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COURT OF APPEAL.

JUNE 18TH, 1912.

RE MICHAEL FRASER.

3 O. W. N. 1420; O. L. R. .

Lunatic—Issue to Determine—Marriage of Alleged Lunatic—Over 80 Years of Age—To Woman of 30—Action to Declare Marriage Void—Inquiry as to Mental Condition.

COURT OF APPEAL reversed judgment of Divisional Court, 19 O. W. R. 545; 24 O. L. R. 222; 2 O. W. N. 1321, and ordered a new trial of the issue.

MEREDITH, J.A., *dissenting*, being of opinion that above judgment should be affirmed.

An appeal by Michael Fraser from an order of Divisional Court, 24 O. L. R. 222; 19 O. W. R. 545; 2 O. W. N. 1321, reversing an order pronounced by HON. MR. JUSTICE BRITTON, 17 O. W. R. 383; 2 O. W. N. 241, after the trial by him of an issue, the question to be determined being whether or not Michael Fraser was at the time of the enquiry of unsound mind and incapable of managing himself or his affairs.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

G. H. Watson, K.C., John King, K.C., and F. W. Grant, for the appellant Fraser.

A. McL. Macdonell, K.C., and A. E. H. Creswicke, K.C., for respondent McCormack.

HON. SIR CHARLES MOSS, C.J.O.:—After a trial extending over four days, during which eleven witnesses in support of the affirmative and ten in support of the negative of

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

of the record when the appeal was taken from the decision of the learned trial Judge.

The first, and indeed the main and most important question, is whether it was competent for the Divisional Court as an appellate tribunal to deal with the case as it has been dealt with, and whether the now appellant Michael Fraser is bound by its action in this regard.

The serious consequences to him of what has been done are very apparent, for whereas upon the case as appearing on the record when the appeal was taken he had been found and adjudged not to be of unsound mind, and incapable of managing himself or his affairs, he has now a decision to the contrary against him, based not upon appeal from that finding and adjudication, but upon a trial and enquiry conducted by a new and different tribunal.

The action of the Divisional Court is sought to be upheld first upon the ground that under the Lunacy Act, 9 Edw. VIII., ch. 37, and the Consolidated Rules with respect to appeals there was jurisdiction, and secondly that having regard to the nature of the enquiry and to the inherent as well as statutory jurisdiction of the Court over the persons and estates of lunatics or persons of unsound mind incapable of managing themselves or their affairs, it is not only within the powers of the Court, but it is its imperative duty to adopt methods of investigation and prescribe rules of procedure which in a case of ordinary litigation between subjects could not, and would not be permitted. With great deferance I am unable to subscribe to either of these propositions.

It is, of course, beyond dispute that the Court either as the inheritor or statutory delegate of the powers, jurisdiction and duty of the King as *parens patriæ*, or as the instrument of the Legislature for the care and protection of the persons and estates of lunatics or persons of unsound mind as defined by the Lunacy Act, possesses most extensive powers, jurisdiction and authority in regard to such matters.

But the exercise of these powers or the right to exercise them is based not upon the allegation of any one, not even of the Crown or of the Attorney-General as representing the Crown, that a person is a lunatic or of unsound mind, and incapable of managing himself or his affairs, but upon a finding and adjudication after due enquiry that such is the case. The enquiry into that question is to be conducted in the same manner and according to the same rules of law and procedure as any other trial where a trial is to take place.

So far as the matter is governed by statute it is quite clear that the first preliminary to the assumption by the Court of the powers, jurisdiction and authority specified in sec. 3 of the Lunacy Act, is a finding and adjudication in some form, and a declaration by the Court that the person in regard to whom application is made is a lunatic. Under sec. 6 that declaration may in some cases be made without the trial of an issue. But when under sec. 7 the Court directs an issue to try the alleged lunacy, the directions as to the mode of trial and the practice and procedure to be observed are specific. It is expressly declared that the practice and procedure as to the preparation, entry for trial and trial of the issue and all the proceedings incidental thereto shall be the same as in the case of any other issue directed by the Court or Judge (sub-sec. 6). By sub-sec. 7, the same (no higher or different) right of appeal may be exercised by any party to the issue as may be exercised by a party to an action in the High Court, and the Court hearing the appeal has the same (and no higher or different) powers as upon an appeal from a judgment entered at or after the trial.

It is plain that the statute confers upon the Court no power of dealing with an issue either at the trial or upon an appeal beyond that which it possesses in the case of an ordinary action.

Nor is there any ground for the contention that special power or authority outside the statute is vested in the Court so as to enable it to conduct the trial of an issue or an appeal from the order made otherwise than according to the rules of law, procedure and practice governing trials of ordinary actions. As has been pointed out the benevolent and paternal jurisdiction and authority over the persons and estates of lunatics or persons of unsound mind, only arises or attaches after a finding and adjudication resulting in a declaration of lunacy or unsoundness of mind. Until that result has been reached the alleged lunatic is entitled to all the rights and privileges to which any litigant may lay claim. There is no presumption to be made against him and the proof upon which the trial is to proceed is to be governed by exactly the same rules as in other cases. And he has the right to require and insist that the enquiry and the subsequent proceedings be conducted against him on no different principles. The contention that because if the finding be adverse to him the Court will be concerned in seeing to the care and protection of his person and estate, it is, therefore,

to be deemed as in some sense a party to the litigation, and may step outside of the powers to which it is restricted in ordinary cases, appears to me to be contrary to those principles of justice upon which all alike are entitled to rely.

In this case the test must be whether what has been done is justified by the law and rules of practice and procedure applicable to appeals from a judgment entered at or after the trial of an action. If so then the question would be whether upon the record as now before this Court, the finding and adjudication and the declaration of unsoundness of mind is sustainable upon the whole case. If on the other hand what has been done, or any substantial part of it, was contrary to the law and rules of practice and procedure applicable to such appeals, and, therefore, beyond the powers and jurisdiction of the Court, all such proceedings are *coram non judice* and not binding upon Fraser.

The power of appellate tribunals, to direct the reception of further evidence is, it is scarcely necessary to say, purely statutory and only exercisable to the extent conferred either expressly or by fair implication.

Here the authority of the Divisional Court is derived from Consolidated Rule 498, which has the force of a statute. By it the appellate tribunal is given "full discretionary power to receive further evidence upon questions of fact," subject, however, to the further provisions of the Rule. By sub-sec. (3) upon appeals from a judgment, order or decision given upon the merits at the trial or hearing of any cause or matter, such further evidence (save as provided by sub-sec. (2) in case of evidence as to matters which have occurred after the date of the judgment, etc), shall be admitted on special grounds only, and not without the special leave of the Court.

Obviously it was not the intention to throw the case in appeal open to the reception of further evidence, unless upon special grounds shewn for obtaining the special leave of the Court. In general the order, if made, would be for production of such evidence as, upon such an application of which the opposite party in the appeal would be notified, and have an opportunity of meeting if so advised, a proper case was made for adducing at that stage. It is not, however, to be thought that in a case where it appeared to the tribunal that by reason of some slip or oversight a piece of evidence necessary to fully elucidate a point or to complete more or less formally the proof of some instrument or fact bearing on the issues had been omitted, it might not in its discretion of its

own motion direct the production of evidence necessary for such purpose.

It would not be proper nor is it advisable to attempt to formulate rules or classify instances, for any such attempt could only tend to hamper or embarrass appellate tribunals in the exercise of their powers under the Rule.

It must be conceded, however, that in doing what was done in this case the Divisional Court has gone much beyond anything that has ever been done by any appellate tribunal in this province. This fact is not necessarily conclusive against what was done, but it is sufficiently significant to call for careful consideration.

In dealing with the reception of further evidence bearing on matters which had occurred before the judgment, order or decision upon the merits at the trial and which might have been produced at the trial, the appellate tribunals have always exercised great caution for reasons which are explained in some of the cases, and are sufficiently apparent. The manifest danger in most cases of throwing open the whole matter after it has been investigated at a trial and the opinion of the trial Judge and his reasons for it have become known, has been very generally recognized.

In no case has the direction for reception of further evidence been made to extend to what is in substance a retrial of the whole case where as appears from the opinions of the Judges the evidence adduced at the trial formed the least important factor, the appellate tribunal taking the place of the trial Judge, and as Middleton, J., says, pronouncing not as upon an appeal, but as in the first instance.

For this course I am unable to find any warrant in the law, statutory or otherwise. In my opinion the course the Divisional Court, if not satisfied upon the argument of the appeal that the case had been so fully developed as to enable a proper decision to be given should have adopted, was to direct a new trial. That would have sent the case to the proper tribunal designated alike by the Judicature Act and the Lunacy Act for the trial of the issue directed. And it does not appear to me that there exists any power or authority in an appellate tribunal to virtually assume the functions of a trial Judge and enter upon a trial at which, as Middleton, J., says, the evidence adduced was widely different from that heard by the trial Judge.

Nor do I think there is any warrant for the examination of Fraser by an appellate tribunal. That appears to be some-

thing that is to be done by the trial Judge at or before the conclusion of the trial before him. Section 7 (4) is explicit upon the subject and there is nowhere any expansion of the right or duty enabling the appellate tribunal to substitute itself for the trial Judge in the conduct of such an examination. The judgment of the Judicial Committee in the case of *Kessowji Issur* v. *Great Indian Peninsuler Rw.*, 96 L. T. R. 859, though dealing with a differently expressed statute bears upon both these questions and supports, I think, the views here expressed.

If these conclusions be correct it follows that much of the record now before this Court is not properly before it. The question then is whether this Court should deal with the case upon the record as it was when the appeal came before the Divisional Court.

After giving the case the best consideration in my power I think we should not do so but that we should do what the Divisional Court might have done under the circumstances, and direct a new trial.

I greatly regret that this result has the effect of putting aside that which was done by the Divisional Court with an evident desire to fully elicit facts and circumstances that may prove very material and important in arriving at a just conclusion upon the issue directed.

But in the view I hold with regard to the powers and authority of the Court I am unable to perceive any alternative.

I would set aside the order of the Divisional Court and direct a new trial, the costs of the former trial and of the proceedings before the Divisional Court and of this appeal to be disposed of by the Judge presiding at the new trial.

HON. MR. JUSTICE GARROW:—Appeal by Michael Fraser from an order of a Divisional Court declaring him to be a lunatic and appointing committees of his person and of his estate.

The application was heard before Sutherland, J., in Chambers, who by an order, dated the 23rd day of July, 1910, directed an issue to be tried before Britton, J., or the Judge assigned to preside at the Barrie assizes.

The issue was accordingly prepared and settled, and was set down for trial at the Barrie assizes, Britton, J., presiding, who after hearing evidence, and an examination at his home of the alleged lunatic, dismissed the application. The

applicant appealed to a Divisional Court, and upon the hearing of the appeal the Court directed further evidence to be adduced, which was done. And the members of the Court also personally examined the alleged lunatic at his home, and upon the whole material thus obtained allowed the appeal, and made the order now complained of.

The direction that further evidence should be given came apparently from the Court, and, while acquiesced in by counsel for the applicant, was opposed by counsel for Michael Fraser, who also opposed the further examination of the alleged lunatic by the Court.

Middleton, J., a member of the Divisional Court, in his judgment said, "Upon the appeal coming before us we thought that at the hearing, the real issue before the Court had not been sufficiently kept in mind, and that evidence essential to the determination of the sole question before the Court—'Is Michael Fraser of unsound mind and incapable of managing himself or his affairs'—had not been given . .

"The evidence which we thought should have been given was:—

1. That of Dr. McGill, the medical man who had attended Fraser for a long time prior to his marriage, and who had also attended the deceased brother John.

2. That of Mr. Finlayson, who for many years had been Mr. Fraser's solicitor, and who had seen him almost daily from the time of his brother's death till the marriage.

3. That of Robert Irwin, who was an intimate friend of many years, and had been a business confidant of both brothers and was along with Michael, executor of John's estate. Against these three men, charges were freely made by counsel representing Mr. Fraser and his wife, with, so far as we could see, no foundation in the evidence."

4. That of Mrs. Fraser. She would, we thought, be able to explain how Mr. Fraser's affairs had actually been managed after the marriage, and also be able to explain the circumstances surrounding the marriage itself.

5. The bankers having custody of Fraser's funds, so that we might see how they had been dealt with.

6. Some of those who were responsible for the marriage, so as to ascertain if Fraser entered into the married state with any apparent appreciation of what he was doing."

"Had the litigation been between the McCormacks and Mr. Fraser, they would have had the right to present the case as they chose, and the Court would have been bound to

deal with the matter as best it could upon the evidence adduced. But the enquiry before the Court was not a piece of litigation between adverse parties, but a solemn enquiry by the Court for the purpose of ascertaining if the old man is at the time of the enquiry capable of managing his affairs, or is "as suggested, in the feebleness of his old age, the victim of a designing woman and her family, who are attempting to deprive him of his property—her marriage being a mere incident of the larger scheme. Upon such an enquiry the Court is not shut up to the evidence which the parties chose to tender, but has the right to demand the fullest information. The suggestion that it is the duty of the Court in a case of this kind to grope blindly in the dark when light may be had for the asking, belongs to the days of long ago, and meets no response in my mind. We felt that any enquiry could be better conducted before us than upon a new trial, because much evidence had been taken and much argument had been heard, and this would be thrown away by directing a new trial, but far more important than this was the question of delay."

Upon the argument in this Court, counsel for Michael Fraser renewed the objections which had been taken to the course adopted in the Divisional Court in directing further evidence to be given, and in examining the alleged lunatic, and contended that the order of Britton, J., dismissing the application, should be restored. The first question, therefore, to be determined on this appeal is as to the procedure in the Divisional Court in respect of the further evidence, and the further examination, under the circumstances which I have stated.

It is practically conceded that what was done was a departure from the ordinary procedure, but it is justified, or attempted to be, upon the ground that the issue in question arising in a lunacy matter the Court had some special duty or special power by virtue of which it might ignore the trial which had been had before Britton, J., and try the matter *de novo*.

I have not been able to find any justification for such a contention. On the contrary it appears to me that the procedure in lunacy matters, however it may have been originally, is now definitely settled by statute; and that, in a word, an issue in lunacy must be tried and afterwards dealt with exactly as if it was the more familiar interpleader issue.

What the Divisional Court has power to do in the one case it may do in the other, neither more nor less.

This seems to be quite clear from a perusal of the statute, 9 Edw. VII., ch. 37, which was the statute in force when the application was made.

By sec. 6 the Court, which by the interpretation clause (c) means the High Court, may if satisfied that the evidence establishes the lunacy beyond reasonable doubt, make the necessary order, or if not so satisfied, may under sec. 7 direct an issue to be tried, with or without a jury, as the Court or the Judge presiding at the trial directs. Sub-sec. 4 directs that upon the trial of the issue the alleged lunatic, if within the jurisdiction of the Court, shall be produced, and shall be examined at such time and in such manner, either in open Court or privately . . . as the presiding Judge may direct . . .

By sub-sec. 6, it is declared that the practice and procedure as to preparation, entry for trial, and trial of the issue, and all the proceedings incidental thereto shall be the same as in the case of any other issue directed by the Court or a Judge.

By sub-sec. 7, a right of appeal is given such as may be exercised by a party to an action in the High Court from a judgment rendered at or after a trial, including the right of appeal, without leave, from the Divisional Court to this Court, and the Court hearing any such motion or appeal shall have the same powers as upon a motion against a verdict or an appeal from a judgment entered at or after the trial of an action.

From these very definite provisions it is, I think, abundantly clear that the jurisdiction conferred upon the Divisional Court, is appellate only, and in no way includes the powers which the statute expressly confers upon the trial Judge. It does not, and cannot, sit in such a matter merely as a Court of first instance. As an appellate Court it has by virtue of Consolidated Rule 498, upon the application of either party, upon a proper case being made for the indulgence, power to receive further evidence, a power very jealously guarded, as the numerous cases on the subject shew, and if improperly exercised, a proper subject of review on appeal to this Court. See *Trimble* v. *Horton*, 22 A. R. 51, where an order to admit further evidence was set aside.

The Court has, apparently, no power of its own motion and without the consent of both parties, to direct further

evidence to be given; see *Re Enoch*, 1910, 1 K. B. 327; and see also *Kessdrop Issur* v. *Great Indian Rw. Co.*, 96 L. T. R. 859. The parties, and not the Court, are *domini litis* in all civil proceedings. If a party comes into Court with an imperfect case, the proper penalty is dismissal. If he desires to give further evidence he can only be allowed that privilege under the rule to which I have before referred, which in my opinion is as applicable in a lunacy matter as in any other.

It was scarcely attempted upon the argument to uphold what was done as falling within the provisions of what may be called ordinary procedure. The respondents' contention, while scarcely so definitely stated perhaps, amounted to this, that the Court as representing the King, has in lunacy matters some official power by virtue of which the ordinary procedure may under certain circumstances be ignored. For such an idea I can find no warrant. In Chitty's Prerogatives of the Crown, p. 155, it is said: "The King as *parens patriæ* is in legal contemplation the guardian of his people, and in that amiable capacity is entitled, or rather it is His Majesty's duty in return for the allegiance paid him, to take care of such of his subjects as are legally unable on account of mental incapacity, whether it proceed from 1 non-age; 2 idiocy, or 3 lunacy, to take proper care of themselves and their property."

Another and equally important branch of the King's prerogative is the creation of Courts. At pp. 75, 76, Chitty further says: "It seems that in very early times our Kings in person often heard and determined causes between party and party. But by the long and uniform usage of many ages they have delegated their whole judicial powers to the Judges of their several Courts, so that at present the King cannot determine any cause or judicial proceeding, but by the mouth of his Judges, whose power is, however, only an emanation of the royal prerogative. The Courts of Justice, therefore, though they were originally instituted by royal power and can only derive their foundation from the Crown, have respectively gained a known and stated jurisdiction, and their decisions must be regulated by the certain and established rules of law."

The "known and stated jurisdiction" of the Courts in lunacy matters is in this province expressly conferred and defined by statute. And the statutory provisions to which I have before referred in detail, must govern else great confusion would arise.

I am for these reasons, with deference, of the opinion that the Divisional Court in calling further evidence and in personally examining the alleged lunatic acted in excess of its jurisdiction, and that the appellant's objections to the course pursued are well founded.

Upon the merits, not much need be said, as in my opinion the proper remedy under all the circumstances is to direct a new trial of the issue. This may be had if the parties, or either of them, desire, before a jury.

If the matter stood as it did when it left the hands of Britton, J., I would not have been inclined to disturb his conclusion.

But I cannot shut my eyes to the fact that further evidence, of more or less importance, was, although irregularly, produced before the Divisional Court which it is desirable, in the best interests of the alleged lunatic himself, should be submitted to the proper tribunal.

Nor do I feel as much impressed by a consideration of the necessary delay involved in such a course, as was Middleton, J. Delay is, of course, undesirable when it can be properly avoided; but it is also highly desirable, even at the expense of some delay, that an order practically depriving an old man, whom several respectable witnesses, and at least one learned Judge, consider sane, of his liberty and the control of his property, and inflicting upon him the stigma of being a lunatic, should only be made after due and even strict compliance with the established course of legal procedure applicable in such cases.

The costs including those of this appeal should I think be reserved to be disposed of by the Judge upon the new trial.

In any event of this appeal, paragraph 6 of the formal judgment should be so amended as to omit all reflections upon the conduct of Mrs. Fraser, who is in no way a party to this record, although doubtless the real cause of this application, for one may, I think, safely say that if there had been no marriage there would have been no application.

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE MEREDITH (*dissenting*):—This case has been presented, throughout, by the persons whose interests really are being advocated in it, from an entirely wrong standpoint; a thing which, no doubt, is natural enough, but none the less entirely wrong; these proceedings, rightly, can-

not be seized upon to bolster up the rights, or claims, present or future, of such persons, to the property of the "supposed lunatic;" and must not be permitted to be made use of for any such ulterior purpose, much less to influence the conscience of the Court in dealing with the real question involved.

The real question involved is whether the supposed lunatic is a person of unsound mind and incapable of managing himself or his affairs; and that question is not to be solved in the interest, or for the benefit, of his wife or his heirs at law, but solely in his own, and in the public interests; and the firmer we close our eyes against the purposes and interests of those who are taking advantage of these proceedings to advance their own selfish ends, in the possession or distribution of the supposed lunatic's property, after his death, the more likely is right to be done.

The case is not one, or at all like, one, nor is it to be treated as one, of ordinary litigation between adverse litigants able to assert, and to take care of, their own interests. The jurisdiction involved in such a case is entirely different from that which is involved in this case. Under the statute law of this province "all the powers, jurisdiction, and authority of His Majesty over and in relation to the persons and estate of lunatics" is conferred upon the High Court of Justice for Ontario; and the word "lunatic" includes persons "of unsound mind:" 9 Edw. VII., ch. 37, sec. 3, and sec. 2 (e); and the power of His Majesty was based upon his position as *parens patriæ;* so that that jurisdiction which alone should be exercised in this case is of an essentially paternal character.

Under the statute to which I have referred, the High Court might exercise its jurisdiction without any trial in the ordinary sense; but it has power also, in case of reasonable doubt, to direct an issue to try the question, whether the alleged lunatic is a person of unsound mind and unable to manage his person or affairs, with or without a jury; the difference between the methods of determining the question being—apart from jury or no jury—a trial upon affidavits and a trial upon *viva voce* testimony; the jurisdiction being in each case, and under all circumstances, that of the High Court standing in the place of His Majesty as the act expressly provides.

In this case an issue was directed to be tried, not because of the right of anyone to such a trial, but solely for the

better satisfaction of the conscience of the Court upon the question of the alleged lunatic's soundness of mind and capacity for managing himself or his affairs; every act and every proceeding being taken, as I have said, solely in his, and the public's interests; considerations which alone should guide this Court, which, though not the High Court, has, under the enactment, appellate powers conferred upon it: sec. 7 (7).

The issue was, as the act requires, whether, at the time of the inquiry, the supposed lunatic was of unsound mind and incapable of managing himself or his affairs; and it was tried without a jury, and found in the negative by the trial Judge. Upon an appeal to a Divisional Court of the High Court, much additional, very material, evidence was taken, *viva voce,* before that Court, and the finding of the trial Judge was, thereupon, reversed; and an order was thereupon made declaring that the supposed lunatic was, at the time of the trial of the issue, and of the hearing of the appeal, of unsound mind and incapable of managing himself or his affairs; and consequent directions, not appealed against, were given: and the question now is, whether that judgment is wrong; the onus of establishing which is, of course, upon the appellant, who is nominally the alleged lunatic, but really his wife.

The inquiry, in both instances, involved the finding of two facts to support an order such as that now appealed against: (1) that, the alleged lunatic was incapable of managing himself or his affairs; and (2) that such incapacity was caused by unsoundness of mind.

Upon the first question I am unable to understand how the Divisional Court could have come to any other conclusion than that which they, unanimously, and without any sort of doubt, reached; indeed I would be inclined to doubt my own, or anyone else's soundness of mind, if capable, upon the main undisputable facts of the case, of conscientiously saying that this poor old man, fast sinking into his dotage, is capable of managing his affairs—which are in no sense trifling affairs—or himself, either of which would be enough to support the order in question if, as I have said, his incapacity be caused by unsoundness of mind.

To say that a man who to-day, without any known consideration for it, gives to a woman an order in writing for a discharge of a $2,500, and to-morrow repudiates it; and who to-day gives away the whole of his property, upon which he

can lay his hands, amounting to about $40,000, and to-morrow has forgotten all about it, denying it in vehement language; and who would undoubtedly have given away, in like manner, the rest of the property—amounting to another $40,000 or so—which is coming to him from his brother's estate, if it had come to his hand; and who could be treated as if a mere child, as this man was for some time before and at the marriage, first on one side giving written orders to turn the woman who was seeking to marry him—for his money—and her father off his property; and then, when they, with assistance, had found their way into his house and made prisoners of the persons he had commissioned to keep them off the property, being married to the woman, by her father, before he, the bridegroom, was fully dressed after being roused from his bed by the conflict; married in such a manner altogether as shocks one's sense of decency in a supposedly solemn ceremony performed by a minister of the gospel with the rights of a religious body; and then going over to the other side apparently as contented as a child with a new toy, to say that such a man is of sound mind and capable of managing his affairs, is to say something which seems to me to be wholly incredible. One has but to imagine what would have happened if any attempt had been made to treat this, when in possession of all his faculties, a stalwart Irish-Canadian, as he was treated at this marriage and for sometime before—to treat him as if he were almost an imbecile, and to so treat him in his own house, his own castle—one has but to imagine that to see and know what a mental falling off was there, to what a helpless condition he has degenerated. It is not necessary to refer to the many other evidences of his mental deterioration appearing throughout the testimony. In regard to his inability to take proper care of himself, his condition up to the time of the marriage, and the manner in which he had to be cared for shews that; and the greatest excuse for his wife's conduct, if there can be any, in getting possession of him, was his need of someone to take care of him: I can have no doubt of his need for a nurse, but not at the cost of his fortune, when better qualified medical persons are available at reasonable wages: his need was of one who would take care of him, and of his property for him, not take care of him in order to swindle him out of it.

Then is his present condition, as to inability to manage himself or his affairs, the result of unsoundness of mind? What else can it be? Nothing else has been suggested, nor

could anything else reasonably be suggested. The man is upwards of 80 years of age, and if the saying that "a man is as old as his arteries," be true, his age is considerably greater; his arteries are so degenerated that his own physician at the present time, declared upon oath that it would be very dangerous to his life for him to give evidence at the trial of the issue; and, consequently, he was relieved from his duty to attend and be examined there: the same physician also testified to his having had a slight hemorrhage of the brain—stroke of paralysis—in June, 1910, when he was attending him as the "family physician:" the family history regarding mental disease, even when read in the most favourable light, is very bad; and his conduct towards one of the witnesses, as well as his conversation with another of the witnesses in regard to marrying a daughter of the witness, and the other things of the same character detailed in the evidence, as well as his marriage, to which I have referred, all seem to be in accord with mental derangements and of degeneration of that character not uncommon in old age. Among the typical symptoms in psychosis of old age Dr. Berkeley mentions that "Plans of marriage are formulated and declaimed upon;" quite in accord with this case.

In these, and in the other circumstances of the case, what could be looked for but mental derangement as the cause of the man's mental condition? But mental disease is not necessary to support the order appealed against: the supposition that it seems to me to account for some of the medical testimony which otherwise it might be difficult to account for: the mind ought not to work after this fashion; if I cannot clearly find some lesion of the brain or some known mental disease or abnormal condition, I am justified in testifying against unsoundness of mind; but rather after this fashion; finding undoubted incapacity, how can it be accounted for except as unsoundness of mind? For I cannot doubt that there may be that which is in law unsoundness of mind arising from a mere natural decay. The use of the word lunatic is, by reason of its more generally accepted meaning, apt to be misleading: see *In re Lord Townsend* (1908), 1 Ch. 205. This ought to be known to the medical profession, for I find it very plainly expressed in such standard works as Dr. Maudsley's: one may be capable of making a will and yet, by reason of loss of memory through old age, quite incapable of managing his own affairs or person.

So that I cannot think that anyone can, having in mind the evidence adduced before the Divisional Court, conscientiously and reasonably assert that the supposed lunatic is capable of managing himself or his affairs. No one yet, as witness or Judge, said so; and if either had, the facts would shew the inaccuracy of it. It was argued that it was not necessary that the man should be physically capable of managing his affairs or even himself, that it was enough if he could employ others to do that for him; a contention that no one will dispute if it means that it is enough if he can manage his servant and agents, those who manage for him; but the contrary of that ability is proved in the way he has permitted his wife to despoil him of his whole available property, and in his belief that it is all yet his own, in his own name and under his sole control, and that, if not, he has been robbed of it; and in his want of understanding as to his means and where deposited or by whom held. In order that there may be no misunderstanding as to his pitiable state of mind in regard to these things I take up the time necessary to read some extracts from his statement to the Judges:—

"Q. Who owns the farm now? A. I own it.

Q. In your own right? A. In my own right.

Q. You have not parted with it to anybody? A. No, I never would part with it.

Q. You have not given it away to anybody? A. No.

Q. I was told you had given that property away? A. Well, whoever told you, told you an untruth.

Q. I was told you made a deed of it to your wife? A. Well, I may have given it to the wife for all I know, but I have no recollection of it.

Q. Somebody said you gave her this house. Is that true? Have you any recollection of that? A. I might just have hinted it to her, but she hasn't got it yet, I don't think. I don't think she would have it that way, anyway.

Q. You have no recollection of having deeded to your wife the house we are now speaking in? A. No, I may have hinted to her, you know, that when I drop out of the world that all that I own would be hers. There is the only way. Whoever has told you that has exaggerated.

Q. But you have never actually signed any deed? A. No.

Q. To her? A. No, not yet. I have signed nothing to her yet.

Q. Nor any deed of the farm? A. But I gave her an understanding to this effect, that I would leave all I have, or the greater part of it, to her anyway after I drop off.

Q. But as far as actually deeding it is concerned you have not yet done so? A. Not done it to anybody at all.

Q. Neither the house nor the farm? A. Nothing whatever.

* * * * * *

Q. Indeed! Coming to your own money that was in the bank at the time you got married, whether it was your own or money belonging to John, where is the money now? A. I never would mention another party's money, for fear they would think that I would lay claim to it. John's and mine were separate while he was living, and I believe I had $10,000 or $12,000 of my own in the bank.

Q. In different banks? A. Yes.

Q. In Midland? A. Yes, some in each of the three banks.

Q. And is that still there? A. I think so. Why shouldn't it be?

Q. You have not parted with it? A. No.

Q. Who owns it now? A. Of course, it is mine now.

Q. You have not given that away to anybody? A. No, not at all.

Q. It was said that you had given it to your wife, is that true? A. No (laughs). Who could say that at all? She hasn't got a dollar from me yet, the poor creature, but I told her, I had made hints to her you know, that in case I drop off it would be all hers. That is all. Probably that is how that has come out."

Middleton, J.: "It is curious how these stories get around, is it not? A. Yes. I never have given the poor little woman—I offered her $20 on a couple of occasions, and she declined taking it."

Mulock, C.J.: "Was it you sold the property to Midland and got debentures for it? A. I think it must have been my brother Samuel.

Q. Well, you did have some debentures of the town of Midland, did you not? A. I have no knowledge of it.

Q. The town of Midland bought some property, and we are told that the town of Midland, or is it a city, issued debentures, or bonds, do you know what bonds are? A. I never signed a paper for any municipality in the world or party either.

Q. Do you remember owning at any time, either in your own right or through any of your brothers, any bonds or debentures of the town of Midland that you are living in? A. I believe my brother Samuel did.

Q. But you did not? A. No, never. I never dealt with the corporation in my life, never.

Q. We have been told that when you got married, Mr. Finlayson, a lawyer here, was acting for you as your lawyer, was that right? A. I don't know, I heard them saying he has some claim on me.

Q. No, it is not any claim, but that there was a debenture falling due at that time, a debenture issued by the town of Midland; it was one of a number, and that you at one time owned a considerable number of those debentures going up in value to about $13,500."

Teetzel, J.: "Ten debentures at $1,300 each? A. It is likely it was my brother John, but I never had any dealings with a corporation in my life, only to pay my taxes. Likely it was my brother John."

Mulock, C.J.: "Is it your recollection then that you never had any debentures of the town of Midland? A. It is. I never had any claim against the corporation.

Q. A claim either of your own or debentures that might have come to you through any of your brothers? A. They might have come to me through my brother John.

Q. Did you ever hear of any coming to you through your brother John? A. No.

Q. Do you remember ever giving any order to have these given to your wife? A. Eh?

Q. Did you ever authorise anyone to give these debentures over to your wife? A. No, never.

Q. Or to Mr. Grant? A. No.

Q. Do you know Mr. Grant, a lawyer here? A. I have seen him, that's all I know about him.

Q. Is he acting for you? A. I really cannot say.

Q. Who is your lawyer? A. I have none whatever.

Q. You have heard of this trouble that is on in the Courts, have you not? A. There is a—I have heard something of it.

Q. What do you understand is going on just now? A. What is going on? If there is anything going on, they are doing their endeavour to pluck me. That is the whole short and long of it. I don't know a pin's worth about them, or care

a damn about them. I paid my way and always did from childhood up.

Q. Have you any lawyers acting for you now in any cases? A. I believe that firm named Grant & King are acting for us.

Q. For us? A. For myself and my wife.

Q. In what matters? A. Oh, for some—lest some party should try to pluck us, I suppose, to prevent that. My gracious, I never knew the like, a fellow that never meddled with a soul in the whole world.

Q. That is the way of the world? A. Well, it is, sir, yes.

Q. When a man gets as much experience as you have got, you don't expect much from the world? A. No, I don't.

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Q. Do you recollect once, when the Rev. Mr. Robertson came here with your present wife, and you wanted them to leave the premises and keep away from the premises? A. No, never. I never gave orders to anybody to leave the place or keep away from it. My John might for all I know, but he, poor fellow, I believe, has gone over the mountain."

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Mulock, C.J.: "Here is a signature of yours to a piece of paper, and I want to see if this is your signature. I will read it to you, shall I? A. Do, please.

Q. It is dated, 'Midland, September 28th, 1909.' That will be two years from next September? A. Two years, yes.

Q. A year ago last September. This is directed to Mr. Robert Irwin. That is the co-executor, is it? A. Yes.

Q. It is worded as follows: 'You will please take such steps by the employment of constables, or otherwise, as may be necessary to protect my house and grounds from trespass by one Robertson, or others.' Whose signature is that to that? A. It isn't mine, anyway.

Q. It is not yours? A. No. I never signed my name if I can't do it better than that.

Q. That is not your signature? A. No.

Q. Did you ever give orders to Mr. Irwin to employ constables or other people to protect your house and property against trespass by Robertson? A. Who is Robertson?

Q. What was your wife's name? A. Robertson. No, never in my life. I never gave an order to any person in all my life. My brother John may have done it for all I know, and he is out of the world now, but I never did.

Q. But this paper is signed 'Michael Fraser?' A. Is it? Well, it isn't mine.

Q. You never gave an order to anybody to keep them off the premises? A. No, never in the wide world. Because if they were trespassing or intruding on me I would keep them off myself pretty damn quick.

Q. A little of the old Irish would come up in you. Do you know Mrs. Weston? A. Mrs. Weston? Yes, I do pretty well. My little wife knows her far better.

Q. Where does she live? A. Right across there, that brick house across there.

Q. Did your brother have any mortgage against her, John? A. I believe he had. Really, I am not certain. You see, gentlemen, you know, we have been seven brothers of us, and we never tried to inquire into each other's affairs whatever, lest the idea should get out that we were trying to pilfer or—

Q. After John died did you ever have any business talk with Mrs. Weston about the mortgage that was held against the Weston property? A. My gracious, I never opened my lips to the woman in my life. She visits once in a while up here, my wife you know, and they have a little chat, but I don't interfere in their conversations.

Q. Do you know what the amount of the mortgage was? A. I do not. I never inquired of poor John, never inquired into his affairs whatever.

Q. You never knew what it was? A. No. I don't know the amount anyway.

Q. Were you not one of his executors? A. I believe I am. But it is lately, isn't it? That Irwin up there is one, I believe, and I another.

Q. Did you never make inquiry after John's death how much was owing on that Weston mortgage? A. No, I did not. I never inquired a whimper about anything belonging to him, about any of his affairs.

Q. Some witnesses in the Court told us that there was about $2,500 owing on that Weston mortgage? A. That they owed that to John Fraser, is it?

Q. Yes? A. I know nothing about that, gentlemen.

Q. Do you know that you are entitled to your brother John's property? A. Of course, I am what is called the heir at law, I know.

Q. Under your brother's will? A. And my brother who lived over there, Samuel.

Q. Is Samuel living yet? A. I really cannot tell you.

Q. Where was Samuel living when you last saw him? A. Oh. living on that lot over there.

Q. Near your homestead lot? A. No, more up that way.

Q. How far from here? A. It would be about a mile from here.

Q. In the township of Tay? A. Yes. It would not be a mile. A little better than half a mile.

Q. You are not sure about his living there yet? A. I am not certain whether he is living or dead now.

Q. When did you last see Samuel? A. The last time I saw him I guess would be six or eight months."

Middleton, J.: "Samuel was the one that was the reeve? A. Yes, that is the one that used to be reeve of the township, and he was a J. P. too."

Mulock, C.J.: "They are all dead but you now? A. I believe so. That is what I have been told, you know. You know, gentlemen, I have been sick myself, and I am not able to move around, and the most of my intelligence has come through acquaintance with other parties, inquiring of them.

Q. Coming back then to Mrs. Weston's mortgage, do you remember telling Mrs. Weston that you were going to forgive her that mortgage? A. No. Forgive? No.

Q. You never did? A. Never in the wide world. Never in the wide world. I never darkened the woman's door, never darkened her door, and how could she expect favours of me that never received the toss of a straw from one of them?

Q. It is said she came here to your house one day just after John's death? A. She is here a couple of times a week.

Q. And that she got from you a paper to Mr. Finlayson to make out a release of her mortgage and that you gave it to her? A. I heard something of it. I heard it whispered, but I never did.

Q. You never did? A. Never.

Q. Is it your intention to collect what is owing on that mortgage ? A. I don't know yet.

Q. You don't know what you will do? A. No, I hardly know.

Q. Let me tell you what this piece of paper says. Can you read that signature there? A. I see Mrs. Weston's name in it and Michael Fraser's name in it. That is all I can read of it.

Q. Who wrote "Michael Fraser" there? Can you read it at all? A. I could not without my glasses.

Q. Well, I will read it to you. 'William Finlayson, Esq.' Who is he? A. A lawyer. I have heard of him, but I have no acquaintance with him. I never saw him to my knowledge.

Q. You never saw him? A. I think not.

Q. I mean Mr. Finlayson, a lawyer in Midland? A. Yes, Finlayson, I have heard of the name, that there is such a person, a lawyer, but I never had the pleasure of his acquaintance or seeing him.

Q. You never saw him at the house here? A. No, never.

Q. He told us in Toronto that he was in the habit of coming to your house. A. (Laughs) I never saw the gentleman at all. I know his name well enough. I have heard the name mentioned often enough."

Middleton, J.: "Did you give him any cheques? A. Sir?

Q. Did you give him any money? A. Not to my knowledge, I never gave him a dollar."

Mulock, C.J.: "I want to read this paper to you and see what you say about it? A. If you please.

Q. 'William Finlayson, Esq. September 8th, 1909. I wish you to make out a release of the Weston mortgage.' Signed, 'Michael Fraser.' A. I never signed a paper for her. A damn old ——— old stink.

Q. You never signed that? A. No.

Q. We were told that that was in your handwriting? A. It is not my writing.

Q. That the body of that is in your writing? A. No, no, it is not my writing.

Q. None of it is your writing? A. No."

(The document referred to is Exhibit 12).

"Q. At all events did you ever intend to give up your mortgage against Mrs. Weston? A. No, never. I had nothing to do with it. The mortgage belonged to my brother John. It was he that took the mortgage. The woman comes to our place once or twice a week.

Q. See if you cannot remember having met Mr. Finlayson some time. I want to try and refresh your memory, if I can. I have now in my hand a cheque on the Bank of British North America, and there is a signature at the bottom of it, 'Michael Fraser.' Tell me, is that your signature? A. Ah, it is not. I never signed anything for anybody.

Damn impostors, they ought to be sent to hell, the buggers, for all I know about the damn crew.

Q. Let me tell you what this cheque says. You had better know what they have got your signature to? A. I suppose it is trying to cheat me out of some money.

Q. I don't know what it is for, you can explain it perhaps? A. I cannot. I know nothing about it. I have no dealings with any of the people around here at all. Didn't want to know them.

Q. This cheque is dated September 28th, 1909? A. I have no knowledge of it.

Q. That is a short time after your brother John died. He died in August, 1909, didn't he? This is the way it reads: 'Pay to W. Finlayson, or order, $1,000, a gift to Miss Catherine McCormack.' From Michael Fraser? A. He is an impostor. God damn the damn son of a bitch—that there should be such damn scoundrels in the world."

Middleton, J.: "What we are here for is to see whether any of these people are putting up any frauds upon you? A. I hardly know that mother McCormack at all."

Mulock, C.J.: "Miss McCormack? A. Miss, I know, but I call her mother. She is old enough to be a mother.

Q. At all events here is a cheque which is a gift from you to her of $1,000. Did you ever give her $1,000? A. No, not a red cent did I give her.

Q. Well, there is a cheque for $1,000 of your money gone to her? A. Well who will give it to her? Will the bank give it to her? The bank will have to be at the loss of it. For I won't."

Middleton, J.: "The bank gave it to her? A. Did they?"

Mulock, C.J.: "Yes, the cheque was cashed and the money drawn? A. Well, my gracious, did anyone ever see such a damn infernal country as this?

Q. Then here is another cheque of the same date and signed, 'Michael Fraser?' A. Michael Fraser never signed anything for anybody.

Q. Wait until you hear this one? A. He signed a cheque for himself, his own cheques; that is all the cheques he ever signed.

Q. This is another cheque on the Bank of British North America, and it is, 'Pay to W. Finlayson $3,000, a gift to R. McCormack.' Did you ever give R. McCormack $3,000? A. That is a fellow named Richard? No. never, I would kick the fellow's backside first, damn it, I am sorry I didn't

do it when I had him here. Since I came up into this house, I was out in the field there, and he was tossing things around like the mischief and swearing like a trooper. I came up and I laid hold of him, and, 'Come sir,' says I, 'Out of this!' I am sorry I didn't kick the guts out of the bugger.

Q. Sit down. Do you know that this $3,000 is gone? A. It is gone? And who has paid it? I didn't pay it. I gave no order to pay it.

Q. The bank has paid it? A. Well, let the bank lose it. I am not going to lose it."

Middleton, J.: "It is about time someone should get after the bank, is it not, to make them put the money back?"

Mulock, C.J.: "The money must be put back? A. That is so. I never gave an order to anybody for money in all my days.

Q. Do you know Dr. McGill? A. No, I don't know him. No, I believe my brother had him a couple of times, attending him. I don't know him.

Q. Did he ever attend you as a doctor? A. Not to my knowledge. Once I believe I went to his office. That is all I know about him.

Q. He says you signed a cheque to him for $1,000? A. He is an infernal liar, and I will tell him to his teeth, the bugger; an infernal god damn liar. Damn it, is this Canada getting—

Q. Well, he has not got his money? A. Is this Canada getting to be such a devil of a country as this?

Q. He has not got the money yet? A. Well, I never signed anything for him. I am sorry, gentleman, to create such a disturbance in your ears."

Middleton, J.: "If they are robbing you, you ought to create some disturbance."

Mulock, C.J.: "If people are plundering you, you have a right to be indignant? A. Of course I have, sir, that is so. I never signed anything for anybody. I pay my lawful debts as soon as they are asked of me.

Q. Here is another cheque to H. R. McGill for $125 on the Bank of Hamilton. Did you ever give him that cheque? A. No, never. No, never.

Q. Here is a cheque to Margaret Fraser for $2,998.41? A. Margaret Fraser? Who is she?

Q. That is for you to say? A. Margaret Fraser? I believe I am married—but I don't know whether that is her name or not.

Q. Supposing you are married, and supposing that is the name of your wife, do you remember ever giving her a cheque for $2,998.41, or thereabouts? A. No, never gave a cheque to a female, whether the wife's sister or mother, in all my days. No, never.

Q. Look at that cheque and tell me if you know whose signature that is? A. I want my glasses, please. I nearly drew the last amount in the Bank of Hamilton when I lived outside, before I came in here.

Q. What do you mean by before you came in here? A. To live in this place. Of course, we lived outside.

(His spectacles having been handed to Mr. Fraser).

You want to know whether that is my signature or not?

Q. Yes? A. No, that is not mine. That is a fraud.

Q. You say before you came from the country to live in Midland you drew out all your money, out of the Bank of Hamilton, did you? A. The greater part of it. I believe I only left about $800 in it.

Q. And what became of that? A. I suppose it is remaining in it yet, if the bank is anyways solvent.

Q. Oh, the bank is all right, it is a good bank? A. I believe so, yes, and I left it there.

Q. This cheque for $2,998.41 that the banks say you signed, you say you did not sign? A. No, I never signed it, no never.

Q. Do you remember ever agreeing to give Margaret Fraser that amount? A. Eh?

Q. Do you remember telling Margaret Fraser that she could have that money? A. No.

Q. Or that she could draw it out? A. Who is that, Margaret Fraser?

Q. You say you have married a woman named Margaret? A. I am married, too, I really believe that is her name, Margaret, but I never made a promise for anybody.

Q. Then you did not give her that? A. No, I told my wife that if I dropped out of the world that she would be the principal possessor of all I owned, yes.

Q. Well, do you know whose signature that is? There is another cheque on another bank, the Bank of British North America. I will read it to you if you like? A. This is more like my writing than any other part of it, but it is not mine.

Q. It is not yours? A. No.

Q. What I am shewing to you now, Mr. Fraser, is another cheque dated the 14th February, 1910, for another sum of money, namely, $2,536.45? A. Who is that to?

Q. Well, that cheque purports to be signed by you and payable to yourself, and your name is on the back of it, and it is said that you signed that cheque and put your name on the back of it, and gave it to your wife to draw the money for herself. Is that true? A. I don't think it. I have no knowledge of it.

Q. No knowledge of it? A. No knowledge of it whatever.

Q. Where ought your money to be that was in the Bank of British North America when you got married, where ought it to be now? A. I suppose they have some of it in each of the banks.

Q. In whose name? A. In my own name.

Q. You have not given away that money? A. No.

Q. Any of this money? A. No, none whatever.

Q. I have some other little things I want to ask you about? A. I never thought there was such damn cheats in this Ontario.

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Q. Do you know what property you own behind John's property, these two lots in Midland? A. Yes, I think I do. I can't give it just on the moment.

Q. Have you ever sold any of the land that you owned in Midland since John died ? A. No, not a perch since John died. I have not sold a perch of land since John Fraser died.

Q. Did you sell Dr. McGill any land before John died? A. No, I don't know anything about McGill at all. Never saw him that I know of.

Q. Dr. McGill says he got a deed from you of a piece of land at a price of $500, and that he did not pay the money, but the $500 went on account of moneys owing to him by John and by you? A. Oh, gracious, he is a damned impostor, and I will tell him to his teeth and probably kick him, too, or he kick me, one or the other. By heavens, I won't be bullied in this style.

Q. Supposing he produces a deed signed by you for that piece of land for $500 consideration, what do you say to that deed? A. I say it is a cheat, it is a forgery.

Q. Supposing Finlayson says he came here to your house and drew that deed by your instructions, what do you say to

that? A. I will tell him he is lying. I will tell him he is a liar, damn him to his teeth, and he may knock me down if he is able, the bugger. Do the damn whelps think men are mice that they can impose on them this way?

Q. Did you ever have any business dealings with Dr. McGill A. I don't know the gentleman. I believe my brother John went to him to consult him a couple of times.

Q. Who is your doctor now? A. Raikes is our principal doctor, I wouldn't give him for all the doctors and lawyers in Midland.

Q. There were some papers of yours in Mr. Finlayson's office once, were there not? A. I don't know that I ever placed any papers there. I never had anything to do with Finlayson. My brother Samuel might, and John might for all I know. And the name Fraser might be to them.

Q. Here is a paper signed Michael Fraser. I will read it to you, shall I? A. Do, please. Let me look at it first.

Q. Do you think that is your signature? A. No, the writing is not mine. It does not belong to me at all. I have a horror of scribbling on paper or sending documents to anybody.

Q. Shall I read it to you? A. Do, please.

Q. 'Midland, April 21st, 1910. Mr. Finlayson. Dear Sir, Kindly give my wife any of my papers that she may ask for, and oblige, Yours very truly, Michael Fraser.' What do you say to that? A. What is it dated?

Q. It is dated a year ago last April. This is May? A. Well, I had no wife a year ago last April.

Q. When did you get married, how long are you married? A. It is now, I am married on the 13th January, 1910.

Q. Well, this is dated, April, 1910? A. Well, it is a forgery.

Q. That is three months after you were married. If you were married in January, you were married in April, that is, you had a wife in April. Well, no matter. Did you ever give your wife instructions to go to Mr. Finlayson to get any of your papers? A. Never.

Q. Very well, that will do? A. Never in the world. The woman is truthful. She will deny it. She will acknowledge everything that I did for her. I never gave her an order for anything. And if she is acting that way—treacherously that way, she is a damn scoundrel. Damn it, did you ever know such a thing, the spawn of a damn Irish navvy? I

could kick the guts into them or out of them, when I have them in my power.

Q. Did you have a mortgage against a man named Smith? A. What is his Christian name?

Q. It is that Smith that used to be around your house here? A. No, I have no mortgage. My brother John might, for all I know.

Q. Did you have a mortgage against a man named Johnston? A. No."

Teetzel, J.: "Smith's name is William Smith? A. What countryman is he?

Q. The man who was about your place here a year or so ago? A. My brother John might, but I never had a mortgage against a soul in my life."

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Mulock, C.J.: "I want to find out what became of the inventory to John's estate. Mr. Finlayson made out a list of the things belonging to the estate of John, and he says he gave it to your wife. If he did, do you know what became of it? A. Probably he did. I don't know a pin's worth about it. That is the first I heard of it. I will inquire of the little wifie and know whether she did or not. Know whether she is truthful or not, and if she is not truthful I will think the less of her. I never heard that he gave it to any person in the world.

Q. Are you aware that she got a good deal of money out of your bank accounts? A. No, I am not.

Q. And got it into her own name? A. I don't know a pin's worth about it. I fancy I gave her an order for some money one time.

Q. You did? A. Yes.

Q. What was that order? A. I really don't know. My memory latterly—I am badly getting indifferent about things. I hardly care how they go.

Q. What was she to do with any money she got from you, was it for the house, the expenses? A. Partly for the house, and partly to give herself an odd new dress. Because I know the sex is fond of dress.

Q. About how much was that order for? A. I really don't know.

Q. About how much money? A. I don't know. I cannot tell you, sir.

Q. Was it for as much as $100? A. I don't think it.

Q. Was it for thousands? A. Oh, no. I would look a good while before I would give her thousands. I might give her a hundred and would not grudge it to her.

Q. Do you say you never gave her an order for as much as a thousand? A. No, not for a hundred either.

Q. At no time? A. No. I asked the little wifie here a few days ago if she would accept a little money, and she would not. Declined it. Said she had enough in her pockets.

Q. Do you know whether or not you have made a deed of this house to your wife? Who owns this house? A. It belongs to me.

Q. Not to your wife? A. No.

Q. You have never made a deed of it to her? A. I have not, but I told her I would give it to her and all the land around it, too.

Q. When were you to give it to her? A. As soon as I kicked the bucket.

Q. You mean you would give it to her by will? A. Yes, by will.

Q. But do you say you have never given it to her by deed? A. No, never.

Q. It is your property yet? A. Yes, I never gave it to anybody yet. It is my own. I have my clutches on it yet.

Q. Did you ever make any will? A. Never.

Q. You have never made a will yet? A. Never. I have a horror of them things. It is next to going to die, to kick the bucket.

Q. We have been told that when John was alive you made two wills, before John died. Did you? A. No, never.

Q. And that after John died and before you got married you made another will? A. No, never. Never made a will in my life. They are fabricators and mischief-makers that say so.

Q. We are told that since you are married you have made still another will? A. I have not made a will in all my life yet.

Q. You have not made a will at any time? A. No, never intend to. My gracious, what trouble they are taking about people."

Teetzel, J.: "Which church do you belong to, Mr. Fraser? A. The Church of England.

Q. Who is your minister? A. Up here?

Q. Yes. A. Mr. Hanna.

Q. He visits you, I suppose, does he? A. Once in a while.

Q. A pretty fine man, is he not? A. I believe he is, yes.

Q. A splendid man? A. Yes. Our minister in the old country was the Rev. Henry Stewart. He was over six feet high, and he had three children, three little girls.

Q. What minister married you? A. It was the Rev. Mr. Robertson.

Q. Any other minister with him? A. No, he did it himself."

Middleton, J.: "Who were in the house when you were married? A. I really forget who they were now. Some friends of ours—some of my brother's."

Teetzel, J.: "Which one of your brothers was present at your marriage? A. John was there.

Q. Who was your best man? A. I really don't know.

Q. Was Samuel there? A. No, I believe Samuel was not living at this time. I am not positive, you know.

Q. Any of your sisters at the wedding? A. Sisters? Never had a sister in my life. Her brains were knocked out in her eighth year on the door-step.

* * * * * *

Q. You said you were engaged only a short time before you were married, how long were you engaged before you were married? A. Probably ten or twelve days.

Q. You have no family, I suppose? A. No. We are only about 12 or 14 months married.

Q. You have hopes, then, yet? A. That is so, yes. My hopes are bright. Would you take a taste of whiskey, gentlemen?"

* * * * * *

Mulock, C.J.:—"Thank you, no, I won't. I don't know about these gentlemen? A. We have some in the house, I believe, if I could only find it.

Mulock, C.J.:—"I spoke to you a little while ago, Mr. Fraser, about a cheque on the Bank of Hamilton for $2,998.41? A. Yes.

Q. This is a cheque I am now showing you. A. And who is the author of that?

Q. Well, it pretends to be signed by you? A. I haven't had that amount in the Bank of Hamilton.

Q. Then, later on, the Bank of Hamilton statement shows another cheque drawn against your account for $3,013.70? A. And who is the author of that?

Q. The cheque is not here, but the bank claims that you drew a cheque for that amount and gave it to somebody, is that true? A. No, it is a lie. It is hell's own lie, concocted by Beelzebub.

Q. It is contended that that cheque was given to Margaret Fraser? A. Margaret Fraser, and who is she?

Q. Your wife, I expect? A. Well, what is the date of it?

Q. February 14th, 1910. A year ago last February. Did you ever give to your wife that cheque? A. No, never. I never gave her a cheque in my life. Never. 1900 and how much?

Q. 1910."

All of which is a hopeless muddle of inaccuracies upon vital questions affecting the man's capability in the management of his own affairs showing without any room for doubt, I would have thought, his utter incapability.

So also I cannot but find that such incapability was caused by unsoundness of mind.

But it is said, in effect, that if that be so the Divisional Court had no right to find it out; a contention which, in my opinion, has nothing in law, or in reason, to support it.

If the case were one of ordinary litigation, between adverse litigants confined to their strictest rights, I would have no doubt the Divisional Court acted well within its power, and indeed was in duty bound to obtain the additional light thrown upon the case by the additional evidence, adduced before it, when the case appeared to be so incomplete as it was, without it. The taking of additional evidence, even in such cases, is expressly authorised by legislation, and is not even an uncommon practice in this Court. It is the duty of the Judges to find the real truth of the matters in controversy. The power expressly conferred upon appellate courts is "full discretionary power to receive further evidence on questions of fact;" a power which of course must be exercised so as not to be made the means of doing an injustice to any party to the litigation, but only a means of elucidating the truth; but also a discretionary power which ought not to be interfered with by an appellate court. But the case is one of an entirely different character—under the Lunacy Act—in which it is the duty of the Court acting in the place of His Majesty to find out the state of the supposed lunatic's mind; and I can

have no manner of doubt that the Divisional Court rightly exercised a power which it had and wisely performed a duty in receiving the additional evidence.

Then it is said that if that be so as to the evidence the Divisional Court had no power to hold the examination of the supposed lunatic. But again, why not? The High Court of Justice acts, as I have said, in the place of the King as *parens patriæ*. Legislation requires that the supposed lunatic shall be produced and examined at the trial of the issue unless the Court otherwise directs; the supposed lunatic was seen and examined by the trial Judge; seeing and hearing him has always, in legislation as well as in practice, been deemed a thing of great importance; in some cases an appeal might be a useless proceeding unless the appellate Court could have also the advantage of seeing and hearing the supposed lunatic; if it had not exercised that power, in this case, the most weighty of the whole evidence would be wanting, the truth would not have been elucidated as it has been; it cannot be doubted, I think, that, even if the case were one between adverse litigants, standing upon their strictest rights, the Divisional Court would have had power to have compelled him to attend, and to have examined him upon oath, before it; but they chose, in his case and for his benefit, just as the trial Judge did, to see and to converse with him in his own house; and above all there was the power of His Majesty over the persons and estates of persons of unsound mind, now existing in the High Court, under which that Court might, even if the finding upon the issue stood, exercise its jurisdiction, at a later date, upon further evidence, without requiring that the proceedings be taken anew. The fact that the power of the Court may be exercised by a Judge in Chambers does not derogate from the power of the Court; nor can I think that the "revised" Lunacy Act was intended to, or does, substantially change the power or duty of the Court under the earlier enactments intended to be embodied in it, but rather to simplify the procedure in exercising such power and duty. Interesting instances of examinations of the character will be found in such cases as *In re Cumming*, 3 DeG. M. & G. 537; *In re Bridge*, Cr. & Ph. 347, and *In re Gilchrist* (1907), 1 Chy. 1. The *Indian Case*, so much relied upon by Mr. Watson, is not at all applicable; it was a case between adverse litigants, in which the Court undertook to determine the question of fact

really upon their own evidence instead of upon that adduced at the trial.

Many cases have been referred to, but, as the question is one of fact only, and no two cases can be quite alike, in their facts, they cannot have authoritative effect. and indeed some of them may be misleading if applied to this case, such, for instance, as those between adverse litigants determining questions as to the validity of wills and of contracts; for no such question arises in this matter, nor will anything done in it conclude any such question; that which is in question is whether the supposed lunatic is, by reason of unsoundness of mind so incapable of managing himself or his affairs that they or he ought to be managed by a committee appointed by the High Court under the power conferred upon it by the statute; and, as I have already intimated, I cannot understand how any reasonable and conscientious person could now say, in view of the revelations made in the proceedings in the Divisional Court, that he is not so incapable.

It may be said, and truly said, that many a person more unsound in mind, and less able to manage his or her affairs than the supposed lunatic, is permitted to depart this life without having been declared of unsound mind, and rightly so, because there was no need of any such precaution, because such lunatics were surrounded by those who were willing and able to protect them and their property, not left alone in the world subject to the wiles of those who were willing to stoop very low to conquer the man's money, and so eager for it that all that could be made available was speedily extracted from him, and in such a manner that he is now unaware of having parted with any of it, and incensed at the thought of it.

Another question of some importance also arises in this case, and one upon which it is proper to express my opinion, though as I have already intimated the order in question should be sustained without any aid from it. That question is as to the effect upon this case of the recent enactment which more broadly defines the meaning of unsoundness of mind under the Lunacy Act; it was passed on the 24th March, 1911, and provides, among other things, that "The powers and provisions of the Lunacy Act relating to management and administration shall apply to every person not declared to be a lunatic with regard to whom it is proved, to the satisfaction of the Court, that he is, through mental infirmity arising from disease, age, or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs."

The additional evidence was taken, the supposed lunatic examined and the order in appeal made, by the Divisional Court, after the passing of this enactment. The appellant's contention is that the provisions should not be applied to the case. If the strict rights of adverse litigants were in question it might be that that contention would raise an arguable point, but in which there would be at least a good deal to be said against it as the case of *Quilter* v. *Mapleson,* 9 Q. B. D. 672, shews; in that case, the enactment there in question was passed after the judgment at the trial and before the hearing of the appeal, just as in this case, and that case was one between adverse litigants relying upon their strict legal right, yet it was held that the enactment was retrospective, and though passed after the judgment appealed against, was made, the Court of Appeal had power, and ought, to give effect to it. How very much more so should that be in this case in which the enquiry made in the interests of the supposed lunatic and of public only; if, for any of the reasons set out in the enactment, he is incapable of managing himself or his person, what excuse could be given for declining to give effect to the enactment; what excuse for introducing almost barbarous technicality; for compelling the parties to march down the hill merely to march up again at such a great loss in law costs. Having regard to the character and purpose of these proceedings, and, having regard to the nature and extent of the jurisdiction of the High Court, it would in my opinion, be quite an inexcusable practice for that Court to refuse to give effect to the later enactment merely because these proceedings were begun before it was passed. If the man need protection of his property, as he unquestionably does, it assuredly ought to be given if either enactment authorises it.

An application was made for leave to file affidavits, of some of the medical gentlemen who have given their evidence at the trial in favour of the man's soundness of mind and others, to the effect that the examination made by the Judges did not afford a fair test; that, as I understand it, the answers given were given when the man was tired; that the examination was had under not sufficiently favourable circumstances, etc.; but do these gentlemen think a man's capacity is to be judged only by his words and acts when at his best; that in business matters he cannot be dealt with and advantage taken of him when not at his best? His best, and his worst, must be taken into consideration; and as to the fairness of the

examinations I can have no manner of doubt that the learned Judges who were present at it are very much better judges of that than party witnesses who were not present; and it may be pointed out that the man's incapacity was shewn at the very outset of the examination in his evidence as to the deed of the farm to his wife. Gentlemen of the medical profession are not, generally speaking, considered the most competent in business matters; nor can I think that, without the least experience with a man in business matters, they are anything like as competent, as a rule, to speak as to the man's business capacity, as the every day business man, learned or unlearned, who has had such advantages in such a case as this; and, I cannot but think, that the affidavits intrinsically prove this. Let me give an instance: taking the affidavit which comes first to my hand, in which it is said "I verily believe, from what I know of him, that he would regard further examinations by the Judges, on the occasion referred to, as a meddlesome interference with his business affairs and private rights, and this I believe would account largely for his not answering according to the fact;" that is to say, that this learned gentlemen believes that a man of sound mind and capable of managing his business affairs, knowing that the question of his capabilities in that respect were the subject of litigation and that the Judges who were to determine the question, and to declare, in the most binding manner, whether he was or was not capable of managing his affairs, and if not would take the management of them out of his hands and commit it to others, and had come from Toronto to his home for the purpose of judging for themselves of his capability, would consider their action meddlesome interference and give untrue answers to them, as if desirous of being declared incapable; the logic, the plainest common sense of the thing, is surely against such an extraordinary belief; if that is the way man would take to advance his interests in his other business affairs, to say the least of it, they could hardly be successful; indeed can anyone but say that if this medical gentleman's belief is true it is fully strong evidence of the man's incapacity. In view of such things as this, things which are not confined to this affidavit, there is at least some excuse for repeating the observations of Lord Shaftesbury upon his examination before a Royal Commission in the year 1859: "For my own part I do not hesitate to say, from a long experience, that, putting aside all its complications with bodily disorder, the mere judgment of the fact whether a

man is in a state of unsound mind and incapable of managing his own affairs and going about the world, requires no medical knowledge. My firm belief is that a layman, acquainted with the world and mankind, can give not only as good an opinion but a better opinion than all the medical men put together." In this case, as is usual, the medical men are not altogether, but are fully equally divided in opinion, against one another.

I well remember a case in which the question was whether the father of a child had sufficient mental power to be entrusted with her care. A member of the medical profession whose probity, ability and sportsmanship were known and admired throughout Western Ontario had made an affidavit of the man's fitness; the man also had made an affidavit; and he was subpœnaed for cross-examination and the medical gentleman was also subpœnaed and attended. The examination went on smoothly for some time, but after that signs of weakness began to creep in and soon it became apparent that the man's mental control was greatly impaired; without waiting to be asked a question, without any sort of attempt to bolster up his former opinion, the gentleman rose and asked leave to withdraw his affidavit, saying he was convinced that he had made a mistake, and desired to say, if it would be of any use to the Court, that he now thought the man incapable though there was no more to shew it than there is in the examination of the supposed lunatic in this case. All professional men are not partisans in giving evidence.

I would allow the affidavits to be filed for what they are worth, and would dismiss the appeal.

DIVISIONAL COURT.

JUNE 25TH, 1912.

RE ADAH MAY HUTCHINSON (AN INFANT).

3 O. W. N. ; O. L. R. .

Infant—Custody—Adoption—Rights of Parent against Grandparent —Welfare of Child—Agreement under Seal—1 Geo. V. c. 35, s. 3 —Habeas Corpus.

By an agreement the father granted and assigned all his rights to the possession, custody, control and care of his infant daughter, to her maternal grandparents. Father sought to regain possession of his child and on return of writ of *habeas corpus* Boyd, C., *held*, 21 O. W. R. 670, 3 O. W. N. 933, that the evidence disclosed that the child could not be better placed than to be left with her grandparents, as they were well-to-do, living in a roomy house with a large lot, in which the child could play. That the character of the grandparents was beyond reproach and stood well in the opinion of the townsfolk. That the interests of the child would be better subserved by letting her custody remain in *statu quo*, the father having all reasonable access to his child when he so desired.—*Ex p. Templer*, 2 S. & C. 169, followed.—*Re Davis*, 13 O. W. R. 939; 18 O. L. R. 384, criticized.

DIVISIONAL COURT reversed above judgment, holding that parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and if they elect so to do, can at any moment resume their control over them.

Re Davis, 18 O. L. R. 384, approved.

An appeal by the father from a judgment of HON. SIR JOHN BOYD, C., 21 O. W. R. 670; 3 O. W. N. 933.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

W. N. Tilley, for the father.

V. A. Sinclair, for the grandparents.

HON. MR. JUSTICE RIDDELL:—William H. Hutchinson some years ago married Mary Pearl Burvill the seventeen year old daughter of Robert Burvill and his wife Adah J. Burvill. The young couple lived most of the time with the father of the wife; their only child Adah May Hutchinson, was born in that home August, 1909, and the grandparents without opposition on the part of the father, at least, took charge of the infant to a great extent. The young mother got sick, and in December, 1911, was lying dangerously ill, at the point of death indeed. The grandparents were and are exceedingly fond of the child; and in order to have posses-

sion of her, Burvill had a document drawn up by his present solicitor. He says he told Hutchinson "it was to make the said infant . . . our child and heir if anything should happen to her mother, and that she would get our property and if nothing did happen to his wife the paper would be no good," "told him that it was to make her our child and heir so that he knew perfectly its purport:" Affidavit, February 26th, sec. 7. Mrs. Burvill swears that what her husband said to H., "was that the . . . agreement was in the interest of the said Adah May Hutchinson and would make her our child and full heir:" Affidavit, February 24th, sec. 12. The witness to the document Ada Moore says that Mrs. Burvill told her "that it was to make the child their heir:" Affidavit, February 26th, sec. 5. Hutchinson says "what he told me was that if anything happened to him as he had no children of his own, my wife's cousins and other relations would claim his property, and would take their share, and stated that the object of the paper was to prevent this—he accentuated to me that I was signing away my right to the custody of the said child:" Affidavit, March 21st, sec. 13.

On Monday 4th December, 1911, the document was signed, sealed, and delivered by H. Burvill and Mrs. Burvill. It is an indenture between H. of the first part and Burvill and his wife of the second part. After reciting that H. was the father of the child Adah May Hutchinson, born 16th August, 1909, that she had largely resided with her grandparents, that "Mary Pearl Hutchinson is now seriously ill and may not recover, and it has been agreed that in the event of her death that (sic) the said grandparents shall assume the care and maintenance of the said child and take over the custody of the same, and the said father has agreed thereto," the indenture proceeds: "Now this indenture witnesseth that in consideration of the premises and the sum of one dollar paid by the parties of the second part to the said father, the said father hereby grants and assigns to the said parties of the second part, all his rights to the possession, custody, control and care of the said infant child Adah May Hutchinson and all the right and advantage to be derived from the custody and possession of the said child until she attains her majority or marries under that age. And the said father hereby appoints the said parties of the second part to be the guardians of the personal estate of the said infant Adah May Hutchinson until she shall attain the age of twenty-one years or

marries and doth hereby covenant and agree not to revoke this appointment or appoint any other person to be the guardian of said child, and the said parties of the second part hereby adopt the said child and covenant and agree with the said party of the first part that until such time as the said child attains the age of twenty-one years, or marries, they will maintain, lodge, clothe and educate the said child in the manner suitable to the position of the said parties of the second part to the same extent and in the same manner as if the said Adah May Hutchinson was their own lawful child and will at their own expense provide the said child with all necessaries and will pay and discharge all debts and liabilities which the said child may incur for necessaries and will indemnify the said party of the first part against all actions, claims and demands in respect thereof.

And the said parties of the second part further agree that the party of the first part shall have access to the said child at all reasonable times, and the father on his part covenants that he will not try to use such visits for the purpose of influencing the said child to leave the said grandparents.

And it is further covenanted and agreed that he will not nor shall any person claiming under him interfere in any way with the rights of the said parties of the second part in the control and custody of the said child."

On the evening of Tuesday the 5th December, as Hutchinson says, he asked to see the document, and when he saw the contents he at once told Burvill that he never had intended to sign such a document and asked to have the document cancelled. This is not assented to by Burvill; but all parties agree that Hutchinson and his brother Clarence H. went to Burvill within a very short time (it is sworn by Clarence on Thursday December 7th) and wanted Burvill to destroy the paper.

The affidavits are conflicting as to whether the dying woman also desired the document to be cancelled, but there is no doubt that Burvill and his wife ultimately refused and insisted on their rights thereunder: they "refused and always have refused to have this destroyed and claimed they were still in force," says Mrs. Burvill: Affidavit, February 24th, sec. 14; "refused to cancel the same," says Burvill. Affidavit, February 26th, sec. 9.

January 18th, 1912, the father tried to take the child away, but the grandparents prevented it by force. Hutchinson then issued a writ to have the document set aside—but

being advised by counsel that the document did not require to be set aside, he sued out a writ of *habeas corpus*—on the return the Chancellor refused to order the child into the custody of her father (1912), 21 O. W. R. 669, and he now appeals.

The judgment in the Court below proceeds upon two grounds of different character.

First upon the instrument—the learned Chancellor says: "I must regard this at present as a valid agreement, which is binding on the father." "The signed and sealed agreement of the 4th December, while it stands, appears to be a bar to any such application as the present; and it is valid in law under the statutory provisions in 1 Geo. V., ch. 35, sec. 2, taken from the R. S. in force when the deed was executed."

In *Fidelity* v. *Buchner* (1912), 22 O. W. R. 72, I had occasion, in deciding as to adoption, to consider the effect of this statute; and I refer to that case for most of the authorities which led me to the view that the statute has no application to such a case as the present.

I add Laws of England vol. 17, p. 123, sec. 287, where citing 12 Car. 2, ch. 24, sec. 8, and 49, 50 Vict. (Imp.), ch. 27, secs. 3, 4, it is said: "Both father and mother have power if under age by deed, and if of full age by deed or will, to appoint persons to act as guardians of an infant child in the case of a father after his death . . . Where the appointment is made by deed it is of a testamentary nature and is revocable by a subsequent will making a different appointment . . ."

In *Lord Westmeath's Case* (1819), Jacob 251 note (c), Lord Westmeath had by indenture of December 17th, 1817, (see Jacob p. 127) covenanted to permit his "daughter and such other child or children as they might have between them to be and reside with their mother (the defendant) and to be educated under her care and superintendence . . ."

One could not find any case more within the words of the Act, if the provisions of the Act were intended to be applicable, the father living—this was "to dispose of the custody and education," but Lord Eldon upon an application by way of *habeas corpus*, nevertheless ordered "Lady Rosa Nugent, aged five years, and Lord Delvin, aged seven months," to be delivered to their father, Jac. 251 note (c). Macpherson on Infants, p. 83: "Such a deed (i.e., a deed under 12 Car. 2, ch. 24, sec. 8), certainly resembles a will in some respects,

for it has no operation during life and is revocable at pleasure," cf. Schouler, sec. 287.

Holding then as I do that the statute does not apply to the present case, it is necessary to consider whether outside the statute this document has any validity to bind the father,

The law is nowhere better expressed than in the judgment of the Chancellor in *Roberts* v. *Hall* (1882), 1 O. R. 388, at p. 404: "The general rule is indisputable that any agreement by which a father relinquishes the custody of his child and renounces the rights and duties which as a parent, the law casts upon him, is illegal and contrary to public policy," p. 406. "The father could have interfered at any moment and put an end to the arrangement if he found that it was being carried out disadvantageously to the child."

In *R.* v. *Smith* (1853), 17 Jur. 24, a father had in May, 1852, entered into a written agreement reciting that his wife being dangerously ill had with his consent requested E. Smith, her brother, to take charge of, educate and bring up her infant daughter, born June, 1847, which E. Smith had agreed to do on condition that the infant should remain with him until she was grown up and able to provide for herself. The document then proceeded with an agreement on the father's part to permit the infant to reside with E. Smith till she should be grown up, etc., and that he "would not in any way interfere with the said E. Smith in the bringing up and education of his said daughter, nor remove nor seek to remove her from the care of the said E. Smith, but would at all times permit her to remain with him as his adopted child," and he agreed to pay E. Smith 14s. per month for her support and education. The mother died in July, 1853. In January, 1853, a writ of *habeas corpus* having been taken out by the father, Ex. 6, Erle, J., apparently with sum reluctance held "The father is at liberty to revoke his consent, and is, therefore, entitled to the custody of the child," S. C. 22 L. J. N. S. Q. B. 117, 16 Eng. L. & Eq. 221.

I adhere to the decision in *Re Davis* (1909), 18 O. L. R. 384, "Parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and if they elect to do so, can at any moment resume their control over them."

Humphrys v. *Polak*, [1901] 2 K. B. 385, is also in point. "What," says Stirling, L.J., at p. 390, "is the bargain in this case . . .? It is in substance that the child is to remain in the possession of the defendants, for the purpose of

enabling the defendants to treat the child as their own and relieve the mother of all responsibility in connection with the bringing up of the child; in other words, the defendants were to undertake the duties which the law imposes on the mother and to have the rights which the law gives her in relation to the child. In my opinion, the law does not permit such a transfer of the mother's rights and liabilities." See also *Lord St. John* v. *Lady St. John*, 11 Ves. 531; *Hope* v. *Hope*, 1857, 8 D. M. & G. 731; *Re O'Hara*, [1900] 2 I. R. 232, at p. 241. "English law does not recognize the power of binding by abdicating either parental right or parental duty": per Fitzgibbon, L.J.

Roberts v. *Hall*, 1 O. R., has been cited as against this doctrine; but all that case actually decides is that even though one party to a contract could not be compelled to carry out his part, if he does in fact carry out his part, the other party is bound to carry out his. We need not consider whether this would be held to be law, since the case in the Supreme Court of *Chisholm* v. *Chisholm* (1908), 40 S. C. R. 115. That case seems to me to be against the respondent rather than for him. The plaintiff being left a widow with one daughter agreed with her father-in-law that he should become guardian to the child, educate her in a convent and then provide for her, the plaintiff to have an allowance of $500 per annum. The Chief Justice and Davies and Maclennan, JJ., considered that the appointment of the defendant as guardian was authorized by the Nova Scotia law, that that was a sufficient consideration—the latter two learned Judges held that there was no surrender of the natural duties of mother to child "beyond those involved in the transference to the grandfather of the legal guardianship under the N. S. Statute:" p. 122. These learned Judges held the contract to pay the $500 per annum valid. But Idington, J., held that no power existed to make the defendant guardian, and that the only consideration was the surrender of the child, and this is "either no consideration or an illegal consideration:" p. 125. Duff, J., p. 127: "the defendant's promise . . . resting upon the consideration of her undertakings respecting the education and guardianship of her child and upon that consideration alone is such a promise as under our law the Courts cannot enforce"—the learned Judge assumed that the Nova Scotia law permitted the appointment of the defendant as guardian: p. 126.

The document not being a bar, there is no need to have it set aside—it is not perhaps wholly without significance that there is no provision in it that the grandchild shall be the "heir" of her grandparents.

The document although it is not a bar to these proceedings is not wholly to be disregarded in the consideration of the second branch of the case.

Upon an application to the Court for the custody of a child it is not altogether or even primarily the parental rights of the father which the Court acting for the King as *parens patriæ* takes into consideration, but the advantage—I use the larger word—of the child. The law gives the custody and control of his children to the father not for his gratification, but on account of his duties; and if he seems to have been oblivious of these duties, the Court may well decline to deliver his children over to him. An agreement that another may have such custody and control may indicate a want of sense of such duty—or it may not—according to circumstances; but it is wholly right that the fact of such an agreement having been made should be taken into consideration.

A long acquiescence in another having such custody and control may indicate disregard of parental duty—and what is equally important may permit a child to become accustomed to an environment from which he should not be torn. Nothing of the kind appears here—even assuming that the father wholly understood the document when he signed it, there was a prompt repudiation—and there was no becoming habituated to a novel situation subsequent to and authorised by the agreement. In my opinion, then, the agreement is of small significance, if any.

There is no doubt as to the law—it is not as at the common law where "the parent had, as against other persons generally an absolute right to the custody of the child unless he or she had forfeited it by certain sorts of misconduct, per Lord Esher, M.R., in *R.* v. *Gyngall*, [1893] 2 Q. B. 232, at p. 239, but as in equity where "the Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in a manner in which a wise, affectionate and careful parent would act for the welfare of the child. The natural parent in a particular case may be affectionate and may be intending to act for the child's good, but may be unwise, and may not be doing what a wise, affectionate and careful

parent would do. The Court may say in such a case that although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate and careful parent would not do. The Court must of course be very cautious in regard to the circumstances under which they will interfere with the parental right . . . it must act judicially in the exercise of its power. In the case of *Re Flynn*, 2 DeG. & S. 457, Knight Bruce, V.-C., said: "Before this jurisdiction can be called into action . . . it (i.e., the Court) must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself to be a person of such a description or is placed in such a position as to render it not merely better for the children but essential to their safety or to their welfare in some very serious and important respect that his rights should be treated as lost or suspended—should be superseded or interfered with. If the word "essential" is too strong an expression, it is not much too strong. That is a clear statement that the Court must exercise this jurisdiction with great care and can only act when it is shewn that either the conduct of the parent or the description of person he is or the position in which he is placed, is such as to render it not merely better but—I will not say "essential" but clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded."

In the case of *Re O'Hara*, [1900] 2 I. R. 232, a woman in poor circumstances had entered into an agreement whereby one McMahon, a man of some means, adopted her daughter about nine years old—the young girl having previously been in an orphan society's home. About 18 months after she demanded her child and McMahon refused. Upon proceedings on *habeas corpus* McMahon deposed that he and his wife were both much attached to the child and that the child was very fond of them. There was no difference of religion. Kenny, J., saw the child and was satisfied that she regarded with the strongest aversion the idea of returning to her mother and decided that having regard to the mother handing over the child under the agreement and the circumstances and the then position of the child, she should not from the point of view of her own welfare be taken from the custody of McMahon. Upon an appeal being

taken by the mother, McMahon lodged an undertaking to maintain and educate the child in a proper manner until she was 21 or married with the approval of the rector and then to pay her £20 charging his property with the payment. The Court of Appeal, Lord Ashbourne, C., Fitzgibbon and Holmes, L.JJ., unanimously reversed this decision—though McMahon was "a decent honest man of his class, of blameless character:" p. 236; "a very respectable man" who had "given his evidence fairly:" p. 237. While the examination of the child by Kenny, J., was approved of it was considered "on the other hand, the parent's *prima facie* right must also be considered and the wishes of a child of tender years must not be permitted (to use the words of Lord Campbell) to subvert the whole law of the family or to prevail against the desire and authority of the parent unless the welfare of the child cannot otherwise be secured . . . misconduct or unmindfulness of parental duty or inability to provide for the welfare of the child must be shewn before the natural right can be displaced. Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities in the rank and position to which the child by birth belongs, i.e., the rank and position of the parent—the Court is, in my opinion, judicially bound to act on what is equally a law of nature and of society and to hold (in the words of Lord Esher) that the best place for a child is with its parent," pp. 240, 241. FitzGibbon, L.J., (p. 241), goes on to say: "Of course I do not speak of exceptional cases . . . where special disturbing elements exist which involve the risk or moral or maternal injury to the child such as disturbance of religious convictions or of settled affections or the endurance of hardship or destitution with a parent as contrasted with solid advantages elsewhere. The Court acting as a wise parent is not bound to sacrifice the child's welfare to the fetish of parental authority by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head or provide it with the necessaries of life."

The whole judgment of the local Judge full as it is of masculine common sense well repays perusal. Holmes, L.J., p. 253, says: "the period during which a child has been in the care of the stranger is always an important element in considering what is best for the child's welfare. If a boy has been brought up from infancy by a person who has won

his love and confidence who is training him to earn his livelihood, and separation from whom would break up all the associations of his life, no Court ought to sanction in his case a change of custody. But I have never heard of this principle being acted on where a boy or girl under the age of eleven has spent less than two years with the person who resists the parent's application. It is one of the advantages of youth that it can adapt itself to altered circumstances with a facility which disappears with advancing years. . . ." The welfare of a child in a case like the present means welfare in its widest sense. Pecuniary benefit is often a very secondary consideration. "Every wise man would say" I am quoting Lord Esher (*R.* v. *Gyngall* (1893), 2 Q. B. p. 243), "that generally speaking, the best place for a child is with its parent. . . . It cannot be merely because the parent is poor and the person who seeks to have possession of the child is rich that without regard to any other consideration to the natural rights and feelings of the parent . . . the child ought to be taken away from its parent merely because its pecuniary position will be thereby bettered."

I also refer to the admirable judgment (if I may without presumption say so) of Mr. Justice Anglin in *Re Fawlds* (1906), 12 O. L. R. p. 245, in which that learned Judge considers the cases some of which I have quoted from.

There is and can be no pretence that the applicant is other than of good character—one witness indeed says he has heard him swear many times and Mr. and Mrs. Burvill both say he swore at his wife. This is emphatically denied—but even so, I should fear for many a father if an occasional oath—however reprehensible and on that opinions might differ—were to be a reason for depriving him of his children. Some think him crusty and quick tempered, some do not—that again is a matter of degree and nothing is adduced to shew that he is below the average in morals or manners. Nothing which with the wildest stretch of the imagination could be called misconduct is even alleged.

The facts or alleged facts adduced to shew unmindfulness of parental duty are almost absurdly petty. It is said that all living together in the same house the baby slept with her grandparents, that the father objected to her sleeping with him and "when she required to be nursed or fed or attended to during the night, he never did it, but" the grandfather "looked after the said child and assisted her mother in tak-

ing care of the child while the said father slept and it was the same during the day, if the child required any attention, the said father would insist on B. and wife looking after the baby . . . "he . . . has refused to take his share of responsibility in connection with the said child and her care and has left the entire care of the said child to the mother and to B. and his wife (the grandparents), "leaving B. and his wife "to walk up and down with the said child and look after her." As the grandmother says 'he . . . would not get up during the night to look after the baby, and while she was a baby, my husband would get up and carry her into her mother's room and would then have to go back again and bring the baby back again to our room, the father refusing to be disturbed, and the said baby has always slept with my said husband and myself from a week after her birth and I never knew the father to look after the baby around the house . . ." The father says the grandparents "have always wanted to have my said . . . child . . . with them and I allowed them to do so to please them and to please my wife, who was in delicate health—that on account of my wife being in delicate health, the child slept but very little with my said wife, and the grandparents . . . always wanted to keep the child with them, and if the child happened to be with myself and wife and awoke in the middle of the night the said R. B. would invariably come and take the child away, and if I raised any objection, he was always offended, and for the purpose of keeping the peace and not annoying my wife I practically allowed the said R. B. and his wife to have almost the entire custody of the child."

Even without this explanation, one does not require to be a wizard to understand how matters went on in that house. A couple with one child, a daughter, that one wee lamb taken very young by an outsider, one and only one grandchild born in their house—what chance had the father even if he wished to do so to take any part in the rearing of that baby? Does any grandmother imagine that her son-in-law or indeed even her own daughter knows anything about bringing up a child? Is the man who snatched from them their only child also to get possession of their only grandchild? And even if he did not wish his sleep to be broken by a crying infant, it is understood that this is not without precedent in the tenderest and most conscientious of fathers.

Then it is said that he refused to wheel the child in a baby cart saying he was no dray horse and the like. He explains that this was only on one occasion when he intended to drive his wife and child in a buggy. But suppose he did refuse—hundreds of fathers have done the like without being considered unnatural.

It is quite plain that the grandparents are passionately fond of the child, as the grandmother swears "we always claimed the said baby and claimed her to be ours because we had brought her up and looked after her," as another affidavit has it "the . . . grandparents . . . appeared to be so far as their actions shewed, the parents of the said infant . . . :" they are jealous of the father as they would be of anyone who should seek to interfere with their charge of the child, a wholly natural jealousy; and they magnify trifles, adduce everything however small which might help them to hold on to their darling. But when all is said, there is nothing which shews that the father is unmindful of his parental duties.

Then is there any inability to provide for the welfare of the child? I do not see any. He is healthy—the attempt to shew or at least to suggest that he is tuberculous, desperate as the attempt was, wholly fails in view of what his medical man swears. He is respectable, of good habits, industrious and trustworthy. He is steadily employed and attends to his work continuously in a tool factory. He intends to take up house and have his sister keep house for him: she is about 30 years of age and was trained in housework by her mother who died about 12 years ago: for some years before that time she had everything to do in the house on account of her mother's ill-health, and after her mother's death she brought up her younger brothers: she has at different times acted as nurse and taken special care of children. She swears she is fond of children and has been in contact with them a great deal—she has indeed for the last six or seven years worked for a cutlery company in New York State but those who should know her best say that she is a steady. competent, experienced girl, a capable and careful housekeeper, quite able and fit to look after her brother and his child.

It is rather suggested than said that the expectations of the child will be diminished by placing her in the hands of her father. That, I decline to believe. It is not at all probable that grandparents so fond as these undoubtedly are

could be unreasonable enough, mean enough, to punish an innocent child for being taken away from them, through no fault of her own. But if it be so, "pecuniary benefit is often a very secondary consideration"—and more so in this new land than in the older countries. We have a different system of society, a different way of looking at life, in Canada from that in England or Ireland. In the case of a boy in a land where everyone works except the tramp or the helpless cripple, a legacy is generally, or at least, often more of a curse than a blessing. It may not be quite the same in the case of a girl; but the possession of a small legacy is by no means of such importance with us as in some countries. In any case, the hope of a legacy from grandparents must in this case be but as the small dust of the balance.

The child must be expected to grieve for a while, but youth is elastic and she will soon become accustomed to her new surroundings. And without pretending to more knowledge on the subject than "common knowledge," I venture to think that the future happiness and welfare of the little girl will not suffer from her being entrusted to an aunt of rather decided views—the father remaining near to see that the discipline is not too rigid, rather than being left in charge of doting grandparents who have no other issue—there is to say the least, rather less chance of the child being spoiled.

I think the appeal should be allowed without costs here or below; the order not to issue until the father files an affidavit shewing that he has procured a suitable house or rooms for himself and child.

A mass of affidavits has been filed containing much irrelevant material—the climax of absurdity in that regard is reached by the filing of a petition signed by a number of neighbours giving their opinions as to the proper custody of the child. This will be taken off the files, the Court does not decide cases according to the wishes or views of neighbours, however respectable, and the solicitor should have known better than to offer such a document. Many allegations are solemnly sworn to which can have no possible bearing upon this case: the Taxing Officer will pay attention to this upon the taxation.

I conclude by joining the Chancellor in the wish expressed in the last paragraph of his judgment.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree in allowing the appeal—no costs here nor below.

HON. MR. JUSTICE BRITTON:—After a careful reading of the judgment of the learned Chancellor, and of the cases cited by him, as well as the cases cited upon the argument, I am of opinion that notwithstanding 1 Geo. V., ch. 35, sec. 3, this appeal should succeed.

The agreement made on the 4th day of December, 1911, between the parties is not binding upon the appellant. The appellant as father of the infant girl is entitled to her custody. I quite agree with the Chancellor in this, that the character of the grandparents (respondents) is beyond reproach—and that the interests of the child would very likely be better subserved by leaving her custody to remain in *statu quo*, the father having all reasonable access to the child when he so desires; but as a matter of law the father is entitled to revoke or ignore the agreement made by him. Nothing has been shewn as to the character or habits of the father such as would disentitle him to insist upon his strict legal rights.

The appeal will be allowed. In view of the agreement and the perfect good faith of the respondents—there should be no costs of appeal—nor below. It will be greatly regretted, later on, if some amicable arrangement be not made between the father and grandparents in reference to this child. If the order allowing the appeal must issue it will be when and on terms mentioned by my brother Riddell.

COURT OF APPEAL CHAMBERS.

HON. MR. JUSTICE GARROW. JUNE 10TH, 1912.

McCLEMONT v. KILGOUR MANUFACTURING CO.

3 O. W. N. 1351.

Appeal—To Court of Appeal—From Divisional Court—Extension of Time—Substantial Question Involved—Solicitor's Oversight.

GARROW, J.A., granted an extension of time to appeal from judgment of Divisional Court herein, 21 O. W. R. 856, 3 O. W. N. 999, as question involved in action was of substantial and general interest, and time had lapsed through solicitor's oversight.

Costs to respondent in any event of appeal.

Application by the defendant for an order extending the time for appeal to the Court of Appeal from a judgment of Divisional Court, 21 O. W. R. 856, 3 O. W. N. 999. Notice of appeal was not served in time.

T. N. Phelan, for defendant.

W. M. McClemont, for plaintiff.

HON. MR. JUSTICE GARROW:—The judgment is for $1,000 and costs. And the question of law relied on by the defendant is that the defence known as *volenti non fit injuria* applies to the breach of a statutory obligation which was denied in the Divisional Court.

The question is substantial and of general interest, and the leave should, I think, be granted, it appearing that there was an intention to appeal within the time communicated to the plaintiff's solicitors, and that the failure to serve the notice was through an oversight in the solicitor's office. See *Ross* v. *Robertson*, 7 O. L. R. 494.

The case must be set down in time to be heard at the September sittings, and the costs of the application will be to the respondent in any event of the appeal.