

the issue were called and examined, and after a personal interview with and examination of Michael Fraser at his home in Midland, the learned trial Judge determined and adjudged that Michael Fraser was not at the time of the said enquiry of unsound mind and incapable of managing himself or his affairs, 17 O. W. R. 383; 2 O. W. N. 241.

From this finding and adjudication an appeal was taken by Catharine McCormack, the promoter of the proceeding, with the result already stated, 19 O. W. R. 545; 24 O. L. R. 222; 2 O. W. N. 1321.

Upon the appeal from the order of the Divisional Court there arose some important and to some extent novel questions owing to the course into which the case was turned, the shape it was caused to assume and the manner in which it was finally dealt with by the Divisional Court upon the appeal to it. The Divisional Court did not dispose of the appeal upon the record as it came before it from the trial Court. While the argument was in progress it apparently of its own motion without any application on the part of the then appellant or any notice of intention on her behalf to make an application, and against objection on behalf of Fraser, directed that the evidence of further witnesses be taken before it. Under this direction eleven witnesses testified before the Court, all but one of whom had not testified before the trial Judge. The Court also appointed one of these witnesses, a medical practitioner, to make a special personal examination and enquiry into the mental condition and capacity of Michael Fraser and report his conclusions. In addition the Judges constituting the Court made a special visit to Fraser's home, and themselves questioned him, the interview lasting, it is said, about two hours.

Upon the record thus procured more than upon the original record the argument was resumed and concluded. So that as stated by Middleton, J., "Originally an appeal, the hearing was reopened, and the matter fell to be dealt with by us upon the original evidence and the new evidence, and upon this we are called to pronounce, not as upon an appeal, but as in the first instance, and if in the result we differ from the learned trial Judge we are not reviewing him, but are arriving at a different conclusion upon widely different evidence."

It is quite apparent from the opinions of the learned Judges that on finally disposing of the case the Court proceeded almost entirely upon the material which was not part