



**THE ATTORNEY GENERAL
OF TEXAS
AUSTIN, TEXAS**

**PRICE DANIEL
ATTORNEY GENERAL**

December 23, 1948

Hon. M. H. Crabb, M. D.
Secretary
Board of Medical Examiners
Fort Worth, Texas

Opinion No. V-754.

Re: The procedure to be followed to
revoke the medical license of
one deported to Germany follow-
ing cancellation of citizenship
for conspiracy to violate the
Espionage Act.

Dear Sir:

Your request for an opinion from this office
upon the above titled subject matter contains the fol-
lowing:

"In 1930 Dr. Wolfgang Ebell, a graduate
of the University of Freiberg School of Med-
icine, Germany, was granted a license to
practice medicine in the State of Texas by
written examination. In 1942 he was convict-
ed of conspiring to violate the Espionage Act
of 1911, etc., and had his citizenship papers
cancelled in El Paso Federal Court, Case No.
165, Civil Action on April 2, 1942. He was
confined to a Correction Institution from
1942 until 1947 when he was deported to Ger-
many. On November 12, 1947, the Texas State
Board of Medical Examiners voted, in execu-
tive session, to institute proceedings to re-
voke the license of Dr. Wolfgang Ebell. A
request has been made of the District Attorney
of El Paso for revocation of the license of
Wolfgang Ebell due to his dishonorable conduct
and deportation. The District Attorney has
raised the question of whether or not Wolfgang
Ebell can be cited by publication or must he
be cited in person as set out in Article 4507,
R. C. S.

"Question No. 1. Under the facts and circumstances stated above, can the District Attorney institute proceedings against Wolfgang Ebell for the revocation of his license to practice medicine in the State of Texas when the Texas State Board of Medical Examiners has not cited him to appear and show cause why his license should not be revoked?

"Question No. 2. Under the circumstances stated above, can the District Attorney cite Wolfgang Ebell by citation by publication? Or must he be cited by citation in person as stated in Article 4507, R. C. S.?"

Although under Article 4505, R. C. S., the State Board of Medical Examiners has the authority to "refuse to admit persons to its examinations, and to issue license to practice medicine to any person," there is no authority in the board to revoke or cancel such license. The authority to revoke, cancel or suspend the license of any practitioner of medicine is given only to the district courts of this state by Article 4506, R. C. S., such article making it "the duty of the several District and County attorneys of this State to file and prosecute appropriate judicial proceedings for such revocation, cancellation, or suspension, in the name of the State, on request of the Board of Medical Examiners." The statutes do not provide for any hearing before the board, nor do we think that due process requires a hearing before the board can request that a suit be brought to revoke a license, there being no power of revocation in the board itself. No hearing being required by the statutes or otherwise before the board takes this preliminary step toward the institution of judicial proceedings for revocation, we think your first question should be answered in the affirmative.

Article 4507, R. C. S., provides that in such judicial proceedings citation shall be issued "in the manner and form as in other cases." Rule 109 of the Rules of Civil Procedure provides:

"Where a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant . . . the Clerk shall issue citation for such

defendant for service by publication . . . provided, however, that where the affidavit shows that the defendant is not within the continental United States, and is not in the Armed Forces of the United States, it shall not be necessary for the party to show that the residence or whereabouts of the defendant is unknown or that an attempt has been made to procure service of non-resident notice."

The applicability of this rule in the present case involves the question of the nature of a proceeding to revoke a physician's license, that is, whether it be one in personam or in rem or quasi in rem. If it be one in personam then personal service is necessary, but "in suits in rem or quasi in rem, personal service is not necessary and may be constitutionally dispensed with, and constructive service by publication may be made if authorized by statute." 126 A. L. R. 664. In discussing suits in rem or quasi in rem, the annotator in 126 A. L. R. 664, 666 says:

"Suits quasi in rem . . . are personal in form in that the owner's personal rights in the property are affected by the decree; but as the judgment operates on the property itself, and merely incidentally affects the personal rights of the owner, such suits are regarded in effect as in rem, and are frequently designated as quasi in rem."

Although there are few cases on the subject, it is generally held that a proceeding to revoke a license of this kind is a proceeding in rem. Board of Dental Examiners v. Hedrick, 116 W. Va. 222, 179 S. E. 809 (1935) involved the revocation of a license to practice dentistry. In discussing the nature of such a proceeding, the court said:

"This proceeding is, in effect, one in rem. State v. Richardson, 108 Conn. 45, 142 A. 406; Freeman on Judgments (5th Ed.) § 1534; 1 C. J., subject Actions, § 171; 1 R. C. L., Id. § 13. The defendant resided in Ohio. Personal service on a nonresident is not requisite to jurisdiction in an in rem proceeding. (Citations) Code, 30-1-8, provides that notice

shall be served on a defendant in such cases as a notice is served under Code 56-2-1. The latter statute relates to personal service. Code, 56-2-2, provides, however, that 'any such notice' to a person not residing in this state may be served by publication, etc. The two statutes being read together specifically authorize the service of notice on the defendant herein by publication. . . ."

In re Craven, 178 La. 372, 151 So. 625, 90 A.L.R. 973 (1931) was a disbarment proceeding in which the attorney excepted on the ground that the judgment sought against the accused was a personal one and could not be based on substituted process. The court said:

"The judgment herein sought against the accused is not a personal judgment, but a judgment in rem. A judgment in personam can result only from some personal obligation which follows the person wherever he may be and may be enforced wherever he may be found. But the present proceedings do not seek to enforce any personal obligation on the part of the accused; their only purpose is to declare his status as an officer of courts of this state.

"Of that status the courts of this state alone have jurisdiction, and yet it may be (and in this case is) essential to pass upon that status.

"Hence, if the courts of this state alone have jurisdiction of the subject-matter, to-wit, the status of the accused as a member of the bar of this state, and it becomes necessary to pass on that status, it follows that the courts of this state must have some method of subjecting him to their jurisdiction; and, since that cannot be done by personal service, it follows that substituted service may be resorted to."

State v. Richardson, 108 Conn. 71, 142 Atl. 406 (1928) was a case in which a license to practice medicine was revoked. There the court said:

"The revocation of his license by the department of health and the subsequent proceedings terminated in a judgment which was in effect one in rem and established his status as

one not entitled to practice medicine in the state of Connecticut."

It is said in 1 Am. Jur. 435-437, Sec. 45:

"A proceeding in rem is not confined to the status of things, but extends to the status of individuals and their relations to others. Proceedings in rem include . . . a proceeding to revoke a dentist's license"

In view of the above, we are of the opinion that such a proceeding as is here contemplated is a proceeding in rem, notice of which can be given by publication as provided in Rule 109. Service thus obtained would give the court jurisdiction to render a judgment revoking the license for good cause, but would not authorize the imposition of a personal judgment, as for the court costs. Therefore, the first question in question 2 is answered in the affirmative, and the second question in question 2 is answered in the negative.

SUMMARY

Where a doctor has been deported to Germany as an undesirable alien, the district attorney may lawfully institute proceedings for the revocation of his license on request of the Board of Medical Examiners, without the board having personally served such doctor with notice or citation to appear and show cause why his license should not be revoked. Citation by publication, as provided in Rule 109, may be made in such suit. Action to revoke such license is a proceeding in rem, and citation by publication satisfies the requirements of due process of law.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED:

Price Daniel
ATTORNEY GENERAL

By *Jesse P. Luton, Jr.*
Jesse P. Luton, Jr.
Assistant

JPL:
OS:wb

By *Ocie Speer*
Ocie Speer
Assistant