HOUSE BILL NO. 45: Does not include Osteopaths.

March 25, 1943

3-30

FILED
87

Mr. W. W. Sunderwirth
Senate Chamber
Capitol Building
Jefferson City, Missouri

Dear Mr. Sunderwirth:

Under date of March 22, 1943, your wrote this office requesting an opinion as follows:

> "I would like to have an opinion as to the rights and duties of Osteopaths in reference to House Bill No. 45. I am attaching a copy of this bill and wish to have an opinion as to the right of an Osteopath to provide the certificate referred to in Section 1, Line 9, of House Bill No. 45 in the light of Section 10046 of Revised Statutes of Missouri, 1939.
>
> "This bill is up for hearing today. I would like to have an opinion as soon as possible. I will try to get the bill laid over until tomorrow awaiting your opinion."

There is no line 9 of Section 1 in House Bill No. 45. On page 2 of House Bill No. 45, line 9, the word "physician" is found. This is in the proposed new Section 3364A. The clause in which the word is found is here quoted:

> " * * * * * or unless, in the case of an applicant with a positive test, such applicant presents and files a certificate from a physician duly licensed to practice in the State of Missouri stating that to his or her best knowledge and belief, after having made a thorough physical examination of such applicant, he or she is not infected with syphilis, or if so infected is not in the stage of the disease wherein it is communicable either to the spouse or the offspring, which said physician's certificate shall have attached thereto a laboratory report of the test for syphilis made by such laboratory; * * * * * "

The question you ask is an exceedingly close one and the opinions of the courts are not in harmony on the meaning of the word "physician". The earlier decisions almost universally held the word "physician" did not include persons practicing osteopathy, but in later years decisions in some states have held the word to include osteopaths. The courts of Missouri have not passed upon the word in recent years. There are two early decisions which hold that osteopaths are not physicians. These cases are Grainger v. Still, 187 Mo. 197, 224:

> "It will thus be observed that the position of osteopaths in this State is not only anomalous, but that it is sui generis. Anomalous, because while it is spoken of as a system, method or science, it is yet declared not to be the practice of medicine

and surgery, in any of its departments. And sui generis, because osteopaths are not subjected to the jurisdiction of the State Board of Health, as all other practitioners of medicine and surgery, in any of its departments, are. Yet, any legally authorized practitioner of medicine and surgery is expressly permitted to cure or relieve diseases, with or without drugs, or by any manipulation by which any disease may be cured or alleviated.

"In other words, osteopaths are not physicians or surgeons, in any of the departments of medicine or surgery, but may cure or relieve any disease of the human body according to the system, method or science as taught by the American School of Osteopathy of Kirksville, Missouri, or any other legally chartered and regularly conducted school of osteopathy.

"Neither the statute nor the record in this case shows what such system, method or science is. The plaintiff offered to prove that they use the same textbooks as other schools of medicine, and also that they have no fixed rule of practice for the treatment of hip joint disease, and, for the purposes of the case, the trial court ruled that such facts might be considered as proved."

and the case of Le Grand v. Security Benefit Association, decided by the Springfield Court of Appeals and reported in 240 S. W. 852, 854:

> "Section 7330, R. S. 1919, a part of article 1, c. 65, R. S. 1919, which has been the law for many years (Laws 1901, p. 207), provides that it shall be unlawful for any person not a registered physician within the meaning of the law to practice medicine or surgery in any of its departments. Section 9202, R. S. 1919, supra, which was enacted in 1897, specifically provides that the practice of osteopathy is not the practice of medicine and surgery within the meaning of article 1, c. 65. In Grainger v. Still, 187 Mo. 197, loc. cit. 224, 85 S. W. 114, 1123 (70 L. R. A. 49), this language appears:
>
> "'In other words, osteopaths are not physicians or surgeons, in any of the departments of medicine or surgery, but may cure or relieve any disease of the human body according to the system, method or science as taught by the American School of Osteopathy of Kirksville, Missouri, or any other legally chartered and regularly conducted school of osteopathy.'"

The Still case, supra, was a damage suit against an osteopath for malpractice; the Le Grand case was an insurance case. Most of the decisions undertaking to define or construe the word "physician" have been in insurance cases. From these two decisions here cited it is apparent that under the present Missouri decisions the word "physician" as used in line 9 on page 2 of House Bill No. 45 would not include persons practicing osteopathy unless there should be some other provision of the law which, when construed with House Bill No. 45, would broaden the meaning of the word sufficiently to include osteopaths.

In your letter you mention Section 10046, Article 1, Chapter 76, R. S. Mo., 1939:

> "Osteopathic physicians shall observe and be subject to the state and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, and such reports shall be accepted by the officer or department to whom such report is made."

For a number of years this State has had laws and regulations pertaining to the control and quarantine of contagious diseases and pertaining to the registration of births and deaths. Osteopaths,having been held not to be physicians and the statutes, Section 10042, declaring that persons practicing osteopathy were not engaged in the practice of medicine, it is the view of the writer that Section 10046, supra, was enacted for the purpose of bringing the osteopaths under the laws and regulations pertaining to the control of contagious

diseases and the registration of births and deaths.

If the purpose of the statute was not to bring the osteopaths under the regulations concerning contagious diseases and the record of births and deaths but was to confer upon them some right, it would be necessary to determine just how far it goes in conferring rights. In this connection it is desired to call to your attention the rule of ejusdem generis, which rule together with the exceptions is very aptly set out in Volume 59, page 981, section 581 of Corpus Juris:

> "By the rule of construction known as 'ejusdem generis,' where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated, and this rule has been held especially applicable to penal statutes. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The words 'other' or 'any other' following an enumeration of particular classes are therefore to be read as 'other such like,' and to include only others of like kind or character. The doctrine of ejusdem generis, however, is

> only a rule of construction, to be applied as an aid in ascertaining the legislative intent, and cannot control where the plain purpose and intent of the legislature would thereby be hindered or defeated; nor does the doctrine apply where the specific words of a statute signify subjects greatly different from one another, nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless, nor where there are no specific terms followed by general terms. * * * * * "

In connection with this rule and its application the following Missouri cases are cited and quoted from:

State ex rel. Goodloe v. Wurdeman, 286 Mo. 153, 161, 162, which illustrates the operation of this rule:

> " * * * * * It is a familiar rule of statutory construction that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase should be construed to refer to things of the same kind. (19 C. J. p. 1255.) An exception to this rule occurs where the specific clauses exhaust the class, so that the general word or phrase must be construed to have a meaning beyond

> the general class, or must be discarded altogether. (State v. Smith, 233 Mo. 242, l. c. 257.)
>
> "It is obvious that the specific words in this instance do not exhaust the general class of those having a pecuniary interest in the estate. An administrator has such an interest for example. (See In re McCune's Admr., 76 Mo. 200, l. c. 205.)
>
> "We therefore conclude that the present is a proper case for the application of the rule of ejusdem generis (State v. Wade, 267 Mo. 249, l. c. 257), and that the general clause 'other person having an interest in the estate' is properly construed as embracing only such other persons as have a pecuniary interest in the estate."

Regan v. Ensley, 283 Mo. 297, 307, 308, which also illustrates the operation of the above rule:

> "There is no dearth of technical reasons based purely upon the canons of construction to sustain the conclusion we have reached herein. The language of that portion of the statute (Sec. 5435, supra) under discussion is as follows: 'The husband shall be debarred from and

incapable of selling, mortgaging or alienating the homestead in any manner whatever,' etc. A rule of construction provides that where general words follow particular words, the former will be construed as applicable only to persons or things of the same nature or class as the latter; or, as we have stated it, 'general words do not explain or amplify particular terms preceding them, but are themselves restricted and explained by the particular terms. (State ex rel. Pike County v. Gordon, 268 Mo. 321.) In the application of this rule to the statute quoted the meaning of the general word 'alienation' may properly be restricted to that embodied in the particular words 'selling' and 'mortgaging.'

"A like construction may be given to that portion of the proviso of the same section that 'nothing herein contained shall be construed to prevent the husband and wife from jointly conveying, mortgaging, alienating or in any other manner disposing of such homestead or any part thereof.' As we have shown, there could not well be a joint alienation by devise and the framers of the law evidently did not so intend. The reasonable construction of this proviso, therefore, is that such a joint alienation was authorized as is expressed by the words 'conveying or mortgaging' and that the word 'alien-

> ating' should be restricted in its meaning to that given to the preceding words, while the words 'or in any manner disposing' may be construed as suppletory. Thus interpreted, the husband's power of alienation by devise is not prohibited by the statute. In the application of this rule the purpose of the homestead law is not to be lost sight of. This necessitates a modification of the foregoing rule of construction which, while not prohibiting alenation by devise, limits the exercise of same to cases where the rights of the widow and minor children are not thereby affected."

State v. Eckhardt, 272 Mo. 49, 52, 53, 54, is an exception to the above rule:

> "Defendant contends that the place of exposure and abandonment 'must be a street or field, or like place, where the exposure is as great or greater than if in a field or street, and not in a place of shelter as charged in the indictment.' By this contention we understand the defendant to invoke the doctrine of ejusdem generis, a familiar rule of construction, that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or

things of the same general nature or class as those enumerated. 'The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The words "other" or "any other," following an enumeration of particular classes are therefore to be read as "other such like," and to include only others of like kind or character. The doctrine of ejusdem generis, however, is only a rule of construction, to be applied as an aid to ascertaining the legislative intent, and does not control where it clearly appears from the statute as a whole that no such limitation was intended. Nor does the doctrine apply where the specific words of a statute signify subjects greatly different from one another; nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless.' (36 Cyc. 1119-1122.) This definition fairly and clearly explains the meaning, purpose, manner of applying and limitations of the doctrine invoked.

"It is very clear to us that the principle of ejusdem generis cannot be applied here, nor yet the doctrine of noscitur a sociis, for the words 'street' and 'field,' appear-

ing in the statute, are not even remotely related, and neither derives any color from association with the other, but each stands as the representative of a distinct class. The meaning, then, of the general expression 'or other place,' in the statute is not restricted or affected by the preceding particular words, which 'signify subjects greatly different from one another.'

"Endlich on the Interpretation of Statutes, section 409, says: 'Further, the general principle in question applies only where the specific words are all of the same nature. Where they are of different genera, the meaning of the general word remains unaffected by its connection with them. Thus, where an act made it penal to convey to a prisoner, in order to facilitate his escape, "any mask, dress, or disguise, or any letter, or any other article or thing," it was held that the last general terms were to be understood in their primary and wide meaning, and as including any article or thing whatsoever which could in any manner facilitate the escape of a prisoner, such as a crowbar. (Reg. v. Payne, L. R. 1 C. C. 27.)'

"The great fundamental rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature. For

> the purpose of discovering the legislative intent it is proper, and often necessary, to consider the history of the statute, the reason for its enactment, and the prior state of the law on the subject to which the statute relates. (Gabriel v. Mullen, 111 Mo. 119; Greeley v. Railroad, 123 Mo. 157; Missouri Light Co. v. Scheurich, 174 Mo. 235; State v. Balch, 178 Mo. 392.)"

State v. Smith, 233 Mo. 242, 256, 257, which is also an exception to the rule of ejusdem generis:

> "Defendant claims that the general words in the statute, 'attempting to treat the sick,' should, by the application of the rule of ejusdem generis, be limited to attempts to treat by medicine or surgery, which are the special words preceding.
>
> "As early as 1877 the Legislature of this State enacted a law 'to regulate the practice of medicine and surgery,' and made it a misdemeanor for any person 'to practice or attempt to practice medicine or surgery' without complying with the provisions of the act. This provision was carried through the various revisions up to and including section 8517, Revised Statutes 1899, excepting only that the words 'attempting to practice' were drop-

ped, so that the revision of 1899 reads: 'Any person practicing medicine or surgery in this State without complying with the provisions of this article,' etc. The revisions of 1889 and 1899 also provided that 'every person practicing medicine and surgery in any of their departments' should possess the qualifications therein specified. In 1901 article 1 of chapter 128 of the 1899 revision, relating to medicine and surgery, was repealed, and a new act passed covering the subject. Section 3 of the act provided that 'all persons desiring to practice medicine or surgery in this State, or to treat the sick or afflicted as provided in section 1,' should apply to the State Board of Health for examination.

"This review of the history of the law affords a complete answer to the claim that the doctrine of ejusdem generis applies to this case. It is not a case of general words following a specific designation. There might be some ground for the claim if the general words 'treating the sick' were in the original act. As shown above, until 1901 the only designation was 'medicine and surgery.' No one will claim that the general words, 'and any person attempting to treat the sick,' added by amendment, are ejusdem generis with the specific words of the original act.

"Furthermore this rule of ejusdem generis is, after all, resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent that the Legislature intended the general words to go beyond the class specially designated, the rule does not apply. If the particular words exhaust the class, then the general words must have a meaning beyond the class, or be discarded altogether. (National Bank v. Ripley, 161 Mo. l. c. 132; Lewis's Sutherland on Stat. Const., sec. 437.) Certainly the words 'medicine or surgery in any of its departments' exhaust the genus or class.

"It is obvious that the Legislature, by this amendment, intended to include those who practice neither medicine nor surgery in any of its departments, but who profess to cure, and who treat or attempt to treat, the sick by means other than medicine or surgery. Evidently the Legislature, in order to guard the over-credulous against injury that might result from yielding to the solicitations and professions of men who ignorantly undertake to diagnose and treat human ailments, deemed it proper, in the exercise of its police power, to require all persons, who undertake to so treat the sick, to show that they possess the qualifications which the

lawmakers prescribe as essential."

Undertaking to apply this rule to Section 10046, supra, it is immediately apparent that the clauses relating to contagious diseases and the registration of births and deaths would not tend in any way to broaden the meaning of the word "physician" as used in House Bill No. 45. The reason for this is that the disease for which the certificate would be required is not a contagious disease but an infectious one, and the registration of births and deaths has no connection whatever with the freedom of some persons from syphilis.

This leaves only the last clause of the section relating to all matters pertaining to public health which might be construed to have the effect, when read with House Bill 45, of broadening the meaning of the word "physician" to include osteopaths under the exceptions to the rule of ejusdem generis. You will see the question is very close.

As previously pointed out, it is the view of the writer that Section 10046, supra, was enacted for the purpose of bringing osteopaths under certain regulations and not to confer rights upon them. The purpose of House Bill 45 is to protect the public health and prevent marriages of persons suffering from syphilis. The clause of this house bill quoted above and which has in it the word "physician" authorizes the issuance of a marriage license when the applicant presents a certificate showing he or she is not infected with syphilis, or if infected, the disease is not in a communicable stage and specifically designates what class of persons are authorized to execute this certificate. It confers a right or power upon this class of persons, namely, physicians.

CONCLUSION

Under the existing decisions of the Missouri courts and the text and purpose of House Bill No 45, it is the opinion of the writer that the word "physician" as used in line 9, page 2 of House Bill No. 45, is not broad enough to include persons practicing osteopathy.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS