THE STATUTE OF MONOPOLIES AND MODERN PATENT LAW: Foundation or Elaborate Folly?

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SUMMARY

The *Statute of Monopolies* occupies a position of unique foundational significance within the traditional developmental tale of intellectual property law in the UK. For some, it forms a point of genesis: a platform from which the intricacies of the modern system have grown. For others, it provides a sense of reassurance that while monopolies may ere have been against the ancient and fundamental laws of this realm, patents for invention have always been considered important enough protect from such castigation. The *Statute* is both comforting and stable, a focal point in an otherwise somewhat chaotic and disjointed narrative that stretches over the best part of half a century. As the *Statute* nears its 400th birthday, however, it seems an appropriate time to re-examine this legacy. Therefore, drawing from accounts contemporaneous with its drafting, and considering the pressures that led to its creation, we investigate whether this picture of the *Statute* is at all justified.

INTRODUCTION

The *Statute of Monopolies* or, to provide its full title, *An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof*, 1623, 21 Jac. I, c.3, received Royal assent in May 1624 and entered into force soon thereafter. The Act's significance has been widely lauded in both intellectual property and constitutional law circles, albeit for starkly different reasons. In the former, this "celebrated statute"[1] has been said to form the "foundation of our modern patent laws."[2] It has been described as "the starting point for patent law in the UK,"[3] and, perhaps

* Thanks to Kate Grady, Robin Jacob and Paul Mitchell for their helpful comments on earlier drafts. The usual caveat applies.

[1] Frost. R., *A Treatise on the Law and Practice relating to Letters Patent for Inventions*, (Stevens & Haynes, 1891), p.2.

[2] Frost. R., *A Treatise on the Law and Practice relating to Letters Patent for Inventions*, (Stevens & Haynes, 1891), p.23. A point echoed by Walterscheid, who notes that it is "frequently described" as such. Walterscheid. E.C., 'To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution', (1994) 2(1) *Journal of Intellectual Property Law* 1, p.12.

most impressively, as the "founding statute of copyright and patent law in the English-speaking Western world."[4] Within the history of constitutional law it has been cast in no less impressive a role: placed as a key marker within a pitched constitutional battle between Crown and Parliament for supremacy;[5] a battle that is eventually highlighted by Civil War, execution and exile.[6] While the ensuing discussion will spend more time unpicking the claims in one of these areas than the other, it is nevertheless worth noting that both arguably owe more to nineteenth and twentieth century historical revisionism than to plain fact.

By the late-1800s the *Statute of Monopolies* was being heralded, by some at least, as the cornerstone of English patent law, the fundamental footing upon which authority to grant limited monopoly for the protection of invention was based. Frost, writing in 1891, accordingly referred to what he described as the "celebrated statute"[7], the "foundation of our modern patent laws".[8] Holdsworth, equally forthright, introduced the *Statute* as the key-stone upon which "the modern law of patents rests to-day".[9] Price also heaped significance upon the Act's shoulders when he described it as "the most important law passed under King James"; thereafter claiming that the

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[3] Jones. S., 'Poet, Pirate, Patentee? Sir Walter Raleigh (1552-1618) and the Origin of the Statute of Monopolies', (2019) 48(4) *CIPA Journal* 39, p.39.

[4] Kyle. C., "But a New Button on an Old Coat': The Enactment of the Statute of Monopolies', (1998) 19 *Legal History* 203, p.203. It should be noted, however, that notwithstanding opening with the sentence above, the remainder of Kyle's article is rather more dismissive of the Statute's significance.

[5] McIlwain, for example, describes the Act as being "the first statutory invasion of the royal prerogative" and, moreover, derogating "from the prerogative … in a startling way". McIlwain. C.H., *Constitutionalism: Ancient and Modern* (Liberty Fund, 2008), p.127. This is a reprint of the revised edition (Cornel University Press, 1947). Notestein similarly imbues Parliament's vociferous complaints about grievances, complaints which came to a head in the passage of the Statute of Monopolies, with significance in the "Winning of the Initiative by the House of Commons." See Notestein. W., *The Winning of the Initiative by the House of Commons*, The Raleigh Lecture on History, 1924, in Vol 11 of *The Proceedings of the British Academy* (British Academy, 1926), *passim*, but in particular p.31.

[6] Blakeney, albeit dealing with the Statute of Monopolies in the context of its role in the field of intellectual property, makes a similar comment: labelling the Statute as a key marker in the "attempts by the House of Commons to limit the royal prerogative" a process "culminating first in the Statute of Monopolies and eventually in the English Civil War." Blakeney. M., 'The patenting of DNA and the Statute of Monopolies in Australia', (2020) 42(8) *EIPR* 493, p.492.

[7] Frost. R., *A Treatise on the Law and Practice relating to Letters Patent for Inventions*, (Stevens & Haynes, 1891), p.2.

[8] Frost. R., *A Treatise on the Law and Practice relating to Letters Patent for Inventions*, (Stevens & Haynes, 1891), p.23.

[9] Holdsworth. W.S., *A History of English Law – Volume XI*, (Little, Brown & Co, 1938), p.430.

"important exceptions … authorized by the act … opened a new chapter in the history of monopoly."[10] While this reimagined importance was not shared by all,[11] it has nevertheless become a staple of the historical account of intellectual property. That the *Statute of Monopolies* is the, or at least one of the,[12] cornerstones of patent law is a 'fact' known by students of the subject the world over. Indeed Walterscheid, usually fastidious in his citation, considers it to be so well accepted that the *Statute* is "frequently described as the legal foundation for the English patent system" that this statement requires no further support.[13]

The totemic value of the claim, ingrained as it is within the folklore of patents, is vast. It provides a legislative anchor, a point of genesis, for the development of a system of property that now nears its four-hundredth anniversary. It provides foundational stability to that system and, perhaps most importantly, also provides it with narrative legitimacy. It is, within the orthodox history of patent law, the Gaia, the All-Father, the Big-Bang, the acorn from which great oaks have grown.

But this claim, this folklore, this totem, is a lie. Thus, while the "Statute of Monopolies forms a handy legislative marker from which to hang a picture of the neat and orderly growth of the modern patent system,"[14] this is about as far as it goes. As we shall see, the historical record, in particular that concerning the debates on the Bill of Monopolies in the Parliaments of 1621 and 1623, demonstrates conclusively that Frost *et al*'s account of the foundational importance of the Act is misplaced. Rather than being focused on the development of technology, in England's first "patent statute" the protection of invention and encouragement of innovation were mere afterthoughts; croutons garnishing a significantly more complex soup. The *Statute* itself, far from

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[10] Price. W.H., *English Patents of Monopoly,* (Houghton, Mifflin & Co, 1906), pp.33-4.

[11] Thomas Terrell, for example, took a different view, remarking that while "It has been supposed that the prerogative of the crown to grant letters patent for inventions was created by this statute" even "the most cursory perusal of its enactments and of the authorities that preceded it, shows clearly that … it has as its intention the limiting of the right of the crown, and the declaring that, which had always been the always been the common law upon the subject." See Terrell. T., *The Law and Practice Relating to Letters Patent for Inventions*, (Henry Sweet, 1884), p.2.

[12] The more enlightened student may also make reference to the Statute of Venice 1474 – although it has to be said that the lustre of this earlier text is rarely buffed to the extent of the English statute.

[13] Walterscheid. E.C., 'To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution', (1994) 2(1) *Journal of Intellectual Property Law* 1, p.12.

[14] Fisher, M., *Fundamentals of Patent Law: Interpretation and Scope of Protection*, (Hart, 2007), p.41.

being enacted to foster innovation, was actually designed to deal with the problems created by other, less beneficial, forms of innovative practice: the Crown's profligate use of prerogative powers to grant so-called "odious" monopolies. These bad monopolies were essentially cheap rewards issued by an impoverished Monarch,[15] which handed control of existing trades to Crown favourites and other hangers-on. The existence of these grants, and the regulatory powers that went with them, led to grave abuse; raised prices, reduced quality and limited supply. The Crown's apparent liberality with their dispensation only served to further stoke the fires of discontent. A vivid picture may therefore be painted of a pox of monopolies invading cities and towns across the realm in the early seventeenth century: a pox only supressed and contained by the flexing of hitherto unexercised Parliamentary muscle.

Nevertheless, this tableau must not be taken too far: to paint the circumstances of the Act's creation as one mired in embittered constitutional conflict between Crown and Parliament is, again, a picture of questionable authenticity. As numerous scholars have noted: the period of the *Statute's* promulgation was, to all intents and purposes, rather harmonious and well-regarded by both Monarch and Parliamentarians alike.[16] This said, from the perspective of weaving a tale, it cannot be denied that the slow erosion of relations between an increasingly rebellious Parliament and a spendthrift and profligate King offers an attractive rhetorical hook. Viewed within the context of the daily progress of Parliament in the 1620s, however, it offers little, if anything, more than mere narrative flourish – after all, at this time legislation could not have passed without at least tacit approval from the Crown. The idea that the *Statute* is therefore a key milestone on an unbroken road stretching inexorably towards Civil War is legitimated solely on the basis that such conflict did in fact occur. To provide it with causative power in this process

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[15] Impoverished in the seventeenth century regal sense rather than in purely fiscal terms – one can apparently never have too many jewels encrusting one's looking glass:
https://www.nationalarchives.gov.uk/education/resources/james-i/james-is-extravagance/

[16] Kyle, for example, takes the view that "the Act should not be viewed as a major constitutional conflict won by an increasingly powerful Lower House but as an example of close co-operation between the Crown and the Commons.". Kyle. C., "'But a New Button on an Old Coat": The Enactment of the Statute of Monopolies', (1998) 19 *Legal History* 203, p.204. Russell, meanwhile, cautions against "letting hindsight lead … [the historian] to see the evidence out of perspective" and therefore cautioning against seeing the "Parliamentary history of the period as a sort of historical escalator" leading to civil war: Russel. C., 'Parliamentary History in Perspective, 1604-1629', (1976) 61 *History* 1, p.1.

would, as Russell has cautioned, essentially equate to writing a detective "story remembering the ultimate conclusion" and thereby "miss[ing] many of the twists and turns that gave it suspense along the way".[17]

With these words ringing clearly in our ears we therefore return to the subject in hand: to patent law and the *Statute's* role, if any, in its development. Within this context something first needs to be said of the deeper background to the Act's creation. This excursion into the history of monopoly privilege is important for two main reasons. First, it helps to explain the nature of the problem that was sought to be addressed when legislation on the matter was proposed. Secondly, and no less important for our understanding of the discussion to come, it also serves to clarify some of the terminology utilised: for words, much like wine, mature and alter with age. It is therefore to these issues that we first direct our attention.

OF PATENTS, MONOPOLIES AND THE ENCOURAGEMENT OF INNOVATION

For many centuries before the passage of the *Statute of Monopolies*, and indeed for a number of years thereafter, the word "patent" carried none of its modern baggage of interpretation. The patent, until relatively recently, was not understood as inherently linked to the furtherance of technology and stimulation of innovation but was instead simply a vehicle of Crown governance and favour. The word itself derives from the Latin term *literæ patentes*, literally 'open letters', and patents were so called, as Blackstone explains "because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large."[18] They were accordingly one of the forms of communication used by the English monarchy to facilitate the conduct of state business. Their utility was great: letters patent were employed to set forth public directives and provide record of any other exercise of royal power that was intended to be open to public inspection. This included exercise of the prerogative, in particular its use in connection with the dispensation of monopoly.

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[17] Russel. C., 'Parliamentary History in Perspective, 1604-1629', (1976) 61 *History* 1, p.1. Russell continues, noting that "They may even forget that the result was ever in suspense."

[18] Blackstone. W., *Commentaries on the Laws of England – Book the Second*, (10th Ed, A. Strahan & T. Cadell, 1787), p.346.

"Monopoly" is itself a somewhat problematic word within this context. Once more, modern conceptions only provide part of the picture. Therefore, while a monopolist would, in the sixteenth and seventeenth centuries, have typically been conceived as someone with control over an industry, product, or service, the boundaries of the concept were unclear. Thus, although Coke offered the following definition in Parliament in 1624: a monopoly is "a claim to use that solely which of right is common and free to many",[19] as White explains, Coke's "parliamentary speeches of the early 1620s provide no conclusive evidence about what sorts of activities he regarded as monopolistic, or about how he distinguished between monopolies and legitimate government of trade."[20] Indeed, although by the time of the publication of the third part of his *Institutes on the Laws of England* some two decades after the *Statute of Monopolies*, Coke's definition had become more refined,[21] it was not really any clearer on the distinction to which White refers. Furthermore, during the Commons debates in 1621 and 1623, when the *Statute* was being formed, Coke (and indeed others) did not always use "the term 'monopoly' in ways that are entirely consistent with" the definition he would later provide in his *Institutes*.[22] Confusion over the extent to which an economic monopoly was therefore intrinsically objectionable is detectable throughout much of the period in question.

Certain patents were regarded as inherently problematic: grants of privilege that raised prices, reduced quality and displaced established traders were monopolies in and of themselves and were castigated as such.[23] Grants that did not inevitably entail these three "incidents", by

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[19] Coke is said to have offered this definition to the House of Lords Committee debating the bill that was to eventually become the *Statute of Monopolies*. See the Diary of John Pym for 19 April 1624, in Baker. P. (ed) *Proceedings in Parliament 1624: The House of Commons*, (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

[20] White. S. D., *Sir Edward Coke and "The Grievances of the Commonwealth" 1621-1628*, (University of North Carolina Press, 1979), p.119.

[21] Thus: "A monopoly is an institution or allowance by the King by his grant, commission or otherwise, to any person or persons, bodies politick or corporate of or for the sole buying, selling, making, working, or using of anything whereby any person or persons, bodies politick or corporate are sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade." Coke E., *The Third Part of the Institutes on the Laws of England*, (E. & R. Brooke, 1797) (originally published 1644), p.181.

[22] White. S. D., *Sir Edward Coke and "The Grievances of the Commonwealth" 1621-1628*, (University of North Carolina Press, 1979), p.119 [n144].

[23] These "incidents" of monopoly are derived from Coke's report in *The Case of Monopolies* 11 Co Rep 84b, p.86b.

contrast, did not automatically fall to be tarred with the monopoly brush. Thus, even patents providing the right to exclude others from the trade in question could still be considered legitimate. Accordingly, the use of monopoly *power* to restrict supply or provide a sole point of control for an industry or commodity was not necessarily indicative of the ill of monopoly itself. However, even legitimate grants could still be misused and thus classify quite separately as a grievance against the Commonwealth.[24] To further complicate matters, as White explains, the "distinction between illegality in the creation and illegality in the execution was not always clear-cut."[25] Indeed, when Parliamentary exploration of these problems accelerated in the 1620s, facts that had only become known, or circumstances that had only arisen, after the grant of the patent were sometimes used to illustrate that it had been illegal in the creation, thereby moving it from the latter category to the former. Essentially, therefore, while grievances could arise out of the straightforward exercise of an improper grant (a monopoly) or the abuse of a legitimate grant (not a monopoly), distinction between the two was not always easy to ascertain. Within the context of a legislative exercise to restrain problematic uses of monopoly, this definitional fluidity was less than ideal and, as we shall see, contributed in no short order to the shape that the *Statute* was eventually to adopt.

From Little Acorns: Use of Monopoly to Encourage Technological Development

In terms of beneficial uses, the award of monopoly power has a longstanding, if initially sporadic and unsystematic, association with technological advancement. Early examples of monopolies being granted to artisans plying a new trade or introducing a new manufacture into a state can be found in various European countries from at least the early 1400s.[26] Venice enacted its own legislation concerning the subject in 1474,[27] a practice which provided the template for a number

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[24] This term was used extensively in the debates of the Parliaments of 1621 and 1623 when discussing the problem of monopolies.

[25] White. S. D., *Sir Edward Coke and "The Grievances of the Commonwealth" 1621-1628*, (University of North Carolina Press, 1979), p.120.

[26] See, for example, Kaufer. E., *The Economics of the Patent System* (Harwood, 1989), p.2; Pohlmann. H., 'The Inventor's Right in Early German Law', (1961) 43 *JPOS* 121, p.122; and Frumkin M., 'Early History of Patents for Invention' (1947) 26 *Trans Newcomen Soc.* 47.

[27] See discussion in Mandich. G., 'Venetian Patents (1450-1550)' (1948) 30 *JPOS* 166. The statute is reproduced at pp.176–7. Also see Prager. F.D., 'The Early Growth and Influence of Intellectual Property' (1952) 34 *JPOS* 106.

of grants in other European states.[28] Notwithstanding earlier *ad hoc* use of such privilege in England,[29] there is, however, no evidence of the systematic use of monopoly as a discrete policy instrument to develop the technological climate of that state until the reign of Elizabeth I.

Thus, from the early 1560s, under the direction of William Cecil (Lord Burghley), Elizabeth's chief advisor,[30] we see a conscious acceleration in, and systemisation of, the use of monopoly power as a mechanism to stimulate domestic industry by fostering innovation. Burghley's original aim appears, from what we can tell, to be founded in a desire to assist the technologically backward State to become self-sufficient.[31] Importation of knowledge and expertise was at least as beneficial in this respect as de novo creation (if not more so: if knowledge were imported then it was, after all, at least plausible that the technology to which it pertained actually worked). Thus, grants were initially focused on "the introduction of those industries the products of which had hitherto figured most prominently in the list of imports—viz. alum, glass, soap, oils, salt, saltpetre, latten, etc."[32]

All these early Elizabethan grants were procured by direct petition to the Crown. There was no structured application, no examination, nor even any bureaucratic process that created any entitlement to a patent.[33] In the sixteenth century, the entire process was simply a matter of

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[28] France has been described as an 'obvious recipient' as the first French patent was granted in 1551 to an Italian from Bologna for 'glassware according to the manufacture of Venice'. Mandich. G., 'Venetian Patents (1450-1550)' (1948) 30 *JPOS* 166, p.206. Also, Prager. F.D., 'A History of Intellectual Property 1545 to 1787' (1944) 26 *JPOS* 711, p.723. As Macleod noted: "[i]t is no coincidence that the first recorded patents in many countries at this time were for glass making, a skill in which the Venetians excelled". MacLeod. C., *Inventing the Industrial Revolution: The English Patent System 1660-1800* (Cambridge University Press, 1988), p.11.

[29] See discussion in Fisher. M., *Fundamentals of Patent Law: Interpretation and Scope of Protection* (Hart, 2007), pp.28-30, and the references cited therein.

[30] Burghley was Secretary of State under Elizabeth I from 1558-72. Thereafter he became Lord High Treasurer, a post he then held until his death in 1598. For more on Burghley see: Hume. M.A.S., *The Great Lord Burghley: A Study in Elizabethan Statecraft*, (James Nisbet & Co, 1898).

[31] Walterscheid. E.C., 'The Early Evolution of the United States Patent Law: Antecedents (Part 2)' (1994) 76 *JPTOS* 849, p.855 and Getz. L., 'History of the Patentee's Obligations in Great Britain', (1964) 46 *JPOS* 62, pp.69–71.

[32] Hulme. E.W., 'The History of the Patent System under the Prerogative and at Common Law', (1896) 12 *LQR* 141, p.152.

[33] Indeed, such things would not be implemented until many years later. The Patent Office would not open its doors until October 1852 (it was established under s4 of the *Patent Law Amendment Act, 1852* (1852, 15 & 16 Vict., c.

royal grace; the decision to grant, or not, lay firmly with the discretion of the Monarch and their advisors. Nevertheless, at least initially, expectations "consonant with the basic premise of developing new trade and industry within the realm" seem to have been imposed upon patentees.[34] Validity, as Hulme explains, essentially hinged upon the idea "that the grant should not seek to restrain the public of any freedom or liberty that they had before, or hinder them in their lawful trade."[35] Accordingly, a miscellaneous rag-bag of different requirements – ranging from those mandating the introduction and 'working' of a new industry within a certain time period, through the training of apprentices, to general requirements that commodities produced must be of good quality and also "better cheap" than if the goods in question were imported – were imposed upon patentees.[36] Over time, as Davies notes, these various conditions were replaced by a general clause giving the power to revoke a patent on grounds of "inconveniency", a term that covered a multitude of sins.[37]

Notwithstanding the framework that had been created surrounding this policy of technological development, the number of grants for patents of invention remained small: only forming a tiny subset of the entries on the patent rolls in any given year.[38] Hulme, for example, states that between 1561 (the year following Elizabeth's accession to the throne) and 1603 (in which she died) a total of 51 grants were made for "new industries and invention to aliens or naturalized

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83)), and, even then, it operated on a simple registration basis until the *Patents, Designs, and Trade Marks Act 1883* created the office of Comptroller General of Patents and provisioned for a staff of patent examiners. See s83 of the *Patents, Designs and Trade Marks Act 1883*, (1883, 46 & 47 Vict., c. 57). In the intervening 31 years, the Patent Office was simply a place of registration.

[34] Walterscheid. E.C., 'The Early Evolution of the United States Patent Law: Antecedents (Part 2)', (1994) 76 *JPTOS* 849, 856-7.

[35] Hulme. E.W., 'The History of the Patent System under the Prerogative and at Common Law', (1896) 12 *LQR* 141, p.153.

[36] See further, Davies. D.S., 'The Early History of the Patent Specification', (1934) 50 *LQR* 86, esp. pp.101-108; Walterscheid. E.C., 'The Early Evolution of the United States Patent Law: Antecedents (Part 2)', (1994) 76 *JPTOS* 849, p.857.

[37] Davies. D.S., 'The Early History of the Patent Specification', (1934) 50 *LQR* 86, p.102.

[38] As explained above, see text accompanying fn18, the patent was a flexible instrument of Crown policy at the time and so the majority of the entries on the patent rolls concerned matters unrelated to any form of new technology.

subjects of the Crown."[39] Other scholars have provided slightly different counts, but all fall within the same general ballpark – around 50 to 60 in total.[40] Accordingly, even taking the highest of these figures we are only really talking about one or two grants being made annually that manifested Elizabeth's original purpose of fostering innovation (on the figures above, an average of 1.2 to 1.4 per year).[41] Indeed, it was thus for many decades even after the *Statute of Monopolies'* promulgation: for example, it was not until the mid-1760s that the number of patents of manufacture granted by the English Crown even reliably exceeded 20 on an annual basis.[42] The number of grants alone could not, therefore, have been a driving force in Parliament's decision to regulate this nascent field. So, what was?

In order to answer this question, we need to consider two things: first, the role that Parliament played within the political landscape of the time – for it is only once we are aware of the context that we can hope to understand what could possibly have been intended. Second, and far more importantly, we must also address the shadow cast by the adoption of Burghley's policy and the unintended consequences that flowed therefrom. It is therefore to these issues that we now turn our attention.

Patents, Prerogative and Parliaments

In the sixteenth and very early-seventeenth centuries, when the foundations required for the *Statute of Monopolies* were, unbeknownst to all, being laid, Parliament occupied a vestigial role in the governance of the English state. Its functions were essentially limited to dealing with local matters – i.e. those of import to individual parliamentarians' constituents – and passing

[39] Hulme. E.W., 'The History of the Patent System under the Prerogative and at Common Law – A Sequel', (1900) 16 *LQR* 44, p.52.

[40] Federico's calculation is the highest. He states that Elizabeth granted 20 patents in the first 10 years of her reign, and 40 thereafter., Federico. P.J., 'Origin and Early History of Patents' (1929) 11 *JPOS* 292, p.297.

[41] To put this in context, in 2019 there were 137,784 patents granted by the European Patent Office, the vast majority of which will have designated the UK – see https://documents.epo.org/projects/babylon/eponet.nsf/0/59B9A0C416D02E75C1258699004AA62F/$File/patent_index_2020_granted_patents_en_.xlsx, and an additional 5,948 granted by the UKIPO following direct application thereto. Accordingly, on these figures, the Eliabethan yearly quota was granted on average approximately every 5 minutes during this period.

[42] See the appendix to the *Report of the Select Committee on the Law Relative to Patents for Inventions*, (1829) Parliamentary Papers III (Command Paper No 332), p.216.

legislation. The real power of governance still lay with the Crown and its advisors, the Privy Council. The Crown's use of prerogative within this framework was significant, and the prerogative's reach, although constrained by law, was nevertheless incredibly broad.[43] This Divine power of the Sovereign,[44] which Elizabeth herself described as the "chiefest Flower in her Garden"[45] was a veritable Swiss-Army knife of governance tools manifesting itself in relation to dispensation of the revenue of the realm and grants of office, privilege, pardons, proclamations and commissions, as well as the dispensation of monopoly.[46]

Parliament, for its part, was required for the raising of the Subsidy that facilitated and enabled the Crown's governance. As Holdsworth explains: "It was quite clear that it was only with its [i.e. Parliament's] consent that taxes could be imposed and new taxes made."[47] While the Monarch could regulate the calling of Parliament and its dissolution, this did not necessarily translate into a recipe for successful fiscal control – a point that became painfully apparent when James I came to the throne at the start of the seventeenth century. Nevertheless, even before this time, it was clear that the use of the prerogative, in particular the ability to dispense privilege and monopoly under its broad umbrella, could provide a simple and effective tool for subverting the Parliamentary chokehold on finance. By reserving a rent, or royalty payment, the Crown was able to profit from the patentee's exercise of their grant. Thus, as well as offering a straightforward manner of rewarding Crown favourites without depleting the Royal coffers, the use of monopoly also enabled circumvention of the critical Parliamentary function of revenue gathering by avoiding the need to vary levels of taxation. As such, it revealed a shadier countenance.

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[43] Holdsworth. W.S., 'The Prerogative in the Sixteenth Century', (1921) 21 *Colombia Law Review* 554, p.558.

[44] John Davies, Parliamentarian, described the prerogative in debate in the House of Commons in 1601 by explaining that "God hath given that power to absolute Princes which he attributeth to himself". See D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.649.

[45] D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.547, recounting the events of Thursday 9 Feb 1597.

[46] See Walterscheid E., 'The Early Evolution of the United States Patent Law: Antecedents (Part 1)', (1994) 76 *Journal of the Patent and Trademark Office Society* 697, pp.700-1.

[47] Holdsworth. W.S., 'The Prerogative in the Sixteenth Century', (1921) 21 *Colombia Law Review* 554, p.555.

ABUSES & ODIOUS MONOPOLIES

The problematic side of monopoly did not take long to manifest itself following invocation of the Elizabethan policy for technological betterment. Notwithstanding, therefore, that the importation of expertise had some notable success,[48] even within the Queen's lifetime it had also become a source of serious discontent: discontent that eventually drew Parliament into the fray. Put simply, liberality with the dispensation of monopoly created personal empires that, as the years wore on, came to directly impact upon the business interests of Parliamentarians and their influencers. As Robert Cecil,[49] Lord Salisbury, Elizabeth's Secretary of State, explained in the Parliamentary debate on monopoly in 1601, the issue drew "two great things in question; First the Prince's power; Secondly the freedom of Englishmen."[50] Monopoly therefore found itself at the epicentre of what may, in hindsight, be painted as a clash between two constitutional titans: Parliament and the Crown. The dirty, but more historically accurate, picture however, was less ideologically cluttered, focusing instead upon economic considerations and, at least initially, motivated by personal interest rather than broad philosophy.

The mere existence of a system of exclusive privileges seemingly provided sufficient incentive by itself for courtiers and other 'hangers-on' to see the potential for personal gain.[51] Such individuals were not, however, attracted by the uncertain rewards offered by patents for new invention – these they left to what Price describes as the "poor and often chimerical inventors."[52] Instead they sought out patents providing control or supervision of established industries: where

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[48] For example, notwithstanding that ordnance featured prominently on the list of imports when Elizabeth took to the throne in 1558, by 1593 it is reported that suspected Spanish agents had attempted to purchase quantities of English canon for furnishing the Armada. The attempted transaction was avoided due to suspicion that "they are instruments for the Spaniards, or other enemies, as no true-hearted Englishman will prefer filthy lucre before the public benefit of his country." See 'Queen Elizabeth – Volume 244: April 1593', entry 116, pp.339-340, in Green. M.A.E. (ed), *Calendar of State Papers Domestic: Elizabeth, 1591-94*, (Her Majesty's Stationery Office, 1867). British History Online https://www.british-history.ac.uk/cal-state-papers/domestic/edw-eliz/1591-4/pp339-346.

[49] The younger son of William Cecil (Lord Burghley) by his second wife.

[50] The text of the debate in which Cecil's speech was delivered is reproduced in D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.649.

[51] Price W.H., *The English Patents of Monopoly* (Cambridge (Mass), Harvard University Press, 1913), pp.16-17

[52] Price W.H., *The English Patents of Monopoly* (Cambridge (Mass), Harvard University Press, 1913), p.16.

profits lay ripe for the taking. Price is pointed in his criticism: at the hands of "corrupt courtiers" the "system of monopolies, designed originally to foster new arts, became degraded into a system of plunder."[53] Thus, in the 1580s we see patents for the production of salt, vinegar and starch, all of which were, by this time, already well-established industries, being granted to court favourites.[54] More significantly perhaps, patents were also granted for the regulation of inns and ale-houses,[55] for the production of gold and silver thread,[56] and for the importation of playing cards,[57] all of which were, in different ways, to play key roles in the development of the *Statute of Monopolies*.

Objection Raised

Pressure for the regulation of these problematic grants built over a significant number of years. The matter came before Parliament on three occasions during Elizabeth's reign: first in 1571,[58]

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[53] Price W.H., *The English Patents of Monopoly* (Cambridge (Mass), Harvard University Press, 1913), pp.16-17.

[54] Respectively, Patent Roll 27 Eliz. p.6. of September 1, 1585 to Thomas Wilkes; Patent Roll, 26 Eliz. p.11. of March 23, 1584 to Richard Drake; and Patent Roll 30 Eliz. p.9. of April 15, 1588 to Young.

[55] Patent Roll, 14 Jac I, p.22. Sir Giles Mompesson was appointed one of three commissioners of inns under this patent. His abuse of this position was to be the cause of great Parliamentary fury.

[56] According to the discussion in the House of Commons on 5 March 1621, control of the production of gold and silver thread came into the hands of Mompesson when he was appointed a commissioner of the patent in in 1618 following grant by the King at the request of Sir Edward Villiers. Commissioners possessed the power to enforce the right against those that infringed notwithstanding that they did not themselves receive the grant. The patent itself, however, does not appear to have been enrolled. See 'House of Commons Journal Volume 1: 05 March 1621', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp.537-539. British History Online http://www.british-history.ac.uk/commons-jrnl/vol1/pp537-539. See also Fox H.G., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), pp.107-9, and Lipson. E., *The Economic History of England – Vol III: The Age of Mercantilism*, (A. & C. Black, 1931), p.373.

[57] Originally granted to Ralph Bowes and Thomas Bedingfelde in July 1576 (Patent Roll, 18 Eliz. pt.1, entry 60. of July 28, 1576). It was reissued twice – first in 1578 to the same patentees, and then in 1588 to Bowes alone (see Patent Roll, 20 Eliz. p.7, and Patent Roll, 30 Eliz p.12, respectively) before finally being issued to Edward Darcy, "Groom of the Privy Chamber", in 1598 "in consideration of his long and acceptable services to the Crown." – Patent Roll, 40 Eliz p.9.

[58] Complaints concerning monopolies were first aired in 1571 in the context of discussion concerning the subsidy. At this point, as Neale notes: "Robert Bell … brought the wrath of authority down on his head" by his denouncement of monopolies in the House of Commons. See Neale. J.E., *Elizabeth I and her Parliaments (1584-1601)*,

again in 1597[59] and finally, and most fiercely, in 1601. Thus, in November of that latter year, upon the introduction of Mr Lawrence Hide's motion for "An Act for the Explanation of Common Law in certain cases of Letters Patent", various examples were given of the excessive public grievance occasioned by the "multiplication of letters patent for monopolies of almost every branch of trade and manufacture."[60]

Debate surrounding Hide's Bill was remarkable for its robust nature. Given the delicacy of the subject – the questioning of the prerogative, the divine right of the sovereign, was not lightly undertaken – a fine line was being trodden. D'Ewes provides a contemporary account of the proceedings in which he reports Mr Francis Moore, parliamentarian, as stating:

> Mr Speaker, I know the Queens Prerogative is a thing curious to be dealt withal, yet all grievances are not comparable. I cannot utter with my tongue or conceive with my heart the great grievances that the Town and Country for which I serve, suffereth by some of these Monopolies. It bringeth the general profit into a private hand, and the end of all is Beggery and Bondage to the Subjects. … And to what purpose is it to do anything by Act of Parliament, when the Queen will undo the same by her Prerogative? Out of the spirit of humiliation, Mr Speaker, I do speak it, there is no Act of hers that hath been or

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(Jonathan Cape, 1957), p.352. See further, Neale. J.E., *Elizabeth I and her Parliaments (1559-1581)*, (Jonathan Cape, 1957), pp.218-9; also Nachbar T.B., 'Monopoly, Mercantilism and the Politics of Regulation', (2005) 91 *Virginia Law Review* 1313, p.1329. Interestingly, D'Ewes S., *A Compleat Journal of the Votes, Speeches and Debates, both of the House of Lords and the House of Commons Throughout the Whole Reign of Queen Elizabeth of Glorious Memory* (Bowes, London, 1693) explains, at pp.158-9 that Bell's questioning of the prerogative was omitted from the "Original Journal-Book of the House of Commons", i.e. from the 'official' record. The stern rebuke offered by the Queen, that the House should "spend little time in motions" and should "avoid long speeches", is therefore presented as a general statement in the Official Journal. D'Ewes, however, further remarks, at p.159, that this admonishment grew directly out of Bell's comments.

[59] Hallam describes the Commons' presentation of an address to the Queen in December 1597 requesting her "most gracious care and favour, in the repressing of sundry inconveniencies and abuses practised by Monopolies and Patents of priviledge" (sic), as a "bold step": Hallam H., *The Constitutional History of England from the Accession of Henry VII to the Death of George II* (Vol I) (London, J Murray, 1827), p.244. The text of the request is reproduced in D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.573 (reporting the events of 14 December 1597).

[60] Holroyd. E., *A Practical Treatise of the Law of Patents for Inventions*, (A. Strahan, 1830), p.2.

> is more derogatory to her own Majesty, more odious to the Subject, more dangerous to the Common-Wealth than the granting of these Monopolies.[61]

Spirits evidently ran high on the subject, and discontent was such that the ingrossing of commodities "into the hand of those blood-suckers of the Common-Wealth"[62] could not be simply brushed off by the Queen. Therefore, while objections raised in 1571 had been crushed by regal outrage,[63] and those of 1597 had been diffused by empty promise,[64] in 1601 something more was required.

The true extent of the problem was staggering. Thus, while unobjectionable patents of invention were of a very limited number,[65] the same could not be said of more objectionable monopolies. Hume makes the point vividly when he explains that:

> "It is astonishing to consider the number and importance of those commodities, which were thus assigned over to patentees. Currants, salt, iron, powder, cards, calf-skins, fells, pouldavies, ox-shin-bones, train oil, lists of cloth, pot-ashes, anniseeds, vinegar, sea-coals, steel, aquavitae, brushes, pots, bottles, saltpetre, lead, accidences, oil, calamine stone, oil of blubber, glasses, paper, starch, tin, sulphur, new drapery, dried pilchards, transportation of Iron ordnance, of beer, of horn, of leather, importation of Spanish wool, of Irish

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[61] See D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.645.

[62] This quote is attributed to Mr Martin – presumably Richard Martin MP for Barnstaple, Devon – see D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.646.

[63] See fn58, above.

[64] Elizabeth is reported as having brought an end to the debate with a promise to open all patents to "be examined to abide the tryal and true Touchstone of the Law" – see D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.547. See also Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), p.75. This promise appears, however, to have been empty: see Holdsworth W.S., *A History of English Law – Volume IV*, (Methuen & Co, 1923), pp.347-8.

[65] See text accompanying fn38 to fn42, above.

> yarn: These are but a part of the commodities, which had been appropriated to monopolists."[66]

In addition, D'Ewes record of the 1601 debate also includes reference to three separate grants provided for the printing of schoolbooks, law books, and songs, a grant allowing the keeping of unlawful Games, and another to allow transport of six thousand calf skins.[67]

Diversity and number aside, it is also astounding how many of these grants related to industries that, by this juncture, would already have been thoroughly well-established. Price's comments concerning corrupt courtiers and chimerical inventors[68] therefore clearly rings true. None of the complaints against monopolies appear however to have touched at all upon the Queen's original ambition in instigating a policy to reward and encourage the institution of new manufacture within the Realm. This is a point that was to replay when Parliament once again discussed monopolies as "Grievances of the Commonwealth" two decades later in the Parliament of 1621.

Remaining, for the moment, in 1601: eventually the Queen ended matters by interjecting and pledging to undertake her own monopoly reform. She terminated a number of the most unpopular grants and opened the rest to adjudication by the courts of the common law.[69] In the context of the debate within which the Monarch's message was communicated to Parliament, Robert Cecil, speaking on behalf of the Crown, explained that Her Majesty:

> "never assented to grant any thing which was *Malum in se*. And if in the abuse of her Grant there be any thing evil (which she took knowledge there was) she her self would take present Order of reformation."[70]

He continued, stating that the Queen's resolve on this matter was firm and that accordingly:

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[66] Hume. D., *The History of England – Vol IV*, (T. Cadell, 1778), p.344.

[67] D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.650.

[68] See text accompanying fns 52 and 53, above.

[69] See D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), pp.652-3, concerning the matters of 25 November 1601.

[70] D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.652.

> "further Order should be taken presently and not in futuro (for that also was another word which I take it her Majesty used) and that some [existing grants] should be presently repealed, some suspended, and none put in Execution, but such as should first have a Tryal according to the Law for the good of the People."[71]

Cecil also cautioned, however, that: "there is no reason that all should be revoked, for the Queen means not to be swept out of her Prerogative. I say it shall be suspended [only] if the Law do not Warrant it."[72]

In toto, the Crown's handling of the matter was a political masterstroke. In one move the Queen quelled the Commons uprising, squashing the Bill that proposed to curtail her powers and simultaneously shifting the blame for any abuses from the prerogative to the patentee. In Holdsworth's words, Elizabeth "never won a greater diplomatic triumph."[73]

For those holding some of the more problematic monopolies, however, the Queen's success had bitter personal consequence. Thus the, now infamous, case of Lord Darcy's patent for the importation, manufacture, and trade in playing cards within England became exposed to adjudication by the courts of the common law.[74] As is well known, the King's Bench considered the patent void. The simple result is, however, far less important than the explanation that Coke provides for the decision. According, therefore, to his report of the case,[75] the legality (or otherwise) of a grant utilising monopoly privilege was to be adjudged according to its effect upon established trade. "[E]very gift or grant from the King has this condition, either expressly or tacitly annexed to it, *Illa quod patria per donationem illam magis solito non oneretur seu gravetur*" i.e., that

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[71] D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.652.

[72] D'Ewes. S., *The Journals of all the Parliaments during the Reign of Queen Elizabeth*, (Printed for John Starkey at the Mitre in Fleet Street near Temple-Bar, 1682), p.652.

[73] Holdsworth W.S., *A History of English Law – Volume IV*, (Methuen & Co, 1923), p.348.

[74] *Darcy v Allen / Allein*, also known as *The Case of Monopolies*, reported variously by Coke (11 Co Rep 84b; *77 English Reports* 1260), Noy (Noy 173; *74 English Reports* 1131), and Moore (Moore (K.B.) 671; *72 English Reports* 830). See further Fisher. M., 'The case that launched a thousand writs, or all that is dross? Re-conceiving Darcy v Allen: The Case of Monopolies', [2010] *IPQ* 356.

[75] *The Case of Monopolies* 11 Co Rep 84b.

the nation should not be burdened thereby. Therefore, every grant made in grievance or prejudice of the subject is void. Thus, in the case itself, the provision of an exclusive right to the "sole trade of any mechanical artifice, or any other monopoly" was considered "not only a damage and prejudice to those who [already] exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees."[76] Furthermore, there were "three inseparable incidents to every monopoly against the commonwealth" which rendered them illegitimate.[77] Monopolies: raise prices; reduce quality ("for the patentee having the sole trade, regards only his private benefit, and not the common wealth"); and tend to impoverishment of those displaced from their trade.[78]

However, while monopolies were, in essence, seen to be bad, this did not mean that all uses of monopoly power should be similarly condemned. Therefore, as Noy's report of *The Case of Monopolies* makes clear, defence counsel (arguing against the patent in question) conceded that:

> "…judges have heretofore allowed of monopoly patents, which is, 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."[79]

Thus, patents for new manufactures (defined at the time to cover both grants issued to inventors in the modern sense of the word, i.e. first devisers, and also those that introduced a heretofore unknown art into the realm from abroad) which were granted for "reasonable time" were not drawn into the discussion. They were simply deemed acceptable provided they were not misused.

As we exit the Elizabethan period therefore, a number of things are apparent. First, the practice of providing monopoly privilege as an incentive for artisans to introduce new trades into

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[76] 11 Co Rep 84b, at p.86b.

[77] 11 Co Rep 84b, at p.86b.

[78] 11 Co Rep 84b, at p.86b.

[79] Noy 173, p.182; *74 English Reports* 1131, p.1139.

England was, by now, well established. Second, abuse of the framework of monopoly outside of this limited window was rife. Third, the concerns of Parliament were focused clearly on so-called odious monopolies and not on patents for new manufactures. And fourth, a lack of definitional clarity dogged these issues that meant differentiation of odious monopolies from those that were legitimate was not at all straightforward. While these observations should already provide the reader with a degree of suspicion over any claim that the *Statute of Monopolies* occupies a foundational role within the law of patents for invention, matters as we approach the drafting of the *Statute* place this suspicion beyond reproach.

JAMES I AND THE QUESTION OF MONOPOLIES

Elizabeth I died in 1603. Her successor, James I, acceded to the throne shortly before the judgment in *Darcy v Allen* was handed down. Perhaps because of this, the King began his reign on a note of caution, almost immediately issuing a proclamation inhibiting the use and execution of any "Charter or Grant made by the late Queen Elizabeth, of any kind of Monopolies, &c."[80] This move was described in a letter from Thomas Wilson to Sir Thomas Parry, then ambassador to France, as one cynically designed to curry favour: "Only, for gayning the love of the People ther ar many thinges in the meane while done, as takinge away of all Monopolies, and other matters reformed wher private gayne hath caused public grevance."[81] Discontent over monopoly remained strong and therefore, at least initially, James remained true to his promises. At the opening of his first Parliament in March 1604 the King therefore ended his speech expressing remorse at having "been so bountiful; for if the Means of the Crown be wasted, I behoved then to have recourse to you My Subjects, and be burdensome to you, which I would be lothest to be of any King alive".[82] As Price explains, despite taking the form of an "excuse for his lack of

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[80] Calendar entry for 7 May 1603 in 'James I: Volume 1, March-May, 1603', in Green. M.A.E. ed, *Calendar of State Papers Domestic: James I, 1603-1610,* (Her Majesty's Stationery Office, 1857), pp.1-13. British History Online http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1603-10/pp1-13. A reproduction of the Proclamation in full can be found in Strype. J., *Annals of the Reformation and Establishment of Religion, and Other Various Occurrences in the Church of England, During Queen Elizabeth's Happy Reign*, (Clarendon Press, 1824), pp.528-31.

[81] Letter from by Thomas Wilson to Sir Thomas Parry dated 12 June 1603. Reproduced in Ellis. H., *Original Letters Illustrative of English History – Second series Vol III* (Harding & Lepard, 1827), pp.201-2.

[82] 'House of Commons Journal Volume 1: 22 March 1604', p.146, in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp.142-149. British History Online http://www.british-history.ac.uk/commons-jrnl/vol1/pp142-149.

liberality", this "plea of prudence and economy must have appealed strongly to the Commons," which therefore turned its attention to other, more pressing, matters.[83]

Notwithstanding this initial note of caution, Wilson's cynicism proved correct as James's "liberality continued unabated."[84] Thus, complaints over monopolies intensified in the coming years. Accordingly, in this Parliament's second session, which was convened from January to May 1606, "patents of monopoly became one of the most important subjects handled by the Committee of Grievances."[85] The King attempted to diffuse the matter in his speech at the opening of the third session later that same year, but this rang hollow, and the complaints continued to accumulate.[86]

The Book of Bounty (1610)

In 1610, the Commons once again raised a petition concerning grievances.[87] According to Gordon's account, James' critics asserted that the King, by his grants, had "most unwarrantably diverted the stream of English wealth into the channel of Scottish well-being."[88] Furthermore, "the grant of patents, being a source of royal bounty which it was singularly easy to set flowing," featured heavily in this torrent.[89] Fox and Price also draw attention to the King's failure to make

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[83] Price. W.H., *The English Patents of Monopoly* (Cambridge (Mass), Harvard University Press, 1913), p.25.

[84] Davison. P., 'King James's Book of Bounty: From Manuscript to Print', (1973) 28 *The Library* 26, p.30.

[85] Price. W.H., *The English Patents of Monopoly* (Cambridge (Mass), Harvard University Press, 1913), p.26.

[86] An abstract of this speech with notes of the grievances raised, as well as a judgment of Council on the answers given to the petition and a memorial of the resolutions that the King promised to take as a consequence can be found in the State Papers Domestic. See Entries 65, 66 and 67 in 'James I: Volume 23, August-November, 1606', in Green. M.A.E. ed., *Calendar of State Papers Domestic: James I, 1603-1610* (Her Majesty's Stationery Office, 1857) pp.328-336. British History Online https://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1603-10/pp328-336. The full text of the King's speech is reproduced at 'House of Commons Journal Volume 1: 19 November 1606', pp.316-18, in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp. 315-318. British History Online http://www.british-history.ac.uk/commons-jrnl/vol1/pp315-318.

[87] Calendar entry for 7 July 1610 in 'James I: Volume 56, July, 1610', in in Green. M.A.E. ed, *Calendar of State Papers Domestic: James I, 1603-1610,* (Her Majesty's Stationery Office, 1857), pp.622-626. British History Online http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1603-10/pp622-626.

[88] Gordon. J.W., *Monopolies by Patents and the Statutable Remedies Available to the Public*, (Stevens & Sons, 1897), p.5. Given the Act of Union was still almost a century away, this criticism was far more pointed than a modern reading might suggest.

[89] Gordon. J.W., *Monopolies by Patents and the Statutable Remedies Available to the Public*, (Stevens & Sons, 1897), p.5.

good on his earlier proclamations, Fox, in particular, commenting that James had "failed in his undertaking that the courts should consider and judge of the validity of certain of the grants".[90] Inaction and bluster can, it appears, only take one so far – a point modern politicians may well be advised to heed.

Shortly after the petition was raised, James issued what has become known as his *Book of Bounty*.[91] Whether the timing of its release was a direct response to the petition or mere coincidence is unclear, the drafting of the *Book* evidently having commenced some years earlier.[92] Nevertheless, it's tone and content were evidently pertinent to the situation in Parliament. It therefore declared monopolies, among other objects, to be "contrary to our Lawes", and therefore one of "those special things which Wee [i.e. the King] expressly command that no Suitor presume to move Us."[93] Blame for the issue of problematic grants was therefore placed firmly at the feet of those in receipt of these rather than the hand that dealt them.[94] Nevertheless, conscious perhaps

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[90] Fox. H.G., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly*, (University of Toronto Press, 1947), p.95.

[91] *A Declaration of His Maiesties' Royall pleasure, in whatsort He thinketh fit to enlarge or reserve Himself in matter of Bountie*, (Robert Barker, 1610). The full text of the Book is reproduced in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol VII*, (Yale University Press, 1935), pp.491-6). It is also reproduced in facsimile reprint in Gordon. J.W., *Monopolies by Patents and the Statutable Remedies Available to the Public*, (Stevens & Sons, 1897), pp.161-192.

[92] In a letter that S.R. Gardiner sent to A.B. Shaw, and which is reproduced in Gordon. J.W., *Monopolies by Patents and the Statutable Remedies Available to the Public*, (Stevens & Sons, 1897), at pp.158-9, Gardiner states of the Book that it: "is not a personal production of his own [i.e. of King James's own], but an official declaration issued in his name, like any other declaration or proclamation. Though it was printed in 1610 (i.e., between March 25, 1610 and March 25, 1611), it was drawn up in the end of 1608, and was one of Salisbury's [i.e. Robert Cecil's] many attempts to check James's extravagance. You will find it in various forms amongst the State Papers Domestic XXXVH., 72-76." Davison also notes that "[i]t was probably about this time, 1608 or 1609, that the Book of Bounty was drafted, though it is conceivable that drafting may have begun earlier." He also suggests that others, such as Sir Julius Caesar, Chancellor of the Exchequer since 1606, may also have had a hand in its creation. Davison. P., 'King James's Book of Bounty: From Manuscript to Print', (1973) 28 *The Library* 26 at p.30-31.

[93] See p.13 of Barker's original print: *A Declaration of His Maiesties' Royall pleasure, in whatsort He thinketh fit to enlarge or reserve Himself in matter of Bountie*, (Robert Barker, 1610) reproduced in Gordon. J.W., *Monopolies by Patents and the Statutable Remedies Available to the Public*, (Stevens & Sons, 1897), pp.161-192.

[94] An approach the UK government returned to in 2021 in respect of dubious contracts for the provision of PPE. Some things never change.

of the multifarious uses to which the dispensation of monopoly power under the prerogative could be put, the text also provided a series of explicit savings. Accordingly, in line with Elizabeth's original policy, "Proiects (sic) of new invention, so they be not contrary to the Law, nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or otherwise inconvenient" were exempted from castigation.[95]

The importance of the *Book of Bounty* cannot be overstated. It not only takes a critical role in the development of the *Statute of Monopolies*,[96] but as Notestein observes, attempts were also made in the years following its initial publication to "keep this a live document." Accordingly, "[m]entions of it occur in the Privy Council proceedings as well as by the lawyers in Parliament. A commission to put its terms into effect was appointed as late in James's reign as Oct 31, 1622."[97] Davison, similarly, draws attention to continued relevance of the *Book* in the decades following its publication.[98]

However, adopting a pattern that was to be repeated with the promulgation of the *Statute of Monopolies* itself, the publication of the *Book of Bounty* seems to have had little immediate effect. Thus, rather than staunching the flow of questionable grants, in the years immediately following its publication in 1610 complaints against monopolies continued unabated. Grievances were

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[95] *Book of Bounty,* schedule paragraph 9. See p.21 of Barker's original print: *A Declaration of His Maiesties' Royall pleasure, in whatsort He thinketh fit to enlarge or reserve Himself in matter of Bountie*, (Robert Barker, 1610) reproduced in Gordon. J.W., *Monopolies by Patents and the Statutable Remedies Available to the Public*, (Stevens & Sons, 1897), pp.161-192.

[96] Despite, it must be said, the occasional claim to the contrary. Russell, for example, stated that it was "a coincidence, to put it no higher, that the Book of Bounty provided the preamble for the monopolies bill". See Russell. C., *Parliaments and English Politics, 1621-1629*, (OUP, 1979), p.99. As Kyle explains, such a statement completely "ignore[d] the facts." Kyle. C., 'But a New Button to an Old Coat': The Enactment of the Statute of Monopolies, 21 James 1 cap.3, (1998) 19 *Journal of Legal History* 203, p.207.

[97] Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol VII*, (Yale University Press, 1935), p.491.

[98] "The Book of Bounty is mentioned frequently throughout the fifteen years of James's reign following its first publication. It is invoked in the Preamble to the Monopolies Act of 1624 and its provisions were renewed in the first year of the reign of Charles I…" Davison. P., 'King James's Book of Bounty: From Manuscript to Print', (1973) 28 *The Library* 26, p.29.

raised once more in the short-lived, so-called, 'Addled' Parliament of 1614,[99] and a not inconsiderable amount of Parliamentary time therein was dedicated to discussion of patents on glass and the production of cloth.[100] More would undoubtedly have been said were it not for the King's abrupt dissolution of Parliament early in June 1614, ostensibly in admonishment for its failure to move discussion forward on the question of the Subsidy.[101]

James I's third Parliament (1621)

It was another six years before the King "was reluctantly compelled to issue fresh writs of summons"[102] to recall Parliament. During the interim, the monopoly problem had only increased. A key marker in this process occurred in 1617, when Bacon replaced Ellesmere as Lord Keeper.[103] Whereas Ellesmere had been a staunch opponent of dubious Princely grants,[104]

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[99] Parliament only sat for just over 2 months, from 5 April to 7 June 1614. During this time no legislation was passed.

[100] For the former, see the record in the House of Commons Journal from 20 April, 4 May and 6 May 1614. The latter was discussed at length on 20 May. See 'House of Commons Journal Volume 1: 20 April 1614', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp.469-470. British History Online http://www.british-history.ac.uk/commons-jrnl/vol1/pp469-470; 'House of Commons Journal Volume 1: 04 May 1614', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp.471-472. British History Online http://www.british-history.ac.uk/commons-jrnl/vol1/pp471-472; 'House of Commons Journal Volume 1: 06 May 1614', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp.474-476. British History Online http://www.british-history.ac.uk/commons-jrnl/vol1/pp474-476 and; 'House of Commons Journal Volume 1: 20 May 1614', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp.490-492. British History Online http://www.british-history.ac.uk/commons-jrnl/vol1/pp490-492, respectively.

[101] The Commons Journal records in an entry on 3 June 1614 that the Speaker delivered a message from the King in which His Majesty indicated that "unless we forthwith proceed to treat of his Supply, he will dissolve the Parliament." See 'House of Commons Journal Volume 1: 03 June 1614', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp.505-506. British History Online http://www.british-history.ac.uk/commons-jrnl/vol1/pp505-506. Parliament was dissolved three days later.

[102] Thrush. A., *The History of Parliament: the House of Commons 1604-1629 – Vol I*, (Cambridge University Press, 2010) p.xliii.

[103] i.e. the custodian of the Great Seal that was used to symbolise the Monarch's approval of certain state documents, including patents.

Bacon "was guided by no similar moral or legal scruples."[105] By 1620, therefore, "[t]he few monopolies complained of at the King's accession" were said to have been "multiplied by as many scores, and the people groan under them".[106] As Foster explains, issues arising from the exercise of several grants issued in the early 1600s meant that by 1621 "discontent was widespread and protests against the patentees came in from many parts of the country."[107] While the number of grants had increased, it was arguably the change in their nature over time that caused the most serious problems. When Elizabeth's policy of providing monopoly privilege had been instituted in the mid-1500s responsibility for the introduction of the new industry had lain with the patentee but the Crown had retained control over the industry itself. By the early 1600s, however, as Foster recounts, "grants were made increasingly to private persons on their own application, and control had shifted from the Crown to the patentee, making possible grievous abuses."[108] Traditionally, actions concerning the prerogative would have been brought before the King's own courts,[109] usually Star Chamber or the Privy Council. While, as

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[104] Ellesmere was, according to Price, ultimately removed from office in 1616 for his "refusal to sanction certain patents desired by the king's favorites." Price. W.H., *The English Patents of Monopoly* (Cambridge (Mass), Harvard University Press, 1913), p.30.

[105] Price. W.H., *The English Patents of Monopoly* (Cambridge (Mass), Harvard University Press, 1913), p.30.

[106] Letter from Chamberlain to Carleton recorded in the *Calendar of State Papers Domestic*. See entry for 8 July 1620 in 'James 1 - volume 116: July 1620', in Green. M.A.E., ed., *Calendar of State Papers Domestic: James I, 1619-23*, (Her Majesty's Stationery Office, 1858), pp. 159-170. British History Online http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1619-23/pp159-170. Gardiner reproduces the full text of the letter which states: "For proclamations and patents they are become so ordinary that there is no end, every day bringing forth some new project or other. In truth, the world doth ever groan under the burden of these perpetual patents, which are become so frequent that whereas at the King's coming in there were complaints of some eight or nine monopolies then in being, they are now said to be multiplied by so many scores." Gardiner. S.R., *History of England from the Accession of James I to the Outbreak of the Civil War 1603-1642; Vol IV (1621-1623)*, (Longmans, Green & Co., 1883), p.1.

[107] Foster. E.R., 'The Procedure of the House of Commons against Patents and Monopolies, 1621-1624.' in Aitkin. W.A., & Henning B.D. (eds), *Conflict in Stewart England – Essays in Honour of Wallace Notestein*, (Jonathan Cape, 1960) p.63.

[108] Foster. E.R., 'The Procedure of the House of Commons against Patents and Monopolies, 1621-1624.' in Aitkin. W.A., & Henning B.D. (eds), *Conflict in Stewart England – Essays in Honour of Wallace Notestein*, (Jonathan Cape, 1960) p.60.

[109] i.e. conciliar courts associated with the King's council and which were intimately tied to the prerogative jurisdiction of the Crown. See 'Chapter 7: The Conciliar Courts', in Baker. J., *Introduction to English Legal History* (5th

Holdsworth eloquently states: "those who suffered [at the hands of monopoly grants] naturally wished for a better remedy than an appeal to the authority from which they emanated",[110] wishing for such and requesting such are still two very different things. Therefore, notwithstanding Elizabeth's promises to open up adjudgment of her grants to the common law,[111] and Allen's victory at King's Bench (a common law court) in *The Case of Monopolies*, by 1621 patentees were still not being challenged within this jurisdiction.

Part of the reason for this reticence to bring claims at common law may well have been a fear that it would have been an affront to royal dignity to have done so. Part may also have been the specific wording of the late Queen's proclamation – in particular, her expressed intention to put to trial those grants already in existence in 1601. Obviously, this would not limit future expression of the prerogative and certainly could not bind a subsequent Monarch. Therefore, the ultimate authority for rectification of any wrong experienced under a patent issued by James I's hand could reasonably have been thought to remain with the Crown.

Uncertainty surrounding the possibility of, and forum for, challenge can only have added to the patentee's sense of power. Accordingly, even the most dubious grant provided a potent weapon for those that could wield it. By the time Parliament was called in 1621 two groups of grants seem to have especially vexed the Commons. Both offered a degree of control over established industries. The first were those made to Sir Giles Mompesson and others concerning the power of regulation over inns. These were alleged not only to be unlawful and inconvenient, but also grossly abused.[112] The second formed a group "towching Coyne",[113] and included grants held by

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Ed, OUP, 2019). For further discussion and history see 'Chapter 10: The Council and Conciliar Courts' in Baker. J., *The Oxford History of the Laws of England: Vol VI 1483-1558*, (OUP, 2003).

[110] Holdsworth W.S., *A History of English Law – Volume IV*, (Methuen & Co, 1923), p.347.

[111] See discussion in text accompanying fn70 to fn72, above.

[112] The list of abuses is set out in Pym's diary for 21 Feb 1621 which recounts Coke's report on the matter delivered to the House of Commons that day. Coke is recorded as outlining nine heads of abuse that range from excessive use of the commission to falsification of certificates and threatening of Justices of the Peace. *John Pym's Diary* – entry for 21 February 1621; in Notestein W. & Relf. F.H, (eds), *Commons Debates, 1621 – Vol IV*, (Yale University Press, 1935), pp.83-87.

[113] i.e. touching coin – that is, were involved in the revenue of the state. The issue of "coyne" was first raised in this Parliament on 6 February 1621 merely days after it began to sit: see *John Pym's Diary* – entry for 6 February 1621; in Notestein W. & Relf. F.H, (eds), *Commons Debates, 1621 – Vol IV*, (Yale University Press, 1935), p.19.

the East India Company for the transport of Spanish silver,[114] and a patent on the making of gold and silver thread "whereby much Bullion is consumed".[115] In the first days of James' third Parliament, therefore, a motion was introduced that "all Patents of that nature might be examined by a select Committee."[116] This was soon amplified to a call for a bill.[117] "It's necessary", Coke stated in the debate of 8 March 1621 concerning some of the Mompesson grants, "that some law be made for the time to come that no monopoly be granted, and they that procure any such may incur some great punishment, and this will kill the serpent in the egg."[118]

As should by now be clear, as we enter what may be considered the critical period in the creation of the *Statute of Monopolies*, Parliamentary focus lay not with the encouragement of invention but rather the curtailment of abuse. The dark and problematic side of monopoly had multiplied, both in terms of the weight of grants that now pressed the countryside and the abuses of power that accompanied them. The King's continued dispensation of such patents, whether the result of duplicity, carelessness, or simple apathy was a thorn in Parliament's side.

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[114] Raised by John Glanville when introducing the discussion: see *John Pym's Diary* – entry for 6 February 1621; in Notestein W. & Relf. F.H, (eds), *Commons Debates, 1621 – Vol IV*, (Yale University Press, 1935), p.19.

[115] Raised by Edward Spencer in the same debate: see *John Pym's Diary* – entry for 6 February 1621; in Notestein W. & Relf. F.H, (eds), *Commons Debates, 1621 – Vol IV*, (Yale University Press, 1935), p.19. As noted above (see fn56), the patent for gold and silver thread appointed Mompesson as commissioner. His apparent abuse of this position, extorting money from goldsmiths, diluting gold stock with base metals such as lead in an attempt to increase profits, and utilising domestic bullion rather than importing gold for the purpose – against the terms of the patent itself – were castigated in the most forceful terms by the King when the patent was eventually revoked in 1621. See Rushworth. J., *Historical Collections of Private Passages of State: Volume 1, 1618-29*, (D. Browne, 1721), which reproduces the King's speech to the Lords from pp.24-62. Available at British History Online: http://www.british-history.ac.uk/rushworth-papers/vol1/pp24-62.

[116] Introduced, according to Pym by Mr Alphard (sp? probably Edward Alford). See *John Pym's Diary* – entry for 6 February 1621; in Notestein W. & Relf. F.H, (eds), *Commons Debates, 1621 – Vol IV*, (Yale University Press, 1935), p.19.

[117] Sir Dudley Digges was first to broach the subject when he called for a bill to be drawn on the matter on 5 March 1621. See *The Anonymous Journal* – entry for 5 March 1621 in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol II*, (Yale University Press, 1935), pp.167-8. See also *The Parliamentary Notes of Sir Thomas Holland* – entry for 5 March 1621 in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol VI*, (Yale University Press, 1935), p.31.

[118] *The Anonymous Journal* – entry for 8 March 1621, in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol II*, (Yale University Press, 1935), p.194.

This story, this backdrop, this framework of creation has been all but ignored by those who sought to elevate the *Statute* to create a foundational icon: when crafting a legend, it pays not to dwell on the detail. Detail is, however, fundamental to the demolition of that legacy. What follows, as we delve further into the legislative processes by which the *Statute* came into existence, is therefore an exhaustive account of the Parliamentary machinations that lie behind its eventual form. These insights, stitched together from contemporary accounts of the legislative process in the parliaments of 1621 and 1623, provide as complete a picture as it is possible to sketch of the motivations of those that created it. As such, they place beyond question the idea that patents of invention were mere afterthoughts: croutons garnishing a significantly more complex soup.

THE DRAFTING OF THE BILL OF MONOPOLIES

The Initial Bill (1621)

A bill, penned by Coke, was introduced to the House on 12 March 1621.[119] It is clear from the debates leading up to this point that the sole focus of the Commons' contempt lay upon abuses of monopoly of the kind perpetrated by Mompesson et al. These essentially consisted of grants providing control, or powers of regulation, over existing industries, often combined with allegations of excessive force or corruption in the exercise thereof. Within the early days of this

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[119] The entry in *The Anonymous Journal* for that date records that "A bill, drawn by Sir Edward Coke, against all monopolies hereafter to be inhibited and tried in the King's courts, and that those that take forth such patents, commissions or grants shall enter into recognizances, and he that findeth himself aggrieved shall have treble damage." *The Anonymous Journal* – entry for 12 March 1621, in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol II*, (Yale University Press, 1935), p.210. Pym also records that on 12 March "An Act against Monopolyes and dispensations with Penall Lawes" was presented that would have made "Those who shall take such Pattents to be in case of Premunire and dissabled to be in any Commission, with a forefeiture of treble damages to the party grieved by any such graunts." *John Pym's Diary* – entry for 12 March 1621, in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 Vol IV*, (Yale University Press, 1935), p.147. Smyth's diary for the same day records that: "Bill for hewynge downe all monopolies and grants of penaltyes upon penal lawes, beinge a declaration both that the same are voyd. And the offendors to bee in the prarmunire and disabled to bee in Commission or in the reputation of a subiects, And to pay 3 damages and 2 costs. Obtayned by false suggestions and importunities. It runneth to all grants made or to bee made. Penned by Cooke." *Observations at the Parliament by John Smyth of Nibley* – entry for 12 March 1621, in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 Vol V*, (Yale University Press, 1935), pp.289-90.

Parliament additional cases of abuse appeared on an almost daily basis.[120] Nowhere in the records for this Session, however, is there to be found mention in negative sense of a patent that is, or was alleged to be, for new manufacture, for limited time and which did not display the "incidents to monopoly" outlined in *Darcy v Allen*.[121] Indeed, not only were patents for new invention not considered to be affected by the taint of monopoly, but "new invention" was actually used as one of the indications for when something *could not be considered* to be objectionable. Thus, when discussing the gold folate patent of Dr Eglesham in the Committee on Grievances on 27 April 1621, Coke is said to have stated that "A Pattente that restraines trade must have 3 incidents [to avoid being classed a grievance]: 1, the commoditie must be as good as before; 2, as good cheape; 3, it must be a new invention never used before."[122] Therefore, as we enter discussion of the text that was eventually to become the *Statute of Monopolies*, one thing is eminently clear from the Commons debates: rather than seeking to lay foundation to the law of patents for inventions, Parliament's attention was instead firmly focused upon abusive grants which, by definition, patents for invention could not be.

If a snapshot of the development of the *Statute of Monopolies* were therefore taken at this point in time, it would be difficult, if not impossible, to substantiate a claim that it had much at all to do with the nascent system of encouraging innovation by the award of monopoly privilege. The totality of the argument for some kind of causal connection between the two would appear to hinge upon combination of the fact that the means of encouragement fell within the area broadly under consideration and that patents for invention are specifically mentioned in the *Statute* as eventually enacted. Any claim to foundational significance would, however, arguably be strengthened by further evidence of these particular patents being at the forefront of consideration when the text of the *Statute* was being drafted. At least then it would be impossible to dismiss their inclusion as a mere afterthought.

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[120] By 12 March it is recorded that there were "many Petitions of Grievances, almost 80, in the House". Entry for 12 March 1621 in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), p.550. British History Online http://www.british-history.ac.uk/commons-jrnl/vol1/pp549-551.

[121] See text accompanying fn78, above.

[122] *The Belasyse Diary* – entry for 27 April 1621; in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 Vol V*, (Yale University Press, 1935), pp.105-6.

In its enacted form, the *Statute of Monopolies* contained a preamble and four main sections that set out its influence. In essence, section 1 states all monopolies to be void. Section 2 maintains that the legality of any potential monopoly should be determined at common law. Section 3 enacts that no monopolies have any force, and section 4 provides that anyone grieved by occasion or pretext of monopoly should have remedy at the court of common law by actions grounded on the *Statute.* These sections are then qualified by a series of provisos that exclude certain grants and uses of monopoly privilege from their ambit; thereby allowing these things to escape an otherwise outright prohibition upon monopoly. Critical in this number, at least for those seeking to lay foundational credit at the *Statute's* feet for the modern law of patents, is section 6. This exempts from castigation grants of limited term for the "sole working or making of any manner of new manufacture within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use."

No record of the text of the draft bill is, however, found within the various diaries that record the Commons debates. Discussion of the legislation's development within these accounts is, in addition, somewhat piecemeal and disjointed, with much of the important work evidently having taken place behind closed doors. A transcript is nevertheless included in Gardiner's *Notes of the Debates in the House of Lords (1621),* published in 1870, in which he italicised "the alterations made in committee".[123] From this we can therefore derive what Gardiner considered to be the originally drafted text. Gardiner's account was taken by a number of late-nineteenth century writers to offer an authoritative explanation of the development of the *Statute*,[124] and therefore occupies a position of particular importance in the development of the legislation's legacy.

In the form put forward in Gardiner's work, several of the provisos do not appear in italics and thus seem to be original parts of the bill. Included in this un-italicised number is the proviso relating to manners of new manufacture, quoted above. Thus, if we take Gardiner's account as authoritative, one might be forgiven for thinking that patents for new manufacture / invention were, in fact, deemed sufficiently important to feature in the first draft of the bill of Monopolies.

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[123] Gardiner. S.R. (ed)., *Notes of the Debates in the House of Lords (1621)*, (Camden Society, 1870), p.151.

[124] This is hardly surprising given Gardiner's status. His influence is clearly detectable in Gordon's *Monopolies by Patents* for example, where he receives rather effusive thanks in the preface to the book. The text also includes a copy of a letter by Gardiner concerning James I's *Book of Bounty.* See Gordon. J.W., *Monopolies by Patents and the Statutable Remedies Available to the Public*, (Stevens & Sons, 1897), p.x and pp.158-9.

Taken by itself, Gardiner's claim may also lend credence to the assertion that it was therefore one of Parliament's primary concerns to ensure that the encouragement of invention was adequately protected. Further investigation, however, reveals this not to be the case.

Reassessing Gardiner's text[125] by working through the various contemporary records of the proceedings of the House of Commons at this time, it would appear that the draft bill in its original form at least contained the following:[126]

a) a preamble that referred to James I's *Book of Bounty*;

b) a provision that declared and enacted 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" to be contrary to law and "utterly void" and therefore "in no wise to be put into execution";

c) a section that declared all monopolies should be "examined, heard, tried and determined, according to the "laws of this realm";

d) A statement that all are "disabled and uncapable to have, use, exercise, or to put in use, any such commission, grant, licence, charter, power or faculty". This was combined with a warning that anyone doing anything by "pretext of any such grant" etc., or endeavouring "to draw the force or validity of any such" risked the repercussions of praemunire;[127]

e) A further statement that any who are "hindered, disquieted, or grieved, by pretext of any such" may bring action to "recover three times so much as the damages which he or they sustained by means or occasion of being so hindered" etc. and "double costs".

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[125] The quotes in the list below derive from Gardiner's transcript, corrected for modern English spelling.

[126] This point is supported by Kyle's analysis, where he explains that the original draft bill contained a preamble and four clauses. However, in contrast to list given in the text that follows, Kyle suggests points a) and b) were combined into the preamble and point d) in the list was, in fact, two separate clauses. The first of which stated that none should use any grant declared illegal in the preamble and the second provided for a remedy of praemunire. Kyle. C., "But a New Button to an Old Coat': The Enactment of the Statute of Monopolies', 21 James 1 cap.3, (1998) 19 *Journal of Legal History* 203, p.207.

[127] i.e. it was an offence against the Crown and was punishable as such.

There is, however, no indication that any proviso relating to manners of new manufacture, or to invention more broadly, was included in the original. Indeed, when the records of the proceedings of Parliament are considered then including such a provision within the original draft simply does not make sense. Pym's account of the debate of the bill on 14 March 1621 (i.e. two days after its introduction), for example, includes reference to suggestions that it should "extend to agency whereby Moinopolies were cowntenanced, and some exceptions made for Priviledge of newe Invencions."[128] If Gardiner was correct, and the proviso was already included in the text when provided to Parlaiment, then this suggestion would have been entirely superfluous. Furthermore, William Hackwyll[129] is recorded as stating that while he considered the Bill to be "of the greatest Consequence, for the Good of the Subject, of any in the House", he still questioned how far the words 'sole working' "may extend to new Inventions, and to some Corporations, having the sole working"[130] of certain commodities. The entry in the *Commons Journal* for that day continues noting that Coke explained that he agreed with the sentiment but thought that the Bill should not be "over much clogged." He therefore preferred to "have this go alone; for that this founded meerly upon the King's own Judgment; who hath adjudged Monopolies unlawful, and to give a Subject Liberty to dispense with penal Laws."[131] Once more, these comments would make no sense if the draft bill already had explicit provisos related to these things included within it.[132]

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[128] *John Pym's Diary* – entry for 14 March 1621, in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol IV*, (Yale University Press, 1935), p.153.

[129] This is the spelling used in the House of Commons Journal. White, among others, use alternate spellings as will be seen below.

[130] See 'House of Commons Journal Volume 1: 14 March 1621', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp.553-554. British History Online https://www.british-history.ac.uk/commons-jrnl/vol1/pp553-554. Also discussed in White. S. D., *Sir Edward Coke and "The Grievances of the Commonwealth" 1621-1628*, (University of North Carolina Press, 1979), p.130.

[131] 'House of Commons Journal Volume 1: 14 March 1621', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp.553-554. British History Online https://www.british-history.ac.uk/commons-jrnl/vol1/pp553-554.

[132] White makes much the same point when he states that the provisos "could simply have been added to the bill without any interlineation." He supports this statement with three facts: first that "the provisos were not written in the same hand as the enacting clauses, or on the same type or size of paper. Second, certain objections that were made to the bill on its second reading would have made little sense if the bill had already contained *any* of the

Hackwyll must also have questioned the definition of monopoly to be used under the bill as Coke then responded that 'monopoly' was to be "defined by the Judges of the Law". The implication seems to be that the courts had previously set forth on this matter and that there was no intention to deviate from this with the draft bill. As we have already seen, however, the definition of monopoly was somewhat mutable at this time. Thus, while Coke may have been content to let this matter lie, others were not. Sir Thomas Wentworth therefore pressed the point, asking that the offences be "particularly defined" as the penalty suggested was so great. Sir George Calvert, Secretary of State at the time, also wished to have recognition that "new inventions have always had a Time of Privilege" and that the Bill should ensure that it had "Care of that".[133]

As White has explained: "It is barely possible that Hakewill [and indeed Pym and the King's Secretary] could have made these objections even if the bill had already contained provisos for new inventions and / or corporations."[134]

Coke's comments, relayed above, that the proposed legislation should not be "over much clogged" really strike at the heart of the issue. He was evidently the driving force behind the initial draft, and his focus was firmly placed on the suppression of what he considered to be problematic monopolies – i.e. those that unjustifiably removed freedoms from the commonwealth. Coke's distaste for this kind of monopoly was, by the time of the 1621 Parliament, already well known. His comments as counsel in *The Case of Monopolies* were a matter of public record, as was his famous *Charge to the Norwich Assizes* of 1606.[135] Coke's involvement

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provisos that appear in Gardiner's transcript as part of the original bill. Finally, several diaries state explicitly that provisos were added to the bill during the early stages of its passage through the Commons." See White. S. D., *Sir Edward Coke and "The Grievances of the Commonwealth" 1621-1628*, (University of North Carolina Press, 1979), p.129 [n192].

[133] 'House of Commons Journal Volume 1: 14 March 1621', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp.553-554. British History Online https://www.british-history.ac.uk/commons-jrnl/vol1/pp553-554.

[134] White. S. D., *Sir Edward Coke and "The Grievances of the Commonwealth" 1621-1628*, (University of North Carolina Press, 1979), p.130 [n194].

[135] See 'The Lord Coke, His Speech and Charge, reproduced as Coke's Speech and Charge at the Norwich Assizes' in Sheppard S., *The Selected Writings and Speeches of Sir Edward Coke*, Vol II, (The Liberty Fund, 2003), p.551. Here Coke likened the monopolist to the concealer, whose claims and titles are "meere illusions, and like himselfe not

in the discussion of grievances earlier in the 1621 Parliament also reveals a singularity of focus. This point is further reinforced by Coke's insistence that the law being drafted was merely declaratory of what was supposed to be the status quo following publication of the King's *Book of Bounty* just over a decade earlier. Odious monopoly and the abuse of powers hatched under the wing of the prerogative were therefore clearly his targets. Limited grants to those bringing things unknown to English shores and seeking to institute such manufactures within the realm, simply did not feature on his horizon. Grants such as these were few in number and generally harmless: when hunting whales, one doesn't generally worry about marauding albatross.

Nevertheless, the expansive wording of the drafted provisions, combined with evident uncertainty concerning the limits of the term monopoly, seem to have spurred the Commons to act. The bill was therefore debated by a committee of the whole House on 15 March 1621. It was then sent to subcommittee to iron out some of the difficulties therein raised. The subcommittee reported back to the House on 20 March at which point Nicholas specifically notes that a report of the Act was presented to the House: "amended by the Committee, and Provisoes are added, that this shall not extend to any Patent made in 11 Jac. for any Manufactures."[136] White concludes that this must be a reference to manners of new manufacture (i.e. inventions) as no general clause of the type described by Nicholas ever became appended to the bill.[137] This, then, is the point of injection of a clause concerning patents for new invention into the legislative maelstrom. A clarifying whimper: hardly the epoch-making formative event that we have been led to expect.

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worth any thing", the promooter, "both a *begger* and a *knave*", and the Alcumist, "our golden Foole". The purchase of monopoly, he explained, allows the monopolist to "anoy and hinder the whole *Publicke Weale* for his owne privat benefit." Coke himself later disavowed of the report of the speech, criticising its publication as misrepresenting his comments and being littered with errors. See the preface to 7 Co Rep; Fraser J.F. (ed), *The Reports of Sir Edward Coke (in thirteen parts),* Vol IV, (London, Joseph Butterworth & Son, 1826), pp.viii-ix. The seventh part of Coke's Reports was originally published in 1608. This distancing may well, however, have been motivated simply by realisation that the comments were politically rather volatile.

136 Nicholas. E., *The Proceedings and Debates of the House of Commons in 1620 and 1621*, (Clarendon Press, 1766)), pp.199-200.

137 White. S. D., *Sir Edward Coke and "The Grievances of the Commonwealth" 1621-1628*, (University of North Carolina Press, 1979), p.131 [n200].

Following further debate, the bill was returned to the subcommittee where it stayed until 26 March, when report was once more made to the Commons. Pym explains that the Bill returned with a number of amendments, including that "it should relate not only to the Pattents against the Kings booke, but against the Lawe." In addition, the jurisdiction clause was amended to state that monopolies should be tried by "the Ordinary Courtes of Common Lawe".[138] Finally, and most significantly for our purposes, the proviso relating to patents of new manufacture was changed to make clear it only applied provided they "were not contrarye to the Lawe and unproffittable to the state by raiseinge prizes."[139] (sic)

The Bill's third reading occurred on 12 May 1621. Pym's explanation of this is worth reproducing in full – original spelling is maintained throughout:

> The Bill contained: (1) a Declaration that all Commissions, Licences, Graunts, Charters, etc., of sole buying, selling makeinge, workeinge, etc., of libertye to dispence or to graunt Lycences contrarye to any Stattute of to Compound for such dispensacions etc., All Graunts of the benefitt of any penall Stattute before Judgment to be voyde by the Comon Lawe of this Realme. (2) Divers Penaltyes, *(1)* The Executors of anye such graunts to be dissabled to be of any Commission or to beare office in the Comon wealth, *(2)* whosoever showld drawe the Tryall of any such Graunts from the Comon Lawe to be in the Statute of Premunire, *(3)* To be charged with trebel damages and doble Costs to all parties grieved. Exceptions: (1) Of Graunts for the Eercise of newe invencions and Patrtents of Priveledge not hurtfull to the State, whereof such as are already graunted to be allowed for twenty-one yeares and not above, And none hereafter to be graunted for above fourteen yeares. (2) Of Printinge Bibles, Comon Prayer bookes, Bookes of the Common Lawe, Stattutes, Proclamacions, etc., (3) of the originall Edition of other Bookes or second

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[138] Pym suggests that the original text of the clause referred to the King's courts of record – *John Pym's Diary* – entry for 26 March 1621, in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol IV*, (Yale University Press, 1935), p.197. For further discussion of courts of record see Thorne. S.E., 'Courts of Record and Sir Edward Coke', (1937) 2(1) *University of Toronto Law Journal* 24.

[139] *John Pym's Diary* – entry for 26 March 1621, in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol IV*, (Yale University Press, 1935), p.197.

> Editions with glosses, for eleven yeares. (4) All Graunts allowed by Act of Parliament before this tyme. (5) Letters Pattents fo[r] salt Peeter, Iron Ordnance, Allum workes. (6) Warrants to the Judges to Compownd for any forfeiture. (7) The Cittye of London, All other Companyes of Marchants, and all other societyes as they were before this Graunt. (8) All Graunts Concerninge Lycences of sellinge wyne.[140]

Coke is recorded as being opposed to all of the provisos, but also indicating that he would nevertheless support the bill's passage.[141]

Failure in the Lords

The text of the bill was sent up to the Lords "with speciall Recomendacion",[142] but there it faltered. It received its first reading on 18 May[143] and its second ten days later, at which point it was committed to 17 peers for further consideration.[144] The bill was given a third reading on 1 Dec 1621 but significant concern was expressed over the extent to which it purported to curtail the exercise of the prerogative. It was therefore "much debated, Whether the same (as it is now penned) be fit to be presented unto His Majesty; for that it seems to restrain His Royal Prerogative (from Grants or Dispensations in the future); or that it be rejected, and a new Bill drawn, or whether this Bill shall be re-committed."[145] It was decided that no bill could be recommitted following a third reading and so was put to the vote. At this point it was, "by most

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[140] *John Pym's Diary* – entry for 12 May 1621, in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol IV*, (Yale University Press, 1935), p.333-4.

[141] See, e.g., 'House of Commons Journal Volume 1: 12 May 1621', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), p.619. British History Online https://www.british-history.ac.uk/commons-jrnl/vol1/p619. Also see comments to this end in White. S. D., *Sir Edward Coke and "The Grievances of the Commonwealth" 1621-1628*, (University of North Carolina Press, 1979), p.132.

[142] According to Pym. *John Pym's Diary* – entry for 12 May 1621, in Notestein W., Relf. F.H. & Simpson. H., (eds), *Commons Debates, 1621 – Vol IV*, (Yale University Press, 1935), p.334.

[143] Entry for 18 May 1621 in *Journal of the House of Lords: Volume 3, 1620-1628* (London, 1767-1830), p.128. British History Online http://www.british-history.ac.uk/lords-jrnl/vol3/pp126-129.

[144] Entry for 28 May 1621 in *Journal of the House of Lords: Volume 3, 1620-1628* (London, 1767-1830), p.137. British History Online http://www.british-history.ac.uk/lords-jrnl/vol3/pp135-138.

[145] Entry for 1 December 1621 in *Journal of the House of Lords: Volume 3, 1620-1628* (London, 1767-1830), p.177. British History Online http://www.british-history.ac.uk/lords-jrnl/vol3/pp176-177.

voices", rejected.[146] Price, for one, has noted that while their Lordships did not object to the bill in principle they did consider its drafting to be rather unflattering to the King.[147] Accordingly, a new committee of 8 members of the Upper House was then named to "set down the Heads for drawing of a new Bill touching Monopolies" etc.[148]

The Lords' Committee reported back to the Chamber on 10 December[149] having agreed upon "A memorial of such things as the Lords have in Consideration for preparing a Bill against Monopolies". This memorial consisted of a preamble, once again making reference to the *Book of Bounty*, and four clauses. The first declared "all Letters Patents, Licences, Dispensations, or Tolerations, heretofore granted, concerning the Particulars to be set down in the Bill" to be void. The second stated that this also extended to such things "hereafter granted concerning the same Things". The third brought the penalty of praemunire to bear on those who procured any "commission, Power, Order, or Warrant to put in execution any of the said Grants made, or hereafter to be made, contrary or otherwise than by the Course of the Common Laws of the Realm." The fourth clause commanded that "[n]o Person hereafter attempt, or make Suit for, the Grant of any unlawful Monopoly, or of the Benefit of any Penal Law, or of Power to dispense with any Penal Law, or compound for the Forefeiture; being Matters non Way fit for the Suit of private Persons". Any that did sue for such things "not agreeable to the Common Laws of this Realm" were to be subject to forfeit "Ten Times so much as he shall receive" following trial at common law. A proviso was also to be included that expressed that the bill "extend not to Privileges for [blank] Years, or under, of any Thing newly invented."[150] The memorial was then sent to the Lower Chamber and a conference with a Committee of the House of Commons requested to discuss the matter.

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[146] Entry for 1 December 1621 in *Journal of the House of Lords: Volume 3, 1620-1628* (London, 1767-1830), p.177. British History Online http://www.british-history.ac.uk/lords-jrnl/vol3/pp176-177.

[147] Price. W.H., *The English Patents of Monopoly*, (Harvard University Press, 1913), p.33.

[148] Entry for 1 December 1621 in *Journal of the House of Lords: Volume 3, 1620-1628* (London, 1767-1830), p.177. British History Online http://www.british-history.ac.uk/lords-jrnl/vol3/pp176-177.

[149] Entry for 10 December 1621 in *Journal of the House of Lords: Volume 3*, 1620-1628 (London, 1767-1830), p.188. British History Online https://www.british-history.ac.uk/lords-jrnl/vol3/pp187-189.

[150] Entry for 10 December 1621 in *Journal of the House of Lords: Volume 3*, 1620-1628 (London, 1767-1830), p.188. British History Online https://www.british-history.ac.uk/lords-jrnl/vol3/pp187-189. The blank presumably indicating that the duration of such was still a question of debate.

This joint conference did not, however, occur as Parliament was abruptly adjourned on 21 December 1621, the King apparently having been outraged by a petition concerning the marriage of his son.[151] Thereafter, it was formally dissolved on 8 Feb the following year, not having met in the meantime.

Resurrection: The Parliament of 1624

The issue of grievances remained live over the next few years and the monopoly bill was therefore quickly revived when Parliament was next recalled. The House met on 19 Feb 1624 and four days later, on the first full day of business, Coke called for a bill of monopolies to be read.[152] The bill was introduced on 24 February and its consideration continued two days later.

Concerning the first reading; little is said in the diaries of those recording the business of Parliament. The most verbose entry is that of Edward Nicholas who explains that the monopolies "bill passed this House [i.e. the Commons] the last Parliament. By this, whosoever being hindered or disquieted by any charter, commission, etc. of monopolies does sue, shall recover double the damages he suffers and in such cases the defendant shall not be admitted to wager law. By this, all commissions, warrants of restraint, proclamations or inhibitions, shall be void, and such as put any of them in force and avoid trial of the common law shall not be admitted to wager law for their defence."[153] Others simply noted that the bill had been read. Nevertheless, it seems clear that the text presented on 24 February was little changed from that rejected by the Lords just over two years earlier.

Slightly fuller notes exist of the discussion entertained on 26 February. Here John Pym, addressing the House, is recorded as explaining that some parties "with good deliberation, can

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[151] The petition requested that Charles be "timely and happily married to one of our own religion" i.e. a Protestant. James was keen on a Spanish (and therefore Catholic) bride. As Thrush explains, the King was "furious" upon receiving Parliament's demand, "as it was clearly understood that royal marriages were exclusively a matter for the royal prerogative." https://www.historyofparliamentonline.org/volume/1604-1629/survey/parliament-1621.

[152] See the entry for 23 February 1624 in the *Diary of John Holles* [f.81], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/feb-23.

[153] Entries for 24 February 1624 in the *Diary of Edward Nicholas*, [f.5]; the *Diary of Sir Nathaniel Rich* [f.3]; and the *Diary of Sir William Spring* [p.9]: in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/feb-24.

and would alter this bill" but that these same people were "loath to speak in so great an assembly and suddenly". He therefore moved that the bill be committed so that further deliberation could be undertaken in a more modest setting than before the whole House.[154] John Glanville, speaking in favour of the bill, explained that it was simply "a law of declaration", and that it was therefore not intended to proscribe any new laws for the suppression of monopoly, but rather to cement the approach already applicable at common law.[155] Glanville did, however, concede that it "does not fully meet with all inconveniences"[156] and so the bill was committed the same day to a group including Coke, Glanville and Pym.

The Committee reported back to the Commons on 9 March.[157] The *Commons Journal* for the day simply records that some "18 or 20 alterations" had been made.[158] Pym offers a slightly fuller account, explaining that 20 alterations were made, of which he lists 10 in detail: none of any real relevance to patents for new manufacture. Pym also explained that the bill was firmly based on the "ground of the King's book of instruction", i.e. the *Book of Bounty*,[159] thereby presumably attempting to head off the same objections that had caused the bill to falter in the Upper House in the last Session. After all, if the King's *Book* lay as the foundation to the proposed Act then it is difficult to see how its contents could be unflattering to the Monarch. The Commons

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[154] See the entry for 26 February in the *Diary of Sir William Spring* [p.32] in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/feb-26.

[155] See Journal of the House of Commons 1624 [CJ 624; f.12] in '26th February 1624', in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/feb-26.

[156] *Diary of Edward Nicolas* [f.25v], in '26th February 1624', in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/feb-26.

[157] White states the date to be 13 March: White. S.D., *Sir Edward Coke and "The Grievances of the Commonwealth," (1621-1628)*, (University of North Carolina Press, 1979), p.133. This is incorrect.

[158] *Commons Journal*, [CJ 680, f.31] in '9th March 1624', in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/mar-09.

[159] *Diary of John Pym*, entry for 9 March 1624 [f.23], in '9th March 1624', *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/mar-09.

accepted the amendments and ordered the text to be "engrossed speedily".[160] The bill was passed on 13 March and sent up to the Lords.[161]

Conference with the Lords

A conference between the Lords and the Commons concerning the bill was held a month later, on 13 April.[162] Coke brought his report of this meeting to the Commons on 19 April, where he explained that their Lordships had raised five objections. Pym recounts these in some detail in his diary:[163]

The first objection related to the "savings" appending to the bill. The Lords questioned the effect of these, noting that, as the "bill declares as well as enacts all monopolies to be against law", the judges will be bound by the declaration. Any "savings" would therefore be void and of no effect. In reply, Coke is said to have explained that the so-called savings were in fact provisos and that there was "a plain distinction between a saving and a proviso." '"Provided"', he

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[160] *Commons Journal*, [CJ 680, f.41] in '9th March 1624', in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/mar-09.

[161] See the various diary entries of *Pym* [f.28v], *Earle* [f.82], *Holles* [f.99v to f.100], *Lowther* [f.31], *Nicholas* [f.77v], *Spring* [pp.113-4], *Holland* [f.51 to f.51v] and *D'Ewes* [f.78v], as well as the entry in the *Commons Journal* [CJ 736, f.53 to f.53v] for 13 March 1624 in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/mar-13.

[162] White, again, appears to be out with his dates for these matters. He states that the meeting occurred on 17 April. However, there is nothing in the House of Commons Journal to support this. The last mention of dates for a conference is found in the entries for 12 April which note that a message was sent to the Lords on the 12th requesting another time for the conference. The answer received indicated "To-morrow Afternoon", i.e. the 13th. See 'House of Commons Journal Volume 1: 12 April 1624', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), British History Online https://www.british-history.ac.uk/commons-jrnl/vol1/12-april-1624. That 13 April was the date of the conference is further supported by John Lowther who, in his entry for Tuesday 13 April 1624, records the fact of the conference with the Lords and makes note of the objections raised. See entry of 13 April 1624 in the *Diary of John Lowther* [f.63v] in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-13.

[163] *Diary of John Pym*, entry for 19 April 1624 [f.71 to f.72v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

explained, "is a plain word of enacting. Our meaning was not to confirm them that are mentioned or any other monopoly, but to leave them as they were. And the proviso helps them thus far, that they shall not be in danger of this law nor of a praemunire."[164] The implication therefore seems to be that those monopolies exempted from the reach of the Act by the provisos could nevertheless still be adjudged illegal (and therefore void) at common law. Accordingly, a patent for a new manufacture that was believed to satisfy the elements of the relevant proviso would not fall foul of the other provisions of the proposed Statute even if it were later deemed invalid. This would, of course, leave the wielding of a grant *known* to be invalid at the time of its attempted enforcement out in the open (and therefore subject to castigation).

A related objection, bundled with the first in Pym's account but perhaps requiring a separate head, flowed from Coke's answer. The Lord Chief Justice, Sir James Ley, is therefore said to have stated that "though laws are to be penned in Parliament, yet they are to be expounded by judges." Accordingly, he continued, "it would be good in the bill to declare certainly what a monopoly is, for the etymology of the word may be larger than the true definition or civil description of the thing."[165] Coke's reply was short and blunt: "monopoly is a claim to use that solely which of right is common and free to many; but there is a rule, *definitiones in lege sunt periculosissimae*."[166] [i.e. definitions in the law are the most dangerous].

The second main objection identified in Pym's account concerned uncertainty over the action to be brought for the monopolies that are sued upon. Here Coke replied that it was up to the subject "whether he will sue generally at the common law or contra formam statute [i.e. under

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[164] *Diary of John Pym*, entry for 19 April 1624 [f.71 to f.72v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

[165] *Diary of John Pym*, entry for 19 April 1624 [f.71 to f.72v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

[166] *Diary of John Pym*, entry for 19 April 1624 [f.71 to f.72v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

the statute], and the defendant by the saving shall be exempted from the penalty."[167] In other words, if the defendant's patent was found to fall under the umbrella of one of the provisos then it would not attract the penalties of the Act. Read in conjunction with the answer to the first question, this would seem to suggest that if a grant fell within one of the provisos then even a finding that it was subsequently somehow invalid at common law would not bring it back within the proposed statute's penalties.

A third objection concerned whether judges should be exposed to praemunire if they delayed a judgment or execution after judgment because of a need to know the King's pleasure for any reason. Coke confirmed that they should, but that judges would still be permitted to issue continuances, and these would not fall within the proposed statute.[168]

The fourth objection is of greater interest, as it related to the proviso for new inventions. This had apparently been stripped back somewhat compared to the version presented to the Upper House in the previous Parliament, as it now referred only to grants already in existence.[169] The Lords thought this too restrictive and recommended that it should also exempt "those that were to be granted hereafter". They also considered that it was limited by "too narrow words, 'and such should not be inconvenient'. That may be inconvenient for one time or place which is not for another, and a particular inconvenience may be accompanied with a greater good."[170] In response, Coke is said to have conceded these points: that the proviso should be extended to privileges of 14 years and under to be granted in the future and that the reference to

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[167] *Diary of John Pym*, entry for 19 April 1624 [f.71 to f.72v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

[168] *Diary of John Pym*, entry for 19 April 1624 [f.71 to f.72v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

[169] c.f. the statement of the bill provided by Pym following its third reading in 1621, reproduced in the text accompanying fn140, above.

[170] *Diary of John Pym*, entry for 19 April 1624 [f.71 to f.72v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

inconvenience should be expanded to "generally inconvenient".[171] The *Commons Journal* further records Coke explaining that the Kings *Book* already contained all of these limitations,[172] thus reinforcing the view that, at least in respect of new invention, the *Statute* was not intended to interfere with the status quo. The *Journal* also records a third objection under this head: that the proviso did not extend to additions to, or improvements of, existing inventions.[173] In relation to this, Coke is said to have held firm: "A new invention is that which brings … to the commonwealth [that which] they had not before. An addition to an old invention, no[t] new, [is] but a new button to an old cloak."[174]

The fifth objection concerned the King's ability to create corporations. It is therefore irrelevant for current purposes.

Joint Conference

Following the initial discussion with the Lords, a conference of both Houses was then convened. It appears that this conference was primarily occupied with petitions from specific of their Lordships trying to gain protection for a number of individual patents, either under the guise of focused proviso or, as White suggests, by securing their Parliamentary confirmation.[175] While this is of little interest to the development of the whole, it does, however, help to explain some

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[171] *Diary of John Pym*, entry for 19 April 1624 [f.71 to f.72v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19. Ever the lawyer…

[172] *Journal of the House of Commons*, entry for 19 April 1624 [CJ 770; f.151] in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

[173] *Journal of the House of Commons*, entry for 19 April 1624 [CJ 770; f.151]. This objection is also mentioned by Earle in a separate account of the proceedings: *Diary of Sir Walter Earle*, entry for 19 April 1624 [f.149]: both in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

[174] *Journal of the House of Commons*, entry for 19 April 1624 [CJ 770; f.151] in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19. Thereby reiterating the finding of Bircott's Case. See further Coke E., *The Third Part of the Institutes on the Laws of England*, (E. & R. Brooke, 1797) (originally published 1644), p.184.

[175] White. S.D., *Sir Edward Coke and "The Grievances of the Commonwealth," (1621-1628)*, (University of North Carolina Press, 1979), p.135.

of the more pointed exemptions found within the latter sections of the *Statute* when it came to pass. When Coke reported the outcome of the conference to the Commons on 13 May he explained that "The excepted monopolies [would] … be in the same state they were before" and that they would accordingly still be open to trial "at the common law".[176] Having friends in high places, it appears, could only get you so far. Abuses of these monopolies could still potentially invoke the wrath of Parliament and the courts. In this respect, therefore, little had changed.

Ultimate consideration of the bill in the House of Commons occurred towards the end of May 1624. Coke reported on the final conference with the Lords (which had been scheduled for 19 May)[177] explaining that: "the Lords will not consent to have the bill to touch or concern all, but only those that are hereafter to be granted, not those patents which are now in present execution, but to reserve them for their time only and to make sure against any in future."[178] He is further recorded as having let "the House know that the bill has sufficiently provided that no more shall be gotten, and that such of these as are contrary to law are, by this bill, no way confirmed but remain only in the same case they were before and liable to law and the penalty of it, and may yet be questioned for grievances."[179] Thereafter the Speaker is said to have shown "the House the virtue and goodness of the bill as it is, though not as we wished it. It declares monopolies to be against law, leaves them to be tried by it and makes them that shall hereafter

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[176] *Journal of the House of Commons*, entry for 13 May 1624 [CJ 788; f.199v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/may-13.

[177] The Commons Journal for 15 May records Coke's report that their Lordships had "appointed Wednesday, 2 [o']clock, Painted Chamber, for the bill of monopolies". See *Journal of the House of Commons*, entry for 15 May 1624 [CJ 789; f.202v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/may-15.

[178] *Diary of Sir William Spring*, entry for 24 May 1624 [p.238], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/may-24.

[179] *Diary of Sir William Spring*, entry for 24 May 1624 [p.238], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/may-24.

get them (which are against law) subject to a praemunire."[180] The amendments were therefore put to the vote[181] and the bill passed the next day.[182] It received Royal assent on 29 May.[183]

THE STATUTE OF MONOPOLIES

An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof, 1623, 21 Jac. I, c. 3, the "Statute of Monopolies", entered into force in the middle of 1624. As should by now be clear, the developmental narrative of the text definitively renders the any romantic imagery of the *Statute* as the founding father of patent law patently incorrect. The intricate picture sketched in the late 1800s that heightens the totemic significance of the legislation, while perhaps attractive as a narrative hook,[184] all but ignores the historical backdrop that shaped its form. As explained above, the primary aim of the Law, far from being focused on the erection of scaffold to encourage invention, was instead directed towards the demolition of ingrained and problematic grants of monopoly. Its purpose was not to innovate, but rather to restate: to draw a line in the sand beyond which monopoly should not invade while simultaneously preserving the beneficial, and harmless, elements of the status quo. As Kyle has noted, the *Statute* simply "enacted an existing state of affairs in the Common Law."[185] As such, it "provided statutory

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[180] *Diary of Sir William Spring*, entry for 24 May 1624 [p.238], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/may-24.

[181] As Spring's diary for 24 May explains: "The bill is committed to all that will come to consider whether it shall be passed or rejected, for that we cannot alter the amendments that came from the Lords but must either receive them or reject the bill." *Diary of Sir William Spring*, entry for 24 May 1624 [p.238], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/may-24.

[182] See *Journal of the House of Commons*, entry for 25 May 1624 [CJ 711; f.56-f.56v]; [CJ 794; f.216v], and *Diary of Richard Dyott* [p.163v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online http://www.british-history.ac.uk/no-series/proceedings-1624-parl/may-25.

[183] *Diary of Sir Simonds D'Ewes*, entry for 29 May 1624 [f.129], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/may-29.

[184] After all, every superhero needs their origin story

[185] Kyle. C., 'But a New Button to an Old Coat': The Enactment of the Statute of Monopolies, 21 James 1 cap.3, (1998) 19 *Journal of Legal History* 203, p.217.

corroboration and confirmation that monopolies were illegal"[186] thereby reinforcing the Common Law position. However, "[i]t did not innovate and thus cannot be regarded as a limitation or attack on the prerogative."[187] Cast in this light, the constitutional import of the *Statute* appears far more muted than the orthodox narrative would suggest. Moreover, the claim of Genesis of the intricate system of intellectual property that now inhabits the skin of the patent, lies rotting in the mud.

Indeed, when the text of the enacted *Statute* is considered then it is difficult to see from whence any fundamental claim of significance can derive. Arguments to the contrary not only ignore the historical account, but also seem blind to the structural formation of the Act itself. The text consists of a long preamble and fourteen sections,[188] the first four of which set out the main purview of the *Statute's* significance, leaving the remaining ten to deal with increasingly specific exceptions.

From a constitutional point of view, the preamble is of primary import. It refers directly to James's *Book of Bounty* and is articulated in practically, although not perfectly, identical language to that of the 1621 bill. It accordingly warns that despite the express command within the *Book* that:

> "no suitor should presume to move your Majesty for matters of that nature [i.e. of grants of monopolies, etc.]; 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…."

Ignoring the historical backdrop, therefore, the text itself makes clear that the *Statute* was primarily enacted to deal with the regulation of the power of the King to dispense monopoly. It

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[186] Kyle. C., 'But a New Button to an Old Coat': The Enactment of the Statute of Monopolies, 21 James 1 cap.3, (1998) 19 *Journal of Legal History* 203, p.217.

[187] Kyle. C., 'But a New Button to an Old Coat': The Enactment of the Statute of Monopolies, 21 James 1 cap.3, (1998) 19 *Journal of Legal History* 203, p.217.

[188] It is reproduced in full in Davies. J., *A Collection of the Most Important Cases Respecting Patents of Invention and the Rights of Patentees*, (W. Reed, 1816), pp.17-27, and also in Fox. H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly*, (University of Toronto Press, 1947), pp.338-42, among others.

also reminds us of the delicacy of this subject. The message itself is clear: the King had been misled by "misinformations and untrue pretences of public good." The Act was not, therefore, a criticism of the Crown, but rather of the evils of men that sought, and wielded, such improper grants. As already noted, it would have been inconceivable at the time to have directly criticised the King's own practices and proclivities when it came to the freedom with which he dispensed such patents. The comments of the House of Lords made three years earlier, in relation to the bill of 1621, make clear the constitutional significance, and indeed risk, in the Commons even hinting at such.[189] If the bill proposed in that Parliament was considered unflattering and "not fit to be presented unto His Majesty,"[190] then the renewed focus on the *Book of Bounty* and the careful highlighting of grants unduly obtained and unlawfully exercised in the preamble of the 1624 Act is eminently understandable. As a shield against the Lords' criticism, the inclusion of this reference was a political masterstroke: it could not be said that the Commons was trying to extend prohibition where a proclamation in the King's name had already stated the elements in question to be against the law. The declaratory nature of the *Statute* is therefore ingrained from the start – a point made by a number of the early commentators on patent law,[191] but seemingly ignored by those later seeking to promote the foundational significance of the legislation for the modern law of patents.

Thereafter, in the main body of the Act, section 1 "declared and enacted" that "all monopolies [etc] … shall be utterly void and of none effect, and in no wise to be putt in ure [(sic) – presumably 'use'] or execution." Accordingly, on the face of the text there is not only no intention to create any new offence, but moreover an additional statement that the legislation was simply declaratory of the status quo. Section 2 avowed that the "force and validity" of any

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[189] See discussion in the text accompanying fn142 to fn148, above.

[190] 'House of Lords Journal Volume 3: 3 December 1621', in *Journal of the House of Lords: Volume 3*, 1620-1628 (London, 1767-1830), pp.178-180. British History Online https://www.british-history.ac.uk/lords-jrnl/vol3/pp178-180.

[191] See e.g.: Collier. J. D., *An Essay on the Law of Patents for Inventions*, (Self-published, 1803), pp.119-20; Davies. J., *A Collection of the Most Important Cases Respecting Patents of Invention and the Rights of Patentees*, (W. Reed, 1816), p.2; Holroyd. E., *A Practical Treatise of the Law of Patents for Inventions*, (A. Strahan, 1830), at p.6; Godson. R., *A Practical Treatise on the Law of Patents for Inventions and of Copyright*, (Sanders & Benning, 1832), p.45; Hume. D., *The History of England – Vol V*, (T. Cadell, 1778), p.114. Gardiner. S.R., *History of England from the Accession of James I to the Outbreak of the Civil War 1603-1642; Vol V (1623-1625)*, (Longmans, Green & Co., 1896), p.233; and Kyle. C., 'But a New Button to an Old Coat': The Enactment of the Statute of Monopolies, 21 James 1 cap.3, (1998) 19 *Journal of Legal History* 203, p.217.

monopoly, etc., should be "examined, heard, tried and determined, by and according to the common laws of this realm, and not otherwise." To the extent that this excluded the conciliar courts' jurisdiction in such matters, this provision arguably does go beyond being merely declaratory. Therefore, while the common law's jurisdiction to adjudicate on the validity of particular monopolies was undoubted by this point in time – the court of King's Bench, a common law court, had, after all, decided *Darcy v Allen*[192] some two decades earlier – nevertheless, as explained above,[193] there remained a degree of uncertainty surrounding the exclusivity of this authority. Motivation for explicitly removing jurisdiction from the King's courts is therefore readily apparent. Section 3 enacted that all shall "be disabled and uncapable to have, use, exercise, or put in use any monopoly [etc]." According to Coke, this provision was designed for the further extirpation of monopoly.[194] Finally, section 4 of the Statute provided procedure and remedy to those "hindered, grieved, disturbed or disquieted" etc., by "occasion or pretext" of any monopoly, availing them of treble damages, and double costs.[195]

The remainder of the *Statute of Monopolies* consists of those provisos added during the passage of the bill for a diversity of reasons. Even on the most casual reading of the text this must have been apparent. Thus, in some instances, such as those for Baker's 'smalt' patent or Dudley's patent on the 'sole melting of iron ore with sea coals' (both excepted from the grip of the *Statute* by s14 of the same), the exceptions were so specific that they must have been the product of friends in high places.[196] In others, broader concerns are easily identifiable – accordingly

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[192] 11 Co Rep 84b; *77 English Reports* 1260; Noy 173; *74 English Reports* 1131; Moore (K.B.) 671; *72 English Reports* 830.

[193] See text accompanying fn111 to fn110, above.

[194] Coke E., *The Third Part of the Institutes on the Laws of England*, (E. & R. Brooke, 1797) (originally published 1644), p.183.

[195] As far as can be ascertained, this provision was never successfully invoked against a patentee. Nevertheless, it did raise some interest in the late 1800s and early 1900s as a possible mechanism of constraining potential enforcement of suspect patents. See e.g., Gordon. J.W., *Monopolies by Patents and the Statutable Remedies Available to the Public*, (Stevens & Sons, 1897), esp pp.10-20 and pp.39-65. See also: Fox. H.G., 'Abuse of Monopoly', (1945) 23 *The Canadian Bar Review* 353, and Fox. H.G., 'Patents in Relation to Monopoly', (1946) 12 *The Canadian Journal of Economics and Political Science* 328.

[196] And indeed, they were. The exception for Baker's smalt patent was, according to Coke's report of the conference with the Lords on the bill of monopolies, pressed for by the Attorney General. See the entry for 13 May 1624 in the *Journal of the House of Commons* [CJ 703; f.38v] in *Proceedings in Parliament 1624: The House of Commons*, Baker.

provision was made within the *Statute* for patents on saltpetre, gunpowder, ordnance and shot to be excluded from the reach of the opening sections, undoubtedly over concerns about defence of the realm.[197] Other provisos, however, appear to have been inserted simply as confirmation and reminder that certain things were not monopolies. Chief among this latter number were sections 5 and 6 of the Act excepting patents of new manufacture/invention.

The Proviso for Patents of New Manufacture

If there is any truth in the claim to foundational link betwen the *Statute of Monopolies* and the modern law of patents then it must be found within sections 5 and 6 of the Act, for these are the only two provisions that deal explicitly with this particular subject matter. Both refer to grants "of the sole working or making of any manner of new manufacture, within this realm, to the first and true inventor or inventors of such manufactures, which others at the time of the making of such letters patents and grants did not use." The sections differ only in their temporal focus – section 5 concerns grants "previously made" and section 6 those "hereafter to be made" – and their tolerated duration. Grants already in existence fell within the *Statute* only if their duration was 21 years or less when created;[198] for future grants 14 years was the limit. Such patents were exempted from the reach of "any declaration before-mentioned" – i.e. from ss1 to 4 of the *Statute*, provided they were "not contrary to the law, nor mischievous to the state, by raising of prices of commodities at home, or hurt of trade, or generally inconvenient".

There is accordingly nothing new here. The clauses seem, if we recall Coke's response to Hackwyll's initial request for their inclusion in the Commons discussion in March 1621,[199] to

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P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/may-13. The proviso for Dudley's iron patent was ordered to be added by the House of Lords on 20 May 1624. See the entry for 20 May 1624, in *Journal of the House of Lords: Volume 3, 1620-1628* (London, 1767-1830), pp. 393-394. British History Online http://www.british-history.ac.uk/lords-jrnl/vol3/pp392-396.

[197] See s10 of the *Statute of Monopolies*.

[198] It may be thought that the reference to "heretofore made" and the limitation to 21 years would have meant that the effect of this particular provision would have been severely limited: all patents benefitting from it must have expired by the summer of 1645. It is therefore perhaps a reflection of the deemed unimportance of the section that the provision remained on the statute book until 1863. It was finally repealed by *The Statute Law Revision Act 1863* (1863, 26 & 27 Vic. c.125).

[199] See discussion in text accompanying fn129 to fn131, above.

simply be reiteration of an accepted truth. Coke's comment that he essentially saw no need for such reassurance as the bill was founded "meerly upon the King's own Judgment"[200] suggests not only that grants of this nature were legitimate, but that they were also not monopolies within his understanding of the term. Their inclusion may accordingly be seen as belt-and-braces to ensure that the censure of monopoly was not considered to overlap with, and therefore exclude, the legitimate use of the prerogative for these ends. In any case, given the *Statute of Monopolies* was based upon the proclamation contained within the King's *Book of Bounty* then it is evident that such patents for "projects of new invention" had already been accepted as permissible.[201] Indeed, the mere existence of section 5, dealing as it did with grants "previously made", and doing so in terms practically identical to the supposed keystone provision found within section 6, would seem to foreclose any claim to the latter's foundational significance.

In respect of both section 5 and 6 of the Act, it is also worth remembering Coke's comments to the Lords concerning their objections to the monopolies bill that were reported back to Parliament on 19 April 1624.[202] Here Coke stated that the purpose of the provisos was "not to confirm them that are mentioned or any other monopoly, but to leave them as they were. And the proviso helps them thus far, that they shall not be in danger of this law nor of a praemunire."[203] Accordingly, the reach of the *Statute* was simply to acknowledge the *continued* validity of this use of the prerogative.

AFTERMATH

If the *Statute of Monopolies* does not, by its text or its history, suggest that it heralded a new law of patents for invention, then from whence does this claim come? One further possible

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[200] 'House of Commons Journal Volume 1: 14 March 1621', in *Journal of the House of Commons: Volume 1, 1547-1629* (His Majesty's Stationery Office, 1802), pp. 553-554. British History Online https://www.british-history.ac.uk/commons-jrnl/vol1/pp553-554.

[201] See paragraph 9 on p.21 of Barker's original print of the *Book of Bounty*: *A Declaration of His Maiesties' Royall pleasure, in whatsort He thinketh fit to enlarge or reserve Himself in matter of Bountie*, (Robert Barker, 1610), reproduced in Gordon. J.W., *Monopolies by Patents and the Statutable Remedies Available to the Public*, (Stevens & Sons, 1897), pp.161-192.

[202] Discussed in detail in text accompanying fn163 to fn174, above.

[203] *Diary of John Pym*, entry for 19 April 1624 [f.71 to f.72v], in *Proceedings in Parliament 1624: The House of Commons*, Baker. P., ed., (2015-18), British History Online https://www.british-history.ac.uk/no-series/proceedings-1624-parl/apr-19.

justification for its elevation to exalted status within this field could derive from the transfer of jurisdiction that its text would seem to mandate. If not the creation of a new law of patents then at least a revolutionary transplantation from Conciliar to Common Law courts may potentially justify its celebration. However, the record would suggest that this also failed in spectacular fashion. Walterscheid is blunt in his assessment: "Perhaps the most remarkable thing about the Statute of Monopolies in the context of the patent law is that for the next one hundred years after its enactment it had almost no effect on the development of that law in England."[204] In terms of numbers of cases, this is certainly true. Fox asserts that only one patent case is reported at common law during the rest of the seventeenth century, and only one more appears in the years stretching from 1700 until 1765.[205] Macleod makes much the same point: "The compilations of judicial precedents are totally silent on patents for the period 1614-1766, except for brief reference to *Edgebury v. Stephens* (1691)".[206] In addition, Macleod notes that searches made of the reports of Chancery and Exchequer (although neither, it should be noted, would during the period in question – and at least until the 1840s[207] – be described as Common Law Courts) similarly produced "few instances". She does, however, concede that some cases may have slipped through the net due, in particular, to the poor indexing of early Chancery reports. Certainly, searching those cases consolidated in the 176 volumes of the *English Reports* produces

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[204] Walterscheid. E.C., 'The Early Evolution of the United States Patent Law: Antecedents (Part 3)', (1995) 77 *JPTOS* 771, p.771.

[205] Fox. H.G., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly*, (University of Toronto Press, 1947), p.119.

[206] MacLeod. C., *Inventing the Industrial Revolution: The English Patent System 1660 – 1800*, (Cambridge University Press, 1988), p.68. The compilations to which she refers are Webster. T., *Reports and Notes of Cases on Letters Patent for Inventions*, (Thomas Blenkarn, 1844), and Davies. J., *A Collection of the Most Important Cases Respecting Patents of Invention and the Rights of Patentees*, (W. Reed, 1816).

[207] The Court of Exchequer clearly had equitable jurisdiction throughout most of its life, but at times it also possessed jurisdiction in common law matters – although by the early 18th century very little common law work seems to have passed through its doors. It had equitable jurisdiction removed by the Administration of Justice Act 1841 and from then until the Judicature Acts of the 1870s, that abolished the common law / equity divide, it operated as a common law court. See further Bryson. W.H., *The Equity Side of the Exchequer* (Cambridge University Press, 2008).

practically no results concerning patents for inventions in the years between 1624 and the middle of the eighteenth century.[208]

There are a number of reasons that may be advanced to explain this low number of decisions. First, the tally of patents for invention issued in the period stretching from the *Statute of Monopolies'* enactment until the 1760s was small: fewer than 7 per year on average based on figures reported in the *1829 Select Committee on Patents*.[209] There were accordingly only a handful of grants that could have been litigated for most of the seventeenth and eighteenth centuries.

Another factor that may have been instrumental in keeping the courts of the Common Law away from patents for invention at this point in time was the continued territoriality of the Privy Council. An early statement of this can be found in its approach to the challenge made to Sir Robert Mansell's glass patent[210] in 1626, merely two years after the *Statute of Monopolies'* entry into law. The Council was petitioned by Isaac Bunger and others concerning the restraint they felt was placed on them freely "injoying of the benefite and freedome of their trade of makeing glasse" by Mansell's grant. They therefore argued that it should be overthrown. The Council adjudicated that the action was "both just and honorable and agreeable with the true intencion of the late statute made against monopolies" and therefore gave leave to "Bunger and the rest to take theire remedie against the said Sir Robert Mansell by due course of law."[211] However, in the interim, until the case had been determined by law, Bunger and his allies were not permitted to

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[208] A search for 'patent*' and 'invention' in the English Reports between 1624 and 1770 produces 42 results, of which most do not concern anything remotely resembling actions on patents for invention. A number of those that would fall under the umbrella of intellectual property concern matters more accurately attributed to the law of copyright or the regulation of the printing trade. Those that remain include *Anonymous* (1750) 1 Vesey Senior 476, 27 ER 1152; *Concerning the Jurisdiction of the Ordinary and Limited Court in Chancery, proceeding according to Law* (1744) 1 Equity Cases Abridged 127, 21 ER 933; *Newsham v Gray* (1742) 2 Atkyns 286, 26 ER 575; *Colt & al' v Woollaston and Arnold* (1723) 2 Peere Williams 154, 24 ER 679; and *Edgeberry [or Edgebury] v Stephens* (1701) 2 Salkeld 447, 91 ER 387; (1693) Holt K.B. 475, 90 ER 1162. Of these, *Edgebury v Stephens* is the only one that concerns a matter of substance as far as development of the law (or, more accurately, confirmation thereof) was concerned. A smaller, and equally unenlightening, list is achieved when searching for "patent*" and "manufacture".

[209] Figures can be found in *Report of the Select Committee on the Law Relative to Patents for Inventions*, (1829) Parliamentary Papers III (Command Paper No 332), p.216.

[210] Specifically exempted from the grip of the *Statute of Monopolies* by s13 of the same.

[211] Entry for 19 June 1626 in Lyle J.V. (ed), *Acts of the Privy Council of England Volume 41, 1626*, (London, 1938), p.9. British History Online http://www.british-history.ac.uk/acts-privy-council/vol41/pp1-25.

"worke or make any kinde of glasse nor [in] any way molest or trouble the said Sir Robert Mansell in his workeing."[212]

The fact that the Council had been petitioned for leave to challenge a patent is, in itself, worthy of comment, as it suggests a certain reticence on the part of Bunger and his allies to take the *Statute of Monopolies* at face value. Section 2 of the Act had, after all, declared that all cases concerning the "force and validity" of any monopoly should be tried at common law.

There could be a number of reasons for this reticence, not least Fox's assertion that it was simply "not thought fitting or consonant with the royal dignity that questions concerning [the] propriety [of such grants] should be discussed and considered in ordinary courts of common law."[213] Equally, it could have been the case that there was genuine uncertainty surrounding the effect of the combination of section 2 of the *Statute* and the provisos appended thereto. Mansell's patent was explicitly exempted under s13 of the Act (he had friends in high places); if it was therefore not an illegal monopoly, was it also not subject to trial at common law? The Privy Council's response, that challenge of this particular grant *was* indeed justiciable at law under the *Statute*, is therefore most significant as it confirms a narrower view of the provisos' exclusionary role – i.e. that they exempted the mentioned grants from *prima facie* condemnation as illegal monopoly but left their validity to be judged as any other under section 2. However, only six months later, the State Papers Domestic record the following:

> "The King having referred to them the complaints of one Bringer [sic] against the glass patent granted to Sir Robert Mansell, it is ordered that the same shall stand. Their Lordships think it to be of dangerous consequence, and far trenching upon the prerogative, that patents granted on just grounds and of long continuance should be referred to the strict trial of the common law,

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[212] Entry for 19 June 1626 in Lyle J.V. (ed), *Acts of the Privy Council of England Volume 41, 1626*, (London, 1938), p.9. British History Online http://www.british-history.ac.uk/acts-privy-council/vol41/pp1-25.

[213] Fox. H.G., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly*, (University of Toronto Press, 1947), p.120.

> wherefore, they order that all proceedings at law be stayed, and that Bringer do not presume further to trouble his Majesty on pain of punishment."[214]

Accordingly, not only did the Privy Council make it very clear that there was to be no encroachment on Mansell's rights until a suit at law had been decided but, rather more significantly, it then removed this right of trial. Given this outcome, it is therefore perhaps unsurprising that those seeking to challenge a patent would be somewhat reticent to bring an action at law (or indeed anywhere else).

The Privy Council finally relinquished its grip on patent law in the mid-1700s, in a case that Hulme describes as marking "the turning point between the old and new systems of patent law."[215] Thus, in the case of *James's Patent No.626*, the jurisdiction of the Privy Council "was confined strictly to the performance of duties imposed by the defeasance clause in Letters Patent. Its action is practically directed to compelling patentees to take their Common Law remedy, under the threat of revocation in case of refusal."[216] Only after this point in time (i.e. the middle of the eighteenth century) were the courts of the Common Law thus finally able to begin to establish their grip on the adjudication of letters patent for invention. As Hulme explains, the going was far from smooth, Common Law judges being forced to "pick up the threads of the principles of [patent] law without the aid of recent and reliable precedents".[217]

Further Deafening Silence

Thus, notwithstanding the *Statute of Monopolies*' apparent celebration at the end of the nineteenth century, in the two hundred years following its promulgation there seems to be precious little discussion of the *Statute* in any legal sphere. As explained above, practically no reported cases

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[214] Entry 37 in 'Charles I - volume 41: December 1-13, 1626', in Bruce. J. (ed), *Calendar of State Papers Domestic: Charles I, 1625-26*, (Longman, Brown & Green, 1858), p.489. British History Online http://www.british-history.ac.uk/cal-state-papers/domestic/chas1/1625-6/pp485-495.

[215] Hulme. E.W., 'Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794 (Part II)', (1917) 33 *LQR* 180, p.189.

[216] Hulme. E.W., 'Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794 (Part II)', (1917) 33 *LQR* 180, pp.193-4.

[217] Hulme. E.W., 'On the Consideration of the Patent Grant, Past and Present' (1897) 13 *LQR* 313, p.318 referring to the dearth of cases prior to the end of the 18th century.

mention it, or indeed seem to deal with the law of patents for inventions at all, and few other texts acknowledge its existence. While Coke had addressed its contents in his *Institutes on the Laws of England*,[218] this treatment was somewhat cursory and, it has to be said, also a little cryptic at times. Indeed, Eyre LCJ had found cause for lament on this very point in the 1795 decision in *Boulton & Watt v Bull*, complaining that: "Patent rights are no where that I can find accurately discussed in our books. Sir Edward Coke discourses largely, and sometimes not quite intelligibly, upon monopolies, in his chapter of monopolies, 3 Inst. 181. But he deals very much in generals, and says little or nothing of patent rights, as opposed to monopolies."[219] The relevant volume of Coke's *Institutes* was published in 1644 and stands, as far as can be discerned, as the sole candle illuminating the Statute's supposed brilliance until at least the early-1700s. Even after this point, treatment was initially sparce, seldom extending to significantly more than Coke's brief explanation and seemingly never deviating from his account. Thus, the four pages of discussion that make up the chapter on 'monopoly' in the 3rd edition of Hawkins' *Treatise on the Pleas of the Crown* (1716),[220] do little more than paraphrase Coke.[221] Equally, the entry on 'monopoly' in the multi-volume *Readings upon the Statute Law,* published by A Gentleman of the Inner Temple in 1723, is merely a distillation of Coke's ideas.[222] The same is true of other generalist texts of the time[223] including that of Blackstone, whose *Commentaries on the Laws of England* dedicates relatively little space to the subject across his various volumes of text and who once more remains

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[218] Coke E., *The Third Part of the Institutes on the Laws of England*, (E. & R. Brooke, 1797) (originally published in 1644). Monopolies are discussed from pp.181-84

[219] *Boulton & Watt v Bull* (1795) 2 Blackstone (H.) 463, p.491.

[220] Hawkins. W., *A Treatise of the Pleas of the Crown – Book I*, (3rd Ed, Eliz. Nutt, 1716). Monopolies are dealt with in ch79 spanning pp.230-4.

[221] By the time of the 6th edition of Hawkins' *Treatise on the Pleas of the Crown*, published in 1777, little had changed. This edition features a number of additional cases in the side notes and a limited expansion of the text. The core, and its wedding to Coke's account, remains intact. See Leech. T., (ed) *Hawkins' Treatise of the Pleas of the Crown* (6th Ed, His Majesty's Law Printers, 1777)

[222] Gentleman of the Middle Temple., *Readings upon the Statute Law (Vol IV – covering 'incumbent' to 'plague')*, (Self-published, 1725). The entry on 'monopolies' can be found from pp.238-48, a significant proportion of which is dedicated to diatribe on the regulation of printing.

[223] E.g. in Postlethwayt. M., *The Universal Dictionary of Trade and Commerce Vol II* (4th Ed, W. Strahan, J. and F. Rivington, J. Hinton., 1774), patents are discussed from pp.438b to 440a. Again, Coke's account features heavily.

shackled to Coke's orthodoxy.[224] Far from being celebrated, therefore, the *Statute's* prominence at this point in time seems to rely solely upon it being wrapped in Coke's handkerchief.

Specialist texts on patent law (or indeed more generally on the law of monopolies) were also in short supply until the beginning of the nineteenth century. Thus, in addition to Eyre LCJ's comments above, the lack of a significant treatise is lamented in the preface of John Davies's *Collection of the Most Important Cases Respecting Patents of Invention* published in 1816. Here the author notes that despite his being engaged in the business of enrolling specifications for inventions for more than 30 years, he: "has felt great surprise, and regret, that no book of the kind, now proposed, has ever been produced by any gentleman versed in this sort of business, and competent to the work."[225]

While not exactly foreshadowing his text, there are at least three surviving specialist treatises that predate Davies's account, only one of which was published prior to the decision in *Boulton & Watt v Bull*. None, however, can be said to do much more than set out the basic elements of the law, and certainly none imbue the *Statute of Monopolies* with any fundamentally effusive significance. Indeed, in the earliest of the three (an essay by an unknown author entitled *Observations on the Utility of Patents: And on the Sentiments of Lord Kenyon Respecting that Subject*, published in 1791), of the *Statute* there is nary a mention. Admittedly, the primary focus of the text lies in justification of the patent right as an incentive or reward to inventors, but if the *Statute* were considered at this time to have general foundational significance in this area then it would not be unreasonable to at least expect it to have been namechecked.

Published just over a decade later, Collier's *Essay on the Law of Patents for Inventions* (1803), is a self-proclaimed effort to collect the "scattered fragments" of the case law on the law of patents together.[226] It seems, therefore, that this is the first real attempt at compiling a comprehensive treatise of the kind that Erye LCJ had pined for in 1785. In addition to its exploration of the practical aspects of the subject, Collier's text also provides a succinct, but reasonably

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[224] Blackstone. W., *Commentaries on the Laws of England in Four Books (Vol IV)*, (12th Ed, A. Strahan & W. Woodfall, 1795), pp.158-9.

[225] Davies. J., *A Collection of the Most Important Cases Respecting Patents of Invention and the Rights of Patentees*, (W. Reed, 1816), p.v.

[226] Collier. J. D., *An Essay on the Law of Patents for Inventions*, (Self-published, 1803), p.vii.

comprehensive, discussion of the development of patent law in England, dedicating an entire chapter to the history of monopoly from the time of King John to the Interregnum (i.e. covering the period from 1166 to 1649).[227] Nevertheless, while one of the appendices is dedicated to extracts from the Parliamentary debates of 1601 concerning monopolies, nothing is said of the sessions of 1621 and 1623 in which the bill that became the *Statute of Monopolies* was penned. Accordingly, while Collier does reference the passage of the Act, he frames the legislation not as the fountain from which the patent system sprouted, but instead as a legislative billhook cutting back the weeds of monopoly and clearing space so that the, already extant, seedling of the patent system could flourish in their wake.

A similarly lacklustre fanfare for the *Statute* is sounded by William Hands' *Law and Practice of Patent for Inventions* (1808). A self-described attempt to create a "detached professional tract on the Law and Practice of Patents for Inventions", it describes the law of patents as it then stood in merely 27 pages of prose. The remainder of the book's 148 pages are dedicated to miscellaneous forms, precedents, and other legal instruments. The *Statute of Monopolies* is included in its entirety at the end of this section,[228] however it attracts nothing in the way of commentary. As such, it is of no help in situating the Act within the legal landscape. While this is somewhat understandable – after all, practicality, rather than parable, was Hands' driving force – the absence of any real consideration does tend to suggest that the *Statute's* importance was deemed by the author to be somewhat limited.

CONCLUSION

As we have seen, despite becoming poster-child for the protection of invention, patents for new manufacture were never the subject of Parliament's ire when the *Statute of Monopolies* was being drafted (or really even something that Parliament paid that much attention to at all). Indeed, as the above discussion amply demonstrates, such grants were not sought to be regulated in any meaningful sense by the *Statute* in either its original conception or its final form. Thus, while undoubtedly the product of prerogative power, and necessarily entailing the dispensation of monopoly interests, reference to these specific grants was only added to the Monopolies bill at a relatively late point in its gestation. Moreover, this addition was driven not so much by concern

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[227] Collier. J. D., *An Essay on the Law of Patents for Inventions*, (Self-published, 1803), pp.12-25.

[228] Hands. W., *The Law and Practice of Patents for Inventions*, (W Clarke & Sons, 1808), pp.133-148.

for regulation of such things as by fear that the far-reaching impact of the measures sought to be adopted within the remainder of the text may have adversely affected this beneficial, and well-established, use of prerogative power. Therefore, far from seeking to establish a law of patents for inventions/new manufacture, the *Statute of Monopolies* in fact sought to simply exempt them from castigation.

That the *Statute* has subsequently become a totem for the protection of invention owes little, if anything, to Parliament's original intent, and much to the efforts of mid-to-late-nineteenth century writers and legal practitioners. Indeed, even as late as the end of the eighteenth century, it is fair to say that the law of patents was something of a legal backwater. The number of grants remained relatively small, and, as we have seen, the attention accorded to them by men of the law (for at this time all of them were) was scant. In terms of figures, an account of the tally of patents for invention granted between 1675 to 1829 is given in an appendix to the *1829 Select Committee on Patents*.[229] In the ninety-one years stretching between 1675 and 1766 the number issued per year only entered double figures on nineteen occasions. It exceeded twenty on three occasions and never made it past twenty-four in any given year. In four years, no patents were issued and in a further ten, fewer than three were granted. The average number of grants per year in this period was 6.8. Morevover, the maximum number of patents that could possibly have been 'live' at any given point in this timeframe, given the 14-year maximum term of protection in the absence of an Act of Parliament extending the duration, was 153 (this equates to the total grants made between 1752 and 1765, which is the highest for a 14-year period within this dataset). After 1766, however, industrialisation took hold and the number of yearly grants began to rise significantly: never again falling below twenty and first reaching more than 100 in 1801. As they rose in number, so too did their associated problems, and these problems brought with them increasing public attention and, eventually, legal scrutiny.

The practical issues that dogged the system by the 1820s are evident from testimony before the *1829 Select Committee.* Here John Farey (among others) noted the prohibitive cost of applying for a patent and also the administrative difficulties in making the application.[230] The complexities of the system, combined with the expense and uncertainties that accompanied enforcement of the

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[229] *Report of the Select Committee on the Law Relative to Patents for Inventions*, (1829) Parliamentary Papers III (Command Paper No 332), p.216.

[230] Farey's initial testimony, of 11 May 1829, can be found reproduced at pp.16-38 of the *Report.*

right against infringers, rendered it an unattractive proposition to all but those with the deepest pockets. However, with the rapid industrialisation that had already swept much of the country, deep pockets were not as rare as they once may have been. As use of the system increased, so too did public discontent leading, eventually, to calls for its abolition.[231] While we may never know the true cause of the *Statute of Monopolies'* metamorphosis from historical footnote to foundation of modern patent law, it is clear that it happened coincidentally with this volatile period in the history of the protection of invention.

Much of the focus of the anti-patent debate of the mid-to-late nineteenth century was placed upon the patent as monopoly and as an obstacle to free-trade.[232] The chief complaints were that patents raised prices of commodities and reduced their quality. This reversion to the 'patents as monopoly' argument may therefore have brought with it a fresh view of the *Statute* of the same name. Texts written at this time, in attempts to shore up and support a failing and fractured system (or at least defend calls for its continued existence and reform against vocal attacks by free-traders seeking to raze it to the ground), therefore elevated the *Statute* far beyond its meagre foundations. Within this context, the practically moribund text became imbued with evangelically reimagined historical significance.[233] Some authors even went as far as to suggest that certain 'overlooked' provisions of the Act could be utilised to combat some of the more pernicious and problematic uses of patents within a vastly expensive system of litigation.[234]

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[231] See, for example, the report of "The Debate on the Patent Laws" in *The Economist* 5 June 1869, that began with the statement "It is probable that patent laws will be abolished ere long", and concluded with comments that "it is for the general interest that patent laws should be abolished, and that their abolition will do no great harm to anyone—least of all, to the great mass of inventors or improvers."

[232] For a broad discussion of the anti-patent debate of the mid-to late 19th century see, e.g., Machlup. F. & Penrose. E., *The Patent Controversy in the Nineteenth Century*, (1950) 10 *J Ec. Hist.* 1. See also Fisher. M., 'Classical Economics and Philosophy of the Patent System', [2005] *IPQ* 1.

[233] For similar assertions concerning the treatment of the history of IP by Victorian writers see Sherman & Bently, *The Making of Intellectual Property Law* (1999, CUP), esp. pp.206 & 208-10, concerning the law of patents.

[234] See, for example, J.W. Gordon's suggestion that section 4 of the Statute of Monopolies (enabling the recovery of treble damages and double costs by anyone "hindered, grieved, disturbed or disquieted" etc., by "occasion or pretext" of any monopoly) was "intended to be the great bulwark of the public right against the encroachment and oppression of monopolists." Gordon. J.W., *Monopolies by Patents and the Statutable Remedies Available to the Public*, (Stevens & Sons, 1897), p.10. Gordon went on at length to provide argument as to why the section was fitting for

Accordingly, the *Statute* transitioned from the marginalia of legal consequence to take a starring role in the narrative development of a *system* of intellectual property. At the same time, the philosophical framework of the patent system was also under development and this reimagined history was therefore drawn into the idea of rationalising monopoly by integrating it within the sphere of social contract.[235] The nineteenth century development of intellectual property, while itself a fascinating topic for investigation, is, however, a story for another day.

For the present, we conclude simply by reflecting upon the foregoing discussion. Without consideration of the background to its creation, the *Statute of Monopolies'* celebrity visage is not entirely implausible. With the benefit of hindsight, the face certainly does not look out of place in the role in which it has been cast. Thus, it is true that the Act placed hitherto unprecedented legislative limits on the Sovereign's freedom to dispense favour under the prerogative. In this respect, its significance cannot be denied. It is also true that the *Statute* formed a neat legislative bookend to a protracted period of Parliamentary disquiet over the issue of monopoly, an issue at the heart of modern patent law and one which by 1624 had already troubled the English State for the better part of half a century.[236] Furthermore, within the *Statute*'s constrictive swaddling – its legislative wrap – specific holes were indeed cut that enabled patents for invention to stretch and flourish despite other monopolistic tendencies being constrained. However, to state that these hastily hacked apertures thereby form the genesis of patent law in England or, even more boldly, in the "English-speaking Western world"[237] is, as we have seen, gross overstatement. There is nothing in the history of its development, nor indeed in the text itself, or even its immediate effects, to support these wild claims. Perhaps, therefore, it is time to finally accept that the origins of the modern law of patents are not clear cut, and to see the *Statute* for what it is: less of a foundation and more of a fissure through which existing practice was allowed to pass. Legends be damned.

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this purpose but entirely omitted consideration of the legislative history of the Statute when making his case. While an interesting subject for subsequent exploration, this line of argument is not further developed here.

[235] For more on this topic, see, for example, Fisher. M., 'Classical Economics and Philosophy of the Patent System', [2005] *IPQ* 1.

[236] See fn58, above.

[237] Kyle. C., "But a New Button on an Old Coat': The Enactment of the Statute of Monopolies', (1998) 19 *Legal History* 203, p.203.