judgment was affirmed in the King's Bench, in a writ of error, and therewith agrees (*b*) 27 H. 6. Aid in Statham. *Vide* 29 E. 3. 1 b.

The heir at common law should have a prohibition of waste against tenant in dower, but if the heir granted over his reversion, his grantee should not have a prohibition of waste: for it appears in the Register 72 that such assignee in an action of waste against tenant in dower shall recite the statute of Gloucester; *ergo*, he shall not have a prohibition of waste at common law, for then he should not recite the statute, *vide* F. N. B. 55 c. 14 H. 4. 3. 5 H. 5. (7.) 17 b.

Lastly, it was resolved, that the said woman by force of the said clause of without impeachment of waste, had such power and privilege, that though in the case at Bar no waste be **[84 a]** done, because the house was blown down *per vim venti* without her fault, yet she should have the timber which was parcel of the house, and also the timber trees which are blown down with the wind; and when they are severed from the inheritance either by the act of the party, or of the law, and become chattels, the whole property of them is in the tenant for life by force of the said clause of "without impeachment of waste." And for this cause judgment was given *per omnes justiciarios una voce, quod querens nihil caperet per billam.*

[84 b] THE CASE OF MONOPOLIES.

Trin. 44 Eliz.

[See *Marsden* v. *Saville Street Foundry Company*, 1878, 3 Ex. D. 206; *Great Eastern Railway Company* v. *Goldsmid*, 1884, 9 App. Cas. 940; *R.* v. *County Court Judge of Halifax* [1891], 1 Q. B. 798; [1891], 2 Q. B. 263].

A grant by the Crown of the sole making of cards within the realm, is void.

A dispensation or licence to have the sole importation and merchandizing of cards, without any limitation or stint, is against law, notwithstanding the 3 E. 4. which imposes a forfeiture upon their importation. S. C. [Moor. 671. Noy 173.]

Com. Dig. Trade, A 1. D 4. Skin. 133. 169, &c. Carth. 270. Lucas 131. 3 Inst. 181. 8 Co. 125 a. 2 Inst. 47. 3 Keb. 269. Hob. 212.

Edward Darcy, Esquire, a groom of the Privy Chamber to Queen Elizabeth brought an action on the case against T. Allein, haberdasher, of London, and declared, that Queen Elizabeth, 13 Junii, anno 30 Eliz. intending that her subjects being able men to exercise husbandry, should apply themselves thereunto, and that they should not employ themselves in making playing cards, which had not been any ancient manual occupation within this realm, and that by making such a multitude of cards, card-playing was become more frequent and especially among servants and apprentices, and poor artificers; and to the end her subjects might apply themselves to more lawful and necessary trades; by her letters patent under the Great Seal of the same date granted to Ralph Bowes, Esq. full power, licence and authority, by himself, his servants, factors, and deputies, to provide and buy in any parts beyond the sea, all such playing cards as he thought good, and to import them into this realm, and to sell and utter them within the same, and that he, his servants, factors, and deputies, should have and enjoy the whole trade, traffic, and merchandize, of all playing cards: and by the same letters patent further **[85 a]** granted, that the said Ralph Bowes, his servants, factors, and deputies, and none other should have the making of playing cards within the realm, to have and to hold for twelve years; and by the same letters patent, the Queen charged and commanded, that no person or persons besides the said Ralph Bowes, &c. should bring any cards within the realm during those twelve years; nor should buy, sell, or offer to be sold within the said realm, within the said term,

(*b*) Co. Lit. 28 a. Dyer 184. pl. 63. Moor 321. Poph. 194. Latch 262. 1 Roll. Rep. 183.

any playing cards, nor should make, or cause to be made any playing cards within the said realm, upon pain of the Queen's highest displeasure, and of such fine and punishment as offenders in the case of voluntary contempt deserve. And afterwards the said Queen, 11 Aug. anno 40 Eliz. by her letters patent reciting the former grants made to Ralph Bowes, granted the plaintiff, his executors, and administrators, and their deputies, &c. the same privileges, authorities, and other the said premises, for twenty-one years after the end of the former term, rendering to the Queen 100 marks per annum; and further granted to him a seal to mark the cards. And further declared, that after the end of the said term of twelve years, *s.* 30 Junii, an. 42 Eliz. the plaintiff caused to be made 400 grosses of cards for the necessary uses of the subjects, to be sold within this realm, and had expended in making them 5000l., and that the defendant knowing of the said grant and prohibition in the plaintiff's letters patent, and other the premises, 15 Martii, anno 44 Eliz. without the Queen's licence, or the plaintiff's, &c. at Westminster caused to be made 80 grosses of playing cards, and as well those, as 100 other grosses of playing cards, 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, he had imported within the realm, and them had sold and uttered to sundry persons unknown, and shewed some in certain, wherefore the plaintiff could not utter his playing cards, &c. *Contra formam prædict' literar' patentium, et in contemptum dictæ dominæ Reginæ*, (*a*) whereby the plaintiff was disabled to pay his farm, to the plaintiff's damages. The (*b*) defendant, except to one half gross pleaded not guilty, and as to that pleaded, that the City of London is an ancient city, and that within the same, from time whereof, &c. there has been a society of Haberdashers, and that within the said city there was a custom, *quod quælibet persona de societate illa, usus fuit et consuevit emere* **[85 b]** *vendere, et libere* (*c*) *merchandizare omnem rem et omnes res merchandizabiles infra hoc regnum Angliæ de quocunque, vel quibuscunque personis, &c.* and pleaded, that he was *civis et liber homo de civitate et societate illa*, and sold the said half gross of playing cards, being made within the realm, &c. as he lawfully might; (*d*) upon which the plaintiff demurred in law.

And this case was argued at the Bar by Dodderidge, Fuller, Fleming Solicitor, and Coke Attorney-General, for the plaintiff; and by Crook, G. Altham, and Tanfield for the defendant. And in this case two general questions were moved and argued at the Bar, arising upon the two distinct grants in the said letters patent, viz. 1. If the said grant to the plaintiff of the sole making of cards within the realm was good or not? 2. If the licence or dispensation to have the sole importation of foreign cards granted to the plaintiff, was available or not in law? to the bar, no regard was had (*e*) because it was no more than the common law would have said, and then no such *particular custom* ought to have been alleged, for *in hiis quæ de jure communi omnibus conceduntur, consuetudo alicujus patriæ vel loci non est alleganda*, and therewith agrees (*a*) 8 E. 4. 5 a. &c. (A). And although (*b*) the bar was held superfluous, yet *that* shall not turn the defendant to any prejudice, but that he may well take advantage of the insufficiency of the declaration (B).

As to the first question it was argued on the plaintiff's side, that the said grant of the sole making of playing cards within the realm, was good for three reasons. 1. Because the said playing cards were not any merchandize, or thing concerning trade of any necessary use, but things of vanity, and the occasion of loss of time, and decrease of the substance of many, the loss of the service and work of servants, causes of want, which is the mother of woe and destruction, and therefore it belongs

(*a*) 1 Roll. 106.
(*b*) Moor 672. Noy 173.
(*c*) Doctrin. placit. 56.
(*d*) Moor 671. Noy 174.
(*e*) Doctrin. placit. 56. Q. Carth. 270.
(*a*) Br. Prescription 71.
(A) *Vide* note (B) *Combe's case*, 9 Co. 75 b.
(*b*) Doctrin. placit. 69. Hob. 14. Cro. Car. 5. Cro. Jac. 133. 221. 312. 8 Co. 120 b. 133 b. Palm. 287. Lit. Rep. 172. 252. 2 Bulstr. 94.
(B) *Vide* note (F) *Fraunces's case*, 8 Co. 93 a. Note (F) *Bonham's case*, 8 Co. 120 b.

to the Queen (who is *parens patriæ, et paterfamilias totius regni*, and as it is said (*c*) in 20 H. 7. fol. 4. *Capitalis Justiciarius Angliæ*) to take away the great abuse, and to take order for the moderate and convenient use of them. 2. In matters of recreation and pleasure, the Queen has a prerogative given her by the law to take such order for such moderate use of them as seems good to her. 3. The Queen, in regard of the great abuse of them, and of the cheat put upon her subjects by reason of them, might utterly suppress them, and by **[86 a]** consequence without injury done to any one, might moderate and tolerate them at her pleasure. And the reason of the law which gives the King these prerogatives in matters of recreation and pleasure was, because the greatest part of mankind are inclinable to exceed in them; and upon these grounds divers cases were put, *sc.* that no subject can make a (*d*) park, chace, or warren within his own land, for his recreation or pleasure, without the King's grant or licence; and if he does it of his own head, in a *quo warranto*, they shall be seised into the King's hands, as it is held in 3 E. 2. Action sur le Statute Br. 48. and 30 E. 3. Rot. Pat. The King granted to another all the wild swans betwixt London Bridge and Oxford.

As to the second, it was argued, and strongly urged, that the (*e*) Queen by her prerogative may dispense with a penal law, when the forfeiture is popular, or given to the King, and the forfeiture given by the statute of 3 E. 4. cap. 4. in case of importation of cards is popular, 2 H. 7. 6 b. 11 H. 7. 11 b. 18 H. 7. 8 b. 2 R. 3. 12 a. Plow. Com, *Greindon's case*, 502 a. b. 6 Eliz. Dyer. 225. 13 El. 393. 18 Eliz. 352. 33 H. 8. Dyer 52. 11 H. 4. 76. 13 E. 3. Release 36. 43 Ass. pl. 19. 5 E. 3. 29. 2 E. 3. 6. & 7. F. N. B. 211 b (C).

As to the first, it was argued to the contrary by the defendant's counsel, and resolved by Popham, Chief Justice, *et per totam Curiam*, that the said (*a*) grant to the plaintiff of the sole making of cards within the realm was utterly void (D), and that for two reasons:—1. That it is a monopoly, and against the common law. 2. That it is against divers Acts of Parliament. Against the common law for four reasons:—1. All (*b*) trades, as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law, and

(*c*) 20 H. 7. 7 a.

(*d*) *Postea* 87 b.

(*e*) 3 E. 4. c. 4. Br. Patent 109. Br. Prerogative 37. 141. Chart. de Pardon 76. Br. Licence 24. Fitz. Grant 33. 12 Co. 18, 19. Jenk. Cent. 292. Hob. 75. 146. 214. 229. 3 Keb. 145. 233. 236. Dyer 52. pl. 1, 2. 352. pl. 25. 3 Bulstr. 5. Dav. 14 b. 75 b. 1 Sid. 6. 4 Co. 35 b. Co. Lit. 120 a. 8 Co. 29 b. Hardr. 110. 232. 442. 445. 2 Roll. Rep. 115. 117. Cro. Car. 198. 3 Inst. 237. 2 Keb. 426.

(C) By stat. 1 W. and M. st. 2. c. 2. it is declared that the pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority without consent of Parliament, is illegal. *Vide* 1 Black. Comm. 192.

(*a*) Hardr. 55. 2 Roll. 214. Cumber. 53 to 56. Lucas 131. 2 Inst. 47. 8 Co. 125 a.

(D) So the King's grant of the sole making and writing of bills, pleas, and writs in a Court of law, to any particular person, has been held to be void. *Manuson* v. *Lyster*, W. Jones 231. *Earl of Yarmouth* v. *Darrel*, 3 Mod. 75.

By stat. 21 Jac. 1. c. 3. all monopolies, grants, letters patent, and licences, for the sole buying, selling, and making of goods and manufactures, are declared void, except in some particular cases: but this does not extend to any grant or privilege granted by Act of Parliament; nor to any grant or charter to corporations or cities, &c. or to grants to companies or societies of merchants, for enlargement of trade; or to inventors of new manufactures, who have patents, grants, or privileges for printing; or making gunpowder, casting ordnance, &c.

(*b*) *Antea* 53 b. Raymond 292. Palm. 396, 397. Hob. 211. Carter 118. 2 Keb. 125. 2 Roll. Rep. 392. Cro. El. 872.

the benefit and liberty of the subject, and therewith agrees Fortescue in Laudibus legum Angliæ, cap. 26.

And a case was adjudged in this Court in an action of trespass (*c*) *inter* Davenant and Hurdis, Trin. 41 Eliz. Rot. 92. where the case was, that the company of Merchant Taylors in London, having power by charter to make ordinances for the better rule and government of the company, so that they are consonant to law and reason, made an ordinance, that every brother of the same society, who should put any cloth to be dressed by any clothworker, not being a brother **[86 b]** of the same society, shall put one half of his cloths to some brother of the same society, who exercised the art of a clothworker, upon pain of forfeiting ten shillings, &c. and to distrain for it, &c. and it was adjudged, that the ordinance, although it had the countenance of a charter, was against the common law, because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly; and, therefore, such ordinance, by colour of a charter, or any grant by charter to such effect, would be void. 2. The sole trade of any mechanical artifice, or any other monopoly, is 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; and although provisions and cautions are added to moderate them, yet (*d*) *res profecto stulta est nequitiæ modus*, it is mere folly to think that there is any measure in mischief or wickedness: and, therefore, there are three inseparable incidents to every monopoly against the commonwealth, *sc.* 1. That (*e*) the price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases: and this word (*a*) *Monopolium, dicitur απο του μονου και πωλεω, quod est, cum unus solus aliquod genus mercaturæ universum emit, pretium ad suum libitum statuens.* And the poet saith; *omnia Castor emit, sic fit ut omnia vendat.* And it appears by the writ of *ad quod damnum*, F. N. B. 222 a. (*b*) that every gift or grant from the King has this condition, either expressly or tacitly annexed to it, *Illa quod patria per donationem illam magis solito non oneretur seu gravetur*, and therefore every grant made in grievance or prejudice of the subject is void; and 13 H. 4. 14 b. the King's grant which tends to the charge and prejudice of the subject is void. The 2d (*c*) incident to a monopoly is, that after the monopoly granted, the commodity is not so good and merchantable as it was before: for the patentee having the sole trade, regards only his private benefit, and not the common wealth. 3. It (*d*) tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary; *vide* Fortescue *ubi supra:* and the common law, in this point, agrees with the equity of the law of God, as appears in Deut. cap. xxiv. ver. 6. *Non accipies loco* **[87 a]** (*e*) *pignoris inferiorem et superiorem molam, quia animam suam apposuit tibi;* you shall not take in pledge the nether and upper millstone, for that is his life; by which it appears, that every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life: and it agrees also with the civil law; *Apud Justinianum enim legimus, monopolia non esse intromittenda, quoniam non ad commodum reipublicæ sed ad labem detrimentaque pertinent.* "*Monopolia interdixerunt leges civiles, cap. De Monopoliis lege unica.*" *Zeno imperator statuit, ut exercentes monopolia bonis omnibus spoliarentur. Adjecit Zeno, ipsa rescripta imperialia non esse audienda, si*

(*c*) Moor 576. and 591. 672. 2 Inst. 47. 3 Inst. 182. 1 Roll. 364. Hob. 212. Raym. 202. Carter 116.

(*d*) 2 Inst. 507.

(*e*) Moor 673. Hard. 55. Noy 179.

(*a*) 3 Inst. 181.

(*b*) Palm. 79. Cro. Arg. 23. 61. 2 Roll. 172.

(*c*) Noy 179.

(*d*) Moor 673. Noy 179.

(*e*) Moor 674. Noy 181. 3 Inst. 181.

cuiquam monopolia concedant. 3. The Queen was (*f*) deceived in her grant; for the Queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; moreover the Queen meant that the abuse should be taken away, which shall never be by this patent, but *potius* the abuse will be increased for the private benefit of the patentee, and therefore as it is said in (*g*) 21 E. 3. 47. in the *Earl of Kent's case*, this grant is void *jure regio.* 4. This grant is *primæ impressionis*, for no such was ever seen to pass by letters patent under the Great Seal before these days, and therefore it is a dangerous innovation, as well without any precedent, or example, as without authority of law, or reason. And it was observed, that this grant to the plaintiff was for twelve years, so that his executors, administrators, wife, or children, or others inexpert in the art and trade, will have this monopoly. And it cannot be intended, that Edward Darcy an Esquire, and a groom of the Queen's Privy Chamber, has any skill in this mechanical trade of making cards; and then it was said, that the patent made to him was void; for to forbid others to make cards who have the art and skill, and to give him the sole making of them who has no (*a*) skill to make them, will make the patent utterly void. *Vide* 9 E. 4. 5 b. And although the grant extends to his deputies, and it may be said he may appoint deputies who are expert, yet if the grantee himself is not expert, and the grant is void as to him, he cannot make any deputy to supply his place, *quia* (*b*) *quod per me non possum, nec per alium.* And as to what has been said, that playing at cards is a vanity, it is true, if it is abused, but the making of them is neither a vanity nor a pleasure, but labour and pains. **[87 b]** And it is true, that none can make a (*c*) park, chase, or warren, without the King's licence, for that is *quodam modo* to appropriate those creatures which are *ferœ naturæ, et nullius in bonis* to himself, and to restrain them of their natural liberty, which he cannot do without the King's licence (E); but for hawking, hunting, &c. which are matters of pastime, pleasure, and recreation, there needs no licence, but every one may, in his own land, use them at his pleasure, without any restraint to be made, unless by Parliament, as appears by the statutes of 11 H. 7. c. 17. 23 Ellz. c. 10. 3 Jac. Regis, c. 13. And it is evident by the preamble of the said Act of (*d*) 3 E. 4. c. 4. That the importation of foreign cards was prohibited at the grievous complaint of the poor artificers cardmakers, who were not able to live of their trades, if foreign cards should be imported; as appears by the preamble, by which it appears, that the said Act provides remedy for the maintenance of the said trade of making cards, forasmuch as it maintained divers families by their labour and industry; and the like Act is made in 1 R. 3. cap. 12. And therefore it was resolved, 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, and cannot be suppressed but by Parliament, nor a (*e*) man restrained from exercising any trade, but by Parliament, 37 E. 3. cap. 16. 5 Eliz. cap. 4. And the playing at dice and cards is not prohibited by the common law, as appears Mich. 8 & 9 El. (*f*) Dyer 254. (unless a man is deceived by false (*g*) dice or cards, for then he who is deceived shall have an action upon his case for the deceit) and therefore

(*f*) 10 Co. 113 b.
(*g*) Hob. 115. 13 Co. 113 b. 21 E. 3. 47 a. b. 1 Co. 44 a. *Antea* 74 a. b.
(*a*) Hob. 148. Br. Office and Officer 16. 48. Br. Patent 108.
(*b*) 4 Co. 24 b. Hawk's Max. 55.
(*c*) Moor 675. *Antea* 86 a.
(E) Acc. Roll. Ab. Forest. Warren. Vin. Ab. Park. pl. 8. *semble* acc. *Pickering* v. *Noyes*, 4 Barn. & Cress. 646. But in *Rex* v. *Lowther*, Strange 637. S. C. 2 Lord Raym. 1409., the Court refused to grant an information in nature of a *quo warranto* for erecting a warren, it being only of a private nature.
(*d*) 3 E. 4. c. 4.
(*e*) *Antea* 54 a.
(*f*) Dyer 254. pl. 2. Hob. 296. Goldsb. 35.
(*g*) Cr. Car. 234. F. N. B. 95 d. 1 Jones 249. Cro. Eliz. 90. Cro. Jac. 497, 498. 2 Roll. 549.

playing at cards, dice, &c. is not *malum in se*, for then the (*h*) Queen could not tolerate nor license it to be done (F). And where King E. 3. in the 39th year of his reign, by his proclamation, commanded in the exercise of archery and artillery, and prohibited the exercise of casting of stones and bars, and the hand and foot-balls, cock-fighting, *et alios ludos vanos*, as appears *in dors' claus' de an.* 39 E. 3. *nu.* 23. yet no effect thereof followed, until divers of them were prohibited upon a penalty, by divers Acts of Parliament, viz. 12 R. 2. cap. 6. 11 H. 4. cap. 4. 17 E. 4. cap. 3. 33 H. 8. cap. 9.

Also such charter of a monopoly, against the freedom of trade and traffic, is against divers Acts of Parliament, *sc.* 9 E. 3. c. 1 & 2. which for the advancement of the freedom of **[88 a]** trade and traffic extends to all things vendible, notwithstanding any charter of franchise granted to the contrary, or usage, or custom, or judgment given upon such charters, which charters are adjudged by the same Parliament to be of no force or effect, and made to the derogation of the prelates, earls, barons, and grandees of the realm, and to the oppression of the commons. And by the statute of 25 E. 3. cap. 2. it is enacted, that the said Act of 9 E. 3. shall be observed, holden, and maintained in all points. And it is further by the same Act provided, that if any statute, charter, letters patent, proclamation, command, usage, allowance, or judgment be made to the contrary, that it shall be utterly void, *vide* Magna Charter, cap. 18. 27 E. 3. cap. 11, &c.

As to the 2d question it was resolved, that the (*a*) dispensation or licence to have the sole importation and merchandizing of cards (without any limitation or stint) notwithstanding the said Act of (*b*) 3 E. 4. is utterly against law (G): for it is true, that forasmuch as an Act of Parliament which generally prohibits a thing upon a penalty, which is popular, or only given to the King, may be inconvenient to divers particular persons, in respect of person, place, time, &c. for this reason the law has given power to the King, to dispense with particular persons; *dispensatio mali prohibiti est de jure domino Regi concessa, propter impossibilitat' præviden' de omnibus particular', et* (*a*) *dispensatio est mali prohib' provida relaxatio, seu necessitate pensata.* (*b*) But when the wisdom of the Parliament has made an Act to restrain *pro bono publico* the importation of many foreign manufactures, to the intent that the subjects of the realm might apply themselves to

(*h*) Hob. 149. Hard. 448.
(F) But the keeping of a common gaming-house, and for lucre and gain unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called "*rouge et noir*," and permitting the said idle and evil-disposed persons to remain playing at the said game for divers large and excessive sums of money, is an indictable offence at common law. *Rex* v. *Rogier*, 1 Barn. & Cress. 272. S. C. 2 Dow. & Ryl. 431.
(*a*) 2 Roll. 179. 214.
(*b*) 3 E. 4. c. 4.
(G) "In *Darcy's case*, the Chief Justice doth report it to be resolved, that the dispensation or licence from Queen Eliz. to Darcy to have the sole importation of cards, notwithstanding the stat. 1 Edw. 4. was against law. But 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 resolution in that point, but passed it by in silence, because they insisted upon the body of the patent, whereby the trade of making cards, which was common to all, was by the patent appropriated to Darcy and his assigns, which the Judges held to be against the law, because it sounded in destruction of a trade whereby many subjects get their living: but in point of dispensation it hath ever been allowed in all ages, with the difference taken between *malum in se*, and *malum prohibitum*, that the King cannot dispense with the first, with the other he may; but that new difference invented by the reporter, that the King may dispense with *malum prohibitum*, but cannot dispense with a statute made *pro bono publico*, the truth is, the only reason of the judgment was that which is mentioned by the reporter, but *obiter* which was because Darcy's patent might excuse him upon an information brought upon the statute, but could not give him an action on the case against another."—Lord Ellesmere's Observations, p. 7. *Vid. ante*, note (D), p. 86 a.
(*a*) Co. Lit. 99 a. Palm. 476. 3 Keb. 236. Godolph. Abr. 112.
(*b*) 2 Roll. 179. 214. Hardr. 110.

the making of the said manufactures, &c. and thereby maintain themselves and their families with the labour of their hands; now 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; for this is not to maintain and increase the labours of the poor card-makers within the realm, at whose petition the Act was made, but utterly to take away and destroy their trade and labours, and that without any reason of necessity, or inconveniency in respect of person, place, or time, and *eo potius*, because it was granted in reversion for years, as hath been said, but only for the benefit of a private man, his executors and administrators, for his particular commodity, and in prejudice of the commonwealth. And King E. 3. (*c*) by his letters patent, granted to one John Peche the sole importation of sweet wine into London, **[88 b]** and at a Parliament held 50 E. 3. † this grant was adjudged void, as appears in Rot. Parl. an. 50 E. 3. M. 33. Also admitting that such grant or dispensation was good, yet the plaintiff cannot maintain an action on the case against those who import any foreign cards, but the remedy which the Act of 3 E. 4. in such case gives ought to be pursued. And judgment was given and entered, *quod querens nihil caperet per billam.*

And *nota*, reader, and well observe the glorious preamble and pretence of this odious monopoly. And it is true *quod privilegia, quæ re vera sunt in præjudicium reipublicæ, magis tamen speciosa habent frontispicia, et boni publici prætextum, quam bonæ et legales concessiones, sed prætextu liciti non debet admitti illicitum.* And our lord the King that now is, in a book which he in zeal to the law and justice commanded to be printed anno 1610, intituled, "A Declaration of His Majesty's Pleasure, &c." p. 13. has published, that monopolies are things against the laws of this realm; and therefore expressly commands, that no suitor presume to move him to grant any of them, &c.

[See the case of *Sandys and The East India Company*, Skin. 132 to 137; also *ib.* 169, 170. 173.]—*Note to former edition.*

[89 a] The Earl of Devonshire's Case.

Hil. 4 Jac. 1.

[Disapproved, *R.* v. *Taylor*, 1824, 3 Barn. & C. 511.]

The King by Privy Seal, reciting that unserviceable munition belonged to the Master of the Ordnance, granted it to him, who thereupon sold it, and died. Held, such munition cannot be claimed as ancient fees, the office having been erected 35 H. 8.; such grant is void, and the executor of the grantee is chargeable to the King for the said munition.

Case of *The Bankers*, 11 State Trials, 136. ed. Harg. Vin. Ab. Prer. N. F b. G b. 2 Roll. Rep. 275. 296. 2 Roll. 161. Skin. 656.

Charles Earl of Devonshire, Master of the Ordnance General, obtained of the King a Privy Seal, bearing date *ultimo* Octobris, anno 2 Regis Jac. in these words:—"James, by the grace of God, &c. to our right trusty and right well beloved cousin and counsellor Charles Earl of Devonshire, our Lieutenant of our realm of Ireland, and Master of the Ordnance General, greeting, &c. Forasmuch as we are given to understand that such munitions as are utterly decayed and unserviceable have been heretofore claimed, taken and enjoyed by the Master of the Ordnance for the time being, as fees and avails to them, by reason or in respect of the said office, belonging; our will and pleasure therefore is, and we do hereby give unto you full power and authority, that you may, at your pleasure, receive and take out of the store within the Tower of London, all such broken and other unserviceable iron ordnance, shot, and other

(*c*) Moor 672.
† Cotton's Records. 1 Roll. 106. Vin. Ab. Actions M. c. pl. 16.

munitions whatsoever, as are particularly expressed, mentioned, or set down in a book, &c. and the same to receive, retain, employ, and convert to your own use, &c." By virtue whereof the said earl took out of the King's store, within the Tower, divers pieces of iron ordnance, shot, and other munition mentioned in the said book, and sold them to divers persons for money, and so converted them to his **[89 b]** own use, and afterwards made his will, and thereof made an executor and died: and now the question was, if the executor of the said earl might be charged to the King, for the said conversion of the said ordnance and munition: and the King referred the examination and consideration of this case to the two Chief Justices and Chief Baron: and the counsel of the said executor objected, that the executor should not be charged in this case for three reasons:—

1. Because, in truth, broken, cast, and unserviceable iron ordnance, shot, and other munition, belong to the Master of Ordnance, as fees and avails belonging to his office; and offered to produce divers witnesses to prove, that the Masters of the Ordnance for the time being, for sixty years past, have taken the broken, cast, and unserviceable iron ordnance, shot, and other munition, as their fees and avails due to their offices.

2. Admitting that they were not fees belonging to their offices, yet the King, by his Privy Seal, has given those especially expressed in the said book, to the said earl, by force of which he may lawfully take and convert them to his own use, although they were not due to him as fees and avails, in respect of his office.

3. It was objected, that in this case the executor cannot be charged in detinue, for none of the said King's goods came to his hands, nor in account, for the testator was never bound to the King to render account, neither as bailiff nor as receiver; for (*a*) no man shall be charged in account but as guardian in socage, bailiff or receiver: and there are not other original writs in the register to charge any in account, except in the said three cases. *Vide* Regist. 135. 19 H. 6. 5 a. b. 29 Hen. 6. Account 6. And that is the reason that an apprentice, by the name of an apprentice, is not chargeable in account, 8 E. 3. 46. F. N. B. 119 d. 7 H. 4. 14 b. And although the King has the prerogative to charge the executors of an accountant, yet he ought to charge the executor only where the testator was chargeable in law, in one of the said three cases.

Also when any one is charged as bailiff or receiver, there ought to be privity to charge him: but when one claims any thing to his own use, there he shall be never charged in account, because he may plead, never his bailiff, never his receiver to render account; and therewith agree 2 Mariæ, Br. Account 89. 2 Hen. 4. 12 a. 39 Ed. 3. 27. So in the case at Bar, the earl claimed them to **[90 a]** his own use, for which no account lies against him; but the personal wrong, if there was any, dies with his person.

As to the first, it was answered and resolved, that the earl could not claim the said iron ordnance as fees or avails belonging to his office, for the said office was erected of late time; for King Henry VIII. anno 35 of his reign, by his letters patent newly erected the said office of Master of the Ordnance, and granted it to Thomas Lord Seymour, and after his death in 1 Ed. 6. it was granted to Sir Philip Hobby, and after his death, *sc.* 1 Mariæ, it was granted to Sir Richard Southwell, and after his death it was granted to Ambrose Lord Dudley, so that the said earl, without question, cannot claim them as ancient fees by prescription to a new office.

As to the second, it was resolved, that the said Privy Seal was made upon a false suggestion, and that the King was therein deceived; for in the King's case these words (heretofore claimed, taken and enjoyed by the Masters of the Ordnance for the time being), shall be intended to be lawfully claimed, taken, and enjoyed, and not by wrong, or usurpation: and also this word (belonging) implies a right to take them; and therefore the said Privy Seal being founded upon a false suggestion contained in the said Privy Seal, and so the King deceived by matter apparent in the same Privy Seal, by consequence the Privy Seal is utterly void.

And as to the third objection, it was answered and resolved by the Court, that although the said earl claimed them to his own use, yet he shall be bound to the King

(*a*) Co. Lit. 90 b. 172 a. Owen 36. 1 Roll. 118, 119. 2 Inst. 379.