use the affidavit of a person who was a witness on the trial for the purposes of a new trial: "Bompas, Serjeant, arguing in Edgar v. Knapp, 7 Jur. 553, at p. 584; Chitty's Archbold Q. B. Prac., 12th ed., p. 1537.

And in many cases it has been laid down that, e.g., the evidence of jurymen as to what took place in the jury room would not be received: Farquhar v. Robertson, 13 P. R. 156.

It seems plain that before the change in the practice there was no absolute right to use any affidavit the applicant might desire to use—the application for a new trial is an appeal to the indulgence of the Court, and the Court has and must have full power to hear such material as the Court may think proper—and such material only.

Such, then, having been the state of the law before our Rules, have these Rules made any difference—in other words, on an application for a new trial now has the applicant the right to read any affidavit he sees fit? There is no such provision in the Act or Rules—and the right to read an affidavit must be now the same as before, and no higher. That being so, it must, I think, follow that the right to read an examination must also be given by the Court, and is not ex debito justitiæ. And if the absolute right to read such examination does not exist, I cannot think that the absolute right can exist to have such an examination taken.

But I do not think it is necessary to go beyond the wording of the Rules to decide this motion. Rule 498 provides for the case of evidence upon appeals of this kind—and I think thereby the application of Rule 491 is excluded. The Court is given "power to receive further evidence upon questions of fact;" but such evidence is to be "as directed." This, I think, means that before evidence of the kind is to be taken, a direction must be had as to the manner of taking it; and this quite irrespective of any supposed application of sub-sec. (3). Mr. McKay, however, contends that the Rule refers simply to such evidence as is intended to be used in connection with evidence already given, and not such evidence as will be of avail to secure a new trial. There is no such distinction made in the notice of motion; and it would appear that the evidence is desired for general use upon the appeal. But, even if it were so limited, I think that such evidence is still "evidence upon questions of fact," within Rule 498.