BOARD OF PHARMACY: Drugs, medicines, chemicals and poisons must be sold by a licensed pharmacist or assistant pharmacist -- with certain exceptions.

March 26, 1935.

Hon. Newt. Gardner
Secretary
Board of Pharmacy
State of Missouri
1700 West 39th Street
Kansas City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date enclosing a copy of an opinion given by the Missouri Board of Pharmacy. Your letter and enclosure reads as follows:

> "Enclosed find copy of the opinion of the Pure Food and Drug Department and the Missouri State Board of Pharmacy in regard to restricting various drug store merchandise for sale in various places in the state of Missouri.
>
> "Would appreciate your giving us your opinion as to whether these products should be sold under this classification relating to the pharmacy laws in the state of Missouri.
>
> "Thanking you in advancefor your reply."

- Enclosure -

"February 26, 1935.

Mr. Jerome Eisner
401 Broadway
New York City, New York.

Dear Mr. Eisner:

"The Pure Food and Drug Department and the State Board of Pharmacy of Missouri which

enforces the pharmacy laws reports that these laws restrict the sale of common household drug products to licensed pharmacists and licensed pharmacies and the following may not be sold in Missouri by variety stores and other general merchants.

Aromatic Spirits of Ammonia; Asperin; Bicarbonate of Soda; Boric Acid ointment; Castor Oil; Epsom Salt; Essence of Peppermint; Glycerine; Gum Camphor; Peroxide of Hydrogen; Rubbin Alcohol; Sweet Spirits of Nitre; Tincture of Iodine.

The following may be sold by variety stores and other general merchants. No permit or license is required.

THE FOLLOWING COMMON HOUSEHOLD DRUG PRODUCTS:

(a) Adhesive Tape; Liquid Inhalants; Mercurochrome; Milk of Magnesia; Nose Drops; Petroleum Jelly; Styptic Pencils; Witch Hazel.

(b) Non-narcotic, proprietary preparations and remedies in original and unbroken packages.

(c) 'Paris Green, lead arsenate, or other poisonous substances or mixtures of poisonous substances, in unbroken packages, for use in the arts or for insecticides purposes, provided they bear a label with the name or names of such poisonous substances, and the word "POISON" and the names of at least two readily obtainable antidotes with directions for their administration.'

NOTE

The following may be sold by variety stores and other general merchants: Lysol, mentholatum, ungentine.

Yours very truly,

MISSOURI BOARD OF PHARMACY

BY_____
Secretary.

NG:MR

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Article 1, Chapter 94, of the Revised Statutes of Missouri, 1929, pertains to laws in regard to druggists and pharmacists and the State Board of Pharmacy. Section 13140 of said article makes it unlawful for any person not licensed as a pharmacist to conduct or manage a pharmacy or other place of business for the retailing of any drugs, medicines, chemicals or poisons; or for any person not licensed as a pharmacist or assistant pharmacist to compound, dispense or sell at retail any drug, chemical, phison or pharmaceutical preparation. Said section reads as follows:

> "It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drugs, medicines, chemicals or poisons, or for the compounding of physicians' prescriptions, or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, or for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this chapter to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions, except as an aid to or under the supervision of a person licensed as a pharmacist under this chapter. And it shall be unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense or sell, at retail, any drug, medicine or poison, except as an aid to or under the supervision of a person licensed as a pharmacist or assistant pharmacist: Provided, however, that nothing in this section shall be construed to interfere with any legally registered practitioner of medicine or dentistry in the compounding or dispensing of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his em-

ploy at least one person who is licensed as a pharmacist, nor with the sale of poisonous substances which are sold exclusively for use in the arts, or for use as insecticides, when such substances are sold in unbroken packages bearing a lable having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes: Provided further, that in any village of not more than five hundred inhabitants, where there is no person licensed as a pharmacist within less than two miles of such village, the board of pharmacy may grant to any person who is licensed as assistant pharmacist a permit to conduct a drug store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than five hundred: Provided, however, that nothing in this section shall be so construed as to apply to the sale of patent and proprietary medicines, and in any locality where there is no licensed pharmacist or assistant pharmacist, the ordinary household remedies and such drugs or medicines as may be specified by the board of pharmacy shall be permitted to be sold by those engaged in the sale of general merchandise: Provided further, that nothing in this section shall be so construed as to prevent any person, firm or corporation from owning a pharmacy, drug or chemical store or apothecary shop, providing such pharmacy, drug or chemical store or apothecary shop shall be in charge of a licensed pharmacist."

Section 13148 of said article provides in part as follows:

"The board of pharmacy shall have a common seal, and shall have power to adopt such rules and by-laws not inconsistent with law as may be necessary for the

> regulation of its proceedings and for the discharge of the duties imposed under this chapter, ****."

It will be noted that there are a number of exceptions contained in Section 13140, supra. Those that concern us here are:

(1) The sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "Poison" and the names of at least two readily obtainable antidotes.

(2) The sale of patent and proprietary medicines.

(3) In addition to the above exceptions, it is provided that in any locality where there is no licensed pharmacist or assistant pharmacist, the ordinary household remedies and such drugs and medicines as may be specified by the board of pharmacy shall be permitted to be sold by those engaged in the sale of general merchandise.

In our opinion, this provision makes it clear that ordinary household remedies, drugs and medicines cannot be sold in localities where there is a licensed pharmacist or assistant pharmacist except by a licensed pharmacist or assistant.

In the case of State v. Donaldson, et al., 42 N. W. (Minn.) 781, the objection was raised that the exception of patent and proprietary medicines only applied to shopkeepers whose place of business is more than one mile from a drugstore or apothecary shop. The court, in denying this contention at loc. cit. page 783, said:

> "****According to the construction claimed for it, the provision of the act as to the sale of patent or proprietary medicines would be of just this character. It would be giving pharmacists a monopoly of the business, without in any manner protect-

> ing public health. It would therefore be void, and, if so, the whole act would fail. A construction that would lead to such a result is to be avoided, if possible. Under these circumstances, we think we are justified, in order to sustain the act, in adopting the other construction, and holding that the clause under such consideration was intended to exclude generally from the operation of the act the business of dealing in and selling patent medicines. This would make it in harmony with other provisions of the act, and right in the line of all, or nearly all, similar legislation in other states. This disposes of the first case, as both the articles sold were 'patent' or 'proprietary.'"

In the case of Riggs v. City of Hot Springs, 26 S. W. (2d) (Ark.) loc. cit. page 72, the Court said:

> "From all of the testimony it is fairly inferable that the article compounded and vended by the appellant was prepared from a secret formula as a medicine for the treatment of certain diseases, put up in packages or bottles, and labeled with a name, for immediate use. This was sufficient to constitute it a patent medicine in the sense in which that term is generally used and in which it was used in the city ordinance in question. While originally the word 'patent' was attached to an article because it was the subject of a patent, it has lost that significance by usage, and has become merely a part of the name of the article, and, where any article intended to be used for medicinal purposes is prepared from a secret formula and is placed in containers, either packages or bottles, for sale, to be used without further preparation, and is labeled so that it may be for immediate use, it is a matter of common knowledge that such remedies are called 'patent' or'proprietary' medicines. ****"

The only Missouri case we have found defining "patent"

and "proprietary" medicines is McHenry v. Royal Neighbors of America, 211 Mo. App. 230, loc. cit. pages 235 and 236, wherein the court said:

> "**** Admitting that she did, were these patent or proprietary medicines? The doctor who sold them testified they were merely regulatory potions which he had prepared for use in his practice. Webster defines 'patent' as a writing securing to an inventor for a term of years the exclusive right to his invention, while proprietary is defined as 'belonging or pertaining to a proprietor; considered as property owned; as a proprietary medicine.' Also 'proprietary articles, manufactured articles which some persons have an exclusive right to make and sell.'
>
> "The physician who sold these pills or tablets to the insured testified that he did so without having prescribed them, and that he had prepared them for use in his practice, and made no claims that they were in any sense patent or proprietary. In the face of this evidence, we hold that the medicine so purchased was neither patent nor proprietary. Moreover there was no testimony of a substantial character tending to show that this medicine was for the personal use of the insured."

In the case of State v. Jewett Market Co., 228 N. W. (Iowa) 288, it was held that asperin is a drug or medicine and not a proprietary or patent medicine. At page 289 of this opinion, the Court said:

> "It is contended that aspirin is not a drug within the meaning of paragraph 1 of section 2578 of the Code. The expert evidence in the case showed that it is a drug. It is classified as a coal tar product. It is a remedial agent used in the treatment of disease. It is described in the record as 'a potent, active drug.' The evidence is amply sufficient to establish the fact that asperin is a drug with decided physiological properties, and is used to cure, mitigate, or prevent disease.
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> "III. It is contended that aspirin

> comes within the exception of paragraph 4 of section 2579 of the Code, in that it is a proprietary medicine, and hence may be sold by the appellant as such. An expert witness testified in this case that: 'A proprietary medicine is a medicine which has a secret formula.'
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> "In Ferguson v. Arthur, 117 U. S. 482, 6 S. Ct. 861, 863, 29 L. Ed. 979, the court said: '"Proprietary" is defined thus in the Imperial Dictionary: "Belonging to ownership; as, proprietary rights." In Webster: "Belonging or pertaining to a proprietor" -- "proprietor" being defined, "One who has the legal right or exclusive title to anything, whether in possession or not; an owner." In Worcester: "Relating to a certain owner or proprietor."'
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> "In State v. Zotalis, 172 Minn. 132, 214 N. W. 766, the Supreme Court of Minnesota said: 'Aspirin is a coal tar product commonly kept in drug stores and is used and sold for medicinal purposes. It is a drug or medicine within the statute. It is not a proprietary or patent medicine."

In State v. F. W. Woolworth Company, 237 N. W. (Minn.) 817, the Court held that milk of magnesia was not a proprietary medicine. At page 818 the Court said:

> "The evidence showed that milk of magnesia is a medicine and used generally internally to correct over-acidity of the stomach and bowels, and as a laxative. It is used also as a mouth wash, and sometimes as a lotion for the face. It is used only for medicinal or hygienic purposes. It is made and distributed by many manufacturers of drugs and medicines. It is frequently prescribed by physicians, either on written prescription or by oral direction. It is also frequently called for and sold to people without a doctor's prescription or direction. It is not poisonous, and, when properly prepared, is

a harmless household remedy. There is no secret about its manufacture or ingredients.

"Defendant contends that the preparation was a proprietary medicine, or should be so considered. One of the manufacturers testified that, in his opinion, their process of manufacturing was distinctive from the process generally used; that they used a special machine and process, which was a trade secret; that they used a few more grains of magnesium hydrate than the minimum required by the United States Pharmacopoeia formula; and that their product was purer than the ordinary milk of magnesia. We find nothing in this evidence to show that the preparation was a proprietary medicine. It had no distinctive name. It was labeled as a United States Pharmacopoeia preparation and came well within the formula contained in that treatise. Any manufacturer could make exactly the same preparation under the United States Pharmacopoeia formula. No distinction is pointed out between this and other milk of magnesia generally sold, except the very general statements of this witness. We may hazard the observation that the other manufacturers would make, in general terms, the same or similar claims for their products.

" *

"We conclude that the milk of magnesia here in question was not a proprietary medicine."

And further at page 819, the Court said:

"We find no good reason for departing from the Donaldson Case, and hold that a harmless household remedy, not a patent or proprietary medicine, sold and used solely or principally as a medicine, comes within the pharmacy law restricting the sale of drugs, medicines, and poisons."

In conclusion the Court stated at pages 819 and 820:

> "It is also our interpretation of the Donaldson and Zotalis cases that they hold that where a preparation is a medicine prepared, sold, and used solely or principally as medicine, and is not a patent or proprietary medicine, then its sale comes within the law and is restricted to sales by or under the supervision of a licensed pharmacist; that the fact that it is a harmless or household medicine does not except it from the law; and that, as so applied, these cases hold the law valid."

CONCLUSION.

In view of the above it is the opinion of this department that it is unlawful for any person not licensed as a pharmacist to conduct or manage any place of business for the retailing, compounding or dispensing any drugs, medicines, chemicals or poisons or to keep exposed for sale at any retail any drugs, medicines, chemicals or poisons, except poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the names of at least two readily obtainable antidotes, and except patent and proprietary medicines. And further, in a locality where there is no licensed pharmacist or assistant pharmacist, the oridinary household remedies and such drugs or medicines as may be specified by the board of pharmacy may be sold by those engaged in the sale of merchandise.

It is plain from a review of the foregoing authorities that ordinary household remedies, medicines, and drugs in a locality where there is a licensed pharmacist or assistant pharmacist comes within the purview of the act but that patent and proprietary medicines do not. We do not have the necessary technical knowledge to distinguish b etween ordinary drugs and medicines and patent and proprietary medicines and feel

that, with this opinion in mind, you are far more capable of designating what are patent and proprietary medicines than we are.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/JLH:afj