have been offered on hearing of the motion:—Held, under the circumstances stated above, he should have made inquiries as to the return day intended, and having chosen to rely on technical grounds, he could not now appeal to the discretion of the Court to enable him to do that which he might have done below.

Gillies v. McDonald, 23/411.

45. **Further evidence.**]—Per Meagher, J., the authorities establish the following principles governing the production of further evidence after trial, under O. 57, R. 5:—

"1. That parties must be diligent in bringing forward on trial all known available evidence, and if want of diligence is apparent leave will not be given.

2. That they must not take the chances of the result of trial in the Court of first instance, and then tender fresh evidence in the Court of Appeal.

3. That the Court will not receive such further evidence unless there is some sufficient reason to justify its doing so; such an application is always regarded as one for indulgence.

4. That it is impossible to lay down a priori, what will be a sufficient ground. Each case must depend on its own special circumstances. But as a general rule, I might say an almost invariable rule, parties are not allowed to bolster up their cases by adducing fresh evidence before the Court of Appeal unless there are reasonably strong special circumstances to justify it, and the more so, as it is the duty of parties to litigation to give the evidence in the first instance, if it could have been produced by the exercise of due diligence. And if it was not so given through any remissness or want of diligence, the leave should be refused. This is particularly so where the parties or witnesses were examined below and the evidence might have been elicited then.

5. That the Court should always be very cautious about admitting further evidence . . . and should always exercise such jurisdiction with great care.

6. That it is regarded as a general, if not universal rule, that it is most dangerous to allow fresh evidence to be introduced after a case has been discussed in Court. But this is not insisted on where the evidence was not discovered until after the trial, and the party desiring to adduce it is not open to the charge of remissness or want of diligence.

7. Surprise is often an important element. But where there is no surprise, and the evidence was not discovered after the hearing, leave will be refused.

8. Mere blunder or inadvertence, or even accident, on the part of the parties, or their agents, by which some point or feature has been overlooked, does not necessarily constitute sufficient ground for the exercise of this jurisdiction.

9. The Court never passes in advance upon the admissibility or sufficiency of the evidence. At any rate it should never do so. Such a course is considered "as obviously extremely undesirable," and therefore where leave is given, the evidence is regarded as taken de bene esse, and this would be true, especially where having regard to the pleadings, it was not admissible." (Authorities cited.)

Leckie v. Stuart, 34/140.

46. **Issue not appealed — Is before Court.**]—Semble, where two distinct issues have been passed on on trial, and there is an appeal in respect to one of them only, the Court of Appeal may, notwithstanding, vary the decision of the lower Court as to the matter not appealed from. If the doctrine of res adjucata applies because of the non-appeal, it is to be met with that of lis pendens.

Fisher v. McPhee, 31/323.

(Cf. JURY, 36. And as to an issue not tried, cf. FRAUD, 7.)

47. **Point not insisted on at trial.**]—Notice of an application for a new trial was given one day short of two clear days. The solicitors agreed to continue the hearing for one week. On the hearing the respondent's solicitor took objection to the short notice, but on being reminded that he had actually had ample time in which to prepare his answer, did not insist on the point:—Held, that because of this non-insistence, he could not