

THE ANTI-TRUST PROSECUTION AGAINST THE AMERICAN MEDICAL ASSOCIATION

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Early in the year 1937 Group Health Association, Inc., was organized under the laws of the District of Columbia¹ as a non-profit cooperative organization for the purpose of "arranging for the provision of medical care and hospitalization to its members and their dependents on a risk-sharing prepayment basis."² This association (hereafter referred to as GHA) was organized voluntarily by, and membership was originally limited to, employees of Home Owners' Loan Corporation.

Despite beliefs to the contrary, the only connection between the federal government and GHA was a grant of \$40,000 by HOLC, made because it was felt that GHA would reduce the loss of employees' services through illness. There was some discussion in Congress of the propriety of this grant,³ but no action was taken concerning it. Subsequently, GHA members voted to include as eligible for membership all civilian employees of the executive branch of the government, a limitation imposed by GHA's charter. Since this extension ended the close association which had existed between GHA and HOLC, GHA members later voted to assess themselves to create a fund for repayment of the HOLC grant.

Upon the organization of GHA, The Medical Society of the District of Columbia, an affiliate⁴ of the American Medical Association (hereafter referred to as AMA) initiated a policy of opposition to GHA. The legality of GHA was questioned in suits brought by the Insurance Commissioner of the District of Columbia on the ground that GHA was engaged in the insurance business, and by the United States District Attorney on the ground that GHA was a corporation engaged in the practice of medicine. The court held that GHA was engaged in neither insurance nor the practice of medicine.⁵

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¹ D. C. CODE (1930) c. 5, tit. 5.

² Indictment, §33. For the text of the indictment, see 111 J. Am. Med. Ass'n 2495 (Dec. 31, 1938); *N. Y. Times*, Dec. 28, 1938, p. 20.

³ 83 CONG. REC. 3620, 3881, 4240, 4256, 4333, 4566, 4658, 5792, 6162, App. 676 (1938); H. R. RES. Nos. 452, 473, 475, 476, 75th Cong., 3d Sess. (1938).

⁴ The term "affiliate" will be used, although the terminology adopted by AMA for societies associated with it is "component" for a local society and "constituent" for a state society.

⁵ *Group Health Ass'n, Inc. v. Moor*, 24 F. Supp. 445 (D. C. 1938). The District Attorney did not appeal from this decision. The Court of Appeals for the District of Columbia decided in favor of GHA in

The most important result of the strife between GHA and organized medicine has been the prosecution by the government of AMA and two of its affiliates, The Medical Society of the District of Columbia and Harris County Medical Society, of Texas, together with certain individual defendants,⁶ for violation of Section 3 of the Sherman Act.⁷ This section declares it a misdemeanor to "engage in any . . . combination or conspiracy . . . in restraint of trade in . . . the District of Columbia."

The medical societies and the other defendants demurred to the indictment. The purpose of a demurrer is to enable the court to decide, before trial of a criminal case, whether, if the facts as stated by the government are assumed to be true,^{7a} the action of the defendants was in violation of the law. If the demurrer in a criminal case is sustained, the indictment is quashed and a new indictment, based on other facts, must be obtained, if the prosecution is to be renewed. If the demurrer is overruled and the defendant then pleads "not guilty," the trial of the case follows. The government must then prove beyond a reasonable doubt sufficient of the facts alleged in the indictment to sustain a conviction.

Judge Proctor of the District Court of the District of Columbia decided in favor of the defendants, sustaining the demurrer.⁸ The government has taken an appeal from this decision to the Court of Appeals for the District of Columbia and has petitioned the Supreme Court of the United States for a writ of certiorari which, if granted, would permit appeal directly to the Supreme Court.^{8a} Inasmuch as these proceedings are pending, the scope of this article will be to outline impartially the questions of law raised by the demurrer, the arguments advanced by each side in support of its views, and the disposition of these questions by the District Court in its decision.

The indictment, a document of considerable length, makes allegations which may be summarized as follows:

GHA was established as an experiment in group medical practice on a risk-sharing, prepayment basis.⁹ The defendant societies, being opposed to GHA, conspired (1) to restrain GHA in its business of arranging for the provision of medical care and hospitalization to its members and their dependents, (2) to restrain GHA members in obtaining, by cooperative efforts, adequate medical care for themselves and their dependents from doctors engaged in group medical practice, (3) to restrain doctors serving on the medical staff of GHA, (4) to restrain other doctors in the District of Columbia in the pursuit of their callings, and (5) to restrain the Washington hospitals in the operation of their businesses.¹⁰

an appeal taken by the Insurance Commissioner. *Jordan v. Group Health Ass'n, Inc.*, 7 U. S. LAW WEEK 261. This decision was subsequent to the decision on the demurrer in the principal case.

⁶ These defendants include officials of AMA and of The Medical Society of the District of Columbia. Among them are Drs. Morris Fishbein and Olin West.

⁷ 26 STAT. 209 (1890).

^{7a} In a demurrer, those facts which are well pleaded in the indictment are accepted as true by the demurring party, but only for the purpose of deciding the questions of law raised by the demurrer.

⁸ 28 F. Supp. 752 (D. C. 1939).

^{8a} This petition has since been denied. 7 U. S. LAW WEEK 417 (Oct. 24, 1939).

⁹ Indictment, §14.

¹⁰ *Id.*, §34.

The defendants were able to accomplish these ends by means of the by-laws of The Medical Society of the District of Columbia and the "Principles of Medical Ethics" promulgated by AMA, and by means of the power which AMA and its affiliates exercise in the medical profession and the hospitals of the United States. The Medical Society of the District of Columbia brought expulsion proceedings against several member doctors associating themselves with GHA, as having violated the "Principles of Medical Ethics." The charge against Harris County Medical Society was based upon a similar proceeding. It was also charged that The Medical Society of the District of Columbia, by means of a "white list" of approved organizations, groups, and individuals, from which GHA was omitted, circulated among members of the medical society, threatened with disciplinary action any members who should become associated with GHA or who should consult with members of its staff.¹¹

AMA and its affiliates exercise considerable power over the hospitals of the United States because AMA or its affiliates can prevent members from making use of the facilities of a hospital unapproved by AMA and thus deprive the hospital of its staff. AMA can also deprive such a hospital of the valuable services of interns, since internship at an unapproved institution is almost worthless.¹² Thus, by circulating a "white list," from which GHA was omitted, among the hospitals of Washington, the defendants "urged and demanded that the Washington hospitals admit to their staffs only those doctors who were members" of societies affiliated with AMA, "well knowing that doctors on the medical staff of Group Health Association, Inc., were not permitted, and intending that they be not permitted, to become or remain members of such societies,"¹³ although they "were and are qualified, ethical practitioners."¹⁴

The defendants attacked the sufficiency of the indictment on three main grounds: (1) The indictment was not formally sufficient to maintain a prosecution under the Sherman Act. (2) The indictment failed to show that the conduct of the defendants was an unreasonable restraint of trade within Section 3 of the Sherman Act. (3) The practice of medicine, being a profession, does not come within the meaning of "trade" as used in Section 3 of the Sherman Act.

Was the Indictment Formally Sufficient?

The defendants pointed out at the beginning of their argument that since the Sherman Act is a criminal statute, the defendants should not be subjected to its penalties unless the conduct complained of was clearly within its provisions.¹⁵ They complained that the indictment was so vague and indefinite that they could not ascertain the exact nature of the charge against them; that after naming the individual defendants, the indictment failed to refer to them again, even in the charging part; that the indictment failed to make nineteen allegations of vital importance to the charge, such as that the means employed in the alleged restraint of trade were illegal, or that GHA or any of the hospitals suffered damage by reason of the alleged restraint.¹⁶

The government replied that in the indictment it had alleged the facts of entrance into the conspiracy with as much particularity as possible, despite the fact that an indictment under the Sherman Act charging merely that the defendants "engaged in

¹¹ *Id.*, §36(a).

¹² *Id.*, §29.

¹³ *Id.*, §36(b).

¹⁴ *Id.*, §36(a).

¹⁵ Def. Brief, 2, citing *U. S. v. Trans-Missouri Freight Ass'n*, 58 Fed. 58, 77 (C. C. A. 8th, 1893).

¹⁶ Def. Brief, 54-59.

a conspiracy" in restraint of trade and commerce had been upheld.¹⁷ The indictment informed the defendants of the terms of the agreement which they are charged with adopting, to hinder GHA in obtaining qualified doctors and hospital facilities, and to hinder GHA doctors from obtaining consultations or treating and operating on their patients in Washington hospitals.¹⁸

Judge Proctor in his opinion agreed¹⁹ with the defendants that "the indictment is afflicted with vague and uncertain statements. In some instances material facts are altogether lacking." He was further inclined to believe that the defendants would be injured "by the prejudice likely to arise by an indictment which smacks so much of a highly-colored, argumentative discourse against them,"²⁰ inasmuch as the indictment accompanies the jury when it begins its deliberations.

Were the Restraints Charged Illegal?

The defendants further objected to the indictment's failure to charge "either by allegation or factual recital, that the restraint was either direct or unreasonable."²¹ Since the establishment of the "rule of reason" in *United States v. Standard Oil Co.*²² it is necessary, to make a case under the Sherman Act, to show a conspiracy in unreasonable restraint of trade. They argued that a labor union, lawfully organized and in lawful pursuit of the purposes of the organization, may not be held to violate the anti-trust act because of incidental restraint on trade or commerce arising from the union's policies, and that the defendants were in an analogous position.²³

The government contended that the medical associations could not classify themselves as labor unions. While both are voluntary membership associations, the chief purpose of labor unions is to engage in collective bargaining. Medical societies, however, do not engage in collective bargaining, but indeed oppose any attempts to interfere with the individual doctor-patient relation, and so are in no way similar to labor unions.²⁴ The defendants' reply to this was that they were not claiming to be labor unions, but that they were drawing an *analogy* to labor unions.²⁵

The defendants insisted that when it is doubtful whether the acts of an association of persons constitute a violation of the Sherman Act, the court must examine into the means used to determine whether they are illegal; that here the means were clearly legal and that, therefore, the indictment could not stand.²⁶ There is no question that physicians may lawfully organize into societies, pass by-laws for the governance thereof, and exercise the power of expulsion or other disciplinary action to enforce such rules.²⁷ There is no allegation that discipline was not exercised in accordance with the rules and regulations of the Society. If the defendants exercised

¹⁷ U. S. v. New Departure Mfg. Co., 204 Fed. 107 (W.D. N. Y. 1913).

¹⁸ Indictment, §36.

¹⁹ 28 F. Supp. at 757. It is not entirely clear that the decision is rested upon the formal inadequacy of the indictment, although the language of the court is sufficiently pointed for it to have done so.

²⁰ 28 F. Supp. at 757.

²¹ Def. Brief, 40.

²² 221 U. S. 1 (1910).

²³ Def. Brief, 38.

²⁴ Gov. Brief, 40.

²⁵ Def. Brief, 36.

²⁶ *Id.* 10, citing *Truax v. Corrigan*, 257 U. S. 312 (1921), and *U. S. v. Patterson*, 55 Fed. 605 (C. C. D. Mass. 1893).

²⁷ Def. Brief, 3-4.

their discipline as a matter of right, then the exercise of their right could not have been illegal.

To this argument the government replied that the indictment does not charge that the defendant societies were unlawful or that they could not legally adopt or enforce valid by-laws. The gist of the action lies, not in the means employed, but in the *combining* and *conspiring*.²⁸ While the means employed by the defendants may have been lawful, not even otherwise lawful means may be adopted for the effectuation of an unlawful conspiracy.²⁹ In this case the defendants did not institute proceedings against the doctors on the staff of GHA "merely in the ordinary, routine enforcement of the constitution and by-laws of defendant, The Medical Society of the District of Columbia. Rather, the proceedings were undertaken as an integral part of the concerted attempt to suppress Group Health Association."³⁰

The defendants argued that the use of a "white list" was lawful, as a means of informing the members of the association of those deemed unfair by the association.³¹ They insisted that the use of the "white list" sent to the hospitals was also legal, since it was "not only the right, but the *duty* of organizations having rules which may adversely affect another in their operations, to appropriately warn others, in advance, so that resulting injury may be avoided if possible."³²

The government, on the other hand, asserted that the type of conspiracy which employs a blacklist is "illegal *per se*."³³ In support of its contention it cited *Eastern States Lumber Dealers' Ass'n v. U. S.*³⁴ In that case a group of lumber dealers combined among themselves to boycott any wholesale dealer who attempted to sell retail, and circulated information as to such dealers by means of an "Official Report." The court held that while an individual retailer had an absolute right to refuse to trade with a wholesaler competing with him, the effect of the combination was to cause retailers who had no personal grievance against the competing wholesaler to refuse to trade with him, and the combination was therefore "within the prohibited class of undue and unreasonable restraints."³⁵ Thus, the government analogized AMA and its affiliates to associations of businessmen, while the defendants analogized themselves to labor unions.

The government also urged that the demand by defendants that the Washington hospitals admit only AMA doctors to their staffs constituted a secondary boycott on GHA. It defined a secondary boycott as one in which "a group of persons bent on destroying another, combine not merely to refrain from dealing with him themselves, but also to coerce third persons into withdrawing or withholding patronage from him, such coercive pressure being exerted by boycott and threats of boycott upon those third persons."³⁶ It asserted that this type of boycott is invariably condemned

²⁸ Gov. Brief, 37.

²⁹ *Id.* 38, citing *Aikens v. Wisconsin*, 195 U. S. 194, 206 (1904), and *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 253 (1917).

³¹ Def. Brief, 6-7, citing *American Federation of Labor v. Buck Stove and Range Co.*, 33 App. D. C. 83, 123 (1909), and other cases.

³² Gov. Brief, 51.

³³ Gov. Brief, 59-60.

³⁰ Gov. Brief, 23.

³¹ Def. Brief, 8.

³⁴ 234 U. S. 600 (1914).

³⁵ *Id.* 52.

by the courts, citing several cases, all of which involved the imposition of a secondary boycott on an employer by a labor union.³⁷

The defendants contended that an examination of *American Federation of Labor v. Buck Stove Co.*³⁸ would disclose that unlawful means must be employed to constitute coercion and establish unreasonable restraint of trade by means of a secondary boycott, while the means employed by defendants were legal. Even so, they said, under the theory of the indictment, GHA and defendants were competitors, and since the hospitals constituted only a "common arena of employment" for GHA and defendants, the case more closely resembled the attempts of rival unions to obtain sole recognition in a plant.³⁹

The government further offered the case of *Montague & Co. v. Lowry*⁴⁰ as a situation parallel to the refusal of the defendant societies to permit GHA doctors to become or remain members or to obtain consultations with member doctors. In that case, the dominant manufacturers and dealers in the tile industry combined in an association, the by-laws of which provided that no member should purchase tiles from a nonmember manufacturer or sell tiles to a nonmember dealer except at greatly advanced prices. The court upheld the right of a nonmember to damages under the Sherman Act, saying that the obvious purpose of the association was to restrain commerce in order to retain the entire business for the members of the association, that nonmembership was followed by grave results, and that no persons in the business could be put under legal obligation to become members in order to enable them to transact their business. "In other words, *Montague & Co. v. Lowry* holds it to be an unreasonable restraint of trade and illegal as a violation of the Sherman Act for a group of persons so to combine and conspire as to make their sanction a condition precedent to the economic existence of a competitor."⁴¹

In support of the charge that the defendants had conspired to restrain doctors not on the staff of GHA, the government cited *Anderson v. Shipowners' Association*,⁴² which held that the combination of shipowners into an association fixing the requirements for qualification as seamen on their vessels was an unreasonable restraint of trade and commerce within the Sherman Act, since "each of the shipowners and operators, by entering into this combination, has, in respect of the employment of seamen, surrendered himself completely to the control of the association."⁴³ The doctors of AMA, it was argued, have similarly surrendered to AMA their freedom of action and decision in the practice of their profession.⁴⁴

In opposition to these authorities, the defendants cited *Anderson v. United States*.⁴⁵ There certain livestock traders combined to establish rules for the conduct of their business and agreed to refuse to trade with other than member traders. The court held that the purpose of the refusal to trade with other than members was to

³⁷ *Loewe v. Lawlor*, 208 U. S. 274 (1908); *Duplex Co. v. Deering*, 254 U. S. 443 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U. S. 37 (1927).

³⁸ *Supra* note 31.

⁴⁰ 193 U. S. 38 (1904).

⁴² 272 U. S. 359 (1926).

⁴⁴ Gov. Brief, 84.

³⁹ Def. Brief, 36.

⁴¹ Gov. Brief, 75.

⁴³ 272 U. S. at 362.

⁴⁵ 171 U. S. 604 (1898).

compel all traders to join the association, and that there was no unreasonable restraint of trade within the Sherman Act.

The government distinguished *Anderson v. United States* on the ground that the court decided that the alleged restraint did not operate in interstate commerce, and further, that there had been no intention to restrain. In addition, it was asserted that the Supreme Court has failed to cite the case "in affirmative support of any principle for twenty years, and whenever during that period the case has been cited to it, the Court has either explained, distinguished, or ignored it."⁴⁶ The defendants vigorously disputed this contention, submitting numerous cases within the past twenty years in support of their position that the *Anderson* case has been followed and is still good law.⁴⁷

The court, in its opinion, did not deal with the foregoing questions, doubtless feeling that it was unnecessary to do so, since its decision on the point which follows was sufficient for the determination of the case.

Did the Defendants' Activities Restrain "Trade"?

The main force of the defendants' attack on the indictment was directed to the proposition put forth by the government: that the practice of medicine is "trade" within the meaning of Section 3 of the Sherman Act. The government's argument was based upon the difference in meaning between the phrase "trade and commerce" in Section 1 (which had been held to mean solely "commerce" since it was necessarily limited by the bounds of "interstate commerce" under the interstate commerce clause)⁴⁸ and the same phrase in Section 3, which applies to the District of Columbia, where Congress has full police power. Thus, the phrase in Section 3 has a wider scope of meaning, and cases holding that "certain kinds of activities do not constitute interstate commerce within the protection of Section 1 are not authorities governing decision as to what types of activities constitute trade within the meaning and protection of Section 3."⁴⁹

The Supreme Court, in *Atlantic Cleaners and Dyers, Inc. v. United States*,⁵⁰ held that the application of Section 3 to a particular combination and conspiracy depended on this test: could Congress legislate against the particular combination? If so, Section 3 is to be construed as applying to it,⁵¹ since "Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade and to that end exercised all the power it possessed."⁵²

The government argued that the Sherman Act "does not legislate against kinds of people," but "against kinds of activity. . . . It was with the economic evils that flow from a kind of conduct that Congress was seeking to deal—not with the character or training of the person restrained."⁵³ It indicated that Congress at the time of the passage of the Sherman Act was not wholly unaware that there might be

⁴⁶ Gov. Brief, 89-90.

⁴⁸ CONSTITUTION, Art. I, §8, cl. 3.

⁵⁰ 286 U. S. 427 (1932).

⁵² 286 U. S. at 435.

⁴⁷ Def. Brief, App. "B" (p. 64).

⁴⁹ Gov. Brief, 94.

⁵¹ Gov. Brief, 102.

⁵³ Gov. Brief, 99.

professional combinations or contracts of a restraining nature, and that Section 3 might extend to such acts.⁵⁴ Dictionary definitions were submitted, defining the word "trade," in its broader sense, as an occupation or means of livelihood. However, the government to prove its claim that the practice of medicine is a "trade," relied principally on the English case of *Brighton College v. Marriott*,⁵⁵ wherein "trade" is defined as the habitual supplying, as a matter of contract, of money's worth for full money payment.

Adopting another point of attack, the government called attention to the rule of statutory construction that "when a statute uses a word or phrase which has a definite and familiar meaning at common law, the legislature will ordinarily be assumed to have adopted the common-law meaning of the word or phrase," a rule "of special importance in construing statutes that are declarative of the common law."⁵⁶ In enacting the Sherman Act Congress adopted the policy of the common law against contracts and combinations in restraint of trade. Congress, however, provided that such contracts, combinations and conspiracies should not only be unenforceable, as at common law, but could be enjoined, or made the basis for a private civil action or a criminal prosecution for a misdemeanor. The conduct prohibited is the same as at common law.

"The Federal courts," the government pointed out, "have repeatedly held, in both civil and criminal cases, that the Sherman Act adopts, and its terms are to be defined in the light of, the common law restraint of trade cases."⁵⁷ It then pointed out numerous cases at common law, involving English and 32 American jurisdictions, where agreements restraining members of the medical profession were treated as restraints of trade, subject to the same rules and exceptions recognized in all cases of contracts in restraint of trade.⁵⁸

To clinch the matter, the government cited *Pratt v. British Medical Association*,⁵⁹ as factually on all fours with the principal case, but differing legally in that it was a common law action for damages brought by the doctor whose practice had been restrained. The court found that the action of the defendant had been a "cruel" boycott of the plaintiff, in unlawful restraint of trade; that the association's threat to boycott any member who consulted with the plaintiff was the use of coercion, which, incapable of being justified by honesty or disinterestedness of motive, certainly could not be justified by advancement of defendant's own interests; that the corporate power of the association to "maintain the honour and interests of the medical profession" did not give the association a blanket power to decide that those doctors of whom it disapproved were not entitled to practice medicine, and that in any event, the plaintiff had not violated the "honour and interests" of the profession.

⁵⁴ 21 CONG. REC. 2726 (1890).

⁵⁵ [1925] 1 K. B. 312, 316.

⁵⁷ *Id.* 120, citing *Addyston Pipe & Steel Co. v. U. S.*, 85 Fed. 271, 279 (C. C. A. 6th, 1898), and *Standard Oil Co. v. U. S.*, 221 U. S., 1, 59 (1911).

⁵⁸ Gov. Brief, 138-174.

⁵⁶ Gov. Brief, 118.

⁵⁹ [1919] 1 K. B. 244.

In response to these arguments, the defendants pointed out that the ordinary meaning of the word "trade" is commerce or occupations, distinctly apart from the liberal arts, the professions, and agriculture.⁶⁰ They cited the language of Justice Story in *The Schooner Nymph*⁶¹ quoted in the *Atlantic Cleaners* case:⁶² "We constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoemaker, though some of these may be, and sometimes are, carried on without buying or selling goods." This, the defendants asserted, was the broad meaning of the word "trade," and, since it did not embrace the practice of a profession such as medicine, the acts of the defendants could not be regarded as restraining "trade." They quoted from *Federal Trade Commission v. Raladam Co.*: "Medical practitioners . . . follow a profession and not a trade,"⁶³ and from *Graves v. Minnesota*: "employments or trades . . . manifestly involve very different considerations from those relating to such professions as dentistry."⁶⁴ In view of these expressions of the Supreme Court, the defendants concluded that it would be impossible to adopt the government's broad "money's worth" definition of "trade."

The government sought to distinguish the language of Justice Story on the grounds that it was used in defining "trade" as employed in the Coasting and Fishery Act of 1793 and would not be so limited in other contexts; that it was not an enumerative definition, but merely illustrative; and that the quotation of this language by the court in the *Atlantic Cleaners* case was only for purposes of adopting a definition broad enough to determine the question then before the court.⁶⁵ The answer to the quotation from the *Raladam* case was that the statement in that case was directed to the point that the practice of medicine is not interstate commerce and, therefore, is not entitled to protection from unfair methods of competition by the Federal Trade Commission. It was merely dictum, to be read in its context.⁶⁶ As for the *Graves* case, it merely recognized "that the peculiar public interest in the practice of dentistry justifies state legislatures in imposing regulations on that practice that perhaps could not be imposed on some other occupations."⁶⁷

The defendants asserted that the cases involving covenants in restraint of the practice of medicine between members of the profession did not decide the question whether the practice of medicine is a "trade," but merely extended to the medical practitioner the same protection which is accorded to one engaged in trade and which is known in the common law as the rules against restraint of trade.⁶⁸ They distinguished the *Pratt* case because: (1) it was a civil action submitted on the theory of private rights, not as a criminal conspiracy; and (2) one of the issues was as to the legality of the rules of the British Medical Association, whereas here the legality of such rules is not questioned. They attacked the decision as out of harmony with later English and American cases⁶⁹ and cited *Harris v. Thomas*, where, on

⁶⁰ Def. Brief, 15-16.

⁶¹ 1 Sumn. 516, 18 Fed. Cas. No. 10388 at 507 (C. C. D. Me. 1834).

⁶² 286 U. S. 427, 436 (1932).

⁶⁴ 272 U. S. 425, 429 (1926).

⁶⁶ *Id.* 179.

⁶⁸ Def. Brief, App. "A," p. 61.

⁶³ 283 U. S. 643, 653 (1931).

⁶⁵ Gov. Brief, 176-178.

⁶⁷ *Id.* 178.

⁶⁹ *Id.* 41-42.

facts similar to the *Pratt* case, the court said: "If appellees were acting to further their legitimate purpose, or to advance the practice of their profession, this, we think, would be justified even if it had the result claimed by appellant. Unless the organization was itself illegal or the methods used by it were wrongful, appellant has no just complaint."⁷⁰

The government contended the *Harris* case was not applicable because it had been decided on the pleadings, where the allegations of the answer, not the complaint, had been taken as true, whereas in the principal case, the defendants' demurrers admit that they had an unlawful purpose and that they used unlawful means to effectuate it.⁷¹

Judge Proctor, in ruling on the demurrer, accepted the defendants' contentions on this point. He ruled that the practice of medicine was not a "trade" within the meaning of Section 3 of the Sherman Act. He declared that the Supreme Court, in the *Atlantic Cleaners* case, undertook to give a definition of "trade," as required by the issues in the case, and that, in so doing, the Court found "trade" to be used in Section 3 in the general sense attributed to it by Justice Story.⁷²

Concerning the restrictive covenant cases cited by the government to show that at common law the practice of medicine was considered in the category of "trade," the court said: "At most such cases serve only to illustrate the development of a legal doctrine, having its origin in contracts concerning tradesmen, which became known as the doctrine 'against restraint of trade,' and which in course of time was extended and applied to agreements by doctors respecting their professional practice."⁷³

The court distinguished the *Pratt* case, commenting on the similarity of the fact situations, but pointing out that the *Pratt* case involved a civil suit for damages, founded on common-law principles involving malicious injury to another's means of livelihood, while the present case involved a statutory criminal prosecution, the gist of which was combination and conspiracy.⁷⁴

Argument that GHA and the Washington hospitals are engaged in trade were also based on the "money's worth" concept of "trade" and were disposed of by the court in the same way. In so doing, the court defined "trade" in the broader sense as the class "of *manual or mercantile* pursuits, carried on for *profit or gain* without buying or selling of goods."⁷⁵ The dry cleaning business, held to be a trade in the *Atlantic Cleaners* case, comes within this definition, since the "very essence of that service was the skillful use of labor and materials."⁷⁶

The court refused to accept the "money's worth" definition of trade, on the ground that it would include all gainful occupations and so do violence to the common understanding of "trade." If Congress had had such an intent, it would

⁷⁰ 217 S. W. 1068, 1076 (Tex. 1920).

⁷¹ Gov. Brief, 89.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷² 28 F. Supp. at 755.

⁷⁴ *Id.* at 756.

⁷⁶ *Ibid.*

have made its purpose clear. "Certainly it is not for the courts to stretch an old statute to fit new uses for which it was never intended."⁷⁷

Additional Questions Before the Court

A further claim by the defendants that GHA, being unlawfully engaged in the practice of medicine and insurance, could not be the subject of restraint within the Sherman Act⁷⁸ was met by the government with three arguments: (1) since the allegations of the indictment are the only facts before the court on the demurrer, the legality of GHA's acts cannot be questioned in argument on the demurrer; (2) the decision in *Group Hospital Association, Inc. v. Moor*⁷⁹ that GHA is not engaged in the practice of medicine or insurance offers strong authority for such a conclusion in this case; (3) even were GHA so engaged, defendants could not justify their conduct on the illegality of GHA, since it is for the government to question such illegality.⁸⁰ The court agreed with the government's contention that the allegations of the indictment did not show that GHA was engaged in medical practice or insurance.⁸¹

The defendants also questioned the constitutionality of Section 3 of the Sherman Act. They argued that since the meaning of "trade and commerce" in Section 3 is not limited to interstate commerce, as in Section 1, the meaning of "trade" is so vague and indefinite as to make the criminal provisions fatally defective for want of an ascertainable standard of guilt and, therefore, repugnant to the due process clause of the Fifth Amendment and to the Sixth as well.⁸² The government replied that the Supreme Court had held that Section 1 of the Sherman Act is not void for want of certainty⁸³ and that the word "trade" certainly has a more definite meaning than "interstate commerce." The court did not agree with the argument of the defendants, but held that it was unnecessary to decide the issue of constitutionality, since the case could be decided on other grounds.⁸⁴

⁷⁷ *Ibid.*

⁷⁹ 24 F. Supp. 445 (D. C. 1938).

⁸² 28 F. Supp. at 758.

⁸³ Gov. Brief, 47-48, citing *Nash v. U. S.* 229 U. S. 373 (1913).

⁸⁴ 28 F. Supp. at 758.

⁷⁸ Def. Brief, 54.

⁸⁰ Gov. Brief, 191.

⁸² Def. Brief, 47-48.