



Credible commitment, patents, and monopolies in England during the seventeenth-century

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Left, Anthony van Dyck's *Charles I with M. de St Antoine* (1633)

Beginning in the 1560s, a technologically backward England started awarding patents of invention, primarily to encourage the importation of new technology. However, the policy was soon corrupted such that monopolies of production and trade were being awarded under the guise of patents for invention, with rents payable to the Crown.

These patents of monopoly spread such that they came to cover a vast range of goods. From a parliamentary debate in 1601:

Upon the reading of the Patents aforesaid Mr Hackwell of Lincolns-Inn stood up and asked thus; Is not Bread there? Bread quoth one, Bread quoth another; this Voice seems strange quoth another; this Voice seems strange quoth a third: No quoth Mr Hackwell, if Order be not taken for these, Bread will be there before the next Parliament

Monopolies were immensely unpopular – and the Crown made successive and escalating assurances to revoke monopoly grants, to cease awarding monopolies, and to allow patent validity to be triable at common law:

Verbal promises: 1571, 1597, 1601

Proclamations: 1603, 1610, 1621, 1623, 1639

Legislation: 1624 (The Statute of Monopolies)

These assurances were made when Parliament was in session and they were reneged upon as soon as the Crown found it convenient to do so - the Crown was incapable of credible commitment. Instead, it is only after the Restoration of the Crown in 1660, and the Glorious Revolution of 1688, that the Statute of Monopolies takes effect – that the Crown ceases awarding patents of monopoly:

The transition to modern patent rights in England only began once there had been underlying constitutional change in the second half of the C17th



In C17th England, conflict over where sovereignty resided. Did it reside with the Crown – which increasingly aspired to a European inspired absolutism, apparent in van Dyck's *Charles I with M. de St Antoine* (1633):

- The white steed represents the body politic, note Charles's effortless, calm control
- Charles is physically elevated above commoners, his equerry hurrying in service
- Framed beneath a classical arch invoking the image of a triumphant Roman conqueror

Or with the 'King-in-Parliament'?

Before 1642, Parliament's sole authority to grant direct taxes provided one (diminishing) check on royal authority

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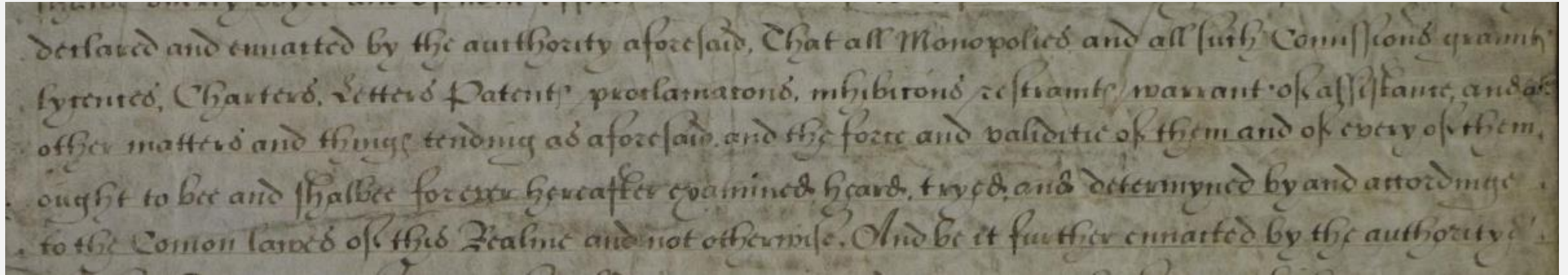
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Statute of Monopolies (1624)

Parliament That all Monopolies and all Commissions grants licences Charters and Letters Patent heretofore made or granted or hereafter to be made or granted to any person or persons bodies politique or Corporate whatsoever of or for the sole buying selling making working or using of any thing within this Realme or the Dominion of Wales or of any other Monopolies or of power libertie or facultie to dispence with any other or to give licence or tolleracion to doe use or exercise any thinge againste the tenor or purpoe of any lawe or Statute or to give or make any warrant for any such dispensacion licence or tolleracion to be had or made or to agree or Compound with any other for any penaltie or forfeitures bymited by any Statute or of any Commite or promise of the benefitt profitt or Commoditie of any forfeiture penaltie or some of them that is or shall be due by any Statute before iudgement thereupon had and all Proclamations inhibitions restraint warrant of assistance and all other matters and thinges and whatsoever any waye tendinge to the instituting erecting strengthening furthering or comitting of the same or any of them are altogether contrary to the lawes of this Realme and soe are and shall be utterly voyde and of none effect and in no wise to be put in use or execution And be yt further

§ 1 all Monopolies, and all Commissions, grants, licences, Charters and Letters Patents heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politique or corporate whatsoever, of or for the sole buying, selling, making, working or using of any thing within this Realm ... are altogether contrary to the Laws of this Realm, and so are and shall be utterly void and of none Effect

Statute of Monopolies (1624)



§ 2 that all monopolies, and all such commissions, grants, licences, charters, letters patent ... the force and validity of them and of every of them ought to be and shall be for ever hereafter examined, heard, tried and determined by and according to the common laws of this realm, and not otherwise

The statute does not initiate changes to the law, rather it is perceived as being declaratory of the prior common law on the subject (e.g. *Darcy v Allen* [1602])

The statute received royal assent on 25th May 1624 and the parliamentary session closed on the 29th May – but the terms of the Statute are abrogated almost as soon as it is politically convenient for the Crown to do so

In September 1624, the Attorney-General (a legal officer working on behalf of the Crown) submitted a bill to the Court of Star Chamber on behalf of Philip Foote, complaining that Foote's patent for preparing clay for manufacturing tobacco pipes had been infringed by the named defendants

The Attorney-General represented the patent as a bona fide patent of invention, having been awarded in recognition of Foote's '*skill and industry and to his great charge*' in being able '*to provide and prepare clay of that temper and quality*' which could be used to make tobacco pipes. TNA, STAC 8/29/9

However, a 1623 parliamentary enquiry had specifically condemned the patent as a monopoly, noting in particular that tobacco pipes had been in common usage beforehand and that Foote had shown no '*arte or industry*' to entitle him to a patent

The patent was also supplemented by a ban on the manufacture and import of all other types of tobacco pipe clay and had reportedly enabled Foote to increase prices from 1s. to 3s. per unit. (Taylor, 2022, pp.291-93).

Finally, the Court of Star Chamber was a prerogative court, not a common law court where the matter should have been tried according to the terms of the Statute of Monopolies. Although an outcome is not recorded, we can infer that Foote succeeded as the patent passed on to third parties (including one George Kirke, a groom to Charles I) who continued to enforce it into the late 1630s

There was no mechanism by which the Crown can be prevented from corrupting the policy of awarding monopolies under the guise of patents for invention

The case of Foote is entirely typical – in 1626, for example, the Privy Council refused to refer a case related to a patent for glass to the common law as it would: *be of dangerous consequence, far trenching upon the prerogative of the King, if patents of this nature, having so just grounds and so often approved, and for so valuable considerations granted and so long practised to the benefit of the commonwealth without injury ... should now bee referred to the strict trial of the common law*

And such can be inferred from the successive promises issued by the Crown –

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Critical events are the English Civil Wars (1642-51) precipitated by the Crown's religious policies in conjunction with an atrophying fiscal capacity. Fought between royalists and parliamentarians, culminates in the execution of Charles I in 1649 and the rule of the republican Commonwealth (1649-60), followed in turn by the Restoration of the Crown in 1660

Below, contemporary portrayal of the execution of Charles I



1) Monopolists and patentees were partly blamed for the outbreak of the War:

And no less unjust projects of all kinds, many ridiculous, many scandalous, all very grievous, were set on foot; the envy and reproach of which came to the King, the profit to other men
Earl of Clarendon, (written 1646-74, published 1702-04, pp.53)

After the Restoration in 1660, the political costs of awarding monopolies increased. Even in the euphoria of Charles II's return, there were pointed warnings not to return to the old monopolies. One piece of doggerel proclaimed

*The people shall, Turn loyal all
And strive t' obey his Majesty,
And Truth and Peace, Shall both increase
They'l be obedient to the Laws*

Before warning

*We'll toil no more to maintain Patentees
That feed upon poor peoples trade* (quoted in Yamamoto 2018)

2) The Commonwealth had introduced the excise - fixed rate levy on units of production, imposed at the point of manufacture.

This vastly augmented the fiscal capacity of the English state and applied to a vast range of goods.

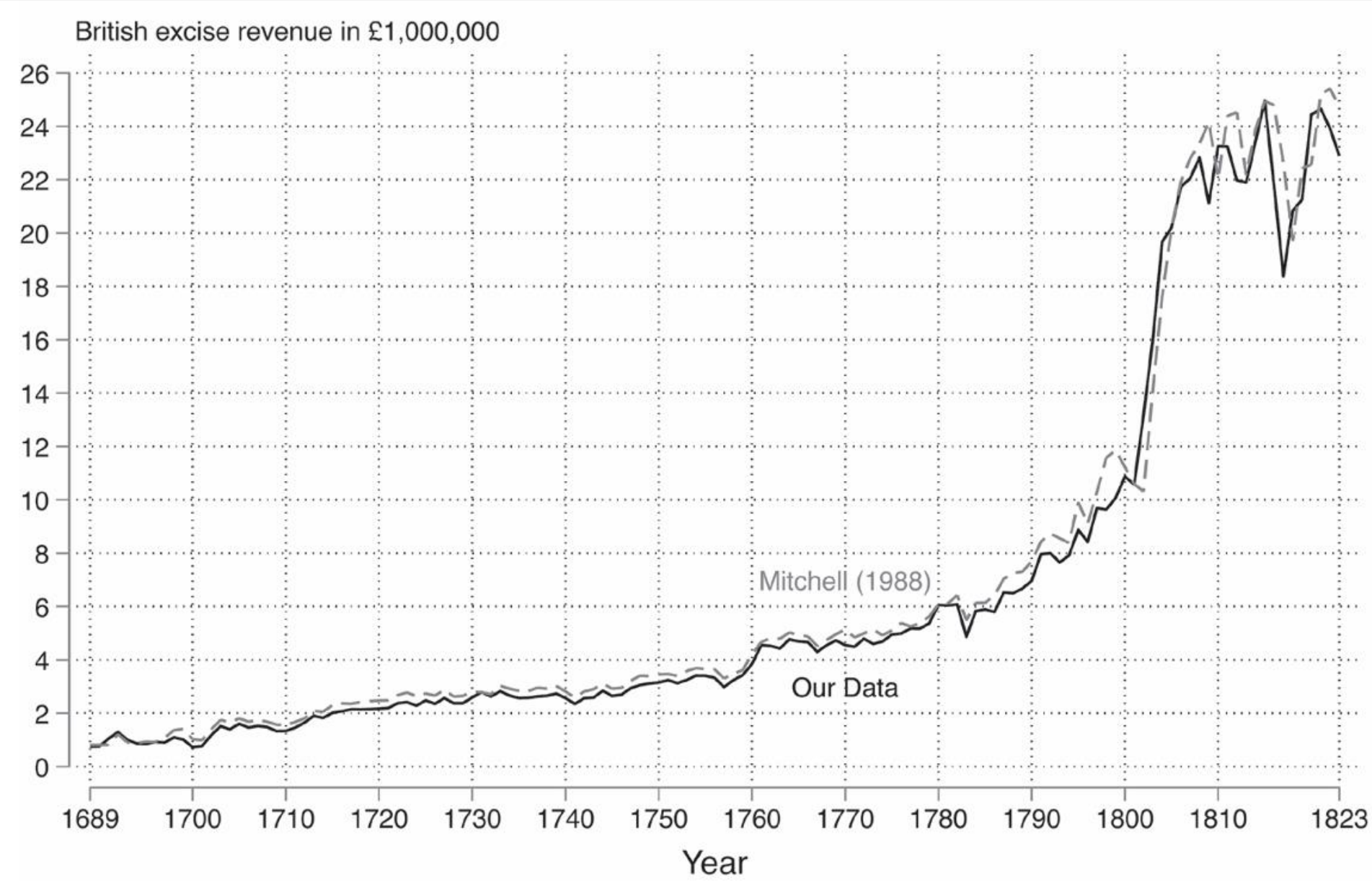
Simultaneously, this meant that the executive was now positively disincentivised from imposing any limitation on the manufacture of excised goods, including awarding monopolies

On generous assumptions, monopolies of manufacture, retail and trade were worth **£98,771 p.a.** to the Crown at the end of the 1630s (BL Egerton MS 2541, fos. 266-71)

The excise, once it was no longer being farmed out, produced a net yield of **£580,000 p.a.** between 1684-86. Chandaman, 1975, p. 75

It was also capable of longer-term growth as well ...

British excise revenue, 1689-1823



3) However! We discuss practical considerations that might change with circumstances - more decisively, the judicial framework that had enabled monopolists to enforce their privileges and prevent competition no longer existed:

The Star Chamber and the other prerogative courts had been abolished by the Habeas Corpus Act 1640 (16 Cha. 1. c. 10), and this was confirmed as part of the Restoration Settlement

This leaves the Privy Council - a primarily executive body with some legal functions. Before the Civil War, patentees/monopolists frequently petitioned the Council to help them to enforce their rights.

Under the terms of the Habeas Corpus Act, the Council was now debarred from adjudicating private-party disputes like an ordinary court – any infraction of the Act by an officer or judge would result in a £500 fine for a first offence, £1000 for a second, ejected from office for a third.

As Edward Southwell, Clerk to the Privy Council from 1692-99 remarked *the penalty is great if the Councill Board meddle with any decision of Property* (BL, Add MSS. 34349, f. 21)

The implication of this Act was that the Council had no power to adjudicate infringement disputes or to assist patentees in the enforcement of their rights – although this is not immediately appreciated; there are several instances of where patentees succeeded in enforcing their patents in the Privy Council (e.g. *Howard and Watson's Patent*, 1669)

The matter was determined in *King's Printers v. University of Oxford* (1680). Both parties held printing patents from the Crown, although the King's Printers believed the University was infringing the former's exclusive right to print Bibles

Their counsel contended that whenever a difference between patentees had arisen such dispute was decided by the Privy Council and: *not by Processe at Common Law: That being a thing belonging to his Majesties Prerogative, it is most proper to be ordered here*

Right, letterpress of one of the offending Bibles, bearing 'OXFORD, Printed at the THEATER, 1680



Conversely, counsel for the university argued that as a patent granted an interest or property, in this case the right to print, this meant under the 1640 Act the dispute would have to be heard in an ordinary court.

the cause was absolutely dismissed from the Board; so that if the King's Printers thought themselves injured they were left to the law for remedy (OUP 5/1/1, f.109-10)

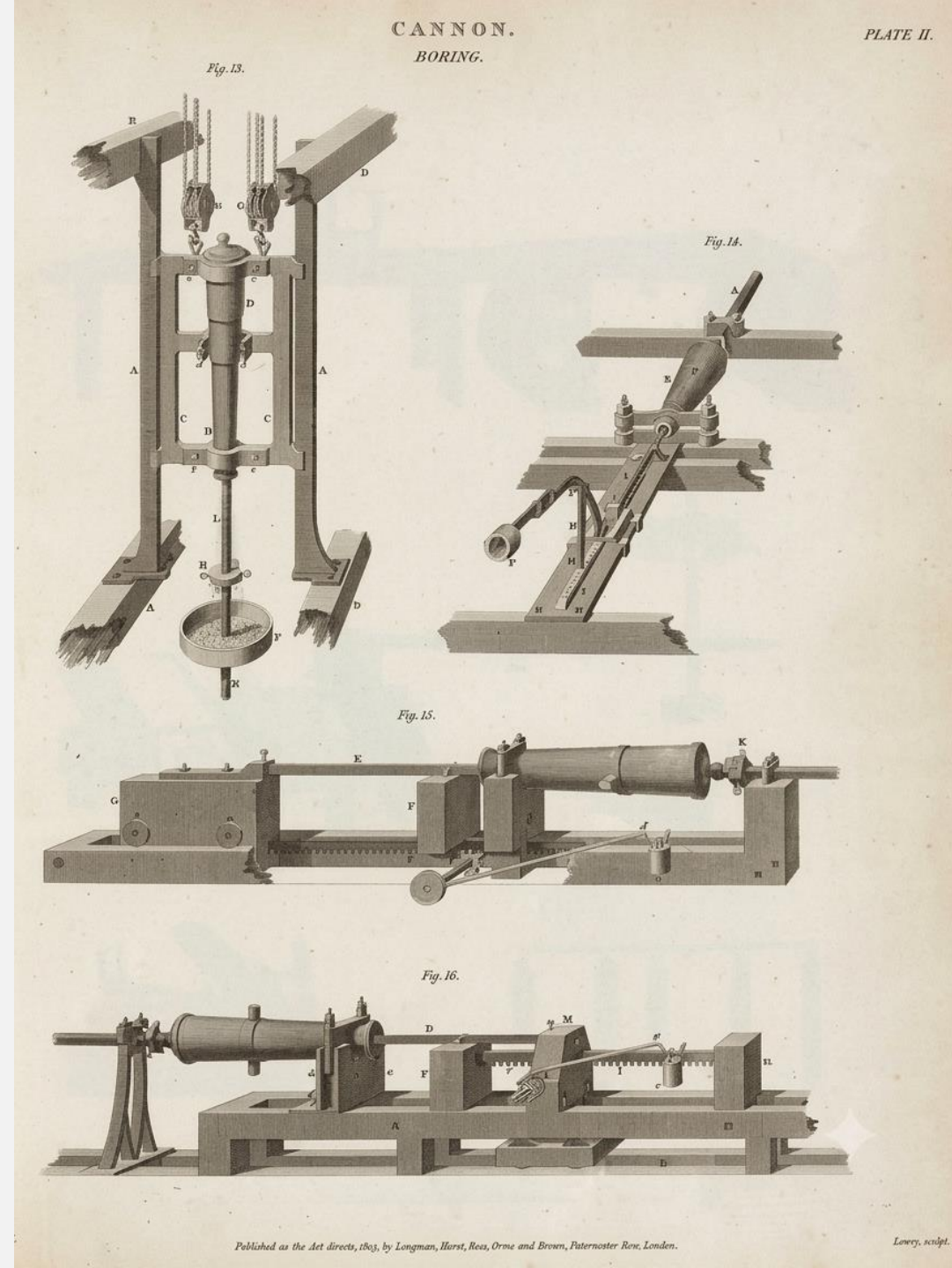
After this point, the Council ***never*** heard any more such disputes

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The Privy Council does retain a jurisdiction in patent validity, virtue of a defeasance clause written into the patent grant itself, permitting six or more Privy Counsellors to declare the patent void if it appeared the invention was contrary to law; prejudicial or inconvenient in general; not new; or not invented by the patentee.

But this is rarely used. In the C18th its employment is analogous to modern 'Crown Use' (or 'Government Use' in the United States) permitting the state to circumvent the patentee's right to exclusivity, usually in relation to matters of national security



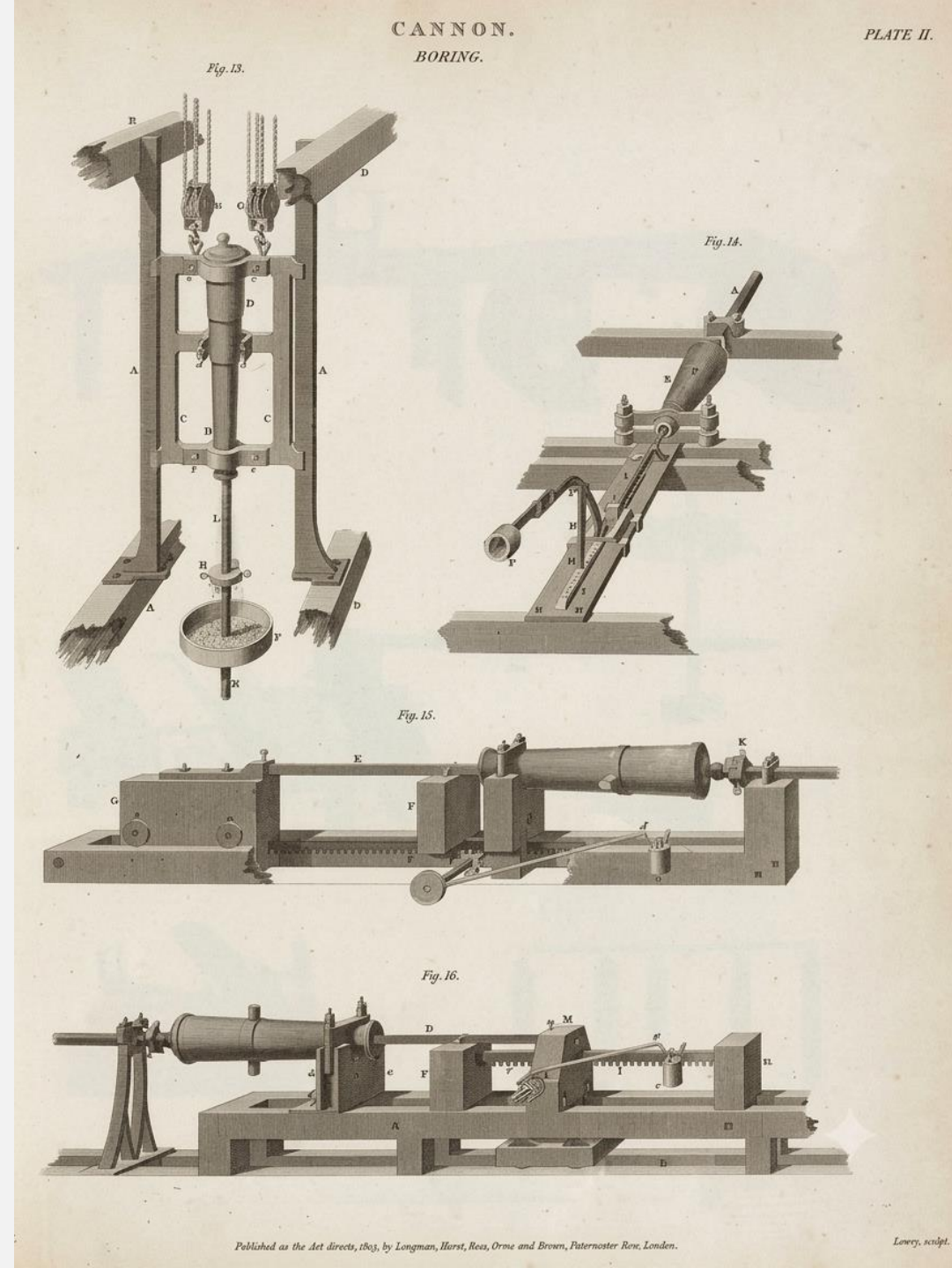
The last instance where the Privy Council annuls a patent was in 1779. Circumstances:

The patent was for the boring of cannon
(see right)

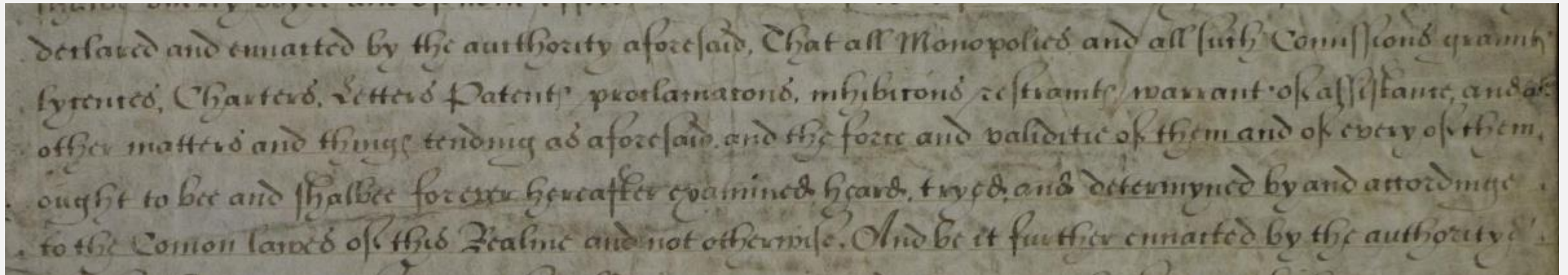
Britain was at war with France and the
American colonies

The patentee (the ironmaster John
Wilkinson) had refused to have the validity
of the patent tried at common law for four
years

Instead, the validity of patents was now
regularly decided by common law courts,
consistent with the terms of the Statute of
Monopolies (1624)



Statute of Monopolies (1624)



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- 4) And finally, it's a constitutional story. Before the Civil War, Parliament provided both a forum where grievances related to the monopolies could be legitimately broadcast and, especially via its sole power to vote direct taxation for an improvident monarch, a means by which the Crown might be persuaded (temporarily) to discard them.

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These assurances were all made (with the exception of the Proclamation of 1603) in the expectation that Parliament would vote direct taxation and then renege upon once Parliament had served its immediate utility

Petition of the Twelve Peers to Charles I (August 28, 1640)

Complained of the multitude of monopolies, and other patents, whereby the commodities and manufactures of the kingdom are much burthened, to the great and universal grievance of your people before immediately digressing onto the The great grief of your subjects by the long intermission of Parliaments

to begin with the faults of the higher powers, and their illegal oppression of the people, during these eight or nine years [of the Personal Rule] ... multitudes of Monopolies were granted by the King, and laid upon all things of most common and necessary use, such as Sope, Salt, Wine, Leather, Sea-cole, and many other of that kinde

Thomas May, *The History of the Parliament of England* (1647, pp.17-18)

the people, forbidd'n to complain, as well as forc'd to suffer, began from thenceforth to despaire of Parlaments. Whereupon such illegal actions, and especially to get vast summs of Money, were put in practice by the King and his new Officers, as Monopolies, compulsive Knight-hoods, Cote, Conduct, and Ship money

John Milton, *Eikonoklastes: In Answer To a Book Intitl'd Eikon Basilike* (London, 1649)

The constitutional position of Parliament vis-à-vis the Crown is fundamentally altered by events immediately following the Glorious Revolution of 1688 - when parliamentary grandees invited the Dutch stadtholder William III of Orange to invade and depose the Catholic James II.

William's overriding concern was to secure Parliamentary revenues for his war with Louis XIV of France and to this end Parliament extracted a series of concessions that permanently secured its constitutional role

To this end:

Crown could no longer suspend laws (the Crown's dispensing power) without Parliamentary consent (Bill of Rights 1689, 1 Will. & Mar. c. 2)

Parliamentary elections had to be called every three years (Meeting of Parliament Act 1694, 6 & 7 Will. & Mar. c. 2)

Parliament had to sit every year in order to vote annual funding for the army and navy (Civil List Act 1698, 9 Will. & Mar. c. 23)



The cumulative effect of these changes is that locus of executive government moves to Parliament as well.

The Crown's chief ministers have to be able to command a majority in order to secure the annual funding bills