The Case that Launched a Thousand Writs, or All that is Dross? Re-conceiving Darcy v Allen: *The Case of Monopolies*.

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Abstract

The case of *Darcy v Allen* is a, if not the, elder statesman of intellectual property law. Much of the case's importance, indeed fame, is derived from Sir Edward Coke's report of the decision, in which he explains not only the detailed reasons given in the court's judgment, but which also brands the case *The Case of Monopolies*. In many respects, Coke's report is treated as being the authoritative account of the decision, a decision that has been seen by many as a defining moment within the history of patent law. Plaudits heap praise upon it, and mark it out as perhaps commencing the history of the English patent system. Moreover, the case is still routinely referred to as authority for the proposition that monopolies are, and have always been, against the ancient and fundamental laws of the land. That monopoly is perceived as a 'bad thing' has much to blame on the decision in *Darcy v Allen*. However, as this paper explores, the foundation provided by Coke's report of the decision may not be as sure-footed as it first appears.

I. Of Monopolies

An unregulated free-market does not, indeed cannot, provide sufficient incentive for investment in research intensive endeavours. Absent legal intervention, a copyist may follow the creator's footsteps to the resultant product, the crock of gold at the end of the rainbow, and price them out of the market. By definition, only the originator bears the risks and expenses that are associated with being the first to clear the path to the new, innovative, ground. The second-comer can take shortcuts unavailable to the pioneer, can reap where they have not sown, and may take advantage of the public-good nature of the information that the innovator has created, rapidly undermining any first-mover advantage that may have been gained. It is the invention's character as a manifestation of an information good, economically speaking both a free and

public-resource – whose use by a third party not only involves no additional cost beyond that of communication and learning, but which also does not reduce the original stock of that resource[1] – which is key in facilitating such market unfairness in the unregulated state. Unlike tangible artefacts, information has no predilection towards exclusivity; the eternal swinger, it pleasures all who have access to its charms without ever leaving the embrace of its creator. Thus, for an innovator to claim theft of an invention is for him to claim "that something has been stolen which he still possesses, and he wants something back which, if given to him a thousand times, would add nothing to his possession."[2] A truly free, unregulated, market therefore cannot be trusted to foster creativity; in the absence of some form of some form of monetary prize or state-sanctioned exclusivity, the inventor may be reduced to penury whilst the copyist drowns in riches.

In order, therefore, to constrain this information, to put limits on its wayward nature, the law intervenes. Through the medium of the patent grant, the exclusivity that the inventor covets is enforced for a period of up to 20 years.[3] This government-sanctioned monopoly distorts the market experienced by the product (or process) that forms the subject matter of the grant, creating scarcity where there would naturally be none and sheltering the proprietor from the full rigors of competition. It creates an area of calm in an otherwise busy market and reduces the availability of direct substitutes. The mechanism by which the patent does this, the provision of exclusive privilege, has remained essentially unchanged for close to the 500 years that England has maintained a systematic policy of promoting innovation.[4]

However, notwithstanding its ancient roots, the consequences of following a proprietary model, and creating 'property' in the intangible by the imposition of a state-sanctioned monopoly, have not escaped critical comment. Sometimes the attack has been broad, condemning the system as

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[1] For a similar definition see Taylor C.T. & Silberston Z.A., *The Economic Impact of the Patent System*, (Cambridge, Cambridge University Press, 1973) at 24.

[2] Rentzsch H., *Geistiges Eigenthum*, Handwörterbuch der Volkswirtschaft (1866; Leipzig) at 334; Quoted from Machlup F., *An Economic Review of the Patent System*, Study No. 15 of the Sub-Committee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, US Senate 85th Congress, 2nd Session, (Washington, 1958) at 22.

[3] In the UK, see s25 of the Patents Act 1977.

[4] Despite a number of earlier grants, the systematic provision of monopoly in return for the introduction of a new manufacture into the realm was a uniquely Elizabethan innovation. See further, text accompanying note 12, below, and the references referred to therein.

a whole and recommending its abolition;[5] at other times it has been more focused, selecting individual areas for detailed (although some may consider ill-conceived) rebuke.[6] Alternative systems of prizes[7] or even common ownership[8] have been suggested, yet the de facto standard adopted worldwide is one of exclusive privilege. Nevertheless, such grants of exclusivity breed unease, and where this unease boils over into discontent and attack then the core of the criticism has always been essentially the same: patent is monopoly, and monopoly is bad.

'Monopoly' then has a somewhat mottled reputation as a mechanism for promoting technological progress. It is a word charged with latent emotion, having potent effect on the ear that hears it: conjuring images of high prices, low quality and short supply – a commodity or service held *unnecessarily* in restraint. A monopoly is at once devious, deceitful and scheming. It is inefficient and wasteful, unfair and unjust. There is something suspicious about a monopoly, something underhand. Whilst competition is to be lauded, monopoly deserves only castigation. Distrust for it is rife, from consumers to the judiciary the message is the same: monopoly is a dirty word, and monopolies untamed are ruinous and unruly things.

To tar a patent, or other government grant, with the monopoly brush is to brand it undeserving; to invite invalidation, censure and reproach. As Giles Rich, one of the draftsman of the US Patents Act 1952 and respected patent judge, was once to state: "The tendency is to call a patent "monopoly" when it is to be invalidated or restricted and to say it is not a monopoly when it is

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[5] See, for example, the anti-patent debate of the mid- to late-nineteenth century, discussed in Fisher M., 'Classical Economics and Philosophy of the Patent System' [2005] *IPQ* 1.

[6] See, for example the Competition Directorate of the European Commission's report into the Pharmaceutical sector. Available here: http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html.

[7] Robert Andrew Macfie, for example, one of the most ardent critics of the patent system during the nineteenth century accepted that an unregulated market would produce a disincentive to invent. However, he doubted the efficacy of the patent system in righting the balance between the market and the inventor, and instead suggested the provision of government-funded rewards. See, for example, Macfie R.A., *The Patent Question in 1875*, (London, Longman, Green & Co, 1875), at 22-6. More recently, see e.g. Shavell S. & Ypersele T., 'Rewards versus Intellectual Property Rights' (2001) 44 *Journal of Law and Economics* 525; Abramowicz M., 'Perfecting Patent Prizes' (2003) 56 *Vanderbilt Law Review* 115; and Mandel G.N., 'Promoting Environmental Innovation with Intellectual Property Innovation: A New Basis for Patent Rewards' (2005) 24 *Temple Journal of Science, Technology & Environmental Law* 51.

[8] As per the old Soviet system.

held to be valid and infringed."[9] Indeed, Robinson, writing at a time when nerves were still raw from the great Anti-Patent Debate of the mid-to-late nineteenth century went as far as to say that the "question whether a patent privilege is a monopoly is not a mere question of words. It is the point of departure for two distinct theories, under whose influence courts and legislatures may be led to widely different conclusions as to the dividing line between the rights to be conceded to inventors and those to be reserved to the public. Every grant of monopoly is, in appearance at least, in derogation of the common right…. In legislative bodies, which recognise a patent-right as a monopoly, the interests of the public will naturally be preferred to those of the inventor".[10] Monopoly, in Robinson's view, deserved to be constrained.

However, it was not always so. Monopoly was once used unbounded as an everyday mechanism of government. Neither good nor bad, monopoly just 'was'. The provision of such privilege was purely a matter for the monarch and was bound so tightly with the exercise of the royal prerogative that its criticism would have been unthinkable; being perceived, if contemplated at all, as direct insult to the King or Queen themselves. This all began to change, however, in the early seventeenth century, as a delicate constitutional struggle for supremacy pitched between Parliament and Crown slowly worked towards resolution. Positioned at the centre of this clash of the Titans is a dispute of far smaller scale, which nevertheless became a poster-child for the larger constitutional questions being asked: setting limits on the power wielded by the Crown. From such little acorns mighty oaks do grow, and this is why when we speak of monopolies there is one case that stands out from the crowd. It is a case that has been used as an icon for the control of monopolisation, and as authority for legitimising feelings of distrust and distaste for monopoly power. It is a case that can be seen to encapsulate the constitutional struggle between the Crown, Parliament, and the courts of the common law. It is the simple tale of a courtier and a haberdasher and the infringement of an exclusive privilege. It is a case of monopolies, indeed *The Case of Monopolies*, the decision in *Darcy v Allen*.

A. Of Legacies

Darcy v Allen is, undoubtedly, one of the most greatly respected elder statesmen of the intellectual property world. It has been described as "one of the outstanding decisions of the English

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[9] Rich G.S., 'Are Letters Patent Grants of Monopoly?' (1993) 15 *Western New England Law Review* 239 at 240.

[10] Robinson W.C., *The Law of Patents for Useful Inventions*, (Boston; Little, Brown & Co., 1890), §12, at 18-19.

Common Law"[11], and as the case that "commences the history of the English … patent system."[12] Some have even claimed that "the arguments of counsel and the reasons for judgment … rank as one of the most valuable contributions ever made to a theory of jurisprudence."[13] Few other cases can even claim to come close to such praise. *Darcy v Allen*, is unique: the gold-standard of patent decisions, untarnished, almost regal in its stature. Yet, as we shall see, all is perhaps not as straightforward as it first seems.

The bare facts of the dispute are relatively uncomplicated: at its most abstract, a patent existed which was alleged to have been infringed. However, much of the importance of the decision derives from the political and constitutional backdrop against which it is set. Therefore, before delving into the dispute in any detail, it is first necessary to give a little background on the patent system and political context of the time.

II. A Little Background

Darcy v Allen concerns an attempt to enforce an exclusive privilege, a patent, on the importation, manufacture, and trade in playing cards within England. The action was commenced before the court of King's Bench in the Easter term of 1602, with judgment given just over a year later. This much is straightforward. However, at the time of which we speak, the patent was a very different animal to that which is in existence today.

The word 'patent' derives from the latin *literæ patentes*, literally 'open letter', and refers to one of the forms of communication used by the English monarchy to facilitate the conduct of state business. Initially letters patent were used to set forth public directives and provide record of any other exercise of royal power that was intended to be open to public inspection. This included exercise of the royal prerogative, in particular its use in relation to the revenue of the realm and grants of office, privilege, pardons, proclamations and commissions.[14] Over time, however, these documents of royal grant were to become more widely known as the medium by

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[11] Davies D.S., 'Further Light on the Case of Monopolies', (1932) 48 *LQR* 394, at 394

[12] Hulme E.W., 'The History of the Patent System under the Prerogative and at Common Law" (1896) 12 *LQR* 141, at 151.

[13] Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), at 87.

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

which the Crown offered protection and incentive to inventors as a means of encouraging the introduction of new and improved trades and manufactures into the realm.

Yet in contrast to the state-administered system of today, where a right to a patent arises upon successful application to, and examination by, the relevant administrative body, with a standard set of entitlements forthcoming upon satisfaction of the patentability criteria,[15] at the time of Elizabeth I. things were rather less regimented. Patents, at this point in history, were objects of Crown favour, inherently bound with the exercise of the prerogative. Indeed, it was not until the reforms of the mid-nineteenth century, some 250 years after Elizabeth's death, that a system was instituted in which bureaucratic property rights arose upon application for a patent, rather than upon grant by the crown,[16] and allowed the system to finally emerge from the prerogative's shadow. Therefore, under the Elizabethan system of grants there was no right *to* a patent, far from it; the privilege could be issued or denied on a whim.

Elizabeth I. was not, by any means, the earliest monarch to utilise prerogative grants as a vehicle to lure foreign artisans to ply their trade within England's shores. Holdsworth, for example, recounts Edward III.'s grant of 1331 to John Kempe of Flanders and his companions "letters of protection in consideration for teaching his subjects their methods of weaving" and his promise to "all other weavers, dyers and fullers who came to England from abroad with the same object the same protection"[17] as an early example of this practice.[18] Elizabethan patent policy, however, was different to that which had been seen before. To begin with, it was systematic; lying in stark

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[15] For similar comments see Bracha O., 'The Commodification of Patents 1600-1836: How Patents Became Rights and Why We Should Care', (2004) 38 *Loyola of Los Angeles Law Review* 177, especially at 181-3.

[16] Primarily by the creation of a system of registration in the Protection of Inventions Act 1851, which was furthered by the Patent Law Amendment Act 1852. See discussion in Sherman B. & Bently L., *The Making of Modern Intellectual Property Law*, (Cambridge, Cambridge University Press, 1999) at 134.

[17] Holdsworth W., *A History of English Law* (Vol 4) (3rd Ed, 1945), at 344. Holdsworth draws heavily on Hulme's work on the history of the patent grant in making these assertions. See, for example, Hulme E.W., 'The History of the Patent System under the Prerogative and at Common Law" (1896) 12 *LQR* 141, and Hulme E.W., 'On the Consideration of the Patent Grant, Past and Present', (1897) 13 *LQR* 313.

[18] Similar open grants were made to others. Holdsworth W., *A History of English Law* (Vol 4) (3rd Ed, 1945), notes, at 345, that "We occasionally meet with similar grants in the early part of the sixteenth century", referring to Dasent ii 109 (1547) – an importation of foreign weavers, "which shuld teach men the art of making poldavies;" ibid iii 415, 509-510 (1551) – foreign worsted makers introduced at Glastonbury by the Protector Somerset.

contrast to the sporadic and *ad hoc* grants of the past. It also revolved around the provision of monopoly privilege and not simply the offer of Crown protection as the predominance of earlier grants had done.[19] This, in turn, led to a shift in the focus of responsibility for the introduction of the 'new', patent protected, industry from the Crown to the patentee. In contrast, therefore, to the mediaeval grants, where the Crown was the direct administrator of the privilege, the grantee essentially being offered protection in the exercise of their trade, under a system of monopoly grant, the patentee held an essentially unregulated power to act under the grant itself. As a consequence, the patent became a far more tempting prospect for which to petition and, in the same breath, became much more useful as an instrument to reward favour. Therefore, whilst the underlying policy of monopoly at the time of Elizabeth ostensibly demonstrated an attempt to use gifts of exclusivity as a means of stimulating domestic industry in order that the 'technologically backward' English state might become self-sufficient,[20] the provision of that privilege was also easily amenable to less noble ends.

The cultivation of a systematic policy of monopoly, itself an ingenious innovation, was masterminded by Elizabeth's first minister, William Cecil (Lord Burghley). Its exercise in the early years of Elizabeth's reign had made the provision of such grants a natural phenomenon,[21] breaking away from the fetters of local custom, from mere provision of Guild and trading privilege that had gone before, and allowing for an unprecedented diversification and expansion of industry.[22] At this point in time, the system (if it may be so-called) aimed squarely at the importation of knowledge and skill from abroad and sought to encourage the *institution* of new manufacture within the realm. The notion of 'invention' in the current sense of the word was

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[19] The grant to John Kempe of Flanders, for example, falls squarely into this latter category. And whilst there are a number of exceptions – Greenstreet, for example, refers to Henry VI.'s patent of 1449 to John Utynam as "an English grant of a monopoly for an invention." See Greenstreet C.H., 'History of Patent Systems' in Liebesny F. (ed), *Mainly on Patents* (London, Butterworths, 1972), at 5. See also, Gomme A.A., *Patents of Invention: Origin and Growth of the Patent System in Britain* (London, Longmans, Green & Co., 1946) at 6 – it is clear that the general model in the early English grants was not one of monopoly.

[20] See Walterscheid E., 'The Early Evolution of the United States Patent Law: Antecedents (Part 2)', (1994) 76 *Journal Of The Patent And Trademark Office Society* 849, at 855 and Getz L., 'History of the Patentee's Obligations in Great Britain', (1964) 46 *Journal of the Patent Office Society* 62 at 69-71.

[21] See Walterscheid E., 'The Early Evolution of the United States Patent Law: Antecedents (Part 2)', (1994) 76 *Journal Of The Patent And Trademark Office Society* 849 at 855; and MacLeod C., *Inventing the Industrial Revolution: The English Patent System 1660 – 1800*, (Cambridge, Cambridge University Press, 1988), at 11.

[22] See Price W.H., *The English Patents of Monopoly* (Cambridge (Mass), Harvard University Press, 1913), at 6.

still a long way from being accepted as a basis for a valid grant, yet the policy reasons behind the provision of exclusive privilege, as a cheap and effective method of improving the technological climate of the state, will be familiar to any student of intellectual property law today. Indeed, in this context, the only significant underlying difference between the concept of the custom then and now, procedure and subject matter aside, being that as yet it was a matter of unquestionable prerogative power. And this, as may now be expected, is where the significance of *Darcy v Allen* leaps into the historical spotlight.

Whilst the beginning of Elizabeth I.'s reign is marked with grants to foreign artisans providing exclusivity of trade in return for the introduction and teaching of new technologies into the realm – particularly, as one commentator has noted, in those areas that had previously "figured most prominently on the list of imports – viz. alum, glass, soap, oils, salt, saltpetre, latten, etc."[23] – as the years marched on abuses of monopoly began to take centre stage. The Queen, it appears, had been quick to realise that the granting of monopolies was not only an excellent tool to tempt foreign workers to divulge the secrets of their trade to the English, but that it was also a very cost-effective manner of rewarding Court favourites without depleting the Royal coffers. And, as Rich notes: "Queen Elizabeth the First, in the vernacular of modern times, was hard up for cash".[24] Courtiers, for their part, saw that the policy could be exploited for personal gain, the mere existence of a system of exclusive privileges being sufficient incentive to join in the race for favours.[25] Drawn by licensing patents or lucrative new monopolies in old industries, they left the more uncertain reward of patents for new inventions to the "poor and often chimerical inventors".[26] Thus we see patents for the production of salt,[27] vinegar[28] and starch[29], all established industries, being granted to court favourites in the 1580s. At the hands of "corrupt

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[23] Hulme E.W., 'The History of the Patent System under the Prerogative and at Common Law" (1896) 12 *LQR* 141, at 152; also MacLeod C., *Inventing the Industrial Revolution: The English Patent System 1660 – 1800*, (Cambridge, Cambridge University Press, 1988), at 12.

[24] Rich G.S., 'Are Letters Patent Grants of Monopoly?' (1993) *15 Western New England Law Review* 239, at 241.

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

[26] *Ibid.*

[27] Patent Roll 27 Eliz. p.6. of September 1, 1585 to Thomas Wilkes.

[28] Patent Roll 26 Eliz. p.11. of March 23, 1584 to Richard Drake.

[29] Patent Roll 30 Eliz. p.9. of April 15, 1588 to Young.

courtiers" this "system of monopolies, designed originally to foster new arts, became degraded into a system of plunder."[30]

The situation was, however, actually far worse than it first appears, for despite the evolution of a framework which handed the administration of the grant to the patentee, the jurisdiction for the settlement of grievances remained with the Crown. Given that the concept of a separation of powers had not yet even been seriously contemplated, and nothing of the like of judicial review even existed, this was a significant hurdle to the striking down of any grants that may have been perceived as bad. Holdsworth accurately sums up the position when he states that; "those who suffered [at the hands of monopoly grants] naturally wished for a better remedy than an appeal to the authority from which they emanated."[31]

The metamorphosis of the system, in particular the increasing abuse to which it was subjected, did not, however, go unnoticed. Thus, over the course of Elizabeth's reign, public (and, in the end, more importantly, Parliamentary) unease over odious monopolies grew. The issue was raised in Parliament on three occasions, first in 1571, again in 1597 and finally, and most fiercely, in 1601, at which point the Queen interjected by undertaking her own monopoly reform, terminating a number of the most unpopular grants and opening the rest to adjudgment by the courts of the common law.

Enter, centre-stage, *Darcy v Allen*.

III. The Case

In the Easter term of 1602, Edward Darcy, a groom of the Privy Chamber to Queen Elizabeth I., brought an action before the court of King's Bench against one Thomas Allen,[32] a haberdasher of London. The action alleged infringement of Darcy's exclusive privilege in the

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

[31] Holdsworth W., *A History of English Law* (Vol 4) (3rd Ed, 1945), at 347. See also Hulme E.W., 'The History of the Patent System under the Prerogative and at Common Law" (1896) 12 *LQR* 141, at 151, who states that; "to dispute the Queen's licences before the Privy Council or in the Court of Star Chamber or in the Exchequer constituted a risk which few individuals cared to run, as the Courts were apt to regard non-compliance with the requirements of the patentee as evincing a want of respect for the Queen's authority."

[32] Often also spelt 'Allein' or 'Allin'.

whole traffic of playing cards within the realm. Allen, it was claimed, knowing fully of Darcy's grant, had caused the manufacture of a quantity of playing cards not made or imported under Darcy's authority,[33] which he then sold to persons unknown, thereby impeding Darcy's own ability to practice the sale of cards under his monopoly grant. In addition, it was alleged that Allen had sold one-half gross (72 packs) to John and Francis Freer for the sum of 13s.4d. In recompense for all of this, Darcy claimed the sum of £200 in damages.[34]

For his part, Allen denied the majority of the charges laid against him, but admitted the sale of the half-gross, claiming a right under immemorial custom whereby, a freeman of London and a member of the company of haberdashers, as he, was entitled to buy and sell all lawful commodities. However, this element of the action is, for us at least, of relatively little concern, rendered unimportant by the wider constitutional issues at stake.

The patent in *Darcy v Allen* was not new, indeed this was part of the problem. A monopoly on playing cards had been granted to Ralph Bowes and Thomas Bedingfield as early as July 1576,[35] and had already been reissued twice (in 1578 to the same patentees, and then in 1588 to Bowes alone)[36] by the time that Darcy entered into the fray. Bowes' death before the expiry of his grant resulted, eventually, in its reissue to Edward Darcy, "Groom of the Privy Chamber", in 1598 "in consideration of his long and acceptable services to the Crown."[37]

As noted, Darcy's grant specified control of "the whole traffic" in playing cards – in other words, the importation, production, sale and distribution of all cards within the realm – for a defined period (which when first granted was 12 years, but by the time it came into Darcy's

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[33] Noy's report of the case refers only to 80 gross of cards (at Noy 173 at 173; 74 *English Reports* 1131 at 1131), whereas Coke's report states that the 80 gross were supplemented by a further 100 gross, "none of which were made within the realm, or imported within the realm by the plaintiff or his servants, factors, or deputies, &c. nor marked with his seal". 11 Co Rep 84b at 85a; 77 *English Reports* 1260, at 1261.

[34] Substantially identical recital of the facts of the case may be found in the three published reports of the case: Coke (11 Co Rep 84b; *77 English Reports* 1260), Noy (Noy 173; *74 English Reports* 1131), and Moore (Moore (K.B.) 671; *72 English Reports* 830).

[35] Patent Roll, 18 Eliz. p.1 of July 28, 1576.

[36] Patent Roll, 20 Eliz. p.7, and Patent Roll, 30 Eliz p.12, respectively.

[37] Patent Roll, 40 Eliz. p.9. See also Davies D.S., 'Further Light on the Case of Monopolies', (1932) 48 *LQR* 394, at 399.

possession had risen to 21)[38] in return for an annual 'rent' of 100 marks to be paid to the Queen. Infringement carried with it the promise of the "Queen's highest displeasure, and of such fine and punishment as offenders in the case of voluntary contempt deserve".[39] The stakes for Allen were therefore considerably high, with imprisonment and delivery up of infringing articles both, if you'll excuse the pun, being on the cards.

However, the deck had not been dealt all in Darcy's favour. Indeed, even prior to his acquisition of the right, the "records of the Privy Council and of the Courts of law and equity, as well as the State Papers Domestic … amply show that these card monopolies were widely resisted and opposed throughout the whole country."[40] Bowes alone had brought several actions before Star Chamber and in the Court of Chancery against infringers of his right. The records of the Privy Council show a similar trend, culminating in the issue of a "special warrant of assistance" in 1593 "to all public officers to assist Bowes in the execution of his grant."[41] However, the efficacy of such measures has to be questioned, perhaps giving insight into the popular feeling for the grant, as merely three years later the Lord Mayor of London was rebuked for failing to fulfil the requirements of this Order.[42]

Therefore, by the time that the patent came into Darcy's hands in 1598, it was already in dire straits. However, in order to understand the extent of the constitutional turmoil into which the facts were thrust, and therefore the true story in *Darcy v Allen*, we must turn our attention to events that occurred a number of years earlier, some years before even the first grant of this particular privilege was made to Bedingfield and Bowes.

A. The Prerogative Questioned

The path that leads us inexorably towards the decision in *Darcy v Allen* does not begin, as perhaps may be assumed, with events even remotely connected with any of the grants mentioned above. Nor does it start with Lord Darcy or any of the protagonists heretofore discussed. The yellow

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[38] See Davies D.S., 'Further Light on the Case of Monopolies', (1932) 48 *LQR* 394, at 399.

[39] 11 Co Rep 84b at 85a. A substantially identical account of the patent is given in Noy 173, at 173.

[40] Davies D.S., 'Further Light on the Case of Monopolies', (1932) 48 *LQR* 394, at 400.

[41] Davies D.S., 'Further Light on the Case of Monopolies', (1932) 48 *LQR* 394, at 403.

[42] Davies D.S., 'Further Light on the Case of Monopolies', (1932) 48 *LQR* 394, at 403.

brick road to one of the most important cases in intellectual property in fact begins in the House of Commons some five years before the playing card monopoly was first issued.

As already noted, a distinct custom of monopoly privilege had been introduced under Elizabeth's rule that had the general aim of improving the technological standing of the English state. England, in the mid-sixteenth century, lagged far behind its Continental counterparts, and was heavily dependent upon imports of many critical goods. Elizabeth and her ministers saw such reliance as a dangerous position in which to be, and therefore concentrated on bridging the technological gap and fostering English production of vital commodities. By far the quickest route to accomplishing this aim was to encourage the importation of technological teaching from abroad and to ensure its dissemination within the Realm.[43] This policy of persuading foreign artisans to teach their trades to the natives was a resounding success: when Elizabeth came to the throne in 1558 there was a frightening need for ordnance,[44] yet by 1591 English cannon were considered to be the best in Europe, and even the Spanish attempted to buy them.[45] However, the dark side of the system, the abuses that crept in due, in part, to the opportunism of the Queen and the greed of some of her courtiers, combined with the fact that monopoly was, as yet, inherently and unquestionably bound with the exercise of the prerogative, tarnish this legacy. Whilst there is no evidence that Elizabeth ever set out to grant monopolies harmful to the State – even where patents were issued in restraint of trade it is clear that the necessity for supply was considered greater than the inconvenience caused[46] – disquiet over abuse steadily increased during her reign.

The first questioning of the exercise of the Crown's prerogative right to grant exclusive privileges came in the 1571 Parliamentary session, when the subject was raised by Robert Bell during a discussion about Parliament's contributions to Crown revenue (the subsidy). Bell's comments

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[43] Piracy, it appears, has always been considered an efficient route to bridge a technological gap.

[44] State Papers, Domestic. Eliz. vii, 5.

[45] State Papers, Domestic. Eliz. ccxliv, 116.

[46] Thus, for example, maintenance of supplies of gunpowder and ordnance of sufficient quality and quantity for the needs of the Realm was considered to outweigh the social cost of imposing a monopoly in its production, and such a monopoly even continued by express provision within the Statute of Monopolies after 1623. See s10 Statute of Monopolies 1624, 21 Jac. I cap 3.

were the subject of stern rebuke by the Queen,[47] who issued a statement instructing the Commons to "spend little time in motions, and to avoid long speeches."[48] The matter then lay silent until 1597, when the issue of monopolies once again reared its head, prompted perhaps by the pressures of industrial depression.[49]

Following debate in committee, the Commons took the "remarkable" step[50], in December 1597, of presenting an address to the Queen requesting her "most gracious care and favour, in the repressing of sundry inconveniencies and abuses practised by Monopolies and Patents of priviledge."[51] Further, at the close of Parliament in February 1598 (the same year that Darcy received his grant of the playing card patent), the Speaker "shewed a Commandment imposed on him by the House of Commons which was touching Monopolies or Patents of priviledge, the which was a set and penned Speech made at a Committee."[52] Nachbar describes this as a "bold move, made doubly so by its touching on the Queen's prerogative",[53] and it certainly provoked a response. However, rather than the stern rebuke that may have been imagined given the

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[47] See D'ewes S., *A Compleat Journal of the Votes, Speeches and Debates, both of the House of Lords and the House of Commons Throughout the Whole Reign of Queen Elizabeth of Glorious Memory* (Bowes, London, 1693) – available from Early English Books Online at: http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:62589) – notes, at 158 that Bell's questioning of the prerogative was omitted from the Journal of the House of Commons. However, he also notes, at 159, that despite being presented generally, the Queen's rebuke grew directly out of Bell's comments.

[48] Nachbar T.B., 'Monopoly, Mercantilism and the Politics of Regulation', (2005) 91 *Virginia Law Review* 1313, at 1329 – quoting from 1 H.C. Jour 83 (10 April 1571). Given the Queen's fearsome reputation, and the fate that met some of her political opponents, the temerity of Bell's comments cannot be overstated.

[49] On this point in general see Holdsworth W., *A History of English Law* (Vol 4) (3rd Ed, 1945), at 347.

[50] See Hallam H., *The Constitutional History of England from the Accession of Henry VII to the Death of George II* (Vol I) (London, J Murray, 1827), at 244.

[51] D'ewes S., *A Compleat Journal of the Votes, Speeches and Debates, both of the House of Lords and the House of Commons Throughout the Whole Reign of Queen Elizabeth of Glorious Memory* (Bowes, London, 1693) – available from Early English Books Online at: http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:62589), at 573 (reporting the events of 14 December 1597).

[52] D'ewes S., *A Compleat Journal of the Votes, Speeches and Debates, both of the House of Lords and the House of Commons Throughout the Whole Reign of Queen Elizabeth of Glorious Memory* (Bowes, London, 1693) – available from Early English Books Online at: http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:62589), at 547.

[53] Nachbar T.B., 'Monopoly, Mercantilism and the Politics of Regulation', (2005) 91 *Virginia Law Review* 1313, at 1329.

Queen's retort to Bell's comments a quarter of a century earlier, Elizabeth, clearly appreciating that the tide had turned against her on this issue, was far more politic in her reply. She issued a statement chastising the Commons for their presumption: "Her Majesty hoped that her dutiful and loving Subjects would not take away her Prerogative, which is the chiefest Flower in her Garden,"[54] but, seemingly aware that the problem would not just fade away, she also promised to open all patents to "be examined to abide the tryal and true Touchstone of the Law".[55]

Talk, however, is cheap, even when the mouth doing the talking is that of a monarch like Elizabeth, and by the time of the next Parliament, some three years later, it was abundantly clear that this promise had not been effective in bringing the abuses of monopoly to task. Indeed, as Holdsworth shows, orders of the Privy Council and the Star Chamber were issued during the interim that prevented the common law courts from exercising any jurisdiction purported to have been presented to them by Elizabeth's promise.[56] Therefore, rather than ameliorating conditions, things had in fact gotten slowly worse.[57]

The issue of monopoly was therefore raised early in the 1601 Parliament and, on 20 November that year, a Bill was introduced entitled "An Act for the Explanation of the Common Law in Certain Cases of Letters Patent." This sparked five days of intense debate, described by Robert Cecil, the Secretary of State at the time, as "more fit for a Grammar-School than a Parliament,"[58] in which a multitude of grievances against monopoly were aired. However, despite all of its

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[54] D'ewes S., *A Compleat Journal of the Votes, Speeches and Debates, both of the House of Lords and the House of Commons Throughout the Whole Reign of Queen Elizabeth of Glorious Memory* (Bowes, London, 1693) – available from Early English Books Online at: http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:62589), at 547.

[55] D'ewes S., *A Compleat Journal of the Votes, Speeches and Debates, both of the House of Lords and the House of Commons Throughout the Whole Reign of Queen Elizabeth of Glorious Memory* (Bowes, London, 1693) – available from Early English Books Online at: http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:62589), at 547. See also 1 Parl Hist 906; and Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), at 75.

[56] See Holdsworth W., *A History of English Law* (Vol 4) (3rd Ed, 1945), at 347-8.

[57] Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), makes similar comments, at 75.

[58] The entire course of the debate is reproduced in Townshend H., *An Exact Account of the Proceedings of the Four Last Parliaments of Q. Elizabeth Of Famous Memory* (London; Basset, Crooke & Cademan, 1680), from 230-53. The statement from Cecil appears at 246.

concerns, Parliament never got the opportunity to conclude the issue, as on 25 November 1601 the Queen herself put an end to all discussion by issuing a statement through the Speaker. Thus, Elizabeth thanked the Commons for bringing matters to her attention and said "She understood, That divers Patents that She had granted, were grievous unto Her Subjects, and that the Substitutes of the Patentees, had used great Oppression."[59] However, she said "She never assented to Grant anything that was *Malum in se*."[60] Furthermore, she doubted the wisdom of simply repealing undesirable grants, stating that if the Bill were withdrawn she would agree to submit her patents to trial according to common law.[61]

This concession was most significant as, not only did it placate Parliament "without even conceding that the prerogative was subject to parliamentary authority"[62], but it also shifted any blame for the abuses away from the prerogative and onto the patentee. This was clearly the Queen's intention, as evidenced by the Speaker's comment that "Against the Abuses, Her Wrath was so Incensed, that, She said, She neither would, nor could suffer such to escape with Impunity."[63] Moreover, as the courts' discussion of the monopolies in question would inevitably turn on the facts of the individual cases, an in-depth criticism of the policy of monopoly grant and the role and nature of the prerogative was deftly avoided.[64]

For Darcy, however, the outcome was less positive. By the beginning of the seventeenth century his patent was wholeheartedly infringed,[65] and the Queen's proclamation of 1601 only

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[59] See Townshend H., *An Exact Account of the Proceedings of the Four Last Parliaments of Q. Elizabeth Of Famous Memory* (London; Basset, Crooke & Cademan, 1680), at 248. See also, Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), at 77.

[60] Wrong in itself. *Ibid.*

[61] *Ibid.*

[62] Nachbar T.B., 'Monopoly, Mercantilism and the Politics of Regulation', (2005) 91 *Virginia Law Review* 1313, at 1332.

[63] Townshend H., *An Exact Account of the Proceedings of the Four Last Parliaments of Q. Elizabeth Of Famous Memory* (London; Basset, Crooke & Cademan, 1680), at 248-9.

[64] See Holdsworth W., *A History of English Law* (Vol 4) (3rd Ed, 1945), at 348-9; and Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), at 78-9 for further discussion.

[65] Davies D.S., 'Further Light on the Case of Monopolies', (1932) 48 *LQR* 394, at 399-403 notes at least eight actions taken by the previous owners against infringers.

accelerated this practice. Indeed, Darcy complained in June 1602 that many people took it for granted that his patent had been revoked and not just opened up to judgment by courts of common law should anyone wish to challenge it.[66] Following this complaint, the Privy Council stepped to his aid and issued an Order confirming that the patent was indeed still valid and that it would be upheld until adjudged void at law.[67] Far from providing the security that he sought, however, the Order was thoroughly impotent; events had already overtaken it.

B. The Decision

By the time that the Privy Council gave its stamp of approval to Darcy's patent, and the stable door had been closed, the horse had not only bolted, but had also managed to book a package holiday to Marbella and could be seen sipping a glass of sangria in the sun, as pleadings in the dispute in *Darcy v Allen* had already been commenced at King's Bench some months earlier. The case was argued upon three occasions over the Trinity and Michaelmas terms of 1602 and into the Easter term of 1603 where it reached conclusion, judgment being given shortly after the Queen's death that year. The case was extremely high-profile and was argued by the leading lawyers of the day, including Coke as Attorney-General and Flemming as Solicitor General, both for the plaintiff.[68]

There are three published contemporary reports of the decision[69] all penned by notable jurists of the day, but none of which really paints the whole story. Moore's is conceivably the most balanced and restrained of the three, being limited to recital of the broad arguments of counsel

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[66] See Davies D.S., 'Further Light on the Case of Monopolies', (1932) 48 *LQR* 394, at 405.

[67] Davies D.S., 'Further Light on the Case of Monopolies', (1932) 48 *LQR* 394, at 405.

[68] A full list of those appearing in the case is given by Coke – viz: "Dodderidge, Fuller, Flemming Solicitor and Coke Attorney-General for the plaintiff; and by Crook, G. Altham, and Tanfield for the defendant." See 11 Co Rep 84b at 85b). This list is not, however, strictly correct, for as Corré points out, Coke misreports that Tanfield argued for Allen, see Corré J.I., 'The Argument, Decision, and Reports of *Darcy v. Allen*', (1996) 45 *Emory Law Journal* 1261, at 1283 n80. Corré fails to explicitly mention, however, that Coke mistakenly assigns a number of the other advocates to the wrong side also. Thus, from Moore and Noy's reports it is clear that Fuller argued for the defendant, Allen, and not for Darcy as Coke claims. See Noy 173; *74 English Reports* 1131, and Moore (K.B.) 671; *72 English Reports* 830. Moreover, Altham, according to Moore, argued for Darcy and Doddridge for Allen.

[69] There are other 'reports' of the case, most notably Thomas Webster's, found in Webster, *Reports and Notes of Cases on Letters Patent for Inventions*, Vol I, (London, T Blenkarn, 1844), at 1 – often cited as 1 *Web Pat Cas* 1 – however, it is clear that this is simply a distillation from the reports of Coke, Noy and Moore – with heavy emphasis on Coke's account.

for both sides in the dispute and ending with a simple statement that in the Easter term of 1603 the case was adjudged for the defendant.[70] Noy's report of the case is perhaps more significant, and yet it is, in some respects, also more limited. To begin, it is longer and contains detail lacking in Moore's report, however it restricts itself to presenting the arguments of but one of the advocates, Fuller, appearing on behalf of the defence. Not only, therefore, is it unbalanced in its coverage, but it is also clear that Fuller's was "by a good measure the most extreme attack on the royal power presented in the case."[71] Therefore the view that it provides of the dispute is somewhat skewed in its focus. Notwithstanding this fact, as we shall see, Noy's report of Fuller's words has become enshrined in the folklore of intellectual property and has contributed in no small part to the enduring significance of the decision. *Darcy v Allen*'s infamy is, however, primarily due to Sir Edward Coke's report – who, it will be recalled, had argued for the plaintiff and lost – in which he sought to set out his perception of the reasoning behind the judgment. Coke's musings are important, not only because he alone branded the decision *The Case of Monopolies*, a moniker that it bears to this very day, but also because, as Corré has shown,[72] no official judicial opinion was ever provided by those that presided in the case. A decision was made that Allen did not infringe, but the reasons lying behind this judgment were not articulated by the court. If *Darcy v Allen*, therefore, has become a poster-child against monopolisation – or is perceived as placing a curb on the exercise of the royal prerogative – then this perhaps has more to do with Coke's interpretation of events than any other factor.

C. Coke's report of the decision

Coke reported that there were two general questions that were argued in the case. The first of these was "whether the grant to the plaintiff of the sole making of cards within the realm was good or not", and the second concerned the more delicate issue of whether the "licence or dispensation to have the sole importation of foreign cards granted to the plaintiff, was available or not in law?"[73] This second question was made all the more problematic given the patent's *non obstante*[74] provision, providing dispensation from a statute of Edward IV outlawing the

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[70] "Et Postea Pasch. 1 Jac. fuit adjudge pro defendente." Moore (K.B.) 671, at 675. *72 English Reports* 830, at 832. See also Corré J.I., 'The Argument, Decision, and Reports of *Darcy v. Allen*', (1996) 45 *Emory Law Journal* 1261, at 1271, n30.

[71] Corré J.I., 'The Argument, Decision, and Reports of *Darcy v. Allen*', (1996) 45 *Emory Law Journal* 1261, at 1265.

[72] Corré J.I., 'The Argument, Decision, and Reports of *Darcy v. Allen*', (1996) 45 *Emory Law Journal* 1261.

[73] 11 Co Rep 85b.

[74] Not withstanding.

importation and sale of playing cards.[75] The crux of this second issue, therefore, was the extent to which the Crown could override the express wishes of Parliament; a delicate constitutional question if ever there was one!

1. The First Question

The first question, Coke stated, was resolved by "Popham, Chief Justice … that the said grant to the plaintiff of the sole making of cards within the realm was utterly void"[76] as it was against the common law and various Acts of Parliament.

It was against the common law for four distinct reasons: the first was that all trades that prevented idleness ("the bane of the commonwealth"), and exercised men and youth in labour, as the making of cards here, were profitable to the commonwealth, and therefore should not be reserved to one party alone, as to do so would be "against the liberty of the subject".[77]

The second reason given for the grant being void was that, according to Coke, providing an exclusive right to the "sole trade of any mechanical artifice, or any other monopoly" was considered "not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees".[78] This alone rendered it unlawful as it resulted in "three inseparable incidents to every monopoly against the commonwealth" which rendered them illegitimate. Therefore, monopolies: raise prices; reduce quality ("for the patentee having the sole trade, regards only his private benefit, and not the common wealth."); and tend to impoverishment of those displaced from their trade.[79] This latter reason alone was a very powerful argument to be deployed for, as Nachbar notes, the "common-law cases of the era are obsessed with protecting the reliance interest of

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[75] 3 Ed IV, cap 4.

[76] 11 Co Rep 86a; *77 English Reports* 1262.

[77] 11 Co Rep 86a; *77 English Reports* 1262-3.

[78] 11 Co Rep 86b; *77 English Reports* 1263.

[79] It should be noted that the mobility of the workforce to other areas of trade was significantly curtailed at this period in history due to the

craftsmen, largely because the then-extant apprenticeship rules made it very difficult for those displaced from one trade to enter another."[80]

The report indicates that the third nail in the monopoly's coffin was that the court held the Queen to have been deceived in her grant. It was apparent from the preamble to Darcy's patent that she intended it to benefit the "weal public", whereas it was in fact employed for the "private gain of the patentee, and for the prejudice of the weal public". Therefore, according to the Earl of Kent's case, the grant was "void *jure regio*".[81]

Finally, the grant was stated to be without precedent, and therefore a "dangerous innovation …without authority of law, or reason."[82] Moreover, it was asserted that it could not have been intended that Edward Darcy, "an Esquire, and a groom of the Queen's Privy Chamber", who has no skill in the trade of making cards, should be in a position to forbid others who do possess such skill from exercising it. His claim was therefore one founded on bad faith; the argument being that giving the power to prevent a person who has skill in an art from exercising that skill, to a person who has no skill in that art at all, is sufficient to make the patent utterly void. Thus, Coke reported, the court had concluded that "the Queen could not suppress the making of cards within the realm, no more than the making of dice, bowls, balls, hawks' hoods, bells, lures, dog-couples, and other the like, which are works of labour and art, although they serve for pleasure, recreation, and pastime." The only body that was capable of restraining and suppressing such manufacture, or restraining a man from exercising any trade, being Parliament itself.

2. The Second Question

The second question – whether the "licence or dispensation to have the sole importation of foreign cards granted to the plaintiff, was available or not in law?" – Coke proclaimed to have been decided, once again, against the plaintiff. He stated that the court had drawn a distinction between provisions enacted to regulate *mala prohibita*, which he stated the Crown could dispense with at will, and those enacted *pro bono publico*, which could it not.[83] In the case of the latter, as

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[80] Nachbar T.B., 'Monopoly, Mercantilism and the Politics of Regulation', (2005) 91 *Virginia Law Review* 1313, at 1372.

[81] 11 Co Rep 87a; *77 English Reports* 1264.

[82] *Ibid.*

[83] 11 Co Rep 88a; *77 English Reports* 1265.

here, "for a private gain to grant the sole importation of them to one, or divers (without any limitation) notwithstanding the said Act, is a monopoly against the common law, and against the end and scope of the Act itself". Such a grant, he stated, was "in prejudice of the commonwealth" and utterly void.

Phrased in this way, the line apparently adopted by the court is extreme. At the time of the decision such a proclamation would have been utterly sensational, and more than a little risky. The line demarcating the boundaries between of the Crown, courts and Parliament had not been clearly established; any questioning of the royal prerogative would still at this time have been an affront to the monarch themselves. Despite, therefore, the case coming to resolution shortly after the Queen's death in 1603, it would evidently have been unthinkable to have criticised the monarch's prerogative grants in such a direct manner as was alleged to have been the case. The accuracy of Coke's report must therefore be questioned.

D. Coke's Report: Altered Reality?

Despite, therefore, appearing to be the most complete of the published reports of the decision, Coke's record cannot be taken as a wholly accurate and true representation of the reasoning behind the King's Bench ruling in favour of Allen. Indeed, it is apparent that Coke's account is lacking in a number of respects. Most obviously, it was not made strictly contemporaneously with the decision itself. As Corré notes, Coke did not actually publish his report until 1615, some 12 years after the decision in *Darcy v Allen* was handed down, in the last volume of the *Reports* that he was to live to see to press.[84] This temporal dissonance between report and decision could be argued to be insignificant, but for the fact that by the time of publication there had been a considerable shift in the prevailing political attitude to monopoly. Thus the report itself makes reference to James I's *Book of Bounty*, a manuscript that was not published until 1610, which pre-empts much of what Coke was claiming was decided in *Darcy v Allen* and sets the scene for more forthright criticism of abuses of the prerogative.

The *Book* was a direct response to a petition presented by the parliamentary Committee on Grievances in 1610 concerning the continuation of the granting of monopolies in established trades. Whilst Elizabeth had been relatively conservative with the grants of monopoly privilege that she had presented to court favourites, James I shared none of the caution of his predecessor

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[84] Corré J.I., 'The Argument, Decision, and Reports of *Darcy v. Allen*', (1996) 45 *Emory Law Journal* 1261, at 1262.

on this matter. His reign, even after publication of the *Book of Bounty*, was marked with alternating periods of excess and prudence over monopoly, the latter arising from chastisement over the former. Indeed, Coke himself was to observe, in a parliamentary debate in 1620, that: "Monopolies are now grown like Hydra-heads: they grow up as fast as they are cut off."[85] Therefore James' excess, and the promises he gave in response to the Committee on Grievances, as well as the changing constitutional landscape that he faced during his reign, meant that by the mid-1610s the monopoly question not nearly as raw as it had been a decade earlier.

Monopolies were the cause of parliamentary censure very early on in James's reign, as in March 1604 he first issued an apology to Parliament over the surfeit of his grants, and promised to moderate his generosity. At this time he also instigated the Commissioners of Suits to examine the merits of all applications lest the errors of the past be repeated. However, by 1606 the situation had not improved; the words of the King seeming not to be matched with any concerted action. Therefore a petition on the subject was presented at the close of that year's parliamentary session.[86] As a result of this, James undertook to revoke those patents of most concern; in fact, however, he did nothing. Thus, in 1610 the Committee once again petitioned the King, pointing to his lack of action and stating that in addition he had "failed in his undertaking that the courts should consider and judge of the validity of certain of the grants."[87]

In direct response to this petition, the King issued the *Book of Bounty* and in it proclaimed that all monopolies were against the laws of the Kingdom; excepting, that is, those concerning "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."[88]

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[85] 1 Parl. Hist. 1193 – quoted from Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), at 93.

[86] State Papers, Domestic. Jac. I, xxiii, 66 and 67. The list is reprinted in Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), at 329.

[87] Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), at 95; see also Price W.H., *The English Patents of Monopoly* (Cambridge (Mass), Harvard University Press, 1913), at 27.

[88] See Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), at 330-335 for a complete reproduction of the proclamation.

By the time, therefore, of the publication of Coke's report of *Darcy v Allen* in 1615, the political climate had changed to a sufficient degree that things could be said that would have been unimaginable twelve years earlier. It is therefore tempting, if nothing more, to conclude that Coke took advantage of this in furthering his own personal agenda on monopoly policy. Furthermore, when compared to his unpublished notes on the case (preserved in the British Library)[89] there are a number of significant differences that are apparent. Fundamental amongst these is the fact that Coke's notebook account of the decision indicates that the factors behind the resolution of the case were not openly disclosed, the justices simply finding for Allen.[90] This lies in stark contrast to the full 'reasoning' that is given in his published report.

There are also other aspects of Coke's account that belie the fact that it may not be as true to life as has erstwhile been believed, foremost amongst these being his record of the advocates appearing in the case. Whilst Coke lists "Dodderidge, Fuller, Flemming Solicitor and Coke Attorney-General for the plaintiff; and … Crook, G. Altham, and Tanfield for the defendant"[91], as Corré points out, Tanfield actually argued for Darcy, the plaintiff.[92] However, what Corré fails to mention is that Coke mistakenly assigns a number of the other advocates to the wrong side also. Thus, from Moore and Noy's reports it is clear that Fuller argued for the defendant, Allen, and not for Darcy as Coke claims.[93] In addition, Altham, according to Moore, argued for Darcy and Doddridge for Allen. If Coke could not get such simple matters correct then it is even more unlikely that his reporting of the substantial issues can automatically be assumed to also be entirely accurate.

Moreover, whilst it is possible that the analysis behind the court's decision may have been communicated to Coke in private, it is nevertheless the case that his published record of the decision attracted claims of bias almost as soon as it came to press. Lord Ellesmere famously commenting upon one of Coke's statements that: "those that observed the passage of that case, and attended the judgment of the Court therein, do know, that the Judges never gave any such

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[89] BL, MS. Harl 6686, fol. 573.

[90] See discussion of this point in Corré J.I., 'The Argument, Decision, and Reports of *Darcy v. Allen*', (1996) 45 *Emory Law Journal* 1261, at 1269-71.

[91] See 11 Co Rep 84b at 85b.

[92] Corré J.I., 'The Argument, Decision, and Reports of *Darcy v. Allen*', (1996) 45 *Emory Law Journal* 1261, at 1283 n80.

[93] See Noy 173; *74 English Reports* 1131, and Moore (K.B.) 671; *72 English Reports* 830.

resolution in that point, but passed it by in silence".[94] Corré draws attention to the fact that Ellesmere saw Coke's record as a specific example of his bias "against Crown prerogatives … [, which] had led to a series of reports in which 'every patent is made good whereby the King parteth with his Inheritance and every patent is made void by which his Majestie would Expresse his power in dispensing with things forbidden or grant his power in doing such things as formerly had been done by the like Patent.'"[95] Indeed, Coke's personal distaste for monopoly comes fully into focus in the discussion of the *Statute of Monopolies* in his *Institutes on the Laws of England* in which he notes that "the monopolist that taketh away a mans trade, taketh away his life, and therefore is so much the more odious, because he is *vir sanguinis*."[96] Therefore, far from perceiving the monopoly as an anodyne vehicle for governance that could be abused like practically any other exclusive right, Coke clearly viewed it as a monster to be tamed.

Coke's report of the decision in *Darcy v Allen* is therefore at best dubious and at worst an almost complete fabrication of events. As a basis for subsequent development of the law we would be safe in stating that neither provides a particularly sound platform. Whilst it would, perhaps, not be surprising if Coke's personal view of monopoly had coloured his interpretation of the case to a certain extent, to conjure full reasoning from the ether and present it as Gospel is a rather more worrying development. The impact of this conclusion is made all the more troubling due to the fact that it is Coke's report of the decision that has, for almost 400 years, been considered to be the final word on this matter.

IV. The Immediate Impact of the Decision

That Coke's report of *Darcy v Allen* is primarily responsible for the significance of the case is apparent from an examination of the events that occurred in the immediate aftermath of the decision. Certainly, in the years directly following cessation of hostilities between the parties, the case did nothing in the wider political sphere to stem the issuance of abusive grants – indeed, under James I, as noted, the situation took a marked turn for the worse, as the King lacked much of the restraint, tact and charm shown by his forebear. As Nachbar notes: in the years that

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[94] This statement is reproduced in note (G) in the English Reports version of Coke's report of the case: 77 Eng Rep 1260, at 1265.

[95] Corré J.I., 'The Argument, Decision, and Reports of *Darcy v. Allen*', (1996) 45 *Emory Law Journal* 1261, at 1264, quoting from Ellesmere, *Observations on Coke's Reports*, BL, MS. Harg. 254, fol. 36.

[96] Coke E., *Third part of the Institutes of the Laws of England* (London, E & R Brooke, 1797), at 181.

followed the decision, *Darcy v Allen* "remained something of a hidden treasure."[97] Thus, during the parliamentary debates on Monopolies in the 1614 parliamentary session, while numerous other cases were referred to in support of the condemnation of monopoly, *Darcy v Allen* is conspicuous only in its absence.[98] Furthermore, the disquiet in parliament in 1604, 1606 and 1610 that had led to the *Book of Bounty* being published by the King, also confirms that the principles allegedly laid down in *Darcy v Allen* were either being ignored or overlooked by both monarch and parliament.

Indeed, it is only with the publication of Noy's and Coke's reports, both somewhat biased views of the proceedings (if not in Coke's case an elaboration *par excellence*), that we begin to see further reference to the case. When faced with these editorial comments, for they can be described as little else, on the arguments presented before the bench and the reasoning behind the decision, it is unsurprising that some modern commentators have gained the impression that the justices pronouncements in *Darcy v Allen* were more radical and hard-hitting than was actually the case. However, the simple fact of the matter is that both Noy and Coke had their own agendas to push, and their political views on monopolies (both Noy and Coke were ardent anti-monopolists: Noy being co-sponsor, in 1621, of a predecessor of the Statute of Monopolies,[99] and Coke later writing extensively of the perils of monopoly in his *Institutes*[100]) may have coloured their writings. Indeed, Coke's famous *Charge to the Norwich Assizes* of 1606[101] sees his colours firmly pinned to the mast, when he likens the monopolist to the concealer, whose claims and titles are "meere illusions, and like himselfe not worth any thing", the promooter, "both a *begger* and a *knave*", and the Alcumist, "our golden Foole". The purchase of monopoly, he explains,

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[97] Nachbar T.B., 'Monopoly, Mercantilism and the Politics of Regulation', (2005) 91 *Virginia Law Review* 1313, at 1341.

[98] See 1 HC Journal 472 (May 4, 1614). Also Nachbar T.B., 'Monopoly, Mercantilism and the Politics of Regulation', (2005) 91 *Virginia Law Review* 1313, at 1341.

[99] See MacLeod C., *Inventing the Industrial Revolution: The English Patent System 1660 – 1800*, (Cambridge, Cambridge University Press, 1988), at 18. Also Nachbar T.B., 'Monopoly, Mercantilism and the Politics of Regulation', (2005) 91 *Virginia Law Review* 1313, at 1333.

[100] See, for example, the comments in Coke E., *Third part of the Institutes of the Laws of England* (London, E & R Brooke, 1797), at 181.

[101] If it is to be believed. Coke himself later disavowed of the report of the speech – see the preface to 7 Co Rep; Fraser J.F. (ed), *The Reports of Sir Edward Coke (in thirteen parts),* Vol IV, (London, Joseph Butterworth & Son, 1826), at viii-ix.

allows the monopolist to "anoy and hinder the whole *Publicke Weale* for his owne privat benefit".[102] That both commentators, therefore, may have been led by their convictions to present an extreme view of the case is perhaps hardly surprising.

Nevertheless, the force and tenor of both Noy and Coke's reports have, in many respects, detracted from the real advance marked by the decision. Simply put, the case was substantially irrelevant for what it decided, as the main progression in thinking, and the change in respect of the approach to monopoly had already occurred by the time that Darcy and Allen first stepped into the courtroom. The decision's significance was simply the fact that it occurred at all, the main battleground being dictated by Parliament's continued assaults on the monopoly issue, culminating in Elizabeth's 1601 proclamation in which she opened her grants to adjudgment by the courts of the common law. Yet this factor is often overlooked, commentators (and courts) instead latching on to Coke's inflammatory comments, and perpetuating the myth that Popham's bench proclaimed an ancient and fundamental distaste for monopoly. We see this, in particular, during the renaissance of critical thinking on patents that occurred in the mid-nineteenth century, when patent decisions and the reasons for them became a valuable commodity and the leading commentators endeavoured to produce digests of historic decisions; both Carpmael and Webster utilised Coke's report as an authoritative and appropriate platform from which to commence their discussion of the law. Webster, for example, noted that his digest of cases on letters patent was "intended to comprise the authorities from which the principles and practice of this branch of the law are derived", before explaining that: "The principles of that common law are not matter of doubt or uncertainty. The case of monopolies, argued and determined in the Exchequer Chamber, in the time of Elizabeth, exhibits the common law of the realm in respect of monopolies generally."[103]

When recounting the decision in *Darcy v Allen*, Webster suggests that Coke's account "presents the principal points of argument which were raised in that important case, and the old common law of the realm in respect of this kind of monopolies." He also adds that: "The principles of

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[102] See 'The Lord Coke, His Speech and Charge, reproduced as Coke's Speech and Charge at the Norwich Assizes' in Sheppard S., *The Selected Writings and Speeches of Sir Edward Coke*, Vol II, (Indianapolis, The Liberty Fund, 2003), at 551. See also Malament B., 'The "Economic Liberalism" of Sir Edward Coke" (1967) 76 *Yale Law Journal* 1321, at 1324.

[103] Webster T., *Reports and Notes of Cases on Letters Patent for Invention*, (London, Thomas Blenkarn, 1844), at iii to iv.

the above decision have been recognised in many subsequent cases of grants or restraints connected with some known manufacture or trade."[104] Thus by the 1840s, if not before, Coke's account of *Darcy v Allen* had become the standard by which others were being judged.

V. A Legacy Questioned

Darcy v Allen is, in many respects, the Che Guevara of intellectual property cases. It is a decision whose image has been taken and used for causes unrelated to those for which it originally stood. Little can authoritatively be said about the actual resolution of the case other than that the justices found for Allen, and yet here is a case that is over 400 years old and which, along with a mere handful of other decisions from such a bygone period, is treated as ranking as an authoritative exposition whose pronouncements on features of trade and commerce are still held legitimate.

Jacob Corré, the person responsible for perhaps the fullest, and most comprehensively researched, indeed altogether most useful, account of the argument, decision, and report of the case states that: "Even by the standards reserved for great cases, *Darcy v Allen* has proven exceptionally durable."[105] Indeed, despite its age, it has been cited as good authority within recent memory in courts in many common law jurisdictions – including, in decisions of the English High court[106] and Court of Appeal[107] as well as the US Supreme Court.[108]

The legacy of the decision is due, in no short measure, to Coke's ideological interpretation, and elaboration, of the potential reasons behind the outcome: a folkloric genesis of a monopoly-phobia that can be seen to pervade modern thinking. The principles he espoused can be seen as providing fuel for the genesis of a free trade movement, and are championed under this banner[109] with little regard for the "distinctly Tudor cast of Coke's thinking."[110] That 'monopoly

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[104] Webster T., *Reports and Notes of Cases on Letters Patent for Invention*, (London, Thomas Blenkarn, 1844), at 4-5.

[105] Corré J.I., 'The Argument, Decision, and Reports of *Darcy v. Allen*', (1996) 45 *Emory Law Journal* 1261, at 1262.

[106] *Oakley Inc. v Animal Limited* [2005] EWHC 210 Ch.

[107] Albeit not in an intellectual property case. *R v Kelly* [2008] EWCA Crim 137.

[108] *City of Colombia v Omni Outdoor Advertising Inc.* 499 U.S. 365 (Sup Ct, 1991), opinion of Justice Stevens (dissenting).

[109] See, for example, *Standard Oil Co. v United States* 221 U.S. 1, at 51 to 54.

[110] Malament B., 'The "Economic Liberalism" of Sir Edward Coke" (1967) 76 *Yale Law Journal* 1321, at 1321.

is bad', has much to blame on the decision in *Darcy v Allen* – indeed this sentiment could only really be expressed once the advances that are marked by the decision had come to be accepted and the patent had become divorced from the royal prerogative once and for all.

Yet to leave all the praise (or perhaps blame) for the legacy of the decision at Coke's door would be to do disservice to the other reporters of, and actors in, the case. The defence's concession, for example, that an exception to the rule against monopoly, voiced in the following terms:

> "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."[111]

may well, as time has passed, have become the "accepted criterion of the legitimacy of a patent."[112]

Therefore, whilst the decision in *Darcy v Allen* as presented in the reports of Noy, Coke, and Moore, may not be the whole, or even a strictly accurate, picture of the resolution of the case, they are its legacy. A legacy created and fostered by the vested interests of the reporters and the political context of the time. The case is the first reported decision that follows Elizabeth's 1601 speech to Parliament in which she opened up her grants to adjudgment by the law, and is therefore significant as a historical marker of a change in prevailing attitude to the treatment of the prerogative,[113] if nothing more. As part of the story of a state struggling to establish

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[111] Noy, 182; 74 *English Reports* 1131, at 1139.

[112] Price W.H., *The English Patents of Monopoly* (Cambridge (Mass); Harvard University Press, 1913), at 24.

[113] It is worth noting that the severance of the direct links between the Crown and the patent was only completed with the passage of the Patent Law Amendment Act 1852, which provided for property to arise in the patent from the date of application, rather than of grant by the Crown. This change was of vital importance in the patent's evolution as an item of property as it created *bureaucratic* property in the grant and enabled its emergence from the shadow of the prerogative. See, in particular, Webster's answer to Q.544 in *Report of the Select Committee on Letters*

parliamentary supremacy, and a tale of a battle to assert political authority, the case is significant, but to ignore the background, and the ill-concealed agendas of the reporters, and to pluck from *Darcy v Allen* a Commandment against monopoly per se, is taking things too far. As Corré astutely notes: "The question of the royal patent power was the most sensitive, the most complicated, and, in many ways, the most novel problem in the case…. It is tempting to suggest that, as is surely the case today, those most familiar with legal culture would have expected the justices at least to consider the possibility of deciding the case on narrower, more neutral, and politically less sensitive grounds."[114]

That Allen won is undeniable; but to extrapolate from this result that monopoly is against the ancient and fundamental laws of the land, is not. Monopoly is, and has always been, a tool of the state. As such, it can be utilised by those that wield it for purposes that are good, or those that are not. As Fox notes: it was "not the monopolies which were bad, but only their abuse".[115] Therefore, to quote the old song: "T'ain't What You Do (It's the Way That You Do It)".[116]

Patent, House of Commons Papers 1871 (Command Paper № 368). Also L. Bently & B. Sherman, *The Making of Modern Intellectual Property Law* (Cambridge, Cambridge University Press, 1999), at 134.

[114] Corré J.I., 'The Argument, Decision, and Reports of *Darcy v. Allen*', (1996) 45 *Emory Law Journal* 1261, at 1326-7.

[115] Fox H., *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto, University of Toronto Press, 1947), at 189.

[116] The song was written by Melvin "Sy" Oliver and James "Trummy" Young, and has been performed/covered by many including Ella Fitzgerald and Bananarama.