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The American Medical Association and the Antitrust Laws

Cover Page Footnote
Acknowledgement is made to Mario Procaccino, member of the Third Year Class, Fordham University, School of Law, for his assistance in the preparation of this paper.
THE AMERICAN MEDICAL ASSOCIATION AND THE ANTITRUST LAWS.*

Is the American Medical Association, or the subsidiary Medical Society of the District of Columbia, violating the antitrust laws in their opposition to the Group Health Association? It will be very helpful in discussing the matter, to briefly outline the salient facts leading up to this problem.

On February 24, 1937, the Group Health Association, Inc., was granted a charter1 in Washington as a so-called "Co-operative Health" corporation. Through a staff of hired physicians it offered to render most types of medical and surgical treatments2 at a stated annual cost;3 and offered such services only to Federal employees and their families. The Medical Society of the District of Columbia opposed this new scheme as contravening the best interests both of the public, and of the physicians, and as violative of its own code of ethics, as well as the Principles and Ethics of the American Medical Association which represents some 110,000 physicians4 in this country.

The members of the Medical Society of the District of Columbia knew the above facts; but several of them, nevertheless, became affiliated with that new organization. One member5 was finally expelled after charges were brought against him in accordance with the rules and regulations of his society. Several other physicians resigned from the Group Health Association rather than risk society expulsion.

The newspapers6 took up the issues, pro and con, so that they gradually became national in their scope; and the discussion finally invaded Congress early in 1938.7 Representative Scott8 offered a resolution to investigate the

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*This article is an analysis of the statement of the Department of Justice, released to the press August 1, 1938, wherein it was contended that the American Medical Association and its affiliate, the Medical Society of the District of Columbia, were attempting to prevent the Group Health Association, of the District of Columbia, from functioning in violation of the antitrust laws. The views expressed herein are the views of the author.

[Editorial Note.]

1. Questions and Answers About Group Health (1937) § 3, (pamphlet prepared by Group Health Association, Inc.).


3. To the same effect, see Questions and Answers About Group Health (1937) § 4.

4. The latest charges are as follows: (a) An application fee of $5 plus $1 for each dependent. (b) A $10 membership fee, if admitted. (c) Monthly dues of single members or head of family $2.20; husband or wife $1.80; child dependents under 18, $1; child dependents 18-21 years (each) $1.00; adult dependents over 21 years (each) $2.20. A man in a family of four people would therefore have to pay $78.00 during the first year, and $60.00 per annum thereafter. Besides these charges there is a $25 maternity charge; a $1.00 house charge for the first visit; there also is a fifty cent additional charge per visit for treatment of venereal diseases. See Questions and Answers About Group Health §§ 10-14. See also membership blank of Group Health Association.

5. (1938) 111 J. AM. MED. ASS'N 1194.

6. Ibid. Also newspapers throughout the country have had numerous discussions pro and con during the past year.


antagonistic activities of the Medical Society of the District of Columbia, and of the parent organization, the American Medical Association.

In July, 1938, in a declaratory judgment, Federal Justice Bailey of the District Court decided among other points that the Group Health Association, Inc. was not practising medicine without a license.

Finally, on August 1, 1938, Assistant Attorney-General Thurman Arnold set forth the position of the Department of Justice. In it, he stated that the expulsion, or threatened expulsion by the Medical Society of its members for allying themselves with the Group Health Association, or for having professional relations with doctors of that organization "... in effect amounts to forcing members of the Medical Society to participate in an illegal boycott of Group Health Association doctors,"—and that the exclusion by Washington hospitals of physicians who were not members of the Medical Society, (thereby excluding doctors of the Group Health Association) "... may or may not have amounted to coercion upon them . . .", and that, "In the opinion of the Department of Justice, this is a violation of the antitrust laws because it is an attempt on the part of one group of physicians to prevent qualified doctors from carrying on their calling. . . . The department interprets the law as prohibiting combinations which prevent others from competing for services as well as goods." Some other of his statements will be quoted in the course of this discussion.

Arnold offered the Medical Society an opportunity to avoid prosecution by accepting a "consent decree" which they rejected;—hence, on October 17, 1938, the entire matter was placed in the hands of the Federal Grand Jury.

Today, the country awaits with great interest the final outcome of this battle between organized medicine and governmental regulation. While the immediate matters here involved concern primarily the medical profession and its relationship to the public, the question ultimately becomes a much broader one.

The current charges squarely raise the question whether the medical associa-

10. For full statement see leading newspapers of Aug. 1, 1938, and (1938) 111 J. AM. MED. ASS'N 537. See also mimeograph release of the Department of Justice, signed by Thurman Arnold, Assistant Attorney, and approved by Homer Cummings, Attorney General, July 30, 1938.
11. (1938) 111 J. AM. MED. ASS'N 537.
12. Ibid.
13. Ibid. Two other relevant statements might well be included here. In referring to the Sherman Act he says: "[I]t is a means of keeping a competitive situation open so that those who can offer services at less cost are not impeded by agreements, boycotts, blacklists, expulsions from societies, or organized activities of any character." He further stated, "No combination or conspiracy can be allowed to limit a doctor's freedom to arrange his practice as he chooses, so long as by therapeutic standards his methods are approved and do not violate the law." See id., at 538.
14. See id., at 539.
tions are violating the antitrust laws or are acting in restraint of trade.\textsuperscript{18}

At this time several propositions present themselves for discussion:

I. Is the Group Health Association, Inc. illegally practising medicine?

II. Are the actions of the Medical Society of the District of Columbia a legal and reasonable exercise of the Society’s function?\textsuperscript{10}

III. Is medical service such a commodity as to come within the purview of the Sherman\textsuperscript{20} and Clayton\textsuperscript{21} Acts?

I. IS THE GROUP HEALTH ASSOCIATION, INC. ILLEGALLY PRACTISING MEDICINE?

The Healing Arts Practise Act of the District of Columbia\textsuperscript{22} provides that “no person shall practise the healing art in the District of Columbia who is not (a) licensed to do so. . . .” Let us see whether the Group Health Association, Inc. or any other corporation, is a “person” within the meaning of this statute.

While a corporation for some purposes is considered legally as a person,\textsuperscript{23} it is not such a person as can be licensed to practise medicine. A learned profession can only be practised by one who has been authorized to do so after an examination as to his knowledge of the subject.\textsuperscript{24} A corporation, because of its impersonal and fictitious character, has no mind and cannot think. For this reason, it cannot meet the educational requirements, nor can it diagnose a case or prescribe treatment therefor.\textsuperscript{25} In addition, the practise of the learned

\begin{itemize}
\item \textsuperscript{18} (1938) 111 J. Am. Med. Ass'n 537.
\item \textsuperscript{19} There are numerous other phases of this organization’s activities which will but briefly be touched upon.
\item \textsuperscript{20} 26 Stat. 209 (1890), 15 U. S. C. § 1 et seq. (1927).
\item \textsuperscript{22} D. C. Code (1929) tit. 20, § 122.
\item \textsuperscript{23} A corporation is a citizen for the purpose of federal jurisdiction, Doctor v. Harrington, 196 U. S. 579 (1905). But the Supreme Court has decided that a corporation is not a citizen within the purview of Art. IV, § 2 of the Constitution to the effect that: “the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.” Paul v. Virginia, 8 Wall. 168 (U. S. 1868).
\item The Fifth Amendment of the Constitution, which provides that no person shall be deprived of liberty or property without due process of law, has been held to apply to corporations. United States v. McHie, 194 Fed. 894 (1912). A similar construction has been placed upon the “due process and equal protection” clauses of the Fourteenth Amendment. Liggett Co. v. Baldridge, 278 U. S. 105 (1928). But in Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77, 85 (1938), Mr. Justice Black said in his dissenting opinion: “I do not believe the word ‘person’ in the Fourteenth Amendment includes corporations.”
\item In Willmott v. London Road Car. Co. Ltd., [1910] 2 Ch. 525, it was held that a corporation could be a “respectable and responsible person” within the meaning of a lease which permitted the lessee to assign it to such a “person.”
\item \textsuperscript{24} State Electro-Medical Institute v. State, 74 Neb. 40, 103 N. W. 1078 (1905); In re Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910).
\item \textsuperscript{25} In State Electro-Medical Institute v. State, 74 Neb. 40, 43, 103 N. W. 1078, 1079 (1905) it was said: “There was no necessity of legislation to prohibit corporations, as
professions involves a confidential relationship. If a corporation were licensed to practise law or medicine, there would be a dual allegiance because of the fact that a corporation can only act through its agents and employees, who would owe a duty to the corporation as well as to the patient or client; and such duties in many instances might conflict. If the Group Health Association, Inc. is practising medicine without a license, which it did not and cannot obtain, then it is illegally engaged in the practise of that learned profession.

The statute defines the healing art as "the art of detecting or attempting to detect the presence of any disease; of determining or attempting to determine the nature and state of any disease if present; of preventing, relieving, correcting, or curing, or of attempting to prevent, relieve, correct, or cure any disease. . . ." It is further provided that "to practise means to do or attempt to do, or to hold one's self out or allow one's self to be held out as ready to do any act enumerated in subsection (b) of this section . . . for a fee, gift, or reward, whether tangible or intangible."

The Group Health Association, Inc. is a duly organized corporation. By its certificate of incorporation and by its by-laws, the corporation may treat its members and their dependants through hired agents and employees of the association, for any and all manner of disease and injury. As a matter of fact the certificate expressly provides that the Group Health Association, Inc. is "to provide . . . for the services of physicians and other medical attention and any and all kinds of medical, surgical and hospital treatment to the members hereof and their dependants—and, in general, the giving to the membership of this Association and their dependents of all forms of care, treatment, or attention that may be required by the sick or in the prevention of disease." It is further provided that membership "shall be composed solely such, from practicing medicine. It is impossible to conceive of an impersonal entity . . . giving or prescribing the application of the remedy of the disease. Members of the corporation, or persons in its employ might do these things, but the corporation itself is incapable to do them."


27 RESTATEMENT, AGENCY (1938) § 13.
28. HERZOG, MEDICAL JURISPRUDENCE (1931) § 96.
29. MECHEM, OUTLINES OF THE LAW OF AGENCY (3d ed. 1923) § 616.
31. D. C. CODE (1929) tit. 20, § 121 (c).
32. The corporation was organized under D. C. CODE (1929) tit. 5, §§ 121 et seq., providing for corporations for " . . . benevolent, charitable, educational, literary, musical, scientific, religious, or missionary purposes, including societies formed for mutual improvement or for the promotion of the arts. . . ."
33. See Certificate of Group Health Association, Inc. art. 3, filed in the office of the Recorder of Deeds, District of Columbia, on the 24th day of Feb., 1937, and recorded in Liber 53, folio 556, et seq. Also, By-LAWS OF THE GROUP HEALTH ASSOCIATION, INC. Art. V, § 5, as revised Oct. 25, 1937 and filed together with the certificate of incorporation.
34. Certificate of Group Health Ass'n, Inc., Art. 3.
35. See id., Art. 4.
of employees of any branch of the United States Government other than officers and enlisted men of the United States Army and Navy," and that the medical services shall be rendered by licensed doctors and physicians only.\textsuperscript{80} Does this constitute the practise of medicine by the association? In a recent decision,\textsuperscript{87} Justice Bailey of the United States District Court held that the Group Health Association, Inc. was not practising medicine. Justice Bailey justified his decision on the ground that the corporation itself is not prescribing for the sick, that it only enters into contracts with duly licensed physicians, who in turn, personally attend and prescribe for the members of the corporation, and that these physicians are really independent contractors.\textsuperscript{88}

It is submitted, however, that both the reasoning and the conclusion of Justice Bailey are unsound. It is a fundamental rule of law that a corporation is an entity separate and distinct from its members,\textsuperscript{89} and that this entity or fictitious person can only act through its agents and employees.\textsuperscript{40} It follows from this that if the corporation through its agents is rendering medical services, even though only to its members, it is illegally engaged in the practise of medicine. That the services rendered to the members and their dependents are medical in nature is not denied. But it is contended that the corporation is not personally engaged in the rendition of these services. The physicians are employed, paid, and discharged by the corporation. These doctors, upon their appointment, become the employees of the corporation, and, as its agents, they give medical care and treatment to the Group Health Association's members and to their dependents. Thus the corporation, acting through these agents, is in effect giving medical treatment,\textsuperscript{43}—or, in other words, is engaged in the practise of medicine. True it is that all the employees of the Group Health Association, Inc. who act as the corporation's agents in the giving of medical treatments are licensed physicians. This fact does not change the result since it is generally recognized that a licensed practitioner of a profession cannot practise his profession as an employee of an unlicensed person or corporation, and if he does so, the unlicensed person or corporation is guilty of practising that profession without a license.\textsuperscript{42}

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\textsuperscript{36} By-Laws of Group Health Ass'n, Inc. (1937) Art. V, § 5.
\textsuperscript{37} See note 10, supra.
\textsuperscript{38} Ibid.
\textsuperscript{39} People's Pleasure Park Co. v. Rohleder, 109 Va. 439, 61 S. E. 794 (1908). Here it was held that a corporation composed entirely of negroes was not a colored person. See SVEENS, CORPORATIONS (1936) § 1.
\textsuperscript{40} See note 27, supra.
\textsuperscript{41} In People, by Kernner v. United Medical Service, Inc., 362 Ill. 442, 200 N. E. 157 (1936), it was held that a corporation's ownership of a medical clinic with offices in which patients were treated solely by licensed and registered physicians employed by the corporation, and which received the fees charged the patients, constituted the practice of medicine by the corporation within the meaning of a statute that prohibited such practice except by licensed persons. People v. Woodbury Dermatological Inst., 192 N. Y. 454, 85 N. E. 697 (1908); State v. Bailey Dental Co., 211 Iowa 781, 234 N. W. 260 (1931) (practice of dentistry); Godfrey v. Medical Society of the County of N. Y., 177 App. Div. 684, 164 N. Y. Supp. 846 (2d Dep't 1917).
\textsuperscript{42} See note 42, supra. McMurdo v. Getter, 10 N. E. (2d) 139 (Mass. 1937); cf.
Even if we concede that Justice Bailey was correct in his contention that the physicians employed by the Group Health Association, Inc. are independent contractors rather than the agents of the corporation, this corporation could not legally manage or conduct the "business side" of the practice. This is so because the law does not pretend to divide the practice of a profession into departments, on one side the actual performance of the professional services,—and on the other the business side. The practice of a profession is treated as a whole, since the courts do not wish to open it to commercial exploitation which certainly would be its fate if corporations were permitted to practise it. Thus, the practice of medicine by the Group Health Association cannot be upheld on the ground that it merely manages, conducts, and controls the business side, and that licensed men are employed to do the actual work.

This leads us to disagree with Justice Bailey's decision as being unsound and against public policy. Were the courts to adopt his ruling, it would follow that an unlicensed person either natural or corporate could own the equipment and be master of the situation by hiring licensed men to do the work. This is not the object and policy of our law.

II. Are the Actions of the Medical Society of the District of Columbia a Legal and Reasonable Exercise of the Society's Function?

Chapter III, Art. 1, Sec. 2 of the Code of Ethics of the American Medical Association states:

"In order that the dignity and honor of the Medical profession may be upheld, its standards exalted ... and the advancement of medical science promoted, a physician should associate himself with medical societies ... in order that these societies may represent the ideals of the profession."

Here we have concrete evidence that every physician is urged to join his

In re Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910), wherein it was held that a corporation cannot practice law through lawyers employed by it, and therefore cannot enforce a lien for legal services. *Contra:* State Electro-Medical Institute v. Plantner, 74 Neb. 23, 103 N. W. 1079 (1905).

43. In Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P. (2d) 67 (1932), it was held that a corporation or an unlicensed person may not manage, conduct, or control the "business side of the practice of dentistry."

It is to be noted that, if such a division were possible, then the corporation or the non-licensed individual could be guilty of gross misconduct, and could violate all standards which a licensed physician would be required to respect, and yet would remain immune from any regulatory supervision whatsoever. That a member of a profession is subject to this regulatory supervision of the state, see People *ex rel.* Karlin v. Cullin, 248 N. Y. 465, 162 N. E. 487 (1928), which held that the Appellate Division of the Supreme Court had power to inquire into the conduct of its officers (the members of the bar), and to punish any of them for "ambulance chasing."

44. The practice of a profession is subject to licensing and regulation and is not subject to commercialization or exploitation. Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P. (2d) 67 (1932); Dr. Allison, Dentist, Inc. v. Allison, 360 Ill. 363, 196 N. E. 799 (1935).
local medical society. Usually the only requirement for admission to a county medical society is that the proposed member be a licensed physician, of good moral character, and that he reside, or practise in the county where he seeks admission. In most instances there are no restrictive qualifications of any kind, so that any physician can become a member without difficulty.

But when a physician does join a medical society, it has very constantly been held that the rules and by-laws of the society are an agreement which he expressly or impliedly accepts, and by which he agrees to govern his professional conduct. Legally, it makes no difference how selfish or unselfish these society rules and by-laws may be; so long as they do not violate any laws of the land, are not against public policy, and are a legitimate protection of the interests of the members of the society, they are binding upon each member.

A society's only means of keeping erring members in line are censure, suspension, and expulsion. These weapons are legally recognized checks on straying members, and can only be used against individuals after charges have been preferred against them.

The only requirements which the law demands of a society are: (a) that

45. A typical rule for membership is that of the Bronx County Medical Society: "Physicians in good moral and professional standing, residing or having an office in Bronx County, duly licensed and recorded in the office of the County Clerk of Bronx Co. . . . are eligible for active membership in the Bronx County Medical Society, the First District Branch of the Medical Society of the State of New York, and of the American Medical Association . . ." By-Laws, as amended Jan. 7, 1926, § 3.

46. People ex rel. Bartlett v. Medical Society, 32 N. Y. 184 (1865). Where a physician has the necessary qualifications he cannot be refused admission to the society, even if he violated some ethical principles before admission, because such society rules are only binding upon members.


50. State ex rel. Waring v. Georgia Med. Soc., 38 Ga. 608 (1869). But where a member is ousted for violation of rules which themselves are against public policy e.g. offering to be a surety for a colored public officer, the courts will interfere, and reinstate such member wrongfully ousted.

51. See note 53, infra. It is to be noted that the rules for medical societies also hold generally for other voluntary societies, unions, and associations. Thus see Cohn & Roth Elec. Co. v. Bricklayer's etc. Local Un. No. 1, 92 Conn. 161, 101 Atl. 659 (1917); Booker & Kinnaird v. Louisville B'd. of Fire Underwriters, 188 Ky. 771, 224 S. W. 451 (1920) (association); see note 78, infra.


the member receive adequate notice of the charges to be brought against him;\(^5\)
(b) that the charges be violations of the rules and regulations of the society;
(c) that the accused be given a fair hearing on these charges.

If the hearing is held in good faith,\(^5\) since the courts consider it quasi-
judicial in character, they have consistently refused to pass on the final verdict
of the society.\(^6\)

In the incidents which led up to Thurman Arnold's statement, several phy-
sicians became professionally affiliated with the Group Health Association, Inc.
As early as October 2, 1937, and before this association had actively com-
menced to function, an excellent article\(^6\) appeared in the Journal of the
American Medical Association, which analyzed the set-up of this new organ-
ization. The writer of the article pointed out among other things, that that
organization was in all likelihood practising medicine illegally;\(^6\) that the
physicians employed were primarily agents of the association rather than of
the patient;\(^6\) that the by-laws of the association expressly provided\(^6\) that
"The Medical Director shall render such reports as the Board of Trustees
shall require . . . which thereby would tend to abolish all privacy and secrecy
between\(^6\) physician and patient; that there was absolutely no freedom of
choice by the patient of his physician;\(^6\) and that undoubtedly such physicians
who became attached to that organization would be looked on as on the
outer verge of ethical practise, if not altogether beyond the pale. . . ."\(^6\)

That the physicians who allied themselves with the Group Health Associa-
tion thereby violated some of the most cardinal rules of their medical organ-
ization is unquestioned. It is illuminating to examine some of these rules.

54. A typical rule regarding disciplinary measures against any member of a society is:
"A three quarter vote of the members and fellows present shall be necessary to expel a
member. . . . A vote to expel a member . . . shall not be taken unless the printed call
for the meeting contains a notice of the proposal to expel, and the accused shall have
been duly notified by registered mail at least one week previously at his last given

we have, well summarized, the holding of most courts on cases of this character. "The
decisions of any kind of voluntary society or association in admitting members and in
disciplining, suspending, or expelling them, are of a quasi-public character, and in such
cases the courts never interfere except to ascertain whether or not the proceeding
was pursuant to the rule and laws of the society, whether it was in good faith, and whether
or not there was anything in it in violation of the laws of the land. If the proceeding
was fairly had, in good faith and pursuant to the laws of the society, and if there was
nothing in it in violation of the laws of the land, then the sentence is conclusive like
that of a judicial tribunal. . . ." See note 74, infra.

58. See id., at 41B.
59. See id., at 44B.
62. Id. at 45B.
63. Id. at 45B, 46B.
Chapter II, Art. 1, Sec. 1 of the Constitution of the Medical Society of the District of Columbia states: “The principles of Medical Ethics of the American Medical Association shall be binding upon the members of the society...” Again Article 3, Sec. 1 of the same chapter, after embodying Chapter III, Art. 6, Sec. 2 of the Principle of Medical Ethics of the American Medical Association, then continues: “No member of the society shall enter into a written, verbal or implied contract or agreement with any person, firm, corporation, association... the terms of which contract or agreement are in violation of the principles herein expressed...” Incidentally, it is noteworthy that the condemnation of medical practices “which interfere with reasonable competition among the physicians of the community...” to say the least, seems paradoxical with Arnold’s accusation of “monopoly” and “restraint of trade”.

One other clause of the Constitution of the Medical Society of the District of Columbia is important at this time. Chapter IX, Article 1, Sec. 3 reads: “All duties... and regulations as to their professional conduct... which shall be imposed by the Constitution and By-Laws of this Society... shall be binding and mandatory upon all members, and for violation thereof they shall be subject to discipline by the Society.”

The District of Columbia Medical Society also demands of each member within three months after his election to membership, a written consent to be bound by all the rules and regulations of the Society.

It is thus apparent that every member of that Society is actually put on notice, shortly after joining, that there are such things as rules and regulations, Constitution and By-Laws, which he expressly agrees to abide by and adhere to.

Furthermore, most active members of the medical societies of this country subscribe to its official magazine, the Journal of the American Medical Association. It is reasonable to suppose that a physician who contemplated allying himself with Group Health Association, Inc., should have read the article concerning that association. Had he done so he would have known that such misalliance would doubtless be deemed unethical, in that, in the opinion of the Medical Association, that society violates most of the cardinal principles of medical ethics.

There are two fairly recent cases very much in point with the facts here under discussion. In Irwin v. Lorio, the Parish Medical Society expelled three doctors for serving as physicians to the Standard Oil Employee’s Medical and Hospital Association on the ground that such service was unethical and

64. “It is unprofessional for a physician to dispose of his services under conditions that make it impossible to render adequate services to his patient or which interfere with reasonable competition among physicians of a community. To do this is detrimental to the public...” (Italics inserted.)
65. See note 68, infra.
68. See id., at 45B, 46B.
69. 169 La. 1090, 126 So. 668 (1930).
violated several important principles of the Code of Ethics of that Society, and of the American Medical Association. The court held that the Parish Medical Society had the power to suspend and expel its members for legal cause, after a fair hearing; that so long as the proceeding was held in good faith, pursuant to the rules and by-laws of the Society; and so long as the rules were not in violation of the laws of the land, the decision of the Society would then be conclusive upon the court. Furthermore, no courts would interfere at the instance of an aggrieved member until he had exhausted all remedies afforded him by the Constitution or By-Laws of the society; or unless he showed a good excuse for not having done so.

In Porter v. Kings County Medical Society, two physicians, who had been members of their local medical society, had engaged in a form of contract and group practise which violated the rules and regulations of their society (in much the same way as in the previous case). The men were expelled after a fair hearing of their case. It was held that the Society’s Constitution, Charter and By-Laws constitute a contract between the members enforceable by the courts unless immoral, or contrary to the law of the land or to public policy. The court also held that whether the by-laws which were violated were just, reasonable, or wise was a question of policy concerning only the society and its members.

These two cases are squarely in point with the facts involved in the Washington dismissal, upon which Arnold later built his “restraint of trade” charge. The holding of the courts in these cases, as well as in so many other related cases involving not only medical societies, but also other voluntary societies, associations, unions, etc. have consistently been the same, and would clearly seem to exonerate such societies from any suggestion of illegal coercion, or restraint.


71. 58 P. (2d) 367 (Wash. 1936).

72. Booker & Kinnaird v. Louisville B’d. of Fire Underwriters, 183 Ky. 771, 224 S. W. 451 (1920); Hareson v. Tyler, 231 Mo. 383, 219 S. W. 903 (1920). A hay dealers' association which fines, suspends, or expels members for violation of its by-laws is not unlawful under the common law.

73. "The enforcing of a by-law forbidding members of the union to serve one who breaks a contract with its members does not amount to intimidation." Seymour Ruff & Son Inc. v. Bricklayer's etc. Union, 165 Md. 687, 703, 164 Atl. 752, 757 (1933); see Cohn & Roth Elec. Co. v. Bricklayers' etc. Local Un. No. 1, 92 Conn. 161, 166, 101 Atl. 659, 661 (1917).

74. "In almost every profession and every business there are associations ... organized by persons engaged in particular lines of industry or following certain professions, that have for their sole purposes the protection and promotion of the best interest of the
Group Insurance, Contract Practise and the Group Health Association.

It is very important at this point to digress slightly from our main theme and call attention to the fact that under the Code of Medical Ethics, Contract Practise per se is not considered unethical. It is only deemed so when certain objectionable features or conditions exist in the contract, among which are the following: "1. When there is solicitation of patients directly or indirectly. . . . 4. When there is interference with reasonable competition in a community. 5. When free choice of a physician is prevented." Does the Group Health Association, Inc. violate these rules? It is almost superfluous to state that that organization violates every one of the above rules. Thus, it solicited for membership among the Federal employees of Washington, and is still doing so. It is a fundamental principle that ethical physicians may not do this; there is no such restraint, however, on a lay organization, which is governed by the ordinary rules and methods of business.

That that organization interferes with reasonable competition among physicians in the vicinity is fairly obvious. The association originally was supposed to serve only 2,500 persons. By June 15, 1938, it already had on its roster 2,568 paying members, and a total of over 6,000 persons entitled to medical service, and was still expecting to expand. When we stop to realize that the membership is composed of Federal employees, that no high income bracket is debarred from joining, that there is no proof that any or most of these individuals are of a class unable to meet medical expenses, we can readily appreciate how many patients are thus withdrawn from the legitimate clientele of the physicians of Washington and the environs, and thrust upon the physicians and specialists affiliated with that organization.

Finally, we come to the matter of "free choice of physicians" of which there is none. The members are limited to the use of the association doctors, with the possible exception of an occasional outside consultant. Hence, it is

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75. PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASS'N (1938), c. III, art. 5, § 3.
76. Group Health Ass'n Inc. (1937) 109 J. AM. MED. ASS'N 39B.
77. QUESTIONS AND ANSWERS ABOUT GROUP HEALTH (1937) § 7.
78. "The membership will be increased to 3,300 immediately. It is anticipated that as rapidly as additional clinical facilities and competent physicians can be provided for, new members will be added." Id., at § 37. It is to be noted that for every paying member there are approximately two and a half individuals entitled to treatment. Thus where there were 2,568 paying members, over 6,000 individuals were entitled to medical service.
79. See id., at § 9.
80. Group Health Ass'n Inc. (1937) 109 J. AM. MED. ASS'N 46B. Also see QUESTIONS AND ANSWERS ABOUT GROUP HEALTH (1937) § 9.
81. Group Health Ass'n Inc. (1937) 109 J. AM. MED. ASS'N 45B.
82. By-Laws of Group Health Ass'n, Inc. (1937) art. X, sec. 4.
interesting to note that Assistant Attorney General Arnold, in his statement to the press, used the phrase "physician of their own choice" concerning members of the Group Health Association. When we consider that 6,000 or more members entitled to medical and surgical treatment have a "choice" of but two surgeons, one baby specialist, two general practitioners, one urologist (genito-urinary specialist), and one obstetrician, the phrase becomes almost ridiculous.

The matter of free choice of physicians is a very important one. It is constantly sought for by the American Medical Association when analyzing any new medical schemes and projects which may be advanced. This is not only demanded for the protection of the medical profession as a whole, but is more particularly stressed for the welfare of the public, to permit them at all times to use a physician of their own choice—one in whom they have confidence and trust;—one who in most instances has been tried out in the past and not found wanting;—one who they know in advance will in every way protect their interests and retain their confidence. To have a physician who is primarily an agent of an association, corporation, or other third person, rather than the agent of his patient, violates one of the most basic and time honored canons of medical ethics, i. e. secrecy or privacy. It violates the law of most communities as well.

While the American Medical Association has objected to "group or contract practise" as illustrated by the Group Health Association, they do not object to the group insurance idea for payment of medical bills. Under approved

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33. (1938) 111 J. AM. MED. ASS'N 537.
34. QUESTIONS AND ANSWERS ABOUT GROUP HEALTH (1937) § 9.
35. (1938) 111 J. AM. MED. ASS'N 1194. Among the ten principles adopted by the American Medical Association in 1934, the third one states, "Patients must have absolute freedom to choose a legally qualified doctor of medicine. . . ." 16 BULLETIN OF BRONX CO. MED. SOC. (1938) 139.
36. In 16 BULLETIN OF BRONX CO. MED. SOC. (1938) 139, the second principle reads: "No third party must be permitted to come between the patient and his physician in any medical relation."
37. Principle No. 4: "The method of giving the service must retain a permanent, confidential relation between the patient and a 'family physician'. This relation must be the fundamental and dominant feature of any system." Ibid.
38. N. Y. CIV. PRACT. ACT (1920) § 352. "A person duly authorized to practice physic or surgery, . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity. . . ."
39. (1938) 111 J. AM. MED. ASS'N 1194; 16 BULLETIN OF THE BRONX CO. MED. SOC. (1938) 139. The sixth principle states: "However the cost of medical services may be distributed, the immediate cost should be borne by the patient if able to pay at the time the service is rendered." See also (1938) 111 J. AM. MED. ASS'N 1216 wherein the following recommendation is reported as having been made on a general program of medical care: "In addition to insurance for hospitalization your committee believes it is practicable
plans a patient at all times has a free choice of his physician, from among all the physicians of the community, county or city, depending on the radius covered by any particular plan.\textsuperscript{90}

As typical examples of such arrangements we have the now very familiar, highly successful, Group Hospitalization Plan found all over the country in one form or another. The choice of the hospital under this plan is left entirely to the patient and his physician,\textsuperscript{91} and in large cities most of the better private institutions are members of this plan. That the service has made rapid strides to extreme popularity with the public is indisputable.\textsuperscript{92} The rates are also very reasonable in view of the benefits offered by this plan.\textsuperscript{93}

Group Hospitalization Insurance is an excellent example of a non-governmental, privately subscribed "group-payment" plan for adequate hospital service, with free choice of hospitals.

A now familiar example of "group-insurance" payment for medical service is found very close to home, namely, under the New York State Workmen's Compensation Law. Prior to July 1, 1935, the duty of the employer was to render adequate medical, surgical, hospital, or other necessary treatment to his injured employee.\textsuperscript{94} Either the employer or the insurance carrier had the right—which they frequently exercised—of ordering an injured employee to a doctor of their own choice. The result was that there was a good deal of "racketeering" in industrial work, particularly by men who specialized in this form of practise. Many of these physicians and Compensation Clinics engaged paid solicitors, bribed carrier's clerks, and used other modern "business methods" to obtain an increased volume of work.

But with the help and advice of the New York State Medical Society, Chapter 258, Sec. 13 of the Laws of New York was written and became effective July 1, 1935.\textsuperscript{95} This provided for the selection by employee of his own physician when he was hurt. Today the employee alone, except in certain unusual instances, has complete freedom of choice of a physician from among to develop cash indemnity insurance plans to cover, in whole or in part, the costs of emergency or prolonged illness.\textsuperscript{96}

\textsuperscript{90} 16 \textit{Bulletin of the Bronx Co. Med. Soc.} (1938) 139, the eighth principle reads: "Any form of medical service should include within its scope all legally qualified doctors of medicine of the locality covered by its operation who wish to give service under the conditions established."

\textsuperscript{91} "A subscriber should be free to choose his hospital at the time of illness." Rorem, \textit{Approved List of Hospital Care Insurance Plans} (May 1938) \textit{Hospitals}.

When a member of the "plan" is travelling and requires hospitalization for any emergency illness or accident, or if for any reason he chooses a non-member hospital while at home, the "plan" makes its usual per-diem allowance to defray his hospital expense.\textsuperscript{92} \textit{Ibid.} "These plans [on Apr. 18] reported a total enrollment of 1,600,000 employed persons on April 1, 1938, as compared with 800,000 one year ago, 300,000 in 1936, and 75,000 in 1935."

\textsuperscript{93} Single individual \$10 \textit{per annum}; married couple \$19 \textit{per annum}; family with all dependents under 18 years of age \$24 \textit{per annum}.

\textsuperscript{94} Chap. 553 Sec. 13 of the Laws of New York (1927).

\textsuperscript{95} These provisions were amendatory of the existing compensation laws and designed to remedy its evils.
any who are authorized by the Industrial Commissioner to treat compensation cases. Any physician may be so empowered by applying to his local medical society.

The new law has worked out beneficially both for the family physician who treats the same patient for all his other ailments, and for the patient who need no longer be ordered to go to a doctor whom he does not know, or in whom he may have little or no confidence.

At this time many medical societies in various parts of the country are working on the "group-insurance" plan for payment of medical services. This plan is very similar to the Group Hospitalization plan and the New York Workmen's Compensation plan. The patient calls his own physician during any medical or surgical illness; professional services are rendered to the patient, but the bill is sent to the insurer. The fundamental differences between this plan and the Group Health Association plan are: first, that in the new plan sponsored by the Medical Societies of the various communities, the time honored relationship between physician and patient remains inviolate; and secondly, that the patient at all times has complete freedom of choice of his doctor.

This plan undoubtedly will meet with the whole-hearted approval of the public in the same manner that the Group Hospitalization plan has become so extremely and deservedly popular during its brief existence. That it also has the whole-hearted support of the medical profession is well evidenced by the fact that when details of the plan were sent out by the Kings County Medical Society (Brooklyn, New York) and each physician was asked to check off "interested" or "not interested", only 4 out of 1987 replied in the negative.

III. Is MEDICAL SERVICE SUCH A COMMODITY AS TO COME WITHIN THE PURVIEW OF THE SHERMAN AND CLAYTON ACTS?

In order to discuss this phase of the question more intelligently, it will be helpful to again quote several of the condemnatory portions of Arnold's official statement and then to compare them with the statutes, and with the doctrine of stare decisis.

Arnold in referring to the expulsion, or threatened expulsion of physicians by the Medical Society for their affiliation with the Group Health Association says:

"In the opinion of the Department of Justice this is a violation of the antitrust

96. N. Y. Sun, Oct. 12, 1938, p. 17, col. 6 (Cincinnati Academy of Medicine). Similarly see N. Y. Times, Sept. 17, 1938, p. 19, col. 2, reporting that "A sweeping plan for providing medical care of every type, surgery and specialization included . . . is being developed for application to sixteen counties of New York next year." Also see (1937) 109 J. Am. Med. Ass'n 49B-50B, concerning British Group Insurance plan, and a Canadian experiment along similar lines.


The department interprets the law as prohibiting combinations which
prevent others from competing for services as well as goods. . . .

"... The Sherman Act is not a method of directing or planning the future; in-
stead it is a means of keeping a competitive situation open so that those who can
offer services at less cost are not impeded by agreements, boycotts, blacklists, ex-
pulsions from societies, or organized activities of any character. . . ."

"No combination or conspiracy can be allowed to limit a doctor's freedom
to arrange his practice as he chooses. . . ."

With these main excerpts in mind, let us now examine the antitrust laws,
to see whether or not they can possibly relate to medical services.

Sec. 1 of the Sherman Act reads as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy in
restraint of trade or commerce among the several states, or with foreign nations is
declared to be illegal."

From this statement of the law, it can readily be seen that almost any
contract, or combination relating to trade or commerce, and interstate in
character, whether legitimate, reasonable or otherwise, can easily be held to
be in restraint of trade.

At first the Supreme Court did in fact construe the statute strictly in
accordance with the Common Law, and held that all contracts, combinations,
or agreements, which created or tended to create a monopoly, whether reason-
able or unreasonable, were unlawful because they were in restraint of trade
and therefore against public policy.

After a short time the Supreme Court commenced to modify its views, so
that in the Joint Traffic Case in 1898, they decided that a restraint of trade,
to be violative of Sec. 1 of the Sherman Act, had to be direct and sub-
stantial; and not indirect, remote and incidental; and that the antitrust

99. (1938) 111 J. AM. MED. ASS'N. 537.
100. See id., at 538.
101. See definition of conspiracy in Duplex Printing Press Co. v. Deering, 254 U. S.
443, 465 (1920).
102. (1938) 111 J. AM. MED. ASS'N. 537.
103. See note 97, supra.
104. United States v. Joint Traffic Ass'n, 171 U. S. 505, 568 (1898). (The effect on
interstate commerce must not be indirect or incidental only, but must be direct and
immediate in its effect on interstate commerce); In Hopkins v. United States, 171 U. S.
578, 600 (1898) the court said: "The act of Congress must have a reasonable construction
or else there would scarcely be an agreement or contract among business men which could
not be said to have, indirectly or remotely, some bearing upon interstate commerce, and
possibly to restrain it. . . ."
105. United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897); United
States v. Addyston Pipe & Steel Co., 175 U. S. 211 (1899); Northern Securities Co. v.
United States, 193 U. S. 197 (1904).
106. See note 104, supra.
108. Accord: United Mine Workers v. Coronado Coal Co., 259 U. S. 344 (1922);
United Leather Workers' International Union v. Herkert & Meisel Trunk Co., 265 U. S.
457 (1924); Industrial Ass'n of San Francisco v. United States, 268 U. S. 64 (1925);
act required a "reasonable construction". This holding was but a short step from the "rule of reason" doctrine which was promulgated in 1910 and 1911 in the celebrated Tobacco and Standard Oil Cases. In these cases the Supreme Court decided that there must be a "resort to reason" in construing what constituted "restraint of trade". They held that only such contracts and combinations which "unduly" restricted competition, or "unduly" obstructed the due course of trade, were to be held violative of the antitrust laws.

From that time on the holding as to restraints of trade gradually became more and more liberal. Thus, in United Mine Workers v. Coronado Coal Co., although there was a good deal of violence and bloodshed, the Court held that any restraint of trade present was merely secondary and incidental to the primary purpose of the strikers, which was to protect their legitimate interests and prevent an open shop; and that these serious trespasses were not part of any conspiracy under the antitrust laws.

Let us now carefully examine Sec. 1 of the Sherman Act. We note that the contract, combination or conspiracy must be in restraint of "trade" or "commerce"; and it must furthermore be "among the several states" i.e. interstate, to be illegal.

What is "trade" and "commerce"? Many of the cases have resorted to the dictionary for the definition of these two terms. Typical of most of these definitions is that given in the Metropolitan Opera Company v. Hammerstein.

Metropolitan Opera Co. v. Hammerstein, 162 App. Div. 691, 693 (1st Dept. 1914), aff'd, 221 N. Y. 507 (1917).

109. See note 108, supra.


111. Standard Oil Co. v. United States, 221 U. S. 1 (1911).

112. In Industrial Ass'n of San Francisco v. United States, supra, dealers in building material formed a protective association to offset the oppression of the labor unions and used methods persuasive and coercive. Held: such interference with commerce was primarily local and only secondarily interstate, and the means used did not unduly obstruct free flow of interstate commerce. Accord: Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 613 (1914); American Column Co. v. United States, 257 U. S. 377, 400 (1921).

113. 259 U. S. 344 (1921); also United Leather Workers v. Herkert, 265 U. S. 457 (1924); Contra: Lawlor v. Loewe, 235 U. S. 522 (1915). This case was decided before the passage of the Clayton Act, and was a rather severe blow to labor organizations since it held them guilty of restraint of trade.

Similarly in Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1920) decided shortly after the passage of the Clayton Act; it also held labor organizations in restraint of trade. But see a strong dissenting opinion by Brandeis, J., in that case (note 122, infra) which was a forerunner of much more liberal subsequent opinions; e.g. the two previous cases cited supra.

114. 162 App. Div. 691, 694, 147 N. Y. Supp. 532, 534 (1st Dept' 1914), aff'd, 221 N. Y. 507 (1917); other definitions of "trade" and "commerce" see American League Baseball Club v. Chase, 86 Misc. 441, 459, 149 N. Y. Supp. 6, 16 (Sup. Ct. 1914) (at page 17: "Baseball . . . is not a commodity or article of commerce. . . ."); Matter of Oriental Society, 104 Fed. 975 (D. C. E. D. Pa. 1900) (giving of theatrical performances is not trading or
"... Webster defines 'trade' as 'the act or business of exchanging commodities by barter; ... commerce, traffic, barter.' 'Commerce' is defined as 'the exchange of merchandise on a large scale between different places or communities; extended trade or traffic.' The Standard Dictionary defines 'commerce' as 'the exchange of goods, production of property of any kind, especially on a large scale between states and nations'. ..."

In *United States v. Swift & Company*, the Court says: "Commerce, briefly stated, is the sale or exchange of commodities. ..."

From these definitions we note that reference is made to goods, to merchandise, to articles of barter, to commodities. What is a commodity? A typical definition may be quoted from *American League Baseball Club of Chicago v. Chase*.

"A commodity is defined as particularly an article of merchandise; anything movable which is a subject of trade or of acquisition. ..."

Is labor a commodity? The Clayton Act passed in 1914 definitely stated that labor was not a commodity or article of commerce. The vast majority of cases prior to the enactment of that law had consistently held the same view. Section 17 of that act also decreed to labor, agriculture, and horticulture the right to form organizations for mutual help and assistance; that section also decreed that such combinations were not to be deemed violative of any antitrust laws; nor were they to be considered in restraint of trade. Sec. 20 of that Act forbade the issuance of injunctions against employees who strike or who persuade others to peacefully do the same.

Labor had been contending for such a law for many years and its passage following mercantile pursuits). Accord: People v. Klaw, 55 Misc. 72, 106 N. Y. Supp. 341 (County Ct. 1907); Harms v. Cohen, 297 Fed. 276 (D. C. Pa. 1922) (a musical composition under a copyright is not trade or commerce).

115. 122 Fed. 529, 531 (C. C. N. D. Ill. 1903).

116. 86 Misc. 441, 149 N. Y. Supp. 6, 16 (Sup. Ct. 1914).

117. 38 STAT. 730 (1914), 15 U. S. C. § 12 et seq. (1927) § 17. "The Labor of a human being is not a commodity or article of commerce. ..." State v. Frank, 114 Ark. 47, 169 S. W. 333 (1914) (laundering is not a commodity). Accord: Downing v. Lewis, 56 Neb. 386, 76 N. W. 900 (1898). In Harelson v. Tyler, 281 Mo. 383, 389, 219 S. W. 908, 913 (1920), it was said: "Labor, whether physical or intellectual, or a combination of the two, is not by any fair result of construction a 'product or commodity'... within the meaning of the word as used in the statute. ..." State *ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 60 S. W. 91 (1900) (getting news is not a commodity).

118. "... Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations instituted for the purpose of mutual help... or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof. ..."

In *Rohlf v. Kasemeier*, 140 Iowa 182, 184, 118 N. W. 276, 278 (1908), the court said: "... It is the right of miners, artisans, laborers, or professional men to unite for their own improvement or advancement or for any other lawful purpose, and it has never been held, so far as we are able to discover, that a union for the purpose of advancing wages is unlawful under any statutes which have been called to our attention. ..."

119. "... nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."
was particularly welcome to them after some severe adverse decisions had been rendered against them, particularly in the celebrated *Danbury Hatter's* case.\(^{120}\) Despite the passage of the Clayton Act\(^ {121}\) the *Duplex v. Deering* case\(^ {122}\) coming on shortly after the enactment of the Clayton Act, gave a decision adverse to labor on the ground that unlawful means had been used to restrain interstate trade. Thereafter the decisions toward labor, and labor organizations, were much more liberal; so that in some cases\(^ {123}\) where the facts involved more decided instances of restraint of trade through the use of force and violence, the Supreme Court nevertheless decided that such restraint was incidental and secondary to some other more primary purposes,—hence, not violative of the antitrust laws.

Where does medical service fit into this picture? Is medical service labor? Is it a commodity of trade or commerce? Is medical practise to be considered as being interstate in character? It is, of course, difficult to find many cases which answer these questions precisely. In *Rohlf v. Kasmeier*,\(^ {124}\) we have a direct answer to our question. That case squarely held that the practise of medicine or surgery is labor; and like other forms of labor it decidedly cannot be classified as a commodity of trade or commerce, and that therefore such services do not come within the purview of the antitrust laws.

There are dicta\(^ {125}\) to the same effect in several other cases; and there are

120. Lawlor v. Loewe, 235 U. S. 522 (1915); but see dissenting opinion of Brandeis, J., in *Duplex Printing Press v. Deering*, at note 122 infra.


122. 254 U. S. 443, 481 (1921): In a strong dissenting opinion Brandeis, J. said "The change in the law by which strikes once illegal and even criminal are not recognized as lawful was effected in America largely without intervention of legislation. . . . This statute (Clayton Act) was the fruit of unceasing agitation, which extended over more than twenty years and was designed to equalize before the law the position of workingmen and employers as industrial combatants. . . . The resulting law set out certain acts which had previously been held unlawful whenever Courts disproved of the ends for which they were performed; it was then declared that when those acts were committed in the course of an industrial dispute, they would not be held to violate any law of the United States."


124. 140 Iowa 182, 184, 118 N. W. 276, 277 (1908). The court said: "The primary inquiry is: Are the charges of a physician or surgeon for his medical skill or ability an article of merchandise or commodity to be produced or sold in this state? . . . the word 'commodity', when used with reference to prices, should not be held to include labor. . . . That the practice of medicine and surgery is labor no one, we think will question. . . ." See Comment (1938) 7 Fordham L. Rev. 217, 226, which points out that since "labor" has been held to include both mental and physical activity, education might conceivably be placed under the comprehensive terms of "labor", and thus come under Federal regulation, if the proposed Child Labor amendment were ratified by the requisite number of states.

125. Metropolitan Opera Co. v. Hammerstein, 162 App. Div. 691, 695, 147 N. Y. Supp. 532, 533 (1st Dept 1914), aff'd 221 N. Y. 507, 116 N. E. 1051 (1917). The court said, "If the production of opera is trade and commerce, it would seem to follow that every museum which exhibits pictures . . . every lawyer who prepares a brief, every surgeon who performs an operation . . . is engaged in commerce. In the construction of statutes the
numerous cases where, by analogy we must arrive at the same conclusion. In fact, if we use a “rule of reason” to analyze medical services, we cannot by any conceivable stretch of the imagination arrive at any other conclusion than that of Rohlf v. Kasemeier—that whether labor or service is skilled or unskilled, manual or intellectual, it cannot be classified as a “commodity”: nor can it be held as an article of “trade” or “commerce” and therefore does not come within the purview of the antitrust laws.

Furthermore, Sec. 17 of the Clayton Act, as we have seen, gives non-profit organizations of labor the right to combine for mutual help, and to lawfully carry out the legitimate objects of such organization. If, therefore, we admit that labor, whether skilled or unskilled, intellectual or manual, has the right to organize, can we on the one hand admit this right, and then, on the other hand state, as Mr. Arnold does, so illogically, that this same lawful organization violates the antitrust laws? This would seem to be a *reductio ad absurdum.*

Finally, Sec. 1 of the Sherman Act states that the combination must be interstate in operation. For that matter, all the Federal antitrust laws, i.e. the Sherman, Clayton and Hepburn Acts relate exclusively to interstate commerce, and leave intrastate violations to the States themselves.

As far as the antitrust violations in the District of Columbia are concerned, they are specifically taken care of by Sec. 3 of the Sherman Act, which states that trusts in the territories of the United States or in the District of Columbia are illegal, and that combinations in restraint of trade are a misdemeanor. Hence the determination of illegality in Washington, would follow the Federal rule which we have already examined.

Is the practise of medicine and surgery interstate in its scope? To merely mention this question would seem to be sufficient to drop it from consideration. When a doctor examines a patient in his office, or goes to the patient’s home, or operates on his patient at his office, or at the hospital, can we possibly make an interstate act out of this? It may be argued that the doctor some-

usual and natural meaning is to be given to words and it can scarcely be urged that a construction which would include the above in ‘trade or commerce’ would give to the words their usual and natural meaning.”

In Harelson v. Tyler, 281 Mo. 383, 393, 219 S. W. 908, 913 (1920), the court said “ . . . labor, whether physical, or intellectual, or a combination of the two, is not by any fair rule of construction a ‘product or commodity’ . . . within the meaning of the word as used in the statute . . . ”

In Hooper v. California, 155 U. S. 648, 655 (1895), the court held that personal effort, not related to production was not a subject of commerce. In Federal Baseball Club of Baltimore v. National League etc., 259 U. S. 200, 209 (1922) the court said, “ . . . A firm of lawyers sending out a lawyer to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State . . . ”

126. In National Fireproofing Co. v. Mason Builders Ass’n, 169 Fed. 259, 265 (C. C. A. 2d, 1909), the court stated, “The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders a combination unlawful . . . a combination entered into merely for the purpose of promoting by lawful means the common interests of its members is not a conspiracy . . . .”
times travels to treat a patient in another state; or that a patient travels from another state to see the doctor for examination and treatment; or that a prescription is given which may be filled in another state. Are not these acts of travel interstate in character? It is indeed true that they may so be, but the travelling from one state to another is merely incidental to the act of treatment which is always local.

Thus, in the Federal Baseball Club v. National League, the Supreme Court held that the necessary travelling of the baseball players from one state to another was merely incidental to the baseball exhibition which is purely a local matter.

Similarly, in Metropolitan Opera Company v. Hammerstein, the Court stated that the travelling of the actors from one state to another, and even the transportation of scenery and other necessary effects were but incidental to the rendition of the operatic performances; but that the performances themselves were strictly local in character.

We have seen, therefore, that medical service is neither a commodity of trade nor commerce; and that it is not interstate in character. We have also found that restraints of trade when found in interstate commerce must be direct and immediate, rather than indirect, remote, or incidental;—so that if we could classify the acts referred to by Arnold as restraints, they would surely be remote and incidental.

Finally, we have found that the Clayton Act expressly gives labor the right to organize for the legitimate protection of its interests, and elsewhere in this article we found that physicians, as members of a society or association, under proper circumstances have the right to censure, suspend or expel members for violations of rules of their organization.


128. Metropolitan Opera Co. v. Hammerstein, 162 App. Div. 691, 696, 147 N. Y. Supp. 532, 535 (1st Dep't 1914), aff'd, 221 N. Y. 507, 116 N. E. 1061 (1917). The court holds: "The decisions are numerous that where the business or thing directly affected by the contracts are not matters of interstate commerce, the mere fact that incidentally in preparation therefor, or as a result thereof, or in some other collateral or incidental manner, acts or transactions of an interstate commercial character take place does not bring the case within the purview of the act." But see H. B. Marienell v. United Booking etc., 227 Fed. 165 (S. D. N. Y. 1914) which tries to distinguish its contrary holding in rather similar facts, from the previous case.

129. See note 128, supra; also Industrial Ass'n of San Francisco v. United States, 263 U. S. 64, 80 (1923) which compares its facts with those of Coronado Coal, and United Leather Workers v. Herkert case, and arrives at a similar holding, namely, that there is a vital difference under the Sherman Act between a direct, substantial and intentional interference with interstate commerce, and an interference which is incidental, indirect, remote, and outside the purpose of those causing it.

In Lipson v. Socony-Vacuum Corp., 76 F. (2d) 211, 218 (C. C. A. 1st, 1935) the court says, "The act was not intended to reach every remote lessening of competition, but only such acts as would probably substantially lessen competition, or disclose an actual tendency to create a monopoly in interstate commerce." Accord: Standard Fashion v. Magrane Houston Co., 258 U. S. 346, 357 (1922); B. S. Fearsall Butler Co. v. Fed. Trade Comm., 292 Fed. 720 (C. C. A. 7th, 1923).
CONCLUSION.

1. The Group Health Association, as a corporation is offering to its members all forms of medical and surgical treatment, rendered by physicians in its employ. Despite the fact that Justice Bailey, in a declaratory judgment, has recently decided that this corporation is not practising medicine illegally, the weight of legal authority seems to be against his holding.

2. Under the Clayton Act, labor is expressly given the right to organize for the mutual help and benefit of its members, and such combinations are not be considered as violative of any antitrust laws.

Similarly, under general rules of law governing associations, unions, corporate and unincorporated societies, individuals may unite to promote and protect their own interests, provided that the purposes of the organization are legitimate and reasonable, and do not contravene public policy. They may make rules and regulations both as to admission of new members, and as to censure, suspension or dismissal of members who violate any society rules and regulations. If a member is given ample notice of the charges to be preferred against him, if he is fairly tried on those charges, and if the charges themselves are not against public policy, the courts of the nation consistently refuse to interfere with the judgment rendered thereon.

Hence, when the Medical Society of the District of Columbia dismissed one or more of its members for violating its rules and regulations, or for violating the rules and regulations of the parent organization—the American Medical Association, such dismissal was a reasonable and lawful exercise of society function. Since this exercise of society function is sanctioned by the courts, and permitted under the Clayton Act, it is difficult to understand under what theory of the law Arnold, or the Department of Justice, can now deem these societies to be guilty of violation of our antitrust laws.

3. Both under the Clayton Act, and by force of stare decisis, it has almost uniformly been held that labor does not come within the purview of the antitrust laws. The practice of medicine, or the rendition of medical service is unquestionably mental or intellectual labor. It has never been classified as a commodity of trade or commerce so far as the writer has been able to determine. Furthermore, the rendition of services is strictly local rather than interstate in its character.

If therefore, the views of our higher courts were to change suddenly, and an adverse opinion were to be rendered, in accordance with the beliefs of the Department of Justice, then we would be obliged to change all our previous concepts and notions concerning antitrust laws, and retrogress to the days of the strict Common Law views on the subject. The likelihood of such dramatic change in judicial outlook seems rather remote, without further legislative intervention.

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