

Full Court.]

[July 6.]

CANADIAN RAILWAY ACCIDENT CO. v. KELLY.

*Practice—Commission to take evidence of plaintiff abroad—
Application for—Material for, sufficiency of.*

Appeal from the order of DUBUC, C.J., affirming the order of the referee granting the plaintiffs' application for the issue of a commission to take the evidence of the plaintiffs' officers and employees at Ottawa, Ontario, and of the plaintiffs' books there. The head office of the plaintiffs was in Ottawa.

This action was to compel the defendant to account for certain moneys received or which should have been collected by him as the local agent of the company in Winnipeg, and the plaintiffs filed affidavits tending to shew that the books were in constant use at the head office and could not be brought to Winnipeg without great inconvenience and loss, also that it would be practically impossible to carry on the business of the company at its head office if all the officers, whose evidence would be necessary at the trial, had to be absent from the head office in order to attend the trial in Winnipeg.

By the court.—A plaintiff suing in a foreign forum should not ordinarily be excused from appearing there and giving his evidence: per Chitty, J., in *Ross v. Woodford* (1894), 1 Ch., at page 42. The proof that the interests of justice require the issue of the commission to take the plaintiffs' evidence abroad should be of the clearest kind and there should be evidence, not upon information and belief, but of the best nature that could be got. The issue of such a commission should be the exception and should only be resorted to when the inconvenience or expense would otherwise pretty nearly thwart the ends of justice. *Keeley v. Wateley*, 9 Times L.R. 571, followed.

The court was not satisfied that all the books must be kept at the head office of the company all the time, and it appeared probable that, if the evidence were taken at Ottawa on commission, the defendant might have to go there himself in order to instruct counsel on cross-examination of the witnesses as to the entries in the books.

Held, that the material was insufficient to warrant an order for the commission asked for and that the appeal should be allowed with all costs to the defendant in any event of the cause.

Semble. If a proper case were made out, an order might go for the examination of some of the officers of the company at