MISSOURI SECTION

COMMENTS

BROKERS—REVOCATION OF REAL-ESTATE BROKER'S LICENSE FOR DISHONEST DEALINGS IN TRANSACTION NOT INVOLVING REAL ESTATE

Robinson v. Missouri Real Estate Comm'n, 280 S.W.2d 138 (Mo. App. 1955)

Appellant, a licensed real-estate broker, agreed to sell promissory notes belonging to McCown, whom he had met in the course of real-estate dealings. Appellant sold the notes for nearly $2,600, receiving a certified check payable jointly to himself and McCown. After having an employee endorse McCown's name to it, appellant cashed the check and subsequently represented to McCown that he had sold the notes for only $1,850. Discovering the fraud, McCown filed a complaint with the Missouri Real Estate Commission. A hearing was called at the conclusion of which appellant's license was revoked pursuant to statutory provision for revocation of licenses when a broker commits any of several enumerated acts relating to real-estate transactions, or "any other conduct which constitutes . . . dishonest dealings . . . ."[1] The Kansas City Court of Appeals reversed the Commission's decision, holding that "any other conduct" referred only to real-estate dealings, and not to transactions for which a real-estate broker's license is not required.[2]

The great majority of states have enacted statutes providing for licensure and delicensure of real-estate brokers. Most of these statutes provide for revocation in the event that a broker is guilty of certain enumerated acts when committed in the course of his real-estate dealings.[3] A minority of the jurisdictions, however, have statutes similar

1. MO. REV. STAT. § 339.100(7) (1949). The defendant clearly was not engaged in real-estate business in regard to this transaction. See MO. REV. STAT. § 339.010 (1949).

2. Robinson v. Missouri Real Estate Comm'n, 280 S.W.2d 138 (Mo. App. 1955).

3. These statutes are of two types. Most of the statutes provide that the license may be revoked when the licensee is guilty of certain conduct proscribed in the statute when performing "any of the acts mentioned herein." See, *e.g.*, D. C. CODE ANN. § 45-1408 (1951); IOWA CODE ANN. c. 117, § 117.34 (1949). The clause, "acts mentioned herein," has been construed to include only those activities which the statute was designed to cover, namely, the acts of a real-estate broker while engaged in real-estate business. See, *e.g.*, Eberman v. Massachusetts Bonding and Ins. Co., 41 A.2d 844 (D.C. Munic. Ct. App. 1945); Blakeley v. Miller, 232 Iowa 980, 7 N.W.2d 11 (1942).

The second group leaves no room for doubt; it expressly limits the grounds for revocation to transactions occurring within the scope of the statutory duties of a real-estate broker. See, *e.g.*, ARIZ. CODE ANN. § 67-1723 (Supp. 1951); CAL. BUSINESS AND PROFESSIONS CODE ANN. § 10176 (Supp. 1955).

A few of these statutes provide for revocation if the licensee is convicted of a felony even though not in the course of real-estate dealings. See, *e.g.*, ILL. REV. STAT. c. 114½, § 8(2) (1955); NEV. COMP. LAWS § 6396.20 (Supp. 1949).

to that of Missouri, which includes not only an enumeration of acts which specifically refer to real-estate transactions but also contains a general provision proscribing "any other conduct" constituting dishonest dealings by the licensee.[4] Clearly, when a real-estate broker has committed some dishonest or fraudulent act which is not directly involved in his real-estate dealings, his license will not be revoked under the majority-type statute.[5] Whether such unconnected act comes within the "any other conduct" clause of the minority-type statute is the issue presented by the principal case.

In reaching the instant decision the court relied heavily upon the cases of *Blakeley v. Miller*[6] and *Schomig v. Keiser*,[7] both of which held that a broker's license cannot be revoked for misconduct while he is acting outside the scope of his duties as a real-estate broker. Both of these decisions, however, were based upon the majority-type statute and thus were clearly of no value in interpreting the Missouri statute.[8]

The court also relied upon the doctrine of *ejusdem generis* under which a general provision in a statute following specific provisions is constructed narrowly so as to include only things of the same general kind or class specifically mentioned in the preceding provisions.[9] Since ten provisions of the Missouri statute covering revocation of real-estate brokers' licenses related specifically to matters in the conduct of real-estate business, application of the *ejusdem generis* rule would operate to limit the general clause to include only "any other conduct" while acting in the sphere of real-estate business. The court, however, could have applied the rule of *expressio unius est exclusio alterius*. Under this rule an affirmative or negative enumeration in a statute gives rise to an inference that all omissions were intended by the legislature.[10] The maxim is especially effective where that which is provided for in one part of a statute is omitted from another.[11] Application of this rule to the Missouri statute would have meant that since ten provisions specifically limit revocation of brokers' licenses to acts committed in relation to real-estate transactions, the court would not

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4. See, *e.g.*, KY. REV. STAT. ANN. § 324.160(k) (Baldwin 1955); WIS. STAT. 136.08(k) (1953).

5. See notes 6 & 7 *infra*.

6. 232 Iowa 980, 7 N.W.2d 11 (1942).

7. 189 Cal. 596, 209 Pac. 550 (1922).

8. The *Blakeley* case was based upon a statute limiting the grounds for revocation to "acts mentioned herein," and the *Schomig* case was based upon a statute which limited revocation to misconduct in carrying out activities within the definition of a real-estate broker. See note 3 *supra*.

9. 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4909 (3d ed. Horack 1943), and see the many cases stating and applying the rule at n.3. See also Note, *The Doctrine of Ejusdem Generis in Missouri*, 1952 WASH. U.L.Q. 250.

10. 2 SUTHERLAND, *op. cit. supra* note 9, § 4915.

11. 2 *id.* § 4915 n.7. See United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820); Gruben v. Leebrick & Fisher, Inc., 32 Cal. App. 2d 762, 84 P.2d 1078 (1938); New Haven v. Whitney, 36 Conn. 373 (1870); Home Bldg. & Loan Ass'n v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1937).

have read into the general clause the limitation that "any other conduct" must occur while the broker is engaged in a real-estate transaction. Under this interpretation no reason is perceived why appellant's misconduct would not have been within the purview of the statute.

While no reason is given in the court's opinion as to why the *ejusdem generis* rule was applied,[12] it seems likely that the court relied sub silentio upon another familiar rule of statutory construction: Penal statutes are to be construed most favorably to the accused.[13] Delicensure statutes are considered penal in nature,[14] and it is the operation of this rule which underlies the marked hesitancy of courts to revoke licenses.[15]

It should be remembered, however, that the cardinal rule of construction is to effectuate the legislative intent,[16] and that all other rules merely aid in the discovery of this intent. In determining the intent of the legislature, it is not sufficient to argue that the clause "any other conduct" is clear and unambiguous and in no way suggests the limitation imposed by the court in the principal case, for the very

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12. There are two opposing canons on almost every point of statutory construction. In order, however, to persuade the court to adopt one or the other it must be by means other than the use of the canon. In other words, a court will not apply a rule solely for the sake of applying a rule. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

13. 2 SUTHERLAND, *op. cit. supra* note 9, § 3305 (The cases are "legion" which support this principle.); Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935). See also HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 36 (1947); Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 VAND. L. REV. 531, 532 (1950).

There has been some dissatisfaction, however, with the rule requiring strict interpretation of penal statutes and as a result many states have abrogated or modified the rule by statute. These legislative attempts to change the old rule, however, have met with little success in the courts—only about half of these states apply the modifying statutes with any consistency and the others ignore them completely. 3 SUTHERLAND, *op. cit. supra* note 9, § 5607 nn.8 & 9; Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 752-56 (1935). Some courts, however, have abrogated the rule where the statute relates to particular subjects such as public health. Quarles, *supra* at 538.

While the Missouri legislature has annulled the rule of strict construction of statutes in derogation of the common law, MO. REV. STAT. § 1.010 (1949), no attempt has been made to modify the rule of strict interpretation of penal statutes. For cases supporting the latter rule, see Lynch v. Missouri K.T.R.R., 333 Mo. 89, 61 S.W.2d 918 (1933); Albers v. Merchants' Exchange, 140 Mo. App. 446, 120 S.W. 139 (1909).

14. See Schomig v. Keiser, 189 Cal. 596, 209 Pac. 550 (1922); Blakeley v. Miller, 232 Iowa 980, 7 N.W.2d 11 (1942) (stating that statutes authorizing revocation of licenses are highly penal in nature). For a discussion of penal statutes, see 2 SUTHERLAND, *op. cit. supra* note 9, § 3303-04.

15. Once a license has been issued, a court naturally will be slow in ordering its revocation, since the licensee is usually one who has invested much time, effort and money in the establishment of his business or profession. In the principal case, for example, the appellant had been licensed for seven years and employed approximately twelve salesmen.

16. Home Bldg. & Loan Ass'n v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1937).

use of the words "any other" introduces an element of uncertainty.[17] It is submitted, however, that the holding of the principal case fails to carry out the basic purpose of the statute. The regulation of real-estate brokers is for the purpose of protecting the public.[18] Insofar as the public is concerned, the primary safeguard against unscrupulous real-estate brokers is that brokers be honest and trustworthy individuals. Therefore, when the conduct of a broker evinces a basic trait of dishonesty or untrustworthiness, as in the principal case, the safety of the public requires that his license be revoked.[19] Thus, the license would no longer serve as a means by which he could make new contacts among members of the community whom he might later exploit, be it through a real-estate or non-real-estate transaction. Moreover, this interpretation of legislative intention is buttressed by the fact that in order to obtain a real-estate broker's license, the applicant must "bear . . . a good reputation for honesty, integrity, [and] fair dealing . . . ."[20] It is difficult to accept the argument that while a general character of honesty is required for procuring a license, such a license, once issued, cannot be revoked for a showing of dishonesty unless such a showing occurs in a real-estate transaction.

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17. The argument that words in a statute are clear and unambiguous has a basic fallacy, *i.e.*, words have meaning in and of themselves and are always uncertain when used in statutes. 2 SUTHERLAND, *op. cit. supra* note 9, § 4502.

18. See, *e.g.*, Marks v. Watson, 112 Cal. App. 2d 196, 200, 245 P.2d 1121, 1124 (1952); Shelton v. McCarroll, 308 Ky. 288, 214 S.W.2d 396 (1948) (The court held that the purpose of such a statute is to protect the public rather than to raise revenue. Rejecting the argument that there was nothing in the business of a real-estate broker which necessitated regulation in order to protect the health, morals, or general welfare of the public, the court held that the statute was a constitutional exercise of the police power of the state.). For cases holding that the purpose of licensure in other occupations is to protect the public, see Cornell v. Reilly, 127 Cal. App. 2d 178, 273 P.2d 572 (1954) (liquor dealers); Murrill v. State Board of Accountancy, 97 Cal. App. 2d 709, 218 P.2d 569 (1950) (accountants); West Coast Home Improvement Co. v. Contractors' State License Board, 72 Cal. App. 2d 287, 164 P.2d 811 (1945) (contractors).

19. See Lauren W. Gibbs, Inc., v. Monson, 102 Utah 234, 129 P.2d 887 (1942). From an order cancelling the license of a securities dealer on the ground that he had demonstrated his untrustworthiness to transact the business of a dealer, the appellant contended that the statute was unconstitutional on the ground that the standard of trustworthiness was too indefinite and its application would depend upon the whim of the commission. In rejecting this argument the court held that the statute did not grant the commission authority to set any standard but rather the commission had to decide whether defendant was untrustworthy to conduct the business for which he was licensed. That untrustworthiness was to be judged by the purpose of the statute, namely, to protect the public against fraudulent schemes in securities. For example, said the court, if one so conducted himself, in the sale of real estate or in his business relations generally, that he lived by fraud and deception, such a showing would evince his unworthiness to sell securities.

See also Goodley v. New Jersey Real Estate Comm'n, 29 N.J. Super. 178, 102 A.2d 65 (1954) (revocation of license for a showing of untrustworthiness on the part of the licensee while not acting solely as a real-estate broker).

20. MO. REV. STAT. § 339.040 (1949).