

deliver the ale to Ind, Coope, & Company, Limited, Malta. This order is signed "Ind, Coope, & Company, Limited, by Arthur F. Whinney, Receiver and Manager." But I am at a loss to understand how the fact that the shipper describes himself in the shipping instructions as a receiver and manager can affect the question as to who are the consignees. Ind, Coope, & Company do not, and indeed cannot, exist in two different senses. The company has not been wound up, nor is it even in liquidation. The only change that has happened is that, instead of the business being managed by an official appointed by the board of directors, it is managed by an official appointed by the court; but the company is still the same company and the business is the same business. Mr Whinney started no new business; he merely continued the old one, and Mr Whinney himself clearly understood this when on January 6 he telegraphed to Turnbull junior & Somerville—"We continue to do business as heretofore, Receiver, Ind, Coope, & Company." It was said during the argument that to let the shipowners have the benefit of the lien would be to make them secured creditors, taking priority over the debenture-holders. The answer is that the shipowners are not concerned with the debenture-holders. They made their contract with Mr Whinney, and it is the money of Mr Whinney which they are claiming a right to keep in this action. If Mr Whinney had provided the money in order to free the goods from a lien which as against the company he ought not to have created, he will not get the amount allowed in his accounts, and the company will be none the worse. To construe the bill of lading contract as the Court of Appeal has construed it is, in my opinion, to twist it from its plain meaning and to deprive the shipowners of part of the consideration for the carriage of the goods for which they stipulated, which was conceded to them. Another point was taken by the learned Lord Justice in the course of the argument in the Court of Appeal—namely, that Mr Whinney could not without the leave of the Court bind the debenture-holders by charging the goods with the back freights. It was a point which had not been taken before Hamilton, J. I think it sufficient to say of it that the same considerations which dispose of the earlier points dispose of this point also. If this contract was one which came within the meaning of carrying on the ordinary business of the company (as I think it was), Mr Whinney required no leave; the making of it was authorised, and in fact enjoined, by the order of the court appointing him; and if it did not, it is he, and not the shipowners, who must bear the consequences. For these reasons, I think this appeal ought to be allowed, and the judgment of Hamilton, J., restored.

LORD CHANCELLOR—Lord Ashbourne, who is not able to be present to-day, desires me to say that he concurs in the view taken by the majority of your Lordships.

Appeal dismissed.

Counsel for Appellants—Bailhache, K.C.—Robertson Dunlop. Agents—Rawle, Johnstone, Gregory, Rowcliffe, & Rowcliffe, Solicitors.

Counsel for Respondent—Sir A. Cripps, K.C.—Leck. Agents—Davidson & Morris, Solicitors.

## HOUSE OF LORDS.

Friday, July 14, 1911.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Ashbourne, Macnaghten, Dunedin, Shaw, and Robson.)

JOHNSTON v. O'NEILL.

(ON APPEAL FROM THE COURT OF APPEAL IN IRELAND.)

*Fishings—Eel-Fishings—Title—Possession—Prescription—Immemorial Use by Public—Navigable Non-Tidal Lake.*

An exclusive right was claimed to the eel-fishing over the whole of Lough Neagh, a large navigable non-tidal inland lough in Ireland by the holders of a long lease, who were in right of a title to the fishings conferred by the Crown in 1661. The title of the Crown had been previously affirmed in certain inquisitions. The claimants and their authors produced some leases of the fishings in the lough, and proved occasional payments made in respect thereof at various dates since the date of the Crown grant. It was proved in defence, and not disputed, that the public had for centuries fished for eels habitually and continuously in the lough as of right.

Held that the public cannot prescribe a right of fishing in inland non-tidal waters, and (*diss.* the Lord Chancellor, Lords Shaw and Robson) that the claimants had sufficiently established their title to the exclusive enjoyment of the fishings notwithstanding the continuous practice of fishing by the public.

Per Lord Macnaghten—"The Crown is not of common right entitled to the soil or waters of an inland non-tidal lake. No right can exist in the public to fish in the waters of an inland non-tidal lake."

Per Lord Dunedin—"The public cannot have a right to the fishing in question. The Crown may have had a right to it when it granted the patent. The only competitor to the Crown and its patentee must be some other private owner or owners, corporation or quasi-corporation."

The lessees of the eel-fishings of Lough Neagh claimed a declaration of their sole right thereto and an injunction against the defendants, who were a number of

local fishermen. The history of the titles and possession of the fishing are set forth at length in their Lordships' judgments. Judgment in favour of the lessees was affirmed by the Court of Appeal in Ireland (Sir S. WALKER, L.C., FITZGIBBON and HOLMES, L.JJ.).

The defendants appealed, and after a re-hearing their Lordships gave considered judgment as follows:—

LORD CHANCELLOR (LOREBURN)—This case has been twice argued, and the mass of documents, accounts, Acts of Parliament, authorities, and comments of all kinds has been very great.

The conflict really is whether or not the public, who have been in fact accustomed from time immemorial to fish in Lough Neagh openly as of right and without interruption, ought to be restrained from fishing any longer at the suit of proprietors who claim a title in law.

This action relates to eel-fishing alone, and the injunction is limited to a comparatively small area of the lough, with liberty to apply as to the rest; but if the title put forward by the plaintiffs can be established, those who possess it will be entitled to an exclusive fishery for all kinds of fish all over the lough, and to dispossess a great number of men who live by the occupation which they have hitherto followed. This is a serious matter. We were also told that unless the plaintiffs succeed their lucrative eel-fishery in the river Bann, which is the outflow from this lough, will be destroyed. That also is a serious matter.

The plaintiffs' case, put quite generally, is that in 1605, and also by later grants, their predecessors in title obtained from the Crown an exclusive right of fishery in a great stretch of the river Bann and also in the whole of this lough; that the Crown had a title to make the grants; that their predecessors have continuously possessed and actually enjoyed the fishery so far as the river is concerned; that this is also a possession of the fishery in the lough, which was a nursery and feeding ground to supply the river; and that such predecessors have also from time to time dealt with and received rents from others for the fishery in the lough itself. They say further that, although the public have in fact always fished in the lough, it has been merely by indulgence and not under any legal right, because there can be no such thing as a right in the public to fish in non-tidal waters, and if the public cannot have the right no other title has ever been put forward to compete with their own. The defendants' case, also put generally, is that the public can in law have such a right, and that in any case the plaintiffs can succeed only on the strength of their own title, and not on the infirmity, if such there be, of the defendants' title. They admit the plaintiffs' possession of the river fishery, but say that it is not possession of the lough fishery.

This dispute in another form came before

your Lordships House in the case of *Bristow v. Cormican*, 3 App. Ca. 641. The only point actually decided in that case was that Lawson, J., had exceeded his power in directing a verdict and that there must be a new trial. There never was a new trial, but the reasoning and observations of such great Judges as Lord Cairns, Lord Hatherley, and Lord Blackburn are of the utmost value. In that case the plaintiffs claimed a several fishery in Lough Neagh said to have been invaded by one Cormican, and claimed it under the identical title set up by the now plaintiffs, which I will call the Chichester title. The defendant Cormican alleged, as here, a right in the public and denied the title to the lough. There, as here, no third persons advanced any claim. The claim of public right had been decided to be bad on demurrer, and that decision, to the effect that such a right could not exist in non-tidal waters, was not appealed from and therefore was not before the House of Lords. Lord Cairns, while pointing out that it was not before the House, by no means brushed aside the claim of public right. He said that it might be a fit question to raise in some other case. The next thing deserving of notice in *Bristow v. Cormican* is that, though the public right was not available to then defendants, and no other title to the Lough Neagh fishery except the Chichester title was put forward or even suggested, yet the House of Lords did not relax upon that account the stress which lay upon those who asserted the Chichester title to prove it even against trespassers. On the contrary, the Lords scrutinised strictly the documents relied upon to establish that title, from a royal lease of 1660 and grant of reversion upon its expiration onwards for 220 years, and affirmed the necessity of the claimants proving that Charles II had a right to grant the lease and the reversion. The Chichester title being documentary, it was for a jury to say whether it had been fortified by actual possession or was merely a paper title not representing any real right. Further, when considering what is in reality evidence of actual possession in a particular place the Lords who decided that case had a practical instance to deal with. The question was whether the then plaintiffs had been in possession of a fishery in Lough Neagh at a place called Feumore, and in order to prove the affirmative they alleged that they had enjoyed a fishery near Shanes Castle, ten or twelve miles away, on the same lough. Could that be regarded as evidence of possession at Feumore? The point was not decided, but it was treated as an open question for the jury whether there was such a common character of locality that to fish at one place was equivalent to fishing at the other. It is remarkable that in *Bristow v. Cormican* no one contended that the paper title to fish in the lough could be strengthened by evidence of fishing in the river Bann, which had unquestionably been done under one and the same title. I have dwelt upon

that authority because it affords great assistance in coming to a conclusion in the appeal now before your Lordships.

I now proceed to examine the Chichester title in order to ascertain whether it is proved that the exclusive fishery in Lough Neagh was in the Crown and by the Crown granted to the plaintiffs' predecessors.

It is more convenient, and will enable me to make what I have to say clearer, if I begin by stating my own conclusion at once. I have arrived, after much reflection, at the conclusion that in 1605, and in the subsequent years down to 1661, when the Chichesters obtained their grants, the Crown may have had something to grant, but it is not proved that the Crown had the fishery in Lough Neagh. The Crown may have had, almost certainly had, large tracts of country forfeited for rebellion, none of which, however, are proved to have been riparian to Lough Neagh. Also, the Crown probably then had rights of fishing in the river Bann and lands riparian to that river to which the fishing rights were most likely attached. These were granted, and so far as can be judged have always been enjoyed by the Chichester title. But as to the water of Lough Neagh itself, though the claim to it runs like a thread through the documents from beginning to end, it seems to me that the plaintiffs' predecessors, however diligent in saying that they were entitled to it, have been careful not to make good their claim by any persistent and unequivocal attempt at exclusive possession, while in some of the documents the frailty of the title is almost confessed. When I add that there never has been any exclusive possession proved in this action, I cannot feel satisfied that there was any right in the King or his grantees. It is an extraordinary thing that, if the Crown had this to give, everyone who pleased should have acted in defiance of the supposed right continuously for so long a time.

I come now to the documentary title. There is an inquisition holden at Antrim on the 12th July 1605, which states that Queen Elizabeth owned all manner of fishings in all that moiety of Lough Neagh which lies toward the east, together with certain ancient weirs in the river Bann, and a certain free fishing in the said river. The inquisition further states that Queen Elizabeth also owned great tracts of territory with castles, manors, and so forth in county Antrim, and had in 1571 covenanted to grant to Sir Thomas Smith and his son certain hereditaments, including the above-named fisheries, as I read the document, provided the Smiths won and possessed themselves thereof before the 28th March 1579 by means of a military expedition which they undertook to collect and lead into Ulster. Neither of the Smiths possessed themselves of the subject-matter of the grant, all of which the jurors say belong to King James on the 12th July 1605, "as well in right of his Crown of England as by reason of the force and intention of divers statutes in that behalf made, ordained, and established." What

the statutes were we are not told. The next document was cited to us as of date the 14th February 1605. I rather think it may have been 1606 and not 1605, but it does not much signify and I take the date as cited. It is a grant from King James of the entire fishing of Lough Neagh and the eel weirs in the river Bann and all fisheries in the river Bann from the lough down to the salmon leap, with the soil and islands in lough and river, and a power to approach and place nets on the banks of either from any direction. The grantee was James Hamilton. Next comes an inquisition holden at Limavaddy on the 30th August 1609, which stated that King James had granted the fisheries in the river Bann and the soil thereof to James Hamilton, and that Hamilton had conveyed the same to Sir Arthur Chichester, then Lord Deputy General of Ireland, who was now seised thereof. Nothing is said of Lough Neagh in the extract before us of this document, and if the earlier inquisition and the grant to Hamilton were valid the necessity of this document is not apparent.

In 1613 there is a grant from the King dated the 29th March to the Society of the Governors and Assistants of London of the entire river Bann and the soil thereof and all fishery therein, from the deep sea up to Lough Neagh, excepting a fishery belonging to the Bishop of Derry in the river Bann. Manifestly this grant is quite inconsistent with the grant to Hamilton, because it includes the whole of the river Bann, part of which had been granted to Hamilton. How the King came to alienate this fishery a second time is not explained. Eight years later, on the 6th April 1621, another inquisition was holden at Carrickfergus, in which the jurors purport to give a history of the King's dealings with the fisheries of Lough Neagh and the river Bann down to the salmon leap. They say that the King granted these fisheries in 1605 to James Hamilton, that Hamilton then gave and granted them "for good and valuable consideration" to Sir Arthur Chichester in 1606, by "virtue of which feoffment the said Arthur Lord Chichester was seised in his demesne as of fee to him and his heirs for ever" of these fisheries among other things. The jury then proceed to say that on the 4th July, in the sixth year of his reign (which would be 1608 or 1609), the King granted to Arthur Bassett lands (which are not specified in the extract and are not material) and also the entire fisheries in and soil of Lough Neagh and the river Bann, down to the salmon leap, together with the eel weirs in the river, and the power of approaching the banks—in short, the very same that had been already granted in 1605. They further say that the grant to Bassett was "upon trust and confidence" for and to the use of Arthur Lord Chichester, and that Bassett on the 23rd January, in the seventh year of King James' reign (1609 or 1610), had enfeoffed Lord Chichester of and in the same "by virtue of which the said Arthur Lord Chichester was likewise seised in his demesne as of fee to him and his

heirs for ever" of the same. Nothing is here said of the grant in 1613 to the London Society; the whole inquisition which is held in Antrim deals with property in other counties as well, and seems framed to establish, not any title in the King, but to fortify the title of Sir Arthur or Lord Chichester, the King's then Lord Deputy General of Ireland. It appears by indorsement on the commission under which this inquisition was holden that it was executed in Tyrone, Antrim, Carrickfergus, Donegal, and Londonderry. The last instrument of the reign of James I is dated the 20th November 1621. It is a grant by the King to the same Sir Arthur, or Lord Chichester, of a great deal of land, and also of the fishings in and soil of Lough Neagh and the river Bann down to the salmon leap with eel weirs, and power to approach the banks, in the same familiar terms as appear in the earlier documents. The entire rent for the hereditaments and fisheries is £920 current money of Ireland.

Detailed objections were taken to some of these grants upon the ground that there was no commission, or no sufficient commission, and, as to the commission of 1605, that it was not enrolled in the Irish Chancery till 1684. For my own part I cannot attach much importance to objections of that kind taken at so distant a date. Every legitimate presumption ought to be made in favour of old documents which have been acted upon, and these grants have certainly been acted upon in regard to the river Bann. But the whole series of instruments in King James' time, though they were not before this House in the case of *Bristow v. Cormican*, are open to criticism similar to that there employed. If the King had a title to Lough Neagh, why does the commission of 1605 say that he owned a moiety of it? Why, after granting it in 1605 to Hamilton, who assigned to Chichester, was a second grant of the same thing made by the King in trust for Chichester three years later? Why did the King again make a grant of the same thing to the same Chichester in 1621? There is a minor point, that in 1613 the King made to the London Society a grant of part of the river Bann which he had, upon the documents before us, already granted twice, first to Hamilton and then to Bassett.

There may imaginably have been explanations of these inconsistencies now withdrawn from our view by the lapse of centuries. Yet they do suggest suspicion that the King's title was then regarded as infirm, a suspicion which is confirmed by what happened in the reign of Charles I. It appears from a commission to accept a surrender from Lord Chichester dated the 21st October 1639, and a surrender dated the 1st July 1640, that Charles I had appointed commissioners "for remedy of defective titles," and that there had been an order of composition on the 7th December 1638, and another order of composition and agreement on the 19th September 1639, between these commissioners, on His Majesty's behalf, and Edward Viscount

Chichester and his son, on the other part. Neither of the orders of composition have been produced. If they exist they would have been of much interest. It is historically accepted that there was much irregularity and unlawfulness in the proceedings of the Irish Government in the time of the first two Stuart Kings, and there were Acts of Parliament to remedy defective titles. This seems to have been regarded as a defective title. The Chichesters compounded with the commissioners on the 1st July 1640, and by deed of that date surrendered the Lough Neagh and Bann fisheries to the King in return for an assurance of certain other property.

Nothing further was done with these fisheries until the Restoration, except that in 1656 Oliver Cromwell granted a ninety-nine years' lease of them to Sir John Clotworthy at a yearly rent of £35 rising to £44 for the river, and £5 rising to £6 for the lough. It was of course invalid, even if it had not been on the face of it made in defiance of the law relating to the alienation of Crown property. But at the Restoration, Charles II granted the same fisheries to Sir John Clotworthy at the same rent and for the same term of ninety-nine years. This lease was dated the 15th November 1660, and on the 3rd July 1661 the King granted the reversion to the Chichester of that day, then become Earl of Donegall. This grant recites the grant of King James to Lord Chichester in 1621 which we know, and the surrender by Lord Chichester, presumably that of 1640.

It is a curious fact that in the following year, 1662, Charles II granted to the Governor and Assistants of London, successors of the London Society, exactly the same fishery in the river Bann from the deep sea to Lough Neagh (excepting the Bishop of Derry's fishery) which King James had granted to the London Society in 1613. Now this included the stretch of the river Bann from the lough to the salmon leap which King Charles II had granted in 1660 on lease to Clotworthy, and in 1661 in reversion or remainder to Donegall. It is inexplicable. The lease of 1660 and grant of reversion to Donegall in 1661 were the beginning of the documentary title proved in the case of *Bristow v. Cormican*, and from this point onward the documents relied upon by the now plaintiffs are, with some additions, the same as were considered and criticised in that case. It is unnecessary to repeat those criticisms, some of which remain applicable and are not answered by any fresh evidence. From this point I propose merely to summarise the general character of the deeds, which are very numerous. From 1692 down to 1891 there are a number of Donegall family settlements, deeds of disentail or leading to uses of recoveries. In all of them fisheries are included, and in most of them the fisheries of Lough Neagh and of the river Bann are expressly mentioned (substantially in the terms of the original royal grants) as part of the property dealt with. From 1662 down to 1755, that is during the currency of the

Clotworthy lease of 1660, and thence down to 1795, there are no leases either of fisheries in lough or in river. I say this subject to what appears in certain rental accounts which I will deal with later. From 1795 onwards there are a number of leases, grants, and assignments down to 1907, from which the following will appear. Beginning with a lease of the 3rd November 1795, it is clear that the Donegalls (plaintiffs' predecessors in title) let and received large rents and sums of money for the fisheries in the river Bann. Sometimes it was eel fishery, sometimes salmon or other fishery. There can be no doubt that for more than 100 years this river fishery has been actually possessed, and the plaintiffs' title is quite unassailable to that river fishery. If it was doubtful it has been perfected by a long possession. Some of the leases and grants of the river fishery also purport to let or grant rights of fishery in Lough Neagh, and there are also separate leases and grants of fishings in Lough Neagh. These require examination. It is the lough alone with which we are now concerned. On the 1st October 1803 the Marquis of Donegall let for sixty-one years to Edward May "all that the salmon trout and scale fisheries of Lough Neagh and the river Bann" with the right to fish "within the known and accustomed limits of said fisheries." The rent was £50 a year and the covenant for quiet enjoyment was "without any let, suit, trouble, denial, eviction, or interruption of or by the said Marquis, his heirs or assigns, or any person or persons lawfully claiming, or to claim, by, under, or in trust for him or them." On the 1st November 1811 Mr May's lease had been surrendered, and the Marquis of Donegall granted a fresh lease for sixty-one years to Sir George Hill of the "salmon, trout pulling and scale fishings of Lough Neagh and of the river Bann, as far as the rock or Salmon Leap, in as full, ample, and extensive a manner as the same have heretofore been enjoyed by the said Marquis of Donegall and those under whom he has derived," for the purpose of fishing "within the known and accustomed limits of said fisheries as late in the tenure of the Rev. Edward May." What these limits were as regards the lough we do not know, if there were any. And the manner of enjoyment is qualified. If the Marquis had enjoyed nothing exclusive, no more would the lessee Sir George Hill. I do not say that this is an unusual covenant, but it is a cautious covenant. Perhaps caution is often necessary in dealing with titles to fisheries.

On the 31st March 1829 the reversion after the expiration of Sir George Hill's lease was granted by the Marquis of Donegall to John Wallace in consideration of a sum of £600 and a yearly rent of £55 odd. The grant was of a lease for three lives, renewable for ever. The subject of the grant was the same fisheries of lough and river as had been leased to Sir George Hill, and there were the same words both as to manner of enjoyment and limits of the fisheries. By a sub-lease

of the 31st May 1837 the representatives of Sir George Hill demised to Lord O'Neill for Hill's term, less ten days, the salmon trout pulling and scale fishings of Lough Neagh and Lough Beg, and the rivers and branches belonging to the same (except the river Bann) "in as full and ample a manner as the same were heretofore enjoyed by the said Marquis of Donegall and those under whom he derived, and since by the lessors." On the 28th January 1857 the Marquis of Donegall makes a fee farm grant (subject to the lease of the 1st November 1811 to Sir George Hill) of the same subjects, namely, the salmon, trout pulling, and scale fishings of Lough Neagh and the river Bann, with the same limitations both of manner of enjoyment and limitation of fisheries. The rent was £60 a year. Since 1857 there has been no grant or demise produced to your Lordships of any rights of fishery for any kind of fish in Lough Neagh until 1905. On the 18th July 1905 Lord Shaftesbury, to whom the Chichester and Donegall title had devolved, granted a lease to O'Neill and others, the now plaintiffs. It recites the royal grant of Charles II in 1661, and deduces the title to Lord Shaftesbury. It then, in express terms, demises for 5000 years the eel fisheries in Lough Neagh and the river Bann. The rent is £884, and the covenant for quiet enjoyment is by the Earl of Shaftesbury "so far only as relates to his own acts and defaults." Two subsequent leases of eel fisheries in Lough Neagh, dated the 20th October 1905 and the 13th November 1905, do not require comment because they are merely made under Lord Shaftesbury's lease of the same year. The last letting is dated the 16th February 1907, and is a let for one year of "the sole right to fish for salmon, trout, pollen, and other scale fish" in a part of Lough Neagh at a rental of £55. The writ in this action had been issued on 9th February 1907.

I must now consider the plaintiffs' contention that rent has been paid to their predecessors in title for fishing in Lough Neagh. There is an extract from the Crown rental stating in effect that Lord Chichester owes 12s. 6d. per annum for the entire fishery in Lough Neagh and the river Bann, which he holds as assignee from James Hamilton. Now, the grant to Hamilton is not a lease but a grant. It does not reserve a rent so far as we know, but states that the fisheries granted "are of the value per annum beyond reprises of twelve shillings and sixpence." Further extracts from the Crown rental and the Crown receipt book of 1659 and 1660 respectively state that Clotworthy paid a year's rent, and possibly a year and a half's rent, at the rate of £5 and £35 per annum, in respect of fishings in Lough Neagh and in the river Bann. It appears that some of this was also in respect of Toome and lands of Lough Neagh. All of it appears to have been rent for the year 1660 or earlier. The lease under which it was paid must have been Cromwell's lease, because the lease from Charles II fixing the same rental

was not given till the 15th November 1660. Why Clotworthy after the Restoration paid rent which was due on a lease obviously void is not apparent.

The only other records of rent are extracts from the Donegall estate rentals from 1775 to 1817 and receivership accounts from 1844 to 1852. These contain numerous entries of rent received for fisheries in the river Bann, which are nothing to the point. Also they contain rentals payable under the various leases which I have already discussed, and of course add nothing to what the leases themselves tell us. But they do also contain a record of rentals purporting to be payable for fisheries in the lough itself. These are material. They are not numerous, but they show that between 1775 and 1807 small sums were charged for fishery on parts of Lough Neagh. The places seem to have been Shanes Castle fishery and Shanes Castle strand, in regard to which four boats were apparently licensed at £1, 10s. per annum for each, also "from M'Kenny's point to the Blackwater foot," of which we were not told the site, for which £8, 1s. 4½d. was paid once in 1801 and again in 1807. Also there are a few entries of rent for fishery from Gartree point to the Fanny point, and from Kilmacevitt to the Bann foot, which site cannot be traced. There are one or two entries of rent from fishery of part of Lough Neagh without specifying where it was. These traces of letting cease altogether, so far as Lough Neagh is concerned, in 1807. Of course the leases which include Lord Neagh, whatever their importance may be, extended throughout the nineteenth century, and rent was presumably paid under them. But that is a distinct subject.

There remains for consideration the long list of legal proceedings which relate to these fisheries. What has to be said about them may be put in a short compass. In 1771 a litigation arose between the holders of the Chichester title and the successors of the London Society, which had obtained in 1662 the grant from Charles II already mentioned. The whole question in that case was whether the London Society had unlawfully placed obstructions in the river Bann which interfered with the fishery claimed by the Chichester successors. The latter alleged damage to their fisheries both in the river Bann and in Lough Neagh. Both sides were interested in upholding King Charles' right to grant the river fishery, and the London Society had no interest, except it might be in regard to damages, in disputing the Chichester title to the fishery in the lough. The jury found a special verdict, affirming in substance the validity of the King's grants both of river and of lough. The verdict enters into much detail, and alleges, among other things, that the successors of Chichester were in possession of the fishery both in river and lough. It is upon the face of it a special verdict carefully drawn up with legal skill. Almost certainly it was a consent verdict. It seems to me quite unjustifiable to treat

that verdict as evidence against anyone except the parties to the suit of the alleged fact that the Chichester successors were in possession of Lough Neagh. There are a series of convictions for fishing in Lough Neagh several fishery at Shanes Castle in 1862 and 1868; also convictions for fishing at Toome in 1900, all on 23rd August 1900; all of which recite that there is a several fishery in Lough Neagh and the river Bann. There was an appeal on the ground that a question of title had arisen, and a conditional order was granted, but afterwards on the hearing discharged, we do not know under what circumstances, but in face of what we do know it is difficult to understand how it could be said there was no question of title. All this time it is admitted that the public were fishing freely all over the lough, and it is useless to regard these isolated convictions as evidence of exclusive possession in anyone. They are no evidence of title. There are also records of actions and judgments in recent years, but all of them refer only to the river fishery.

I have now stated the substance of all the evidence tendered by the plaintiffs in support of their claim for a declaration that they are "entitled to the exclusive right of fishing for eels" in the whole of Lough Neagh. They have established that they are entitled to all the fishing in the river Bann from its mouth in Lough Neagh down to the Salmon Leap, and their title to the river is based upon grants which also convey the fishing in Lough Neagh. They have established that fishings in Lough Neagh have been included in their family settlements, and that since 1803 there have been leases of fishing for some kind of fish in the lough itself. Also from 1775 to 1807 there are a few records of small sums paid, or said to be payable, for fishing in some parts of the lough. There is a record of a claim for payment in the year 1619, and another payment in 1660. There is also a record of a special verdict towards the end of the 18th century binding only on the parties, and most probably arrived at by consent, in which the Chichester title is found good, and it is said that the lough fisheries are in the possession of those who claim under that title.

Now this would amply support a title if it were not for the evidence given on the side of the defendants. It is quite clear from a number of affidavits that whatever they said in their settlements and leases, or special verdicts, there never was within human memory any exclusive possession of this lough under the Chichester title. Indeed, the only inference is that from time immemorial anyone who pleased fished there as of right and without real interruption. The evidence is that 800 people, or thereabouts, habitually fish in this lough under a claim of right, and that their forefathers have done so from generation to generation. It is not attempted to deny this nor was it questioned in argument. I will assume that such a public right could not exist in law. But this fact of immemorial fishing abso-

lutely negatives the idea that there ever has been any exclusive possession of this fishing under the alleged title.

A title must be very clear before it can be enforced, even against trespassers, for the first time if it is 300 years old and has never been accompanied by actual possession. Is this title clear? The early deeds are open to serious suspicions for the reasons which I have pointed out in discussing them. The later deeds are remarkable for this feature. In no case is the fishery of Lough Neagh let by itself. It is always inserted as a subject-matter of letting together with other fisheries. There is nothing in the deeds to show that any person was willing at any time to take a fishery of Lough Neagh alone or any part of it and to pay any money for it until the year 1907, after the writ in this action had been issued. This is very significant. Mr Jellett argued that no one would let the eel fishing in the lough alone, because the way of enjoying the eel fishery of the lough was to take the catch in the river. Let it be so assumed for the moment. But there is no separate letting of salmon or trout or scale fishing in the lough or any part of it down to the issue of the writ. It is always let together with something else. The title to Lough Neagh fishery is continuously claimed in the leases, as it is in the domestic documents of the family, but the claimants to this title never put it to the hazard, and no one ever pays them for it alone. I cannot think this a title which can be regarded as good. The evidence most favourable to the plaintiffs' title consists of the records of the rent paid from 1775 to 1807, as appearing in the Donegall books. But they are few, ill to identify as regards site, extending over a short period, and I do not think that they are of any real weight in view of the other history of these fishings.

I should be the last to depreciate the importance of maintaining ancient titles, and quieting them if they are invaded. But this is a case in which what is virtually a paper title of great antiquity, unsupported by any satisfactory evidence of actual possession, and resting upon documents which are open to serious criticism, is put forward in order to obtain the exclusive enjoyment of what has never been enjoyed under it before, and to displace an industry which (whether a public right can exist or not) has been carried on under the eyes of all concerned *nec clam nec vi nec precario* from time immemorial. That seems to me to be a fact so inconsistent with the alleged title of the plaintiffs that, even if there were less room for suspicion in its origin, I cannot believe that the title ever was good as regards Lough Neagh.

I have come to this conclusion upon the footing that there can be no public right in non-tidal waters. If there can, then it has been abundantly proved. But I will follow the example of Lord Cairns and refrain from expressing an opinion on that point of law.

EARL OF HALSBURY—This is an appeal

from the judgment which was unanimous of the Court in Ireland, and raises questions both of fact and of law. I do not myself feel that it has been of so much difficulty as that it would naturally have raised a conflict of judicial opinion which it appears to have raised in this House. The original judgment of Ross, J., seems to me absolutely satisfactory; the learned judge has with great precision examined the facts brought before him, and has arrived at a conclusion which I should have thought it difficult to question. Undoubtedly the learned Judge has exhibited great care, and has with a degree of minute accuracy considered the whole question raised with the most deliberate and anxious desire to do justice between the parties. That judgment was confirmed by the unanimous judgment of the Court of Appeal in Ireland, and I should be disposed to place the greatest reliance on such a court as was assembled for the determination of the question in debate.

I cannot myself appreciate the difficulty which is supposed to arise here. The law I think is clear, and the first question seems to be whether there is to be made any difference in the application of the law because instead of being an ordinary piece of inland water it is a lake whose dimensions are very large; but although as regards the exact amount of land covered by water there seems to have been some difference in the quantities described, which it is difficult to understand, I do not think that can raise any difficulties of law. There are one or two propositions about which there can be no doubt, and one cardinal proposition which seems to me to go to the whole question in debate is that in inland waters, apart from tidal waters, there can be no such thing as a public right, meaning by the word "public" a right unconnected with any right of fishing which is capable of being described as a *profit à prendre in alieno solo*, and I am bound to say that I think that in the judgments of the noble and learned Lords who have taken part in this discussion (although I cannot find that in any of them there is a qualification of that proposition), there seems to be an effort to suggest that, although that proposition cannot be denied as matter of law, you might in effect produce the same result by the establishment of a practice to take fish by any member of the public, although it would be impossible to connect that taking of the fish with any right recognised by the law, simply because everybody who thought proper could take the fish.

Now there is one phrase in more than one of your Lordships' judgments which I think requires to be examined, and that is the phrase "claim as of right." If that means that any claim of right, in the proper sense of those words, has been ever set up, I fail to find any evidence justifying the use of such a phrase. No right has ever been set up, or is now set up, capable of definition except the right of the public—that is to say, of any one of His Majesty's

subjects—that is no right that the law has ever recognised. Throughout one sees a disposition to question the propriety of recognising such a law as expedient or proper to control the fishing in such an area as this. But I must for my own part deprecate any effort to make the law yield to a popular claim which does not and cannot exist at law, because one sympathises very much with a large class of poor people who are supposed to obtain their living by the exercise of the practice of fishing in an area over which they have no legal right to claim the rightfulness of their practice. There is an old gibe on the subject which suggests that hard cases make bad law, and I am unable to see what rational account can be given of the various acts of ownership (and I will not waste time by going through them) except that of the ownership of the area by those who have exercised those acts.

There is another phrase which I think requires exposition, and that is the phrase “a paper title.” I can understand that phrase as being intended to represent what it literally would signify, simply the paper documents by which by way of narrative the title was deduced; but what is called a paper title may be evidence of seisin. Expired leases are evidence of actual transactions between man and man which will happen through centuries, and this may be not only evidence of the deduction of title but may also constitute reasonable evidence of seisin. So that an estate having gone according to the settlements is itself evidence not only of the mode in which the title is deduced but also proof of seisin. And again, the evidence given of Oliver Cromwell’s having dealt with the lough as though it belonged to the executive Government for the time being, and having disposed of it according to his own will, seems to me to be very good evidence of his dominion over it in the character of the sovereign head of the State, although he was usurping the authority at that time, and the unlawfulness of his title seems to me to be irrelevant to the question here in debate. I am unable therefore to share the doubts which have been suggested in the course of the argument. As Holmes, L.J., most truly says, the only claim which the defendants make is based on the allegation that Lough Neagh is and from time immemorial has been a public and common navigable inland sea, and that every subject of the realm has and of right ought to have the right and privilege of fishing in and on the same lough. Palles, C.B., in giving judgment in an action for trespass to several fisheries in a place called Feumore, a part of Lough Neagh, pointed out that so far back as 1862 the Court of Exchequer in this country had decided adversely to any such right as is now claimed.

I do not propose to go through the very long and, I think, exhaustive examination of the titles. A great many observations have been made with reference to the case of *Bristow v. Cormican*, 3 App. Ca. 641. I say with the utmost respect to those who

decided the question that a great many of the observations made were simply *obiter*. The only question there was whether or not the learned Judge who tried the case should have left the question to the jury or whether he could properly have directed the jury to find a verdict for the plaintiff. Since that case was decided, and though I think that there was evidence from which a jury might reasonably have given the verdict even in that case which the Judge improperly directed them to give, no one has doubted that, had it been left to the jury and they had found the same verdict which the Judge directed, it could not have been set aside. As Holmes, L.J., has said, Ross, J., has so carefully and in such detail stated the contents of ten documents having an important bearing on the issue, all prior to 1660, which were included in the proofs given in the hearing in the Divisional Court, that he relieved the learned Lord Justice from the necessity of dealing with them in detail, and it certainly is not necessary for me to go through them again. But there is one of them upon which observations have been made which I think it desirable to notice, and that is the inquisition of the 12th July 1605, and the criticism has been made that it weakens the effect of the title, because Queen Elizabeth has been therein found only to be seised of half of Lough Neagh. I think that what has been pointed out by Lord Macnaghten satisfactorily accounts for the use of the phrase *medietas*, and certainly if anything could add to the strength of the case as proved by the plaintiffs it would be the fact that for so many years the question of the fishing in Lough Neagh has been the subject of litigation in Ireland, with the result that no one has been found to attempt any claim other than that which, as I have said, the law will not recognise. I do not think it necessary for me to do more than say that I heartily concur with the judgment of Ross, J., and the very strong Court of Appeal by which his judgment was confirmed in Ireland. I am therefore of opinion that the order made was right and ought to be affirmed, and I move your Lordships accordingly. I should have thought it right to enter more largely into the various points which have been most learnedly argued, but that I have had the opportunity of reading the exhaustive judgment of my noble and learned friend Lord Macnaghten, with which I entirely concur, and I think that it deals most lucidly with the whole question in debate.

LORD ASHBORNE—The plaintiffs in this case claim the exclusive right of fishing for eels and all eel fisheries in Lough Neagh. The extent of the waters over which this exclusive right is claimed attaches to the case special interest. Lough Neagh is the largest inland lake in the United Kingdom, and contains in area 150 square miles. It is twenty-four miles long, is navigable and non-tidal, and is bounded by five counties. The waters, fed



by thirteen rivers, converge into Toome Bay, in which lies the exit of the waters to the sea. This exit is the lower Bann, which finds its way to the sea below Coleraine. The lake abounds in fish—salmon, eels, and pollen. The first two are of considerable value, and pollen are also valuable and much sought after in the neighbourhood. The defendants deny the plaintiffs' title, and say that, no matter what may be their paper title, they have failed to prove that they had any real or effective title with actual possession, or that they had asserted effectively any right to an exclusive use. The plaintiffs' right to the eel fishing in the river Bann is not in dispute; the controversy is entirely confined to the eel fishing in the lough, although the lease of the 18th July 1905 also includes the eel fishery in the river. The plaintiffs rely on this fact as having a bearing on the case, inasmuch as they claim the same root of title to the Bann eel fisheries and the lough eel fisheries. This is not, however, sufficient to raise a reasonable inference that he who had possession of one part had possession of the rest. Whatever may be the opinion as to the paper title, I regard the real question of difficulty to be a consideration of how far the evidence shows possession under that title. The evidence established I think that there has always been unrestricted fishing over the greater part of the lough, and that from the earliest times it was fished by the inhabitants in the vicinity openly and without question. Although it is pleaded, we have not been pressed at any length with the claim that Lough Neagh being a public navigable inland sea, although not tidal, every subject of the nation has the right of fishing in it. In *Bristow v. Cormican* (3 App. Cas. 641) the question is left aside for possible future examination, and the cautious words of Lord Cairns "that it might be a fit question to raise in some other case" are worthy of note. When the case was in the Irish Court of Exchequer, Pailles, C.B. (Ir. R. 10 C. L. 398) thought he was bound by *Blomfield v. Johnston* (Ir. R. 8 C. L. 68), but said that—"If now open to consider that question unfettered by authority I should deem it one that would require very great consideration." Dowse, B., on the same occasion said—"Having carefully looked into all the authorities in this country or America applicable to the question, I am by no means satisfied that the question has been thoroughly investigated. It remains for the Court of Ultimate Appeal to decide the question." When the case was in the Irish Court of Exchequer Chamber (Ir. R. 10 C. L. 412) Mr Justice (afterwards Lord) Fitzgerald, who had been one of the judges in the case, said that in *Blomfield v. Johnston* "the judges in the Exchequer Chamber did not intend to affirm that the public could not have a common of piscary in the large inland navigable fresh-water lakes." Lord Blackburn in the House of Lords, although he saw no reason why the same law should not apply to land covered by still water and to land covered by run-

ning water, cautiously added—"At least when the lake is so small or the adjoining manor is so large that the whole is included in one property."

This case may not necessitate any direct decision on the point, as the defendants contend that the plaintiffs have entirely failed to prove any exclusive right to the fishing which they claim in the lough, and that the open user by the defendants and their forefathers from time immemorial entirely rebuts the possession of any such right, no matter what papers or patents may be produced. The plaintiffs must prove their title and show that the Crown had acquired a title to make its grants, the open user by the public, suggesting immemorial usage, throwing upon the plaintiffs the *onus* of proving that their title to the alleged exclusive right was real and effective. Lord Hatherley puts it in *Bristow v. Cormican*—"Clearly no one has a right to say that it became vested in the Crown because it belonged to nobody else."

The plaintiffs argue that their case is powerfully supported by the absence of any other title being shown by the defendants, or alleged by any other person. But the plaintiffs claim from the Crown and the Crown has no *prima facie* right, and therefore the defendants are entitled to contend that the *onus* of proving their title rests on the plaintiffs, not only by production of documents but by proof of actual use, possession, and enjoyment sufficient to support the inference that their claim to an exclusive right is sound and irresistible. The plaintiffs also contend that this admitted use by the defendants was merely permissive and tolerated, while the defendants entirely repudiate any such sanction for the open use of the lough fishing for centuries, and urge that if a public right is denied as the true authority then that some other legal origin may be sought, as was done in the case of *Goodman v. Saltash Corporation*, 7 App. Ca. 633. But all through the defendants insist that no matter what their own legal status may be found to be, the plaintiffs have not discharged the *onus* which rested on them of showing actual enjoyment under their alleged title, and therefore they have no right to maintain this action.

The plaintiffs urge that it would have been difficult to restrain the defendants from fishing in the lough, and that it was not worth while, but the fishing was large and open. It occupied some 800 fishermen and maintained their families, and this vast user—perfectly open and notorious—cannot all be brushed aside by saying that it was tolerated because it was not easy to grapple with or worth the effort to try to end it. Therefore it is necessary to scrutinise with care what was the actual user of the plaintiffs of their alleged exclusive fishing right in the lough or any part of it. Was the user enough to support their claim to own an exclusive right in the whole lough? How is the user of the plaintiffs (such as it was) to be regarded or applied? Is the open user of the defendants and

their ancestors for centuries to be ignored as the result of benevolent toleration? Or shall the plaintiffs be given credit for such limited user as is capable of being ascribed to them and their claim to the residue found to be unproven?

On the paper title I do not deem it necessary to say much, as it is discussed fully by the learned Judge who heard the case in the first instance, and by the Irish Court of Appeal, which unanimously affirmed him. The eminent lawyers who heard the case of *Bristow v. Cormican* discussed closely the paper title and the facts before them, and came to the clear conclusion that it was for the jury to decide on the evidence whether the plaintiff had made out his case and whether the actual user proved was adequate to support an action for trespass at Feumore. [*His Lordship here dealt with the respondents' paper title.*]

It is worthy of note that it was not denied that members of the public have continuously and systematically fished without controversy in every part of the lough for pollen, and the Lord Chancellor of Ireland in reference to this says—"If this case was conversant with or included an alleged exclusive right to take pollen, different considerations would apply, and I express no opinion as to what the result would be in such a case."

The Donegall rentals show payments of large rents for the Bann fisheries from 1775 to 1816. There are also some payments of rents in respect of what are called the lough fisheries. Fitzgibbon, L.J., refers to them as "small in amount, occasional, and in a sense suspicious." Reliance has been placed on the litigation that was undertaken by persons claiming to enforce their rights under the patent, but as the right to the Bann fishings is not at all in dispute I do not deem it necessary to refer to it in any detail. As regards the fishing in Lough Neagh, several convictions were obtained by Lord O'Neill (who held under a sub-lease) and his successors for trespasses committed in the vicinity of Shanes Castle. There were two in 1862 and one in 1868 for trespass to a several fishery.

The case of *Bristow v. Cormican* (*cit.*) has been much referred to in the arguments addressed to your Lordships, and is well worthy of the closest attention and the highest respect, owing to the care and eminence of the learned Lords who took part in it. The defence upon which everything turned was a traverse of the plaintiffs' property in the several fisheries and in the land covered by water. The plaintiffs proved the convictions which I have mentioned obtained by Lord O'Neill and his successors, but they could prove no acts in the neighbourhood of Feumore, where the alleged trespass occurred. A large number of witnesses were produced for the defendants, who proved that they fished both at Feumore and through the entire of Lough Neagh. The learned Judge declined to leave any question to the jury and directed a verdict for the plaintiffs. The Court of Exchequer held that the question ought to have been submitted to

the jury. An appeal was taken to the Exchequer Chamber and that Court was equally divided. The case was then taken to the House of Lords, who decided unanimously that there was evidence that ought to have been submitted to a jury, and that there must be a new trial. No new trial took place. The House of Lords held that it was a jury question, and that it was for the jury to decide.

Many additional documents are now produced, and I think that they strengthen the plaintiffs' case, although they are not all harmonious or consistent with each other. Up to the present I do not know what is alleged as the origin of the Crown title. It was probably some confiscation, but the inquisition of 1605, founded on an illegible commission, only refers to a moiety of the lough, which was deemed sufficient to support letters-patent granting the entire lough and going much beyond its terms. But we must, I think, assume that sufficient evidence was given upon which the findings of the several inquisitions proved were founded. They were taken under the statute 18 Hen. VI, c. 6, which enacted that "no lands shall be granted by letters-patent until the King's title be found by inquisition." And considering the great length of time which has elapsed I do not feel at liberty to set aside or not give due weight to the conclusions arrived at, supported as they are by other documents, and I think that as far as paper goes the title of the plaintiffs is made out.

But what is the inference to be fairly deduced from the evidence as to the effective use, possession, and enjoyment of the alleged right of exclusive fishing in the lough under this title? We are dealing with the largest inland lake in the United Kingdom, and in this action, claiming an exclusive right of fishing for eels in this wide area, what is the evidence? Ross, J., finds that the evidence established "that there has always been unrestricted fishing over the greater part of the lough; and in that part of it from Shanes Castle to Toome Bay the fishing has been protected and trespassers kept off; that in the small portion of it enclosed by the walls constructed in Toome Bay at the place where the lough discharges itself into the Bann the fishing has been protected. . . . There have been no acts of ownership in respect of eel fishing in the lough since the termination of Clotworthy's lease, but the eel fisheries in the lough have always been excepted from the demises or grants of the lake fishing."

Assuming that these findings are fairly deducible from the evidence, are they sufficient to support the judgment under appeal in its integrity? I do not think so. I think that the judgment goes too far in holding the right claimed to be established in respect of the entire area of Lough Neagh. I am of opinion that the plaintiffs have not proved an actual and effective possession of the exclusive fishing alleged in the whole lough, but they have done so not only to the line marked on the map by Ross, J., but also to a line between Dunore

Point and Mullan Point, which would include the lough opposite Shanes Castle.

I think that this limitation is in accordance with the principle of the decision of this House in the case of *Bristow v. Cormican*, which held that it was a question of fact for a jury to say whether Feumore fishery, some miles away, was to be regarded as held under the same title and ownership as the Shanes Castle fishery and coast, where actual acts of possession and protection were proved. Lord Blackburn put it—"It was for the jury to say whether the Lords Donegall by themselves or their tenants were in possession of land covered by water at Feumore or the fishings there, and the jury might not unreasonably say that that was not proved by the evidence."

A similar question arises in this case, and I am unable as a juror to say that I am satisfied that actual and effectual use or enjoyment have been proved beyond the lines which I have indicated. I therefore am of opinion that the order under appeal should be affirmed, but if possible be varied as I have indicated.

**LORD MACNAGHTEN**—This is an appeal from a judgment of the Court of Appeal in Ireland affirming a decree of Ross, J., which declared that the respondents, who were plaintiffs in the action, were entitled to the exclusive right of fishing for eels and to all eel fisheries in Lough Neagh for the residue of the term of 5000 years granted by a lease of 18th July 1905.

At the outset of his judgment Ross, J., states two propositions of law. They are these:—(1) The Crown is not of common right entitled to the soil or waters of an inland non-tidal lake. (2) No right can exist in the public to fish in the waters of an inland non-tidal lake. These propositions were accepted by the Court of Appeal. They were only faintly questioned at the Bar. Speaking for myself, I heard no argument tending in the slightest degree to shake their authority. I think that they are incontrovertible. I may add that in my opinion there can be no difference in this respect between a small lake and a lake so large that it may be termed an inland sea. In this country one and the same law applies to inland non-tidal waters whatever the size of the water space may be.

The appeal is in reality an appeal from two concurrent findings of fact. In such a case the appellant undertakes a somewhat heavy burden. It lies on him to show that the order appealed from is clearly wrong. In a Scotch case, *Gray v. Turnbull* (1870, 7 S.L.R. 654; L.R. 2 H.L. 53), where there was an appeal from two concurrent findings of fact in a case in which the evidence was taken on commission and neither Court saw the witnesses, Lord Westbury, after referring to the practice in courts of equity of allowing appeals on matters of fact, makes this observation—"If we open the door to an appeal of this kind undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt

whatever." In an English case, *Owners of the P. Caland v. Glamorgan Steamship Company* ([1893] A.C. 207), Lord Watson expressed himself as follows—"In my opinion it is a salutary principle that judges sitting in a court of last resort ought not to disturb concurrent findings of fact by the courts below unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous; and the principle appears to me specially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability." Now here there are concurrent findings of fact, and in a great measure these findings rest upon considerations of probability, upon inferences to be drawn from documents of ancient date, the precise bearing and exact significance of which no one living can explain thoroughly. I do not pursue this subject further, because I do not think it necessary to invoke the principle which Lord Watson described as "the rule of this House." I mention it in passing lest this case should hereafter be cited as a case in which the principle was altogether ignored. At the same time, I confess that it does seem to me no light matter to put aside the unanimous decision of two courts and the deliberate opinion of judges second to none in ability and learning and peculiarly conversant with Irish titles and the law of real property in Ireland.

If it had not been that some of your Lordships, to whose opinions I would gladly defer, take an opposite view, I should content myself with adopting the judgment of Ross, J., and the judgments of the learned Judges in the Court of Appeal. As it is, without going through the case from beginning to end, I will venture to add a few observations, avoiding as far as I can recital of facts and repetition of arguments with which your Lordships by this time must be only too familiar.

Before I come to the substance of the respondents' case I cannot help saying a word about *Bristow v. Cormican*, on which I think more time was expended than on the facts of the case now under appeal. No one can quarrel with the decision in *Bristow v. Cormican*. But the only question in that case, as Lord Cairns says, was whether the course taken by the learned Judge at the trial was the right one or not. Was the learned Judge right, asks his Lordship, in treating the title to the fishery as a question of law to be withdrawn from the jury, and to be decided by the court upon the construction of the documents before it, or did the title of the plaintiffs depend to a greater or less extent upon the proper view to be taken of questions of fact, which facts ought therefore to be left to the jury?

The action was brought for trespass on the plaintiffs' several fishery at a place called Feumore, in the barony of Upper Massareene, many miles away from the old place where the plaintiffs had attempted

to prove possession. Of a fishery at that particular spot the plaintiff, as Lord Cairns says, had not, nor so far as the evidence went had ever had, "actual physical or mechanical possession." "If," his Lordship adds, "they had had possession of this kind for however short a period, it would, as against a trespasser, have been sufficient, but they had none. They therefore proceeded upon their documentary or paper title." Then his Lordship goes on to criticise the documentary title, which in that case was presented in a very incomplete and fragmentary fashion. The criticism was perfectly just, but I cannot see what it has to do with the present case, where there is, at least according to my view and the view of the learned Judges in Ireland, ample evidence of actual possession in various places all over the lough. On turning to the report in *Bristow v. Cormican* one thing seems clear, and that is that if the matter had been submitted to the jury and the jury had found in favour of the plaintiffs upon the evidence, scanty as it was, the verdict could not have been disturbed. The learned Judge at the trial was asked to non-suit the plaintiffs. He refused. Every one of the Judges below agreed that he was right in so refusing, for "there was," as Lord Blackburn says, "evidence in support of the plaintiff's claim proper to be submitted to the jury." "In this," adds Lord Blackburn, "I quite agree, and I believe no one of the noble and learned Lords who heard the argument doubted that this was so."

I will not weary you by recapitulating or reviewing what has been called the paper title. It seems to me to be deduced in a satisfactory manner to the lessors of the present respondents. Infinite labour and excellent learning have been expended on the law relating to grants from the Crown, on patents, on commissions, and on inquisitions. To my mind the pinch of the case does not lie there. Agreeing with Holmes, L.J., I must say that I am rather surprised to find the title as complete as it is. At the same time I have no doubt that lawyers less learned than those whom we have had the pleasure of hearing would not have much difficulty in picking holes in it here and there, either because there may be something missing which cannot be supplied after the lapse of centuries, or because it is not proved that formalities adjudged necessary in other cases have been duly observed in this.

But, after all, what does that matter? Every title in Ulster, so far as I know, begins with what people nowadays, better instructed in the principles of morality than their forefathers, would call usurpation, oppression, and wrong. Every title in Ulster has its origin in possession, and generally in possession taken by force. According to the temper of those old days the Antrim chieftain was not far astray when he rejected the gracious offer of a grant from the Crown, saying that he had no mind to hold by a sheepskin what he had gained by his sword. We know what

the Donegall patents purported to grant—the river Bann from the Salmon Leap to Lough Neagh—the fishery of Lough Neagh—and the soil and islands thereof—Coney or Conny Island and Ram's Island. The terms of the grant are plain. The real question, in my opinion, is not whether the Donegall patents are without a flaw, but whether possession has been held by the Donegall family in accordance with the express terms of the grant.

Before I pass from the paper title I may perhaps be forgiven for attempting to clear up one difficulty on which much ingenuity was bestowed. There is an inquisition which finds that Queen Elizabeth was entitled to one-half of Lough Neagh. "How can you claim the whole," it was said, "when Her Majesty did not pretend to more than one-half?" Fitz-Gibbon, L.J., cuts the knot by saying that *medietas* does not mean one-half. There, I think, his Lordship is wrong, but it is the only mistake, if it be a mistake, which the Lord Justice has made. It seems to me that the difficulty may perhaps be solved by a glance at any map which shows the boundaries of the counties bordering on Lough Neagh. The inquisition was an Antrim inquisition. The jurors could only deal with Her Majesty's possessions in Antrim, and the fact is that one-half of Lough Neagh, and no more, does lie within county Antrim. The inquisition itself refers to an inquisition taken in county Down only eight days before. Probably there were other inquisitions dealing with the rest of the lough.

Now I come to what seems to me to be the substance of the case. The patentees, although they had granted to them all manner of fish, never concerned themselves with any fish but salmon and eels. Why should they? The salmon fisheries and the eel fisheries in the Bann are very valuable. In former days they were vastly more productive than they are now. No one who had eel weirs on the Bann would have dreamt of trying to catch eels in the lough. Every eel fattened in the lough must find its way to the sea by the river Bann. The Bann is the only outlet. Nor would anyone possessed of the Bann eel weirs have thought of interfering with eel fishing in the lough so long as it was carried on by line fishing. The injury that line fishing in the lough can do to the eel weirs is infinitesimal. In that interesting account of the cause of *Donegall v. Hamilton* (1795, 3 Ridgeway 267) contained in Mr Babington's "concise view" (Concise View of the origin of the Irish Society by D. Babington), to which both parties referred, the author, who was the solicitor of the Irish Society, writing in 1801, states that Lord Donegall had no less than twenty-eight weirs for the taking of eels on different parts of the river between the lough and the Salmon Leap, and that in one of those weirs, and that not the best, but with respect to which he was best able to procure proof, 80,000 eels were caught in one night worth £5 a thousand. Is it conceivable that persons who were catching

eels by thousands would interfere with poor fishermen who were catching a comparatively trifling number on long lines? Even if it could be supposed that the patentees were so unreasonable as to wish to interfere with line fishing, interference would be practically impossible. Fishermen know by their landmarks or by corks and floats where their lines are set. Strangers not in their secrets would have some difficulty in finding the place, and I need hardly add that a search for lines set by the fishermen would be a venture of no little danger to life and limb, and would provoke reprisals. It is a different thing altogether when the line fishermen adopt a novel practice, and take to fishing for eels with nets of an illegal mesh immediately above the Toome eel weirs. That means ruin to the eel weirs or recourse to law.

It seems to me that in the arguments on behalf of the appellants there was some misapprehension as to the value of salmon fishing in Lough Neagh. The notion seemed to be that because Lough Neagh is a large expanse of water salmon must be abundant in every part of it, and, in fact, that if you dipped a net in anywhere you would or might catch a salmon. That is not the case at all. Of all lakes in the kingdom communicating with the sea Lough Neagh is, I suppose, nowadays at any rate, the very poorest fishing ground for salmon that can be imagined. There is no evidence that there is, or ever has been, angling for salmon in Lough Neagh or that any human being has ever caught a salmon there with rod and line. There is no suggestion that anybody, except the respondents and their predecessors in title, ever claimed a right of fishing in Lough Neagh by any right known to the law. There is no evidence that the fisher folk fishing for pollen have ever caught salmon in the lough in their nets. Of the thirteen rivers that fall into the lough, three only can be called salmon rivers. In Antrim there is the Main, which runs through Shaes Castle Park. There is the Upper Bann in Armagh, and the Blackwater, which is the boundary between Armagh and Tyrone. Wherever there is an old fishery worked by draft nets, whatever the extent of the fishery may be, in the description of it you will always, I think, find some particular place to which in practice fishing has been from time immemorial confined, and there is usually, if not always, a green attached to the fishery—so attached from time immemorial—where the fishermen spread their nets. Salmon fishing in Lough Neagh has fallen off so much during the last 200 or 150 years that it would be difficult, if not impossible, to ascertain now where "the known and accustomed limits" of the fisheries comprised in the Lough Neagh fishery were, except that it may be assumed with tolerable certainty that the mouths of the three salmon rivers which I have mentioned must have been among the places so described, for there or thereabouts the salmon would gather, especially in dry seasons, before running up to spawn. This, I think, is

borne out by entries in the Donegall rent books.

As to possession, it has been said in this House, that "it must be considered in every case with reference to the peculiar circumstances . . . the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests. All these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession." This is what Lord O'Hagan said in *Lord Advocate v. Lord Lovat* (1880, 17 S.L.R. 421; 7 R. (H.L.) 122; L.R. 5 App. Ca. 273).

Now the evidence as to possession falls, as it seems to me, under three heads—First, and most important of all in my opinion, is the evidence afforded by the great case of *Donegall v. Hamilton*, which Mr Babington calls the cause of Lord Donegall against the Irish Society, and the final decrees passed in that cause. Secondly, there is the evidence of old lettings which, considering the circumstance, seems to me to be extraordinarily full and complete. And thirdly, there is some evidence as to the islands of the lough, which were held undoubtedly at one time by the same title as the fishery in the Bann and the fishery in the lough. The evidence on the third head is extremely meagre, but I should think that there could be no difficulty in supplementing it if a question should ever be raised as to the right to fishing in the lough for fish other than eels. The two islands are islands of some note, and I should think of far more value than the salmon fishery in the lough. There is a round tower on one, and on the other the residence, or the occasional residence, of a well-known gentleman. It seems to me that in that quarter there may be found more certain proof of possession under the Donegall documentary or paper title than is afforded by entries in the Donegall rental books.

The cause of *Donegall v. Hamilton* in one shape or another lasted for thirty years. It was one of the hardest fought and most famous cases tried in Ireland during the eighteenth century.

[His Lordship here narrated the history of the case of *Donegall v. Hamilton*.]

Now that was a final judgment pronounced by the highest Court of Appeal after a prolonged contest in which the Irish Society spared no expense and took the utmost pains to defeat the claim of Lord Donegall. It was of vital importance to them to maintain the cuts which Lord Donegall sought to have abated. The ground of the decision and the gist of the action was the right of Lord Donegall to a several fishery in the whole of the lough, and particularly in that part of it which was in the county Armagh. Such a judgment, in a case where the proceedings were regularly conducted and there was no pretence of collusion, is entitled to the utmost weight, and better evidence of possession than any old lease can be. See

*Neill v. Duke of Devonshire* (1882, 8 App. Ca. 135). It was suggested, or rather hinted, that this controversy was only a stage battle, and that while there was all this brave show of fighting the friendly combatants were only engaged in fortifying their several positions against the common enemy—the public. Nothing, I think, could be more opposed to the truth and reality of the case.

Then there is the evidence of lettings of the fishery in Lough Neagh. It was said that this evidence is meagre and unsatisfactory, and that it is to be disregarded, especially in those cases where no rent was actually paid. Is that so? I confess that unless one is prepared to agree with the arguments of the learned counsel for the appellants—that the Donegall people were all along scheming to appropriate property which was not theirs—I should have thought that these entries represented real transactions, and that the reason why no rent was paid was that the rents stipulated for were probably rents depending on the profits of the venture, and that the profits were not sufficient to pay the expenses. But there are entries of lettings for which rent was paid. These entries were brushed aside because it was said that it was difficult, if not impossible, to identify the locality. Surely that is a mistake. I will only take three entries. One is a letting of the fishery of Lough Neagh from Kilmacevitt to Bann Foot. Everybody knows where Bann Foot is. It is the mouth of the Upper Bann, and Kilmacevitt is in the county of Antrim, and it is mentioned as the “Cinament of Kilmacevet” in the Antrim inquisition of 1605.

Then there is the letting of part of Lough Neagh fishery from McKenny's Point to the Blackwater Foot. Well, there is no difficulty in finding the Blackwater Foot. Whether McKenny's Point is in county Tyrone or county Armagh, each of those two entries to which I have referred represents a fishing in county Armagh, and goes some way to prove that the claim to a several fishery in county Armagh was a real and substantial claim, which the jurors of the county in the case of *Donegall v. Hamilton* must have known perfectly well. Then there is an entry of fishery of Lough Neagh from Gartree Point to the Fanny Point including Ram's Island, for which rent was actually paid. I agree with FitzGibbon, L.J., in thinking that this is the most important, or one of the most important, entries produced in evidence. It shows that Ram's Island was actually let with that fishery in July 1800, and that Ram's Island, to which the title was originally the same as the title to the soil of Lough Neagh, was then in the possession of the Donegall family. Lastly, it seems to me that the sub-lease to Lord O'Neill in 1837 is a most important document. A riparian proprietor takes a lease of an alleged several fishery including that part of the fishery which is *ex adverso* his own lands. It does not seem to me to matter in the very least whether he had or had not in his mind the notion that a

lease under the persons who claimed to be proprietors of a several fishery in the whole of the lough would add to the security of his domain and the protection of his river or not. I may remind your Lordships that this sub-lease and the actings under it, which were confined to one corner of the lough many miles distant from the place where the alleged trespass in the case of *Bristow v. Cormican* was said to have been committed, were the only evidence offered in *Bristow v. Cormican* to prove possession of the whole of the lough. It was evidence, said Lord Blackburn, but it was for the jury to say what weight was to be attached to it. Here the sub-lease of 1837 and the actings under it are a very small portion of the mass of evidence submitted in proof of possession. As regards the third head of evidence—possession of the two islands under the same title as the fishery—I have already referred to the only instance which I can find in the papers before the House. Perhaps I ought to say a word about May's lease. For my part I think it a very unimportant document. In *Bristow v. Cormican* an importance was attached to it which I think that it did not deserve, apparently because the common expression “within the known and accustomed limits” of the fishery was supposed to have a mysterious meaning which I must confess that I do not quite understand. I do not for a moment suppose that either May or Sir George Hill ever fished or ever meant to fish in Lough Neagh.

The reference to the fishery in Lough Neagh in both those leases had, I think, no other object than the putting on record the claim of the Donegall family to the fishery of Lough Neagh. But when we know that the right or claim of the Donegall family to the several fishery of the whole of Lough Neagh had been asserted openly, and had been the subject of a litigation which lasted for thirty years just before the date of the lease to May, the notion that there was anything surreptitious connected with May's lease is, I think, not within the region of probability, and the suggestion of forgery or something like forgery which was made at the Bar is, I think, quite unfounded. Your Lordships saw this unhappy document. There is writing upon an erasure. That is patent to anyone who looks at the document. But the writing on the erasure is obviously in the same handwriting as the rest of the instrument. In my opinion there is not the slightest ground for supposing that the document was tampered with after its execution.

The document is a document very carelessly prepared at anyrate. It purports to grant the fishery in the whole of the river Bann, not merely in that part of the river which extends from the lough to the Salmon Leap; and if, as was suggested by the learned counsel, it was originally a lease of the Bann alone, it is more extraordinary still, for it describes the Bann as being in the county of Tyrone as well as in Antrim and Londonderry, and I suppose

the Bann was never in Tyrone since the days of the Flood. I think both May's lease and Sir George Hill's lease, in which the blunders in May's lease are corrected, may be left out of the question altogether. It looks as if Hill's lease was really intended to be effective only for the purpose of angling in the Bann.

I would venture to add one word in conclusion, and I do not think that the result of this appeal, whatever it may be, can affect any question between the pollen fishermen and the claimants to a several fishery for all kind of fish in the whole of the lough. Pollen fishing is no doubt a considerable industry in that part of Ulster. But there is not, I should think, the remotest probability of persons interested in salmon-fishing or in eel-fishing interfering with it or with fishing for coarse fish in the lough. For one thing it could not pay to interfere. That sort of fishing is an industry that can only be followed with profit by men who toil at it themselves for their daily bread. It cannot be exercised vicariously with any hope of profit or advantage.

For the reasons assigned by Ross, J., and the learned Judges of the Court of Appeal in Ireland—no mean Judges, I think, on the question of title to Irish property—and for the reasons which I have ventured to add, I think that this appeal should be dismissed.

LORD DUNEDIN—The question which I feel bound to put to myself in this case was settled by the judgment of this House in *Bristow v. Cormican* (1878), and has, I think, been accurately re-stated by Ross, J., and by Holmes, L.J., in the judgment under appeal.

I do not understand that any of your Lordships has any doubt as to the sufficiency of the title in the plaintiffs from a conveyancing point of view. The patent of 1661 gives in terms the fishing in the lough to Arthur Earl of Donegall, and the transmission of title to the present plaintiffs from him is unimpeached. The whole controversy turns on whether, so far as the fishings in the lough are concerned, the Crown had them to give. As fishings in a freshwater lough do not belong to the Crown *jure coronæ* it is a question of fact whether the Crown had them. It is obvious that direct proof of possession before 1661 is impossible. The matter therefore becomes one of inference to be drawn from the whole facts proved, and the question as often said is a jury question.

Now in addressing myself to the best of my ability to that question, I confess at once that I am quite unable to hold, like my noble and learned friends the Lord Chancellor and Lord Ashbourne, an open mind on the question of whether there can or cannot be a public right of fishing in such a place. I do not think Lord Cairns did so in *Bristow v. Cormican*. All that he said was to point out that the question having been raised and decided (adversely to such a possibility) on demurrer in that case, and that judgment not having been

appealed against, it was impossible to raise it before the House. Lord Cairns did not have to consider the question of the title as a juror. All that he decided, and that this House decided, was that it was a question for a jury. If he had had to consider the question as a juror, I am humbly of opinion that he would have had to begin, as I do, by making up his mind if he had any doubts on the subject. I question if he had. The reason which in my mind makes this step imperative is that it seems to me that the possibility or impossibility of the public having such a right completely alters the standpoint from which we ought to view the actual fishing by the public. Tolerance in the one case is difficult, in the other is easy to suppose.

There is a well-known illustration in an analogous matter. Proprietors often admit indiscriminate trespass on their property. In the case of those who have large tracts of uncultivated land trespass to a certain extent is universal. They know that they have nothing to fear because a general right of trespass cannot be acquired, and they will only interfere when the trespass is such as to cause actual damage or annoyance. But if the public are seen to walk in a certain line from one public place to another, any proprietor knows that if he allows that to go on unchecked for a sufficient period, it will be held that his non-interference was not due to tolerance but to his consciousness that there was a right-of-way between the two places. As to the question itself I confess that I have no doubt. It seems to me to be conclusively settled by authority. I need only cite *Murphy v. Ryan* (Ir. L.R. 2-C. L. 143) and *Smith v. Andrews* ([1891] 2 Ch. 678). None of the learned Judges in the courts below have the slightest doubt on the point, and it is stated as a commonplace in the text-books of the law. It is true that it does not seem to be actually so determined by a judgment of this House. But to hold that one of the fundamental doctrines of real property can be called in question because it has not been in terms laid down by a judgment of the House of Lords is, in my opinion, to invest the judicial proceedings of this House with an authority to which they are not entitled. The ABC of the law is generally not questioned before your Lordships, just because it is the ABC.

Starting, then, from the position that the public never had, and never could have, any right of fishing in a fresh-water lake, the next consideration in my mind is was it possible for the Crown to have such a right? It is not, as already mentioned, one of the rights of the Crown *jure coronæ*. But no one doubts that the Crown could acquire such a right, either by transference or, much more probably, by forfeiture. Naturally the most cogent evidence, which indeed would be conclusive, would be an Act of Parliament vesting the fishing by name in the Crown. No such Act is here forthcoming. But we do know that the Crown acquired lands by extensive for-

feitures in Ulster in the times of Elizabeth. The eleventh Act of Elizabeth forfeits a vast number of lands which belonged to the O'Neills and their adherents. In short, on this matter Mr Jellet in his interesting argument convinced me that although it was impossible to point to any forfeiture which identified the lough, yet it was obviously very probable that the lough was included in the various territories forfeited to the Crown in the times of the O'Neills. Ross, J., took, I think, the same view. I would also draw attention to the form in which the forfeiture is expressed, "That your Majesty, your heirs, and successors shall have, hold, possess, and enjoy as in right of Your Imperial Crown of England the county of Tyrone the county of Claneboy," &c. It seems to me that if at the times of the inquisitions which are mentioned there was identification of the particular lands or fishings with lands and fishings forfeited in general terms, then the finding of the jurors was an echo of the statute. I therefore do not draw the inference which one of your Lordships, in an opinion which I have had the advantage of perusing, is somewhat inclined to draw—viz., that the jurors made a finding based upon an erroneous view of what the *jus coronæ* included. The episode of the Smiths does not in any way disturb my view. Although the Act 11 of Elizabeth forfeited large tracts of land, it did not reduce them into the peaceable possession of the Queen. The indenture to the Smiths was dated two years afterwards, and it made a conditional grant of what was in the Queen in certain parts of the land. The Queen's title is not dependent on the Smiths; it rested on the 11th Elizabeth. Neither in the indenture of 1571 nor in the inquisition of 1605 is there any identification of the fishings of Lough Neagh with the lands granted to the Smiths. It is immaterial, in my view, whether they are or are not so included, for the Smiths did not perform their part of the covenant, and so the grant never took effect, and the jurors in the inquisition clear it out of the way. This leaves untouched their earlier finding relating expressly to the fishings *usque ad medietatem*—a limitation which does not lead me to the inference that the Crown had not the whole fishings, but is explained by the fact that the inquisition was an Antrim inquisition, and that the jurors had been therefore locally limited.

The next consideration is that if the right to the fishing was not in the Crown then it must have been in the hands of some private individual or individuals, presumably the riparian proprietors. The only other alternative would be to hold that the fishing of this great lake was derelict or belonged to no one—a proposition which I understand to be contrary to law, as North, J., says in *Smith v. Andrews* (1891, 2 Ch. 678).

Accordingly I approach the evidence in the light of three propositions, which I formulate as follows—1. The public cannot have a right to the fishing in question. 2.

The Crown may have had a right to it when it granted the patent. 3. The only competitor to the Crown and its patentee must be some other private owner or owners. (To make this theoretically complete I should have to add corporation or *quasi* corporation, but of such ownership there is neither suggestion nor trace.) I am not forgetting the fact that it is for the plaintiff to prove his case. That the Crown affected to have the right cannot be doubted. The patent to Hamilton of 1605, the patent to Lord Chichester of 1621, the commission for the surrender in 1639, all show this conclusively. Nor am I disposed to minimise the weight of the Protector's lease to Clotworthy. The Protector would be little likely to deal with anything unless he believed on evidence available at the time that it belonged to the Crown. And then comes the patent on which the plaintiffs' title really rests, viz., that of 1661. It is next to be noted that so far as the titles are concerned the fishings of the river are linked with that of the lough. I do not think that what is conveniently called the *unum quid* principle can be pushed so far as to make evidence of possession of the river serve as evidence of possession of the lough. The river and lough have not in my opinion that "common character of locality as to raise a reasonable inference that he who had possession of one part had possession of the rest." The words are those of Parke, B., in *Jones v. Williams*, 2 M. & W. 326, as adopted by Lord Blackburn in this House in *Lord Advocate v. Lovat*. But nevertheless, when we find that the Crown's title to the river has been held unimpeachable—for no one suggests any originating title to the present holders except the grant from the Crown by the same patent of 1661—it goes far to suggest that the grant as to the lough was something more than a mere paper grant. Still I agree that, following what was laid down in *Bristow v. Cormican*, we have to look for evidence of possession by the Crown in 1661. Direct evidence is impossible. We can only judge by inference from the acts of the Crown patentees at subsequent periods. These acts must point to possession, and if we find possession in them it is admissible to infer that there was equally possession at the time of the granting of the patent. But possession is searched for, as I understand it, as the badge not as the measure of the right, and it is because of that that I think it is so absolutely necessary to make up one's mind as to the soundness of the first and third propositions which I have ventured to lay down.

It is this that makes the entries in the Donegal rentals so important. I do not go through them. They are not, I admit (if you exclude the river), at all considerable in extent. But they certainly relate to various parts of the lough. Now if possession was the measure of right this would fall far short of what was necessary. But if possession is only sought for as the badge, there is the fact that the Donegal family, who admittedly have no separate



title to particular bits of the lough, get money from other people by giving them limited rights all in different parts of the lough. It is necessarily of no moment that the limited rights are not rights to fish for eels. It is common ground that a right of fishing includes all sorts of fish, and the reason why grants of eel-fishings in the lough were not to be met with is easily explained by the known habits of the eel. It is certain that the eel enters a freshwater lake like Lough Neagh small and leaves it large for the purposes of breeding, and that the eels congregate in large quantities to leave it in stormy nights in the autumn. It is equally certain that to those who had the command of the river it was useless trouble to fish in the lough, and that fishing for eels in the lough itself for any really remunerative purpose was impracticable till the recent invention of a long and small meshed net employed as the learned Judges describe.

Besides the entries in the Donegall rentals we have also the much larger lease grants of May and Hill. It is true that in May's lease the words "and lough" are written on an erasure. That might make the document a bad one if there was a contest upon it at the instance of the lessee against the lessor. But I confess that I do not understand the theory of a forgery. Who was to forge? Surely not Lord Donegall, whose own title from the Crown had clearly the lough included. May might conceivably forge in order to enlarge his grant, but I should have thought that he could scarcely hope to escape detection. On the whole, I think the theory of a clerk who had written the words wrong, and did not wish to be chidden, or to have to buy a new sheet of parchment, is a conjecture much more likely to be near the truth. Anyway, there is no erasure in Hill's lease, and the fact is that he was content to pay money for what the Donegalls assumed to give, viz., *inter alia*, fishing in the lough. Besides this there is the uninterrupted repetition of the right in the Donegall settlements. By itself this is not much. But at least it shows a continued belief in the family that the fishing was theirs.

Reverting again to what I said as to possible competitors, there is surely no more substantial proof that such competitors do not exist than when we find a lease of fishings in the lough taken from the appellants by one of the riparian owners themselves. None of these matters separately would prove the case. But the question is what is the weight of the cumulative evidence? To my mind as a juror I am compelled to come to the conclusion that the title given by the Crown in 1661 was not a mere paper title but a real title; that the grantees have, through the lessees, always used that title to effect by possession in various parts of the lough, and that no competitor has ever appeared to challenge their proceedings. It comes back, therefore, to this—Does the fact that the public have undoubtedly fished continuously and universally for pollen, and sometimes for eels, prevent me drawing

the inference which I now draw? I think not, for the reasons stated by Bowen, L.J. in *Blount v. Layard* (not reported), and quoted by North, J., in *Smith v. Andrews* ([1891] 2 Ch. 678).

I take the facts as they are stated by the learned Judges in the courts below. I think it is clear (1) that pollen fishing could never have been made profitable by the patentees; (2) that the eel fishing as practised till the recent introduction of the new net was casual and immaterial.

Upon the whole matter, therefore, I think this appeal should not be allowed. I confess that to me it would be no light matter on such a subject to overrule the unanimous judgment of the judge of first instance and the Court of Appeal. It is true that this is an appeal on the merits, and that I do not treat the verdict of the learned Judges below in the same way as I should be bound to treat the verdict of a jury. Nevertheless their opinions are not only worthy of respectful consideration at all times, but in the present instance bear in themselves the marks of most learned and careful consideration. I should have been quite content to say that I agree with the opinions of Ross, J., and Holmes, L.J., who have expressed themselves in a manner entirely satisfactory to my judgment. I have only added these remarks of my own as I know there is a difference of opinion among your Lordships, and I feel bound therefore to explain the particular matters which have most affected my mind.

LORD SHAW—The order of the Court of Appeal in Ireland, of date the 30th November 1909, affirmed the judgment of Ross, J., sitting for the Master of the Rolls in Ireland, dated the 26th February of that year. That judgment declared that the respondents were entitled to the exclusive right of fishing for eels and to all eel fishing places, and weirs in Lough Neagh, and it adjudged that they be quieted in the possession of these exclusive rights. So far the judgment was applicable to the lough as a whole. The injunction directed against the appellants to restrain them from eel fishing or interference with the respondents' exclusive rights before declared was, however geographically limited to a portion of the lough known as Toome Bay, lying to the north of a certain line specified in Ross, J.'s judgment. So far as the questions of law to be determined in this case are concerned, this limitation, which was accompanied by liberty to make further application, need not be further considered. Be the judgment for one party or the other, it falls to be based upon the opinion held with regard to the rights of parties to the lough as a whole. In the next place, those rights so considered extend to all fishings whatsoever, including not eels alone, but salmon, trout, pollen, and other fish. The case of both parties was presented, and rightly so, at your Lordships' Bar.

The claim, accordingly, is of an extensive character, extending as it does to all fishings in the largest inland lake in the United Kingdom, a sheet of water over 100,000

acres in extent. This great lough, of about twenty miles in length by fifteen miles in breadth, is fed by thirteen rivers. It is bounded by five counties, and is navigable throughout. It however is not a tidal lough its waters outflowing by a comparatively short stretch of the river called the Lower Bann into the sea. "Steamers, as well as other vessels carrying passengers and merchandise, use it as a highway from place to place on its shores."

Having carefully considered the evidence, and reserving for the moment, his denomination of the trade or practice of fishing as a public right, I am of opinion that the affidavit of John Devlin in the following terms is substantially in accordance with the facts—"The number of fishermen exercising their calling on Lough Neagh is about 800, and the number of people depending for their livelihood on this public right of fishing therein is over 3000. In nearly every case these fishermen represent a line of families who from generation to generation have followed the occupation of fishermen, publicly fishing and earning their livelihood upon Lough Neagh."

As bearing, however, upon the gravity of the issue to be determined, I may add this consideration—To the best of my humble judgment the progress of titles founded on by the respondents appears to embrace in all its salient items, not the fisheries merely, but the lough itself, extending to 150 square miles or thereabouts, and the soil thereof. It is accordingly manifest that the scope of the title submitted to the judgment of this House is such that it would embrace lough, soil, and fisheries so completely as not only to exclude the public, and, if desired, to put a stop to the immemorial usage of fishing referred to, but to exclude also all riparian owners round the entire extent of Lough Neagh, and inhibit these owners from the exercise of fishing or of any patrimonial rights *ex adverso* of their properties. These owners are not called as such in this action, and I do not suppose that the judgment about to be pronounced by your Lordships would be binding upon them. But the title submitted is as I have stated, and the importance of the issues to be here determined is added to by the consideration that the title falling to be interpreted on the lines of the argument submitted for the respondents would appear to involve a territorial claim of stupendous magnitude.

The plaintiffs are lessees of Lord Shaftesbury under a lease dated the 18th July 1905, which demises the eel fisheries in Lough Neagh and the river Bann for 5000 years at a rent of 884*l.* The Earl covenants for quiet enjoyment by the lessees "so far only as relates to his own acts and defaults." The statement of claim made in this suit by the lessees is, I observe, dated the 16th February 1907, and upon that day a lease was granted of the right to fish for salmon, trout, pollen, and other scale fish in a part of Lough Neagh. The details as to these leases and sub-leases need not be entered upon. The title actually put in issue is Lord Shaftesbury's title, he being the suc-

cessor of the Earls of Chichester and Donegall. The steps of Lord Shaftesbury's title have been examined with such fulness and clearness by the Lord Chancellor that I do not think that it is necessary for me to do more than tender my respectful assent to his analysis thereof and conclusion thereon; and I only venture to add to the narrative of the following limited extent.

I think that the respondents accurately put the issue in the first statement of their claim, and it will be observed that they put it in all its breadth. "At and previously," they say, "to the granting of the letters-patent next hereinafter mentioned, King Charles II was seised in his demesne in fee simple in possession of all the fisheries of what kind soever of and in the pool of Lough Neagh . . . situate in the counties of Down, Tyrone, Armagh, Antrim, and Londonderry, and the river Bann, and also all the islands in the said lough and the bed and soil of the said lough." They then proceed to cite the letters-patent of 1661, which were the subject of examination in the case of *Bristow v. Cormican*. Certain deeds and documents not produced in that case have now been furnished. The most important of these is undoubtedly an inquisition of the 12th July 1605, because it purports to carry the record of title back to the reign of Queen Elizabeth. It humbly appears to me to be a serious blot upon the title so traced that it starts with a finding that Queen Elizabeth was seised in her demesne as of fee in right of her Crown of England in all manner of fisheries "in and upon all that moiety of the pool of Lough Neagh aforesaid which lies towards the east parcel of Clandeboyne aforesaid in the county aforesaid." I have no doubt, notwithstanding the observations as to the term "*medietas*" made in his judgment by Fitzgibbon, L.J., that this was not a title to the fisheries over the whole of Lough Neagh.

In the next place, notwithstanding repeated consideration of the case, I have still serious doubts as to what is the meaning of the term, "seised in her demesne and as of fee in right of her Crown of England." I think it necessary to explain how this strikes me. I agree with Ross, J., when he declares broadly, "There is no record in evidence to enable us to know in what way the whole lough became the possession of the Crown," and I think the occasion for explanation all the greater because the same inquisition, namely, that of the 12th July 1605, taken at Antrim, contained striking internal evidence as to the kind of thing which was meant at that period of the history of Ireland by the expression "in right of her Crown of England." The jurors, having affirmed that Queen Elizabeth was seised in her demesne as of fee in right of her Crown of England of the moiety of the pool of Lough Neagh, as stated, proceeded to say that the Queen, being so seised, entered into a certain indenture with Sir Thomas Smith and his son, dated the 5th October 1571, and the indenture is printed *ad longum* among the papers. [*His Lord.*

ship here narrated the terms of the indenture.]

The deed is not a derivation or transfer of title by law; it is a commission; and that commission was simply a commission of conquest, and it failed. But it will be observed that, so far as an assertion of property in a patrimonial sense is concerned, Queen Elizabeth's grant is carefully guarded by phrases such as, "inasmuch as in Her is," or in another passage, "appertaining unto Her, or that of right ought to come, belong, or appertain unto Her Majesty." There is, as I say, no tracing of title, and, in short, I do not entertain much doubt that the only title put forward was her right to the Crown of England. This view is confirmed by the further step, bringing, or being supposed to bring, the property into the hands of King James. For the inquisition in its final step proceeds—"And the jurors likewise say that . . . all and singular the premises . . . belong and appertain to our said Lord James the King that now is, as well in right of his Crown of England as by reason of the force and intention of divers statutes in that behalf made, ordained, and established." There have been no statutes cited to confirm such a forfeiture, annexation, or possession of property. So that the title of King James appears again to arise solely *jure coronæ*. This assertion of title is explained historically by the spirit of the time; it was a rough and ready claim of right by the power of the sword. But we are here and now in the region of law; and it is unquestionable that a claim thus rested on the mere right of the Crown is without legal foundation.

The stage of the inquiry now reached is that of the examination of this title as a bare paper title. Totally different considerations come into play when a long-continued possession has followed. The case being considered is that of the bed, soil, and waters of a great inland lake. *Jure coronæ* these do not belong to the Sovereign of the realm. In the words of Lord Cairns in *Bristow v. Cormican* (3 H.L. 652), "The Crown has no *de jure* right to soil or fisheries of a lough like Lough Neagh . . . I am not aware of any rule which would *prima facie* connect the soil or fishings with the Crown, or disconnect them from the private ownership either of riparian proprietors or other persons. Charles II, or some of his predecessors, may have become possessed of the lough and its fishings, either by grant or forfeiture or otherwise; but it would be a legitimate and necessary subject of inquiry how and from whom, and subject to what conditions or qualifications this possession or proprietorship was obtained."

It is in that view that I reckon the production of this earlier inquisition—that is to say, proceedings which were not before this House in the case of *Bristow v. Cormican*, but are now before your Lordships—to be of importance. For it now appears that instead of there being anything to connect the soil or fishings with the Crown or disconnect them from the private owner-

ship of subjects—that is to say, to connect or disconnect these according to law—there is much *in gremio* of these documents to suggest that instead of a legal process, whether of private or statutory transfer, there was what in the eye of the law when it is settling patrimonial rights must be considered to be simply a usurpation.

I need not carry it further than to say that I think that no title which, apart from possession, could now claim to stand valid in law is proved in the person either of Queen Elizabeth or of any of the Sovereigns of the Stuart dynasty, and I think it fairly manifest that in the opinion of the advisers of the Crown the Sovereign's title was, to say the least, considered doubtful. This last consideration is confirmed by the review of the various transfers and grants and the repugnancies and confusions arising therein, made in the judgment of my noble and learned friend on the Woolsack. One document of the series is plain enough, as it is not unnatural to expect, remembering the grantor and the time. I refer to the lease granted by Cromwell in 1656. That deed quite openly and bluntly defies all the formalities relating to the grant of Crown properties, and it is frankly founded upon nothing but the will of the Protector. But I think that the maxim *Stat pro ratione voluntas* can also be discerned equally as alone lying at the foundations in title of all the royal grants. To regularise these either constitutionally or legally a statute was required and there appears to be no such statute.

There is another view of this matter upon which, although I view it with interest, I should have desired further argument before making any pronouncement. I refer to the following point—Had Lough Neagh been tidal as well as navigable there could be no doubt of the law that, in the first place, it could have belonged to the Crown *jure coronæ*, but that, so belonging, it would have been subject to public rights of fishing—that is to say, rights in the public as such. Lord Hale, *De Jure Maris*, is naturally cited in this connection, and Lord Blackburn, in *Goodman v. Mayor of Saltash (ubi sup.)*, puts the familiar point thus—"The right of fishing in arms and creeks of the sea and in tidal rivers is originally lodged in the King, yet as Lord Hale says, 'the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof as a public common or piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers where either the King or some subject has gained a propriety exclusive of that liberty.'"

In the argument it was suggested that this great inland lake or inland sea might well be treated as subject to a public right of fishing, because in any view the best that could be said for the Crown's right was that it must have been acquired as part of a great act of State. That being so, it is not at all beyond the range of forcible argument to maintain that

Crown property in an inland sea shall be subject to the same limitations of public use as those affecting open tidal water. There may be much in the history of Ireland from the period of the overthrow of Shane O'Neill to confirm the view that the transition then made from what was practically a tribal to what was practically a feudal system should be accompanied by the conservation of those public rights in those waters which, be they the great lake or the foreshore, or arms of the sea, form both a highway and a source of sustenance for the people of the country.

I do not pursue the topic further, holding, as I do, that the original title of the Crown is defective. But my desire is to indicate that, had the Crown right as such been held to be valid, even though the validation had taken place by formal act of State, the question as to the existence of public rights in water thus taken over by the Crown might still have remained for serious consideration. In short, in the language of Lord Cairns, "it would be a legitimate and necessary subject of inquiry . . . subject to what conditions or qualifications this possession or proprietorship was obtained." In such an inquiry I do but desire to indicate that one of these conditions or qualifications might be the existence of a public right over this Crown property even although it was inland water.

It will be observed that the conclusion to which I have felt constrained to arrive is that the title of the Crown, whether in 1605 or onward through the seventeenth century to 1661, the date of the documents of which so much citation has been given, is not proved. I think that it would have been possible to found upon it, with all the doubts attaching to it, as the beginning of a title upon which possession could proceed. On the subject of possession I have not, since reperusing the evidence and papers, entertained any doubt that the possession was not exclusive. The public have fished, and fished as of right, and fished all the time.

In the next place, the entries of any payment made in respect of the fishings of Lough Neagh are discontinuous by centuries or half-centuries. They are nearly always mixed up with the possession, not of the lough alone, but of the river Bann and the lough. It appears to me to be quite impossible to hold that anything like possession of Lough Neagh as a several fishery is proved. On that part of the case I refer to and adopt the opinion which I have had the advantage of seeing, of my noble and learned friend Lord Robson.

I desire to make special reference to one point upon possession to which great importance was attached in the opinions of the learned Judges who decided the case of *Bristow v. Cormican*, and especially in the opinions of Lord Cairns and Lord Hatherley. Ancient leases go in the direction of proving that the subject of the lease was believed to be the property of the grantor. He not only presumably believed himself to be, and actually held

himself out as, owner, but the demise was accepted upon the footing that he was. Now the possession, *per* the leases of Lough Neagh and the fishings therein, was in *Bristow's* case made the subject of careful scrutiny. Lord Cairns went over the documents then before the House *seriatim*, and observed that "from 1660 to 1811 there is a complete blank as regards anything that would be evidence of ownership or seisin in 1660."

As prefatory to the observations which I shall venture to make on the lease of 1803, I think it right to state the seriousness of the issue on this subject in Lord Cairns' own language—"In 1811 there is a lease by the then Marquis of Donegall to Sir George Hill of fishings in Lough Neagh, for sixty-one years, expiring in 1872, at a rent of £60. But the extent of the fishing included in this lease does not appear to me to be necessarily co-extensive with the whole of the lake. On the contrary, the lease appears on the face of it to raise a question as to the extent of the fishings intended to be demised, which could be solved only by parole evidence. The description of the fishings demised is this—'All that and those the salmon, trout, pollan, and scale fishings of Lough Neagh . . . in as full, ample, and extensive a manner as the same have heretofore been enjoyed by the Marquis of Donegall, and those under whom he has derived . . . with full power of going to the banks of the said lough and river, and every part thereof within the aforesaid limits . . . for the purpose of catching and taking salmon and other fish, except eels, within the known and accustomed limits of said fisheries, as late in the tenure of the Rev. Edward May, by virtue of an indenture of lease dated the 1st day of October 1803' . . . which lease had come by assignment to Sir George Hill and had been surrendered." Lord Cairns then proceeds—"It is impossible not to see that this lease is not meant to be a demise without qualification of the fisheries of the whole lake, and that parole evidence of the 'known and accustomed' limits of the fisheries as then lately held by the Rev. Edward May might have been introduced and might have been material."

Lord Hatherley deals with the same topic in this language—"And when you come to the lease to Sir George Hill, you find that it was founded upon a grant which had already been made to the Rev. Edward May by a demise of 1803, and the grant is to hold in the same manner and to the same extent, in fact, as May had held. That made it particularly important that we should see the lease to May. That lease to May, or the counterpart of it, must be amongst the archives of the Donegall family, by whom this lease was made, but that document has not been produced."

In the proceedings in the Court in Ireland and in this House in the present case the lease to Edward May of the 1st October 1803 was produced. I have thought it right to examine personally and

carefully that parchment document. I will now state the result of that examination. [*His Lordship dealt with the parchment lease and certain erasures thereon.*] I am bound to say quite plainly that the description of the property which is the subject of demise is to the best of my judgment a forged description.

My humble opinion is that the lease of 1803 was a lease of the river alone. Whether Lord Cairns and Lord Hatherley, observing the reference in the lease of 1811 to the limitation of the subject "as late in the tenure of the Rev. Edward May," and noting the fact that "the grant is to hold in the same manner and to the same extent in fact as May had held," and the importance accordingly of the deed of 1803 and the striking fact of its absence, may have had certain surmises upon the subject, one does not know. But the desired production has now been made, and the relation appears to be, that while the deed of 1811 is founded upon a grant made to May in 1803, it now appears, and the deed in its mutilated condition I think demonstrates, that May held no portion of Lough Neagh whatever.

The link supposed to be missing in the history of the possession by the Marquis of Donegall of the fishings of Lough Neagh turns out to be not a link establishing such possession, but, on the contrary, invalidating the whole of the references in subsequent leases to Lough Neagh as in May's possession, and proving that May's possession had no application under the deed of October 1803, which referred to other fishings or part of the fishings, as to which there is no dispute or adverse claim, namely, the fishings in the river alone. It follows that the reasoning of these most distinguished Judges to whom I have referred applies *a fortiori* to the history under possessory title as that history is now disclosed. In my view the fabric of possession thus set up cannot stand. The leases of the last few years, to which I referred in the earlier portion of my observations, thus appear to me to have proceeded from an owner whose paper title is imperfect and doubtful, and has not been validated by clear, exclusive, or continuous possession. The public thus in enjoyment for generations of the right of fishing over Lough Neagh are therefore not in a position to be disturbed by the respondents or those through whom they claim.

I should add in conclusion that possession of the river fishing does not appear to me to throw real light on the ownership of the lough. I think that this is so in the nature of the case, there being no necessary or actual unity of subject such as to ascribe the possession of one in point of fact to both in point of law. There is no such unity, but, on the contrary, and very frequently, great segregation of ownership and possession in regard to salmon-fishings stretching from the spawning grounds to the sea; and I cannot see any reason in law for ascribing a necessary unity of ownership or possession in the case of eel-fishings from the fattening

grounds to the sea. Further, the instance of Feumore, a portion of the shore of Lough Neagh, and the illustrations given by the learned Judges in *Bristow v. Cormican* with regard to the difficulty of treating possession at one portion of the shore as equivalent to possession of the entire lough, humbly appear to me to make the present case a stronger instance for the avoidance of the unification of subject claimed. I recognise that the licensing of nets of a particular mesh in recent years and the localising of their operations at certain seasons, so as to secure in the lough instead of the river large takes of outgoing eels, may involve inconvenience and change and loss. These things will be the subject of local or Parliamentary regulations, to which the authorities on the spot will no doubt direct their attention, so that a remedy, if such is needed and to the extent which is just, may be provided, and among other things undue injury of the fishing avoided. I humbly concur in the course proposed from the Woolsack.

LORD ROBSON—Although the claim of the plaintiffs, who are respondents in this case, is, in form, confined to eel fishing in Lough Neagh, it is founded on documents and allegations of exclusive possession, which comprise all kinds of fishing in the lough, together with fishing rights in the river Bann. This has opened out a wide field of controversy, but the questions of law that have been raised are easily disposed of, so far as they are material, when once a decision is reached on the question whether the plaintiffs have, under the title they put forward, had effective or exclusive possession of the several fishery which they claim in Lough Neagh. Once this is established, inquiry into their title depending on ancient documents, inquiries, and transactions two or three centuries ago becomes of comparatively little importance. The law will assume that their possession had a lawful origin and will not impeach their title because after so great a lapse of time explicit proof of every document or step necessary to the completion of that title is not forthcoming. On the other hand, if no such possession is shown, then not only must the paper title be carefully scrutinised, but it may be found perfect in itself and yet held unavailing if adequate evidence be given of acts of ownership or user by others inconsistent with it.

There is no question as to the plaintiffs' title to the fishing in the river Bann, but the letters-patent which granted the fishery in the Bann granted also the fishery in the lough, and the plaintiffs contend that, apart from the fact of the two places being comprised in one grant, the nature and circumstances of the fishery itself show that, though specified as being in two places, it is really *unum quid*. Proof of possession of the river fishery is therefore, according to them, proof of possession of the lough fishery. I can see no reasonable ground for this contention. It is true that when the eels have fattened

in the lough they proceed seaward through the lower Bann, and they must pass the plaintiff's weir. The weir is therefore the most convenient and profitable place for catching them, but that circumstance is far from justifying the plaintiffs in treating the lough and river as one fishery, so that taking possession of any part would prove possession of the whole.

In *Jones v. Williams* (2 M. & W. 326), Parke, B., said in reference to this point, that evidence might be given of acts done on other parts of the property than the part immediately in dispute if there was between those parts such a common character of locality as would raise a reasonable inference in the minds of the jury that the part in dispute belonged to the plaintiff if the other part did. The fact that the fish caught at the weir all come from the lough does not establish a common character of locality in this sense. No one would infer as a matter of necessity or probability that the man who owned the weir owned the fishery in the lough. Nor is any such "common character of locality" established by comprising both places in the same grant. There is, moreover, the plain fact that until the time of the present dispute the plaintiffs in letting the eel fishery in the river Bann have never assumed to let with it the eel fishery in the lough, nor have their lessees ever attempted to proceed on the theory they now put forward that the fishing in the lough was in any sense appurtenant to, or part of, a single undivided fishery inclusive both of lough and river.

Dealing, therefore, with the lough fishery by itself, we find certain salient and undisputed facts which are of vital importance in determining the question of possession. The first is that for centuries during the time that the plaintiffs' alleged title to the lough fishing has been in existence, the fishing, at all events for eels and pollen, has been a great local industry publicly carried on without hindrance from the plaintiffs' predecessors, and without any attempt on their part to exact any payment or acknowledgment in respect of a practice so inconsistent with their alleged right. It is in evidence that some 3000 people, comprising about 800 fishermen, in the adjoining counties are dependent on this lough fishery. The plaintiffs suggest that this immemorial user on this extensive scale has been allowed by the mere good nature of their predecessors in title, and ought to be regarded as being of no more importance in its effect on the plaintiffs' claim to exclusive possession than the picking of wild fruit in a field would have on the landlord's title to the land. I confess myself unable to appreciate that analogy. The extensive industry, which is thus compared with a mere practice of petty trespass, was the subject of several statutes specifically relating to Lough Neagh whereby it was recognised and regulated. The times and seasons for fishing were restricted; the size of mesh for netting was prescribed;

the use of dynamite was forbidden, and other rules were made which show that the Legislature, at all events, did not regard the public user of the lough fishery as either unlawful or trivial.

It is, however, said that this public fishing used of old to be by line only, and did no harm to the really important fishing at the weir in the river Bann, whereas recently the local fisherman had taken to the use of draft nets, which had compelled the owners of the several fishery to withdraw their ancient indulgence. The argument of the plaintiffs' counsel proceeded persistently on the assumption that this contention was established in fact, but the evidence is almost entirely the other way. A great number of local witnesses speak to the use of draft nets long before the present proceedings, going back as far as fifty or sixty years. Some restrictions were for a time placed on that method of fishing by the action of the conservators, but the great body of the evidence, to the effect that it existed and was exercised without interruption on the part of the plaintiffs or their predecessors, is almost uncontradicted except as to recent times and in regard to the close neighbourhood of the Bann fishery. Next, it is admitted by the plaintiffs that, although the lough fishing had been included in certain leases granted by their predecessors in title, there was no evidence that the rights purporting to be conferred by such leases had been actually exercised in the lough as well as in the river. This is an important circumstance in estimating the weight which should attach to such leases as being in themselves proof of possession. It is also material to observe that, although an owner of a several fishery in Ireland is liable to pay rates in respect thereof under various statutes, no such rates have ever been paid by the plaintiffs or their predecessors for the fishing in the lough.

Before examining the evidence put forward by the plaintiffs as to possession, upon which the case must ultimately turn, it is convenient to consider first the nature of their paper title, for the character of that title materially helps us to an understanding of some of the disputed facts with regard to possession. [*His Lordship discussed the title and continued*].—After the surrender by Lord Chichester in 1640, the plaintiffs must rely on the letters-patent of the 3rd July 1661 as being the origin of their present title. These letters-patent purport to have been granted absolutely on the advice of certain distinguished persons, and without any fresh inquisition or office found. The plaintiffs have therefore failed, as their predecessors did in *Bristow v. Cormican*, to trace the title of the King to any lawful origin, and have not done what Lord Hatherley and Lord Cairns regarded as incumbent upon them under the circumstances of this particular case. They have only transferred their difficulty from 1661 to 1605. Neither have they shown that the King's title has been validated by statute. The Irish Act of Settlement enumerated many

titles, which were thereby made good, but this is not one of them.

These considerations are of little importance if the plaintiffs can show actual possession, but the uncertainty on the part of the plaintiffs' predecessors as to the sufficiency of their paper title explains a good deal in their case as to possession. They asserted their claim vigorously in regard to the river and weir, which formed a considerable and easy source of profit, but they may well have thought that to assert dominion over the lough would be a more serious and troublesome matter both as to the proof of title and to the enforcement of a judgment. They ventured so far as to include the lough in a few of their leases, and in a few cases induced fishermen here and there to pay something which may have been for fishing, or some special facilities in connection with fishing in the lough. It is clear, however, that they never seriously attempted any occupation of that fishing as a whole. Leases are ordinarily the best proof of possession if it can be shown, or reasonably presumed, that the lessees exercised the powers contained in them; but in this case they are accompanied by circumstances which greatly diminish their value as evidence of possession so far as the lough is concerned. In the only important cases where the lough fishing is granted it is accompanied by a grant of the river fishing, and the possession taken and payments made under those grants seem to have been in regard to the river fishing only. Others, relating to the lough alone, were apparently taken for what they were worth, and then abandoned by the parties because the lessor could not, or did not, attempt to give his lessee exclusive possession of the fishery leased. Thus Sir John Clotworthy is not shown to have asserted any ownership over the fishery in the lough as against the public, and his payments of rent ceased the year after his lease. His lease expired in 1755. Important and profitable leases were then made of the fishery in the Bann, which included the Toome Eel Fishery as part of the river fishery. They were followed by considerable litigation in regard to the river fishing. The Donegall rent books show payments of large rents for the river from 1775 to 1816, but nothing is recorded as being done in reference to the lough until the next century, except a small payment of £3, 8s. 3d. by one Blizzard in 1797, under a lease which seems to have been surrendered in 1798. In November 1800 a payment is made by Heyland of £7, 10s., and another payment in May 1807 of the same amount in respect of fishing in the lough. Four payments of £6 each are made by Joseph Macay in 1800 and 1801; Samuel Finniston made a payment of £7, 10s. in May 1801, and another in 1807, which are all expressed as being in respect of the lough fishery. There are also entries showing payments which appear to be made on dates about that period for boat accommodation or special facilities on the Strand, near Shanes Castle, which indicate that some-

thing more than ordinary fishing may have been the origin of these payments.

There are no documents produced which explain these entries. It is certain that the lough was then being fished, as now, by local fishermen on a large scale, so that responsible tenants would scarcely incur a pecuniary liability for a privilege which other people were publicly exercising for nothing. If it is suggested that the payments related only to some special kind of fishing, *e.g.*, salmon, it should be remembered that in 1803 a lease of the salmon and scale fishing for both lough and river is alleged to have been given by Lord Donegall to a clergyman called May for a term of sixty-one years at £60 per annum. That lease covers the period during which some of the above payments were made, and prevents them from being accepted as evidence that the persons who made them did so as tenants or lessees with exclusive possession of any part of the lough fishing. The lease to May is a most unsatisfactory document. It is the first lease since Clotworthy's lease purporting to deal with the lough as well as the river. The lough is mentioned in the lease, but not in the memorial thereof which was enrolled, and the words in the lease referring to the lough are written over erasures. It is important to observe that May never paid any rent, and there is nothing to show that the document was acted on. On the 1st November 1811 May's lease having been assigned to Sir George Hill and surrendered, a fresh lease was granted to Hill of the fisheries "within the accustomed limits of said fisheries as late in the tenure of the Rev. E. May" for sixty-one years at £60 per annum. No rent appears to have been paid by Sir George Hill under this lease until 1843, and the payment was continued to 1847, but as it was under a lease of both lough and river, it is by no means sufficient to show that actual possession was taken of the fishing in the lough. On the 29th March 1829 Lord Donegall made a long lease of the lough and river fishery to John Wallace as trustee for Crommelin, for a premium of £600 and a rental of £55, 7s. 8d., subject to Hill's lease. Hill's assignees made a sub-lease in 1837 to Lord O'Neill of part of the Lough Neagh scale fishery near his residence and in Lough Beg, which was part of the river fishery, at a substantial rent, but except what I have mentioned above there is no document dealing separately with the lough fishing, or showing any payment specifically made in respect of it, until recent times, when the dispute began which has culminated in this action. In fact, the plaintiffs' case for the ownership of the lough depends substantially on evidence as to their possession of the fishing in the river. They have admittedly failed to prove a single act publicly and clearly indicating their claim to exclusive possession of the lough, and the fact that the lough fishing was more or less speculatively comprised in a few leases along with the river fishing is not, under the circumstances of this case, sufficient to make good their claim.

I need not deal in detail with the various prosecutions and suits which have been explained in evidence. Except as to two or three convictions obtained by Lord O'Neill, they all relate to the river, or are of quite recent date leading to the present litigation. Lord O'Neill's prosecutions are more material. They were brought in 1862 and 1868 for trespass in the lough near his residence, and are, of course, some evidence in support of the plaintiff's contention. In dealing with these prosecutions in *Bristow v. Cormican* Lord Blackburn suggests that a jury might be right if they inferred that Lord O'Neill took the sub-lease in order that he might protect his own demesne, and that the acts of his keepers were novelties. That certainly strikes me as the more probable view, having regard to all the circumstances of this case. As to the rights conferred by the letters-patent to the soil of the lough and the power of using the banks for fishing purposes, the plaintiffs have not attempted to make any case. Yet if they are right they have been for centuries and are now entitled to powers over the water supply and drainage of the adjacent counties which may be of great value, and were not likely to have been overlooked if they could have been enforced.

I think, therefore, that the plaintiffs have failed to prove effective possession of the fishing in the lough. As against the ambiguous and uncertain acts on which they rely, we have the open, extensive, and unchallenged user for centuries of that fishing by a fleet of boats and hundreds of fishermen in a way which is gravely inconsistent with the plaintiffs' title.

It is settled law that the public cannot prescribe for a *profit à prendre*, but because the public user does not avail to establish a public right it is not therefore to be treated as being without significance on the question of ownership. Like every other right or privilege which has been long exercised, the courts will presume a legal origin for it if they can, and the facts of this case are consistent with, and indeed strongly suggest, a licence tacitly given by riparian proprietors or by other persons whose ancient title has never yet been extinguished by the Crown. Under these circumstances the public user is cogent for the purpose of rebutting a private paper title unsupported by possession, or supported only by such doubtful acts as are here alleged. In *Blount v. Layard* (reported in a note to *Smith v. Andrews* ([1891] 2 Ch. 684) Lord Esher puts the case of a paper title, against which facts (*e.g.*, a long public user) are shown which make it doubtful whether the holder of the title has the real title, and he says that in such circumstances a jury may say to him—"We come to the conclusion that you did not interfere with these people, because although you had a paper title you were afraid to act upon it; because you knew, or because you feared, that notwithstanding your paper title someone else had a better title."

In my opinion such a conclusion would be amply justified in the present case.

The plaintiffs have shown neither effective possession nor a sufficient title, and I think that this appeal should be allowed.

Appeal dismissed.

Counsel for Appellants—Gordon, K.C.—Healy, K.C.—J. P. Kerr. Agent—Herbert Z. Deane, Solicitor.

Counsel for Respondents—Ronan, K.C.—Jellett, K.C.—Gausson, K.C. Agents—Wansey, Stammers, & Company, Solicitors.

## HOUSE OF LORDS.

Monday, July 17, 1911.

(Before the Lord Chancellor (Loreburn), Lords Atkinson, Shaw, and Robson.)

KEATES v. LEWIS MERTHYR  
CONSOLIDATED COLLIERIES,  
LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL  
IN ENGLAND.)

*Master and Servant—Employers and Workmen Act 1875 (38 and 39 Vict. cap. 90), secs. 3 and 4—Jurisdiction of Summary Court—Master Claiming Damages for Breach of Contract—Wages Due but not Claimed—Set-off.*

An employer company claimed damages for breach of contract against a workman in a summary court. Certain wages were due by the company to the workman which were not yet payable, and which he did not claim in the proceedings. The magistrate set off the damages against the wages and made a corresponding award.

*Held*, upon a construction of the statute, that the magistrate had jurisdiction to adjust and set off the workman's claim for wages notwithstanding that the workman had lodged no claim to them.

A workman was in dispute with his employers under the circumstances stated *supra* in rubric and in their Lordships' judgments. The Divisional Court held that the magistrate had jurisdiction to adjust and set off the workman's right to wages, and this judgment was confirmed by the Court of Appeal (VAUGHAN WILLIAMS and FARWELL, L.JJ., *diss.* FLETCHER MOULTON, L.J.).

The workman appealed.

Their Lordships gave considered judgment as follows:—

LORD ATKINSON—The question for decision in this case turns upon the construction of sec. 3, sub-sec. 1, of the Employers and Workmen Act 1875, and resolves itself into this—Do the words of that sub-section mean that the claims which the Court may adjust and set off are claims which the employer or workman has a right to make, though he has in fact omitted to put