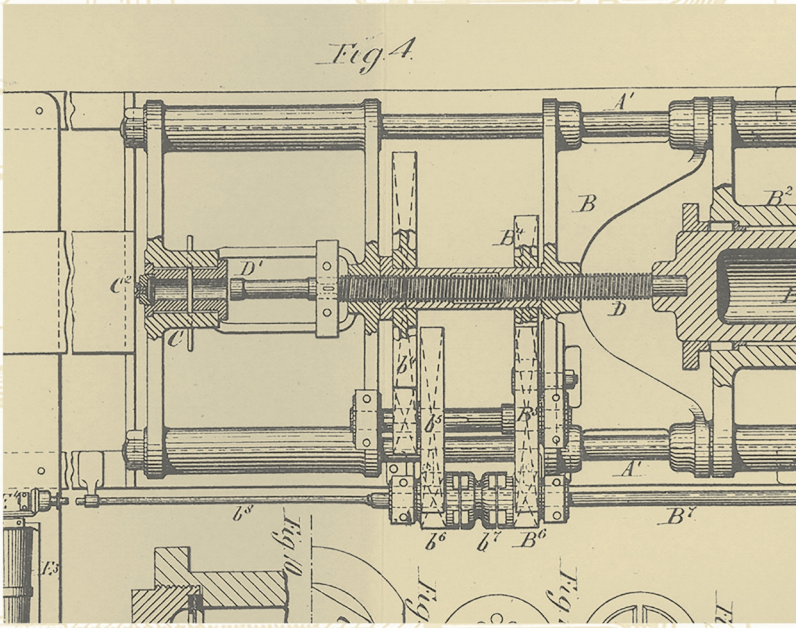

Landmark Cases in Intellectual Property Law

Edited by
Jose Bellido

BLOOMSBURY

LANDMARK CASES IN INTELLECTUAL PROPERTY LAW

This volume explores the nature of intellectual property law by looking at particular disputes. All the cases gathered here aim to show the versatile and unstable character of a discipline still searching for landmarks. Each contribution offers an opportunity to raise questions about the narratives that have shaped the discipline throughout its short but profound history. The volume begins by revisiting patent litigation to consider the impact of the Statute of Monopolies (1624). It continues looking at different controversies to describe how the existence of an author's right in literary property was a plausible basis for legal argument, even though no statute expressly mentioned authors' rights before the Statute of Anne (1710). The collection also explores different moments of historical significance for intellectual property law: the first trade mark injunctions; the difficulties the law faced when protecting maps; and the origins of originality in copyright law. Similarly, it considers the different ways of interpreting patent claims in the late nineteenth and twentieth century; the impact of seminal cases on passing off and the law of confidentiality; and more generally, the construction of intellectual property law and its branches in their interaction with new technologies and marketing developments. It is essential reading for anyone interested in the development of intellectual property law.

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Preface

Intellectual property is a discipline with contested contours, historical and theoretical alike. It is also an area of the law that is attracting an increasing amount of scholarly attention. Such interest could explain why some key intellectual property cases have already appeared in earlier volumes of this series, despite or precisely because of their focus on property or equity.[1] Those cases were particularly notable because they were—and still are—frequently used as referents to trace principles and mark conceptual boundaries that facilitated the making, or crystallised the ingredients, of an emerging discipline.[2] This volume explores the nature of intellectual property law and the procedural conditions for its historical existence by looking at particular disputes. All the cases gathered here aim to show the versatile and unstable character of a discipline still searching for landmarks. Each contribution offers an opportunity to raise questions about the retrospective and prospective narratives that have shaped the discipline throughout its short but profound history. Each contribution, furthermore, stretches the parameters of discussion by focusing on a variety of legal and historical features that have purportedly influenced the development of intellectual property.

The case study is the genre that unites all the contributions, yet it will soon become clear that the methodology used to unveil the landmark status of a particular case is anchored and understood differently by the scholars writing here. For instance, the significance of a decision is tested by some scholars who have decided to map the historicity of its citation across decades and jurisdictions. Instead of the decision itself, its shadow is considered to be the reason why the case has become an authority in intellectual property law. Some contributors use the landmark designation as a tool to explore the historical permutations evidenced by a controversy, and particularly those possibilities that were either obscured or highlighted by a given decision. However, others selected a case as a way to challenge reigning historical interpretations. Had all contributors agreed on the definition of a landmark intellectual property case and the reasons for its designation, the volume would not be so compelling.

[1] L Bently 'Prince Albert v Strange' in C Mitchell and P Mitchell (eds) *Landmark Cases in Equity* (Oxford, Hart, 2012); C Seville 'Millar v Taylor (1769): Landmark and Beacon. Still' in S Douglas, R Hickey and E Waring (eds) *Landmark Cases in Property Law* (London, Bloomsbury, 2015); E Hudson 'Phillips v Mulcaire [2012]: A Property Paradox?' in Douglas et al *Landmark Cases in Property Law* (ibid).

[2] B Sherman and L Bently, *The Making of Modern Intellectual Property Law* (Cambridge, Cambridge University Press, 1999).

Just as valuable, the historical significance of a case might not necessarily correspond to its importance as legal precedent. As some of the chapters in this volume explain, the elusive value of a dispute, or the historical ramifications of a case, tend to revolve around how the controversy arose and how its decision is remembered in the discipline. Many contributors consider cases that might not have been viewed as significant at the time, and only later have come to be viewed as salient. Others prefer to reflect on the status of a case as a landmark, and its concomitant effect in setting legal principles, in order to discuss the distinctive nature of intellectual property law or any of its branches. It is precisely in the interstices between law and history that contributors find the value of a particular case. The volume consists of 13 contributions exploring distinct cases and elucidating a wide range of crucial perspectives on intellectual property law. For instance, the volume begins by revisiting patent litigation to consider the impact of the Jacobean Statute of Monopolies (1624). The next chapter then looks at different controversies and recurrent themes to describe how the existence of an author's right in literary property was a plausible basis for legal argument, even though no statute expressly mentioned authors' rights before the Statute of Anne (1710). The collection also explores different moments of historical significance that deepen our understanding of the discipline: the first trade mark injunctions; the difficulties copyright law faced when protecting maps; and the everlasting confusion around the meaning of originality. Similarly, it looks at the different ways of interpreting patent claims in the late nineteenth and twentieth centuries; the impact of seminal cases on passing off and the law of confidentiality; and more generally, the construction of intellectual property law and its branches in their interaction with new technologies, distributing arrangements and marketing developments.

This collection contains contributions from some of the foremost researchers and academics in intellectual property law. I want to thank them all for their patience, their suggestions and their insightful contributions. I am also grateful to Paul Mitchell for encouraging me to prepare a proposal for an edited volume and to Hart for their interest in the manuscript and the care they have taken in publishing it. In addition, John Maher, Janet MacMillan and Cara Levey have provided comments and suggestions; my gratitude goes to all of them.

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SEAN BOTTOMLEY

I. INTRODUCTION

THE FIRST USE of the word 'monopoly' recorded by the *Oxford English Dictionary* is from Sir Thomas More's 1534 *Treatise on the Passion*. Considering that he used the term in connection with Judas Iscariot, More clearly meant to use it in an emotive and pejorative sense:

> He knoweth wel also that of all the disciples, there would none bee so false a traitor to betray his master but him selfe alone. And therefore is thys ware Iudas all in thyne owne hande. Thou haste a monopoly thereof. And whyle it is sought for, and so sore desired, and that by so many, and they that are also very ryche, thou mayest nowe make the price of thyne own pleasure & therefore ye shall good readers see Iudas was a great rich manne wyth thys one bargayne.[1]

Although 'monopoly' had probably yet to enter the popular vernacular, it certainly would before the end of the sixteenth century, monopolies becoming one of the most politically contentious issues of the day.[2] In brief, the controversy revolved around the (ab)use of letters patent awarded by the monarchy, the primary instrument by which the royal prerogative was exercised. In the mid-sixteenth century, it was recognised that letters patent represented an apposite legal instrument by which foreign tradesmen could be awarded

[1] Quoted in D Harris Sacks, 'The Greed of Judas: Avarice, Monopoly, and the Moral Economy in England, ca 1350–ca 1600' (1998) 28 *The Journal of Medieval and Early Modern Studies* 265. 'Monopoly' though, was also being used in a more recognisable way. Bishop Hooper, for instance, enjoined the 'making scarsite of all thinges [and] bringing the greater part of such commodities as be in euery realme into a few ryche menes handes so that they cannot be sold as commune goddes of the ciuile wealthe but as the goddes of one private person. The whiche Monopolie or selling of one man is forbiddin not onlie in the law of god: but also by the law of man'. J Hooper *Declaration of the ten holy commaundementes* (Zurich, Augustin Fries, 1549) 174. Similarly, the first English edition of More's *Utopia* warned: 'Suffer not these riche men to bie vp al, to ingrosse and forstalle, and with their monopolie to kepe the market alone as please them'. T More (Ralph Robynson, tr), *Utopia* (London, Abraham Neale, 1551) 56.

[2] By way of illustration, a search on the Early English Books Online website (eebo.chadwyck.com/home) yields only seven publications containing the word 'monopoly' and/or its variants before 1575. Over the next half century leading up to the Statute of Monopolies, however, the same search yields 212 results.

exclusive rights to their technology, and so encourage them to emigrate to England to establish new industries and to instruct native apprentices.[3] It was also hoped that the protection proffered by patents would encourage inventive activities at home. Such was the policy as originally envisaged by Lord Burghley, Elizabeth's chief minister, but it soon came to be usurped by other interests and the monopolies that came to be awarded via patents can be divided into two broad categories.[4] The first consisted of those awarded for the sole supply of basic commodities, such as salt and starch, or the manufacture of commercial and industrial goods, like iron and glass (although bona fide patents for invention also come within this category). These monopolies were usually awarded as a means of raising revenue for the Crown (patentees usually paid a rent to the Crown) and/or as a means of rewarding favourites: in 1618, James I awarded his jester a patent to manufacture tobacco pipes.[5] The second category consisted of those patents awarded to confer the exclusive right to undertake certain administrative or bureaucratic functions that might ordinarily be deemed the responsibility of the government, but which, it was thought, could be 'farmed' out to private parties (who also paid a rent to the Crown).

How patentees then profited from these 'privileges' was largely left up to them. Arthur Duckett, for example, co-held the right to search for saltpetre (an essential component for the manufacture of gunpowder) and, under the pretence of searching for saltpetre materials, would 'offer to digge the kytchens parlers bedchambers workehouses and most necessary rooms of divers your said subjects … of purpose to drawe … great somes of money … to have their houses spared'.[6] There was some overlap between these two categories: James's jester probably never intended to manufacture tobacco pipes himself, but to licence and control the trade, and both categories would be censured by the Statute of Monopolies.[7]

Monopolies were understandably reviled by manufacturers, who were now excluded from their livelihoods, and by consumers who had to pay higher prices.[8] Often associated with 'projects' and 'projectors', monopolies

[3] An example of such a patent would be the one awarded in 1567 to Anthony Becku and Jean Carré, discussed below in Section II. Becku and Carré were awarded a patent for 21 years to make window glass, on condition that 'they instruct fully in the art a convenient number of Englishmen apprenticed to them'. *Calendar of the Patent Rolls preserved in the Public Record Office. Elizabeth I, Volume IV, 1566–1569* (London, Her Majesty's Stationary Office, 1964) 147.

[4] C MacLeod, *Inventing the Industrial Revolution: The English Patent System, 1660–1800* (Cambridge, Cambridge University Press, 1988) 12.

[5] RM Smuts, 'Armstrong, Archibald (*d* 1672)', *Oxford Dictionary of National Biography* (Oxford, Oxford University Press, 2004).

[6] Quoted in D Chan Smith, *Sir Edward Coke and the Reformation of the Laws, Religion, Politics and Jurisprudence, 1578–1616* (Cambridge, Cambridge University Press, 2014) 66.

[7] Similarly, one of the reasons advanced for the maintenance of the monopoly for playing cards was because higher prices might dissuade more workers from gambling. *Darcy v Allin* [1603] Noy 173, 174, 74 ER 1131, 1133 (KB).

[8] For an example of a glass manufacturer excluded by Mansell, see n 36.

became something of a mainstay in popular literature and songs. The poet and satirist George Wither broached the subject in his popular *Motto* (1621), which reputedly sold 30,000 copies in a few months:

> *I care not* when there comes a *Parliament*:
>
> For I am no Projector, who invent
>
> New *Monopolies*, or such *Suites*, as Those,
>
> Who, wickedly pretending goodle shows,
>
> *Abuses* to reforme; engender more:
>
> And farre lesse tolerable, than before.
>
> Abusing *Prince*, and *State*, and *Common-weale*;
>
> Their (just deserved) beggaries to heale:
>
> Or, that their ill-got profit, may advance,
>
> To some Great Place, their Pride, and Ignorance.[9]

The authorities were less impressed—Wither was first examined by the House of Lords and then imprisoned for *Motto*.[10] More seriously, monopolies were also subject to repeated attacks in Parliament, although the Crown was naturally reluctant to relinquish an important source of revenue and to see the prerogative curtailed. A basic pattern to these contests had emerged in Elizabeth's final parliaments. Members would openly attack monopolists in the strongest terms, demanding action.[11] The Crown in turn would express surprise and regret at the actions of its patentees and, to pre-empt legislation, agree to revoke the most controversial patents.[12] But the Crown

[9] Quoted in C Kyle, *Theatre of State: Parliament and political culture in early Stuart England* (Stanford, Stanford University Press, 2012).

[10] M O'Callaghan, 'Wither, George (1588–1667)', *Oxford Dictionary of National Biography* (Oxford, Oxford University Press, 2004).

[11] In 1601, the Member for Reading Sir Francis Moore despaired: '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 … I do speak it, there is no Act of hers that hath been or is more derogatory to her own Majesty, more odious to the Subject, more dangerous to the Common-Wealth than the granting of these Monopolies'. Presciently, Moore also understood that legislative action would prove to be futile: 'And to what purpose is it to do anything by Act of Parliament, when the Queen will undo the same by her Prerogative?', foreseeing what James and Charles would do after the Statute of Monopolies was passed. S D'Ewes, *The Journals of All the Parliaments During the Reign of Queen Elizabeth* (London, John Starkey, 1682) 645.

[12] In her 'Golden Speech' of 1601, Elizabeth assured a delegation of Members: 'That my grants should be grievous to my people and oppressions privileged under colour of our patents, our kingly dignity shall not suffer it. Yea, when I heard it, I could give no rest unto my thoughts until I had reformed it. Shall they, think you, escape unpunished that have thus oppressed you, and have been respectless of their duty, and regardless of our honour? No I assure you Mr Speaker … these varlets and lewd persons, not worthy the name of subjects, should not escape without condign punishment'. Quoted in JE Neale, *Elizabeth I and her Parliaments, Vol. II 1584–1601* (London, Jonathan Cape, 1957) 390.

also took care to remind MPs of the importance of patents and warned them not to meddle too intrusively with the prerogative. In 1597, Elizabeth expressed the hope

> that her dutiful and loving Subjects would not take away her Prerogative, which is the chiefest Flower in her Garden, and the principal and head Pearl in her Crown and Diadem; but that they will rather leave that to her disposition. And as her Majesty hath proceeded to tryal of them already, so she promiseth to continue that they shall all be examined to abide the tryal and true Touchstone of the Law.[13]

Matters deteriorated under James I, a more profligate character than Elizabeth. In 1606, after Parliament complained about the proliferation of patents, he had obliged by promising to annul the most egregious grants.[14] Similarly, in 1610, James issued a royal declaration based on his *Book of Bounty*, disavowing patents that would be 'contrary to our Law' and affirming that they should be triable at common law. None of this, however, did anything to curtail his largesse and, after an abortive attempt at legislation in 1621, Parliament managed to pass the Statute of Monopolies in 1624. The first section of the Statute confirmed the common law prohibition on monopolies:

> all Monopolies, and all Commissions, Grants, Licences, Charters and Letters Patents heretofore made or granted, or hereafter to be made or granted, to any Person or Persons, Bodies Politick or Corporate whatsoever, of or for the sole Buying, Selling, Making, Working or Using of any Thing within this Realm … are altogether contrary to the Laws of this Realm, and so are and shall be utterly void and of none Effect.[15]

The second section of the Statute continued that all such instruments 'shall be for ever hereafter examined, heard, tried, and determined, by and according to the common laws of this realm, and not otherwise', excluding the prerogative courts. Most of the following sections of the Statute detail exceptions to the general prohibition of the first section. Most famously, the sixth section excepted patents for new inventions. Similarly, the final two clauses of the Statute excepted specific patents and awards from the general prohibition. These were excluded primarily to guarantee that there was sufficient support for the Act to pass and, not coincidentally, one of the patents spared belonged to the Member for Glamorgan—Sir Robert Mansell.[16]

The significance of the Act has been emphasised for two reasons. Firstly, for the Whig historians of the nineteenth century, the Statute represented

[13] D'Ewes, *Journals of All the Parliaments* (n 11) 547.

[14] W Hyde Price, *The English Patents of Monopoly* (London, Archibald Constable & Co, 1906) 26.

[15] Statute of Monopolies 21 Jac. I c 3 (1624).

[16] C Russell, *Parliaments and English Politics, 1621–1629* (Oxford, Clarendon Press, 1979) 191.

the first occasion that the Crown relinquished a significant component of its traditional prerogative rights. For example, in his *Constitutional History of England*, Henry Hallam argued that during the reign of James I, 'the commons had been engaged … in a struggle to restore and to fortify their own and their fellow subjects' liberties. They had obtained in this period but one legislative measure of importance, the late declaratory act against monopolies'.[17] Moving into the twentieth century, the Statute has been variously described as 'the first statutory invasion of the prerogative' and as a critical moment in the Commons' 'winning of the initiative' in its protracted conflict with the Crown.[18] This triumphalist account of the Statute has never commanded universal assent, though. David Hume, for example, while agreeing that the passing of the Statute 'was gaining a great point, and establishing principles very favourable to liberty', argued that James I had assented to its passing, and had actively supported the earlier Bill in 1621.[19] In the modern historiography, Conrad Russell has also argued that the Statute passed with the active support of James I and Prince Charles. James was reportedly anxious for the Bill to pass in 1621 and 1624 as a means of sparing him the wheedling and begging of courtiers for special dispensations and monopolies. In one speech to the House of Lords in 1621, cited by Russell, James complained that suitors for patents 'have been so troublesome to me that neither myself nor those about me could rest in their beds quiet for projectors, as the great back gallery, if it had a voice, could tell'.[20] Other historians though, have suggested that James's self-interest was piqued by other motives.

[17] H Hallam, *The Constitutional History of England, vol 1*, 2nd edn (London, John Murray, 1829) 509.

[18] C Mcllwain (writing in 1940) and Wallace Notestein (1924) quoted in C Kyle, '"But a New Button to an Old Coat": The Enactment of the Statute of Monopolies, 21 James I cap 3' (1998) 19 *Journal of Legal History*, 203–04.

[19] D Hume, *The History of Great Britain under the House of Stuart, Volume I containing the reigns of James I and Charles I* (London, A Millar, 1759) 96–97.

[20] Russell, *Parliaments and English Politics* (n 16) 109. James's speech, however, is rambling and contradictory. Certainly the speech begins in strong terms: 'I have bene alwayes a hater of projects and projectors, as those of my privie counsel both upon their honors and consciences can tell you'. But it was not the monopolies themselves that so irked the King, but the conduct of the patentees/monopolists. For example, at one point he condemns Sir Gyles Mompesson (the most notorious monopolist of the period, holding a patent for the manufacture of gold and silver thread): 'Mompesson regarded not me, but got it only for him selfe'. In almost his next breath, though, James defends him: 'he laboured for my proftt and soe few have I about me that doe trewly regard it as I must not discourage'. James also argued that the matter was not 'fit for the judges to deliver their opinions [but instead] should have beene brought unto my Privy Counsell, for Sir Edward Villiers that is Master of my Mint came and tould me that this allwance of makinge gould and silver thread did hurt the Bullion'. He also chided Coke: 'For though Sir Edward Coke be very busie and be called the father of the Law and the Commons' howse have divers Yonge lawyers in it, yet all is not law that they say … I hope in his vouching presidents to compare my actions to usurpers or tyrants tymes you will punish him'. The speech appears in Lady De Villiers (ed), *The Hastings Journal of the Parliament of 1621* (London, Royal Historical Society, 1953) 26–31.

Tim Harris argues that the Statute was an essentially political concession, used by James to obtain what he really wanted: funds for a potential war with Spain.[21] Even then, the Lords were reportedly only induced to give the Bill its third reading after being cajoled by Prince Charles.[22] There is, however, hardly any work on the legal history of patents and monopolies in the immediate aftermath of the Statute. One of the arguments in this chapter is that the true intent of James and Charles in assisting with the passage of the Statute is revealed by their subsequent actions.

Secondly, the Act is conventionally regarded as the legislative foundation of the English patent system, and, by extension, arguably *the* 'landmark' in the history of British Intellectual Property Rights. Some economic historians, particularly new institutional economists, have suggested that the Statute, by establishing patents for invention in the common law, guaranteed the intellectual property rights of inventors. This, argued Douglass North (recipient of the 1993 Nobel prize in Economics), gave England a comparative advantage in the development of technology, which ultimately contributed to the industrial revolution,[23] and this is a view that remains current in this literature.[24] Historians of the patent system, though, are more measured in their assessment of the Statute and there is general agreement that the content of the Statute was declaratory of the common law of patents and monopolies as it stood at that time—although there was some disagreement as to what precisely this was and whether it would not be politic for the Statute to introduce some additional restrictions.[25] Sir Edward Coke, for example, the Statute's guiding hand, needed to be persuaded that new inventions ought to be excluded from the general prohibition on monopolies.[26] What is certain though, is that the Statute gave expression to the growing determination to reaffirm the common law vis-à-vis the royal prerogative

[21] T Harris, *Rebellion, Britain's First Stuart Kings* (Oxford, Oxford University Press, 2014) 220.

[22] Russell, *Parliaments and English Politics* (n 16) 191.

[23] D North, *The Rise of the Western World: A New Economic History* (Cambridge, Cambridge University Press, 1973) 154.

[24] Most notably, D Acemoğlu and J Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (London, Profile Books, 2013) 32.

[25] MacLeod, *Inventing the Industrial Revolution* (1988) 17–18; S Bottomley, *The British Patent System During the Industrial Revolution* (Cambridge, Cambridge University Press, 2014), 102.

[26] Even though when Coke had been Chief Justice of the King's Bench, he had recognised that while monopolies were unlawful ('for that is to take away Free-trade, which is the birthright of every Subject'), 'if a man hath brought in a new Invention and a new Trade within the Kingdom, in peril of his life, and consumption of his estate or stock or if a man hath made a new Discovery of any thing, In such cases the King of his grace and favour, in recompense of his costs and travail, may grant by Charter unto him, That only he shall use such a Trade or Trafique for a certain time, because at first the people of the Kingdom are ignorant, and have not the knowledge or skill to use it'. *The Clothworkers of Ipswich* [1615] Godbolt 254, 78 ER 149 (KB).

and to define their respective boundaries. The second purpose of this chapter is to assess whether the Statute succeeded in this aim. Did the common law prevent James and Charles from awarding and maintaining monopolies? To this end, the chapter examines the story of one of the most important patents awarded during this period, a patent for glass manufacture held by Sir Robert Mansell, and the source of the dispute for the first 'test' case heard after the Statute of Monopolies—*Mansell v Bunger* in 1626.

II. ROBERT MANSELL AND THE PATENT FOR GLASS

The development of English glass-making in this period has been well covered by Eleanor Godfrey and David Crossley, and this section draws heavily on their work. Although there is some limited evidence for medieval glass manufacture in England, the story really begins in 1567 when Lord Burghley awarded a patent for the manufacture of window glass to Anthony Becku and Jean Carré ('born in the Low Countries under the dominion of the King of Spain').[27] To help establish their enterprise, they arranged for the emigration of two Frenchmen, Pierre and Jean de Bongard (soon anglicised to Peter and John Bunger), who, unfortunately, did not prove to be entirely co-operative.[28] When, for example, agents of the patentees were sent to the Bunger works to encourage the training of locals (as required by the terms of the patent), they were assaulted and the glass industry would remain in the hands of foreigners into the 1600s.[29] Consequently, there was an ongoing search for a 'native' method of glass manufacture that would break this monopoly. It was also recognised that a method of glass manufacture that replaced timber with coal would yield a significant saving in fuel costs—although there were significant technical problems to be overcome. In particular, traditional wood furnaces did not produce a strong enough draught for coal to be used effectively and the coal smoke could discolour the molten glass.[30] All this required the design of a new glass furnace which could produce high enough temperatures for the coal to burn and melt the glass, while also drawing away the coal smoke.

The first patent for making glass with coal was awarded in 1610 to Sir William Slingsby, and a document in the Bodleian gives the reasons for the grant. In particular, it was hoped that encouraging Slingsby would lead to the 'preservation of wood, whereof there is great famine' and that 'a great number of poor countrymen can be set at work … where now strangers only

[27] *Calendar of the Patent Rolls*, 1566–1569, 146.
[28] E Godfrey, *The Development of English Glassmaking, 1560–1640* (Oxford, Clarendon Press, 1975) 20.
[29] ibid 24.
[30] ibid 148.

are employed'.[31] This was also, however, a bona fide patent for invention, and it was hoped that the patent would result in 'other men encouraged to exert their wit for new inventions'. Slingsby's furnace, though, does not appear to have worked, and another coal furnace was patented by several courtiers the following year, including Thomas Mefflyn, the King's Glazier, and Thomas Percival, to whom the actual invention has been accredited.[32] Matters did not proceed smoothly for the new patentees. James I had to intercede on their behalf in a dispute with one William Robson, who held other patents relating to glass manufacture, and the Privy Council also noted that their works may have been sabotaged in 1613, of which 'Isaac Bunger is vehemently to be suspected'.[33]

This probably explains why the patentees took on five new partners in 1615, attempting to shore up their financial position with an infusion of new capital, and also their political position. Among the new partners were Philip, Earl of Montgomery, and Sir Thomas Howard, both well-connected courtiers in favour with the King. Another new partner was Sir Robert Mansell, who soon bought out the other patentees to become sole proprietor of the patent. Mansell was in some respects a rather strange figure to have become a pioneer of coal-based glass manufacture. Born in 1570/1, he had entered naval service in his youth, serving as a privateer in 1590 and at the raid of Cadiz in 1596. He later served as an Admiral of the Narrow Seas, a position in which he achieved some personal distinction. James I also thought it strange, wondering aloud why '*Robin Mansell* being a Seaman, whereby he hath got so much Honour, should fall from *Water* to tamper with *Fire*, which are two contrary Elements'.[34] However, as a protégé of Lord Nottingham, (to whom James I was indebted for the ease of his succession), Mansell had been appointed Treasurer of the Navy in 1604. Here, he revealed considerable financial acumen, as well as a near boundless

[31] 'Motives to make glass by sea coal', 1610. North MSS. a.2, f 145. Bodleian Library, Oxford. The document also discussed potential objections to the grant. In particular, it was noted that while the patent might lead to 'many families of glass makers undone or at least greatly deterred', this should not preclude a grant to Slingsby: 'there is no great cause to favour these glassmakers being foreigners … they did undertake to instruct our people in that art or mystery and did not, yet we will be contented to set them as work'.

[32] Prompting Eleanor Godfrey to suggest that this 'patent was legal by modern standards and was certainly the most legitimate of all the glass patents granted'. Godfrey, *English Glassmaking* (n 28) 60.

[33] Quoted in Godfrey, *English Glassmaking* (n 28) 69. This does not, however, appear to have been the end of Robson's opposition to the glass patent, and Mansell instigated action against Robson in King's Bench and then the Court of Exchequer. Unfortunately, though, no direct record of the action survives and there is only passing reference made to it in another Exchequer case. 'John Holloway, of London, Humphrey Holloway, of London. v. William Robson, of London', 1618–19. King's Remembrancer: Depositions, E134/16Jas1/East2, ff1–2. National Archives, London.

[34] J Howard, *Epistolæ Ho-Elianæ: Familiar Letters Domestick and Foreign* (London, Humphrey Mosley, 1645) s 2, 6.

capacity for avarice. Mansell, for example, used Navy ships for his own private trading concerns. Another wheeze was for Mansell to under-supply the Navy with overpriced goods and to pocket the difference. Least appealingly, requests by injured and crippled seamen for relief from the Chatham Chest, a charitable fund founded by Lord Effingham, would prompt Mansell to fall 'presently into raging passions and pangs' of anger.[35] Of course, Mansell's corruption hardly distinguished him from other Navy administrators of the time, but the vigour with which he pursued the opportunities for malfeasance probably did. A 1608 Navy Commission found that 'Mansell alone had made £12,000 from naval stores and embezzled £1,000 in wages in a single year'. But all this happened with the cognizance of James I, and Mansell stayed on as Treasurer until 1618.

In itself, his newly acquired patent was a bona fide one for a new invention, a glass furnace that could use coal instead of wood. Mansell, however, was able to secure in 1615 a de facto monopoly of all glass manufacture by obtaining a proclamation from the King forbidding the use of wood for glass manufacture.[36] Ostensibly, the proclamation was issued to preserve timber supplies for the Navy, although the total wood consumption of the glass industry was modest. By one estimate, the entire Wealden glass industry (the main centre of English glass-making) would have required a maximum of just over 5,000 acres of low-yielding coppice to sustainably fuel itself in 1600.[37] The true purpose of the proclamation was alluded to later in the text, where it referred to the 'encouragement which we are accustomed to give to new and profitable inventions, as the civility of the times may be maintained'—in other words, to provide additional protection for Mansell. This also explains why the proclamation prohibited the importation of glass as well. The proclamation was acted upon, providing Mansell with a working and enforceable monopoly. In 1618, for example, two glass-makers were arrested for infringing the monopoly (using wood rather than coal), and were only released once they entered bonds guaranteeing good behaviour in the future.[38]

[35] 'Considerations of the present state of the Navy' by Sir Robert Cotton, *c* 1608. Egerton MSS 2975, f 47. British Library.

[36] 'Proclamation for making glass with sea coal and pit coal only', May 23 1615. State Papers Domestic James I, 14/187, f 95. National Archives, London. Mansell lost no time in enforcing his privileges. Sir Walter Bagot wrote to Mansell the following year complaining that 'The proclamation was published here in this county of Stafford the 16th of June, and the third day after a messenger took away Jacob Henze, my chief workman, who hath been and still is employed in your works at Wollerton … we are now in despair to recover our loss'. 'Petition of Sir Walter Bagot to Sir Robert Mansell' in J Thirsk and JP Cooper (eds), *Seventeenth-Century Economic Documents* (Oxford, Clarendon Press, 1972) 205.

[37] By contrast, the Wealden iron industry would have needed 200,000 to 250,000 acres of coppiced woodland. D Crossley, 'The Archaeology of the Coal-Fuelled Glass Industry in England' (2003) 1 *The Archaeological Journal* 160, 164.

[38] 'Letter from Sir Robert Mansell to Sir George Calvert, Clerk of the Council', 4 May 1618. State Papers Domestic James I, 14/97, f 145. National Archives, London.

Even with his monopoly, however, Mansell faced problems on two fronts. First of all, technical issues with using coal still remained. Mansell struggled for several years to find a suitable location for his glass-works, moving them from the Isle of Purbeck, to Milford Haven, to Nottinghamshire and then finally up to Newcastle. It was here, finally, that the use of coal in glass-making became a technical and commercial success. In particular, coal at Newcastle was cheap and there was a well-established sea-borne trade to London, the main market for Mansell's glass (it was also possible to supply coastal towns in the east, such as Lynn and Norwich). Elsewhere in the country, licences were sold to window glass-makers to use coal—but on the condition that they did not sell their glass in London.[39] Mansell also enjoyed early success in manufacturing looking glasses and crystal glass, drawing comparison to Murano glass from the Venetian ambassador in 1620.[40]

Second, Mansell had to deal with the intransigent opposition of Isaac Bunger and his various associates. This again took the form of sabotage, Bunger being suspected of various 'devices to spoile the glasse' at Newcastle (for want of alternatives, Mansell was obliged to employ some of Bunger's kinsmen).[41] It also took the form of outright violation of the monopoly, which resulted in Bunger's imprisonment.[42] Bunger's opportunity to seriously threaten Mansell's patent arrived in the Parliament of 1621. When Parliament met, the economy was in the midst of a serious economic downturn and, true to form, monopolies were blamed and roundly attacked.[43] Mansell's patent was especially vulnerable, partly because he was abroad on naval duties but also because the Venetian ambassador was anxious to forestall competition from English glass-makers and to stymie developments

[39] D Crossley, 'Sir William Clavell's Glasshouse at Kimmeridge, Dorset: The Excavations of 1980–81' (1987) 144 *The Archaeological Journal* 348.

[40] In a report to the Doge in 1620, the Ambassador noted that the 'crystal attaine a beauty not sensibly inferior, but of quite equal quality to that of Murano, which used once to have the pre-eminence and was the pride of all the world'. Quoted in Godfrey, *English Glassmaking* (n 28) 82.

[41] As reported by Sir George More in W Notestein, FH Relf and H Simpson (eds), *Commons Debates 1621, Volume 3 'The Notes of Sir Thomas Barrington of the House of Commones'* (New Haven, Yale University Press, 1934) 256.

[42] And even in prison, Bunger resisted Mansell's overtures. Elizabeth (Mansell's wife) offered him his release, if 'he will be conformable to his Majesty's patent and proclamations for the glass business nor be a malicious disturber of Sir Robert Mansell's works or contracts from henceforth'. This he initially refused, not knowing 'how far my lady may straine any such promise to draw me into further trouble and therefore do fully desire to be excused for putting my hand to anything [which] may engage me to any future inconvenience'. 'Elizabeth, Lady Mansell to Sir Clement Edmondes', 1621. State Papers Domestic James I, 14/124, f 229. National Archives, London.

[43] Although it is now thought that the ultimate cause of the depression may have been a currency devaluation in the Baltic, prompting an outflow of English specie. Harris, *Rebellion* (n 21) 196.

in the industry.[44] It also seems that Mansell's patent attracted particular controversy, even in the midst of the general attack on monopolies: the Member for Dunwich, Clement Coke, was briefly imprisoned in the Tower for striking a fellow Member after a heated discussion concerning the patent.[45]

It was Clement's father, Sir Edward Coke, who was the main force pushing for the revocation of Mansell's patent. In committee, he observed that 'Three things need to be proved for the patent to be maintained: that it is a new invention, that the glass is as good cheape. That the glass is as good as before'.[46] Coke appears to have made up his mind even before counsel were heard, stating on 7 May that:

> This is no new invention, for in Stafford and Herefordshire glass was before made with seacoale and Pitt Coale before this And whosoever will have the making of thing heeaer and prohibit all importation of the like, they must make it as well conditioned, sized, and as good cheape as the other. But all this yow faule in.[47]

This was a striking volte-face from Coke's earlier support for the glass patent in 1614, when he had intervened personally in the dispute between Mansell's predecessors and Robson, as well as redrafting the patent to include all types of glass.[48]

Counsel was heard later on the same day, and again a week later (14 May). Elizabeth Mansell (Sir Robert's wife), was able to marshal an impressive body of evidence for the maintenance of the patent. In particular, the London Glaziers and the London Spectacle-Makers both supported Mansell's patent, probably for two reasons. One, Isaac Bunger had already demonstrated his (lack of) good intentions before Mansell had secured his patent. In connection with his compatriots and Lionel Bennett, a London

[44] Russell, *Parliaments and English Politics* (n 16) 62. The Venetian Ambassador also tried to encourage Venetian glassmakers to return home. In a 1623 report to the Council of Ten, Girolamo Lando, claimed that he had 'even given my own money to some in order that they might return to Murano as they professed they wished to do; but I afterwards learned that they had gone to Scotland and to work elsewhere, which alone would render them worthy of punishment'. Allen B Hinds (ed), *Calendar of State Papers and Manuscripts relating to English Affairs existing in the archives and collections of Venice*, Vol. XVII, 1621–23 (London, HMSO, 1911) 309.

[45] Notestein et al, *Notes of Sir Thomas Barrington* (n 41) 204, 215–19.

[46] W Notestein, FH Relf and H Simpson (eds), *Commons Debates 1621, Volume 5 'The Belasyse Diary'* (New Haven, Yale University Press, 1934) 122.

[47] Notestein et al, *Notes of Sir Thomas Barrington* (n 41) 195.

[48] Godfrey, *English Glassmaking* (n 28) 68. This was not an isolated incident. One Lepton held a patent giving him a monopoly for engrossing bills for lawsuits before the Council of the North. The patent was condemned as a grievance in Parliament and Coke angrily enquired of Lepton who had drawn up his patent, adding that whoever had done so deserved to be hanged. Lepton replied that it had prepared by the then Attorney-General—Coke. Russell, *Parliaments and English Politics* (n 16) 128.

wholesaler, he had secured his own de facto monopoly for supplying glass to the London glaziers. The monopoly was sustained by predatory pricing to force out any unwanted competition:

> when another man sett upp a ffurance, And then they woulde advaunce theire size and fall theire price to the value of a noble in a case difference, though yt weare by their owne protestation to theire losse 200 £; of purpose to overthrowe the party, which in a short time they effected.[49]

Second, contrary to claims from the other side, Mansell's glass was probably better and cheaper than that made previously. This was certainly the view of the Venetian ambassador and it is corroborated by archaeological evidence showing that glass was being adopted for a growing variety of purposes at around this time, indicating that its price was falling, while its quality was improving.[50] However, while the patent itself may have been beneficial to the commonwealth, in conjunction with the proclamation it conferred a monopoly to Mansell as Coke appreciated: 'Why suffer yow not glasses to be imported if yow can sell cheaper. Answer. Tis for the Manefacture'.

Coke's eventual report on the patent led to it being denounced as a grievance by Parliament:

> If Mansil had invented the makeinge of glass with coale, yet he could not restraine them that made it with wood before no more then brewers or Cookes can be restrained from rostinge with wood if one should devise a new tricke to roast; but he invented it not, but the furnace. T'is but a new button upon an ould coate. And therefore adjudged a grievance in the creation and execution.[51]

This ostensibly weakened Mansell's position, but in the absence of any accompanying legislation to actually annul his patent, it remained in force. Mansell was especially helped by the continuing support of the Privy Council, and a document prepared for the Master of the Rolls at the end of 1621, entitled 'Instructions concerning the patent of glass', made three main arguments for this policy. First, Mansell's investments had been considerable (a figure of £28,000 is mentioned) and this had yielded improvements in the quality of glass and a reduction in prices. Secondly, he had also succeeded in expanding the range of domestically produced glass goods: 'And as concerning looking glass, Sir Robert Mansell hath brought to such perfection that he hath caused our natives to be fully instructed and taught therein'. Finally, he was paying a rent of £1,000 per annum directly to His

[49] Quoted in Godfrey, *English Glassmaking* (n 28) 55. Similarly, the French glass-makers were accused in 1610 of 'often forbid[ding] the bringing of [glass] into the city and great places of commerce until such time that they find great scarcity'. 'Motives to make glass by sea coal', f 145.

[50] D Crossley, 'The English Glass Maker and His Search for Materials in the 16th And 17th Centuries' in P McGray (ed) *The Prehistory and History of Glassmaking Technology* (Ann Arbor, American Ceramic Society, 1998) 168.

[51] ibid 170.

Majesty, as well as another £1,800 to His Majesty's servants. The document ends tersely, noting that 'Bunger never paid penny rent'.[52] Consequently, on his return from service abroad, Mansell's position was as strong as ever. In 1623, for example, he had Sir William Clavell imprisoned in Marshalsea debtors' prison and his glass furnace in Dorset demolished.[53]

Mansell's patent was actually much safer in 1624 than it had been in the previous Parliament, even though this was when the Statute of Monopolies was passed. This is partly because Mansell was back in the country, and sitting in Parliament as Member for Glamorgan, but also because his incorrigible opposition to the widely loathed Duke of Buckingham buttressed his own popularity. An exception was probably made for Mansell's patent as a result of Coke surmising that the Statute needed Mansell's support to pass.[54] This exception illustrates how, despite the framers of the Statute of Monopolies seeking to reaffirm the common law concerning monopolies and patents, the terms of the Statute had in practice been subject to negotiation and concession.

A. *Mansell v Bunger*

As we will shortly see, this marked only the beginning of Mansell's dispute with Bunger, but before this could reach its conclusion in 1626, there were also at least two instances prior to the main hearing in *Mansell* where patentees instigated action in the prerogative courts, in contravention of the Statute of Monopolies. The first was *Attorney-General v Rosse*, dated September 1624, just a few months after the Statute had received the Royal Assent (25 May 1624).[55] This was a prosecution in Star Chamber brought by the Attorney-General, Sir Thomas Coventry, for the infringement of Philip Foote's patent, awarded for preparing clay for manufacturing tobacco pipes. Foote's patent shared many of the same characteristics as Mansell's. In particular, although it was apparently awarded in recognition of Foote's 'skill and industry and to his great charge' in being able 'to provide and prepare clay of that temper and quality' which could be used to make tobacco pipes, his patent was also supplemented by a ban on the manufacture and import of all other types of tobacco pipe clay.[56] Coventry sought to prosecute a large number of individuals for forcibly resisting the

[52] 'Reasons for defence of the glass patent', Sir Julius Caesar, 21 December 1621. Additional Manuscripts 12496, ff 155–156. British Library, London.

[53] D Crossley, 'Sir William Clavell's Glasshouse at Kimmeridge, Dorset: The Excavations of 1980–81' (1987) 144 *The Archaeological Journal* 348, 355.

[54] Godfrey, *English Glassmaking* (n 28) 122.

[55] 'Attorney-General v Rosse', September 1624. Court of Star Chambers: Proceedings James I, STAC 8/29/9. National Archives, London.

[56] ibid f 2.