

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-