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DISCOVERY—PROCUREMENT OF AN ORDER REQUIRING A NONRESIDENT PLAINTIFF TO SUBMIT TO AN ORAL EXAMINATION WITHIN THE STATE BEFORE TRIAL—Relator, a resident of Massachusetts, brought an action in Illinois against the Railway Express Company to recover damages for the negligent transportation of the relator's cattle. After the cause was at issue the Express Company's attorneys presented a motion to respondent, a superior court judge, requesting a court order directing the nonresident relator to appear before a notary public in Chicago for the purpose of an oral examination. The court granted the order, fixing a time and place for the taking of relator's deposition on oral interrogatories. Upon failure of the relator to appear, the court stayed proceedings for a period extending thirty days beyond the date of the taking of the deposition for the purposes of discovery. Relator then petitioned for a writ of mandamus to command respondent to strike the orders from the court records. *Held*, writ of mandamus granted. *People ex rel. Prince v. Graber*, (Ill. 1947) 74 N.E. (2d) 865.

The court stated two possible reasons for its conclusion. First, the power of the court to compel parties to give a deposition is purely statutory.¹ The procedure provided by the Illinois statutes for the taking of pretrial depositions makes no differentiation between party litigants and witnesses, so that the manner of taking a pretrial deposition of a nonresident party is the same as that provided for the taking of a deposition of a nonresident witness.² As the statute

¹ Principal case at 866.

² Ill. Rev. Stat. (1947) c. 110, § 182 (2) provides that the deposition of any other party or any person may be taken as prescribed by court rules. The applicable court rule, Ill. Rev. Stat. (1947) c. 110, § 259.19, provides that any party to a civil action may cause the testimony of any other party or person relevant to the prosecution or defense of the action to be taken, or oral or written interrogatories, by deposition before trial in the manner provided by law for taking depositions in chancery cases. The manner provided for taking depositions in chancery cases is set forth in Ill. Rev. Stat. (1947) c. 51, §§ 24, 26 and 28, and deals with witnesses only, making no reference to parties. Section 28 provides for the taking of the deposition of a nonresident witness, upon oral interrogatories, after obtaining a commission from the court to take the deposition at the place of the witness' residence.

requires the suing out of a commission to take the deposition of a nonresident witness, before a properly designated officer, in the state of the domicile of the witness,³ the order of the court directing the relator to appear in Chicago was contrary to the statutory procedure and therefore void. In stating a second reason for its decision, the court ruled that it could not require relator's physical presence before any officer in Illinois merely because the relator, as plaintiff, submitted his person to the jurisdiction of the court for the purpose of prosecuting his lawsuit. "Jurisdiction of the person of the relator was not for the purpose of forcing him to do anything, and the attempt to force him to give his pre-trial deposition before a notary public in Chicago, by an erroneous order which was beyond the power of the court to enter, exceeded the jurisdiction of the court."⁴ Although the result of the case seems undesirable, it appears that the court is correct in its conclusions upon both grounds.⁵ Under the rules of the common law, courts had no inherent power to order discovery.⁶ The equitable remedy of bill for discovery was developed to assist the parties in procuring necessary information to prepare their case for trial.⁷ This was the sole means of discovery until legislatures began to pass statutes authorizing the examination of parties in actions at law.⁸ The Illinois statutes involved in the principal case do not give the court power to order a nonresident plaintiff, despite the fact that he has submitted his case to the jurisdiction of the court for determination, to appear for examination before trial, and in the absence of such a provision, any order requiring the relator's presence for discovery purposes is void. As the present Illinois statutes deal solely with depositions of nonresident witnesses, for the purpose of getting evidence to produce upon trial, it would seem that there is a need for a statute expressly authorizing the court to order a nonresident to appear for pre-trial discovery.⁹

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³ Ill. Rev. Stat. (1947) c. 51, § 28.

⁴ Principal case at 867.

⁵ Principal case at 867. The reference by the court to ". . . an erroneous order . . ." indicates that the real basis for the decision is the result of statutory interpretation, and that the court's reference to the submission of the relator's person to the jurisdiction of the court is unnecessary.

⁶ RAGLAND, DISCOVERY BEFORE TRIAL 12 (1932); 27 C.J.S., Discovery, § 1; Yorkshire Worsted Mills v. National Transit Co., 325 Pa. 427 at 429, 190 A. 897 (1937); Sloss-Sheffield Steel & Iron Co. v. Maryland Casualty Co., 167 Ala. 557 at 561, 52 S. 751 (1910). This lack of inherent power in the court to order discovery appears to apply equally to residents and nonresidents.

⁷ Ibid.

⁸ RAGLAND, DISCOVERY BEFORE TRIAL 12 et seq. (1932). Statutes authorizing courts of common law to grant discovery without the necessity of resort to chancery were first passed in England in 1854.

⁹ It seems clear that a state has power to authorize its courts to order a nonresident plaintiff to come into the forum and submit to preliminary examination. See the dissent of Mr. Justice Brandeis in *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544 at 552, 43 S.Ct. 636 (1923). See also RAGLAND, DISCOVERY BEFORE TRIAL 77-79 (1932); 27 C.J.S. 41, 57 and 75; *E. Richard Meinig Co. v. U.S. Fastener Corp.*, 194 App. Div. 397, 185 N.Y.S. 320 (1920); *Duncan v. Jacobson*, 187 Misc. 918, 66 N.Y.S. (2d) 369 (1946).