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Constitutional Law--Anti-Trust Legislation--Practice of Medicine Not a Trade Within Section 3 of Sherman Act (United States of America v. American Medical Association, et al., 28 F. Supp. 752 (D.C.D.C. 1939))

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the respondents, may not be ignored." (Italics added.) At common law, where there was no testamentary guardian, an infant, over fourteen years of age, could petition the surrogate or judge of probate to appoint a certain person he had chosen his guardian.[12] Under the New York Statute, the infant retains the right of nomination,[13] subject, however, to judicial approval. Consequently, upon an infant's petition, the Surrogate may, in the interests of the infant, appoint a step-parent rather than a natural parent as guardian, although the latter has not been declared to be an unfit, improper or incompetent custodian.

M. M. S.

CONSTITUTIONAL LAW—ANTI-TRUST LEGISLATION—PRACTICE OF MEDICINE NOT A TRADE WITHIN SECTION 3 OF SHERMAN ACT.—Under Section 3 [1] of the Sherman Anti-Trust Act, defendants [2] were charged with combining and conspiring to restrain the activities of a group health association of government employees engaged in arranging for the provision of medical care and hospitalization for its members, with restraining such members from obtaining adequate medical care from doctors engaged in group medical practice, and with imposing illegal restraints upon physicians serving on the medical staff of the association, upon other doctors in the District of Columbia, and upon Washington hospitals.[3] Defendants demurred on the principal ground that none of the illegal restraints has reference to a trade and that in view of the fact that Section 3 concerns itself with "trade" and not with the professions, the indictment should be dismissed. *Held,* demurrers sustained. The practice of medicine and the businesses of

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[12] 2 KENT'S COMM.* 227; Sherman v. Ballou, 8 Cow. 304 (N. Y. 1828).

[13] N. Y. SURROGATE'S COURT ACT §§ 175, 179; Schouler, *Domestic Relations* (6th ed. 1921) § 844.

[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in * * * or of the District of Columbia * * * is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *." 26 STAT. 209 (1890), 15 U. S. C. § 3 (1934).

[2] American Medical Association, a national organization of physicians; two of its subordinate bodies, the Medical Society of the District of Columbia, and Harris County Medical Society of Houston, Texas; the Washington Academy of Surgery; and twenty-one individual doctors, all members of the national body, some officers thereof, others members and officers of the Medical Society of the District of Columbia.

[3] The indictment, criticized by the Court for lack of facts, and in which "influence, opinion and conjecture were freely indulged", charged that the defendant medical societies had sought to exclude from their membership, doctors connected with the group health association; that they then urged the Washington hospitals to admit to their staffs only those doctors who were members of the societies.

the health association and hospitals do not constitute "trade" within the meaning of the provisions of Section 3 of the Sherman Anti-Trust Act. *United States of America* v. *American Medical Association, et al.,* 28 F. Supp. 752 (D. C. D. C. 1939), *appeal denied,* — Sup. Ct. — (1939).

The absence of any direct reference in the statute to restraints upon "professional activities" as distinguished from "trade" raised the question of whether or not the practice of medicine is a trade within the purview of Section 3 of the Sherman Act. The Court in the present case has stated that if Congress had any intention to regulate the practice of medicine within the District of Columbia and bring it under the provisions of Section 3, it would have made its purpose clear by incorporating such language in the statute.[4]

By way of precedent, the early American case of *"The Nymph"* [5] lends influence to the oft-repeated view that the practice of a profession does not come within the meaning of the word "trade".[6] Although the question of whether restraints upon the practice of a profession are within Section 3 was not before the court in that case, the liberal arts and the learned professions were expressly excepted from Mr. Justice Story's definition of "trade".[7] An opposite view was taken in a leading English case [8] which involved a restraint upon

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[4] The need for the application of § 3 to restraints upon the practice of medicine, did not pass unnoticed during the debate in the Senate before the adoption of the section. The discussion of the subject in the Legislature, however, had no definite effect upon the Act in its final form. See 21 CONG. REC. 2726.

[5] 18 Fed. Cas. No. 10,388 (1834).

[6] See also Graves v. Minnesota, 272 U. S. 425, 47 Sup. Ct. 122 (1926) and Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608, 55 Sup. Ct. 570 (1935) for examples of federal decisions which bear out the conception of trade as an occupation or pursuit of a mercantile character. See Federal Trade Commission v. Raladam, 283 U. S. 643, 51 Sup. Ct. 587 (1931) (involving an order of the Federal Trade Commission directing the defendant to cease and desist from vending a patent obesity remedy in interstate commerce wherein the Court remarked that "medical practitioners are not in competition with respondent. * * * They follow a profession and not a trade"); National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 Fed. 681 (App. D. C. 1920), *aff'd,* 259 U. S. 200, 42 Sup. Ct. 465 (1922) (holding that a restraint upon professional baseball would not be a restraint upon interstate commerce within the meaning of the Sherman Act); Metropolitan Opera Co. v. Hammerstein, 162 App. Div. 691, 147 N. Y. Supp. 532 (1st Dept. 1914) (holding that a restraint upon the production of operas would not be a restraint of trade). *Contra:* H. B. Marienelli, Ltd. v. United Booking Offices of America, *et al.,* 227 Fed. 165 (D. C. N. Y. 1914).

[7] Both the narrow and broad understanding of "trade" is encompassed by the definition. It comprehends "traffic in goods, or buying or selling in commerce or exchange" in the restrictive sense; the "manual or mercantile pursuits for profit without buying or selling goods", is placed within the broad class. The language of Mr. Justice Story was relied upon in Atlantic Cleaners & Dyers, Inc. v. United States, 286 U. S. 427, 52 Sup. Ct. 607 (1932) wherein the Court, in holding that a cleaning and dyeing business was a "trade", gave expression to the view that Congress intended that the word "trade" as used in § 3 be deemed of broad significance.

[8] Brighton College v. Marriott (1925) 1 K. B. 312.

the practice of medicine, wherein the court considered such practice as "trade". In that case the court was of the opinion that a person trades when he supplies monies worth for money payment, and that the nature of a physician's practice necessarily brings him within that definition of trade.[9]

The common law doctrine as to "contracts in restraint of trade" has been applied to contracts in restraint of the practice of medicine [10] by numerous English and American cases.[11] In the light of these cases, it was argued that Congress had intended that the word "trade" should embrace the practice of medicine on the principle that the legislature will be assumed to have adopted the common law meaning of a word or phrase,[12] unless the context of the statute compels the contrary.[13] The opinion of the court in the instant case was that those cases are merely indicative of the tendency of the courts to develop the common law doctrine regarding restraints in the pursuit of a calling so as to include, through necessity, the learned professions within that doctrine. Those cases do not define the meaning of "trade", and were rejected by the court as not in point.[14]

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[9] The Court in the present case rejected this view and stated that it "represents an extreme position which does violence to the common understanding of 'trade', rejects authoritative decisions of our courts, and ignores cardinal rules of statutory construction".

[10] The common law of England and America has always condemned combinations and contracts in absolute restraint of trade as well as restrictive agreements ancillary to contracts by which men restrained themselves from freely pursuing their callings. The famous case of Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711), introduced the modern rule that such restraints are lawful if the restraint is restricted or "partial" to area and as to duration, and is otherwise reasonable.

[11] Horner v. Graves, 7 Bing. 735, 131 Eng. Rep. 284 (1831) (the court stated that a surgeon dentist was restrained in his *trade*); Robertson v. Buchanan, (1904) 73 L. J. Ch. (N. S.) 408; Smith v. Smith, 4 Wend. 468 (N. Y. 1830) (the first of these cases reported in the United States); Holbrook v. Waters, 9 How. Pr. 335 (N. Y. 1854) (contract not to "do business as a physician" was held to be a "contract restraining the exercise of a trade or profession * * *"); Gilman v. Dwight, 79 Mass. 356 (1859) (the court remarks that the nature of the medical profession does not take it out of the rules applicable to contracts in restraint of trade); Hill v. Gudgell, 9 Ky. L. R. 436 (1887) (cases "where physicians have * * * agreed not to practice medicine * * * fall within the general principles covering contracts in restraint of 'trade' "); Styles v. Lyon, 87 Conn. 23, 86 Atl. 564 (1913) (the court declared that there is no distinction between a profession and a business); *In re* Greene, 52 Fed. 104 (1892) (the court in its opinion cites Whittaker v. Howe, 3 Beav. 383, 49 Eng. Rep. 150 (1841), a case involving a restraint upon the practice of law); see Mott v. Mott, 11 Barb. 127 (N. Y. 1851); McClurg's Appeal, 58 Pa. 51 (1868); Mandeville v. Harman, 42 N. J. Eq. 185 (1886).

[12] *In re* Corning, 51 Fed. 205 (D. C. Ohio 1892); SUTHERLAND, STATUTORY CONSTRUCTIONS (1891) §§ 225, 289.

[13] Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502 (1911).

[14] The English case of Pratt v. British Medical Association (1919) 1 K. B. 244, resembled the factual situation of the instant case but did not arise out of a violation of an anti-trust statute. There, the plaintiff doctors brought a civil action in tort to recover damages for malicious injury to their livelihood as a result of the actions of the defendant medical society. In holding that the

The statute is constitutional;[15] it is neither vague nor uncertain in failing to fix a definite standard of guilt nor in informing the accused ones of the nature and cause of the accusation. If the restraint upon the doctors was the direct result of the activity of the defendants, any indirect effect it may have had upon the association or hospitals would not suffice to support the charges as to them.[16]

There is no doubt of the persuasive influence of this decision on the law of those states where similar provisions against combinations for restraint of trade exist.[17] It is also interesting to consider the effect of this decision upon the practice of law, in the light of the analogous relationship between medical society and physician, in the one instance, and bar association and attorney, in the other. Although the influence of the bar associations has manifested itself in the maintenance of an ideal standard of ethics for the bar, such influence is not incapable of abuse. It remains to be seen whether or not bar associations might be engaged in restraint of "trade" in the enforcement of their requirements upon the legal profession. However, in view of the decision in the instant case, it is most improbable that the practice of law would be considered a trade.

This decision, based as it is on a technical definition of the word "trade", is to be regretted as it may impede the development of group health associations and the furnishing of medical relief to the low-income group who cannot otherwise afford to obtain complete and adequate medical care. However, the door is left open for tort liability in cases of this sort which may or may not act as a deterrent to the alleged restrictive activities of the defendant medical societies.[18]

C. B. D.

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — DUE PROCESS—FREEDOM OF SPEECH AND RIGHT OF ASSEMBLY—FEDERAL JURISDICTION.—The Committee for Industrial Organization[1] and

doctors suffered in the restraint of their profession, the court does not infer, however, that the practice of medicine is a *trade*.

[15] Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780 (1913).

[16] Standard Oil Co. v. United States, 283 U. S. 163, 179, 51 Sup. Ct. 421 (1931).

[17] N. Y. STOCK CORP. LAW § 23 prohibits corporations doing business in New York State from combining "with any other corporation or person for the creation of a monopoly or for the unlawful restraint of trade or for the prevention of competition in any necessary of life." N. Y. GENERAL BUSINESS LAW § 340 (Donnelly Anti-Trust Act) declares void and illegal agreements for monopoly and "every contract, agreement, arrangement or combination whereby * * * competition or the free exercise of any activity in this state in * * * *trade* practice is or may be restrained or prevented * * *".

[18] In the present case, the group practitioners undoubtedly had a cause of action in *tort* for damages to their livelihood if they had been injured by the alleged wrongful acts of the defendants.

[1] Now called Congress of Industrial Organizations. The purpose of this body is to organize into labor unions unorganized workers and to cause such