which must now be considered; and as no substantial observation has been made on the subject of costs, the costs must follow the result, and be paid up to the present time by the Defendant to the Plaintiffs, reserving subsequent costs.

I have omitted to observe what I had intended to state, that if the Defendant had meant to rely on that part of his case stated in the answer, which alleged that, whatever was the title to the soil of the pool, those removals of the soil were justifiable, and justifiable in consequence of the necessity arising from the lower position of the mills, and the exigencies of that establishment; that was matter pleadable, that was matter which ought to have been pleaded, but no such matter is suggested on the record which establishes **[526]** that whatever damage was done was damage done unjustifiably and injuriously.

The account must not go beyond that day in October 1833 which is mentioned in Lord Cottenham's decree.

Let the Master take an account of the quantity and value of the soil, oxide of iron, ochre, shine and other, if any other, mineral substance carried or taken away by, or by the order of, the Defendant since the 10th of October 1833, from or out of the pool called Llaethdu Pool, as well the old as the new part thereof, which have been sold or wholly or partially prepared for sale by him, or by his order, or for his use, or on his account, and by the Plaintiff's consent. Let the Defendant be at liberty to sell all such of the particulars aforesaid as he has now ready prepared or in the course of preparation for sale. The Plaintiffs having received the sum of £25, 1s. as the amount of damages in the action, let that sum be without prejudice within ten days after service be repaid by them to the Defendant without prejudice to any question of account in the cause, and the Defendant is to pay the Plaintiffs' costs of the suit in equity up to this time. Then the injunction will be to restrain the Defendant, his agents and servants, in the usual way, from taking and carrying away from and out of the bed and bottom of the said pool or any part thereof, any soil, oxide of iron, ochre, shine, deposit or other mineral substance, and from puddling, loosening, disturbing and floating off, and from causing to be puddled, loosened, disturbed and floated off, any soil, oxide of iron, ochre, shine, deposits or mineral substances which have already been deposited, or which may hereafter be deposited upon the beds of the said pool called Llaethdu Pool.

The decree to be without prejudice to any application which the Defendant may make for any purpose connected with the use or working of the Melin Adda Mills; and let **[527]** him be at liberty to make any such application, and let either party be at liberty to apply generally. I do not mean at all to prevent the Defendant, if he has the right, from going up the stream for the purpose of keeping the watercourse open. The decree to be without prejudice to any application which the Defendant may make in connection with the use or working of the Melin Adda Mills: And let him be at liberty to make any such application, and let either party be at liberty to apply generally; and let the Master be at liberty to state special circumstances. The account relates to so singular a subject that it may be of use.

NOTE.—The following case extracted from the 20th volume of Serjeant Hill's MSS., though not cited in the above case, was intended to have been cited, if any argument had been addressed to the Court on the question, whether the Court would grant a perpetual injunction after a verdict of law, where the verdict was in an action brought by the Plaintiff in equity, and not in an issue or action directed by the Court:—

Liardet and Adams *v.* Johnson and Another. *July* 5, 1780.
From Mr. Douglas. In Chancery.

S. C. Bull, N. P. edit. 1790, p. 75.

Decreed by Eyre, Baron, and Masters Graves and Leeds, sitting for Lord Chancellor, at Lincoln's Inn Hall, 5th July 1780. After T. 20, G. 3.

The Plaintiff, Liardet, on the 3d April, 13 Geo. 3, obtained a patent for a cement of his invention, and for the exclusive use thereof for the term of 14 years in England, Wales, and the plantations, upon the usual condition that if he, his executors,

administrators or assigns, should not particularly describe and ascertain the nature of his invention, and in what manner it was to be made and applied, by an instrument in writing under his hand and seal, the same to be inrolled in the Court of Chancery within four calendar months after the date of the letters patent, then the letters patent to determine and be void.

The specification was accordingly inrolled on the 3d August following, which was clearly within the time, although the Defendant, Johnson, in his answer, made a question on the point.

The patent was assigned by Liardet to Messrs. Adams, 10th May 1774.

Liardet having made some additions or alterations (as was alleged) in the manufacture of the cement, which made it more valuable and more perfect, it was agreed between him and Messrs. Adams that they should reassign the patent to him, in order that he might apply to Parliament for an enlargement of the term, and also to extend the exclusive right to Scotland. Such a reassignment was accordingly made, Liardet at the **[528]** same time executing a declaration of the purpose thereof, and covenanting to convey back to Messrs. Adams all the benefit of the letters patent and of the Act of Parliament.

An Act of Parliament was accordingly applied for and obtained, 16 Geo. 3, c. 29, by which the exclusive privilege of using and selling the cement as improved was granted for 18 years, from the date of the Act, 13th May 1776, and extended to Scotland, still on the condition that a specification of preparing and applying it should be inrolled within four months after the passing of the Act.

The new specification was inrolled on the 4th September 1776, and Messrs. Adams continued to make and sell the cement as before the reassignment to Liardet, allowing him a certain proportion of the profits, as had been agreed upon between them when he first conveyed his patent to them. There had been no new conveyance of the privilege granted by the Act according to Liardet's stipulation when this suit was instituted.

In May 1777 the Plaintiffs filed their bill against the Defendant, Johnson, who had also obtained a patent subsequently to that of the Plaintiffs, for a cement of a nature very similar, except that he had introduced a new article or ingredient into his composition, and against the other Defendants, Downes and Bellman, two workmen of Johnson's, setting forth the particulars above stated, complaining that the Defendants had evaded their exclusive right, and praying an account and an injunction.

Before the time to answer was out, the Plaintiffs having laid an affidavit before the Court stating the most material parts of their case, as above mentioned, and also swearing that they verily believed that, since the passing of the Act, and the inrolment of the specification under it and not before, the Defendant, Johnson, and the other two as his servants, had made and used great quantities of a cement similar to Liardet's. That they had seen and examined it, and that from such examination they believed it to be made and used according to the invention of Liardet, or on the same principles, with very little addition or subtraction, and mentioning certain houses where they had employed it. And the Defendant, Johnson, having also made an affidavit which tended both to impeach the novelty of Liardet's cement, and also to prove that what he had used was materially different from it, but which did not directly deny the novelty of the Plaintiffs' composition, and counsel having been heard, Lord Chancellor Bathurst, on the 12th June 1777, made an order that an injunction should issue to restrain the Defendant, Johnson, and his servants from making, using or vending the composition in question, as prayed by the bill, until the further order of the Court, the Plaintiffs undertaking to bring an action at law, and to proceed to trial therein without delay, as soon as the Defendants should have fully answered the Plaintiffs' bill, but such injunction was not to extend to prevent Johnson from finishing the houses mentioned in the affidavit, which he had begun to cover with his cement, he submitting by his counsel to account in respect of those houses **[529]** in case the Court on the hearing should direct an account. The injunction accordingly issued.

The Defendants, Johnson and Downes, put in several answers in September 1777 (as did the other Defendant, Bellman. I suppose though, as no proceedings were had

against him, his answer was not stated in the briefs for the Plaintiffs). Downes swore in his answer that he had acted merely as the servant of Johnson.

Upon the answers coming in, the Plaintiff, Liardet, agreeably to the undertaking under the Lord Chancellor's order, brought an action on the case in B. R. against the Defendant, Johnson, and, after stating in his declaration the first patent, the Act of Parliament, and that in pursuance thereof he had inrolled a specification of his invention, he charged the Defendant by the first count with "making, using and putting in practice his said invention." By the second, with "making, using and putting in practice part of his said invention." By the third, with "counterfeiting, imitating and resembling it." By the fourth, with making and causing to be made additions to his invention, whereby to pretend himself the inventor, and for pretending himself the inventor, contrary to the form of the said Act.

This action was tried at the sittings after H. 18 Geo. 3, at Westminster Hall, before Lord Mansfield and a special jury, and a verdict was found for the Plaintiff.

In Easter term following a new trial was moved for and granted, Lord Mansfield saying, in delivering the opinion of the Court, that it was an action brought in effect by direction of the Court of Chancery, and to be a ground for a perpetual injunction; and that, therefore, they ought to consider whether on the first trial the cause had been so completely discussed and understood as to be a ground for a perpetual injunction. He and the rest of the Court were of opinion that it had not.

The second trial came on at the sittings after Trinity term, 18 Geo. 3, before Lord Mansfield. The Defendant produced a good deal of new evidence; but after the trial had lasted from nine in the morning till past eleven at night the special jury, having retired for a very short time, brought in another verdict for the Plaintiff.

No new trial was moved for after the second verdict, but the Plaintiffs in Chancery having replied, the cause was at issue, and the Defendants examined a number of witnesses, chiefly those who had been produced by them at the trials at law, with a view to establish the same points on which they had relied before the jury. The Plaintiffs only proved the records of the action and of the two verdicts.

The cause came on to be heard before Mr. Baron Eyre.

Mr. Mansfield, Mr. Macdonald, Mr. Arden, Mr. Thomson and Mr. Douglas being of counsel for the Plaintiffs; and Mr. Maddocks, Mr. Kenyon and Mr. Mitford, for the Defendants.

On the part of the Plaintiffs it was contended that the two verdicts ought to be conclusive, that as no new trial had been moved for after the **[530]** second trial it was too late to impeach the truth of the last verdict; and that every fact alleged in the declaration, and necessary to support the action, must be taken as proved and found by the jury, and that agreeably to the terms and spirit of the decretal order, granting the temporary injunction, that injunction ought now to be made perpetual. That, if it was competent to the Defendants to read any evidence, it could only be such as in a Court of law would furnish a ground for granting a new trial, such, for instance, as new evidence, which not only had not been produced before the jury, but which it was not in the Defendants' power to have produced, or evidence to shew misconduct in the jury. That, strictly, it was not for the Defendants to impeach the verdict even on such grounds as those in this Court, and in this stage of the cause; for that the proper time and place was within the time allowed by the Court in which the action at law was brought, and in that Court. But that, in truth, none of the depositions for the Defendants would be found to be of the tendency just mentioned. That they, in general, consisted of a repetition by the same witnesses of what had been sworn before the jury on the same questions of fact directly at issue in the action; and that the little new evidence they contained (as, for instance, a patent and specification of one work which they contended to be the same in substance with the Plaintiffs) was all accessible to the Defendants before the trials at law. That if a Court of Equity were upon the written depositions of persons, who had or might have been examined and cross-examined before a jury, to draw a different conclusion in point of fact from what the jury had done, it would act in opposition to the general and established principle that where there are doubts and apparent contradictions as to questions of fact in a cause the Courts of Equity are not the proper tribunals for investigating such questions, but ought to send them before a jury in order to be

informed of the truth of them. That if such a principle was applicable on any occasion, it was on this point; for that twelve special jurymen must certainly be much better judges of the nature of such an invention as that in question than a single Judge sitting in a Court of Equity. They, therefore, contended that the Defendants ought not to be permitted to send their evidence.

On the part of the Defendants it was urged that the Court would never grant a perpetual injunction on a verdict at law; that it will always direct an issue, first, before binding the parties for ever, and for this reason, because the trial and verdict upon an issue are under the control and direction of the Court, which, if dissatisfied with the verdict, may, without the intervention of the Court of law, set it aside and direct a new trial. That the verdict, or rather the last verdict, was not conclusive; that it could not be pleaded in a new action, and would only be evidence. That contrary evidence might, therefore, be heard to contradict it, and that, if so, it would appear that the Defendants' evidence in the present case most completely contradicted the verdict in the Plaintiffs' favour, both as to the novelty of the invention, *the fulness and clearness of the specification, and the invasion by the Defendants*, which three points it was absolutely **[531]** incumbent on the Plaintiffs to make out before they could be entitled to the relief prayed for. The cases of *The Earl of Bath* v. *Sherwin*, Prec. in Ch. 261, and of *Lord Pomfret* in the House of Lords, were cited as instances where the Court had refused to grant perpetual injunctions after several verdicts upon actions at law.

In answer to this part of the argument for the Defendants, it was observed that Lord Cowper, indeed, in the case of *The Earl of Bath* v. *Sherwin*, had refused to grant a perpetual injunction after five verdicts in ejectments; but upon an appeal the House of Lords granted the injunction. 1 Wms. 673. That in the case of *Leighton* v. *Sir Edward Leighton*, 3 Wms. 673, Lord Parker had granted a perpetual injunction after three concurrent verdicts in ejectment, although there had been two previous verdicts in favour of the other party. That the reasoning of his Lordship in that case was extremely applicable to the present; for he said that, as the two last verdicts had been upon trials directed by the Court, he did not see what the Court had been doing, unless there should now be a perpetual injunction. That here the action and trials must be considered as if expressly directed by the Court; and that, if they were not to be conclusive in any one case, but must be succeeded by an issue, the Plaintiff had been deceived by being brought into an undertaking to bring an action, the result of which could not ascertain the right. That the case of *Lord Pomfret* was extremely anomalous, and could never be a precedent. That, in that case, although it was an action, not an issue, this Court had been moved for a new trial, and the House of Lords, on an *appeal*, had directed one. *N.B.*—which was perfectly irregular. It seemed to be taken for granted in this cause, by the counsel on both sides and by the learned Judge, that in the case of an action, though brought in consequence of an order of the Court of Equity, that Court cannot grant a new trial. But this case of *Lord Pomfret* seems a direct authority to shew that the Courts of Equity may; for the Court of Chancery entertained the motion, and the House of Lords, sitting as a Court of Equity, actually granted the new trial. Indeed, if the Courts of Equity can set aside a verdict on an issue, which is in form of an action, there is no reason why they should not in an action directed by themselves. In the case of an issue the Court of Equity will give leave to move the Court of law out of which the record goes for a new trial. *Hope and Others* v. *Cust and Others*, Hil. 15 G. 3.

Note.—Some doubts were at first started how far the record of the action and verdicts could be given in evidence on the hearing, as they did not make part of any of the allegations in the bill; but, upon consideration, those doubts soon vanished, because the terms of the order and the Defendant, Johnson's, answer certainly made them evidence, because he insisted he ought not to *account* for the profits he had made *until the Plaintiffs should have established at law their sole and exclusive right.*

On the question of the admissibility of the Defendants' evidence, Mr. Baron Eyre delivered himself as follows:—"Strictly speaking, in the same **[532]** point and between the same parties, a verdict is always conclusive. In cases like ejectments it is only evidence, because it does not appear on the record that the point is the same. If those verdicts had been given after the hearing of the cause they would have been

conclusive, but they were given before the cause came on to be heard. I do not see my way in a case so circumstanced. I shall admit the evidence to be read. The operation it may have is a difficult question. As to all those points which may have been discussed at the trial the Court may think it improper to attend to the depositions, and I reserve to myself the fullest liberty on that matter."

The evidence was then read to the effect as above stated, and the Defendants' counsel pressed strongly for an issue; and, besides the topics above mentioned, insisted that the Plaintiffs' specification was so confused, general and inaccurate, that it would be impossible for the Defendant to know whether, in any cements he might be disposed to use, he did or did not interfere with the Plaintiffs and infringe the injunction.

The Plaintiffs waived all benefit of account.

Eyre, Baron. The ordinary relief in the case of a patent is an injunction and an account. When the *right* is disputed the Court expects that to be ascertained by a trial at law. If such trial has been had and a verdict found for the Plaintiff before the bill is brought, the only question is how is the invasion to be prevented. An injunction in this case is very different from one on bills of peace, or to prevent the bringing of actions. There it is a very *extraordinary remedy.* It is depriving a man of a right common to all; the right of bringing any claim he may have before a Court of law. The sort of injunction here prayed does not deprive the Defendant of any right.

If the cause had gone on to a hearing the Court would either have directed an action or an issue, and then the subsequent decision would have been according to the event of the trial.

I conceive there is no difference as to the effect here between an action and an issue. The latter often brings a question more neatly before a jury; it is an incidental difference that in the case of an issue the Judge makes his report here, and the motion for a new trial is made here, which may be appealed from.

I know not when or how that practice was introduced, perhaps it would have been better if it had never taken place.

The granting the temporary injunction in this cause in the beginning shews what I have before advanced, that an injunction is an *ordinary* relief in such cases.

How does this, in substance, differ from an action directed upon the hearing? If the cause had come on to be heard without a previous trial at law, and there had been all the evidence then for the Defendants which has now been produced, and evidence also for the Plaintiff, the Court would have sent it to law. Suppose there had been, in that case, these **[533]** two verdicts and a long contested trial, and the cause had come on again, whatever might have been the private opinion of the Court (if, indeed, they would take upon them to be plasterers), I have no doubt that it would not have hesitated to grant the relief prayed for, viz., "An injunction and an account, if there was evidence which would entitle the Plaintiff to an account."

It seems to me that the case is now the same in substance. Indeed, I think the method which was taken of postponing the hearing till after the trial preferable. As to what has been said, that it will be a hardship to tie the Defendant up for ever from making the cement, upon two trials, if the Plaintiffs have established their right at law, they are entitled to tie him up. This is not different from other injunctions in like cases.

I do not inquire into the weight and merits of the evidence now laid before me. I am glad I admitted it. I at first thought the verdict conclusive, I do not now think it so conclusive that it could be pleaded; I cannot put a case where there could be an opportunity of pleading it. But it does not become me in a Court of Equity on a doubt of mine to impeach it, I am not the proper Judge of the question.

The evidence which has been read only goes to the point of the verdict. If there had been extrinsic evidence which went to shew any ground for not granting the injunction the case would be different.

As to the form of the injunction (about which some difficulty had been raised by one of the Defendants' counsel), it must necessarily follow the form of the temporary injunction.

I do not know that the injunction will benefit the Plaintiffs, because, upon an

application to this Court on an infringement of the specification, it may be competent to the Defendant to shew that what he has done is no infringement, and then perhaps he may be at liberty to produce the evidence which was offered now.

Injunction decreed against Johnson, but without costs.

Bill dismissed as to Downes, with costs.

[534] ROSE *v.* CLARKE. *April* 20, 21, 22, *May* 23, 1842.

On the marriage of A. and B. the fortune of B., which consisted partly of a sum of money due from C. to D., and secured by the bond of C., was settled on the intended husband and wife and their issue. The bond was not referred to in the settlement, but the wife's fortune was therein stated to have been paid to the trustees; and power was reserved to the trustees to lend the wife's fortune to A., the husband, on his personal security. The marriage took effect, and some years afterwards the son of A. and B. filed his bill against C. to recover the money due upon the bond, alleging that C., with knowledge of the existence of the settlement, and that according to its provisions the money ought to have been paid to the trustees, wrongfully paid the money to A., who had wasted it and become bankrupt. In support of the allegation as to C.'s knowledge of the provisions of the settlement the Plaintiff gave some general evidence connecting him with that instrument; as that he was brother-in-law of B., that the parties married from his house, that he was spoken to on the subject of the settlement, that it was prepared by his attorney, and that he was present when it was read over previously to execution; but the bond was not produced, nor was there any proof of its existence, and C., by his answer (which was in evidence), averred that it had been long since satisfied. Held, under these circumstances, that the Plaintiff could not recover from C. the amount of the bond.

An equitable title to money secured by bond is not of itself sufficient to entitle the party interested to sue the obligor in equity for payment of the money.

Before a payment by a debtor to, or under the direction of, his legal creditor can be impeached or avoided to the prejudice of the debtor, it must be shewn clearly either that the debtor was subjected to the obligation of seeing to some particular mode of application of the money, which was not pursued, or that the debtor, having notice of circumstances rendering it inequitable for the legal creditor to receive or direct the payment, could reasonably and with safety have avoided making the payment.

The Court refused to admit secondary evidence of a declaration of trust, there being strong circumstantial evidence to shew that the original instrument was not stamped.

Quære, whether the mere fact that the Plaintiff has filed a replication to the answer of a Defendant precludes him from examining that Defendant as a witness.

John Hood, by his will, devised his real estates to his daughter Isabella, and her heirs, upon trust, with the consent of Dummeller and Lakin, his executors, to sell the estates, and distribute the money arising from the sale amongst his children.

After the death of the testator, and in the year 1806, part of the property was purchased by Joseph Clarke, who had married the testator's daughter Isabella; and Clarke and his father gave their joint bond to secure the amount of the purchase-money, £1705, 14s., to Dummeller and Lakin.

Mary, another daughter of the testator, married Matthew Rose, and in contemplation of that marriage the intended wife's fortune, which consisted for the most part of her share of the monies arising under the testator's will, and amounted in the whole to £1073, was by an indenture of settlement of the 11th May 1809 assigned to William Hood and John Rose, upon the usual trusts for the intended husband and wife and their issue. This settlement, to which Mary Hood, Matthew Rose and the trustees were **[535]** the only parties, stated the £1073 to have been actually paid to the trustees, and it gave power to the trustees to lend the money to the husband on his real or personal security.