

PHARMACY BOARD:
STATUTES:

Repeal of statute authorizing Pharmacy Board to give examination to and to license persons who met the standards set out in said statute left the Board without authority to give such an examination or issue licenses pursuant thereto three days after the repeal became effective.

December 22, 1961

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90

Mr. Lloyd W. Tracy, Secretary
Board of Pharmacy
Room 130
State Capitol Building
Jefferson City, Missouri

Dear Mr. Tracy:

This is in response to your recent request for an opinion of this office which request reads as follows:

"The State Board of Pharmacy request an official opinion of your office on the following questions:

(1) May the Board properly issue licenses to persons who took and passed an examination under the provisions of Section 338.045, RSMo. 1959. The examination was given on October 16, 1961, and Section 338.045 was repealed by the last session of the Missouri legislature. All applications of those who took this examination had been received by the Board prior to October 13, 1961.

(2) May persons who were qualified to take the examination under Section 338.045, RSMo 1959 and whose applications were received prior to October 13, 1961, take the examination in the future. These persons fall into two categories: those who applied to take an examination prior to October 13, 1961, and did not take the examination on that day; and those who applied prior to October 13, 1961, took, and failed the October 16 examination."

Mr. Lloyd W. Tracy, Secretary

Section 338.045, RSMo 1959, provided as follows:

"Any person who is at least fifty-one years of age and who has resided in this state for at least thirty years before the effective date of this section shall, on compliance with this section, be given an examination by the board of pharmacy upon presentation of evidence establishing that he has been engaged in the management of a drug store or pharmacy and in the compounding of prescriptions for at least thirty years and upon successful completion of such examination such person shall be granted a license. Application for such examination shall be made on forms prescribed by the board and shall be accompanied by the fee required by section 338.070. Any person so licensed shall be entitled to all the rights and subject to all the duties prescribed by sections 338.010 to 338.190 for applicants qualifying under sections 338.020 and 338.030."

House Bill 342, passed by the Seventy-first General Assembly reads:

"Section 338.045, RSMo 1959, is repealed."

We take notice of the fact that all legislation enacted by the Seventy-first General Assembly, except that containing an emergency clause, became effective on October 13, 1961.

The unlicensed practice of pharmacy in Missouri is declared unlawful by Section 338.010 and denominated a misdemeanor by Section 338.190, RSMo 1959.

In view of the intimate relationship between the practice of pharmacy and the health and welfare of the community, there can be little doubt that the state has the authority, in the exercise of its police power, to establish standards to be met by those who would practice that profession. In affirming a conviction for the unlicensed practice of pharmacy, our Supreme Court said with regard to an earlier form of Section 338.010:

"In our opinion there is no merit in the contention that the section of the statute upon which this prosecution is predicated is unconstitutional. That the General Assembly have the power by appropriate

Mr. Lloyd W. Tracy, Secretary

legislation to regulate the transaction of business by those who are engaged in dispensing drugs or medicines for medical use we have no doubt. While it may be true that the occupation of a druggist or pharmacist is highly beneficial to the public, yet it will not be seriously contended that a business where medicines are compounded and sold is frequently attended with a great danger to the people who are so unfortunate as to need the assistance of medical remedies. It has been uniformly recognized, by the courts of this as well as in foreign jurisdictions, that 'whenever the pursuit of any particular occupation or profession requires, for the protection of the lives or health of the general public, skill, integrity, knowledge, or other personal attributes or characteristics in the person pursuing it, the General Assembly has the power and the authority to have recourse to proper measures to insure that none but persons possessing these qualifications should pursue the calling.'" State v. Hamlett, (Mo. Sup. 1908), 110 S.W. 1082, 1083.

Until the effective date of House Bill 342, all persons under consideration here were presumably qualified to be examined by the Board and, upon successfully passing the examination, to be licensed as pharmacists. After House Bill 342 became law, there could be no authorization for testing or licensing persons under Section 338.045 unless it could be held that the recent action of the Legislature failed to remove all effect of the section or that while the section was in existence, those who qualified thereunder acquired rights of which they could not be divested by subsequent legislative action.

In City of St. Louis v. Kellman, (Mo. Sup. 1911) 139 S.W. 443, the Court said, l.c. 445:

"[2] Attending to that term, what does the word 'repeal' mean, when used by lawmaker or judge? 'Repeal' is defined as the abrogation or annulling of a previously existing law by the enactment of a subsequent statute, which either declares that the former law shall be revoked and abrogated, or which contains provisions so contrary to or irreconcilable with

Mr. Lloyd W. Tracy, Secretary

those of the earlier law that only one of the two can stand in force; the latter is the 'implied' repeal heretofore mentioned; the former, the 'express' repeal. Black, L. Dict. tit. 'Repeal.' Bourvier defines it to be: 'The abrogation or destruction of a law by a legislative act.' Bouv. L. Dict. tit. 'Repeal.' (Note the word 'destruction.')

Webster defines it: 'To recall; to rescind or abrogate by authority; to revoke.' He gives among its synonyms 'annul,' 'cancel,' 'reverse,' 'abolish.' He defines the noun 'repeal' as meaning 'revocation'; 'rescission'; 'abrogation.'

Abrogate, in turn means to annul by an authoritative act; to abolish by the authority of the maker; to repeal. Other instructive shades of meaning come out in accredited definitions of the several synonyms, but the foregoing are enough for our purpose."

In the terms of the above quotation it is obvious that House Bill 342 effected an "express repeal" of Section 338.045, thereby completely eliminating it from legal existence.

That one may not acquire vested rights to practice without license the professions controlled by the police power of the state is an uncontroverted principle of the law of Missouri.

The case of State v. Davis (Mo. Sup. 1906) 92 S.W. 484 grew out of a conviction of the defendant for practicing medicine without a license. One of the defenses advanced therein was that the defendant had engaged in the practice of medicine in Missouri almost fifty years prior to the enactment of the statute under which he was being prosecuted and that he had thereby secured the right to practice without obtaining a license. The Court held with respect to this contention, 1.c. 489:

"It is apparent that the General Assembly of Missouri, in the enactment of the provisions of law regulating the practice of medicine and surgery in this state, intended to fix a standard as to fitness, skill, and qualification which would authorize the practice of that profession. This law does not undertake to deprive any person of a vested right, for there can be no such thing as a vested right in the practice of medicine. It does not undertake to suppress or prohibit the practice

Mr. Lloyd W. Tracy, Secretary

of medicine or surgery, nor to prohibit any particular person from practicing as a physician or surgeon, but it simply undertakes to require the necessary and essential qualifications for that purpose. The correctness of the conclusions as herein indicated are fully supported by the well-considered cases of this country. (Citing cases) We see no necessity for pursuing this subject further. It is clearly manifest that the defendant had no vested right to practice medicine in this state by virtue of his former practice here in 1857. Upon returning to this state to practice his profession, his qualifications, fitness, and skill to do so must be judged by the law in force at the time he so returns, and before he will be authorized to engage in the practice of his profession and reap the rewards from such practice, there is no reason why he should not comply with the conditions imposed upon him by the law in force at the time he so undertakes to engage in the practice." (Emphasis added.)

The Davis case was recently followed by the Supreme Court in *State v. Errington*, (Mo. Sup. 1958) 317 S.W. 2d 326, 330, in which the court ruled that a person had no natural right to engage in the practice of naturopathy without benefit of a license to practice medicine.

With regard to the persons who took the examination given under the provisions of Section 338.045 some three days after its repeal became effective, we must hold that their testing was not authorized by any law or right in existence at that time. Licenses granted on the basis of such examination would likewise be unauthorized. For just as there can be no vested right to practice medicine as a result of having previously done so, there can be no enduring right to be examined and licensed as a pharmacist as a result of having once been so qualified under a now defunct statute. Anyone seeking to practice pharmacy in Missouri must "comply with the conditions imposed upon him by the law in force at the time he so undertakes to engage in the practice." *State v. Davis*, supra. As of October 13, 1961, the only routes to admission to the practice of pharmacy are those provided by the statutes other than Section 338.045.

Mr. Lloyd W. Tracy, Secretary

We are fully aware that the effect of this opinion may be to deprive this state of the benefits of having some persons practice pharmacy who in fact may be well qualified to do so. However, we must measure their qualifications by the criteria existing at the time they endeavored to enter the profession. We are faced here with a set of laws made strict by the legislature and interpreted narrowly by the courts for the protection of the public. We can do no less than construe those laws so as to vitalize the obvious legislative intent that brought them into existence, as regrettable as such a holding might be in regard to some competent individuals who desire to practice pharmacy.

CONCLUSION

It is the opinion of this office that Section 338.045, RSMo 1959, went out of legal existence on October 13, 1961, taking with it all privileges which had accrued thereunder. Therefore, the Board of Pharmacy, subsequent to October 13, 1961, may no longer issue licenses pursuant to the authority granted by that section. This would be true notwithstanding the date upon which application for examination under that statute was filed, the fact of the applicant's prior qualification, or the fact that the applicant had actually taken such an examination and failed it during the existence of Section 338.045.

This opinion which I hereby approve was prepared by my Assistant, Albert J. Stephan, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

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