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**TREATISE**  
 ON THE  
**LAW AND PRACTICE**  
 RELATING TO  
**Letters Patent for Inventions.**

WITH  
**AN APPENDIX**  
 OF  
*STATUTES, INTERNATIONAL CONVENTION, RULES,  
 FORMS AND PRECEDENTS, ORDERS, &c.*

BY  
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TO

SIR RICHARD EVERARD WEBSTER, KNT., Q.C., M.P.,

HER MAJESTY'S ATTORNEY-GENERAL,

*THIS WORK IS BY PERMISSION*

*Dedicated.*

## P R E F A C E.

THIS book is my attempt to bring within a reasonable compass our law, as it at present exists, in reference to Letters Patent for Inventions. Any complete history of our legislation in the past upon the subject would have inconveniently added to the bulk of the volume; and, consequently, it has not been referred to, except where necessary to explain the present practice. For the same reason I have omitted all reference to the laws of foreign countries where legal protection to Inventors is afforded.

To the extent that the book approximates to the end I had in view, so must be the measure of its success or failure. Whatever its shortcomings, I hope it may be found of use.

My friend Mr. H. H. Haldinsein, of the South-Eastern Circuit, has assisted me in the revision of the MSS. and in seeing the work through the press. My best thanks are due to him; I proffer them here.

ROBERT FROST.

8 KING'S BENCH WALK, TEMPLE.

*January 1891.*

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## ABBREVIATIONS USED IN THIS WORK.

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A. & E.	Adolphus and Ellis' Reports.
B. & Ad.	Barnewall and Adolphus' Reports.
B. & Ald.	Barnewall and Alderson's Reports.
B. & C.	Barnewall and Cresswell's Reports.
Beav.	Beavan's Reports.
B. & S.	Best and Smith's Reports.
Bing. N. C.	Bingham's New Cases.
B. & P. N. R.	Bosanquet and Puller's New Reports.
Brod. & Bing.	Broderip and Bingham's Reports.
Bull. N. P.	Buller's Nisi Prius.
Camp.	Campbell's Reports.
C. B.	Common Bench Reports.
C. B. N. S.	Common Bench Reports, New Series.
Car. & K.	Carrington and Kirwan's Reports.
Car. & P.	Carrington and Payne's Reports.
C. L. R.	Common Law Reports.
Cl. & F.	Clark and Finnelly's Reports.
Coop. Ch. Ca.	Cooper's Chancery Cases.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports.
D. & L.	Dawson and Lloyd's Reports.
Dav. P. C.	Davies' Patent Cases.
De G. F. & J.	De Gex, Fisher, and Jones' Reports.
De G. & J.	De Gex and Jones' Reports.
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports.
De G. J. & S.	De Gex, Jones, and Smith's Reports.
Dowl. & Ry.	Dowling and Ryland's Reports.
Dr. & S.	Drewry and Smale's Reports.
E. & B.	Ellis and Blackburn's Reports.
E. B. & E.	Ellis, Blackburn, and Ellis' Reports.
E. & E.	Ellis and Ellis' Reports.
Eng.	The Engineer (a weekly publication).
Eq. Rep.	Equity Reports.
Exch.	Exchequer Reports.
F. & F.	Foster and Finlason's Reports.
Giff.	Giffard's Reports.
Griff. P. C.	Griffin's Patent Cases.
G. P. C.	Goodeve's Patent Cases.
G. P. P.	Goodeve's Patent Practice.
H. Bl.	H. Blackstone's Reports.
H. & M.	Hemming and Miller's Reports.
H. L. Cas.	House of Lords Cases.
Holt N. P.	Holt's Nisi Prius Cases.
H. & N.	Hurlstone and Norman's Exchequer Reports.
Ir. Ch. Rep.	Irish Chancery Reports.
Iron	Iron (a weekly publication).



Johns.	Johnson's Reports.
J. & H.	Johnson and Hemming's Reports.
Jur. N. S.	Jurist, New Series.
Jur. O. S.	Jurist, Old Series.
K. & J.	Kay and Johnson's Reports.
L. J. N. S. Ch.	Law Journal Reports, New Series, Chancery.
L. J. N. S. C. P.	" " " Common Pleas.
L. J. N. S. Ex.	" " " Exchequer.
L. J. N. S. Q. B.	" " " Queen's Bench.
L. J. O. S.	Law Journal Reports, Old Series.
L. O. C.	Griffin's Patent Cases decided by the Comptroller-General and Law Officers.
L. R. App. Cas.	Law Reports, Appeal Cases.
L. R. Ch.	" Chancery Appeals.
L. R. Ch. D.	" Chancery Division.
L. R. C. P.	" Common Pleas Cases.
L. R. E. & I. App.	" English and Irish Appeal Cases.
L. R. Eq.	" Equity Cases.
L. R. Ex.	" Exchequer Cases.
L. R. H. L.	" House of Lords.
L. R. P. C.	" Privy Council Cases.
L. R. Q. B. D.	" Queen's Bench Division.
M. & G.	Manning and Granger's Reports.
M. & W.	Meeson and Welsby's Reports.
Mac. & G.	Maenaghten and Gordon's Reports.
Macr. P. C.	Macrory's Patent Cases.
Marsh.	Marshall's Reports.
Mer.	Merivale's Reports.
Moo. P. C. N. S.	Moore's Reports of Cases in the Privy Council, New Series.
Moo. P. C. O. S.	Moore's Reports of Cases in the Privy Council, Old Series.
Myl. & Cr.	Mylne and Craig's Reports.
N. R.	The New Reports.
Newt. L. J. C. S.	Newton's London Journal of Arts and Sciences, Conjoined Series.
Newt. L. J. N. S.	Newton's London Journal of Arts and Sciences, New Series.
Parl. Rep.	Parliamentary Reports.
Phill.	Phillips' Reports.
P. O. R.	Patent Office Reports.
Q. B.	Queen's Bench Reports.
Russ.	Russell's Reports.
Russ. & M.	Russell and Mylne's Reports.
Ry. & M.	Ryan and Moody's Reports.
Scott N. R.	Scott's New Reports.
Stark. R.	Starkie's Reports.
Taunt.	Taunton's Reports.
T. R.	Term Reports.
Tyr.	Tyrwhitt's Reports.
Ves.	Vesey's Reports.
W. P. C.	Webster's Patent Cases.
W. R.	The Weekly Reporter.
Y. & C.	Younge and Collyer's Reports.

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## ADDENDA ET CORRIGENDA.

- Page 21, line 15, *for* invention *read* inventor.
- Page 26, line 34, *for* Bricot's *read* Bireot's.
- Page 64, line 8, *for* first *read* fresh.
- Page 115, note (g), *add* Pickard *v.* Prescott, 7 P. O. R. 361.
- Page 118, note (g), *add* Thompson *v.* Macdonald, 8 P. O. R. 5.
- Page 150, note (g), *add* 7 P. O. R. 436.
- Page 158, line 26, *for* concise *read* precise.
- Page 173, line 23, *for* concise *read* precise.
- Page 193, note (r), *add* Kelly *v.* Heathman, 7 P. O. R. 343.
- Page 200, note (f), *add* Kelly *v.* Heathman, 7 P. O. R. 343.
- Page 250, note (t), *add* Meyer *v.* Sherwood, 7 P. O. R. 283, and as a further reference to Lang *v.* Whitecross Co., *add* 7 P. O. R. 389.
- Page 271, note (l), *add* as to the meaning of the words "the invention," *see* In the matter of Heatherington's Patent, 7 P. O. R. 419.
- Page 285, note (t), *add* In the matter of Kilner's Patent, 8 P. O. R. 35.
- Page 427, note (f), *add* Wenham Co. *v.* Champion Gas Lamp Co., 8 P. O. R. 22.
- Page 444, note (b), *add see* also 8 P. O. R. 1.
- Page 459, note (k), *add* Bracher *v.* Bracher, 7 P. O. R. 420.
- Page 462, note (k), *add* Bracher *v.* Bracher, 7 P. O. R. 420.
- Page 507, note (m), *add* Tweedale *v.* Ashworth, 7 P. O. R. 436.
- Page 511, note (m), *add* as to certificate on reversal of judgment of the Court of Appeal by the House of Lords, *see* Morgan *v.* Windover, 7 P. O. R. 446.

# LETTERS PATENT FOR INVENTIONS.



## CHAPTER I.

### THE PATENTEE.

EARLY MONOPOLIES STATUTE OF MONOPOLIES—GRANTEE—TRUE AND FIRST INVENTOR—WORKMEN AND SERVANTS—COMMUNICATIONS FROM ABROAD—PERSONS INCAPABLE OF BECOMING PATENTEES.

PREVIOUS to the reign of James I., the Sovereigns of England laid claim to, and exercised, the right of granting monopolies of carrying on certain trades, or producing various articles within the realm, or importing them from other countries. Early monopolies.

These monopolies were given to the recipients in respect of services rendered by them, or as marks of royal favour to the favourites of the Crown.

The system of creating monopolies was made the means on various occasions of raising large sums of money for the expenditure of the government, and the support of the Crown, to the detriment of the public at large.

Under the Tudor Sovereigns monopolies were granted to such an extent, and became so monstrously oppressive that, finally, in the twenty-first year of James I., Parliament passed the celebrated Statute of Monopolies,<sup>(a)</sup> which, as a declaration of the Common Law on the subject of monopolies, must be considered as the foundation of our modern patent laws. The Statute of Monopolies is the foundation of our modern patent laws.

The Statute of Monopolies is the earliest statute which Illegal monopolies.

(a) 21 Jac. 1. c. 3.

## LETTERS PATENT FOR INVENTIONS.

relates to grants of the sole use and exercise of inventions, though several Acts had been previously passed for suppressing various illegal monopolies.<sup>(b)</sup>

Inventions  
prior to Statute  
of Monopolies.

There is no doubt, however, that the Crown, previous to the Statute of Monopolies,<sup>(c)</sup> did exercise the right, which it claimed at Common Law, of granting to inventors the sole use and exercise of their inventions, and there are several reported cases dealing with grants of letters patent from the Crown to inventors previous to 1623, the date of the statute,<sup>(d)</sup> and the practice is referred to by the early text-writers.<sup>(e)</sup>

Preamble to  
Statute of  
Monopolies.

The preamble to the celebrated statute recites as follows:—

“Forasmuch as your most excellent Majesty, in your royal judgment, and of your blessed disposition to the weal and quiet of your subjects, did in the year of our Lord God one thousand six hundred and ten, publish in print to the whole realm and to all posterity, that all grants of monopolies, and of the benefit of any penal laws, or of power to dispense with the law or to compound for the forfeiture, are contrary to your Majesty’s laws, which your Majesty’s declaration is truly consonant and agreeable to the ancient and fundamental laws of this your realm: And whereas your Majesty was further graciously pleased expressly to command, that no suitor should presume to move your Majesty for matters of that nature; Yet, nevertheless, upon *misinformations* and *untrue pretences of public good*, many such grants have been unduly obtained and unlawfully put in execution to the great grievance and inconvenience of your Majesty’s subjects, contrary to the laws of this your realm, and contrary to your Majesty’s most royal and blessed intention so published as aforesaid: For avoiding whereof and preventing the like in time to come, may it please your excellent Majesty,” &c.

Provisions of  
Statute of  
Monopolies.

The 1st section of the statute declares “That all monopolies and all commissions, grants, licences, charters, and letters

(b) See Mag. Ch., c. 30; 9 Edw. III. st. 1, c. 1; Stat. of Cloths (25 Edw. III. c. 2); Stat. 27 Edw. III. st. 2; 28 Edw. III. c. 13, s. 3; 31 Edw. III. c. 10; 2 Ric. II. st. 1, c. 1; 7 Hen. VII. c. 9; and 12 Hen. VII. c. 6.

(c) 21 Jac. I. c. 3.

(d) *Darcy v. Allin*, Noy R. 182; *Hast-*

*ings’ Case*, Noy R. 182; *Clothworkers of Ipswich Case*, Godb. 252; S. C. 1 Rol. R. 4; *Mitchell v. Reynolds*, 1 P. Wms. 181; 10 Mod. 130.

(e) *Sheppard’s Abridgment*, part iii., tit. *Prerog.*, p. 61; *Hawkins, Pleas of the Crown*, bk. i. c. 79, s. 20; *Coke*, 3 Inst. 184.



patent heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using of anything within this realm or the dominion of Wales, or of any other monopolies, or of power, liberty, or faculty to dispense with any others; or to give licence or toleration to do, use or exercise anything against the tenor or purport of any law or statute; or to give or make any warrants for any such dispensation, licence, or toleration, to be had or made, or to agree or compound with any others for any penalty or forfeitures limited by any statute, or of any grant or promise of the benefit, profit, or commodity of any forfeiture, penalty, or sum of money, that is or shall be due by any statute before judgment thereupon had, and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering, or countenancing of the same or any of them, *are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in nowise to be put in use or execution.*"

The second section declares and enacts that all monopolies, and all such grants, letters patent, &c., ought to be, and shall be, tried by the common laws of the realm, and not otherwise.

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

The fourth section provides that any person aggrieved by any monopoly, or any such commission, grant, letters patent, &c., shall have a remedy by action to recover treble damages and double costs, and imposes the penalties of præmunire upon persons delaying such actions except by authority of the Court.

The fifth and sixth sections refer to letters patent for inventions, and exclude them from the effect of the foregoing clauses, which effectually suppressed all illegal monopolies, and deprived the Crown of all claims to grant such monopolies in the future, and also of all power to prevent persons aggrieved from pursuing their legal remedies.

The fifth section referred to patents already granted, and

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declared that none of them should be of any force for a longer period than twenty-one years from the date of the grant.

The terms of the sixth section which deals with patents to be granted in future are as follows: "Provided also and be it declared and enacted, that any declaration before mentioned shall not extend to any letters patent and *grants of privilege*, for the term of fourteen years or under, hereafter to be made, *of the sole working, or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use*, so as also they be not contrary to the law, nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters patents or grants of such privilege hereafter to be made, but that the same shall be of such force as they should be if this Act had never been made and of none other.

Grantees must be true and first inventor.

From the above it is clear that the grantee of letters patent for an invention must be the true and first inventor, and, if there are two or more grantees, the true and first inventor must be included in their number, otherwise the Crown, as the dispenser of the privilege, has no power to make such a grant.(f)

Any person may apply for Letters Patent.

It is expressly provided by recent enactments that any person, whether a British subject or not, may make an application for letters patent for an invention(g), and that two or more persons may make a joint application, and a patent may be granted to them jointly.(h) Moreover, a patent granted to several persons, jointly, is not invalid because some or one of them only are or is the true and first inventors or inventor(i) and, consequently, a capitalist may advance money to a needy inventor and obtain an interest in the patent from the beginning.

An application for a patent must contain a declaration to the effect that the applicant is in possession of an invention,

(f) Marshall's Application, 5 P. O. R. 661.

(g) 46 & 47 Vict. c. 57, s. 4 (1).

(h) 46 & 47 Vict. c. 57, s. 4 (2).

(i) 48 & 49 Vict. c. 63, s. 5.



whereof he, or, in the case of a joint application, one or more of the applicants, claims or claim to be the true and first inventor or inventors, and for which he or they desires or desire to obtain a patent.(*m*)

Previous to this direct enactment it had long been the practice for the Crown to grant letters patent for inventions to foreigners who were, in law, the true and first inventors thereof within this realm:(*n*) and in one case the question was raised whether a patent granted to a person in trust for an alien enemy would be valid, but the Court did not determine the point, as the patent was found defective on other grounds.(*o*)

An invention to be capable of forming the subject-matter Subject-matter. of a valid grant of letters patent must be a manufacture within the meaning of the Statute of Monopolies(*p*), which is new(*q*) and useful;(r) and it is further requisite that the patentee fulfils the obligation which the law imposes on him of filing proper and sufficient specifications.(*s*)

A married woman may be a patentee, and the property in Married woman. the invention will be her separate estate.(*t*)

It might be doubted whether the grant of letters patent to Infant. an infant inventor alone would be valid, as there does not appear to be any case which judicially decides the point, but it would seem that in the case of a grant to two persons, one of whom is an infant, the infancy of such joint grantee does not affect the validity of the patent.(*u*)

A patent may be granted to a person found lunatic, and the Lunatic. declaration, which must accompany the application, must be made by the committee of the lunatic, or a person appointed by the Court or a judge.(*x*)

The Comptroller of the Patent Office does not inquire as to the age, coverture, or sanity of an applicant.

(*m*) 46 & 47 Vict. c. 57, s. 4 (2).  
See Chap. VII.

(*n*) Coppel v. Pendry, 14 M. & W. 318; *In re Wirth's Patent*, L. R. 12 Ch. D. 303; Beard v. Egerton, 3 C. B. 97.

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

(*p*) Chap. II.

(*q*) Chap. III.

(*r*) Chap. IV.

(*s*) Chap. V.

(*t*) M. W. P. Act (45 & 46 Vict. c. 75.)

(*u*) Chevin v. Walker, L. R. 5 Ch. D. 858; 46 & 47 Vict. c. 57, s. 4 (2); 48 & 49 Vict. c. 63.

(*x*) Chap. VII.

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Legal representative of person dying possessed of an invention, in respect of which no application has been made.

The legal representative of a person dying possessed of an invention in respect of which no application for a patent has been made, may apply for, and obtain, a patent in respect of it, if such application be made within six months of the decease of such person, and contains a declaration by the legal representative that he believes such person to be the true and first inventor.(y)

The application of such a personal representative must be accompanied by an official copy of, or extract from, the will of the deceased, or the letters of administration granted of his estate and effects if he died intestate.(z)

Legal representative of person dying possessed of an invention, in respect of which an application has been made.

The legal representative of a person dying possessed of an invention in respect of which he has made an application for a patent within fifteen months prior to his decease, may obtain a grant of a patent in respect of the invention within twelve months of the decease of the person so dying.

It is the practice for the legal representative of a person so dying to produce on applying for a patent the probate of the will, or letters of administration granted of the estate and effects of the deceased for the inspection of the Comptroller, and subsequently to carry out the later stages of the application in his own name.

True and first inventor.

Letters patent for an invention can, except in the above cases of the legal personal representatives of deceased persons, be validly granted only to the true and first inventor either solely or together with another person or persons.(a)

Any patent obtained by any person or persons who is not, or none of whom is or are, the true and first inventor or inventors, would be absolutely void, for the Crown would have been deceived in its grant.(b)

It therefore becomes a very important question to decide what, in the patent law, is the meaning of the words "true and first inventor."

Except in the case of an invention communicated from

(y) 46 & 47 Vict. c. 57, s. 34.

(z) See Patent Rules, 1890, r. 20.

(a) In the Matter of Marshall's Application, 5 P. O. R. 661; 46 & 47 Vict. c. 57, s. 5.

(b) Com. Dig. Grant, c. 8 & 9; Earl of Devon's Case, 11 Co. 90; R. v. Mus-sary, 1 W. P. C. 41; Minter v. Wells, 1 W. P. C. 129.



abroad (c) a person will not be considered the true and first inventor if he himself did not make the discovery or invention, or if the idea of it did not originate in his own mind (d), or if it was suggested to him by another (e) or taken from a book or other document circulated in Great Britain, (f) or if the invention had been previously used by the public. (g)

It is not an objection to a patent that the discovery was the result of accident; and it is immaterial whether it be the outcome of some happy thought, or great study, labour, and expense. (h)

No objection that the invention is the result of accident.

The patentee must have invented every part of that for which he claims protection. (i) If he claims a number of things, as being the inventor of them, whether they consist of improvement or original inventions, and it turns out that some of them are not original, his patent is void. (k)

Patentee must have invented all he claims.

The person who himself actually makes an invention and is the first to disclose that invention, will be the true and first inventor in the legal sense of the term, and a valid patent may be granted to him notwithstanding the fact that it may possibly be shown that the invention had been previously made by another who did not disclose it. (l)

Inventor who first discloses invention is true and first inventor.

In the words of Tindal, C.J. (m): "Sometimes it is a material question to determine whether the party who got the patent was the real and original inventor or not; because these patents are granted as a reward, not only for the benefit that is conferred upon the public by the discovery, but also to the ingenuity of the first inventor; and although it is proved that it is a new discovery, so far as the world is concerned, yet if anybody is able to show that although that was new that the party who got the patent was not the man whose ingenuity first discovered it, that he had borrowed it from A. or B., or taken it from a book that was

(c) P. 18; Chap. VII.

(d) Jones v. Pearce, 1 W. P. C. 124.

(e) Tennant's Case, 1 W. P. C. 125.

(f) Arkwright's Case, Dav. P. C. 61; Hill v. Thompson, 8 Taunt. 375; 2 B. Mo. 424, S. C.; The Househill Co. v. Neilson, 1 W. P. C. 673; Lang v. Gisborne, 31 Beav. 133; Plimpton v. Malcolmson, L. R. 3 Ch. D. 531; Plimpton v. Spiller, L. R. 6 Ch. D. 412; Chap. III.

(g) Carpenter v. Smith, 1 W. P. C. 535; Chap. IV.

(h) Crane v. Price, 1 W. P. C. 411.

(i) Tennant's Case, 1 W. P. C. 125; Arkwright's Case, Dav. P. C. 61.

(k) Losh v. Hague, 1 W. P. C. 203.

(l) Chap. III.

(m) Cornish v. Keene, 1 W. P. C. 501, 507.



printed in England, and which was open to all the world—then, although the public had the benefit of it, it would become an important question whether he was the first and original inventor. . . . A man may make experiments in his own closet for the purpose of improving any art or manufacture in public use; if he makes these experiments and never communicates them to the world, and lays them by as forgotten things, another person who has made the same experiments, or has gone a little further, or is satisfied with the experiments, may take out a patent, and protect himself in the privilege of the sole making of the article for fourteen years; and it will be no answer to him to say that another person before him made the same experiment, and, therefore, that he was not the first discoverer of it—because there may be many discoverers starting at the same time, many rivals that may be running on the same road at the same time, and the first which comes to the Crown and takes out a patent, it not being generally known to the public, is the man who has a right to clothe himself with the authority of the patent and to enjoy its benefits.”(n)

And again : (o) “A man may publish to the world that which is perfectly new in all its use, and has not before been enjoyed, and yet he may not be the first and true inventor; he may have borrowed it from some other person, he may have taken it from a book, he may have learnt it from a specification, and then the Legislature never intended that a person who had taken all his knowledge from the art of another—from the labours and assiduity or ingenuity of another—should be the man who was to receive the benefit of another’s skill.”

The proof of publication must be very clear indeed in order to invalidate a patent granted to a person for a process producing a useful article at an economical rate when that person was, *de facto*, the first to produce the thing to the public practically in a working state.(p)

In *Dollond’s Case*, one of the earliest on the subject of true

Dollond’s  
Case.

(n) See however Chap. VII.

(o) *Gibson v. Brand*, 1 W. P. C. 627, J. N. S. Ch. 126; L. R. 14 Ch. D. 230.  
6:8.

(p) *Von Heyden v. Nevstalt*, 50 L.

and first inventor, which is not reported, but is often referred to (q) in subsequent decisions, and always with approval, it was objected that Dollond was not the inventor of a new method of making object-glasses, but that a Dr. Hall had made the same discovery before him. It was, however, held, that as Dr. Hall had confined it to his closet, and the public were not acquainted with it, Dollond was to be considered as the inventor.

In *Tennant's Case*(r) the patent was declared void on the ground that though the utility of the invention and the general ignorance of it of those engaged in the trade to which it referred were proved, yet the plaintiff was not the true and first inventor, as the process had been used by one engaged in the trade for five or six years previous to the date of the patent. Tennant's Case.

From the principles of these two cases it appears that in order to invalidate a patent on the ground that the patentee is not the true and first inventor, it is not enough to show that the alleged invention is only a disclosure of what was known to others before; but it must be shown that it was communicated to some extent, or that it was more or less made use of, so as to constitute discovery as applied to the subject with which the invention deals.(s) Patent not invalid if the invention has not been previously disclosed.

If several persons about the same time discover the same thing, but keep it secret, the party first making application for a patent becomes the true and first inventor, and is entitled to the benefit of a grant of letters patent,(t) provided that no application has been made by or on behalf of a foreigner, who has within seven months secured protection in respect of the same invention in any State with the Government of which Her Majesty has made any arrangement for mutual protection of inventions.(u) Several inventors.

If a man makes a discovery and is enabled to produce an effect from his own experiments, judgment, and skill, it is no objection that someone else has made a similar discovery by his mind unless it has become public.(x)

(q) *Boulton v. Bull*, 2 H. Bl. 463.

(r) *Dav. P. C.* 429; 1 *W. P. C.* 125.

(s) *Hill v. Thompson*, 1 *W. P. C.* 239.

(t) *Chap. VII.*

(u) 46 & 47 *Vict. c.* 57, s. 103, *Chap. VII.*

(x) *Per Baley, J., Lewis v. Marling*, 1 *W. P. C.* 496.



There is no case in which a patentee has been deprived of the benefit of his invention because another also had invented it, unless he had also brought it into public use or disclosed it.<sup>(y)</sup>

Remarks of  
Westbury, L.C.,  
on prior pub-  
lication.

Westbury, L.C.,<sup>(z)</sup> referring to the principle upon which prior publication will vitiate a subsequent patent for an invention, said, "The invention must be shown to have been before made known. Whatever, therefore, is essential to the invention must be read out of the prior publication. If specific details are necessary for the practical working and real utility of the alleged invention, they must be found substantially in the prior publication. Apparent generality, or a proposition not true to its full extent, will not prejudice a subsequent statement which is limited, accurate, and gives a specific rule of practical application. The reason is manifest, because much further information, and therefore much further discovery, are required before the real truth can be extricated and embodied in a form to serve the uses of mankind. It is the difference between the ore and the refined and pure metal which is extracted from it. . . . Upon principle, therefore, I conclude that the prior knowledge of an invention to avoid a patent must be a knowledge equal to that required to be given by a patent—viz., such a knowledge as will enable the public to perceive the very discovery, and to carry the invention into practical use."

Economic and  
commercial  
purposes.

An inventor who succeeds in producing in abundance, suitable for economic and commercial purposes, that which was before only produced as a rarity and unsuited for either of the above purposes, will be considered the true and first inventor of the process, and entitled to a patent in respect of it.

Young v.  
Ferne.

Thus, in the case of *Young v. Fernie* <sup>(a)</sup> the plaintiff's claim was for "obtaining paraffin oil, or an oil containing paraffin, and paraffin, from bituminous coals by treating them in the manner hereinbefore described." The defendant proved that paraffin was discovered in 1830, twenty years previous to the date of the plaintiff's patent, by Dr. Reichenbach, and was first obtained from beech-wood tar. On the other hand the plaintiff had found out and stated in his specification that cannel coal, or

<sup>(y)</sup> *Lewis v. Marling*, 1 W. P. C. 497;  
as to public use see Chap. IV.

<sup>(z)</sup> *Hill v. Evans*, 31 L. J. Ch. 457.  
<sup>(a)</sup> 33 L. J. Ch. 192; 35 L. J. Ch. 523.



other highly bituminous coal, was suitable for producing paraffin, but that the temperature should be much lower than that employed in the dry distillation of coal for gas-making, and should not rise above a low red-heat which was visible in the dark. An American book containing the following extract from a publication of Reichenbach, in 1854, was adduced in evidence, "So remained paraffin until this hour a beautiful item in the collection of chemical preparations, but it has never escaped from the rooms of the scientific man." Stewart, V.C., who tried the case, pointed out that this illustrated the important distinction between the discoveries of the merely scientific chemist and of the practical manufacturer who invents the means of producing in abundance, suitable for economic and commercial purposes, that which had previously existed as a beautiful item in the cabinets of men of science. It was established to the satisfaction of the Vice-Chancellor that the plaintiff Young was an inventor of the latter class, and that his patent was entitled to the protection of the law. Young had ascertained, by a course of laborious experiments, a particular class of materials among many, and a particular process among many, which enabled him to create and introduce to the public a useful manufacture which amply supplied the market with that which, until the use of the materials, process, and temperature indicated by him, had never been supplied for commercial purposes. At the date of his patent something remained to be ascertained which was necessary for the useful application of the chemical discovery of paraffin and paraffin oil. This brought it within the principle laid down by Westbury, L.C.,<sup>(b)</sup> and the Court held that the manufacture, with the materials and process indicated by the inventor, according to the sense in which the word "manufacture" is used in the Statute of Monopolies, was a new manufacture not in use at the date of the patent?"<sup>(c)</sup>

It is no objection to a person being the true and first inventor to show that a patent having a similar object had been previously obtained by another, or that an apparatus or process giving similar results had been previously used, if the means

Patents having similar objects.

<sup>(b)</sup> Hill v. Evans, 31 L. J. Ch. 457.

<sup>(c)</sup> See judgment of Stuart, V.C., 33 L. J. Ch. 192; 35 L. J. Ch. 523.

employed by the person seeking to obtain the protection of the law are substantially different to those comprised in the alleged anticipating patent or previous user.<sup>(d)</sup>

In the year 1828 W. E. Kneller obtained a patent for "improvements in evaporating sugar." The patent related to a method of evaporating water from a solution of sugar by blowing air into the liquid. This was done according to the specification by an apparatus consisting of a large horizontal pipe, placed near the surface of the liquid, from which a number of small blowing tubes radiated downwards in different directions. Two things were described as essential to the invention. 1. That a stream of air should issue from each blowing tube at the same time. 2. That the ends should all be in the same horizontal plane, whereby the fluid would exert the same pressure at each orifice. At the trial of an action<sup>(e)</sup> brought for the infringement of this patent, the defendant put in evidence the specification of a patent obtained in 1822 for a similar apparatus, consisting of a set of perforated pipes, coiled or otherwise, shaped and accommodated to the nature and form of the vessel. The pipes might be replaced by a shallow metallic vessel, in the nature of a colander. Kneller's patent was, however, declared valid, and Lord Tenterden, C.J., said, "I cannot forbear saying that I think a great deal too much critical acumen has been applied to the construction of patents, as if the object was to defeat and not to sustain them. It is evident that the object of the two patents is the same. But the mode of effecting that object is different."

Omission of  
component  
parts.

A person may be the true and first inventor of an invention which merely consists of the omission of one of several component parts of something previously known if it requires the exercise of invention to make such omission.<sup>(f)</sup>

Thus, Minter took out a patent for "an improvement in the construction, making, or manufacture of chairs," and claimed as his invention "the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat

<sup>(d)</sup> Walton v. Potter, 1 W. P. C. 590; see Chap. II.

<sup>(e)</sup> Hullett v. Hague, 9 L. J. O. S. K. B. 242; 2 B. & Ad. 370.

<sup>(f)</sup> See Chap. II.



acts as a counterbalance to the pressure against the back of such chair." When the validity of the patent was contested, it appeared that one Brown had previously made chairs embodying the principle patented by this Minter, though Brown's chair was encumbered with additional machinery. The patent was declared void on the ground of the specification claiming too much.<sup>(g)</sup> But Lord Denman having asked the jury to suppose that Brown's chair would have been a chair with a self-adjusting leverage if the additional encumbering part had been taken away, said, "then the question is, whether the principle of self-adjustment was at all discovered or thought of at that time. Because, it seems to me, if that principle might have been deduced from the machinery of the chair that was made, but that it was so encumbered and connected with other machinery that nobody did make that discovery, or ever found out that they could have a chair with a self-adjusting leverage, by reason of that or any other defect in the chair actually made; I confess, it seems to me, that does not prevent this from being a new invention when the plaintiff says, I have discovered, throwing aside everything but this self-adjusting leverage itself, that will produce an effect, which I think a very beneficial one."<sup>(h)</sup>

A person who produces an invention which successfully does that which a previous and similar invention failed to do, will be the true and first inventor, and entitled to a patent.<sup>(i)</sup>

Previous failures.

If the result produced by a new method is either a new article, or a better article, or a cheaper article to the public than that produced before by an old method, such new method is an invention, or manufacture intended by the statute to be protected, and may become the subject of a patent,<sup>(k)</sup> and there does not appear to be any principle or authority upon which the exhibition of a useless machine which turns out a failure, can be held to affect the right of a patentee who has made a successful machine, although there may be a degree of similarity between some of the details of the two machines.<sup>(l)</sup>

<sup>(g)</sup> See Chap. V.

<sup>(h)</sup> *Minter v. Mower*, 1 W. P. C. 140; 4 L. J. Ex. 72; see also *Saxby v. The Gloucester Waggon Co.*, L. R. 7 Q. B. D. 305; 50 L. J. Q. B. 577.

<sup>(i)</sup> Chap. II.

<sup>(k)</sup> Judgment of Tindal, C.J., *Crane v. Price*, 4 M. & G. 580.

<sup>(l)</sup> *Murray v. Clayton*, L. R. 7 Ch. 570; L. R. 15 Eq. 115.



Joint inven-  
tors.

A true and first inventor must have invented every part of that which he claims to have invented,<sup>(m)</sup> hence, if different parts of an invention are the outcome of the inventive faculty of different minds, it will be necessary that all the inventors join in applying for a patent to be granted to them jointly.

Workmen and  
servants of  
inventors.

There is nothing in law to prevent an inventor from availing himself of the assistance of workmen or servants in the prosecution of his search after a new manufacture. Indeed, many processes cannot be conducted by the unaided exertions of a single individual, and in almost all cases actual experiments are a necessity in order to find out how a desired end may be best obtained. It would, therefore, be absurd to confine the rewards given to inventors to that small class of them only, who have entirely, and without any assistance whatever, brought their discoveries to perfection, and it is grave matter of doubt whether, strictly speaking, any such could be found. The law, therefore, considers workmen and servants merely as tools of the inventor, and instruments in his hands, carrying out the ideas which originate in the master mind: and a person who has invented a main and leading idea remains the true and first inventor, and, as such, entitled to apply for a patent notwithstanding that he avails himself of the assistance and suggestions of workmen and servants in bringing his invention to a state of perfection.<sup>(n)</sup>

Minter v.  
Wells.

Thus Alderson, B., addressing the jury in the case of *Minter v. Wells*,<sup>(o)</sup> said, "Minter and Sutton were together about the time the invention took place: which of the two suggested the invention, and which carried it into effect, is the question for you to decide. If Sutton suggested the principle to Mr. Minter, then he would be the inventor. If, on the other hand, Mr. Minter suggested the principle to Sutton, and Sutton was assisting him, then Mr. Minter would be the first and true inventor, and Sutton would be a machine, so to speak,

<sup>(m)</sup> See p. 6, *ante*.  
<sup>(n)</sup> *Minter v. Wells*, 1 W. P. C. 132; *Bloxam v. Elsec*, 1 C. & P. 567; 1 W. P. C. 132; *Allen v. Rawson*, 1 C. B. 551; *David v. Woodley*, 1884,

No. 13, 876, *Griff. L. O. C.* 26; *Kurtz v. Spence*, 5 P. O. R. 181; *Healey's Application*, *Johnson's Pat. Man.*, 6 ed. 165; *Macfarlane's Patent*, *ibid.*  
<sup>(o)</sup> 1 W. P. C. 132.

which Mr. Minter uses for the purpose of enabling him to carry his original conception into effect. You will judge which is the more probable of the two. Mr. Minter makes out his *prima facie* case; he is the person who takes out the patent, if Sutton has received a compensation, nothing would have been more simple and easy that he should have taken out the patent, and still Mr. Minter might have the same benefit to-day; and there is no apparent reason why Sutton should not have taken out the patent which Mr. Minter has taken out, unless they were both desirous to ruin the invention: for suppose two persons are engaged on an invention of this description, they know perfectly well between themselves who is the real inventor of it, and who is the workman to carry into effect the conception, but they would destroy the value of it to both if they did not take it out in the name of the right person.(p)

Again, in *Bloxam v. Elsec* (q) an action in respect of two patents granted to John Gamble, it was objected that the improvements on the first invention, which formed the subject of the second patent, were the invention of one Donkin, an engineer. It was established that the improvements were the invention of Donkin, but it appeared that at the time he invented them he was employed by the patentee and one Foudrinier, his partner, as an engineer, for the purpose of bringing the machine to perfection, and was paid by them for so doing; and therefore he was acting as their servant for the purpose of suggesting improvements in the machine. The plaintiff, on the other hand, contended that the improvements were the patentee's inventions, and that Donkin was employed by him to carry his ideas into effect, and this view of the case seems to have prevailed with the Court.

*Bloxam v. Elsec.*

*Allen v. Rawson* (r) is another case supporting the same principle. In this case it was sought to upset a patent for improvements in the manufacture of felted fabrics on the ground that parts of the invention were discovered by two workmen. Erle, J., in directing the jury, put his

*Allen v. Rawson.*

(p) See also *Makepeace v. Jackson*, 4 Taunt. 770.

(q) 1 C. & P. 558; 1 W. P. C. 132 n.  
(r) 1 C. B. 551.



idea of the law thus: "I take the law to be that, if a person has discovered an improved principle, and employs engineers, agents, or other persons to assist him in carrying out that principle, and they, in the course of experiments arising from that employment, make valuable discoveries accessory to the main principle and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied in his patent; and if so embodied the patent is not avoided by evidence that the agent or servant made the suggestion of the subordinate improvement of the primary and improved principle." A motion for a new trial on the ground that the judge had misdirected the jury was refused, Tindal, C.J.,(s) saying: "It would be difficult to define how far the suggestions of a workman employed in the construction of a machine are to be considered as distinct inventions by him so as to avoid a patent incorporating those taken out by his employer. Each case must depend upon its own merits. But when we see that the principle and object of an invention are complete without it, I think it is too much that a suggestion of a workman employed in the course of the experiments, of something calculated more easily to carry into effect the conceptions of the inventor, should render the whole patent void."

Master is not entitled to the invention of his servant.

R. v. Arkwright.

The mere relationship of master and servant gives no right to the master to the invention of his servant,(t) and if an employer takes out a patent for an invention discovered and worked out by a workman in his employ, and the patentee has no more connection with the invention than that he is the employer of the workman, the patent will be void, on the ground that the workman and not the patentee is the true and first inventor. Thus, in *Arkwright's Case* (u) it appeared that the patentee had been told of a particular roller, part of the machinery, by one Kay, and, perceiving the value of the invention, he took Kay into his service for two years, and

(s) 1 C. B. 574.

(t) *Saxby v. Gloucester Waggon Co.*,  
Griff. L. O. C. 56.

(u) *R. v. Arkwright*, Dav. P. C. 61;  
1 W. P. C. 61; *Barker v. Shaw*, 1 W.  
P. C. 126 n.



employed him in making models, and subsequently applied for and obtained a patent for the invention as his own. In the same way Arkwright adopted a crank invented by one Hargrave. At the trial Arkwright was declared not to be the true and first inventor.(x)

When a workman, who is employed by his master to make models, or to carry out experiments, in the course of his employment, makes improvements in details, the improvements so made are the property of the master,(y) and the workman cannot patent them.(z) There is in fact a confidential relationship between a master who experiments with a view to taking out a patent for an invention, the leading idea of which originated with him, and the workmen he employs in aiding him to perform those experiments, and anything suggested by the workman during such confidential employment will not vitiate the subsequent patent of the master.(a) It is always, however, a question of evidence whether such confidential relationship actually existed between the employer and employed.(b) Though there may be a confidential relationship existing between a master and his workman, it does not necessarily follow that there is a corresponding confidential relationship existing between the workman and his fellow workmen, so as to prevent the communication of an invention being made by one workman to another, and violating, on the ground of lack of novelty, a patent taken out in respect of it.(c)

Master is entitled to improvements in details made by his servant.

Question of evidence.

We next come to the subject of patents for inventions communicated from abroad which are new within this realm. Before the passing of the Patent Act, 1883, the law had long allowed grants of patents, in their own name, to persons who were in possession of inventions which they had received from others resident in foreign countries, but which inventions had never before been published within this realm.

Communications from abroad.

(x) *Rex v. Arkwright*, Dav. P. C. 61 ;  
1 W. P. C. 64. (y) p. 16.  
(z) *David v. Woodley*, 1884, No. 13,  
S73, Griff. L. O. C. 26 ; *Kurtz v. Spence*,  
5 P. O. R. 181 ; *Healey's Application*,  
*Johns. Pat. Man.* 6 ed. ; *Conniff's Appli-*  
*cation*, *ibid.* ; *Macfarlane's Patent*, *ibid.*,  
165.

(a) *Saxby v. Gloucester Waggon Co.*,  
Griff. L. O. C. 57 ; *Homan's Patent*, 6  
P. O. R. 104.  
(b) *Humpherson v. Syer*, 4 P. O. R.  
407, 413.  
(c) *Saxby v. Gloucester Waggon Co.*,  
Griff. L. O. C. 56.

It was stated in the celebrated *Clothworkers of Ipswich Case*, which was long prior to the Statute of Monopolies, "If a man hath brought in a new invention and a new trade within the kingdom in peril of his life and consumption of his estate, or stock, &c., or if a man hath made new discovery of anything, in such cases the king of his grace and favour in recompense of his costs and travail may grant by charter unto him that he only shall use such trade or trafique for a certain time, because at the first the people of the kingdom are ignorant, and have not the knowledge or skill to use it. But when that patent is expired the king cannot make a new grant thereof." This practice was continued after the framing of the Statute of Monopolies of 21 James I., and has frequently been sanctioned by the judges in many cases, from *Edgebury v. Stephens*,<sup>(d)</sup> which decided that if the invention be new in England, a patent may be granted though the thing was practised beyond sea before; "for the statute speaks of new manufactures within this realm; so that if it be new here it is within the statute; for the Act intended to encourage new devices useful to the kingdom, and whether learned by travel or by study it is the same thing," down to cases such as *Carpenter v. Smith*,<sup>(e)</sup> *Nicholls v. Ross*,<sup>(f)</sup> and *Plumpton v. Malcolmson*,<sup>(g)</sup> from which the proposition is established that the first actual importer of an invention into this country is *in law the true and first inventor*.

First importer  
is true and  
first inventor.

The Act of 1883 does not contain anything to prevent a person who has become acquainted with an invention abroad, though it was not actually made by him, coming over to this country and applying for a patent for it in his own name, and making the declaration<sup>(h)</sup> as to true and first inventor comprised in Form A1,<sup>(i)</sup> in the schedule to the Patent Rules, 1890, which is especially prepared to meet such a case. Before the Act of 1883 it was long the practice for a person applying for a patent in respect of a communication from abroad in his declaration<sup>(k)</sup> to state that he was the true and first inventor *within this realm*—though the words "within

<sup>(d)</sup> Salkeld's Rep. 477; 1 W. P. C. 35; Dav. P. C. 36.

<sup>(e)</sup> 1 W. P. C. 530, 535.

<sup>(f)</sup> 8 C. B. 679.

<sup>(g)</sup> L. R. 3 Ch. D. 531.

<sup>(h)</sup> Chap. VII.

<sup>(i)</sup> See Appendix.

<sup>(k)</sup> Chap. VII.



this realm " might have been omitted, without detracting, from the validity of the declaration; and in the form of declaration given in the schedule to the Act of 1852 they were in fact so omitted. It was objected by some that under the Act of 1883 a person cannot obtain a valid patent for an invention communicated from abroad, seeing that the Act requires him to declare himself the true and first inventor, which it was said he cannot be unless he himself actually made the discovery, and the case of *Milligan v. Marsh*(*l*) decided in 1856, and *Renard v. Levenstein*,(*m*) decided in 1885 were relied on as supporting this view. On a reference to these cases it will be found that neither of them amounts to a decision on the point; they are at most dicta of Wood, V.C., afterwards Lord Hatherley, and Knight Bruce, L.J.

The Act of 1883 defines invention to be "any manner of new manufacture as defined in 21 Jac. I. c. 3," and it is only reasonable to infer that "inventor" has the same meaning as it has been declared to have in the same statute—*i.e.*, it includes the actual importer of a communicated invention.(*n*)

Many patents have in fact been granted under the Act of 1883 to importers in respect of inventions communicated to them from abroad, and it has never been established that the grantees of such patents are not entitled to hold them for their own benefit in the absence of a fiduciary relationship between them, and the actual foreign inventor.(*o*)

It must also be noticed that the clauses in the Act of 1883 relating to opposition to the grant of a patent, provide for the case of a person without the knowledge or against the will of a foreigner endeavouring to forestall him in this country, and give the Comptroller and law officers ample powers to prevent any injustice from being done.(*p*)

In virtue of sec. 103 of the Act of 1883, and the International Convention of 1884,(*q*) a foreign inventor who has applied for a patent in any State or States to which the powers

(*l*) 2 Jur. N. S. 1083.

(*m*) 10 L. T. N. S. 177.

(*n*) *Marsden v. Saville Street Foundry and Engineering Company*, L. R. 3 Ex D. 203.

(*o*) See *Nickels v. Ross* 8 C. B. 679;

*Steadman v. Marsh*, 2 Jur. N. S. 391; *Avory's Patent*, L. R. 36 Ch. D. 307, 318, 324; Chap. VII.

(*p*) See *Edmunds' Patent*, 1886, Griff. P. C. 281.

(*q*) p. vii.; Appendix.

Definition of  
"invention."

Patents  
granted under  
Act of 1883  
for communi-  
cations from  
abroad.



of sec. 103 of the Act of 1883 have been applied, has a right of priority to a British patent if he applies for it during a period of seven months from the date of his first foreign application, notwithstanding any intermediate publication of the invention in this country.(r)

Communica-  
tions by one  
British subject  
to another.

The communication made in England by one British subject to another of an invention does not make the person to whom the communication is made the true and first inventor within the meaning of 21 Jac. I. c. 3, so as to enable him to obtain letters patent for the invention in his own name alone,(s) and it would appear that a valid patent could not be granted in respect of a communication by an alien permanently domiciled in this country.

Foreign resi-  
dent abroad.

*In re Wirth's patent*(t) decided that letters patent may be granted to a foreigner resident abroad for an invention communicated to him by another foreigner resident abroad; but patents will not in future be granted to agents resident abroad in respect of inventions communicated to them by foreigners also resident abroad.(u)

Patents for  
communica-  
tions not  
granted to  
agents resident  
abroad.

Patentee may  
be agent of  
foreign in-  
ventor.

In *Beard v. Egerton*,(x) it was held that a person taking out a patent for a communication from abroad need not necessarily be the *meritorious* importer, he may be the mere clerk or agent of the foreign inventor.

The law  
recognises only  
the person to  
whom the  
patent is  
granted.

The law recognises, however, only the person to whom the patent is granted. Thus it is no objection to the sufficiency of a specification that a foreign inventor was possessed of knowledge which ought to have been indicated in the specification when it appeared that the actual patentee who was merely the agent of the foreign inventor was not possessed of that information.(y) And again, it is not a sufficient answer to an objection that a specification is insufficient to say that it contains all the information which the foreign inventor communicated to his agent, the actual patentee.(z)

(r) See Chap. VII.

(s) *Marsden v. Saville Street Foundry and Engineering Company, Ltd.*, L. R. 3 Ex. D. 203.

(t) L. R. 12 Ch. D. 303.

(u) Notice 21st April, 1884; P. O. J. 9th May, 1884.

(x) 3 C. B. 97; see also *Chappel v. Purday*, 14 M. & W. 310.

(y) *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 531, 582.

(z) *Wegmann v. Corcoran*, L. R. 13 Ch. D. 65; 44 L. T. N. S. 357.

We have seen that "any person, whether a British subject or not may make an application for a patent(*a*), but there are certain persons who, by virtue of their position, could not obtain a valid grant. Persons incapable of becoming patentees.

It seems that the Queen herself could not become a patentee The Queen. for she could not grant to herself.

Rule 73 of the Patent Rules, 1890, provides that a body corporate may be registered as a proprietor by its corporate name; but it is clear that such a body could not alone obtain a grant of a patent for an original invention, for it could not make the requisite declaration,*(b)* invention being the act of the mind, which could not proceed from such a body in its corporate capacity. Body corporate.

Letters patent may be granted to a body corporate, together with the true and first invention, since "person," as defined by the Act of 1883,*(c)* includes a body corporate.*(d)* It would appear, also, that in the case of an invention communicated from abroad, a patent may be granted to a corporation alone, since such corporation, as the first introducer of the invention into this country, might be in law the true and first inventor.*(e)*

A corporation sole, *as such*, cannot become a patentee of an original invention, for he must make the invention by his own mind in his individual capacity, and in that capacity only could he therefore become a patentee. Corporation sole.

It is to be doubted whether the exercise of a patent privilege by a beneficed clergyman would not be trading within the meaning of the Statute 57 Geo. III. c. 99, s. 3,*(f)* and therefore prohibited by that Act. And if that be so, it would appear that a grant to such clergyman would be void, for the intent that the patentee should derive profit from the exercise of the privilege could not take effect.*(g)* Beneficed clergyman.

Official persons are in certain cases incapable of obtaining a patent for inventions connected with the subject-matter of their official position. Official persons.

*(a)* p. 4.  
*(b)* Chap. VII.  
*(c)* Sec. 117.  
*(d)* *Ibid.*

*(e)* In the Matter of Carey's application, 6 P. O. R. 552, p. 18.  
*(f)* Hall v. Franklin, 3 M. & W. 259.  
*(g)* Hindmarch on Patents, p. 35.

Thus, in *Patterson v. Gas Light and Coke Company*,<sup>(h)</sup> the House of Lords held that Patterson, who had obtained a knowledge of the patented process in the discharge of the duties of his official position of gas referee, appointed by the Board of Trade, under the City of London Gas Act of 1868, was incapable of obtaining a valid patent, as such process was described in an official report of himself and his two colleagues, and thus was public property, notwithstanding that the report was kept back from the authorities to whom it was addressed till after the date of the patent.

Alien enemy.

It is doubtful whether a patent granted to an alien enemy would be valid. It has been doubted whether letters patent taken out on a secret trust, to be held for the benefit of the real inventor, who was an alien enemy, were void or not. To hold that such a trust could not exist would appear contrary to the spirit and policy of the patent law, in recognising communications from foreigners as good subject-matters for letters patent ; but no action could be maintained by such alien as by the trustee on his behalf, on any contract, on the ground that the resulting moneys might be employed against the country.<sup>(i)</sup>

<sup>(h)</sup> L. R. 2 Ch. D. 512 ; L. R. 3 App. Cas. 239.

<sup>(i)</sup> Webster on Patents, p. 23 ; also 1 W. P. C. 418 n.



## CHAPTER II.

### THE SUBJECT-MATTER.

GENERAL—CLASSIFICATION OF INVENTIONS—PRINCIPLES—PROCESSES  
—COMBINATIONS—IMPROVEMENTS—NEW USES OF OLD APPLIANCES.

#### *General.*

THE Statute of Monopolies, the statutory foundation of our modern patent laws<sup>(a)</sup>, defines the common-law right of the Crown to grant letters patent for inventions as limited to the granting of patents for “the sole working or making of any manner of new manufactures within this realm to the true and first inventor of such manufactures, which others at the time of making such letters patent and grants shall not use, so as also they be not contrary to the law, nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient.”

Subject-matter  
defined by 21  
Jac. I. c. 3, s. 6.

Subsequent enactments have not in any way altered the provisions of the Statute of Monopolies as regards subject-matter of letters patent for inventions, and the Act of 1883<sup>(b)</sup> expressly states that the word “invention” shall mean any manner of new manufacture the subject letters patent and grants of privilege within section “six” of the Statute of James I.

Subsequent  
Acts have made  
no alteration.

The effect of this sixth section of the celebrated statute is twofold:(i) it exempts all patents and grants of privilege which its terms embrace from the abolition of monopolies in general which the preceding section of the Act effected, and (ii) it expressly declares that such patents and grants of privilege shall have the same effect as they would have had if the Act had never been passed and none other—*i.e.*, they are not rendered valid by virtue of the Act, but obtain their force from the Common Law.

The words “working and making of any manner of new

(a) p. 4.

(b) Sec. 46.

manufacture" coupled with the fact that "manufacture" is capable of more than one meaning, suggest the question, What is it the working and making of which the enactment contemplates as forming the subject-matter of a patent?

Manufacture.

"Manufacture" used as a noun may mean either (i) the art or practice of making or constructing any piece of workmanship, or (ii) anything made by art. The words "working or making," used in conjunction with the word "manufactures," seem to imply both of these meanings, and the decisions of various Courts warrant the statement that in the contemplation of the patent law the word bears both significations.(c)

It is to be noticed that the word "manufactures," construed with the word "working" in the sixth section of the Statute of Monopolies, signifies the arts or processes of making, and the words "working of manufactures" refer to the exercise of arts of making or constructing; whereas the word "manufactures" construed with the word "making" signifies articles or things made, and the words "making of manufactures" therefore mean the art of making articles or things which, when made, may properly be denominated manufactures, and which must be articles of trade or commerce.(d)

The subject of a valid patent must consequently be the working or making of a manner of new manufacture (in one or other of its two meanings) which must be new, useful, and not contrary to the law; new and useful because if it were not so the consideration for which the Crown makes the grant would fail, and not contrary to the law, for the Crown has not the power to make such a grant.

Subject-matter  
must be an art

The subject-matter of letters patent for an invention must be an *art*. For if any person other than the patentee makes any article or articles in accordance with the patentee's specification he thereby commits an infringement of the patent, and yet the patent does not vest in the grantee the right to use the particular materials of which the articles made in infringement consist, for they may never have been his property. What the

(c) Crane v. Price, 4 M. & G. 580; Household Co. v. Neilson, 1 W. P. C. 683; Hornblower v. Boulton, 8 T. R. 98; Dav. P. C. 225; R. v. Wheeler, 2

B. & Ald. 349; 1 Cary. P. C. 393; Stevens v. Keating, 2 W. P. C. 182.

(d) Boulton v. Bull, 2 H. Bl. 463; Hindmarch on Patents, pp. 80, 81.



infringer does besides using the materials, which he has a right to do, and the physical power, which he is also entitled to avail himself of, is to use the art of applying the physical power to the materials in the manner set forth in the specification.<sup>(e)</sup> It is this *art*, therefore, which is the exclusive property of the patentee, and which he, his agents or licensees, and no one else, is entitled to use during the continuance of the privilege.

Only an art by the exercise of which vendible articles, or articles of trade or commerce, are capable of being produced can form the subject-matter of valid letters patent<sup>(f)</sup> for two reasons:—(i) If the articles made by the exercise of the protected art cannot be sold, the invention will not be used, and therefore will not give any new employment to the people, and the public will receive no benefit from the invention. (ii) The intent of the patent is to reward the inventor by means of the profit arising from the making and selling the patent articles during the continuance of the privilege.<sup>(g)</sup>

An art which is to be exercised for the sole object of breaking the law, or for the sole purpose of producing anything designed to be used for any illegal purpose—*e.g.*, implements for housebreaking, picking pockets, locks, &c.—cannot form the subject-matter of valid letters patent.

A grant of letters patent for such an object would be void, both on the ground of want of utility,<sup>(h)</sup> and as being contrary to public policy. “It would be absurd if by one law patents might be granted to reward persons for providing the means of violating any other law.”<sup>(i)</sup>

The Court of King’s Bench, in the case of *Mitchell v. Reynolds*<sup>(k)</sup> stated what they deemed capable of forming the subject-matter of a patent—*viz.*, “A grant of the sole use of a *new invented art* is good, being indulged for the encouragement of ingenuity; but this is tied up by the Statute of 21 James I. c. 3, s. 6, to the term of fourteen years; for after that time it is presumed to be a known *trade* and to have spread itself among

<sup>(e)</sup> *Huddart v. Grimshaw*, Dav. P. C. 278; 1 W. P. C. 86.

<sup>(f)</sup> *Boulton v. Bull*, 2 H. Bl. 463; *R. v. Wheeler*, 2 B. & Ald. 349; *Cornish v. Keene*, 3 Bing, N. C. 570.

<sup>(g)</sup> See *Hindmarch on Patents*, pp. 101–102.

<sup>(h)</sup> Chap. VII.

<sup>(i)</sup> See *Hindmarch on Patents*, p. 142.

<sup>(k)</sup> 1 P. Wms. 181; 10 Mod. 130 S. C.

by which vendible articles or articles of trade or commerce can be produced.

An art to be exercised for illegal purposes cannot be subject-matter.

Subject-matter defined by Court of King’s Bench in *Mitchell v. Reynolds*.



the people." After a statement of the reasons why monopolies are generally void at Common Law, the judgment of the Court continues: "But none of the cases of customs, by-laws to enforce these customs, and *patents for the sole use of a new invented art*, are within any of these reasons; for here no man is abridged of his liberty or disseised of his freehold; a custom is *lex loci*, and foreigners have no pretence of right in a particular society exempt from the laws of that society; *and as to new-invented arts nobody can be said to have a right to that which was not in being before*; and therefore it is but a reasonable reward to ingenuity and uncommon industry."<sup>(l)</sup>

Sir Edward  
Coke's Com-  
mentary on  
ss. 5 & 6 of  
21 Jac. I. c. 3.

The Chapter of Monopolies in Sir Edward Coke's Third Institute of the Laws of England (*m*) contains the following commentary respecting the exception specified in the Statute of Monopolies as being fit subject-matter of letters patent. In reference to the proviso in section 5 he says: "The first is that this Act shall not extend to any letters patents, or grants of privilege heretofore made of the sole working, or making, of any manner of new manufacture, but that new manufacture must have seven properties.

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

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

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

"*Fourthly*, the privilege must not be contrary to law: such a privilege as is consonant to law must be substantially and essentially newly invented; but if the substance was *in esse* before, and a new addition thereunto, though that addition make the former more profitable, yet is it not a new manufacture in law; and so was it resolved in the Exchequer Chamber, Pasch, 15 Eliz., in *Bricot's Case*, for a privilege concerning the preparing and melting, &c., of lead ore: for then it was said that that was to put but a new button to an old coat, and it is much easier

(*l*) See also *The Master, Wardens, and Society of Gunmakers v. Fell*, Willes, R. 388.

(*m*) 3 Inst. c. 85, pp. 181, 184.

to add than to invent. And then it was also resolved, that if the new manufacture be substantially invented according to law, yet no old manufacture in use before can be prohibited.

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

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

“ *Seventhly*, nor generally inconvenient.

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

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

In reference to Section 6 of the Statute of Monopolies, Sir Edward Coke says :

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

“ The cause wherefore the privileges of new manufacturers, either before this Act granted, or which after this Act should be granted, having these seven properties, were not declared to be good was, for that the reason wherefore such a privilege is good in law is, because the inventor bringeth to and for the commonwealth a new manufacture by his invention, cost and charges ; and therefore it is reason that he should have a privilege for his reward (and the encouragement of others in the like), for a



convenient time, but it was thought that the times limited by this Act were too long for the private, before the commonwealth should be partaker thereof, and such as served such privileged persons by the space of seven years, in making or working of the new manufacture (which is the time limited by law of apprenticeship), must be apprentices or servants still during the residue of the privilege, by means whereof such numbers of men would not apply themselves thereunto as should be requisite for the commonwealth after the privilege ended, and this was the true cause wherefore, both for the time past, and for the time to come, they were left of such force as they were before the making of this Act."

Every case must be considered on its own merits.

It is impossible to give any definition which will enable any one at once to see whether a given example is capable of forming the subject-matter of a valid patent. Each instance must be considered on its own merits.

Common-law authorities.

The Common-law authorities respecting what may be the subject of a valid patent which were decided before the passing of 21 Jac. I. c. 3 are not very numerous, but they agree perfectly with the construction which the modern law has placed upon the words of the sixth section of that Act.

In the *case of monopolies*(*n*) it was held that the Crown may grant a patent of "a new trade" or "any engine tending to the furtherance of a trade that never was used before."

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

*Edgebury v. Stephens*(*p*) held that the exception contained in the sixth section of the Statute of Monopolies intended to encourage *new devices* useful to the kingdom.

It is stated in Sheppard's Abridgment(*q*) that the King may grant a patent for a new *trade* or *device*, or any new *engine* tending to the furtherance of it.

And Serjeant Hawkins says(*r*) the King may grant the sole

(*n*) Noy, 182.

(*o*) Godb. 252, 253.

(*p*) 2 Salk. 447; 1 W. P. C. 35.

(*q*) Part iii., tit. Prerog., p. 61.

(*r*) Hawk. P. Cr. part i., c. 79. s.



use of “ *An Art* invented or first brought into the realm by the grantee.”

The words of the excepting clause of the Statute of James I. appear so wide and extensive as to embrace almost the whole domain of the inventive faculty of the human mind, but there are, nevertheless, certain discoveries which may be most highly beneficial to mankind, and yet, for meritorious reasons, are not capable of forming the subject-matter of a valid patent. Moreover, if a part of what the patentee claims as being his invention is not proper subject-matter, it will vitiate the whole and render the grant entirely void.<sup>(s)</sup>

There are some discoveries which are not subject-matter.

Many instances of discoveries which are incapable of protection by letters patent, and the reasons why, will be found in the following pages.

*Classification of Inventions which have been held good Subject-matter of Letters Patent.*

Any invention which possesses all the attributes imposed as conditions by the law—viz., that it is included in the term “new manufactures” as used in the sixth section of the Statute of Monopolies<sup>(t)</sup> and is new and useful—may be the subject of a grant of letters patent.

Not possible to classify all inventions which may be held good subject-matter of future letters patent.

It is not possible to give a classification of inventions, including all which may be held to fall within the definition given in 21 Jac. I. c. 3, s. 6. The difficulty which exists in giving an exhaustive classification of all inventions which could possibly support a grant of letters patent arises from the fact that the arts and manufactures of the country are in a continual state of progression, and consequently desirable results, never before contemplated, are continually presenting themselves, and the most minute changes may constitute new and useful inventions when the possibility of thought, design, and skilful ingenuity having been exercised cannot be excluded.

It may, however, be pointed out that all inventions for which letters patent have hitherto been upheld on the ground of sub-

Classification of inventions which have

<sup>(s)</sup> *Kay v. Marshall*, 8 L. J. C. P. 261 ; 2 W. P. C. 36, 39.

<sup>(t)</sup> 21 Jac. I. c. 3, s. 6.

formed the  
subject-matter  
of letters  
patent  
declared valid.

ject-matter may be classed under one or more of the following heads :—

- I. New contrivances applied to new objects or purposes.
- II. New contrivances applied to old objects or purposes.
- III. New combinations of new or old or partly new and partly old parts which result either in the production of a material object or a process.
- IV. New methods, involving the exercise of invention, of applying old things.
- V. The application with ingenuity of materials previously unapplied to any useful purpose to some one or more specific useful purpose or purposes.
- VI. Chemical processes.

Class I.

1. The first class consists of those inventions which require the greatest amount of ingenuity and talent for their production, for not only is the contrivance new, but the object or purpose aimed at is also new. To this class belong such inventions as that of the electric telegraph or apparatus for transmitting signals by means of electricity, the telephone for carrying the sound of the human voice as a current of electricity, and reproducing it as sound again at the other end of the circuit; the phonograph, an apparatus for storing and reproducing sound; an invention for burning off the superfluous furs and fibres from lace or net without injuring the fabric, made at a time when no means of effectually destroying the furs and fibres of lace were known.

Class II.

2. The second class is by far the largest in point of the number of inventions which it comprises. The production of known objects or ascertained purposes by new, useful, and more economical means is naturally the ground on which most inventors work. It is to be noticed that the application of a new contrivance to an old object or purpose is a very different thing to the application of an old contrivance to a new object or purpose, which is incapable of supporting a patent unless there is some distinct novelty and invention in making the new application.(x)

(x) *Sugg v. Bray*, 2 P. O. R. 233, 239; *Lawrence v. Perry*, 2 P. O. R. 79, 188.

In the words of Tindal C.J.,<sup>(y)</sup> “there can be no doubt whatever that although one man has obtained a patent for a given object, there are many modes still open for other men of ingenuity to obtain a patent for the same object, there may be many roads leading to one place, and if a man has by dint of his own genius and discovery, after a patent has been obtained, been able to give the public, without reference to the former one, or borrowing from the former one, a new and superior mode of arriving at the same end, there can be no objection to his taking out a patent for that purpose. But he has no right whatever to take, if I may so say, a leaf out of his neighbours’ book, for he must be content to rest upon his own skill and labour for the discovery, and he must not avail himself of that which had before been granted to another.”

To this class belong such inventions as that for an improvement in the smelting of iron, consisting only in the use and application of lime and mine rubbish in addition to the means previously adopted, and of which invention Lord Eldon, L.C., said: “There may be a valid patent for a new combination of materials previously in use for the same purpose or for a new method of applying such materials.<sup>(z)</sup>”

3. The third class includes a great number of inventions. Class III. A new combination of old parts may produce a new result, or an old result in a more economical manner or better form. The new result may consist of articles or processes cheaper or better than those known before, in either of which cases the new combination will support a patent.

A process or method in which the new combination consists in nothing more than the omission of a part hitherto thought to be essential is sufficient to support a patent on the ground of subject-matter.<sup>(a)</sup>

To this class belong such inventions as that supported in *Crane v. Price*,<sup>(b)</sup> which invention was a new combination of old parts used in the process of smelting iron, whereby great advantages were gained over the old combination. Before the

<sup>(y)</sup> *Walton v. Potter*, 1 W. P. C. 590.

<sup>(z)</sup> *Hill v. Thompson*, 1 W. P. C. 237.

<sup>(a)</sup> pp. 47, 54, 56.      <sup>(b)</sup> 1 W. P. C. 393, 408.



invention the hot-air blast had been used, and stone coal as fuel had been used, but the two had never been combined until the patentee made the combination and took out a patent for it, which the Court held to be good.

It is perfectly good subject-matter to take that which has been merely a known fact, not applied to any particular use, and apply it to a particular and a useful purpose, and, thereby, produce a new result. Thus, in the case of the telephone, it was known before the patent, and had been stated by Faraday, thirty or forty years ago, that if a metallic plate be oscillated or moved in front of a magnet, each time the plate is moved a current, either positive or negative, according to the direction of motion, is sent through the circuit. The telephone, in its simplest form, is a little plate put in front of a permanent magnet, or an electro-magnet; the plate, when spoken to, vibrates, and sends the current through the circuit, which increases or diminishes the attraction by magnetism to a similar metallic plate at the other end, which thereby reproduces the vibration of the air, which, communicated to the tympanum of the instrument, reproduces the speech. The patent was opposed, on the ground that it was merely an instance of Faraday's law, but the Court of Appeal overruled the objection and decided for the patentee.

Other instances of inventions belonging to this class are the invention of a method of manufacturing iron tubes, *without the use of a mandril*, which had been previously considered necessary, whereby tubes could be produced larger, more uniform, and cheaper than by the old process,<sup>(b)</sup> and the invention of a process of producing gas by a means of the *direct* distillation of oleaginous seeds, which was held good subject-matter notwithstanding the fact that gas had been before produced by the distillation of the oil *expressed* from the same seeds.<sup>(c)</sup>

Class IV.

4. The fourth class includes such inventions as that of Watt for economising the consumption of steam, and, consequently, fuel in the steam-engine, by enclosing the cylinder in a casing

(b) 1 Russel v. Cowley, W. P. C. 459.

(c) Booth v. Kennard, 1 H. & N. 527; 2 H. & N. 84.

of wood or other bad conductor of heat.<sup>(d)</sup> Sieves' invention of "improvements in the manufacture of elastic fabrics applicable to various purposes" is also an example of an invention belonging to this class. The invention consisted in the interweaving into the fabric threads of india-rubber, coated with filamentous material, as warp or weft according to the direction in which it was required to give elasticity to the fabric. The specification stated that the india-rubber threads were stretched to their utmost tension and rendered non-elastic before being introduced into the fabric, and then rendered re-elastic by being heated. In an action for the infringement of this patent,<sup>(e)</sup> Tindal, C.J., delivering the judgment of the Court in favour of the plaintiff, said: "The first objection is, that the invention is not the subject-matter of a patent. . . . The question, therefore, as to this point is, Does it come under the description of 'any manner of new manufacture' which are the terms employed in the Statute of James? That it is a manufacture can admit of no doubt: it is a vendible article, produced by the art and hand of man, and of all the instances that would occur to the mind when inquiring into the meaning of the terms employed in the terms of the statute, perhaps the very readiest would be that of some fabric or texture of cloth. . . . The use of elastic threads or strands of india-rubber, previously covered by filaments wound round them, was known before; the use of yarns of cotton or other non-elastic material was also known before; but the placing them alternately, side by side together as a warp, and combining them by means of a weft, when in extreme tension and deprived of their elasticity, appears to be new; and the result—viz., a cloth, in which the non-elastic threads, form a limit up to which the elastic threads may be stretched, but beyond which they cannot, and, therefore, cannot easily, be broken—appears a production altogether new: it is a manufacture at once ingenious and simple. It is a web combining the two qualities of great elasticity and a limit thereto."

5. As an example of inventions belonging to the fifth class, Class V.

<sup>(d)</sup> *Boulton v. Bull*, 2 H. Bl. 634.

<sup>(e)</sup> *Cornish v. Keene*, 1 W. P. C. 517.



that of Muntz, of an alloy of zinc and copper in certain proportions for coating the bottoms of ships, may be given. In reference to this patent, Tindal, C.J., said: "I look upon it that there is as much merit in discovering the hidden and concealed virtue of a compound alloy of metal as there would be in discovering an unknown quality which a natural earth or stone possessed. We know, by cases that have been determined, that when such unknown qualities have, from the result of experiments, been applied to useful purposes of life, such application has been considered as the proper ground of a patent.(f)

Lister's invention of "improvements in the manufacture of pile fabrics in imitation of sealskin and other similar fabrics," is another instance of an invention belonging to this class. The invention consisted in a new combination of materials for use in the manufacture of the fabrics referred to. The materials consisted of silk and mohair in the raw state—*i.e.*, they were blended previous to spinning. The patentee, as the result of observation of the structure of the natural sealskin and experiments, found that the mixture produced certain beneficial results, existing in the natural article, but not before found in any attempted imitation. Under these circumstances the patent was upheld, on the ground of subject-matter, although it was established in evidence that the very same combination had been well known for years in connection with Bradford dress goods, which consist, however, of a smooth material, quite different from pile fabrics.(g)

## Class VI.

6. The sixth class includes such inventions as that of a process for mixing and treating two or more substances in such proportions and in such manner that by combining chemically they form a new substance which is useful in medicine, or for manufacturing or other purposes—*e.g.*, the preparation of a dye.(h)

Other instances of inventions belonging to this class are Hill's process for purifying coal-gas from sulphuretted hydrogen

(f) *Muntz v. Foster*, 2 W. P. C. 103. R. 3; App. Cas. 1055; *Steinar v. Heald*,  
 (g) *Lister v. Norton*, 3 P. O. R. 199. 6 Exch. 607; *Simpson v. Holliday*, 5  
 (h) See *Bewley v. Hancock*, 6 De G. M. N. R. 340; L. R. 1 E. & I. App. Cas.  
 & G. 391, 402; *Bailey v. Robertson*, L. 315.



by passing the gas over sesquioxide of iron ;(i) Young's process for obtaining illuminating and lubricating oils from certain bituminous mineral substances ;(k) and Higgs' method for treating sewage and precipitating the solid animal and vegetable matter which may be used as manure.(l)

### *Principles.*

A new principle—*i.e.*, an abstract law of Nature, a fundamental law of science—cannot be the subject-matter of a valid patent. Principles are not subject-matter.

Principles may be of the utmost value to mankind, as, for instance, the principle of gravitation or the doctrine of evolution, which have in the hands of their discoverers and others been productive of the greatest usefulness. The law, however, will not attempt to secure to the discoverer the sole use and enjoyment of such a bare principle, nor to prohibit others from making use of it. In the language of Lord Kenyon, it would be difficult to frame a specification of a philosophical principle, it would be something like an idea without a substratum.(m)

Moreover, the very statement of what a principle is proves it not to be a ground for a patent. It is a first ground and rule for arts and sciences, or, in other words, the elements and rudiments of them. A patent must be for some production from those elements, and not for the elements themselves ; for some new manufacture, whether with or without principle, produced by art or accident.(n)

A principle cannot of itself, apart from a practical application, produce any vendible article or manufacture, and therefore, unless the discoverer of a principle points out some practical application of it, it is clear that he cannot give the public the consideration necessary to support a patent—*viz.*, a new and useful manufacture.

(i) *Hills v. The London Gaslight Co.*, 5 H. & N. 312.

(k) *Young v. Fernie*, L. R. 1 E. & I. App. Cas. 63 ; 4 Griff. 577.

(l) *Higgs v. Goodwin*, E. B. & E. 529 ; 27 L. J. Q. B. 421.

(m) *Hornblower v. Boulton*, 8 T. R. 95 ; Dav. P. C. 221 ; see also *Boulton v. Bull*, 2 H. Bl. 463.

(n) *Boulton v. Bull*, Dav. P. C. 196, 198.

Principles, together with a method of applying them, may be subject-matter.

Principles in a concrete form, together with a method of applying them to a new and useful purpose, may form the subject of a grant of letters patent. In other words, a new principle or a new idea as regards any art or manufacture, together with a mode of carrying it into practice, may be patented, though the idea alone, and very likely the machine alone, because the machine might not be new, is not proper subject-matter.<sup>(o)</sup>

Claim to every mode of carrying a principle into effect amounts to a claim to the principle itself.

A claim to every mode of carrying a new principle or idea into effect amounts to a claim for the principle or idea itself,<sup>(p)</sup> and therefore renders the patent void.

Patents for carrying new principles into effect

A patent, however, for carrying a principle which is new into effect, protects the grantee against all other modes of carrying the same principle into effect,<sup>(q)</sup> provided that they can be construed as colourable imitations.<sup>(r)</sup>

When a new principle is applied for the first time, the Court looks very narrowly at what a person does who claims to carry the principle into effect by a means different to that employed by the patent.<sup>(s)</sup>

In order that a patent may secure to the patentee the application of a principle by means different to those described in the specification, the principle itself must be new, and the patentee must sufficiently describe a means of applying it. It is not necessary that the means, as well as the principle, should be new, for the novelty of the invention consists in applying the new principle by the means specified. If, however, not only the principle but the means is also new, then the means may form the subject of a distinct claim, or a separate patent.

Patents for carrying principles which are not new into effect.

If a principle is not new, then a patent for a method of applying it secures to the patentee protection only in respect of the particular method specified, and there may be other

<sup>(o)</sup> *Otto v. Linford*, 46 L. T. N. S. 35; L. R. 18 Ch. D. 394; *Crossley v. Potter*, Macr. P. C. 240.

<sup>(p)</sup> *Neilson v. Harford*, 1 W. P. C. 295; *Booth v. Kennard*, 2 H. & N. 34; 26 L. J. Ex. 23, 305; *Wyeth v. Stone*, Story, 273; *Arnold v. Bradbury*, L. R. 6 Ch. App. 711; *Automatic Weighing Machine Co. v. Knight*, 6 P. O. R. 297.

<sup>(q)</sup> *Jupe v. Pratt*, 1 W. P. C. 146; *Minter v. Wells*, 1 W. P. C. 127; *Househill Co. v. Neilson*, 1 W. P. C.

685; *Otto v. Linford*, 46 L. T. N. S. 35; *Crossley v. Beverley*, 1 W. P. C. 106; *Badische Anilin und Soda Fabrik v. Levenstein*, L. R. 24, Ch. D. 156, 171; *Easterbrook v. The Great Western Ry. Co.*, 2 P. O. R. 201.

<sup>(r)</sup> *Automatic Weighing Machine Co. v. Knight*, 6 P. O. R. 297, 304, 308.

<sup>(s)</sup> *Automatic Weighing Machine Co. v. Knight*, 6 P. O. R. 304; *Automatic Weighing Machine Co. v. Combined Weighing Machine Co.*, 6 P. O. R. 367.



perfectly valid patents in respect of new and different methods of carrying the same principle into effect.(t)

Thus it has been held that finishing hosiery and other goods by pressing them between rollers heated by steam was no infringement of a patent for finishing such goods by pressing them between flat-sided boxes, filled with steam.(u)

In *Jupe v. Pratt*,(x) Alderson, B., in the course of the *Jupe v. Pratt*. argument, laid down the law thus: "You cannot take out a patent for a principle; you may take out a patent for a principle coupled with the mode of carrying the principle into effect, provided you have not only discovered the principle, but invented some mode of carrying it into effect. But then you must start with having invented some 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 piracy of your original invention."

The above expressions of Alderson, B., would at first sight appear to establish the proposition, that if a man has invented a new principle, and shows one method of carrying it into effect, he thereupon becomes entitled to protection against every other possible method of carrying out the new principle. Cotton, L.J., however, has pointed out that the above language of Alderson, B., was used during the discussion of the case, probably to meet something that was said by counsel, and did not express his full opinion. A patentee can prevent any one from using the same method of carrying a new principle into effect, or from using the same thing with only a colourable difference. Where there is a principle first applied in a machine, capable of carrying it into effect, the Court looks more narrowly at those who carry out the same principle, and say they do it by a different mode, and looks

Judgment of Alderson, B., explained by Cotton, L.J.

(t) *Proctor v. Bennis*, 4 P. O. R. 333; L. R. 36 Ch. D. 740; *Automatic Weighing Machine Co. v. Knight*, 6 P. O. R. 113; *Siddell v. Vickers*, 5 P. O. R. 416; *Needham v. Johnson*, 1 P. O. R. 49; *Bovill v. Primm*, 1 Ex. R. 718, 739; *Barber v. Grace*, 1 Ex. R. 339; 17 L. J. Ex. 122; *Jupe v. Pratt*, 1 W. P. C. 145; *Curtis v. Platt*, L. R. 3 Ch. D.

135 n.; *Lister v. Leather*, 8 E. & B. 1004, 1033; *Saxby v. Clunes*, 43 L. J. Ex. 228; *Dudgeon v. Thomson*, L. R. 3 App. Cas. 34; *Nordensfelt v. Gardner*, 1 P. O. R. 61; *Hocking v. Hocking*, 6 P. O. R. 76.

(u) *Barber v. Grace*, 1 Ex. R. 339; 17 L. J. 122.

(x) 1 W. P. C. 145, 146.

to see whether, in effect, although the mode is not exactly the same, it is only a colourable difference—a mechanical equivalent for a substantial part of the patentees invention, being looked upon as a mere colourable difference, and therefore, he being entitled to an injunction against that mode of carrying out his principle, which is only the same in substance as that which he patented, though there are colourable differences.(y)

Neilson v.  
Harford.

The patent, the validity of which was questioned in *Neilson v. Harford*,(z) was for an improved method of applying air to produce heat in furnaces, and the specification stated that “a blast or current of air must be produced by blowing apparatus in the ordinary way. The blast so produced is to be passed from the blowing apparatus into an air vessel, and from that vessel, by means of a pipe, into the furnace. The air vessel must be kept artificially heated at a considerable temperature. It is better to be kept to a red heat, or nearly so, but so high a temperature is not absolutely necessary to produce a beneficial effect. The size of the air vessel must depend upon the blast and on the heat necessary to be produced. *The form or shape of the vessel, or receptacle, is immaterial to the effect, and may be adapted to the local circumstances or situation.*” There was no separate claim. The defendants contended that the patent was bad, as being for a principle only, but the Court of Exchequer, after much debate, came to the conclusion that it claimed not only a principle, but also a practical means of carrying the principle into effect—viz., heating the air in a separate vessel, and was therefore good.

Househill  
Company v.  
Neilson.

Judgment of  
Clerk-Hope,  
L.J.

In the *Househill Company v. Neilson*,(a) the validity of the patent forming the subject of the action last referred to again came under consideration, and Lord Justice Clerk-Hope is reported (b) to have said: “It is quite true that a patent cannot be taken out solely for an abstract philosophical principle—for

(y) See judgment of Cotton, L.J., *Automatic Weighing Machine Co. v. Knight*, 6 P. O. R. 304-305; see also *Automatic Weighing Machine Co. v.*

*Combined Weighing Machine Co.*, 6 P. O. R. 367.

(z) 1 W. P. C. 295, 328, 331.

(a) 1 W. P. C. 673.

(b) 1 W. P. C. 683.



instance for any law of Nature, or any property of matter, apart from any mode of turning it to account in the practical operations of manufacture, or the business, and arts, and utilities of life. The mere discovery of such a principle is not an invention in the patent law sense of the term. Stating such a principle in a patent may be a promulgation of the principle, but it is no application of the principle to any practical purpose. And without that application of the principle to a practical object and end, and without the application of it to human industry, or to the purposes of human enjoyment, a person cannot in the abstract appropriate a principle to himself. But a patent will be good, though the subject of the patent consists in the discovery of a just, general, and most comprehensive principle in science or law of Nature, if that principle is by the specification applied to any special purpose, so as thereby to effectuate a practical result and benefit not previously attained. The main merit, the most important part of the invention, may consist in the conception of the original idea—in the discovery of the principle in science, or of the law of Nature, stated in the patent—and little or no pains may have been taken in working out the best manner and mode of the application of the principle to the purposes set forth in the patent. But still if the principle is stated to be applicable to any special purpose, so as to produce any result previously unknown, in the way and for the objects described, the patent is good. It is no longer an abstract principle. It comes to be a principle turned to account to a practical object, and applied to a special result. It becomes, then, not an abstract principle, which means a principle considered apart from any special purpose or practical operation, but the discovery and statement of a principle for a special purpose, that is, a practical invention, a mode of carrying a principle into effect. That such is the law, if a well-known principle is applied for the first time to produce a practical result for a special purpose, has never been disputed. It would be very strange and unjust to refuse the same legal effect, when the inventor has the additional merit of discovering the principle as well as its application to a practical object. The instant that the prin-

ciple, although discovered for the first time, is stated, in actual application to, and as the agent of, producing a certain specified effect, it is no longer an abstract principle, it is then clothed with the language of practical application, and receives the impress of tangible direction to the actual business of human life."

*Dangerfield v. Jones.*

In *Dangerfield v. Jones*,<sup>(c)</sup> a patent for a mode of bending wood for the handles of walking sticks, &c., in which the claim was "the application of a flame of gas or other combustible fluid or liquid as described for softening the fibres of the wood while being bent in combination with a clamping apparatus for securing the wood in its bent form until the fibres are set, so that the work may remain permanent as herein set forth," was declared to be perfectly valid. Vice-Chancellor Wood, before whom the case was tried, saying: "If, having a particular purpose in view, you take the general principles of mechanics, and apply one or other of them to a manufacture to which it has never been before applied, that is a sufficient ground for taking out a patent, provided that the Court sees that that which has been invented is new, desirable, and for the public benefit."<sup>(d)</sup>

Judgment of Wood, V.C.

*Minter v. Wells.*

In *Minter v. Wells*,<sup>(e)</sup> on motion to nonsuit the plaintiff who had succeeded in an action against the defendant for infringement of a patent in the specification of which Minter 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 counterbalance to the pressure against the back of such chair, as above described," the defendant contended that Minter had claimed the principle of the lever, but the Court held that it was the application of a self-adjusting leverage to the back and seat of a chair, the patentee having described what that self-adjusting leverage was. And it was further held that any application of a self-adjusting leverage to the back and seat of a chair producing this effect, that the one acts as a counterbalance to the pressure against the other, would be an infringement of the patent, and it was not a leverage only, but the application of a self-adjusting leverage; and it was not a self-adjusting leverage only, but a self-adjusting leverage producing a particular effect, by means

<sup>(c)</sup> 13 L. T. N. S. 142.  
<sup>(e)</sup> 1 W. P. C. 134.

<sup>(d)</sup> *Ibid.*



of which the weight on the seat counterbalanced the pressure against the back. Parke, B., in reply to the statement that this was nothing more than one of the first principles of mechanics, observed: "But that not being in combination before cannot that be patented? It is only for the application of a self-adjusting leverage to a chair—cannot he patent that? He claims the combination of the two, no matter in what shape you may combine them, but if you combine the self-adjusting leverage, which he thus applies to the subject of a chair, that is an infringement of his patent."

In *The Electric Telegraph Company v. Brett* (*f*) the patentees claimed, substantially: (1) "We wish it to be understood that we make no claim to the application of the multiplying coils of conducting wires herein described (meaning thereby the galvanometer coils and magnetic needles), but the improvement and the adaptation of magnetic needles for giving signals consists in disposing the needles in vertical planes with fixed horizontal axes, making them heavier at one end than the other, so that they hang perpendicularly, and limiting the angular motion by stops, against which the needles may rest in suitable inclining directions for pointing out on a vertical dial the signification of the signals. (2) The combining several needles, so as to give signals by determinate angular motions. (3) The improvement whereby the complete apparatus for giving signals and sounding alarms, as described, may have duplicates of such apparatus at intermediate places between the two ends, all such duplicates operating simultaneously with each other." In the judgment, Cresswell, J., said: "It was insisted that the giving of duplicate signals at intermediate stations was not the proper subject of a patent, being an idea or principle only, and not a new manufacture. But we think that the patentees not only communicated the idea or principle that duplicate signals might be given, but showed how it might be done—*i.e.*, by duplicate apparatus at each station—and that this is a fit subject of a patent."

*The Electric  
Telegraph Co.  
v. Brett.*

*Judgment of  
Cresswell, J.*

In *Patterson v. The Gas Light and Coke Company*, (*g*) James, J., said: "The subject-matter of the patent is a new and useful improvement in the construction of gas lamps, and is not a mere idea or principle."  
*Patterson v.  
The Gas Light*

(*f*) 10 C. B. 838; 20 L. J. C. P. 123.

(*g*) L. R. 2 Ch. D. 812; affirmed by House of Lords, 3 App. Cas. 239.

and Coke Com-  
pany.

Judgment of  
House of  
Lords de-  
livered by  
James, L.J.

L.J., delivering the judgment, in reference to a claim for "the employment of sulphide of calcium in separate purifiers as a means of purifying coal-gas from sulphur existing in other forms than that of sulphuretted hydrogen," said: "There is nothing in this but the enunciation of a chemical truth that pure sulphide of calcium will absorb the sulphur compounds. The plaintiff believed that he had discovered that chemical truth, although it had been taught for many years in many books, and was well known to chemists. There is no invention of any particular process or means of employing the pure sulphide of calcium. If pure sulphide of calcium is to be used, it must be used in some separate purifier, and there is nothing therefore in any previous part of the specification to limit the universality of the claim to the employment of sulphide of calcium for the removal of sulphur in other forms than sulphuretted hydrogen. It is obviously impossible to support such a claim as that, which was plainly based on the plaintiff's mistaken idea that he had discovered that peculiar property in sulphide of calcium."

In *Otto v. Linford*,<sup>(i)</sup> Jessel, M.R., said: "The first objection is that this is not the subject-matter of a patent, because it is said that what is claimed is a principle . . . or, as it is sometimes termed, the idea of putting a cushion of air between the explosive mixture and the piston of the gas motor engine, so as to regulate, detain, or make gradual what would otherwise be a sudden explosion. Of course 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 by one or other of these machines. That is the subject of a patent. If you have a new principle, or a new idea, as regards any art or manufacture, and then show a mode of carrying that into practice, you may patent that, though you could not patent the idea alone, and very likely could not patent the machine alone, because the machine alone would not be new. One of the strongest illustrations that I know of is the patent

(i) 46 L. T. N. S. 35; L. R. 18 Ch. D. 394.



for the hot blast in the iron manufacture, where there was nothing new at all except the idea that the application of hot air instead of cold air to the mixture of iron ore and fuel would produce most remarkable results in the shape of economy in the manufacture of iron. The inventor or discoverer could not patent that, but what he did was this. He said: 'I will patent that idea in combination with the mode of carrying it out; that is, I tell you you may heat your air in a closed vessel next your furnace, and then that will effect the object.' It was held that that would do. . . . Now that is a much stronger illustration than this of the validity of a patent as regards the subject-matter. For here is a complicated machine. . . . In the case of the hot blast the man did not pretend to invent anything; he said a machine of any shape in which you can heat air is sufficient. Mr. Otto does allege he has invented a machine. It appears that he did, although a machine which, *per se*, was not of sufficient novelty probably to support a patent. It comes therefore to this, that we have a principle and a mode of carrying it out, and, I will assume for this purpose, sufficiently described, and that is good subject-matter for a patent."

### *Processes.*

The proposition that a method or process of itself and apart from the thing produced, or result, can be the subject-matter of a valid patent, was finally established by the decision in *Crane v. Price*,<sup>(k)</sup> in 1842.

Processes are subject-matter.

For some time prior to that decision there were many cases and dicta of the judges indicating the general opinion that grants made in respect of such subject-matter were not invalid.

Abbott, C.J., in delivering the judgment of the Court in *R. v. Wheeler*,<sup>(l)</sup> said, that the word "manufacture" "may perhaps extend to a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a

<sup>(k)</sup> 4 M. & G. 580; 1 W. P. C. 393; 12 L. J. C. P. 81.

<sup>(l)</sup> 2 B. & Ald. 345.

cheaper or more expeditious manner, or of a better or more useful kind.”

Boulton v.  
Bull.

In *Boulton v. Bull*,<sup>(m)</sup> the Court was divided in opinion, but Eyre, C.J., made the following remarks: “When the effect produced is some new substance or composition of things, it would seem that the privilege of the sole working or making ought to be for such new substance, or composition, without regard to the mechanism or process by which it has been produced, which, though perhaps also new, will be only useful as producing the new substance. When the effect produced is no substance or composition of things, the patent can only be for the mechanism, if new mechanism is used, *for the process, if it be a new method of operating*, with or without old mechanism, by which the effect is produced.

“It was admitted in the argument at the bar that the word “*manufacture*” in the statute<sup>(n)</sup> was of extensive signification, that it applied not only to principles carried into practice in a new manner, to new results of principles carried into practice. Let us presume this admission. Under things made we may class in the first place, new compositions of things, such as manufactures in the most ordinary sense of the word; secondly, all mechanical inventions, whether to produce old or new effects, for a new piece of mechanism is certainly a thing made. Under the practice of making we may class all new artificial manners of operating with the hand, or with instruments in common use, new processes in any art producing effects useful to the public. In the list of patents with which I have been furnished, there are several for new methods of manufacturing articles in common use, where the sole merit and the whole effect produced are the saving of time and expense, and thereby lowering the price of the article and introducing it into more general use. Now I think these methods may be said to be new manufactures.” And again, the same learned judge in reference to the patent, said, “The patent cannot be for the effect produced, for it is either no substance at all, or what is exactly the same thing as to the question upon a patent, no new substance, but an old one produced advantageously for the public. It cannot be for the

<sup>(m)</sup> 2 H. Bl. 463.

<sup>(n)</sup> 21 Jac. 1. c. 3.



mechanism, for there is no new mechanism employed ; it must then be for the method ; and I would say, in the very significant words of Lord Mansfield, in the great case of the copyright,<sup>(o)</sup> it must be for the method detached from all physical existence whatever.”

*Hall v. Jarvis*,<sup>(p)</sup> decided that though the application of the flame of oil to remove the superfluous fibres from lace and other goods was a mere process, yet a patent for this invention could be upheld on the ground of subject-matter. Hall v. Jarvis.

In *Hill v. Thompson*,<sup>(q)</sup> Lord Eldon, L.C., stated that, “there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials.” In *Morgan v. Scaward*,<sup>(r)</sup> Park, B., said that the word “manufacture” in the statute<sup>(s)</sup> must be construed in one of two ways ; it may mean the machine when completed, or the mode of constructing the machine ; and in *Gibson v. Brand*,<sup>(t)</sup> Tindal, C.J., pointed out that it was not necessary in that case to go into the question whether or not a patent can be supported for a process only. If the specification were properly prepared it probably might be considered a fit subject for a patent. Hill v. Thompson.  
Gibson v. Brand.

*Crane v. Price*,<sup>(u)</sup> tried in 1842, finally settled the question. In this case the patent related to the use of anthracite or stone coal, in conjunction with a hot-air blast, for the smelting of iron, and the claim was in the following terms : “The application of anthracite or stone coal combined with the using of a hot-air blast in the smelting and manufacture of iron.” In delivering the judgment of the Court of Common Pleas, Tindal, C.J., said : “The question becomes this, whether admitting the using of the hot-air blast to have been known before in the manufacture of iron with bituminous coal, and the use of anthracite or stone coal to have been known before in the manufacture of iron with the cold blast, but that the combination of the two together (the hot-air blast and the anthracite) was not known before in Crane v. Price,  
decided that a  
process alone  
may be sub-  
ject-matter.  
Judgment of  
Tindal, C.J.

(o) 4 Bun. 2397.

(p) 1 W. P. C. 150, approved in *Losh v. Hagne*, 1 W. C. P. 207, and *Crane v. Price*, 5 M. & G. 580 ; 1 W. P. C. 393 ; 12 L. J. C. P. 81.

(q) 1 W. P. C. 237.

(r) 2 M. & W. 544 ; 1 W. P. C. 171.

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

(t) 4 M. & G. 179 ; 1 W. P. C. 627.

(u) 4 M. & G. 580 ; 1 W. P. C. 393 ; 12 L. J. C. P. 81.

the manufacture of iron—such combination can be the subject of a patent. We are of opinion that, if the result produced by such a combination is either a new article, or a better article, or a cheaper article to the public than that produced before by the old method, such combination may well become the subject of a patent.”

It is sometimes objected that to speak of a patentable process is in reality a misuse of terms, for the subject of the patent is *a manufacture according to a new process*, and therefore a new manufacture. To take the above case of *Crane v. Price*,<sup>(x)</sup> the subject there was the manufacture of iron by a new process—*i.e.*, the combination of a hot-air blast and anthracite in the furnace.

This idea seems to have been in the mind of Pollock, C.B., when he gave judgment in *Stevens v. Keating*,<sup>(y)</sup> and made use of the words “the real invention may be, not so much the thing when produced, as 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, but produced by a different process. In one sense, an old substance produced by a new process is a new manufacture, of that there cannot be a doubt, and therefore, although the language of the Act has been said to apply only to manufactures and not to processes, when you come to examine, either literally, or even strictly, it appears to me the expression ‘manufacture’ is free from objection, because though an old thing, if made in a new way, the very making of it in a new way makes it a new manufacture, therefore, although I think this is a patent for the process rather than the product, I think it may be a patent for the product.”

Bearing in mind, however, the very wide interpretation given to the word “manufacture” as used in the Act of James I., the exposition of which term, “as far as usage will expound it, has gone very much beyond the letter”<sup>(z)</sup> the above excuse by way of explanation becomes unnecessary. For instance the word “manufacture” has a very wide and extended meaning, and may be interpreted “invention”<sup>(a)</sup> and it includes both process

<sup>(x)</sup> 2 M. & G. 580.

<sup>(y)</sup> 2 W. P. C. 182.

<sup>(z)</sup> Eyre, C.J., in *Boulton v. Bull*, 2 H. Bl. 463.

<sup>(a)</sup> *Cornish v. Keen*, 1 W. P. C. 508.



and result.(b) Lord Westbury, in discussing the meaning of the word, said, "By the large interpretation given to the word 'manufacture,' it not only comprehends productions, but it also comprehends the means of producing them. Therefore, in addition to the thing produced it will comprehend a new machine, or a new combination of machinery; it will comprehend a new process or an improvement of an old process."(c)

"Manufacture" comprehends productions and the means of producing them.

A reference to the cases will show that patents have again and again been granted and held valid for processes pure and simple. For example, the application of a known detonating powder to the discharge of known kinds of fire-arms was held (d) to be a patentable invention. And (e) a patent was granted and upheld for the application of metal plates made in a known way to ships and buildings, for the purpose of protecting them against fire, by preventing the access of air.

Letters patent have often been granted and held valid for processes pure and simple.

In the case of the *Electric Telegraph Company v. Brett*,(f) a patent was upheld for a method of giving duplicate signals at intermediate stations; and again in a case (g) in which the patent was for improvements in apparatus employed in laying down submarine telegraph wires, and the claim was, "First, coiling the wire or cable round a cone; secondly, the supports placed cylindrically outside the coil round the cone; thirdly, the use of the rings in continuation with the cone as described," the Court declared the patent valid, and overruled the objection that the invention claimed was merely a mode of coiling and paying out cables, and not a new manufacture, and therefore incapable of being the subject-matter of a patent.

A new process which consists merely in the omission of a step hitherto thought to be important from an old process will support a patent.

Process which consists merely in the omission of a step in a former process.

Thus a process for the manufacture of gelatine by cutting hides into thin slices and then submitting them in that state to the action of caustic alkali, whereby the use of blood, as in the method previously used, was rendered unnecessary, was declared to be the subject-matter for a valid patent.(h)

(b) *Rush v. Fox*, Macr. P. C. 176.

(c) *Ralston v. Smith*, 11 H. L. C. 223.

(d) *Forsyth v. Riviere*, 1 Carp. Rep. 401.

(e) *Hartley's Patent*, 1 W. P. C. 54.

(f) 1 C. B. 838.

(g) *Newall v. Elliott*, 13 W. R. 11.

(h) *Wallington v. Dale*, 7 Exch. 888.

And vegetable gas having been obtained from oils which were separated from seeds and other oleaginous substances by pressure, the discovery that the same gas might be distilled at once from the seeds, &c., without separating the oils, was held to be fit subject-matter for a patent,<sup>(i)</sup> though the patent was upset on other grounds.

Processes for arriving at new results.

When a person has discovered a process for arriving at a new result not known before, and in his specification there is described one means which is effectual for the purpose of arriving at that result, new at the time when the patent is taken out, the patentee will be protected against all other analogous processes for arriving at the same result, and no one can without infringing his patent adopt simply a different process to achieve the same result.<sup>(k)</sup> Where, on the other hand, a patent is obtained for a process for arriving at what at the date of the patent is a known result, any other person may obtain another patent for any new process for arriving at the same result; or he may use any other process without infringing the patent first taken out.<sup>(l)</sup>

Processes for arriving at known results.

Lord Westbury, L.C., laid down the law thus: "It is extremely desirable that when a beneficial idea has been stated by one man he should have the benefit of his invention, and that it should not be curtailed or destroyed by another man simply improving upon the idea; but if the idea be nothing in the world more than the discovery of a road to attain a particular end, it does not at all interfere with another man discovering another road to attain that end, any more than it would be reasonable to say that if one man has a good road to go to Brighton by Croydon, another man shall not have a road to go to Brighton by Dorking."<sup>(m)</sup>

<sup>(i)</sup> Booth v. Kennard, 1 H. & N. 527.

<sup>(k)</sup> Jupe v. Pratt, 1 W. P. C. 145; The Househill Co. v. Neilson, 1 W. P. C. 673; Curtis v. Platt L. R. 3 Ch. D. 135 n.; L. R. 1 H. L. 337; The Badische Anilin und Soda Fabrik v. Levinstein, 2 P. O. R. 89; 4 P. O. R. 449; 6 P. O. R. 387; Proctor v. Bennis, 4 P. O. R. 333; L. R. 36 Ch. D. 740; 57 L. J. Ch. 11; Automatic Weighing Co. v. Knight, 6 P. O. R. 304.

<sup>(l)</sup> Jupe v. Pratt, 1 W. P. C. 145; The Househill Co. v. Neilson, 1 W. P.

C. 673; Curtis v. Platt, L. R. 3 Ch. D. 135 n.; L. R. 1 H. L. 337; The Badische Anilin und Soda Fabrik v. Levinstein, 2 P. O. R. 89; 4 P. O. R. 449; 6 P. O. R. 387; Proctor v. Bennis, 4 P. O. R. 333; L. R. 36 Ch. D. 740; 57 L. J. Ch. 11; Gosnell v. Bishop, 5 P. O. R. 158; Bovill v. Primm, 11 Exch. 718, 739; Barber v. Grace, 1 Exch. 339; 17 L. J. Exch. 122; Automatic Weighing Machine Co. v. Knight, 6 P. O. R. 304.

<sup>(m)</sup> Curtis v. Platt, L. R. 3 Ch. D. 139 n.



The question has arisen<sup>(n)</sup> whether a patent can be granted for a product. The point has not been decided, though Kekewich, J.,<sup>Can there be a patent for a product?</sup> has expressed an opinion that a patent for a product would be bad, whilst, on the other hand, Cotton and Bowen, L.JJ., have refused to acquiesce in this statement of the law, and seem to incline to the view that such a patent might be good. Fry, L.J., refrained from passing any opinion on the point.

It is submitted that the term "patent for a product" is ambiguous, as it may mean (i) a patent for a product pure and simple, apart from the art by the exercise of which it is produced; (ii) the art by the exercise of which the product is produced.

All inventions capable of forming the subject-matter of letters patent, as falling within the meaning of the words, "the working or making of any manner of new manufactures,"<sup>(o)</sup> consist either in new applications or new adaptations of matter, and may be divided into two classes: (i) those in which the result or effect produced is the real subject-matter, (ii) those in which the mode of attaining the result is the real subject-matter.

It would appear, therefore, that a product, apart from the art by the exercise of which it is produced, cannot be the subject-matter of letters patent, for it is not "the working or making of any manner of new manufactures" within the meaning of the Statute of Monopolies; whereas a means or method resulting in a product has often been held fit subject-matter.

The question arises, If a means or method result in a *new* product, does the patent secure to the patentee protection against all other means or methods resulting in the new product? It is submitted that such is not the case,<sup>(p)</sup> as in the analogous instance of a patent for the application of a new principle.<sup>(q)</sup> It would appear that a patent for a means or method resulting in a *new* product is no wider in its scope than one resulting in an *old* product, excepting that in the former case the Courts look very closely at the acts of one who claims to arrive at the *new* product by a means different to that employed by the patentee.<sup>(r)</sup>

<sup>(n)</sup> See *Vorwerk v. Evans*, 7 P. O. R. 167, 265.  
<sup>(o)</sup> Pp. 23, 24 *ante*.

<sup>(p)</sup> p. 48 *ante*.  
<sup>(q)</sup> p. 36 *ante*.  
<sup>(r)</sup> See p. 36 *ante*.

*Combinations.*

Combination of two or more new or old, or partly new and partly old, parts may be subject-matter.

The art of combining two or more parts, whether they be new or old, or partly new and partly old, so as to obtain a new result, or a known result in a better, cheaper, or more expeditious manner, is valid subject-matter of letters patent, if it is presumable that thought, design, or skilful ingenuity were necessary to make the combination.

In fact, many of the most important inventions, from a practical and commercial point of view, are inventions of this kind, being merely the combination in a new way of new or old, or partly new and partly old, parts.

*Ratio decidendi* for holding letters patent for combinations valid.

The *ratio decidendi* for holding valid such grants of letters patent is, that there is sufficient evidence of the presumption of thought, design, or skilful ingenuity in the invention and novelty in the combination.(s)

Not every novelty is good subject-matter.

It is true that every invention capable of supporting a patent must be a new manufacture, but it does not follow that every novelty, though an important and useful one, is good subject-matter. In order to support a patent the novelty must be the possible outcome of thought, design, or skilful ingenuity.

Presumption of the exercise of thought, design or skilful ingenuity necessary to support patent.

It is not however necessary that either thought, design, or skilful ingenuity must have actually been expended in making the invention, for the discovery may have been the outcome of a mere guess or happy accident. Thus, the discovery of water tabbies was made by mere accident. A man having spat upon the floor, placed his hot iron on it, and observed that it spread out into a kind of flower. He afterwards tried the experiment upon linen, and found it produced the same effect. He then obtained a patent which proved valuable.(t)

(s) *Boulton v. Bull*, 2 H. & Bl. 487; *Dav. P. C.* 199; *Bovill v. Moor*, 2 Coop. App. Cas. 56; *Dav. P. C.* 361; 2 Marsh, R. 211; *Brunton v. Hawkes*, 4 B. & Ald. 541; *Huddart v. Grimshaw*, *Dav. P. C.* 265; 1 *W. P. C.* 85; *Lister v. Leather*, 8 E. & B. 1004; 27 L. J. Q. B. 295; *Hill v. Thompson*, 1 *W. P. C.* 237; *Lewis v. Davis*, C. & P. 502; 1 *W. P. C.* 488; 1 *Carp. P. C.* 471; *Saunders v. Aston*, 1 *Carp. P. C.* 510; *Carpenter v. Smith*, 1 *W. P. C.* 538; *Allen v. Rawson*, 1 C. B. 551; *Bovill v.*

*Keyworth*, 7 E. & B. 725; 29 L. T. 194; *Spencer v. Jack*, 3 De G. J. & S. 346; 11 L. T. N. S. 242; *Morton v. Middleton*, 1 Court of Session, 3rd series, 721; *Foxwell v. Bostock*, 4 De G. J. & S. 298; *Wright v. Hitchcock*, L. R. 5 Ex. 37; 39 L. J. Ex. 97; *Murray v. Clayton*, L. R. 7 Ch. 570; *Watling v. Stevens*, 3 P. O. R. 37; *Moseley v. Victoria Rubber Co.*, 4 P. O. R. 251.

(t) *Liardet v. Johnson*, 1 *W. P. C.* 54; see also 2 H. Bl. 486; *Crane v. Price*, 1 *W. P. C.* 411.



If the alleged invention is obvious, and it cannot be presumed that the exercise of thought, design, or skilful ingenuity was required in making it, the patent is void, on the ground of lack of subject-matter.<sup>(u)</sup>

In point of law the labour of thought or experiment, and the expenditure of money, are not the essential grounds of consideration on which the question whether the invention is or is not the subject-matter of a patent, ought to depend; for if the invention be new, and useful to the public, it is not material whether it be the result of long experiment and profound search, or of some sudden and lucky thought, or mere accidental discovery.<sup>(v)</sup>

Not material whether invention be the result of experiment and search or of accidental discovery.

The conception of the idea is, in many cases, the whole merit of the invention; and its application, when once conceived, becomes the simplest thing in the world, and, consequently, does not evidence the expenditure of thought, design, or skilful ingenuity.

Conception of the idea is in many cases the whole novelty.

The question whether any alleged invention is proper subject-matter, depends, not on whether it was the result of thought, design, or skilful ingenuity, but whether it is possible that it could have required the exercise of thought, design, or skilful ingenuity, to arrive at the result claimed by the patentee—*e.g.*, a new combination which consists merely in putting together two inventions without making any other experiment, or gaining any further information, is not proper subject-matter.<sup>(w)</sup>

The merit of a new combination very much depends on the result produced. When a very slight alteration turns that which was practically useless into what is useful and important, the Courts consider that, though the invention was apparently small, yet the result being the difference between

Merit of a combination depends much on the result produced.

<sup>(u)</sup> *White v. Toms*, 32 L. J. Ch. 204; *Britain v. Hirsch*, 5 P. O. R. 74, 226; *Jackson v. Needle*, 2 P. O. R. 191; *Sharp v. Bauer*, 3 P. O. R. 193; *Guilbert-Martin v. Kerr*, 4 P. O. R. 18; *Rowellie v. Longford Wire Co.*, 4 P. O. R. 281; *Haslam v. Hall*, 5 P. O. R. 21; *Longbottom v. Shaw*, 5 P. O. R. 497; 6 P. O. R. 143; *Goulard & Gibb's Patent*, 5 P. O. R. 525; *Herrburger v. Squire*, 6 P. O.

R. 194; *Morgan v. Windover*, 7 P. O. R. 131.

<sup>(v)</sup> Per Tindal, C.J., *Crane v. Price*, 1 W. P. C. 411.

<sup>(w)</sup> *Saxby v. Gloucester Waggon Co.*, L. R. 7 Q. B. D. 305; 50 L. J. Q. B. 577; *Williams v. Nye*, 7 P. O. R. 62; *Ormsom v. Clarke*, 13 C. B. 339; 14 C. B. 490.

failure and success, it is fit subject-matter.(x) Thus, the mere placing of two flat wicks parallel to each other in an oil lamp, two concentric round wicks having been previously combined, and flat wicks being perfectly well known, has been held sufficient to merit a patent;(y) so also has the substitution of a filament carbonized before formation in an incandescent electric lamp;(z) and the alteration in the shape of the handle of a tennis racket.(a)

In the words of Tindal, C.J.,(b) there are numerous instances of patents which have been granted where the invention consisted in no more than in the use of things already known and acting with them in a manner already known, and producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public.(c)

Crane v. Price.

In *Crane v. Price*(d) a patent for a new combination of the use of the known hot-air blast with the use of the known anthracite or stone-coal in the process of smelting iron was declared valid by Tindal, C.J. James, L.J., in the case of *Murray v. Clayton*,(e) took objection to the use of the word "combination" by Tindal, C.J., in *Crane v. Price*, but agreed with the principle of the decision of the learned Chief Justice in the following words: "No doubt this case (*Crane v. Price*) has been questioned, but, if I may be permitted to say so, with all respect to the very powerful tribunal which decided that case, I have never been satisfied with the decision. That, however, is simply because I could not see how the word "combination" could be properly applied to the introduction of a particular kind of fuel into a machine which had been patented for the use of every kind of fuel in the making of iron; and neither I, nor, so far as I am aware, any other

(x) *Hinks v. Safety Lighting Co.*, L. R. 4 Ch. D. 615; *Re Bell's Patent*, 1 Moo. P. C. N. S. 49; *Wallington v. Dale*, 7 Exch. 888; *Moss v. Malings*, 3 P. O. R. 373; *Edison v. Woodhouse*, 4 P. O. R. 79.

(y) *Hinks v. Safety Lighting Co.*, L. R. 4 Ch. D. 615.

(z) *Edison v. Woodhouse*, 4 P. O. R. 92; *Edison v. Holland*, 6 P. O. R. 243.

(a) *Moss v. Malings*, 3 P. O. R. 373.

(b) *Crane v. Price*, 4 M. & G. 580; 1 W. P. C. 408.

(c) *E.g.*, *Hull's Patent*, 1 W. P. C. 97; *Derosne's Patent*, 1 W. P. C. 152; *Hill's Patent*, 3 Mer. 629; *Daniell's Patent*, *Godson*, Pat. 274.

(d) 4 M. & G. 580; 1 W. P. C. 393; 12 L. J. C. P. 81.

(e) L. R. 7 Ch. 570; L. R. 15 Eq. 115; 21 W. R. 498, 42 L. J. Ch. 191.



judge, has ever questioned the principles upon which that case was decided."

In *Hayward v. Hamilton*,<sup>(f)</sup> a patent for an improved pavement light was upheld by the Court of Appeal, under the following state of facts: pavement lights, prior to the date of the patent, had been made by fastening in an iron frame by certain ledges, certain lumps of glass of a rhomboidal or rectangular form, or sometimes in a bull's-eye shape. It occurred to the inventor that it would be a very good thing to take prisms such as were used in a camera obscura, and put the prism forms into an old iron frame, fitted in the old way. The consequence of this arrangement was that the perpendicular rays of light falling upon the horizontal surface were reflected from the inclined surface, and were so caused to enter into a room, cellar, or any other place that it was desired to illuminate. It was proved in evidence that prisms had been used as deck lights in ships, in cameras, and that a man named Darke had put one in the shutter for the purpose of directing an intense pencil of light to fall upon his work, whilst doing some fine metallic work, the rest of the room being dark. The Court of Appeal upheld Hayward's patent, on the ground that his pavement light was a new manufactured thing, and though all the parts were old, the introduction of the old prism constituted a new and improved result, and the combination was good subject-matter.

*Hayward v.  
Hamilton.*

The judgment of Bramwell, L.J., contains the following passage: "It seems to me that the plaintiff really is an inventor; he has found out something. He makes an article that was not made before. This particular case may be in doubt, upon the verge, but one cannot help making this remark, that it is very strange, if it is no invention, that it has never been done before. Why has it never been done before? Why, because nobody had found it out, which I take to be equivalent to invention."

It is true that where there is a long unsatisfied demand, <sup>Long unsatisfied demand</sup>

(f) Griff. P. C. 115.

presumes  
ingenuity and  
invention ;

and an article suddenly springs into existence which meets the demand, the length of time during which the demand was unsatisfied is matter from which it may be inferred that it is ingenuity alone which has enabled the inventor to surmount the obstacle, which otherwise would seem, from the mere existence of the long unsatisfied demand, to have existed somewhere, or in some shape.

but the  
demand itself  
may be new  
and its supply  
be obvious.

The fact, however, must not be overlooked that the demand itself may be quite new, and the novelty of the demand may have produced immediately, and without any operation of ingenuity, an obvious article to satisfy it, which consequently could not be good subject-matter.(g)

A new combination of materials previously in use for the same purpose, or a new method of applying such materials, will support a patent, but the inventor must claim only the new combination, under pain of vitiating his grant.(h)

Combination  
may consist of  
all old, or of  
some new and  
some old, or of  
all new parts.

Each of the parts of which the combination consists may, in itself, be old,(i) or some of the parts may be old and some new,(j) or the whole of the parts may be new.(k)

If combination  
consist of  
some new, or  
of all new,  
parts, the  
patentee may  
as well as  
claiming the  
combination,  
claim the new  
parts sepa-  
rately, or obtain  
separate  
patents in  
respect of  
them.

If a new combination consists of some new parts, together with others which are old, or entirely of new parts, the patentee may claim as his invention the combination as a whole, and also each of the new parts separately, but a claim to the combination will not entitle him to a new part separately, nor will a claim to a new part separately entitle him to the combination.(l)

A new combination which will support a patent may consist merely in the omission of something from an old combination,

(g) Gosnell v. Bishop, 5 P. O. R. 158 ; American Braided Wire Co., v. Thompson, 5 P. O. R. 125 ; Blakey v. Latham, 6 P. O. R. 187.

(h) Hill v. Thompson, 8 Taunt. 375 ; 3 Mer. 622 ; 1 W. P. C. 232 ; Chap. V.

(i) Lister v. Leather, 8 E. & B. 1004 ; 27 L. J. Q. B. 295 ; Bovill v. Moor, 2 Coop. App. Cas. 56 ; Dav. P. C. 361 ; 2 Marsh R. 211 ; Bovill v. Keyworth, 7 E. & B. 725 ; 3 Jur. N. S. 817 ; Crane v. Price, 4 M. & G. 580 ; 1 W. P. C. 377 ; 12 L. J. C. P. 81.

(j) Potter v. Parr, 2 B. & S. 216 n. ; Harrison v. Anderston Foundry Co., L.

R. 1 App. Cas. 574 ; Clark v. Adie, L. R. 2 App. Cas. 327 ; Nordenfelt v. Gardner, 1 P. O. R. 61.

(k) Lister v. Leather, 2 El. & Bl. 1004 ; Clark v. Adie, L. R. 2 App. Cas. 327.

(l) Chap. V. ; Lister v. Leather, 8 El. & Bl. 1004 ; 27 L. J. Q. B. 295 ; Foxwell v. Bostock, 12 W. R. 723 ; 4 De G. J. & S. 298 ; Harrison v. Anderston Foundry Co., L. R. 1 App. Cas. 574 ; Clark v. Adie, 2 App. Cas. 328 ; Westinghouse v. Lancashire and Yorkshire Ry. Co., 1 P. O. R. 239.



when that something was previously thought to be essential, and the omission required the exercise of invention on the part of the person making it.<sup>(m)</sup> The parts of which a combination consists, may be old or new processes, and the combination of such processes will support a patent if the result be new and useful.<sup>(n)</sup>

Combination may consist merely in omission of part of an old combination.

In *Cannington v. Nuttall*,<sup>(o)</sup> Pocheron's patent for "improvements in the manufacture of glass," was upheld by the House of Lords on the ground of subject-matter. The process consisted in the combination of a tank, instead of pots, the fire placed laterally to the tank instead of immediately beneath it, and a channel formed all round the tank in order that the atmospheric air might circulate freely and exert a cooling effect. Lord Westbury, in moving the judgment of the House, said: "Now, the only thing that appears to have been regarded by the patentee as a new discovery (apart from the apparatus) was the application of the external air to the sides of the tank. It was a discovery, certainly, but it was a thing for which, independently of the other apparatus, probably no patent could have been obtained. . . . The refrigerating effect of the air upon the sides of the tank was not a thing for which, *per se*, a patent could be claimed; but an apparatus so constructed as to bring into operation that particular property of the external atmospheric air, so as to produce a most useful effect, constitutes an invention to which the merit of novelty attaches, and for which a patent may be taken out."

*Cannington v. Nuttall.*

A combination which differs only from a previous combination in that there is substituted an equivalent part or process in the place of some part or process found in the prior combination, is good subject-matter when the equivalent part or process was not known to be an equivalent at the date of the prior patent,<sup>(p)</sup> but if the equivalent was known to be an equivalent at the date of the former patent, the mere substituting it

Substitution of equivalents good subject-matter, if equivalents not previously known to be equivalents.

<sup>(m)</sup> *Russel v. Cowley*, 1 W. P. C. 459; 1 Cr. M. & R. 864; *Minter v. Mower*, 6 A. & E. 735, 1 W. P. C. 142; *Booth v. Kennard*, 1 H. & N. 527; 2 H. & N. 84.

I. App. 205; *Moscley v. Victoria Rubber Co.*, 4 P. O. R. 241.

<sup>(o)</sup> L. R. 5 E. & L. App. 205.

<sup>(p)</sup> *Unwin v. Heath*, 5 H. L. Cas. 505, 522, 543; *Badische Anilin und Soda Fabrik v. Levinstein*, 2 P. O. R. 90.

<sup>(n)</sup> *Cannington v. Nuttall*, L. R. 5 E. &

in the combination would be an infringement, and is not subject-matter for a fresh patent.(*q*)

Examples of inventions which are not subject-matter as consisting merely in the substitution of one known equivalent for another.

The following may be taken as instances of patents which have been held void on the ground of lack of subject-matter, the novelty being merely the substitution of one equivalent for another in an old combination of parts or processes, and requiring the exercise of no invention. Rushton's patent for "improvements in the manufacture of artificial hair," which consisted of the use of Russian tops or similar wool in the manufacture of chignons, which were formerly made from mohair.(*r*) Amet's patent for "improved means of distending articles of dress," which consisted in making the hoops of a petticoat of steel instead of whalebone.(*s*) Horton's patent for "improvements in the construction of gas holders," which consisted in forming a joint of double-angle iron instead of two pieces of single-angle iron.(*t*) Parkes' patent for "improvements in lamps," which consisted in the substitution of a hinge for a slide in a known glass lamp.(*u*) Fletcher's patent for "improvements in apparatus for cooking and heating by means of gas," which consisted merely in the substitution of a hinge for a slide.(*v*) Jensen's patent for "improvements in oil boxes or lubricators for revolving and other parts of machinery," which consisted in the alteration of a known combination of an oil box with a piston actuated by a screw for the purpose of forcing the oil out, by substituting in the place of the piston a screw filling the whole of the box.(*w*) Murray's patent for "improvements in machinery for making bricks," which consisted in moving the cutting wires against the clay instead of the clay against the cutting wires.(*x*) Brunton's patent for "improvements in

(*q*) *Bateman v. Gray*, Macr. P. C. 102; *Electric Telegraph Co. v. Brett*, 10 C. B. 838; 20 L. J. C. P. 123; *Ormsen v. Clarke*, 13 C. B. 339; 14 C. B. 490; *Stevens v. Keating*, 1 Ex. R. 339; 17 L. J. Ex. 122; *Gamble v. Kurtz*, 3 C. B. 435; *Walton v. Potter*, 1 W. P. C. 586; *Russel v. Cowley*, 1 W. P. C. 463; *Morgan v. Seaward*, 1 W. P. C. 171; *Bovill v. Moore*, Dav. P. C. 405; *Hill v. Thompson*, 1 W. P. 242; *R. v. Lister*, *Webster on Patents*, 80; *Hancock v. Moulton*, *Johns. Pat. Man.* 6th ed. 254; *Cochrane v. Braith-*

*waite*, 3 Lon. Journ. N. S. 42; *Neilson v. Harford*, 1 W. P. C. 310.

(*r*) *Rushton v. Crawley*, L. R. 10 Eq. 522.

(*s*) *Thompson v. James*, 32 Beav. 570.

(*t*) *Horton v. Mabon*, 16 C. B. N. S. 141; 31 L. J. C. P. 255.

(*u*) *Parkes v. Stevens*, L. R. 8 Eq. 358.

(*v*) *Fletcher v. Arden*, 5 P. O. R. 46.

(*w*) *Jensen v. Smith*, 2 P. O. R. 249.

(*x*) *Murray v. Clayton*, L. R. 7 Ch. 570; L. R. 15 Eq. 115.



the manufacture of ship's anchors," &c., which consisted merely in making the two flukes in one with a thickness of metal in the middle sufficient to pierce with a hole for the insertion of the shank instead of joining the flukes by welding them to the shank, as was done formerly.(y) Tickelpenny's patent for "improvements in, and connected with, the construction and support of fire-proof floors and ceilings," which consisted merely in filling known hollow iron columns with water.(z) Brown's patent for "improvements in punching nails for shoeing horses and other animals," which consisted merely in the substitution of a pivot for a hinge in a nail-making machine.(a)

### *Improvements.*

If a man takes an existing and already known manufacture, and by the exercise of invention makes an alteration, which really is novel and an improvement, whether it be the addition to,(b) the omission from,(c) or only the re-arrangement of old parts,(d) the alteration so made is a fresh arrangement. It is now established beyond doubt that such an improvement, provided that it be new and useful, may be the subject-matter of a patent.(e)

Improvement on existing invention may be good subject-matter.

As has been pointed out by Lord Mansfield,(f) if there could be no patent for an improvement on an existing invention, that objection would go to repeal almost every patent that was ever granted.

Though an improvement on the subject of a prior and existing patent may be the subject of a second patent, the second patentee must wait till the expiration of the prior patent before

Patentee of improvement cannot use original invention without

(y) *Brunton v. Hawkes*, 4 B. & Ald. 541.

(z) *Tickelpenny v. Army and Navy Co-operative Society*, 5 P. O. R. 405.

(a) *United Horseshoe & Nail Co. v. Swedish Horsenail Co.*, 6 P. O. R. 1; see also *Deutsche Nähmaschinen Fabrik Vorm Wertheim v. Pfaff*, 7 P. O. R. 251.

(b) *Morris v. Branson*, Bull, N. P. 76; 1 Carp. P. C. 30; 1 W. P. C. 51; *R. v. Arkwright*, 1 W. P. C. 71; *Boulton v. Bull*, 2 H. Bl. 463; *Dav. P. C.* 162; *Hornblower v. Boulton*, *Dav. P. C.* 221; 8 T. R. 95; *Ex parte Fox*, 1 V. & Br. 67; 1 W. P. C. 431; *Bovill v. Moore*, 2 Coop. Ch. Ca. 56; *Dav. P. C.* 361; 2 Marsh, R. 211; *Lister v. Leather*,

8 E. & B. 1017; *Ralston v. Smith*, 11 H. L. C. 223; *Fox v. Dellestable*, 15 W. R. 195.

(c) *Russel v. Cowley*, 1 W. P. C. 463; *Wallington v. Dale*, 7 Exch. 888; *Booth v. Kennard*, 1 H. & N. 527.

(d) P. 53.

(e) *R. v. Arkwright*, *Dav. P. C.* 61; 1 W. P. C. 64; *Hill v. Thompson*, 8 Taunt. 375; 2 B. & Mo. 448; 1 W. P. C. 232; *Lewis v. Davis*, 3 C. & P. 502; *Harmar v. Playne*, 11 East, 101; *Crano v. Price*, 1 W. P. C. 410.

(f) *Morris v. Branson*, Bull, N. P. 76; 1 W. P. C. 51.

licence if  
patent for it  
exists.

he can use the prior invention without the licence of the prior patentee.(g)

Argument that  
patents for  
improvements  
ought to be  
held illegal.

It may be argued that if a subsequent patent for a combination includes part of an invention already protected by patent, it infringes on the property of another, and so is a violation of his right, and ought to be held illegal on account of his interest, and further, because the second patent prolongs the monopoly granted by the first. The following words of Lord Campbell form a complete answer to this contention: "The patent for an improvement on an invention, already the subject of a patent, if confined to the improvement, is not an infringement of the former patent. The use of the improvement with the former invention, during the existence of the former patent, without licence, would be an infringement; but with licence, that also would be lawful, as in constant experience. Indeed, the objection was carried to the extent that a patent for an improvement on a patent invention of the same patentee would be void; but this rests only on the assumption that the improvement cannot be distinguished from the invention on which it is made. The assertion that all patents for improvements on existing patents must be void is obviously untenable. The third argument on this point, that a patent for an improvement on a patent is void as contrary to policy because it prolonged the monopoly granted by the first, till the last expired, is already virtually answered. The monopoly in the second patent is for the improvement only; and the use of the former invention without the improvement is free at the expiration of the first patent."(h)

Patent for  
improvement  
not proof of  
inutility of  
original inven-  
tion.

The fact of a patent for an improvement on an existing invention having been obtained is not proof of the inutility of the original patent, and does not throw the original invention open to the world.(i)

Patentee  
protected  
against use of  
his improve-  
ment with the

If a person obtains a patent for an improvement on a known process, he is protected against the use of his improvement, however much the original process is further altered and im-

(g) *Ex parte Fox*, 1 V. & B. 67; 1 W. P. C. 431 n.; *Fox v. Dellestable*, 15 W. R. 195; *Crane v. Price*, 4 M. & G. 580; 1 W. P. C. 410; 12 L. J. C. P. 81; *Lister v. Leather*, 8 E. & B. 1017.

(h) *Lister v. Leather*, 8 E. & B. 1017.

(i) *Thomson v. Batty*, 6 P. O. R. 100; *Edison v. Holland*, 6 P. O. R. 243.



proved by subsequent discoveries, so long as it remains substantially the same.<sup>(k)</sup> original invention.

The patentee must be very careful not to lay claim in his specification to the old art or invention which he alleges he has improved, but he must limit his claim to the new art or invention produced by his labour, otherwise he will render his patent void, as claiming in part that which is not new.<sup>(l)</sup> Patentee must claim only the improvement.

In order that an improvement may be good subject-matter of a patent it is absolutely necessary that there be the presumption of some degree of invention having been required to make the improvement.<sup>(m)</sup> Thus, in the case of a patent granted to J. White for "improvements in ladies' mourning bonnet and hat falls," which claimed the forming both sides of ladies' mourning bonnet and hat falls alike by applying thereto the fold above the bottom fold on each side thereof, as explained, the patent was held void on the ground of want of invention, Malins, V.C., saying: "Whereas formerly the fold was sewn on one side only, now it is sewn on both sides, so that whichever way it is turned it has a good side outwards. There is no invention in it. However meritorious as an improvement, which might probably have been registered for one or two years, it is not the subject of a patent."<sup>(n)</sup> Presumption of the exercise of invention necessary to support patent for improvement.

So, an improvement which consists merely in the application of a more skilful and efficient mode of working a known process will not be the subject-matter of a patent when the application is obvious.<sup>(o)</sup> Thus, in reference to a claim in the specification of a patent for "improvements in the purification of coal gas," which claimed "a method or system of employing lime purifiers in the manner hereinbefore described, whereby the contents of all the said purifiers, or of any required number of them, can be converted into sulphides of calcium, and also (if required) be maintained in that condition." James, L.J., delivering the

<sup>(k)</sup> *Electric Telegraph Co. v. Brett*, 10 C. B. 881.

<sup>(l)</sup> *Chap. V. Hill v. Thompson*, 8 Taunt. 375; 2 B. Mo. 448; 1 W. P. C. 229; *Bovill v. Moor*, 2 Marsh, 211; *Dav. P. C. 361*; *Minter v. Mower*, 1 W. P. C. 142; *Williams v. Brodie*, *Dav. P. C. 26*; 1 W. P. C. 75; *Hornblower v.*

*Bolton*, 8 T. R. 103; *Jessop's Case*, 1 W. P. C. 42 n.; *Dav. P. C. 182, 203*; *Crane v. Price*, 1 W. P. C. 413; *Lister v. Leather*, 8 E. & B. 1004.

<sup>(m)</sup> *Blakely v. Latham*, 6 P. O. R. 188.

<sup>(n)</sup> *White v. Toms*, 37 L. J. Ch. 204.

<sup>(o)</sup> *Tetley v. Easton*, 2 C. B. N. S. 706.

## LETTERS PATENT FOR INVENTIONS.

judgment of the Court of Appeal, said: "There is in that no suggestion of any new apparatus—of any new process. There is no device or scheme of any kind. Lime purifiers in succession were in general, almost universal, use wherever lime could be freely used. . . . What he (the patentee) claims to have discovered is, that if the carbonic acid, which is the first thing taken up by the lime, is not wholly taken up at the beginning, and is allowed to enter the last purifier or purifiers, it in fact poisons the latter, decomposes the sulphide of calcium already formed, disengages the other sulphur absorbed by the sulphide, and of course fills the gas again with the sulphur impurities which had been removed. This is a very valuable working caution and direction, but it is impossible to make anything more of it than a working caution and direction. It really amounts to nothing more than a direction to be sufficiently liberal in the use of the caustic lime in the first stage, and an instruction that the moment it is so far carbonated as not to arrest the carbonic acid it should be removed and a fresh supply of lime got. It may be a direction and an instruction of the greatest possible value and utility, but it is utterly impossible to make such a direction and instruction, however valuable, the subject of a patent."(p)

The decision of the Court of Appeal was affirmed by the House of Lords, and Lord Blackburn observed: "The appellant appears, from what he says in his specification, to be of opinion that, if he first discovered the theory and reason of that which had before been done empirically, he is entitled to a patent. I need hardly point out that this is a mistake, if by reason of knowing the theory he is enabled to make some improvement, he may take out a patent to prevent others using what they had used before, though empirically."(q)

In another case it appeared that in the process of calendering woven fabrics the use of a roller and a bowl, and the method of regulating the relative speed of their motions, were well known at the date of the patent. In the process of *calendering* a smooth roller was used, and the speeds of the roller and bowl

(p) *Patterson v. The Gaslight and Coke Co.*, L. R. 2 Ch. D. 834.

(q) L. R. 3 App. Cas. 246.



were different, whilst in the process of *embossing* a roller with a pattern on it was used, and the speeds of the roller and bowl were equal. A patent was obtained for a combination of a patterned roller with a bowl, the roller and bowl moving at unequal speeds. It was held by the Court of Common Pleas and the House of Lords that the alleged invention was not the proper subject-matter of a grant of letters patent, as it was nothing more than the use of an existing machine in a more beneficial manner than previously.<sup>(r)</sup>

It is to be noticed that an improvement in the sense in which the word has been used in the foregoing pages is not always the subject of the invention when the word is used in the title of letters-patent—*e.g.*, the title may be “improvements in the manufacture” of a certain article, the object being either the production of the article of a better quality, or at a lower price, and yet the means by which that object is attained may be some entirely new art, or some machine totally different from anything before known or used for the manufacture of that article.<sup>(s)</sup>

When an invention is an improvement on an existing invention the amount of the improvement does not affect the validity of a patent granted in respect of it; if there is an improvement, however small, which is the outcome of invention, that is quite sufficient to support the patent.<sup>(t)</sup>

In *Sykes v. Howarth*,<sup>(u)</sup> a patent for “improvements in fancy rollers of machines for carding wool and other fabrics,” was held valid. Before the invention, the machines used for carding wool, &c., consisted of a series of large cylinders on which smaller cylinders revolved, the last of the series of smaller cylinders being termed a “fancy roller,” and was used to raise the fibre on the surface of the larger roller. The rollers were covered with “cards” (strips of leather thickly studded with short wires). These cards were cleaned by means of a hand-scraper, an objectionable method, from the fact that the person using the scraper had to stand at the side of the machine, and

(r) *Ralston v. Smith*, 9 C. B. N. S. 117; 11 H. L. Ca. 223.

(s) See Chap. V.

(t) See *Alderson, B.*, in *Morgan v. Seaward*, 1 W. P. C. 173, 186.

(u) L. R. 12 Ch. D. 826.

was therefore unable to draw the scraper in an exact line with the "gates" of the "cards" (passages between the wires), and other cards were liable to be injured. The improvements for which the patent was granted consisted in the introduction of wide spaces between the cards, which produced an exhaust current of air, and made the rollers operate in their function as fancy rollers. Also the fancy rollers were applicable and employed for cleaning the other card-covered cylinders.

*Heath v. Unwin.* In the case of *Heath v. Unwin*,<sup>(x)</sup> the defendant was charged with infringing the plaintiff's patent, which was for "certain improvements in the manufacture of iron and steel" consisting among others in the use of carburet of manganese in any process whereby iron is converted into cast steel. The alleged infringement consisted in the substitution of the elements of carburet of manganese in the place of the carburet of manganese itself in the plaintiff's process. The evidence showed that the elements combined first in the crucible, and formed carburet of manganese, which then acted on the iron in the same way as the ready formed carburet of manganese introduced according to the plaintiff's original process. The Court of Exchequer Chamber taking this view of the evidence, reversed the decision of the Courts below, and held that the process had been infringed, but the House of Lords<sup>(y)</sup> reversed the decision of the Court of Exchequer Chamber. The process, as carried out by Unwin, was a great improvement on that mentioned in the plaintiff's patent, being much neater and effecting a considerable reduction in the cost of the steel, and it was held to be no infringement of the plaintiff's process, and would, therefore, probably have of itself formed the subject of a patent.

#### *New Uses of Old Appliances.*

New use of an old appliance is good subject-matter if it implies invention.

The question whether a new use of an old appliance is competent to form the subject-matter of a valid patent must in each particular instance be answered in the affirmative or negative according as invention and ingenuity are present or absent in the new application.

<sup>(x)</sup> 2 W. P. C. 216, 218, 221, 223, 228, 236, 279; 5 H. L. 505.

<sup>(y)</sup> 2 W. P. C. ; 5 H. L. 505.



If the new use requires no sufficient exercise of invention, *i.e.*, if it is merely analogous to a use of the known thing made before, then a patent cannot be validly granted in respect of it,<sup>(z)</sup> but if the new use is one which lies so far outside and removed from those previously made as to necessarily imply the exercise of invention it will be perfectly good subject-matter.<sup>(a)</sup>

A more analogous use is not good subject-matter.

It is obviously impossible to frame any rule which will serve as a guide to show at once whether any particular instance is one involving invention or not. The authorities are necessarily decisions on particular cases, and are useful only as affording some guide to the decision of any particular instance coming under consideration. Each case must be decided on its own merits, and with reference to its own especial circumstances.<sup>(b)</sup>

There may be an element of novelty in an alleged invention, and yet that novelty may consist only in the new occasion or new use to which an old and well-known thing or method is applied. The principle—*i.e.*, the method of operation, or order of combination—of the alleged new invention may have been discovered and applied before, though not on precisely the same occasions and uses, or with the same materials. If the new

<sup>(z)</sup> *Losh v. Hague*, 1 W. P. C. 207; *R. v. Cutler*, 14 Q. B. 372 n.; *Macr. P. C.* 133; *Tetley v. Easton*, 2 C. B. N. S. 706; 26 L. J. C. P. 269; *Patent Bottle Envelope Co. v. Seymer*, 5 C. B. N. S. 164; 28 L. J. C. P. 22; 5 Jur. N. S. 174; *Kay v. Marshall*, 2 W. P. C. 71, 79; *Horton v. Mabon*, 31 L. J. C. P. 255; 12 C. B. N. S. 437; 16 C. B. N. S. 141; *Ormsou v. Clarke*, 32 L. J. C. P. 8; 13 C. B. N. S. 337; 32 L. J. C. P. 291; 14 C. B. N. S. 475; *Willis v. Davison*, 1 N. R. 234; *Harwood v. G. N. Ry. Co.*, 2 B. & S. 194, 222; 11 H. L. C. 654; *Ralston v. Smith*, 11 H. L. C. 223; *Jordan v. Moor*, L. R. 1 C. P. 624; *Parkes v. Stevens*, L. R. 5 Ch. 36; *Cropper v. Smith*, 1 P. O. R. 90; *Sharp v. Bauer*, 3 P. O. R. 196; *Rowcliff v. Longford Wire Co.*, 4 P. O. R. 281; *Albo-Carbon Light Co. v. Kidd*, 4 P. O. R. 535; 5 P. O. R. 581; 6 P. O. R. 194; *Blakey v. Latham*, 6 P. O. R. 184; *Longbottom v. Shaw*, 6 P. O. R. 143; *Morgan v. Windover*, 5 P. O. R. 304; 7 P. O. R. 131; *Calvert v. Ash-*

*burn*, *Pract. Mech. Journ.* vol. vii. 2nd ser. p. 97.

<sup>(a)</sup> *Hartley's Case*, 2 H. Bl. 493; *Brunton v. Hawkes*, 1 Carp. P. C. 405; *Hall v. Jarvis*, 1 W. P. C. 100; *Kay v. Marshall*, 2 W. P. C. 71, 79; *Walton v. Potter*, 1 W. P. C. 597; *Muntz v. Foster*, 2 W. P. C. 103; *R. v. Cutter*, *Macr. P. C.* 124; *Bush v. Fox*, *Macr. P. C.* 164, 178; 5 H. L. C. 707; *Pow v. Taunton*, 9 Jur. 1056; *Steiner v. Heald*, 6 Exch. R. 107; 11 Jur. 875; 20 L. J. Ex. 410; *Mackean v. Rennie*, 13 C. B. N. S. 52; *Penn v. Bibby*, L. R. 2 Ch. 127; 36 L. J. Ch. 455; *White v. Toms*, 36 L. J. Ch. 204; 17 L. T. N. S. 399; *Rushton v. Crawley*, L. R. 10 Eq. 522; *Newton v. Vaucher*, 6 Exch. 865; *Reynolds v. Amos*, 3 P. O. R. 215; *American Braided Wire Co. v. Thompson*, 4 P. O. R. 316; 5 P. O. R. 113; 6 P. O. R. 518.

<sup>(b)</sup> See *Lister v. Norton*, 3 P. O. R. 205; *Morgan v. Windover*, 4 P. O. R. 426.

application is nothing more than a double use, and shows nothing beyond the mere skill of a constructor in adapting a well-known method to different occasions, the patent cannot be supported.

If there is no novelty in the effect produced, but the occasion only is new, then the use to which the known thing or method has been applied is simply analogous to what was done before; but if the effect is new, then the first application of the known thing or method may constitute the subject-matter of a valid patent.

Novelty in sense of doing what has not been done before is not sufficient, there must be novelty which implies invention.

For a patentee to succeed in upholding his patent, it is necessary for him to show, not merely newness in the sense of doing a thing which has not been done before, but he must show newness in the shape of novelty by producing a thing which, it may be presumed, requires some exertion of mind that could properly be called invention. To apply an old tool to a new material could not be the subject of a patent, although all mankind had been previously using another sort of tool which produced a much inferior effect; and although, therefore, the application of the other tool had the merit in it that it produced a useful result in the easier working of a material to which that tool had not been applied before, inasmuch as the tool had been used for an analogous purpose to that which all mankind knew it was useful for before, although the application might be new, it could not be said that the application was a novelty, in the sense of invention, so as to sustain a patent.<sup>(c)</sup>

Cases in which new applications were held insufficient to support letters patent.

In the following cases the patents, which, in each instance, related to some new application of a new thing or method, were declared invalid, on the ground of insufficiency of invention and consequent want of proper subject-matter.

Kay v. Marshall.

In *Kay v. Marshall*,<sup>(d)</sup> it appeared that before the patent flax and other fibrous substances were spun with machines, by which the reach was varied according to the staple or fibre of the article to be spun, and that it had been a fundamental principle of dry spinning, known and used before the granting

<sup>(c)</sup> *Tatham v. Dania*, Griff. P. C. 213, judgment of Willes, J.

<sup>(d)</sup> 2 W. P. C. 36, 39, 47, 48, 69, 71, 77, 79; 8 L. J. C. P. 261.



of the patent; and, further, that the reach used in cotton spinning had been less than two-and-a-half inches. The real question in the case was whether, with public knowledge in the state above indicated, a patent could be upheld for placing the retaining rollers, and the drawing rollers, of a spinning machine, which was known and in use before, within two-and-a-half inches of each other, and the Court of Common Pleas held that it could not. Tindal, C.J., in delivering the judgment of the Court, said: (e)

“The application of a reach of two-and-a-half inches to the spinning of flax, when in a state of maceration, by which the fibre of flax will not hold together beyond two-and-a-half inches, does not appear to us to be any new invention or discovery, but is merely the application of a piece of machinery, already known and in use, to the *new* macerated state of flax. . . . And if a patent, taken out for that object separately, would be invalid, so also a patent taken out for an invention consisting of two distinct parts, one of which is the precise object, would be void also. . . . If a part of what is claimed is not properly the subject of a patent, or is not new, the whole must be void.”

In *Losh v. Hague*,(f) which was an action brought for the alleged infringement of a patent for “improvement in the construction of wheels for carriages *to be used on railways*,” it was objected by the defendant that Losh was not the true and first inventor; and it was proved that wheels, made on the same principle as that claimed by the patent had been previously known, though they had never been used on railways. The jury by their verdict upheld this objection on the part of the defendant. Lord Abinger, C.B., in directing the jury, referred to the case of *Hall v. Jarvis*,(g) and said: “That was the application of a new contrivance to the same purpose; but it is a different thing when you take out a patent for applying a new contrivance to an old object, and applying an old contrivance to a new object—that is a very different thing.

(e) 2 W. P. C. at p. 75.

(f) 1 W. P. C. 200; 5 M. & W. 387.

(g) 1 W. P. C. 100.

In the case the learned counsel put, he says, 'If a surgeon goes into a mercer's shop and sees the mercer cutting velvet or silk with a pair of scissors with a nob to them, he, seeing that, would have a right to take out a patent in order to apply the same scissors to cutting a sore or a patient's skin.' I do not quite agree with that law. I think if a surgeon had gone to him and said, 'I see how well your scissors cut,' and, he said, 'I can apply them instead of a lancet by putting a knob at the end,' that would be quite a different thing, and he might get a patent for that; but it would be a very extraordinary thing to say that because all mankind have been accustomed to eat soup with a spoon, a man could take out a patent because he says you might eat peas with a spoon. The law on the subject is this: that you cannot have a patent for applying a well-known thing, that might be applied to fifty thousand different purposes, for applying it to an operation which is exactly analogous to what was done before. Suppose a man invents a pair of scissors to cut cloth with, if the scissors were never invented before, he could take out a patent for it. If another man found he could cut silk with them, why should he take out a patent for that?"

Regina v.  
Cutler.

In *Regina v. Cutler* (*h*) the patent was for improvements in the construction of the tubular flues of steam boilers and the patentee claimed the application of iron tubes coated with copper or brass to this purpose. It having been proved that such tubes were not new and that there was no novelty in the manner in which they were applied in the flues, since uncovered tubes had been applied in the same way before the date of the patent, Lord Denman, C.J., and Wightman, J., on different occasions held that this was the mere application of a known article to a new use, the mode of application having been previously employed in applying analogous articles to the same purpose, and could not therefore be the subject of a valid patent.

Bush v. Fox.

In *Bush v. Fox* (*i*) the patent was for "Improvements in the means of, and in the apparatus for, building and working under

(*h*) 4 Q. B. 372; Macr. P. C. 124; 3 C. & K. 215.  
(*i*) Macr. P. C. 164; 23 L. J. Ex. 275; 24 L. J. Ex. 251; 5 H. L. Cas. 707.



water," and the patentee claimed "the mode of constructing the interior of a caisson in such manner that the workpeople may be supplied with compressed air, and be able to raise the materials excavated, and to make or construct foundations and buildings, as above described." The defendant proved that the apparatus described in a prior patent was the same in all material respects as the plaintiff's caisson, the mode of working was the same in both cases, and they differed only in their application, the prior patent being for excavating and sinking shafts, &c., on land, the plaintiff's for sinking, excavating and constructing foundations under water. In directing the jury, Pollock, C.B., said: "I am of opinion, upon the evidence as it now stands, that the said supposed invention in the declaration mentioned was not an invention of a certain manner of new manufacture in processes and forms as the plaintiff has alleged. I think that an invention must be a production of something that can be used or sold or made use of for some purpose, or some method which results in something of the same sort. And I think that a man cannot, if he has applied—supposing this to be a new application—-an old invention, or part of an old invention, to a new purpose, obtain a patent for such an application. Now, if the construction of this caisson, or pile, or whatever it is to be called, is to be looked upon as old, and the object of the patent is for applying it to a new purpose, that is not a manufacture: and the application is such an operation (if so it can be called) that nothing new which results from it can, I think, be the subject of a patent. . . . I think if one man invents a new mode of looking at the moon, somebody else cannot take out a patent for using the same mode to look at the sun, nor for any mere application of it to a different purpose. If a man were to take out a patent for a telescope to be used for making observations on land, I do not think any one could say, 'I will take out another patent for that telescope to be used for making observations on the sea.' I therefore direct you, that, in point of law, in my judgment, the supposed invention was not an invention of any manner of new manufacture in manner and form as the plaintiff has alleged." This ruling was affirmed in the Exchequer Chamber and the House of Lords. Maule, J.,

in the Court of Exchequer Chamber, said: "Assuming that the machine itself is old, the learned judge held that a new application is not a new manufacture, and, therefore, not the subject of a patent; and my present opinion is that, on the evidence, he was right in so directing the jury."

Comments on  
Bush v. Fox.

It must be noticed that in the extracts from the charge and judgment above given the learned judges did not refer to the question of the amount of invention required to adapt the caisson which had been previously used on land to the use under water. If this had required the expenditure of any considerable amount of ingenuity no doubt the patent would have been supported on the ground of subject-matter. From the report of the case it must be concluded that the jury below were of opinion that the evidence showed the application of the caisson under water did not imply the exercise of any ingenuity, but it must be observed that the Court of Exchequer Chamber and the House of Lords upheld the decision of the Court of First Instance not on the ground of mere analogous use, but because the specification describing the mode of construction of a machine for a particular purpose was to be considered as claiming the machine itself, which the evidence showed was old.

The Patent  
Bottle Enve-  
lope Co. v.  
Seymer.

In *The Patent Bottle Envelope Company v. Seymer*,<sup>(h)</sup> the patent was for "improvements in the manufacture of cases or envelopes for covering bottles." The claim was for "the combination of mechanism, and the making of envelopes for bottles, as herein described." The defendants worked a patent for "improvements in the manufacture of cases or packings for bottles or jars," in which they employed a mould or mandril similar to the plaintiff's, and this was the infringement complained of. In delivering the judgment of the Court of Common Pleas, Willes, J., said: "The fact that the mould or mandril constitutes part only of the plaintiff's process, does not of itself affect the question. The infringement of any part of a patent process is actionable, if that part is of itself new and useful, so as that it might be the subject-matter of a patent, and is used by the infringer to effect

(h) 5 C. B. N. S. 164; 28 L. J. C. P. 22.



the object, or part of the object, proposed by the patentee. The question, therefore, is, whether the plaintiffs could have taken out a patent, simply for applying a model or mandril in the form of a bottle, or, indeed, a bottle itself, in making envelopes for bottles. We are of opinion that they could not. The use of a model or mandril, for producing given forms of pliable materials, was admitted at the trial, and indeed, without such admission, is well known to have been for ages common and usual in various arts. Such use was part of common knowledge, and a model or mandril for purposes similar to that of this patent was an ordinary and well-known tool. It is merely in respect of the sort of material to which it is applied, and the form of the utensil produced by it, that the plaintiff's application of the model possesses any novelty. The application of a well-known tool to work previously untried materials, or to produce new forms, is not, in my opinion, the subject-matter of a patent. The observations of the Court, in giving judgment in the recent case of *Tetley v. Easton*,<sup>(l)</sup> sustained this proposition. Indeed, to hold the contrary, might tend to produce oppressive monopolies in the application of old and well-known implements to new materials, without any further novelty or merit than the discovery of the material or the form into which it is to be worked. Such discovery is not, in our opinion, one of a new "manufacture" within the Statute of James; and a patent for it alone cannot be maintained."

In *Brook v. Aston*,<sup>(m)</sup> the action was brought for the infringement of a patent for "improvement in finishing yarns of wool or hair, and in the finishing of woven fabrics." The defendant pleaded that it was not the working or making of any manufacture for which letters patent could by law be granted. The specification stated "this invention has for its object an improvement in finishing yarns of wool or hair, and consists in causing *yarns of wool or hair*, whilst distended and kept separate, to be subjected to the action of rotatory beaters, or burnishers, by which such yarns will be burnished

<sup>(l)</sup> 26 L. J. C. P. 269.

<sup>(m)</sup> 8 E. & B. 478; 27 L. J. Q. B. 145; 28 L. J. Q. B. 175; affirmed 5 Jur. N. S. 1025.

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or polished on all sides." Then followed a description and drawings of the machinery, showing the manner in which the threads were distended and kept separate, and were passed over a revolving circular brush, on their way to some rapidly revolving beaters or burnishers, which gave smoothness to their surface. The first claim was: "causing yarns of wool or hair, whilst distended and kept separate, to be subjected to the action of rotatory beaters or burnishers, whereby the fibre is closed and strengthened, and the surface effectually polished."

The defendant put in evidence the specification of a former patent granted to W. L. Brook, and C. Brook, in 1853, for certain improvements in finishing cotton and linen yarns, and in the machinery connected therewith. This specification stated: "Our improvements relate, first, to a method of finishing *cotton and linen* yarns by the application of friction, produced by a peculiar combination of horizontal brushes, with revolving beaters or burnishers, the yarns being extended from end to end, instead of being dressed in the hank or skein, by which means a more perfect adhesion of the fibre with smoothness, and a *glacé* effect is produced. The yarns or threads are wound upon a roller at one end of the machine, and pass through the operation of sizeing, as in common use, and thence to the finishing end of the machine." The jury found for the plaintiff.

On application to the Court of Queen's Bench, a rule *nisi* to enter a nonsuit was made absolute, Lord Campbell, C.J., saying: "It may well be that a patent may be valid, for the application of an old invention to a new purpose, but to make it valid, there must be some novelty in the application. Here there is none at all. We may suppose that the specification of 1853, instead of extending to cotton and linen yarns, had been confined to cotton yarns only. Could, in that case, a new patent have been supported for applying the same process precisely to linen threads? It is clear it could not. In all the cases in which a patent has been supported, there has been some discovery, some invention. It has not been, as in this case, merely the application of the old machinery, in the old manner, to an analogous substance.



That cannot be the subject of a patent, and this patent claiming it is void."

On a writ of error being brought in the Court of Exchequer Chamber, Cockburn, C.J., said: "Our duty is to look to the two specifications, and construing them in the best manner, to see whether the second involves any infringement of the first. I am of opinion that it does. The second patent includes every material portion of that which was the subject-matter of the first. Mr. Bovill has argued on the assumption that the sizeing process, which is omitted in the second patent, was an essential part of the first. But I cannot look upon it in that light. . . . There is a *glacé* appearance produced on the linen, and not in the wool. But the main purpose, which is to give strength to the matter operated on, is the same in both. . . . The polish is no essential part of the patent."

Martin, B., said: "The question is, whether there was any evidence to go to the jury at the end of the plaintiff's case. . . . I quite concur in the judgment of the Court of Common Pleas in the *Patent Bottle Envelope Company v. Seymer*,<sup>(n)</sup> that the application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject of a patent. When a machine is well-known it becomes in fact a tool. I am therefore of opinion that the application of this machinery to woollen yarn is not the subject of a patent."

Willes, J., said: "I am of the same opinion. The machinery is admitted to be the same in the two patents; the thing operated upon in each is the same, or similar, the one being vegetable, the other animal fibre. The *modus operandi* is the same, namely, by friction, and the result aimed at is the same—the improvement of the thread or yarn to be produced by the friction of the brushes or beaters—the two patents are, in my opinion, for similar, if not for identical, purposes."

Bramwell, B., said: "The two specifications are substantially identical. Doing to wool identically the same thing which has been done to linen or cotton is not, in my opinion, a new manufacture."

(n) 28 L. J. C. P. 22.

Harwood v.  
The Great  
Northern  
Railway Co.

In *Harwood v. The Great Northern Railway Company*,<sup>(o)</sup> a patent for the purpose of connecting the rails of railways by "fishes" was held void on the ground that similar fishes had been previously used to fasten pieces of timber together in the construction of bridges, and also in various articles of machinery. Willes, J., in the Court of Exchequer Chamber, said the invention was the mere application of an old contrivance in the old way to an analogous subject without novelty or invention in the mode of applying such old contrivance to the new purpose. On the appeal to the House of Lords, Lord Westbury, L.C., thus expressed himself: "The question is, whether there can be any invention in taking that thing which was a fish for a bridge and having applied it as a fish to a railway. Upon that I think the law is well and rightly settled, for there would be no end to the interference with trade and with the liberty of adopting any mechanical contrivance if every slight difference in the application of a well-known thing should be held to constitute ground for a patent. There is the familiar contrivance of the button to the button-hole taken from the waistcoat or the coat, which may be applied in some particular mechanical combination in which it has not hitherto been applied. But it would be an idle thing, if it were possible, to take a well known mechanical contrivance and by applying it to a subject to which it has not hitherto been applied, to constitute that application the subject of a patent to be granted as for a new invention. No sounder or more wholesome doctrine, I think, was ever established than that which was established by the decisions referred to in the opinions of the four learned judges who concur in the sound opinion delivered to your Lordships—namely, that you cannot have a patent for a well-known mechanical contrivance merely when it is applied in a manner, or to a purpose, which is not quite the same, but is analogous to the manner or purpose in or to which it has been hitherto notoriously used."

Jordan v.  
Moore.

In *Jordan v. Moore* (*p*) the question was whether the application of wooden planking to the iron frame of a ship (without

(*o*) 2 B. & S. 194, 222; 11 H. L. Cas. 654; 29 L. J. Q. B. 193; 31 L. J. Q. B. 198; 35 L. J. Q. B. 27.

(*p*) L. R. 1 C. P. 624; 35 L. J. C. P. 268.



any peculiarity in the nature of the planking) could be the subject of a patent. The Court of Common Pleas held it could not, on the ground that it was not only the substitution of one well-known and analogous material for another—that is, wood for iron—to effect the same purpose on an iron ship, but it was the application of an old invention—viz., planking with timber, which was formerly done on a wooden frame—to an analogous purpose, or rather the same purpose on an iron frame, and *Harwood v. Great Northern Railway Company* (q) was directly in point, and decisive against the patent.

In *Parkes v. Stevens* (r) Lord Hatherley, L.C., held that the adaptation of a sliding door to a spherical lamp—sliding doors having been previously applied to cylindrical lamps and other glazed surfaces—cannot of itself be the subject of a patent. Parkes v.  
Stevens.

In *Horton v. Mabon* (s) the patent sued on was held void by the Court of Common Pleas, and on appeal the Court of Exchequer Chamber upheld the judgment below, and came to the conclusion that what the plaintiff claimed as part of his invention was merely the substitution of *double* angle iron for two pieces of *single* angle iron, in the formation of hydraulic cups or joints to telescopic gas-holders. It was matter of general knowledge that the cups might be formed by rivetting two pieces of single angle iron to a plate, and the Court held that the mere substitution of double angle iron—an article well-known in the trade—was not an invention for which a patent could be granted. Horton v.  
Mabon.

In *Ormson v. Clarke* (t) the patent was for “an improvement in the manufacture of cast tubular boilers” and the invention consisted in causing the upright tubes and the lower hollow ring (which connected the tubes together at their lower ends) to be cast at one time, and thus form one casting. It appeared that similar boilers had been previously made in several pieces which were afterwards fastened together by means of cement. The Court of Common Pleas and, on appeal, the Court of Exchequer Chamber, held that the alleged invention, which was Ormson v.  
Clarke.

(q) 2 B. & S. 194, 222; 11 H. L. Cas. 654; 29 L. J. Q. B. 193; 31 L. J. Q. B. 198; 35 L. J. Q. B. 27.

(r) L. R. 5 Ch. 36; L. R. 8 Eq. 358; 38 L. J. Ch. 627.

(s) 12 C. B. N. S. 437; 16 C. B. N. S. 141; 31 L. J. C. B. 255.

(t) 13 C. B. N. S. 337; 14 C. B. N. S. 475; 32 L. J. C. P. S. 291.

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merely the casting in one piece that which used formerly to be cast in several pieces, was not proper subject-matter.

*Bamlett v. Pinksley.*

In *Bamlett v. Pinksley* (u) the patent related to improvements in reaping and mowing machines, and the alleged invention consisted in making the cutting knife revolve quicker for mowing grass than for cutting corn. This was accomplished by the application of an arrangement of shaft and wheels identical with one used by a previous inventor in a hay-making or tedding machine, for the purpose of driving the tossing rakes slower or faster at will. The patent was declared void, on the ground that the alleged invention was not proper subject-matter.

*Philpot v. Hanbury.*

In *Philpot v. Hanbury* (v) an action for the infringement of a patent for "improvements in apparatus for use in drafting patterns for ladies' dresses and under garments." Grove, J., held that the state of public knowledge at the date of the plaintiff's specification disclosed by three prior specifications made his claim to be for what was virtually an application of a known method in a known way, or in a variety of ways open to everybody else, and in giving judgment for the defendant on the plea of want of subject-matter, the learned judge said: "I think there is no reasonable construction which I can give to the plaintiff's patent without obliging him to claim over again; and, if so, then, even if he has modified or changed it, that does not make it the subject of a patent; for if a person has got a patent by which you can supplement measurements by applying curves, then a person cannot get a fresh patent by putting new curves, or slightly changed curves, to the measurements. Suppose there was no patent at all for curves, and it was a case of ordinary measurement, and a tailor measured his customer in a particular way, you could not grant a patent to another tailor for cutting his tape or applying his tape in a different way. It is the use of a thing which is common to all the world. If it were otherwise, everybody could get a patent for different-shaped scales, different numbers, and different curves. . . . I decide it upon the ground that, taking the existing knowledge into consideration, it is merely the application of a known method in a known way or a variety of

(u) Griff. P. C. 40.

(v) 2 P. O. R. 33.



ways open to everybody else. It is no more than a shoemaker applying a different mode of measurement to ladies' feet and to gentlemen's feet. He may find it convenient to apply a different method to each, but nobody can say that if it were known how to measure a gentleman's foot, a shoemaker making ordinary differences in measuring a lady's foot could take out a patent for that."

In *Sharp v. Brauer*,<sup>(x)</sup> the plaintiff's patent was for "a new or improved window screen or blind," and the specification stated that the invention related to screens or blinds for windows, and the improvement consisted in forming them of cardboard, mill-board, &c. The evidence showed that screens were old and well known. Bacon, V.C., in deciding against the patent, observed: "It is clear and evident to me that he (the patentee) did not invent anything; but a luminous idea occurred to him that this old-fashioned thing, that everybody might have made and used whenever he liked and wherever he liked, would be very handy if it was applied to a window, and so it is applied to a window. It is equally applicable to a fireplace, and just as much applied to a fireplace. The use of the screen is only to repel the air, or to keep out the air, or to diminish the light that comes through the window. Whatever it is, it is produced by an old-fashioned, notorious, well-established contrivance; and unless I was to lay down—and if I did, it would be the first time—that the first particular mode of applying a well-known article gives to the man who so first applied it a patent right, I could not entertain the claim of Mr. Sharp in the slightest way or upon any ground that I can conceive. There is nothing new in it. . . . It is the very essence, according to my notion of the law, of the right to sustain a patent that it must contain an invention."

In *Rowcliffe v. Longford Wire Co.*,<sup>(y)</sup> a patent for "improvement in frames for woven or elastic wire net mattresses" was declared invalid on the ground that the patentees claimed merely a rectangular framework which differed only from the old four-post bedstead in not having any legs or posts,

(x) 3 P. O. R. 193.

(y) 4 P. O. R. 281.

by sliding the transverse piece not in grooves but on the top of the sides, and by making the foot and head, instead of being flush with the sides, raised above the sides.

Albo-Carbon  
Light Co. v.  
Kidd.

In *Albo-Carbon Light Co. v. Kidd*,<sup>(2)</sup> the patent called in question by the defendant related to the use of solid naphthaline for the purpose of enriching gas, and the patentee claimed "The use of solid naphthaline, prepared in the forms of sticks, rods or pellets, for the enrichment of combustible gas, substantially as herein described."

The defendant proved that liquid naphthaline prior to the patent had been used for the purpose for which the patentee used solid naphthaline, and that solid naphthaline had been prepared before the patent as a well-known article of commerce. Kekewich, J., in deciding against the validity of the patent, said: "The existence of that theory was known, and the only invention which Mr. Livesey can possibly claim is to have applied that particular form of naphthaline to the enrichment of gas in place of naphthaline in some other form. He says himself that what he claims, to repeat the words, 'is the use of solid naphthaline in the form of solid sticks, rods or pellets,' . . . it is immaterial whether the solid naphthaline used for the enrichment is in one form or another. Whether it is in pellets, whether it is in sticks, or whether it is in a granular form, the result is precisely the same; the enrichment is the same in quality; and more than that, the solid naphthaline, in whatever form it is put into the instrument which holds it, is immediately reduced to a liquid, so that you cannot distinguish one from the other. That being so, it seems to me that all Mr. Livesey has done, cleverly enough, is to take a known article and apply it to a known purpose; that he has taken naphthaline in one form to apply it to a purpose for which naphthaline in another form had been for some time used; and to my mind, though that may be, and was, a clever and useful thing to do; that is not the subject-matter of a patent. I think that before that the application of naphthaline was known, and, whether it is in solution or in the solid (seeing that solid naphthaline was on the market), I

(2) 4 P. O. R. 535.



do not think that a man can claim to be the first and true inventor, when that is all that he has done."

In *Calvert v. Ashburn*,<sup>(a)</sup> it was held, that as caustic alkali had been previously used to dissolve gluten in the manufacture of *starch*, it was not the subject-matter of a patent to apply caustic alkalis to dissolve gluten in the manufacture of *size* from flour. Calvert v.  
Ashburn.

In *Herrburger v. Squire*,<sup>(b)</sup> it was held that the mere alteration of the arc in which a damper for a pianoforte string was worked, though useful, was not proper subject-matter, on the authority of *Kay v. Marshall*.<sup>(c)</sup> Herrburger v.  
Squire.

In *Blakeley v. Latham*,<sup>(d)</sup> it was held that to put a plate on the heel of a boot, which had been previously used on the toe, was not subject-matter. Blakeley v.  
Latham.

In *Longbottom v. Shaw*,<sup>(e)</sup> a patent for "improvements in reels or frames for holding pile and other fabrics" was declared invalid, on the ground that there being no novelty in making separate rows of hooks attached to a bar, and then attaching that bar to some material, there was no invention in the present application. Longbottom v.  
Shaw.

In *Morgan v. Windover*,<sup>(f)</sup> the Court of First Instance and the Court of Appeal upheld a patent for turning springs, which had been formerly used at the back of carriages, and inverting them and putting them to the front of carriages in such a manner as not to interfere with the fore wheels and their motion in turning the carriage. The Court thought, that there was invention in selecting the proper spring to effect the desired purpose of giving horizontal motion, and in adopting it in the proper way to the carriage. The House of Lords, however, held the patent void on the ground that it was merely the application of a known article to an analogous purpose without any ingenuity, and that it was not patentable though advantages were produced that were not produced before. Morgan v.  
Windover.

The preceding cases are all illustrations of the rule that a patent cannot be obtained for a mere analogous use of a known New uses of  
old appliances  
which are not

(a) Pract. Mech. Jour. vol. vii. 2nd ser. p. 97.

(b) 5 P. O. R. 581; 6 P. O. R. 194.

(c) 2 W. P. C. 36.

(d) 6 P. O. R. 29, 184.

(e) 5 P. O. R. 447; 6 P. O. R. 143;  
1 L. R. 43 Ch. D. 46; 58 L. J. Ch. 734.

(f) 5 P. O. R. 304; 7 P. O. R. 131.

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analogous to  
previous ones.

thing. When, however, the new use produces an important effect never before produced, or develops or makes practical some new property of matter not previously known, the new use is not analogous to the former uses, and the novelty of the new agent becomes immaterial, and a good patent may be granted in respect of such a use. The subject of the patent is really the new art, consisting of the production of the new effect or the utilization of the new property of matter, by the use of the known and old thing, and the monopoly is granted as a reward to the patentee for the invention and ingenuity which it is implied he has exercised in making this new application.

There are cases in which an old and known thing is used to produce a new product, when applied to something so totally different to anything to which it was previously applied, so that there is an obvious invention in making the application, *e.g.*, though it was known that macaroni pipe could be made by spinning tough dough into a pipe, an invention of a method of taking red-hot iron and spinning that into pipes in the same manner, might be the subject-matter of a patent.<sup>(g)</sup>

A patent for making salicylic acid, by the alleged application of a known process, was declared valid when it appeared that no one before the patentee had ever practically or theoretically taught the world how to make, out of such abundant and cheap materials as soda, carbolic acid, carbonic acid gas, and hydrochloric acid, the rare and expensive thing salicylic acid; no one had ever taught the world the simple and chemical truth that all that was required to effect this was to make the carbonate of soda perfectly anhydrous and perfectly desiccated.<sup>(h)</sup>

Applications  
of newly dis-  
covered  
qualities of  
natural or  
artificial pro-  
ducts.

When unknown qualities possessed by a natural or artificial product are discovered, and, from the result of experiments, applied to useful purposes, such application is the proper subject-matter of letters patent.<sup>(i)</sup>

Cases in which  
new applica-  
tions were held

In *Muntz v. Foster*,<sup>(k)</sup> it appeared that at the date of the plaintiff's patent, alloys of zinc and copper were known, but it

<sup>(g)</sup> See *Bamlett v. Picksley*, Griff. P. C. 40, 42.

<sup>(h)</sup> *Von Heyden v. Neustadt*, L. R. 14 Ch. D. 230; 50 L. J. Ch. 126.

<sup>(i)</sup> *Muntz v. Foster*, 2 W. P. C. 92, 93, 96; *Lister v. Norton*, 3 P. O. R. 199.

<sup>(k)</sup> 2 W. P. C. 96.



was not known that an alloy consisting of zinc and copper, in certain definite proportions, by virtue of its oxydating properties, was especially adapted for sheathing the bottoms of ships, which was the object of the invention. The novelty consisted in this that the patentee by an experiment ascertained that a mixture of the alloy of zinc with copper, in certain definite proportions, has the effect of producing a better sheathing than the copper sheathing previously in use, by reason and by means of its oxidation just in sufficient quantities, and not too much, so as to wear away and impair the sheathing and render the vessel unsafe, but enough at the same time to keep by its wearing the bottom of the vessel clean from the impurities which before attached to it. Tindal, C.J., was of opinion that the subject-matter was good, and the jury by their verdict upheld the patent.

sufficient to  
support letters  
patent.  
Muntz v.  
Foster.

In *Penn v. Bibby*<sup>(l)</sup> the patent related to the construction of hard wood bearings for the shafts of screw propellers. The complete specification described the manner of performing the invention by reference to drawings, and stated (in substance): The inner surfaces of the bearings for a propeller shaft are grooved to receive strips or fillets of wood, which project beyond the inner surfaces of the metal bearings, and allow the water to circulate in the channels so formed. The wood is by preference *lignum vitæ*, the grain being either longitudinal with the fillets, or at right angles to the bearing surfaces thereof. In other words the bearings are not continuous metal surfaces, as previously constructed; but a series of wooden fillets or ridges, having water spaces between them, which support the rubbing action of the shaft. It was further stated that the several pieces of wood employed in a bearing might be inclined to the axis instead of parallel to it as shown. Also, that it was not essential that the fillets of wood should be fitted in the interior of fixed metal bearings, as a like effect would be obtained if they were attached to the shaft and revolved therewith, in metal bearings, in the manner shown in the drawings. The claim was "the employment of wood in the construction of the bearings, and brushes for the shafts of screw and submerged propellers, as herein described." The

*Penn v. Bibby.*

(l) L. R. 1 Eq. 548; L. R. 2 Ch. 127.

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defendant objected that this was not the subject-matter of a patent, because the alleged invention was merely the new application of an old and well-known thing, and alleged, as examples of old use, certain grindstones and water-wheels.

Lord Chelmsford, L.C., dismissed an application for a new trial, which was made on the ground (*inter alia*) that the invention was not the subject-matter of a patent, saying, "The criterion given by Lord Campbell, in *Brook v. Aston*,<sup>(m)</sup> has been frequently cited (as it was in the present argument), that a patent may be valid for the application of an old invention to a new purpose; but to make it valid there must be some novelty in the application. I cannot help thinking that there must be some inaccuracy in his Lordship's words, because, according to the proposition as he stated it, if the invention be applied to a new purpose there cannot but be some novelty in the application. In every case of this description one main consideration seems to be, whether the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study. Now, strictly applying this test to the present case, it appears to me impossible to say that the patented invention is merely the application of an old thing to a new purpose. The only examples of old use alleged by the defendant were in grindstones and water-wheels. No doubt these have what may be called bearings; but they are of a totally different character, and for a totally different object from the bearings patented. It is difficult to believe that bearings of this description could ever have suggested the application of wood to bearings of screw propellers in the way described in the patent. It is, to my mind, not merely a different application, but something in itself essentially different. It has been found that, in the mode of constructing screw propellers by making metal work upon metal they soon wore out, and occasioned a violent irregular motion on the vessel. Mr. Penn devised the plan of placing fillets of wood upon the inner surface of the bearings, so as to prevent the shaft coming into contact with the metal of the

<sup>(m)</sup> 8 E. & B. 485.



bearings, and so as to admit of the water flowing freely between the shaft and the inner surfaces of the metal bearings, thereby keeping the wood constantly lubricated. The success of this invention has been proved in a remarkable manner. It would be an extraordinary fact if an invention of this kind, so long wanted, and of such great utility, should have been lying in everybody's way who knew anything of the construction of water-wheels or grindstones, and yet should never have been discovered."

In *Steiner v. Heald* (n) it appeared that, prior to the plaintiff's patent, a dye called garancine had been extracted by a certain process from fresh madder. The plaintiff found that it could be extracted by the same process from "spent" madder—*i.e.*, madder which had been used in dyeing, and which up to the date of the plaintiff's patent had always been regarded as a waste product. The defendant pleaded that this was no manner of new manufacture, and at the trial the judge directed the jury to find for the defendant, thereby treating the conclusion to be derived from the evidence as one of law. But the Court of Exchequer granted a new trial, being of opinion that it was a question of fact whether fresh madder and spent madder were so much alike chemically as to be practically the same thing. And if they were not the same thing, then the invention would be the application of an old process to a new substance.

In *Newton v. Vaucher* (o) the defendant was the owner of a patent for an improvement in packing hydraulic and other machines by means of a lining of soft metal, the effect of which was to make certain parts of the machine air and fluid tight. The plaintiff discovered that soft metal had the effect of diminishing friction, and of preventing the evolution of heat, when applied to the surfaces in contact of machines in rapid motion, and subject to pressure, and obtained a patent of later date than the defendants, whereby he claimed as his invention the making or constructing the boxes within which the journals or axles of machinery are to move, by providing them with rims or fillets along their edges, &c., and the lining such boxes

(n) 6 Exch. 620; 20 L. J. Ex. 410.

(o) 6 Exch. 865; 21 L. J. Ex. 305.

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with soft metal. The Court held that the plaintiff's application of the soft metal differed essentially from that of the defendant, and that the plaintiff's patent was valid.

Reynolds v.  
Amos.

In *Reynolds v. Amos* (*p*) the patent was for "improved appliances to be used in the manufacture of ensilage," and the invention and value of the process consisted in obtaining the requisite pressure with heaps of ensilage by means of chains furnished with a peg contrivance for retaining the pressure. Before the plaintiff's patent nobody had ever proposed to deal with fodder in the way he did, and his process enabled him to sell for 7s. what the defendant had to charge £3 10s. for. Though the use of chains was sufficiently obvious, Bacon, V.C., held the patent a good one, but he did not in his judgment refer to the fact that the use to which the chain was applied was not one so analogous to the old uses, and self-evident, as not to call for a considerable amount of invention, and he seems to have considered that there was a new combination.

American  
Braided Wire  
Co. v. Thomp-  
son.

In *American Braided Wire Company v. Thompson* (*q*) a patent for "improvements in bustles or dress-improvers" was declared void by the Court of First Instance, but the decision was reversed by the Court of Appeal, and a majority of the House of Lords saw no reason for dissenting from the decision of the Court of Appeal, which was accordingly upheld. The invention consisted substantially in the application of tubular sections of braided hard wire to bustles. A specification was produced which specified certain applications of braided wire to satchel-handles and other articles, and mentioned that the material might be applied to bustles. On the hearing of the appeal fresh evidence was adduced as to the state of public knowledge at the date of the patent, from which it appeared that the application of braided hard wire to cushions and pillows had been specified, and that it was known that hard wire could be braided in the same manner as soft wire—*i.e.*, in a tubular form on a core—but that there had not been any use of tubular sections of braided hard wire within the realm. The

(*p*) 3 P. O. R. 215.

(*q*) 4 P. O. R. 316; 5 P. O. R. 113; 6 P. O. R. 518.



majority of the House of Lords held that the invention was not the mere application of a known thing to an analogous use, but that sufficient ingenuity to support the patent was shown in the patentee's combination in the adoption of tubular wire braids (though a known elastic material) and their application in substitution for other known elastic materials in making bustles, the result obtained being a complete article, effective and capable of being manufactured and sold cheaply.

It must not be forgotten that in order to support a patent for an analogous use of a known thing there must be evidence of some invention being required in making the analogous application, and it is not sufficient to point out that advantages are obtained which were never before produced.<sup>(r)</sup>

To support a patent for an analogous use of a known thing, it is not sufficient to show that advantages never before produced were obtained.

Lord Watson, in supporting a motion in the House of Lords that the judgment of the Court of Appeal in *Morgan v. Windover* (s) should be reversed, referred to the decision of the House in *American Braided Wire Company v. Thompson* (t) in the following terms: "The learned judges do not appear to me to have sufficiently considered the principle enunciated by Lord Westbury, and accepted by this House in *Harwood v. Great Northern Railway Company*, to the effect that there cannot be a patent 'for a well-known mechanical contrivance merely when it is applied in a manner and to a purpose which is not quite the same, but is analogous to, the manner or the purpose in or to which it has hitherto been notoriously applied.' Your Lordships had recent occasion to consider that principle in *Thompson v. American Braided Wire Company*. (t) In that case, although your Lordships were not agreed in the result, there was no difference of opinion as to the soundness of the rule which formed the ground of the judgment in *Harwood's Case*. The majority, of whom I happened to be one, rested their judgment upon the fact, which they held to be established, that the particular forms of 'dress improvers'

(r) See *Cole v. Saqui*, 5 P. O. R. 489; *Blakey v. Iatham*, 6 P. O. R. 29; *Morgan v. Windover*, 7 P. O. R. 131.

(s) 7 P. O. R. 131.

(t) 6 P. O. R. 518.

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specified and claimed were not *mere* applications of wire braid to an analogous purpose, but that the patentee in his peculiar modes of adapting the old material to its new though analogous use had exercised and exhibited a degree of inventive ingenuity just sufficient to protect him from the incidence of the rule. It was for that reason only that the patent was sustained."<sup>(u)</sup>

(u) 7 P. O. R. 136.



## CHAPTER III.

### NOVELTY.

NOVELTY AT COMMON LAW—NOVELTY AND DISCOVERY—ANTICIPATION AND PUBLICATION — REDISCOVERY OF LOST ART — PUBLIC KNOWLEDGE — PUBLICATION BY USER — PUBLICATION BY DESCRIPTION.

It is absolutely essential that every invention capable of sustaining a grant of letters patent must be new at the time the grant is made. The novelty of the invention is, in fact, in every case in which a patent is granted part of the consideration in exchange for which the Crown,<sup>(a)</sup> acting on behalf of,<sup>(b)</sup> and for the benefit of, the public,<sup>(c)</sup> gives the monopoly, conferred by the grant. Novelty is an essential.

The Sovereign has no prerogative extending to anything injurious to her subjects,<sup>(d)</sup> nor can she by her patent do wrong,<sup>(e)</sup> or enable another to do so.<sup>(f)</sup>

Everybody has alike a *prima facie* right to make experiments and to use in any manner he pleases any invention which is the product of his skill or good fortune. The grant of letters patent vesting in one individual the exclusive privilege of making, using, exercising and vending an invention, curtails the *prima facie* right of the public, for it excludes the rest of the public from using that invention, even though they should, quite independently of the information contained in the patentee's specification, make it for themselves. It is, therefore, only equitable that the public should receive some consideration in return for the curtailment of their rights which the patent thus effects. Everybody has *prima facie* right to invent.  
Grant of letters patent curtails this right.

(a) *Harmar v. Playne*, 14 Ves. 131, 136.

(b) *Harmar v. Playne*, 14 Ves. 132.

(c) Bac. Abr. tit. Prerog; Year Book 40 Edw. III. fol. 18.

(d) Finch, 84.

(e) 1 Co. R. 44<sup>b</sup>, 45<sup>b</sup>; Noy, R. 182; 3 Shep. Abr. 48.

(f) Godb. 254.

If invention is not new consideration fails.

The only consideration which the patentee gives to the public is a knowledge of the invention which they are at liberty to use freely after the expiration of the term for which the patent is granted. If the invention were not new it is quite evident that the patentee would not have given to the public any consideration at all, for the invention being public property at the date of the patent, the public would be in the same position after its expiration that they were in before it was granted. The patent would, therefore, be void for want of consideration. A patent is in effect a bargain made by the Crown on behalf of the public (*g*) on the one hand, and the patentee on the other, and, as in the case of other contracts not made by deed, it would be void if there were no consideration for the grant. (*h*) In the language of Lord Loughborough, L.C., "A bargain without consideration is a contradiction in terms and cannot exist." (*i*)

Cases at Common Law prior to Statute of Monopolies.

The Common Law, as expressed in the cases decided before the passing of the Statute of Monopolies, required that an invention should possess the element of novelty in order to render a patent for it valid. (*k*)

(*g*) *Harmar v. Playne*, 14 Ves. 132.

(*h*) *Rann v. Hughes*, 7 T. R. 350 n.; Anson on Contracts, 68.

(*i*) *Myddleton v. Lord Kenyon*, 2 Ves. Jr. 408.

(*k*) It was laid down in *Darcy v. Allin* (Noy, R. 178; 1 W. P. C. 6), decided in 1602, that: "where any man, by his own charge and industry, or by his own wit or invention, doth bring any *new* trade into the realm, or any engine tending to the furtherance of a trade *that never was used before*, and that for the good of the realm, that in such cases the king may grant to him a monopoly patent, for some reasonable time, until the subjects may learn the same, *in consideration of the good that he doth bring by his invention to the Commonwealth*, otherwise not."

In *Hastings' patent*, (Noy, R. 182; 1 W. P. C. 6) it appeared that a patent was granted to Mr. Hastings in consideration that he brought in the skill of making *frisadoes*, as they were made in Haarlem and Amsterdam, beyond the seas, *being not used in England*, and on action brought for the infringement of the patent it was upset on the ground that such *frisadoes* as Mr. Hastings' were made in England before the date of the patent.

In *Humphrey's Patent* (Noy, R. 183; 1 W. P. C. 7) the Court of Exchequer Chamber held that if the sieve or instrument for melting lead which formed the subject of the patent were used in this country before the patentee should not have the sole use thereof.

In *Moore's Reports* (p. 672) it is laid down that the king cannot grant a patent to restrain people in their usual trades and occupations; and that no occupation can be prohibited or put in monopoly, *but only such thing as is newly invented*, by the skill of man.

In *The Clothworkers of Ipswich Case* (Godb. R. 252; 1 Roll R. 4) it was decided that: "If a man hath brought in a new manufacture, and a *new* trade within the kingdom in peril of his life, and consumption of his estate or stock, or if a man hath made a *new* discovery of anything; in such cases the king of his grace and favour in recompence of his costs and travail, may grant by charter unto him, that he only shall use such a trade or *trafique* for a certain time, *because at the first the people of*



It is stated by the following early text writers, that novelty is essential to the validity of a patent: Sir Edward Coke in his Third Institute,<sup>(l)</sup> Bacon in his Abridgment,<sup>(m)</sup> Hawkins in his Pleas of the Crown,<sup>(n)</sup> and by Sheppard in his Abridgment.<sup>(o)</sup>

The power retained by the Crown by the Statute of Monopolies,<sup>(p)</sup> of granting patents for inventions, is limited to granting patents and grants of privilege "of the sole working or making of any manner of *new* manufacture within this realm, to *the true and first inventor and inventors* of such manufacture, *which others, at the time of making such letters patents and grants, shall not use.*"<sup>(q)</sup> Thus, it appears that, in virtue of this statute, as well as of the Common Law, novelty is a requisite of a valid patent, for the section concludes with the statement that the grants thereby allowed "shall be of such force as they should be, if this Act had never been made and of none other."

Limit of the Crown's authority to grant letters patent for inventions.

Novelty requisite by Statute of Monopolies.

The section provides that (1) the subject of the grant must be a manufacture which is *new* within this realm; (2) the grantee must be the true and first inventor; and (3) the subject of the grant must be a new manufacture which others shall not use. All these three conditions necessarily imply the elements of novelty.

We have seen<sup>(r)</sup> what is the meaning of the words "true and first inventor," and that they do not imply that the grantee must necessarily be the man who actually first made the discovery, but that, if he be the man who first published the invention within this realm, he is deemed to be the true and first inventor within the legal meaning of the term.

True and first inventor.

Although the grantee be the true and first inventor the patent will be void if he has allowed the invention to be used by others before obtaining the grant, and there is a "sound distinction in the abstract" between the two issues raised by a

Prior use by others renders patent bad.

*the kingdom are ignorant, and have not the knowledge or skill to use it; but when the patent is expired, the king cannot make a new grant thereof. For when the trade is become common, and others have been bound apprentices in the same trade, there is no reason that such should be forbidden to use it."* And again: "Of a *new invention* the king can grant a patent;" but "*where there is no invention, the king cannot by his patent hinder any trade.*"

(l) Chap. 85, p. 181.

(n) Part I. c. 79, s. 2.

(p) 21 Jac. I. c. 3.

(r) Chap. I. ante.

(m) Titles "Monop." and "Prerog." F. 4.

(o) Part III. pp. 61, 62.

(q) 21 Jac. I. c. 3, s. 6.

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denial that the patentee is the true and first inventor, and that the invention has not been used before.(s) Moreover, in an action for the infringement of the patent both ought to be pleaded separately if either party desires to rely on both.(t)

The grantee may, in fact, have made the discovery himself without assistance from any source other than his own ingenuity. Yet, if it turn out that the invention was the property of the public before, although unknown to the patentee, his patent will be void, for it is not because a patentee does not know what was in existence before that he can get a monopoly, otherwise, as a learned judge once said, a patentee would get a patent for exclusive ignorance instead of exclusive knowledge.(u)

If the public is possessed of an invention no patent can be granted.

If the public once became possessed of an invention, by any means whatever, no subsequent patent for it can be granted, either to the true and first inventor himself or to any other person. In such circumstances the public cannot be deprived of the right to use the invention, and a patentee cannot give to the public any consideration for the grant, as the public already possess everything he could give. It is not necessary that the invention should be used by the public as well as known to the public; if the invention and the mode in which it can be used has been made known to the public, it is public property, and any subsequent patent in respect of it will be invalid.(v)

Consideration is entire.

The consideration upon the strength of which a patent is granted is in law said to be "entire," that is, a failure of part of the consideration will have the same effect on the validity of the patent as the failure of the whole consideration would have. Hence it follows that, if the patent includes more than one head of invention, the want of novelty in any one of those heads will invalidate the whole on the ground of failure of part of the consideration.(x) And that if in the case of a single in-

(s) *The Househill Co. v. Neilson*, 1 W. P. C. 689; *Cornish v. Keene*, 1 W. P. C. 507.

(t) *Ibid.*, Chap. XIII.

(u) *Young v. Rosenthal*, 1 P. O. R. 32.

(v) *Patterson v. The Gas Light and Coke Co.*, L. R. 3 App. Cas. 239;

*Humpherson v. Syer*, 4 P. O. R. 414.

(x) *Turner v. Winter*, 1 W. P. C. 77; 1 T. R. 602; *Bloxam v. Elsee*, 6 B. & C. 178; 1 Carp. 444; *Morgan v. Seaward*, 1 W. P. C. 196; *Kay v. Marshall*, 2 W. P. C. 71; *Cropper v. Smith*, 1 P. O. R. 87; 2 P. O. R. 61.



vention any material part turns out to be old, the patent will be rendered entirely void.(y)

In either of the above cases the patent would also be void on the ground of false suggestion, for before the grant was made the patentee in his application must have declared himself to be in possession of the invention of which he, or in the case of a joint application, one of the applicants, was the true and first inventor, and which was not in use by any other person or persons.(z) Moreover, the patent contains an express condition avoiding it, in the event of the representation as to true and first inventor, and prior use, turning out to be untrue.(a) Although the Statute of Monopolies invalidates a patent in the event of there being no novelty in the invention, and consequently the patent would be void so far as related to that which was old, yet the principle on which the patent has been held to be void altogether in the event of a material part turning out to be old is, that "the consideration for the grant is the novelty of all, and, the consideration failing, or, in other words, the Crown having been deceived in its grant, the patent is void; and no action maintainable upon it."(b)

In the case of *Brunton v. Hawkes* (c) the patent was for an invention of improvements in the manufacture of ships' anchors, windlasses, and chain cables. At the trial it was proved that the mode of manufacturing anchors described in the plaintiff's specification had never been applied before to ships' anchors. But it had been applied to the adze anchor and the mushroom anchor. These anchors are used only for the purpose of mooring floating lights or vessels intended to be stationary; and are never taken on board. The jury found a verdict for the plaintiff, and the defendant obtained a rule nisi for a new trial, which the Court made *absolute*.

In delivering judgment, Abbott, C.J., said: "I think that so

*Brunton v. Hawkes,*

Judgment of Abbott, C.J.

(y) *Crossley v. Beverley*, 1 W. P. C. 106; *Hill v. Thompson*, 8 Taunt. 382; 2 B. Moore, 433; *Morgan v. Seaward*, 1 W. P. C. 192; *Manton v. Parker*, Dav. P. C. 327; 1 W. P. C. 192 n.; *Bloxam v. Elsee*, 6 B. & C. 169; 1 Carp. 444; *Roberts v. Heywood*, 27 W. R. 454; *Gibson v. Brand*, 1 W. P. C. 636; *Hill v. Tombs*, April 1881, *Engineer*, 51, p. 274.

Under the Act of 1883 patents do not usually comprise more than one invention. See Chap. VII.

(z) Chap. VII.

(a) See Appendix.

(b) Per Parke, B., in *Morgan v. Seaward*, 2 M. & W. 544; Mur. & H. 55; 1 Jur. 527; 1 W. P. C. 196.

(c) 4 B. & Ald. 541.

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much of the plaintiff's invention as respects the anchor is not new, and that the whole patent is therefore void. The mode of joining the shank to the flukes of the anchor is to put the end of the shank, which is in the form of a solid cylinder, through the hollow and conical aperture, and it is then made to fill up the hollow and to unite itself with it. Now that is precisely the mode by which the shank of the mushroom anchor is united to the mushroom top, by which the shank of the adze anchor is united to its other parts." It is indeed the mode by which the different parts of the common hammer and the pick-axe also are united together. Now a patent for a machine each part of which was in use before, but in which the combination of the different parts is new, and a new result produced, is good, because there is a novelty in the combination. But here the case is perfectly different; formerly three pieces were united together; the plaintiff only unites two; and, *if the union of those two had been effected in a mode unknown before, as applied in any degree to similar purposes, I should have thought it a good ground for a patent;* but unfortunately the mode was well known and long practised. I think that a man cannot be entitled to a patent for uniting two things instead of three, *when that union is effected in a mode well known and long practised for a similar purpose.* It seems to me, therefore, that there is no novelty in that part of the patent as affects the anchor, and if the patent had been taken out for that alone, I should have had no hesitation in declaring it bad. Then, if there be no novelty in that part of the patent, can the plaintiff sustain his patent for the other part as to the mooring chain? As at present advised, I am inclined to think that the combination of a link of this particular form with the stay of the form which he uses, although the form of the link might have been known before, is so far new and beneficial as to sustain a patent for that part of the invention, if the patent had been taken out for that alone. But inasmuch as one of the things is not new, the question arises, whether any part can be sustained. It is quite clear that a patent granted by the Crown cannot extend beyond the consideration of the patent. The King could not, in consideration of a



new invention in one article, grant a patent for that article and another. The question then is, whether, if the party applies for a patent, reciting that he has discovered improvements in three things, and obtains a patent for these three things, and in the result it turns out that there is no novelty in one of them, he can sustain his patent. It appears to me that the case of *Hill v. Thompson*, which underwent great consideration in the Common Pleas, is decisive upon that question. In that case the patent was granted to the plaintiff for the invention of certain improvements in the smelting and working of iron; and the Court of Common Pleas appears to have considered that the improvement introduced by the plaintiff into what may properly be called the smelting of iron, was the obtaining iron from that cinder and slag which before had been thrown away as refuse, and that may be considered as new. It appeared, however, that the plaintiff claimed further the merit of having discovered that the application of lime in certain stages of the process would cure a disease common to all iron, not merely to that which he was to produce, but to iron originally manufactured from the fresh ore. Now it turned out that that was not a discovery, for the application of lime to iron made from the cinder, originally used in making ore, was known and practised before. No two things can be more distinct in their nature than the obtaining of iron from a material from which it was impracticable to obtain it before, and the cure or prevention of a disease to which all iron was subjected. In that case, however, the Court of Common Pleas held that, admitting there was novelty in the one, yet, as there was no novelty in the other, the patent was wholly void. The only difference between that case and this is, that here the plaintiff, instead of saying that he has made certain improvements, states the improvements; but still he claims the merit of having invented improvements in all the three, and that they are new; and the consideration of the patent is the improvement in the three articles, and not in one; for an improvement in only one of them would render the patent bad. The consideration is the entirety of the improvement of the three; and if it turns out there is no novelty in one of the improve-

ments the consideration fails in the whole, and the patentee is not entitled to the benefit of that other part of his invention."

Claim to old subsidiary invention not fatal.

Though want of novelty in an essential part of an invention (*d*) invalidates a patent, if a specification claims two inventions of which one is to be used only in connection with, and as subsidiary to the other, want of novelty in the subsidiary claim does not invalidate the patent.

Thus a patentee claimed first a mode of applying rollers and runners to the foot-stand of skates so that they might be cramped or turned so as to cause the skate to run in a curved line by the canting or tilting of the footstand; and secondly, the mode of securing the runners and making them reversible, as described. The Court of Appeal held that assuming that there was nothing novel in the mode of securing the runners to the footstand, yet the want of novelty in the second claim did not invalidate the patent, because the second claim was for a subsidiary invention to be used only in connection with the principal invention. (*e*)

Test of novelty.

It has been shown (*f*) that an invention may be perfectly good subject-matter for a patent though some or all of the parts of which it consists may be old, if the entire combination is a new manufacture. The proper test as to the novelty of the invention is whether the subject-matter claimed *as a whole is new*, though it may consist of old parts provided the patentee does not claim them, but only the combination of the old with the new. (*g*)

Lord Hatherley, L.C., stated the test of novelty in the following words—"Few things come to be known now in the shape of new principles, but the object of an invention generally is the applying of well-known principles to the achievement of a particular result not yet obtained, and I take it that the test of novelty is this: Is the product which is the result of an apparatus for which the inventor claims letters patent effectively obtained by means of your new apparatus, whereas it had never before been effectively obtained by any of the separate

(*d*) p. 88. (*e*) *Plimpton v. Spiller*, L. R. 6 Ch. D. 412. (*f*) Chap. II. p. 50.  
 (*g*) *Newton v. The Grand Junction Railway Co.*, 5 Exch. 331; 20 L. J. Ex. 427 n.; *Cannington v. Nuttall*, L. R. 5 H. L. 205; 40 L. J. Ch. 739.



portions of the apparatus which you have combined into one valuable whole for the purpose of effecting the object you have in view.”(g)

A perfectly valid patent may be obtained for an invention which consists merely in a new application of a thing which was perfectly well-known before.(h) Of course the application which is the subject of the subsequent patent must be totally distinct and novel as compared with any application previously made, and it is always a question of evidence as to whether former applications are so analogous to the one claimed by the subsequent patentee as to amount virtually to the same and so render his patent bad as claiming that which is in fact not new.(i)

The mere statement of the desirability of achieving an unattained result does not invalidate a patent for an invention which actually achieves that result.(j)

There is a great distinction between novelty and discovery; for a thing may have been discovered before, and in that sense not be new, but if the previous discovery has never been made public, it will not be sufficient to upset the patent of a subsequent discoverer on the ground of want of novelty.(k)

This will appear from a contrast of *Dollond's Case* (l) with *Tennant's Case*, (m) and *R. v. Arkwright*. (n) In *Dollond's Case* the question was, Who was the true inventor within the meaning of the statute? Hall had made the discovery in his closet, but had never made it public; and, on this ground, Dollond's patent was confirmed. In *Tennant's Case* the great utility of the invention, which related to bleaching, on the parts of persons engaged in the trade was proved in evidence. On the other hand, a bleacher near Nottingham deposed that he had used the same means of preparing bleaching liquor for six years previous to the date of the patent, but that he had kept his method a secret from all but his two partners and his two servants concerned in preparing

(g) *Cannington v. Nuttall*, L. R. 5 II. L. 216.

(h) Chap. II.

(i) Chap. II. *Newton v. Vaucher*, 6 Exch. 865; *Muntz v. Foster*, 2 W. P. C. 93; *Jordan v. Moore*, L. R. 1 C. P. 624; 12 Jur. N. S. 766; 35 L. J. C. P. 268; 14 W. R. 769; *Harwood v. The Great Northern Railway Co.*, 29 L. J. Q. B. 193; 6 Jur. N. S. 993.

(j) *Thomson v. Batty*, 6 P. O. R. 84.

(k) *Hill v. Thompson*, per Dallas, J., Holt, N. P. C. 636; 2 Moore, 429; 8 B. Taunt. 382; 1 W. P. C. 244.

(l) 1 W. P. C. 43.

(m) 1 W. P. C. 125 n.

(n) 1 W. P. C. 71.

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it. In addition to this, different conversations were proved to have passed between Tennant and a chemist of Glasgow, before the patent, and in these conversations the chemist had suggested to Tennant the basis of the improvement in question. Under these circumstances, Tennant was deemed not to be the inventor, and a nonsuit took place. In the case of *Arkwright's* patent, with respect to a particular roller forming part of the machine, the evidence was, that Arkwright had been told of it by one Kay; that, being satisfied of its value, he took Kay for a servant, kept him for two years, employed him to make models, and afterwards claimed it as his own invention, and made it the foundation of a patent. The same fact was proved as to a crank, which had been discovered by a person of the name of Hargreave, which also had been adopted by Arkwright. And although it had been made use of to some extent before by a few, a general ignorance with respect of it was proved by a great number of persons in the trade. Buller, J., was of opinion that, though it might be perfectly true—that is, the general ignorance as to these improvements—it signified nothing; the fact that the witnesses on the part of the defendant had not heard of those improvements was no contradiction of previous knowledge and previous use by others.

Distinction between anticipation and publication.

It must also be noticed that there is a great distinction between anticipation and publication. An invention has been anticipated when it has been previously made, but not disclosed; it has been published when it has been previously made and disclosed. In the case of *Dollond's* patent,<sup>(o)</sup> Hall's discovery was an anticipation of Dollond's, but not a publication of it, whereas in *Tennant's* case, and *R. v. Arkwright*,<sup>(p)</sup> the subject of the patent in each had not only been anticipated, but had also been published before, and the grants were therefore void on the ground that the respective inventions lacked the essential feature of novelty.

Equivalents.

If an invention differs only from a previous invention in that for one part in the former invention there is substituted an equivalent, though somewhat different part in the latter,

(o) p. 92 *ante*.

(p) p. 92 *ante*.



the mere substitution of the equivalent will not be sufficient to sustain a patent for the second invention, if the analogous parts were known at the date of the first patent to be equivalents; (q) but any person may obtain a patent, valid as regards novelty, for the use of equivalents, which were not taken to be equivalents at the time the patent for the former discovery was granted. (r)

It may be questioned whether if an invention had been formerly used and abandoned many years ago, and the whole thing had been lost sight of, such a state of facts would prevent, on the ground of want of novelty, a person who subsequently rediscovered the invention from obtaining a valid patent in respect of it. Rediscovery of  
lost art.

There does not appear to be any judicial decision one way or the other on this point, which was noticed by Lord Lyndhurst, L.C., in *The Househill Co. v. Neilson*. (s) The House of Lords in that case purposely refrained from expressing an opinion on the question which did not then call for decision. It would appear from an application of the principles in this chapter discussed, that if the invention has ever been the subject of a patent, or has been described in some written document, however long ago, which can be produced, the fact that the invention has been lost sight of, and not been used by the public for a long time, will not enable a later discoverer to obtain a patent for it, as he would clearly not be the true and first inventor. (t) A state of facts might, however, be supposed in which the case would be different. For instance, (u) an encaustic tile or a particular kind of stained glass might be perfectly well known to exist at the present day, but the mode of producing the tile, or the particular kind of glass, might be a long-lost art. In such a case, if an inventor newly discovers the art of producing the encaustic tile, or the particular kind of glass, there does not appear to be any rule of law depriving the Crown of the right to grant a patent, securing to the inventor the monopoly of the art which

(q) *Heath v. Unwin*, 5 H. L. Cas. 505; 2 W. P. C. 216.

(r) *Heath v. Unwin*, 5 H. L. Cas. 505, 538; *The Badische Anilin und Soda Fabrik v. Levinstein*, 2 P. O. R. 90; Chap. II. p. 55.

(s) 1 W. P. C. 717.

(t) See *ante*, p. 88.

(u) 1 W. P. C. 718 n.

he has newly discovered. For it must be observed that the fact of the existence of the result which the newly discovered art produces only proves conclusively that *an art* of producing that result, must have been previously known, not that *the art* which the patentee has described was ever before practised. There may be many ways of arriving at a known result, and, as has been pointed out,<sup>(v)</sup> each one of those ways, provided they are all different, may be the subject of a patent.<sup>(w)</sup> If the existing result convey at once to an observer information as to the way in which it was obtained, and that way is an exercise of the art which the patentee has described, then the previous existence of the result would make the patent void, there being no consideration given to the public. In such circumstances the patentee would only have described an invention which the public was already possessed of, as shown by the existence of the result.

Public know-  
ledge.

Jessel, M.R., discussing the question, What is meant by a thing being known to the public in England, said:<sup>(x)</sup> "Here, again, we must have recourse to authority, and also must consider what the principle is that is to be deduced from the authorities. When you say a thing is known to the public, and part of common knowledge, of course you do not mean that every individual member of the public knows it. That would be absurd. What is meant is, that if it is a manufacture connected with a particular trade, the people in the trade shall know something about it; if it is a thing connected with a chemical invention, people conversant with chemistry shall know something about it. And it need not go so far as that. You need not show that the bulk, or even a large number of those people know it. If a sufficient number know it or if the communication is such that a sufficient number may be presumed or assumed to know it, that will do. Now, how are they to know it? They are to know it by being told of it, or informed of it in some way. You may show that they know it by showing that the trade had commonly used

<sup>(v)</sup> p. 48, *ante*.

<sup>(w)</sup> See *Morgan v. Windover*, 5 P. O. R. 306.

<sup>(x)</sup> *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 556.



it. That is the best evidence you can have. You may show the thing was known because it was used and brought into practice, which is a case I have not now to consider. But you may show that they knew it in another way—that it was published or made known to the public. I use the word ‘published’ in that sense. How made known to the public? It has been held that if it is in a specification, certainly in a modern specification, which has been enrolled in the Patent Office, and not published besides, that will do. And it has also been held that, as a common rule, if the description has been printed in *England*, and published in *England*, in a book which circulates in *England*, that will do. But, after all it is a question of fact. The judge must decide, from the evidence brought before him, whether it has, in fact, been sufficiently published to come within the definition of being made known within the realm.”

If some of the public, not under terms of secrecy or confidence to the inventor, become, at any time before the date of the patent, acquainted with the invention, this will be quite sufficient to render the grant void; and the question in an action upon a patent, the validity of which is put in issue, on the ground of previous publication, is: “Is it the fair conclusion from the evidence that some English people under no obligation of secrecy(*y*) arising from confidence or good faith towards the patentee, knew of the invention at the date when the plaintiff took out his patent.”(*z*)

It is evident, that a knowledge of an invention cannot possibly be communicated to the public until the invention has been completed either by the patentee or some one else before him, and it therefore follows that any experiment made prior to the date of the patent, which resulted in failure, or only a partial success, cannot, even though published, amount to a disclosure of a perfected discovery. A machine which is useless, and a failure, is not an anticipation of a similar machine effecting the object for which the useless machine was

Experiments which result in failure will not vitiate subsequent patent.

(*y*) p. 100 *post*.

(*z*) Per Fry, L.J., *Humpherson v. Syer*, 4 P. O. R. 407, 414; *Tickelpenny v. Army & Navy Co-operative Society*, 5 P. O. R. 405.

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designed, though there may be a degree of similarity in the details of the two.(a)

A mere experiment, supposed by the person making it to be fruitless, and abandoned because it was not brought to a complete result, will not prevent a more successful investigator, who adds the last link of improvement towards bringing it to a state of perfection, from maintaining a patent for the invention ;(b) nor does the publication of a method of achieving a particular result vitiate a patent for achieving that result by different means involving the exercise of invention.(c)

Law of anticipation stated by Tindal, C.J.

Tindal, C.J., stated the law of anticipation by experiments in the following words : " A man may make experiments in his own closet for the purpose of improving any art or manufacture in public use ; if he makes these experiments and never communicates them to the world, and lays them by as forgotten things, another person who has made the same experiments, or has gone a little further, or is satisfied with the experiments, may take out a patent, and protect himself in the privilege of the sole making of the article for fourteen years ; and it will be no answer to him to say that another person before him made the same experiments and therefore that he was not the first discoverer of it, because there may be many discoverers starting at the same time, and many rivals that may be running on the same road at the same time, and the first which comes to the Crown and takes out a patent, it not being generally known to the public, is the man who has a right to clothe himself with the authority of the patent and enjoy its benefits."(d)

And again, the same learned judge directed a jury that a mere experiment, or a mere course of experiments, for the purpose of producing a result, which is not brought to its completion, but

(a) *Murray v. Clayton*, L. R. 7 Ch. 570 ; 15 Eq. 115 ; 1 W. R. 498 ; 42 L. J. Ch. 191 ; *Tangue v. Stott*, W. N. 1886, p. 63 ; *Jones v. Pearce*, 1 W. P. C. 124 ; *Stead v. Williams*, 2 W. P. C. 135 ; *Barlow v. Bayliss*, 1 Griff. P. C. 44 ; *Shaw v. Jones*, 6 P. O. R. 336 ; *Cannington v. Nuttall*, is often quoted in support of this proposition, but there the case was decided on the ground that the two machines were not the same.

(b) *Galloway v. Bleden*, 1 W. P. C.

529 ; *Jones v. Pearce*, 1 W. P. C. 124 ; *Tangue v. Stott*, W. N. 1886, p. 68 ; *Stead v. Williams*, 2 W. P. C. 135 ; *Hill v. London Gas Light Co.*, 5 H. & N. 312 ; *Otto v. Linford*, 46 L. T. N. S. 39.

(c) pp. 48, 49 ; *Hill v. London Gas Light Co.*, 5 H. & N. 312 ; *Otto v. Linford*, 46 L. T. N. S. 39 ; *Hullett v. Hague*, 1 Carp. R. 501 ; 2 B. & A. 370 ; *Minter v. Mower*, 1 W. P. C. 140.

(d) *Cornish v. Keene*, 1 W. P. C. 508 ; but see Chap. VII.



begins and ends in uncertain experiments, is not such an invention as should prevent another person, who is more successful or pursues with greater industry the chain in the line that has been laid out for him by the preceding inventor, from availing himself of it, and having the benefit of it.<sup>(e)</sup>

In the case of *Jones v. Pearce*,<sup>(f)</sup> the patent called in question Jones v. Pearce. was for "improvements in wheels for carriages," and the defendant proved at the trial that prior to the date of the plaintiff's patent wheels similar to those described in the specification had been made by a Mr. Strutt. Patterson, J., directed the jury that if they were of opinion that Mr. Strutt's invention was an experiment, that he found it did not answer, and ceased to use it altogether, and abandoned it as useless, and nobody else followed it up, and that the plaintiff's invention, which came afterwards, was his own invention, and remedied the defects of Mr. Strutt's wheel, then there was no reason for saying that the plaintiff's patent was not good.

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

An invention abandoned must be presumed not to have been completed, but to have rested in experiments and trial, but if it was completed it does not signify whether it was completely abandoned, or whether it was continued to be used down to the very date of the patent, provided that it was published.<sup>(h)</sup> Thus, the validity of Walton's patent for "improvements in

Invention abandoned is presumed to be incomplete.

<sup>(e)</sup> *Galloway v. Bleadon*, 1 W. P. C. 525; see also *Bereton v. Richardson*, 1 P. O. R. 165; *Moseley v. Victoria Rubber Co.*, 4 P. O. R. 211; *Humpherson v. Syer*, 4 P. O. R. 184, 188; *Morgan v. Windover*, 4 P. O. R. 417; 5 P. O. R. 295; 7 P. O. R. 131; *Edison v. Swan*, 6 P. O. R. 277; *Winbey v.*

*Manchester Tramways Co.*, 6 P. O. R. 359; 7 P. O. R. 30.

<sup>(f)</sup> 1 W. P. C. 122.

<sup>(g)</sup> *Carpenter v. Smith*, 1 W. P. C. 534.

<sup>(h)</sup> *The Househill Co. v. Neilson*, 1 W. P. C. 713; *Galloway v. Bleadon*, 1 W. P. C. 525; *Morgan v. Windover*, 5 P. O. R. 295, 303.

cards for carding wool, cotton, silk, and other fibrous substances," was questioned, on the ground that the improvement consisting in using caoutchouc as a substitute for leather as an elastic bed in which to fix the teeth, was not novel. It appeared in evidence that a certain material called "Hancock's patent leather," had been manufactured and sold prior to the date of the patent, and it was contended that this "Hancock's patent leather" was substantially the same thing as the elastic bed in which the teeth of the plaintiff's cards were fixed, and further, that Hancock's material had been supplied to certain manufacturers during a period of about a year and a half, several years before the date of the plaintiff's patent, and that it had been used in the construction of cards, but had not been so used since that time. Cresswell, J., said to the jury: "Supposing that the article did embody the principle of the plaintiff so as to present to persons using it the properties, qualities, and advantages in principle of that article which the plaintiff makes, the question for you will be whether that use is not to be considered rather in the nature of an experiment than of any public user of the article, so as to deprive the plaintiff of the fruit of his discovery in respect of this manufacture."<sup>(i)</sup>

And speaking on the same subject in another case the learned judge observed: "I take it that there is a great difference between the knowledge of an invention as a thing that would answer and was in use, and the knowledge of it as a new experiment that had been found to be a failure, and thrown aside. If a person has had a scheme in his head and has carried it out, but after a trial has thrown it aside, and the thing is forgotten and gone by, then another person re-introducing it may, within the meaning of the act, be the inventor and the first user of it, so as to justify a patent."<sup>(k)</sup>

Experimental  
user not neces-  
sarily publi-  
cation.

An inventor may, before making application for a patent, entrust his invention to another person, bound to him by terms of confidence and secrecy, for the purpose of making experi-

<sup>(i)</sup> Walton v. Bateman, 1 W. P. C. 619; see also Tangué v. Stott, W. N. 1866, p. 68.

<sup>(k)</sup> Stead v. Williams, 2 W. P. C. 135.



ments, with a view to rendering the invention more perfect and efficient, and such an experimental user, though to a certain extent a user in public, will not necessarily invalidate a subsequent patent.<sup>(l)</sup>

An inventor may, in certain cases, derive pecuniary profit from an experimental user of his invention before applying for protection, without rendering his patent subsequently obtained deficient on the ground of want of novelty. Thus, in the case of Newall's patent for "improvements in apparatus employed in laying down submarine electric telegraph wires," experiments on dry land were necessarily not sufficient to prove the utility of the apparatus for the purpose for which it was designed, and Newall accordingly tested the practicability of the invention during the laying of a submarine cable under a Government contract. The Court held that this user, notwithstanding the fact that Newall had derived profit from it, was only experimental, and did not prevent him obtaining a valid patent for the invention.<sup>(m)</sup>

Inventor may, in some cases, derive profit from an experimental user without rendering the patent void.

In *Hill v. London Gas Light Co.*,<sup>(n)</sup> the finding of the jury that one Croll had by means of the method for which the plaintiff had subsequently obtained a patent, purified many thousand feet of gas, but that this user was by way of experiment only saved Hill's patent from being upset on the ground of want of novelty. And the Court refused to grant a new trial, the judgment containing the following passage: "The word 'experiment,' in the cases referred to, has been used, not as the sole test upon a matter of this sort, but as indicating a class of practice, and for the purpose of showing that if there has been a user of an invention not of a substantial character, but in the character of an experiment, then, although the thing has been done before, it does not preclude a person from taking out a patent for it; so that although what Croll did may not have been strictly in the nature of an experiment, still the jury have so found it, and we cannot grant a new trial."<sup>(o)</sup>

<sup>(l)</sup> *Bentley v. Fleming*, 1 Car. & K. 269; see also *Morgan v. Seaward*, 1 W. P. C. 578; *Morgan v. Seaward*, 1 W. P. C. 194.  
<sup>(n)</sup> 5 H. & N. 312.  
<sup>(o)</sup> See also *Lewis v. Marling*, 10 B. & C. 22; 4 Car. & P. 57; 1 W. P. C. 493.  
<sup>(m)</sup> *Newall v. Elliott*, 4 C. B. N. S. 493.

On the other hand, where a person invented certain machinery during the fulfilment of a contract for the building of a pier, and used that machinery for four months in a place to which the public had access, before applying for the patent; and after the utility of the machinery in question had been determined and profit had been derived from the public user, such person on making application was held not to be entitled to a patent.<sup>(p)</sup>

And where a referee appointed by Act of Parliament to inspect the works of the London Gas Companies, whilst engaged in the prosecution of his duties discovered a process for purifying gas and obtained a patent for the invention, after the report of himself, and his co-referees embodying the principle of the process had been drawn up, it was held by the House of Lords that the patent was void for lack of novelty, because the report conveying a knowledge of the invention had become public property from the time it was written.<sup>(q)</sup>

Two different kinds of user.

It is to be observed that it is competent for a person before the date of a patent to use the invention, the subject of the grant, in one of two ways. First, he may use it openly in such a manner as that the user will convey to the mind of any one seeing it, a knowledge of what the invention consists, *e.g.*, if the alleged invention relate to the particular construction of a lock, any person who has before the date of the patent constructed a lock on the principles claimed by the patentee, and publicly used it in this country, will thereby have published the invention, and any subsequent patent for it could not be sustained.<sup>(r)</sup> Secondly, an invention may be so used, as that the user will not enable any one seeing it to discover in what the invention really consists, *e.g.*, in the case of a chemical invention, a dye for instance, the dye might be produced and known, but the existence of it would not demonstrate the method according to which it was prepared, and no person other than the manufacturer in possession of the secret would

<sup>(p)</sup> *Re Adamson's Patent*, 6 De G. M. & G. 420; 25 L. J. Ch. 456.

<sup>(q)</sup> *Patterson v. The Gas Light and Coke Co.*, L. R. 3 App. Cas. 239.

<sup>(r)</sup> *Carpenter v. Smith*, 1 W. P. C. 530, 534; see also *Stead v. Williams*,

2 W. P. C. 136; *Heath v. Smith*, 2 W. P. C. 278; *Honiball v. Bloomer*, 10 Exch. 588; *Honiball's Patent*, 2 W. P. C. 209; *Young v. Fernie*, 4 Griff. 577; *Bereton v. Richardson*, 1 P. O. R. 177.



be able to produce it—in such a case it is submitted, for reasons which will appear hereafter,<sup>(s)</sup> that such a user would not prevent either the manufacturer or any other person who should discover the secret from obtaining a patent valid on the ground of novelty for the invention.<sup>(t)</sup> Again, a prior user of an invention may be made in public or in secret. It is well settled law that, if the invention has been used publicly, a subsequent patent would, under section 6 of the Statute of Monopolies, be void,<sup>(u)</sup> whereas if the user has only been secret, the grant may be sustained,<sup>(x)</sup> and this whether the user has been by the inventor himself,<sup>(y)</sup> or by a manufacturer for the inventor under terms of secrecy to him,<sup>(z)</sup> or his workmen.<sup>(a)</sup> It may be open to question, however, as to whether if a patentee has made profit by a prior secret user of the invention, he has not thereby rendered his subsequent patent null and void.<sup>(b)</sup>

The public use of only one specimen of a patented article,<sup>(c)</sup> or by only one person,<sup>(d)</sup> is quite sufficient to invalidate a subsequent patent.

Lord Abinger, explaining to a jury what in the patent law sense is meant by the “public use and exercise” of an invention which will render a subsequent patent void on the ground of want of novelty, used the following words: “I think that what is meant by ‘public use and exercise’ is this: a man is entitled to a patent for a new invention, and if his invention is new and useful, he shall not be prejudiced by any other man having invented that before, and not made any use of it; because the mere speculations of ingenious men, which may be fruitful of a great variety of inventions, if they are not brought into actual use, ought not to stand in the way of other men equally ingenious, who may afterwards make the same inventions and apply them. A great many patents

Public use of only one specimen or by only one person will vitiate patent.

“Public use”

<sup>(s)</sup> pp. 110, 111-115, *post*.

<sup>(t)</sup> See *Hancock v. Somervell*, 39 Newton, L. J. 158.

<sup>(u)</sup> *Cornish v. Keen*, 1 W. P. C. 508.

<sup>(x)</sup> *Dollond's Case*, 1 W. P. C. 43.

<sup>(y)</sup> *Smith v. Davidson*, 19 C. B. 690; *Bentley v. Flemming*, 1 Car. & K. 587.

<sup>(z)</sup> *Morgan v. Seaward*, 1 W. P. C. 187; *Useful Patents Co. v. Rylands* 2 P. O. R. 235; *Humpherson v. Syer*, 4 P.

O R. 407; *Kurtz v. Spence*, 5 P. O. R. 161.

<sup>(a)</sup> *Betts v. Menzies*, 1 E. & E. 1008.

<sup>(b)</sup> See pp. 110-115, *post*.

<sup>(c)</sup> *Honiball v. Bloomer*, 10 Exch. 538; *Honiball's Patent*, 2 W. P. C. 201, 209; *Carpenter v. Smith*, 1 W. P. C. 530, 534; *Young v. Fernie*, Griff. P. C. 577; *Bereton v. Richardson*, 1 P. O. R. 177.

<sup>(d)</sup> *Stead v. Williams*, 2 W. P. C. 136; *Heath v. Smith*, 2 W. P. C. 278.

## LETTERS PATENT FOR INVENTIONS.

have been taken out, for example, upon suggestions made in a celebrated work by the Marquis of Worcester, and many patents have been derived from hints and speculations by that ingenious author. But yet, as he never acted upon them, as he never brought out any machines whatsoever, those patents are good. So that the meaning of these words, 'public use' is this: that a man shall not by his own private invention, which he keeps locked up in his own breast, or in his own desk, and never communicates it, take away the right which another man has to a patent for the same invention. Now, 'public use' means this: that the use of it shall not be secret, but public. . . . If a man invents a thing for his own use, whether he sells it or not—if he invents a lock, and puts it on his own gate, and has used it for a dozen years, that is a public use of it. If it were otherwise, see what the consequences would be. If Mr. Davies has a lock which he directed to be made and put on his gate sixteen years ago at least; if that was not a public use which prevented a man from taking out a patent, any man might go and take a model of that lock, and get a patent for it. How can he be the inventor of it? Because, to obtain a patent, a man must be the inventor; and if it has been once in public use (that is, used in a public manner, not used by the public), yet if it has been used by half a dozen individuals, or one in a public manner, any man having access to it, how can he be said to be the inventor if by merely gaining access to that he takes out a patent? . . . A man cannot be said to be the inventor of that which has been exposed to public view, and to which he might have had access if he had thought fit. . . . If you are of opinion (not that they were generally adopted by the public and used by the public, for that in my opinion is a perfect fallacy) that the use of them is public, and the exercise of the invention was public, and not kept secret, so that the public might have no benefit from it, then I think that part of the issue you ought to find for the defendant.<sup>(e)</sup> The jury found for the defendant, and on a motion for a new trial, on the ground of misdirection, the Court of Exchequer approved of the state-

means public,  
as distin-  
guished from  
secret,

(e) *Carpenter v. Smith*, 1 W. P. C. 530, 534, 535, 540.



ment of the law made by Lord Abinger, Alderson, B., adding these words: (*f*) "Public use means a use in public, so as to come to the knowledge of others than the inventor as contradistinguished from the use of it by himself in his chamber."(*g*)

To rebut the claim of novelty, it is not necessary to show that the invention has been used by the public; it is quite sufficient to establish that it has been used in public as contradistinguished from being used in secret, (*h*) *e.g.*, to show that an article has been openly manufactured (*i*) or exhibited in a workshop, (*k*) where all the workmen knew the process of its manufacture. (*l*)

(*f*) 1 W. P. C. 542.

(*g*) See *Croisdale v. Fisher*, 1 P. O. R. 21.

(*h*) *Carpenter v. Smith*, 1 W. P. C. 530; *Stead v. Williams*, 2 W. P. C. 136; *Stead v. Anderson*, 2 W. P. C. 149; *Hancock v. Somervell*, 39 Newton, L. J. 158; *Honiball v. Bloomer*, 2 W. P. C. 199; *Young v. Rosenthal*, 1 P. O. R. 32.

(*i*) *Croisdale v. Fisher*, 1 P. O. R. 17; *Lister v. Norton*, 3 P. O. R. 199; *Heath v. Smith*, 3 E. & B. 256; *Betts v. Neilson*, L. R. 3 Ch. 436.

(*k*) *Humpherson v. Syer*, 4 P. O. R. 407.

(*l*) In *Tennant's Case* (1 W. P. C. 123) the patent was for a method of using certain calcareous earths instead of alkaline substances, by neutralizing the oxygenated muriatic acid, used in bleaching, &c. The great utility of the invention, and the general ignorance of bleachers with respect to such bleaching liquor before the date of the patent, were established in evidence. It was, however, proved that a bleacher had used the same means of preparing his bleaching liquor for five or six years prior to the date of the plaintiff's patent, and that he had kept his method a secret from all but his two partners and two servants connected in preparing it; and a chemist deposed that having had frequent conversations with the plaintiff on the means of improving bleaching liquor, he had in one of them suggested that he would probably attain his end by keeping the lime water constantly agitated; that the plaintiff afterwards informed him that the method had succeeded, and that these conversations took place in 1796. Lord Ellenborough, C.J., who tried the case, nonsuited the plaintiff, holding that the above evidence established a prior publication of the invention.

*Losh v. Hague* (1 W. P. C. 202) was a case in which damages were sought for the infringement of Losh's patent for "certain improvements in the construction of wheels for carriages to be used on railways," and it was established, to the satisfaction of the jury, that wheels made on the same principle as those claimed by Losh, had been constructed before the date of his patent, though they had not been previously used on railways. The invention was, under these circumstances, held not to be novel, Lord Abinger, C.B., pointing out to the jury that if the wheels had been made and sold to any one individual, it made no difference though the public did not want them, because there were no railways, and they were not adapted to any particular use to which at that time the public could apply them (1 W. P. C. 205).

In *Muntz v. Foster* (2 W. P. C. 96) it was proved that Muntz discovered, in a particular combination of metals made before, a hidden virtue or quality which had never before been noticed, and in consequence of this discovery he was enabled to apply the metal to a new and useful purpose, and thereby became entitled to a patent for the application, under the name of "an improved manufacture of metal plates for strengthening the bottom of ships or other such vessels." Tindal, C.J., in summing up to the jury, used these words: "I look upon the invention to consist in this, that Muntz has, by an experiment ascertained that a certain mixture of the alloy of zinc with copper will have the effect of producing a better sheathing by reason and by means of its oxidating just in sufficient quantities—that is, not too much, so as to wear away and impair the sheathing and render the vessel unsafe, but enough at the same time to keep by its wearing the bottom of the vessel clean from those impurities which before attached to it. And if it was



Not necessary to prove that prior use was continued till date of patent.

In order to avoid a patent on the ground of prior public use of the invention, it is not necessary to show that the prior use relied on was continued up to the date of the patent, for

shown, as it possibly might be, that sheets had been made of metal before, in the same proportion which he had pointed out, and if this hidden virtue or quality had not been discovered or ascertained, and consequently the application never made, I cannot think the patent will fail on that ground. I look upon it that there is as much merit in discovering the hidden and concealed virtue of a compound alloy of metal, as there would be in discovering an unknown quality which a natural earth or stone possessed. We know by the cases that have been determined that where such unknown qualities have, from the result of experiments, been applied to useful purposes of life, that such application has been considered as the ground and proper ground of a patent; and therefore when I come to that part of the case in which they seek to show this is not so, because these metal plates have been invented before—that is, persons have used them before—in my judgment it will not go far enough, unless they can show there has been some application of them before to this very useful purpose. . . . I do not think that the circumstance of showing that the combination of these two materials in a metal plate will of itself destroy this patent, when no attention at the time was paid to the purpose for which this patent was taken out, and it was made merely in the ordinary course of melters of metal for the various and ordinary purposes of life. I do not think that the circumstances of showing, that in the long time that has passed before us in the different, and, I may say, infinitely varying, combinations that must have been made for the various purposes for which brass and other metal was manufactured for ordinary and common purposes of life—to call a workman to show that on some occasion or occasions he had combined them in those proportions for another and different purpose; it does not appear to me that such destroys the patent.”

*Muntz v. Foster* (2 W. P. C. 96) is to be distinguished from *Losh v. Hague* (1 W. P. C. 203), in that in the former case the patent was for a result which had been arrived at casually before, but there was merit in discovering a hidden virtue in the result which made it applicable to a particular purpose and capable of sustaining a patent, whereas, in the latter case, the result was known before, but the application to the part or purpose (which was self-evident) was not made because the occasion had never arisen, and the patent was therefore held void.

In *Lewis v. Marling* (10 B. & C. 22; 4 Cas. & P. 57; 1 W. P. C. 493) the patent related to a shearing machine in which the novelty consisted in shearing from list to list. It was proved at the trial that a similar machine had been made previously to the patent, which was tried by a person called on behalf of the defendant, but he did not think it answered, and soon discontinued the use of it. It was also proved that a model had been sent over from America and shown to a few persons, but no machine was made from it, and also that a specification had been brought over from America and two persons employed to make a machine from this, which, however, was never completed, so that, before the patentee's machine was publicly known or used in this country for shearing from list to list. Lord Tenterden, C.J., directed the jury that if it could be shown that the patentees had seen the model or specification, that might answer the claim of invention, but there was no evidence of that kind, and he left it to the jury to say whether the machine had been in public use and operation before the patent was granted, and they found that it had not.

On a motion for a rule *nisi* for a new trial this direction of Lord Tenterden, C.J., was approved of. Bayley, J., saying: “If I make a discovery and am enabled to produce an effect from my own experiments, judgment, and skill, it is no objection that some one else had made a similar discovery by his mind, unless it has become public. So if I introduce a discovery *bonâ fide* made, I may have a patent for it, though a person might have received previously a communication from abroad which would have enabled him to have made the machine.”

In *Heath v. Smith* (2 W. P. C. 268), it was proved that the process included in the plaintiff's claim had been practised by five manufacturers in the course of their trade before the date of the patent, and, that whilst two of these manufacturers had kept the process a secret and the other three had practised it openly, it was not generally known till the plaintiff stated it in his specification. The Court of Queen's Bench held that there had been a public use of the process and that the patent was consequently invalid.



if there be a complete anticipation, by prior use, the abandonment of it is nothing, yet when it is a question whether there really was a machine perfected in accordance with the alleged invention, the fact that it had never been used for a number of years before the patentee took out his patent is most material, as leading to the conclusion that that which was made many years ago was not a machine in accordance with the invention.<sup>(m)</sup>

An inventor who, before applying for a patent, uses his invention in such a manner as to convey to the public a knowledge of it, or allows it to be used by the public, will thereby render his patent just as invalid on the ground of want of novelty, as if a prior public use and exercise by persons other than himself were shown to have existed.<sup>(n)</sup> But after the inventor has sent in his application for a patent, and the same has been accepted, and before the patent is sealed, he is justified in using the invention in public, and will not by such use render the grant void, but he is not entitled to use, in connection with the apparatus manufactured according to the invention, the word "patent," until he has obtained the seal of the Patent Office.<sup>(o)</sup>

Protection on application for patent.

The combined effect of Art. 4 of the International Convention of 1883,<sup>(p)</sup> and s. 103 of the Act of 1883 is to protect any person who has duly registered an application for a patent in any of the States of the Union during a period of seven months from the date of such application against the ordinary consequences of publication of the invention in this country. Such a person has a right of priority to a British patent at any time before the expiration of such period of seven months from the date of his application in the foreign State, notwithstanding that in the meanwhile the invention may have been published in this country.

Foreign applicant.

It is submitted that the period of seven months, during

<sup>(m)</sup> Per Lord Brougham, *The Househill Co. v. Neilson*, 1 W. P. C. 13; *Tangue v. Stott*, W. N. 1866, p. 68; *Morgan v. Windover*, 5 P. O. R. 303; *King, Brown & Co. v. Anglo-American Brush Co.*, 6 P. O. R. 414; pp. 97, 98 *ante*.

<sup>(n)</sup> p. 88 *ante*.  
<sup>(o)</sup> 46 & 47 Vict. c. 57, ss. 14, 15; *Row* on the prosecution of *Crow v. Wallis*, 3 P. O. R. 1; *R. v. Crampton*, 3 P. O. R. 367.  
<sup>(p)</sup> Appendix.

which protection from publication is afforded to the inventor, dates from the first application in one of the States of the Union, and not from the last of several applications in different States.

**Exhibitions.**

If an inventor desires to exhibit at an industrial or international exhibition an invention for which he has not applied, but intends to apply, for protection by letters patent, he can do so without thereby rendering his subsequent patent, if obtained, null and void by proceeding under s. 39 of the Patents, &c., Act, 1883, and Rule 15 of the Patent Rules, 1890. The section of the Act referred to enacts that the exhibition of an invention at an industrial or international exhibition, certified as such by the Board of Trade, or publication of any description of the invention during the period of the holding of the exhibition in the place where the exhibition is held, or the use of the invention during the period of the holding of the exhibition by any person elsewhere, without the privity or consent of the inventor, shall not prejudice the right of the inventor, or his legal personal representative, to apply for, and obtain, provisional protection, and a patent in respect of the invention, or the validity of any patent granted on the application, provided that both the following conditions are complied with, namely :

- (a) The exhibitor must, before exhibiting the invention, give the Comptroller the prescribed notice of his intention to do so ;
- (b) The application for a patent must be made before or within six months from the date of the opening of the exhibition.

Rule 15 of the Patent Rules, 1890,<sup>(g)</sup> provides that the inventor shall give to the Comptroller notice in writing of his intention to exhibit, publish, or use the invention, as the case may be, and for the purpose of identifying the invention in the event of an application for a patent being subsequently made, the applicant shall furnish to the Comptroller a brief description of his invention, accompanied, if necessary, by drawings,

(g) See Appendix.



and such other information as the Comptroller may in each case require.

The fact of an inventor having kept his invention secret, after it has been brought to completion, does not, at any rate if there has been no profitable use of it,<sup>(r)</sup> deprive the Crown of its right to grant a patent on the application of such inventor,<sup>(s)</sup> but delay on the part of the applicant is extremely undesirable, because it is always possible that some one else may make an application first, and so get a prior right to a patent.<sup>(t)</sup>

Delay in making application is undesirable.

If an inventor manufacture and offer for sale an article made in accordance with his invention before the date of his patent, even though no sale actually take place, he will thereby publish his invention and deprive himself of any right to become a patentee in respect of it.<sup>(u)</sup>

Manufacture for sale is publication;

The sale of a single specimen of a patented article before the date of the patent is sufficient to render the grant null and void,<sup>(v)</sup> though the sale was for export,<sup>(y)</sup> or as an experiment to ascertain whether there would be a demand for the article.<sup>(z)</sup>

But if the article does not on the face of it show the manner in which it was made, it may be doubted whether such a manufacture and offering for sale would deprive the inventor of his right to a subsequent patent for the process of manufacture,<sup>(a)</sup> and the bare fact of the article having been made before the patent was obtained would not alone render it bad.<sup>(b)</sup>

but not if article does not show the manner of its manufacture.

It has been held that when delay has arisen in the granting of a patent from causes over which the patentee had no control, the manufacture by him of articles made according to, and before the date of the patent, for sale after the seal of the Patent Office has been obtained, will not vitiate the patent.<sup>(c)</sup>

Delay in granting patent.

<sup>(r)</sup> See pp. 111-115, *post*.

<sup>(s)</sup> Bentley v. Fleming, 1 C. & R. 587; Bowman v. Taylor, 1 W. P. C. 293.

<sup>(t)</sup> Hancock v. Somervell, 39 Newton, L. J. 158.

<sup>(u)</sup> Oxley v. Holden, 8 C. B. N. S. 666; Wood v. Zimmer, 1 Holt, N. P. C. 57; 1 W. P. C. 44; Morgan v. Seaward, 1 W. P. C. 194; Mullins v. Hart, 3 Car. & K. 297; Lister v. Norton, 3 P. O. R. 192, 207.

<sup>(v)</sup> Honiball v. Bloomer, 2 P. O. R.

199; Germ Milling Co. v. Robinson, No. 2, 3 P. O. R. 399; Hollins v. Capper, 5 P. O. R. 289.

<sup>(y)</sup> Carpenter v. Smith, 1 W. P. C. 541.

<sup>(z)</sup> Lister v. Norton, 3 P. O. R. 207.

<sup>(a)</sup> See pp. 111-115, *post*; Hancock v. Somervell, 39 Newton L. J. 158.

<sup>(b)</sup> Bramah v. Hardcastle, Holroyd, 81; Lewis v. Marling, 4 C. & P. 57; Moss v. Malings, 3 P. O. R. 378.

<sup>(c)</sup> Betts v. Menzies, 4 Jur. N. S. 477.

Loan of patented article.

The loan of an article for the purpose of experiment before the application of a patent in respect of it may not amount to publication sufficient to avoid the patent when obtained.

Thus, in *Bentley v. Fleming*,<sup>(d)</sup> it appeared that a machine manufactured according to the invention had, before the date of the patent, been lent by the patentee to a friend for the purpose of trial, and that the machine was fixed in a room in a mill to which workpeople had access. Cresswell, J., who tried the case, held that the machine having been merely lent for the purpose of testing it, the use of it did not amount to a publication of the invention.

*Morgan v. Seaward*.

In *Morgan v. Seaward*,<sup>(e)</sup> the Court of Exchequer thought that the manufacture of two pieces of machinery for a person connected in business with the patentee, under an injunction of secrecy and their user abroad, might not be such a publication as would vitiate a subsequent grant.

When an article has been manufactured and sold in England, even though it be manufactured and sold expressly for exportation abroad, the article has been published, and a subsequent patent for it will consequently be bad for want of novelty; but this must not be taken to mean that if a man abroad employ an agent in England to see if he can get an article manufactured according to a particular model, not with a view of making it public at all, but with the object of taking out a patent for it himself, he is thereby disentitled to the invention afterwards, because he employs a workman to assist him in it; or that if he had failed entirely some other man might not make the invention in England.<sup>(f)</sup>

Prior user in a colony.

It has been held that the prior user of an invention in a colony forms no legal bar to the granting of a patent for the same invention in this country.<sup>(g)</sup>

Pecuniary profit by secret user.

We have now to consider the question whether the fact of an inventor having made pecuniary profit by a secret user of his invention before the date of a subsequent grant of letters

<sup>(d)</sup> 1 C. & R. 587.

<sup>(e)</sup> 1 W. P. C. 195.

<sup>(f)</sup> Per Lord Abinger, C.B., in *Carpenter v. Smith*, 1 W. P. C. 536.

<sup>(g)</sup> *Rolls v. Isaacs*, L. R. 19 Ch. D. 268.



patent, will render the grant invalid on the ground of want of novelty.

This question has never been judicially decided, though Erle, J., is reported, in *Heath v. Smith*,<sup>(h)</sup> to have given expression to the following *obiter dictum* : " If one party only had used the process, and had brought out the article for profit, and kept the method entirely secret, I am not prepared to say that then the patent would have been valid. And in *The Germ Milling Company, Limited, v. Robinson*,<sup>(i)</sup> the plaintiff elected to be nonsuited, on his own evidence of prior user of the invention, the validity of which was in contest, and did not take up the position of such prior user being secret.

The above remarks of Erle, J., must, from the context, be assumed to refer to a user by a person other than the patentee, and so do not directly bear on the question now under consideration. It is submitted, from the first principles of the patent law, that there does not appear any reason why an inventor should not be capable of receiving a grant of letters patent from the Crown at any time before he has disclosed his invention to the public and enabled them to practise it for themselves. The bargain between the patentee and the Crown<sup>(k)</sup> is, that the former discloses his invention and the manner in which it is to be performed, in exchange for a patent for a limited period from the latter, and it is evident that the patentee is capable of carrying out his part of the bargain whether or not he has derived profit from what has hitherto been a secret use of the invention.

The argument<sup>(l)</sup> that the patentee by keeping the invention secret and making profit by its use before applying for a patent, would thereby obtain a monopoly longer than fourteen years, or the usual duration of the grant, is not at all conclusive ; for it must be remembered that the Crown offers patent grants as rewards for the disclosure of useful inventions and the means of performing them, for the public good, and it does not go into the past history of the inventor and insist on his having made the discovery within any fixed time prior to his applica-

(h) 2 W. P. C. 278.  
(k) p. 86 ante.

(i) 3 P. O. R. 254.  
(l) *Morgan v. Seaward*, 1 W. P. C. 194.

tion, but merely requires that it shall be a new manufacture which others shall not use.(*m*)

There is a distinction between secret uses by the patentee and by others.

There is a considerable difference between the patentee using the subject of the patent, *i.e.*, the art according to which the result is produced,(*n*) and its being used by others. Moreover, the bare fact of an article having been made before a patent for its manufacture is obtained, does not alone render the grant void,(*o*) and it would be absurd to hold that profit would render public that which otherwise would have been a secret use, though of course the fact of profit having been derived would no doubt influence the Court against the contention of secrecy.

Importation of an article made abroad.

A question closely connected with the above is, will the publication in this country of an article made *abroad* be a publication of the *invention* by the exercise of which the article was made? If the article made abroad shows on the face of it how it was made, its sale in this country is a publication of the invention (*p*) but there is authority for saying that such will not be the case if the article does not show on the face of it how it was made. In *Hancock v. Somervell* (*q*) it was sought to upset Hancock's patent for improvements in the preparation of caoutchouc consisting in combining sulphur with it, and thus rendering it elastic at all temperatures. The evidence established the fact that shoes had been imported from America made of caoutchouc which on analysis was found to contain sulphur as well as oxide of lead and other ingredients. Prior to the plaintiff's patent samples of caoutchouc prepared by sulphur were sent to England by one Goodyear of New York, and were shown to Hancock, but the secret of their manufacture was not communicated to him. It was attempted to negotiate a sale of the invention to Hancock, but this was never completed. Goodyear's agent left the samples with Hancock under the impression that it would not be possible for him to discover the secret of their manufacture. As the result of experiments, Hancock, however, discovered that

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

(*o*) *Bramah v. Hardcastle*, Holroyd, 81; 1 W. P. C. 44, n.

(*p*) *Jensen v. Smith*, 2 P. O. R. 249.

(*n*) p. 24 *ante*.

(*q*) 39 Newton, L. J., 158.



sulphur made caoutchouc elastic at all temperatures, and he then obtained his patent for his method of manufacturing it. Williams, J., directed the jury to say whether, supposing the shoes to have been manufactured in England, they could have been made without injuring the plaintiff's patent, and made use of the following words: "The defendants do not deny that Hancock is to be considered the inventor, notwithstanding Goodyear had previously made the discovery, provided the invention had not been published or in use in this country before the date of the patent. The defence consists of this: not only had Goodyear discovered the invention first, but also that the invention had been substantially published and was in use—not in secret use, but in public use—before the date of the patent; that the material being in public use, the ready means of the invention were also necessarily before the public; because it is said the article presented in itself such means of knowledge to the public as to enable any one of ordinary competence to reproduce the article. If you should be of opinion that the material was in use before the date of the patent, then the question resolves itself into this: What is your opinion as to whether the publication of the material was substantially a publication of the invention? If you should find that the material was in public use, but that notwithstanding the invention remained still a matter to be discovered, in my opinion the plaintiff's case would not be affected by the circumstance of the material being in public use. If, on the other hand, you should think not only that the material was in public use (and I should here say that I do not think it is necessary that the use should be actual sale—if it were in public use it need not be sold; it would be sufficient, for instance, if it were in use, handing about the country for the purpose of attracting customers): if you should think, also, that the material being so in use it was so palpable how you could make it when you got the material, that substantially the disclosure of the material was a disclosure of the means of making it; if you do not think that, then I think the plaintiff's case is unaffected by the circumstance of the material being before the public in the way I have been describing." The jury

found a verdict for the plaintiff, and his patent was accordingly upheld.

Publication by documents.

Besides the different ways heretofore indicated, a knowledge of an invention may be made the property of the public, so as to render a subsequent patent for it void on the ground of want of novelty, by a description of it being contained in a printed or written book or document or specification published in this country in such a manner that the public have access to it, and may therefore be presumed or assumed to have a knowledge of its contents.(*r*)

Chemical inventions.

With reference to the publication of a chemical invention it is to be remembered that there are two distinct forms of literature on the subject: the systematic scientific literature, and the technical literature; and the distinction is one very important to be borne in mind in dealing with such patents, since publications having reference to chemical science will be studied by scientific chemists, but speaking generally such publications are not sought after and studied by the practical working chemists.(*s*)

Foreign books.

It has been held that an invention is published if a description of it is contained in a foreign book which has been circulated in England,(*t*) in such a manner that some English people may be fairly supposed to know of it,(*u*) whether the foreign book be in a foreign language or English;(*x*) but it would appear that if the foreign book is in a remote language with which very few English people would be acquainted, it will not amount to such a publication as would vitiate a subsequent patent.(*y*)

Publication in a foreign book, only four copies of which

(*r*) *Rex v. Arkwright*, 1 W. P. C. 72; *Huddart v. Grimshaw*, 1 W. P. C. 86; *Jones v. Berger*, 1 W. P. C. 550; *Cornish v. Keene*, 1 W. P. C. 507; *Heurteloup's Patent*, 1 W. P. C. 553; *Dobbs v. Penn*, 3 Exch. 427; *The Househill Co. v. Neilson*, 1 W. P. C. 673; *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 531; *Plimpton v. Spiller*, L. R. 6 Ch. D. 412; *Lawrence v. Perry*, 2 P. O. R. 180; *United Horseshoe and Nail Co. v. Stewart*, 2 P. O. R. 122, 133; *Harris v. Rothwell*, L. R. 35 Ch. D. 429.

(*s*) *Per Baggallay*, L.J., *Badische*

*Anilin und Soda Fabrik v. Levinstein*, L. R. 29 Ch. D. 384.

(*t*) *Reg. v. Seine*, 40 Newton, L. J. 71; *The United Telephone Co. v. Harrison*, L. R. 21 Ch. D. 720.

(*u*) *Harris v. Rothwell*, L. R. 35 Ch. D. 429: remarks of Cotton and Lindley, L.J.J.

(*x*) *Lang v. Gisborne*, 31 Beav. 133; *United Telephone Co. v. Harrison*, L. R. 21 Ch. D. 720; *Otto v. Steele*, L. R. 31 Ch. D. 241; *Harris v. Rothwell*, L. R. 35 Ch. D. 416.

(*y*) *Harris v. Rothwell*, L. R. 35 Ch. D. 426.



were sent over to this country and exposed for sale (only one copy of which was actually sold), has been held sufficient to vitiate a patent.(z)

In order to invalidate a patent on the ground of prior publication in a book or document, it is not necessary to show that the patentee actually derived his knowledge of the invention from such prior book or document; it is quite sufficient to show that the prior book or document was open to public inspection before the date of the patent.(a)

Not necessary to show that patentee actually got his information from a book or document.

Thus, where an American book was kept in a private room at the Patent Office, and not entered in the donation book or in the Catalogue,(b) it was held that there was not sufficient publication to upset an English patent.(c) Again, the fact that a French book containing a description of an invention was mentioned in catalogues distributed in this country was held, in the absence of any proof that a single copy of the French book had ever been brought to this country, to be no publication of the invention.(d) If, however, the foreign book or document is catalogued, and in a library to which the public have access it will amount to a publication of the invention though only one person has seen it,(e) or it is the only copy accessible to the public.(f)

The question whether a particular document has really become part of the stock of public knowledge or at any rate part of the knowledge of that portion of the public interested in the invention, is in every case a matter of evidence.(g) In the words of Tindal, C.J. : "The existence of a single copy of a work, though printed, brought from a depository where it has long been kept in a state of obscurity, would afford a very different inference from the production of an encyclopædia or other work in general circulation. The question will be whether, on the whole evidence there has been such a publica-

Matter of evidence.

(z) *Lang v. Gisborne*, 31 Beav. 133.

(a) *Stead v. Williams*, 2 W. P. C. 142.

(b) *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 531.

(c) See *Plimpton v. Spiller*, L. R. 6 Ch. D. 412.

(d) *Otto v. Steel*, L. R. 31 Ch. D. 241.

(e) *Harris v. Rothwell*, L. R. 35 Ch. D. 426; 3 P. O. R. 383; 4 P. O. R. 225.

(f) *United Telephone Co. v. Harrison* L. R. 21 Ch. D. 721, 731.

(g) *The Househill Co. v. Neilson*, 1 W. P. C. 673; *Stead v. Williams*, 2 W. P. C. 137; *Stead v. Anderson*, 2 W. P. C. 147; *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 531.

tion as to make the description a part of the public stock of information.”(h)

Plimpton v.  
Malcolmson.

In *Plimpton v. Malcolmson*,(i) the facts proved were that a copy of a book published in America containing a short description of the invention forming the subject of the patent in dispute, was sent over to this country before the date of the patent, and placed in the library of the Patent Office, but it was not entered in the catalogue of the library, and was not placed on the shelves of the room to which the public had access, but in a private room; and it was also proved that the book did not come to light till ten years or more after the date of the patent. Under these circumstances, Jessel, M.R., held that there had not been such a publication of the invention as would deprive the man who first made it known in this country of that merit—the only merit so far as an importer is concerned—which consists in making known a useful invention to the public. This decision was, in a subsequent case(k) upheld by the Court of Appeal.

Terms of art.

It is not always possible to predict of two documents which make use of terms of art *ipsissimis verbis* the same, that they describe the same invention, if they were composed at different periods. For it must not be forgotten that terms of art are liable to constant changes of meaning during the progress and development of any particular department of science, and therefore in considering whether a description in an earlier published book or document is really the same as that in a later specification, it must be carefully ascertained that the terms of art used in the two denote the same thing. In the words of Lord Westbury: “Even if there is identity of language in two specifications, and (remembering that those specifications describe external things) even if the language is *verbatim* the same, yet if there are terms of art found in the one specification, and also terms of art found in the other specification, it is impossible to predict of the two with certainty that they describe the same

(h) *Stead v. Williams*, 2 W. P. C. 143; *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 531; Judgment of Jessel, M.R., at p. 561, and his explanation of the dictum of Romilly, M.R., in *Lang v. Gisborne*, 31 Beav. 133; see also *Plimpton v.*

*Spiller*, L. R. 6 Ch. D. 412; *Von Heyden v. Neustadt*, 50 L. J. N. S. Ch. 126; *United Telephone Co. v. Harrison*, L. R. 21 Ch. D. 720.

(i) L. R. 3 Ch. D. 531. (k) *Plimpton v. Spiller*, L. R. 6 Ch. D. 412.



identical external object, unless you ascertain that the terms of art used in the one have precisely the same signification, and denote the same external objects at the date of the one specification as they do at the date of the other.”(l)

Though there be user of an invention during the period of provisional protection, an abandonment of the provisional specification will not amount to a publication of the invention, which may form the subject-matter of a subsequent patent.(m)

If, however, the provisional specification has been published, a description of an invention contained in it will invalidate a subsequent patent, though it turns out that the prior patent, in respect of which the provisional specification was filed, is void.(n)

Thus, in *Lister v. Norton*,(o) the facts were these : the plaintiff, on 24th June 1880, filed a provisional specification of an invention for “improvements in the manufacture of pile fabrics in imitation of sealskin and other similar fabrics.” This specification was abandoned by the plaintiff, and on the 21st January 1881, he filed a second provisional specification of an invention for “improvements in the manufacture of velvets and of pile fabrics in imitation of sealskin and other similar materials.” On the 21st July 1881, he obtained a grant of letters patent on his provisional specification of 21st January 1881. The invention claimed consisted in a new combination of materials for use in the manufacture of the fabrics referred to—the employment of a mixture of mohair and silk in the raw state, combined and blended before spinning. It was held that, assuming the invention in the two provisional specifications to be identical, the abandonment of this first provisional specification did not avoid the patent which was granted within the period of six months from the date of the first provisional specification, even if actual user during the currency of the first provisional specification could be shown.(p)

A prior description which has become the property of the public of a machine or combination, though that machine or

Provisional specifications.

*Lister v. Norton.*

Description of a machine or combination

(l) *Betts v. Menzies*, 10 H. L. Cas. 152.

(m) 48 & 49 Vict. c. 63, s. 4; *Oxley v. Holden*, 8 C. B. N. S. 666; *Lister v. Norton*, 3 P. O. R. 199.

(n) See *Kaye v. Clubb*, 5 P. O. R. 641, 648.

(o) 3 P. O. R. 199.

(p) See also *Oxley v. Holden*, 8 C. B. N. S. 666; 30 L. J. C. P. 68; *Stoner v. Todd*, L. R. 4 Ch. D. 58.

which has not been actually made.

combination has never been actually made and publically used, will render a subsequent patent for that machine or combination bad both on the ground that the patentee is not the true and first inventor, and because the invention is not new.(q)

As has been shown, the subject of a patent is really the art of producing the new and useful result,(r) and it is not necessary to avoid a patent that the art should have actually been put in practice—*i.e.*, the machine, for instance, made by the exercise of it, need not have been constructed, provided that the public are, at the date of the patent, in possession of full and sufficient information to enable them to produce, without the exercise of further invention, the result claimed by the patentee.(s) The question whether a description has really become the property of the public so as to vitiate a subsequent patent is therefore always one of evidence, when that description has not been acted upon and no machine made in accordance with it.(t)

Invention not used by the public but known to the public.

Lord Blackburn, in the House of Lords,(u) pointed out that in order to vitiate a patent on the ground of want of novelty it is not necessary that the invention should be used by the public as well as known to the public. If the invention and the mode in which it can be used has been made known to the public by a description in a work which has been publicly circulated (x) or a specification duly enrolled,(y) it avoids the patent, though it is not shown that it ever was actually put in use.

Mere suggestion of an invention.

If the document relied on as a publication contain *merely a suggestion* of the invention, it will be immaterial to the novelty of a subsequent patent, which will only be upset on the ground of prior publication, if the document contain a description which is such that the invention could be easily carried out from it.(z)

(q) *Frearson v. Loc*, L. R. 9 Ch. D. 62.  
 (r) p. 24 *ante*. (s) p. 88 *ante*.  
 (t) *Humpherson v. Syer*, 4 P. O. R. 407; *Tickelpenny v. Army & Navy Co-operative Society, Ltd.*, 5 P. O. R. 405.  
 (u) *Patterson v. Gas Light and Coko Co.*, L. R. 3 App. Cas. 239.  
 (x) *Stead v. Williams*, 7 M. & G. 818, 842; 2 W. P. C. 141.  
 (y) *Bush v. Fox*, 5 H. L. Cas. 707; *Betts v. Menzies*, 10 H. L. Cas. 117.

(z) *Woodcroft's Patent*, 2 W. P. C. 23; *Betts v. Menzies*, 10 H. L. Cas. 117; *Betts v. De Vitre*, 11 L. T. N. S. 445; *Von Heyden v. Neustadt*, L. R. 14 Ch. D. 230; 50 L. J. N. S. Ch. 126; *Stoner v. Todd*, L. R. 4 Ch. D. 58; *Moseley v. Victoria Rubber Co.*, 4 P. O. R. 252; *Bray v. Gardner*, 4 P. O. R. 405; *Haslam v. Hall*, 5 P. O. R. 19; *Ehrlich v. Ihlee*, 5 P. O. R. 450; *Thompson v. American Braided Wire*



In *Otto v. Linford* (a) a prior specification was relied on as a publication of the invention claimed by Otto. Brett, L.J., said that the question to be considered was whether the prior specification, fairly read by a person conversant with such matters, would give a reasonably clear description of the latter invention. In other words, supposing it to relate to a machine, would it give such a reasonably clear description of a machine that would accomplish what the machine of the later inventor effected.

In *Stoner v. Todd*, (b) it appeared that a certain provisional specification contained a partial description of a piece of mechanism which was not mentioned in the corresponding complete specification. A subsequent patent was taken out for the piece of mechanism, and this was held not to be invalidated by the incomplete description in the prior provisional specification.

In the words of Lord Westbury: "An antecedent specification ought not to be held to be an anticipation of a subsequent discovery, unless you have ascertained that the antecedent specification discloses a practicable mode of producing the result which is the effect of the subsequent discovery ;(c) and in the language of Lord Wensleydale, 'the mere production of a notion that a particular article might be made, without any information or means of knowledge communicated to the public, does not prevent a subsequent first inventor of those means from taking out a patent.' "(d)

A drawing alone which has been published so as to become the property of the public is quite sufficient to invalidate a subsequent patent, if the drawing is intelligible to machinists and enables them by its aid alone to make the machine indicated ;(e) and a description that will enable competent workmen to carry out an invention will vitiate a subsequent patent for that invention, even though at the time of the prior description no one could use the machine made according to the

Co., 6 P. O. R. 518; *Winby v. Manchester, &c., Steam Tramways Co.*, 6 P. O. R. 359; *Shaw v. Jones*, 6 P. O. R. 336.  
 (a) 46 L. T. N. S. 35.  
 (b) L. R. 4 Ch. D. 58.  
 (c) *Betts v. Menzies*, 10 H. L. Cas. 154; see also *Woodcraft's Patent*, 2 W. P. C. 23.

(d) *Betts v. Menzies*, 10 H. L. Cas. 157; see also *Muntz v. Foster*, 2 W. P. C. 105; *Galloway v. Bladen*, 1 W. P. C. 521; *Thomson v. Batty*, 6 P. O. R. 84.  
 (e) *Herrburger v. Squire*, 6 P. O. R. 191.

description, provided that its use is indicated in such description. (f)

Prior description of a useless machine.

If a prior description when completely carried out results in the production of an impracticable and useless machine, it will be no anticipation and publication of the result arrived at by a subsequent inventor when that result is both practicable and useful. (g)

Publication by several documents.

An invention may be anticipated partly by one prior publication, and partly by another, so that in the result the whole invention may have been previously published. It is not, however, allowable to take a mosaic construction of previous publications, and thereby deny the want of novelty in an invention, which consists in the construction of a whole, the component parts of which have never before been put together in the manner shown by the subsequent inventor. (h)

Two or more documents which are public knowledge, and which indicate discussion, invention, or discovery in the same line may be honestly taken together and form a publication of a subsequent alleged invention; but it is not allowable, for the purpose of showing the publication of a combination, which has never in fact existed or been described prior to the time the patentee discloses his invention, to piece together parts of prior documents which describe things now found to be useful, but which were never before intended to be put in combination. (i)

James, L.J., delivering the judgment of the Court of Appeal in *Von Heyden v. Neustadt*, (k) and commenting on a number of extracts and papers relied on as evidence of the prior publication of the invention which was the subject of the action, said: "We are of opinion that if it requires this 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. . . . And even if it could be shown that a patentee had made his discovery of a constructive process by

(f) *United Telephone Co. v. Harrison*, L. R. 21 Ch. D. 720; 51 L. J. Ch. 705, judgment of Jessel, M.R.

(g) See p. 97, *ante*.

(h) *Neilson v. Betts*, L. R. 5 H. L. 1; 40 L. J. Ch. 317; *Von Heyden v. Neu-*

*stadt*, 50 L. J. N. S. Ch. 126; *Young v. Fernie*, 4 Giff. 577; L. R. 1 H. L. 36.

(i) See *Otto v. Linford*, 46 L. T. N. S. 35.

(k) 50 L. J. N. S. Ch. 128.



studying, collating, and applying a number of facts discriminated in the pages of such works, his diligent study of such works would as much entitle him to the character of an inventor as the diligent study of the works of Nature would do."

It is to be remembered that there is no case where a new commercial article, consisting of a combination of parts, being produced for the first time, a separate description of any one or more of those parts alone has been held to amount to a publication of that article.<sup>(l)</sup>

There is a considerable difference as to the effect on the question of publication of an invention between the production of a machine made prior to the date of the patent, and a document published before that date. In the former case the production of a machine made for a particular purpose, which would accomplish when used results which were not thought of when it was made, might possibly, without any user, be an anticipation of a patent for the application of the machine to produce such results. There does not appear to be any authority on the point, and Holker, L.J., expressed doubt upon it.<sup>(m)</sup> It seems that if the machine were used in such a way as to make clear to the public what it would effect, it would be a sufficient publication to defeat any subsequent patent for any such result.<sup>(n)</sup>

Difference between publication by production of a machine and a document.

In the case of a written document it is not apparent, except from the language thereof, what results the contemplated machine would accomplish. It is not sufficient to defeat a patent to say that, if a machine were made by following the description in a document, something in that machine would anticipate the invention of the patentee, unless that something is apparent from the description itself. When the publication is in writing and in writing only, it is necessary to show that a person conversant with such matters, on reading it, would find a reasonably clear description of the invention in the writing alone. If it be necessary that the machine should be made in order that the publication may be seen, the subsequent inventor is not obliged, when his attention is called to a mere writing, to

<sup>(l)</sup> *Otto v. Linford*, 46 L. T. N. S. 35.

<sup>(m)</sup> *Ibid.*

<sup>(n)</sup> *Ibid.*

make a machine from it in order to see what will be the effect. If the document is to invalidate the subsequent patent, it must contain on the face of it a description of the invention.(o)

Accuracy of description.

The law requires the inventor in the specification which he is compelled to lodge at the Patent Office (p) to describe his invention and the mode of performing it in language so accurate and explicit, as will enable an ordinary and intelligent workman in the trade, to which the invention relates, to put it in practice. The question arises as to whether it is necessary that a document containing an alleged anticipation of a subsequently patented invention should be framed in language equally accurate and explicit as that which is required in the specification itself. In other words, will an alleged anticipating document, which is sufficiently accurate and explicit to enable a highly skilled person to perceive without effort and perform the invention, though it is not intelligible to an ordinary workman, amount to a prior disclosure of the discovery which will render a subsequent patent void on the ground of want of novelty?

It has been held that the prior knowledge of an invention requisite to avoid a subsequent patent must be such a knowledge as will enable the public to perceive the very discovery, and to carry the invention into practical operation.(q) Lord Westbury gave it as his opinion that an antecedent statement must, in order to invalidate a subsequent patent, be such that a person with ordinary knowledge of the subject would at once perceive and understand and be able practically to apply the discovery without making further experiments.(r)

In *Betts v. Menzies* (s) it was held that an antecedent description must disclose a practicable mode of producing the result of the subsequent discovery, if the description is to be held sufficient to invalidate the subsequent patent. In this case Dobbs' specification was relied on as an anticipation of Betts', but it was not contended that the former would enable any

(o) *Hill v. Evans*, 31 L. J. Ch. 457; 4 De G. F. & J. 288; *Betts v. Menzies*, 10 H. L. Cas. 152-154; *Otto v. Linford*, 46 L. T. N. S. 44; *Goulard v. Gibbs*, 5 P. O. R. 535.

(p) 46 & 47 Vict. c. 57, s. 3; see Chap. V.

(q) *Hill v. Evans*, 31 L. J. Ch. 457 4 De G. F. & J. 288.

(r) *Hill v. Evans*, 31 L. J. Ch. 463.

(s) 10 H. L. Cas. 152.



skilled person to perform the invention. It appeared that proportions and subsidiary processes not disclosed by Dobbs were necessary. Dobbs' was held not to be an anticipation of Betts'. The information given would clearly not enable *any one* without experiments to perform the invention, and the point of it being intelligible to a skilled person was not raised at the Bar.

As was remarked by Lord Abinger,<sup>(t)</sup> many patents have been taken out upon suggestions contained in a celebrated work by the Marquis of Worcester, and from hints and speculations from the same author, and his lordship seemed of opinion that these patents would have been good as regards anticipation by the Marquis of Worcester. All the Marquis did in his writings, was to make suggestions and speculations, not to describe perfected inventions in language which would disclose them as such to any one however skilled he might be. This is a very different thing to a description of an invention in terms that would enable skilled persons, though not the ordinary workman, to perceive and carry it out.

Jessel, M.R.,<sup>(u)</sup> seems to have been of opinion that the effect of the decisions in *Betts v. Neilson*,<sup>(v)</sup> *Hills v. Evans*,<sup>(y)</sup> and *Betts v. Menzies*,<sup>(z)</sup> was to require that the description in an anticipating document must be equivalent to that required in a specification; <sup>(a)</sup> though, on the other hand, Grove, J., addressing a jury<sup>(b)</sup> expressed it as his opinion that there is not the same necessity for accurate description of how an invention is to be carried into effect for the purpose of anticipation, as there is for the purpose of sustaining a patent in the hands of the patentee.

It is to be inferred from the reports of the above-mentioned cases that in none of them was the description contained in the alleged anticipating documents sufficient to enable any one, whether a highly skilled person or a workman of merely ordinary intelligence, to perform, without the exercise of further ingenuity, the subsequently patented inventions, which were

<sup>(t)</sup> *Carpenter v. Smith*, 1 W. P. C. 530.

<sup>(u)</sup> *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 531; 45 L. J. Ch. 505.

<sup>(v)</sup> 4 L. J. Ch. 317; L. R. 5 H. L. 1.

<sup>(y)</sup> 4 De G. F. & J. 288; 31 L. J. Ch. 457.

<sup>(z)</sup> 10 H. L. Cas. 152.

<sup>(a)</sup> See also *Stoner v. Todd*, L. R. 4 Ch. D. 58; *Bray v. Gardiner*, 4 P. O. R. 405.

<sup>(b)</sup> *Philpot v. Hanbury*, 2 P. O. R. 43.

upheld on the ground of novelty. It is submitted that the real point to be considered in determining whether a prior description is sufficiently explicit to vitiate a subsequent patent is, will the prior description enable any person, *without the exercise of invention*, to carry out the alleged new discovery? It may be that a given prior description will enable a highly skilled person to perform an invention for which a patent is subsequently taken out, whereas an ordinary workman in the trade would not be able to carry the invention into effect from the hints and suggestions contained in that prior description. If the highly skilled person has to exercise any ingenuity or invention to enable him to arrive at the result achieved by the patentee it is submitted that the prior description is not one which will vitiate a subsequent patent.(c)

(c) See *Edison v. Holland*, 5 P. O. R. 459; 6 P. O. R. 243



## CHAPTER IV.

### UTILITY.

UTILITY AT COMMON LAW—MEANING OF UTILITY—COMMERCIAL UTILITY—AMOUNT OF UTILITY—UTILITY OF MATERIAL PARTS—IMPROVEMENTS ON USELESS INVENTIONS.

THERE do not appear to be any words in the sixth section of the Statute of Monopolies directly implying that the subject of a patent must be an invention which is useful, but “utility” is a condition imposed by the Common Law quite independently of enactment. Utility at Common Law.

The Crown in exercising any of its prerogatives must do so for the good of the public, otherwise it would be acting contrary to the law.<sup>(a)</sup> The Sovereign has no power to charge its subjects, or abridge any of their liberties, excepting it be for their benefit, or in exchange for a sufficient consideration.<sup>(b)</sup> It is evident that during the continuance of a patent, granting to the patentee and his nominees the sole use and enjoyment of the invention forming the subject of the grant, the public are not able to exercise the invention without the licence of the owner for the time being of the patent, even though they should, independently of the information contained in the specification,<sup>(c)</sup> make the discovery for themselves, and if they desire to procure the articles made according to the invention they are obliged to pay whatever price the owner of the patent right chooses to demand.<sup>(d)</sup> The Sovereign in making the grant really acts on behalf of the public,<sup>(e)</sup> and it is therefore only equitable that they should obtain some consideration in respect of the benefit they confer on the grantee.

<sup>(a)</sup> Bac. Abr. tit. “Prerog.”

<sup>(b)</sup> 2 Rol. Abr. 172, s. 20.

<sup>(c)</sup> p. 85.

<sup>(d)</sup> As to compulsory licences see Chap. IX.

<sup>(e)</sup> Per Lord Eldon, L.C., in *Harmer v. Plane*, 14 Ves. 130, 136.

Utility is part of the consideration for a grant of letters patent.

The subject-matter of every patent must be an art,<sup>(f)</sup> and if such art is incapable of producing useful results in its application to any of the purposes in respect of which the grantee claims protection, it is clear that the public can get no benefit from its application, and the grant will be therefore void on the ground that the necessary consideration for its support is wanting.

Recital in letters patent

Moreover, every patent contains a recital to the effect that the Sovereign, being willing to give encouragement to all arts and inventions which may be for the public good, is pleased to condescend to the applicant's request. It is the evident intention, therefore, that the patentee should give as a consideration to the public an art or invention which is for their good, whereas one devoid of utility would not be. In this latter case the Crown would have been deceived in its grant, which would be void on the ground of the failure of part of the consideration in respect of which the grant was made,<sup>(g)</sup> that is to say because there was no utility in the invention.<sup>(h)</sup>

The invention must be useful.

It is, of course, the subject of the patent—*i.e.*, the art by the exercise of which the manufactured articles are produced, which must possess the quality of utility.<sup>(i)</sup> The utility of the articles produced by the exercise of the protected art is necessarily the measure of the utility of the art itself, for an art incapable of useful results cannot possess this quality, which is essential for its protection by letters patent.

Common Law before Statute of Monopolies.

It is required by the Common Law, in existence before the Statute of Monopolies, that an invention to be capable of substantiating a patent shall possess the element of utility.<sup>(k)</sup>

(f) Chap. II. p. 24. (g) Vin. Abr. Prerog. M.C. (h) Chap. III. p. 87.

(i) See *Palmer v. Wagstaff*, Newton, L. J. vol. xliii. p. 151.

(k) It was laid down in *Darcy v. Allin* (Noy. R. 182), that when a man brings into the realm any new trade, and that for the good of the realm, the King may grant him a monopoly for a reasonable time "in consideration of the good that he doth bring by his invention to the commonwealth, otherwise not."

And again, in Sheppard's Abridgment (Part iii. p. 61), it was stated that the King may for a reasonable time grant a monopoly patent for a new trade or device, or any new engine tending to the furtherance of it, for the good of the realm.

In a *scire facias* to repeal a patent, Buller, J., held that it was a question for the jury to decide whether the only new part of the machinery described in the specification was material or useful, and that if they came to the conclusion that such was not the fact the patent was void. The jury gave their verdict against the patent, and on the motion for a new trial no objection was taken to this direction of the judge. (*R. v. Arkwright*, Dav. P. C. 138).

In *Boulton v. Bull* (2 H. Bl. 463; Dav. P. C. 162), Rooke, J., said the public



As we have seen,<sup>(l)</sup> the Statute of Monopolies did not confer any new right on the Crown, but only reserved to it the privilege which it had long enjoyed before the statute, of granting monopolies in respect of new inventions, and the concluding words of the reserving clause <sup>(m)</sup> expressly declared that such privileges are not to be “contrary to the law, nor mischievous to the State by raising the prices of commodities at home, or hurt of trade, or generally inconvenient.” And the section concludes with a declaration that grants made in virtue of the power thereby reserved to the Crown, shall be “of such force as they should be if this Act had never been made, and of none other,” clearly indicating that all the provisions imposed by the Common Law were to be preserved whether expressly mentioned in the Act or not. Thus the element of utility is as much a requisite, since the passing of the statute, as it was before it, for the enactment made no difference in this respect, and every case relative to utility decided since the statute is a fresh declaration of the Common Law on the subject.

Requisite of utility preserved by Statute of Monopolies.

Sir Edward Coke, commenting on the words “mischievous to the State by raising the prices of commodities at home,” in 21 Jac. I. c. 3, s. 6, says: “In every such new manufacture as

had a right to receive a meritorious consideration in return for the protection which the patent claimed.

In *Turner v. Winter* (1 T. R. 602; Dav. P. C. 151), Ashurst, J., stated that a patent would be contrary to law were it not for the advantages which the public derive from the communication of the invention.

In *Manton v. Parker* (Dav. P. C. 327), Thomson, L.C.B., holding the plaintiff's patent void on the ground of the utility of the invention having failed, nonsuited him.

In *Manton v. Manton* (Dav. P. C. 333), Gibbs, L.C.J., held that in order to support a right to the exclusive enjoyment of a patent, it is necessary that the party who takes out a patent should show that the invention is useful to the public.

In *Bovill v. Moore* (Dav. P. C. 399), the same learned judge held that it was necessary that the plaintiff should prove that his invention was useful.

In *Huddart v. Grimshaw* (Dav. P. C. 265), Ellenborough, C.J., held that in order to support the patent the invention ought to be beneficial to the public.

In *Brunton v. Hawkes* (4 B. & Ald. 541), Abbott, C.J., put it to the jury to say whether the invention was useful. And in *Russell v. Cowley* (1 W. P. C. 459), Lyndhurst, C.B., said that the first question respecting the invention was, whether it was new and useful; and the rest of the Court concurred in this statement.

In *Hill v. Thompson* (1 W. P. C. 235), Eldon, L.C., concurred in the direction of Dallas, J., to the jury who tried the case in the Court of Common Pleas, that the invention to support a patent must be useful. And in *Minter v. Wells* (1 W. P. C. 129), Alderson, B., stated the same fact. And again, in *Morgan v. Seaward* (2 M. & W. 544; Mur. & H. 55; 1 Jur. 527; 1 W. P. C. 170), the same learned judge said, that if the invention was useful it was a subject to be protected by patent; but if it was of no use then it was not a subject to be protected by patent.

In *Neilson v. Harford* (8 M. & W. 806; 1 W. P. C. 331), the Court of Exchequer held that a machine produced according to the invention must be beneficial to the public in order that the patent may be valid.

(l) Chap. I.

(m) s. 6.

deserves a privilege there must be *urgens necessitas* and *evidens utilitas*," and that the reason why such a privilege is good in law is "because the inventor bringeth to and for the commonwealth; a new manufacture by his invention, costs, and charges, and therefore it is reason that he should have a privilege for his reward (and the encouragement of the like) for a convenient time."

Reason why  
the law re-  
quires utility.

Parke, B.,<sup>(n)</sup> assigned as the reason why the law requires an invention to be useful in order to merit protection by patent, "that a grant of a monopoly for an invention which is altogether useless, may well be considered as 'mischievous to the State, to the hurt of trade, or generally inconvenient,' within the meaning of the Statute of Jac. I., which requires, as a condition of the patent, that it should not be so, for no addition or improvement of such an invention could be made by any one during the continuance of the monopoly without obliging the person making use of it to purchase the useless invention."

Patents which  
obstruct im-  
provements.

On a review of the cases it may be doubted whether the question of utility is anything more than a compendious mode, introduced in comparatively modern times, of deciding the question whether the patent be void under the Statute of Monopolies. So where the evidence showed<sup>(o)</sup> that the patent, the subject of the action, had never been worked, and no attempt had been made to bring the articles, manufactured according to the method stated in the specification, before the public, and that the patent was only being used for the purpose of stopping the defendant from making improvements in the manufacture of candles, Pollock, C.B., said that in legal language it is a fraud on the law of patents for any person to take out a patent with a view to the obstruction of improvements. And again, the same learned judge in another case,<sup>(p)</sup> held that a patent for an invention which is merely to obstruct every subsequent improvement, which is to step in and prevent the exercise of the ingenuity of mankind and the introduction of other inventions adapted to the particular subject to which the invention may be applicable, could not in his judgment be supported.

<sup>(n)</sup> *Morgan v. Seaward*, 1 W. P. C. 197.

<sup>(o)</sup> *Palmer v. Wagstaff*, Newton, L. J., vol. xliii. p. 151.

<sup>(p)</sup> *Cressley v. Potter*, Macr. P. C. 240.



It is not necessary that the invention should be actually put in practice, and the articles produced by its exercise sold, in order that the requisite utility in the invention to merit protection by letters patent may be established; it is quite sufficient if there is evidence to the effect that the invention, if put in practice, would produce useful results.<sup>(q)</sup>

Evidence of utility.

The kind of utility which the law requires that an invention must possess to make it fit subject-matter for a patent is not abstract utility, but "utility" in law means "an invention better than the preceding knowledge of the trade as to a particular fabric."<sup>(r)</sup>

Meaning of "utility."

In a case in which the validity of a patent for improvements in the manufacture of stays and corsets was questioned, on the ground that the invention was not useful, Grove, J., told the jury that though they might be of opinion that stays are very bad things in themselves they ought not to say that the invention was useless for that reason.

An invention need not, at the date of the trial of an action for infringement, be *commercially* useful, as the reason why it has not been adopted in commerce may be that it has been immediately superseded by simpler and better constructions, involving the same principle,<sup>(s)</sup> though the circumstance that it has not come into general use raises a strong presumption against its utility.<sup>(t)</sup> There is in fact no necessary relationship between the commercial pecuniary success of an invention and its utility in patent law.<sup>(u)</sup>

Commercial utility.

The law does not require that an invention, to be worthy of a patent, must possess any definite amount of utility; but it has been decided, over and over again, that a very slight amount of utility will be sufficient <sup>(v)</sup> provided that the Crown

Amount of utility.

<sup>(q)</sup> *Otto v. Linford*, 46 L. T. N. S. 39; *United Telephone Co. v. Bassano*, 3 P. O. R. 313; *Ehrlich v. Ihlee*, 5 P. O. R. 450; *Edison v. Holland*, 6 P. O. R. 277.

<sup>(r)</sup> Per Grove, J., *Young v. Rosenthal*, 1 P. O. R. 34, 41; see also *Manton v. Parker*, Dav. P. C. 327; 1 W. P. C. 192 n.; *Manton v. Manton*, D. P. C. 348.

<sup>(s)</sup> *Galloway's Patent*, 1 W. P. C. 724; *Boville v. Moore*, Dav. P. C. 361; *Otto v. Linford*, 46 L. T. N. S. 41; *United Telephone Co. v. Bassano*, 3 P. O. R. 313; *Ehrlich v. Ihlee*, 5 P. O. R.

450; *Edison v. Holland*, 6 P. O. R. 257, 277.

<sup>(t)</sup> *Morgan v. Seaward*, 1 W. P. C. 185; *Tetley v. Easton*, Macr. P. C. 56.

<sup>(u)</sup> *Badische Anilin und Soda Fabrik v. Levinstein*, L. R. 12 App. Cas. 710, 712; *Ehrlich v. Ihlee*, 5 P. O. R. 450; see also *Kurtz v. Spence*, 5 P. O. R. 182.

<sup>(v)</sup> *Philpot v. Hanbury*, 2 P. O. R. 37; *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 582; *Otto v. Linford*, 46 L. T. N. S. 35.

has not been deceived as to the extent of the utility of the invention. Thus, when the validity of Galloway's patent for improvements in steam engines came into question, Alderson, B., told the jury, with regard to the utility of the invention, that the question for them to decide was, whether the steam engine was a useful invention, and that he thought, if Galloway's engine was of a different construction from any other steam engine, and of any use to the public, that was sufficient.(y)

Partial failure  
of considera-  
tion of utility.

If any material part of the representation, with regard to utility, upon the strength of which a patent was granted, turns out to be untrue, the patent will be void, because of the partial failure of the consideration,(z) and also on the ground that the representation being false, the Crown has been deceived in its grant.(a) In the words of Dallas, J.: "If any part of the alleged discovery, being a material part, fail, (the discovery in its entirety forming one entire consideration) the patent is altogether void."(b)

Want of  
utility in a  
material part.

Thus, in the case of *Manton v. Parker*,(c) the whole purpose for which the invention, in the specification, was said to be useful, failed, and the patent was declared to be consequently void. The invention was "for a hammer on an improved construction, for the locks of all kinds of fowling-pieces and small arms," and a material part of the invention consisted in a means of letting out the air from the barrel and causing a communication between the powder in the pan and in the barrel. The evidence, however, showed that the powder passed through the same hole as the air; and Thomson, L.C.B., held that the utility of the invention, and the purpose of the hole, as described in the specification, wholly failed; for the purpose of the hole as described, was to let the air pass through, and, at the same time, secure the powder from passing through.

Again, in *Easterbrook v. The Great Western Railway Company* (d) the main object of an invention of "improvements

(y) *Morgan v. Seaward*, 1 W. P. C. 172, 186.

(z) *Hill v. Thompson*, 8 Taunt. 375; 2 B. Moore 448; 1 W. P. C. 232; *Bloxam v. Elsee*, 1 Car. & P. 558; 9 Dowl. & Ry. 215; 6 B. & C. 169; 3 L. J. (O. S.) Q. B. 93; *United Horse Shoe & Nail Co. v. Swedish Horsenail Co.* 6 P. O. R. 8.

(a) *Morgan v. Seaward*, 2 M. & W. 561; 1 W. P. C. 172

(b) *Hill v. Thompson*, 8 Taunt. 375; 2 B. Moore, 448.

(c) *Dav. P. C.* 327; 1 W. P. C. 192 n., 484 n.

(d) 2 P. O. R. 201.



in machinery and apparatus for actuating and controlling railway points and signals "was to prevent points and signals being set antagonistic to each other. The defendants, who set up the invalidity of the patent, upon the ground (*inter alia*) of absence of utility in the invention, proved at the trial that the apparatus could be so worked as to give conflicting signals, or signals conflicting with the points. The Court held that the patent was bad, because the invention was not only not useful, but dangerous.

It has been held that when an invention, only differed from a previous one in that the latter contained an ingredient which did neither harm nor good, there was not sufficient utility in the latter invention to merit a patent.(e)

Invention which consists only in the introduction of an ingredient which does neither harm nor good. Utility of separate heads of invention.

If a patentee claims several inventions under different heads, and it turns out that any one of them, which is essential, is useless, the patent is void.(f)

In *Turner v. Winter* (g) the plaintiff's patent was declared void, on the ground that it claimed to produce three different things by one and the same process; and the evidence distinctly showed that the process would not produce one of them (white lead) at all. On a motion for a new trial, made in the Court of King's Bench, Ashurst, J., laid down that: "If the process, as directed by the specification, does not produce that which the patent professes to do, the patent is void." And Buller, J.: "If the patentee says that by one process he can produce three things, and he fails in any one, the consideration of his merit, and for which the patent was granted, fails, and the Crown has been deceived in the grant."

*Bloxam v. Elsec* (h) was an action brought for the infringement of two patents belonging to the plaintiff. Both patents were, however, held void on the ground that the second depended on the first, which was bad for want of utility.

Abbott, C.J., said, that by the patent (the first patent) it appeared that the patentee had represented to the Crown that

(e) *Lawrence v. Perry*, 2 P. O. R. 180, 184.

(f) *Morgan v. Seaward*, 1 W. P. C. 171; 2 M. & W. 558; *Simpson v. Holliday*, L. R. 1 H. L. 315; *Templeton v. Macfarlane*, 1 H. L. Cas. 595; *United*

*Horsenail Co. v. Stewart*, 2 P. O. R. 122, 132.

(g) 1 T. R. 602; 1 W. P. C. 77.  
(h) 1 Car. & P. 558; 9 Dowl. & Ry. 215; 6 B. & C. 169; 3 L. J. (O. S.) Q. B. 93.