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COMPULSORY WORKING AND REVOCATION OF PATENTS.

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PREFACE.

THE fate of Perillos provides an early example of the difficulty of reconciling the interests of inventors with governmental compulsion to work their inventions. Perillos, a brass-founder of Athens, domiciled at Agrigentum, in Sicily, constructed a brazen bull larger than life, capable of containing a human victim, and so contrived that, a fire being placed beneath the bull, the unhappy man was gradually burnt to death, whilst the agonizing cries which he uttered before death came to his relief were said to resemble those of a bull. The full-sized working model was exhibited to Phalaris, the tyrant of Agrigentum, who, wrapped in admiration of this instrument of torture, caused the inventor to make the first trial of it himself. Thus, in or about B.C. 570, Perillos the inventor experienced the perils of inventorship under the first essay of statesmen in "Compulsory Working."

In our days, the institution popularly called "Compulsory Working" amounts, broadly speak-

ing, to the principle of penalizing an inventor with forfeiture of his patent unless he manages to put his invention into practice within the realm for which the patent grants him a monopoly of manufacture. The matter is dealt with in sect. 27 of the Patents and Designs Act, 1907, and is of such interest to the public that this one modest section is commonly referred to as the "Patents Act." When, accordingly, politicians of every school of thought proclaim the "Patents Act" as the embodiment of every species of wisdom and virtue, they desire to announce their approval of "Compulsory Working," confident of the applause of their hearers.

The following pages contain, firstly, a historical sketch showing that "Compulsory Working" was the basic idea of the early British patent system, and that (whether for good or for evil) the Act of 1907 has substantially taken us back to the recognized patents policy of Elizabeth and the Stuarts. The writer did not attempt to carry his investigations much deeper than the student of this subject is led by the researches of Mr. E. Wyndham Hulme and Mr. J. W. Gordon. A synopsis of the leading historical data appeared, however, justified in view of the fact that they are not so generally known as might be expected, and that, *e.g.*, even so ample a historical study as Mr. William Hyde Price's "The English Patents of Monopoly" does not allude to the fact that

"Compulsory Working" has ever been previously known in England.

In the second place, the writer has attempted to provide a practical guide covering every matter connected with the law and practice under sect. 27, so far as the words of the statute, the Patents Rules of the Board of Trade, the Rules of the Supreme Court, and the decisions of the Courts which have dealt with the section, afford authentic materials. In choosing the form of a code for presenting the law and practice of the subject under discussion, the writer has been constantly on his guard against the obvious danger of carrying generalization further than it is justified by distinct authority. On the other hand, the Comptroller-General of the Patent Office, and after him the Judge to whom appeals from the Court of the Comptroller are assigned, have been entrusted with the constructive task of building up a practical working measure out of sect. 27 which in itself is merely a so-called skeleton provision, and the writer has incorporated in the code many utterances of the Judge and the Comptroller which, strictly speaking, are *obiter dicta*, but were made with the express purpose of settling the practice. To a considerable extent the views of the Judge of the High Court to whom the appeals have been assigned, are in themselves inappealable, and the contingency that the present established practice

will be materially altered in any direction as the result of cases commenced in the High Court of Justice, is too remote to impose any hesitation in describing the very complete body of thought contained in the decisions given under sect. 27 as a serviceable guide upon which patentees can base their business policy. Certain moot points are discussed in the memoranda, which are appended to the code.

The conflict between Free Trade and Protection is so inseparably bound up with the history of "Compulsory Working" during the past three and a half centuries, that the writer does not apologize for the terminological digression on p. 26 *et seq.* It is there set forth that sect. 27 of the Patents and Designs Act, 1907, is undiluted Protection, and irreconcilable with the tenets of orthodox Free Trade.

The writer has not pretended to conceal his opinion that every system of "Compulsory Working" is vexatious and injurious to inventors without producing any advantage to the community which would not be equally insured by an intelligent system of compulsory licences or by reciprocal treaties with other countries, on the lines advantageously pursued by America, Germany, Austria, Switzerland and Italy.

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PATENTS.

"Compulsory Working" in the Past.

The principle of compulsory working is the very keystone of the early British patent law. The working of patents in England was originally the one essential condition of their grant and subsequent validity. The first patents, and those granted for many a year thereafter, were rewards for introducing industries into England.

The Crown has from the earliest times possessed the right to grant industrial privileges in England. In the middle ages there was no legislative limitation upon this right of the Crown. There was, however, an unwritten constitutional limitation contained in the common law of the country, which dictated that the Crown must exercise its prerogative in granting industrial privileges for the sake of the public good. Now, as Mr. Hulme (*a*) reminds us, in the middle ages the industrial attainments of the English were far below the level of their Continental rivals —France, Germany, Italy, Spain, the Low Countries— whilst throughout Europe, progress in the manufacturing arts was found due, not so much to experimental effort of

(*a*) For the historical data contained in this sketch the writer is indebted so largely to the learned studies published by Mr. Wyndham Hulme, the Librarian of the British Patent Office, in the *Law Quarterly Magazine*, that he hastens to acknowledge his general obligation without attempting to admit his indebtedness in every single case.

individuals, as to the slow infiltration of improved processes which may frequently, if not generally, be traced to the Orient, and which slowly crept forward to the West. Thus industrial progress was as a matter of history identical with the importation of such industries into the country which had previously been elaborated and were practised abroad. The English Kings were not remiss in recognizing the value of industries to their country, and as early as 1326 a royal ordinance promised protection and franchises to persons who would develop the manufacture of cloth in England, Ireland and Wales.

In 1331 we find what is probably the first industrial patent, a grant by Edward III. to Johannes Kempe, a Flandorian. This patent was not a monopoly, but a patent of royal protection, a very important matter in those mediæval days, granted in consideration of his coming to England to instruct those willing to learn his art. Simultaneously, the King promised similar privileges to all others who would settle in Great Britain and Ireland, and teach their arts to those willing to learn.

In 1336 a patent of protection was issued by King Edward III. to two Brabant weavers to settle at York, in consideration of the value of their industry to the realm. Similar privileges were granted in 1368 to three clockmakers of Delft, and apparently the manufacture of silk and linen was also established in London by the introduction of colonies of foreign craftsmen.

In foreign text-books the legend, originally due to a misunderstanding, is preserved that Edward III. granted a patent to the inventor of the "Philosopher's Stone," and Continental dissertations, replete with learned deductions, trace the recognition of "inventors' rights" to this alleged grant. But nobody then thought of inventions or inventors as a factor of economic progress, and it was only some centuries later that inventions were looked upon as anything peculiar in themselves for the purpose of legal treatment. In point of fact, the first grant to the intro-

ducer of a newly invented process (as against the introducers of old-established trades) is found in 1440, when a citizen of Schiedam was invited to come over with his company to introduce a method of manufacturing salt on a scale unattempted in the United Kingdom, and it is interesting to note that England, the classical country of mining, had to rely on foreigners in the early mining days; for in 1452, miners and their company were brought over from Bohemia by the King and offered a royal grant of privileges on account of their superior knowledge "in mineris."

These early grants were intended to introduce foreign manufacturing arts to the British tradesman. A great step in the direction of our modern system of patents was taken when the person who introduced a new branch of industry into England, received a *monopoly* which ran for a sufficient time to give him substantial advantages, before he should be subjected to the competition of the English who had learned the new art from him.

In the days of Queen Elizabeth monopolies granted for new manufactures became an important institution. These monopolies were undoubtedly borrowed from the example of the Continent, where printers' privileges and industrial monopolies were well known, such industrial monopolies being found in Venice about 1500, and being introduced into England *viâ* the Netherlands. Elizabeth's monopolies for novel industrial arts, like the earliest industrial privileges, were based upon the consideration of the value of the industry to the realm, and to qualify for a patent the applicant undertook to introduce at his cost a new manufacture.

Still, there was not the faintest suggestion that he was receiving a reward for *invention*, as such, and, as the text of the patents shows, the knowledge of the introducer might be equally attained by procuring foreign workmen, by travel abroad, or by experimental research. In these circumstances, every such grant was necessarily void if the patentee failed to realize the promises to, and the expecta-

tion of the Crown which granted the patent. In many cases the applicant for a patent represented to the Crown that he had already taken steps to put the new art into practice in the United Kingdom; in other cases special clauses were inserted in the patent declaring it void unless the patentee should put it into practice within a limited period.

A patent granted in 1561 to two foreigners to introduce the manufacture of hard Spanish soap, obliged them to submit the produce manufactured by them to municipal authorities, and the privilege was to be void on proof of defective manufacture. A patent for manufacturing saltpetre granted in the same year included a special proviso that the manufacture should be thrown open to all the Queen's subjects, unless the patentees proved by their manufacture within one year that it was of such utility and profit as was represented by the foreign introducer of the manufacture. It may be mentioned that saltpetre was not then manufactured in England, but that most of it was imported from Antwerp. A patentee who "by diligent travel" discovered a dredging machine, obtained a monopoly in 1562 for importation of this machine, but was obliged to carry out his undertaking within three months, on pain of losing his monopoly.

A monopoly granted in 1563 for fuel-saving ovens and furnaces was to be void in case the patentees failed "to come over" to England and put the grant into practice within two months, or if they proved extortionate in their charges. A patent for engines for draining mines was, in 1563, granted for twenty years, but contained a clause that three years were allowed for the patentee to perfect and demonstrate the utility of his engines. A patent for an engine for draining low-lying land and supplying water was granted in 1571 to an English knight. Here, apparently, we meet with a real invention made in England, but, by analogy to the patents granted to importers, the grant is made void if the engine be not erected within two

years or fails to work efficiently as set forth by the application. In 1573, a native of Amsterdam obtained a patent for similar purposes, viz., an instrument for land-draining, and the stopping of breaches in dams. The patent was granted for ten years, but a term of two years was assigned for introducing the invention.

In 1574 another fuel-saving device was patented for seven years, with the condition that a trial installation must be erected and the efficiency proved by the patentee within one year. A Dutch inventor obtained in 1578 a patent for an engine for water-raising for twenty-one years, and the grant fixed three years for the introduction of the invention, the principle of which was at that time well known abroad. In 1582 a patent was granted for twenty years to an Englishman for making white salt, and two years were given to him within which he was to introduce the industry and to supply better salt at cheaper rates. A special undertaking to introduce skilled labour from abroad is contained in a patent of 1597 for methods in the amelioration and reclamation of land and the preparation of turf or peat for burning purposes.

Again, many patents contained special provisions requiring foreigners who received the grant to employ and sufficiently to educate natives in England, the obvious policy of these clauses being to ensure that the industry would not die out in England in case the foreign patentee discontinued his manufacture or left the country when his monopoly expired. The white soap patent of 1561 mentioned above required that at least two of the servants of the foreign patentees must be English born. The saltpetre patent of 1561 referred to originated in a bargain made by the Queen that a German should come to England and teach her subjects the true art of making saltpetre as good as that made beyond the seas.

In 1565 the exclusive right of manufacturing Spanish leather was coupled with a dispensation from the Act forbidding the export of leather, in a privilege granted to

two foreigners. This grant insisted on the employment and instruction of one English apprentice for every foreigner employed, and the exercise of the art was subjected to inspection by the Company of Leathersellers. The instruction of the English was expressly made a condition of the validity of the grant in the case of the highly important privilege given in 1567 to two Frenchmen to introduce the art of making window glass in England. Only small green glassware had previously been made in England, and the modern industry of glass-making originated in this patent.

A patent for cloth-making, of 1569, contained similar provisions, and a twenty-one years' patent granted jointly to an Englishman and a foreigner to ridden woollen cloth of oil insisted on the instruction of any member of the public for a reasonable recompense. A trial of the invention was to be made before the Privy Council, and the grant to be void if the cloth were injured in the process.

Similar clauses, insisting on the instruction of the English as a specific condition of the grant, are found in patents up to the end of the seventeenth century. A patent granted in 1612 for metallurgical inventions was cancelled in the following year for neglect to work it, and about the same time other patents for metallurgical processes had to be surrendered for failure to carry them out successfully (*b*).

It is known to every student of the elements of English history, how great a part the abuse of the prerogative in granting industrial patents played in the great constitutional contest between the Crown and the nation which culminated in the seventeenth century. The historian Hume has recorded graphically the situation produced by Queen Elizabeth's policy of monopolies in 1601: "It is astonishing to consider the number and importance of those commodities which were thus assigned over to

(*b*) See 1 Webster's Reports, 16, note.

patentees. Currants, salt, iron, powder, cards, calf-skins, fells, pouldavies, ox-shin-bones, train oil, lists of cloth, pot-ashes, aniseseeds, vinegar, sea-coals, steel, aqua vitæ, 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 yarn. These are but a part of the commodities which had been appropriated to monopolists. When this list was read in the house, a member cried: *Is not bread in the number?* *Bread*, said every one with astonishment: *Yes I assure you*, replied he, *if affairs go on at this rate, we shall have bread reduced to a monopoly before next parliament.* Those monopolists were so exorbitant in their demands, that in some places they raised the price of salt from sixteen pence a bushel to fourteen or fifteen shillings. Such high profits naturally begat intruders upon their commerce; and in order to secure themselves against encroachments, the patentees were armed with high and arbitrary powers from the council, by which they were enabled to oppress the people at pleasure, and to exact money from such as they thought proper to accuse of interfering with their patent. The patentees of saltpetre, having the power of entering every house, and of committing what havoc they pleased in stables, cellars, or wheresoever they suspected saltpetre might be gathered, commonly extorted money from those who desired to free themselves from this damage or trouble. And while all domestic intercourse was thus restrained, lest any scope should remain for industry, almost every species of foreign commerce was confined to exclusive companies, who bought and sold at any price that they themselves thought proper to offer or exact."

The great struggle of the House of Commons against the abuse of the royal prerogative found its counterpart in the law courts when the validity of industrial monopolies came to be tested by the law as enforced by the judges.

The Courts in the beginning of the seventeenth century held that the right of the Crown to grant privileges was limited to those cases where a new industry was introduced in the country, and that those grants were all in violation of the common law where the citizens were restrained in the exercise of an art previously known to them.

In the celebrated case of *Darcy* v. *Allin* in the year 1603, the Judges boldly interpreted the law on the question, when patents were properly granted by the Crown and when improperly granted. In this case it was indelibly placed on record that the Crown cannot interfere with the legitimate trade of the citizens by granting monopolies interfering with the exercise of arts and manufactures previously in use. A pregnant argument used by one of the advocates has been so frequently repeated that it was generally quoted by mistake as part of the judgment, until Mr. J. W. Gordon's "Monopolies by Patents" cleared up the matter. It was to the following effect: "Now therefore I will show you how the 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."

In the year 1610 there was published a Royal Declaration in which the King set forth in detail the classes of privileges of all kinds which he held himself entitled to grant, and all those which it was declared it was improper to ask him to grant. One of the permissible classes of grant was as follows: "Projects 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."

Ultimately, in the famous "Statute of Monopolies," legislative effect was given to the victory obtained by the people in the long fight for the restriction of improper grants of monopoly. The Statute of Monopolies is still a canon of modern British patent law. It stands unrepealed in the collection of British Statutes. It is explicitly confirmed by the Act of 1907. But it would be a radical misconception to imagine that the Statute of Monopolies of 1623 is in any sense the origin and legal basis of the British patent system. Apart from special matters not affecting the principle, the Statute of Monopolies merely confirmed, by act of legislation, the limits to the royal prerogative which the Royal Declaration of 1610 had virtually admitted. All it did was to declare, in conformity with the views of the Courts which interpreted the common law, that monopolies in general were void *unless* they complied with certain conditions, and thus the statute declared that the prohibition of monopolies should not comprehend patents granted for the term of fourteen years or less, "hereafter to be made of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures which others at the time of making such Letters Patents and grants shall not use, so as also they be not contrary to the law nor mischievous to the State by raising prices of commodities at home, or hurt of trade, or generally inconvenient."

Several facts stand out prominently in the history of the patent system completed by the Statute of Monopolies.

In the first place, all monopolies for novel industrial arts were professedly granted with the object of fostering trades and industries within the realm. This, the ancient ground of the earliest franchises, remained throughout the formal reason for the grants of patents, and it continued to be recognised as the one legitimate ground of such grants.

Secondly, monopolies were granted both for entire trades or important branches of industries, as well as for special devices and appliances. The border-line was never clearly defined, if at all attempted, in the patents. The system of industrial monopolies had grown into life at a time when entire industries practised abroad remained to be introduced into England, and even when individual inventions were concerned, they were treated by the grant of monopoly exactly like the industries which had been introduced as a whole. Thus, no special point of view was deemed necessary where single inventions were brought into the realm: they were from the beginning of the monopoly system simply treated as so many "new manufactures," on a par with any other novel industry.

The institution of new trades and industries being the one legitimate object of the grants, the grantee was required to start the novel manufacture, the subject matter of his patent, by his own efforts. From the first, it was recognised that it was useful to provide for the information of a narrower or wider section of the British public, and in some cases this information was the expressed consideration for the grant. Even where, however, the actual enrichment of the country through the business created by the patentee was apparently subsidiary to the requirement that he should enable the British public to become proficient in the new art, the patentee was in every case required to demonstrate the latter himself by practical working. It may well be that other means of instructing the trading classes were not considered as adequate in an age when reading and writing was still a possession of the few.

Lastly, "invention" in the modern sense of the word, as the result of a special creative ingenuity, was neither the ground nor a condition of the grant of a patent.

In the Statute of Monopolies we meet with the words "inventor" and "inventors" in an Act of Parliament.

There might appear to be the recognition, by the British law, of something which had not previously been recognised: the inventor's claim to the "industrial property" created by him; but the text of the patents granted at this time fails to bear out such a view of the matter. The fact is simply this, as Mr. Hulme puts it: "The modern distinction between invention, discovery, and the acquisition of knowledge by other than mental effort had no existence in the language of the sixteenth and seventeenth centuries. The terms, invention, discovery, first finding out, &c., are used indiscriminately not only on the patent rolls but in the literature of the period."

In a patent granted in 1618 for a dredging machine, the document of grant states in so many words that the patentee's "invention" was "attained, invented, and found out" by the laboursome and costly investigations made abroad by the patentee; and in another case the word "invention" is actually used to distinguish the institution of a trade from new industrial discovery of that kind which would nowadays be called invention. As the word to "invent" meant in those days, amongst other things, "to originate, to bring into use formally or by authority, to find, establish, institute, or appoint," we can have no hesitation in accepting the view of the learned librarian of the Patent Office that the "true and first inventor" of the statute in 1623 was the true and first originator or institutor of a manufacture. This view is supported by the known facts of history. It never occurred to anyone to require invention, in its modern sense, as the exercise of the "inventive faculty," as justification for a patent. Institution of the manufacture, wherever the knowledge of the art came from, was the valid consideration of the patent grant under the statute. Even novel information, as such, was not to begin with insisted upon: all that was required was that there should not have been a *prior user within the realm*. Novelty, so far as it was required at all in the patented manufacture, was required only to

this extent: that the citizens should not be interfered with in the exercise of arts previously practised.

It is true that the phrase "own wit or invention" (*c*) points to the modern meaning of the word "invention" rather than the wider meaning put forward by Mr. Hulme; but in the same report which quotes the celebrated passage containing these words we find: "In which Court the question was whether it was newly invented by him whereby he might have the sole privilege or else used before at Mendiff in the West Country; which, if it were there before used, this Court was of opinion he should not have the sole use thereof." It is difficult to give full effect to the argument contained in this sentence unless the words "newly invented" here mean something corresponding, say, to the modern phrase "newly put in the market." Obviously the accent is put upon the novelty of the industry and absence of prior user, and not upon the origin of a scientific or technical discovery in the mind of an "inventor." At all events, generations passed after this judgment before prior publication of an invention came to be recognised as a fact which made the grant of a patent improper.

The law of the days of the Statute of Monopolies did not distinguish between the functions of the manufacturer and those of the inventor, and for that reason the statutory inventor was in the eyes of the law identical with the introducer of a new and useful manufacture. Obviously, however, some difference was present to the mind of the contemporaries of the Statute, between a man's "own wit" and the labour and expense brought to bear upon the introduction of other people's inventions. The verbal distinction was present to the lawyers of the time, although they saw no reason for giving legal effect to such a distinction. It was bound, however, to grow to such importance that at a later period it influenced the law

(c) See above, p. 8.

itself. The differentiation between the social functions of the manufacturer and those of the inventor came into being when during the seventeenth and eighteenth centuries most, if not all of the trades of the civilized world were known and practised in the United Kingdom, at least in a rudimentary form.

Both the introduction of industries from abroad and other means of advancing knowledge throughout the world—foremost the printing-press—made it impossible for countries to develop the bulk of their trades in water-tight national compartments, and to isolate themselves as regards the knowledge of artizans and craftsmen. Industrial progress must at such a stage necessarily be confined to the development of new specialities within known branches of industry, and in course of time more and more be narrowed down to the introduction of novel special processes and devices.

Well-known industries are developed within themselves by constant improvement of methods and appliances which, when of conspicuous novelty, are recognised as inventions. Inventions of this kind grew apace in the century of the Statute of Monopolies, and the eighteenth century was the era of the great inventions which founded our marvellous modern civilization more than any other element of progress. Looking cursorily at the list of patent lawsuits which were fought out in the British Courts in the eighteenth century, we find towards the end of the century patent actions about the manufacture of vitriol in vessels of lead, about knitting and weaving-machines, about the use of stucco, the use of metal for making vessels and buildings fireproof, the great historical inventions of Arkwright in textile machinery, the manufacture by machinery of cables and other cords, and last, but not least, Watt's steam engine. These were all inventions in the modern sense of the word. They and many other patents of that century concerned inventions in which the highest degree of inventive genius was displayed, but the English law,

having a convenient system of legislative treatment ready-made for these new inventions, *qua* "new and useful manufactures," had no necessity for discovering inventors' rights as such, as was done as a matter of fact in those days by the American and by the French legislators. In England a new invention was simply treated as a new manufacture, precisely parallel with manufactures imported ready-made from abroad, and this apostolic succession could not be more clearly marked than by the fact that up to this day the English law styles the plagiarist of a foreign invention the "true and first inventor" as soon as he is the first introducer of the invention, and applies for a patent.

When the great age of inventions came with the eighteenth century, compulsory working had lost its place as the foundation of the British patent system. It was never formally abolished, and indeed, as we shall see later on, the doctrine that the working of an invention is the consideration for the grant was kept alive at least in theoretical treatises on patent law. As a matter of fact, however, the requirement of compulsory working dropped into desuetude and its place was taken for all practical purposes, in particular in the practice of the law courts, by another requirement. As seen above, some of the earliest patents of monopoly made the grant conditional upon means of information about the new art being supplied to the public. In the sixteenth and seventeenth centuries this became first the preponderant and ultimately the only consideration which was distinctly insisted upon. The way in which the practical law came to be altered can be clearly traced. As early as 1612, Sturtevant, who obtained a patent for metallurgical inventions, published a full description of the same in compliance with a special covenant inserted in the patent. It is not improper to regard Sturtevant's publication, which is known as the "Treatise of Motallica," as the first patent specification, but quite a century elapsed before specifications had to be published as the leading condition of the grants. Mean-

while, however, specifications were voluntarily forthcoming in increasing numbers, the patentees finding them a highly convenient method of placing on record the extent to which they claimed to have made a new invention; the specification was a simple and convincing means of distinguishing a new invention from what was previously known, of thereby establishing the novelty, and at the same time of warning off infringers or subsequent applicants for patents in the same line of industry.

Then, as the seventeenth century proceeded, a change gradually came into the views prevailing as to the amount of novelty required to support a valid patent. The Statute of Monopolies was clearly based upon the view that a patent could be properly granted even for an invention the knowledge of which was available to others than the patentee, provided that others were not then working the invention or otherwise unduly interfered with in the pursuit of their own trade.

As inventions grew in number, it became more and more difficult to ascertain whether an alleged "new manufacture" was merely something which it was open for any skilled craftsman to carry out as soon as he directed his attention and applied the rules of his art to the given problem, or whether there was, on the other hand, a distinct innovation which it was correct to regard as more than a mere natural development of what was already known.

Where a patentee originated the whole of a new industry in England he might claim that he was not preventing others from exercising any art previously known to them; but when the foundations for practically all modern industries had been laid and were the common property of all sections of the nation it would become increasingly difficult to suggest that methods and devices known to the public were not part and parcel of the existing industry, and this would necessarily be felt the more with the rapid progress made by the people in the knowledge of reading

and writing. The tendency to which full effect was given by legal decisions in the latter half of the eighteenth century was then to regard any man practising an art or industry as unduly interfered with by a patentee if he was not permitted freely to exercise every part of the knowledge common to his trade. In a complex industry, as contrasted with the simple trades of earlier days, no one man will be found to exercise every trick known to his trade, and yet he will properly regard the whole stock of technical information available to him in an emergency as part of his own trade. Accordingly, every complex industry is immediately enriched by all and any valuable new information bearing upon its ends. Thus the development of British industries brought two consequences to the law concerning patents. In the first place, the largely increasing number of inventions removed the centre of gravity from the services which the inventor gave to the nation by starting a new manufacture in the country to the services which he gave by adding to the technical and scientific knowledge of the nation. Again, whilst the Statute of Monopolies required that the subject matter of the patent should amount to a "new and useful manufacture," the practice of the Crown and the courts relaxed the formal stringency of the statute by ceasing to insist upon something which was fundamentally new and not connected with existing manufactures, until ultimately in 1776 an addition to an existing thing or an improvement in a known trade were formally recognised as the proper subject matter of letters patent (*d*).

In the second place, the inventor had to make good his claim to have produced an invention of real novelty, and patent specifications, originally used by inventors for their own convenience, were from the beginning of the eighteenth century more and more generally regarded as the proper vehicle for conveying the inventor's knowledge to the public.

(*d*) *Morris* v. *Bransom*, 1 Webster's Reports, 51.

In lieu, therefore, of requiring the inventor actually to introduce his invention, he was with increasing stringency required fully to disclose all details of his invention to the public at large, a matter which was originally insisted upon only in quite exceptional cases. *Dollond's case* (*e*) decided in 1766 that publication of the invention within the realm was essential in order to support a claim of inventorship within the meaning of the Statute of Monopolies. At last, in 1778, Lord Mansfield laid down rules which at the same time recognized the altered state of affairs, and relaid the foundations of the legal ideas governing the validity of patents. In *Liardet* v. *Johnson*, he established as a principle of law that a patentee was called upon to instruct the public entirely through the patent specification, and thus the old doctrine became obsolete that this instruction must take place through the patentee's personal efforts and supervision. Lord Mansfield also introduced vastly more stringent rules as to the amount of novelty required in an invention which was to support a valid patent. Truly, this was a momentous step in advance, although as a matter of historic development it was made purely from the point of view of the convenience of the public, and without any deliberate intention to relay the foundation of patent law.

Since Lord Mansfield's judgment in *Liardet* v. *Johnson*, it was clearly established that the functions of the inventor were entirely independent of the part played by the organizer of new industries. It was never thereafter seriously questioned in *practice* that the consideration for the grant of a patent was the disclosure of a new and useful invention, and yet the law failed to recognize anything in the nature of special rights accruing to an inventor by reason of his having made an invention.

The *doctrine* that the introduction of the invention was the real consideration for the patent was kept alive by

(*e*) 1 Webster's Reports, 43.

writers of the highest authority, as by Webster, who in 1844 wrote: "But whether the grantee be the true and first inventor in the literal sense of the terms, or in the constructive sense, as the introducer of an invention from abroad, it must always be remembered that the principle upon which he rests his title is the introduction of the invention; and though public policy may require the restriction imposed by the statute, the old common law of the realm, and the uniform tenour of the Acts of Parliament for confirming or extending patent rights, show the introduction of the invention to be the real consideration upon which these exclusive privileges are founded" (*f*). It would be difficult, however, to establish that even so highly authoritative a theory as the one quoted was in accordance with the law enforced at any time after *Liardet* v. *Johnson*. When the question was fully argued in recent days it was found that no case since the Statute of Monopolies could be quoted in which it was laid down that a patentee loses his patent on the ground of non-working (*g*).

As a matter of fact, there were practically no precedents at all available for the guidance of the Courts when patent cases were brought before them in the latter half of the eighteenth century. The Courts of common law do not appear to have been approached for litigation concerning patents for inventions for over one hundred years from the Statute of Monopolies. The practice of the Crown and the altered conditions of industries and inventorship had allowed the working of inventions as a condition of the grants to pass into oblivion, full disclosure of the invention in the specification being substituted and recognised as the most convenient and efficient means whereby an inventor could serve the public. Lord Mansfield was thus able to

(*f*) Webster's Reports, v.

(*g*) *Badische Anilin und Soda Fabrik* v. *W. G. Thompson & Co., Ltd., and Others*, 21 R. P. C. 479.

record the wants of a new age without being either assisted or hampered by precedents dealing with the great changes occurring between the date of the Statute of Monopolies and his own days.

Such litigation as took place during the long period from the enactment of the statute till 1766 was carried to the Privy Council, but the decisions were not made public and still lie buried in the archives of the Council. From a very early period the patents contained a clause providing that if at any time during the term of the patent it should be made to appear to the King, or any six or more members of his Privy Council, that the grant was prejudicial or inconvenient to the King's subjects, the Letters Patent should be void. This clause was contained in patents preceding the Statute of Monopolies; it was maintained in patents during the following period, when the undertaking to carry out the process within the realm was still inserted as the specific ground of the grant; and it was preserved in the statutory forms prescribed for a British patent, right up to the Act of 1907.

It is commonly taken for granted that the practice of revoking a patent on these general grounds of inconvenience to the public became obsolete early in the seventeenth century, but revocation was pronounced by the Council as recently as 1745, and the almost complete absence of patent cases from the records of the courts of common law during the one hundred and fifty years preceding *Dollond's case* rather supports the supposition that the Privy Council continued to be approached by suitors at least till the second half of the eighteenth century. It would therefore be difficult to say without a search of the records of the Council when the clause under notice was last put into effect. Undoubtedly, it was a mere antiquarian curiosity in the nineteenth century and merely served to display the formal continuity between the old British patent system and the modern system.

The law came to recognize copyright in a literary or

artistic production as a right springing into existence in the moment when the work is complete, by virtue of the creation of that work, and the copyright is independent of any special confirmation by the executive. But patents for inventions, which, like copyright monopolies, were originally privileges conferred by Royal concessions, remain to this day administrative grants. They are concessions creating special rights through an act of the executive, and this is not affected by the fact that a general law, regularising the system of granting patents, requires the officers of the executive impartially to exercise their discretion on all applications.

Throughout the nineteenth century the theory of grants coming as favours from the Crown (now exercised, of course, by the responsible administration, and not by the monarch in person) was preserved. In 1821, it was held, in *Brunton* v. *Hawkes* (*h*), that "upon an application for a patent, although the thing may be new in every particular, it is in the judgment of the Crown whether it will or not, as a matter of favour, make the grant to the person who has made the discovery." Again, in the year 1851, in *Caldwell* v. *Vanvlissengen* (*i*), it was held: "the Crown has always exercised control over the trade of the country; and although restrained by the common law and the Statute of Monopolies, within reasonable limits the Crown might grant the exclusive right to treat with a new invention for a limited period." In 1865, it was pronounced, in *Feather* v. *The Queen* (*k*): "A patent is not based upon a contract between the patentee and the Crown, in which the patentee, by communicating the secret of the invention to the public, gives valuable consideration for the grant; but it is simply an exercise of the royal prerogative."

The idea that a monopoly was not merely operative as

(*h*) 4 B. & Ald. 551.
(*i*) 21 L. J. Ch. 97.
(*k*) 6 B. & S. 285.

an inducement to a manufacturer or merchant to start a new industry, but was also a reward for his pains, intruded from early times into the considerations affecting the grants of patents. The abusive grant of rewards was the very ground upon which the Royal prerogative was cut down, or at least reduced, to the grant of patents supported by the interest of the public in the introduction of new and useful manufactures; and accordingly, the idea that an inventor might automatically acquire a vested interest in the results of his labours, similar to the vested interest acquired by the author or artist in the shape of a copyright, was unable to obtain legal recognition.

In one of the Smalt patents the recitals of the motives moving the Crown set forth at considerable length the undertaking of the patentees to introduce the industry, and then, by way almost of an afterthought, follows the suggestion that "a convenient recompense and reward" was due to the patentees for their undertaking (*l*). The encouragement of the patentee and of others is mentioned in another Smalt patent as one of these additional grounds of the grant (*m*). In Dudley's patent of 1622, the primary consideration recited is the benefit to the Crown and the nation of the process for manufacturing iron with pit coal, and at the end of the recitals there is added: "And holding it agreeable to justice that the authors of so laudable and useful inventions should, in some good measure, reap the fruits of their studies, labours and charges" (*n*).

Yet even when the work of the inventor had been clearly distinguished from that of the introducer of industries by Lord Mansfield, the inventor continued to suffer from the fact that the law of patents was firmly founded upon conceptions which preceded his recognition as an independent factor in the industrial world. Charles

(*l*) 1 Webster's Reports, 9.
(*m*) 1 Webster's Reports, 11.
(*n*) 1 Webster's Reports, 14.

Dickens showed, in his "Poor Man's Tale of a Patent," how bitterly this was felt as recently as 1850. Three centuries had passed since patents for inventions were granted, and inventions had played a leading part in raising the country to its unrivalled manufacturing position, and yet Dickens' poor inventor is made to say: "Thereby I say nothing of my being tired of my life while I was patenting my invention. But I put this: Is it reasonable to make a man feel as if, in inventing an ingenious improvement meant to do good, he had done something wrong? How else can a man feel, when he is met by such difficulties at every turn? All inventors *must* feel so."

The subsequent simplification of the procedure in obtaining a patent, and the enormous reduction of its cost, requires no further notice. Compared with the prior state of affairs, the position of inventors was, comparatively speaking, comfortable enough since the great changes begun by the Act of 1852. There was no longer a pressing need for inventors to re-consider their position entirely, and thus they never asked the legislature for that fuller recognition which has so liberally been extended to writers and artists.

Inventors were able to obtain early recognition abroad as the originators of a valuable addition to the wealth of nations which might properly claim *recognition* as a species of property, on a par with the property recognized in the author's, the painter's, the musician's productions.

The report presented by Boufller to the French Constituent Assembly in 1793 contained the following clear pronouncement:—"The first contract between the inventor and society may be reduced to the following terms. The inventor desires to be allowed to enjoy peacefully the thing which comes from him, and which belongs to him. The evidence which he provides of his title is the fact that the thing itself becomes known as existing through his agency alone. He asks in return for that knowledge, that all

others should be restrained in advance from seizing his own after he shall have published it, and it is only upon this condition precedent that he will make known his discovery. And, indeed, this demand, as well as the conditions upon which it is granted, are just, in their very nature, and the social body cannot refuse to accede to the demand, for the inventor's statement is either true or false. In the former case, society has something to gain; in the latter case, nothing to lose. In order, however, to prevent the inventor from interference with quiet enjoyment by greedy or jealous competitors, it is necessary that he should receive clear protection from the State with which he, on his part, enters into two indispensable covenants. His first obligation is to manifest a most complete confidence in the protection granted him by the public authority, and to provide it with the most exact knowledge of the object for which he claims protection, so that society knows exactly what it has undertaken to protect, and that in all events the inventor may have a clear and precise title upon which to support his claims. The second obligation undertaken by a citizen protected by society is to give consideration for the protection. This he can only do by dividing with society, in one way or the other, the usefulness attending his discovery. The most natural form of this partnership is, however, that he may have quiet enjoyment for a given period by the protection of the public, and that after the expiration of this period the public may join with him in the enjoyment."

The old common law principle of monopolies as such is preserved, as against views necessarily following from the recognition of inventors' rights as a species of property created by them, in many points of English patent law which have partly found their way into foreign laws otherwise based upon the recognition of "industrial property." So, for instance, it is still for the first publisher of an invention who is entitled to a patent, even if another inventor made the invention long before, but omitted to reveal it to the public by applying for a patent or otherwise,

and the earlier inventor loses the right to use his own invention if a later inventor first applies for a patent. Then, as mentioned above, the importer of an invention, who has no part whatever in creating it, is treated as equal to the inventor himself. And right up to the Act of 1907 every divulgence of a patentee's secrets, even if made against his wish by persons whom he had confidentially employed in working out his invention, was fatal to his obtaining a patent. A mitigation of the latter rule has only been introduced by the 1907 Act. One highly limited recognition of the special rights of an inventor was previously made by statute; a patentee who has been fraudulently deprived of his invention may, on successfully proving this to the Court, obtain the cancellation of the patent and the issue of a new patent to himself.

This was then the development of the British patent system from the Statute of Monopolies. The establishment of entire new industries was necessarily narrowed down, and technical progress was centred in the invention of new devices and methods springing out of industries already known and practised within the realm. Complete novelty, and not only absence of prior user within the realm, came to be regarded as the essence of a sound claim to inventorship, and complete disclosure of the subject-matter of the grants was gradually recognized as the leading condition with which patentees should comply. The disclosure by the specification, originally volunteered by patentees for their own purposes, was afterwards required by the terms of the grants. Ultimately, the requirement that the patentee should personally introduce the "new and useful manufacture" became completely obsolete in practice.

It was not, however, entirely forgotten. Inventors were never admitted by the English law to acquire any rights in their invention otherwise than by obtaining a special grant of monopoly, and the "Privy Council clause," preserved in the patents till 1907, assisted in keeping alive the tradition that patents for inventions may be obnoxious to the State and the welfare of the public.

Compulsory Working in the Present.

Thus there was a ready-made machinery of historical legal doctrine available for those who in our own days commenced the agitation for compulsory working in the United Kingdom. It had long since been forgotten by the people that "compulsory working" was the very essence of the original English patents of monopoly, the root out of which all modern doctrines of patent law have grown. But there remained the general recollection of the fierce antagonism of former centuries to monopolies; there remained the Statute of Monopolies itself, which up to this day formally prohibits monopolies prejudicial to British trade. There remained, above all, a highly developed body of patent law which was modernised sufficiently to satisfy the requirements of the twentieth century, without having yielded up a structure reminiscent of the old ages of industrial monopolies granted for the advancement of the national trade, rather than admitting any new-fangled notions about the inventor's "natural right" to the product of his special genius.

England, having led the world in modern industries and served as instructor to every nation in the world, had grown so prosperous that she became satisfied in many directions to rest upon her laurels, whilst younger foreign industrial nations had assumed a vigorous industrial development of their own, utilizing in many cases in a far more determined manner than Great Britain, the organized resources of modern science. I shall not be accused of drifting into political argument if I venture to state as a matter of fact, that the growth of foreign industries was closely watched with envious eyes in very wide circles in the United Kingdom. At times it was chiefly the progress of the Americans, at other times chiefly that of the Germans which occupied the particular

attention of the British public. The absence of a law enforcing the working of English patents in England was declared responsible for the development of a gigantic chemical industry in Germany, to the prejudice of that of England. The idea took firm root in the minds of many Englishmen that foreigners systematically obtained English patents all round with the deliberate intention of not working the inventions in the United Kingdom, but of fostering their own foreign trade, and importing the finished article only into the United Kingdom, where it would then successfully compete with antiquated British articles of the same class. The agitation for compulsory working was endorsed by a Free Trade Cabinet at the very time when miraculously quickly the demand for Protection had sprung up in many quarters indeed. As long as few people had paid heed to the cry for Protection, the agitation for the compulsory working of patents had similarly seemed to take little hold on the public mind.

Suddenly, within the last decade, the salvation of England was discovered by an enormous number of men in protective measures. The cause of Free Trade was championed with equal zeal by a majority of the voters, and the fiscal war has raged ever since with unabated fury. But in 1907, Mr. Lloyd George's new Patents Bill was hailed with almost unanimous joy for that one clause, now sect. 27 of the Act, which was so obviously directed against the foreigner. Protectionists and Free Traders were equally gratified. The Protectionists maintained that the Liberal Ministry of Commerce had surrendered to a great protectionist idea. The Free Traders found that the introduction of "compulsory working" was in reality a measure of Free Trade, and as the principle of "making the foreigner pay" is ever popular where it is believed to be practicable, the writer found himself almost isolated when he raised his voice against the new clause as a violation of Free Trade and of the claims of inventors alike.

Protectionists favour "compulsory working" for the obvious reason that it is a measure designed to favour manufacture in the United Kingdom at the expense of manufacture abroad. They maintain that you cannot regard the importation of foreign *patented* articles as offensive, without by implication adopting the view that it is desirable to foster the manufacture of *any other class* of goods in the United Kingdom in preference to importing them. Free Traders maintain that foreign patentees were using their English patents artificially to restrict that amount of manufacture within the United Kingdom which would otherwise have probably taken place, if the foreign patentee was not enabled to prevent the manufacture in the United Kingdom by virtue of his British patent. If, therefore, the patent was revoked, it simply produced the conditions of Free Trade.

Now, Protection may be preferable to Free Trade or *vice versâ*. This is not the proper place for discussing that question. But it is difficult to maintain that the view now taken in England of the nature of patents is consistent with the views of orthodox Free Trade. It is quite true that the revocation of patents leads to "the conditions of Free Trade" so far as the particular patented article is concerned. But the revocation of a patent is after all an abnormal occurrence. The normal condition of affairs contemplated by the law which allows a patent to be granted, is, since 1907, exactly as in the days of Queen Elizabeth: the grant of a monopoly to a person who has in return for this monopoly to institute a British manufacture—the manufacture of the patented article.

The grant of a monopoly enables the patentee to take a higher price by virtue of his monopoly than he would be able to do in a free market with open competition. Protection by fiscal measures would operate with customs at the frontier, and enable the manufacturers of the protected article to compete with importers by reason of the increased margin of profit. Protection, when constituted by

a patent monopoly, gives the inland manufacturer far greater competitive powers. He is entitled to *exclude competitors* altogether from importing his specialities in violation of his patent rights.

Up to the Act of 1907 a British patent under the system in vogue throughout the nineteenth century was dependent for its validity exclusively upon novelty and disclosure at the time of the application; if properly granted *ab initio*, it was necessarily valid for fourteen years, if the patentee chose to pay the fees for renewal. The 1907 Act fundamentally altered the nature of the modern British patent and threw it back into the legal condition of British patents as granted by Elizabeth and the Stuarts. Since 1907 a patent is no longer a reward for the disclosure of a new invention; it partakes of this nature for a period of four years only, during which the inventor is at liberty to work or not to work. From the first day of the fifth year till the end of the fourteen years for which it is granted, a British patent is henceforth held conditional upon the establishment and maintenance of a British industry, the manufacture of the patented articles within the United Kingdom.

The normal condition of affairs contemplated by every system of patents is their continued existence and not their abrogation. Accordingly the legal and economic effect of patents running their full natural course of life should be contemplated in order to define the nature of patents as an institution, and not the exceptional case in which a patent is revoked by way of penalty because it ceases to comply with the conditions established for its normal maintenance in force. Now, throughout modern times, up to the Act of 1907, the sole condition of the grant of a patent was the disclosure of a new and useful invention; the services rendered to the community lay in this disclosure, and if such disclosure had been properly performed, there was nothing to defeat the grant subsequently, unless we are to regard the "Privy Council clause" in the Letters Patent

as anything beyond an antiquarian curiosity. This has been fundamentally changed by re-introducing the requirement of working the invention in the United Kingdom.

How is it possible, then, to deny that British patents as an institution are in the most formal sense of the word a machine of protection? It may even be said that a patent granted on the strict condition of working within the country is the only pure form of protection known to modern statesmanship, for, after all, import duties may also serve as a source of revenue, and they will operate as such to all the greater extent, the less they succeed as measures of protection. A patent with the condition of compulsory working is not tainted with this dual nature; if its protective purposes do not come into operation it is cancelled altogether, and then the State even bears a financial loss, since in penalizing the patentee for not introducing the protected industry the State actually deprives itself of the fees which he would otherwise have paid.

This proposition is subject to two non-essential qualifications. Firstly, the compulsion to work a British patent is suspended so long as the invention in question is not worked abroad. Thus the four years' time-limit may be automatically enlarged where the invention remains entirely unworked in any part of the world, but as soon as anybody, with or without the concurrence or knowledge of the patentee, carries out the invention abroad, to however small an extent, under a foreign patent or without one, the necessity of working in the United Kingdom springs into existence. The elasticity of the time-limit does not affect the character of the British patent as a protective institution during the latter part of its life: on the contrary, the protective nature is emphasised by the fact that the compulsion to work the invention is instituted exclusively for the purpose of combating foreign competition. The first English patents of monopoly were granted to reward the introduction of a new industry,

irrespective of foreign competition: foreign competition is now the essence of the condition that a British patent must be worked in the United Kingdom.

Secondly, the Comptroller is not required by the Act to penalise every non-working patentee by mechanically enforcing a hide-bound rule. Sect. 27 allows the Comptroller to accept such explanations of inadequate working in the United Kingdom as appear satisfactory to him and to exercise his discretion in decreeing the revocation. This, again, does not affect the principle that the life of an undoubtedly valid patent depends upon its utilisation for the establishment of a British industry, co-extensive with the subject-matter of the grant, and benefiting by the protective monopoly. The discretionary powers allowed to the Comptroller do not go beyond the authority to suspend the operation of the section, where the patentee, who is on the defensive, can make out a satisfactory case for exceptional treatment of his patent; this he can only do by showing that even active efforts, complying with a reasonable standard of efficiency in business, did not enable him to carry out the economic policy of the section, viz., the establishment of a British industry.

If the position were correctly appreciated by Free Traders, they would have to admit that a patentee may in the great majority of cases be relied upon as manufacturing wherever he finds it possible to do so at a profit. Should he find it more profitable to manufacture abroad, the Free Trade view suggests that it is to the benefit of this nation that he should be allowed to choose freely the domicile of manufacture, just as the manufacturer of non-patented articles is supposed to benefit the United Kingdom by importing them from abroad if they can be manufactured more conveniently or economically abroad.

The granting of compulsory licences would be ample protection of the inhabitants of the United Kingdom against the attempt of a foreign patentee to keep the invention out of the United Kingdom altogether, or to

omit manufacturing within the United Kingdom for some invidious reason, although the manufacture could be economically performed.

Sweden has deliberately abandoned the system of compulsory working, and relies now upon compulsory licences. Under the Swedish Act of 1884, the patentee lost his rights if he did not work his invention to a substantial extent within three years from the grant, or within four years where he obtained an enlargement of the time for working on account of the peculiar nature of the invention in question. The patent rights were also lost if the working of the invention was subsequently discontinued for one year. The Swedish Patent Act of 1902 enacts, in sect. 15: "If on the expiration of three years from the grant of the patent the protected invention has not been worked to an extent proportionate to the conditions obtaining in the country, any person who desires to work the invention in spite of the patent may summon the patentee to appear at a hearing in Court. If the application is considered well founded, the Court has full discretion to decide to what extent and upon which conditions the invention may be worked by the applicant, and to decide upon the remuneration which he shall pay to the patentee." Surely this provision is based upon a clearer appreciation of the practical limits to patentees' powers than any measures of unqualified or qualified compulsory working; for the latter depend for their justification upon the legal fiction that a patentee is not only in the position to prevent others from working the patented invention, but is also able to work the invention or procure its working if only he cares to do so. Except in very exceptional cases, the average inventor does not command facilities for introducing his invention at his own time in any country. Those who re-introduced the old English principles of compulsory working into the modern law of patents simply chose to disregard the one basic law of the world of inventions. It is easy enough to make an invention, however complicated or ingenious, in

comparison with the skill required to procure its introduction as a manufacture. "Compulsory working" means cutting down the inventor's power to make equitable terms for himself. It means, in many cases, the loss of the benefit of his invention.

Without granting the whole case for Protection, it is barely possible for Free Traders to adhere to the principle of forcing an inventor to manufacture in the United Kingdom, if other States are prepared to suspend the compulsory working clauses of their patent laws by mutual arrangements with Great Britain. International Conventions are a perfectly familiar method of dealing with proprietary rights created by intellectual effort.

Germany agreed long ago with Switzerland that a patentee holding a German and Swiss patent for the same invention is only required to work it in either of these countries at his own discretion, if he is either a citizen of, or has his principal domicile within, either of the countries. Germany subsequently entered into the same arrangement with Italy. On the 23rd of February, 1909, Germany and the United States agreed that an American patentee holding a German patent should enjoy the privileges of a German holding an American patent, *i.e.*, the German patent of an American is now entirely exempt from revocation for non-working, since the United States require no working at all for the maintenance of an American patent.

Germany cannot be accused of illiberality in thus agreeing with the United States, since the effect of the Convention is to absolve the American patentee from working his German patent, whereas the Germans themselves must work or lose the patents obtained in their own country, without having obtained any advantage from America, beyond the assurance of reciprocity in the event of the adoption of compulsory working by the United States.

Unfortunately, it appears that the British Government

refused even prior to the enactment of the Patents and Designs Act of 1907, to enter into a similar agreement with Germany, whereby the British owner of a German patent would have been relieved of the obligation to work his invention in Germany. As the hardships of inventors have been practically ignored by those responsible for sect. 27 of the 1907 Act, it would be useless to enter into any recriminations at this time of the day. The passing of the Patents and Designs Act, 1907, with its sect. 27, by a Free Trade Government, can only be accounted for by the suggestion that the Government were desirous of holding a convenient means of retaliation at their disposal, with which reciprocity could be extracted from any other nation maintaining the working clause. If that be so, there can be no good reason for postponing negotiations leading to an International Convention for the general suspension of the working clause, unless it is suggested that the United Kingdom is incapable of holding its own in arts and industries when competing on equal terms with the rest of the world—which is not exactly the view commonly professed by the protagonists of Free Trade.

DEVELOPMENT OF THE PRACTICE UNDER THE PATENTS AND DESIGNS ACT, 1907, s. 27.

In the first case decided the revocation of a patent granted to an Austrian was contested by a Belgian company, the Société Anonyme Eternit, the exclusive licensees in this country. The Comptroller revoked the patent on the 9th of December, 1908. He found that the only efforts made by the Belgian firm to introduce the patent in England "were vague and futile advertisements and offers," and he established the rule that he would not grant a period of grace for working an invention in the United Kingdom when a patentee deferred real steps to introduce the manufacture in England until an application was made to revoke the patents (*o*).

In his next decision, given on the 4th of January, 1909, the Comptroller again revoked a patent, although the patentee would have had to establish special works and import special machinery and skilled labourers in order to manufacture in England, and here, again, a period of grace was refused (*p*).

On the 3rd of February, 1909 (*q*), the Comptroller refused a period of grace to manufacturers who declared that they had misunderstood the meaning of the Act, and were prepared to make arrangements for their patent to be worked in the United Kingdom. The patentees had to pay thirty guineas costs to the applicant.

(*o*) *Hatschek's Patent*, 26 R. P. C. 1.
(*p*) *Johnson's Patent*, 26 R. P. C. 52.
(*q*) *Worring and Kortenbach's Patent*, 26 R. P. C. 163.

On the 8th of February, 1909, there was another unpleasant surprise for foreign patentees (*r*). The patentee consented to an order revoking the patent, but was yet ordered to pay £8 8*s*. costs to the applicant.

On the 9th of February, 1909, the Comptroller revoked a patent for electric lamps, although the patentee had tried *bonâ fide* to manufacture and sell lamps in the United Kingdom (*s*); a German manufacturing firm was, however, in a position to import the same lamps into the United Kingdom under a licence previously granted. The importers were far more successful than the English manufacturers and, correspondingly, more imported lamps than British lamps were sold. The Comptroller laid down the rule that the working of the invention within the realm "must be to such an extent as will substantially satisfy the demand in the United Kingdom even if no importation takes place." This drastic interpretation of the law would, if endorsed by the judge on appeal, have left every English patent voidable, if anything beyond a small nominal importation of the patented article took place; it is difficult to follow the *ratio decidendi* of the Comptroller who was then in office, unless he assumed that sect. 27 must be interpreted as harshly as possible, so long as the interpretation would not, by absolutely prohibiting any importation at all, amount to a breach of the International Convention. Mr. Justice Parker in his judgment on *Hatschek's Patents* (*t*), laid down rules for a far more liberal interpretation of the law on this point, and thus the cases which were heard after the appeal in Hatschek's case were decided on far less draconic lines.

In a decision given on the 18th of February, 1909 (*u*), the Comptroller continued the series of revocations, finally

(*r*) *Brookes' Patent*, 26 R. P. C. 161.
(*s*) *Bremer's Patent*, 26 R. P. C. 114.
(*t*) 26 R. P. C. 245.
(*u*) *Hoegner's Patent*, 26 R. P. C. 149.

laying down in complete form the doctrine, that it was not a question of comparing the number of articles imported into the United Kingdom with the number of articles manufactured in the United Kingdom in order to ascertain whether a patented article is mainly manufactured abroad or adequately manufactured in the United Kingdom, but that the *total bulk of manufacture* of the article or process in question *in all parts of the world* was to be compared with the *amount of manufacture* under the patent in the *United Kingdom*. This principle was upheld by Mr. Justice Parker in the appeal on *Hatschek's Patents*, though with a very liberal interpretation of its bearing.

On March the 17th, 1909, a decision of great interest was given (*r*). The Comptroller laid down the procedure in applications for revocation in the way which at that date appeared *primâ facie* necessary in view of the wording of sect. 27 itself and of the rules laid down by the Board of Trade.

All these rules appear to require is that the applicant for revocation should apply on the form (reprinted at the end) asking for revocation on the ground of the patent being worked mainly or exclusively abroad, but without giving further reasons or evidence. The rules then appear to require the patentee to give full information about the extent to which his patent is worked in the United Kingdom. Manifestly it was possible for a member of the public to ferret out the trade secrets of any firm owning a British patent by simply paying 2*l.* for a stamp and putting his name at the bottom of a printed form. The Comptroller had previously held himself bound to take the view that the Act really meant this procedure to take place (*s*). He now held: "It seems to me clear from a consideration of the other provisions of the Act, and the circumstances under which sect. 27 was introduced, that

(*r*) *Ilgner's Patents*, 26 R. P. C. 198.
(*s*) *Hoegner's Patent*, 26 R. P. C. 154.

the Legislature deliberately intended to relieve the applicant from making out a *prima facie* case or throwing upon him the necessity of proving—without help from the patentee—that the patented article is manufactured exclusively or mainly outside the United Kingdom. If the Legislature desired to put this burden upon the applicant, it had only to insert the words which are used in sect. 24. . . . . Sect. 3 of the Act of 1902 was largely inoperative, owing, it has been stated, to the heavy costs entailed by the proceedings, and the fact that the burden of proof was on the applicant, and it may well be that it was the deliberate intention of the Legislature to relieve the applicant of the burden of proof and make the patentee disclose at the earliest opportunity what he is really doing in this country with the patent rights he has obtained, so as to assist the Court in coming to a proper decision. I see no hardship or injustice in this, on the assumption that the Legislature treats adequate working in this country, when the main or exclusive working is abroad, as a public duty attaching to the monopoly granted here; and that to secure the performance of this duty 'any person' may give information. . . . I am of opinion, therefore, that upon a proper construction of this section the applicant is not compelled to make out a *prima facie* case before the patentee is called upon to leave evidence or make a disclosure of what he relies upon in answer to the application" (*y*).

The Comptroller concluded a lengthy review of this important question with the words: "In conclusion, I think any other reading of the section than that given above would entail great expense, and might render the section *practically inoperative* if a too difficult or impossible task were thrown on the applicant" (*z*).

(*y*) 26 R. P. C. 201, 202.
(*z*) 26 R. P. C. 203.

In spite of this elaborately-reasoned decision of Sir Cornelius Dalton, Mr. Justice Parker deliberately reversed the practice of the late Comptroller-General. In the case of *Hatschek's Patents* Mr. Justice Parker laid down the rule that it is the duty of the applicant for revocation not to put in his application unless he has satisfactory evidence at hand that the patented article is mainly or exclusively manufactured abroad, and that it is the Comptroller's duty to examine the evidence offered by the applicant to this effect before he proceeds to trouble the patentee for further information (*a*). Sir Cornelius Dalton erred in the direction of pessimism in assuming that the section might become inoperative in case the applicant had to make out a *primâ facie* case, and to provide evidence constituting a preliminary proof of his allegations. Nevertheless, Mr. Justice Parker's ruling is of the greatest benefit to patentees, and must make it very difficult to make more speculative applications for revocation. Technically the new procedure was suggested by an *obiter dictum*, but in view of the peculiar position of the judge to whom appeals are assigned under sect. 92 of the Patents and Designs Act, 1907, as the final appellate Court for revocation cases commenced in the Patent Office, the Comptroller has since regarded and treated the views pronounced in the judgment on appeal in *Hatschek's Case* as fully authoritative and binding.

Meanwhile, other instances occurred in which patentees had to pay costs to the applicants, although they consented to the revocation of the patents, but the costs were reduced to four guineas, the consent having been given at a comparatively early date. But the Comptroller refused at first to accept the view which he was urged to take, that a patentee ought not to be penalized with costs who voluntarily relinquished the patent at the earliest possible opportunity after knowledge of the application.

(*a*) 26 R. P. C. 246.

A fundamental step in the direction of mitigating the hardship to patentees, was the interpretation by the judge of what manufacture "mainly abroad" means, in the matter of *Hatschek's Patents* (*b*). The judge accepted Sir Cornelius Dalton's view that the amount of manufacture under a patent in the United Kingdom must be compared with the total amount of manufacture in all other countries, but he refused either to require that the British demand for the article must be substantially met by manufacture in the United Kingdom, as a mechanical rule applying in every case, or to adopt the even further reaching view that an article is always "*mainly manufactured abroad*" within the meaning of the Act, as soon as less than 50 per cent. of the world's manufacture is performed outside the British Islands. The judge laid down the rule that a sensible differentiation between all cases arising shall take place, *on the merits of each case*, as it comes before the Court. He even declared that there may be "adequate manufacture" in the United Kingdom, where an important section of the *British* demand is met by *imported* articles. The leading principle established by this judgment was: that when a case for revocation arises, the *conduct* of the *patentee* shall be investigated, in order to ascertain whether it led to an undue preference of foreign industries, and to an undue handicapping of the industrial development of the United Kingdom, when the working of the patent was commenced. It has already been pointed out, that the procedure in revocation cases was fundamentally affected by other parts of this judgment.

As a matter of fact, the first break in the chain of revocations was made by the first case heard by the Comptroller after Mr. Justice Parker's judgment. In this case (*c*) it was held, on the 28th of April, 1909, that a patentee who had made genuine efforts to manufacture in the United

(*b*) 26 R. P. C. 240.
(*c*) *Weber's Patent*, 26 R. P. C. 300.

Kingdom, although meanwhile developing his invention abroad, had claim to consideration, and time till the end of the year was granted for satisfying the Comptroller that the patentee had meanwhile worked the patent to an adequate extent, or at least given new reasons why he had failed to do so. In this particular case, the patentee has since been successful in satisfying the Comptroller before the end of the year, but obviously there are not many cases in which it is possible to introduce a manufacture within nine months, which the patentee has in vain endeavoured to introduce during the preceding four years and more. Severe hardship will be experienced, unless the jurisdiction under section 27 takes cognizance of the one great fact in an inventor's existence, that it is only in quite exceptional circumstances that he is free to choose where he will first manufacture. He is generally prepared to accept the first *bonâ fide* offer to take up his patent on reasonable terms, and in all but a very small number of cases, the owner of a British patent would be only too glad to work it in the United Kingdom as well as abroad. To give a patentee nine months only, or even one year, within which to establish an adequate manufacture in the United Kingdom, will in many cases be tantamount to destroying his patent at once. How is it possible to get people to take an interest in a patent if it has only a few months to run, unless actual manufacturing can be established?

It may, however, be anticipated that similarly liberal views will in the future prevail in this respect, as have characterized the interpretation of section 27 under the new régime at the Patent Office ever since Mr. Justice Parker's judgment in Hatschek's patent case.

The infusion of humane consideration into the treatment of patentees found expression in a case on the 11th of May, 1909 (*d*), when a patentee, a resident in the United States, notified the Comptroller that he consented to

(*d*) *Taylor's Patent*, 26 R. P. C. 381.

revocation as soon as he heard of the application. The new Comptroller-General refused to penalize the patentee by making him pay the applicant's costs. On the 28th of April, 1909, the Comptroller had, amongst other rules which gave effect to Mr. Justice Parker's views as to the proper procedure, enunciated his intention of considering whether a patentee had reasonable notice of the applicant's intention before the application for revocation was filed, before awarding costs to the applicant at the expense of the patentee (*e*). From this time on, the jurisdiction in revocation cases produced no innovation which can be described as sensational, although a highly interesting body of rules can be culled from the decisions given. Other applications for revocation were refused on the 18th of May, 1909 (*f*), and on the 28th of May (*g*). Meanwhile the new procedure, which requires the applicant to make out a *prima facie* case, had come into force, and an application for revocation was refused because the applicants were unable to satisfy the Comptroller that the patented article in question was manufactured mainly abroad (*h*). Under the procedure originally adopted, it would have been possible to cross-examine the patentee and his witnesses to elicit the information required by the applicants.

Another judgment by Mr. Justice Parker, given on the 25th of May, 1909 (*i*), may be mentioned as of importance, inasmuch as it was the *first to discharge an order for revocation* previously made by the Comptroller in the early days. The judge found that there was adequate manufacture and sufficient exertion by the patentees to manufacture in the United Kingdom, although the Comptroller had held the opposite view. Another decision given in

(*e*) Official Journal (Patents), 1909, p. 732.
(*f*) *Boult's Patent*, 26 R. P. C. 383.
(*g*) *Boult's Patent*, 26 R. P. C. 425.
(*h*) *Lake's Patent*, 26 R. P. C. 443.
(*i*) *Bremer's Patent* and *Hoegner's Patent*, 26 R. P. C. 449.

favour of the patentee was that by the present Comptroller on the 30th of July, 1909 (*k*), where he found that sufficient reasons were given for the absence of a more extensive manufacture.

On the 24th of November, 1909, a most important decision was given by the Comptroller (*l*). The De Dion Bouton Company had sold certain machines in the United Kingdom which were only manufactured in France. It was held that the company proved that it would be commercially quite impracticable to manufacture the machines in the United Kingdom, as the utility of the patent had practically expired in consequence of the improvements made since its grant. The Comptroller agreed that it would be senseless to start manufacturing in the United Kingdom, since even abroad the manufacture of the particular article was dying out. It was alleged, nevertheless, that actions for infringement of the patent were constantly being brought in the United Kingdom by the patentees against the purchasers of French cars which included the appliance in question, and were brought into the United Kingdom without permission of the patentees. The Comptroller found that he was only entitled to revoke a patent upon an application under sect. 27, if there had been an abuse of the monopoly which was connected with the *non-working* in the United Kingdom. So here, at least, is one case in which the Comptroller has found, considering the peculiar facts, that he should *decline revocation* where there was *no manufacture in England at all*, although the British patent might be used to harass inadvertent infringers in the United Kingdom.

On the 26th of November, 1908, a Belgian company—*L'Oxhydrique Internationale*—was successful in contesting the application for revocation (*m*); the Comptroller found

(*k*) *Kent's Patent*, 26 R. P. C. 666.
(*l*) *Osborn's Patent*, 26 R. P. C. 819.
(*m*) *Jottrand's Patent*, 26 R. P. C. 830.

again that there was satisfactory manufacture in the United Kingdom. He took into account the special circumstances which promised that the incipient manufacture in the United Kingdom would continue to be expanded, and he fully appreciated the reasons why it might, as was here the case, be necessary for a patentee *first to work his invention abroad, before introducing it* into the United Kingdom. As the manufacture would probably be satisfactorily continued he did not even think it necessary to grant a conditional revocation, and to require evidence subsequently, that his presumption did prove correct.

The last decision in the year 1909 was given on the 23rd of December; the Comptroller cancelled an order for conditional revocation made on the 28th April (*a*), a satisfactory start having meanwhile been made with the manufacture in the United Kingdom, since there was "every security for its continuance in future" (*o*).

It is obvious that many problems connected with compulsory working still remain to be solved by the Comptroller and Judge, when cases with new features will come before them. It is equally obvious that whatever may be thought of the practice adopted by the Patent Office in the case of the first applications, the spirit now prevails to appreciate as generously as possible the reasons which inventors may have for failing to make the United Kingdom the headquarters of their commercial efforts. Yet the writer apprehends that the working of section 27 must, at its very best, prove a serious obstacle in the way of patentees, whether foreign or British, who do not happen to be possessed of such ample capital, business experience, and organizing skill, that they can freely control the commercial development of their patent during the first critical years of the grant. Even the most liberal interpretation

(*a*) See p. 39.
(*o*) *Weber's Patent*, 27 R. P. C. 32.

of the English law will not help patentees out of the grave disadvantages to which they find themselves now put, nor will it reconstitute the previous nature of a patent as a right which is indefensible for fourteen years, if it concern a genuinely novel and useful invention which was properly disclosed. *The difficulty of every compulsory working system is that it makes a perfectly valid patent a legally precarious tenure, in addition to the precarious commercial nature of all but a handful of pioneer inventions.*

PATENTS AND DESIGNS ACT, 1907, s. 27.

(1) At any time not less than four years after the date of a patent and not less than one year after the passing of this Act, any person may apply to the Comptroller for the revocation of the patent on the ground that the protected article or process is manufactured or carried on exclusively or mainly outside the United Kingdom.

(2) The Comptroller shall consider the application, and, if after enquiry he is satisfied that the allegations contained therein are correct, then, subject to the provisions of this section, and unless the patentee proves that the patented article or process is manufactured or carried on to an adequate extent in the United Kingdom, or gives satisfactory reasons why the article or process is not so manufactured or carried on, the Comptroller may make an order revoking the patent either—

(a) forthwith; or,

(b) after such reasonable interval as may be specified in the order, unless in the meantime it is shown to his satisfaction that the patented article or process is manufactured or carried on within the United Kingdom to an adequate extent:

Provided that no such order shall be made which is at variance with any treaty, convention,

arrangement, or engagement with any foreign country or British possession.

(3) If within the time limited in the order the patented article or process is not manufactured or carried on within the United Kingdom to an adequate extent, but the patentee gives satisfactory reasons why it is not so manufactured or carried on, the Comptroller may extend the period mentioned in the previous order for such period not exceeding twelve months as may be specified in the subsequent order.

(4) Any decision of the Comptroller under this section shall be subject to appeal to the Court, and on any such appeal the law officer or such other counsel as he may appoint shall be entitled to appear and be heard.

CODE OF THE LAW AND PRACTICE CONCERNING THE PATENTS AND DESIGNS ACT, 1907, s. 27.

I. PRINCIPLES.

1.

It is deemed an abuse of the monopoly conferred by a British patent if it is used with the object or with the effect that the development of industries abroad is favoured at the expense of industries in the United Kingdom. The said abuse may render the patent liable to revocation.

Hatschek's Patents, 26 R. P. C. 239: *Osborn's Patent*, 26 R. P. C. 821.

2.

The presumption arises that there has been an abuse within the meaning of par. 1, and that the patent should be revoked, if the article (or process) protected by the patent is found to be mainly or exclusively manufactured (or carried on) outside the United Kingdom after the expiration of four years from the date of the patent.

Hatschek's Patents, 26 R. P. C. 240.

3.

Subject to the provisions of the law for compulsory licences, there is no compulsion to work a British patent as a condition of the grant, and its validity is not impaired by omission to work in the United Kingdom, unless the article (or process) claimed in the patent is manufactured (or carried on) abroad.

See *Boult's Patent*, 26 R. P. C. 426; and *Breuer's Patent* and *Haegner's Patent*, 26 R. P. C. 456, 457.

4.

The presumption of par. 2 may be rebutted by the patentee, although the article (or process) protected by his patent is manufactured (or carried on) mainly or exclusively outside the United Kingdom, if he can, nevertheless,

(a) show that the article (or process) is manufactured (or carried on) "to an adequate extent" in the United Kingdom, or

(b) if he can give satisfactory reasons why the article (or process) is not manufactured (or carried on) "to an adequate extent" in the United Kingdom.

Hatschek's Patents, 26 R. P. C. 241.

5.

No order for revocation shall be made which is at variance with any treaty, convention, arrangement or engagement with any foreign country or British possession.

Patents and Designs Act, 1907, s. 27, sub-s. 2.

II. JURISDICTION.

6.

Jurisdiction for revoking a patent on the ground of the said abuse is vested independently in

(a) the High Court of Justice, and in

(b) the Court of the Comptroller-General of the Patent Office.

Patents and Designs Act, 1907, ss. 25, 27.

7.

If the proceedings are commenced in the High Court of Justice, they take the form of a petition to the Court for revocation of the patent under sect. 25 of the Patents and

Dosigns Act, 1907, and accordingly the authority of the Attorney-General is required for commencing proceedings in the High Court of Justice.

Patents and Designs Act, 1907, s. 25.

8.

Where proceedings are taken by petition to the High Court of Justice, the Court has jurisdiction only to

(a) dismiss the petition, or

(b) make an unconditional order for revocation.

See Memorandum No. 5.

9.

Where the proceedings are commenced by petition to the High Court, an appeal by the petitioner or the patentee will lie to the Court of Appeal, and from the Court of Appeal to the House of Lords.

Patents and Designs Act, 1908.

10.

A person sued for infringement of a patent in the High Court may defend the action (either exclusively or together with any other defence available in patent actions) by proving that the patented article (or process) is manufactured (or carried on) exclusively or mainly outside the United Kingdom and will be entitled to succeed, unless the patentee can prove that the patented article (or process) is manufactured (or carried on) to an adequate extent in the United Kingdom, or gives satisfactory reasons why the article (or process) is not so manufactured (or carried on).

If the defendant desires not only to defeat the action brought against him, but also to obtain revocation of the patent, he may apply for revocation by way of counter-

claim in the action, if authorized by the Attorney-General to do so.

Patents and Designs Act, 1907, s. 25. Particulars of defence: see *Thermos, Ltd.* v. *Isola, Ltd.*, 27 R. P. C. 195.

11.

Where a defendant in an infringement action does not elect to avail himself of this defence or to ask for revocation by way of counterclaim in the action, he may, notwithstanding the action brought against him, apply independently of the action, to the Comptroller for revocation of the patent.

It is a matter for consideration by the Comptroller in each case on its separate merits whether it is right and proper that he should allow the application to proceed while the action for infringement is pending elsewhere against the applicant; the Comptroller shall consider the whole of the circumstances in each case, above all the state of the action in the High Court, the pleadings and any other relevant facts, and shall dismiss the application if he finds that it is made for improper purposes likely to affect improperly the action for infringement.

The mere fact that the applicant desires by obtaining revocation of the patent under sect. 27 to render the action for infringement futile will not in itself be considered an abuse of the right to apply while an action for infringement is pending in the High Court.

Ilgner's Patents, 26 R. P. C. 204.

12.

Where proceedings for revocation are taken in the Court of the Comptroller-General of the Patent Office the Comptroller has jurisdiction—

(a) To refuse to proceed with the application for revocation, or

(b) To hold an enquiry into the facts, and thereupon to

(aa) Dismiss the application, or
(bb) Order the immediate revocation of the patent, or
(cc) Make a conditional order for the revocation of the patent.

Hatschek's Patents, 26 R. P. C. 245 *et seq.*

13.

A conditional order for revocation made by the Comptroller orders that the revocation of the patent shall take place after a reasonable interval specified in the order, unless in the meantime it is shown to his satisfaction that the patent article (or process) is manufactured (or carried on) within the United Kingdom to an adequate extent.

A conditional order may be made when the Comptroller has found that the patented article (or process) is not manufactured (or carried on) to an adequate extent in the United Kingdom, but the patentee has given reasons for the inadequacy of working which, in the opinion of the Comptroller, make a middle course between unconditional revocation and refusal of the application proper.

See s. 27, sub-ss. 2, 3; *Weber's Patent*, 26 R. P. C. 309.

14.

A conditional order for revocation comes automatically into final force when the period of grace allowed by the conditional order has expired, unless the patentee has previously obtained from the Comptroller—

(a) a further suspension of the revocation, or
(b) the discharge of the order.

Patents and Designs Act, 1907, s. 27, sub-ss. 2, 3.

15.

If within the time limited in the conditional order for revocation the patented article (or process) is not manufactured (or carried on) within the United Kingdom to an

adequate extent, but the patentee gives satisfactory reasons why it is not so manufactured (or carried on), the Comptroller may grant an additional final period of grace not exceeding twelve months, to enable the patentee to manufacture to an adequate extent, or to give a satisfactory explanation of his failure to work the patent to an adequate extent within this final period of grace.

Patents and Designs Act, 1907, s. 27, sub-s. 3.

16.

If within the additional period of grace thus granted the patentee does not procure from the Comptroller the discharge of the conditional order for revocation, the order shall automatically come into final force.

Patents and Designs Act, 1907, s. 27, sub-ss. 2, 3.

17.

Any decision of the Comptroller, whether dismissing the application or ordering the unconditional or conditional revocation of the patent, or discharging a conditional order, is subject to an appeal to the High Court of Justice.

This appeal shall be made to the judge appointed by the Lord Chancellor for hearing these appeals, and the decision of the judge is final.

Patents and Designs Act, 1907, s. 92.

18.

Proceedings for revocation of a patent under sect. 27 of the Patents Act, 1907, are not initiated *ex officio*.

See Memorandum No. 6.

III. PROCEDURE IN THE COURT OF THE COMPTROLLER.

19.

The proceedings for revocation in the Court of the Comptroller-General are commenced by an application addressed to the Comptroller on the prescribed form.

Patents Rules, 1908, r. 78.

20.

The application may be made by anyone, whether a British subject or a foreigner.

The motive of the applicant is irrelevant.

It is irrelevant whether he has any real interest in the development of British industries or not.

Hatschek's Patents, 26 R. P. C. 239, 243; *Johnson's Patent*, 26 R. P. C. 57.

21.

The revocation of a patent may be ordered where the patentee has abused his monopoly by inadequate working in the United Kingdom, although it cannot be shown by the applicant that the revocation will lead to the establishment of a new industry, or the further development of an existing industry in the United Kingdom.

Accordingly the revocation may be ordered, although the applicant may desire the revocation for the sole purpose of importing foreign-made articles into the United Kingdom free from the restraint of a British patent.

Hatschek's Patents, 26 R. P. C. 10, 243; *Johnson's Patent*, 26 R. P. C. 54, 57.

22.

Simultaneously with his application on the prescribed form, the applicant shall deliver to the Comptroller a statement specifying the facts upon which he relies in support of his allegation that the patented article (or process), in respect of which revocation of the patent is desired by him, is manufactured (or carried on) exclusively or mainly outside the United Kingdom. This statement must be made by the applicant in the form of a statutory declaration.

Hatschek's Patents, 26 R. P. C. 246, 247; Official Journal (Patents), 1909, p. 731. See *Thermos, Ltd.* v. *Isola, Ltd.*, 27 R. P. C. 200.

23.

If the applicant does not furnish, together with his application, evidence that the patented article (or process) in question is manufactured (or carried on) exclusively or mainly outside the United Kingdom, which is sufficiently conclusive in the opinion of the Comptroller to call for rebuttal by the patentee, the Comptroller may refuse to proceed further with the matter.

Hatschek's Patents, 26 R. P. C. 247; *Lake's Patent*, 26 R. P. C. 446.

24.

The applicant shall, without any avoidable delay, deliver to the patentee or his agent a copy of the application and of the statutory declaration which accompanied the application, and the applicant shall forthwith furnish the Comptroller with evidence that he has delivered these documents to the patentee or his agent.

Patents Rules, 1908, r. 78; Official Journal (Patents), 1909, p. 731.

25.

When notified of the application for revocation, the patentee shall provide the Comptroller with evidence in the form of a statutory declaration, stating whether or not the allegations contained in the application are correct. If the patentee denies the accuracy of the statements of the applicant, his declaration must contain particulars of the facts upon which he intends to rely in answer to the allegations made by the applicant.

The above reply by the patentee shall be delivered to the Comptroller within fourteen days after the patentee has been supplied with the copy of the application for revocation.

Copies of the patentee's reply should be simultaneously delivered to the applicant.

Hatschek's Patents, 26 R. P. C. 246; Official Journal (Patents), 1909, p. 731.

26.

The Comptroller may, at the request of the patentee, extend the said term of fourteen days within which the patentee should deliver his reply to the allegations contained in the application.

The Comptroller may, in particular, postpone the term for the patentee's reply if he is not satisfied by the evidence provided by the applicant that there is a case, calling on the patentee to defend himself, and if in such an event he thinks it necessary to require further evidence from the applicant before proceeding with the matter.

Patents Rules, 1908, rr. 79, 109; *Hatschek's Patents*, 26 R. P. C. 247.

27.

Should the applicant, having received the reply of the patentee, decide to proceed with his application, he shall,

within fourteen days from the delivery of the patentee's reply, or within such further time as the Comptroller may allow, leave at the Comptroller's office a statutory declaration in answer. A copy of this statutory declaration shall be simultaneously delivered to the patentee or his agent, and the Comptroller shall be furnished with evidence of such delivery.

Patents Rules, 1908, r. 79; Official Journal (Patents), 1909, p. 732.

28.

The Comptroller will then intimate to the parties his preliminary decision upon the application. This preliminary decision may be either—

(a) That the Comptroller considers it desirable and intends to hold a preliminary hearing on the question whether the applicant has made out a *primâ facie* case that the allegations in the application are correct; or

(b) That he intends to deal at one hearing with the whole case, including the further questions, whether the patentee can prove that the patented article (or process) is manufactured (or carried on) "to an adequate extent" in the United Kingdom, or can give satisfactory reasons why the article or process is not so manufactured or carried on.

Patents Rules, 1908, r. 81; *Hatschek's Patents*, 26 R. P. C. 246; Official Journal (Patents), 1909, p. 732.

29.

The definition of a "*primâ facie*" case for the purposes of these rules is—evidence and arguments raising a presumption in favour of the case propounded by the respective party and necessitating rebutting evidence and arguments to displace such a presumption.

When the Comptroller has found, after hearing the

parties, that there is a *primâ facie* case against one of the parties, it will be open to the party in question to finally rebut the *primâ facie* case by supplementary evidence and arguments, either at the same hearing or at a subsequent hearing, if such an additional hearing has been deemed necessary by the Comptroller.

See *Hatschek's Patents*, 26 R. P. C. 246; Official Journal (Patents), 1909, p. 732.

30.

If the Comptroller holds a preliminary hearing as aforesaid he may either decide as a result of the hearing—

(a) That no *primâ facie* case has been made out by the applicant, and dismiss the application; or

(b) He may decide that the applicant has made out a *primâ facie* case in support of the allegations in the application and determine to hold a final hearing.

Hatschek's Patents, 26 R. P. C. 246, 247; Official Journal (Patents), 1909, p. 732.

31.

If the Comptroller decides (either with or without a preliminary hearing) that a *primâ facie* case in support of the allegations in the application has been made out by the applicant, he shall give to the patentee further time for leaving at the office and delivering to the applicant further evidence in the form of a statutory declaration. The patentee shall in this declaration set forth—

(a) That the patented article (or process) is manufactured (or carried on) to an adequate extent in the United Kingdom; or

(b) If the patentee does not contend that there is an adequate manufacture, he shall set out the reasons why the patented article (or process) is not so

manufactured (or carried on) in the United Kingdom.

The patentee shall deliver to the applicant copies of such evidence, and shall furnish the Comptroller with evidence of such delivery.

Patents Rules, 1908, rr. 79, 109; *Hatschek's Patents*, 26 R. P. C. 247; Official Journal (Patents), 1909, p. 732.

32.

Should the applicant still desire to proceed with his application after delivery of the said further evidence, the Comptroller shall give him further time for leaving at the Comptroller's office statutory declarations in answer. Copies of these declarations shall be delivered to the patentee or his agent, and the Comptroller shall be furnished with evidence of such delivery.

Patents Rules, 1908, rr. 79, 109; Official Journal (Patents), 1909, p. 732.

33.

No further evidence shall be left at the office on either side, except by leave or on the request of the Comptroller and upon such terms, if any, as the Comptroller may think fit.

Patents Rules, 1908, r. 80.

34.

On completion of the evidence or at such other time as he may see fit, the Comptroller shall appoint a time for the hearing of the case, and give the parties ten days' notice at least of such appointment, and in the event of his deciding to take evidence *viva voce* in lieu of, or in addition to, the evidence by declaration, or to allow any declarant to be cross-examined on his declaration, he may require the attendance of any declarant or other person whose evidence he may consider desirable.

Patents Rules, 1908, r. 81.

35.

The Comptroller is entitled to call at the hearing, and consider for the purposes of his decision, evidence in addition to that provided by the parties if in his discretion he thinks it necessary or proper to do so.

Patents Rules, 1908, r. 81. See Memorandum No. 7.

36.

As a rule the Comptroller will not allow evidence to be given at a hearing of facts which ought in his opinion to have been disclosed by the party offering the evidence, in the statutory declarations filed prior to the hearing.

Horgner's Patents, 26 R. P. C. 154.

37.

A patentee who desires the discharge or further suspension of a conditional order for revocation shall apply to the Comptroller for an opportunity of proving that he has since the conditional order established an adequate manufacture of the patented article (or process) in the United Kingdom, or alternatively of giving satisfactory reasons why there is no adequate manufacture.

The Comptroller will appoint a hearing for deciding on the evidence produced by the patentee in support of his allegation.

The applicant for the revocation will be invited by the Comptroller to appear at the hearing and if so desired by the applicant to oppose the application.

Practice. See *Weber's Patent*, 27 R. P. C. 31.

38.

If the applicant for revocation does not appear at the hearing the Comptroller will, nevertheless, require the

patentee to give him satisfactory evidence of adequate working or alternatively reasons which, in the opinion of the Comptroller, are satisfactory to account for the failure of the patentee to have commenced adequate working within the time of grace allowed in the order for conditional revocation.

If the Comptroller, instead of cancelling the conditional order for revocation or dismissing the patentee's application, decides to give him a further period of grace, he may suspend the final revocation of the patent for a further period not exceeding one year.

Practice. See *Weber's Patent*, 27 R. P. C. 31; Patents and Designs Act, 1907, s. 27, sub-s. 3.

39.

If within the said second period of grace the patentee applies for a hearing, the Comptroller will proceed in the same manner as at the hearing in consequence of which he granted the extended period of grace to the patentee.

The Comptroller has, however, no power to give a further period of grace, and he may only order that the conditional order for revocation shall either be finally confirmed or discharged.

Patents and Designs Act, 1907, s. 27, sub-s. 3.

40.

When an application for revocation of a patent has been refused, or a patentee has obtained the discharge of a conditional order for revocation, the unsuccessful applicant for revocation, or any other person, may at any time make a new application for revocation of the same patent.

Such an application will, in particular, be properly made if the working of the patent within the United Kingdom ceases to be adequate in comparison with the manufacture

abroad, or if it is entirely discontinued in the United Kingdom.

Hutchek's Patents, 26 R. P. C. 240; *Kent's Patent*, 26 R. P. C. 671; *Weber's Patent*, 27 R. P. C. 30.

41.

As a rule the Comptroller will allow costs to the successful party.

The Comptroller has liberty to assess the amount of costs at his discretion, taking into consideration the expense reasonably incurred by the successful party in preparing and bringing his case before the Court.

The Comptroller may, however, take the conduct of the parties into consideration, and, in particular, when dismissing the application, deprive the patentee entirely or partly of his costs, if he finds that the applicant had justifiable grounds for making an application or pressing it to a hearing.

Practice.

42.

In the event of an application under section 27 being uncontested by the patentee, the Comptroller, in deciding whether costs should be awarded to the applicant, will consider whether proceedings under the section might have been avoided if reasonable notice had been given by the applicant to the patentee before the application was filed.

Official Journal (Patents), 1909, p. 732.

IV. APPEALS FROM THE COMPTROLLER.

43.

All appeals to the Court from any decision of the Comptroller under sect. 27 of the Patents and Designs Act, 1907, shall be brought by petition presented to the Court within one calendar month of the decision of the Comptroller or within such further time as the Court may under special circumstances allow. Each such petition shall state the nature of the decision appealed against, and whether the appeal is from the whole, or part only, and if so, what part of such decision. It shall also state concisely the grounds of the appeal, and no grounds, other than those so stated, shall, except with the leave of the Court to be given on such terms and conditions as may seem just, be allowed to be taken by the appellant at the hearing.

Ord. LIIIA. r. 4.

44.

Every appeal to the Court under sect. 27 of the Patents and Designs Act, 1907, shall, if and so long as the Court is a Judge of the Chancery Division, and subject to any direction of the Court to the contrary, be set down in the same manner as if it were a witness action assigned to such Judge, and be heard and disposed of in due course.

Ord. LIIIA. r. 5.

45.

In all proceedings before the Court under sect. 27 of the Patents and Designs Act, 1907, the evidence used shall be the same as that used at the hearing before the Comptroller, and no further evidence shall be given except

by the leave of the Court on application to be made to the Court at or before the hearing.

Ord. LIIIA. r. 6.

46.

In all proceedings before the Court the costs of and incident thereto, including the costs of hearings before the Comptroller, shall be in the discretion of the Court.

Ord. LIIIA. r. 8.

47.

In all proceedings before the Court, the Court shall have all the powers by the Patents and Designs Act, 1907, vested in the Comptroller, and may make an order which might, or ought to, have been made by the Comptroller.

Ord. LIIIA. r. 9. See Memorandum No. 5.

V. INTERPRETATION.

48.

For the purpose of ascertaining whether an article (or process) is manufactured (or carried on) mainly abroad, it is irrelevant whether articles so manufactured (or resulting from the process so carried on abroad) are or are not imported into the United Kingdom, and accordingly the Comptroller may find that there has been an abuse of the British patent by favouring the development of industries abroad at the expense of industries within the United Kingdom, although there has been no importation into the United Kingdom of articles made abroad under the patented process in question.

Hatschek's Patents, 26 R. P. C. 241.

49.

In order to ascertain whether the article (or process) in question is mainly manufactured (or carried on) abroad, the Comptroller shall therefore compare the extent to which the manufacture is carried on in the United Kingdom with the extent to which it is carried on in all countries outside the United Kingdom.

Hatschek's Patents, 26 R. P. C. 241.

50.

The Comptroller is, however, not bound to find that the patented article (or process) is manufactured (or carried on) "mainly outside the United Kingdom," within the meaning of sect. 27 of the Patents Act, 1907, in every case in which the amount of the manufacture of the patented article (or process) abroad is absolutely greater than the amount of the manufacture of the patented article (or process) within the United Kingdom. If a patented article (or process) be manufactured (or carried on) in the United Kingdom to as great an extent as can reasonably be expected, having regard to the industrial developments of other countries, there will be no presumption of an abuse of the British monopoly in the United Kingdom.

Hatschek's Patents, 26 R. P. C. 240.

51.

In ascertaining the proportion of the manufacture in the United Kingdom to the manufacture abroad, it is not a question of comparing what the patentee, his licensees and agents do abroad or in the United Kingdom respectively, but the Comptroller shall consider the amount of manufacture of the article or process in question performed by all persons, whether they are authorized by the patentee or not.

Accordingly, it is irrelevant whether the manufacture abroad is carried on under foreign patents in the respective

foreign countries or not, and the patentee of a British patent may be found guilty of abusing his monopoly, although he has no foreign patents and is not connected personally with the manufacture abroad, provided he has used his British patent in a manner which has the effect of benefiting industries abroad at the expense of industries in the United Kingdom.

Hatschek's Patents, 26 R. P. C. 241.

52.

Subject to the duty of the patentee to deny or admit the allegations of the applicant by statutory declaration and to the Comptroller's discretionary powers at hearings held by him, the onus of proving that the article (or process) is so preponderantly manufactured abroad as to amount to its being manufactured (or carried on) mainly abroad, as defined in par. 50, rests upon the applicant.

Hatschek's Patents, 26 R. P. C. 246, 247; Official Journal (Patents), 1909, p. 731. See *Thermos, Ltd.* v. *Isola, Ltd.*, 27 R. P. C. 200.

53.

If the Comptroller finds that the allegation has been proved that the article (or process) is exclusively or mainly manufactured (or carried on) outside the United Kingdom, or if the Comptroller provisionally withholds his decision upon this question at the final hearing, then in either case the onus of proof rests upon the patentee to prove that—

(a) There is, nevertheless, an adequate manufacture of the article (or process) in the United Kingdom, or

(b) If there is no manufacture at all, or no "adequate" manufacture in the United Kingdom, there are satisfactory reasons therefor.

Hatschek's Patents, 26 R. P. C. 241, 246, 247; Official Journal (Patents), 1909, p. 732.

54.

It is left to the Comptroller to determine in each case, and having regard to all the circumstances, whether the extent to which the article (or process) is manufactured (or carried on) is "adequate," and if not, whether the reasons put forward by the patentee are satisfactory.

Hatschek's Patents, 26 R. P. C. 243.

55.

The Comptroller will not consider the extent to which the article is manufactured or the process carried on "adequate" if it be less than it would have been but for the fact that the patentee has exercised the rights conferred by his patent to the detriment of the British industry.

Such detriment will be found in particular if the patentee has given foreign traders a preference over British traders.

Hatschek's Patents, 26 R. P. C. 241; *Bremer's Patent* and *Hoegner's Patent*, 26 R. P. C. 462; *Kent's Patent*, 26 R. P. C. 670.

56.

The Comptroller will not consider any reason given by the patentee to account for the inadequacy of the extent to which the patented article (or process) is manufactured (or carried on) within the United Kingdom, or for total failure to manufacture, as satisfactory, unless these reasons show causes which have operated irrespective of any abuse of the monopoly granted by the patent.

Hatschek's Patents, 26 R. P. C. 241.

57.

It will never be deemed a satisfactory explanation of non-working or inadequate working of a patent in the United Kingdom if a patentee has precluded himself by

contract from working his patent in the United Kingdom, irrespective of whether such contract was made before or after the passing of the Act.

Hatschek's Patents, 26 R. P. C. 244.

58.

The patentee is expected to disclose fully to the Comptroller the manner in which he has exercised his patent rights in order to free himself from all suspicion of having done anything to hamper the industry of the United Kingdom, and the Comptroller will, in the first place, consider the conduct of the patentee with respect to his patent, including the terms, if any, upon which the patentee offered to permit the use of his invention.

Hatschek's Patents, 26 R. P. C. 242; *Kent's Patent*, 26 R. P. C. 670.

59.

In considering whether the patentee has or has not exercised his rights fairly and properly, having regard to the interests of the trade of the United Kingdom, the Comptroller shall decide all questions arising with reference to all the circumstances of the particular case, including the nature of the patented invention in question.

Hatschek's Patents, 26 R. P. C. 242.

60.

The patentee must at least take the same pains to develop the manufacture under his patents in the United Kingdom as he does abroad, and the conduct of the patentee will not be considered satisfactory if he has given foreigners any preferential terms in the grant of licences or otherwise, or if he has utilized the statutory period of grace (four years) in developing foreign industries, as opposed to the industries of the United Kingdom, and at the end of the

period seeks to defend his conduct by offering to grant licences in the United Kingdom on the same terms as he has granted them abroad.

Hatschek's Patents, 26 R. P. C. 242; *Kent's Patent*, 26 R. P. C. 670.

61.

It is the policy of sect. 27 of the Patents Act, 1907, to secure fair play between foreign industries and the industries of the United Kingdom, and not to compel patentees to exclude foreign goods altogether for the benefit of the United Kingdom. There is, therefore, no necessary presumption of an abuse of a British patent if the patentee, besides manufacturing under his patent in the United Kingdom, imports or allows to be imported part of the patented goods from abroad into the United Kingdom. In spite of such importation the patentee *may*, nevertheless, be able to prove to the Comptroller that the manufacture of the patented article or the use of the patented process in the United Kingdom is adequate, or to give satisfactory reasons why it is not adequate.

Every case must be considered on its own merits and with reference to its own attendant circumstances.

Hatschek's Patents, 26 R. P. C. 242; *Osborn's Patent*, 26 R. P. C. 819.

62.

Where a patentee has countenanced the importation of articles manufactured under his process into the United Kingdom, the Comptroller shall take into consideration how far the demand for the article in the United Kingdom is met by the imported article and by the British-made article respectively in order to decide whether there has been an adequate manufacture within the United Kingdom.

Although it may be found that the patentee does not

attempt to supply the entire demand in the United Kingdom for his article by manufacturing the article in the United Kingdom, the Court may, nevertheless, take into account any reasonable explanation of the proportions between the importation from abroad and the manufacture of the article in the United Kingdom.

Hatschek's Patents, 26 R. P. C. 243; *Bremer's Patent* and *Hoegner's Patent*, 26 R. P. C. 165.

63.

In considering whether there is an adequate manufacture of a patented article in the United Kingdom when the article is manufactured abroad and imported into the Kingdom, the Comptroller may take into consideration in favour of the patentee the fact that the British public prefers the article manufactured abroad to the article made in the United Kingdom.

Hatschek's Patents, 26 R. P. C. 243; *Bremer's Patent* and *Hoegner's Patent*, 26 R. P. C. 464; *Osborn's Patent*, 26 R. P. C. 821.

64.

A patentee who explains his omission to work a patent in the United Kingdom by the lack of a British demand for the article protected by his patent will not necessarily be excused for the non-working by that lack of demand. In considering the adequacy of manufacture in the United Kingdom the Comptroller will take the demand existing for the patented article in the United Kingdom or in neutral markets outside the United Kingdom into consideration. Where, however, the patented article (or process) is in fact manufactured (or carried on) in foreign countries where there is a demand for the article (or process), it will be presumed that the establishment of an industry in the patented article (or process) may in itself help to create a demand for the article (or process) in

question in the United Kingdom, and the patentee must in such cases make an effort to create a demand in the United Kingdom.

Hatschek's Patents, 26 R. P. C. 243; *Boult's Patent*, 26 R. P. C. 387.

65.

Where the absence of manufacture or the inadequacy of manufacture in the United Kingdom is declared by the patentee to be due to the absence of any demand at all for the patented article (or process) within the United Kingdom, the Comptroller shall be free to consider whether the patentee has precluded the growth of the demand by his own unreasonable conduct.

Such unreasonable conduct may be found to exist where the patentee has imposed unreasonable prices for the patented article, or unreasonable terms for licences to work his patent in the United Kingdom, or where the patentee has neglected the markets of the United Kingdom in his efforts to develop a trade abroad.

Hatschek's Patents, 26 R. P. C. 243; *Weber's Patent*, 26 R. P. C. 305; *Boult's Patent*, 26 R. P. C. 388; *Bremer's Patent* and *Hoegner's Patent*, 26 R. P. C. 465; *Kent's Patent*, 26 R. P. C. 670.

66.

It will be considered a satisfactory reason for not manufacturing under the patent in the United Kingdom if the patentee can satisfy the Comptroller that it was impossible to work it in the United Kingdom because of the nature of the invention or because of local conditions prevailing in the United Kingdom, but not in other countries where the invention is worked.

In considering whether it was possible to work the patent within the United Kingdom, the Comptroller may consider the relative cost of production in the United Kingdom and the foreign countries where the patent is

worked. It will not, however, be accepted as a satisfactory reason for not working the patent in the United Kingdom that the profits made by working in the United Kingdom would be smaller than those made by working it abroad.

Hatschek's Patents, 26 R. P. C. 8, 243; *Boult's Patent*, 26 R. P. C. 388.

67.

Where a patentee delays manufacturing under his patent in the United Kingdom whilst he commences and continues manufacturing abroad, the Comptroller may consider as a satisfactory reason for this delay the fact that the machines were constantly being improved during the manufacture abroad, and that the patentee endeavoured to perfect his machine in his own country before selling it elsewhere.

Boult's Patent, 26 R. P. C. 386. See *Fell's Patent*, 27 R. P. C. 28.

68.

It will be generally presumed that the requisite skilled labour or special tools for working a particular invention are available in the United Kingdom. The allegation by a patentee that such special skill or special tools are to be found abroad but not in the United Kingdom will be received with considerable hesitation by the Comptroller. The Comptroller may take such circumstances into account, where a patentee explains by them his delay in manufacturing in the United Kingdom, but the Comptroller will not in the absence of other excusing circumstances accept the difficulty in obtaining special skill or tools as a satisfactory reason for continued non-working in the United Kingdom. The Comptroller may, in particular, enquire in such cases what steps have been taken by the patentee to import the requisite special skilled labour or special tools.

Johnson's Patent, 26 R. P. C. 57; *Boult's Patent*, 26 R. P. C. 388; *Kent's Patent*, 26 R. P. C. 670; *Fell's Patent*, 27 R. P. C. 28.

69.

The fact that a patented article (or process) cannot be manufactured (or carried out) at a profit in the United Kingdom will not be accepted by the Comptroller as a satisfactory reason for not working the patent in the United Kingdom, if it is due to improper delay by the patentee in starting the manufacture in the United Kingdom, whilst the manufacture of the patented article (or process) has meanwhile been established abroad. This will be especially the case where a patentee has developed his invention abroad and finds it difficult or impossible to develop an industry on the same lines in the United Kingdom which he might have developed but for the preference he has given to foreign countries.

Hatschek's Patents, 26 R. P. C. 243.

70.

The Patents Act of 1907 was not intended to penalize want of success when the patentee has done his best to introduce manufacturing under his patent in the United Kingdom. If the failure to establish an adequate industry under the patent in the United Kingdom is due to circumstances beyond the control of the patentee, and not to the manner in which the patent has been used by the patentee, and if it is found that there was a *bonâ fide* intention to manufacture the patented article in the United Kingdom to as large an extent as possible, the Comptroller will not order revocation of the patent merely because the manufacture in the United Kingdom is disproportionately small as against the manufacture of the patented article abroad. In such cases the revocation may even be refused, although the patentee has licensed under his patent the importation of articles made abroad which compete successfully with

the articles manufactured in the United Kingdom, provided that the terms of the licence were not such as to handicap the manufacture under the patent in the United Kingdom.

Hatschek's Patents, 26 R. P. C. 213; *Bremer's Patent* and *Hoegner's Patent*, 26 R. P. C. 464, 465.

71.

In considering whether there has been a *bonâ fide* attempt to work a patent in the United Kingdom on as large an extent as possible, the Comptroller will take into consideration the fact that it is not an easy thing to establish an industry for the first time. The Comptroller will also consider the fact that experiments were necessary in order to overcome initial difficulties in the manufacture and remedy defects in the articles first manufactured under the patent in the United Kingdom. The Comptroller will be assisted in coming to the conclusion that there was a *bonâ fide* attempt to work the patent by evidence of the expense incurred in instituting manufacturing under the patent in the United Kingdom.

Bremer's Patent and *Hoegner's Patent*, 26 R. P. C. 464; *Fell's Patent*, 27 R. P. C. 28. Conf., however, *Weber's Patent*, 26 R. P. C. 308.

72.

Where it is contended by the applicant that the working of a patent is inadequate within the United Kingdom the Comptroller may, besides regarding the actual amount of manufacture at the time being, take into consideration whether the persons who have commenced to manufacture under the patent are in a position to manufacture to a fully satisfactory and adequate extent in the United Kingdom, and that they are really proposing to carry on a genuine business in the patented article or process, and that there is accordingly a reasonable prospect of a satisfactory

increase in the working of the patent within the United Kingdom.

Boult's Patent, 26 R. P. C. 380; *Jottrand's Patent*, 26 R. P. C. 833; *Fell's Patent*, 27 R. P. C. 29; *Weber's Patent*, 27 R. P. C. 32.

73.

If a patentee maintains that he was unsuccessful in procuring the working of his patent in the United Kingdom, it is not sufficient for him to show that he made genuine and *bonâ fide* attempts to dispose of the patent, unless these efforts are, in the opinion of the Comptroller, sufficiently efficient and businesslike. The standard to be applied is what a reasonable man or a reasonable business man would do in the circumstances. It is not enough for the efforts to be sufficient in the patentee's own estimation; they must conform to the standard which an intelligent business man in the United Kingdom would place before himself and adopt. A foreigner who does not comply with these requirements cannot excuse himself by urging that he had done the best according to the standard of his own country or his own peculiar notions of business requirements.

Boult's Patent, 26 R. P. C. 387. See *Weber's Patent*, 26 R. P. C. 306.

74.

A patentee cannot relieve himself from the duty of manufacturing in the United Kingdom by the mere insertion of a few advertisements and the sending round to manufacturers of a few circulars intimating that the owner of the patents is desirous of disposing of the same, or of entering into a working arrangement with firms in the United Kingdom. Where the patentee contends that advertisements, circulars, or other offers made by him in the United Kingdom constituted a reasonable effort on his part to procure manufacture in the United Kingdom, the Comptroller will consider any circumstances which tended

to make such advertisements and circulars or other offers ineffectual. Such circumstances may be found in the fact that the advertisements, circulars, or other offers were framed vaguely, and gave no intimation of the terms on which the owner of the patent was prepared to treat, beyond the statement that such terms would be reasonable, or if the advertisements and circulars are only issued when the period of grace of four years has come to an end.

Hatschek's Patents, 26 R. P. C. 9, 248; *Weber's Patent*, 26 R. P. C. 305. For satisfactory efforts, see *Kent's Patent*, 26 R. P. C. 668, 670; and *Weber's Patent*, 27 R. P. C. 32.

75.

In considering whether the patentee has made due efforts to introduce his invention into the United Kingdom, the Comptroller may consider whether in the circumstances of the case the patentee should, besides making offers to British manufacturers, have given demonstrations of his invention within the United Kingdom.

Weber's Patent, 26 R. P. C. 308.

76.

The Comptroller will not hesitate, except in very exceptional circumstances, to revoke a patent forthwith when a case for revocation has been made out and the patentee has, prior to the application, taken no steps whatever to comply with the requirements of sect. 27 of the Patents and Designs Act, 1907.

Hatschek's Patents, 26 R. P. C. 248. See also *Fell's Patent*, 27 R. P. C. 28.

77.

All patents are equally liable to revocation at the expiration of four years from the date of the patent, whether they

were granted before or after the passing of the Patents Act, 1907.

In the case of patents granted before the passing of the Act the Comptroller may, however, in suitable exceptional cases, take into consideration reasons for not manufacturing (or carrying on) a patented article (or process) in the United Kingdom which would be regarded as unsatisfactory in the case of patents granted after the passing of the Act.

Hatschek's Patents, 26 R. P. C. 248; *Boult's Patent*, 26 R. P. C. 386.

78.

Where it is doubtful how much of a given machine or other complex article constitutes "the patented article" within the meaning of sect. 27 of the Patents and Designs Act, 1907, the question must in each case be determined after an examination of the whole specification, which should be considered like an ordinary legal document.

Lake's Patent, 26 R. P. C. 446. See *Weber's Patent*, 26 R. P. C. 304.

79.

The following rules will generally be applicable where, for the purpose of deciding which parts of a complex machine or apparatus must be manufactured in the United Kingdom in order to amount to manufacture within the United Kingdom of "the patented article," the Comptroller has to decide what the "patented article" is.

(a) As a general rule a patentee is not bound under sect. 27 to manufacture within the United Kingdom any mechanism or machine which he has not specifically described and claimed in his specification. This is, above all, the case where such mechanism or machine is the subject of prior patents which are not in question for the purpose of revocation, and it is only claimed in

combination, if at all, in the patent the revocation of which is in question.

This rule may, however, be inapplicable where it is found impossible to sever the various elements claimed in combination.

(b) If a patentee has claimed a wholly new machine or mechanism, the whole of it must be manufactured in the United Kingdom.

(c) If the patentee claims a new improvement in a well-known machine, he must manufacture the improvement in question in the United Kingdom and not necessarily the whole machine.

(d) If the patentee claims a new improvement in combination with a machine consisting of well-known parts he must, besides manufacturing the improvement in the United Kingdom, put together in the United Kingdom all the parts of the combination claimed.

(e) If the new invention merely consists in a new combination of old and well-known elements, it will generally be sufficient if the patentee puts together the whole of the combination in the United Kingdom, without having manufactured in the United Kingdom the individual parts of the combination; this will, in particular, apply where some or all of the individual parts are the subject-matter of prior patents the revocation of which is not in question.

(f) Where well-known individual parts are claimed as part of a combination, the Comptroller may find that they ought to have been individually manufactured in the United Kingdom, if important alterations in these known parts were necessary for the new combination.

(g) Each case must be decided on its merits, and in each case it will have to be determined on a

proper construction of the patent specification what the patentee's invention really is and what are its essential features.

Lake's Patent, 26 R. P. C. 447; *Fell's Patent*, 27 R. P. C. 28.

MEMORANDUM 1.

The following varying propositions may present themselves:—

(1) A patent is not worked at all in the United Kingdom.
(2) A patent is worked mainly abroad.
(3) A patent is worked mainly abroad, but is worked to an "adequate extent" in the United Kingdom.
(4) The patent is not worked to an "adequate extent" in the United Kingdom, but the patentee attempts to give satisfactory reasons why it is not so worked.

If the applicant for revocation cannot bring any evidence, sub 1 and 2, the Comptroller will not proceed with the matter at all.

Even if the applicant proves number 2 by a *primâ facie* case at the preliminary hearing, the patentee may still be able to satisfy the Comptroller at the final hearing that the *primâ facie* view was incorrect, and that under the circumstances the patent is not worked "*mainly abroad*." He will be in a position to satisfy the Comptroller in this manner, if he can show that it is worked sufficiently in the United Kingdom, having regard to the total relative development of British and foreign industries.

Even if he cannot prove this to him, he may yet be in a position to prove that it is worked to an "adequate extent," having regard to the special circumstances. Of course, in practice this will be, so far as his *objective* reasons for the limited working in the United Kingdom are concerned,

identical with the evidence that would satisfy the Comptroller that the patent could not be considered worked mainly abroad, having regard to the relative industrial development of the United Kingdom and all foreign countries. Therefore no strict theoretical distinction can be made between that which enables a patentee to say that his patent is not worked "mainly abroad," and that which enables him to say that it is worked to an "adequate extent" in the United Kingdom.

Again, where he has to rely on *subjective* reasons to show that he is working to an adequate extent in the United Kingdom, these subjective reasons may be largely identical with the objective conditions prevailing.

Where, again, is one to find the precise dividing line between—

(a) Adequate working, and
(b) Inadequate working when the inadequacy can be accounted for by circumstances which the Comptroller accepts as satisfactory reasons?

The conclusion to be drawn herefrom is, that the definitions of (1) mainly working abroad, (2) adequate working in the United Kingdom, and (3) satisfactory reasons for inadequate working, cannot be strained far enough to provide a definite theoretical distinction. However desirable it may appear to be in the interests of abstract jurisprudence and the symmetry of an attempted codification of the special subject, it would be practically unnecessary and, at any rate, alien to the spirit of the English law.

Memorandum 2.

The Comptroller *may*—

(1.) Revoke the patent.
(2.) Refuse the application for revocation.
(3.) Grant conditional revocation with a period of grace.

Whilst in many cases the Comptroller will have no hesitation in finding the circumstances of the case such as to call for unconditional revocation or, *per contra*, unconditional refusal of revocation, there are manifestly a huge variety of circumstances in which no such unhesitating decision can be given, but where the Comptroller must exercise his *discretion*. His discretionary right to judge of doubtful cases is amply provided for by the permissive language used in sect. 27. Nevertheless, the Comptroller and the judge on appeal justify in each case the exercise of their discretion by reference to *definite reasons*, and thus it was possible to frame a code of rules indicating for many matters the lines on which their decisions will generally be given. Now, according to these rules the patentee is entitled to *refusal of the application* where he can

(a) satisfy the Comptroller that there is adequate manufacture, or

(b) give satisfactory reasons for the manufacture being inadequate or non-existing.

On the other hand, the Comptroller appears bound to *grant revocation* where he finds neither adequate manufacture nor satisfactory reasons for inadequacy.

At first sight, there would appear to be no room for a third course between complete revocation or complete refusal of revocation. When has then a patentee to look for conditional revocation, and when will the Comptroller be unable to decide that he is "satisfied" the one way or the other? The few decisions so far given, in which the question of conditional revocation was immediately in issue, do not contain general principles which are of sufficiently wide application to enable our codification to be completed in this direction. It can only be said that the tendency of the decisions given is in the direction of the following rules. They indicate the *probable tendency* of the Comptroller's policy rather than finally established rules of practice.

(1.) Conditional revocation will only come into question where the Comptroller does not find that there is adequate working at the time of hearing.

(2.) This inadequacy must be accounted for by reasons which disprove intentional abuse or neglect of the British market by the patentee, for otherwise the Comptroller would revoke the patent.

(3.) On the other hand, the excuses given by the patentee must fall short of such subjective or objective reasons as would satisfactorily account to the Comptroller for the inadequacy, for otherwise he would feel himself bound to refuse revocation entirely.

(4.) An intermediate set of circumstances will, however, be present where the *objective* reasons for inadequate working do not provide a satisfactory reason to the Comptroller for the inadequacy, and when, in his opinion, properly conducted efforts would have led to an adequate manufacture, whilst the *subjective* reasons stated by the patentee to account for the inadequacy show that his failure to procure adequate working in the United Kingdom is neither due to *force majeure* nor to positive neglect, but rather to a *bonâ fide misapprehension* of what would in the circumstances have been reasonable efforts to procure the working of his invention.

The criterium will therefore be the patentee's conduct. Where there has been a *bonâ fide mistake* in the way in which the patent rights were offered to purchasers in the United Kingdom, conditional revocation may be pronounced, whereas, with the same amount of manufacture in the United Kingdom the Comptroller might have refused the application had he found that the patentee's efforts were properly conducted, or might, on the other hand, have

granted the revocation had he not been satisfied that some *bonâ fide* efforts were made by the patentee (*a*).

It would be useless to grant a limited period of grace for working the invention, unless the Comptroller could infer from the circumstances that there was a reasonable probability of an adequate start being made within that period, and where a patentee has failed to take substantial preparatory steps (without accounting satisfactorily for no such substantial steps having been taken) to comply with the requirements of the Act, the Comptroller will not be satisfied with his subsequent contrition, his promises *now* to commence in earnest what he ought to have done before, or with the excuse that he had misunderstood the meaning of sect. 27 (*b*).

Where, however, the probability of adequate working at an early period appears from the actual circumstances so strong as to amount to an almost reliable certainty, the Comptroller will not penalize the *bonâ fide* though belated patentee, even by a conditional revocation. Such definite prospects of adequate working in a short time may, in particular, be discerned by the Comptroller, where a *bonâ fide* start has been made with manufacture in the United Kingdom, and a substantial firm has commenced to manufacture, and both its own standing and the manner in which the business has been introduced lead the Comptroller to believe, that a genuine business in the patented article or process will be carried on by them to an adequate extent (*c*).

In another case the Comptroller said:—

"There is at this moment what may be said to be a substantial working, and in any case there will be in a few weeks, and no useful purpose would be served by giving a

(*a*) *Weber's Patent*, 26 R. P. C. 309.

(*b*) *Johnson's Patent*, 26 R. P. C. 58; *Worring and Kortenbach's Patent*, 26 R. P. C. 165.

(*c*) *Jottrand's Patent*, 26 R. P. C. 833.

decision to revoke the patent at some future date when there is evidence to show that there will be a satisfactory output of the patented article in a very short period" (*d*).

In contrast to these views may be quoted part of Mr. Justice Parker's views in circumstances adverse to the patentee:—"Under all the circumstances, I think the revocation of the patents was amply justified; and further, I am of opinion that the refusal of the Comptroller to suspend the revocation was also right. It would be wrong to suspend the revocation of a patent merely on the chance of an industry springing up here under some licence which some manufacturer may possibly in future be willing to take. If the patentee himself or the Belgian licensees had been prepared themselves to start the industry here, and had utilized their year of grace in *bonâ fide* preparations with that end in view, but had found the year too short a period, the revocation might well have been suspended; but upon the evidence I do not believe that either the patentee or the Belgian company has now or ever had any intention of manufacturing by the patented process in this country, or of allowing anyone else to do so, unless the purchaser or licensee will accept a licence from them on terms which they may consider reasonable, but which possibly no prudent purchaser or licensee would accept, and as to the nature of which I am not informed" (*e*).

From the above it will be seen again how difficult it is to define with scientific precision the particular position of the term "adequate working." The decisions in the cases referred to (*f*) really amount to this: that the Comptroller found that there was *adequate* working, taking a *dynamical* view of the position, although there was *inadequate* working, taking a merely *statical* view of the manufacturing position.

(*d*) *Boult's Patent*, 26 R. P. C. 386.

(*e*) *Hatschek's Patents*, 26 R. P. C. 248.

(*f*) *Boult's Patent*, 26 R. P. C. 386; and *Jottrand's Patent*, 26 R. P. C. 833.

Memorandum 3.

The term "adequate working" finds two distinct applications:—

(1) Adequacy of the *number of articles* manufactured in the United Kingdom, and
(2) Adequacy of the *amount of work performed on an article* in the United Kingdom.

Questions of the greatest complexity may obviously arise, particularly where complex machines are in question. In Article 79 of the Code above, the question is decided from one aspect, namely, how much of a complex machine comes into question at all for the purpose of testing whether "the patented article" has been manufactured in the United Kingdom. These rules in Article 79 merely define what "the patented article" is, for the purposes of sect. 27, and do not finally decide that there is necessarily inadequate working, even when a part of "the patented article" has been made abroad. In the latter case the general rules guiding the discretion of the Comptroller come into play. The Comptroller decided adversely to the patentee, in a case where only certain parts of "the patented article" were made in England and inserted in the machine which, as a whole, had been manufactured abroad (*g*).

It is impossible to foresee how decisions will be given where, for instance, the question is seriously raised, how far half-finished materials imported from abroad and merely finished within the United Kingdom, will amount to "manufacture within the United Kingdom." It is equally impossible to foresee from what stage it will be required that materials used in a chemical process must be manufactured in the United Kingdom in order to secure safety. Presumably a liberal attitude will be taken

(*g*) *Johnson's Patent*, 26 R. P. C. 52; and *Fell's Patent*, 27 R. P. C. 25.

towards the patentee, on the lines of paragraph 79 of the Code, but no rule governing all cases can be attempted.

Memorandum 4.

None of the cases so far decided have dealt with the following circumstances:—

An inventor may be precluded by his poverty or his lack of business experience from dealing with his patent to any advantage to himself. It may even be a British inventor whose means just barely suffice to take out a British patent. No working is done in the United Kingdom, but the invention is taken up abroad, where, owing, perhaps, to more progressive methods in the particular industry or to a higher standard of development previously achieved in the industry in question, the invention is worked on an appreciable scale. An application is then made for revocation of the British patent. The application may either be made by persons desirous to manufacture in the United Kingdom or by a foreign manufacturer who desires to import into the United Kingdom.

The Comptroller has full powers to exercise his discretion, and it may well be that in such circumstances the explanation forthcoming from the patentee would be regarded as satisfactory. There is, indeed, every reason for believing that any such case would be dealt with with the greatest consideration. It can simply be said that such a case has not, as yet, arisen.

This is, however, an extreme case (although one which might occur very frequently). Between this *extreme* set of circumstances and cases in which inventors find it *comparatively difficult* to procure the working in England owing to their limited resources there is a wide, doubtful borderland, and hitherto all arguments, both in the legislature and those forthcoming in the course of the cases heard, have been dictated by something like a *presumption* that it is *within the power of the normal inventor to make*

adequate efforts for having his invention worked in the United Kingdom. The general rules so far established, as to what constitutes adequate efforts to introduce an invention into the United Kingdom, are based at least upon the assumption that any inventor can make reasonably efficient, businesslike efforts to procure working in the United Kingdom, if he chooses to exercise his will in that direction.

Obviously, great hardship may ensue in cases where an inventor with patents in many countries is unable to pay attention to them all round, to comply with all the various legal requirements of working his patent, but where he cannot go so far as to prove to the Comptroller that his limited personal resources formed such a barrier to active steps as to amount practically to *force majeure*. The extreme kindness of modern legislation, both in domestic legislation and in international arrangements, towards the *literary* or *artistic producer*, stands in painful contrast to the difficult position of the *inventor* of moderate means, in face of the compulsory working clauses of so many States; even the most humane tendencies of the British Comptroller in applying sect. 27 will be unable to avoid serious material hardship to many an inventor of moderate means. Reciprocal interstatal conventions for the suspension of the compulsory working clauses are the only way out of the difficulty into which the Legislature has thrown inventors by confusing their social functions with those of manufacturers.

Memorandum 5.

The Patents and Designs Act, 1907, does not authorize the Court to make, on a petition for revocation under sects. 25 and 27, the conditional order which the Comptroller is authorized to make under sect. 27, sub-s. 2.

Ord. LIIIA. r. 8 certainly says: "In all proceedings before the Court under the Act the Court shall have all

the powers by the Act vested in the Comptroller, and may make any order which might or ought to have been made by the Comptroller." It appears to the writer that this rule cannot be interpreted as increasing the statutory powers of the Court, and that its operation must be confined to appeals under sects. 27 and 92.

Sect. 92 says: "(1) In this Act, unless the context otherwise requires, 'the Court' means, subject to the provisions as to Scotland, Ireland, and the Isle of Man, the High Court in England.

"(2) Where by virtue of this Act a decision of the Comptroller is subject to an appeal to the Court, or a petition may be referred or presented to the Court, *the appeal shall, subject to and in accordance with rules of the Supreme Court*, be made and the petition referred or presented to such judge of the High Court as the Lord Chancellor may select for the purpose, and the decision of that judge shall be final, except in the case of an appeal from a decision of the Comptroller revoking a patent on any ground on which the grant of such patent might have been opposed."

Accordingly, the judge has ampler powers when deciding an appeal from the Comptroller than he possesses as a Court of first instance.

The Patents and Designs Act, 1908, which limits the apparent bearing of sect. 92 of the Patents and Designs Act, 1907, does not affect the question under consideration.

Memorandum 6.

Article 18 is in agreement with and represents the present actual practice, but it is self-evident that the Attorney-General is explicitly empowered by the Patents and Designs Act, 1907, s. 25, sub-s. 3 (a), to present a petition for revocation on the grounds of sect. 27 to the High Court. There is, strictly speaking, no reason for suggesting that the Attorney-General is not included in the absolutely general terms of sect. 27, "any person may

apply to the Comptroller . . ."; but such an application would not be truly consistent with the general relations between the law officers and the Comptroller in view of sect. 74 of the Patents and Designs Act, 1907, which says: "The Comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to a law officer for directions in the matter." Moreover, the Attorney-General is explicitly authorized by sect. 27, sub-s. 4, to appear and be heard on any appeal from the Comptroller to the Court under sect. 27, and whilst the *locus standi* thus conferred on the Attorney-General is not necessarily inconsistent with a *locus standi* to commence proceedings himself before the Comptroller, the Act, which in sect. 25, sub-s. 3 (a), provides explicitly for the initiative being taken by the Attorney-General in proceedings in the High Court, would probably not have omitted to provide for the eventuality of the Attorney-General's appearance before the Comptroller, had it been contemplated that their relations, generally governed by sect. 74 (not to mention the appellate jurisdiction of the law officer in other matters), should be ignored for the purposes of sect. 27. In the case of *Hatschek's Patents* the Attorney-General appeared in support of the application for revocation, on the patentee's appeal to the judge, but in this case the circumstances were in so far exceptional as the first judicial interpretation of sect. 27 was expected. And it may, perhaps, be anticipated that the present practice will be continued whereby the Attorney-General would confine his intervention to cases where general principles rather than the particular merits or demerits of the special facts are in question.

Memorandum 7.

Whilst Article 35 is clearly in accordance with Rule 81 of the Patent Rules, 1908, it might at first sight appear to stand in contradiction with the views of Parker J. uttered

in the course of his judgment in *Hutschek's case* (*h*): "It must be remembered that the section is in its nature a penal section, that the patentee is on his trial, that mere accusation raises no presumption of guilt, and that the Comptroller is a Court exercising judicial functions. It is not merely the case of a departmental inquiry. The Comptroller is in the position of a judge, and not of a commissioner employed to take evidence and with power to summon before him and examine any person he pleases." There is, however, no real conflict between Rule 81 and Article 35 of the Code, which is based upon that rule on the one side and the dictum in *Hutschek's case* on the other. As the context to the passage quoted clearly shows, the special question only was under consideration how far the applicant for revocation must make out a case which the patentee can be called on to answer; read in this connection the judgment does not go further than to say that it is no part of the Comptroller's duties to make out a case by an *ex officio* inquiry which the applicant himself is unable, on the face of the declarations filed, to supply for himself. In other words, an application for revocation under sect. 27 does not set an *ex officio* inquiry into the conduct of the patentee in motion, but a judicial inquiry into the cases presented by the applicant and the patentee respectively. When, however, the Comptroller proceeds to the hearing of the application, entirely different considerations come into question. Both the applicant and the patentee have by then presented their cases in their declarations, and the Comptroller has to apply substantially the same machinery for hearing and deciding the matter as a judge in an ordinary action with pleadings and particulars. In precisely the same manner as a judge is empowered to provide himself with assistance other than that supplied by the parties' evidence in order to determine the questions presented to him by the parties, Rule 81 (as

(*h*) 26 R. P. C. 247.

interpreted by Article 35 of the Code) grants general and ample powers to the Comptroller to obtain assistance, independent of the evidence offered by the parties, always within the confines of the case as determined by the declarations filed in lieu of pleadings. If this view be adopted, there is no difficulty whatever in reconciling the dictum of Parker J. in *Hatschek's case* with Rule 81 and Article 35 of the Code.

PATENTS FORM NO. 24.

PATENTS AND DESIGNS ACT, 1907.

FORM OF APPLICATION FOR REVOCATION OF A PATENT UNDER SECTION 27 OF THE ACT.

(Patent, 2*l.*)

I (or we) [*Here state (in full) name and address of applicant, or applicants, for revocation*] hereby apply for the revocation of Letters Patent No. of 1 , on the ground that the patented article (or process) is manufactured [or carried on] exclusively or mainly outside the United Kingdom.

My (or our) address for service in the United Kingdom is:

[*To be signed by applicant, or applicants, for revocation.*]

To the Comptroller,
Patent Office, 25, Southampton Buildings,
Chancery Lane, London, W.C.

E. & S. C.
10/3/10

LONDON:

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