

1941

Lauren W. Gibbs, Inc. v. E. E. Monson, Joseph Chez,
and Rulon F. Starley, and the Securities
Commission of the State of Utah : Brief of
Appellants

Utah Supreme Court

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In the Supreme Court

OF THE

State of Utah

LAUREN W. GIBBS, INC., a corporation,

Plaintiff and Respondent,

vs.

E. E. MONSON, Secretary of State
of the State of Utah, JOSEPH
CHEZ, Attorney General of the
State of Utah, and RULON F.
STARLEY, State Bank Commissioner
of the State of Utah, as members
of the Securities Commission
of the State of Utah, and the SE-
CURITIES COMMISSION OF
THE STATE OF UTAH,

Defendants and Appellants,

No. 6331

BRIEF OF APPELLANTS

APPEAL FROM DISTRICT COURT OF THIRD
JUDICIAL DISTRICT, SALT LAKE COUNTY.
HONORABLE ALLEN G. THURMAN,
JUDGE.

GROVER A. GILES,
Attorney General of Utah, and
DELBERT M. DRAPER,

Attorneys for Defendants and Appellants

FILED

INDEX

STATEMENT OF THE CASE.....	1- 3
STATEMENT OF ERRORS RELIED UPON.....	3- 4
ARGUMENT:	
Assignment I	5- 9
Assignment II	10
Assignment III	10
Assignment IV—General Demurrer	10-38
Assignment IV—Special Demurrer	38-48
Assignment V—Summary	49

CITATIONS

Alsup vs. State, 238 S. W. 667	32
Atchinson, etc. Ry. Co. vs. Comm. 130 Kan. 777, 288 Pac. 755.....	41
Baker vs. Dept. 78 Utah, 424; 3 Pac. (2d) 1082.....	22
Botany Worsted Mills vs. N. L. R. B. 106 Fed. (2d) 263, Syl. 1	34
66 C. J. 63	15
D. & R. G. W. Ry. Co. vs. Comm. 98 Utah, 431; 100 Pac. (2d) 552	41
Doble etc. Corp. vs. Daugherty (Cal.) 232 Pac. 140.....	7
Fed. Communications Comm. vs. Pottsville Bdctg. Co., 309 U. S. 134.....	8
Golding vs. Schubach Optical Co., 93 Utah, 32; 70 Pac. (2d) 871	5
Guaranty Mortgage Co. vs. Wilcox, 62 Utah 184; 218 Pac. 133; 30 A. L. R. 1324	25
Hampshire vs. Woolley, 72 Utah, 106; 269 Pac. 135	39
Hastings Estate (Nev.) 160 Pac. 782	32
In Re Burnette, Kan.; 85 Pac. 575	27
Inland Steel vs. N. L. R. B. 105 Fed. 246	12
Kansas Gas & Electric Co. vs. Comm. 122 Kan. 462; 251 Pac. 1097	12
49 L. ed. 350	14
79 L. ed. 474.....	22
1 L. R. A. (N. S.) 814	15
Lees vs. Freeman, 19 Utah, 481; Pac. 411	47
Marrs vs. Matthews (Tex.) 270 S. W. 586	32
McCarty vs. Public Service Comm., 94 Utah, 304; 77 Pac. (2d) 331.....	14
Meffert vs. Packer, 66 Kan. 710; 72 Pac. 27	14

Montana Amusements Co. vs. Goldwyn, 182 Pac. 121	10
Note 5 A. L. R. 94	22
People vs. Hasbrouck, 11 Utah, 291; 39 Pac. 918	19
Ry. Comm. vs. Rowan, 84 L. ed. 1373 (1939)	40
Scripps-Howard Radio, et al. vs. Fed. Communications Comm. Fed. (2d)	8
State vs. Cragun, 81 Utah, 457; 20 Pac (2d) 247.....	14
Union Trans. Co. vs. Bassett, 118 Cal. 604; 50 Pac. 754.....	7
Yoshizawa vs. Hewitt, 52 Fed. (2d) 411; 79 A. L. R. 317	33
L. 25, Ch. 87, Sec. 19	5
Revised Statutes of Utah, 1933, Title 82, Chap. 1	5
Revised Statutes of Utah, 1933, Sections 82-1-15, 21, 24 and 28	29-31
Laws of Utah, 1933, Chap. 58, Sec. 6	9
Laws of Utah, 1935, Chap. 4, Sec. 17	8
Laws of Utah, 1935, Chap. 10, Sec. 17.....	8
Laws of Utah, 1935, Chap. 65, Sec. 9	9
Laws of Utah, 1937, Chap. 10, Sec. 17	8
195 U. S. 625; 25 Sup. Court Rep. 790	14

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LAUREN W. GIBBS, INC., a corporation,

Plaintiff and Respondent

vs.

E. E. MONSON, Secretary of State of the State of Utah, JOSEPH CHEZ, Attorney General of the State of Utah, and RULON F. STARLEY, State Bank Commissioner of the State of Utah, as members of the Securities Commission of the State of Utah, and the SECURITIES COMMISSION OF THE STATE OF UTAH,

Defendants and Appellants,

No. 6331

BRIEF OF APPELLANT.

STATEMENT OF CASE

Respondent herein was registered as a dealer in securities for the year 1939 pursuant to Sec. 82-1-15 R. S. 1933.

The Securities Commission, on November 18, 1939, revoked said registration pursuant to Sec. 82-1-21 R. S. 1933.

Thereafter, on December 18, 1939, respondent instituted an action in the Third Judicial District Court of Salt

Lake County by filing a Complaint against the Commission and the members thereof, praying that the Court set aside the Order of Revocation made by the Commission, and that the Commission "be required to return to this Court a transcript of the proceedings had before it * * *, together with a transcript of the evidence adduced at the hearing * * *, within the time allowed by law for the defendants to answer the Complaint * * *, and for such other and further relief as may be proper in the premises." *Abz 11*

A Summons, in form prescribed for civil actions in District Courts, was served upon the Commission December 18, 1939, and on the same day the District Court of Salt Lake County, without notice to the Commission of its intent to act, issued, ex parte, an Order requiring the Commission to "return to the Court within twenty days from the date of service hereof, a full and complete transcript of the proceedings had by defendants * * *, and that pending the determination of the cause and until the judgment of the Court becomes final, the Order of defendants cancelling plaintiff's registration as a dealer in securities * * *, shall be suspended and the right of plaintiff to do business in the State of Utah as a licensed dealer shall continue." *Abz 23*

Thereafter, and within the time allowed to appear, the Commission challenged, by Demurrer and Motion, the sufficiency of the Complaint and the jurisdiction of the Court to proceed in the manner in which it had proceeded and proposed to proceed, and prayed that the Court vacate its unlawful Order suspending the Order of the Commission. *Abz*

The Demurrer was over-ruled and the Motion was denied, and notice thereof was given defendants on January 3, 1941. *Abn 26*

Upon receipt of notice of the Court's disposition of the Demurrer and Motion the Commission filed its notice of intention to stand on its Demurrer and Motion, and on the same day the Court entered its Judgment, January 4, 1941, setting aside and holding for naught the revocation order of the Commission. *Abn 26-8*

Thereafter, on January 15, 1941, defendants served and filed a Notice of Appeal, and on January 28, the Clerk of the District Court filed in this Court the Transcript on Appeal in the case, and thereafter, on the 29th day of January, 1941, appellants served and filed Assignments of Error as follows: *Abn 29-31*

ASSIGNMENTS OF ERROR

I.

The Trial Court erred in making and entering its Order of December 18, 1939, in the following particulars:

1. It suspended an Order of the Securities Commission dated November 18, 1939, on mere motion of respondent's Counsel, ex parte, without notice to appellants, and without affording appellants an opportunity to be heard.
2. It authorized respondent to continue to do business as a licensed dealer in securities, pending final determination by the Court of the action instituted by respondent.

3. It failed to require a bond or other security from respondent pending such final determination by the Court.

All of which acts and omissions were contrary to law, and the plain provisions of Chapter 1, Title 82, Revised Statutes of Utah, 1933.

II.

The Trial Court erred in denying appellants' Motion for an Order to set aside its Suspending Order of December 18, 1939.

III.

The Trial Court erred in the exercise of its discretion, if it had discretion, and clearly abused such discretion with respect to matters stated in Assignments I and II herein.

IV.

The Trial Court erred in over-ruling appellants' Demurrer to respondent's Amended Complaint on file in said cause.

V.

The Trial Court erred in making and entering its final Judgment in said cause setting aside and holding for naught the said Order of the Securities Commission dated November 18, 1939, for the reason that said Judgment is contrary to law.

The questions raised by each Assignment of Error may be discussed in the order in which the assignments appear above.

ASSIGNMENT I. ARGUMENT

1. Had the District Court jurisdiction to suspend the Revocation Order of the Securities Commission ex parte, without notice to the Commission, and without affording the Commission an opportunity to be heard?

The answer must be No; for the reason that the Legislature of Utah has declared that the business of selling securities, and dealers in securities, shall be regulated. It has set up standards and rules of regulation and has vested in the Securities Commission of Utah the *sole* duty of administering the law with respect thereto,—Title 82, Chap. 1, Revised Statutes of Utah, 1933.

It may be argued that the Courts share this responsibility with the Commission by reason of Sec. 82-1-41. This position cannot be sustained because neither a Commission nor the Courts had authority to license dealers in securities before the passage of the Securities Act, and a fortiori, neither had authority to revoke a license. After the Act was passed the Commission was given such authority, subject to court control. L. 25. Chap. 87, Sec. 19. But in 1933, the control of the court was limited by Sec. 82-1-41-supra. No word, phrase or sentence in the Act as amended, can be construed to show a legislative intent to give the Courts power to license, suspend, or revoke licenses of dealers in securities. Courts must find and follow the legislative intent. This Court tersely enunciated such doctrine in a very recent case,—*Golding vs. Schubach Optical Company*, 93 Utah, 32, 70 Pac. (2d) 871. Speaking of regulating Optometrists the Court said:

"It matters not whether optometry be regarded as a 'learned profession' or not. It is a 'licensed profession', or trade, which had no regulation until the Legislature acted and set up standards and regulations. The Legislature having so acted, the Court cannot go beyond what the Legislature has done. We are not concerned with what the regulations or limitations should be. That argument must be addressed to the Legislature. We are only concerned with what the Legislature has said; how far have they gone?"

Applying this test to the regulation of dealers in securities, let us see what the Legislature has said with respect to the Court's authority to issue, suspend, or revoke dealers' licenses. The law as now written is found in Sec. 82-1-41, which reads as follows:

"Any person directly affected and aggrieved by any final order of the Commission made under any of the provisions of this title may, within 30 days after notice of such order, institute an action in the district court of the county at the seat of government against the Commission, setting out his grievance and right to complain. In its answer the commission may set out any matter in justification; and the court shall determine the issues on both questions of law and fact, and may affirm, set aside or modify the order complained of."

For emphasis, we repeat that before the passage of the 1925 law, the Courts had no power to issue, suspend, or revoke dealers' licenses, and a reading of Section 82-1-41 shows no such power granted now. It is not even intimated. On the contrary, there is conclusive proof that the legislature intended to relieve the Court of such responsibility by the

amendment aforesaid. It may now initiate nothing itself with respect to licensing. It may not even disturb what the Commission has done except after a complaint filed, answer made, and "issues on both questions of law and fact" are determined by the Court.

Yet in this case the Court suspended an order of the Commission, with nothing but a complaint before it, and without a single issue made, and without an opportunity afforded the Commission to answer and make an issue. In view of the Statute the conduct of the Court was both unlawful and high-handed. *Union Trans. Co. vs. Bassett* 118 Cal. 604, 50 P. 754; *Doble etc. Corp. vs. Daugherty* (Cal.) 232 P. 140.

2. But the Court was not content to merely suspend the Order of the Commission. It went further, and authorized the plaintiff to continue as a "licensed dealer" pending final determination of the case, notwithstanding the only body authorized to revoke a license had revoked it, and notwithstanding Sec. 82-1-15 of the Securities Act, which provides:

"Every registration under this section shall expire on the 31st day of December in each year."

The Court's suspension order was made December 18th, 1939, and its final determination of the issues was made and entered January 4, 1941, so that the plaintiff operated as a licensed dealer, by Court Order, in three distinct license years contrary to plain legislative mandate. If the Suspension Order was high-handed, this was little short of con-

tumacious. It could not even be excused on the ground that the Court believed the whole Act to be unconstitutional for the reason that if the Act is unconstitutional the Court is stripped of power to make any orders of any kind respecting the licensing of dealers.

3. Assuming that the Court had authority to suspend the Commission's Order and the authority to issue a license to the dealer pending its determination of issues, had it the authority to do so without requiring a bond from the dealer to insure proper conduct by the dealer pending such determination?

Again, this would depend upon the Legislative intent. On this point the Securities Act is silent, but the Legislature has created many other boards and commissions, and with respect to orders to be made by them it has not been unmindful that the status of such orders pending Court review is important. *Scripps-Howard Radio et al. vs. Fed. Communications Comm.* U. S. Ct. of App. D. C. Decided Feb. 3, 1941, —Fed. 2nd—. *Fed. Communications Comm. vs. Pottsville Bdctg. Co.*, 309 U. S. 134.

With respect to the Board of Agriculture, it provided that the license should remain in effect until the end of the license period, or until final determination of Court proceedings, whichever is first in point of time. *Laws of Utah, 1935, Chap. 4, Sec. 17.*

With respect to the Aeronautic Commission, it provided: "The district court may in its discretion determine whether the filing of the praecipe shall act as a supersedeas." *Laws of Utah, 1937, Chap. 10, Sec. 17.*

With respect to the Public Service Commission it provided: "The Commission shall be served with process * * * which shall operate to stay all proceedings pending the decision of the district court, during which pendency the commission shall grant the applicant a temporary permit to operate as a contract carrier." Laws of Utah, 1935, Chap. 65, Sec. 9.

With respect to Contractors under the Board of Registration, it provided for an appeal to the district court like an appeal from a justice's court, and gave the Court the power to suspend or cancel licenses after a hearing. Laws of Utah, 1933, Chap. 58, Sec. 6.

With respect to Board of Registration, controlling the licensing of about 20 trades and professions, the Insurance Commission and the Securities Commission, nothing was said with respect to supersedeas, stays, or bonds. What, then, did the Legislature intend by such omission?

The most natural and logical conclusion is that it intended the orders of such bodies to stand until found unlawful by a Court of competent jurisdiction. If it intended anything else it could have said so as it did in the case of other licensing bodies.

If, upon any consideration of law or equity, it could be said that the Court has authority to reinstate a revoked license, the same consideration would lead to the conclusion that the dealer should be required to give bond for the protection of the public, since the Legislature must have thought

that he ought not to practice his business or profession at all during pendency of the Court action.

ASSIGNMENT II. ARGUMENT.

For reasons set forth under Assignment I, it appears that the Court erred in denying appellants' Motion to vacate its Suspending Order of December 18, 1939.

ASSIGNMENT III. ARGUMENT.

Assignment III is also disposed of by the facts and conclusions set forth under the discussion of Assignment I.

ARGUMENT. ASSIGNMENT IV.

GENERAL DEMURRER

Should appellants' Demurrer to respondent's Complaint have been sustained?

We answer in the affirmative, because all the well pleaded facts set forth in the said Complaint state no remedial grievance, but on the contrary they constitute a justification of the Order complained of. What constitutes well pleaded facts is tersely stated in the case of *Montana Amusements Company vs. Goldwyn*, 182 Pac. 121, as follows:

“A demurrer only admits facts well pleaded; it does not admit matters of inference and argument however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument is set forth in the bill, or a copy is annexed, against a construction required by its terms, nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the con-

tract can, therefore, exert no influence upon the mind of the Court in the disposition of the demurrer. *Dillon vs. Barnard*, 21 Wall 437; 22 L. Ed. 673."

"Courts will not read into a pleading a substantive allegation which has been omitted therefrom. Substance is just as essential under the Code as at common law. Where * * * attack is made upon a complaint for want of substantial allegations, the Court should indulge, as against the pleader, the presumption that he has stated his cause of action as strongly as he can, and construe it accordingly. *Conrad National Bank vs. G. N. Railway*, 24 Mont. 182, 61 Pac. 3."

With these principles in mind, we may now proceed to examine the Complaint paragraph by paragraph, to determine whether a cause of action is stated.

Paragraphs 1, 2 and 3 allege the capacity of the parties, and raise no issue.

Paragraph 4 sets forth an Order to the respondent to Show Cause before the Commission why its registration should not be cancelled for allegedly having engaged in a practice of the sale of securities, which is fraudulent and in violation of law, and allegedly having demonstrated its unworthiness to transact the business of a dealer in securities. Respondent complains that this is not "information in writing" or information concerning the nature of the wrongs committed. But in paragraphs 7 and 11 respondent alleges that it was furnished a Bill of Particulars and an Amended Bill of Particulars concerning said wrongs, thereby negating its allegation that it was not furnished information in writing, both in general and specific terms, concerning the alleged wrongs.

In paragraphs 8 and 11 respondent alleges that the Bill of Particulars and the amended Bill of Particulars "wholly failed to set forth facts sufficient to support or sustain in anywise the said information served upon plaintiff" as alleged in paragraph 4.

This is not an allegation of fact at all. It is the pleader's conclusion and cannot overcome the presumption that the Bill of Particulars was sufficient. *Inland Steel vs. N.L.R.B.* 105 Fed. 246. Thus we have not only the pleader's bare conclusions, but the unconscious statement of a fallacy as well. A parallel instance may be found in *Kansas Gas & Electric Co. vs. Comm.*, 122 Kan. 462, 251 Pac. 1097. In that case the aggrieved party brought an action in Court praying that an order of a commission granting a competing company a license, or certificate of convenience and necessity to operate in a described district, be set aside and enjoined, on the ground that the order was arbitrary, unlawful and unreasonable "for the reason that no evidence whatever was introduced before said commission which would justify or support its order or finding."

In support of its contention the "aggrieved party" outlined the proceedings had before the commission "and other more or less pertinent facts in detail", which on its face showed that proper issues had been raised before the commission followed by the introduction of competent evidence on the issues, and findings and an order.

The Commission, and the company receiving the license, demurred to the Complaint of the aggrieved party and the

demurrer was sustained. It was sustained for the following reasons:

1. That the allegations that the conduct of the Commission was arbitrary, unlawful and unreasonable was a mere conclusion of the pleader and a paralogism.

2. That the allegation in the Complaint to the effect that no evidence whatever was introduced to justify or support the Commission's order or finding was negated by an allegation in the Complaint stating that at the hearing before the Commission "evidence was introduced (by applicant) in support of its said petition, and by these plaintiffs (protestants) in opposition thereto, and said hearing was closed and the matter taken under advisement."

Reference to the Complaint of the aggrieved party in the case at bar discloses the following grievances:

1. That the Securities Act is unconstitutional.
2. That the charges made by the Commission against the aggrieved party were insufficient.
3. That the hearing was not conducted lawfully.
4. That the aggrieved party is innocent.

We purpose to show, as we go along, that each of these grievances is negated by the allegations of the Complaint, except the first, which will be shown to be untrue as a matter of law.

With respect to the sufficiency of the charges it is now too well settled to admit of argument that:

"The requirements of a complaint before the department charging unprofessional conduct, even

on direct attack, are not as exacting nor are the ingredients of the charged misconduct required to be as formally or as specifically stated as in a criminal or civil proceeding where the offense involved in the charge is the basis of the action." *State vs. Cragun*, 81 Utah, 457, 20 P (2nd) 247.

It is equally well established that "The Code provisions do not govern procedure before public quasi-judicial bodies, such as the Public Service Commission, the Industrial Commission, or the like." *McCarty vs. Public Service Commission*, 94 Utah, 304, 77 Pac. (2d) 331; *Meffert vs. Packer*, 66 Kan. 710, 72 Pac. 27, which later case was affirmed by the Supreme Court of the United States; 195 U.S. 625, 49 L. ed. 350, 25 Sup. Court Rep. 790.

Charges filed against a licensee with the Commission, or charges laid by the Commission itself, must be sufficient "to challenge the attention of the board, and notify" the licensee "of the nature of the charges made against him." *Meffert vs. Packer*, *supra*.

It may be conceded that a notice to a licensee to appear before the Commission "and show cause why your license should not be revoked," without more, would be insufficient, but it is not so clear that the following notice is insufficient:

"That the said Lauren W. Gibbs, Inc., . . . through one or more of its officers or directors has been guilty of a fraudulent act in connection with the sale of certain securities and has demonstrated its unworthiness to transact the business of a dealer in securities within the State of Utah."

This charge is in the language of our statute, and it is admittedly general. But, as we shall show hereafter, charges

sometimes can be made only in general language. As said in a note to the Meffert case found in 1 L.R.A. (N.S.) 811:

“The power exercised and the object of its exercise are in each case identical, viz: to exclude an incompetent or unworthy person from the practice of medicine.”

The purpose of sub-section 4 of Section 82-1-21 (Utah Statute) is the same. It provides that a dealer's license may be cancelled if he

“Has demonstrated his *unworthiness* to transact the business of dealer.” (*Italics supplied*) “In the very nature of the subject there must be lodged somewhere a personal discretion for determining who are unworthy.” 66 C.J. 63.

Under a Kansas statute, quoted below, the Medical Board proceeded as follows:

Kansas Statute:

“The board may refuse to grant a certificate to any person guilty of gross immorality or addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery; and may, after notice and hearing, revoke the license for like cause.” 1 L.R.A. (N.S.) 814.

Dr. Meffert was accused of being grossly immoral under this statute and his license was revoked. The Complaint served upon him contained a charge of gross immorality supported by exhibits as follows:

(1) A resolution passed by the Board of Education of the City of Emporia, discharging one of its female teachers for associating with him; (2) a statement “that he was a man notorious in Emporia for his immorality”; (3) a request signed by 18 practi-

ing physicians and surgeons of Emporia, stating that "we have grounds to believe that he is grossly immoral, and we know that he is guilty of other unprofessional conduct of such a degree that we will not meet in consultation or recognize him as a member of the medical profession"; (4) a request signed by the Pastors of 9 of the Churches of Emporia; (5) another signed by 38 business men of Emporia each stating that Meffert was grossly immoral, and asking that his license to practice be revoked; (6) an affidavit of O. M. Wilhite charging Meffert with numerous acts unprofessional, grossly immoral and criminal. Respecting this "information in writing" the Court said:

"These charges, while not as formal or specific as would be required in an information or an indictment, were ample to challenge the attention of the board, and to notify the plaintiff in error of the nature of the charges made against him." 1 L.R.A. (N.S.) 814.

Respecting the whole investigation the Court said:

"The provisions of the Act creating the board plainly indicate that such investigation was not intended to be carried on in observance of the technical rules adopted by courts of law . . . and to require of a board thus composed that its investigations be conducted in conformity to the technical rules of a common law court would at once disqualify it from making any investigation." 1 L. R. A. (N.S.) 816.

The same doctrine was announced by this court in the case of *State vs. Cragun*, 81 Utah, 457, 20 P. (2d) 247. While the attack made on the Order of Revocation in that case was collateral, and not direct, yet the court said:

"The requirements of a complaint before the department charging unprofessional conduct, even on direct attack, are not as exacting nor are the ingredi-

ents of the charged misconduct required to be as formally or as specifically stated as in a criminal or civil proceeding where the offense involved in the charge is the basis of the action."

But whether the notice, set forth in paragraph 4 of the Complaint in the case at bar, is held to be sufficient or not, the whole Complaint shows beyond doubt that the charge in that notice was fully amplified by a Bill of Particulars which was served 35 days before the hearing. The hearing began on September 27, 1939 (see paragraph 10 of the Complaint) and according to paragraph 8 of the Complaint the plaintiff was served with a Bill of Particulars on August 22, 1939. The Findings of Fact, which are made a part of the Complaint, show 18 specific findings of fact, based on documentary evidence, oral testimony and stipulations of the parties, and that a hearing was had beginning August 27th "and continued thereafter on set dates through the 21st day of October, 1939." So that it could not be supposed that the respondent was not informed of details of the wrongs charged against it or that it was without opportunity to prepare a defense. This is emphasized by the fact that respondent entered into stipulations at the hearing, which became a basis for the findings, as shown by the complaint.

Paragraph 5 sets forth the Commission's suspension Order and *paragraph 6* complains that said Order was illegal and void and failed to state facts sufficient to justify the suspension.

The Statute, Section 82-1-21, provides that:

"Pending the hearing the Commission shall have

power to order the suspension of such dealer's registration, and such order shall state the cause for such suspension."

The respondent was plainly informed that the reason for temporary suspension was that "one or more of its officers or directors has been guilty of a fraudulent act in the sale of certain securities and has demonstrated its unworthiness to transact the business of dealer in securities." It seems quite unnecessary to labor the point that this was a sufficient statement of cause for temporary suspension. Even Courts of Law in such cases go no further than to say, "and good cause appearing therefor."

Obviously the statement of cause in such order is not the complaint upon which the case is to be heard, and so no reason appears, in law or in equity, for detailing all the ultimate facts to be proved on hearing.

However, any question respecting the temporary suspension order had become moot when the case reached the District Court. The Show Cause Order had been amplified by a Bill of Particulars, the respondent had been given 35 days to prepare its defense, a full hearing was had at which respondent was represented by able Counsel, and a final Order of Cancellation had been made based upon an adequate set of Findings of Fact in writing, which superseded the Suspension Order, and left nothing to review but the final Order of Cancellation, all of which appears upon the face of the Complaint.

Paragraph 7 of the Complaint alleges that the Bill of Particulars served on respondent made appellants, the plain-

tiffs, prosecutors, and Court all combined in one tribunal and deprived respondent of due process of law under the State and Federal constitutions.

There is some ambiguity in this allegation. Just how the Bill of Particulars did this is not apparent. It has often been charged, in State and Federal actions, that administrative boards act as plaintiffs, prosecutors and court all in one, but probably no case can be found where a Bill of Particulars cast those roles upon them.

However that may be, administrative boards are not courts, and their acts cannot be tested by reference to judicial codes.—McCarty vs. Comm., supra.

This Court went on record in 1895 as to what constitutes "due process" in an administrative hearing and it has not changed its position since. At that early date there was a Utah statute which provided that:

"The board of medical examiners may refuse to issue the certificates provided for in this Act to individuals guilty of unprofessional or dishonorable conduct, the nature of which shall be stated in writing, and it may revoke such certificates for like causes, to be stated in writing." (Quoted from *People vs. Hasbrouck*, 11 Utah, 291 at page 300; 39 Pac. 918, at page 920.)

The statute made it a misdemeanor to practice medicine without a license. Notwithstanding this statute, one Dr. Hasbrouck did practice without a license for which he was haled before Commissioner Harmel Pratt, found guilty, and fined \$50.00

The case was appealed to the Third District Court and

was tried on an agreed statement of facts, where the defendant was again found guilty and fined \$50.00.

The case was then appealed to the Supreme Court. There the sufficiency of the Complaint seems to have been questioned but the Court disposed of the point by saying:

“Upon the question whether the Complaint is sufficient in form the authorities are somewhat in conflict; but it is not necessary to pass upon that question.”

But upon the question of whether the regulatory statute deprived the defendant of “due process,” the Court said:

“That legislation of the general character enacted in this statute—namely, legislation to protect the community against the effects of ignorance and incapacity, as well as deception and fraud, in the practice of medicine, by requiring a certain degree of learning and skill upon the part of the practitioner, ‘ascertained upon an examination by competent persons, or inferred from a certificate in the form of a diploma or license from an institution established for instruction on the subject,’—is a legitimate exercise of the police power of the state, and that depriving persons not so qualified of the right to practice is not obnoxious to the inhibition of the federal constitution against the deprivation of property without due process of law, are propositions which are thoroughly settled.” 11 Utah, 302; 39 Pac. 920.

At the same time this Court also set at rest the question of conferring judicial power upon an administrative body in the following language:

“The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judiciously in

the determination of facts in the performance of their official duties; and in so doing they do not exercise 'judicial power,' as that phrase is commonly used, and as it is used in the organic act, in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are no wise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government. It does not trench upon the judicial power." 11 Utah, 305; 39 Pac. 921.

In the leading case of *Meffert v. Packer*, supra, Counsel for the State of Kansas, cited the foregoing Utah case in support of this proposition:

"The element of good character is a pre-requisite to the right to practice medicine. That has been the fixed policy of the law makers of the country." 1 L. R. A. (N. S.) 814.

In the same leading case the Court cited said Utah case in support of this proposition:

"The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure, or tend to secure, them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end, it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning, upon which the community may confidently rely." 1 L. R. A. (N. S.) 815.

Such statutes are not unconstitutional because power is conferred upon administrative bodies in general terms.

“The rule obtaining in the majority of the jurisdictions which have passed on the question is that a statute providing that the license of a physician, surgeon or dentist may be revoked by the officers or board by which licenses are granted, is not rendered uncertain or otherwise invalid because the grounds for revocation are therein stated in general terms.”

Note, 5 A. L. R. 94

The case of Baker vs. Dept., 78 Utah, 424, 3 Pac. (2d) 1082 is cited as coming under this rule. Note, 79 A. L. R., 327.

In this connection we point out that the statute in question in *People vs. Hasbrouck*, 11 Utah, 300; 39 Pac. 920, provided for revocation under the general terms “unprofessional or dishonorable conduct,” notwithstanding which the statute was, by this Court, held to be valid.

Full discussion of “Permissible limits or delegation of legislative power” may be found in an extensive note in 79 L ed. 474. On the separation of governmental power and the delegation thereof, the basic rule for guidance is stated thus:

“The theory of the distribution of governmental functions is certainly as old as Aristotle (*Politics*, bk. 6, chap. 11, 1), and has been a controlling principle and accepted doctrine of political science since it was elaborated by Montesquieu in his *Spirit of Laws*. The belief in its importance was never stronger than during the latter part of the century, when our national Constitution was formed and the government established. See 1 B1. Com. 146, 154 (Hammond’s ed. pp. 362, 371); 2 Woolsey, *Pol. Sci.* p.

259; Maine, Pop. Gov. 219; Montesquieu, Spirit of Laws (Nugent's Trans.) bk. 11, chap. 6; The Federalist, Nos. 47, 48, 51. But the founders were too intensely practical to be controlled by any political theory, and, while they recognized the principle in constructing the framework of the government, they violated it in practice and so distributed the powers as to create a system of checks and balances. See Mason, Veto Power. The principle formulated by Montesquieu still lies at the base of most political organizations of the present day, but during the last century the tendency of political science has been to discard it in its extreme form, because, as said by Goodnow: 'It is incapable of accurate statement, and because it seems to be impossible to apply it with beneficial results in the formation of any concrete political organization. The flaw in Montesquieu's reasoning and in that of his followers was in the assumption that the expressions of the governmental power by different authorities were different powers.' Goodnow, Adm. Law, 20, 21. The recent tendency of legislatures and courts is commented on by Justice Brown in *State ex rel. Jonason vs. Crosby* (1904) 92 Minn. 176, 99 N. W. 636. The present attitude of the courts towards questions arising under this constitutional provision is well expressed by the supreme court of North Carolina: 'While . . . the executive, legislative, and supreme judicial powers of the government ought to be forever separate and distinct, it is also true that the science of government is a practical one. Therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of the occupancy of what seems to be a "common because of vicinage" bordering on the domains of each.' *Brown vs. Turner* (1874) 70 N. C. 93, 102. It is well to recognize

the fact that 'there are a multitude of governmental duties which have never been and cannot possibly be performed either by the legislature or by the governor, and which are certainly not prescribed by the Constitution to the judiciary.' State, Paul, Prosecutor, vs. Circuit Judge (1888) 50 N. J. L. 585, 611, 15 A. 272, 1 L. R. A. 86; Bluntschli, Theory of the State, chap. 7. The constitutional provision has no application to acts of this character. It applies only to the powers which, because of their nature, are assigned by the Constitution itself to one of the departments exclusively. Ross vs. Essex County (1903) 69 N. J. L. 291, 55 A. 310; Eckert vs. Perth Amboy & W. R. Co. (1904) 66 N. J. Eq. 437, 57 A. 438. The powers not thus assigned remain properly under the control of the legislature. As said by Black: 'There may be cases in which a particular power cannot be said to be either executive, legislative, or judicial; and if such a power is not by the Constitution unequivocally intrusted to either the executive or judicial departments of the government, the mode of its exercise and the agency must necessarily be determined by law; that is, by the legislature.' Black, Const. Law, 74. See also Cooley, Const. Lim. 2d ed. 42, 43; McClain, Const. Law in United States, Sec. 24; Bridges vs. Shallcross (1873) 6 W. Va. 562, Field vs. People (1839) 3 Ill. 79; People ex rel. Le Roy vs. Hurlbut (1871) 24 Mich. 44, 63, 9 Am. Rep. 103." 79 L. Ed. 477.

As a guide to determine whether an unlawful delegation of power has been made it is said:

"The long practice of the legislature in delegating certain powers, and the universal acceptance and acquiescence of the bar and the courts in the constitutionality of such delegation, will be given much weight by the court in determining the validity of such delegation. It was stated by the Supreme Court

that the fact that Congress had frequently, from the organization of the government to the present time, in numerous instances related by the court, conferred upon the President certain powers with reference to trade and commerce, was entitled to great weight in determining the question whether such a delegation was unconstitutional, and that such practical construction should not be overruled unless the legislation was clearly incompatible with the Constitution." 79 L. Ed. 487.

The Utah legislature has long indulged in the delegation of power to regulate professions, trades and callings, so that it may be said that a basis has been provided from which to conclude that Utah's administrative laws are constitutional.

The majority of the Courts, both State and Federal, entertain no doubt about the delegation of powers, so commonly made to boards and commissions, and so the conclusion follows that the constitutionality of "Blue Sky" laws is pretty generally set at rest. Such being the case it will be helpful to learn how such laws are interpreted. In the case of Guaranty Mortgage Co. vs. Wilcox, 62 Utah 184, 218 Pac. 133, 30 A. L. R. 1324, this Court assumed, without deciding, the constitutionality of the Utah "Blue Sky" law and respecting its interpretation said:

"In this connection we desire to add here that we are not unmindful of counsel's contention that, in view of the very drastic penalties that are imposed by law, and of the consequences that may be visited even upon innocent persons in case the provisions of the law are violated, the law should receive a strict construction. The penalties are indeed drastic and the consequences harsh, but that, standing alone, does not authorize us to except transactions that are clear-

ly within both the spirit and the letter of the law, as well as within the mischief the law was intended to meet. Nor have we overlooked the fact that a too liberal construction and application of the "Blue Sky Law" may defeat its own purpose, in that it may interfere with legitimate transactions, and may thus, through such undue interference, become harmful, rather than a shield to protect the unwary from fraudulent stock transactions, as well as from transactions in unsecured bonds, securities, etc., as is manifestly the purpose of the law. In view, however, that the validity of the law is not assailed, and the transaction here in question comes squarely within the terms of the law, we have no alternative save to enforce the law as written." 30 A. L. R. 1330.

Assuming now, as we think the Court must, that the provisions of the Securities Act, under consideration in the case at bar, are constitutional, it follows that they must be enforced as written. And as written, it appears that appellants in this case followed these provisions with a precision commendable for a mere administrative body which was not required to follow the refinements of technical judicial code proceedings.

In *paragraph 9* respondent complains that appellants failed to disclose who was the Securities Commission's informant and that it failed to confront respondent with such informant at the hearing, "contrary to law and to the due process clause of the Federal and State Constitutions."

It was not the duty of the Commission to disclose the name of any particular informant or to produce and confront the respondent with such informant at the hearing. Such a duty is consonant only with certain aspects of crimi-

nal actions. Even an attorney in a disbarment proceeding before a Court would not be entitled to be confronted by any *particular* witness or informant. This is clearly shown "In Re Burnette"—Kan.—85 Pac. 575.

In that case the Trial Court "excluded important depositions taken against the defendant, holding that the accused had the right to meet the witnesses face to face."

On appeal, the Supreme Court of Kansas said:

"Such is not the law (4 Cyc. 915)"—85 Pac. 577.

In addition to the authority given for this holding, the Court announced the following rules and principles:

"An 'action' is an ordinary proceeding by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense . . . Every remedy other than an action is a special proceeding . . . It is sufficient to say, with the Legislature, that the remedy of disbarment is a special proceeding." 85 Pac. 576-7.

The Court further said:

"It leads to confusion to call the proceeding criminal. This confusion is nowise clarified by using the hybrid expression 'quasi-criminal.' It involves an ancient fallacy to give a thing a name, and then attempt to prove its attributes by that name." 85 Pac. 576.

From the foregoing it appears clear that respondent's grievance about not being confronted with a complaining witness, or not having such witness made known, arises from the belief that the special proceeding before the Securities Commission was a criminal or "quasi-criminal" action. This

would not be so even if the charges laid for cancellation of respondent's license had involved crime, as stated by the Kansas Court:

"Proceedings to disbar an attorney on account of criminal conduct connected with the practice of his profession are wholly independent of any prosecution for crime. The proceeding to disbar is not for punishment of the derelict attorney, but for the protection of the courts, the legal profession, and the administration of justice generally." 85 Pac. 576.

The purpose for the control of the sale of securities is stated to be, by the Supreme Court of Utah in the quotations from *Guaranty Mortgage Co. vs. Wilcox*, supra, "to protect the unwary from fraudulent stock transactions, as well as from transactions in unsecured bonds, securities, etc."

To protect the public in such transactions, the Securities Commission has the right to purge its rolls of persons guilty of misconduct even though it involves disgrace and destroys a means of making a living. In doing so the Commission would in nowise be engaged in criminal prosecution. *In Re Burnette*, 85 Pac. 576.

Paragraphs 10 and 12 involve no controversial matter, and *paragraph 11* is disposed of above.

Paragraph 12a we shall quote in full. It reads:

"That the defendants are wholly without jurisdiction to enter their final order of cancellation dated November 18, 1939, as aforesaid, or at all, for the reason and upon the grounds that all of the transactions therein mentioned pertain to securities expressly exempted by law, to-wit, municipal bonds, and contrary to and in violation of Section 29, Article 6 of the Constitution of the State of Utah, and constitute

an isolated transaction expressly exempted from the defendants' jurisdiction by law."

These allegations are unintelligible because it cannot be told therefrom, first, what said transactions are exempt from, second, what is contrary to and in violation of Article 6, Section 29 of the Constitution, and third, how "all of the transactions therein mentioned" can constitute an "isolated transaction."

If by the first is meant to be said that municipal bonds are exempt from registration, we admit it. If it is meant to be said that a registered dealer is exempt from regulation in transactions involving municipal bonds, we cite Sections 82-1-15, 21, 24 and 28 Revised Statutes of Utah, 1933, as a complete refutation of the allegation. These sections provide as follows:

Section 15: "No dealer or salesman shall engage in business in this State as such dealer or salesman, or sell any securities, including securities exempted in Section 82-1-5, except in transactions exempt under Section 82-1-6, unless he has been registered as a dealer or salesman in the office of the Commission pursuant to the provisions of this section."

Section 21: "Registration under Sections 82-1-15 and 82-1-17 may be refused, or any registration granted may be canceled, by the Commission, if after a reasonable notice and a hearing the Commission determines that such applicant or registrant so registered:

- (1) Has violated any provision of this chapter or any regulation made hereunder; or,
- (2) Has made a material false statement in the application for registration; or,

(3) Has been guilty of a fraudulent act in connection with any sale of securities, or has been or is engaged, or is about to engage, in making fictitious or pretended sales or purchases of any securities, or has been or is engaged, or is about to engage, in any practice or sale of securities which is fraudulent or in violation of law; or,

(4) Has demonstrated his unworthiness to transact the business of dealer, salesman or agent; or,

(5) Is insolvent.

Pending the hearing the Commission shall have the power to order the suspension of such dealer's, salesman's or agent's registration, and such order shall state the cause for such suspension.

In the event the Commission determines to refuse or to cancel a registration as hereinabove provided, it shall enter a final order to that effect with its findings on the register of dealers and salesmen.

It shall be sufficient cause for refusal or cancellation of registration in case of a partnership, or of a corporation or unincorporated association, if any member of the partnership, or any officer or director of the corporation or association, has been guilty of any act or omission which would be cause for refusing or canceling the registration of an individual dealer or salesman."

Section 24: "Whenever in the issuance, sale, promotion, negotiation, advertisement or distribution of any securities within this State, including any security exempted under the provisions of Section 82-1-5, or in any transaction exempted under the provisions of Section 82-1-6, any person, as defined in this chapter, shall have employed or employs or is about to employ any device, scheme or artifice to defraud," etc. . . . "the Commission may investigate, and whenever it shall believe from evidence satisfactory to it that any such person has engaged in . . .

it may in addition to any other remedies bring an action . . .” (Italics supplied.)

Section 28 makes false advertising a felony which the Commission could, under the terms of the Act, make a ground for revocation without instituting a criminal proceeding.

If by the second it is meant to be said that the Commission may not interfere with municipal affairs we point out that there is no allegation in the whole Complaint charging that the Commission has so interfered. Nothing but the conduct of the dealer is in question.

If by the third it is meant to be said that all the transactions detailed in the Findings of Fact constitute an isolated transaction, we call attention to the fact that respondent alleges more than an isolated transaction by alleging “all of the transactions” mentioned in the final Order. And further, upon reading the Findings, which are part of the Complaint, a multitude of transactions appear. Here, again, we have the paralogism described in *Kansas Gas vs. Comm.*, supra.

The amendment to the Complaint, added (as 12c), assails Title 82, Chap. 1, Section 21, and particularly sub-section 4 thereof, as in violation of the due process clauses of the State and Federal Constitutions and as an unwarranted delegation of legislative powers. We have given attention to “due process” and “delegation” features above, and, therefore, shall look here at sub-section 4 only, since it is particularly designated.

This sub-section provides that a dealer’s license may be cancelled if he “has demonstrated his unworthiness to trans-

act the business of dealer, salesman or agent." Similiar provisions may be found in many statutes regulating professions, trades and callings, and the Courts have found no difficulty in finding them constitutional. We call attention to the note appended to Meffert vs. Packer, *supra*, wherein the annotator says:

"The power exercised and the object of its exercise are in each case identical, viz: to exclude an incompetent or unworthy person from the practice of medicine." Note to Meffert vs. Packer, *supra*, 1 L. R. A. (N. S.) 811.

Delegating to a Commission the duty of weeding out the *unworthy* without defining the term is not uncommon. Upon this subject we read from 66 C. J. 63 as follows:

"As used in statute, what qualities, or lack of qualities, should render one 'unworthy' would be difficult for legislative enumeration; they are so numerous, and their combinations so varied in different individuals, that a statute which undertakes to be more specific would either be incomplete, or so varied, or so inflexible as to defeat the ends sought. In the very nature of the subject there must be lodged somewhere a personal discretion for determining who are 'unworthy'."

Courts have defined the term "worthy" so that it is well understood by all. See in *Re Hastings Estate*, (Nev.) 160 Pac. 782; *Alsup vs. State*, 238 S. W. 667; *Marrs vs. Matthews* (Tex.) 270 S. W. 586.

The terms "worthy" and "unworthy" are no less capable of definite definition than "moral" and "immoral," "honorable" and "dishonorable," "competent" and "incom-

petent," "careful" and "careless," and all of these words have been used and upheld in statutes delegating to Commissions the duty to find their presence or absence in determining the qualifications of those seeking, "or having licenses," to practice in various professions, trades, and callings, and that without any definition to guide the Commissions other than the definition generally recognized by the Courts.

"To particularize, a State may delegate not only the powers of determining an applicant's intellectual fitness and educational qualifications, but also his moral fitness; or the power may be broad enough to cover the general fitness of the applicant. In case of an applicant's grievance because of some act of such a board or because of its failure to act, the remedy is not against the delegation of power but against its proper exercise, and is available by means of a proper proceeding against the board." *Yoshizawa vs. Hewitt*, 52 Fed. (2nd) 411; 79 A. L. R. 317 at 320 and 322.

Paragraph 12b alleges a strange and unusual grievance, to-wit, the Commission made a transcript of its proceedings, but in spite of frequent, formal demands it refused to give plaintiff a full copy thereof.

The Commission is not required by law to make a transcript of proceedings. Any notes it made of evidence received would be the same as notes on evidence made by a judge on the bench. If the judge had his notes transcribed, it is hardly thinkable that a party to the action could demand, as a matter of right, a full copy of his transcript, or any at all.

Let it be assumed that the Commission was required by law to make a transcript, still a party would not be en-

titled to a copy unless he tendered to the Commission the cost of making one. There is no allegation that Respondent tendered such costs for a transcript, so in any event its grievance is without merit.

Paragraph 13 alleges "that the plaintiff has been informed . . . that the Commission had before it at the time of its determination a complete transcript of the evidence adduced by the Commission but had not transcribed and did not have before it in transcribed form the evidence adduced by plaintiff."

Respondent seems to think that it has a right to know by what process of reasoning or action the Commission arrived at its decision, but this is not the law.

"The policy against requiring public disclosure by judges or jurors of their reasoning and actions in arriving at a decision or verdict applies as well to the judicial function of an administrative board." *Botany Worsted Mills vs. N. L. R. B.* 106 Fed. (2d) 263, Syllabus 1.

Paragraphs 14 to 18 inc., allege the making and serving of Findings of Fact and Conclusions of Law and assail both as contrary to law. Neither, it is complained, is supported by the issues raised by the Order to Show Cause, the Order of Suspension, the Bill of Particulars, or the Amended Bill of Particulars, and both are outside the issue raised therein.

In answer to this, we point out again that neither the Bill of Particulars nor the Amended Bill of Particulars is set forth in the Complaint although they were served on Respondent and, therefore, were in its possession. Absent

their appearance in the Complaint, or an allegation of a material fact wherein they were defective, it must be presumed that they were sufficient for all purposes. The presumption that the acts of the board were regular must be indulged. *Inland Steel vs. N. L. R. B.*, 105 Fed. (2d) 246.

But the grievance is not good as against what actually does appear in the Complaint. To illustrate: The Findings show that the respondent agreed "to use their best efforts to extend or refund" certain water and electric light bonds of Mount Pleasant City, "or any part thereof." Finding 3.

Some of the things respondent did after such agreement follow:

(a) It proceeded "to provide the necessary refunding bond blanks, together with all necessary proceedings by Mount Pleasant City in the issuance of said bonds, including an Attorney's opinion approving the legality of said refunding bonds." Finding 5.

(b) Among the necessary proceedings prepared by respondent, as found above, was a resolution which was passed by said City's Council as follows:

"Whereas the owners of said bonds have offered to accept refunding bonds of said Mount Pleasant City in exchange for their present holding of \$25,000 Mount Pleasant bonds and accept said refunding bonds at a lower rate of interest." Finding 6.

(c) The owners of the outstanding bonds had not agreed to accept refunding bonds at a lower rate of interest,

or at all, but on the contrary respondent had bought the refunding bonds under an exchange agreement. Finding 7.

(d) Instead of exchanging the refunding bonds for original outstanding bonds respondent got possession of the refunding bonds and sold \$22,000, par value, of them to the State Land Board of Utah for \$28,485.22, and this without taking up a single outstanding original bond, and without accounting, or delivering, to Mount Pleasant City the \$28,485.22 received. Findings 8 and 18.

(e) Respondent pursued a similar course with respect to \$15,000 worth of the City's electric light bonds. Finding 9.

Without detailing, specifically, the remainder of the 18 Findings, suffice it to say that they show a multiplicity of transactions, and not an isolated transaction, and a course of dealing that fully supports the conclusions that the respondent misled and engineered the City into an unlawful position; that it was guilty of misrepresentations, that it jeopardized the taxpayers of the City and the interests of two departments of State and the interests of the holders of the original outstanding bonds, and generally conducted itself in an unworthy manner.

Paragraph 19 of the Complaint raises no issue.

Paragraph 20 alleges a conclusion of the pleader that respondent was entitled to have a full and complete transcript of proceedings before the Commission sent down for review by the Court to the end that the final order of the Commission might be set aside and revoked. The Commission is not required to make a full record of its proceedings

and therefore it cannot be required to make a full transcript thereof to be used by the Court. This point will receive further attention under our argument on special demurrer, *infra*.

Paragraph 21 alleges that "plaintiff herein has committed no act in the sale, purchase, or exchange of securities, either of commission or omission, which in anywise justifies or sustains the final Order of Cancellation."

The Commission found otherwise, and there is no allegation of lack of evidence, on this point to sustain the finding.

Paragraph 22 alleges that the Attorney General conceded that there was no charge of actual fraud and no evidence of actual fraud, but "at most it might be considered constructive fraud," and that he admitted the evidence adduced shows no fraud or intent to defraud.

This allegation raises no substantial issue. The Attorney General sat as a member of the Commission, and any remarks made by him would be no more binding on the Commission than the remarks of a single judge, in a three judge trial court, would be upon such court. But whatever their effect the Attorney General's remarks did not exclude the idea of fraud. Constructive fraud may be as damning as actual fraud.

Paragraph 23, the last paragraph in the complaint, alleges that "municipal bonds are expressly exempted under the State Securities Act and can be issued, sold or otherwise dealt in without registration or license as a dealer first had

and obtained.” We have discussed a similiar ambiguous allegation under paragraph 12a, but will repeat part of the discussion here.

If the foregoing allegation is divided into its component clauses, it would read as follows:

- (a) “Municipal bonds are expressly exempted” by law.
- (b) “Municipal bonds can be issued, sold or otherwise dealt in without registration or license as a dealer first had and obtained.”

Thus divided the meaninglessness of the allegation appears. If respondent meant to allege that municipal bonds are exempt from registration, we admit it, but if he meant to allege that a dealer in such bonds may go unregistered and unregulated, we appeal to the Act for complete refutation.

Having examined every allegation in the Complaint, well pleaded or otherwise, and having found no grievance stated that entitles respondent to any relief, we submit, under Assignment of Error IV, the Court should have sustained appellants’ General Demurrer.

ARGUMENT ASSIGNMENT IV SPECIAL DEMURRER

Appellants, by Special Demurrer, sought to compel amendment of the Complaint to make it conform to some procedure consonant with Sec. 82-1-41, Revised Statutes,

1933. We believe that appellants were entitled to as much, and we further believe that if the statute has any meaning at all, its provisions must be complied with.

Certainly courts may not depart from the provisions of a statute conferring power upon them.

“The extent and nature of a power depend upon the terms in which it is conferred, and it will not be enlarged because exercised by courts clothed with general jurisdiction; and a judgment by a tribunal without authority, or which exceeds or lies beyond its authority, is necessarily void.” *Hampshire vs. Woolley*, 72 Utah, 106, 269 Pac. 135 at 138.

It is our contention that although the Third Judicial District Court had jurisdiction over the subject matter and parties in the case, it was proceeding in an unauthorized manner, from which course it should have desisted, particularly, when so advised.

“Person’s rights and relief to which he may be entitled are based on and measured by established rules of law and procedure, and though court may have jurisdiction over subject matter and parties, judgment or decree may be void, because procedure employed by court was such that court was not authorized to exert its power in that way.” *Hampshire vs. Woolley*, supra, Syl. 1.

The language of 82-1-41, conferring power upon the court, sets forth, in terms too plain to permit of construction, the right of a party, affected and aggrieved by an order of the Securities Commission to state his grievance and right to complain, in an action instituted in the court. Of necessity his grievance would be confined to the wrongful, unlawful,

or oppressive manner in which the order was arrived at or made. His grievance could not be, for instance, that he just did not like it, and would prefer to have the court's judgment in the matter, because Sec. 82-1-41 confers no power upon the court to substitute its judgment for that of the Commission.

“A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted.” Ry. Comm. vs. Rowan, 84 L. ed. 1373 (1939).

Under 82-1-41 the court “may affirm, set aside or modify the order complained of,” but it is given no authority to set up its own independent judgment.

“It shall determine the issues on both questions of law and fact.”

This can mean no other than the issues of law and fact raised by the complaint of the aggrieved party and the answer of the Commission, and not the issues of fact raised by the Show Cause Order and charges of the Commission. There is a clear and a wide distinction between the two situations which we shall illustrate later.

Sections 82-1-41, 79-1-36, and 43-2-17, Revised Statutes of Utah, 1933, are alike and they provide the manner in which practically all licensees in the professions, trades and callings in the State may resort to the Courts to air their grievances against boards and commissions. None of these sections have been construed by this Court and hence the importance of this appeal.

It is our contention that these sections are reasonably clear as to the procedure intended to be followed in such cases. It is safe to assume that the Legislature intended to establish a simple, direct, and effective "resort" to the courts and not some flock-shot, hybrid, or ambiguous procedure.

There is nothing therein to indicate that a trial de novo, as in an appeal from a Justice's Court, was intended. (See *Baker vs. Dept.*, 78 Utah, 424, 3 Pac. (2d) 1082). If such an action was intended, then respondent failed to follow the procedure as defined by the Court in the case just cited.

Likewise, it would seem that a "trial de novo on the record" was not intended, because the Commission is not required to keep a record of testimony taken at its hearings.

The procedure most conformable to the foregoing sections is an action "in the nature of a suit to set aside the action of a public service body" as suggested by this Court in *D. & R. G. W. Ry. Co. vs. Comm.*, 98 Utah, 431; 100 Pac. (2d) 552.

The State of Kansas has a statute almost identical with our Sections 82-1-41, 79-1-36, and 43-2-17. The Supreme Court of Kansas has held that the procedure indicated by such statute is in the nature of an action to set aside the action of a public service body. *Kansas Gas & E. Co. vs. Comm.*, 122 Kan. 462, 251 Pac. 1097; *Atchison, etc. Ry. Co. vs. Comm.*, 130 Kan. 777, 288 Pac. 755. This Court, in *D. & R. G. W. Ry. Co., vs. Comm.*, supra, refused to apply this construction to Sec. 9 of Chap. 35, Laws of Utah, 1935, because it was different from the Kansas statute. No

substantial difference, however, exists between the Kansas statute and our sections 82-1-41, 79-1-36, and 43-2-17.

The pertinent part of the Kansas Statute reads as follows:

“ . . . within thirty days from the making of such order, commence an action in a court of competent jurisdiction, against the public utilities commission as defendant, to vacate and set aside any such order, finding or decision of the public utilities commission . . . and such action shall be tried and determined as other civil actions.”

The pertinent part of the Utah statute reads:

“ . . . within thirty days after notice of such order, institute an action in the district court . . . setting out his grievance and right to complain. In its answer the commission may set out any matter in justification; and the court shall determine the issues on both questions of law and fact, and may affirm, set aside or modify the order complained of.”

The Kansas statute requires a new complaint in the court by the aggrieved party, an answer by the commission and a trial on the issues of both law and fact made by such complaint and answer, and not a trial on the issues raised before the Commission. (See *Kansas Gas etc. vs. Comm.*, *supra.*)

In a later Kansas case, *Atchison T. & S. F. Ry. Co. vs. Comm.*, *supra*, the aggrieved party complained that the Commission had granted a license, or certificate of convenience and necessity, to a transportation company to operate a motor bus line, without sufficient evidence to justify the granting of such certificate. In support of the Complaint a complete transcript of all the evidence received by the

Commission was attached to the Complaint, and a claim and request for a judicial review of the law and the facts was made, because of insufficiency of facts amounting to "absolutely no evidence to support the order of the commission," as shown by the transcript.

The Commission filed an Answer, and the Court, over the objection of the plaintiff, refused to weigh the evidence in the transcript, but proceeded to try the case on the issues raised by the complaint and answer filed in the Court, and not the issues raised by the complaint and answer before the Commission.

Among the rights tried and issues raised were:

- (a) May the Commission make an order based on absolutely no evidence? This was resolved in the negative.
- (b) Were letters and opinions competent evidence before the Commission? On this point the Court quoted another Kansas decision which held that "so long as a judicial hearing de novo is provided, it is not very important just what sort of evidence is received by the Commission."
- (c) Was there any evidence before the Commission which would support its Order?

Answer: Yes.

- (d) May a court substitute its judgment for that of a commission based on competent evidence?
Answer: "Time and time again the Court in consonance with the prevailing attitude of courts throughout the country, has declared that it will not substitute its judgment for that of some administrative tribunal created by legislative authority for dealing with matters of non-judicial character."

The Utah statute specifically provides how far a court may go in this respect. It may affirm. It may reverse, if the aggrieved party's "rights involved in the hearing before the Commission" have been violated. And it may modify the Commission's order for like reasons. But it may not set up its own judgment as to what relief the competent evidence received by the Commission entitles the aggrieved party.

Such seems to be clear legislative intent. Our statute does not say, nor does it reasonably imply, that courts shall have the ultimate authority to determine who shall be permitted to practice the business of selling securities, or practice any other calling, trade, or profession, because the authority is given, in terms, to a commission by Section 82-1-41, and like statutes.

It may, however, be readily inferred therefrom that the aggrieved party may have his day in Court to test the validity of the law under which the Commission operates, to insure "due process" in its hearings, to prevent captiousness and oppression, and all like matters, but the language of the statute is too plain to question that the legislature intended the Commission, and not the Courts, to administer the law and to pass upon the fitness and conduct of licensees.

In the case at bar, the aggrieved party was largely right in the course it pursued, but it got mixed up. It was permissible, for instance, to complain that the Commission's Order was based on a void statute; that its Findings were not within the issues, and like matters.

Respondent might, also, have complained that the Commission's Order was not supported by any evidence at all, if it thought it could prove the allegation, but it did not. Yet it demanded that a full and complete transcript of the evidence be filed with the Court, for no reason at all, that can be imagined, other than it wished the Court to substitute its judgment, for that of the Commission, on the weight of the evidence.

There is not even a charge in the Complaint that the evidence received by the Commission was insufficient to support its Order. Such being the case, the absurdity of requiring a transcript of the evidence is starkly apparent.

In the Atchison case, *supra*, the plaintiff produced a full and complete transcript of the evidence, to prove its allegation that such evidence did not support the findings and order. The Court refused to weigh the evidence or to make any conclusion of its own as to what order should have been made. That function, it held, belonged to the Commission.

There is very little of the judicial function involved in granting or withholding of licenses to practice a profession, trade or calling. It is largely an administrative matter. In the utility field, boards are authorized to issue licenses to operate, and in addition they are authorized to regulate service and rates. "In the exercise of the latter powers, the lawful scope of the Commission's orders is hedged about by statutory and unconstitutional guarantees and inhibitions. In granting or withholding of certificates of convenience, no

justiciable questions touching confiscation of property or impairment of vested rights can well arise." Kan. Gas etc. vs. Comms., supra.

If, then, it may be said that the Kansas "resort to courts statute," supra, contemplates only a testing of the lawfulness of the Commission's procedure where only the licensing feature is involved, then of necessity it must be concluded that the Utah statutes, supra, contemplate no more because nothing more than mere licensing is involved in the Utah statutes.

In the Kansas case last quoted above the Court said:

"In determining whether such certificate of convenience (license) should be granted, the public convenience ought to be the Commission's primary concern, . . . the desires and solicitations of the applicant (are) a relatively minor consideration." (Bracketed words added.) Quoted from 251 Pac. 1099.

From the foregoing it is easy to see why a Kansas Court might open the doors a little wider to new evidence under its statute than a Utah Court would under its similar statutes. The Kansas statute covers the utility field while the Utah statutes cover pure licensing in the fields of professional, trade and business callings. But even a Kansas Court, where nothing but the license itself is involved, as in the Kansas Gas case, supra, hews to the line and tests only the lawfulness of the Commission's orders.

We are unable to find any substantial difference between the Kansas and Utah laws in this respect. It might

be contended that a difference exists in the following two clauses of the statutes; Kansas: "Such action shall be tried and determined as other civil actions." Utah: "The Court shall determine the issues on both questions of law and fact, and may affirm, set aside, or modify the order complained of."

We see no difference in results that may be obtained under either of these clauses. Obviously in a trial to set aside a judgment, resulting in a refusal by the Court, such refusal would be the equivalent of affirming the Commission's Order. If good cause appeared therefor, the Court could modify the Order, pursuant to its equity powers.

A good example of a case for modification may be found in *Lees vs. Freeman*, 19 Utah, 481, 57 Pac. 411. There the action was against I. E. and J. J. Freeman. Upon conclusion of the trial the Court ordered judgment against J. J. Freeman in the sum of \$456.71 and for I. E. Freeman no cause of action. Thereafter, judgment was entered against both of the defendants for \$485.59, for no reason that appeared in the record. I. E. Freeman filed a petition to modify the judgment, but it was filed after the statutory time. Notwithstanding this, the Court, after hearing, modified the judgment. From the modifying order plaintiff appealed to this Court where it was held that the lower Court had lost jurisdiction under the statute to modify, but it took occasion to say:

"In a case such as presented here, a bill in equity is the proper remedy by which all the parties may be

brought before the Court, and where issues may be regularly joined and tried on all the facts connected with the transaction."

In cases like the one at bar, a plaintiff has the same remedy afforded by statute, whether it be in Kansas or Utah. The merit of the remedy thus provided against unlawful, fraudulent, or oppressive acts of licensing agencies is that it is simple, direct, and adequate. Any other construction of the statute would lead to a more complicated and costly procedure, which is persuasive evidence that the legislature intended that the language of the statute should be understood in its usual and normal sense, to say nothing of the effect of dropping Sec. 19 L. 25.

In construing the numerous and varied "resort" statutes, Courts all over the country have often referred to proceedings thereunder as trial de novo. This has led to some confusion. But a careful examination of these cases shows that there may be trials de novo in appeal courts as if the case originated there; trials "de novo on the record," as in equity appeals (see D. & R. G. W. Ry., supra), and trials de novo on the rights involved in a hearing or trial. It is this latter type of trial that is contemplated by Sec. 82-1-41, supra. It is described by the Supreme Court of Kansas as follows:

"It is not an appeal, neither is it one for review of the former hearing, but it is an application to a judicial tribunal for a trial de novo of the rights involved in the hearing before the Commission."

ASSIGNMENT V. SUMMARY

It is our firm belief that the statutes, authorities and reasoning presented above clearly establish the following propositions:

1. That Sec. 82-1-41 Revised Statutes of Utah, 1933, provides for a trial de novo of the rights involved in the hearing before the Securities Commission, and not a re-trial of the issues raised at that hearing, or a judicial review thereof on the record as made, or as supplemented by a Court.

2. That respondent's Complaint to the Court does not show that any of its rights were infringed or violated at said hearing, and, therefore, does not state a case for relief.

3. That the Court had no jurisdiction to order a transcript for purposes of review, or to disturb the Order of the Commission without a hearing, on notice, first had.

4. That the Court erred in ordering a transcript; in annulling the Commission's final Order; in refusing to grant appellants' Motion to vacate its own preliminary Order; in over-ruling appellants' Demurrer; and finally entering judgment, setting aside and holding for naught the final Cancellation Order of the Securities Commission.

By reason of which appellants pray for a complete reversal of the Orders and Judgment of the Court below.

Respectfully submitted,

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of the State of Utah.

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