

FOODS AND DRUGS: Only licensed pharmacists may remove poisons from original package and dispense same in other packages.

August 20, 1940

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Honorable Charles R. Bohrer
Secretary, Missouri Board of Pharmacy
West Plains, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of August 17, 1940, as follows:

"The Board of Pharmacy respectfully requests an opinion from your department concerning the sale of Paris Green and poisonous insecticides by businesses not regularly employing a licensed pharmacist. The Revised Statutes of 1929, Chapter 94, Section 13140, reads as follows:

' * * * PROVIDED, HOWEVER, that nothing in this section shall be construed to interfere with * * * nor with the sale of poisonous substances which are sold exclusively for use in 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: * * '

The Weston Milling Company, Weston, Missouri, according to a letter from them and other information received by this office, has been buying Paris Green, a poisonous insecticide containing a large amount of arsenic, in 270 pound barrels and repacking it in 10, 5 and 2½ pound tan cans and relabelling the

same as suggested by the Pure Food and Drug Department in 1938. These repacked cans are being sold direct to the consumers and are advertised for sale direct to the consumers according to our information.

It is the opinion of the Board of Pharmacy that the intention of the law is that such retailers shall not break and repack poisonous insecticides and that they can legally only sell such original unbroken packages as are received by them from the distributor, wholesaler, jobber or manufacturer. This part of the law was evidently intended to protect the public health by eliminating the weighing and handling of such poisonous substances by inexperienced and untrained people and to eliminate the possibility of contamination of food products where these items were handled in groceries, feed stores and similar places of business."

Section 13140, R. S. Mo. 1929, was amended by the Sixtieth General Assembly, the new section being found at page 369, Laws of 1939, and is 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 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 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; 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 employ 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 label 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 has had one year's experience under the supervision of a registered 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, 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."

We believe that the correct answer to your request is to be found in the Act itself. After several clauses prohibiting absolutely the compounding or dispensing of any drugs, medicines, chemicals or poisons, except by a licensed pharmacist, we find the following phrase:

" * * * or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, * * * "

The only exception to which this phrase could possibly refer is the following:

" * * * provided, however, that nothing in this section shall be construed to interfere with * * * 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

label having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes."

It will be readily seen that there is no authority in the exception for the compounding of a poison to be used as an insecticide by any person other than a licensed pharmacist, the exception plainly referring to the former phrase permitting a retailer to keep such poison exposed at retail in the unbroken package.

In 15 C. J. S., under the general title "Commerce", we find the definitions of the words "original package" and "unbroken package", which have apparently been considered as synonymous. We find the following on page 310 under Section 28:

" * * * Where bottles or packages are fastened together and marked, or are placed in a larger box, barrel, crate, or other receptacle, and shipped therein, the outside box, bundle, or receptacle, and not any bottle or package contained therein, constitutes the original package, and this is true, although each bottle or package is separately wrapped in paper labeled 'original package' and marked with the name of the importer, and although the larger receptacle is furnished by the carrier. * * * "

And on page 311:

"Imported articles lose their interstate character and become subject to state regulation when they no longer remain in the original package. This happens when the package is broken, especially where the larger receptacle

is broken for the purpose of selling and delivering the smaller units, or where the property is otherwise mingled with the mass of property of the state. Goods are held to be no longer in the original package when they are sold or offered for retail sale by peddlers. The opening of a package for the sole purpose of examination or inspection is not such a breaking as will destroy its original character, but a contrary view has been taken. The borrowing of fixtures from goods in original crates or boxes by agents of a foreign corporation, to be replaced afterward without the sanction of the corporation being shown, does not of itself change the nature of a transaction otherwise interstate to intra-state commerce.

Natural gas ceases to be part of interstate commerce and becomes subject to state laws when its bulk is broken up for indiscriminate distribution to individual purchasers at retail sale."

In the Federal Food and Drug Act the words "original unbroken package" are frequently used, and this is doubtless the source of the term "unbroken package" as used in the section above quoted.

In U. S. v. 65 Casks Liquid Extracts, 170 Fed. 449, affirmed by the Circuit Court of Appeals in 175 Fed. 1022, the casks in which liquids were shipped were held to constitute unbroken packages.

In U. S. v. Great Atlantic and Pacific Tea Company, 92 Fed. (2d) 610, the defendant was charged under a provision making it an offense to deliver in the original unbroken package any misbranded article. The facts disclosed that the defendant delivered prints of misbranded butter after they had been removed from a broken box. The court held that a conviction could not be sustained.

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These cases, particularly that in which a cask was held to be the unbroken package, appear to apply to the facts at hand. It would also appear that this firm is violating Section 13140 R. S. Missouri, 1929, for another reason. The statute prohibits the dispensing of poisons, except under the supervision of a licensed pharmacist. We have found the following definitions of the word dispense:

"'Dispense' has been defined: 'To deal out in portions; to distribute; to give.' Webster's New International Dictionary. 'To deal out; to apportion; to distribute. To dispense is to deal out generally or indiscriminately; to distribute, deal out to, or divide among individuals.' Worcester's Dictionary. 'To deal or divide out; give forth diffusively, or in some general way; practice distribution of.' Century Dictionary."

It is obviously hazardous to the public health to permit a firm engaged in the preparation of food products from grain to open a large container of highly poisonous substance on premises where such food products are produced, when such preparations are not under the supervision of those specially trained for such work. The segregation of paris green into smaller packages by the milling company and the placing of labels thereon, which we must assume were prepared by one not skilled in the use of poisons, or their antidotes, is undoubtedly a "dispensing" of poisons and not permitted by the statute, except under proper supervision.

It is therefore the conclusion of this Department that the dispensing and sale of a poisonous insecticide by a milling company in packages dispensed and labeled by such company, and not in the unbroken package, is a violation of Section 13140 R. S. Mo., 1929, as amended by Laws of 1939, at page 369.

APPROVED:

Respectfully submitted,

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