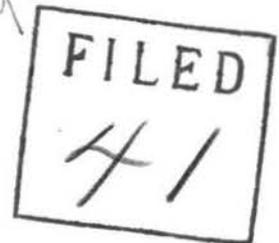


REAL ESTATE COMMISSION - Approved information  
and violation of the Act.

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October 21, 1942

Missouri Real Estate Commission  
Jefferson City, Missouri



Attention - Mr. J. W. Hobbs  
Executive Secretary

Dear Sir:

Your request to this office for an official opinion, in reference to the citing of persons before your board, by a subpoena, and the procedure of prosecution of persons acting as real estate brokers and dealers, without a license, has been received.

I

Your first question reads as follows:

"Does the Commission have the right to subpoena a Real Estate Broker to appear before the Commission and show cause why he should not be prosecuted for failure to apply to the Commission for a Real Estate License? The Commission in checking the names of persons known to be in the real estate business throughout the State discovered that many of them failed to apply for a license and although the Commission

wrote them stating that a State Real Estate License was necessary for any person to operate a general real estate business they have ignored such letters and failed to apply for a license."

The statute applicable to this question is Section 11, Laws of Missouri, 1941, page 429, and is very lengthy. It provides the whole procedure for the granting, denying, revoking and suspension of a real estate broker's, dealer's or agent's license. That part of Section 11, supra, in reference to the powers of the Real Estate Commission to subpoena and bring before it any person in this State, to take his or her testimony, only applies where an application has been made for a license and there is a possibility that it may be denied, or, where the Commission is holding a hearing on the suspension, or revocation, of a license that has been granted. The particular part of said Section 11, supra, pertaining to subpoenas, reads as follows:

" \* \* \* The commission shall have the power to subpoena and bring before it any person in this state or take the testimony of any such person by deposition with the same fees and mileage and in the same manner as prescribed by law in judicial procedure, before courts of this state in civil cases. \* \* \* \* \* "

This power is an incidental power granted the Commission upon a hearing, as set out in Section 11, and is not a power which would permit the Commission to

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promiscuously subpoena any person whom they suspect of acting as a real estate broker, dealer or salesman, who has not obtained a license, or has not made an application for a license, in order to determine whether or not they are acting in violation of the Missouri Real Estate Commission Act.

Such a procedure would compel a person to testify against himself, in case a criminal action is brought, for acting as a real estate broker without first obtaining a real estate license, as set out under the Missouri Real Estate Commission Act. It is prohibited by Section 23, Article II, of the Constitution of Missouri, which partially reads as follows:

"That no person shall be compelled to testify against himself in a criminal cause, \* \* \* \* \*"

The above partial section has been held to apply in any trial before any tribunal, or in any proceedings. (State ex rel v. Kearns, 264 S. W. 775.)

When a person applies for a license, or has received a license, he may be subpoenaed to testify, and it would not be a violation of Section 23, Article II of the Constitution of Missouri, for the reason that in accepting the license he has waived his constitutional immunity. In the case of an application for a license he may then refuse to testify to facts which would incriminate him, but would thereby empower the board to refuse the application.

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CONCLUSION

It is, therefore, the conclusion of this department that the Missouri Real Estate Commission has no authority to subpoena a real estate broker to appear before the Commission and show cause why he should not be prosecuted for failure to apply to the Commission for a real estate license.

II

Your second question reads as follows:

"What procedure is necessary and what information is required to prosecute a violator that operates without a State Real Estate License?"

"The Commission has received letters from various parts of the State that gives the names and in some cases newspaper advertisements of violators and the Commission is desirous of obtaining necessary instructions to prosecute some of these reported violators."

Section 1 of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 425, reads as follows:

"After January 1, 1942, it shall be unlawful for any person, co-partnership, association or corporation, foreign or domestic, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such without a license first procured from the Missouri Real Estate Commission."

This section consists of two specific law violations. The first violation is: "to act as a real estate broker or real estate salesman," without first having procured a license from the Missouri Real Estate Commission; the second violation is: "to advertise or assume to act" as a real estate broker, or real estate salesman, without first having procured a license from the Missouri Real Estate Commission.

The information must be drawn, if on one count only, on only one of the two violations, as above set out, but the information may be drawn under two counts, each consisting of one of the two violations above set out.

After the proof has been introduced, and before the cause is submitted to the court or jury, the State can elect on which count it desires to stand, but the election is not compulsory.

In the case of *State v. Stark*, 148 S. W. (2d) 82, par. 4, the court in holding that it is not compulsory to make such election, in a case where a person was being prosecuted for practicing medicine without a license, said:

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" \* \* \* Neither did the court err in not requiring the state to elect upon which count it would try the defendant. The defendant was properly charged in separate counts and Counts 1 and 2 were properly submitted to the jury. State v. Young, Mo. App., 215 S. W. 499; State v. Kellmann, 343 Mo. 762, 123 S. W. 2d 70."

Under Section 17, of the Missouri Real Estate Commission Act, any person violating the provisions of the Act is guilty of a misdemeanor. Under Section 3783 R. S. Missouri, 1939, no criminal action can be prosecuted after one year from the commission of the crime, and the institution of the prosecution dates from the time of the filing of the information. (State v. Criddle, 259 S. W. 429.)

In a criminal prosecution under the Missouri Real Estate Commission Act; the complaint and information may be either filed in a justice court, in the township where the violation has been committed, or in the circuit court of the county in which the violation has been committed. (Section 3891 R. S. Missouri, 1939.)

The proper procedure is to have a complaining witness file an affidavit with the prosecuting attorney, as set out in Section 3895 R. S. Missouri, 1939. The prosecuting attorney may file an information on his information and belief, if he so desires, without an affidavit, and may file the information either before a justice of the peace in the township where the crime was committed, or in the circuit court of the county in which the crime was committed. Section 3895, supra, provides the affidavit can be filed in the office of the clerk of the circuit court, or with the prosecuting attorney, with the names of all witnesses to be used in the prosecution of the case. It then becomes the duty of

the prosecuting attorney to file an information, as set out in Section 3894 R. S. Missouri, 1939. The information must be verified by the prosecuting attorney.

In the prosecution of a continuing misdemeanor, such as practicing medicine, dentistry, osteopathy and acting as real estate broker, dealer, or salesman, without first having obtained a license from the proper board, it is better to frame the information as to the continuing dates, and it is not necessary that a specific date of an act be set out in a misdemeanor information. The misdemeanor should show a continuing act from one date to another, but the dates mentioned in the information should be within the statute of limitations of one year before the filing of the information.

It was so held in the case of *The State v. Bennett*, 102 Mo. 356, 1. c. 368, where the court said:

"The offense as charged is but single, and only one punishment could be applied on the information as now framed. State v. Stubblefield, 32 Mo. 563. The pith of it is the prosecution of the business of private detective without license. Whether it was essential (in order to bring the case within the statute) to allege that defendant acted as a detective to the extent of making it a business need not be discussed since that allegation was in fact made. The state's evidence was directed chiefly toward showing that defendant engaged in that business.

"It went to show that defendant, within the period mentioned, kept a business office the sign at which was 'C. D. Bennett,

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Detective Agency;' that he advertised 'all kinds of detective business promptly attended to' with his name and location of office, in one of the city papers, and one witness (an attorney) also testified that he employed and paid defendant to render him services in searching for information to utilize in connection with a case he had in hand. These facts fairly tended to support the charge preferred.

"An allegation that one conducts or prosecutes a certain general avocation or business falls within the rule that where a misdemeanor (merely statutory) is made up of a series of transactions or acts, indicating a general design, which cannot be enumerated on the record without unnecessary prolixity and danger of variance, they ought not to be required to be stated where the charge as formulated is fairly informative of the case to be met. United States v. Gooding (1827), 12 Wheat. 460. The allegation that a particular business was carried on without a license belongs to this class. Sterne v. State (1852), 20 Ala. 43; State v. Myers, supra; State v. Little, supra; State v. Sprinkle (1846), 7 Humph. 36; Commonwealth v. Pray (1832), 13 Pick. 362. Considering the whole record, we, therefore hold the information was sufficiently definite and certain to support the proceedings."

Also, in the case of State v. Randolph, 139 Mo. App. 311, 1. c. 313, where the court said:

"It is next contended that the information having been filed August 15, 1907, charging the sale of liquor to have occurred on the \_\_\_ day of June, 1906, that the information shows on its face that the offense was barred by the Statute of Limitations and will not support a conviction.

"The offense charged is a misdemeanor, and time is not of the essence of the offense; hence, its commission could be shown on any day within a year before the filing of the information, and the allegation as to date in the information is wholly immaterial under our statute. (Revised Statutes of 1899, section 2535.) All that is required in cases in which time is not of the essence of the offense is that the proof of the commission of the offense shall be within the period of the Statute of Limitations, which, in this case, would be one year.

"By an examination of the transcript in this case we learn that the evidence shows the sale to have occurred in September, 1906. This information having been filed on August 15, 1907, the proof shows the sale to be within one year prior to the filing of the information, and is sufficient."

We are herein setting out an approved form of affidavit to be made by a complaining witness, either before the circuit clerk of the county, or the prosecuting attorney of the county:

"IN THE

\_\_\_\_\_  
(Name the Court)

"STATE OF MISSOURI,

Plaintiff,

vs

"(Name Defendant),

Defendant.

"COMPLAINT

"Comes now \_\_\_\_\_ and  
(Name of Affiant)

being first duly sworn on his oath  
states:

"That \_\_\_\_\_,  
(Name of Defendant)

in the County of \_\_\_\_\_,  
(Name of County)

and State of Missouri, on the \_\_\_\_ day  
of \_\_\_\_\_, 1942, and on divers  
other days and times prior thereto,  
between said date and the \_\_\_\_ day of  
\_\_\_\_\_ (within one year before the  
filing of the complaint) did then and

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there wilfully, wrongfully and unlawfully act as a ( real estate broker) or (real estate salesman) or (to advertise as a real estate broker) or (real estate salesman) or (to assume to act as a real estate broker or real estate salesman) without then and there having a license from the Missouri Real Estate Commission of the State of Missouri.

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"Subscribed and sworn to before me  
this \_\_\_ day of \_\_\_\_\_, 19\_\_.

(Officer taking oath.)"

The above is simply a copy of an affidavit to be filed by the person designated as the complaining witness. This complaint should also have all of the necessary witnesses then known, who are to testify in the case.

Upon the filing of the above complaint before the prosecuting attorney, it becomes the duty of the prosecuting attorney to file an information. We are herein setting out an approved form of the information to be filed by the prosecuting attorney, either directly in the circuit court, or before some justice of the peace, in the township where the Missouri Real Estate Commission Act has been violated:

"IN THE

"

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(Name of the Court)

"STATE OF MISSOURI,

Plaintiff

vs.

"  
\_\_\_\_\_  
(Name of Defendant)

Defendant.

"INFORMATION

"Now comes \_\_\_\_\_, Prosecuting  
Attorney, for the State of Missouri, in  
and for the body of the County of \_\_\_\_\_,  
and upon his oath informs the court that  
\_\_\_\_\_, whose

(Name of Defendant)  
christian name in full is unknown to said  
Prosecuting Attorney, late of the county  
aforesaid, on the \_\_\_\_ day of \_\_\_\_\_,  
1942, at the County of \_\_\_\_\_, State  
of Missouri, and on divers other days and  
times prior thereto between said date and  
the \_\_\_\_ day of \_\_\_\_\_, 1941, did then  
and there wilfully, wrongfully and unlawfully  
act as a real estate broker without then and  
there having a license from the Missouri Real  
Estate Commission of the State of Missouri;  
against the peace and dignity of the State.

"

\_\_\_\_\_  
Prosecuting Attorney

"STATE OF MISSOURI, )

SS

COUNTY OF \_\_\_\_\_ )

" \_\_\_\_\_, Prosecuting  
Attorney, in and for \_\_\_\_\_  
County, Missouri, makes oath and  
says that the facts set forth in  
the foregoing information are true,  
according to his best information  
and belief.

\_\_\_\_\_  
"Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

\_\_\_\_\_  
(Officer taking ac-  
knowledgment.)"

This information has been approved in State v. Bennett,  
102 Mo. 356, and State v. Stark, 148 S. W. (2d) 82.

The above information may be drawn under two  
counts, that is, acting as a real estate broker under  
one count, and assuming to act as a real estate broker  
under the second count. We consider it advisable  
though that only one count should be contained in the  
information, that is, "acting as a real estate broker  
without a proper license."

In filing the complaint or information the  
Missouri Real Estate Commission should take into con-  
sideration a part of Section 3, of the Missouri Real  
Estate Commission Act, which, in a way, takes the teeth  
out of the Act. That part which we refer to in Section  
3, reads as follows:

" \* \* \* nor shall this act apply to any person who does not advertise or hold himself out to the public as a licensed real estate broker or dealer and who might, occasionally, buy or offer to buy, or sell or offer to sell, or rent or lease or offer to rent or lease any real estate, or to loan or offer to loan money secured by real estate."

Under the above exception to the Missouri Real Estate Commission Act, it almost becomes necessary that unless a person fraudulently represents himself to be the holder of a Missouri Real Estate license, any person may act as a real estate broker, or salesman occasionally. It would be a question of fact in the trial of the case as to what might be considered "occasionally" performing the duties, as set out in the above partial section. So, in view of that fact, in order to obtain a conviction that would be affirmed, it would be almost necessary that the information set out that the person charged has been acting as a real estate broker for several months, and there should be evidence to substantiate the charge.

It is not necessary to negative the exceptions set out in Section 3, of the Act, when a prosecution has begun under Section 1 of the Act. It was so held in State v. Smith, 233 Mo. 242, l. c. 254, where the court said:

"This court has held it to be the sound rule in this State that where the exception is contained in a subsequent section to the one which defines the offense, such exception

need not be negatived in the information. (State v. Bockstruck, 136 Mo. l. c. 352.)"

The following evidence is suggested in the prosecution of brokers or others who come within the powers of the Missouri Real Estate Commission Act:

First - The best witness would be a witness who has dealt personally with the defendant, and can testify that he either stated that he had a Missouri Real Estate Commission license, or that he had been selling, buying or dealing otherwise, in property, or loaning or offering to loan money secured by real estate for some time continuously, or, any contracts, applications for loans, etc., used in the transaction between the defendant and the complaining witness would be admissible;

second - in case the defendant had advertised certain properties for sale which were not owned by the defendant, and for the sale of which he was to receive a commission, the newspaper advertisements, including many of those inserted prior to the date alleged in the information can be used in evidence, provided that it can be shown, either by the representatives of the newspaper or by other witnesses that the defendant inserted the advertisement or made admissions that he had inserted the advertisement;

third - other proper evidence which could be admitted would be stationery of the defendant showing that he is a real estate dealer, or dealt in the loaning of money which is secured by real estate;

fourth - in case the defendant has an office, and has a window display or signs that designate the defendant as a real estate broker, or other person who is covered by the Missouri Real Estate Commission Act, photographs of the advertisements on the windows would be proper evidence in court to show that he assumed to be a real estate broker, or other person covered by the Act;

fifth - in a prosecution under an information for a misdemeanor, such as the information herein set out time is not an essence of the crime, except that it must be evidence of a fact that the crime was committed within one year before the filing of the misdemeanor. Under such a procedure other transactions are admissible to show that he was dealing in real estate or performing other duties under the Missouri Real Estate Commission Act, with different persons at different times, for the reason that the gist of the prosecution is acting as broker, and other duties in violation of the Missouri Real Estate Commission Act;

sixth - the best evidence would be letters or communications between the defendant and customers, or prospective customers, in which letters, or communications, he offered to sell property which he did not own, or offered to buy property;

seventh - in some cities and townships real estate brokers and other persons coming within the Act, are compelled to obtain

occupation license for their office. A certified copy of the application for the real estate license in the city, township, or other municipality would be proper evidence in the trial set out under the above information that he was acting as a broker or other person coming within the Missouri Real Estate Commission Act, without a proper license;

eight - some real estate boards of different cities require that an application be made and his qualifications passed upon before a person can become a member of the real estate board. The said real estate boards are composed of only members who are acting as real estate brokers, or performing other duties coming under the Missouri Real Estate Commission Act. In such case the written application would be an admission that the defendant is acting as a broker or performing other duties coming within the Act, and would be admissible to show that if he had no license he has violated the Act. This is especially so in associations known as "realtors";

nine - other evidence admissible would be in case of a client who has paid the defendant a commission for the sale or purchase of real estate, and has given a check payable to the defendant for said commission, the check may be used as evidence in the trial of the cause.

Under the above procedure and evidence suggested, it is necessary that the evidence must show that the defendant has falsely advertised or held himself out to the public as a real estate broker or dealer, and that he

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is not occasionally buying or offering to buy, selling  
or offering to sell, renting or leasing, or offering  
to rent or lease, any real estate, or loaning or offering  
to loan money secured by real estate.

Respectfully submitted

W. J. BURKE  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General of Missouri

WJB:RW