

HIGH COURT OF JUSTICE.

DIVISIONAL COURT.

DECEMBER 1ST, 1911.

HAWES GIBSON & CO. v. HAWES.

Evidence — Foreign Commission — Irrelevancy of Evidence Sought to Claim Made by Pleadings—Leave to Amend—Dismissal of Application, without Prejudice to Fresh Application after Amendment—Costs.

Appeal by the plaintiffs from an order of MEREDITH, C.J. C.P., in Chambers.

The plaintiffs applied to the Master in Chambers for an order for the issue of a commission to Edmonton, Alberta, for the examination of certain witnesses. The Master ordered that no commission should issue until after James Hawes, the brother of the defendant and one of the members of the plaintiff firm, had been examined for discovery. Upon appeal, MEREDITH, C.J., amended the Master's order by refusing the commission altogether. This was the order appealed from; leave to appeal having been granted.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, J.J.

H. D. Gamble, K.C., for the plaintiffs.

F. R. MacKelcan, for the defendant.

RIDDELL, J. (after setting out the pleadings and proceedings):—Looking at the pleadings alone, it is apparent that the plaintiffs claim as upon a loan, for the return of the money; the defendant substantially admits an advance, but upon special terms. The issue would then be "loan or no loan;" and no evidence such as is sought from the desired commission would be of advantage. . . . In my judgment, an order for a commission should never issue unless it appears that the evidence sought could be available upon some issue which is raised upon the pleadings. Costs are not to be incurred where there is no reasonable prospect of benefit to be derived therefrom by some one else than the solicitor-recipient; and when a litigant asks for such an order (which is not as of course), he should at least set out in the pleadings some allegation leading to an issue upon which the evidence sought is applicable.