

# RESTRAIN ME NOT: *MITCHEL V REYNOLDS* AND EARLY 18<sup>TH</sup> CENTURY PATENT LAW

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*For historians of the patent system, the first half of the eighteenth century provides little of use – with no reported decisions that clearly relate to a dispute over a patent grant. The option presented here is to examine a non-patent decision, in a related field, that sheds light on the assumptions and perspectives that underpin the legal discourse of the time. *Mitchel v Reynolds* (1711) shares similarities with the early seventeenth-century patent law; however, there were also differences that make it look more “modern”. In terms of the former, there was still the tendency to discuss patents for invention as only an example of the general Crown right to grant charters and there remained an implicit acceptance of the mercantilist approach to the economy. Differences between the eighteenth-century law and that of the seventeenth-century include an acknowledgement of the perceived role of patents in encouraging ingenuity and also of the individual’s freedom to contract. A nuanced understanding of *Mitchel v Reynolds*, then, allows for a perspective of the assumptions of the system in the “dark ages” between the Statute of Monopolies and the reforms of the nineteenth century.*

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## I INTRODUCTION

The early part of the eighteenth century is a quiet time as far as the history of patent law goes. There were no statutes; and Hayward, in his compilation of patent cases,<sup>1</sup> refers to only four decisions<sup>2</sup> – only one of which would be understood to be a decision of relevance to patents for invention.<sup>3</sup> Other commentary has found additional material to discuss; however, even these works have a broader span of focus than just the period 1701-1750 with little discussion of the first part of the eighteenth century.<sup>4</sup> Other commentary, on the other hand, focuses on the (later) relationship between the industrial revolution and the intellectual property system.<sup>5</sup> This is not a criticism of the commentators, as there is very little primary material to work with in the area. It may also be that, given the fact that most of the current settings of the patent system were put in place in the nineteenth century,<sup>6</sup> others have seen less need to explore the earlier period – the argument here is that it was the developments in the eighteenth century that delimited the possibilities of reforms in the nineteenth century and, therefore, are worthy of focused examination.<sup>7</sup>

<sup>1</sup> Hayward compiled all the decisions, up until 1883, from Webster's Patent Cases, Carpmael's Patent Cases, the English Reports and other contemporaneous records of patent cases to produce the most comprehensive set of patent decisions available.

<sup>2</sup> All four of these decisions will be referred to in this article. There is one other decision of interest – though it is not a patent case either. The decision of *Whitchurch v Hide* contains the clause 'in the cases of new inventions upon the act, that fixes the sole property of books in the authors, for it is under a common general right upon the statute, so likewise under the act of parliament for vesting the sole property in prints of new invention': (1742) 2 Atk 391, 391; 26 ER 636, 637. What is odd about this is the fact that it seems to refer to books as inventions – further muddying the understanding of innovation at the time (a time when invention and discovery were used interchangeably). The interpretation of *Whitchurch v Hide* is, of course, made problematic by the lack of clarity around the Act concerned – was it the *Statute of Anne 1710* (copyright) or the *Statute of Monopolies 1624* (patents)?

<sup>3</sup> That decision was *R v Mussary* (1738) 1 HPC 153 – its relevance stems from the fact that it involved a discussion of the writ of *scire facias*. The writ will be discussed in more detail below.

<sup>4</sup> MacLeod's work covers the period 1660-1800: Christine MacLeod, *Inventing the Industrial Revolution: The English Patent System, 1660-1800* (Cambridge University Press, 2002); and Bottomley's from 1700-1852: Sean Bottomley, *The British Patent System during the Industrial Revolution 1700-1852: From Privilege to Property* (Cambridge University Press, 2014).

<sup>5</sup> See, eg, H I Dutton, *The Patent System and Inventive Activity during the Industrial Revolution, 1750-1852* (Manchester University Press, 1984).

<sup>6</sup> See, eg, B Sherman and L Bently, *The Making of Modern Intellectual Property Law* (Cambridge University Press, 1999).

<sup>7</sup> For an analysis of the "sequential" nature of reforms in the intellectual property system, see Chris Dent, 'Registers of Artefacts of Creation – from the Late Medieval Period to the 19<sup>th</sup> Century' (2014) 3 *Laws* 239.

Given the lack in the primary materials, there may be value in looking outside the standard sources of information. This paper looks at one of the other cases included by Hayward – *Mitchel v Reynolds* (“*Mitchel*”)<sup>8</sup> – to see if an analysis of that decision can shed light on the legal environment that regulated the patent system of the time. Usually, *Mitchel* is seen as an important decision in the history of the restraint of trade doctrine;<sup>9</sup> however, its discussion of the manner in which competition may be limited is relevant to the patent system that is focused on Crown-authorized monopolies – with that relevance stemming from the fact that both involuntary restraints of trade and patents restrict the economic activity of individuals.<sup>10</sup> As *Mitchel* is not, strictly, a patent law case (at least not in terms of patents for inventions<sup>11</sup>), this cannot be, properly, a piece of doctrinal analysis. Instead, it will take a broader, socio-legal, look at what was going on three centuries ago. This range of material allows for an assessment of the early eighteenth-century legal system as sharing some elements with the seventeenth-century system and yet also including aspects that presage the nineteenth century and many of the patent law reforms that took place then.

## II CURRENT KNOWLEDGE OF EARLY 18<sup>TH</sup> CENTURY PATENT LAW

Before the discussion of *Mitchel* is embarked upon, it is useful to summarise the current understanding of the patent law of the first half of the eighteenth century as well as relevant aspects of broader society of the time. In terms of patents themselves, according to MacLeod, only 285 patents for invention were enrolled in the period from 1701 to 1750.<sup>12</sup> By way of comparison, that number of patents was exceeded in the four year period from 1796 to 1799<sup>13</sup> – a time after the industrial revolution had started. Of course, one reason for the low level of patenting was the tortuous, and expensive, procedure that had to be

<sup>8</sup> (1711) P Wms 181; 24 ER 347.

<sup>9</sup> See, for example, the discussion of it as a “point of inflection” that history in Chris Dent, ‘*Nordenfelt v Maxim-Nordenfelt: An Expanded Reading*’ (2015) 36 *Adelaide Law Review* 329.

<sup>10</sup> It is notable that *Mitchel* does discuss some of the most important patent decisions of the early modern period such as the *Case of Monopolies* (1602) 11 Co Rep 84b; 77 ER 1260.

<sup>11</sup> The different types of patents in the early modern period will be discussed further below.

<sup>12</sup> MacLeod, above n 4, 150, citing data from Bennet Woodcroft, *Chronological index of patents of invention* (G E Eyre and W Spottiswoode, 1854).

<sup>13</sup> In those four years, 288 patents were enrolled: *ibid*.

undergone in order to be granted a patent (though the procedure was still in place at the end of the eighteenth century). Gomme summarises the diary of a patentee who spent five months in London and total of more than £128, of which more than £68 were for official fees, in order to gain his patent.<sup>14</sup> Given the many publications, including those of Gomme and MacLeod, that do detail the process, there is no need for it to be gone into here.

The one key development was the introduction of the patent specification, a device that became ‘standard practice after 1734’.<sup>15</sup> There is debate as to the reasons for this particular form of description of the invention – MacLeod highlights Hulme’s view that the document was for the benefit of the patentee (on the grounds that it made the ‘grant more certain’<sup>16</sup>), before arguing that the specification was ‘introduced on the government’s initiative, to make discrimination between superficially similar inventions easier’.<sup>17</sup> Biagioli, on the other hand, considers that the ‘specification requirement ... makes the patent system defensible in political terms’.<sup>18</sup> It is not, however, clear that he is suggesting that they always have had that role; and, without an analysis of any need for the English Executive to gain public support at the time, it may be a stretch to argue that this was the prime motivation for its introduction. Overall, the reasons for the specification are not important for this analysis; and it is worth noting MacLeod’s observation that the document was of ‘limited legal significance in the first half of the eighteenth century’.<sup>19</sup>

As mentioned above, there was one decision directly relevant to patents for invention that was included in Hayward’s compilation of patent cases – *R v Mussary*.<sup>20</sup> The facts of the case are not included in the decision and, therefore, it is not clear whether it is about a patent for invention. It does, however, discuss the application of the writ of *scire facias*. Up until the nineteenth century, this prerogative writ was a key technique for revoking a granted patent (with many bases of challenge stemming from, in effect, the deception of, or

<sup>14</sup> A Gomme, ‘Patent Practice in the Eighteenth Century: The Diary of Samuel Taylor, Thread-maker and Inventor, 1722-1723’ (1937) 19 *Journal of the Patent Office Society* 256.

<sup>15</sup> MacLeod, above n 4, 49.

<sup>16</sup> E W Hulme, ‘On the Consideration of the Patent Grant, Past and Present’ (1897) 13 *Law Quarterly Review* 313, 317.

<sup>17</sup> MacLeod, ‘Inventing the Industrial Revolution’, above n 4, 51.

<sup>18</sup> Mario Biagioli, ‘Patent Republic: Representing Inventions, Constructing Rights and Authors’ (2006) 73 *Social Research* 1129, 1130.

<sup>19</sup> MacLeod, ‘Inventing the Industrial Revolution’, above n 4, 49.

<sup>20</sup> (1738) 1 HPC 153.

misinformation provided to, the Crown<sup>21</sup>). Importantly, the decision in *R v Mussary* discussed the extent to which false recitals in the patent documents, or mistakes on the part of the Crown, would vitiate the grant of the patent. This focus, then, is a reminder that the grant of patents, at that time, was still very much a function of the Crown in person – and not the function of an agency of the Executive (as it came to be in the more bureaucratised system of the nineteenth century<sup>22</sup>).

There is one last detail of eighteenth-century patent law that can be raised here. It does not relate to a patent for an invention, but it did have an impact on the ownership of such patents. The “South Sea Bubble” was a financial event that focused on the collapse of a joint-stock company. The South Sea Company was established as a monopolist trader with South America.<sup>23</sup> There is not the space to go into the detail of the boom and bust of the Company; suffice it to say that, in a space of six months in 1720, the price of shares in the Company increased eight-fold and returned to close to their original value in a further three months.<sup>24</sup> Despite the trade-related initial purpose of the Company, the ‘real explanation of both its origin and collapse’ related to the ‘finances of the State’.<sup>25</sup> The goal was to convert the ‘entire national debt into the company’s capital stock’,<sup>26</sup> with more than £1,250,000 being ‘disbursed to ‘favourites of the King, members of the government and of the Houses of Parliament’.<sup>27</sup> The collapse, of course, hurt speculators who invested in the Company when the share price was on the rise. In terms of patents for invention specifically,<sup>28</sup> the

<sup>21</sup> See, generally, Thomas Foster, *A Treatise on the Writ of Scire Facias* (Stevens & Norton, 1851) 242.

<sup>22</sup> Sherman and Bently discuss this in terms of the ‘normalisation or standardisation’ of patent law: above n 6, 139.

<sup>23</sup> That the Company was established by an Act of Parliament does not detract from its characterisation as “Crown-authorized” – given the relationship between the Crown and Parliament of the time. For an in-depth description of the Company, its formation and its collapse, see John Carswell, *The South Sea Bubble* (Cresset Press, 1969).

<sup>24</sup> Peter Garber, *Famous First Bubbles: The Fundamentals of Early Manias* (MIT Press, 2001) 116.

<sup>25</sup> William Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720* (Peter Smith, 1951) vol 3, 288.

<sup>26</sup> Carl Wennerlind, *Casualties of Credit: The English Financial Revolution 1620-1720* (Harvard University Press, 2011) 234.

<sup>27</sup> Scott, above n 25, 315.

<sup>28</sup> There are, of course, links to the role of Crown debt and the role of the patent system in the early modern period. Many have seen the patent system under Elizabeth and James in terms of its alleged capacity to raise funds – for example, the ‘Tudor monarchs found that granting monopolies by letters patent was an effective way of raising revenue’: Neil Davenport, *The United Kingdom Patent System: A Brief History* (Mason, Portsmouth, 1979) 19. It has been argued, however, that with respect to patents generally, the ‘financial returns to the Crown were at the most negligible, and, while it may be

collapse of the Company meant that patent grants, including those for inventions, were rendered ‘void if the benefits were divided between more than five persons’.<sup>29</sup> In other words, despite the now-perceived qualitative difference between speculation over companies and over new projects for inventions,<sup>30</sup> the State, at the time, appears to have considered that both activities should be curtailed in the same manner. This lack of distinguishing the regulation of inventions reflects an early modern understanding of governance and is borne out by an examination of the *Mitchel* decision.

### III THE DECISION IN *MITCHEL V REYNOLDS*

This Part of the paper is the focus of the research. It will contain a brief summary of the *Mitchel* decision itself as well as an analysis of it in light of factors that are relevant to the understanding of the environment in which the patent system operated. What makes the decision unusual, and useful, is the fact that judgment, read by Parker CJ,<sup>31</sup> undertook a survey of all the decisions that he thought may have impacted on his ruling.<sup>32</sup> That is, he conducted a review of all the decisions relating to an entity restricting someone from working in a particular geographical area – with a key aspect of his judgment being the classification of all relevant case law. It is his commentary on the found cases that will be the focus of the discussion here. As a result, the facts of

admitted that fiscal policy and the hope of raising revenue were contributing factors, they were not the main nor even an important motivating force’: Harold Fox, *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (University of Toronto Press, 1947) 188.

<sup>29</sup> MacLeod, ‘Inventing the Industrial Revolution’, above n 4, 55. It is possible, though perhaps unlikely, that it was public concern over the Crown-authorized grants generally that prompted the Executive to require patent applicants to justify their request with a specification – thereby rendering Biagioli’s argument (above n 18 and the surrounding text) plausible.

<sup>30</sup> MacLeod also considers that the patent system ‘suffered by implication ... during the “bubbles” of the early 1690s and 1717-1720’: Christine MacLeod, *Heroes of Invention: Technology, Liberalism and British Identity 1750-1914* (Cambridge University Press, 2007) 35.

<sup>31</sup> The other judges who formed the court were not named in the judgment – Parker CJ’s use of the phrase ‘we are all of [the] opinion’ makes it clear that he was not sitting alone: (1711) P Wms 181, 182; 24 ER 347, 348

<sup>32</sup> He does not explain why such a wide ranging analysis was required. The report does not contain the arguments of counsel, so it is possible that the diversity of cases raised by the opposing sides prompted Parker CJ’s approach. It is also worth noting that, as the printing of law texts increased markedly in the seventeenth century, Parker CJ had access to more material than did the early modern judges and, for some reason, took advantage of it in this case. For a discussion of the changes in the printing of law texts, see David Harvey, *The Law Empryted and Englysshed: The Printing Press as an Agent of Change in Law and Legal Culture 1475-1642* (Hart Publishing, 2015).

the case are not particularly useful for this analysis. For completeness, however, they will be included. The defendant had assigned a lease of a messuage and bakehouse in the parish of St Andrew's Holborn to the plaintiff. The deal was for five years and, for that time, the defendant had agreed to not ply his trade as a baker within that parish. The defendant argued that the bond was void in law. In the end, the court found for the plaintiff.<sup>33</sup> There is no mention in the decision as to what order the court made as a result of the finding.

The key classificatory decision of Parker CJ's analysis was the distinction between voluntary and involuntary restraints of trade. Unsurprisingly, voluntary restraints were ones that individuals chose to be bound by; any other restraint was understood to be involuntary. It is the involuntary restraints that will be focused on here because a patent for inventions acts as an involuntary restraint on others who wish to use the protected technology.

The category of involuntary restraints was further broken down into 'grants or charters from the Crown', 'Customs' and 'By-laws'.<sup>34</sup> Statements made around each of these are of relevance to understanding the societal context of patents for invention in the first part of the eighteenth century. In terms of the grants from the Crown specifically, Parker CJ lists three types: a 'new charter of incorporation to trade generally, exclusive of all others'; a 'grant to particular persons for the sole exercise of any known trade'; and a 'grant of the sole use of a new invented art'.<sup>35</sup> The first two of these were said to be 'void' while the third was 'good'.<sup>36</sup> It should be pointed out, in terms of the perceptions of governance of that, that the list does not include the grants covering the trading companies such as the Society for Merchant Adventurers.<sup>37</sup> This is perhaps not surprising as the focus of Parker CJ's decision was on restrictions around an individual's capacity to work and not on restrictions placed on competition between companies.

<sup>33</sup> These days, a restraint for five years is not likely to be seen as reasonable and, therefore, would not be enforceable. Research shows that Australian practitioners consider that a six month restraint would have a good chance of success whereas a 'year would usually be too long unless the employee was a senior manager': Christopher Arup, Chris Dent, John Howe & William van Caenegem, 'Restraints of Trade: The Legal Practice' (2013) 36 *University of New South Wales Law Journal* 1, 13.

<sup>34</sup> (1711) P Wms 181, 183; 24 ER 347, 348.

<sup>35</sup> (1711) P Wms 181, 183; 24 ER 347, 348.

<sup>36</sup> (1711) P Wms 181, 183; 24 ER 347, 348. The basis for the illegality of the second category of restraints was given as the Magna Carta.

<sup>37</sup> The decision Parker CJ cites with respect to charters to "trade generally" was the *City of London Case* (1610) 8 Co Rep 121b; 77 ER 658. That decision relates the grant to a City and not to a company.

There were also considered to be three categories of involuntary restraints by custom. The first of these is those that 'are for the benefit of some particular persons, who are alleged to use a trade for the advantage of a community'.<sup>38</sup> One of the examples provided referred to the actions of the guild of weavers in controlling the industry in London – though, in the judgment cited, the individual who was being sued by the guild won the case.<sup>39</sup> Presumably, the custom granted the privilege to the guild, allegedly for the benefits of its members. It may be noted, however, that the judgment made a point of the guild paying 20 shillings and 8 pence to the Queen annually.<sup>40</sup> The second category of involuntary restraint by custom related to those that were 'for the benefit of a community of persons who are not alleged, but supposed to use the trade, in order to exclude foreigners'.<sup>41</sup> One case, *Mayor and Commonalty of Colchester v Goodwin*, referred to supports a custom 'that no artificer being a foreigner shall exercise a trade within the town' of Colchester.<sup>42</sup> No justification is given for the custom, it is sufficient that it meets the definition of a valid custom.<sup>43</sup> The third category covered customs that were used to 'restrain a trade in a particular place, though none are either supposed or alleged to use it'.<sup>44</sup> No further discussion is offered, and the decision cited, *Rippon*,<sup>45</sup> is not readily available now. Parker CJ said that customs from all three categories may be good.<sup>46</sup>

Three categories of involuntary restraints by by-laws are also offered. The first category relates to the exclusion of foreigners – such restraints are legal only where the by-law enforces a pre-existing custom. The above-cited

<sup>38</sup> (1711) P Wms 181, 183-4; 24 ER 347, 348.

<sup>39</sup> *Wardens and Corporation of Weavers in London v Brown* (1600) Cro Eliz 803; 78 ER 1031.

<sup>40</sup> *Wardens and Corporation of Weavers in London v Brown* (1600) Cro Eliz 803, 803; 78 ER 1031, 1031.

<sup>41</sup> (1711) P Wms 181, 184; 24 ER 347, 348. One of the decisions cited to prove this assertion – *The Case of the Tailors of Ipswich* (1614) 11 Co. Rep. 53a; 77 ER 1218 – however, makes no reference to foreigners (unless the term is used to apply to people from outside a city and not from outside the country. Another case cited, however, differentiates between 'stranger artificers that are not free of the said borough' and 'foreigners': *Mayor and Commonalty of Colchester v Goodwin* Carter 68, 68; 124 ER 829, 829.

<sup>42</sup> Carter 114, 114; 124 ER 859, 859.

<sup>43</sup> The decision highlights that the custom is only good because it is a 'custom time out of mind': 114, 115; 124 ER 859, 860.

<sup>44</sup> (1711) P Wms 181, 184; 24 ER 347, 348.

<sup>45</sup> The citation given is Register 105.

<sup>46</sup> Others have noted that "customs" were still a key mode of social control until the 1750s; see, for example, Douglas Hay and Nicholas Rogers, *Eighteenth-Century English Society* (Oxford University Press, 1997) ch 6.

*Colchester v Goodwin* decision was used as authority here too.<sup>47</sup> The second category includes by-laws that are ‘made to cramp trade in general [and] are void’.<sup>48</sup> One decision used to support this claim was *Franklin v Green*, the finding of which was that a ‘stranger is not bound to take notice of a ‘private ordnance’.<sup>49</sup> The only reference to foreigners was in an awkwardly worded qualification, that now would be seen as *obiter*, that suggests that the ordnance would be ‘good, if made for to suppress fraud, or any other general inconvenience, used by a foreigner, as corruption or the like, in the sale of their meat’.<sup>50</sup> This reads more like allowing ordinances to limit illegal activity than those that limit foreigners.

The third category of by-law covers that that are made for the ‘better government and regulation’ of a trade and are good ‘if they are for the benefit of the place and to avoid public inconvenience, nuisances etc’.<sup>51</sup> Three decisions were cited to support the claim. The first, *Player v Vere*, contained the statement that the City of London could not ‘make by-laws that are prejudicial to the people’;<sup>52</sup> but, again, this could be seen as *obiter*. The second decision was the *Chamberlain of London’s Case*. Coke’s summary of the decision stated that the ‘ordnance being made for the better observation and execution of [a number of unnamed statutes], to prevent frauds and falsities, was good’.<sup>53</sup> The third decision, *Master, Wardens and Assistants of Silk Throwsters v*

<sup>47</sup> (1711) P Wms 181, 184; 24 ER 347, 348.

<sup>48</sup> (1711) P Wms 181, 184; 24 ER 347, 348.

<sup>49</sup> (1610) 1 Bulst 11, 12; 80 ER 717. The ordnance, in this case, was a by-law of the Corporation of Butchers of London.

<sup>50</sup> (1610) 1 Bulst 11, 12; 80 ER 717. There was another case cited in support of this category of restraints, *Davenant v Hurdis* (1598) Moore 576; 72 ER 769, however, this judgment is in Law French. Parker CJ also refers to Coke’s discussion of *Davenant v Hurdis*; however, Coke’s discussion makes no mention of foreigners: 2 Inst 47. Further, Coke does base his analysis of restraints on the provisions of the Magna Carta: *ibid*.

<sup>51</sup> (1711) P Wms 181, 184; 24 ER 347, 348.

<sup>52</sup> (1680) T. Raym 288, 293; 83 ER 149, 151. Parker CJ refers to multiple reports of the decision – including Sid 284 and 2 Keb 27.

<sup>53</sup> (1590) 5 Co 62b, 63a; 77 ER 150,151. This report does not quote directly from the judgment of the court. Recourse to Coke’s writings alone risks accepting his perspective as the sole arbiter of the law of the time. One commentator, for example, considers that Coke’s writings demonstrate a ‘marked bias’: Donald Wagner, ‘Coke and the Rise of Economic Liberalism’ (1935) 6 *Economic History Review* 30, 31; and that Coke ‘completely misrepresents’ precedents in the furthering of his case: *ibid*, 43. This is not to claim that Coke was necessarily wrong, only that caution may be required when considering his statements with respect to any law that is not supported by other evidence.

*Fremantee*,<sup>54</sup> a by-law of the Throwsters was held to be good. This was on the grounds that ‘manufactures differ from other trades, for here all must have something, else they would be left to starve’.<sup>55</sup> In other words, one party cannot dominate a market, otherwise there will not be enough trade for all to survive.

The final point to be made on the Throwsters case is that a test of reasonableness was mentioned, in *obiter*, with the assessment instead being made that the by-law was ‘necessary’.<sup>56</sup> Reasonableness, however, was significant in Parker CJ’s judgment in *Mitchel*. On at least eight occasions, the term “reasonable”, “unreasonable” or “unreasonably” were used in connection with restraints of trade.<sup>57</sup> A close reading suggests that there was an inconsistency in the application of the concept;<sup>58</sup> it is, nonetheless significant that decisions in the history of patent law alluded to such a test – with, perhaps, it only being a reluctance on the part of the courts to view the actions of the Crown in terms of reasonableness that prevented the test being more widespread in patent law.

#### IV PATENT-RELEVANT INFERENCES TO BE DRAWN FROM *MITCHEL V REYNOLDS*

What can be inferred from the *Mitchel* decision is that the legal discourse had moved on, to a degree, from the early seventeenth century but had not reached the understandings that underpin the nineteenth-century patent law. This is not surprising; to flesh out the point, a number of aspects of the law of the time can be highlighted. Four aspects will be covered: the continuance of mercantilist policies; the entities that had the power to constrain the action of individuals; the conception of innovation; and the acceptance of a limited amount of individual choice. Two of these can be seen to accord with an early modern perspective of governance, while the other two can be seen to reflect a more modern view of individuals.

<sup>54</sup> (1668) 2 Keb 309; 84 ER 193. Apparently, a silk throwster is someone who twists silk fibres into raw silk or twists raw silk into thread.

<sup>55</sup> *Master, Wardens and Assistants of Silk Throwsters v Fremantee* (1668) 2 Keb 309, 310; 84 ER 193, 193.

<sup>56</sup> *Master, Wardens and Assistants of Silk Throwsters v Fremantee* (1668) 2 Keb 309, 310; 84 ER 193, 193.

<sup>57</sup> See, for example, (1711) P Wms 181, 182, 185, 191, 194, 196, 197; 24 ER 347, 348, 350, 351, 352.

<sup>58</sup> This point will be discussed further below.

### A      *Mercantilist Policies*

Previous research has shown that the patent system of the early modern period was in keeping with the mercantilist ideas of the time.<sup>59</sup> Without rehashing the detail of mercantilism here, it is sufficient to say that three key policy goals, pursued by the Crown, were maximum employment, the regulation of trade and the improvement of the balance of trade with Europe. These goals were still evident in the words of Parker CJ. In terms of promoting employment, it is stated that ‘no man can contract not to use his trade at all’.<sup>60</sup> In other words, a person could not, voluntarily, take themselves out of the labour market.<sup>61</sup> Further, the ‘mischief which may arise’ from voluntary restraints was said to include the loss ‘to the publick [sic], by depriving it of a useful member’.<sup>62</sup> Again, society, generally, would lose out if a person was no longer available to contribute their labour.<sup>63</sup>

Further, the judgment referred to, with approval, the early modern cases that were very much pro-employment. Coke, in his report of *Darcy v Allen*, stated that the law of monopolies as he saw it ‘agrees with the equity of the law of God, as appears in Deuteronomy cap 24, verse 6’.<sup>64</sup> That verse reads, “No man shall take the nether or the upper millstone to pledge: for he takes a man’s life to pledge”. To take the means of a man’s work from him is to take his life.<sup>65</sup> Also, in Coke’s report of the *Ipswich Tailors Case*, he stated that:

at common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil ... and especially in young men, who

<sup>59</sup> Chris Dent, ‘Patent Policy in Early Modern England: Jobs, Trade and Regulation’ (2006) 10 *Legal History* 71.

<sup>60</sup> (1711) P Wms 181, 187; 24 ER 347, 349.

<sup>61</sup> Of course, it wasn’t conceived of as the labour market – concepts such as a ‘reserve army of labour’ were a nineteenth-century invention: François Bédarida, *A Social History of England 1851–1975* (Methuen, 1976) 60.

<sup>62</sup> (1711) P Wms 181, 190; 24 ER 347, 350.

<sup>63</sup> For a key mercantilist, ‘all other artificers and workemen shall be set on work, to avoid idleness which is the root of all mischief’: Thomas Mun, *England’s Treasure by Foreign Trade or the Balance of our Foreign Trade is the Rule of our Treasure*, reprinted in Antoin Murphy (ed), *Monetary Theory: 1601–1758*, (Routledge, 1997) vol 1, 64.

<sup>64</sup> (1602) 11 Co Rep 84b, 86b; 77 ER 1260, 1263. This report was referred to by Parker CJ at (1711) P Wms 181, 183; 24 ER 347, 348.

<sup>65</sup> Edward Coke, *The Third Part of the Institutes of the Laws of England* (Garland Publishing, 1979) 181.

ought in their youth to learn lawful sciences and trades which are profitable to the commonwealth.<sup>66</sup>

The language used to justify the findings include statements such as: restraints of trade are ‘against the law, and ... void, for it is against the liberty of a free-man’;<sup>67</sup> and monopolies ‘tend to the impoverishment of diverse artificers and others who, before, by the labour of their hands ... had maintained themselves ... who now will of necessity by constrained to live in idleness and beggary’.<sup>68</sup> It is clear, therefore, that the *Mitchel* decision was in keeping with the early modern views on unemployment.

The second mercantilist goal to be discussed here relates to the regulation of trades.<sup>69</sup> To be clear, Parker CJ emphasised the ‘grant to particular persons for the sole exercise of any known trade ... is void, because it is a monopoly and against the policy of the common law’.<sup>70</sup> On the other hand, ‘by-laws made to restrain trade, in order to the better government and regulation of it, are good, in some cases’.<sup>71</sup> So, attempts to control labour, as long as they were for the purpose of better control of the trade, were good. Again, if the decisions cited in *Mitchel* are considered, then there is the statement from the *City of London Case*, that ‘trade and traffic cannot be maintained or increased without order and government’.<sup>72</sup> Further, another report of the *Ipswich Tailors Case*, the *Cloth-workers of Ipswich Case*, states that, ‘it was agreed by the Court that the King might make corporations and grant to them that they may make ordinances for the ordering and government of any trade’.<sup>73</sup> Finally, in *Player v*

<sup>66</sup> (1614) 11 Co Rep 53a, 53b; 77 ER 1218, 1219. This report was referred to by Parker CJ at (1711) P Wms 181, 184; 24 ER 347, 348.

<sup>67</sup> *Claygate v Batchelor* (1610) Owen 143, 143; 77 ER 961, 962. This report was referred to by Parker CJ at (1711) P Wms 181, 184; 24 ER 347, 348.

<sup>68</sup> *Darcy v Allen* (1602) 11 Co Rep 84b, 86b; 77 ER 1260, 1263.

<sup>69</sup> In the early modern period, a key aspect of the regulation of trade was the regulation of foreign trade – notably through the use of monopolist trading companies such as the Society of Merchant Adventurers. It has been noted that, notwithstanding the South Sea Company, at the beginning of the eighteenth century, the ‘existence of monopoly exporting companies, even for long-distance trades, was now felt to be a fetter on expansion’: C. Hill, *The Century of Revolution 1603-1714*, 2<sup>nd</sup> ed., W. W. Norton & Company, New York, 1980, 224. This did not mean, however, that the internal regulation of trades had gone out of fashion too.

<sup>70</sup> (1711) P Wms 181, 183; 24 ER 347, 348.

<sup>71</sup> (1711) P Wms 181, 184; 24 ER 347, 348.

<sup>72</sup> (1610) 8 Co Rep 121b, 125a; 77 ER 658, 663. This report was referred to by Parker CJ at (1711) P Wms 181, 184; 24 ER 347, 348.

<sup>73</sup> (1614) Godbolt 252, 253; 78 ER 147, 148.

*Vere*, the need to delegate authority was reinforced.<sup>74</sup> Regulation, of course, is tied to the early modern policy goal of “control”;<sup>75</sup> it would appear that the delegated governance, or the regulation of trades, was still a key policy goal into the eighteenth century.<sup>76</sup>

Unsurprisingly given the focus of the *Mitchel* decision, there is little evidence of any policy directly related to the balance of trade with the continent. Parker CJ does, however, mention powers to restrict the activities of foreigners. This is done with respect to restraints by custom and restraints via by-laws – both categories of which were deemed to be good.<sup>77</sup> These have already been discussed above and, given the doubts around their meaning, there may be little to add here. In the end, it may be better to consider that the references to foreign workers in *Mitchel* may not, in fact, be reflective of mercantilist policies. Instead, it may reflect a political mindset that goes back to the medieval period – as, for example, the Magna Carta made specific provision for the treatment of foreign merchants: ‘All merchants shall have liberty safely to enter, to dwell and travel in, and to depart from England, for the purposes of commerce...’<sup>78</sup> The references to foreigners may be of tangential relevance in that European merchants with the freedom to move in England may act as a conduit for new inventions to cross the Channel, but that is probably the limit of their importance to this article.

<sup>74</sup> (1680) T. Raym 324, 324; 83 ER 168, 168. This case was the continuation of the report of T. Raym 288, referred to by Parker CJ at (1711) P Wms 181, 184-5; 24 ER 347, 348.

<sup>75</sup> For one commentator, the ‘Tudor and Stuart governments directed their regulatory efforts to the maintenance of social order, public peace, national security and the achievement of economic prosperity’: B. Supple, *Commercial Crisis and Change in England 1600-42: A Study in the Instability of a Mercantile Economy*, Cambridge University Press, Cambridge, 1959, 226.

<sup>76</sup> For another mercantilist:

Those that trade without order and government are like unto men, that makes holes in the bottom of [a] ship, wherein themselves are passengers. For want of government in trade, opens a gap and lets in all sorts of unskilful and disorderly persons: and these not only sink themselves and others with them, but also mar the merchandise of the land, both in estimation and goodness: than which there can be nothing in trade more prejudicial to the public utility.

E. Misselden, *Free Trade or the Means to Make Trade Flourish*, De Capo, Amsterdam, 1622/1970), 84-85. Misselden was talking, here about trade between countries (as most mercantilists had a focus on that issue); however, the perspective applies also to the regulation of trades within England.

<sup>77</sup> (1711) P Wms 181, 184; 24 ER 347, 348.

<sup>78</sup> Chapter 41, translated in T. Plucknett, *Taswell-Langmeid’s English Constitutional History*, 11<sup>th</sup> ed., Sweet & Maxwell, London, 1960, 83. As Pollock and Maitland have pointed out, however, the Magna Carta also confirms the customs of cities like London and ‘thus takes away with one hand what it gives with the other’: F. Pollock and F. Maitland, *The History of English Law before the Time of Edward I*, Vol. 1, Liberty Fund, Indianapolis, 2010, 490.

## B Powers to Constrain Individuals

There were a range of powers that constrained individuals, and a range of entities with those powers, that were referred to in *Mitchel*. Leaving aside voluntary restraints, the Crown had the power to constrain an individual from working, as did a number of entities that had the capacity to pass by-laws.<sup>79</sup> These entities included certain corporations and guilds. It could be argued that this capacity of the Crown should not warrant much discussion here as the power was around in the early modern period and persists today. It is, however, noteworthy for two reasons here. First, in terms of *Mitchel* itself, the Magna Carta was raised as the basis for monopolies to be held to be void.<sup>80</sup> Second, one of the other early eighteenth-century cases contained in Hayward's compilation – *R v Mussary* – still talks of the writ of *scire facias* as if it was an action involving the Crown as a person. That decision, for example, uses the phrases 'although the king is mistaken' and 'if the king's intent is plainly expressed'.<sup>81</sup> This form of expression suggests a personification of the Crown that seems more medieval or early modern than modern.

It is the by-law-passing entities that are of more interest because they reflect a pre-modern approach to governance. Whilst the city of London still exists today, and even the Corporation of the City of London still exists,<sup>82</sup> it has been a while since a by-law of the Corporation has been discussed in a case in terms of being of comparable importance to a Crown grant.<sup>83</sup> *Mitchel*, however, did not question the relative powers of the medieval entities and the Crown. Parker CJ, with his affirmation of decisions such as *Master, Wardens and Assistants of Silk Throwsters v Fremantee*<sup>84</sup> and *Wardens and Corporation of*

<sup>79</sup> For the purposes of this analysis, no entity had the power to constrain via custom – as these constraints had been around since time immemorial.

<sup>80</sup> (1711) P Wms 181, 183; 24 ER 347, 348. Though the chapter number is not cited, Parker CJ uses the phrase "*nullus liber homo etc, disseisetur de libero tenement vel libertatibus, vel leberis consuetudinibus suis etc*" which is chapter 39. For a discussion of the clause, see P. Vinogradoff, 'Magna Carta, C. 39' in *Magna Carta Commemoration Essays*, Royal Historical Society, London, 1917. It is not clear, however, why Parker CJ refers to the Charter as a 'statute' at that point: (1711) P Wms 181, 188; 24 ER 347, 349.

<sup>81</sup> (1738) 1 HPC 153, 153.

<sup>82</sup> Or, more properly, the Mayoralty and Commonalty and the Citizens of London.

<sup>83</sup> At the beginning of the eighteenth century, 'powerful vested interests', of which the City of London would have been one, 'could and did lobby for special dispensations' from Parliament: J. Mokyr, *The Enlightened Economy: An Economic History of Britain 1700-1850*, Yale University Press, New Haven, 2009, 27. Again, this shows that the overall structure of power in England at the time of *Mitchel* is not the same as it is today.

<sup>84</sup> (1668) 2 Keb 309; 84 ER 193.

*Weavers in London v Brown*,<sup>85</sup> does not resist the idea that guilds still retained the power to constrain the activities of workers.<sup>86</sup> As was said in the *Ipswich Tailors Case*, and agreed with in *Mitchel*, ‘ordnances for the good order and government of men of trades and mysteries are good’.<sup>87</sup> In short, the *Mitchel* decision acknowledges the power of institutions that were prominent in the early modern period and before that time. There is no suggestion, in the words of the court, that these institutions were not to be dominant for much longer in the English economy.

It is possible to go so far as to say that the verging on medieval understanding of governance in *Mitchel* is exemplified by the fact that Magna Carta was seen as restricting the Crown’s power to constrain.<sup>88</sup> Key here is the fact that, while general restraints are discussed as being void, the only examples cited that cover the whole of England are those that emanate from the Crown. The decision in *Mitchel*, therefore, can be seen to perpetuate the decentralised mode of governance – with the decision restricting the capacity of the Crown to have any more power, with respect to restraints of trade, than the guilds and corporations had. As has been noted, ‘Britain in the early modern period was a decentralised state in which political and social authority were widely delegated’.<sup>89</sup> It appears that *Mitchel* continued this understanding into the eighteenth century.

<sup>85</sup> (1600) Cro Eliz 803; 78 ER 1031.

<sup>86</sup> Dobson suggests that it was in the eighteenth century that trade unions surpassed the guilds as the pre-eminent form of organised labour: C. Dobson, *Masters and Journeymen: A Prehistory of Industrial Relations 1717-1800*, Croom Helm, London, 1980.

<sup>87</sup> (1614) 11 Co. Rep. 53a, 54a; 77 ER 1218, 1220.

<sup>88</sup> As an aside, it may be noted that in *Blanchard v Hill* it was the power of the Parliament that was privilege: ‘in the case of monopolies, the rule the court has governed itself by is whether there is any Act of Parliament under which the restriction is founded’ (1742) 2 Atk 484, 485; 26 ER 692, 693. This decision, however, was more than 30 years after the one in *Mitchel*. Further, despite the case being discussed in terms of monopolies and restrictions on manufactures undertaken by individuals, there is no reference to the *Mitchel* decision in it.

<sup>89</sup> F. O’Gorman, *The Long Eighteenth Century: British Political and Social History 1688-1832*, Arnold, London, 1997, 1.

### C Innovation

Innovation, as a concept, was not central to patent law in the early modern period.<sup>90</sup> There was, of course, the requirement in the *Statute of Monopolies* that a patent could only be granted for a ‘new manufacture’;<sup>91</sup> however, that requirement was met as long as it was new to England. An invention was sufficiently new even if it had been known in Europe. This is not surprising when it is remembered that a key mercantilist goal of the time was the improvement of the balance of trade with the continent – if a new technology could be imported from Europe, and the technology was used to develop a new industry, then fewer goods would have to be imported.<sup>92</sup>

*Mitchel*, however, makes specific reference to the need for a ‘reasonable reward to ingenuity and uncommon industry’.<sup>93</sup> At one level, the fact that the term “ingenuity” is used here, and not a century earlier is also not surprising. This is because, according to the Oxford English Dictionary, the word “ingenuity”, at least with respect to its meaning of ‘capacity for invention or construction’, did not enter the language until the middle of the seventeenth century. Of course, it is not as if those in the early modern period did not consider the processes of education – the decision in the the *Ipswich Tailors Case* referred specifically for the need of ‘young men’ to learn ‘lawful sciences and trades’<sup>94</sup> – the use of the term “ingenuity”, instead implies a greater level of agency, on the part of the individual, in the generation of new knowledge. This understanding still fits within the general perception of the value of learning that can be seen in the long title of the *Statute of Anne*.<sup>95</sup>

<sup>90</sup> One of the other early eighteenth-century cases contained in Hayward’s compilation – *Gibbs v Cole* – may be seen to, obliquely, refer to the issue of innovation. That decision focused on whether a new book infringed on the patent for printing an older book. The court held that the ‘small variation’ between the two books ‘would not entitle the defendant to break in upon the patent’: (1734) 3 P. Wms 255, 255; 24 ER 1051, 1052. There was, however, no detail as to what the difference between the two books was. It may, therefore, be possible to see the case as being similar to the 1572 decision in *Bircot’s Case*. The case held that a ‘patent should not be granted for an improvement in an existing manufacture’: E. Walterscheid, ‘The Early Evolution of the United States Patent Law: Antecedents (Part 2)’ (1994) 76 *Journal of the Patent and Trademark Society* 849, 859. It may be noted that there is no remaining report for *Bircot’s Case*. This decision gave rise to Coke’s use of the phrase ‘to put but a new button to an old coat’: *Third Part of the Institutes*, above n 65, 184.

<sup>91</sup> Section 6.

<sup>92</sup> See, further, Dent, ‘Patent Policy’, above n 59, 85-9.

<sup>93</sup> (1711) P Wms 181, 188; 24 ER 347, 350.

<sup>94</sup> (1614) 11 Co. Rep. 53a, 53b; 77 ER 1218, 1219.

<sup>95</sup> ‘An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned’: 8 Anne, c. 19 (1710), emphasis added.

That said, it should also be noted that Parker CJ did not consider patents for invention to be a special type of Crown grant – he just considered them to be another grant that restricted the capacity of workers to ply their trade in a given area. This is more in keeping with the practices of the early modern period. Other commentators have considered those early patents to fall into four categories: (1) where ‘any man out of his own wit, industry or endeavour finds out anything beneficial for the commonwealth’; (2) licences that ‘relaxed the rigidity of the law’, the *non obstante* grants; (3) the ‘bestowal in an individual of powers of supervision over an industry or trade’; and (4) where the control of a ‘settled trade was handed over to one or more persons’.<sup>96</sup> Most of the patent case law of the time, including the infamous decision of *Darcy v Allen*,<sup>97</sup> related to patents that did not involve new inventions. That the decision in *Mitchel* maintained the lack of distinction between the categories of patents does tie the judgment more closely to the early modern discourse.

A key reason for the use of the new word, ingenuity, was the beginning of the English Enlightenment. There is no precise timing for that process; however, common measures include Isaac Newton’s publishing of his *Principia Mathematica* in 1687 and the Royal Society being granted its first Royal Charter in 1662. Porter, more generally, states that the ‘half-century after 1660 brought decisive transformations’ to the structures and ideologies of England.<sup>98</sup> In other words, the manner in which people thought about ideas, and even the process of thinking itself,<sup>99</sup> changed radically in the second half of the seventeenth century.<sup>100</sup> Expressed differently, in the early modern period the conceptualisation of knowledge, in particular new knowledge, was still tied to established and settled modes of thought. For Gay, it was in the century of Enlightenment (1660-1760) that ‘innovation, traditionally an effective term of

<sup>96</sup> E. Lipson, *Economic History of England*, quoted in D. Seaborne Davies, ‘Further Light on the Case of Monopolies’ (1932) 49 *Law Quarterly Review* 394, 397.

<sup>97</sup> (1602) 11 Co Rep 84b; 77 ER 1260.

<sup>98</sup> R. Porter, *The Creation of the Modern World: The Untold Story of the British Enlightenment*, WW Norton & Co., New York, 2000, 24.

<sup>99</sup> Even Descartes’ *Discourse on Method*, with its first iteration of “je pense, donc je suis”, was not published until 1637 (the Latin version, *cogito ergo sum*, was contained in 1644’s *Principles of Philosophy*). The different conceptualisation of ideas was one of Descartes’ key contributions: B. Russell, *History of Western Philosophy*, 2<sup>nd</sup> ed., George Allen & Unwin, London, 1961, 549ff.

<sup>100</sup> For a discussion of how the Enlightenment impacted in the economy, see Mokyr, above n 83, Ch. 2.

abuse, became a word of praise'.<sup>101</sup> An “idea”, a “new idea”, as a separate, knowable, construct for analysis, then, is a product of the Enlightenment. With respect to the patent system, specifically, it is arguable that it was as late as 1799 that there were doubts in the minds of judges as to the patentability of discoveries.<sup>102</sup> More generally, it is clear that the issue of whether or not principles were patentable was raised as a concern in the decisions of the courts only after the Enlightenment.<sup>103</sup> Even the earlier of these two judgments was almost 50 years after *Mitchel*. The 1711 decision may, therefore, be indicative of the law’s gradual change to accept the relevance of knowledge in the adjudication of disputes; at the very least, it was an acknowledgement that was not evident in the law of the seventeenth century.

#### D *Individual Choice*

This last inference relates more to voluntary restraints than it does to the involuntary ones. The inference, therefore, may be of less direct relevance to patent law; however, it is still indicative of the manner in which the law saw the individuals who came before the court. The penultimate phrase in *Mitchel* is if ‘it appears to be a just and honest contract, [the restraint] ought to be maintained’.<sup>104</sup> A key factor for the court, in this case, was that a valid restraint was one that had been entered into by two contracting parties. As long as the parties are ‘capable’,<sup>105</sup> then the agreement is good. Even the choice, on the part of Parker CJ, to separate voluntary restraints from involuntary restraints emphasises the acknowledgement of individual choice. It would have been possible for the court to categorise restraints solely in terms of the nature of the entity or person who sought the restraints – which would have allowed a

<sup>101</sup> P. Gay, *The Enlightenment: An Interpretation*, Knopf, New York, 1966, Vol. 2, 3.

<sup>102</sup> To be accurate, the patentability of principles was not completely ruled out – ‘If it were necessary to consider whether or not mere abstract principles are the subject of a patent, I should feel great difficulty in deciding that they are’: *Hornblower v Boulton* (1799) 8 TR 95, 106; 101 ER 1285, 1291, Lawrence J. It was not until 1819 that the courts stated, clearly, that ‘no merely philosophical or abstract principle can answer to the word manufacture’: *R v Wheeler* (1819) 2 B & Ald 345, 350; 106 ER 392, 394-5.

<sup>103</sup> The first such case in Hayward’s compilation of patent decisions is *Dollond v Champneys* (1758) 1 CPC 28 – Dollond’s ‘patent is for glasses completely formed, not for mere principles’: 1 CPC 28, 30, Buller J.

<sup>104</sup> (1711) P Wms 181, 197; 24 ER 347, 352.

<sup>105</sup> (1711) P Wms 181, 195; 24 ER 347, 350. At this point of the decision, Parker CJ was accepting the possibility that restraints signed by those under the age of majority could be valid.

similar analysis – instead, the split was voluntary/involuntary. The assertion here is that this acknowledgement of the importance of choice is reflective of a wider societal move of the time.<sup>106</sup> Expressed differently, the case law of the early modern period makes little reference to the choices of individuals; *Mitchel*, on the other hand, referred to the issue repeatedly.

The *Mitchel* decision also made repeated references to the question of the consideration that the covenantor received. For example, no ‘particular restraints’ (as opposed to general restraints) ‘without consideration’ are good;<sup>107</sup> but where a restraint is ‘made upon and adequate consideration ... it is good’.<sup>108</sup> Further, Parker CJ links the ‘liberty of the subject’ to the potential for a ‘man ... by his own consent, for a valuable consideration [to] part with his liberty’.<sup>109</sup> Finally, for restraints of trade, ‘it is always necessary to shew the consideration, so that the presumption of injury could not take place’.<sup>110</sup> In other words, the decision in *Mitchel* was based on the assumption that an individual can decide for themselves as to whether they should not work in the area – but there remains the safety net of the court. If there is no evidence that the individual gained any benefit from the decision, then the contract would be void.

As indicated above, there was another aspect to the exercise of choice that was raised by Parker CJ – the court’s assessment of whether the restraints were “reasonable” or not. Reasonableness came to be central to the operation of the doctrine;<sup>111</sup> in *Mitchel*, however, the concept was loosely applied. For example, it was held to be ‘reasonable for the parties to enter into’ the agreement;<sup>112</sup> there was also reference to a ‘reasonable by-law’;<sup>113</sup> a characterisation of the law as ‘not so unreasonable’;<sup>114</sup> a reference to a ‘reasonable and useful contract’;<sup>115</sup> and the assessment that ‘what makes this more reasonable is, that the restraint is

<sup>106</sup> With that move being the creation of a more “modern” view of the self and identity. See, for example, D. Wahrman, *The Making of the Modern Self: Identity and Culture in Eighteenth-Century England*, Yale University Press, New Haven, 2004.

<sup>107</sup> (1711) P Wms 181, 185; 24 ER 347, 349.

<sup>108</sup> (1711) P Wms 181, 186; 24 ER 347, 349.

<sup>109</sup> (1711) P Wms 181, 189; 24 ER 347, 350.

<sup>110</sup> (1711) P Wms 181, 193; 24 ER 347, 351.

<sup>111</sup> See the discussion in C. Dent, ‘*Nordenfelt v Maxim-Nordenfelt*’, above n 9.

<sup>112</sup> (1711) 1 P Wms 181, 182; 24 ER 347, 348.

<sup>113</sup> (1711) 1 P Wms 181, 185; 24 ER 347, 348.

<sup>114</sup> (1711) 1 P Wms 181, 191; 24 ER 347, 351.

<sup>115</sup> (1711) 1 P Wms 181, 196; 24 ER 347, 352.

exactly proportioned to the consideration'.<sup>116</sup> Arguably, there are two senses of the word being used. The first relates to a sense of “fairness” – for example, the law being seen as “not so unreasonable”. The second sense is one of an almost quantitative “balancing” of interests. This is most evident in the reference of the restraint being “exactly proportioned to the consideration”. The latter one looks like it imagines a conscious assessment process – looking at both sides of the ledger. What is not clear, however, is whether the court was seeing the covenantor weighing the options or whether it was only the judge who was to do it after the restraint was challenged. Either way, the choice had qualitative elements that were not present in the case law of the seventeenth century.

That said, there were limits to the potential for individual choice. To repeat a point made above in the context of mercantilist policies, ‘no man can contract not to use his trade at all’.<sup>117</sup> An individual, therefore, could not choose to not work at all – regardless of any consideration that may have been received. Further, it may also be noted that the acknowledgement, in *Mitchel*, of individual choice in contracting was not as extreme as it became under the *laissez-faire* approach in the nineteenth century. In that century, the general approach of the judges may be understood in terms of the “sanctity”<sup>118</sup> of contracts.<sup>119</sup> In addition, many of the procedural reforms, in patent law, of the nineteenth century can be seen as providing more information to patentees and entrepreneurs<sup>120</sup> – thereby assisting their capacity to make decisions in their financial interest. While the understanding of choice in Parker CJ’s words was an advance on early modern law, it was not at the stage of understanding that was to come later.

<sup>116</sup> (1711) 1 P Wms 181, 197; 24 ER 347, 352.

<sup>117</sup> (1711) P Wms 181, 187; 24 ER 347, 349.

<sup>118</sup> ‘...contracts when entered into freely and voluntarily shall be held sacred and shall be enforced’: *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462, 465, Jessel MR.

<sup>119</sup> A justification for the privileging of contracts was provided by Jessel MR: ‘I have always thought, in those cases where the Court is satisfied of the bona fides of a transaction, and its entire freedom from the mischief which the established principle of law was intended to prevent, that the Court should lean on the side of fair dealing, and should not so apply the principle of law so as to make it comprise a case not within the mischief which it was intended to prevent without absolute necessity, the necessity being that of preserving the principle untouched for the guidance of mankind in their ordinary transactions’: *Albion Steel and Wire Company v Martin* (1875) 1 Ch D 580, 584-5.

<sup>120</sup> See Chris Dent, ‘19th Century Patent Law and Classical Economics: Patents as Exchangeable Sites of Value’ [2016] (2) *Intellectual Property Quarterly* 103.

## V CONCLUSION: *MITCHEL V REYNOLDS* AND PATENT LAW

Unsurprisingly, the legal discourse as evidenced in *Mitchel* shares some features of the early modern system (mercantilist policies and localised forms of governance) and some features that had more in common with the later law (innovation and individual choice). The value of this work is to take advantage of what little information we have on the legal “dark ages” of the early seventeenth century in order to shed a little bit of additional light on the changes that the law experienced. While there was only limited reference to patents by Parker CJ, this analysis does add to our knowledge of the systems that underpinned the change, in patent law, from the *Statute of Monopolies* to the upsurge in legislation that came with the industrial revolution.

