Michigan Law Review

Volume 3 | Issue 4

1905

Note and Comment

Michigan Law Review

MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE, $2.50 PER YEAR, ... 35 CENTS PER NUMBER

NOTE AND COMMENT

THE FAYERWEATHER WILL CASE.—The long and tedious litigation over the famous Fayerweather will, in which a large number of American colleges have been pecuniarily interested, has just been brought to a close by the recent decision of the United States Supreme Court in *Fayerweather* v. *Ritch*, 25 Sup. Ct. Rep. 58. The heirs of Daniel B. Fayerweather have exhausted every resource open to them in both the state and federal courts, and the right of the colleges to the Fayerweather millions seems now to be finally and conclusively sustained.

In 1884, Mr. Fayerweather, who was a millionaire leather merchant of New York, made his last will and testament, by which he bequeathed to twenty colleges amounts aggregating $2,100,000. These colleges were Bowdoin, Dartmouth, Williams, Amherst, Wesleyan, Yale, Columbia, Union Theological, Hamilton, Rochester, Cornell, Lafayette, Lincoln, Virginia, Hampton, Maryville, Marietta, Adelbert, Wabash, and Park. At that time his estate amounted to about three millions of dollars, and at the time of his death to from five to six millions. At various times prior to the death of Mr. Fayerweather, which occurred in 1890, this will was altered, and several codicils were added, these definite bequests to the twenty colleges, however, remaining unchanged; and no question was ever raised as to this part of the will. The dispute related to the disposition of the residuary estate, which aggregated about $3,500,000.

It was Mr. Fayerweather's desire to give the great bulk of his estate to literary and benevolent institutions, and chiefly to the aforementioned twenty colleges, but a statute of the state of New York prohibited a testator, who had a wife living, from so disposing of more than half of his property. To avoid the effect of this statute, and cut off his wife's right to contest his will under its provisions, he bequeathed the residuary estate absolutely to three of his friends, Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, who were also named as executors, with the suggestion in his will that they should use the same in carrying out his intentions.

After Mr. Fayerweather's death, the three residuary devisees and legatees proceeded to dispose of the property left to them. They gave certain small portions to Mrs. Fayerweather and to the three nieces of the testator, in consideration of the execution by them of releases in full of all claims against the estate or the residuary holders thereof. The rest they gave to various individuals, hospitals and colleges, some of the latter being among the twenty otherwise provided for.

But some of the twenty colleges were not satisfied, and brought suit in the Supreme Court of the state of New York against the executors, the heirs of Mr. Fayerweather, and all the other institutions and individuals claiming an interest in the estate, alleging that the bequest to the executors was made in pursuance of an agreement that they should take that residue in trust for the twenty colleges enumerated in the will. The donees of the executors appeared and asserted the validity of their claims, and the executors of Mrs. Fayerweather and the three nieces filed an answer and counterclaim, alleging that the releases had been fraudulently obtained, that the secret trust which the colleges were seeking to enforce was therefore void under the statute, and that the residue belonged to the heirs.

This suit was commenced in 1894. *Trustees of Amherst College* v. *Ritch*, 31 N. Y. Supp. 885. JUDGE TRUAX, sitting at special term, sustained the colleges, and decreed that the residuary estate was held by the executors in trust for the twenty colleges mentioned in the will and for Northwestern University. As for the question of the fraudulent character of the releases, he held that it was unnecessary to consider it, and thereby gave occasion for all the subsequent litigation in the federal courts.

On appeal to the General Term the case was affirmed. *Trustees* v. *Ritch* (1895), 91 Hun. 509. A further appeal was taken to the Court of Appeals, where the decision was again affirmed. *Trustees of Amherst College* v. *Ritch* (1897), 151 N. Y. 282. A motion was then made to amend the remittitur so as to direct the justice before whom the action was tried to consider evidence concerning the releases of Mrs. Fayerweather and the next of kin, which it was claimed he did not consider, and to pass upon the same, which motion was overruled. 152 N. Y. 627. Finally a motion for a reargument was made, and the same was denied. 152 N. Y. 641. This exhausted the possibilities in the New York courts.

The nieces of Mr. Fayerweather, who were citizens of Iowa, thereupon brought suit in the United States Circuit Court for the Southern District of New York, setting up in their bill the proceedings in the New York courts, and alleging that the issue of fraud as to the releases had not been tried and

the proceedings did not, therefore, constitute due process of law. *Fayerweather* v. *Ritch* (1898), 88 Fed. Rep. 713. JUDGE WHEELER decided that the issue of fraud had not been passed upon, that the judgment of the New York courts was therefore not conclusive upon the plaintiffs, and that they had not enjoyed due process of law.

In view of this decision the plaintiffs applied for an injunction restraining the executors from disposing of the residuary estate, which was granted. *Fayerweather* v. *Ritch* (1898), 89 Fed. Rep. 385. But an appeal was promptly taken from this order, and the United States Circuit Court of Appeals held that the question of fraud in the releases *had* been passed upon by the New York court and that the plaintiffs were *not* deprived of due process of law, and the order was reversed. *Fayerweather* v. *Ritch* (1899), 91 Fed. Rep. 721.

The plaintiffs next moved for leave to amend their bill, which was granted. *Fayerweather* v. *Ritch* (1899), 94 Fed. Rep. 1021. On appeal to the United States Circuit Court of Appeals this order was sustained. *Fayerweather* v. *Ritch*, 97 Fed. Rep. 982. The case then came on for trial upon the amended bill and cross bill, and JUDGE LACOMBE held that while it might be difficult to follow the reasoning by which the United States Circuit Court of Appeals had decided that the releases were valid, yet "that conclusion certainly was reached, and was expressed with no uncertain sound." And the pleas of former adjudication were sustained. *Fayerweather* v. *Trustees of Hamilton College* (1900), 103 Fed. Rep. 546; *Fayerweather Will Cases* (1900), 103 Fed. Rep. 548. On final hearing this position was adhered to. *Fayerweather Will Cases* (1902), 118 Fed. Rep. 943.

The only remaining chance for the plaintiffs lay in an appeal directly to the Supreme Court of the United States, and such an appeal was taken from the decision of the Circuit Court on final hearing. It is the decision on this appeal which has just been rendered. The direct appeal was sustained on the ground that the question of due process of law was involved, notwithstanding that all the forms of legal procedure in force under the laws of New York had been observed. But upon the merits of the case the United States Supreme Court agreed with the United States Circuit Court of Appeals, and held that the pleas of *res judicata* were properly sustained. Mr. JUSTICE BREWER, who spoke for the court, pointed out that under the well settled rule, a former judgment was a bar to a subsequent action upon the *same claim* not only as to all matters actually litigated but also as to all matters which might have been litigated. And inasmuch as the trial judge in the New York court could not have rendered judgment for the colleges without finding that the releases were valid, it must be presumed that he did so find, notwithstanding his statement that he deemed it unnecessary to consider that question. Furthermore, the General Term and the Court of Appeals both referred to the releases in their opinions, and assumed that on the record the releases appeared valid; and the entire evidence taken at the trial was carried on appeal to the General Term and was before it when it rendered its decision. Under these circumstances the pleas were held to have been properly sustained and the decree of the Circuit Court was affirmed. All the justices concurred except Mr. CHIEF JUSTICE FULLER, who took no part in the case, since he was an overseer of Bowdoin College.

CONVEYANCE OF LAND INCLUDES BUILDING MATERIAL FITTED FOR USE THEREON.—The recent case of *Byrne* v. *Werner* (Mich. Sup. Ct., Dec. 7, 1904), 101 N. W. Rep. 555, decides a question of interest in regard to what passes under a deed of land upon which is a partially constructed building and upon and near which is material fitted for use in the completion of the building. The controversy was between the vendee of the building material not as yet used in the building at the time of the conveyance of the realty and the owners of the realty. In 1887 the then owner of the realty conveyed the property, describing it as lots four and five of block seventeen in the city of Marquette, Michigan. At this time there was upon the lots a partially constructed building. There was also upon them and an adjoining lot a quantity of cut stone and structural iron, the property in controversy, which was put there by the owner of the lots with the intention of using it in the completion of the building. The stone had been cut and dressed expressly for this building, and each piece of the structural iron had been fitted for its place in the building in accordance with the plan. The title to the realty came to the present owners in 1902 through two conveyances, each containing presumably a description like the one given above. Nothing was done toward the completion of the building after the original owner parted with his title in 1887, and the unused material, when the present owners took title, was still on and near the lots. The deed from their immediate grantor, when first drawn, included definitely in the description the said building material, but, upon the request of the grantees, it was changed, and a separate bill of sale of the material given. The original owner, nine years after conveying his title to the said lots, executed a bill of sale of said building material to his son, the plaintiff herein, but it does not appear that the son ever attempted in any way, before the beginning of this suit, to assert title to said material. The present owners of the lots erected a business block thereon, using a small portion of the building material in question, and disposing of the remainder. An action of trover was brought against them by the vendee under said bill of sale, and in the court below the plaintiff had judgment.

The essential question in the case is as to what passed under the deed of the original grantor, executed in 1887. If the building material passed, the bill of sale thereof to the plaintiff was a nullity, and the judgment below should be reversed. The majority of the Supreme Court held that it did pass, and reversed the judgment, basing their conclusion, however, upon the evident intention of the parties, and not upon the proposition that the personalty, as between grantor and grantee, became a part of the realty. The CHIEF JUSTICE, with whom JUSTICE HOOKER concurred, dissented upon the ground that the building material did not become a part of the realty. The reasoning of the majority opinion appears from the following quotation: "It is urged that the building material had not become a part of the land, and was, therefore, in a legal sense, personalty at the time of the conveyance to Thurber. If this be true, it is not, in my judgment, decisive of this controversy. Though the building material was personalty, it is our duty to declare that it passed with the partially completed building, if the parties so intended, and if that intent may be ascertained from a proper construction of the conveyance

of the land upon which said building stood. The question is then, not whether the building material was in fact personalty, but whether it was intended to transfer it with the conveyance of the partially completed building. And this intent is to be determined by a proper construction of the conveyance; that is * * * * by applying the language of the conveyance to its subject matter. No uncertainty results from this rule. Upon the land conveyed to Thurber was an incomplete building in the process of erection. Situated upon that land and upon the adjoining land was building material designed to be used for the completion of the building. It was surely intended that the incomplete building should be transfered to Thurber. It was surely intended that the building would be speedily completed with the building material at hand. And I think it therefore equally certain that it was intended that such material should pass with the conveyance. In my judgment, there is no sound principle of law which compels us to defeat this intention. On the contrary, I maintain that it is our clear legal duty to give it effect. I think, therefore, that the building material became the property of Thurber."

The conclusion of the majority is undoubtedly correct. It is supported by abundant authority collected and commented upon in the opinion. It is suggested, however, that it may prove to be the better reasoning in support of the conclusion to argue that as between grantor and grantee, for the purposes of the conveyance, the building material had become realty and passed under the deed as such; that it had become realty for the purposes suggested by virtue of the circumstances of the case and the intention of the parties; that it was fitted for use upon the realty by the grantor and was intended by him for use thereon; that for certain purposes it was constructively a part thereof. The material was not described by special or general reference or in any manner in the deed, nor does it appear that it passed to the grantee by any separate agreement. If, therefore, it passed under the deed, it must have been because, for the purpose of conveyance, it had become a part of the realty. And certainly there is no inconsistency in concluding that it did so pass, for it goes without saying that property may be personalty for one purpose and realty for another. Growing crops, for example, for many purposes are personalty, yet as between grantor and grantee of the land upon which they are growing, they are a part of the realty. Many articles that as between landlord and tenant would be personalty, become a part of the realty, if placed thereon by the owner, and pass by his conveyance. Personalty, if actually or constructively attached to the realty by the owner, or if specially fitted for use thereon, presumptively becomes a part of the realty as between grantor and grantee. Indeed, the cases cited in the majority opinion in support of the conclusion reached, almost without exception are clearly based upon the theory that the personalty in question for the purposes of the conveyance had become a part of the realty. For example, in *Hackett* v. *Amsden*, 57 Vt. 432, one of the cases cited, the court uses the following language: "Whatever the rule may be elsewhere, it seems to be settled in this state that suitable materials deposited upon a farm for the purpose and with the intention of building necessary fences with them thereon pass by a conveyance of the land as a part of the realty." And

again, the Supreme Court of Illinois, in *Palmer* v. *Forbes*, 23 Ill. 301, also cited in the majority opinion, uses this language: "It is a familiar principle to all that rails hauled on to the land, designed to be laid into a fence, or timber for a building, although not yet raised, but lying around loose and in no way attached to the soil, are treated as a part of the realty, and pass with the land as appurtenances." The reasoning outlined undoubtedly finds support in most of the cases in which a conclusion similar to the one in the case under examination has been reached.

THE WAIVER OF FATAL DEFECTS IN AN INDICTMENT.—A very questionable decision on criminal procedure has recently been rendered by the New York Court of Appeals. An indictment was presented for conspiracy to cheat and defraud, and the jury found a verdict of guilty. No motion in arrest of judgment was made, and the only appeal taken was from the judgment of conviction. In the Court of Appeals the defendant sought for the first time to raise the question that the indictment charged no crime, since the representations set forth therein did not refer to any existing *fact* capable of proof but only to the *belief* of the defendants that they could cure all bodily afflictions.

JUDGE VANN, speaking for the court, said that an indictment, except in capital cases, could not be attacked upon appeal unless some foundation was laid therefor before final judgment was rendered. Therefore, the objection that the indictment charged no crime was waived if not raised in the trial court.

JUDGE O'BRIEN, with whom concurred CHIEF JUDGE CULLEN, dissented from this doctrine, saying: "The charge in the indictment is the very foundation of all procedure, and I think, where no crime is charged, the question can be raised at any time and in any court. * * * In our code the want of jurisdiction and the absence of a criminal charge are classed together and treated in precisely the same way, and, indeed, as matter of reason, it cannot be said that any court has jurisdiction to try a criminal case unless it appears that a crime is charged and embraced in the indictment." *People* v. *Wiechers* (1904), — N. Y. —, 72 N. E. 501.

Undoubtedly there is far too prevalent a tendency among American appellate courts to reverse criminal cases for technical and unsubstantial errors. And it has been frequently suggested that this tendency has given occasion for much of the popular distrust respecting the administration of justice. But in this case the court seems to have gone to the very opposite extreme, and has sustained a judgment of conviction against a defendant who was never legally charged with any offense whatever. This is neither good logic nor good law.

The very recent case of *State* v. *Rosenblatt* (1904), Mo. —, 83 S. W. 975, published subsequently to the New York case under discussion, holds that "a defendant in a criminal case may take advantage of a material defect apparent of record though such point be raised for the first time in this court." In this case there was a plea of guilty, and the court, taking the same line of argument

as O'BRIEN, J., *supra*, said that if no crime was charged in the indictment, none was confessed by pleading guilty thereto.

In a similar case the Supreme Court of Mississippi said: "But the error insisted upon goes to the very essence of the offence. It is that the indictment is invalid, because, in law, it charges no offence against the accused. If this position is correct, it is manifest that he could not waive the insufficiency of the indictment, by neglecting to raise any objection to it in the court below, so as to render a conviction rendered upon it valid; for that would be, by mere silence, to give legal validity to a criminal charge against him, when the indictment contained no such legal charge." *Newcomb* v. *State,* 37 Miss. 397.

Similarly, in *Moore* v. *People,* 26 Ill. App. 140, the court said: "There was no necessity in this case that either a motion for a new trial or motion in arrest of judgment should have been made in the court below. * * * The indictment which was returned by the grand jury does not support the verdict of the petit jury and the judgment of the court. The case is not different, in legal principle, from what it would have been, had the petit jury in this trial upon an indictment for an assault with a deadly weapon returned into court a verdict finding plaintiff in error guilty of larceny, and the court had rendered judgment thereon."

Many other cases are to the same effect. In *State* v. *Meyers,* 99 Mo. 112, it was said: "If the defect in the indictment be a material one, one available on motion in arrest, it is equally available in this court on appeal or error." In *Matthews* v. *Commonwealth,* 18 Gratt. 989, the court said: "Anything which is good cause for arresting a judgment is good cause for reversing it, though no motion in arrest be made"; and the same statement appears in *State* v. *McClung,* 35 W. Va. 286, and *Randall* v. *Commonwealth,* 24 Gratt. 644. And see also *Lemon's Case,* 4 W. Va. 755, and *State* v. *Garvey,* 11 Minn. 160.

There would seem to be no difference in principle between the true rule in this regard as applied to criminal and to civil procedure, and it is the almost universal doctrine that the objection that a civil pleading does not state facts constituting a cause of action or defence is never waived, but may be raised at any stage of the proceedings. *Moore* v. *Halliday,* 43 Ore. 243; *City of South Bend* v. *Turner,* 156 Ind. 418; *Insurance Co.* v. *Bonner,* 24 Colo. 220; *Warner* v. *Hess,* 66 Ark. 113; *Thomas* v. *Franklin,* 42 Neb. 310. In the last case the court held that it would, of its own motion, examine the record on appeal to determine whether the petition upon which the action was founded stated a cause of action.

It must be admitted that there is *some* authority in support of the rule announced by the New York Court of Appeals. The following cases take the same view in regard to indictments: *State* v. *Hinckley,* (Idaho) 42 Pac. 510; *Territory* v. *Carland,* 6 Mont. 14; *State* v. *Mallish,* 15 Mont. 509; *Mayer* v. *State,* 48 Ind. 122 (WORDEN, J., dissenting). And the courts of Iowa and South Carolina have apparently laid down the same rule regarding civil pleadings. See *Exix* v. *Iowa Cent. R. R. Co.,* 114 Iowa 508; *Osborne* v. *Met-*

calf, 112 Iowa 540; *Dubuque Lumber Co.* v. *Kimball*, 111 Iowa 48; *Green* v. *Green*, 50 S. C. 514; *Hillhouse* v. *Jennings*, 60 S. C. 373. But such a doctrine can be sustained neither on principle nor on authority.

CONSOLIDATION OF RAILROADS AND CONDEMNATION OF SHARES OF DISSENTING STOCKHOLDERS.—In an early Pennsylvania case, where consolidation of railways had been authorized by the legislature, the court held that shares of dissenting stockholders could be condemned, even though the statute had not so provided. *Lauman* v. *Lebanon Valley R. Co.*, 30 Pa. St. 42. But this view has not received general support and has, in fact, been subjected to severe criticism. However, a recent North Carolina decision, interesting from the fact that it is almost without precedent, holds that the legislature may expressly authorize by statute the condemnation of stock of dissenting shareholders, where a majority of stockholders favor consolidation, even though the shares were issued prior to the Constitution of 1868, which first reserved to the state the right to amend charters granted by it. *Spencer et al.* v. *Seaboard Air Line Ry. Co. et al.* (1904), — N. C. —, 49 S. E. Rep. 96.

Under the general rule, if a corporation, when created, is without the authority to consolidate, either under its charter, or under general laws of the state, but later the legislature grants authority to consolidate, the exercise of such power requires the unanimous consent of the stockholders. *Earl* v. *Seattle Etc. R. Co.*, 56 Fed. Rep. 909; *Mowrey* v. *Indianapolis Etc. R. Co.*, 4 Biss. 78; *Mills* v. *Central R. Co.*, 41 N. J. Eq. 1, 4. Upon principle and authority, in the absence of a statute existing at the time of his subscription, providing for consolidation upon a vote less than the whole, or for the purchase of the interests of dissenting stockholders, the shareholder will neither be bound to consent to the consolidation nor to surrender his interest in his original corporation. NOYES ON INTERCORPORATE RELATIONS, § 47; THOMPSON ON CORPORATIONS, § 343. Otherwise the obligation of the contract between the shareholder and the corporation would be impaired. Nevertheless, the authorities have recognized an exception to this rule in the case of quasi-public corporations, concerning which they have said that the legislature in the exercise of the sovereign power of eminent domain, may authorize the consolidation of railroads and other quasi-public corporations, without the unanimous consent of their stockholders. Only one case, it appears, aside from the principal case, directly supports this position. *Black* v. *Delaware Etc. Canal Co.*, 24 N. J. Eq. 455. Yet text-writers generally have adopted the view of this case. MORAWETZ ON PRIVATE CORPORATIONS, (2nd. Ed.) § 1089; NOYES ON INTERCORPORATE RELATIONS, § 51; COOK ON CORPORATIONS, § 896. Several states have also passed laws similar to the North Carolina statute, and the Connecticut law even permits compulsory consolidation by condemnation of the minority shares, when any railroad company has acquired by purchase three-fourths of the shares of another railroad company.

The exercise of the power of eminent domain is justifiable only through public necessity, and the fact that the right of consolidation and condemnation of dissenting stock is dependent upon the consent of the majority of the

stockholders is itself conclusive against its necessity. 5 *Yale Law Journal,* 205. On the whole, the theory that the stock of dissenting shareholders may be seized by the majority under the power of eminent domain seems radically unsafe and unsound. If an actual public necessity exists, rather let the legislature directly determine that necessity, instead of permitting it to be determined by the majority of stockholders. Thus a few minority shareholders could not prevent the completion of a great public enterprise, such as a continuous line of railway formed from consolidating shorter lines.

COMPULSORY VACCINATION.—The opponents of vaccination as a preventive of smallpox have been trying for almost fifteen years to obtain assistance from the courts in their efforts to resist the enforcement of compulsory vaccination by school boards and other state agencies. The first American case which sustained the validity of such legislation was *Abeel* v. *Clark,* 84 Cal. 226, decided in 1890. No case has ever denied the right of the state to make vaccination compulsory when the disease was actually present or an epidemic was threatened. Some have held that these conditions must exist in order to justify the measure. See *State ex rel.* v. *Burdge,* 95 Wis. 390. Others have held that mere general authority to regulate the public health or to make suitable rules and regulations respecting the conduct of the public schools, would not of itself authorize compulsory vaccination except in cases of present emergency. *Potts* v. *Breen,* 167 Ill. 67; *Blue* v. *Beach,* 155 Ind. 121; *Matthews* v. *Board of Education,* 127 Mich. 530 (LONG and GRANT, JJ., dissenting); *Morris* v. *Columbus,* 102 Ga. 792.

A recent case decided by the Supreme Court of North Carolina has taken a much more liberal view respecting the rights of municipal boards to enforce compulsory vaccination under a grant of general authority. *Hutchins* v. *School Committee of Town of Durham* (1904), — N. C. —, 49 S. E. 46. And the court here expressly repudiated the limitation stated in *Potts* v. *Breen,* supra, and went even farther than *Bissell* v. *Davison,* 65 Conn. 183, which has heretofore been regarded as perhaps the broadest decision on this question.

But another feature of the *Hutchins* case is of interest. The court had recently decided in *State* v. *Hay,* 126 N. C. 999, that although no exception was stated in the regulation prescribing compulsory vaccination, the requirement nevertheless did not apply to one whose condition of health was such that vaccination would be dangerous; but the burden was upon the person seeking to escape vaccination to show a justification for non-compliance, and the sufficiency of the showing was for the jury, the person's own belief and the advice of his physician being non-conclusive. Hence an adequate showing of this character might be a complete defense to a criminal prosecution for failure to observe the regulation. But in the *Hutchins* case the action was mandamus, and it was sought to compel the admission into the public schools of the daughter of the plaintiff, who had not been vaccinated under the rule, by showing that her health was such that vaccination would be dangerous. But the court refused to approve this position, and said: "The fact that it would be dangerous to vaccinate the plaintiff's daughter, owing to her

physical condition, would be a defense for her to an order for general compulsory vaccination (*State* v. *Hay*, supra), but is no reason why she should be excepted from a resolution excluding from the school all children who have not been vaccinated. That she cannot safely be vaccinated may make it preferable that she herself should run the risk of taking the smallpox, but is no reason that the children of the public school should be exposed to like risk of infection, through her, or others in like case."

CONFIDENTIAL COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.—This subject was fully considered in an article upon *The Physician as an Expert*, published in the MICHIGAN LAW REVIEW for May, 1904 (Vol. II, pp. 687-703). One phase of it, however, that is not there discussed, and that, so far as the writer has observed, had not, at the time of the publication of the article, been judicially determined, has recently been adjudicated by the Supreme Court of Michigan in the case of *Dick* v. *International Congress*, decided Dec. 7, 1904, and reported in 101 N. W. Rep. 564. The defendant in the case was a mutual benefit association. The husband of the plaintiff at the time of his death was a member of the defendant order, and as such was insured therein to the extent of one thousand dollars. His wife, the plaintiff, was his beneficiary, and after his death, the defendant having refused to recognize the validity of her claim to the insurance money, she brought suit and in the court below obtained a verdict and judgment. Upon appeal, the defendant contended that a verdict should have been directed in its favor, on the ground that the decision of the tribunals of the order against the claim was final. The majority of the court, speaking through Justice CARPENTER, sustained the lower court, but a dissenting opinion, in which Justice GRANT concurred, was filed by Justice HOOKER.

The by-laws of the defendant order provide for the adjudication by a supreme board of trustees in the first instance, and upon appeal, by the supreme body of the order, of all death claims; that the decisions of the order in regard to the death claims shall be final and binding upon every member and his beneficiaries, and that no suit at law or in equity in regard to such a claim shall be commenced or maintained by any member or beneficiary against the order. It was the contention of the defendant that deceased had obtained his insurance by making false statements in regard to the condition of his health. Upon the hearing before defendant's board of trustees, several affidavits tending to prove the validity of the claim were introduced. The only other evidence was the statement of the general manager of the defendant to the effect that the physician of the deceased had reported to him a conversation with deceased from which it would appear that deceased must have known at the time of his application for insurance that his statements in regard to the condition of his health were false. This testimony was objected to by the representative of the claimant as incompetent, hearsay and privileged, but it was received and served as the only basis for the rejection of the claim. The claim upon appeal to the supreme body of the order was heard upon the same testimony as that introduced before the board of trus-

tees, excepting that instead of the hearsay testimony in regard to the statement of the physician of the deceased, the affidavit of the physician, in which were incorporated substantially the same facts, was introduced. The plaintiff was not represented upon the appeal, as her attorney was informed that representation would not be necessary, as the case would probably be heard upon the same testimony as that introduced before the board of trustees, although he was informed also that either party could present additional evidence.

Upon the rejection of the claim by the supreme body of the order, the plaintiff brought her suit at law, basing her case upon the theory that, by the introduction of the statement of the physician of the deceased, first through the medium of the hearsay testimony of the general manager of defendant, and upon appeal through the affidavit of the physician, she was deprived of the hearing to which she was lawfully entitled, it appearing that the rejection of her claim had been due to this testimony. The question for decision was as to the application, in the litigation of a claim before the tribunals of the order, of the statute that provides that "no person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." C. L. 1897, § 10181. The question was made more difficult by the fact that theretofore the court had decided that, within the limits of common fairness, tribunals like those of the defendant order may prescribe their own rules of evidence, and that the validity of an adjudication by such tribunals cannot be questioned because in the admission of evidence technical rules have been disregarded. *Derry* v. *Great Hive Ladies of Modern Maccabees,* 98 N. W. Rep. 23; *Barker* v. *Great Hive Ladies of Modern Maccabees,* 98 N. W. Rep. 24. Indeed, in the last cited case, the unsworn certificate of a physician who had attended the assured was read in evidence, but it does not appear that objection was made upon the ground that it disclosed confidential communications.

Recognizing that the statute in question was passed in order that a patient might be free to disclose the secrets of his case to his medical adviser without the danger of public exposure in judicial proceedings, the majority opinion holds that the statute in question must apply in a case like the present, because the proceedings upon the hearing of claims before the tribunals of the order are essentially judicial in character. In other words, the court holds that these tribunals, which are in no sense a part of the judicial machinery of the state but simply the creatures of the by-laws of the defendant order, must be regarded as judicial in character and therefore subject to the requirements of the statute in question. After referring to its former decisions in which the power of such tribunals to prescribe their own rules of evidence, is recognized, the court says: "It is also true that no error of such tribunals in admitting testimony will be considered by a court unless such error affected its decision. But it must not be supposed that such tribunals are above the law-making power of the state. They have no right to violate any law which that power prescribes for their guidance. And if such violation results in their depriving a claimant of the hearing to which

he is lawfully entitled, their adjudications are of no legal effect. See *Rose* v. *Order of Patricians,* 126 Mich. 577. Did defendant violate a law which was prescribed for its guidance when it admitted in evidence the affidavit in question?" * * * * After quoting the statute, the court continues: "If this statute applies to its proceedings, defendant flagrantly violated it. Did it apply? The proceedings were in their nature judicial, and there can be no doubt that the legislature had power to prescribe rules which it was defendant's duty to observe. Did the statute prescribe such a rule? * * * * Did the legislature in passing this statute, which prescribed a rule of evidence to be observed in judicial proceedings, intend to permit this confidence to be betrayed in any judicial proceedings which it had the power to regulate? To impute any such intention to the legislature, is to assume that it designed to defeat its manifest purpose. There is nothing in the statute to limit its operation to any particular judicial tribunal or to any particular class of judicial proceedings. We must therefore assume that it was intended to extend to all proceedings of a judicial character which the legislature had the power to regulate. This statute was, therefore, in my judgment, violated when the physician's affidavit was used as testimony. See *Fennimore* v. *Childs,* 1 Halst. (N. J.) 366; *Gallagher* v. *Kern,* 31 Mich. 138." The court concludes that through the violation of this statute, the plaintiff was deprived of the hearing before the tribunals of the order to which she was lawfully entitled.

The foregoing conclusion is challenged in the dissenting opinion, in which it is contended that the statute in question embodies merely a rule of evidence; that the statute "has appeared under the title 'Evidence' * * * ever since the compilation of 1838"; that it "is entitled to no such broad interpretation as is claimed for it"; and that as a hearing is not vitiated because the tribunal of the order has "failed to comply with the technical rules governing courts in the admission of evidence," as theretofore decided by the court, the judgment of the court below should not stand. In view of the former decisions of the court which recognize the authority of tribunals like those of the defendant order and the finality of their conclusions, in the absence of fraud and unfair procedure, and that they are not in their hearings bound by the technical rules of evidence, it would seem that the minority opinion is sound. But the situation developed in this case and other situations that will doubtless be developed in other cases, prompt the suggestion that a revision of former decisions in regard to these orders may be found necessary. It is possible that the court may have been fundamentally wrong in recognizing that authority essentially judicial may be conferred by contract.

THE LAW ON THE PANAMA CANAL ZONE.—It cannot be long now till the Panama strip owned by the United States will furnish additional pabulum for the reports. Advance signs are beginning to appear, for questions concerning rights and liabilities on the canal zone are being formulated and asked. The influx of population, commerce and wealth, the industries and the variety of nationalities must soon give birth to controversies for the

appropriate tribunals to settle. It may therefore be interesting to note what law is to be applied there, and in this connection the opinion handed down by the Assistant Attorney-General of the Interior on December 16, 1904, will be found in point.

The special interrogation was in regard to the protection to be accorded to patents and trade-marks on the zone. From an examination of the acts of Congress, the treaty with the Republic of Panama, and the determination of the President under the powers vested in him, the conclusion was reached that "the canal zone has not in any sense been organized as a territory of the United States; that there is no provision making the laws of the United States generally applicable in the canal zone; and that there is no provision specifically making the patent laws and the laws relating to the registration of trade-marks and labels applicable there." 113 *Official Gazette of Commissioner of Patents,* 2503.

The matter of making rules and regulations has been left in the hands of the President, who has put it under the supervision of the Secretary of War. It will remain, however, for Congress to give a permanent system of laws and, if a forecast may be made, legislation similar to that in the case of Porto Rico will be enacted.