

played according to certain rules—has no more place in the present conception of the administration of justice than has the wager of battle.” The use of depositions, discovery, physical examinations and pre-trial procedure (Superior Court Rule 48, 93 N. H. Appendix) are customary examples of “rational means” to discover some of the truth before trial. They enable court, counsel and the parties to have a more intelligent grasp of the issues to be litigated and the modern trend is to encourage such practices.

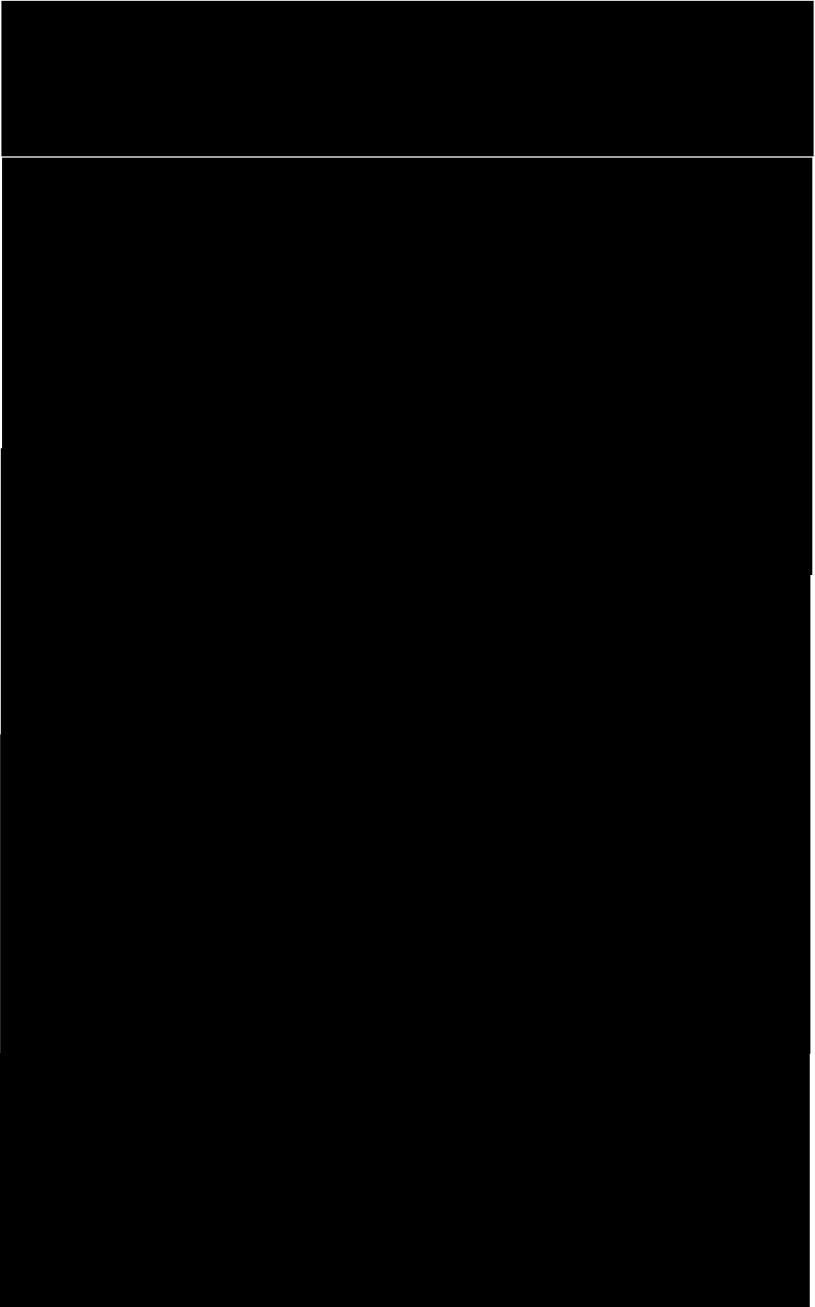
Whatever may have been the rule formerly, it is quite clear now that the right of a court to order the physical examination of a plaintiff in a personal injury action violates no constitutional privilege and is a procedural matter to be passed upon in the discretion of the Trial Court. *Sibbach v. Wilson & Co.*, 312 U. S. 1; 8 Wig. Ev. (3rd ed.) s. 2220 B (Supp., *supra*, note 13). Since the court has the inherent discretionary power to order a physical examination, the absence of a statute is not fatal to the exercise of that power. Such is the rule supported by the great weight of authority. 51 A. L. R. 184; 108 A. L. R. 142. In support of its third assignment of error, the plaintiff relies on *Stack v. Railroad*, 177 Mass. 155 and 17 Am. Jur. 51, note 20. This represents a minority view which is inconsistent with present day practice and procedure and is therefore not followed. The Presiding Judge had full opportunity to gauge to what extent, if any, plaintiff's rights would be prejudiced by his order and has decided that question adversely to the plaintiff. There appears to be no abuse of discretion in this ruling. The plaintiff's rights may be fully protected by cross-examination of the physician and the plaintiff's physician could be present at the physical examination.

Exceptions overruled.

All concurred.

Rockingham, }
June 1, 1948. } No. 3736.

WARREN KAY VANTINE STUDIO, INC. & a. v. PORTSMOUTH & a.



Mintz, Levin & Cohn of Massachusetts, *A. Morris Kobrick* and *William M. Glosky* also of Massachusetts on the brief and *Cooper, Hall & Grimes* (*Mr. Kobrick* orally), for the plaintiffs.

Samuel Levy for the defendants, filed no brief.

KENISON, J. The right to enact reasonable statutes and ordinances for the regulation and licensing of hawkers and peddlers, itinerant vendors and solicitors has been recognized and enforced in this jurisdiction for a long period of time. R. L., c. 188; R. L., c. 66 s. 13 (XV); R. L., c. 189; Wright, *Hawkers and Walkers in Early America* (1927) 91. "Itinerants present some menace to the public if unrestrained . . . and sales in itinerancy may be regulated because of the elements of travel and wandering." *Woolf v. Fuller* 87 N. H. 64, 70, 72. However, the regulation and licensing must not unduly or unfairly discriminate against non-residents. Such discrimination was formerly considered to be in conflict with the privileges and immunities clause (*Art. 4, Pt. I, s. 2*) of the Federal constitution (*State v. Lancaster* 63 N. H. 267) but today the emphasis is placed on its violation of the commerce clause. *Nippert v. Richmond*, 327 U. S. 416.

The challenged ordinance if not designed for the purpose of discriminating against the non-resident photographer clearly has that necessary effect. Portsmouth photographers pay no license fees under this ordinance nor are they subject to any substantially equivalent charges. The cumulative burden of such an ordinance in various municipalities throughout the state as applied to the plaintiffs, who photograph succeeding high school graduating classes year after year, constitutes a barrier to interstate commerce which is not permitted. *Nippert v. Richmond, supra*, 429, 430. While interstate commerce may be required to pay its way, it must be placed on a plane of equality with local trade and commerce. If ordinances may accomplish that object, the present one does not. Compare the comprehensive report by Rhyne & a., *Municipal Regulation of Peddlers, Solicitors & Itinerant Merchants* (1947, Nat'l Institute of Municipal Law Officers) 5—165.

This case does not present the question of the right of the state to regulate the practice of photography since there is no statute on the point and no opinion is expressed thereon. See Annotations, 116



A. L. R. 1366; 134 A. L. R. 1374. The ordinance of the city of Portsmouth being invalid for the reason indicated, the order is

Judgment for plaintiff.

All concurred.



Merrimack, }
June 1, 1948. } No. 3737.

SCOTT S. McINTIRE

v.

LOUIS BOROFKY *d/b/a* The Army and Navy Store.

