is to be expounded, as the usage has been ever after the making of it. And the form of the writ is not upon any demand upon title. Fenner agreed. The Statute de Mercatoribus, that the manner of the recognisance shall be of money starling: but it is sufficient, if it be lawfull money. To which Clench agreed: for it was said, that if that should be revers'd, a thousand judgments in the Common Bench would be revers'd upon the same point.

Rowles and How arrest a man upon a latitat. And there was an obligation made to the sheriff, with a condition to make an appearance; and the question was if it be good; for he may make his appearance by his atturney. Yet Clench and Fenner, cæteris absentibus, thought it to be good; for the law intends, that he is in person, when he is in custodia marescall. And Kempe said it was adjudg'd. Where Mr. Sackford Bayly of the liberty of St. Andrew, took an obligation in his own name, for a personal appearance, upon a latitat. At another day Doderidge mov'd that the bond was void. For the statute being **[173]** general, that he shall take a bond for his appearance, and the sheriff hath not taken a bond for his personal appearance, and he may answer to the action by his atturney; but that he ought to be alwayes in custodia marescall. which is intended in proper person, and ought to be put in bayl, which is good enough. And it was rul'd, that judgment should be entred for the plaintiff, unless better cause were shewed within four dayes. And so it was adjudged, 30 Eliz. Rot. 126. In Banstons the Sheriff of Sussex.

EDWARD DARCY Esquire } Plaintiff. } THOMAS ALLIN OF LONDON Haberdasher } Defendant,

Action upon the case.

[S. C. 11 Co. Rep. 84 b. See *Marsden* v. *Saville Street Company*, 1878, 3 Ex. D. 206; *R.* v. *County Court Judge of Halifax*, [1891] 1 Q. B. 798; [1891] 2 Q. B. 263.]

Mr. Fuller,

The plaintiff declareth, that whereas the Queen perceiving that divers subjects of able bodies which might go to plow, did imploy themselves in the art of making of cards, she did by her letters patents, dated the 13 Junii, anno 30. grant to Ralph Bowes Esquire, that he by himself, his factors, and assigns, as well denizens as strangers, might buy and provide beyond the seas playing cards, and cause them to be brought into England, or in her dominions, by whatsoever means, and to utter, sell, or distribute the same in grosse, or by retail, and that he should have the whole trade of making and selling of cards in England, &c. And that none should have the making and selling of cards within her dominions, but he, for 12 years, streightly restraining all other subjects other than the said Ralph Bowes his factors and assigns from the making and selling thereof.

Then he rehearseth the letters patents made to himself, dated 11 August. anno 40. for 12 years to begin after the expiration of the former term of 21 years, and that he was possessed of that interest, and that the former term expired 13 Junii, anno 42. and that he ult. Junii, caused 4000 grosse of cards to be made in London at his charges, amounting to 5000l. for the necessary use of the subjects.

That the defendant knowing the premises 15 Maii, anno 44. caused 80 grosse of cards to be made, he being a subject, and no assignee or factor to the plaintiff, and that the defendant 16 Maii, anno 44. did sell half a grosse of playing cards to John Freer and Francis Freer for 13s. 4d. which were not made in England, or brought into England by the plaintiff or his factor, without licence of the Queen, or consent

of the plaintiff, he being a subject, whereby the plaintiff was defrauded of the benefit which he was to enjoy by his charter to his damages of 200l.

The defendant pleadeth to all, except half a gross of cards sold to Jo. Freer, and Francis Freer, not guilty, and for them pleadeth that the City of London is an ancient city, and that from time whereof no memory of man is to the contrary, within the same city, there hath been a fellowship or company of citizens called Haberdashers of London: and that within the same city one lawful custom hath been used de tempore, &c. That every citizen of the said company may buy, sell, and merchandize all things merchandable within the realm of England. And sheweth that the defendant tempore quo, &c. and before and since was a citizen and haberdasher of London: and that by reason thereof he did sell the said grosse of cards, as was lawful for him to do, and **[174]** averreth that they were things merchantable.

To this plea the plaintiff hath demurred in law.

Edward Darcy Esq. plaintiff. Thomas Allin defendant.

Mr. Fuller,

This cause is of great weight, and to be dealt in with good regard, for on the one side, it concerneth the prerogative of the Queens Majesty in a material point thereof; and on the other side it doth concern many of Her Majestys subjects in present; and in the rule thereof it may concern all the subjects in England; and yet the cause is such, as may, yea ought to be disputed and censured before competent Judges, as this Court is. For I learn in Bracton, lib. 1. cap. 8. thus. Ipse autem Rex non debet esse sub homine, sed sub Deo & sub lege, quia lex facit regem, attribuat igitur Rex legi quod lex attribuat ei. And after he saith, Non est enim Rex ubi dominatur voluntas, & non lex: which latter words, as also the cases following, prove the intent to be sub lege loquente. According to the opinion of Bracton it is said, 19 H. 6. fo. 62. That the law is the most high inheritance of the realm, by which the King and all his subjects are governed; and that if the law were not, there would neither be King nor inheritance: for to outrun the law, is to hast to confusion.

This law all subjects are bound to obey, and the Queens Majesty hath given her assent to perform the same in some sort at her coronation by her oath, which I know not precisely what it is; but I find by the statutes of 2 E. 3. and 14 E. 3. and others, that the King shall grant no pardon contrary to his oath, and that if he do grant any such pardon contrary to his oath, it shall be void; which sheweth, that his oath referreth to some rules of law. And to come near to the point of prerogative, it is said in the Commentaries, fol. 236. That the law doth so admeasure the Kings prerogative, that it shall not tend to the prejudice or hurt of the inheritance of any of his subjects.

Being thus inabled to speak in this weighty cause, to the intent that the whole course of my argument may the better be conceived, I have divided that into these heads.

1. That all patents concerning the King and his subjects are to receive exposition and allowance how far they are lawful, and how far not, by the Judges of the law.

2. That the Judges in the exposition of the Kings letters patents, are to be guided not by the precise letters, and the words of the letters patents, but by the laws of the realm, the laws of God, and according to the ancient allowance thereof. And herein I mean the laws of God, because we are now the house of God and the people of God, the Jews being cut off to whom God was the law-giver, and we being ingraffed in their stead: so as the judgments that are executed, are not the judgments of men but of God, and he is with them in the cause and in the judgment.

3. That the letters patents made to the plaintiff are contrary to the laws of the realm, contrary to the laws of God, hurtful to the commonwealth, and in no part good or allowable.

[175] 4. That the action upon the case grounded upon this void patent, is no lawful action.

5. In the last place I will answer all the material matters and cases that have been alledged on the plaintiffs part, to the intent that this monopoly patent should have no ground to stand upon.

In the argument of this case I am eased much: for that it is confessed by Mr. Solicitor, who very learnedly argued on the part of the plaintiff, that such letters patents as tended to change the law, or course of any mans inheritance, or that was contra commune jus, or that tended to any generall charge of the subjects, were void in law, for which I meant to have put divers cases, which I omit.

It is agreed by the Court, that the grants of the King shall not be expounded according to the letter; but according to the antient allowance, and to prove the same, I will put some particular cases. (10 H. 7. f. 14.)

The Kings grants in many cases are controlled by the Judges of the law for the benefit of the King, contrary to the expresse letters of the grant. As when the King granteth the mannor of Dale, and all manner of woods, underwoods, mines and quarries in the same: yet mines of gold and silver shall not passe. And so when the goods and chattels of persons qualitercunque damnatorum are granted, yet the goods of persons attainted of treason passe not, because by rule of law these things of prerogative will not passe by such general words. So in cases that concern the subjects as shall hereafter appear, the Judges shall controll patents contrary to the letters, because they have liked rules of law so to do, whereby it shall appear that the Judges stand indifferent between the King and his subjects, for which many cases more might be put on the Kings part: for power of judgment is so commited to the Judges. (Com. fo. 337. 45 ass. p. 15. 22 ass. p. 49.)

Now I will shew you that patents shall be controlled for justice sake, albeit they do concern but particular persons, and not generall ones. (1 E. 3. fo. 26.)

The King granteth to I. S. that he shall not be sued by N. T. this is void: so when it is more particular. As when the King doth grant to the Chancellor of Oxford, that he shall not be sued for debt or trespass concerning his office, is void. And when the King doth grant conusans de plee licet ipsemet fuerit pars, or generally, not naming before whom, is void for the reasons abovesaid, being contrary to the rule of justice. (8 H. 6. fo. 19. 1 H. 4. fo. 6. 44 E. 3. fo. 27. 6 H. 4. fo. 1.)

A commission is granted under the Great Seal of England to persons of credit, to take the body and goods of I. S. without indictment and due proceeding according to law. This is adjudged unlawful. (42 ass. p. 5.)

A commission is awarded to persons of credit to examine the title of Scrogges concerning the office of exigenter, and to commit him to prison, if he refused. Scrogges refused, and was committed to prison, but was delivered by the Judges of the Common Place upon a habeas **[176]** corpus, as an unlawful imprisonment, the reasons I gather to be these. (23 Eliz. fo. 175.)

The law knoweth no commandement but by writ, nor no minister to execute the commandements of the law, but the sheriff and the officers under him, for he is the only lieutenant in the time of peace, who is to be guided by the law, and to be controlled, if he follow not the course of law in the commandements of the King or of the law.

For commissions to subjects of any absolute power, which be occasions of absolute wrongs, as the law knoweth them not, so the law alloweth not such proceedings. I do not here speak of justices of peace, who have power given them by divers statutes, who if they exceed their power, are to be punished by law, nor of commissioners of bankrupts, nor of sewers, which are grounded upon particular Acts of Parliament. (13 Eliz. cap. 7. 23 H. 5. cap. 5.)

Now touching patents that tend to prejudice or to charge particular subjects, how they are to be controlled, I will put some cases.

20 acres of land are holden of the Bishop of Winchester, by I. S. I. S. granteth the same 20 acres to the King, to the intent that the King should grant them in mortmayne to a monastery; which is done accordingly. Afterwards, notwithstanding that the grant to the King were lawful, and the grant of the King to the monastery in itself is lawful; yet because it tended to take away the mean surrender of the Bishop of Winchester, upon petition it was repelled. (19 E. 3. fo. 39. 46 E. B. Pet. 19.)

The King granted to A. B. his servant the office of measuring of cloth in London, with a fee, and a writ was awarded to the Mayor and Sheriffs of London to put him in possession thereof, who refused to put him in possession, and returned that there is no such office in London. Hereupon it is excellently argued by the Judges, how far the King may charge his subjects by his patents, and agreed, that without the Parliament the King cannot grant any new office with charge to charge the subjects: and although in this case there had been a former grant of this office to an other man deceased, and that he had executed the office, and received some fees for a time, yet the Judges thought that seisin by wrong upon an unlawful patent to be of no force. (13 H. 4. fo. 15.)

It is agreed, that the King cannot grant toll to be taken in the highway, which is free, but pontage and murage may be granted; because there is quid pro quo; and no longer than the bridge is maintained for use of the subjects, nor shall continue for defence of the subject, the toll is not due to be paid for the pontage, nor for the murage. (13 H. 4. fo. 15. 50 E. 3. tit. p. 112. Brook.)

Like learning in the cases of the office of brocage, tonage, &c. and the difference between the clerk of the market and such offices. (22 H. 6. fo. 14. 21 E. 4. fo. 1.)

I. S. is indebted to R. in 20l. by contract. R. is outlawed, the Queen shall not have this debt, for the Queen shall rather lose this debt, than the subject lose the benefit of waging of law, wherein it is to be noted, how indifferent the law is for the subject. (49 E. 3. fo. 5. 50 Ass. p. 1. 16 E. 4. fo. 4.)

[177] The King shall not arrest one for suspicion of felony or treason, because if it be without cause the subject hath no remedy. By Markham. So that the King shall rather lose the liberty that a subject hath, than that the subject shall lose the benefit of his action. (4 H. 7. fo. 4. prerog. 139. Brook.)

To come near to the point of prerogative, the King did grant a protection, quia profecturus, to I. B. and sheweth it was for the service of the King, and of his realm at Rome, to continue for 3 years, & sit quietus ab omnibus actionibus sectis, &c. and it was refused by the Judges, for that it was for 3 years, and the law alloweth but for one year. And for that there was not exception of dower, quare impedit and assize, as should be in such protections. (39 H. 6. f. 39.)

A protection was granted to I. B. quia profecturus in a voyage royal with the King into Ireland, and rejected by the Judges, because it was no voyage royal into Ireland, otherwise in Scotland. Per Noyle. Note that these protections are not to

take any thing from the subject; but tend only to delay the lawful sutes of some particular subjects, and yet rejected as abovesaid. (1 E. 4. f. 29.)

NOW TOUCHING THE KINGS MERCY, HOW THAT SHALL BE CONTROULED FOR THE GOOD OF THE SUBJECTS, IT IS MEET TO SEE.

The King doth pardon I. S. the making or repairing of a bridge, which he ought to do: now for that in this bridge the subjects have a use or kind of interest, for that reason the pardon is void. 2 R. 3. Rex potest dare licentiam alicui ad deferend. literas apostolicas infra hoc regnum, ubi tantum Regem tangat, sed non ubi tangat partem. (Com. f. 48. 3 E. in Northf. ss. 445. 2 R. 13. fo. 12.)

Thus it appeareth how all the attributes given to the King, of power, justice and mercy are in him to dispose to the good of the subjects: that justice controuleth both the power and mercy in grants, commissions, protections, pardons, as for the good of the subject in the time of 1 E. 3. H. 4. H. 6 E. 4. H. 7. &c. why did the Judges withstand the Kings letters patents in this sort? And why are these things recorded and left to us, but that it may appear to the ages following what great care those reverend Judges had to leave the land and people in like liberty to the ages following as they found it, and so ought every man in conscience in his place to have the like care.

NOW TOUCHING THIS PARTICULAR PATENT.

The pretence is chiefly upon this, viz. that the Queen may restrain all card-playing, and then by consequence all making, buying and selling of cards, because for the good of the whole common-wealth, the card-maker or seller may receive particular loss in his trade.

First it is not to be confessed, that the Queen may by letters patents without Parliament restrain all card-playing, which I will prove by reason, use, and by intent of statutes.

For this is true without any contradiction, that no man can continue alwaies in labour, alwaies in reading, or alwaies in meditation, but he must have reasonable recreation, and all persons cannot take recreation **[178]** abroad, for some be sick, weak, or impotent, that need refreshing, some seasons are such, as that there is no recreation abroad, and in these times, and to these persons to make restraint is wrong.

For as Mr. Solicitor said, that the benefit of government was not that the subjects should live safely only, but tutè vivere, pacificè vivere, honestè vivere, & jucundè vivere. And the law in ages past alloweth as much: for Cicero saith, that sex est vinculum civitatis, fundamentum libertatis, & sons æquitatis; and how can it be said that freemen should according to the Statute of Magna Charta, use libertatibus & liberis consuetudinibus suis, when Mr. Darcy hath a patent to restrain cards, another to restrain tennis play, another hawking and hunting, &c. Is not this to make freemen bondmen? And if the Queen cannot to maintain her war, take from her subject 12d. but by Parliament, much lesse may she take moderate recreation from all subjects, which hath continued so long, and is so universal in every country, city, town and houshold, but to punish the abuse is necessary: for common-weals are not made for King's, but Kings for common-weals. (Mag. car. c. 29. 25 E. 3. a. 8.)

The statutes of 12 R. 11 H. 4. and 5. do shew plainly that none were restrained from playing at dice, but servants, and they not altogether restrained, but at times, and from card-playing none restrained untill 33 H. 8. and in that statute, certain persons and certain places restreined, which declareth the intents of the Parliaments to be, that it should be lawful for the rest not restrained, and for them restrained in

the times prescribed for times for them to play in. 12 R. 2. cap. 6. 11 H. 4. cap. 4. 33 H. 8. cap. 9.

And if in the times of K. R. 2. H. 4. and 5. it was thought necessary to have several Acts of Parliament to restrain the use of playing in servants, much more is it necessary to have an Act of Parliament to restrain all the subjects of the realm from the moderate use of playing, and not by letters patents only.

But allow that the Queen could restrain card-playing; yet that proveth not that this patent is good, which restraineth not the place, but rather increaseth playing at cards, and taketh away the trade of making and selling of cards from many subjects that used it well, and giveth it to another that knoweth not how to use it: for thus should the argument be to uphold this monopoly patent.

Major. All patents made for the general good of the realm may restrain some subjects in their particular trades lawfully.

Minor. But this patent is made for the general good of the realm.

Conclusio. Therefore this patent may restrain some in their particular trades lawfuly.

The minor proposition or assumption is untrue, and that I will prove so plainly as no man shall gainsay that, and so the force of these letters patents must needs fall to the ground.

[179] Before the making of these letters patents, many subjects were set on work in making of cards, as the preamble of the patent doth partly expresse, and as in truth it is, for that many carvers, painters, carpenters, card-makers and card-sellers maintained themselves, their children and families by their trade.

And now Mr. Darcy hath power to bring all from beyond the seas, contrary to the intent of the statute of 3 E. 4. cap. 6. 1 R. 3. cap. 12. and to restrain all the subjects from making and selling of the same, which is a manifest hurt to the realm, by the opinion of 2 Parliaments.

Where before this patent, men skilful in the trade, being subjects born, and brought up 7 years as apprentices in the trade, according to the statute of 5 Eliz. were imployed in this work in due order, to be seen and corrected by the wardens of the company.

Now Mr. Darcy may set to work in this trade I. a done, and his fellows, without any view search or correction: yea he may set a work only strangers if he will, which is also hurtful to the realm.

Where before cards were, and ought to be sold at reasonable prizes, or else to be punished as enhauncers of merchandize, as appeareth 27 E. 3. by the common laws of the realm.

Now Mr. Darcy by the words of this patent may sell cards for his most advantage, as he doth, viz. one grosse for 35s. where the haberdashers have offered to sell better for 20s. the grosse, and this is malum in se against the common law, that cannot be dispenced with by pat. as malum prohibitum may be.

Where before if any made naughty and false cards, one might buy of others better cards; for that there were then many makers and many sellers.

Now by this patent, be they good, be they bad, be they false, be they true, be they dear, or good cheap, you must buy all of him and his assignes in what manner pleaseth him.

Where before if any person by his industry had obtained excellent skill in his trade, he might have reaped the fruits thereof, and that hath been thought the surest thing a man could obtain, skill and knowledge, because theeves could not steal it.

Now Mr. Darcy hath devised a means to take away a mans skill from him, which was never heard of before, which if others should do the like in other trades, it would discourage men to labour to be skillful in any art, and bring in barbarism and confusion.

Where by the laws of God, the poor and the stranger were to be relieved with the gleaning of the harvest, and the latter grapes of the vintage.

Mr. Darcy by his patent may take all the harvest and vintage of this trade from the natural subjects, and give it to strangers, and not leave so much as the gleaning of the harvest or latter grapes of the vin-**[180]**-tage for natural born subjects, which is an hatefull thing:

And may not these subjects thus put from their trade, say as the steward in the Gospel said, when he was put out of service, What shall I do? digg I cannot, and to beg I am ashamed, I will use this fraud, &c. And if none will trust them to be beguiled, then will they rob and steal, and become thieves and traitors; for extreamity breedeth nothing but thefts, and then what comfort this will be to him that procured this mischief, I leave to God and his own conscience, remembring this withall, that Bracton saith, It is a good part of a King to reject no person, but to make every person profitable to the common-wealth. And Cicero saith, Qui autem parti consulunt, partemque negligunt, seditiones & discordias inducunt.

Now to prove that it is against the Law of God and Man.

The ordinance of God is, that every man should live by labour, and that he that will not labour, let him not eat. (Thess. cap. 3.)

This general ordinance of God, by the policy of the realm, and by the laws and customs of the same, is distributed into several arts, manual occupations and trades, whereby we may have the mutual help one of another, and all governed in due order by the wardens and governours of the same society and fellowship.

Now therefore it is as unlawful to prohibit a man not to live by the labour of his own trade, wherein he was brought up as an apprentice, and was lawfully used, as to prohibit him not to live by labour, which if it were by Act of Parliament, it were a void act: for an Act of Parliament against the law of God directly is void, as is expressed in the Book of Doctor and Student, much more letters patents against the law of God are void.

But Mr. Darcy will say this is no necessary trade, and therefore, &c. so others may say the like of silk lace, another of womens tyers, another of gilt rapiers and gilt daggers, and some already have added a reason for the onely making of aqua vitæ aqua composita, vinegar and allegant throughout the whole realm, whereby the several trades that now maintain many thousand good subjects may be cut off by letters patents at an instant upon bare sugestion, which ought only to be done in Parliament; where amongst the assembly of such wise men, some will consider the inconvenience, some the damage, some the profit, some the mischief; some what is meet for this place, some for that place: therefore it is well said of Plato, Except wise men be made governours, or governours made wise men, mankind shall never have quiet rest, nor vertue be able to defend it self.

Now I will put a case of the common law. I. S. is bound to A. B. in 40l. that he shall not use the trade of a dyer in the town of Dale for the space of half a year. The condition of this bond is thought to be against the law, to restrain a man from his

lawful trade, though it were but in one town, and but for half a year: much more this patent, which is to restrain men from their trade 21 years, and throughout the whole realm. The like patent whereof is not to be found in any record, or **[181]** in any book-case within this realm, since the Conquest, until within 20 or 30 years last past, which I do more confidently affirm, because Mr. Solicitor being a very learned man, and others who have argued in this cause for the plaintiff, after much search and study cannot find any such case or record. (2 H. 5. fol. 5.)

I will put other cases where the laws of God and the laws of the realm do agree, as one squared by the rule of the other, to confound this monopoly patent.

Thou shalt not take to pledge the upper or nether milstone, for it is his living. By this law none may take to pawn that which was the living of another, and so to force him to seek another trade, though constrained by need, he give his consent thereunto. (Deut. 24. 6.)

But Mr. Darcy will take from men against their wills, their living and lawful trade, and force them to seek other trades, directly contrary to the law of God.

Agreeing to this rule of God are these book-cases, viz. that none shall distrain, which is a kind of taking to pledge, the upper or nether milstone; yea though the milstone be not then upon the mil, but lieth in the house to be picked, because it is his living, where the other goods in the house are destrainable by law. (14 H. 3. fo. 25.)

In like manner the anvil in the smiths shop, the garment in the taylors shop, the horse within an inne, or at a smiths forge a shooing, are not distrainable, because it is their trades and living, although the rest of the goods in the house are distrainable. (22 E. 4. 49.)

This difference I have always thought reasonable, that because justice floweth from the Queen, as from the head or fountain of justice, that therefore she may grant or restrain the same, more liberally or more sparingly, as she thinketh good, according to the rules of law.

As to grant conusans of plea in such actions, within such precincts as she thinks good, and to save the defaults of the tenant by writ of warrantia die, giving of power to make atturneys in Court by dedimus potestatem, and such like things.

But arts and skill of manual occupations rise not from the King, but from the labour and industry of men, and by the gifts of God to them, tending to the good of the commonwealth, and of the King, the head thereof, and do meet with commutative justice by the way, to see that there be just measure and just weight in things to be measured and weighed, and that no deceipt or fraud be used therein, to the deceipt of the subjects, and for that purpose the office of the clark of the market, gager, and garbler, &c. are used; but to restrain men from any lawful trade whereunto they are inclined, is unnatural and unmeet.

By these statutes and others, as well all merchant-strangers as denizens, have liberty granted to them to bring their wares into England, and to sell the same in grosse, or by retail, notwithstanding any patent, priviledge or custom to the contrary: therefore this monopoly patent to restrain, or take away that from the subjects being merchants, which was **[182]** given unto them by Parliament, is not good in law, for it is not like the case where the King may dispense with malum prohibitum, and there it is said, that such a charter is hurtful to the King and to his people. (9 E. 3. cap. 1. 25 E. 3. cap. 2.)

And the statute of 26 H. 8. cap. 10. doth give power to the King during his life to restrain or set at liberty traffick beyond the seas for certain countries, which act had been an idle and vain act, if the King by letters patents might have done so much

without act. And the writ of ne exeas regnum, was never granted generally against all merchants, but against particular persons, for particular causes; for if partial affection by private discretion do govern publique affairs, there one mans will becometh every mans misery. (26 H. 8. cap. 10. 31 E. 3. cap. 9.)

It is a ground in law, that the King by his patent cannot do wrong, as to make discont. &c. and that his prerogative is no warrant to injure any subject. (Case de Alton woods, fo. 44.)

And sith the law is clear, that if the King grant my lands or goods, the grant is void and unlawful. I see no reason when the King cannot grant away 22d. which I have gotten by my trade, that he should grant away my trade whereby I got that 22d. and maintained my wife and children. (1 H. 4. c. 8. 21 Ass. 24. 8 H. 4. fo. 168.)

That this is a monopoly patent it appeareth by the description or definition set forth by Mr. Solicitor, which is thus. It is a monopoly cum penes vestrum potestas vendendi sit. But when there be many sellers, although they be all free of one company, as goldsmiths, clothiers, merchants, drapers, taylors, shoomakers, tanners, and such like, who have settled governments, and wardens and governours to keep them in order, they were never accounted a monopoly, which the statute of anno. 5 Eliz. in some sort proveth, because in many of these trades all persons are prohibited to use the same, but onely such as have served in the same trade seven years as an apprentice. But if they, or any other like society, should conspire together to inhaunce the prices of their wares, or of their labours, it is a thing punishable by the common laws, presentable in every Court, and to be censured severely in the Star Chamber; but in this patent the sole and whole traffick for the making, buying and selling of cards throughout the realm is given to Mr. Darcy and his assigns onely for twenty one years; which is plain monopoly patent.

Now therefore I will shew 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 9th Eliz. there was a patent granted to Mr. Hastings of the Court. That in consideration that he brought in the skill of making of frisadoes as they were made in Harlem and Amsterdam beyond the seas, **[183]** being not used in England: that therefore he should have the sole trade of the making and selling thereof for divers years; charging all other subjects not to make any frisadoes in England during that time, upon pain to forfeit the same frisadoes by them made, and to forfeit also 100l. the one moiety thereof to the Queen's Majestie, the other to Mr. Hastings: upon which patent Mr. Hastings about 20 years past exhibited an information in the Exchequer against certain clothiers of Coxsall for making of frisadoes, contrary to the intent of this patent. To which information, for that it was against law to have such penalties of the goods, and 100l. to be forfeited by force of a letter patent; therefore did demur upon the information, and moved the Court, and the opinion of the Court being clear against him, he never went further in his information: but exhibited his English bill in the Exchequer Chamber against them, where upon the examination of the cause it appeared that the same clothiers did make baies very like to Mr. Hastings frisadoes, and that they used to make them before Mr. Hastings patent; for which cause they were neither punished nor restrained from making their baies like to his frisadoes.

Another monopoly patent was granted to Mr. Matthey a cutler at Fleetbridge in the beginning of this Queens time, which I have here in Court to shew, by which patent it was granted unto him the sole making of knives with bone hafts and plates of lattin; because as the patent suggested, he brought the first use thereof from beyond seas; yet neverthelesse when the wardens of the company of cutlers did shew

before some of the councel, and some learned in the law, that they did use to make knives before, though not with such hafts, that such a light difference or invention should be no cause to restrain them, whereupon he could never have benefit of this patent, although he laboured very greatly therein.

Lastly the monopoly patent granted to one Humphrey of the Tower, for the sole and only use of a sive or instrument for melting of lead, supposing that it was of his own invention, and therefore prohibited all others to use the same for a time: and because others used the like instrument in Darbyshire, contrary to the intent of his patent, therefore he did sue them in the Exchequer Chamber by English bill. In which Court the question was, whether it was newly invented by him, whereby he might have the sole priviledge, or else used before at Mendiff in the west country, which if it were there before used, then the Court was of opinion he should not have the sole use thereof.

In Easter term last, in the Kings Bench Gowby brought an action of trespass against Knight for false imprisonment. Knight justified because of the Mayor and Citizens of C. have used time out of mind to nominate a town chandler within Cant. and that all the butchers within Canter. should sell there tallow to him at such a price as the mayor should appoint, or else to be committed: and that because the plaintiff was a butcher in the town, and refused to sell his tallow to the town chandler, was committed, and so justified, &c. Whereupon the Court was moved this term, that the issue concerning the custom might be tryed out of Cant. And the Court then thought that the custom was not good, but unreasonable and unlawful, because it did tend to a monopoly. Wherefore the plaintiff did demur upon the same plea.

[184] NOW TOUCHING THE ACTION OF THE CASE GROUNDED UPON THE MONOPOLY PATENT.

There is no wrong done to the plaintiff by the defendant selling of cards better cheap than the plaintiff would, though he received loss, and therefore no cause of action, like unto the case of 11 H. 4. f. 47. where there was a school of long continuance, and another had erected a new school in the same town; whereby the school-master of the ancient school gained not so much as he did before, yet he could have no action against the new school-master for the same: and Mr. Darcies case is much stronger against him: for that he newly intruding into the trade of making and selling of cards, doth bring his action against the ancient card-seller for hindring his sale: which is all one, as if the new school-master should bring his action against the old school-master for teaching so well that he cannot gain so much by teaching his scholars as he desired, which the law will not allow, being damnum absque injuria, as in this case. (11 H. 4. f. 47.)

A man hath a mill in a town of ancient continuance, and another buildeth a mill in the same town, whereby some of his customers doth forsake the ancient mill, this is no wrong though it be damage, and therefore no cause of action, and then also I compare that to this case. (22 H. 6. fo. 14.)

I. S. hath a pasture in the town of Dale, where the tenants do use sometimes to put their cattel to jost, and another person in the same town doth recover grounds overflown with water, and doth make that good pasture, where the tenants have cattel better cheap to the damage of I. S. and yet no cause of action, being neither wrong to I. S. nor hurt to the common-wealth.

The case was this, B. said unto R. that I. S. said, that if he did meet R. he would kill him, whereupon R. for fear of I. S. fled so fast that he killed his horse: this was damage to him, and yet he had no cause of action. So in our case, although the ancient cardseller do sell better cheap than Mr. Darcy, yet it is no wrong to him nor to the common-wealth, so no cause of action.

NOW TO ANSWER THE CASES AND MATTERS MATERIAL TO BE ANSWERED.

Object.

It is first objected, that it is unlawful and hurtful the playing at cards in all parts of the realms, and therefore restrainable by pat. in all parts of the realm.

Resp.

I answer, that moderate playing at cards was never thought unlawful, or prohibited generally, but for servants, and in some particular manner for some persons, which by the intent of the same laws must be thought lawful for the persons not thereby prohibited. And Mr. Darcy in his declaration saith: that he made 4000 grósse of cards for the necessary use of subjects, &c. which necessary use cannot be of a thing hurtful. (12 R. 2. c. 6. 1 H. 4. c. 9. 33 H. 8. c. 9.)

This patent is no restraint of card-playing. But rather an occasion [185] of increase of play, as I can prove plainly, as it is now used, and doth but take the trade of making and selling of cards from many persons, and giveth that trade to one, which is unlawful.

Object.

Where it is objected, that an action of case was maintainable for money won by false dice.

Resp.

This maketh rather against the plaintiff, than with him, for that if it had been won by true dice, it had been so lawfully done, that the party had had no remedy.

Object.

Where they object a writ in the register, rehearsing of a grant made to the Abbot of Westminster, that he should have a fair to continue 32 days at Westminster, and that none during that time should buy or sell any merchandise, within seven miles of the fair.

Resp.

To this I answer, that upon this writ there was never judgment or allowance given in any Court, and that it is unreasonable and absurd that none should buy or sell within seven miles, whatsoever occasion should happen: as many times men are robbed of their apparel, and then they must go seven miles to buy new, or go naked, and there be divers writs in the register which have no warrant of law, as action of waste against tenant for life, when there is a mean remainder for life between, and likewise an action of waste by the heir for waste done in the time of the father, which are against law, and it is a fit answer to vouch against this writ, the writ that Thorninge saith he hath seen in the register, precepe Domino Regi, which is as absurd as the other, though in an other degree, which writs are more meet to be concealed than vouch'd, by such as regard the credit of the law. But it was adjourned till another day.

DIXSON AGAINST WILLIAMS.

An action upon the case was brought against Chester. And he counts, how the plaintiff did certain businesses for him the defendant. And the defendant said to him, Do it, and I will repay whatsoever you lay out. And he shews that he had expended 4l. And does not shew in certain and particular circa quid. And for that cause it was held ill.