

1980

# In the Matter of The New and Used Motor Vehicle Dealer's License, Dick and Lavonne Noren, dba Central R.V. Sales : Reply Brief of Respondent-Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 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.

David M. Bown; Attorney for Petitioner-Respondent;

Robert B. Hansen; Mark K. Buchi; Attorneys for Respondent-Appellant;

---

## Recommended Citation

Reply Brief, *State v. Noren*, No. 16521 (Utah Supreme Court, 1980).

[https://digitalcommons.law.byu.edu/uofu\\_sc2/1779](https://digitalcommons.law.byu.edu/uofu_sc2/1779)

This Reply Brief 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 (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF:

The New and Used Motor  
Vehicle Dealer's License,  
DICK and LAVONNE NOREN, dba  
Central R.V. Sales

Case No. 16521

REPLY BRIEF OF RESPONDENT-APPELLANT ADMINISTRATOR OF THE  
UTAH STATE MOTOR VEHICLE BUSINESS ADMINISTRATION

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY  
HONORABLE ERNEST F. BALDWIN PRESIDING

ROBERT B. HANSEN  
Attorney General

MARK K. BUCHI  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84111

Attorneys for Respondent-  
Appellant Administrator of  
the Utah State Motor Vehicle  
Business Administration

DAVID M. BOWN  
3007 South West Temple  
Salt Lake City, UT 84115

Attorney for Petitioner-  
Respondent Dick and Lavonne Noren,  
dba Central R.V. Sales

FILED

MAY - 2 1980

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

---

IN THE MATTER OF:

The New and Used Motor  
Vehicle Dealer's License,  
DICK and LAVONNE NOREN, dba  
Central R.V. Sales

)  
)  
)  
)  
)  
)

Case No. 16521

---

REPLY BRIEF OF RESPONDENT-APPELLANT ADMINISTRATOR OF THE  
UTAH STATE MOTOR VEHICLE BUSINESS ADMINISTRATION

---

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY  
HONORABLE ERNEST F. BALDWIN PRESIDING

---

ROBERT B. HANSEN  
Attorney General

MARK K. BUCHI  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84114

Attorneys for Respondent-  
Appellant Administrator of  
the Utah State Motor Vehicle  
Business Administration

DAVID M. BOWN  
3007 South West Temple  
Salt Lake City, UT 84115

Attorney for Petitioner-  
Respondent Dick and Lavonne Noren,  
dba Central R.V. Sales

## TABLE OF CONTENTS

ARGUMENT	Page
POINT I: THE LEGISLATIVE INTENT IN ENACTING UTAH CODE ANN. §77-35-17, WAS DISTINCT FROM THE PURPOSE OF UTAH CODE ANN. §77-35-17.5, AND SHOULD BE GIVEN A SEPARATE AND DISTINCT APPLICATION AND OPERATION . . . . .	1
POINT II: THE DISTRICT COURT ERRED BY HEARING THIS MATTER COMPLETELY DE NOVO, BY EXCLUDING RESPONDENTS' PRIOR CONVICTIONS, AND BY FAILING TO CONSIDER THE RECORD CREATED BY THE ADMINISTRATIVE AGENCY . . . . .	14

## CASES AND AUTHORITIES CITED

<u>American Smelting v. Utah State Tax Commission</u> , 16 Utah 2d 147, 397 P.2d 67 (1966) . . . . .	8
<u>Denver &amp; R.G.W.R. Co. v. Central Weber Sevier Improvement District</u> , 4 Utah 2d 105, 287 P.2d 884 (1955) . . . . .	16
<u>Denver &amp; R.G.W.R. Co. v. Public Service Comm.</u> , 98 Utah 431, 100 P.2d 552 (1940) . . . . .	16
<u>Donahue v. Warner Bros.</u> , 2 Utah 2d 256, 272 P.2d 177 (1954)	8
<u>Great Salt Lake Authority v. Island Ranching</u> , 18 Utah 2d 45, 414 P.2d 963, <u>Rehearing</u> , 18 Utah 2d 276, 421 P.2d 504 (1966) . . . . .	7
<u>Hakki v. Faux</u> , 16 Utah 2d 132, 396 P.2d 876 (1964) . . . . .	14,16
<u>In Re Peterson's Estate</u> , 22 N.D. 480, 134 N.W. 751 (1912) at 763 . . . . .	15
<u>In Re Phillips</u> , 17 Cal.2d 55, 109 P.2d 344 (1941) . . . . .	8,9,10, 11,12,13
<u>Loder v. Municipal Court for S.D. Judicial District</u> , 17 Cal.3d 859, 553 P.2d 624 (1976) . . . . .	12,13
<u>Meyer v. Board of Medical Examiners</u> , 34 Cal.2d 62, 206 P.2d 1085 (1949) . . . . .	8,9,10, 11,12,13

	Page
<u>Peterson v. Livestock Commission</u> , 120 Mont. 140, 181 P.2d 152 (1947) . . . . .	16
<u>Patt v. Nevada State Board of Accountancy</u> , 93 Nev. 548, 571 P.2d 105 (1977) . . . . .	12,13
<u>State v. Chambers</u> , 533 P.2d 876 (Utah 1975) . . . . .	1,2,3, 4,5,6
<u>State v. Hougensen</u> , 91 Utah 351, 64 P.2d 229 (1936) . . . .	11
<u>State v. Johnson</u> , 100 Utah 316, 114 P.2d 1034 (1941) . . .	14, 15,16
<u>United States v. District Court</u> , 121 Utah 1, 238 P.2d 1132 (1951) . . . . .	16

#### STATUTES CITED

Utah Code Ann. §41-3-8 . . . . .	11,17
Utah Code Ann. §41-3-26 . . . . .	11,17
Utah Code Ann. §41-3-27 . . . . .	14
Utah Code Ann. §77-35-17 . . . . .	1,2,3, 4,5,6, 7,9,12
Utah Code Ann. §77-35-17.5 . . . . .	3,6,7, 9,17
Utah Code Ann. §78-24-9 . . . . .	11

#### SECONDARY SOURCES CITED

<u>Expungement of Criminal Convictions in Kansas:</u> <u>A Necessary Tool</u> , 13 Washburn L.H., 93,94 . . . . .	2
<u>Gough, The Expungement of Adjudication Records of</u> <u>Juvenile and Adult Offenders: A Problem of Status</u> , 1966 Wash. L.Q. 147,149. . . . .	2
<u>Legal Rights of the Convicted</u> , Kerper & Kerper (1974) . . .	2

IN THE SUPREME COURT OF THE STATE OF UTAH

---

IN THE MATTER OF:

The New and Used Motor  
Vehicle Dealer's License,  
DICK and LAVONNE NOREN, dba  
Central R. V. Sales

)  
)  
)  
)  
)  
)

Case No. 16521

---

REPLY BRIEF OF RESPONDENT-APPELLANT ADMINISTRATOR OF THE  
UTAH STATE MOTOR VEHICLE BUSINESS ADMINISTRATION

---

ARGUMENT

POINT I

THE LEGISLATIVE INTENT IN ENACTING  
UTAH CODE ANN. §77-35-17, WAS DISTINCT  
FROM THE PURPOSE OF UTAH CODE ANN.  
§77-35-17.5, AND SHOULD BE GIVEN A  
SEPARATE AND DISTINCT APPLICATION AND  
OPERATION.

Respondents' brief states that Utah Code Ann. §77-35-17  
(hereinafter §77-35-17) is an "expungement" statute which is in-  
tended to restore "the criminal offender to his status quo ante  
thereby removing all evidence and the very existence of the prior  
conviction." In partial support for this proposition, counsel  
cites to the language used by Justice Maughn in State v. Chambers,  
533 P.2d 876 (Utah 1975):

The word "expunge" properly describes a  
physical act, not a legal one. However, in rela-  
tion to 77-35-17, it has become fastened in our law  
by decision and practice as descriptive of what the  
court can do under that statute. In this sense, it  
is expressive of council, revoke, set aside.  
533 P.2d at 878.

Respondents continue by comparing Justice Maughn's language in Chambers to that of various noted authorities in their descriptions of what effect expungement has on convicted parties' records. Respondents claim them to be identical. But, a closer analysis of these comparisons reveals a sharp contrast rather than a similarity between the two. Chambers and respondents' authorities describe different events.

For their comparison, respondents cite the following definitions: "the word expungement means to erase. The purpose of expungement statutes is to erase a criminal record as if it never happened in the first place," Legal Rights of the Convicted, Kerper & Kerper (1974); "expunge" means "to obliterate or to make void and of no effect," Expungement of Criminal Convictions in Kansas: A Necessary Rehabilitative Tool, 13 Washburn L.H., 93, 94; "It is rather . . . a process of erasing the legal event of a conviction or adjudication," Gough, The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of State, 1966 Wash. L.Q. 147, 149.

Appellant notes a distinction between these definitions "expungement," cited to the court by respondents, and the actual effect of §77-35-17. This distinction is demonstrated through the choice of words selected by Justice Maughn in the majority opinion in Chambers. In essence, the majority says that when (the Utah Supreme Court) use the word "expunge," "in this sense it is expressive of cancel, revoke, set aside." Chambers at 80. The appellant suggests that the above language by the court was

in effect saying: "Yes, we realize that §77-35-17 is often referred to as an 'expungement' statute, for lack of a better short title, but when this court uses the word 'expunge' in reference to §77-35-17, it will only be 'expressive of cancel, revoke, set aside.'" Id. at 878.

The contrast between respondents' authorities and the language of this court in Chambers, demonstrates that respondents are defining a "pure" expungement situation for which §77-35-17.5 was created, whereas, §77-35-17, the statute under which respondents proceeded, does something different and does not purport to apply to a "pure" expungement situation.

Appellant's rationale is clearly borne out in Chambers by the majority's language which precedes the above quoted passage:

These two statutes are mutually exclusive. Section 77-35-17.5 does not purport to amend or repeal 77-35-17. It is apparent that each deals with a different situation.

\* \* \* \*

The record shows a confusion of both statutes in the initiation of this matter; . . . . Proceeding under this statute the court cannot seal the record, restrict its inspection, nor bring into operation circumstances which would allow a response to inquiries relating to a conviction of crime, as though such conviction had never occurred. The court can terminate the sentence, set aside a defendant's plea of guilty, the conviction, dismiss the action, and discharge the defendant. 533 P.2d at 878 (emphasis added).

Clearly, the court recognized confusion in the application of these two statutes and clarified that §77-35-17 was more limited in scope in what type of relief a court may grant proceeding under it. In deciding Chambers, this court refrained from using those



"common buzz words of expungement" which respondents would have this court use in defining §77-35-17. There is a clear absence of such "buzz words" as "obliterate," "erase," and "as if it never happened in the first place."

Respondents urge the court to return Mr. Noren "to his status quo ante, thereby removing all evidence and the very existence of the prior conviction," but, even respondents cite the very language from Chambers which denies that this may happen under §77-35-17:

Proceeding under this statute the court cannot seal the record, restrict its inspection, nor bring into operation circumstances which would allow response to inquiries relating to a conviction of crime, as though the conviction never occurred. Chambers at 878 (emphasis added).

If an offender must always respond to inquiries pertaining to his convictions, how can respondents contend that the purpose of the statute is to return Mr. Noren "to his status quo ante?"

Appellant suggests that a difference does exist between the complete erasure and obliteration of an event and a mere cancelling, revoking, or setting aside. This difference is highlighted by the effect that each action has.

An erasure of an event would remove and, for practical purposes, render it nonexistent. In this context, (1) an ex-fel could respond in the negative to any inquiry as to prior convictions; (2) no party could testify as to his prior conviction; (3) no record would exist for public inspection. On the other hand, a revocation, cancellation or setting aside does not remove

the court-created and evidence-sustained record. The written record still exists and will always exist until erased by court order. There was no court-ordered erasure in the instant case. In this context, an ex-felon with his record cancelled, set aside, or revoked, (1) does not have the privilege of denying prior convictions; (2) other people with direct knowledge of the crimes and convictions may reveal their knowledge; and (3) the record of conviction is always open to public inspection at the appropriate court clerk's office. It is this latter effect which Justice Maughn attributed to §77-35-17: "Proceeding under this statute the court cannot seal the record, restrict its inspection, nor . . . allow a response to inquiries relating to a conviction of crime, as though such conviction had never occurred." Chambers, supra.

The realities of the instant case reveal that Mr. Noren proceeded under §77-35-17, and had his conviction set aside, but has never received a court order allowing him to deny prior convictions, nor has there ever been a court order "sealing" his record and effectively removing it from public knowledge and inspection. The current status of Mr. Noren's prior convictions is that they are to this day unsealed, unerased, and available for public inspection through an inquiry at the clerk's office of the Fifth Circuit Court at the Metropolitan Hall of Justice.

Appellant draws the court's attention to yet another argument which appears in respondents' brief, but which differs from appellant's understanding of what this court has said in Chambers.

- Respondents use the following language:

[A]lthough the respondent herein, after the expunging of his convictions under §77-35-17, may not answer as he could under §77-35-17.5 that he had never been convicted of the offenses in question, he could nevertheless answer truthfully, that although he had been convicted of the offenses, that the convicting court had set aside the conviction, had dismissed the action and had discharged him and that therefore his conviction(s) do not now exist. Respondents' brief at p.6 (emphasis added).

Appellant disagrees with the respondents' view that "therefore his conviction(s) do not now exist." To so proclaim is to deny the direct language, and intended operation of §77-35-17, as defined by this court in Chambers and as earlier discussed in appellant's brief, supra. Appellant submits that when §77-35-17 dismisses, revokes, or sets aside, it is not the conviction itself but, rather, the effect of the conviction, or the sentence and penalties involved therewith which are dismissed, revoked, or set aside. Appellant further submits that if as discussed, supra, the record of convictions is never sealed, erased, or obliterated, each conviction will always be noted on the public records. The effect of §77-35-17 is merely one of waiving or staying the remainder of any sentence which was imposed by the court following a conviction. This benefit usually comes to a party when the conviction is a first conviction and the conduct was not so egregious that society needs to invoke some stricter form of retribution. In these cases, completing a successful period of probation in which no further convictions have occurred will be sufficient to invoke §77-35-17 and waive the remainder of the sentence.

This distinction draws support from two separate sources. First, the legislative titles of the two acts (§§77-35-17 and 77-35-17.5) are entirely different and suggest separate public policies, the latter being entitled, "Expungement of court records," and the former entitled, "Suspension of sentence—Probation—Conditions of probation—Power of court to dismiss or discharge defendant—Exceptions."

The title of §77-35-17 indicates that the legislature intended that the public policy to be attained by §77-35-17 is to allow it to operate by staying the effects of a sentence, but not of the conviction itself. Whereas, the public policy intended by the legislature to be attained under §77-35-17.5 is to free the offender from future public dissemination of his conviction by sealing all records pertaining thereto, and freeing him, thereby, of all effects of the conviction.

Appellant recognizes that the court will usually refrain from considering the titles to Acts when asked to interpret a statute, but appellant also recognizes that certain exceptions are made to this practice when a certain degree of uncertainty exists. Appellant suggests the instant case contains this requisite degree of uncertainty as explained in Great Salt Lake Authority v. Island Ranching, 18 Utah 2d 45, 414 P.2d 963, Rehearing, 18 Utah 2d 276, 421 P.2d 504 (1966), where the court stated:

We are aware that in many decisions, including our own, it has been stated that the title is not part of the act. This is true in the sense that it is not integrated into the operating portion of the legislation; and that it will not be permitted to contradict or defeat a plainly expressed intent;

nor can it be used to create an ambiguity or uncertainty when the language of the body of the act is clear. But where such clarity is lacking it is permissible to look to the title of the enactment to shed light on and clarify the meaning. 414 P.2d at 964-965 (emphasis added). (See also, Donahue v. Warner Bros., 2 Utah 2d 256, 272 P.2d 177 (1954); Young v. Barney, 20 Utah 2d 108, 433 P.2d 846 (1967); American Smelting v. Utah State Tax Commission, 16 Utah 2d 147, 397 P.2d 67 (1966).)

If the court feels there is great ambiguity in the statute, it may find the titles helpful. Second, further support is found in the two California cases cited in appellant's original brief hereinbefore filed with this court (In Re Phillips, 17 Cal.2d 55, 109 P.2d 344 (1941) and Meyer v. Board of Medical Examiners, 34 Cal.2d 62, 206 P.2d 1085 (1949)). In both cases, the petitioners had been convicted of a criminal statute and sentenced, but the execution of part of the sentences was suspended pending payment of fines and/or certain periods of probation. In both cases, petitioners complied with their probation conditions (or were still in the process of so doing) and petitioned their respective courts to relieve them of further effects of the sentence and probation. In Phillips, the court set "aside the verdict of guilty and dismissed the accusation." at 345. In Meyer, the court "ordered that his "probation be terminated and he be discharged therefrom . . . ." at 1086. Following these judicial actions, both petitioners filed to remove the professional disbarments which had been based upon their prior convictions. On appeal, the California Supreme Court refused to regrant their professional licenses stating that the "setting aside" or "discharge" only stayed the execution of the sentences and did not

remove the actual convictions. The court in Phillips is especially clear in outlining the distinction between §§77-35-17 and 77-35-17.5 alluded to by the appellant, supra:

It is contended that the order granting probation followed by an order dismissing the action . . . is analogous to an order granting a new trial or to the reversal of a judgment of conviction upon appeal, and that a judgment of conviction cannot be final so long as the court can set it aside by any of these methods. But we do not believe that the power granted to the trial court can be given this effect . . . . No such considerations are present in the granting of probation to a convicted defendant. Whether the court suspends the rendition of the judgment of conviction or whether it merely suspends the execution of the judgment, the order of probation presupposes that the defendant is guilty. 109 P.2d at 347 (emphasis added).

It is important to note that the statutes involved in Phillips and Meyer are similar to §77-35-17, which is being considered in the instant case.

Not only do these cases stand for the proposition that it is only the execution of the sentence and not the conviction itself which is waived but, they also stand for the proposition that professional licensing boards may still consider the conviction, even after a "discharge" or setting aside:

The powers possessed by the trial courts under the probation statutes . . . are concerned with mitigation of punishment . . . . The power of the court to reward a convicted defendant who satisfactorily completes his period of probation by setting aside the verdict and dismissing the action operates to mitigate his punishment by restoring certain rights and removing certain disabilities. But it cannot be assumed that the legislature intended that such action by the trial court . . . should be considered as obliterating the fact that the defendant had been finally

adjudged guilty of a crime . . . . In brief, action in mitigation of the defendant's punishment should not affect the fact that his guilt as been finally determined according to law. Such a final determination of guilt is the basis for the order of disbarment in this case. That final judgment of conviction is a fact; and its effect cannot be nullified for the purpose here involved, either by order of probation or by the later order dismissing the action after judgment. 109 P.2d at 347-48 (emphasis added (see also Meyer at 1087).

The effect of this is shown by the difference between pre-conviction and post-conviction acquittals or dismissals. A dismissal or acquittal made prior to conviction reflects the fact that the prosecution has failed to meet its burden of proof and either withdrew the complaint prior to trial or received a verdict of not guilty from the triers of fact at trial. On the other hand a post-conviction acquittal or dismissal is the type referred to in Phillips and Meyer and which is present in the instant case. The effect of such an action would be to "mitigate" the offender's "punishment." But, it should not be interpreted as "obliterating the fact that the defendant had been finally adjudged guilty of a crime." It was on this basis that the Phillips court felt it could not restore the professional license sought. Appellant suggests the facts of this case require similar treatment on the same basis.

This result is all the more demanded where professional licenses are concerned because the very character of the party involved is called into question, and where the offender was convicted of violating the very act which he will be called upon to enforce if a license is granted, then the character of the applicant is very relevant to the applicant's fitness for the particular



license applied for and should be admissable at any stage of any proceeding where the character of the applicant and the propriety of issuing the license are in question. To this same effect were this court's guidelines in State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936):

The following principles, . . . are here enumerated for the guidance of the bench and bar:

\* \* \* \*

(2) Any witness may be asked a question the answer to which has a direct tendency to degrade his or her character if it is pertinent to establish the ultimate fact in issue or to a fact from which such fact may be presumed or inferred. 64 P.2d at 238 (emphasis added).

And in the Utah Judicial Code, §78-24-9:

A witness must answer questions legal and pertinent to the matter in issue, . . . but he need not give an answer . . . which will have a direct tendency to degrade his character, unless it is to the very fact in issue or to a fact from which the fact in issue would be presumed. (Emphasis added.)

In this regard, it is important to note that one of the main inquiries required of the Motor Vehicle Licensing Board, as directed by the Motor Vehicle Code, is to ascertain and consider the fitness of all applicants for dealership licenses. Utah Code Ann. §§41-3-8 and 41-3-26. This calls into question the applicant's character and requires him to reveal whether he has ever been convicted of a crime under the act which he may be required to enforce.

Respondents have attempted to distinguish Phillips and Meyer and to discount appellant's analysis by claiming that, (1) the statutes involved in those cases were "probation" statutes and not "expungement" statutes; (2) California now has a different



statute than that which was litigated in Phillips and Meyer; and (3) Loder v. Municipal Court for S.D. Judicial District, 17 Cal. 859, 553 P.2d 624 (1976), holds to the opposite effect of these cases.

First, appellant agrees that the statutes involved in Meyer and Phillips were probationary in nature, but the important thing to note is that these statutes are worded very similarly to Utah §77-35-17, making it also probationary in nature. This would likewise appear to have been the intended legislative effect of the statute based upon that section's title. Appellant submits that Utah's statute should be read as a Meyer - Phillips type statute.

Second, the fact that California has enacted new legislation which has repealed the statutes under which Meyer and Phillips were decided does not destroy the usefulness of these cases in deciding the proper interpretation of similar legislation. The Nevada Supreme Court found both cases helpful in deciding Patt v. Nevada State Board of Accountancy, 93 Nev. 548, 571 P.2d 105 (1977), where the Nevada Supreme Court cited both Phillips and Meyer as authority in holding that business and professional licenses may be withheld on the basis of prior convictions, even though the verdict has been "set aside" and "dismissed," following a "satisfactory completion of probation." 571 P.2d at 106.

Finally, appellant submits that respondents' reliance upon Loder is misplaced here because that case dealt with expungement of arrest records of individuals, which arrests never proceeded to trial or conviction. The court allowed these records to be

destroyed. Respondents' citation of that court's remarks directed at expungement of convictions was only dicta, which the same court followed with these directive remarks:

Indeed, even a conviction can no longer support a denial or revocation of a license unless the crime is "substantially related to the qualifications, functions or duties of the business or profession in question." 553 P.2d at 635 (emphasis added).

The instant case is easily distinguishable because, as noted in Phillips the "final judgment of conviction is a fact; and its effects cannot be nullified for the purpose here involved, either by order of probation or by the later order dismissing the action after judgment." 109 P.2d at 349.

There is no reason to keep a record where there has been only an arrest and no conviction, as in Loder, but there is ample reason where a conviction resulted and sentence imposed.

Appellant suggests that following the rule established in Meyer, Phillips and Patt, the fact that a party seeking a professional or business license has had his conviction set aside or dismissed should not affect a court or an administrative agency from weighing that conviction, especially when the conviction relates directly to the license applied for. Where the offender's record is not sealed, is open to public inspection, and where the offender himself must acknowledge his convictions when confronted, the court or agency must be able to consider this information in making a "fitness" determination.

## POINT II

THE DISTRICT COURT ERRED BY HEARING THIS MATTER COMPLETELY DE NOVO, BY EXCLUDING RESPONDENTS' PRIOR CONVICTIONS, AND BY FAILING TO CONSIDER THE RECORD CREATED BY THE ADMINISTRATIVE AGENCY.

Appellant asserts that although the statute under which respondents filed their appeal to the Third District Court is ambiguous and not defined explicitly through case law, the interpretation selected by the Third District Court was the least desirable and least applicable of all possible interpretations.

Appellant suggests that there are at least three interpretations more viable than that selected, below, which encompass a "review" type of appeal which appellant believes is mandated. (See appellant's reply brief at 17.)

Respondents cite State v. Johnson, 100 Utah 316, 114 P.2d 1034 (1941) and Hakki v. Faux, 16 Utah 2d 132, 396 P.2d 876 (1964) for the proposition that the "original action" required in Utah Code Ann. §41-3-27, is synonymous with the invoking of the original jurisdiction of the district court. Appellant disputes this reading of these cases as being too cursory and distinguishable from the instant setting.

First, we are dealing with a proceeding commenced in an administrative agency as opposed to one commenced in a lower judicial tribunal. The legislature created these agencies and granted them quasi-judicial powers in order to create a body with expertise in the particular area and to avoid overburdening the courts with nonjudicial functions like licensing. Therefore, an attempt to compare Johnson and Faux with the instant case fails.

short because this court was not confronted in either case with an "appeal" to the district court from a lower tribunal, nor did they grapple with the state of the law when the facts were first disputed at an administrative agency and then brought to the district court.

Secondly, this case may be distinguished by the very language and authority used in Johnson. There, citing In Re Peterson's Estate, 22 N.D. 480, 134 N.W. 751 (1912) at 763, it is suggested that the legislature may grant reviewing courts whatever power it wishes, including some incidences of original jurisdiction:

The Legislature may require the appellate court to review the facts and render final judgment. If in so doing it exercise [sic] some of the functions of a court of original jurisdiction, we answer that there is neither constitutional nor legal reason why it should not. 114 P.2d at 1037.

In this regard, appellant suggests that for the Third District Court to have original jurisdiction over this licensing action, as submitted by respondents, then that court must have the power to have originally heard the action without following the administrative procedure created by statute. In essence, what respondents are contending is that the administrative agency is similar to the old city court which was a court of limited jurisdiction, wherein any action commenced in that court could have been equally commenced in the district court. Appellant contends that this is a strained interpretation because the legislature has granted the licensing power, not to the courts, but to its statutorily created administrative agencies. These agencies are created as experts in their particular areas and are not similar

to the city court system in this respect at all. Unless application is made to an administrative agency and a hearing is held and a record and decision entered, the district court may not enter the field and become a licensing body. Application may not originally be made to the Third District Court to bypass the administrative process. (See, in this regard, Point II of appellant's original brief, especially the discussion of U.S. v. District Court, 121 Utah 1, 238 P.2d 1132 (1951), and Peterson v. Livestock Commission, 120 Mont. 140, 181 P.2d 152 (1947) at pp. 9-14, Appellant's Brief.) Therefore, the contention that original action means precisely the same as original jurisdiction as expressed in Johnson and Faux is unfounded.

Appellant asserts that the legislature's choice of words has determined that the courts are not to become licensing bodies. They are to function as reviewers of the agency's actions on "appeal." If anything but some form of review on the record was intended by the legislature, then there would have been no need to create such an elaborate process whereby judicial powers are granted and a record created. (See appellant's discussion of this point in relation to Denver & R.G.W.R. Co. v. Public Service Comm., 98 Utah 431, 100 P.2d 552 (1940), and Denver & R.G.W.R. Co. v. Central Weber Sevier Improvement District, 4 Utah 2d 105, 288 P.2d 884 (1955) at pp. 14-16 of appellant's original brief.) Appellant submits that the legislature created a requirement of an appeal bond in a licensing case because it intended the district court to review the administrator's decision. The filing of an original action was merely a means of invoking the jurisdiction of the district court.

Appellant suggests that the three most logical interpretations which could be given to the "appeal and original action" requirement of Utah Code Ann. §41-3-26 are: The district court should have (1) considered the case as a review of an administrative agency, applying the applicable standards of review; (2) held a trial de novo in which the administrative agency's hearing record was considered and additional evidence taken; and (3) sat as the administrative agency applying the law appropriate thereto, and sitting in a pure de novo hearing as the administrator.

Under any of these applications of the statute, the prior convictions are admissible evidence and the mere setting aside thereof could not operate so as to make them inadmissible in this particular administrative setting. Since the convictions are admissible, the trial court committed error when it failed to follow the specific mandate of Utah Code Ann. §41-3-8 and refuse to issue a motor vehicle dealer's license because an applicant had been convicted in a court of record of a violation of the Motor Vehicle Dealers' Act.

In short, Mr. Noren has been convicted of such a violation and only an expungement under Utah Code Ann. §77-35-17.5 can ever alter that fact. In the absence of such an expungement, §41-3-8 calls for a denial of a license.

DATED this 1<sup>ST</sup> day of May, 1980.

Respectfully submitted,

ROBERT B. HANSEN  
Attorney General

*Mark K. Buchi*

MARK K. BUCHI

Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Reply Brief of Respondent-Appellant, postage prepaid, to David M. Bown, Attorney for Petitioner-Respondent, 3007 South West Temple, Salt Lake City, Utah, 84115 on this 1st day of May, 1980.

Carol Dahlberg