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 á 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.—Gaussen, 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

them forward in the proceedings arising out of the dispute mentioned in the section, or are the words to be confined to claims which have in fact been put forward in those proceedings by the person who has the right to make them?

In the construction of a statute it is of course at all times and under all circumstances permissible to have regard to the state of things existing at the time when the statute was passed, and to the evils which as appears from its provisions it was designed to remedy; and I think that nothing could be more unsafe or more misleading than to allow oneself to be deterred from putting upon a statute the particular construction which the consideration of these things would lead one to adopt, by the apprehension of the prejudicial effect which it might have on rights and privileges conferred by subsequent legislation, unthought of at the time when the particular statute was passed.

It is necessary then to ask oneself what were the respective rights and liabilities of employer and employed in the year 1875, and what the jurisdiction and power conferred on County Courts to set off the respective claims of litigants who might come before them. The doctrine of common employment was then well established and in full operation. The Workmen's Compensation Act had not been passed. The employer who paid the wages which he owed, who did not dismiss illegally, and was not guilty of personal negligence in the selection of the fellow-servant of the complaining workman or of the machine with which that workman had to work, could not well be sued either in tort or contract; and the workman on his side would seldom if ever be sued save for damages for breach of his contract of service by leaving his employment without adequate notice, or for damages for negligence in discharge of the duties which his contract of employment imposed. Claims such as these were likely to be comparatively small in amount, and would be fully met by the sum of £50, the highest amount which the County Court could award.

By the combined operation of the 76th section of the County Courts Act in force in 1875 (9 and 10 Vict. cap. 95) and the 88th and three following sections of the Judicature Act of 1873, it is clear that the County Court had already ample jurisdiction to set off claims such as are in this case dealt with, if put forward in a litigation before it. But the statute of 1875 was passed, as set forth on the face of it, to enlarge the powers of the County Courts, not to leave them as they were, and it has enlarged them in a most remarkable way.

The Court may now under this very section (section 3) give relief which not only was never claimed by either of the parties litigant, but is directly in conflict with the relief claimed and setting at naught the rights which they respectively insist upon. For instance, if an employer should sue his workman for damages for breach of contract by refusing to do the work which he had contracted to do, and the workman insisted that the work which he refused to do was not work which under his contract he was bound to do, each party thus insisting on the contract between them, each standing as it were on the "letter of his bond," the County Court Judge could in defiance of this insistence dissolve the contract, apportion the wages earned under it and award damages, presumably for its breach or for its termination, as the case might be, to either of the parties litigant, not one of which things was claimed by anyone concerned.

Again, instead of awarding damages, he might, under sub-section 3 of section 3, take security from the party in default for the due performance of so much of his contract as remained unperformed if the defaulter consented to that course. It is obvious that this peculiar quasi-parental jurisdiction was conferred in the interest of industrial peace and should not be hampered by rules of pleading. Section 3 confers jurisdiction in addition to that already possessed by the County Courts —for what end? In order, in the words of the statute, to "adjust and set off one against the other all such claims on the part either of the employer or the workman arising out of or incidental to the relation between them as the Court may find to be subsisting."

It is conceded that these claims may have no connection whatever with the particular matter in dispute between the employer and the workman. The claim may be a claim for wages which the employer admits to be due. It need not be a contested claim, but according to the argument for the appellant the party sued can oust the operation of this remedial statute and leave things in precisely the same position as if it never had been passed, simply by omitting to give the notice required by the 76th section of 9 and 10 Vict. cap. 95, though there be no danger of surprise. In my view the consideration of section 3, sub-section 1, should be approached from an entirely different point of view from that suggested by the appellant.

I think that the object of the statute being, as in my opinion it obviously is, to promote industrial peace, and with that end, in the case of any dispute between employer and workman coming before the County Court, to secure the adjustment of all claims for debt or damages, wages, or other liability subsisting between them, whether connected with this dispute or not, one's attention ought to be directed to seeing whether there is any provision of the statute so clear and imperative as to prohibit the exercise of the benevolent jurisdiction conferred by it in such a case as the present. I think that the words "claims" which the Court "may find to be subsisting" are adequate, though not happily chosen to indicate claims which the Court may find that either party has the right to make, whether they have in fact put them forward in the litigation or not,

and therefore that the County Court Judge had in this case power to make the decree or order which he made, and that the judgment of the Court of Appeal is therefore right and should be affirmed.

It was urged in argument that if the County Court or a court of summary jurisdiction has the jurisdiction exercised in this case, the employer might make a claim before either of these tribunals for a small sum, and that under such circumstances the tribunal whose jurisdiction he invoked would have power to adjudicate upon a claim of the workman, under the Workmen's Compensation Act, for compensation in respect of an injury sustained by him. I wish to say emphatically that I express no opinion upon that point. It does not arise in this case. The latter statute does not affect the claims adjudicated upon here. If unfortunate results of this kind, which must have been unforeseen in 1875, follow, it is a matter to be set right by the Legislature. But whether they do follow or not affords in my view no justification for construing the Act of 1875 otherwise than as it should be construed if this later statute had never been passed.

LORD SHAW—I agree.

LORD ROBSON—This case turns on the effect to be given to the word "claims" in section 3 of the Employers and Workmen Act 1875. The section confers on a County Court the power in any proceeding before it in relation to any dispute between an employer and a workman, arising out of their relation as such, to "adjust and set off one against the other all such claims on the part either of the employer or of the workman arising out of or incidental to the relation between them as the Court may find to be subsisting, whether such claims are liquidated or unliquidated and are for wages, damages, or otherwise." Section 4 provides that this comprehensive power may also be exercised by a court of summary jurisdiction, and it has been so exercised in the present case. The magistrate has found the workman indebted to the employer in a sum of 11s. 3d. for damages for breach of contract. Acting under the above section he has also, on the invitation of the employer, inquired whether there are any claims on the part of the workman against the employer incidental to the relation between them, and he has found one such claim to be subsisting, namely, for a sum of £1, 15s. 8d. earned and due in respect of wages. He has therefore directed the 11s. 3d. to be set off against the larger sum, leaving only £1, 4s. 5d. to be paid by the employer.

The workman contends that the jurisdiction to do this only arises where the claim, which the magistrate assumes thus to adjust and settle by means of set-off, is a claim made before him by the party entitled to make it, and not merely, as in this case, a claim of which he has been informed judicially, and as to the existence and correctness of which he has satisfied himself judicially.

The answer to this contention is to be found in the plain words of the section, which are in complete accord with the object of the statute taken as a whole. It is a statute dealing with industrial disputes, and it seeks to provide certain courts with a means of checking or composing such disputes so far as they are concerned with small pecuniary claims. In the subsection following the one just quoted, the Act goes so far as to empower the magistrate to rescind wholly any contract between the employer and the workman if, having regard to all the circumstances of the case, he thinks it just so to do, "upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages or other sums due, as the court thinks just." This is a very unusual power, and it shows that the County Court Judge or magistrate is being entrusted with a jurisdiction and discretion outside the limits of ordinary litigation. It opens a wide field of inquiry beyond the particular claim which one of the parties has brought before him. He is able under this 2nd sub-section to exercise a power similar to but stronger than that which the appellant says is so novel and extreme that the Legislature cannot be taken to have intended it under sub-sec. 1. Thus, if he thought it expedient to rescind the contract between the parties, the claim or right to wages due would be one of "the circumstances of the case," and, as such, would be subject to the magistrate's discretionary powers in reference to apportionment and payment. It seems to me that some such power is necessary to give effect to either sub-section. Sub-sec. 1 aims at settling disputes by the adjustment of all subsisting claims, and sub-sec. 2 aims at the same object by the summary termination of contracts which it may have become irksome, or dangerous to enforce. The scope of the statute being thus wide, there seems to be no ground on which the 1st sub-section can be properly read in a more restricted sense than its literal wording imports. In directing the magistrate to adjust all the claims between the parties which the court "finds to be subsisting," the Legislature can scarcely be taken to have intended that the magistrate might find a claim for wages to be in fact subsisting between the parties, and yet be unable to deal with it in settling the whole account, because the workman had not thought it necessary to sue for it.

But the appellant contends that the mere right to have the wages paid is not a claim at all. This appears to be only another way of saying that it is not a claim preferred before the magistrate. The workman has worked in order to get his wages, and although he does not think it necessary to bring an action for them, it is quite well understood between his employer and himself that he wants his wages, that he is entitled to them, and that he means to have them. If he refrains from formal or explicit demand, it is only because in such circumstances it is so well understood and implied that it

does not need to be made explicit. I think that this constitutes a "claim" within the meaning of this sub-section. It has been pointed out that if the magistrates acted up to the full extent of the jurisdiction given to them by this statute it might have the most inconvenient consequences. When the statute was passed the claims between employer and workman were, for the most part, simple in character and small in amount. Since then they have become numerous, complicated, and substantial, and are no longer such as can be conveniently or properly disposed of by a magistrate acting under this sub-section. But most of them are confined to special tribunals, and I doubt if the mischief suggested would be serious in extent. The jurisdiction of the magistrate, however, is discretionary, and it is difficult to think that he would be so unreasonable as to exercise it in some of the extreme and inappropriate cases which have been suggested. In any event we have no power to construe this statute otherwise than according to its plain intent, and I think that this appeal falls.

LORD CHANCELLOR (LOREBURN)—I agree.

Appeal dismissed.

Counsel for Appellant—Bailhache, K.C. — John Sankey, K.C. — Clive Lawrence. Agents—Smith, Rundell, & Dods, Solicitors.

Counsel for Respondents—Danckwerts, K.C. — Stewart Brown — H. H. Harding. Agents — Bell, Brodrick, & Gray, Solicitors.

HOUSE OF LORDS.

Tuesday, July 18, 1911.

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

NEW MONCKTON COLLIERIES LIMITED *v.* KEELING.

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

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13, *Sched. I* (1) (*a*)—*Dependant—Wife—Inference of Fact.*

There is no presumption of law or of fact that a workman's wife is dependent upon him, but only an inference of fact arising from the circumstances.

The widow of a workman who was accidentally killed had for twenty years before his death neither received any support whatever from him nor communicated with him in any way.

Held that there was no evidence on which the County Court Judge could competently find in fact that the widow was dependent either totally or partially upon the workman.

Baird & Company v. *Birsztan*, 1906, 46 S.L.R. 300, 8 F. 438, *approved.*

A workman was killed by an accident, and his widow sought to recover compensation from his employers in respect of his death. As stated *supra in rubric*, and fully in their Lordships' opinions, she had not actually been supported by him for twenty years. The County Court Judge made an award of compensation, which was affirmed by the Court of Appeal (COSENS-HARDY, M.R., FLETCHER-MOULTON and FARWELL, L.JJ.).

The employers appealed.

Their Lordships gave considered judgment as follows:—

LORD CHANCELLOR (LOREBURN)—I agree with the judgment about to be delivered by Lord Atkinson, which I have had an opportunity of reading.

It is a question of fact whether a particular person is a dependant or not. The Act was passed to provide compensation for certain people who should be damnified because the workman ceased to earn wages. If thereby they were either deprived of actual support, or deprived of a source on which they did and would reasonably rely for it, they may be damnified to a degree greater or less according to the circumstances. The fact that a legal duty lay upon the workman to provide maintenance is an element to be considered, no doubt, because people usually count upon getting what they are entitled to get. But when, as here, the wife had not been supported for twenty years, and in no sense relied upon the workman for any help, I think that there was no evidence of dependency. In my opinion this appeal should be allowed.

LORD ATKINSON—I have read through the notes of the County Court Judge in this case more than once without being able to discover any express finding that the respondent was either wholly dependent upon the earnings of her deceased husband at the time of his death, or partly dependent upon them. In the judgment of the Master of the Rolls, however, I find the following passage—"The learned County Court Judge has not found in this case that the widow was wholly dependent, but he has proceeded upon the footing of partial dependency, and has awarded somewhat less than she would have been entitled to if it had been a case of total dependency. Nothing turns upon the figures here." I assume, therefore, that the County Court Judge was of opinion that the respondent was, at the time of her husband's death, the 5th January 1910, only partly dependent upon his earnings within the meaning of the Workmen's Compensation Act 1906. The County Court Judge has omitted to state in his notes on what principle he arrived at that conclusion, but as it appears to me his finding, if sustained at all, can only be sustained on the ground that in such a case as this there is some presumption of law that a wife is dependent on the earnings of her husband, within the meaning of the statute, if he is under a legal obligation to maintain her, I assume that he has proceeded on that principle.

Isaac Keeling, the respondent's husband,