

Province of Ontario.**COURT OF APPEAL.**

Full Court.]

RE FRASER.

[June 18.

FRASER v. ROBERTSON.

McCORMICK v. FRASER.

Appeal—Further evidence on—Jurisdiction—Lunacy issue—Proceedings on—Incompetent person—Power to examine alleged lunatic—Jurisdiction—Taking fresh evidence—Powers of appellate court—New trial—Examination of alleged lunatic by appellate court.

Appeal by Michael Fraser from the order of a Divisional Court, *Re Fraser*, 24 O.L.R. 222, 19 O.W.R. 545, declaring him of unsound mind.

Held, 1. The power of appellate courts to direct the reception of further evidence is purely statutory, and exercisable only to the extent conferred either expressly or by fair implication.

2. In dealing with the reception of further evidence bearing upon matters which have occurred before the decision upon the merits at the trial, an appellate court should exercise great caution, owing to the danger 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. *Trimble v. Hortin*, 22 A.R. 51, referred to.

3. Ontario Rule 498 (C.R. 1897) does not throw the case in appeal open for the reception of further evidence unless grounds are shewn for obtaining the special leave of the Court; and such leave will, in general, be confined to the production of such evidence as, upon an application of which the opposite party in the appeal would be notified and would have an opportunity of meeting, a proper case is made for adducing at that stage; though, where it appears to the appellate court, that, by reason of some slip or oversight, evidence necessary for the full elucidation of a point, or which would complete more issues, has been omitted, it may in its discretion, of its own motion or less formally the proof of some instrument or fact bearing upon the direct production of the necessary evidence. *Re Fraser*, 24 O.L.R. 222, reversed on appeal.

4. An issue as to lunacy under sec. 77 of the Lunacy Act, 9 Edw. VII. (Ont.) c. 37, is to be conducted in the same manner