

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
Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Moyle, Richards & McKay; Attorneys for Plaintiff and Respondent;

Recommended Citation

Brief of Respondent, *Gibbs v. Monson et al*, No. 6331 (Utah Supreme Court, 1941).
https://digitalcommons.law.byu.edu/uofu_sc1/768

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

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 SECURITIES COMMISSION OF THE STATE OF UTAH,

Defendants and Appellants.

No. 6331

BRIEF OF RESPONDENT

FILED

MOYLE, RICHARDS & McKAY

Attorneys for Plaintiff and Respondent.

INDEX

ARGUMENT

Page

I. The Plaintiff's complaint stated a cause of action.....	6
A. The complaint alleged that the commission were without jurisdiction to enter their order of cancellation because Sec. 82-1-21, Subsection (4) is contrary to law and is unconstitutional.....	7
B. The complaint alleged that the commission were without jurisdiction to enter their order of cancellation because the transaction on which the order is based is exempted by statute from the jurisdiction of the commission.....	26
C. The complaint alleged that the procedure before the Securities Commission was not a fair trial and deprived the plaintiff of due process of law.....	28
D. The complaint alleged a total lack of justification for the commission's order in plaintiff's acts prior to the hearing and as adduced at the hearing and in the whole procedure.....	41
II. The court below and the plaintiff followed the proper and statutory procedure.....	43

ASSIGNMENTS OF ERROR, DISCUSSION OF

I, II, III	43-50
IV. General Demurrer	6-43
IV. Special Demurrer	43-50
CONCLUSION	50
STATEMENT OF THE CASE.....	2

AUTHORITIES CITED

CASES	Page
Abrams v. Daugherty, 60 Cal. App. 297, 212 Pac. 942.....	31
Alsup v. State, 238 S. W. 667.....	24
Baker v. Department of Registration, 78 Utah 424, 3 Pac. (2d) 1082	38, 49
Burnette, In Re. 85 Pac. 575, 73 Kan. 609.....	37
Chicagoland Agencies v. Palmer, 364 Ill. 13, 2 N. E. (2d) 910..	13
Commonwealth v. Maletsky, 203 Mass. 241, 89 N. E. 245.....	21
D. & R.G.W.R. Co. v. Public Service Commission, 98 Utah 431, 100 Pac. (2d) 552.....	45
De La Ysla v. Publix Theatres Corporation, 82 Utah 528, 26 Pac. (2d) 818.....	6
Dymment v. Board of Medical Examiners, 57 Cal. App. 260, 207 Pac. 409.....	29
Eureka City v. Wilson, 15 Utah 67, 48 Pac. 150.....	22
Hartung's Estate, Re, (Nev.) 160 Pac. 782.....	23
Hastings Estate, Re (Nev.) 160 Pac. 782.....	23
Hewitt v. Board of Medical Examiners of the State, 148 Cal. 590, 84 Pac. 39, 3 L.R.A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cases 750.....	20
Klein v. Barry, 182 Wis. 255, 196 N. W. 457.....	16
Malloy v. City of Chicago, 365 Ill. 604, 7 N. E. (2) 320.....	15
Marrs v. Matthews, 270 S. W. 586, (Texas).....	24
McCarty v. Public Service Commission, 94 Utah 304, 77 Pac. (2d) 331	38
McGrew v. Industrial Commission, 96 Utah 203, 85 Pac. (2d) 608	28
Meffert v. Packer, 1 L.R.A. (N. S.) 811, 66 Kan. 710, 72 Pac. 247	23
Moormeister v. Golding, 84 Utah 324, 27 Pac. (2d) 447.....	39, 45, 49
Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. 446.....	11
People v. Federal Surety Company, 336 Ill. 472, 168 N. E. 401....	17
People v. Hasbrouck, 11 Utah 291, 39 Pac. 918.....	38

AUTHORITIES CITED

CASES

	Page
People v. J. O. Beckman & Co., 347 Ill. 92, 179 N. E. 435.....	18
Schechter v. U. S., 295 U. S. 495, 79 L. Ed. 1570.....	12
Smith, In Re, 73 Kan. 743, 85 Pac. 584.....	37
State v. Becker, 34 S. W. (2d) 27 (Missouri).....	33, 35
State v. Cragun, 81 Utah 457, 20 Pac. (2d) 247.....	37
State v. Great Northern Railway, 111 N. W. 289.....	19
State of Washington v. Superior Court, 113 Wash. 296, 193 Pac. 845	22
Sweet v. Salt Lake City, 43 Utah 306, 134 Pac. 1167.....	6, 7
Tite v. State Tax Commission, 89 Utah 404, 57 Pac. (2d) 734....	9
Watts v. Greenwood, 49 Utah 118, 162 Pac. 72.....	49
West Cache Sugar Company vs. Hendrickson, 56 Utah 327, 190 Pac. 946.....	49
Wilcox, In Re, 90 Kan. 646, 135 Pac. 995.....	37
Wright v. Intermountain Motor Car Company, 53 Utah 176, 177 Pac. 237.....	6

CONSTITUTION OF UTAH

Article V	3, 8
Article VI, Sec. 1.....	3, 9
Article VI, Sec 29.....	3

STATUTES

Laws of Utah, 1935, Chapter 65, Sec. 9.....	45
Revised Statutes of Utah, 1933	
Sec. 20-7-25	48
Title 82	5
Sec. 82-1-5	26
Sec. 82-1-6	26
Sec. 82-1-15	27
Sec. 82-1-21.....	2, 3, 7, 8, 9, 26, 33, 35, 51
Sec. 82-1-41	2, 44, 45
Sec. 93-1-5	9

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 SECURITIES COMMISSION OF THE STATE OF UTAH,

Defendants and Appellants.

No. 6331

BRIEF OF RESPONDENT

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

STATEMENT OF THE CASE

On November 18, 1939, the Securities Commission revoked the registration of respondent as a dealer in securities, claiming to act under Sec. 82-1-21, Revised Statutes of Utah, 1933.

On December 18, 1939, the respondent instituted an action in the Third Judicial District Court of Salt Lake County, pursuant to Sec. 82-1-41, Revised Statutes of Utah, 1933. The complaint alleged, in addition to the formal allegations of jurisdiction:

1. That the Utah Securities Commission issued an order to show cause which is set forth in the complaint (Abs. 2) and which stated that an information in writing had been filed with the Securities Commission but that plaintiff was not furnished the "information in writing" or any portion thereof or any information concerning the nature thereof.

2. That a suspension order set forth in the complaint (Abs. 3) failed to state facts sustaining the suspension order and that the suspension order was issued contrary to law.

3. That a bill of particulars was furnished to the plaintiff wherein and whereby the defendants became the complainants, the prosecutors, and the court, all combined in one tribunal, in violation of the due process clause of the State and Federal constitutions.

4. That the so-called bill of particulars and the so-called amended bill of particulars failed to set forth facts sufficient to support the order to show cause and failed to set forth facts sufficient to constitute a cause of action, and failed to state facts sufficient to constitute a cause for the suspension of the plaintiff and to constitute fraud or any violation of law. (Abs. 5, 7.)

5. That at no time was the plaintiff informed as to the defendants' informant nor was he confronted with said informant or complaining witness. (Abs. 5.)

6. That the defendants were without jurisdiction to enter their final order of cancellation of November 18, 1939, because all of the transactions therein mentioned pertained to securities expressly exempted by law, to-wit, municipal bonds, and contrary to and in violation of Sec. 29, Art. 6 of the Constitution of the State of Utah, and constitute an isolated transaction expressly exempted from the defendant's jurisdiction by law. (Abs. 7.)

7. That the Securities Commission failed to give the plaintiff a copy of the transcript of the evidence adduced at the proceedings upon the demand made. (Abs. 7.)

8. That Title 82 of the Revised Statutes of Utah, 1933, and particularly Sec. 82-1-21, Subsection (4), violates Article 5 and Sec. 1 of Article 6 of the Constitution of Utah, and constitutes a delegation to an administrative body and to the executive branch of the state government of powers and functions properly belonging and appertaining to the legislative department thereof. (Abs. 7.)

9. That the Commission at the time of its determination had before it a complete transcript of the evidence adduced by the Commission and did not have before it in transcript form the evidence adduced by the plaintiff. (Abs. 8.)

10. That the findings of fact and conclusions made by the Securities Commission are in conflict with the evidence; that the conclusions are contrary to law and are not supported by the findings of fact and the evidence; and that the order of cancellation is contrary to law. (Abs. 8, 9.)

11. That the plaintiff has committed no act which justifies the final order of cancellation, that the attorney general conceded that there was no charge or evidence of actual fraud or intent to defraud.

Plaintiff then prayed judgment "setting aside and revoking the order of cancellation of registration entered by the defendants against the plaintiff on the 18th day of November, 1939, and that the defendants be required to return to this court a transcript of the proceedings had before it in the matter of the order to show cause issued to the plaintiff herein, as hereinbefore set forth, together with a transcript of the evidence adduced at the hearing upon said order to show cause, within the time allowed by law for the defendants to answer the complaint of the plaintiff herein, and for such other and further relief as may be proper in the premises." (Abs. 11.)

The findings of fact and conclusions of law of the Securities Commission were attached to the complaint as Exhibit "A". (Abs. 12-22.)

The District Court then made an ex parte order that the defendants return to that Court a full and complete transcript of the proceedings had before the Commission, and that pending the determination of this cause and until the judgment of this Court becomes final the order of the defendants cancelling plaintiff's registration as a dealer in securities, dated November 18, 1939, shall be suspended and the right of plaintiff to do business in the State of Utah as a licensed dealer in securities shall continue. (Abs. 23.)

The defendants demurred generally that the complaint does not state facts sufficient to constitute a cause of action and that the Court has no jurisdiction of the subject of the action:

(a) For the reason that no notice of appeal had been given and no bond or security for costs ordered or posted.

(b) For the reason that Title 82, Revised Statutes of Utah, 1933, authorizes no review of the proceedings of the Securities Commission.

Defendants also demurred specially, setting forth the sole ground that the complaint is ambiguous, unintelligible and uncertain "in that it cannot be told there-

from whether a new and independent action is sought to be instituted or whether a writ of review of the proceedings of these defendants against the plaintiff herein as described in said complaint is sought, or whether said complaint is intended to be an appeal from the order of these defendants in said proceedings." (Abs. 24.)

The defendants also moved to vacate the court order suspending the order of the Securities Commission. The demurrer was overruled and motion denied (Abs. 26), and defendants, standing on their demurrer and motion, appealed. (Abs. 27-31.)

ARGUMENT

Appellants by their assignments raise two main questions: the content matter of the plaintiff's complaint (general demurrer in assignment IV); and the procedure requested by the plaintiff and followed by the district court (assignments I, II, III and IV, special demurrer). We shall discuss the content matter first and the procedural element second.

I. The Plaintiff's Complaint Stated a Cause of Action. (Assignment IV, general demurrer.)

It is elementary that a general demurrer must be overruled if any part of the complaint states a cause of action (*De La Ysla v. Publix Theatres Corporation*, 82 Utah, 528, 26 Pac. (2d) 818; *Wright v. Intermountain Motor Car Company*, 53 Utah 176, 177 Pac. 237; *Sweet v.*

Salt Lake City, 43 Utah 306, 134 Pac. 1167.) Even though this Court should find that part of the allegations of the complaint were superfluous, still if other parts state a cause of action the lower court properly overruled the general demurrer. We submit that any one of the following grounds alleged in the complaint constitutes a cause of action sufficient to support the overruling of a general demurrer.

A. *The complaint alleged that the Commission were wholly without jurisdiction to enter their final order of cancellation because Title 82, Revised Statutes of Utah, 1933, and particularly Sec. 82-1-21 Subsection (4) thereof, is contrary to law and is unconstitutional. (Par. 12-c of the complaint, Abs. 7.)*

Sec. 82-1-21 is that section which empowers the Commission to cancel registration. It lists five grounds for the cancellation as follows:

“Registration under sections 82-1-15 and 82-1-17 may be refused, or any registration granted may be cancelled, 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 provisions 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.”

Only two of these grounds are named in the Commission's order as a basis of the cancellation (Abs. 3): (1) That the plaintiff has been guilty of a fraudulent act; and, (2) That the plaintiff has demonstrated its “unworthiness” to transact the business of a dealer in securities.

The conclusions of law on which the order is based (Abs. 21), however, do not find any fraudulent act and leave “unworthiness” as the sole basis of the order of cancellation. This order, then, depends for its validity upon Subsection (4) of Sec. 82-1-21 of Revised Statutes, 1933: Registration may be cancelled if the commission determines that the registrant “has demonstrated his unworthiness to transact the business of a dealer, salesman or agent.” This section is unconstitutional.

Article V of the Constitution of Utah reads as follows:

“The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others except in the cases herein expressly directed or permitted.”

Sec. 1 of Article 6 of the Utah Constitution provides that the legislative power of the State shall be vested in the Legislature of the State of Utah. Subsection (4) of Sec. 82-1-21, of the Revised Statutes, 1933, is a delegation by the Legislature of legislative powers to an administrative body—a branch of the executive power—without any limitation upon the discretion and power of the Commission. This Court has held that such delegation cannot be done. In *Tite v. State Tax Commission*, 89 Utah 404, 57, Pac. (2d) 734, the validity of Sec. 93-1-5, Revised Statutes of Utah, 1933, was questioned. This section provided that any person failing to affix certain cigarette stamps shall be required to pay as part of the tax a penalty of not less than \$10.00, nor more than \$299.00 for each offense, to be affixed and collected by the State Tax Commission. The State Tax Commission, after a hearing, placed a penalty of \$250.00 on the plaintiffs. Mr. Justice Wolfe, in expressing the majority opinion holding the statute unconstitutional, said:

“In this case, the Legislature gave the tax commission not only power to hear and determine whether a penalty should attach, but within the limits of from \$10 to \$299 to fix the penalty. The commission fixed it at \$250. This involved

not only the function of determining whether a situation was such as would work an imposition of the penalty fixed or ascertainable by law and the function of imposing such penalty, but the function and power of determining the amount of the penalty. This involves not the question of whether the Legislature gave the tax commission a judicial rather than an administrative power (unless we accept the plaintiffs' contention that this power to determine the amount of the penalty is really fixing punishment for a crime), but the question of whether the Legislature could delegate such power to determine the amount, in its discretion, to any tribunal as a matter of penalty imposed not as punishment for a crime but as a sanction to pay the tax. We think it could not do so. Giving to the tax commission the power to determine in its own judgment the amount of the penalty was a legislative function which could not be delegated. It is not the power to enforce or apply a law, but the power to make a law for each particular case, to determine in its judgment the amount of a penalty. We recognize the power to make reasonable rules and regulations and to make a failure to obey them involve a loss of rights either given by law or by the regulations themselves. But in this case there was no basis provided for the commission to ascertain the amount of the penalty by a mathematical computation, but the broad power to determine its amount within its discretion, from \$10 up to \$299 . . . The infirmity in 93-1-5 lies in the fact that the tax commission can in each case name a different sum. It has not set a standard for all cases which fit the rule, but in each case within its mind at its discretion fixes the amount. Only the courts in imposing a fine as a punishment for a crime have this discretion."

What standards does the Utah Statute set as a guide for our Securities Commission, so far as its action against the plaintiff is concerned? None whatever. It states that the registration may be canceled if the Commission determines that the registrant so registered "has demonstrated his unworthiness to transact the business of dealer, salesman, or agent." *Unworthiness* is not such a term as common law has defined or limited. It is new in the law. Its interpretation depends upon the wish and whim of the Commission. A man is unworthy if he does not meet standards which the Commission will have set up itself. The Commission may one day be in a mood to declare certain actions unworthy and on another day the same actions worthy. No guiding limitation is present in the statute to prevent such a situation. The Commission here is given a free hand, and can determine at will whether a registrant has demonstrated his "unworthiness." It must determine by its own standards what "unworthiness" means.

In a long line of decisions, the U. S. Supreme Court has held the Constitution of the United States to require a separation of powers, under which the power to make regulations for administering the laws can be delegated by Congress. In all of these cases it was recognized that there were limits in this delegation; and, finally, in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. Ed. 446, it was determined that the limits had been crossed. The reason for finding there that the Congress had delegated too much are set forth in the terse statements of Mr. Chief Justice Hughes, who said :

“As to the transportation of oil production in excess of State permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.”

In *Schechter v. U. S.*, 295 U. S. 495, 79 L. Ed. 1570, the U. S. Supreme Court held that the N.R.A. Statute was an invalid delegation of legislative authority to administrative bodies. Mr. Chief Justice Hughes, speaking for the court, said:

“The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the National Legislature cannot deal directly. We pointed out in the *Panama Ref. Co. Case* that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. Id. p. 421.

“Accordingly, we look to the statute to see whether Congress has overstepped these limitations,—whether Congress in authorizing ‘Codes of Fair Competition’ has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others . . .

“To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, Section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in Section 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.”

The Illinois Court, in *Chicagoland Agencies v. Palmer*, 364 Ill. 13, 2 N. E. (2d) 910, held unconstitutional a section of an act very similar to the one involved in the case at bar and which reads as follows:

“A certificate issued under this Act may be revoked and/or a renewal thereof refused by the Director, if after due investigation and a hearing either before him or before any salaried employee of the insurance department designated by him whose report he may adopt, he determines that the holder of such certificate

“(a) has violated any provision of the insurance law; or

“(b) has intentionally made a material misstatement in the application for such certificate; or

“(c) has been guilty of fraudulent or dishonest practices; or

“(d) has demonstrated his incompetency or untrustworthiness to transact the insurance brokerage business.”

This section was declared unconstitutional because no standard of qualification was required of the person before whom the hearing was to be held and because no definition of the term “due investigation” was given, the Court saying:

“What does the term ‘due investigation,’ used in section 11, contemplate? The director is left without restraint to interpret that phrase. It is possible that each succeeding director may place a substantially different meaning upon it. Even a salaried employee designated from time to time by the director might differ in his interpretation of the term from that of some previous salaried employee so acting, as to the character and type of investigation to be heard on the in-

quiry before him. It is significant that no charges are required to be filed under any of the four subdivisions of section 11. No provision is made for the giving of notice of such charge to the agent or broker under investigation so that he may know what accusation he is to meet, and prepare his defense, if any; no place is fixed for the hearing nor the manner or the giving of notice thereof; no procedure is prescribed for the production or consideration of the evidence, subpoenaing of witnesses, administering of an oath thereto, nor the preservation of the record. These usual and necessary incidents to a 'hearing,' as that term is commonly understood, are lacking, but the director alone, determines what manner of hearing will be had and the procedure to be followed.

"An act, to be valid, may not be vague, indefinite, and uncertain, but must be complete when it leaves the Legislature and be sufficiently explicit to advise everyone what his rights are under it and how he will be affected by its operation . . .

"The powers attempted to be conferred upon the director are so arbitrary, unlimited, and unrestrained that such powers are in direct conflict with the constitutional command that the Legislature may not delegate its legislative function to any person or body."

In *Malloy v. City of Chicago*, 365 Ill. 604, 7 N. E. (2) 320, the statute provided that in cities of a certain population, policemen or firemen who have attained the age of 63 years "shall be retired from active service upon the order of the head of the police or fire depart-

ment of such city, as the case may be." The Court said, in holding this unconstitutional:

"The objection to this act is that it is incomplete and leaves the retirement of policemen and firemen to the whims of the head of these departments without rules to guide their action. It has frequently been held by this court that, while the method and manner of enforcing an act of the General Assembly must, of necessity, be left to the reasonable discretion of administrative officers, yet a statute which vests in such officers a discretion, not only as to the administration of the act but also to determine what the law is, or to apply it to one and refuse its application to another in like circumstances, is void, as an unwarranted delegation of legislative authority."

In *Klein v. Barry*, 182 Wis. 255, 196 N. W. 457, the Wisconsin Court held invalid a Blue Sky law on the same ground, that the Legislature had failed to give standards to the administrative body. That act gave the power to the Commission to declare voidable any sale not made in conformity with the requirements of the Commission. The Court said:

"The difficulty with the statute is that it leaves it in the discretion of the Commission to say what shall happen. This clearly brings it within the condemnation of the decision in *Borgnis v. Falk Co.*, supra, as a delegation of legislative power; the fact that it attempts to delegate to the Commission the power to make an award which shall be just and equitable without erecting any standard, but leaving it wholly within the discre-

tion of the Commission, makes it a clear delegation of judicial power using these terms in their commonest and best understood meaning. No refinements need to be indulged in in this case to show that the powers granted to the Commission are those which are vested by the Constitution respectively in the Legislature and the courts. Our attention is called to no case where a similar delegation of power has been sustained, where the act itself did not prescribe some standard by which the discretion of the Commission or other administrative body was to be controlled and measured."

People v. Federal Surety Company, 336 Ill. 472, 168 N. E. 401, declared unconstitutional the Illinois Securities Act, requiring that no person should sell securities, unless registered with the Secretary of State, as owner, dealer, and broker. In condemning the statute giving the Secretary of State authority to fix the bond, the decision said:

" 'The true distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made.' Examples of this distinction are found in the cases of *People v. Cregier*, 138 Ill. 401, 28 N. E. 812, and *Harrison v. People*, 222 Ill. 150, 78 N. E. 52. It is apparent that section 23 was not complete when it came from the Legislature. No one can tell the amount of the bond required for the license as a dealer and broker in securities, or the conditions which it should contain, until the Secretary of State had fixed the

amount and the terms and conditions in each particular case, and the section fixed no rules which he should follow in determining these questions. The appellant's objection to the constitutionality of these requirements of the section should have been sustained."

After that decision, the Illinois Legislature attempted to make its standards more precise in delegating power to the Secretary of State, and still failed, the Court saying, *People v. J. O. Beckman & Co.*, 347 Ill. 92, 179 N. E. 435:

"The enactment of 1929 attempted to establish rules to serve as a guide to the secretary of state in fixing the amount of the bond. It sets out three factors which the secretary of state is to investigate and consider: First, the proposed method of transacting the business; second, the financial standing of the applicant; and, third, the experience, ability and general reputation for integrity of the applicant, or if a corporation, of its officers, managers, and principal agents. This section does not fix a standard of qualifications or fitness for applicants. There is nothing to indicate how much experience or ability or what amount of capital shall be necessary to justify the secretary of state in fixing the bond at the minimum amount and when the maximum amount shall be required. While the manner of executing a law must necessarily be left to the reasonable discretion of an administrative officer and the exercise of that discretion does not constitute the exercise of judicial power (*Italia America Shipping Corp. v. Nelson*, 323 Ill. 427, 154 N. E. 198),

yet in the absence of rules by which the administrative officer may be guided in the exercise of that discretion the law is incomplete. *People v. Federal Surety Co.*, supra; *City of Chicago v. Matthies*, 320 Ill. 352, 151 N. E. 248; *People v. Sholem*, 294 Ill. 204, 128 N. E. 377. All of the guides given to the secretary of state for determining the amount of the bond leave to him his own interpretation and definition of the terms used in the statute. A law vesting discretionary power in an administrative officer without properly defining the terms under which his discretion is to be exercised is void as being an unlawful delegation of legislative power."

The Minnesota Court, in *State v. Great Northern Railway*, 111 N. W. 289, held invalid the statute requiring a permit from the Commission for a railroad corporation to increase its capital stock, the Court saying:

"The statute declares that before any such corporation shall increase its capital stock it shall apply to the commission in writing, setting forth the amount of the proposed increase and the purpose for which it is desired. The commission must then fix a time and place for hearing the matter and give notice thereof. Upon the hearing the commission must make a finding of the facts established in reference to the proposed increase. What must they then do? Must they allow the increase if they find that 'the amount of the proposed increase and the purpose for which it is desired' are such as are authorized by law? Certainly not. There is no such provision in the statute. The language of the statute cannot by

any fair or permissible construction be so read. On the contrary, the language used is: If they allow it (the application for an increase of stock), they shall prescribe the manner in which and the terms upon which the same shall be made. If they disapprove of such increase, the reasons therefor shall be stated in their next annual report. Nor shall the capital stock of any such corporation be increased, except by special authority of such commission. The prescribing 'the manner in which and the terms upon which' the capital stock of railway corporations may be increased is a legislative power, not an administrative duty, and cannot be delegated. And yet this is just what the Legislature attempted to do by this statute, unless the words we have quoted can be read out of it, and the omitted provisions we have indicated be read into it, by construction. It is only by arbitrarily so construing the statute that we can hold that it authorizes the commission to supervise the issuance of only such stock as is authorized by law, and to charge them with the duty of ascertaining in each case whether the proposed increase is for an authorized purpose and in accordance with the requirements of the law."

The Supreme Court of California, in *Hewitt v. Board of Medical Examiners of the State*, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cases, 750, held the term "grossly improbable statements" in the statute too indefinite to permit the Board of Medical Examiners to cancel a physician's license. This Court said:

“Under this provision the penalty of forfeiture of a physician’s license is not made to depend upon falsity in fact of any matter contained in a statement, or knowledge on the part of the physician that it is false, or for the reason that it was intended or had a tendency to deceive the public, or to impose upon credulous or ignorant persons and so be harmful and injurious to public morals, health, and safety. It is a matter of no moment under the provision of the act, and is entirely immaterial whether the statement is true or false, beneficial or injurious. If, in the opinion of the board, the statement is ‘grossly improbable,’ the certificate to practice is to be revoked. The right of the physician to be secure in his privilege of practicing his profession is thus made to depend, not upon any definition which the law furnishes him as to what shall constitute ‘grossly improbable statements,’ but upon the determination of the board after the statement is made and simply upon its opinion of its improbability. No definite standard is furnished by the law under this provision whereby a physician with any safety can advertise his medical business; nor is there any definite rule declared whereby after such advertisement is had the board of medical examiners shall be controlled in determining its probability or improbability.”

In *Commonwealth v. Maletsky*, 203 Mass. 241, 89 N. E. 245, the Massachusetts Court held that an ordinance providing that no person should occupy, use or maintain any building for the purpose of packing, sorting or storing rags without a permit in writing from the chief of the fire department was invalid because there was noth-

ing in the ordinance to guide him in passing upon the applications that might be made to him.

In *State of Washington v. Superior Court*, 113 Wash. 296, 193 Pac. 845, the Washington Court held invalid an ordinance which provided that the license could be "revoked by the commissioner of public safety in his discretion for disorderly or immoral conduct or gambling on the premises, or whenever the preservation of public morality, health, peace, or good order shall in his judgment render such revocation necessary."

The Utah Supreme Court, in *Eureka City v. Wilson*, 15 Utah 67, 48 Pac. 150, held that the following ordinance was an unlawful delegation of legislative power:

"provided, that any person desiring to erect a building of other material than those above specified within said fire limits, shall first apply to the committee on buildings within said fire limits of the city for permission so to do, and if the consent of the committee on building within said fire limits shall be given, they shall issue a permit, and it shall thereupon be lawful to erect such building under such regulations and restrictions as the committee on building within said fire limits may provide.' "

The Utah Securities Commission by the subsection (4) challenged in the complaint is given as much liberty to set the standards of "unworthiness" as the commissions in the cases just quoted, which could set the standards, dismiss policemen and firemen at will, set the

amount of a bond at will, determine the amount of a fine at will, and interpret the meaning of the term "due investigation" at will. "Unworthiness" is not a term which has been defined by a long series of judicial decisions as has "negligence". Whether a man is worthy or not to sell securities depends upon the individual experience or interpretation of the commission at the time of its order and even upon its whim and caprice. The Constitution does not permit our Legislature to delegate its legislative functions in this manner.

The quotations made by appellants' brief under this topic do not stand for what they seem to say when taken out of their context. For example, the note to *Meffert v. Packer*, 1 L.R.A. (N. S.) 811, 66 Kan. 710, 72 Pac. 247 is quoted, but the case itself does not use the term "unworthy" either in the statute or in its discussion. Even though the case itself were approved by this Court, it is not authority for the point urged by appellants. "Gross immorality" has a clearly limited social meaning well defined by custom which the term "unworthy" totally lacks.

Re Hastings (Hartung's) Estate (Nevada, 160 Pac. 782, cited on page 32 of appellants' brief involves the interpretation of a will which uses the word "unworthy." Manifestly, the interpretation of a will should not be used as an analogy to the requirement of definiteness of a term in a statute.

Alsup v. State, 238 S. W. 667, likewise bears no relationship to the problem of delegation of legislative power. It involved the guilt of a defendant in a criminal court under a statute defining as criminal libel a statement "that any person in office or a candidate therefor, is dishonest and therefore unworthy of such office" Clearly, under this statute the term "unworthy" was limited by the definable term "dishonest". The Court's attempted definition of the term "unworthy" illustrates the flexibility of the word. "Unworthy," said the Court, "means 'unbecoming,' 'discreditable,' 'not having suitable qualities or value,' 'beneath the character of.' "

Marrs v. Matthews, 270 S. W. 586, a Texas case, is the only citation which even approaches the question in hand. That is the sole case which the author of the paragraph in 66 C. J. 63 (quoted on page 32 of appellants' brief) cites as authority for the paragraph. The case involved the cancellation of the certificate of a teacher by the superintendent of public instruction. The Court held that the term "unworthy" is so flexible that it is difficult for legislative enumeration and is therefore proper for an administrative body to interpret. Whatever pertinency the case has to the question at hand, certainly this holding is so contrary to fundamental conceptions that definite standards must be given to administrative bodies, and is so contrary to the attitude heretofore taken by this Court that it should not be used as authority. That Texas Court in its own definition shows how impossible it is to define "unworthy" in any terms which

would serve as standards for an administrative body. It said:

“The word ‘unworthy’ as used in common parlance, has a well-defined signification. As here used, it means the lack of ‘worth’; the absence of those moral and mental qualities which are required to enable one to render the service essential to the accomplishment of the object which the law has in view. It may also include those positive traits of character which, notwithstanding excellent educational attainments, unfit one to impart proper instruction to the young. To call one ‘unworthy’ is to impute moral delinquency to a degree of unfitness for the work in hand. There are many characteristics which may and should be considered in passing upon the issue of unworthiness in a teacher in the public schools. *Different minds might reach different conclusions as to what qualities of character should render one unworthy to hold a certificate to teach.* But there can be no difference of opinion about the fact that an unworthy person should not be permitted to teach in the public schools. 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 flexible as to defeat the ends sought.” (Italics added.)

Such an argument has only one logical conclusion: That the Legislature must use such other terms than “unworthiness” to set a limitation upon the broad powers and discretion of the commission.

Clearly, Sec. 82-1-21, Subsection (4), of the Revised Statutes of Utah, 1933, is an unlawful delegation of legislative power, and paragraph 12-c of the complaint which sets that out states a cause of action.

B. *The complaint alleged that the commission were wholly without jurisdiction to enter their final order of cancellation because the transaction on which the order is based is exempted by statute from the jurisdiction of the commission. (Paragraphs 12a, 23 of the complaint, Abs. 6, 11.)*

Sec. 82-1-5, Revised Statutes of Utah, 1933, provides :

“Except as hereinafter otherwise expressly provided, the provisions of this chapter shall not apply to any of the following classes of securities: (1) Any security issued or guaranteed by the United States or any territory or insular possession thereof, or by the District of Columbia, *or by any State or political subdivision or agency thereof . . .*” (Italics added.)

Sec. 82-1-6 of the same statutes provides :

“Except as hereinafter expressly provided, the provisions of this chapter shall not apply to the sale of any security in any of the following cases . . .

“(3) An isolated transaction in which any security is sold, offered for sale, subscription or delivery by the owner thereof or by his representative for the owner’s account, such sale or offer for sale, subscription or delivery not being made

in the course of repeated and successive transactions of a like character by such owner or on his account by such representative, and such owner or representative not being the underwriter of such security . . . ”

Then follow exceptions to these exemptions which do not apply.

Sec. 82-1-15 of the same statute provides :

“No dealer or salesman shall engage in business in this state as such dealer or salesman, or sell any securities including securities exempted in Sec. 82-1-5 *except in transactions exempt under Sec. 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.” (Italics added.)

The findings of fact and the conclusions of law as set forth in the complaint show better than any argument that “all of the transactions” mentioned in paragraph 12a of the complaint and questioned in appellants’ brief are all part and parcel of one single isolated transaction, to-wit, the refunding of the debt of the City of Mt. Pleasant. This is an isolated transaction, and the respondent, as agent of the City, was exempted by Sec. 82-1-15 from the provisions of the chapter under which his registration was revoked. Paragraph 12a of the complaint states a cause of action.

C. *The complaint alleged that the procedure before the Securities Commission was not a fair trial and deprived the plaintiff of due process of law.* (Paragraphs 4 to 11, 13 to 18; Abs. 2-6, 8-9.)

It is fundamental that both in an administrative hearing and in a court a man who is being deprived of rights must have a fair hearing and be apprised in advance of the charges against him. The fact that the hearing is before an administrative body does not excuse irregularities that have repeatedly been declared to deprive a defendant of his inalienable rights. Whether the restrictions to protect rights in the proceedings before an administrative body in a hearing criminal or quasi criminal in character such as this is, can be relaxed to any greater degree than can those in a court trial, and if so, to what degree, this Court has not yet decided, but it has decided that an irregular hearing vitiates an order. In *McGrew v. Industrial Commission*, 96 Utah 203, 85 Pac. 2d 608, the Industrial Commission conducted a hearing in an informal fashion as a public meeting. Opponents and proponents were allotted three hours each to talk about the matters. No witnesses were sworn and no record was made of their statements. The Supreme Court in condemning this said:

“The legislature in requiring a full and public hearing had regard to judicial standards—not in a technical sense but in regards to fundamental requirements of fairness,—that one shall hear before one condemns, and that judgments shall be based on evidence—which are the essence of due

process in a proceeding of a judicial nature. Maintaining of proper standards by administrative agencies charged with quasi-judicial or quasi-legislative functions is of the highest importance and in the interest of the agency itself. Thus only can it maintain the confidence and respect essential to a proper performance of its duties. For these agencies, which necessarily multiply in our complex society,—to serve the purposes for which they are created and endowed with such vast power, they must accredit themselves by acting in harmony with the inbred concepts of fair play and the cherished traditions of a cautious, deliberate and judicious determination of the questions affecting people's rights or liberties.”

For the Gibbs hearing before the Securities Commission the plaintiff received as notice only an order which alleged fraud without detailing the facts constituting the fraud. No copy of the complaint was given him nor was the complainant at any time brought into the hearing and cross examined.

In *Dyment v. Board of Medical Examiners*, 57 Cal. App. 260, 207 Pac. 409, there was filed with the Board of Examiners a complaint that Dyment had procured his certificate through fraud and misrepresentation. The Court of Appeal, speaking of the question whether a person in the administrative hearing might object to the sufficiency of the written charge lodged against him, said:

“The right to present such a question in every form of action or proceeding, whether civil, crim-

inal, or quasi-criminal is practically universal under the genius of Anglo-Saxon institutions, if not under all systems for the administration of justice. It may almost be said to be a natural right, for the idea that a man may be brought to trial upon an insufficient charge is opposed to the sense of justice inherent in the human breast . . .

“The complaint fails to state the facts constituting the fraud and misrepresentation by means of which it is alleged that appellant procured his reciprocity certificate. The averment is that the person making the complaint ‘charges Philip Dyment with having been guilty of unprofessional conduct by violating section 14 of chapter 354 of the Statutes of 1913 and acts amendatory thereof of the state of California, in that he (Philip Dyment) procured by fraud and misrepresentation a certificate to practice medicine and surgery in the state of California.’ We are of the opinion that the complaint is insufficient.

“It is of course, needless to cite authorities upon the proposition that neither as to pleadings nor as to evidence must the procedure in trials before medical boards be marked by the refinements and subtleties which are characteristic of the conduct of actions in courts of law. The cases upon this point are both uniform and numerous. Still, giving to the rule its full scope, a complaint in such a proceeding must give an alleged erring practitioner such notice of the nature of the charge against him as will enable him to formulate a defense. (*Citing cases.*) This the complaint now before us does not do. It is probably not possible to conceive of the many different practices by means of which an applicant fraudulently might procure the issuance to him of a certificate

licensing him to practice medicine and surgery, and a complaint against him for having brought such an attempt to fruition ought to notify him of the specific acts committed by him in the attempt."

The California Supreme Court approved this and denied a hearing of this case, saying (207 Pac. 412):

" . . . the complaint must be sufficient in its statement of facts to show actual unprofessional conduct by the person charged, or it will not give the board power or jurisdiction to revoke his certificate, and if a revocation is ordered on such a complaint the holder thereof may maintain a proceeding in certiorari to have it annulled for the want of jurisdiction of the board to make the order, as well where he did not make the objection to the board as where he did object."

In *Abrams v. Daugherty*, 60 Cal. App. 297, 212 Pac. 942, the California Court of Appeal held that the Commissioner of Corporations acted without jurisdiction under the Corporate Securities Act, in revoking the certificate of a broker. The following notice had been sent to the broker by the Commissioner: "You are hereby notified to appear at this office at 2:30 p. m., on Friday, September 29, 1922, to show cause why your broker's certificate should not be revoked." The broker appeared at the hearing by his attorney and after the hearing the broker's certificate was suspended. The statute did not require any particular procedure, but the Court said:

“Applying the rule to the present case, it follows that, even though an attorney appeared for petitioner at the time noticed, the commissioner would not have jurisdiction to make the order if the complaint or notice did not state facts showing that the petitioner had committed some breach within the purview of the act. This is so, not because the statute requires the filing of charges against the broker, but because the constitutional guaranty of due process of law requires that he be allowed to appear and defend, and the established rules of procedure demand that the accused shall be given ‘such notice of the nature of the charge against him as will enable him to formulate a defense.’ *Dyment v. Board of Medical Examiners* (Cal. App.), 207 Pac. 409, 411. The rule is particularly applicable here for two reasons: (1) The proceeding is ‘highly penal in its nature’ (*Schomig v. Keiser* (Cal. App.) 209 Pac. 550); and (2) the only conceivable ground of revocation was based upon fraud and misrepresentation, and the accused should have been notified of the facts constituting the fraud or misrepresentation (*Dyment v. Board of Med. Examiners* (Cal. App.), 207 Pac. 409, 412).

“(3) The notice mailed to the petitioner was merely an order to show cause why his certificate should not be revoked. It contained no charges of any nature and nothing from which he could ascertain what he would be required to defend. It was therefore insufficient to give the commissioners any jurisdiction to either suspend or revoke the certificate.”

Like the proceeding before the California commission, this proceeding is highly penal in its nature, and deprives Mr. Gibbs of his rights of due process.

In *State vs. Becker*, 34 S. W. (2d) 27, the Missouri Court had a proceeding before it under a statute almost identical with Section 81-1-21 of the Utah Statutes under which the commission acted. That statute provided that "registration under section 22 may be refused, or any registration granted may be revoked by the commissioner if, after a reasonable notice and a hearing the commissioner determines that such applicant or registrant so registered": (then follow the five subsections listed in the Utah Statute). Acting under this section the Missouri commissioner of securities caused to be served the following notice on the plaintiffs:

"Whereas it has been charged that you and your agents have violated and are violating the provision of an act of the 55th General Assembly of Missouri" . . . (here follows a detailed description of the act) "and

" 'Whereas, you have refused to cooperate with the Commissioner of Securities of the State of Missouri and his agents and representatives in the examination of your books, papers and records in order to determine whether or not you have or are now violating the Missouri Securities Act.

" 'You are therefore notified and directed to be and appear before the undersigned Commissioner of Securities of the State of Missouri at room 204 in the State Capitol Building in the City of Jefferson, County of Cole and State of Missouri, at 10:00 o'clock a.m. on Thursday, the 15th day of May, 1930, then and there to produce for examination and use in evidence all of your books, papers and records in regard to and concerning

your transactions and sales of securities in the State of Missouri down the years 1929 and 1930 in order that it may be ascertained and determined by said Commissioner whether or not you have violated or are now violating said act, and to show cause why your registration as a dealer in securities in the State of Missouri should not be revoked under the provisions of section 23 of said act for the causes named in paragraphs numbered 1, 3 and 5 of said section, as provided by law.'

The person aggrieved under that order brought an action in the lower court and the Supreme Court ruled that this notice was not reasonable notice under the statute, saying:

"The notice is a double-barreled effort. It orders the production of books and papers and orders relators to show cause why their licenses should not be revoked under section 23 and causes named in paragraphs 1, 3 and 5 of said section. It contains no charges, and the commissioner did not furnish such information. How could they show cause without official information as to the charges? A hearing presupposes the existence of charges. There could be no hearing without charges. Therefore, it seems clear that the Legislature intended 'reasonable notice' to include information as to the charges. If the words 'reasonable notice' as used do not include such information, then the section is in violation of the due process clause of the Constitution . . ." (citing cases) "It must be presumed that the Legislature, by providing in section 23 for a hearing on 'reasonable notice,' did not intend to violate the Constitution.

“We understand respondents to concede that ‘reasonable notice’ includes information as to the nature of the charges, but they contend that reference in the notice to certain paragraphs of section 23 was ‘reasonable notice’ within the meaning of the section. We do not think so. One proceeded against under the section must be advised of the charges by ‘reasonable notice.’ It could not have been the intention of the Legislature that persons who might be proceeded against should carry with them pocket editions of the act that they might be advised of the charges by referring to the statute. The contemplated hearing without ‘reasonable notice’ is in excess of the commissioner’s authority, and our rule should be made absolute.”

Paragraph 4 of respondent’s complaint sets forth the notice which was sent to respondent by the commission. Clearly, that notice is no more reasonable notice as required by the statute than was the notice set forth in the Missouri case of *State vs. Becker*, supra. In fact, the Utah Securities Commission went even further and issued a suspension order without any notice whatever which operated immediately, although the statute specifically provides that the revocation may be had only after “a reasonable notice and a hearing.” (Sec. 82-1-21). That section in authorizing the suspension of the dealer’s registration pending the hearing requires that such order shall state the cause for such suspension. Paragraphs 5 and 6 of the complaint (Abs. 3) set forth the order and allege its insufficiency and illegality. The order states no cause. It says merely that the respondent “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.”

Appellants’ brief suggests that the defect of lack of notice was cured by the bill of particulars. The complaint, however, (Paragraph 8) alleges:

“That the said so-called bill of particulars wholly failed to set forth facts sufficient to support or sustain in anywise the said order to show cause served upon the plaintiff herein by the defendants herein on August 12, 1939, as more particularly set forth in paragraph 4 hereof; that said bill of particulars failed to set forth facts sufficient to constitute a cause of action against the plaintiff herein or to state facts sufficient to constitute a cause for the suspension of the plaintiff from transacting business as a dealer in securities within the State of Utah, and particularly failed to state facts sufficient to constitute fraud or any violation of law, either as set forth in said notice of August 12, 1939, or at all.”

Plaintiff in this case had to rely on a negative. It stated a fact, not a conclusion, that the bill of particulars lacked certain necessary allegations. If the defendants desired amplification and the setting forth in detail of the bill of particulars their procedure was to demur specially on this ground. The request could then have been easily complied with. Appellants cannot now rely upon their general demurrer to argue that the bill of particulars was not set forth in the complaint.

Appellants cite *In Re Burnette*, 85 Pac. 575, 73 Kan. 609, as authority that these revocation proceedings are not criminal actions. Yet even the Kansas court twice found it necessary to qualify its decision of *In Re Burnette*, supra. In *In Re Smith*, 73 Kan. 743, 85 Pac. 584, that court said:

“While formal and technical pleading is not essential to this proceeding it is important that the charges against an attorney shall be so specific as to fairly inform him of the precise nature of the misconduct with which he is accused. If the facts of the charged misconduct are clearly brought to his attention, the form in which they are stated and whether in 1 or 2 paragraphs is not of great importance . . . *Although the proceeding is not criminal it is of such a nature and the judgment of disbarment is so severe and so direful in its results to an attorney that something more than a mere preponderance of proof is necessary.*” (Italics added.)

Clearly this is more than a mere civil special proceeding. See also *In Re Wilcox*, 90 Kan. 646, 135 Pac. 995, in which the Kansas court holds that so far as awarding costs is concerned, a disbarment proceeding is an action rather than a special proceeding.

Appellants' brief cites the Utah case of *State vs. Cragun*, 81 Utah 457, 20 Pac. (2d) 247. In that case Cragun was convicted in the district court for practicing obstetrics without a license. His license had prior to that trial been revoked by the department of registration,

and he had not appealed to the district court from that revocation. Instead, as a defense to the independent criminal action against him in the district court he urged that the proceedings of revocation before the department were irregular. This Court, in affirming the conviction made clear that this defense was a collateral and not direct attack on the proceedings, and said:

“A complaint may well be held insufficient to support a judgment when attacked in a direct proceeding, but held sufficient when attacked collaterally.”

The proceeding at bar, however, is a direct, not a collateral, attack upon the sufficiency of the revocation of the plaintiff's license, and the procedure followed therein. It is a direct attack upon the penal deprivation of the plaintiff's right to engage in daily livelihood.

In its discussion of the due process question, the appellants' brief cites *People vs. Hasbrouck*, 11 Utah 291, 39 Pac. 918, and *McCarty vs. Public Service Commission*, 94 Utah 304, 77 Pac. (2d) 331, as alleged authority for the statement that administrative boards are not courts and their acts cannot be tested by reference to judicial codes. This Court, however, has definitely held that these administrative bodies, in the exercise of their function in revoking licenses, are acting in a judicial capacity. In *Baker vs. Department of Registration*, 78 Utah 424, 3 Pac. (2d) 1082, this Court said:

“The right to practice medicine is a valuable property right, and the proceeding to revoke such

right is essentially the exercise of a judicial function. While the department of registration is primarily an administrative body, it exercises judicial functions when it undertakes to hear and determine whether or not a license of a physician and surgeon shall be revoked. It is while exercising such function essentially a tribunal.”

This complaint raises the objection that in its exercise of the judicial power the commission failed to follow the procedure necessary to give the defendant the rights which he is guaranteed by the Constitution, of a fair trial in this criminal or quasi criminal proceeding. While it is not necessary that the code procedure set out for courts be strictly followed by the commission, still the commission’s procedure must be such that the inherent rights of the accused to a fair trial are preserved. The complaint says that this was not done, and in so saying states a cause of action.

We have already discussed the failure of the commission to give proper notice, alleged as a cause of action in the complaint. In addition to that, the complaint alleges in paragraph 9 that the plaintiff was not informed as to the defendants’ informant nor confronted with the informant or complaining witness. This Court has already ruled that in the absence of statutory authority depositions cannot be taken in these administrative hearings, that it is necessary to have the direct testimony of the witnesses. *Moormeister vs. Golding*, 84 Utah 324, 27 Pac. (2d) 447). In a hearing which has for its purpose the depriving of the respondent of his means of live-

lihood and which the authorities we have already cited affirm is the equivalent of a criminal hearing, the person whose registration is being revoked surely has a fundamental right to know who the complaining witness is and to have the opportunity to cross examine that witness.

The complaint, then, states a cause of action in alleging that the plaintiff was deprived in the hearing of due process of law by the irregularities of the hearing. It sets forth the following irregularities, all of which taken together constitute such a lack of fundamental procedure of justice in a judicial or quasi judicial proceeding that it should be severely condemned:

1. The suspension order failed to state the facts of the accusation. (Complaint, Par. 4, Abs. 2.)

2. The suspension order failed to state facts sustaining the accusation. (Complaint Par. 5 and 6, Abs. 3 and 4.)

3. The suspension order was issued contrary to law. (Complaint, Par. 6, Abs. 4.)

4. The bill of particulars failed to set forth facts sufficient to constitute a cause of action. (Complaint, Par. 7, 8, 11, Abs. 4, 5, 6.)

5. The plaintiff was not informed as to defendant's informant and was not confronted with the complaining witness. (Complaint, Par. 9, Abs. 5.)

6. The commission in arriving at its findings and conclusions acted irregularly in having the transcript of only one side before it. (Complaint, Par. 13, Abs. 8.)

D. *The complaint alleged a total lack of justification for the commission's order in plaintiff's acts prior to the hearing and as adduced at the hearing, and in the whole procedure. (Paragraphs 15 to 18, 21, 22, Abs. 8-10.)*

In the second main section of this brief we shall discuss the question whether the procedure authorized by the statute constitutes an appeal and a review of the decision of the commission or an independent action. If it does constitute an appeal, paragraphs 14 to 18 of the complaint themselves state a cause of action because they set forth the grounds necessary for an appeal from this order of the commission:

1. That the findings of fact and conclusions of law are contrary to and not 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.

2. That the findings of fact and conclusions of law are not supported by, are in conflict with, and go beyond the evidence adduced at the hearing.

3. That the conclusions of law are not supported by the findings of fact and are contrary to law.

4. That the conclusions of law are contrary to the evidence and to the findings of fact and are contrary to law.

5. That the order of cancellation is contrary to law.

On the other hand, if this procedure is not an appeal but is an independent action, the important allegation of the complaint against the commission by the person aggrieved is that there are no grounds for revocation. This is necessarily a statement of fact because it involves a negative. Paragraph 21 of the complaint is a sufficient allegation of this negative:

“That the 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 of registration of the plaintiff as a dealer in securities, dated November 8, 1939, or at all, and is entitled to have said order of cancellation set aside and revoked and its registration as a dealer in securities reinstated.”

In addition to this allegation the complaint alleges that the attorney general conceded that there was no charge of actual fraud and no evidence of actual fraud, and that it was further admitted that there was no fraud on the part of the plaintiff herein nor any intent to defraud, and that no evidence was adduced either on behalf of the plaintiff or commission in any wise showing any fraud or intent to defraud. The appellants' brief attempts to belittle this allegation by the statement that the attorney general sat as a member of the commission and his remarks would not be binding on the other two members of the commission. The appellants forget that

the attorney general was not only a member of the commission judging the respondent, but was also, through his assistant, the attorney prosecuting the action. Whether or not his remarks would be binding on him as judge, they bind him as prosecutor. The admission was actually made by the present attorney general who was then the assistant attorney general prosecuting the case. Admissions of an attorney in open hearing during its progress are of course conclusive upon his client. The attorney general, acting as attorney, cannot now say in his brief that it was not as attorney, but as judge that he made the admissions charged in the complaint. This attempt illustrates one of the many dangers of a system in which representatives of the same office act both as prosecutor and judge. Unless our courts hold a strict rein on commission practices, what advantages there are of the commission system will be lost in a deprivation of personal liberty. We believe this court will not permit the practices alleged in respondent's complaint to go unchecked.

II. The Court below and the Plaintiff and Respondent followed the proper and statutory procedure (Assignments I, II, and III, and Special Demurrer, Assignment IV).

The appellants question the Court's procedure in suspending ex parte the revocation order of the Securities Commission, in authorizing respondent to continue to do business as a licensed dealer pending final determin-

ation by the Court of the action, and in failing to require security pending this determination.

This is an objection to the procedure of the Court which the appellants attempt to raise by their First, Second and Third assignments and by their special demurrer discussed under their Fourth assignment. The action was brought under Sec. 82-1-41, Rev. Stat. 1933, 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.”

This section contemplates one of two procedures, under either one of which the Court's action is proper.

1. An appeal to the district court from the commission's order involving a trial *de novo* on the record.
2. An action reviewing the decision of the commission by the taking of testimony anew in the district court.

An analysis of the section of the statute will show that the Court's action was proper under either of these theories.

It is self-evident that if the trial in the district court is a review of the action of the commission upon the record, it was proper for the Court to order a transcript of that record of the commission brought before it. In *D. & R. G. W. R. Co. vs. Public Service Commission*, 98 Utah 431, 100 Pac. (2d) 552, this Court held that the procedure set forth in Chapter 65, Laws of Utah, 1935, Sec. 9, involves a trial *de novo* upon the record. Sec. 82-1-41, set forth above, is similar in the following respects to the act interpreted in the *D. & R. G. W.* case. Both provide that any person aggrieved by the action of the commission may, within thirty days after notice of the decision, bring an action in the district court. Both provide that the person aggrieved shall be plaintiff and the commission defendant. The act interpreted in the *D. & R. G. W.* case provides that the action shall be a "plenary review" of the action of the commission; while Sec. 82-1-41 says that the Court "may affirm, set aside, or modify the order complained of." "To review an action is to study or examine it again," this Court stated in that case. To "examine, set aside or modify the order" of the commission limits the district court to the order complained of. We believe that this contemplates a review of the proceedings and that the interpretation of this court in the *D. & R. G. W. R. Co.* case should apply.

In an appeal from the commission to the district court the parties in the absence of statute are put into the position that they were in before the order of the commission. This Court has so ruled in *Moormeister vs.*

Golding, Director of Registration Department, 84 Utah
324, 27 Pac. (2d) 447:

“The general rule is, unless otherwise provided by statute, that an appeal, where the case is triable *de novo*, vacates the judgment appealed from . . .

“It will be noted from our statute in the case of an appeal from a judgment or order made by the department of registration revoking a license to the district court, it makes no provision whatsoever for the necessity of giving a supersedeas bond to stay the judgment appealed from. There is no provision in the statute whatever keeping the judgment effective pending the appeal. This being so, the general rule would seem to apply. This would be true, regardless of whether the judgment may be considered as self-executing, or whether it was not, because in the absence of a statute to the contrary, the appeal vacates it. Hence the effect of an appeal from a judgment, or order, of the department of registration revoking the license, leaves the parties in the same situation with reference to the rights involved as they were prior to the rendition of revocation of license.”

This ruling is directly contrary to the argument of appellants, who claim that the natural and logical conclusion is that the legislature intended orders of such bodies to stand until found unlawful.

If, then, the Court was acting under the first theory that this action in the district court is a trial *de novo* on the record of the action of the Commission, it did ex-

actly what this Court has said is contemplated in an appeal to the district court in such a case: (1) It ordered a transcript of the record so that it could review it on the facts as well as on the law; (2) it suspended the order of the commission and placed the parties in the status they were in before the order of the commission, and it permitted this without a supersedeas bond.

If we look at the statute under the second theory, to-wit, that the procedure outlined there contemplates the taking of new evidence under new issues, we find that under this theory the Court acted likewise in conformity to the statute. It is significant that the section of the statute limits the action in the Court to a decision on the ruling of the commission. Clearly, the commission's order is the subject matter of the action. The "aggrieved party" is the plaintiff. The commission, which by its action has caused the grievance, is the defendant. What is the grievance to set up in the pleading? Primarily, of course, the order itself. Secondly, the lack of justification for the order both in lack of evidence to substantiate the findings and in the procedure which violates the rights of the plaintiff. Appellants urge that under a new trial in which evidence is taken, the procedure of the commission is immaterial, and that it was therefore improper to allege them. If this were so, the allegations in the complaint objecting to the high-handed procedure of the commission might be superfluous, and might be stricken by proper motions. But they cannot be reached by defendants' general demurrer, and are harmless. A

copy of the transcript under this theory might not be necessary, but an order requiring it would at the most be harmless error. The better view, however, should be that an action brought for the purpose of determining whether the district court should affirm, set aside, or modify the order of the Commission, necessarily should have before it all the facts leading to the making of the order by the Commission—including the commission's procedure—whether these facts are presented by a full transcript of the proceedings or by testimony showing what the proceedings were.

If this section requires the taking of evidence, could the Court cancel the order of the commission pending the hearing? Courts have an inherent right in equity to prevent a hardship on the plaintiff pending the outcome of the trial. In addition to this inherent right it receives statutory powers. Section 20-7-25, Revised Statutes of Utah, 1933, provides:

“When jurisdiction is, by statute, conferred on a court or judicial officer, all means necessary to carry it into effect are also given; and in the exercise of jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or of the codes of procedure.”

This Court has heretofore held justifiable under these powers even in the absence of specific statutory

authority an order requiring a garnishee to open a safety deposit box (*West Cache Sugar Company vs. Hendrickson*, 56 Utah 327, 190 Pac. 946), and an order to a mortgagee to dispose of perishable goods pending foreclosure (*Watts vs. Greenwood*, 49 Utah 118, 162 Pac. 72). And in *Baker vs. Department of Registration*, 78 Utah 424, 3 Pac. (2d) 1082, this Court said, speaking of itself:

“While the cases just cited from this jurisdiction deal with the power of a court to, in the absence of legislative provisions, prescribe proceedings in a complaint pending before it, there is nothing in the language of section 1813 [now 20-7-25] which limits the power of the court to such cases. The statute applies alike in all cases where jurisdiction is conferred by statute without regard to whether such jurisdiction is original or appellate . . .

“Thus, in the absence of any specific legislative provision regulating the procedure that shall be followed in appeals from a judgment or order of the director of the department of registration in revoking or refusing to revoke the license of a physician and surgeon, this court has the authority, and it is its duty, to direct the procedure that shall be followed.”

This Court has already held that in the absence of statutory requirements to the contrary an appeal to the district court vacates the order of the commission appealed from. *Moormeister vs. Golding*, supra. Just so, we submit the district court has the power to stay the harm which would be done by an invalid order pending the final determination of the question whether or not

that order is valid. The commission's revocation of this respondent's registration was drastic in its effect. It deprived Mr. Gibbs of his means of daily livelihood. Though unquestionably the matter should be one for a speedy determination by the Court, the record shows that in this case over one year elapsed between the filing of plaintiff's complaint and the ruling by the district judge on defendants' demurrer thereto. Clearly, the prevention by the administrative body of the respondents' right to practice a livelihood for such a period of time and longer is a hardship which should be prevented by the Court when an issue is raised by the complaint that the commission acted wrongfully or beyond its power in revoking the registration.

CONCLUSION

We respectfully submit that the complaint, which set forth the irregularities of the commission in revoking the respondent's registration, stated a cause of action, and that the Court in staying the effect of this revocation until after proper review of this administrative act by the courts acted not only within its powers but within its duties.

I. The plaintiff's complaint stated a cause of action.

A. The complaint alleged that the commission were wholly without jurisdiction to enter their final order of cancellation because Title 82, Revised Statutes of Utah,

1933, and particularly Sec. 82-1-21, Subsection (4) thereof, is contrary to law and unconstitutional.

B. The complaint alleged that the commission were wholly without jurisdiction to enter their final order of cancellation because the transaction on which the order is based is exempted by statute from the jurisdiction of the commission.

C. The complaint alleged that the procedure before the Securities Commission was not a fair trial and deprived the plaintiff of due process of law.

D. The complaint alleged a total lack of justification for the commission's order prior to the hearing, adduced at the hearing and in the whole procedure.

II. The Court below and the plaintiff and respondent followed the proper and statutory procedure.

Respectfully submitted,

MOYLE, RICHARDS & McKAY,
Attorneys for Respondent
and Plaintiff.

720 Newhouse Bldg.,
Salt Lake City, Utah.