

# Washington University Law Review

---

Volume 20 | Issue 3

---

January 1935

## Implied Powers of License Revocation by Administrative Agencies

Abe J. Gallant

*Washington University School of Law*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Administrative Law Commons](#)

---

### Recommended Citation

Abe J. Gallant, *Implied Powers of License Revocation by Administrative Agencies*, 20 ST. LOUIS L. REV. 269 (1935).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol20/iss3/6](https://openscholarship.wustl.edu/law_lawreview/vol20/iss3/6)

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

the record, then the writ of *coram nobis* will lie whether the court has been misled through mistake or fraud.

#### CONCLUSION

This article is not intended as an attack on any of the decisions of the courts, nor on the use of *coram nobis*. It is simply an effort to call attention to the fact that the so-called law of *coram nobis* still persists as a necessary part of the practice and procedure in Missouri. For our own purposes if it were felt that the present day motion completely supplanted the old writ of error *coram nobis*, it would seem that the rational procedure would be to cease speaking in terms of *coram nobis*, but its language has been carried through the books from *Calloway v. Nifong*<sup>145</sup> to *G. M. A. C. v. Lyman*,<sup>146</sup> of the present year. However, once convinced of the propriety of the relief, there need be no worry as to the mode of attaining it through the function of writ of error *coram nobis* via the motion route. For this reason, the granting of the motion should be exercised with the utmost caution and the grounds for the motion must be certain and definite, and restricted to such cases as where the facts to be presented are such that if those facts had been presented to the court at the original trial, the judgment rendered would not have been rendered.

J. CHARLES CRAWLEY '35.

---

## IMPLIED POWERS OF LICENSE REVOCATION BY ADMINISTRATIVE AGENCIES

### I.

American legislatures in many instances have provided for the licensing of business, trades and acts to be performed by individuals.<sup>1</sup> Express legislative provisions for the revocation of licenses are, however, "meager and haphazard."<sup>2</sup> "There is no consistent legislative policy in any one jurisdiction concerning revocability or non-revocability, grounds of revocation, character of the revoking body, or appeal. . . . There are few fields in which there is more room and need for doing constructive work in the way of building up correct principles of legislation."<sup>3</sup> Freund says that the work would involve, among others, this question,

---

<sup>145</sup> (1822) 1 Mo. 223.

<sup>146</sup> (Mo. App. 1935) 78 S. W. (2d.) 109.

<sup>1</sup> Freund, *Police Power*, sec. 493; "Current Legislation", 22 *Col. L. Rev.* 269.

<sup>2</sup> Freund, *Legislative Regulation*, p. 294.

<sup>3</sup> *Ibid.* See also Freund, *Administrative Powers Over Persons and Property*, sec. 64.

"What is the law in cases where powers of revocation are not expressly granted?"<sup>4</sup>

This article will attempt, in some degree, to answer the proposed question. The field is a limited one and concerns itself only with the power of an administrative agency to revoke a license which it has granted when the statute or ordinance by virtue of which the agency acts does not expressly confer upon the tribunal the power of revocation.<sup>5</sup>

Freund has aptly said, "There is no general rule analogous to the federal rule concerning appointment to and removal from office (Ex Parte Hennen 13 Pet. 230) to the effect that a licensing power in the absence of a positive provision carries with it a power to revoke the license."<sup>6</sup> Whether the revocation of a license by an administrative body will be upheld in the courts depends on several factors, including: 1. the type of activity licensed; 2. the giving of notice and the opportunity for a hearing preceding the revocation; 3. the presence of provisions in the license itself for revocation; 4. the presence of sanctions, other than revocation, in the statute or ordinance for the enforcement of the terms of the license. In general, however, the cases may be classified into two categories. In the first group are those cases involving the revocation of a license which was granted to authorize the carrying on of an activity which bears a close relation to the public health, morals, or safety. Licenses in such cases may be termed "privilege licenses" and include, for example, licenses to operate a saloon or dairy or to use the public streets for a private purpose. The second group of cases includes those in which a license has been granted authorizing the doing of an act or acts in regard to real property and in which there has been a revocation. To distinguish licenses in the latter group from the former they may be termed "property licenses." A typical example is the ordinary building permit.

## II.

In cases involving "privilege licenses" the revocation by an administrative agency is generally upheld. In a New York case<sup>7</sup>

---

<sup>7</sup> Metropolitan Milk and Cream Co. v. City of New York et al. (1906) 113 App. Div. 377, 98 N. Y. Supp. 894, aff. 186 N. Y. 533, 78 N. E. 1107. A fine for the violation of the conditions of the license was provided in the ordinance. Previously in *People ex rel. Lieberman v. Vandecarr* (1903) 175 N. Y. 440, 67 N. E. 913 the validity of the licensing provisions had been upheld.

<sup>4</sup> *Ibid.* p. 295.

<sup>5</sup> This eliminates questions in regard to 1) the power of a legislative body to revoke by statute or ordinance a license which it has granted by the same means; 2) the power of a municipality to provide for the revocation of licenses when the statute or charter under which it operates provide for licensing but contain no provision as to revocation.

<sup>6</sup> Freund, *Administrative Powers Over Persons and Property*, p. 117.

the Department of Health of the City of New York, after notice and hearing, revoked a license to sell milk and the revocation was upheld. The court said, "The sole authority that the health board would have if this contention<sup>8</sup> was correct, would be to prosecute the person selling the poisonous article in the shape of milk, fine it, and in the meantime such person could go on poisoning the people under a permit or license from the health authorities, a proposition which is so unreasonable that a mere statement is sufficient to refute it. . . . To hold that a permit once granted is irrevocable would be to totally defeat the object of the statute in requiring such a permit before a person should engage in the business of supplying to the inhabitants of a city food."<sup>9</sup> The practical reason behind the decision is clear and should have been a sufficient basis on which to rest the decision, but the court found another basis. The license itself provided that the Department of Health could revoke the license at its pleasure and the court held that since the licensee accepted the provision as a part of the license he could not contend that the license was irrevocable.<sup>10</sup> This basis may be termed the "agreement theory."

The latter basis for the decision in the New York case is the usual one given in cases involving "privilege licenses" and seems to be the main basis for the results.<sup>11</sup> In but one case where a "privilege license" was revoked has the "agreement theory" been

---

<sup>8</sup> The defendant's contention that the license was irrevocable and that the only thing the board could do was impose the fine provided in the ordinance.

<sup>9</sup> *Supra* note 6, 113 App. Div. l. c. 381, 98 N. Y. Supp. l. c. 897.

<sup>10</sup> *Ibid.* A later New York case, *People ex rel. Lodes v. The Department of Health of the City of New York* (1907) 189 N. Y. 187, 82 N. E. 187, approved the Metropolitan Milk and Cream Co. case and further held that no notice or hearing was necessary before the board could revoke the license. There was a dissenting opinion.

<sup>11</sup> *Malkan v. City of Chicago* (1905) 217 Ill. 471, 75 N. E. 548. The revocation of a license to sell intoxicating liquor was sustained. The court said that the licensee "accepted the license with the provision in it that it was subject to revocation at the discretion of the mayor. By thus accepting the license he assented to its terms and conditions." This statement was the sole ground for the decision on the point with which this article is concerned. In *People ex rel. Van Norder v. Sewer etc. Commission of the Village of Saratoga Springs* (1904) 90 App. Div. 555, 86 N. Y. Supp. 445, the court upheld the revocation of a hackman's license and the sole ground for the decision was the "agreement theory." In *the City of Grand Rapids v. Brandy* (1895) 105 Mich. 670, 64 N. W. 29, the court sustained the revocation of a junk dealer's license on the "agreement theory." In *Sarlo v. Pulaski County* (1905) 76 Ark. 336, 88 S. W. 953, a case involving the revocation of a liquor license, the court upheld the revocation on two grounds: 1) the "agreement theory" and 2) an implied power of revocation derived from the power of prohibition granted the administrative agency. This latter case is the only case which speaks of an implied power of revocation.

entirely disregarded.<sup>12</sup> The ground for the decision in that case seems to have been that the power of an administrative official to approve is a continuous one "in the sense that under appropriate circumstances the approval may and should be withdrawn."<sup>13</sup> There is another possible ground for the decision, namely that the matter affected public health (since a food product was involved) and that for the practical reason mentioned in the *Metropolitan Milk and Cream Co.* case<sup>14</sup> it was best to allow the administrative official to rescind his approval.

Although the cases generally follow what the writer has chosen to call the "agreement theory", it does not seem that such a basis for the decisions is a sound one. The question at once arises as to the power of the administrative tribunal to impose as a part of the license a provision for revocation. The better rule seems to be that an administrative body may not put terms or conditions in a license in the absence of statutory authority; for to do so would be an unauthorized act.<sup>15</sup> If this rule be followed, then in all the cases considered the licensing agency had no authority to impose as part of the license a provision for revocation.<sup>16</sup> This means that the provision imposed was inoperative,<sup>17</sup> and, consequently, there was no reason to deny the licensee the right to contest the validity of the revocation, even though he accepted the license with the provision in it. Moreover, if the power of an administrative tribunal to provide for revocation is recognized, the door is open to the inclusion of numerous restrictions in licenses which would amount to an exercise of legislative power that ought not to be taken to have been conferred by implication.<sup>18</sup>

---

<sup>12</sup> *Brougham v. Blanton Mfg. Co.* (1919) 249 U. S. 495. The Sec. of Agriculture withdrew his approval of a trade name for oleomargarine because a change in ingredients made the name misleading.

<sup>13</sup> Freund, *Administrative Powers Over Persons and Property*, p. 113. The theory of the *Blanton Mfg. Co.* case could have been applied also in *Metropolitan Milk and Cream Co. v. City of New York*, supra note 7, and *People ex rel. Lodes v. The Department of Health of the City of New York*, supra note 10.

<sup>14</sup> Supra note 7.

<sup>15</sup> Freund, *Administrative Powers Over Persons and Property*, p. 113 and cases cited. See also *Drew County v. Bennett* (1884) 43 Ark. 364; *State of West Virginia ex rel. Haddad v. City of Charleston* (1922) 92 W. Va. 57, 114 S. E. 378, 27 A. L. R. 323.

<sup>16</sup> A distinction must be made between those licensing boards which have a rule making power and under it may make a valid rule for revocation of licenses (cf. *Miller v. Johnson et al.* (1921) 110 Kan. 135, 202 Pac. 619) and those licensing boards which have little or no rule making power which nevertheless impose revocation provisions in licenses. It is with the latter type of board that this article is concerned. The validity of the rules for revocation of the former type of board will depend largely on the scope of rule making power granted the board; a problem which is not within the purview of this article. See *Miller v. Johnson*, supra.

<sup>17</sup> Freund, *Administrative Powers Over Persons and Property*, p. 113.

<sup>18</sup> Cf. *Thompson v. Gibbs* (1896) 97 Tenn. 489, 492, 37 S. W. 277, 278.

A license by a municipality to use the public streets is also a type of "privilege license." Its revocation presents a slightly different problem. The general rule seems to be that a city, absent a charter provision or a statute, has no power to grant a permanent right to use the public streets for a private purpose, and that, hence, any license to use the streets in such a manner must necessarily be temporary and revocable.<sup>19</sup> Following this rule, since the city council itself by ordinance may not grant a permanent right, it has been held that an administrative agency of the city, authorized to issue licenses for the use of the streets, may revoke a license so granted, although express power of revocation was not conferred upon it.<sup>20</sup> In another case<sup>21</sup> the defendant had been granted a permit to use a public street for the purpose of maintaining a scale thereon. After the defendant had incurred expense in reliance upon the permit there was an attempted revocation of the license. The court, however, did not sustain the rescission, holding, "The license having been granted by authority, and the defendants having acted thereon, as stated, the plaintiff is estopped from revoking it until the interests of the public shall require that it be revoked."<sup>22</sup> This case while holding that one who has incurred liabilities in reliance upon a permit to use the public streets is entitled to use them so long as such use does not interfere with the public interest, nevertheless recognizes that there is no power in the city council (here acting as an administrative body) to grant a permanent use to the licensee. Thus in the ultimate view this case also follows the general rule and is not necessarily in conflict with the *Union Institution for Savings* case.

### III.

There remain for consideration cases involving the revocation of "property licenses"<sup>23</sup> A Washington case<sup>24</sup> is illustrative. The relator was granted a permit to erect a stable and he immediately made arrangements for construction. He had pro-

---

<sup>19</sup> McQuillin, *The Law of Municipal Corporations* (2nd ed. 1928) secs. 1422 & 1423; Dillon, *Commentaries on the Law of Municipal Corporations* (5th ed. 1911) sec. 1176; *Laing v. Americus* (1891) 86 Ga. 756, 13 S. E. 107; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator* (1884) 82 Mo. 121.

<sup>20</sup> *Union Institution for Savings in the City of Boston v. City of Boston* (1916) 224 Mass. 286, 112 N. E. 637. A permit granted to the plaintiff to maintain a post with a clock set thereon in the sidewalk was revoked.

<sup>21</sup> *Incorporated Town of Spencer v. Andrew et al.* (1891) 82 Iowa 14, 47 N. W. 1007.

<sup>22</sup> *Ibid.* 82 Iowa l. c. 18, 47 N. W. l. c. 1008. See also *Henman v. Clarke et al.* (1907) 121 App. Div. 105, 105 N. Y. Supp. 725. A case involving the revocation of a permit to move two houses along the public streets.

<sup>23</sup> See p. 2.

<sup>24</sup> *State ex rel. Grimmer v. City of Spokane* (1911) 64 Wash. 388, 116 Pac. 878.

ceeded so far as to have lumber hauled upon the premises, when he received a notice that his permit was about to be revoked, and that he should appear at a hearing. In consequence he brought an action to prohibit the defendant, The Board of Public Works, from revoking the permit. Judgment was given for the relator, the court holding, "It seems to us that when the board heard the relator's application for this building permit upon its merits and thereafter granted it, its power in the premises was exhausted. Any other rule would make a building undertaking of this nature rather a perilous undertaking on the part of the one procuring the permit. We think that after a fair hearing and the granting of the permit there, in the absence of fraud on the part of the applicant, he has a right to presume that the matter is finally determined in so far as his rights under the ordinance and the permit are concerned."<sup>25</sup> As in the "privilege license" cases, the practical reason for the decision is clear, and the cases are generally in accord with the Washington result.<sup>26</sup>

It should be noted that in the Washington case the relator had actually made preparations for construction, and this is true in all of the cases.<sup>27</sup> The incurring of liabilities in reliance upon the permit is noteworthy because the express theory behind two of the decisions and the general idea running through all the cases is that when the licensee enters upon the construction of a building or incurs liabilities in reliance upon the permit he acquires a vested right of which the administrative tribunal has no power to deprive him.<sup>28</sup> Two cases adopt a slightly different theory in this regard. They say that where such circumstances exist "it must be held that the city is estopped to claim that the permit has been revoked."<sup>29</sup> The writer has been unable to find any case

<sup>25</sup> *Ibid.* 64 Wash. l. c. 394, 116 Pac. l. c. 880.

<sup>26</sup> *Lowell v. Archambault* (1905) 189 Mass. 70, 75 N. E. 65; *Rehman v. City of Des Moines* (1925) 200 Iowa 286, 204 N. W. 267, 40 A. L. R. 922; *The City of Buffalo v. Chadeayne* (1892) 134 N. Y. 163, 31 N. E. 443; *General Baking Co. v. Street Com'rs of Boston* (1922) 242 Mass. 194, 136 N. E. 245; *McPherson v. Board of Street Com'rs. of Boston* (1925) 251 Mass. 34, 146 N. E. 244; *Pratt v. City and County of Denver* (1922) 72 Colo. 51, 209 Pac. 508; *Williams v. Smith* (1925) 77 Colo. 572, 238 Pac. 40; *Gallagher v. Flury* (1904) 99 Md. 181, 57 Atl. 672; *People ex rel. Evens v. Kleinert* (1922) 201 App. Div. 751, 195 N. Y. Supp. 711; *Fuller v. Schwab* (1925) 208 N. Y. Supp. 289.

<sup>27</sup> *Supra* note 26. In some of the cases, e. g., *Lowell v. Archambault & The City of Buffalo v. Chadeayne* *supra* note 26 not only had preparations been made but actual construction was started before the attempted revocation.

<sup>28</sup> *People ex rel. Evens v. Kleinert* *supra* note 26, 201 App. Div. l. c. 755 195 N. Y. Supp. l. c. 714; *The City of Buffalo v. Chadeayne* *supra* note 26, 134 N. Y. l. c. 165, 31 N. E. l. c. 444.

<sup>29</sup> *Pratt v. City and County of Denver* *supra* note 26, 72 Colo. l. c. 54, 209 Pac. l. c. 509; *Williams v. Smith* *supra* note 26. See also *Fuller v. Schwab* *supra* note 26.

in which the attempted revocation occurred before the licensee assumed liabilities in reliance upon the permit.<sup>30</sup>

There exist two other possible bases for the decisions in a few of the cases. As a general rule notice and hearing must be afforded by the administrative agency before it may deprive one of a property right through administrative action.<sup>31</sup> If it be held<sup>32</sup> that the licensee acquires a property right when he assumes liabilities in reliance upon a permit, then under the general rule the administrative body may not revoke the permit without a notice and hearing. In at least three cases<sup>33</sup> no notice and hearing were afforded, and it would seem that in those cases a proper basis for the decisions would be the absence of the requisite procedure. The cases do little more than mention the point. In another case<sup>34</sup> the licensing authority had power to revoke a building permit for certain enumerated causes, none of which applied to the licensee. The decision in that case, not sustaining the revocation, very easily could have been grounded on the general rule that "where a statute or ordinance authorizes the revocation of a license for enumerated causes, the license cannot be revoked by the administrative officer on any ground other than the causes specified in the statute."<sup>35</sup> The case, however, was grounded on the usual point that the licensee had obtained a vested right of which the administrative agency had no power to deprive him.<sup>36</sup>

#### IV.

The decisions in the two classes of cases seem to be practical though the grounds on which they are based vary and are not satisfactory in all instances.<sup>37</sup> In the "privilege license" cases it

<sup>30</sup> In *General Baking Co. v. Street Com'rs. of Boston*, supra note 26, that situation was specifically excepted from the decision.

<sup>31</sup> Willoughby, *The Constitutional Law of the United States*, sec. 1144. The exception to the general rule is that notice and hearing are not necessary when the public need is urgent or when administrative efficiency or effectiveness are hampered by the procedure. Clearly this exception does not apply to building permits, though it will justify the holding in *People ex rel. Lodes v. The Department of Health of the City of New York* supra note 10.

<sup>32</sup> Supra note 28.

<sup>33</sup> *The City of Buffalo v. Chadeayne*, *General Baking Co. v. Street Com'rs. of Boston*, and *Gallagher v. Flury* supra note 26.

<sup>34</sup> *People ex rel. Evens v. Kleinert* supra note 26. The Building Code of the City of New York provided, "The superintendent of buildings may revoke any permit or approval . . . in case of any false statement or any misrepresentation as to a material fact in the application on which the permit or approval was based." 201 App. Div. 1. c. 755, 195 N. Y. Supp. 1. c. 714.

<sup>35</sup> Comment, 1 *Geo. Wash. L. Rev.* 122 and cases cited. See also *Stone v. Fritts* (1907) 169 Ind. 361. 82 N. E. 792; *Commonwealth v. Mary Moylan* (1875) 119 Mass. 109.

<sup>36</sup> Supra note 28.

<sup>37</sup> Supra notes 15 and 16.



is clear, as pointed out in the Metropolitan Milk and Cream Co. decision,<sup>38</sup> that if an administrative body could not validly revoke a license a licensee could continue with impunity<sup>39</sup> to endanger the public and the sole thing the board could do would be to impose penalties which the law provided, but the administrative body could not eradicate the harmful business. Obviously, however, what is needed is not the imposition of penalties but a rapid elimination of the activity and it seems that the best way to effect that end is to allow the administrative agency to revoke the license summarily,<sup>40</sup> and to provide an appeal to the courts to determine whether or not the administrative tribunal acted arbitrarily.<sup>41</sup> This is the usual procedure in the cases<sup>42</sup> and hence it seems that a satisfactory result was reached from the viewpoint of public administration.

With reference to the "property license" decisions it also seems that a practical result was attained. In those cases there is no need for the quick action so necessary in the "privilege license" decisions since the public is not vitally affected. Moreover, when the licensee has actually acted in reliance upon the license, without violating any of its terms or any ordinance,<sup>43</sup> there seems to be no legitimate reason why an administrative agency should be allowed to revoke the license. In general then, it appears that the decisions in both types of cases are based upon a policy which makes for a desired public administration of the licensed activity.

ABE J. GALLANT '36.

<sup>38</sup> Supra note 7.

<sup>39</sup> Limited by but two things exclusive of penalties provided in the licensing law: 1. possible suits brought by individuals personally affected; 2. abolition of the activity as a nuisance (cf. *City of Revere v. Riseman* (1932) 280 Mass. 76, 181 N. E. 716).

<sup>40</sup> Freund disagrees with this. See his *Administrative Powers Over Persons and Property*, p. 126.

<sup>41</sup> *People ex rel. Lodes v. The Department of health of the City of New York*, supra note 10.

<sup>42</sup> Supra note 11.

<sup>43</sup> The writer has been unable to find cases wherein such circumstances existed.