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### Case Note, *Missouri ex rel. Hurwitz v. North*

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## COMMENT ON RECENT CASES

ADMINISTRATIVE LAW—DUE PROCESS IN THE REVOCATION OF LICENSES.—[United States] The law of Missouri, like that of other states, authorizes the revocation of licenses to practice medicine by the state board of health, for cause and upon notice and hearing. The constitutionality of the statute was questioned as denying due process in that there was no power to subpoena witnesses on behalf of the person charged. The Supreme Court of the United States holds it to be sufficient that the statute provided that testimony may be taken by deposition, to be used in evidence on the trial of such charges before the board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases. It appears that through such depositions witnesses may be compelled to testify who do not voluntarily appear.<sup>1</sup>

The decision belongs to that class of cases in which a statute is attacked for a supposed defect which the court finds does not exist. It is in this respect like *Bratton v. Chandler*<sup>2</sup> in which the court held to be without merit the contention that a statute denied due process in authorizing the refusal of a license for personal unreliability without hearing, the right to a hearing being implied from a power to require and procure all satisfactory proof.

A decision sustaining a statute by reason of the non-existence of alleged defects does not, of course, require as careful examination of the merits of the contention as though the defect were found to exist, and the court compelled to consider its effect upon the statute. Such cases are therefore of qualified authority.

It is true that notice and hearing is generally required for the revocation (though not for the refusal) of a license, but these notice and hearing provisions are not always accompanied by the power to subpoena witnesses or otherwise to compel testimony, and if there is a power to subpoena witnesses, it will be found that in many, if not in most, cases it lacks the further provision for a power to apply to a court to make the subpoena effective in case of disobedience. While it appears that in Missouri a notary public may issue contempt process where he is authorized to take depositions,<sup>3</sup> the predominant opinion in this country is that administrative bodies cannot constitutionally be vested with contempt powers.<sup>4</sup>

It is therefore a question whether the decision in *Missouri v. North* does not throw a cloud upon a good deal of American legislation for the revocation of licenses.

A saving circumstance will, however, be found in the rule, so far as it is recognized, that a person cannot rely upon a constitu-

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1. *Missouri ex rel. Hurwitz v. North* U. S. Supreme Court, April 12, 1926.

2. (1922) 260 U. S. 210.

3. 272 Mo. on p. 528.

4. *Langenberg v. Decker* 131 Ind. 471; matter of *Sims* 54 Kan. 1.

tional defect by which he is not prejudiced. In a revocation proceeding it will be rare indeed that the person charged has to rely for his defence upon the testimony of unwilling witnesses; normally it is the testimony on behalf of the state that may stand in need of compulsory process, and if it does, the case for the state will be apt to be weak. Except in cases of investigations, it is the opportunity to be heard and to hear the evidence on the other side, not the right to compulsory testimony that counts in administrative proceedings.

However, the decision calls attention to the desirability of two general statutory provisions: the one, authorizing and requiring administrative bodies or officials, in connection with determinations adverse to private right, to take all necessary proof; the other, giving them for that purpose the necessary testimonial powers and the right to apply to a court to enforce obedience, if necessary.

ERNST FREUND.

AGENCY—POWER TO CONFESS JUDGMENT—INSANITY OF MAKER.—[Illinois] May 1, 1920, George F. Hoots and his wife, Mabel, executed a note with a power of attorney to confess judgment "in the usual form of such powers used by banks." Hoots was adjudicated insane July 30, 1920, and the appointed conservator took possession of Hoots' property. The bank had judgment entered by confession in circuit court August 10, 1920, against George and Mabel. County court decreed sale of Hoots' land November 3, 1920. Daily purchased and subsequently conveyed to complainant who filed bill for declaration that the judgment was void. *Held* bill dismissed, reversing decree of circuit court which had been affirmed by appellate court.<sup>1</sup>

The well considered opinion of the Supreme Court of Illinois followed the authority under the Anglo-American system of jurisprudence reversing the poorly considered opinion of the appellate court to the contrary.<sup>2</sup> The latter court failed to make a distinction between a naked power or ordinary agency and a power given as security or, as more frequently expressed, coupled with an interest. Only one case of a power to confess judgment where confession was had after insanity of the maker has been found.<sup>3</sup> There are other decisions, however, that hold that insanity does not end a power that is "coupled with an interest."<sup>4</sup> The result is desirable. The law of

1. *Johnson v. National Bank of Mattoon* (1926) 151 N.E. 231.

2. *Johnson v. National Bank of Mattoon* (1925) 237 Ill. App. 233.

3. *Spencer v. Reynolds* (1890) 9 Pa. Co. Ct. Rep. 249.

4. *Berry v. Skinner* (1869) 30 Md. 567 (power of sale in mortgage not revoked by adjudication and appointment of committee); *Meyer v. Kuechler* (1881) 10 Mo. App. 371 (similar except adjudication occurred after sale under deed of trust); *VanMeter v. Darroh* (1892) 115 Mo. 153, 22 S. W. 30 (adjudication before sale under deed of trust); *Laughlin v. Hibben* (1891) 129 Ind. 5, 27 N. E. 753 (foreclosure by suit); *Hill v. Day* (1881) 34 N. J. Eq. 150 (power to pledge mortgage); *Powell v. Batchelor* (1915) 192 Mo. App. 67, l. c. 74, 179 S. W. 751, noted in U. of Pa. L. R. 64: 397 (power to dispose of business). Contrast *Encking v. Simmons* (1871) 28 Wis. 272 (circumstances may make sale fraudulent). See also *Davis v. Lane* (1839) 10 N. H. 156; *Matthiessen v. McMahon* (1876) 38 N. J. L. 536.