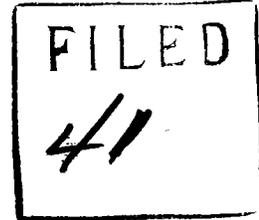


MISSOURI REAL ESTATE  
COMMISSION:

Effect of entry of plea of nolo contendere,  
followed by probation, upon right of a per-  
son to obtain or retain a real estate  
broker's or salesman's license.

June 17, 1946

Missouri Real Estate Commission  
222 Monroe Street  
Jefferson City, Missouri



Attention: Mr. J. W. Hobbs, Secretary

Gentlemen:

Reference is made to your letter of recent date, re-  
questing an opinion of this office, and reading as follows:

"May this Commission request an opinion from  
your office in regard to an applicant for a  
real estate license who has been indicted in  
the Federal and Civil Court on a plea of  
guilty or Nolo Contendere that is not sen-  
tenced, but is put on probation which he  
serves and is released. Would it be manda-  
tory under Section 14 of the Real Estate Li-  
cense Law to deny such a person a license?"

Section 14 of the Missouri Real Estate Commission Act,  
found in Laws of 1941, pages 424 to 431, inclusive, reads as  
follows:

"Where during the term of any license issued  
by the commission the licensee shall be con-  
victed in a court of competent jurisdiction  
in the state of Missouri or any state (in-  
cluding federal courts) of forgery, embezzle-  
ment, 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 forth-  
with the license by it theretofore issued to

the licensee so convicted. No license shall be issued by the commission to any person known by it to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses, or association or copartnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly." (Emphasis ours.)

From the above, it is apparent that the answer to your inquiry resolves itself into a determination of whether or not, by entering a plea of nolo contendere, following which the accused is placed on probation by the court, such accused has thereby been "convicted" of the crime with which he stood charged, within the meaning of the term as used in the Missouri Real Estate Commission Act.

We are of the opinion that such proceedings do not amount to a conviction of the accused such as to require the mandatory denial of such person's application for a real estate broker's or salesman's license. We direct your attention to Meyer v. Missouri Real Estate Commission, 183 S.W. (2d) 342, wherein the Kansas City Court of Appeals made the following comment with respect to what does constitute a "conviction" under the precise section of the Missouri Real Estate Commission Act referred to in your letter:

"Under the weight of authority it is held: 'That where the context of the statutes refers to the successive steps in a criminal case, or any particular stage of such a prosecution, as distinguished from the others, these words apply simply and solely to the verdict of guilty; but where the reference is to the ascertainment of guilt in another proceeding, in its bearing upon the status or rights of the individual in a subsequent case, then a broader meaning attaches to the expressions, and a "conviction" is not established or a person deemed to have been "convicted" unless it is shown that a judgment has been pronounced upon the verdict.' People v. Fabian, 192 N.Y. 443, 85 N.E. 672, 675, 18 L.R.A., N.S., 684, 127 Am. St. Rep. 917, 15 Ann. Cas. 100. See, also, Smith

v. Commonwealth, 134 Va. 589, 113 S.E. 707, 24 A.L.R. 1286. \* \* \*

"And the authorities are very numerous and practically unanimous in their holding to the effect that, under statutes disqualifying persons from testifying as witnesses who have been convicted of crimes mentioned in the statute, the disqualification does not arise upon the mere conviction of the crime by the verdict of the jury, but only where there has been a judgment of conviction, without which, as is uniformly held, there has been no conviction within the meaning of such statutes. 1 Bish. New Cr. Law (8th Ed.) sec. 975; 7 Am. & Eng. Ency. L. (New Ed.) pp. 498-502, and note 1 on page 502; People v. Whipple, 9 Cow. (N.Y.) 707; Fitch v. Smallbrook, T. Raym. 32; Rex v. Castell, 8 East. 77; State v. Damery, 48 Me. 327; (Jackson ex dem.) Gibbs v. Osborn, 2 Wend. (N.Y.) 555, 20 Am. Dec. 649; Dawley v. State, 4 Ind. 128; Commonwealth v. Gorham, 99 Mass. 420; Marion v. State, 16 Neb. 349, 20 N.W. 289; Bishop v. State, 41 Fla. 522, 26 So. 703; 16 C.J. 1341 (3) (24 C.J.S., Criminal Law, sec.1960, subd. f).

"In Bish. New Cr. Law (8th Ed.) sec. 975, just cited, this is said:

"Judgment necessary.--A mere plea or verdict of guilt works no infamy, for until judgment it has not reached the conclusion of guilt. So that this disqualification (to be a witness), like common-law forfeiture, does not come from the mere crime, or the mere conviction of it, or the punishment, but from the final judgment of the court. Until judgment, the accused or indicted person is competent to testify"--citing numerous cases in England as well as in the United States.

"There is the same practically unanimous holding of the authorities where the statute disqualifies from voting persons convicted of crimes mentioned in the statute. Gallagher v.

State, 10 Tex. App. 469; Egan v. Jones, 21 Nev. 433, 32 P. 929; People v. Fabian, 192 N. Y. 443, 85 N.E. 672, 18 L.R.A., N.S., 684, 127 Am. St. Rep. 917, 15 Ann. Cas. 100.

"By the great weight of authority there is the same holding as to the necessity of a judgment of conviction to bring the case within the meaning of "convicted" or "conviction" in statutes imposing any punitive consequences as the result of the conviction of the offense mentioned in such statutes.

\* \* \* \* \*

"Where the context in which the word is found concerns, not merely the particular case, but the effect of the conviction of the accused in one case, when pleaded or given in evidence in another, the word "conviction," or "convicted," is more comprehensive and includes the judgment of the court upon the verdict or confession of guilt.'

"See, also, Faunce v. People, 51 Ill. 311; State v. La Rose, 71 N.H. 435, 52 A. 943; Commonwealth v. Lockwood, 109 Mass. 323, 329, 12 Am. Rep. 699; I Bishop on Criminal Law, sec. 975 (8th Ed.)

\* \* \* \* \*

"We have been cited to no authority holding that the suspension of the imposition of the sentence, or the suspension of the sentence, itself, upon a plea or a verdict of guilty, and the placing of the defendant upon probation is a final judgment within the meaning of the statutes giving effect to such proceedings in another proceeding.

"It is held that where there has been a suspended sentence there is no final judgment. People v. Page, supra, 125 Misc. 538, 211 N.Y.S. 401, loc. cit. 403; 24 C.J.S., Criminal Law, secs. 1571, 1618, pp. 47, 187. If this is so it would seem that, certainly, where there has been no sentence at all but merely a suspension of the imposition of sentence,

as in this case, there has been no such judgment.

"We are of the opinion that the word 'conviction', as used in the Missouri Real Estate Commission Act, should be taken in its most comprehensive sense, that is, to include the judgment of the court upon a verdict or confession of guilt.

"We have heretofore approached this subject from a more or less technical viewpoint but there are practical considerations as to why the word 'conviction' in the statute before us should be taken in its broader sense. In this connection we wish to review to some extent the Federal Probationary Act to ascertain what effect is to be given to the order suspending the imposition of sentence and placing the defendant on probation as related to the question as to whether any final judgment has been rendered when such a course of action has been taken by the court.

"Section 724, Title 18 U.S.C.A. provides that 'When it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby (the court) shall have power \* \* \* to suspend the imposition or execution of sentence and to place the defendant upon probation.'

"The statutes providing for suspension of sentence and probation are said to be remedial and hence are to be liberally construed.' 24 C.J.S., Criminal Law, sec. 1571, p. 55.

"In Riggs v. United States, 4 Cir., 14 F. 2d 5, 9, the court said the federal act is to be viewed as 'having regard to its general purposes, and the wise and humane things that should be done in its due administration, looking to the amelioration of the condition of the unfortunate in whose behalf it was enacted. The purpose of the act was to give to the federal District Courts a free hand in humanely dealing with criminal classes which come before

them, and much discretion, of course, should be allowed, having regard to the offenses charged,' etc.

"In Zerbat v. Kidwell, 304 U. S. 359, 58 S. Ct. 872, 874, 82 L. Ed. 1399, 116 A.L.R. 808, the court said: 'Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency-- under guidance and control of the Board.'

"The evidence shows that the business of plaintiff herein is that of a real estate broker, and it would appear that to deprive him of his occupation might well shut the door of opportunity against him and impede, if not prevent, his restoration to society as a good social risk. In cases where the defendant is put upon probation the federal court, no doubt, finds that there are circumstances surrounding the life of the defendant to lead it to believe that he will be a good risk for reformation. If this is true it appears to us that his future should not be clouded by depriving him of his occupation. Consequently, having in mind the beneficent purposes of the Federal Act we are of the opinion that it was not intended by Congress that a suspension of imposition of sentence and placing of defendant on probation should be construed to be a final judgment of conviction in the case such as to work injury to him in another proceeding. It might be further observed that while the probationary period is running in these cases it may appear to the federal court that the best interests of the public and the defendant would be served by modifying the conditions of the probation, as for instance, changing the period, *Scalia v. United States*, 1. Cir., 62 F. 2d 220, or defendant may be discharged altogether from supervision and the proceedings terminated against him as provided by sections 724, 725 of the Federal Statute, or, the court may see fit, in order to remove the stain, as far as possible, of the record made in the case against plaintiff, to dismiss the proceedings against him entirely.

\* \* \* \* \*

"As long as it is within the province of the federal court to dismiss the criminal proceedings against the plaintiff herein, it can hardly be said that there has been a final judgment of conviction.

\* \* \* \* \*

" \* \* \* The rule is well stated in *People v. Fabian*, supra, as follows: 'Where sentence is suspended, and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so, also, the indirect consequences are likewise postponed.'"  
(Emphasis ours.)

CONCLUSION

In the premises, we are of the opinion that the entry of a plea of nolo contendere to a charge of one of the offenses specified in Section 14 of the Missouri Real Estate Commission Act, which is followed by the defendant being placed upon probation, does not constitute a conviction of such person.

We are further of the opinion that, under such circumstances, it is not the mandatory duty of the Missouri Real Estate Commission to deny the application of such person for a real estate broker's or salesman's license.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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