

IN RE: DOES PHARMACIST HAVE TO SECURE PERMIT FROM COUNTY COURT TO FILL PHYSICIAN'S PRESCRIPTION UNDER THE ACT OF 1933. (SESSION LAWS OF MO. 1933, P. 377) RELATING TO MEDICAL PRESCRIPTION FOR INTOXICATING LIQUORS.

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4485-86 Laws 33 August 8, 1933.

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Hon. J. B. McGuffin
Prosecuting Attorney
Lawrence County
Aurora, Missouri

Dear Sir:

Your letter of July 30 reads as follows:

"Kindly advise at once if enactment made by last Legislature, Acts 1933 at page 377 relating to Druggists selling liquors under Physicians prescriptions sufficient-ly repeals Sec. 4483 of R. S. 1929.

"Making my question plainer - can a registered Pharmacist in Missouri now handle and sell liquors under prescriptions issued by reputable physicians?"

The question presented is whether or not a registered pharmacist must secure a permit under Section 4483 R. S. Mo. 1929 to fill a prescription issued by a reputable practicing physician for intoxicating liquor?

Section 4483 R. S. Mo. 1929 provides that any person or corporation desiring to manufacture or sell ethyl alcohol or wine shall secure a permit from the clerk of the County Court of the county wherein such person resides and comply with certain conditions therein named and among which is that, after securing said permit, said holder thereof shall monthly file a statement under oath showing amount and kind of intoxicating liquor manufactured or received during preceding month with names and addresses of persons or corporations from whom received and disclosing amount and kind of intoxicating liquors sold or disposed of during said month with names and addresses of persons to whom sold or delivered, and amount and kind of intoxicating liquors on hand at end of month.

The last General Assembly of Missouri enacted and the Governor approved the following act relating to issuance of liquor prescriptions by physicians:

"Section 1. Repealing and reenacting certain sections. -- Sections 4485, 4486, 4504, 4505, 4506 and 4510 of Chapter 31 of the Revised Statutes of Missouri of 1929, are hereby repealed and two new sections to be numbered and known as Sections 4485 and 4486 enacted in lieu thereof to read as follows:

'Sec. 4485. Legalizing prescribing of liquor -- amount. -- frequency. -- It shall be lawful for any reputable physician licensed to practice medicine and surgery in this state to prescribe any distilled, spiritous, vinous, fermented or other alcoholic liquor in such quantities and with such frequency and dosage as in his judgment the needs of his patient may require.

'Sec. 4486. Legalizing filling prescription. -- It shall be lawful for any registered pharmacist engaged in the retail drug business or employed as a pharmacist in any retail drug store in this state to fill any prescription of any reputable physician licensed to practice medicine and surgery in this state, prescribing for the person named in such prescription any distilled, spiritous, vinous, fermented or other alcoholic liquor."

The first line of Section 4483 R. S. No. 1929 reads as follows:

"It shall be unlawful for any person, firm, association or corporation to manufacture or sell ethyl alcohol or wine within the State of Missouri for non-beverage purposes without a permit therefor as herein provided."

It will be observed this sentence applies distinctly to non-beverage uses and purposes of intoxicating liquor.

In construing the prohibition and druggists' law of Missouri, we must consider the past statutory legislation of both the State and the Federal government and the existing laws of both governments.

The statute law as to pharmacists in Missouri deals with intoxicating liquors only as a medicine.

The local option laws of Missouri and the state-wide Prohibition Laws deal with intoxicating liquors as a beverage.

This is an important fact to be borne clearly in mind in construing legislation affecting the sale of intoxicating liquors in Missouri.

In *State v. Ryan*, 217 M. A., l.o. 545, the Court said:

"The prohibition statute is separate and distinct from the druggists' statute and does not repeal the provisions of the Druggists' Act unless it be so clearly in conflict therewith that both cannot stand. It is familiar law in this State that prior to the adoption of the Federal Prohibition Amendment and subsequent state legislation of a prohibitive character, the adoption of the local option law, which put prohibition in force in the territory adopting it, did not repeal or supersede the druggists' statute."

Prior to March 1933, Sections 7 and 8 of Title II of Federal Prohibition Statute required a physician prescribing intoxicating liquor to insert in the prescription the ailment for which it was to be used, and copies of said prescriptions were filed with federal officials. On March 3, 1933, this federal statute was amended by eliminating the provisions for filing copies of prescriptions with federal officials and setting forth in prescription the ailment for which same was given.

The Statutes of Missouri, Sections 4485 and 4505 R. S. Mo. 1929, respectively provide that physician's prescription must set forth the malady for which the intoxicating liquor is prescribed and that same is prescribed as a necessary remedy.

Sections 4485, 4486, 4504, 4505, 4509 and 4510 are all a part of the state-wide code of Prohibition Laws. Section 4483 is likewise the third section in the code of state-wide Prohibition Laws adopted May 27, 1919 and made effective January 16, 1920. Section 4483 appeared in the Session Acts of 1919 just as it appears to-day in the Statutes of 1929 (See Session Laws of Mo. 1919, p. 408.). Section 4483 does not mention druggists specifically and deals with the sale of intoxicants as a beverage and not as a medicine.

The Act of 1919 appears as Article 7 of Chapter 53 R. S. No. 1919, and is entitled "Prohibition". The same revision of 1919 which incorporated therein the above mentioned state-wide Prohibition Act of 1919, also carried forward from the Revision of 1909 the Druggists' and Pharmacists' Act intact as Chapter 39 containing Sections 4712 to 4735 inclusive, being a complete Druggists' Code authorizing physicians to write and druggists to fill prescriptions for medicinal use. If the said Act of 1919 had not therein any provision other than Section 4483 of R. S. No. 1929 relating to permits for sale of intoxicating liquor, there can be no doubt but what under the decisions of Missouri Courts concerning the local option laws, and in harmony with the general principles of statutory construction, the Missouri Courts would hold that the state-wide Prohibition Act and the Druggists' Act, being each a part of the code of statute laws relating to intoxicating liquor, the one dealing with said liquor as a medicine and the other dealing with intoxicating liquor as a beverage, that the two statutes - the druggists' and the prohibition statute, shall be so construed as to leave in force, where absolutely not contradictory with each other, the provisions of each.

It was held in *Ex Parte Swann*, 96 No. 44, and *State v. Moore*, 107 No., l.c. 83, that the local option law did not interfere in the least degree with the Druggists' and Pharmacists' Law; and, in *State v. Ryan*, 317 No. App., l.c. 545, the court held that the state-wide Prohibition Statute does not repeal the provisions of the Druggists' Act unless it be so clearly in conflict therewith that both cannot stand. And in *State v. Witty*, 74 No. App. 550, and in *State v. Alexander*, 73 No. App. 605, and *Knox City v. Whittaker*, 87 No. App. 468, it was held that persons having druggists' licenses under pharmacists' law could not be indicted under the dramshop law.

Evidently, the Legislature of 1919 took cognizance of these decisions of the Supreme and Courts of Appeal holding that neither the local option law nor the dramshop law repealed the Druggists' Law and that all three should be so construed that the provisions of each should stand. That the Legislature of 1919 knew that it had to specifically provide the state-wide Prohibition Law should apply to druggists is evidenced by the fact that Section 4 of said Act (now appearing as Sec. 4805 R. S. No. 1929.) among other things provided,

"That any druggist, pharmacist or proprietor of a drug store, holding a permit to sell ethyl alcohol or wine under this act may sell or give away ethyl alcohol or wine un-

prescription dated and signed, first having obtained from some regularly registered and practicing physician * * * * * provided further that each permit holder selling or giving away or otherwise disposing of ethyl alcohol or wine under this section shall attach a copy of each application and prescription received during each month to the monthly report required to be filed with the Clerk of the County Court under the provisions of Section 3 of this Act (Sec. 3 now appears as Sec. 4483 R. S. No. 1939.). Any permit holder who shall violate any of the provisions of this section or any person who shall make a false statement in an application for ethyl alcohol or wine shall be deemed guilty of a misdemeanor."

Evidently, however, the Legislature was not satisfied that the above quoted provisions of the Act of 1919 sufficiently tied the writing of prescriptions by physicians on to the provisions of what is now Section 4483 so as to over-ride the Druggists' Act as set forth in other parts of the Revised Statutes of Missouri of 1919; and so in 1921, Session Laws of 1921, page 4717, the Legislature more specifically undertook to make the provisions of what is now Section 4483 R. S. No. 1939, with reference to permits, apply to druggists. A close inspection of the above quoted provisions of the Act of 1919 relative to druggists will disclose that it does not specifically require a druggist to secure a permit in order to fill physician's prescriptions for intoxicating liquor under the Pharmacy Laws of the State. In 1921, the Legislature added the following to the State-wide Prohibition Law:

"That nothing in this Act contained, shall so be construed as to prevent or prohibit any reputable licensed physician, having authority or permit, to prescribe ethyl alcohol or wine from prescribing in lieu thereof any intoxicating liquor susceptible of use as a beverage or to prevent or prohibit any druggist from possessing such intoxicating liquors; and in all such cases, the physician writing such prescription, the person for whom such prescription is written and the druggist filling the same shall be subject to same rules and regulations and with the same penalties and restrictions as provided

in this Act for the prescription and sale of ethyl alcohol or wine."

This section, it will be observed, makes the druggist subject to the same penalties and restrictions as provided in the state-wide Prohibition Law for the sale of ethyl alcohol or wine. The restrictions provided in said Prohibition Law with reference to permits were contained in Section 3 of said Act, which now appears in the same form as Section 4483 of 1929 Statute; and the specific direction in the amended statutes of 1931 that the druggists should be subjected, in filling the prescription, to the same restrictions and should be required to obtain a permit subject to conditions provided for in said state-wide act for the sale of intoxicating liquors, conclusively shows that the Legislature realized that Section 4483 R. S. No. 1929, even with the provisions of Section 4 of the Act of 1919 (now section 4505 of 1929) did not make the druggists subject to the state-wide Prohibition Law and that Section 3 of said original state-wide statute of 1919 (now section 4483, R. S. No. 1929) applied only to sales of intoxicating liquor as a beverage and not to sales thereof as medicine.

All of the above provisions specifically making druggists subject to the provisions, as to permit to sell on prescription intoxicating liquor, found in Section 3 of the original state-wide Act of Prohibition of 1919 (now appearing as Section 4483, R. S. No. 1929) were repealed by Section 1 of the Act of 1933 by expressly being designated as repealed sections of Revised Statutes of Missouri of 1929. This therefore leaves the state-wide Prohibition Law with Section 4483 R. S. No. 1929 as the only section that can be pointed to as requiring druggists to secure a permit under said section 4483 to enable them to fill a physician's prescription for intoxicating liquor; and this section nowhere mentions druggists nor pharmacists.

It is true, the opening sentence of Sec. 4483 R. S. No. 1929 makes it unlawful to manufacture or sell intoxicating liquor for non-beverage purposes in this State. But, intoxicating liquors are used for many purposes besides medicinal that are non-beverage uses, such as antiseptics, culinary, laboratory, industrial uses and for experimental purposes in educational institutions. This state-wide prohibition act and Section 4483 thereof constitute a code of Criminal Laws and will be strictly construed and no person, not clearly within the provisions thereof, will be subject to the penalties thereunder; and, as heretofore shown by the Missouri cases cited in criminal prosecutions, persons who are druggists will not be held subject either to the state-wide Prohibition Laws or to Local Option Laws or Dram-shop Laws unless the provisions of said state-wide local option and dram-shop laws are so irreconcilably in conflict with the Druggists' Law of this State

that the two classes of statute cannot both stand.

Again, if with the provisions of the state-wide Prohibition Act providing specifically that druggists should be required to secure a permit under the provisions of Section 4483 eliminated from the Statutes of Missouri, druggists are still required to secure such a permit, then the Acts of the Missouri Legislature in enacting the repealed provisions of Sections 4483, 4486, 4504, 4506, 4509 and 4510 was a foolish and absurd thing, and left the law precisely as it was before said sections were enacted.

If it was unnecessary for the Legislature to enact the original Section 4 (now section 4506 R. S. Mo. 1939) and Section 6592 (a) Session Laws of 1919, p. 417 (now Sec. 4486 R. S. Mo. 1939) specifically providing druggists should be required to secure a permit under Section 4483 in order to fill a prescription for intoxicating liquor, then in enacting said sections, the Legislature left the law precisely where it was before; but the rule of construction is, a Court will not impute to the Legislature the folly of enacting a statute without a purpose and which leaves the law practically as before. Sutherland on "Statutory Construction, Vol. I. (3d) pp. 476, 477, and 478. Curtis v. Gill, 34 Ct. 49.

There is no repugnancy between Section 4483 R. S. Mo. 1939, and the other provisions of the State-wide Prohibition Law, and the provisions of the Druggists' Act contained in Sections, 13157, 13158, 13160, requiring druggists to have written prescription from a registered and practicing physician before selling intoxicating liquor for medicinal purposes; and to file monthly with the County Clerk, a list of all prescriptions filled by him prescribing liquor during preceding month accompanying said list by an affidavit thereto; and requiring physicians not to issue prescriptions for intoxicating liquor in any quantity to be used other than for medical purposes, or to issue more than one intoxicating liquor prescription at one time or to issue any prescription contrary to any existing law. There is no conflict either between the Act of 1933 and the above herein referred to sections of the Druggists' Act, found in the Revised Statutes of Missouri of 1939.

In the case of State ex rel. Moseley v. Lee, 319 Mo. l.c. 989, the rule is laid down as follows:

"If both acts can by any reasonable construction be construed together, both will be sustained. Two statutes are not repugnant to each other, unless they relate to the same subject."

says: Sedgwick on "Statutory Construction"; (3d), p. 300

"It has been said that in construing any part of a law, the whole must be considered; the different parts reflect light on each other; and if possible such a construction is to be made as will avoid any contradiction or inconsistency. * * * * In putting a construction upon any statute, every part should be regarded; and it shall be so expounded if practicable as to give some effect to every part of it. * * * * In the construction of a statute, effect is to be given if possible to every clause and section of it; and it is the duty of the court as far as practicable so to reconcile the different provisions as to make the whole act consistent and harmonious. If this becomes impossible, then we are to give effect to what was manifestly the intention of the Legislature, though by so doing we may restrict the meaning or application of general words."

Turning now to the Act of 1933, we find that it first repeals all of the sections of the 1929 Statutes specifically requiring a druggist to secure a permit under section 4483 before he can fill a prescription for liquor. The first section provides that two new sections, to be numbered 4485 and 4486, shall be enacted in lieu of the same numbered sections in R. S. No. 1929. The second section thereof, numbered 4485, provides that it shall be lawful for any reputable physician to prescribe alcoholic liquor in such quantities and frequency and dosage as his judgment dictates his patient requires. Section 4486, R. S. No. 1929, required physician to secure a permit before he could write prescriptions for alcoholic liquor; but that section was expressly repealed by the Act of 1933; therefore, the professional judgment of the physician is the only controlling factor in the quantity, frequency and amount of alcoholic liquor a physician may prescribe.

The repealed section 4505 of R. S. No. 1929, prohibited pharmacists from filling physician's prescriptions except that it was stated therein the alcoholic liquor was prescribed as a necessary remedy. It is evident that the right affirmatively given to a physician by the Act of 1933 to prescribe intoxicating liquor solely according to his professional judgment, would be entirely worthless unless the prescription when written could be filled by a druggist. Therefore, after repealing the restrictive provisions as to druggists, contained in R. S. No. 1929, the third section of the Act of 1933 provides:

"It shall be lawful for any registered phar-

macist * * * * to fill any prescription of any reputable physician * * * * prescribing for the person named * * * * alcoholic liquor."

The authority to issue the prescription and responsibility legally therefore is by 1933 Act vested in the physician. The Legislature intended to remove restrictions from the Druggist in filling the prescription so physician, unhampered, could exercise his professional judgment in prescribing alcoholic liquor.

The three sections of the new Act of 1933 relate entirely to the sale of alcoholic liquor as a medicine and not as a beverage. If it be true that despite the act of 1933, a registered pharmacist must still secure a permit under the provisions of Section 4483 R. S. No. 1939, to fill a physician's prescription for alcoholic liquor, for what purpose was the third section of the Act of 1933 enacted and what meaning, if any, shall be attached to the words "it shall be lawful for any registered pharmacist * * * * to fill any prescription of any reputable licensed physician * * * * for alcoholic liquor?" When the third section of the Act of 1933 says that it shall be lawful for the druggist to fill the physician's prescription, reference is made to the prescription authorized by the second section of said Act to be written by the physician. The third section of the Act was written to carry out the provisions of the second section. If this is not true, then the third section of the Act means nothing and was an idle gesture insofar as Legislature is concerned, because to hold that despite the third section of the new Act, the permit must still be secured under the provisions of Section 4483 R. S. No. 1939, is to say that the Legislature had no purpose in enacting said third section of the Act of 1933.

The law is that if it is necessary in order to give effect to a section of a statute, so as to not impute to a Legislature the folly of enacting a law that would leave the law precisely as it was, the Court will hold that a former statute is impliedly repealed although not mentioned in the new statute. This is the rule laid down by an eminent writer on "statutory construction". Sutherland on Statutory Construction, Vol. I, (2d) pp. 476, 477 and 478. And he cites the following instance of application of the rule:

"While the statute existed, giving appeals to the county court from judgments of Justices of the Peace in all cases without regard to the amount other than upon the verdict of the Jury, a new statute was passed which allowed appeals from such judgments when they exceeded five dollars. It was held a repeal of the former statute; for otherwise there would be imputed

to the Legislature the folly of enacting a statute without purpose and which leaves the law precisely as before."

Under the above rule of statutory construction, even if it should be held that after the repeal by the Act of 1933 of all the specific provisions requiring pharmacists to secure permits under Section 4483 R. S. Mo. 1929, still Section 4483 itself required druggists to secure permit thereunder to fill prescriptions for intoxicating liquor; yet under the above rule of statutory construction, the Act of 1933 being a later act, in order to give effect to all its provisions and to the third section thereof declaring it lawful for the pharmacist to fill the physician's prescription written without the restrictions therein provided for by the repealed sections, the Court should declare that insofar as Section 4483 R. S. Mo. of 1929 relating to permits to be secured by druggists, said provisions of Section 4483 were repealed by the third section of the Act of 1933, thereby relieving the Legislature of the imputation of enacting a statute without a purpose and leaving the law precisely as it was before. Both the physician and the pharmacist are given new affirmative rights by the Act of 1933. In 105 Mo. l.c. 272, the Supreme Court quoted from an eminent writer on "statutory construction" as follows:

"It is a rule of great importance and frequently acted upon that where by a statute a new right is given and a specific remedy provided * * * the right will be vindicated in no other way than that provided by the statute."

To the same effect is *Ex Parte Jaffee*, 48 Mo. App. 365; *Riddick v. Governor*, 1. Mo. 147; *State v. Hamey*, 188 Mo. l.c. 213; *Sutherland on Statutory Construction* (2d) Vol. I. p. 473. Here we find the new right given physician to issue the prescription and the pharmacist the right to fill it. Under the last statutory rule above quoted, the only method provided for filling the prescription issued under the Act of 1933, is the simple one provided by the third section of said Act of 1933, regardless of the provisions of other sections relating to druggists. If it be held Section 4483 required druggist to secure permit to fill physician's prescription for alcoholic liquor, then the act of 1933, not providing for a permit, conflicts with Section 4483, and the later Act of 1933 will be held to be an exception to the general provisions of Section 4483. *State ex rel. County v. Fulks*, 295 Mo. l.c. 625; *McGrew v. Railway Co.* 230 Mo. 961.

This opinion is written upon the assumption that it was the intention of the Legislature to harmonize the laws of Missouri with those of the Federal government as to the sale of intoxicating liquors, as medicine, under prescriptions of practicing registered physicians; and that it was the further intention of the Missouri Legislature to free the druggists of the State from any restrictions theretofore imposed upon them in filling physicians' prescriptions for intoxicating liquor to be used as medicine and that to accomplish this end, the Legislature expressly repealed the sections named in the said Act of 1933.

It is the opinion of this department that a duly registered pharmacist is not required under the law of Missouri to secure a permit under Section 4483 R. S. Mo. 1929 in order to be able to fill a prescription written by a reputable licensed and practicing physician for alcoholic liquor to be used as a medicine.

Respectfully submitted,

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APPROVED:

ROY McKITTTRICK
Attorney General.

EGG/AJ