MEDICINE--PRACTICE OF MEDICINE--INJUNCTION will lie to restrain any person engaged in the practice of medicine without a license, and same is to be brought by the Prosecuting or Circuit Attorneys in the County or City where the alleged offense occured.

9-12

September 4, 1934.

FILED
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Dr. E. T. McGaugh
State Board of Health
Jefferson City, Missouri

Dear Dr. McGaugh:

This Department is in receipt of your letter of July 30, 1934, requesting an opinion wherein you state in part as follows:

> "I am writing to have your opinion whether or not the State Board of Health of Missouri, under existing laws, may restrain any one from practicing medicine by permanent injunction.
>
> "In Iowa they have a law-Injunction against illegal practice, which reads as follows: 'Any person engaged in any business or in the practice of any profession for which a license may be restrained by permanent injunction.' Section 2519 of the Code of Iowa, 1931. The Iowa law further provides that the state department of health shall enforce the provisions of the act and make the necessary investigations relative to it. The law also makes it the duty of the attorney general and the county attorney to institute and prosecute the proper proceedings against any such defendant.
>
> "The use of such an injunction is also authorized in the State of Indiana by legislation that has been enacted. Have we any such authority?

Section 9118 R. S. Mo. 1929, prohibits the practice of medicine and treatment of the sick and reads in part as follows:

> "Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever,

> or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the State board of health, as provided in this article, or after the revocation of such license by the state board of health, as provided in this article, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than one year, or by both such fine and imprisonment for each and every offense; and treating each patient shall be regarded as a separate offense. * * * *."

Under the above statute, any person practicing medicine without a license from the State Board of Health is deemed guilty of a misdemeanor and punishable by fine and imprisonment or both.

The vital question in your query is: Can the remedy by injunction be resorted to for the purpose of preventing one practicing the profession of medicine without complying with the provisions of the Statute by procuring a license and complying with its other requirements?

A general proposition of law usually laid down is that the qquitable relief of injunction may not be employed to enjoin a defendant from the commission of a crime, and we have no quarrel to make with the broad statement of the doctrine as stated by all text writers. However, a reading thereof will disclose that many exceptions have been ingrafted on the doctrine as so broadly stated, and that courts in the exercise of equitable jurisdiction will in a number of cases employ the injunctive remedy to prevent the commission of forbidden acts, although the perpetrator may be guilty of a crime or subject himself to a penalty by committing them.

Mr. Pomeroy in his excellent work on Equitable Remedies (1919 Ed.) Vol. 5, Section 1893, and which is Section 478 of his Equity Jurisprudence to which his Equity Remedies is supplemental, at the beginning of that text the learned author says:

> "As a public nuisance concerns the public generally, it is the duty of the government to take measures to abate or enjoin it."

In the case of State ex rel. Attorney General v. Canty, 105 S. W. 1078; 207 Mo. 439, l. c. 449, our Court had before its consideration and determination what a public nuisance was within the meaning of the law. The Court in its opinion said:

> "Mr. Joyce, in his valuable work on the Law of Nuisances, section 5, defines a public or common nuisance in the following words: 'A public or common nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty which the common good, public decency or morals, or the public right to life, health, and the use of property required, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights of property of the whole community, or neighborhood, or of any considerable number of persons; even though the extent of the annoyance, injury or damage may be unequal or may vary in its effect upon individuals. * * * *."

According to the above definition, a public nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty which the public right to life and health requires.

The Supreme Court of Kansas in the case of State v. Lindsay, 116 Pac. 207, 85 Kan. 79, 35 L. R. A. (N. S.) 810, had before it a question precisely analagous to the one involved here. A statute of that state provided that owners and operators for compensation of institutions for the care and treatment of persons mentally deranged or of unsound mind should first obtain a license from the State Board of Health. The Defendant in that case undertook to operate such an institution without first obtaining the statutory license, and the State Board of Health filed an action to enjoin him from doing so. The relief was granted notwithstanding the fact that the statute provided for a penalty for operating the institution without license. The Court recognized the general doctrine, supra, that ordinarily a Court of equity would not enjoin the commission of a crime and the reluctance with which it would in any case do so, but said:

That the relief would be granted unhesitatingly "where the remedy is not adequate and it is necessary to protect the rights of the public or an individual. A Court is not powerless to prevent the doing of an act merely because it is denounced as a public offense."

Further along in its opinion it is said:

> "The obligation of the government to promote the interest of all, and to prevent the wrong doing of one resulting in injury to the general welfare, is often sufficient to give it a standing in Court to obtain an injunction.* * * *."

The Supreme Court of the United States in the case of In Re: Debbs, 15 S. C. 900; 158 U. S. 564; 39 L. E. 1092, l. c. 1102, in commenting on the right of the government to maintain an equity action for an injunction, although the violations involved constituted a crime, said:

> "Every government, entrusted by the very terms of its being with the powers and duties to be exdrcised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court."

In the case of State ex rel. v. Lamb, 237 Mo. 437, l. c. 457, the Court in answering the argument that Courts of equity will not lend their aid in the enforcement of criminal laws or in restraining acts which are criminal in their nature said:

> "We have ruled many times that injunction will not lie to prevent the commission of a crime. We said in the Canty case, speaking through Woodson, J., that 'this court has uniformly held that a court of equity

> has no jurisdiction to enjoin the commission of a crime; ' but Judge Woodson said further in that case (l. c. 459): 'The contention of respondents that a court of equity has no jurisdiction to abate a public nuisance where the offenders are amenable to the criminal laws of the State, is not tenable.' And the court, speaking further through Valliant, J. says (l. c. 460): 'A court of equity will not undertake to enforce the criminal law; therefore it will not enjoin the commission of a threatened act merely because the act would be a crime, but, on the other hand, neither will it withhold its equitable relief in a case in which, for other reasons, it has jurisdiction, merely because the act when committed would be a crime.' "

CONCLUSION.

Section 9118 R.S. Mo. 1929, sppra, prohibiting the practice of medicine and treatment of the sick without a license is intended to protect those in need of medical treatment and to, in a measure at least, guard against empicirism and incompetency in said profession. The statute was enacted in furtherance of a high and most commendable public policy. It has in view, not only the possible consequences ordinarily resulting from inefficiency, but also the protection of the lives of the patients which might be placed in peril if the incompetent practitioner of medicine was permitted to ply his trade; for it is a well known fact that modern methods of treatment of those needing the services of a physician require the administration of deadly concoctions, and those intrusted with prescribing them should be qualified for the purpose. It was the intention of the Legislature by this statute to require Medical Doctors to be licensed, in order that they may standardize their profession to the highest degree of public service.

The statute involved here is not purely a criminal one. It was enacted under the police power of the State and in

furtherance of a wholesome public policy. The purpose was not to create a crime, but to provide for the public welfare. The criminal feature was only intended as a deterrent and a partial restraint, and was inserted for the purpose of admonishing the practitioner that he must comply with the salutary terms of the statute, and which compliance was the chief purpose in enacting the statute, the penal section being merely incidental and collateral thereto.

In view of the foregoing, we are of the opinion that equity will not enjoin the commission of a crime as such, but where the chief purpose of the statute as here, is the protection of health and life of those needing medical service, injunction will lie to prevent the practice of medicine without a license notwithstanding such unlicensed practitioner lays himself open to penalties imposed by Section 9118 R. S. Mo. 1929, supra.

The next question for determination is one of practice. Who is to institute the proceedings to enjoin the practice of medicine without a license?

Section 9118 R. S. Mo. 1929, provides in part as follows:

> "Upon receiving information that any provision of this section has been or is being violated the secretary of the state board of health shall investigate the matter and upon probable cause appearing shall, under the direction of the board, file a complaint with the prosecuting or circuit attorney in the county or city where the alleged offense occured.* * *"

Section 11316 R. S. Mo. 1929, describes the powers and duties of the prosecuting attorney and authorizes the prosecutor to proceed at the relation of the State of Missouri in all cases where the State or county may be interested.

In the case of State ex rel. v. Lamb, 237 Mo. 437, l. c. 455, our Court said:

> "Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance,* * * *"

In view of the foregoing we are of the opinion that a prosecuting or circuit attorney may upon a complaint from the State Board of Health that any person is practicing medicine without a license, proceed in a suit in equity at the relation of the State to enjoin them; such suits being brought in the County or State where the nuisance is being perpetrated.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.