

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, J.J.A., BRITTON, J.

D. L. McCarthy, for appellants.

J. G. O'Donoghue, for plaintiff.

OSLER, J.A.:—*Leitch v. Grand Trunk R. W. Co.*, 13 P. R. 369, binds us to hold, and so far as I am concerned, for the reasons there given by me, that the conductor of a railway train may be examined as an officer of defendants within the meaning of Rule 439 (1), the language of which is the same as that of the old Con. Rule 487 and R. S. O. 1877 ch. 56, sec. 156. The question now is, whether the engine driver is also an officer who may be examined. I have considered the reasons given by me in the opinion I delivered in the case cited, and, while abiding by what I said there, do not think I said anything which obliges me to hold that the engine-driver is a person on the same plane as the conductor, or possessed of the degree of authority or charge of the train which there led me to the conclusion that the latter might be regarded as an officer. He did not in fact in the present case become conductor under the rules of the company in place of the conductor whose death has given rise to the action, as a person superior in authority to both of them was then on the train and took charge of it.

The whole question of the examination for discovery of officers of a corporation is full of difficulty, which might be solved in one direction, perhaps, by treating the word "officer" as merely a synonym for "servant," and regarding these as convertible terms. This, if not actually decided, appears to be the result of the decision in the Court below, but I am not prepared to go so far as to give the former word the wide meaning contended for. There would indeed be no practical harm in doing so, were the rules as to the use which may be made of the deposition of the person examined the same as they were when *Leitch's* case was decided, and when such deposition could not be read against the corporation, if at all, unless the latter took part in the examination. Rule 461 (2), (3), has made a material change in the practice in this respect, and the deposition of the officer, no matter what his grade or authority, may now be read against the corporation, just as those of a natural party may be read against him under the first clause of the Rule.

I do not agree that the consequences are so unimportant or free from disadvantage to the corporation as one of my learned brothers in the Court below seems to think, and while, perhaps, it is not legitimate to construe Rule 439 (1) by looking at the consequences I have referred to under