

NOVEMBER 27TH, 1902.

DIVISIONAL COURT.

FLETT v. COULTER.

*Infant—Party to Action—Right of Opposite Party to Examine for
Discovery—Discretion of Examiner.*

Appeal by plaintiff, an infant of the age of 12 years, by his next friend, from an order of MEREDITH, C.J., in Chambers, dismissing an appeal by plaintiff from an order of the Master in Chambers directing plaintiff to attend at his own expense before a special examiner and submit to be examined as to his competency to give evidence, and to submit to be examined viva voce for discovery, unless the special examiner should deem him of too tender an age to be examined viva voce upon oath. An affidavit of plaintiff's mother was filed upon the motion, but it shewed no mental incapacity on the part of plaintiff.

J. G. O'Donoghue, for plaintiff.

W. R. P. Parker, for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

STREET, J.—We should adhere to the practice settled nearly eleven years ago in *Arnold v. Playter*, 14 P. R. 399, and dismiss the appeal.

It appears to us that the provision of the order which gave to the examiner a discretion to determine the competency of the infant and to act accordingly, was not in accordance with proper and convenient practice. The proper manner of raising any question as to the competency or capacity of the party to be examined is by a motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be raised and considered by the Court itself. If it be left to the examiner, the Court is not always in a position to review his discretion upon the same evidence as that upon which he exercised it.

Appeal dismissed with costs.

MOSS, C.J.O.

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C.A.—CHAMBERS.

HINDS v. TOWN OF BARRIE.

*Appeal—Leave—Question of Substance—Joinder of Plaintiffs and
Causes of Action.*

Motion by defendants for leave to appeal from order of a Divisional Court dismissing appeal from order of MEREDITH,