question 15 in the affirmative would mean that an inquiry under the Equitable Owners Act is not an inquiry into what was contemplated, but into a strictly legal matter, as to whether the Court proceeded according to statute or not, with the result that, if not, the peculiar result which would follow of a *quasi*-quashing of all the titles on proceedings equivalent to *certiorari*. That, I understand, closes the argument on question 15. All sides have been heard on 16 and 17, and I understand it is not open to my friends to refer to those questions again. I should like to reply, with your permission, to the questions concerning Judge Wilson, in order to close that part of the case. I still submit that if what occurred before him is clear in his recollection, that is conclusive and exclusive. Your Honours know that no case has been shown questioning the authority of Rex *v.* Grant. It was suggested by the Chief Justice that it was a rule of practice. I submit that could not be so. That was a motion in a criminal case for a new trial, and it was an undoubted fact that the counsel on both sides and the shorthand-writer agreed that a certain course had been taken, and they offered to prove it. The question is not whether the Judge's statement is paramount evidence, but whether it is exclusive. If it is a rule of practice, then the Court ought to refuse affidavits, and say, "We shall accept the Judge's statement against everybody." If the Judge is there, and his recollection is clear, then the affidavits will not be allowed to be filed. That is our answer to the peculiar form in which question 14 has been put, and our answer to my friend's argument upon it. What we say is that, if the evidence manifestly appears against the record, then we admit the record will prevail; but, if "manifestly" means manifest by other evidence, we say you cannot call that evidence, and therefore it cannot manifestly appear. If you are going to call the evidence of a Judge, you ought, as in this case, to take it first. Having got the recollection of the Judge, then nothing manifestly can appear against it, if the rule is a correct one which is laid down in Rex *v.* Grant. It appears to me, and I submit to the Court, that, curious as it seems, there should be a kind of conclusiveness in it; and, unquestionably, it is conclusive in the case of a report from a Judge appealed from, and the reason for the Court adhering to it is, we submit, better than the obvious reason that can be given against it. It is obvious, as the Chief Justice said in Hapuka *v.* Smith, that if the evidence is overwhelming against the Judge, then, unpleasant as it may be, you ought to accept it if you admit it. If a Judge says, speaking of a matter before him, that such-and-such a thing did occur, and that his recollection is clear upon it, then unpleasantness is avoided if, as laid down in Rex *v.* Grant, you treat his evidence as conclusive and do not allow it to be contravened.

Mr. Justice Denniston: And he should not be cross-examined?

Mr. Bell: I know there is the case of Lord Penzance, where he was called and sworn.

Mr. Justice Denniston: Should he have been sworn, from your point of view?

Mr. Bell: I am not quite sure. I saw the case, but I am so uncertain about the events that I could not speak to it. However, that is the position we submit. The case to which his Honour the Chief Justice referred is the case of Buccleugh *v.* The Metropolitan Board of Works, in 5 Law Reports, House of Lords, page 418, and this question is discussed at very considerable length. I do not propose to read each of the opinions, but perhaps I may read Lord Cairns's with regard to the acceptance of the evidence. Lord Blackburn's opinion is in Law Reports, 5 Exchequer, page 247; and I say that because Lord Blackburn says that, inasmuch as he gave his opinion at length in the Exchequer Court, he would not repeat it in the House of Lords. The point I make is this: that up to the point of giving evidence as to what was the subject-matter of the adjudication the Judge or the arbitrator might be a witness, but for the purpose of saying what was done before him sitting as a Judge if a dispute arises, or what he intended to do, then, if his opinion is asked and he gives it, that is conclusive. For instance, my friend reads from the judgment of Lord Mansfield, and says that the matter can be proved by a note of counsel. That is a good illustration. So it can; but it cannot be proved, nor will counsel's note be read, if the Judge's recollection is clear. It would be quite the same as if Sir Robert Stout and I differed as to what had been said by your Honour, and we were allowed to file affidavits, supposing your Honour's recollection was clear. What might happen here is that, in respect of matters which happened in 1886, a number of documents might be produced and pieced together. They are not records, and yet they might be used by a Court to countervail the clear recollection of a Judge. That is what is suggested in the case. Very well; that may happen in this Court, or in any other Court. The question is, what, having regard to the proper regulation of Courts, is and should be the principle in such matters; and we submit, in regard to the proper regulation in Courts, the practice is laid down in Rex *v.* Grant; and it must be more than a rule of practice, because that was a criminal case, and it is stated, not that the affidavits cannot be used to countervail, but that they cannot be filed at all to contravene. That is the point. With regard to the point of my friend, with regard to the County Court rule showing that it is a rule of practice, the rule of practice is not the rule authorising the Judge's note to be given, but saying that where the Judge's recollection is not clear, where there is no note, there you may read the note of counsel. That is not making it a rule of practice.

Sir R. Stout: Rule 58 deals with the Supreme Court.

Mr. Bell: The rule of practice is to permit matter being used where you have not the Judge's note, but it is not the rule of practice to contravene the Judge's note. If this Court was sitting on a rehearing from a Magistrate of a question of fact, not on an appeal on a question of law, but for a new trial, and the question arose whether at a particular time or on a particular day counsel had raised a particular objection to the reception of particular evidence, would not the Court be bound by the statement of the Magistrate in contravention to any number of documents to the contrary? I know of no case where that has not been done. Nobody supposes that counsel would say, "You have got the Magistrate's report, and we are going to file affidavits to contravene it."

The Chief Justice: I remember a case where an application was made for a mandamus to compel the Magistrate to state what the counsel had said in the case, but which did not appear in the statement of the case. I do not think we came to a decision, but I rather thought, under such