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The American Medical Association and the Antitrust Laws

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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 charter[1] 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 treatments[2] 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 physicians[4] 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 member[5] 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 newspapers[6] 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 Scott[8] offered a resolution to investigate the

*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.).

2. By-laws of the Group Health Association (Revised Oct. 25, 1937). Art. X, §§ 1, 4. To the same effect, see QUESTIONS AND ANSWERS ABOUT GROUP HEALTH (1937) § 4.

3. 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.

4. (1938) 111 J. AM. MED. ASS'N 1194.

5. Washington Post, March 27, 1938, Magazine Section.

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

7. Hon. Jed Johnson, 83 CONG. REC., Feb. 16, 1938, at p. 2803.

8. Hon. Byron Scott, 83 CONG. REC., May 3, 1938, at p. 8101.

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[9] among other points that the Group Health Association, Inc. was not practising medicine without a license.

Finally, on August 1, 1938,[10] 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,"[11]—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 . . . ",[12] 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."[13] 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"[14] which they rejected;—hence, on October 17, 1938, the entire matter was placed in the hands of the Federal Grand Jury.[15] 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.[16] The current charges[17] squarely raise the question whether the medical associa-

9. Group Health Association, Inc. v. Moor and Pine, U. S. District Court of the District of Columbia, July 27, 1938.

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: "[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, 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.

15. N. Y. Sun, Oct. 4, 1938, p. 5, col. 1.

16. Jackson and Dumbauld, *Monopolies and the Courts* (1938) 86 U. of Pa. L. Rev. 231.

17. N. Y. Sun, Oct. 4, 1938, p. 5, col. 1.

tions are violating the antitrust laws or are acting in restraint of trade.[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?[19]

III. Is medical service such a commodity as to come within the purview of the Sherman[20] and Clayton[21] Acts?

I. Is the Group Health Association, Inc. Illegally Practising Medicine?

The Healing Arts Practise Act of the District of Columbia[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,[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.[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.[25] In addition, the practise of the learned

18. (1938) 111 J. Am. Med. Ass'n 537.

19. There are numerous other phases of this organization's activities which will but briefly be touched upon.

20. 26 Stat. 209 (1890), 15 U. S. C. § 1 *et seq.* (1927).

21. 38 Stat. 730 (1914), 15 U. S. C. § 12 *et seq.* (1927).

22. D. C. Code (1929) tit. 20, § 122.

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).

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."

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."

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).

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,[26] who would owe a duty to the corporation[27] as well as to the patient[28] or client;[29] 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[30] 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[31] 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.[32] 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.[33] As a matter of fact the certificate expressly provides[34] 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[35] 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."

26. "A corporation aggregate being an artificial body . . . is, from its nature, incapable of doing any act, except through agents. . . ." New York & N. H. R. R. v. Schuyler, 34 N. Y. 30, 50 (1865).

27 RESTATEMENT, AGENCY (1938) § 13.

28. HERZOG, MEDICAL JURISPRUDENCE (1931) § 96.

29. MECHEM, OUTLINES OF THE LAW OF AGENCY (3d ed. 1923) § 616.

30. D. C. CODE (1929) tit. 20, § 121 (b).

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.[36] Does this constitute the practise of medicine by the association? In a recent decision,[37] 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.[38]

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,[39] and that this entity or fictitious person can only act through its agents and employees.[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,[41]—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.[42]

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36. By-Laws of Group Health Ass'n, Inc. (1937) Art. V, § 5.

37. See note 10, *supra*.

38. *Ibid.*

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 STEVENS, CORPORATIONS (1936) § 1.

40. See note 27, *supra*.

41. In People, by Kerner 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).

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 practise. This is so because the law does not pretend to divide the practise of a profession into departments, on one side the actual performance of the professional services,—and on the other the business side.[43] The practise 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.[44] Thus, the practise 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

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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. Culkin, 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 refulation 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. 368, 196 N. E. 799 (1935).