498 (1): "In all appeals . . or hearings in the nature of appeals, and in all motions to set aside a verdict or finding of a jury, and to set aside or vary a judgment, the Court or Judge appealed to shall have all the powers and duties . . . and full discretionary power to receive further evidence upon questions of fact; such evidence to be either by oral examination before the Court or Judge appealed to or as may be directed—

"(2) without special leave if the matters have occurred since the judgment, but—

"(3) upon appeal from a judgment, order, or decision given upon the merits at the trial or hearing of any cause or matter, such evidence (save as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court."

The claim now made seems to be based on the proposition that the applicant has, upon a motion for a new trial at least, the right to read the evidence of any person he thinks fit, and the Court has no discretion but to hear it. It could not be that the right exists to take evidence—an absolute right to take evidence—unless there were the absolute right to use it. It may be well to look into the former practice.

Before the Act the practice was well established that in order to allow of affidavits being read as to newly discovered evidence, the applicant must file an affidavit made by himself or (and) the person intrusted with the conduct of his case, shewing that the evidence could not by reasonable efforts have been discovered before trial. There was no absolute right on the part of the applicant to read any affidavit as to the alleged newly discovered evidence, and until he had complied with this pre-requisite the Court might, and in strict practice would, refuse to receive the affidavit setting out what this evidence was. The Court, upon hearing the grounds upon which it was desired to bring before it the new evidence, would allow the affidavit to be read or refuse it as the Court saw fit.

Many cases there are where the Courts have refused to listen to affidavits upon other grounds. For example, the Court will not receive affidavits of witnesses examined at the trial to explain or add to their evidence given thereat. "The general rule is not to hear affidavits of witnesses examined at the trial:" per Lord Abinger, C.B., in Phillips v. Hatfield, 10 L. J. N. S. Ex. 33. "The general rule is that you cannot