

REAL ESTATE COMMISSION: Section 14 includes misdemeanors as well as felonies.

A judgment upon an insufficient information is not a conviction within the meaning of Section 14.

October 30, 1947



Mr. John W. Hobbs, Secretary  
Missouri Real Estate Commission  
Jefferson City, Missouri

Dear Mr. Hobbs:

This is in reply to your letter of October 15, 1947, in which you requested an opinion from this department, reading, in part, as follows:

"Pursuant to the visit of Commissioner O'Flaherty and myself with you yesterday afternoon and the conversation in regard to Section 14 of the Missouri Real Estate License Law. May the Commission request an opinion from you on the following complaint.

"This office received a letter of complaint and the Certified copy of the Circuit Court of Scott County, Missouri, copy of which is enclosed and self explanatory.

"You will notice that the plea of guilty is to a misdemeanor instead of a felony as originally filed in the above suit.  
\* \* \* "

We will answer your request in two parts: (1) Does Section 14 include the crimes listed even though they are only misdemeanors, and not felonies under the criminal statutes? (2) Does the enclosed copy of the record show conviction of a crime within Section 14?

Section 14, Laws of 1941, page 430, reads, in part, as follows:

"Where during the term of any license issued by the commission the licensee shall be convicted in a court of competent jurisdiction in the state of Missouri or any state (including federal courts) of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the commission, the commission shall revoke forthwith the license by it theretofore issued to the licensee so convicted."

That the Commission has no discretion in a proceeding under this section does not appear to be questioned. The plain wording of the section indicates that when a duly certified copy of a record in the criminal proceedings against a broker or salesman is filed with the Commission, it is mandatory that the Commission revoke the license theretofore issued. It was so considered in the case of Meyer v. Missouri Real Estate Commission, 183 S.W. (2d) 342, wherein the Court said, l.c. 343:

" \* \* \* Many specific grounds are prescribed in Section 10 of the statute on which the Commission may revoke such licenses. Proceedings under this section contemplate a hearing on the question of the guilt of the person proceeded against but, under the provisions of Section 14, it is made mandatory for the Commission to revoke such licenses 'where during the term \* \* \*'"

In Section 14, the Legislature did not qualify the crimes listed nor even limit them to the ones named, but included "or other like offense or offenses." There are no exceptions set out, and to say now that the Legislature intended to except conviction of misdemeanors would be doing violence to the act and its plain wording. In McPike v. Friedman Loan and Mercantile Company, 206 Mo. App. 187, the Court stated, l.c. 191:

" \* \* \* And no citation of authority is necessary for the proposition that a case

which falls within the purview of a statute cannot be excepted from its operation unless it comes clearly within an exception named therein, that is to say courts cannot sua sponte except cases from the operation of a law but must take the law and apply it as the Legislature made and intended it and this is the rule even when the exception would be an equitable one. \* \* \*

Throughout the act, it is plainly indicated that the Legislature desired to bring under rigid control those who deal in the buying and selling of real estate, as witness the wording of Sections 7 and 10 of the act. The purpose of these acts may be found in an expression of the Utah Supreme Court in a recent case, *Andersen v. Johnson*, 167 A.L.R. 768, which dealt with the Utah Real Estate Brokers' Act, I.C. 771:

"By its inherent nature, real estate business requires confidence in and honesty of those delegated with authority to list, rent, supervise or sell real estate belonging to others. Public criticism of real estate rackets and unscrupulous and unworthy brokers and agents has caused the respectable and reliable real estate brokers and salesmen, throughout the land, to promote and demand legislative supervision and regulation of those engaged in this business.  
\* \* \*

In a Missouri case, *State ex rel. Lentine v. State Board of Health*, 65 S.W. (2d) 943, concerned with the action of the State Board of Health in revoking the license of a physician, the Court said, I.C. 949:

" \* \* \* Given the construction for which relator contends since such conduct does not come within any of the acts enumerated in our statute a physician licensed in this state could follow such a reprehensible and immoral practice with impunity so far as his right to practice medicine is concerned and without being subjected to deprivation of his license. We have heretofore touched upon this contention and indicated

that we do not think the statute should be given such a narrow or restricted construction. \* \* \*

If misdemeanors were not included under this section, there are many offenses listed in Section 14 for which a broker or salesman could be convicted and still retain his license, because they are only misdemeanors, and not felonies under the criminal statutes, for example, the following, all from the Revised Statutes of Missouri, 1939:

- Section 4490 - Fraudulent conveyance;
- " 4491 - Executing second deed fraudulently;
- " 4598 - Destroying wills and other instruments;
- " 4599 - Accessories before the fact;
- " 4631 - Forcible entry and detainer;
- " 4632 - Conspiracy.

Brokers and salesmen are confronted with these offenses constantly in their work, and due to the nature of their work, even more so than the general public.

We think that to follow the rules of construction and give effect to the purpose and intent of the act, the language of the statute includes the crimes listed in Section 14, even though they are only misdemeanors in some instances, and when a duly certified copy of the record of conviction is before the Commission, it is mandatory that the license of the person offending be revoked. We fully realize that injustices may some times be worked by such a construction, but as was said by the Court in Robinson v. Union Electric Light & Power Co., 43 S.W. (2d) 912, 1.c. 914:

"We can imagine cases where this interpretation of the statute will doubtless work an injustice, and for all we know this may be such a case; \* \* \* At any rate, our duty is only to interpret the statute as written, and, if there are any inequalities in its practical application, those are matters which the Legislature in its wisdom will soon correct."

The second part of your inquiry is directed to a specific case now before the Commission. A copy of the court record in the case has been filed and is before the Commission for determination. It is the duty of the Commission to inquire into the

record to see if all the provisions of Section 14 have been complied with before the license is revoked. By this, we do not mean to intimate that the merits of the criminal proceeding may be inquired into, but that a record must be scrutinized to see if Section 14 is applicable. If one of the conditions for revocation are not met, the Commission may not revoke under Section 14. The pertinent parts of the record, for our purposes, are as follows:

"FIRST AMENDED  
"INFORMATION FOR A MISDEMEANOR  
"CIRCUIT COURT

\* \* \* \* \*

"\* \* \* the said defendant \_\_\_\_\_  
did then and there wilfully and unlawfully,  
conspire, combine and confederate with one  
\_\_\_\_\_ to commit an offense, to-wit:  
to unlawfully, wilfully and feloniously  
forge the signature of \_\_\_\_\_ to a  
written instrument purporting to convey an  
interest in real property, contrary to the  
form of the Statutes in such cases made and  
provided and against the peace and dignity  
of the State.

\* \* \* \* \*

"AND THEREAFTER, TO-WIT:

\* \* \* \* \*

"\* \* \* whereupon the Defendant waives arraign-  
ment and enters a plea of guilty to the charge  
of Conspiracy as charged in the First Amended  
Information heretofore filed in this cause,  
and this cause is now taken up and submitted  
to the Court so that judgment may be rendered  
against him according to law.

"And the Court being sufficiently advised of  
and concerning the premises, doth fix his  
punishment at a Fine of \$100.00.

"IT IS THEREFORE, SENTENCED, ORDERED AND AD-  
JUDGED BY THE COURT, That said Defendant,

\_\_\_\_\_ having entered a plea of guilty as aforesaid, be assessed a Fine of \$100.00, together with the costs herein."

You will note that the judgment of the Court is upon the "plea of guilty to the charge of Conspiracy as charged in the First Amended Information."

Section 4075, R.S. No. 1939, reads as follows:

"In trials for conspiracy, in those cases where an overt act is required by law to consummate the offense, no conviction shall be had, unless one or more overt acts be expressly alleged in the indictment and proved on the trial; but other overt acts, not alleged in the indictment, may be given in evidence on the part of the prosecution." (Underscoring ours.)

Section 4633, R.S. No. 1939, reads as follows:

"No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act besides such agreement be done to effect the object thereof, by one or more of the parties to such agreement." (Underscoring ours.)

The charge of conspiracy has been set out above, but we think that the charge was fatally defective in that it did not allege an overt act pursuant to the agreement as required by the sections above.

Has the defendant in that proceeding been convicted of any crime, and if so, of what crime has he been convicted? A determination of these questions is necessary in order to ascertain whether or not Section 14 applies to the instant case.

Webster's New International Dictionary defines the word "convict" as follows:

"To prove or find guilty of an offense or crime charged or of wrong; to pronounce or find guilty, as of a crime by legal decision, \* \* \*" (Underscoring ours.)

Black's Law Dictionary defines the word "convict" thusly:

"To find a man guilty of a criminal charge.  
\* \* \*" (Underscoring ours.)

Therefore, in order to say that a person has been convicted, it follows that he must have been charged with a crime. The information in the instant case does not charge a crime, for the reason that it does not allege facts sufficient to constitute a crime as required in Sections 4075 and 4633, above. In the case of Ex parte Sydnor, 10 S.W. (2d) 63, the Court said, l.c. 644:

"Now, is the information wholly a nullity because it does not charge that the offense was committed during the period of one year preceding the filing of the information? The rule which we adopt, and which we think is clearly correct and in accord with our decisions in this jurisdiction, is that although much of imperfection of an indictment or information may be disregarded after judgment, yet the information or indictment must always, whether time be of the essence of the offense or not, state in some manner that the crime is charged as having been committed within the period so as to avoid the operation of the bar of the statute. If the information, though omitting the day and month, yet showed the year or a period within a year, it would be sufficient, since it would show that the prosecution is not barred. \* \* \*

\* \* \* \* \*

"It is true there are cases in which language is used in a broad sense which might lend support to the view that this information is sufficient at this stage of the case. Yet the direct authorities and the general rule are clearly to the effect that the instant information is no charge upon which a conviction either by plea of guilty or upon trial may be permitted to stand. Petitioner discharged."

In 42 C. J. S., at page 835, the rule is stated:

"There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. \* \* \* The accusation must charge an offense; it must charge the particular offense for which accused is tried and convicted; and it must be made in the particular form and mode required by law. \* \* \*"  
(Underscoring ours.)

In State v. Biven, 151 S.W. (2d) 1114, the Court said, l.c. 1118:

" \* \* \* An indictment or information will not be held bad after verdict unless it fails in some essential averment necessary in description of the crime. \* \* \*"

In view of Sections 4075, 4633 and cases cited above, we think that the judgment of the Court was upon an information which did not allege an offense, and, therefore, the licensee in this case does not now stand convicted of a crime listed in Section 14. If a person has not been charged with a crime he cannot be said to stand convicted of a crime.

#### Conclusion.

It is the opinion of this department that:

(1) When a duly certified copy of the proceedings wherein a licensee has been convicted of one of the offenses enumerated in Section 14 is filed with the Commission, it is mandatory that the Commission revoke the license of the offending person, even though the offense is only a misdemeanor under the criminal statutes.

(2) The license of the broker should not be revoked on the record now before the Commission, for the reason that the record does not show that he has been convicted of a crime under Section 14 of the act.

Respectfully submitted,

APPROVED:

JOHN R. BATY  
Assistant Attorney General

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J. W. TAYLOR  
Attorney General