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# Physicians and Surgeons--Licenses--Construction of Education Law § 1259--Abuse of Discretion (Marburg v. Cole, 286 N.Y. 202 (1941))

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ute, where the mortgage is \$8,000, for example, if the court were to find that the fair market value of the property was \$10,000, the mortgagee would not be entitled to a deficiency judgment even if the property were sold to a stranger for only \$5,000. In such event the mortgagee would be prevented by the statute from receiving payment in full; and it seems that the contract clause of the Federal Constitution would be violated. But this question—the effect of the statute where the property is sold to a stranger—is expressly left open by the Supreme Court.

J. H.

PHYSICIANS AND SURGEONS — LICENSES — CONSTRUCTION OF EDUCATION LAW § 1259—ABUSE OF DISCRETION.—The applicant, an Austrian physician who in 1938 came to this country as a result of the political upheaval in Austria, brought these proceedings under Article 78 of the Civil Practice Act of New York, to direct the Commissioner of Education and the state university Board of Regents to indorse his Austrian physician's license or diploma under Section 1259 of the Education Law,<sup>1</sup> and thereby make it possible for him to practice his profession in this state. The indorsement was denied in spite of petitioner's uncontradicted evidence as to his preeminence and authority in the field of medicine.<sup>2</sup> Upon application to the courts, Spe-

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tical class. Although it may be interpreted not to include purchases by strangers, there seem to be no decisions on the subject as yet.

<sup>1</sup> N. Y. EDUCATION LAW § 1259. Licenses. " \* \* \* The commissioner of education may in his discretion on the approval of the board of regents indorse a license or diploma of a physician from another state, or country, provided the applicant has met all the preliminary and professional qualifications required for earning a license on examination in this state, has been in reputable practice for a period of ten years, and has reached a position of conceded eminence and authority in his profession." Besides taking the necessary licensing examination, available to a proper applicant, N. Y. EDUCATION LAW § 1256 (3, 4), petitioner had two alternatives to enable him to practice medicine in this state. Firstly, he could have obtained an indorsement of his foreign license from the Board of Regents of the University of the State of New York by satisfactorily showing "that the requirements for the issuance of such license were substantially the equivalent of the requirements in force in this state when such license was issued, and that the applicant had been in the lawful and reputable practice of his profession for a period of not less than five years prior to his making application for such indorsement," N. Y. EDUCATION LAW § 51(3), or secondly, obtain an indorsement of his foreign license by coming within the provisions of N. Y. EDUCATION LAW § 1259.

<sup>2</sup> Dr. Marburg's active practice began in Vienna in 1905 since which time he has published some 200 scientific papers and books, edited several encyclopedias on medicine and was accorded membership in leading neurological societies of the world, including the American Neurological Society. From 1919 to 1938 he was director of the Neurological Institute at the University of Vienna, where he gave post-graduate instruction to students who came to him from every part of the world. In 1939 he was appointed clinical

cial Term annulled the determination of the Board of Regents, and directed them to indorse Dr. Marburg's foreign license. The Appellate Division<sup>3</sup> affirmed the decision of the Special Term, holding that the refusal to indorse the foreign license of a physician of conceded eminence and authority as a neurologist, was arbitrary, unfair and capricious, and therefore an abuse of discretion. Upon appeal to the Court of Appeals, *held*, for the appellants. Section 1295 of the Education Law which permits the Commissioner of Education, in his discretion, on the approval of the Board of Regents to indorse the foreign license of the physician who has reached a position of conceded eminence in his profession, also permits the Commissioner to determine the degree of eminence required. The power vested in the Commissioner of Education is a power "to confer a privilege and does not create an absolute right in the applicant." Since, in a period of twenty-three years, only four physicians have had the honor of having their foreign license indorsed under this section, the Commissioner of Education and the Board of Regents did not abuse the discretion invested in them by refusing to indorse a foreign physician's license on the ground that the evidence of his preeminence was insufficient. *Marburg v. Cole*, 286 N. Y. 202, 36 N. E. (2d) 113 (1941).

The majority of the Court of Appeals, through Judge Edward Finch, said it was not unreasonable for the Board of Regents to interpret the broad power granted to it by the statute as meaning that the eminence required by the statute is obtained only by an outstanding original contribution to some field of medicine, or that the applicant ranks among the few leading men of his profession so as to warrant making an exception to the Board's general standard.<sup>4</sup>

Judge Desmond in his dissenting opinion, in which Chief Judge Lehman concurred, states that by requiring that the applicant shall have made an original discovery in the field of medicine, the coverage of the statute is limited.

In proceedings to review the determination of the Board of Regents of the State of New York denying the indorsement of a foreign medical license, the Appellate Division cannot substitute its own judgment for that of the Regents.<sup>5</sup> The legislature has invested such Board with discretion, and unless the Board abuses such discretion by acting in a discriminatory or capricious manner, it is not

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Professor of Neurology at Columbia University, and became Research Neuro-pathologist at the Montefiore Hospital. His application contained the testimonials of some of the most famous and distinguished neurologists in America.

<sup>3</sup> 261 App. Div. 324, 26 N. Y. S. (2d) 77 (3d Dep't 1941).

<sup>4</sup> Three of the physicians whose foreign licenses were indorsed under the provisions of N. Y. EDUCATION LAW § 1259, came within this general standard by having made an outstanding original contribution to the medical profession, while the fourth was granted an indorsement on the basis of his "universal recognition and outstanding appointments."

<sup>5</sup> N. Y. CIV. PRAC. ACT § 1283 *et seq.*; *Levi v. Regents of University of State of New York*, 281 N. Y. 627, 22 N. E. (2d) 178 (1939).

for the Supreme Court to interfere with the exercise of such discretion.<sup>6</sup> In order to obtain the indorsement of his foreign license, an applicant must establish his merits to the satisfaction of the Board of Regents. His medical license cannot be indorsed unless he has substantially met all of the requirements established by the legislature.<sup>7</sup> Physicians' licensing statutes are not for the benefit of the members of the medical profession, but are intended to advance and promote public welfare through the improvement of citizens' health.

E. D. R.

TRUSTS—ASSIGNABILITY OF INTEREST OF BENEFICIARY IN A "SPEND-THRIFT" TRUST—ATTACHMENT OF SAME.—The deceased by his will established a trust fund for his grandson, the defendant in this action. The testator directed the trustees to pay to his grandson the net income of the trust fund for the duration of the beneficiary's life. The defendant in 1935 filed a voluntary petition in bankruptcy in which he listed among his assets his interest in the trust, but claimed exemption stating that only 10% of the income could be attached by a judgment creditor. Prior to the time that the petition had been filed and the defendant had been adjudicated and discharged as a bankrupt, 10% of his interest in the trust had been garnisheed by a judgment creditor.<sup>1</sup> The trustee in bankruptcy, in accordance with his powers,<sup>2</sup> obtained an order vacating the judgment creditor's garnishee order and directing that the beneficiary's trust income be paid to the trustee in bankruptcy. In order to facilitate the winding up of the bankrupt estate, the Referee in Bankruptcy authorized the sale of the bankrupt estate's interest in the 10% of the defendant's trust income. The plaintiff, Richard R. Sarver, purchased all right,

<sup>6</sup> N. Y. EDUCATION LAW §§ 51, 1259; *In re De Luca*, 168 Misc. 841, 6 N. Y. S. (2d) 742 (1938), *aff'd*, 256 App. Div. 859, 8 N. Y. S. (2d) 763 (1939).

<sup>7</sup> N. Y. EDUCATION LAW §§ 51(3), 1259; *Erlanger v. Regents of University of New York*, 256 App. Div. 444, 10 N. Y. S. (2d) 1013 (1939), *rev'g*, *Levi v. Regents of University of State of New York*, 169 Misc. 332, 8 N. Y. S. (2d) 19 (1938), *aff'd*, *Levi v. Regents of University of State of New York*, 281 N. Y. 627, 22 N. E. (2d) 178 (1939).

<sup>1</sup> N. Y. CIV. PRAC. ACT § 684. "1. Where a judgment has been recovered \* \* \* and where any \* \* \* income from trust funds or profits is due \* \* \* a judge or justice must grant an order directing that an execution issue against the \* \* \* income from trust funds \* \* \*, said execution shall become a lien and a continuing levy upon the \* \* \* income from trust funds \* \* \* and the amount specified therein which shall not exceed ten per centum thereof, \* \* \*"

<sup>2</sup> BANKRUPTCY ACT § 47, subd. a(2); 30 STAT. 557, Amd. 36 STAT. 840; U. S. CODE tit. 11, § 75: The trustee in bankruptcy, "as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."