

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