

On an application for a new trial, on the ground of newly discovered evidence, it is a well-established rule that "it must be shewn that the evidence could not with reasonable diligence have been discovered and have been given before:" *Murray v. Canada Central R.W. Co.* (1882), 7 A.R. 646, 656; *Trumble v. Hortin* (1895), 22 A.R. 51, 52; and cases quoted in the *Ontario Digest of Case Law to 1900*, vol. 3, col. 4799 sqq. This rule is generally strictly enforced; and this Court has in at least two cases refused leave to the applicant to supplement material defective in this respect (*Detlor v. Hannah*, 31st May, 1915, is one of them). This, like every other rule of discretion, may in a proper case be relaxed: see *Trumble v. Hortin*, 22 A.R. at p. 52, per Osler, J.A.

In this case a new trial should not be granted; but, in view of the very great importance of the question to be decided and the amount involved, the defendant Forbes should (on proper terms) be allowed to have the evidence referred to before the Court before the appeal is disposed of.

The Court, therefore, exercising the power given by Rule 232 (3), directed that, upon the defendant Forbes undertaking to pay in any event the costs of the plaintiff of the motion for a new trial and of the supplementary evidence, he may adduce before the Court, on the 15th November, the evidence viva voce of A. E. Davison, the plaintiff's brother. The Court will then consider the further steps to be taken.

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NOVEMBER 9TH, 1915.

### VANSICKLE v. JAMES.

*Way — Assertion of Right of User — Public Highway — Plan — Estoppel — Private Way — Limitation of Actions — Abandonment — Evidence.*

Appeal by the defendant from the judgment of KELLY, J., 7 O.W.N. 473.

The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

E. D. Armour, K.C., for the appellant.

S. F. Washington, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., delivering judgment, said that the action was brought to recover damages for an alleged trespass by the