addition to a claim of the usual phrase "as described" has been held to prevent the patentee from alleging that such a claim can be a master claim. In *re Sielaff* ([1888] 5 R. P. C. 484) Webster, A.-G., said: "I am not satisfied that Everitt's is the master patent. Looking at the claim 'as described,' I should doubt exceedingly whether it was a proper description to suggest that Everitt's was the first patent for connecting together two moving pieces of mechanism by a coin."

Where the applicant's specification discloses a minimum of invention and the opponent's is not absolutely but of the nature of a master patent, according to Carson, S.-G., the position of the alleged master patent is not to be discussed in too narrow a spirit (*re Sachse's Application*, [1900] 18 R. P. C. 221).

Where applicant's invention is narrow master patent to be liberally construed.

A special reference is never given in the case of concurrent applications (*re Greenhalgh*, [1897] 14 R. P. C. 387).

Even if the applicant's invention would be an infringement of the opponent's patent, that is not *per se* a reason for a special reference (*re Marsden*, [1896] 13 R. P. C. 87). Although the patent quoted by the opponent may have expired, this was considered by Clarke, S.-G., in *re Hall and Hall* ([1888] 5 R. P. C. 283), to be no reason why it should not be specially referred to. On the contrary, he considered it an additional reason.

No special reference to concurrent application. Nor even when applicant's invention would infringe. Reference to expired patent.

Where an invention is merely an improvement upon previously patented inventions, general words capable of being construed to mean or cover anything already patented must not be used in the claims (*Hamilton's Application*, [1901] 19 R. P. C. 33).

It must, however, be remembered that now that the Patents Act of 1902 enables the Comptroller, on his own initiative, to insert special references to prior patents, the applicant who finds his grant opposed cannot look for any particular tenderness as regards specific references, if the circumstances of the case at all warrant them; nor need the opponent's be a master patent if, in fact, it contains matter which, without disclaimer or specific reference, might be considered as included wholly or in part in the applicant's specification and claims.

Quantum of applicant's invention sometimes considered.

Subject-matter.

Applicant may obtain patent for residuum of original claim.

But residuum must have been within original claim.

Although apparently the Law Officer will not consider whether or not the applicant's invention is subject-matter for a patent unless on an appeal by an applicant from the decision of the Comptroller on the point of bad subject-matter, nevertheless he may weigh the quantum of invention, and if it shows no appreciable advance upon the opponent's patent he may refuse to seal (*re Todd's Application*, [1892] 9 R. P. C. 487). This discretion of the Law Officer to adjudicate upon the quantum of the applicant's invention was exercised in *Bridge's Application* ([1901] 18 R. P. C. 257), where Carson, S.-G., decided that the mere stringing together of separate items, previously patented by the opponent and others, did not show sufficient invention to justify the grant of a patent. This decision goes considerably beyond the decision in *Todd's Case*.

A common result of opposition to the grant of a patent is that the applicant's claim may be cut down to a shadow of its former self, if not completely destroyed. Many applicants, rather than accede to the total refusal of their application, cling to some trifling detail of which they originally thought nothing, and request that a patent may be granted on this surviving wreckage. It is within the province of the Comptroller or Law Officer to do so if the surviving detail formed part of the original claim, and if it is in any degree an advance. But when it is plain that after eliminating the part objected to there is nothing patentable left, the patent will be refused (see *re Hedge*, [1895] 12 R. P. C. 136; *re Whittaker*, [1896] 13 R. P. C. 580; *re Harrild and Parkins*, [1900] 17 R. P. C. 617). It is true that in *re Harrild and Parkins' Case* Carson, S.-G., said: "If I found something substantially new, and clearly the object of the inventor, on the evidence before me I might order the patent to be sealed with an entirely different claim." But it would be dangerous to interpret this *dictum* as meaning that the applicant would be allowed to claim something not within the ambit of his original claim or claims. If he meant this the learned Law Officer corrected himself in the later case of *in re Mills* ([1901] 18 R. P. C. 322, *infra*), and in *Crist's Application*, ([1903] 20 R. P. C. 475.) As Finlay, S.-G., said when

refusing a patent in *re Lupton and Place* ([1896] 14 R. P. C. 261): "When an applicant has put forward a specification making a claim manifestly the subject of previous patents, would it be right to amend the specification in the manner proposed by the Comptroller so as to limit his claim to this one point on which reliance is now placed? In my judgment it would not be right to do so." The same learned Law Officer, in *re Whittaker* (*supra*), refused to allow the applicant to shift his ground and amend his specification so as to claim a trifling feature not originally claimed. Said the Law Officer: "If all that the applicant claims is the improvement of having a joint instead of a fixed bar at this bend, *he ought to have said so.*" In *re Thomas and Prerost* ([1898] 16 R. P. C. 69) the Law Officer said that a specification ought to be properly framed in the first instance, and, if not, it is by no means a matter of course that amendment will be allowed. See also *Crist's Application* (*supra*). In *re Garnett* ([1899] R. P. C. 154) Finlay, S.-G., made some observations to the same effect. In *re Mills* ([1901] 18 R. P. C. 322) Carson, S.-G., also decided that an applicant whose claim *as originally drawn* is anticipated by the patent relied on by the opponent, even where the applicant's specification contains something that may distinguish his alleged invention from the patent of his opponent, he will not be allowed to amend his claim by introducing or substituting such distinguishing matter, still less so when the distinguishing feature left is not to be found in the Provisional (*Lancaster's Application*, [1902] 20 R. P. C. 366).

Applicant
not allowed
to shift his
ground.

If after the opponent has done his worst there still remains something apparently novel of the original claim of the applicant, a patent may be granted on such restricted claim either with or without a general disclaimer or special reference. But where the residuum of the applicant's claim appears to be trifling and immaterial, the patent is and ought to be refused outright.

In comparing the applicant's and opponent's specifications, questions of mechanical equivalents will be considered; and if it is obvious that the applicant's alleged improvements are merely mechanical equivalents for the opponent's

The
doctrine of
mechanical
equivalents
may be
considered.

parts, the application will be refused (*per* Clarke, S.-G., in *re Haythornthwaite*, [1889] 7 R. P. C. 70); and in *re Smith* ([1896] 13 R. P. C. 200) Webster, A.-G., reaffirmed the doctrine that the Law Officer can consider the question of mechanical equivalents as bearing on the identity of inventions.

Third
ground of
opposition.

Applicant
introducing
inter-
mediate
improve-
ments
made by
opponent
and
protected
by him.

The last of the three grounds of opposition—viz., that the Complete Specification describes or claims an invention other than that described in the Provisional Specification, and that such other invention forms the subject-matter of an application made by the opponent in the interval between the leaving of the applicant's Provisional Specification and the leaving of his Complete Specification—was introduced by the Amending Act of 1888. The additional ground was intended to remedy a possible abuse, such as was disclosed in *re Green* (Griff. P. C. 286), where the applicant's patent was refused although the specifications made it clear that the opponents had not originally in their Provisional Specification contemplated certain improvements for which the applicant had thereafter made provisional application.

*Re Hether-
ington.*

Now, however, such a case is impossible; and even if the first applicant were to describe part of the second applicant's invention without laying claim to it, the second applicant might oppose the patent and get such part of the description expunged. In *re Hetherington* ([1890] 7 R. P. C. 419) the Complete Specification of the applicant described, but did not claim, a modified arrangement of flexible bend for carding engines not foreshadowed in his Provisional Specification. The opponents had filed a subsequent Provisional Application which contained a clear description of this arrangement of flexible bend. The applicant's patent was allowed to go forward only upon condition that the description of the opponents' flexible bend should be struck out. In *re Hudson's Application* ([1904] 22 R. P. C. 218) the same ground of opposition was considered and acted upon.

But
applicant
still allowed

This ground of opposition is not, however, allowed to interfere with the privilege which the inventor has of

developing the invention upon the general lines laid down in his Provisional Specification. Thus, in *re Millar and Miller* ([1898] 15 R. P. C. 718), the patent was unsuccessfully opposed on these grounds, Webster, A.-G., holding that the applicants had merely described a legitimate development of the invention indicated in their Provisional Specification. The same was held in *re Edwards* ([1894] 11 R. P. C. 461).

to develop
invention
under
Provisional.

The decision of the Law Officer on appeal from the Comptroller is final, but a case may be ordered to be reheard on the grounds of fraud or serious mistake or miscarriage (*per* Finlay, S.-G., in *re Thomas and Prerost*, [1898] 15 R. P. C. 257).

Law
Officer's
decision
final, except
where fraud
discovered.

Bogus oppositions entered collusively with the applicant for the purpose of delaying the sealing for ulterior purposes may result in the grant of the patent being refused (see *A. B.'s Application*, [1902] 19 R. P. C. 403, 556).

Bogus
oppositions.

CHAPTER XV.

SEALING OF THE PATENT.

NATURE OF THE PROPERTY SO CREATED.

Patent sealed as of date of application.

EVERY Patent is dated and sealed as of the day of application.

Under the Patent Rules of 1905 an additional fee of £1 is payable on the sealing of the Patent (see Rule 12: viz., 5B of Consolidation). Form X. is made use of for this purpose, and the request to seal must be made on or before the last day on which a patent can lawfully be sealed.

Letters Patent are sealed with the Seal of the Patent Office, which has the same effect as if sealed with the Great Seal of the United Kingdom. The use of the Great Seal for this purpose was discontinued in 1878.

Periods within which sealing must be effected.

The sealing should be effected within fifteen months from the date of application, except under special circumstances over which the patentee has no control—such, for example, as delay caused by opposition—in which case the Law Officer may direct the sealing at any time. But delay artificially created by the applicant may cause refusal to seal (*A. B.'s Application*, [1902] 19 R. P. C. 403, 556). Should an applicant die before the expiry of the fifteen months the patent may be granted to his legal representative and sealed within twelve months of death. If an extension of time for filing the Complete Specification has been obtained, a patent may be sealed within nineteen months from the date of application (Patents Act, 1885, Section 3).

Patent may be issued to legal representative of deceased inventor.

Duration of patent.

Under the terms of the grant the patent privilege lasts for fourteen years, and is maintained in force by payment of the following annual renewal fees, which come into existence at the end of the fourth year:—

Annual taxes.

Before the expiry of the fourth year, £ s. d.
and in respect of the fifth year ... 5 0 0

Before the expiry of the fifth year, and in respect of the sixth year ...	£	s.	d.
	6	0	0
Before the expiry of the sixth year, and in respect of the seventh year ...	7	0	0
Before the expiry of the seventh year, and in respect of the eighth year ...	8	0	0
Before the expiry of the eighth year, and in respect of the ninth year ...	9	0	0
Before the expiry of the ninth year, and in respect of the tenth year ...	10	0	0
Before the expiry of the tenth year, and in respect of the eleventh year ...	11	0	0
Before the expiry of the eleventh year, and in respect of the twelfth year ...	12	0	0
Before the expiry of the twelfth year, and in respect of the thirteenth year	13	0	0
Before the expiry of the thirteenth year, and in respect of the fourteenth year	14	0	0

When by accident the payment of the annual tax has been overlooked, an extension of time can be obtained on payment of the following fines:—

	£	s.	d.
On extension of time for one month ...	1	0	0
“ “ “ two mont . . .	3	0	0
“ “ “ three moni' s... 5'	5	0	0

If these periods have passed and the fee remains unpaid the patent can only be revived by a special Act of Parliament.

A patent falls under the head of personal estate. As such it is transmissible by assignment, by devolution, or by operation of law, as, for example, to a trustee in bankruptcy.

When a patent has been granted to more than one person, the mutual rights and obligations of the co-patentees are worthy of a short consideration. Their position is in no degree that of an ordinary commercial partnership. They possess a joint interest, which passes

Extension
of time to
pay taxes.

Nature of
patent
property.

Rights of
co-patentee.

Joint
interest.

by survivorship unless there has been severance of the joint interest (*National Co. v. Gibbs*, [1899] 16 R. P. C. 339; 2 Ch. 289; 48 W. R. 499).

Indepen-
dent rights.
Mathers v.
Green.

According to the decision in *Mathers v. Green* ([1865] L. R. 1 Ch. 29; 34 Beav. 170; 35 L. J. Ch. 1) each co-owner of a patent can assign his share, and sue for an infringement, independently of the other or others. He can work the patent himself and for his own benefit without accounting to his co-patentees, and can also grant licences under his own hand. This was the substance of Lord Chancellor Cranworth's decision in *Mathers v. Green*. Lord Romilly, M. R., in the Court below, ruled that a co-patentee who granted a licence independently of his fellow-patentees was liable to account to them for their proper share of the royalties accruing under such a licence, but the Lord Chancellor apparently thought otherwise, although he gave no express decision on this point.

Steers v.
Rogers.

Rights of
assignee of
part of
patent.

The decision in *Mathers v. Green* was approved and followed in the House of Lords in the more recent case of *Steers v. Rogers* ([1893] 10 R. P. C. 245; [1893] App. Cas. 233; 63 L. T. 726). The defendant was part owner of a moiety of a patent by assignment, and was mortgagee of the other moiety. It was sought to make the defendant liable to account to the mortgagor for a share of the profits made by working the patent, but without success, the House of Lords approving and confirming the judgment of Romer, J., in the lower Court, that a part owner of a patent, even when only so by assignment, can work the patent, without accounting to his co-owner.

Mortgagee.

Of course a mortgagee of a patent or share in a patent alone would not be in the same position, but must account for profits as mortgagee in possession in the usual way.

Desirable
to define
mutual
rights of
co-patentees
by agree-
ment.

It is, therefore, clear that where there is a possibility of disputes of this nature arising, co-patentees should clearly define their relative positions and rights by means of a properly prepared agreement or severance of the joint interest, which would prevent any co-owner from taking an unfair advantage of his fellows. For example, it might be provided that no one of the co-owners should use the invention without the consent of the other or others, or

without accounting to him or them in respect of the profits. Again, it might be mutually agreed that none of the owners should sell his share without the consent of the others, or that the patent should be sold only in its entirety. Provisions should also be made regarding the granting of licences, the payment of renewal fees, the prosecution of infringers, and other points likely to breed differences if unprovided for. If it is not desired that the law of survivorship should take effect severance of joint interest should be effected by the co-patentees.

Severance
of interest.

A Register of Patents is kept at the Patent Office in accordance with Section 23 of the Patents Act. Every patent upon being sealed is entered upon this Register, and all dealings with the patent, whether by assignment, licence, amendment, extension, or revocation, and, in short, everything affecting the validity or proprietorship of the patent, should be entered on the Register by those concerned.

Register of
Patents.

Entries
on the
Register.

The patent is registered immediately upon being sealed, and, as the Comptroller recognises no property in the invention until after the grant, no documents affecting to deal with the patent will be registered until the patent has been sealed.

Documents
affecting
patent only
registrable
after
sealing.

No notice of any trust can be entered on the Register (*Haslett v. Hutchinson*, [1891] 8 R. P. C. 457); but an equitable assignment of a patent or share therein may be entered on the Register as a document affecting the proprietorship of the patent (*Stewart v. Casey*, [1891] 9 R. P. C. 15). An agreement made *before* the filing of an application, and referring to proposed dealings with the patent to be afterwards obtained, was refused entry on the Register, even after the sealing of the patent.

Notices of
trusts not
entered on
Register.

This was decided in *Parnell's Patent* ([1888] 5 R. P. C. 126); but North, J., in refusing the motion to compel entry on the Register, declined to lay down as an absolute rule that no document executed before the date of application could be entered on the Register after sealing. Probably an agreement made before the date of application, but having attached to it, as an exhibit, a model or description and drawing of the invention, would be capable of registration

Query as to
agreements
made before
application.

if the model or description or drawing corresponded clearly with the invention for which application was afterwards made.

Registration of assignments and licences.

Entries by joint patentees.

An assignment, licence, or other deed affecting the ownership or use of the patent should be immediately registered by the person claiming to be entitled under the assignment, licence, &c. The fee for each entry in the Register is ten shillings. A joint patentee is not entitled to have any entry put upon the Register which will affect the rights of his co-owner; and such entry may, on application by the party prejudiced, be expunged by the Court (*Horsley and Knighton's Patent*, [1869] L. R. 8 Eq. 475; 39 L. J. Ch. 157).

Entry of mortgages.

A notification of a mortgage of a patent may be entered on the Register, but the mortgagee is not entitled to be registered as proprietor (*Van Gelder, Apsimon & Co., Limited v. Sowerby Bridge, Limited*, [1890] 7 R. P. C. 208).

Procedure in placing entries on the Register.

A request for entry of any document on the Register should be left at or posted to the Patent Office, together with the original assignment, licence, or other document, and also a copy of the same. The Comptroller, having made the entry in the Register, returns the original, bearing his certificate of entry, but retains the copy. If the assignment, licence, or other document should refer to other documents of title, not being matters of record, an official or certified copy of these should accompany the request. A body corporate may be registered as proprietor in its corporate name, and any change of name, whether of a company or individual, arising by operation of law may be placed on the Register by the Comptroller under Section 87 of the Act (*per North, J.*, in *ex parte New Ormonde Cycle Co.*, [1896] 2 Ch. 523; 13 R. P. C. 475). In the case of a body corporate a certificate of the change of name should be obtained from the Registrar of Joint Stock Companies and filed with the request to vary the entry.

Bodies corporate registrable as proprietors &c.

Inspection of Register.

The Register of Patents is open to inspection by the public, and a certified copy of any entry may be had on payment of a small fee. The Register is *prima facie* evidence of any matters directed or authorised to be inserted

therein. Written or printed copies or extracts, certified by the Comptroller, and bearing the seal of the Patent Office, of patents, specifications, or of registers, books, and other documents kept there, are admitted in evidence, without proof or production of the originals, in all Courts of Law.

Certified
extracts
prima facie
evidence.

The Register may be rectified by an order of Court made on the application of any person aggrieved (*re Horsley*, L. R. 8 Eq. 475; and see also Section 90 of the Act). Any person interested in a particular patent may, on payment of a small fee, leave a request at the Office to be informed when any attempt is made to register any dealings in connection with the patent in question (see Comptroller's letter to Kekewich, J., in *Viola v. Sharpe*, [1904] 22 R. P. C. 24).

Rectifica-
tion of
Register.

In the event of the Letters Patent being lost or destroyed, the Comptroller may, on a satisfactory explanation of the disappearance of the original, cause a duplicate to be sealed or issued on payment of a fee of £2.

Duplicate
Letters
Patent.