

Opinion No. 23-3668

February 7, 1923

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Forrest Fielder, District Attorney, Deming, New Mexico.

The offense of Selling Medicine by one not a Pharmacist is to be Prosecuted under Sec. 4061 of the Code of 1915. Chap. 168 of the Laws of 1921 Merely Creates an Exception which is not an Offense under the Code.

OPINION

{*12} This inquiry is whether a merchant disobeying the provisions of Chapter 168 of the Laws of 1921 can be prosecuted under the {*13} provisions of Section 4061 of the Code of 1916. This section of the Code together with other sections provides for the registry of pharmacists in New Mexico and governs the sale of medicines. It provides a penalty for any person not a registered pharmacist who shall conduct a store or pharmacy or place for retailing, compounding or dispensing drugs, medicines or poisons or chemicals for medical use. Chapter 168 of the Laws of 1921 provides that merchants and storekeepers in towns, villages and camps where there is no registered pharmacist may sell patent or proprietary medicines, but that in the event a drug store with a registered pharmacist is established in the locality, such drug store shall be required to buy from such merchant his stock of patent and proprietary medicines and should the drug store fail so to do, the merchant may continue to sell out the stock he has on hand. However, there is no penalty recited in the chapter for the failure of a merchant to comply with this provision.

I find in the office an opinion by the former Attorney General written on May 5, 1921 to the Secretary of the Board of Pharmacy in which he says that the provisions of Chapter 168, Laws of 1921, may be enforced by the penalties of Section 4061 and that the penalties of such section apply to one who violates the provisions of Chapter 168. In this opinion he gave no reason for his conclusion and although there may be some doubt, I am inclined to agree with him.

Section 4061 makes it a misdemeanor to conduct a place or store for the sale of medicine, etc., without being a registered pharmacist. I take it that it will not be contended by any one that this means a place or store exclusively for the sale of medicine, but that it means a place or store where medicine is sold. If this were not the case, there would have been no reason for enacting Chapter 168. It seems to me that Chapter 168 is, as you state, a sort of a legislative interpretation of Section 4061 and merely creates an exception to the sweeping provisions of that section. The act of a merchant in selling medicine in a town where there is a registered pharmacist is unlawful under Chapter 168 and therefore is unlawful under Section 4061, and it occurs to me that the offense is committed really under Section 4061 and not under Chapter

168 at all. In other words, Chapter 168 in effect defines a defense to the offense defined in Section 4061 and obviously if a merchant is not acting within the exception set out in Chapter 168, he cannot derive any comfort from the provisions of that chapter. I believe that such an interpretation of these two legislative enactments harmonizes them and gives effect to both of them without violating any rule or strict interpretation of penal statutes.