

BOARD OF PHARMACY: Appeal does not vacate Board's revocation of license pending decision of Governor and Attorney General.  
LICENSES:

January 12, 1942

Honorable Ted D. Willard, Secretary  
Board of Pharmacy  
Camdenton, Missouri

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Dear Sir:

We are in receipt of your letter of January 7th wherein you state as follows:

"On February 27, 1941 the Missouri Board of Pharmacy revoked the license of Harry Ludmeyer of Joplin, Missouri and Abraham I. Schnaer of Kansas City, Missouri. They in turn as provided for by the Statutes appealed to the established Appeal Board, consisting of you and the Governor.

"Hearings upon which were held before you in the early part of September 1941, as yet this office has had no notice of what decision has been rendered in the matter by you and the Governor. These men have now demanded that I issue them a renewal license to practice pharmacy for 1942 in Missouri, stating that due to the fact an appeal is still pending and that they are still in good standing and are eligible to practice pharmacy in Missouri.

"I am asking whether or not in your opinion these licenses should be issued or withheld until your final decision in the case is rendered. I will appreciate an early reply to this, since these men are insistent upon receiving their license."

Section 10006, Revised Statutes of Missouri, 1939, provides for renewal of licenses for pharmacists in part as follows:

"Every person now licensed or registered as a pharmacist under the laws of this state shall be entitled to continue in the practice of his profession until the thirty-first day of December, 1909, and after such date shall be entitled to renewal of his license under the provisions of this chapter upon the presentation of an application for such renewal. \* \* \* "

Section 10007, Revised Statutes of Missouri, 1939, provides for an appeal to the Governor and Attorney General from the action of the Board in revoking a license.

"If the applicant for license as a pharmacist has complied with all the requirements of the two preceding sections, the board of pharmacy shall enroll his name upon the register of pharmacists and issue to him a license which shall entitle him to practice as pharmacist for a period of one year from the date of said license. The board of pharmacy may refuse to grant a license to any person guilty of felony, or gross immorality or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit to practice pharmacy; and the board of pharmacy may, after due notice and hearing, revoke a license for like cause or any license which has been procured by fraud, or the license of anyone who shall allow his license to be used where he is not personally,

actively and continuously engaged in the pharmaceutical business at a fixed and definite location. An appeal from the action of the board in refusing to grant or in revoking a license for such cause may be taken to the governor and attorney-general, the decision of which officers, either affirming or overruling the action of the board shall be final."

The question is whether the appeal to the Governor and Attorney General vacates the Board's action so that, pending a decision of the Governor and Attorney General, the men may secure a renewal license to practice pharmacy in Missouri for the year 1942.

It is to be noted that the Governor and Attorney General, in considering the actions of the Board of Pharmacy in revoking a license, may either affirm or overrule the action of the Board. The appeal is not tried de novo since there is no provision made by statute for rehearing the case a second time by the Governor and Attorney General. The record made by the Board is simply reexamined, and the Board's action affirmed or overruled.

An analogous situation is found in the case of *Silent Automatic Sales Corporation v. Stayton*, 45 Fed. (2d) 476, l. c. 477, 478, wherein the court considered the question of whether a judgment in a court below was vacated upon appeal. The court said:

"In a number of states a distinction is drawn between appeals from courts of record, where the case is affirmed or reversed upon a re-examination of the record made below, and those tried de novo in the appellate court, such as, in Missouri, an appeal from a justice of the peace to a circuit court of the state. The rule in this circuit has

thus been declared by Judge Thayer, speaking for this court in *Ransom v. City of Pierre*, 101 F. 665:

"When a case removed to an appellate court by a writ of error or an appeal is not there tried de novo, but the record made below is simply re-examined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below, or prevent it from being pleaded, and given in evidence, as an estoppel upon issues which were tried and determined, in the absence of a statute providing that it shall not be so used pending appeal. A supersedeas bond merely stays process for enforcement of the judgment, and does not vacate the judgment, or change its effect as an estoppel."

"This case is cited and discussed with approval by the Supreme Court of Missouri in *Rodney v. Gibbs*, 184 Mo. 1, 14, 82 S. W. 187. Reference is also made to *Freeman on Judgments* as stating the 'settled doctrine.' In that text-book we find the following language.

"In some cases the operation of an appeal has been made to depend upon the character of the jurisdiction of the appellate court. If the latter court has authority to try the cause de novo, and to settle the controversy by a judgment of its own, and to enforce such judgment by its own process, then it is plain that by the appeal the judgment of the inferior court is not merely suspended, it is vacated and set aside,

and can no longer have effect as an estoppel.' 2 Freeman on Judgments, par. 722, p. 1528.

"This statement of the rule is in accord with a long line of Missouri decisions: Turner v. Northcut & McCarty, 9 Mo. 252; Lee v. Kaiser, 80 Mo. 431; Ketchum et al. v. Thatcher, 12 Mo. App. 185; Williams v. Lewis, 47 Mo. App. 657; Earl v. Hart, 89 Mo. 263, 1 S. W. 238; Young v. Thrasher, 61 Mo. App. 413; George v. Waller (Mo. Sup.) 19 S. W. (2d) 284."

In referring to the nature of a trial "de novo," the court, in the case of Nichols v. Vinson, 32 Atl. (Del.) 325, said:

"The case then comes up to this court to be tried 'de novo,' that is, just as though no action whatever had been instituted in the court below."

And in the case of Ex Parte Morales, 53 S. W. (Tex. Cr.) 107, 108, the court said:

"The term 'de novo' means, 'a new; a second time.' 1 Rap. & L. Law Dict., 8 Am. & Eng. Enc. Law (2d Ed.) p. 832."

Section 2738, Revised Statutes of Missouri, 1939, provides that appeals from justice courts shall be tried de novo.

"Upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause, and

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shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the original summons or the service thereof, or on the trial, judgment or other proceedings of the justice or constable in relation to the cause."

There is nothing in Section 10007, supra, comparable to the above section, which would permit the Governor and Attorney General to "proceed to hear, try and determine the same anew." It is obvious that the Legislature, in restricting their decision "either affirming or overruling the action of the Board," intended merely a reexamination of the Board's record. In declaring the decision of the Governor and Attorney General to be "final," it was meant that no further appeal from their decision would be permitted.

From the foregoing, we are of the opinion that the appeals of Harry Ludmeyer, Joplin, Missouri, and Abraham I. Schnaer of Kansas City, Missouri, under Section 10007, Revised Statutes of Missouri, 1939, does not vacate the action of the Board of Pharmacy, and that their renewal licenses should be withheld pending a decision by the Governor and Attorney General.

Respectfully submitted,

MAX WASSERMAN  
Assistant Attorney General

APPROVED:

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VANE C. THURLO  
(Acting) Attorney General

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