ASSEMBLY JUDICIARY COMMITTEE
March 24, 1977
8:10 a.m.

Members Present: Chairman Barengo
Vice Chairman Hayes
Mr. Price
Mr. Coulter
Mrs. Wagner
Mr. Sena
Mr. Polish
Mr. Ross
Mr. Banner

Chairman Barengo brought this meeting to order at 8:10 a.m.

Assembly Bill 297:

Mr. Gene Milligan, Nevada Association of Realtors, testified in support of this bill. In explanation of this bill, he stated that basically, whenever transfer in trust of any estate in real property is made after July 1, 1977, the performance or payment secured thereby many not be declared in default, nor may the maturity date secured thereby be accelerated. In other words, he stated, when you sell a piece of property, the lien against the loan on the property cannot be called at that point, according to this proposed bill. He mentioned the second part of the bill, stating that if it is further encumbered by a junior deed of trust, the real property or any portion thereof, unless the security underlying the obligation or debt is thereby impaired. This is a protective clause whereby it may be accelerated should a second loan impair the situation. Basically, in terms of the industry, there are times when this becomes a problem in terms of calling the loan or accelerating and it just makes it easier for them to do business and makes it easier for the public to do business.

Mr. Norman Spotteswood, Executive Vice-President of Security National Bank in Reno, testified on behalf of his bank and the Nevada Bankers Association, in opposition to this bill. He stated that in speaking to it in terms of commercial loan rather than a housing loan, in granting of commercial loans secured by real estate, they look as much to the borrower as they do to the security. This would enable the property to fall into the hands of somebody who would not be acceptable to begin with and this, of course, he stated, could present some tremendous problems. He detailed some specific examples for the committee which showed what could happen when a bank has no control over itself.

Senator Hilbrecht testified on this bill stating that the reason the bill was drafted was because last year the Nevada Supreme Court, for the first time, made a ruling of a technical or literal interpretation of the so-called "Due on Sale" provisions of mortgages, which in Nevada, are Deeds of Trust principally. For many years it was believed by people in the real estate business and in the law business and title companies that if asked to rule upon the issue, the Nevada Supreme Court would rule as the California Supreme Court did. This ruling was that the Deed of Trust provision says that you may not sell a house or building or real property which is mortgaged to secure a debt without the prior approval of the owner of the deed of trust or the

beneficiary as applied to a transfer where the holder of the mortgage could not demonstrate that his security was impaired was in defiance of the common law rule against unreasonable restraints on alienation. Surprisingly, the Nevada Supreme Court said that these provisions of Deeds of Trust would be interpreted literally now and enforced. He gave some examples to the committee. He stated that most of us associated with real estate transactions felt that the Nevada Court if ever really called upon to rule, would rule in the same fashion that for years the Courts in our sister states had with identical trust deed provisions, namely, that they had to be given a reasonable interpretation, if you could demonstrate that you were injured because of the transfer, that your security was impaired in any fashion, then you could foreclose or go to sale. If you could not demonstrate it, it just was not an occasion to do that. He feels it is fair to take this position because when you lend money, you are expected to be on inquiry as to the competency and the financial stability of the individual with whom you deal, but more important, when you take back the mortgage, you have gone beyond that and you have decided whatever the individuals credit reputation might be, you want security in a very tangible form. He stated that at the present time in many parts of the state, he is told that there is a serious shortage of single-family housing and he believes this is an impediment towards the alienability or the transfer of our housing requirements; he thinks it impedes the market to place an undue burden upon these transfers. He mentioned the ground rules on financing in section 2 of the bill and that is that in the event that it can be demonstrated that the security of the original obligee, the original beneficiary on the original Deed of Trust, is impaired and in the event he is given appropriate notice so that he can inspect and properly protect himself against his security being erroded or impaired, unless he can demonstrate that he doesn't have the right to utilize the "Due on Sale" provisions of the Deed of Trust. He feels that holders of Deeds of Trust should have notice; he thinks there are unusual circumstances in which it may be prejudicial to allow a transfer to another party. Although, he feels that those are very remote and unusual circumstances and not the rule and that this bill, as he understands it, protects them against any impairment of their security. Upon request of Mr. Ross, Mr. Hilbrecht explained that "an assumption subject to novation" is a situation where it is the intent of all of the parties to the transaction that the new owner, the buyer, obtain his own financing and that he become the only person responsible on the property on whatever terms and conditions he can arrange with his lender. Under those circumstances, he feels there is no question that whatever the prevailing interest rate, whatever the prevailing points, whatever he can negotiate for himself, he is expected to do, but, that is the atypical arrangement under the sale, particulary of single-family residence in Nevada.

Jim Johnson, with First National Bank, testified in opposition to this bill on behalf of them, the local banks through the Nevada Bankers Association and collectively. As has been pointed out, the interest of the lenders in wanting the acceleration clause to remain usable sounds totally selfish and to some degree it is, he stated. It gives the lender two advantages, one, he can look at the credit and ability to repay of the proposed new buyer and if he is not satisfied, he can accelerate the loan; two, the lender does have the ability as things now stand to review the interest rate. Both sound selfish, he stated, as Sen. Hilbrecht pointed out, they have collateral on the loan to begin with, however, as Norman Spotteswood mentioned most formal lenders engaged actively in the real estate business, put first priority on the credit of the first owner and second on the collateral.

He gave reasons for the need for that collateral. He stated that if the loans were unsecured, they would not be able, under present regulatory restrictions, to extend 30 year credit. He detailed this further for the committee. Mr. Johnson also stated that, true they are selfish when rates are going up and unfortunately, we have all been more aware of rates going up in recent years than we have been in them going down. However, he stated that in the last 2-3 year period, we have seen a significant decline in mortgage rates and there has been more than one instance which could be statistically demonstrated by all of the various formal lenders here in Nevada that rates have been adjusted downward, as well as up. Additionally, he noted in regard to that area of interest rate as Sen. Hilbrecht pointed out in California the acceleration clause for more than one reason is pretty much not being utilized, but, also in California now they have seen a trend towards lenders looking at the variable interest rate mortgages. They are doing this because they have lost the ability for the most part, to adjust interest rates when a sale is made and they simply, need, as lenders, the ability to adjust rates when a sale is made, since most lenders base their lending plans on the statistical turnover of loans and the turnover on loans will average out to a number of years a great deal less than the normal maturity of a loan. If the lender has an acceleration clause has a chance to, on the average, review his interest rates at something much less than the maturity on the note. He said that the effect of not having an acceleration clause would be to force the lenders to look in other areas towards legitimate abilities to adjust rates when they need to and he is not sure that this would work out to the consumer's advantage. There were some questioning and discussion followed. Assemblyman Ross asked Mr. Johnson if he knew of any reason why a loan could not be written which would say that it is 30 years, perhaps right on the face of the Deed of Trust, as opposed to being buried in small print, stating that the loan would be due upon 30 years or upon sale of the house, whichever occurs first. He agreed with Mr. Ross that maybe they are not being totally fair to the consumer. He stated that in order for lenders to have the kind of protection that is needed for complex Deeds of Trust and how one can emphasize all of those areas to make sure the consumer is properly informed, he doesn't really know the answer. It could be that there is a better way of disclosing some of these vital points in Deeds of Trusts than is presently being done and he is sure that lenders would cooperate in that area of disclosure. There was discussion at length in regard to the variable interest rate.

Mr. Collins E. Butler, Executive Vice President of Nevada Savings and Loan Association, speaking on behalf of the state chartered Savings and Loans in the state of Nevada, testified on this bill stating that they are deeply concerned with it and urge its rejection. He gave an example to the committee regarding a certain home being sold and a new capable buyer comes in with good credit and this loan is of record for five years, attempting to point out to the committee the problems they would have if this bill went through in the area of economics and what their problems would be if they are not allowed the right to review and adjust rates periodically. He urged the committee to be sensitive to any change in any kind of a debt instrument. Considerable discussion and questioning followed.

Mr. Roger Bissett, attorney in Reno, Nevada, member of Board of Directors of American Savings and Loan Association and their counsel, appearing on behalf of that association and also as an additional spokesman for the state of Nevada Savings and Loan League, testified on this bill. Regarding Senator Hilbrecht's comments with reference to the shortage of housing and this bill having some

influence in easing that problem, he stated that he feels just the contrary is true. The answer to that is construction, not the rotating of existing housing units. This bill would give, perhaps, realtors some additional leverage and additional commodity to sell in that they would be selling interest rates and loans rather than real estate. A point that he feels is significant here, is to realize that lending institutions do have an obligation to the public they serve because they are regulated by state and federal agencies. In doing that, they are severely restricted by a number of requirements. He detailed those requirements for the committee. The fact that the "Due on Sale" clause is there minimizes the number of times that you end up in Court on it. This bill, as it is drawn, he believes there might be a serious constitutional question regarding impairment of obligation contracts because of the retroactive effect of the July 1, 1977 date. Mr. Bissett also stated that the bill would cause a great deal of concern among other lenders. He stated that it is too premature to enact this bill; the real estate group is more concerned with finding additional commodities to market rather than dealing with their primary product in the form of the loans they would be selling. Again, why does the public feel that he is getting this rate? It is represented to him by someone. Therefore, he feels that this bill really skirts the problem and he urges its rejection in its present form. Upon request of Assemblyman Ross, the following is a list of citations for the committee's reference:

Century Federal Savings and Loan Association vs. Van Glahn, Superior Court, New Jersey, Chancery Division, June 15, 1976, 144 New Jersey super 48,364 A 2d 558 (Advance Sheet, November 13, 1976).
Mutual Federal Savings and Loan Association vs. Wisconsin Wire Works, (Wire Works II), Supreme Court of Wisconsin) March 2, 1976, 239NW 2d 20 (Advance Sheet March 3, 1976).
First Commercial Title, Inc. vs. Holmes, Supreme Court of Nevada, 1976, 550 P 2d 1271 (Advance Sheet, July 23, 1976)

Mr. Fran Breen, representing Nevada Bankers, testified on this bill and he detailed for the committee the above-referenced case of First Commercial Title vs. Holmes wherein his law firm represented the "two little old ladies" involved in the case. The type of situation that caused this particular law suit is that of individuals who are investing in mortgages rather than stocks or something of that sort. Attached hereto and marked as Exhibit "A" is a copy of the briefs with regard to this case. In addition there is a copy of a review of the decision which appeared in the National Property Law Digest. Additionally, he wanted to make one correction as to a statement made by Senator Hilbrecht. The law in California has not been that these acceleration clauses are illegal, the law is the other way. In addition, he stated that they should keep in mind that very few banks have any prohibition or any penalty for prepayment on commercial loans or real estate loans, etc.

Mr. George Folsum, President of Family Savings and Loan Association, testified on this bill in regard to two points that were brought up during testimony today. One point, there was a question regarding variable interest rates being used in Nevada. He stated that there are no particular restrictions against state-chartered savings and loan associations using variable rates, however, the Congress of the U.S. forbid the federal savings and loan associations to use variable interest rates, they made them stay with fixed interest rates. Secondly, he said that the Federal Home Loan Corporation, now called the Mortgage Corporation, was formed for the purpose of aiding savings and loan associations with their financial needs. This federal association purchases the loans of savings and loan associations under certain conditions. He detailed this for the committee. Attached hereto and marked as Exhibit"B" is a copy of their "Due on Sale" provision used in their Deed of Trust (paragraph 17). Attached as Exhibit "C" is a copy of their Note used.

Assembly Bill 251:

Mr. George Bennett, State Board of Pharmacy, testified in support of this bill. They requested, however, the option of using a hearing officer and they suggested the following amendment to this bill: On page 2, line 1, Section 4, they would like to insert after "The chief", the words, "upon request of an agency". Attached hereto and marked as Exhibit "D" is the suggested amendment.

Chairman Barengo stated that this is his bill and there have been some questions regarding the bill. On the first page, lines 16 and 17, he stated that when he and Sen. Sherrin worked on this bill during the interim, it was not their intention that a hearing officer must be a licensed attorney and Mr. Daykin takes the position that a semicolon does not mean that that has to be a, b and c, but it must be a by itself, or b by itself or c by itself. It is a bill drafting technique in there and if it would make people happier to have "or" inserted in there, he has no objection. Mr. Barengo stated that the hearing officers are doing a good job, however, there are a lot of complaints mainly because of the system and not because the job is not being done. If they had an independent system or independent hearing officers who were not part of the agency for whom they are making said decisions, it would be alot smoother and alot less cases going to court. Mr. Barengo said that there also might be some discrepancies in that the hearing officer shall conduct the hearing, while he might not be the only one who will be at the hearing, but he is the presiding officer.

Mr. Richard Bortolin, Appeals Officer for Nevada Industrial Commission, also an attorney, testified on this bill. He stated that he has some problems with the bill although he understands what Assemblyman Barengo is trying to improve. He feels there should be a greater study made to ascertain the needs of the various state agencies relative to what they do need. In addition, this bill does not take into consideration that there is a need for some input from the various agencies to tell the individual heading this department what was required. There should be some consideration for a specialization in a particular agency. Referring to section 7, § 2, he feels that that provision is completely inoperative. He asked that when and if the committee restructures this bill, whether or not it would be better to set up an office of state administrative law judges and hearings examiners instead of placing this under the Department of Administration as a division. Mr. Bortolin opposes this bill until it has undergone further study and perhaps rewriting. Chairman Barengo offered that he tried to address the problem of hearing officers on page 1, line 18.

Mr. Darrell Capurro, representing the Nevada Motor Transport Association and the Nevada Franchized Auto Dealers Association, testified in support of this bill. He explained that there are situations that have developed over the years with regard to contested case and he thinks there ought to be a distinction made between contested cases and the promulgation of rules and regulations with which the agency implements their responsibility as placed upon them by the Legislature. He feels a contested case situation is different in that the individual who is taking the testimony and making a recommendation to an agency head should not be the same individual who is on the payroll of that agency. There is too great an area for abuse. In concept, he feels that this bill is

addressing the problem that they are experiencing in some of these state agencies. He agrees with Mr. Bortolin that the machinery that has been set up under the Nevada Industrial Commission should probably not be tampered with, and from that standpoint, the appeals officer from NIC should be exempted from the provisions of this bill. In addition, they might also consider exempting the Public Service Commission on the same basis. He asked that if the committee is not inclined to process this bill, that at the very least, there should be a study done with regard to it.

Mr. Tom Cooke, attorney with the State Contractors Board, testified on this bill. He feels that the concept has merit, but, it might be a little too broad. He agrees with the amendment proposed by the Pharmacy Board. He feels it would be extremely beneficial to some to have a hearing officer handle some of the contested cases as it would insure protection to the people who appear before them and might eliminate some litigation. However, he feels in the case of the State Contractor's Board, it should be optional. He explained in further detail to the committee his experiences on the Contractor's Board and the need for technical competence on the entire Board. They need him, as attorney, because they must have someone to insure that due process of law is followed. Attached hereto and marked as Exhibit "E" is a copy of a letter from the Contractors' State License Board of California which they requested which discusses some of their problems including the cost. He stated that as 233b is presently written, there is sufficient protection in there for licensees and people coming before the Board. Attached hereto and marked respectively as Exhibit "F" and Exhibit "G", are two cases that hold that this type of a situation does not offend due process clause of the federal constitution or the state constitution.

Mr. Fred Little,Deputy Director of the Dept. of Motor Vehicles, testified on this bill stating that the Department of Motor Vehicles has no position on this bill other than to possibly recommend that a section be included to grandfather the current hearing officer. Their reasoning is that they feel their hearing officer has been doing a commendable job since he has been serving in that capacity. As of November, 1973 he has heard 1784 and they haven't had any complaints. Chairman Barengo agreed with Mr. Little that their hearing officer does an excellent job. Mr. Little asked that he be kept on working for the new division, but, still working as a hearing officer for Department of Motor Vehicles.

Assembly Bill 342:

Mr. George Flint, Nevada Wedding Chapel Association, as well as, representing himself personally as a wedding chapel owner and operator, testified on this bill in support of it. Mr. Flint testified at length on this bill, detailing it for the committee. He was testifying mostly on behalf of the ministers with regard to page 2, Section 2, § 2(c). He stated that his main concern lies with the "moral turpitude" point . In conclusion, he stated that in ten years, neither the wedding chapel industry or the ministers that work for wedding chapels have asked for any changes in this, although they have had some problems with it. The main problem is the "felony and moral turpitude thing", secondly, the matter of this additional regulations which they feel has been used too tough against the ministers at times. Finally, the matter of the incidental thing, because they feel that everyone that has the opportunity to exercise their authority in this incidental matter judge it differently. These are the three areas of concern and he would request a "Do Pass" at least on part of the three issues.

Mr. Vaughn Smith, Carson City Clerk, testified on behalf of the County Clerks of Nevada who definitely oppose this bill. He stated that the regulations that a county clerk has are not very stringent and they feel that any change at this point would further weaken what regulatory power there may be. Upon further questioning by Chairman Barengo, Mr. Smith stated that he has no written regulations. Upon other questioning by Chairman Barengo as to why they have a need for regulations, Mr. Smith stated that they need the ability to promulgate such regulations in case they become necessary. In regard to this bill, Mr. Smith stated that it seems to be the wedding chapel industry who want changes made for ministers. In regard to the "moral turpitude" point, Mr. Smith stated that in the law if they had ever been convicted of a crime involving moral turpitude, certainly if they have such a wide selection to draw upon, they might be able to find someone who was not convicted of a crime. Chairman Barengo asked Mr. Smith if he had any problem (regarding page 2, lines 42 and 43) with the concept of giving a person, after a certain period of time, that they have not been involved with any problems with the law, the opportunity to be allowed to come back into society to purge themselves, so to speak, or do you want it to be forever, we are holding this over them. Mr. Smith stated that he did not want it to be "forever", however, he thinks that each case history should be reviewed and treated on its own merits. He stated that Loretta Bowman, Clerk of Clark County, is opposed to this bill.

Pastor Douglas Thunder, Bethlehem Lutheran Church, Carson City, Nevada testified on this bill. He pointed out the triangular relationship between a religious institution, the state, and business and detailed this for the committee. At this one point, he stated that we have a very clear connection between church and state and, as far as he knows, it is the only function that a minister performs where he is required to have some kind of state authorization in order to perform that. He stated that we have heard some parallels drawn today to some other trades. One problem is that you are trained in these professions and ultimately gain a license or certification. There is no such thing for clergymen and the state makes no distinction between the different levels of ministers and perhaps, it is time to bring something like that about. Concerning the part of the bill regarding "moral turpitude", he feels that the point Chairman Barengo made regarding "after 10 years you can petition to have your civil rights restored", would be quite proper, however, it should require some form of hearing.

Assembly Bill 24:

Mr. Collins E. Butler, Nevada Savings and Loan League, and Mr. Orville Wahrenbrock, Dept. of Human Resources and Mr. Frank Sullivan all testified on this bill. Mr. Wahrenbrock reviewed the need for the bill stating that current statutes provide for the superintendent of either Elko or Caliente to parole a boy or girl and unilaterally revoke that parole without any hearing whatsoever. Obviously, he stated, this is in conflict with Supreme Court Decisions, but also in conflict with their own feeling of justice. Therefore, they requested a bill which would provide for "due process" in parole revocation proceedures. The courts in Washoe and Clark county have been extremely cooperative as they have held parole revocation proceedures for them, however, it is not required by statute and they feel it should be. This is paralleled somewhat after the Adult system, wherein it is provided for an administrative review or panel, as well as a judicial process. He stated that they endorse the proposed amendments of Mr. Butler.

Mr. Collins E. Butler proposed certain amendments to A.B. 24, a copy of which are attached hereto and marked as Exhibit "H" and stated that in keeping with

the due process, they feel that the constitutionality of the bill still needs to lie with the Judiciary, rather than with the Executive branch. In answer to a question which arose during the last hearing on this bill, Mr. Butler stated that they are not dealing with a compensation claim, or a claim against a contractors Board, but, when you are dealing with revocation of probation or parole, you are dealing with the thing that the constitutionality of the present statute, they feel is questioned and does need the bill as they are dealing with the freedom of an individual. Mr. Frank Sullivan, Chief Probation Officer of Washoe County, stated that he has no problem with "due process". However, he calls the committee's attention to this bill in regard to its fiscal impact. With respect to line 23 on page 1 wherein it gives the superintendent of the girls' school and boys' school, the authority to place children in a local juvenile facility. He detailed for the committee, the amount of referrals he has received. This would have a strong fiscal impact to Washoe and Clark counties, as the only two juvenile facilities in the state. He does not believe that the superintendent of either school should have the authority to place in a local facility. Upon further questioning of Mr. Wahrenbrock by Chairman Barengo, he stated that they have always worked very well with the juvenile facilities and if they wish to send them a bill, they can send it and they will have to pay it. Chairman Barengo posed the question of why there are three juvenile systems throughout the state. There was considerable discussion that followed.

This meeting was adjourned at 12:05 p.m.

Respectfully submitted,

Anne M. Peirce

Anne M. Peirce

3/24/77

GUEST LIST

NAME (Please print)	REPRESENTING	WISH TO SPEAK Yes	No
BOBT. L. STOKER	STATE CONT. BOARD		✓
GEORGE BENNETT	STATE BD. OF PHARMACY	✓	
Tom Cooke	STATE CONTRACTORS BD	✓	
Orville Wahrenbrock	Dept. of Human Resources AB 24	✓	
COLLINS E. BUTLER	NEVADA SAVINGS & LOAN LEAGUE	✓	

IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST COMMERCIAL TITLE, INC., a Nevada corporation, APPELLANT,	)	
VS.	)	No. 8202
ALVALETTA Z. HOLMES and MARION H. PARSONS, RESPONDENTS.	)	

OPENING BRIEF OF APPELLANT

STREETER, SALA & McAULIFFE
30 Court Street - P.O. Box 2481
Reno, Nevada 89505

Attorneys for Appellant

BREEN, YOUNG, WHITEHEAD & HOY
232 Court Street
Reno, Nevada

Attorneys for Respondents.

EXHIBIT 1104A

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STATEMENT OF THE ISSUES

PRESENTED FOR REVIEW

Though the issues set forth on this page do not indicate such, this case is one of first impression in the State of Nevada. The decision of this court, if addressed to the validity of "due on sale clauses", will affect practically every homeowner and commercial trustor-mortgagor in this state.

I.

The trial court did not apply the correct rule of law to the case at bar.

II.

The trial court abused its discretion in denying plaintiff's motion for reconsideration and rehearing.

III.

The award of attorney's fee to the defendants as prevailing parties is error.

STATEMENT OF THE CASE

This case is one of first impression in the State of Nevada. It presents to this court the question of automatic enforceability of a "due on sale" clause, contained in a first deed of trust when the prior written consent of the beneficiary is not obtained prior to a conveyance by the trustor. It is the contention of appellant, hereinafter referred to as plaintiff, that, premised upon the facts of the case at bar, and the law, the due on sale clause is an unreasonable restraint on alienation.

A suit for injunctive and declaratory relief was commenced in the trial court by plaintiff and Premier Development Company. Plaintiff is the title and escrow company which was handling the transaction at the time the alleged default occurred. Premier Development Company was a co-plaintiff below and is the beneficiary of a promissory note secured by a second deed of trust upon the property which is involved in this case.

The defendants below were Alvaletta Z. Holmes and Marion H. Parsons, hereinafter referred to as defendants. Defendants are the beneficiaries of a promissory note secured by a first deed of trust upon the property involved in this case. The remaining defendant in the trial court was First American Title Company, who handled the collection of the promissory note secured by the first deed of trust.

Answers were filed to the complaint and both plaintiff and defendants moved for summary judgment. Summary judgment was granted in favor

of defendants. Plaintiff thereupon moved the district court to reconsider its order granting summary judgment to defendants. That motion was denied and this appeal followed. An order making an express determination under NRCP 54(b) was entered by the trial court.

Plaintiff appeals from the trial court's order of November 14, 1974, granting summary judgment in favor of defendants; the trial court's order of March 4, 1975, denying defendants' motion for rehearing and reconsideration and the trial court's Findings of Fact, Conclusions of Law and Judgment dated March 17, 1975.

STATEMENT OF THE FACTS

On or about February 28, 1969, Elmer and Mary Etnyre, husband and wife, purchased a piece of property, located in Washoe County, from Stella Snyder. A down payment was made and a promissory note executed by Elmer and Mary Etnyre was given to Stella Snyder for the balance of the purchase price. The promissory note was secured by a first deed of trust upon the property. The deed of trust was executed by Elmer and Mary Etnyre and Stella Snyder was the beneficiary thereof. App. pp. 1, 6, 40.

The first deed of trust contained the following clause:

> In the event that trustor shall sell or contract to sell the parcel of land hereby encumbered without first obtaining the written consent of beneficiary, the balance of principal and interest that shall then remain unpaid on the obligation secured by this deed of trust shall forthwith become due and payable although the time of maturity as expressed therein shall not have arrived. App. pp. 40.

Stella Snyder thereafter died testate in the State of California. On or about July 24, 1972, a "Decree of Distributions Without Rendering an Account" was signed by a judge of the Superior Court of the State of California, in and for the County of Placer. Said decree, among other things, distributed to defendants the above described note secured by the first deed of trust. The decree of distribution was recorded in the office of the Washoe County Recorder on August 30, 1972. App. pp. 1,2,6.

On or about November 30, 1971, the trustors of the aforesaid deed of trust conveyed by grant, bargain and sale deed, their interest to Premier Development Company. Said deed was recorded in the office of the Washoe County Recorder on January 20, 1972. Defendants agreed to give their consent to such transfer. App. pp. 2,7,41.

Thereafter, and in December of 1972, defendants were requested to sign a consent for a conveyance by Premier Development Company to Ronald Gardner and Ben Miller. Defendants signed the consent, however, the sale to Gardner and Miller never closed. App. pp. 2, 7, 42.

On or about March 15, 1973, Premier Development Company conveyed the property to John and Jill Barney. Defendants consented to this conveyance. App. pp. 2, 8, 43.

On or about September 28, 1973, the Barneys conveyed the property to Lynn and Orva Ziegler. Defendants never gave their written consent to that conveyance, App. pp. 3,8,14, thus precipitating this controversy.

On or about December 27, 1973, defendants recorded a Notice of Default and Election to Sell as a result of their written permission not being procured prior to the Barney-Ziegler transaction. App. pp. 3,9.

As previously stated, plaintiff commenced an action for injunction and declaratory relief and in its complaint set forth five theories upon which the Notice of Default and Election to Sell was defective, illegal, improper and void. App. p. 4.

Defendants then moved for a summary judgment challenging the five theories of relief requested by plaintiff in its complaint. App. pp. 11-29.

Plaintiff answered defendants' motion for summary judgment and also moved the trial court for summary judgment in its favor. App. pp. 30-46. The thrust of plaintiff's motion and points and authorities in opposition to defendants' motion was that the "due on sale clause" contained in the first deed of trust was an unreasonable restraint on alienation per se, and therefore void; and if not unreasonable per se, then attempted to be used by the defendants in an unreasonable fashion, i.e. automatic enforcement without any evidence indicating a threat to any of the justifiable interests of the defendants as a result of the conveyance.

In their motion for summary judgment, in respect to the validity of the due on sale clause, defendants relied heavily upon California case law. App. pp. 11-29. Subsequent to the submission to the trial

court of the cross-motions, and the trial court's granting of summary judgment in favor of defendants, the California Supreme Court, sitting in bank, announced its decision in the case of Tucker v. Lassen Savings and Loan Association, 116 Cal. Rptr. 633, 526 P. 2d. 1169 (1974). Premised upon Tucker v. Lassen, supra, plaintiff timely moved the trial court for reconsideration of its order granting summary judgment to defendants. App. pp. 55, 56. This motion was based upon the ground that Tucker v. Lassen, supra, clarified, distinguished and overruled California cases relied upon by defendants and thus the decision of the trial court in granting summary judgment in favor of defendants was in error. The motion was denied, App. p. 61. Findings of Fact, Conclusions of Law and Judgment was thereupon filed. App. pp. 62-66.

ARGUMENT

I.

THE TRIAL COURT DID NOT APPLY THE CORRECT RULE OF LAW TO THE CASE AT BAR

Though this court cannot decide disputed issues of fact, it may determine whether a genuine issue of fact exists and whether the law was applied correctly in the court below. Harrison v. Rice, 89 Nev. 180, 510 P.2d. 633 (1973); Wright and Miller, Federal Practice and Procedure: Civil Sec. 2716, p. 437.

The common law rule is that all restraints on alienation are invalid.

Coast Bank v. Minderhout, 38 Cal. Rptr. 505, 392 P.2d. 265 (1964); La Sala v. American Savings and Loan Association, 97 Cal. Rptr. 849, 489 P.2d. 1113, 1121, 1122 (1971). Over the years certain exceptions to the common law rule have been created by case law. Coast Bank v. Minderhout, supra; Bernhard, The Minority Doctrine Concerning Direct Restraint On Alienation, 57 Mich. L.Rev. 1173(1959) (A copy of that law review article is contained in the original record on file with this court.) It should be noted that in the Bernhard article, page 1175, exception number 6 was premised upon the following law review article and case: Goddard, Non-Assignment Provision in Land Contracts, 31 Mich. L.Rev. 1 (1932); Sloman v. Cutler, 258 Mich. 372, 242 N.W. 735 (1932). The last cited article and case were subject to recent criticism by the Court of Appeals of Michigan in the case of Pellerito v. Weber, 22 Mich. App. 242, 177 N.W. 2d. 236, 237, footnote 2 (1970). The Bernhard article suggested a palatable minority position in respect to restraints on alienation, i.e., rather than the all or nothing approach of the common law rule (the restraint is invalid unless it falls within certain excepted categories), establish a rule that a restraint on alienation, if reasonable, is valid. The suggested minority rule, according to Bernhard, would allow flexibility to weigh all conflicting policies in order to deal with changing social and commercial considerations.

Nevada has no law on the subject and the plaintiff would accordingly submit that the common law rule should control and thus the due

on sale clause contained in the first deed of trust be declared a restraint on alienation and therefore invalid.

In analyzing the law in other jurisdictions, in 1964, the California Supreme Court, sitting in bank, announced its decision in Coast Bank v. Minderhout, supra.. That case did not involve a true mortgage or deed of trust, but rather a recorded agreement in which the borrower, without having given other security, agreed not to encumber or transfer certain real property which they owned, without the consent of the lendor, until all of the indebtedness was paid. When the borrowers subsequently conveyed the property to their purchasers with part of the indebtedness still unpaid, the beneficiary-lendor accelerated the due date. However, the lendor was unable to collect the unpaid balance from the original borrowers. Thereupon, the lendor brought suit against the purchasers to foreclose on the real property, on the theory that the agreement between lendor and borrowers was a disguised security transaction that created an equitable mortgage on the property.

The court upheld the theory of an equitable mortgage, and by implication, the "due on sale" clause, stating, at page 268, "In the present case it was not unreasonable for plaintiff (lendor), to condition its continued extension of credit to the Enrights (borrowers) on their retaining their interest in the property that stood as security for the debt. Accordingly, plaintiff validly provided that it might accelerate the due date if the Enrights encumbered or transferred the property." (emphasis supplied)

In the decision, the court also observed that there are certain exceptions to the rule against restraints on alienation which are reasonable and designed to protect justifiable interests of the parties. Once such exception and justifiable interest was noted to be a restraint on alienation contained in an executory land contract because of the lendor's interest in the upkeep of the property and in the character and integrity of the purchaser. As previously noted, this exception comes from the case of Sloman v. Cutler, supra, and the Goddard article, which has been subject to criticism as noted.

The unfortunate thing about the Coast Bank case is that subsequent decisions by California courts did not attach the significance to the words "reasonable" as used in that case in light of the article by Bernhard, which was cited with approval by the California court. Though, as will be subsequently discussed, cases from other jurisdictions did.

The next major California case after Coast Bank was Hellbaum v. Lytton Savings and Loan Association, 274 Cal. App. 2d 456, 79 Cal. Rptr. 9 (1969), a decision from the Court of Appeal, First District. In that case, there was a due on sale clause, and also a prepayment penalty. The trustors sold the property without the prior written consent of the beneficiary, and the beneficiary accelerated the note. The facts indicate that the beneficiary would have consented to the assumption without acceleration had the new buyers paid a 5% assumption fee.

Suit was commenced; the main theory being that the provision for a prepayment fee upon acceleration required because of a transfer constituted an unreasonable restraint on alienation. The court expressly recognized the due on sale clause as a restraint reasonably designed to protect the creditors justifiable interest in maintaining the direct responsibility of the parties on whose credit the loan was made. Also, in respect to the prepayment penalty, the court observed, "... the lendor has a justifiable interest in motivating an intended long-term debtor to refrain from early payment of principal." Hellbaum v. Lytton Savings and Loan Association, supra, page 458, 79 Cal. Rptr. 9, 11.

In conclusion, the court observed, "The complaint does not allege that the fees proposed (prepayment penalty or assumption fee) were so large as to have no reasonable relation to the justifiable interest of the lendor which we have mentioned. Perhaps a fact question could have been presented as to whether in effect the restraint was unreasonable. But none was presented in the first cause of action and appellants' present position is not that an amendment should have been allowed but that as a matter of law the restrain on alienation was invalid." Hellbaum v. Lytton Savings and Loan Association, supra, at page 458, 79 Cal. Rptr. 9, 11. (Emphasis supplied). Compare this language with plaintiffs' complaint in the case at bar, App. p. 4, Paragraph XII (2), the significance of which will be subsequently discussed.

The next major California case was Cherry v. Home Savings and Loan Association, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (1969), a decision from the Court of Appeal, Second District. In that case, there was a due on sale clause contained in the deed of trust. Cherry purchased the home from the trustor without the prior written consent of the beneficiary. The beneficiary threatened to accelerate the note unless Cherry would assume the note at a higher rate of interest than his seller was paying and also pay a loan assumption fee.

The argument was made that in the deed of trust there was an implied condition that the beneficiary act reasonably in withholding its consent to a transfer prior to declaring the debt accelerated, i.e., if there was no threat to the security, the acceleration would be unreasonable. The court stated, at page 139, "It (beneficiary) had the power of free decision regarding use of its money by others, the right to determine in its own discretion whether it would exercise its option, and it had no obligation to act only in a manner which others might term 'reasonable'."

The court also indicated that the due on sale clause was a legitimate means to protect what the court characterized as the justifiable interest of the lendor in taking advantage of rising interest rates in the event its borrower transferred the security at a time when interest rates were up. Cherry v. Home Savings and Loan Association, supra, at page 138.

In 1971, the California Supreme Court, sitting in bank, rendered its decision in the case of La Sala v. American Savings and Loan Association, supra. The suit was a class action to determine the validity of due on encumbrance clauses, i.e., acceleration upon a second deed of trust or mortgage placed upon the property. The court held that a due on encumbrance clause could accelerate a note only upon a trial court's finding that such acceleration is reasonably necessary to the protection of the lendor's interest. La Sala v. American Savings and Loan Association, supra, at page 1126.

However, the court did not content itself with the foregoing pronouncement, and by way of dicta, on page 1126, stated that the lendor may insist upon automatic performance of the due on sale clause because such a provision is necessary to the lendor's security.

Presumably, after the dicta referred to above, Cherry v. Home Savings and Loan Association, supra, was the law in California. The Coast Bank case and Hellbaum case at least appeared to suggest that the due on sale clause would not be enforced unless reasonably necessary to protect the beneficiary's interest, or if the "effect" of the restraint was unreasonable. The La Sala case though appeared to give blanket approval to the exercise of the due on sale clause and implied that it would not be proper to question the reasons for the exercise of the clause in a court proceeding.

Subsequent to the La Sala case, legal scholars and others rushed to the aid of the debtors and their untenable positions, and severely criticized the trend of the California cases. Among those articles criticizing the California cases are the following:

1. Bonanno, Due on Sale and Prepayment Clauses in Real Estate Financing in California in Time of Fluctuating Interest Rates -- Legal Issues and Alternatives 6 U.S.F.L. Rev. 267 (1972), App. pp. 70-94, also contained in the original record on file with this court.

2. Comment, Applying the Brakes to Acceleration Clauses: Controlling Their Misuse in Real Property Secured Transactions, 9 Cal. Western L. Rev. 514 (1973), App. pp. 106-127, also contained in the original record on file with this court.

3. Comment, The Case for Relief from Due on Sale Provisions: A Note to Hellbaum v. Lytton Savings and Loan Association, 22 Hastings L.J. 431 (1971), App. pp. 95-105, also contained in the original record on file with this court.

4. Comment, Due on Sale and Due on Encumbrance Clauses in California, 7 Loyola U.L. Rev. (L.A.) 306. (1974)

5. Comment, Mortgages -- A Catalog and Critique on the Role of Equity in the Enforcement of Modern-Day "Due on Sale" Clauses, 26 Ark. L. Rev. 485. (1973).

6. Valensi, The Due on Sale Clause -- a Dissenting Opinion, 45 L.A. Bar Bull. 121 (1970).

The above cited articles can best be summarized by the statement that unless there is a threat to a justifiable interest of the lendor, automatic enforcement of a due on sale clause is an unreasonable restraint on alienation.

Such was the State of California law at the time the cross-motions for summary judgment were submitted to the trial court for decision in the matter at bar. However, in other jurisdictions, which had cited the Coast Bank case with approval, courts were holding that reasonable retraints upon alienation were not invalid per se, as had been urged in the Coast Bank case and the article by Bernhard. Malouff v. Midland Federal Savings and Loan Association, Colo., 509 P. 2d. 1240 (1973); People's Savings Association v. Standard Industries, 22 Ohio App. 2d 35, 257 N.E. 2d 406 (1970). The query of these courts was to define the justifiable interests of the beneficiary-lendor and determine the reasonableness of conditions to be imposed upon an assuming purchaser or seller in order to realize the justifiable interest of the beneficiary by use of the clause.

Malouff v. Midland Federal Savings and Loan Association, supra, Gunther v. White, Tenn., 489 S.W. 2d 529 (1973), Clark v. Lachenmeier, Fla. 237 So. 2d 583 (1970) Arizona Coffee Shops v. Phoenix Downtown Park Association, Ariz. 387 P.2d 801 (1963), and Mutual Federal Savings and Loan Association v. Wisconsin Wire Works, 58 Wis. 2d 99, 205 N.W. 2d 762

(1973), all deal essentially with due on sale clauses, and all set forth the propositions of law that a court may refuse to allow a sale or foreclosure of the mortgage when acceleration of the due date would be unconscionable or unreasonable and the result would be inequitable and unjust; each case must be considered on its own facts to decide whether or not in light of those facts an acceleration would be in order.

The common thread which runs through all of the above cited cases is that a due on sale clause is not unreasonable as long as there is a justifiable interest of the beneficiary-lendor sought to be protected by the invocation of the clause. If the beneficiary is not attempting to extract a promise in furtherance of his justifiable interest, then the exercise of the due on sale clause is unconscionable, inequitable and unreasonable.

The above cited cases were all set forth in plaintiff's motion for summary judgment in the case at bar. App. p. 36.

Also cited to the trial court in plaintiff's motion for summary judgment was the case of Tucker v. Pulaski Federal Savings and Loan Association, Ark. 481 S.W. 2d 725 (1972). The case involved facts very similar to that at bar in that the only reason for the acceleration which was put forth was that the prior written consent of the mortgagee was not obtained. The court stated very simply that the invocation of the acceleration clause must be based on grounds that are reasonable on their face; further, there must be legitimate grounds for refusal to accept a transfer to a

particular person.

The foregoing discussion being the state of the law throughout other jurisdictions at the time the cross-motions for summary judgment were submitted to the trial court for decision in the case at bar, plaintiff would submit that the trial court misapplied the law or erred in any one of the following respects:

1. Since there was no case law or statutes in the State of Nevada controlling the matter at the time of submission, then the common law rule should have controlled. The common law rule is, as indicated previously, that all restraints on alienation are repugnant and invalid. Accordingly, this court should instruct the trial court to enter summary judgment in favor of plaintiff.

2. If the rule of reasonableness proffered by the Coast Bank case (and lost in the shuffle in California), the legal scholars in their cited articles and the other jurisdictions discussed was followed by the trial court, then there was a genuine issue of fact before the trial court and summary judgment for the defendants was improper. That issue, which was created by implication by the trial court in deciding to follow the rules of reasonableness, is whether there was a threat to a justifiable interest of the defendants sought to be protected by operation of the due on sale clause.

No affidavits were submitted by defendants to apprise the court of defendants justifiable interest to be protected or the impending threat

to their security. This issue of fact was placed before the trial court pursuant to Paragraph XII (2) of the complaint. App. p. 4. It was further raised by the affidavits of Sharon Auble, Roberta Greiner and Jack McAuliffe, attached to plaintiff's motion for summary judgment. App. pp. 38-46.

Plaintiff would also submit that under the Hellbaum case, a further issue of fact exists as to whether or not the "effect" of the restraint would be unreasonable. This issue is also raised by Paragraph XII (2) of the complaint.

If the trial court was attempting to follow the rule of reasonableness, then this court should vacate the order of summary judgment and instruct the trial court to have an evidentiary hearing to decide the issues of fact previously indicated.

3. If the California rule of automatic acceleration was followed, the trial court did not correctly analyze the California decisions. No court, other than California, applied the rule of automatic enforcement. As indicated in the journals and articles previously mentioned, the California rule was under strenuous attack premised upon sound reasoning both legally and in terms of commercial reality. Indeed, the California rule ignored its own analysis of justification of departure from the common law rule which prohibits all restraint on alienation. That analysis contained in the Coast Bank case, was that the common law rule needlessly invalidated reasonable restraints designed to protect justifiable interests of the

parties. There is no way to determine what is a reasonable restraint or a justifiable interest to be protected if there is no fact finding procedure by the court, as there is not in an automatic enforcement situation.

Plaintiff would submit that if the trial court followed the California rule as it existed at that time, a proper analysis of the California cases would require that an evidentiary hearing be held, the same as called for in number 2 above.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND REHEARING

Tucker v. Lassen Savings and Loan Association, 116 Cal. Rptr. 633, 526 P.2d 1169 (1974) was rendered by the California Supreme Court, sitting in bank. It held very simply, at page 1175, ". . . a 'due on' clause contained in a promissory note or deed of trust is not to be enforced simply because trustor-obligor enters into an instalment land contract for the sale of the security. Rather, in such a case the clause can be validly enforced only when the beneficiary-obligee can demonstrate a threat to one of his legitimate interests sufficient to justify the restraint on alienation inherent in its enforcement."

Premised upon the foregoing holding, plaintiff moved the district court for rehearing pursuant to D.C.R. 20(4). App. pp. 55-56, which

motion was denied. Plaintiff submits that the failure of the trial court to rehear and reconsider the summary judgment was an error of law and/or abuse of discretion, in that after the case of Tucker v. Lassen no jurisdiction supported the rule of automatic enforcement of due on sale clauses without some type of evidentiary hearing.

More recently, in Baker v. Loves Park Savings and Loan Association, Ill., 314 N.E. 2d 306 (1974), the Appellate Court of Illinois held that a due on sale clause is not per se unlawful as against public policy, but, rather, that it may be found to be a reasonable restraint upon alienation of property depending upon the underlying circumstances of the case. In Baltimore Life Insurance Company v. Harn, Ariz., 486 P.2d 190 (1971), the Court of Appeals of Arizona stated, at page 193, "it follows that the invocation of the clause must be based on grounds that are reasonable on their face." Further, at page 193, "absent an allegation that the purpose of the clause is in some respects being circumvented or that the mortgagee's security is jeopardized, a plaintiff cannot be entitled to equitable relief. Otherwise the equitable powers of the trial court would be invoked to impose an extreme penalty on a mortgagor with no showing that he has violated the substance of the agreement, that is, that he would not make a conveyance that would impair the security. We note that the complaint contained no allegation that there had been any default in payments as they became due and at oral argument, counsel

for the plaintiff, responding to a question directed to this point, affirmed that there had been no missed payment. At no place in the pleading does an allegation appear that the plaintiff's security is in any way jeopardized." See also, Mutual Federal Savings and Loan Association v. American Medical Services, Wis., 223 N.W. 2d 921 (1974).

The record before this court is absolutely barren of any affidavits or allegations by the defendants' that their security has in any respect been jeopardized as a result of the conveyance without their written permission. The cases and the articles are very clear that if the common law rule of invalidity of all restraints on alienation is not adopted by this court, at a minimum an evidentiary hearing is required to determine the justifiable interests of the defendants and whether as a result of the conveyance without their permission, their security has in fact been jeopardized. Accordingly, Paragraphs II, III, IV and V of the conclusions of law, App. p. 65, are in error.

III.

THE AWARD OF ATTORNEY'S FEES TO THE DEFENDANTS AS PREVAILING PARTIES IS ERROR

In its conclusions of law, App. p. 65, the trial court stated that the defendants were entitled to an award of attorney's fee pursuant to the promissory note and pursuant to NRS 18.010 as prevailing parties. The promissory note is not contained in the record nor was it ever before

the trial court. Only the deed of trust containing the due on sale clause is contained in the record and was before the trial court. Accordingly, the trial court could not award attorney's fees pursuant to the terms of the promissory note. Further, defendants were not the prevailing parties pursuant to NRS 18.010. City of Las Vegas v. Cragin Industries, 86 Nev. 933 (1970).

CONCLUSION

Premised upon the foregoing discussions, plaintiff requests the following relief from this court:

1. Reverse the judgment of the trial court and remand with the instruction to enter summary judgment in favor of plaintiff. Or, in the alternative;

2. Reverse the judgment of the trial court and remand with the instruction that a trial be held to determine the justifiable interests of the defendants and whether their justifiable interests have in fact been jeopardized by a conveyance of the property without their prior written permission.

3. Reverse the judgment of the trial court in respect to the award of attorneys fees.

Respectfully submitted,

STREETER, SALA & McAULIFFE

By _____

Attorneys for Appellant
30 Court Street - P.O. Box 2481
Reno, Nevada 89505

Pursuant to NRAP 25 (d), I certify that I am an employee of Streeter, Sala & McAuliffe, Chartered, and that on this 13th day of June, 1975, I personally served a true copy of the attached Opening Brief of Appellant and Appendix upon the law firm of Breen, Young, Whitehead and Hoy at their address of 232 Court Street, Reno, Nevada, by delivering same to the secretary for David Hoy.

Tamara Bloomster

TAMARA BLOOMSTER

IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST COMMERCIAL TITLE, INC., a Nevada corporation, APPELLANT, vs. ALVALETTA Z. HOLMES and MARION H. PARSONS, RESPONDENTS.	No. 8202

RESPONDENTS' REPLY BRIEF

STREETER, SALA & McAULIFFE
30 Court Street - P.O. Box 2431
Reno, Nevada 89501

Attorneys for Appellant

BREEN, YOUNG, WHITEHEAD & HOY,
Chartered
232 Court Street
Reno, Nevada 89501

Attorneys for Respondents

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

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Is a provision in a deed of trust that the beneficiary may declare the entire amount secured by such deed of trust due and payable if the trustor conveys the land subject to it without the consent of the beneficiary, enforceable?

II

Is an award of attorneys' fees to the defendant as prevailing party in an action to enjoin foreclosure of a deed of trust proper?

STATEMENT OF THE CASE

This is an action to enjoin the foreclosure of a deed of trust for the transfer of the property subject to the deed of trust without consent of the beneficiaries in violation of a due-on-sale clause. The action also seeks a declaratory judgment that due-on-sale clauses are invalid.

The plaintiffs are: First Commercial Title, Inc., which handled the escrow transaction wherein the property was transferred without consent; and Premier Development Co., the holder of a second deed of trust on the property. Only the plaintiff title company has appealed.

The respondents, Alvaletta Z. Holmes and Marion H. Parsons are the daughters of Stella Snyder, the beneficiary of the first deed of trust and former owner of the property.

Following the filing of the complaint and answer, defendants filed their motion for summary judgment contending the due-on-sale clause was valid and that they could proceed with foreclosure under the power of sale. Appellant filed a cross-motion for summary judgment contending the due-on-sale clause was invalid.

The court granted respondents' motion for summary judgment. Thereafter plaintiffs (appellant) moved the court to reconsider, which motion was also denied.

STATEMENT OF THE FACTS

The facts of this case are undisputed. On February 28, 1969, Stella Snyder conveyed to Elmer Ray Etnyre and Mary Sue Etnyre, husband and wife, a parcel of land in Reno, Washoe County, Nevada. As part of the consideration for the conveyance, the Etnyres executed and delivered to Mrs. Snyder a promissory note in the sum of $30,000.00 which note was secured by a deed of trust. The deed of trust was duly recorded on February 28, 1969 as Document No. 137657, Official Records of Washoe County, Nevada. The deed of trust contained the following language:

> "In the event that Trustor shall sell or contract to sell the parcel hereby encumbered without first obtaining the written consent of Beneficiary, the balance of principal and interest that shall then remain unpaid on the obligation secured by this deed of trust shall forthwith become due and payable although the time of maturity as expressed therein shall not have arrived." (Rec. of Appeal Page 7.)

Thereafter Stella Snyder died in the State of California. The respondents Marion H. Parsons and Alvaletta Z. Holmes, the daughters of Stella Snyder, were awarded the promissory note and deed of trust under the terms of the will of Stella Snyder. A decree of distribution awarding the deed of trust to respondents was recorded in Book 257, Page 512, Official Records of Washoe County, Nevada on August 30, 1972. (Record on Appeal, Page 8-10).

Prior to the recording of the decree of distribution

respondents were requested to sign and did sign a consent to the transfer of the property to Premier Development Co. (The consent actually recites that permission is given to allow Premier to "assume" the deed of trust. See Page 16, Record on Appeal)

The transfer to Premier took place between November, 1971 and January, 1972. In December, 1972, respondents were asked by appellant title company to consent to a transfer of the property to Ronald Gardner and Ben Biller. (See Record on Appeal, Page 17.) The consent dated December 19, 1972 contains the following language: "It is hereby understood that this consent is limited to the above named Gardner/Miller and shall in no way be construed as a consent on any future buyer of the subject property."

Hand written at the bottom of the consent was the following language:

> "We hope that this transaction does not delay the monthly payment due the first of each month as we use the money toward our living expenses.
>
> A. Holmes"

See Record on Appeal, Page 18.

The sale to Gardner/Miller was never consumated and thereafter appellant First Commercial Title sent a letter dated February 5, 1973 requesting that respondents sign another consent to transfer the property to John DeWitt Barney and Jill Barney. The consent form enclosed by the title company was signed by the respondents and returned. This consent again contained the same limiting language as the previous

one, i.e. "It is hereby understood that this consent is limited to the above named Barneys, and shall in no way be construed as a consent on any future buyer of the subject property." See Record on Appeal, Page 20.

On September 28, 1973, the Barneys conveyed the property to Lynn and Orva Ziegler. The escrow was handled by appellant title company, which had also handled the previous transfers. See Record on Appeal, Page 26, Affidavit of Auble, Page 79, Affidavit of Griener, Record on Appeal, Page 85. No request for consent to the transfer was ever made to defendants and no consent was ever given.

Upon learning that Barneys had breached the terms of the deed of trust by conveying the property to Ziegler without their consent, respondents caused to be recorded a notice of default and election to sell pursuant to the power of sale in the deed of trust. (Record on Appeal, Pages 29-31.)

Appellant thereupon brought this action to enjoin the sale and declare the "due on sale" clause void.

Appellant urged five grounds to enjoin the sale, including defects in the notice of default, waiver of the right to require consent by having previously consented, waiver of the due on sale clause by the collection agent for appellants, the invalidity of the distribution of the deed of trust to respondents following their mother's death and that the due on sale clause is void.

Appellant has abandoned all of its arguments in the trial court except that the due on sale clause is void as an

unreasonable restraint on alienation of land.

THE DUE ON SALE CLAUSE IS A REASONABLE RESTRAINT ON ALIENATION AND VALID AND ENFORCEABLE.

Appellant concedes that, the clear language of the deed of trust requiring consent to a transfer, has been breached. It seeks to excuse that breach, however, upon the ground that respondents must show a detriment as a result of the breach before they can enforce their rights.

Such a theory of law is indeed curious in these circumstances. Granted, that before a man may collect for injuries or for breach of a contract, he must show damages. Here, however, there is no question but that respondents are owed the money, it is only a matter of when it will be paid. The landowner owes the money to the holder of the deed of trust. So long as he does not sell the land, he may pay the money in installments. The moment the land is conveyed without the consent of the holder of the security, then the entire amount becomes due and payable. The seller merely elected a different time for payment by the act of selling which was solely and totally in his control. This cannot be an unreasonable restraint of alienation.

Appellant grounds its argument on the common law prohibition against restraints on alienation. As Justice Traynor suggests in Coast Bank v. Minderhout, 61 Cal. 2d 311, 38 Cal. Rptr. 505, 392 P.2d 265 (1964) one must look to the reasons for the prohibition against restraints on alienation to determine if the prohibition should even apply to the

instant case.

The basis of the prohibition at Common Law was the Statute of Quia Emptores (18 Edw I. C.7, St. Westm. III 1290). This statute was to prevent the practice of sublords extracting fees and other benefits as a condition of allowing alienation. This had the effect of depriving the King and high lords of fees and incidents of the estate. See Digby, History of Real Property. (5th Ed.) 234.

The common law rule was then extended to any restraint on alienation, until exceptions were made for circumstances wherein the restraint served a useful purpose. See 61 Am. Jur. 2d, Perpetuities and Restraints on Alienation.

Coast Bank recites some of the reasonable and allowable restraints on alienation. All of the allowable restraints on alienation enumerated are based upon an interest in the property by the one imposing the restraint.

Coast Bank merely extended the allowable restraints to a mortgagee of the property.

The reasons for such a valid restraint are given in Coast Bank:

> "In the present case it was not unreasonable for plaintiff to condition its continued extension of credit to the Enrights on their retaining their interest in the property that stood as security for the debt. Accordingly, plaintiff validly provided that it might accelerate the due date if the Enrights encumbered or transferred the property." 392 P.2d 265 at 268.

The Coast Bank case was heralded as a land-mark decision in the area of due-on-sale clauses. It upheld generally the

validity of such a clause and in effect, rejected the view that such a clause in a security instrument is per se an invalid restraint. Numerous decisions since Coast Bank, supra, have upheld the validity of such provisions. Jones v. Sacramento Savings and Loan Association, 248 Cal. App. 2d 522, 56 Cal. Rptr. 741 (1967); Hellbaum v. Lytton Savings and Loan Ass'n of No. Cal., 274 Cal. App. 2d 456, 79 Cal. Rptr. 9 (1969); Cherry v. Homes Savings & Loan Ass'n, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (1969); Lazzareschi Invest. Co. v. San Francisco Fed. S. & L. Ass'n, 22 Cal. App. 3d, 99 Cal. Rptr. 417 (1971); Shalit v. Investors Savings and Loan Ass'n, 101 N.J. Super. 283, 244 A.2d 151 (1968); Stith v. Hudson City Savings Institution, 63 Misc. 2d 863, 313 N.Y.S.2d 804 (1970); Gunther v. White, Tenn., 489 S.W.2d 529 (1973); People's Savings Ass'n v. Standard Industries, Inc., 22 Ohio App. 2d 35, 257 N.E.2d 406 (1970); Walker Bank & Trust Company v. Neilson, 26 Utah 2d 383, 490 P.2d 328 (1971); Malouff v. Midland Federal Savings and Loan Ass'n, Colo., 509 P.2d 1240 (1973).

In view of the numerous cases that have held due-on-sale clauses to be a reasonable restraint on alienation, and in view of the sound logic expressed in these cases, the only question remaining seems to be what conditions can the mortgagee impose upon the assuming purchaser in exchange for non-acceleration.

In Hellbaum, supra, the court held that not only could the mortgagee accelerate upon transfer, but that he could also impose a fee for pre-payment upon such acceleration. Such

provision was not an unreasonable restraint on alienation, nor was it an unreasonable imposition of liquidated damages.

In Cherry, supra, it was held that there was a justifiable interest of the lender in protecting itself against a rise in the interest rate and in permitting an acceleration of the indebtedness on sale where the purchaser will not agree to pay an increased interest rate on assumption of the loan. The restraint on alienation by the election to exercise the due-on-sale clause under these circumstances was held to be a reasonable one and enforceable. The Court expressed the business rationale therefore, 81 Cal. Rptr. at 138:

> "First, a substantial loan ordinarily is not obtained for the asking. Lenders run the risk that security may depreciate in value, or be totally destroyed. This risk of loss is reduced in the lender's viewpoint if the borrower is known to be conscientious, experienced and able. Often, as here, a trust deed requires the borrower to maintain the property in good repair, secure and keep adequate insurance in force, satisfy liens, taxes and other encumbrances and in other ways to protect the security. If a borrower were able to sell the security without concern for the debt, he may take the proceeds of the sale, leaving for parts unknown, and the new owner of the property might permit it to run down and depreciate. Thus, the lender places some value on his belief that the person who takes out the loan is reliable and responsible. A lender may, indeed, be willing to loan money to some persons or entities at one rate of interest but to other, less desirable risks only at an increased interest rate.
> "Secondly, loan agreements frequently permit a borrower to pay off a loan before it is due. When interest rates are high, a lender runs the risks they will drop and that the borrower will refinance his debt elsewhere at a lower rate and pay off the loan, leaving the lender with money to loan but at a less favorable interest rate. On the other hand, when money is loaned at low interest, the lender risks losing the benefit of a later increase in rates. As one

protection against the foregoing contingency, a due-on-sale clause is employed permitting acceleration of the due date by the lender so that he may take advantage of rising interest rates in the event his borrower transfers the security. This is merely one example of ways taken to minimize risks by sensible lenders. "There is no inequity visible from such a provision."

In Shalit, supra, which involved a proceeding on a motion for summary judgment in an action against a mortgagee to recover a premium paid for waiver of an acceleration clause, the Court held that the payment of a fee for mortgagee's waiver of its right to accelerate the payment was not usury, and that the right to receive payment of money in exchange for its mortgage acceleration privilege is within the powers incidental and necessary to business. In Stith, supra, an action was brought by purchasers for declaration that the mortgagee had no "right" to condition approval of the purchaser's assumption of vendor's mortgage upon the payment of a higher interest rate, and mortgagee filed a counterclaim for foreclosure. On cross motions for summary judgment, the Court held that even a statute which prohibited increasing the rate of interest on a loan beyond the maximum rate authorized at the time the loan was made did not preclude the mortgagee from exercising his option to accelerate the balance due and require an increased rate of interest on a new loan, by reason of the sale of the property and purchaser's assumption of the mortgage without consent of the mortgagee.

In Gunther, supra, the vendor brought an action to restrain mortgagee from enforcing an acceleration provision upon the sale of the property, and mortgagee moved to dismiss for failure to state a claim upon which relief could be granted.

The Court sustained the validity of due-on-sale clauses and dismissed the action stating, 489 S.W.2d at 532:

> The appellees under their contract have the right to insist upon the repayment of their loan in the event of sale, so that they can relend the money at an increased interest rate, and so maintain their supply of lending money, at the level of their present cost of such money."

In People's Savings Ass'n, supra, the Court held that a clause in a note and mortgage which permits the mortgagee to treat a transfer of the mortgaged property by the mortgagor without the written consent of the mortgagee as a default, and which entitles the mortgagee to acceleration of the balance due, is not illegal, inequitable or contrary to the public policy of the State of Ohio. The Court expressed this view, 257 N.W.2d at 408:

> "The right of the mortgagee to protect its security by maintaining control over the identity and financial responsibility of the purchaser is a legitimate business objective . . ."

In Malouff, supra, the buyer of residential real estate assuming a deed of trust of the prior owner brought suit against the lender to enjoin it from foreclosing on property under a "due-on-sale" acceleration clause. The Colorado Supreme Court held that the clause was not an unreasonable restraint on alienation of real property, and that the action of the lender in imposing a higher interest rate on the purchaser of the property assuming the loan as a condition for not invoking acceleration clause was not unreasonable. The Court stated at 509 P.2d at 1245:

> "We do not consider the motive of Midland in seeking to protect itself and the borrower from the effects of inflationary or deflationary conditions in the money market to be improper or unlawful. Both parties have the benefit of their original bargain during their continued creditor - debtor relationship. However, when the property is sold to a purchaser who desires to assume the existing loan, economic consideration may reasonably justify the lender in raising the interest rate to or approaching one equal to the current market rate."

All of these cases upholding the due-on-sale acceleration clause are soundly reasoned. The borrower in such sales generally receives cash sufficient to pay off his obligations. To permit the lender to accelerate insures that all buyers of property must finance at the current interest rate, and that none obtain an advantage because of the fortuitous fact that his seller originally purchased during a period of low interest. Acceleration upon sale of the property, in other words, does not seriously restrict alienation because the sale terms can, and usually will, provide for payment of the prior trust deed. Cherry, supra.

In LaSala v. American Savings and Loan, 97 Cal. Rptr. 849, 489 P.2d 1113 (1971) the California Supreme Court held that a lender could not enforce a due on encumbrance clause in a deed of trust without a showing that its security was impaired. The court held that the uncontrolled right to accelerate upon encumbrance "created too serious a potential of abuse."

The court was impressed by the fact that the lender used the clause to extract additional fees from all of its

numerous borrowers whenever a junior encumbrance was placed on the property.

> "When such enforcement is not reasonably necessary to protect the security, the lenders use of the clause to exact collateral benefits must be held an unlawful restraint on alienation."

It should be noted, and appellant concedes, that LaSala expressly affirmed the right of a lender to insist upon automatic enforcement of a due on-sale-clause because it is necessary to protect the lenders security. This was not an inappropriate dicta but was the clear pronouncement of the court for the guidance of the bar and the public with respect to the status of due-on-sale clauses in California.

The authors of the law review articles cited by appellant all suggest that Cherry, LaSala, Coast Bank and others create too much potential for abuse. They refer to the abuses of charging fees to allow a transfer, of the uneven bargaining position between the lender and borrowers, and the unreasonable exercise by lenders of the clause solely for the purpose of raising the interest rate or obtaining a transfer fee.

None of those abuses or potential abuses are present here. The bargaining positions of appellant and respondents is not weighted in favor of the lender. As indicated by the affidavits of appellant, no demand for any excessive or other fee was ever made by respondents.

Respondents had consented to three previous sales, with knowledge of appellant. To now hold that no consent is

necessary would destroy the clear language of the deed of trust.

There are none of the abuses present in this case where two ladies who derive part of their living from the payments of a note secured by a deed of trust attempt to enforce the terms of it against a title company that had full knowledge of the provisions of the deed of trust.

Appellant contends that the trial court abused its discretion when it failed to reconsider this case following the announcement of the decision in Tucker v. Lassen Savings and Loan Assoc., 116 Cal. Rptr. 633, 526 P.2d 1169 (1974).

Appellant, however, fails to consider that in Tucker, the California Supreme Court expressly limited the holding to the facts of that case.

In Tucker, Jerry and Nadene Tucker, and Dan and Sharon Tucker purchased a piece of property in Shasta County. Three of the Tuckers were real estate salesmen or brokers. The Tuckers paid $11,400.00 for the property with $4,000.00 down and the balance financed by Lassen Savings. The deed of trust contained the usual due-on-sale clause. The Tuckers never occupied the property but instead rented it to the Nolls. Later the Tuckers entered into a contract of sale to sell the property to their tenants, the Nolls. Upon learning these facts, Lassen sought to exercise its right to acceleration and demanded that the loan, together with a prepayment penalty of $230.00, be paid. Tuckers were unable to pay the

amount and Lassen Savings commenced foreclosure. No sale was held because Nolls entered into an agreement to assume the existing loan at an interest rate 1.25% higher than the original rate. Tuckers were forced to quitclaim their interest to Nolls.

Tuckers then brought suit for damages of $3,724.85 representing the amount that was owed to them under the contract of sale and which they gave up when the quitclaimed to Nolls.

In short, the case illustrates all of the cited evils of an institutional lender using the due-on-sale clause to extract a higher interest rate and/or a penalty as a condition of waiving the due-on-sale clause.

The court held that when the trustor enters into an installment land sale contract for the sale of the security, there is a difference from an outright sale because the seller-trustor usually receives only a small down payment and is therefore not able to pay off the note secured by the deed of trust. The court indicated that further, the seller-trustor under a contract of sale usually has an interest in the property until he is paid off on the contract. For all of these reasons the court held that the due-on-sale clause could not automatically be enforced on the sale of the property under a contract of sale.

The court was careful to point out the differences between a contract to sell and an outright sale. Tucker leaves as the law of California the right to automatically enforce a due-on-sale clause upon the outright conveyance of

property subject to a due-on-sale clause.

The trial court was therefore not presented with any authority on the motion to reconsider which would justify changing its ruling.

The other cases cited by appellant as authority for the proposition that the due-on-sale clause cannot be enforced automatically are distinguishable on their facts.

Malouff v. Midland Federal Savings and Loan Assoc., Colo., 509 P.2d 1240 (1973); Peoples Savings Assoc., v. Standard Industries, 22 Ohio App. 2d 35, 257 N.E. 2d 406 (1970); Mutual Federal Savings and Loan Assoc., v. Wisconsin Wire Works, 58 Wis. 2d 99 (205 of N.W. 2d 762, 1973); Tucker v. Pulaski Federal Savings and Loan Assoc. (Ark.) 481 S.W.2d 725 (1972) all involved institutional lenders and in each case there is either the expressed or implied concern that the institutional lender was abusing the due-on-sale clause. See also Mutual Federal Savings and Loan v. American Medical Services, Wisc. 223 N.W. 2d 921 (1974).

In the other cases cited by appellant the mortgagee or beneficiary was attempting to use the court of equity to foreclose the mortgage. The law in those states requires that a mortgage be foreclosed by an equitable action. The holding of the cases is that before equity or enforcement by foreclosure by mortgagee must in fact be equitable and of good grounds for exercising the due-on-sale clause.

In the instant case the beneficiary respondents are not seeking aid of a court of equity but are merely seeking to enforce without the aid of court the terms and conditions of the deed of trust.

THE AWARD OF ATTORNEYS FEES TO RESPONDENT DEFENDANT AS PREVAILING PARTY WAS PROPER.

The appellants rely on City of Las Vegas v. Cragin Industries, 86 Nev. 966, 478 P.2d 585 (1970) for the proposition that respondents were not entitled to an award of attorneys fees as prevailing party. City of Las Vegas v. Cragin Industries is distinguishable in that there the award of fees was to the plaintiff and apparently grounded on N.R.S. 18.010 3(a) which reads as follows:

> "The court may make an allowance of attorney fees to: (a) the plaintiff as prevailing party when the plaintiff has not recovered more than $10,000.00;"

The award in this case is based upon N.R.S. 18.010 3(c) which allows an award to the defendant to the prevailing party when the plaintiff has not sought recovery in excess of $10,000.00. In this case there was no recovery sought in excess of $10,000.00 and the award of attorney fees under 18.010 3(c) was proper.

Appellant further complains that the court erred in grounding its award of attorneys fees on the promissory note which was not before the court. The deed of trust before the court, however, incorporated by reference the covenants of N.R.S. Chapter 107 which provide for attorneys fees.

The record is clear that the parties to the deed of trust contemplated the payment of attorneys fees incurred in the foreclosure on the security and the enforcement of the note and the court was proper in granting the attorneys fees.

CONCLUSION

This case does not demonstrate any abuse of the due-on-sale clause contained in the deed of trust. The exercise by respondents of the right to declare the entire balance due and payable was proper and in keeping with the express terms and conditions of the agreement. There is no just reason to interfere with the private contractual rights of the parties. The judgment of the trial court should be affirmed.

Respectfully submitted this 15th day of August, 1975.

BREEN, YOUNG, WHITEHEAD & HOY
Chartered
232 Court Street
Reno, Nevada 89501

Attorneys for Respondents

By /s/
David R. Hoy

IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST COMMERCIAL TITLE, INC., a Nevada corporation, Appellant, vs. ALVALETTA Z. HOLMES and MARION H. PARSONS, Respondents.	)	No. 8202

REPLY BRIEF OF APPELLANT

STREETER, SALA & McAULIFFE
30 Court Street - P.O. Box 2481
Reno, Nevada 89505

Attorneys for Appellant

BREEN, YOUNG, WHITEHEAD & HOY
232 Court Street
Reno, Nevada 89501

Attorneys for Respondents

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REPLY TO RESPONDENTS' ARGUMENT THAT THE DUE ON SALE CLAUSE IS A REASONABLE RESTRAINT ON ALIENATION AND VALID AND ENFORCEABLE

On page nine of their Brief, Defendants state, inter alia, that the California Appellate Court held in the case of Cherry v. Home Savings & Loan Association, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (1969), that a lender has a "justifiable interest" in protecting itself against a rise in the interest rate and in permitting an acceleration of the indebtedness on sale where the purchaser will not agree to pay an increased rate on assumption of the loan. This proposition was expressly rejected by the Supreme Court of California in Tucker v. Lassen Savings & Loan Association, 116 Cal. Rptr. 633, 526 P2d 1169 (1974), 116 Cal. Rptr. 633, 639, footnote 10, at least as to instances involving sales by "installment land contract," i.e., any instrument whereby the trustor-vendor retains an interest in the property as security for the payment of his equity. Also, premised upon footnotes 7 and 10 of Tucker, supra, it is clear that when an appropriate factual situation reaches it, the California court will overrule its decision in La Sala v. American Savings & Loan Association, 97 Cal. Rptr. 849, 489 P2d 1113 (1971), where by way of dicta it was stated that a beneficiary can automatically enforce a due on sale clause in the event of an "outright sale," i.e., one in which the seller receives full payment for his equity and retains no interest in the property. The reasoning of the Tucker, court expressed at 116 Cal. Rptr. 633, 638, indicates that acceleration in the event of an outright sale would be reasonable to protect the beneficiary interest only if the trustor-vendor realized sufficient funds on the financing of the second sale to pay off the note to the beneficiary.

The distinction made by the Tucker court, supra, between an "outright sale" and a sale made by "installment land contract" is very important in reading Defendants' brief. For instance, the statement on page 12 of Defendants' Brief wherein Cherry, supra, is cited, would be viable, if at all (see above), only as applied to outright sales as opposed to sales by installment land contract. Further, the statement made on page 13 of Defendants' Brief and attributed to the case of La Sala, supra, would not be accurate as applied to sales made by installment land contracts. Tucker, supra, distinguished La Sala, supra, in this respect; and, as discussed above, the authority of La Sala, supra, in respect to automatic enforcement in instances of an outright sale is for all practical purposes ended.

Defendants' purported distinction of the Tucker case on pages 15 and 16 of their Brief is no distinction at all. There are no facts before this court, nor were there before the trial court, upon which to determine whether the transaction in question was an "outright sale" or a sale by "installment land contract." Further, an analysis of the case at bench in light of Tucker would necessarily involve a consideration of all transactions concerning the subject property. That is to say, whether acceleration would be reasonable in its affect upon intervening trustor-vendors who have substantial equity in the property evidenced by notes secured by deeds of trust subsequent to that of Defendants. Thus, at a minimum, this Court should order an evidentiary hearing.

REPLY TO DEFENDANTS' ARGUMENT THAT THE AWARD OF ATTORNEY'S FEES TO RESPONDENT DEFENDANT AS PREVAILING PARTY WAS PROPER

Defendants' reliance upon N.R.S. 18.0103(c) as authority for

the award of attorney's fees is refuted by City of Las Vegas v. Cragin Industries, 86 Nev. 933 (1970). In Cragin, supra, this court stated that N.R.S. 18.010 required an award of a money judgment as a precondition to an award of an attorney's fee. No monetary award was requested nor given to either Plaintiffs or Defendants, nor did Defendants counterclaim for attorney's fees as an item of damage.

Defendants also argue, on page 17 of their Brief, that the deed of trust before the trial court incorporated by reference the covenants of Chapter 107 of N.R.S. which provide for attorney's fees and therefore the award of such fees by the trial court was proper. N.R.S. 107.030(7) provides that upon a trustee's sale a certain percentage of the amount secured by the deed of trust and remaining unpaid, will be deemed attorney's fees. In the case at bench, and as the record reflects, no trustee's sale has been held. The sale has been enjoined by the District Court pending appeal. Thus, attorney's fees are not proper under N.R.S. 107.030(7).

N.R.S. 107.030(3) and (4) would not justify an award by the trial court of an attorney's fee, for, among other things, the record contains no demand indicating an amount expended by Defendants, which is a condition precedent, according to that statute.

Respectfully submitted this 9th day of October, 1975.

STREETER, SALA & McAULIFFE

By _____

Attorneys for Appellant
30 Court Street - P. O. Box 2481
Reno, Nevada 89505

of the debt as equals the value of the property, and if someone else wishes to bid the same or more, so much the better for every other party concerned with the property. * * *" (*Whitestone Sav. & Loan Assn. v. Allstate Ins. Co., supra,* p. 337, 321 N.Y.S.2d p. 866, 270 N.E.2d p. 697)."

MORTGAGES—DUE ON SALE CLAUSE UPHELD

FIRST COMMERCIAL TITLE, INC. v. HOLMES
550 P.2d 1271 (Supreme Court of Nevada, 1976)

ISSUE: Whether a "due-on-sale" clause in a deed of trust constitutes an unreasonable restraint upon alienation.

FACTS: A deed of trust executed in conjunction with the sale of real estate in Reno, Nevada provided:

> "In the event that Trustor shall sell or contract to sell the parcel of land hereby encumbered without first obtaining the written consent of Beneficiary, the balance of principal and interest that shall then remain unpaid on the obligation secured by this Deed of Trust shall forthwith become due and payable although the time of maturity as expressed therein shall not have arrived."

Several subsequent sales of the encumbered property were made with the consent of the beneficiary and the assumption of the obligation by the new owners. However, the escrow agent neglected to obtain consent at the sale which was the subject of this action. The trial court refused to enjoin the sale of the property by the trustees, declaring that the due-on-sale clause was valid and enforceable.

HELD: The due-on-sale clause does not constitute an unreasonable restraint on alienation and is not on its face inequitable or violative of public policy. The court held:

> "While most jurisdictions uphold the validity of the due-on-sale clause, some divergence of opinion exists as to its practical application. We adopt the view that the clause is entitled to automatic enforcement where there is an outright sale by the trustor-vendor. *Coast Bank v. Minderhout,* 61 Cal.2d 311, 38 Cal.Rptr. 505, 392 P.2d 265 (1964); *LaSala v. American Savings & Loan Ass'n.,* 5 Cal.3 864, 97 Cal.Rptr. 849, 489 P.2d 1113 (1971); *Cherry v. Home Savings & Loan Ass'n.,* 276 Cal.App. 2d 574, 81 Cal.Rptr. 135 (1969); *People's Savings Assn'n. v. Standard Industries, Inc.,* 22 Ohio App.2d 35, 257 N.E.2d 406 (1970); *Shalit v. Investors Savings & Loan Ass'n.,* 101 N.J. Super. 283, 244 A.2d 151 (1968); *Stith v. Hudson City Savings Institution,* 63 Misc. 2d 863, 313 N.Y.S.2d 804 (1970); *Gunther v. White,* 489 S.W.2d 529 (Tenn.1973). In so holding, we do not suggest that the clause is absolutely enforceable without regard to surrounding circumstances. We would merely attach the same reverence to the due-on-sale clause as is accorded to any other provision which may appear in a contract.
>
> Although enforceability of the clause is automatic, it is not absolute

and may be vulnerable to certain defenses (i.e., waiver). However, we reject the view that imposes upon the beneficiary the burden of establishing justification for enforcement of the clause. See *Baltimore Life Insurance Co. v. Harn,* 15 Ariz.App. 78, 486 P.2d 190 (1971); *Tucker v. Pulaski Federal Savings & Loan Ass'n.,* 252 Ark. 849, 481 S.W.2d 725 (1972); *Clark v. Lachenmeier,* 237 So.2d 583 (Fla.App.1970); *Sanders v. Hicks,* 317 So.2d 61 (Miss.1975). Instead, we would burden the trustor with the responsibility of establishing grounds for unenforceability. If the trustor feels that enforcement of the clause is unreasonable, he may seek a judicial determination to that effect. A lender has the right to be assured in his own mind of the safety of his security without the burden of showing at each transfer that his security is being impaired."

N.B. The *Sanders v. Hicks* case, referenced above, was digested in Volume 1, No. 4 of NPLD, at page 72.

MORTGAGES—LIMITATION OF RECOVERY TO PROPERTY ONLY—AS SET FORTH IN MORTGAGE—CANNOT BE AVOIDED BY SUIT ON NOTE

STERN v. ITKIN BROS., INC.
383 N.Y.S. 2d 753 (Supreme Court, Special Term, 1975)

ISSUE: Whether assignees of a mortgage and a mortgage note are permitted to recover upon the note alone when the note incorporated the terms of the mortgage, including a provision that the mortgagees look only to the mortgaged premises for a judgment.

FACTS: Defendant, Itkin, executed a mortgage note simultaneously with a purchase money mortgage for $1,120,000 in connection with the purchase of a parcel of realty. The holder of the note and mortgage then assigned a portion of the note and mortgage to plaintiff, Stern. The note provided, in pertinent part, "all of the covenants, conditions and agreements contained in said mortgage are hereby made part of this instrument." A rider to the mortgage provided, in pertinent part:

> "On default hereunder, no deficiency judgment shall be sought, rendered or entered against the mortgagor and mortgagees will look only to the mortgaged premises."

When the other assignees, Ornstein Enterprises, Inc., instituted a foreclosure action against the mortgaged property, plaintiffs Stern refused to join them in the foreclosure suit and brought a suit on the mortgage note. The defendants argued that recourse could be had only to the mortgaged premises.

HELD: "Although this action, instituted by the Sterns, is an action on the mortgage note, not a foreclosure action on the mortgage, the court must look at the terms of the mortgage incorporated in the mortgage note. This is required, albeit the note represents a debtor-creditor relationship and the mortgage is merely security for the debt, not implying a covenant to pay the debt. (RPL, Sec. 249.) Where two

9. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of the Property, or part thereof, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender.

In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Deed of Trust, with the excess, if any, paid to Borrower. In the event of a partial taking of the Property, unless Borrower and Lender otherwise agree in writing, there shall be applied to the sums secured by this Deed of Trust such proportion of the proceeds as is equal to that proportion which the amount of the sums secured by this Deed of Trust immediately prior to the date of taking bears to the fair market value of the Property immediately prior to the date of taking, with the balance of the proceeds paid to Borrower.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date such notice is mailed, Lender is authorized to collect and apply the proceeds, at Lender's option, either to restoration or repair of the Property or to the sums secured by this Deed of Trust.

Unless Lender and Borrower otherwise agree in writing, any such application of proceeds to principal shall not extend or postpone the due date of the monthly installments referred to in paragraphs 1 and 2 hereof or change the amount of such installments.

10. Borrower Not Released. Extension of the time for payment or modification of amortization of the sums secured by this Deed of Trust granted by Lender to any successor in interest of Borrower shall not operate to release, in any manner, the liability of the original Borrower and Borrower's successors in interest. Lender shall not be required to commence proceedings against such successor or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Deed of Trust by reason of any demand made by the original Borrower and Borrower's successors in interest.

11. Forbearance by Lender Not a Waiver. Any forbearance by Lender in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any such right or remedy. The procurement of insurance or the payment of taxes or other liens or charges by Lender shall not be a waiver of Lender's right to accelerate the maturity of the indebtedness secured by this Deed of Trust.

12. Remedies Cumulative. All remedies provided in this Deed of Trust are distinct and cumulative to any other right or remedy under this Deed of Trust or afforded by law or equity, and may be exercised concurrently, independently or successively.

13. Successors and Assigns Bound; Joint and Several Liability; Captions. The covenants and agreements herein contained shall bind, and the rights hereunder shall inure to, the respective successors and assigns of Lender and Borrower, subject to the provisions of paragraph 17 hereof. All covenants and agreements of Borrower shall be joint and several. The captions and headings of the paragraphs of this Deed of Trust are for convenience only and are not to be used to interpret or define the provisions hereof.

14. Notice. Except for any notice required under applicable law to be given in another manner, (a) any notice to Borrower provided for in this Deed of Trust shall be given by mailing such notice by certified mail addressed to Borrower at the Property Address or at such other address as Borrower may designate by notice to Lender as provided herein, and (b) any notice to Lender shall be given by certified mail, return receipt requested, to Lender's address stated herein or to such other address as Lender may designate by notice to Borrower as provided herein. Any notice provided for in this Deed of Trust shall be deemed to have been given to Borrower or Lender when given in the manner designated herein.

15. Uniform Deed of Trust; Governing Law; Severability. This form of deed of trust combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property. This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Deed of Trust or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Deed of Trust or the Note which can be given effect without the conflicting provision, and to this end the provisions of the Deed of Trust and the Note are declared to be severable.

16. Borrower's Copy. Borrower shall be furnished a conformed copy of the Note and of this Deed of Trust at the time of execution or after recordation hereof.

17. Transfer of the Property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17, and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Deed of Trust and the Note.

Due on sale

If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration in accordance with paragraph 14 hereof. Such notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by paragraph 18 hereof.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

18. Acceleration; Remedies. Except as provided in paragraph 17 hereof, upon Borrower's breach of any covenant or agreement of Borrower in this Deed of Trust, including the covenants to pay when due any sums secured by this Deed of Trust, Lender prior to acceleration shall mail notice to Borrower as provided in paragraph 14 hereof specifying: (1) the breach; (2) the action required to cure such breach; (3) a date, not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Deed of Trust and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the breach is not cured on or before the date specified in the notice, Lender at Lender's option may declare all of the sums secured by this Deed of Trust to be immediately due and payable without further demand and may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all reasonable costs and expenses incurred in pursuing the remedies provided in this paragraph 18, including, but not limited to, reasonable attorney's fees.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which the Property or some part thereof is located. Lender shall mail copies of such notice in the manner prescribed by applicable law to Borrower and to the other persons prescribed by applicable law. Trustee shall give public notice of sale to the persons and in the manner prescribed by applicable law. After the lapse of such time as may be required by applicable law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in such order as Trustee may determine. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or Lender's designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property so sold without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all reasonable costs and expenses of the sale, including, but not limited to, reasonable Trustee's and attorney's fees and costs of title evidence; (b) to all sums secured by this Deed of Trust; and (c) the excess, if any, to the person or persons legally entitled thereto.

19. Borrower's Right to Reinstate. Notwithstanding Lender's acceleration of the sums secured by this Deed of Trust, Borrower shall have the right to have any proceedings begun by Lender to enforce this Deed of Trust discontinued at any time prior to the earlier to occur of (i) the fifth day before sale of the Property pursuant to the power of sale contained in this Deed of Trust or (ii) entry of a judgment enforcing this Deed of Trust if: (a) Borrower pays Lender all sums which would be then due under this Deed of Trust, the Note and notes securing Future Advances, if any, had no acceleration occurred; (b) Borrower cures all breaches of any other covenants or agreements of Borrower contained in this Deed of Trust; (c) Borrower pays all reasonable expenses incurred by Lender and Trustee in enforcing the covenants and agreements of Borrower contained in this Deed of Trust and in enforcing Lender's and Trustee's remedies as provided in paragraph 18 hereof, including, but not limited to, reasonable attorney's fees; and (d) Borrower takes such action as Lender may reasonably require to assure that the lien of this Deed of Trust, Lender's interest in the Property and Borrower's obligation to pay

EXHIBIT 1162 B

DEED OF TRUST

THIS DEED OF TRUST is made this .....day of....., 19...., among the Grantor,..... .....(herein "Borrower"),..... .....(herein "Trustee"), and the Beneficiary, ...a corporation organized and existing under the laws of....., whose address is..... .....(herein "Lender").

BORROWER, in consideration of the indebtedness herein recited and the trust herein created, irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the County of ....., State of Nevada:

which has the address of....., ...,
[Street] [City]
.....(herein "Property Address");
[State and Zip Code]

TOGETHER with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents (subject however to the rights and authorities given herein to Lender to collect and apply such rents), royalties, mineral, oil and gas rights and profits, water, water rights, and water stock, and all fixtures now or hereafter attached to the property, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the property covered by this Deed of Trust; and all of the foregoing, together with said property (or the leasehold estate if this Deed of Trust is on a leasehold) are herein referred to as the "Property";

TO SECURE to Lender (a) the repayment of the indebtedness evidenced by Borrower's note dated ....(herein "Note"), in the principal sum of..... .....Dollars, with interest thereon, providing for monthly installments of principal and interest, with the balance of the indebtedness, if not sooner paid, due and payable on..... .....; the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Deed of Trust; and the performance of the covenants and agreements of Borrower herein contained; and (b) the repayment of any future advances, with interest thereon, made to Borrower by Lender pursuant to paragraph 21 hereof (herein "Future Advances").

Borrower covenants that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property, that the Property is unencumbered, and that Borrower will warrant and defend generally the title to the Property against all claims and demands, subject to any declarations, easements or restrictions listed in a schedule of exceptions to coverage in any title insurance policy insuring Lender's interest in the Property.

the sums secured by this Deed of Trust shall continue unimpaired. Upon such payment and cure by Borrower, this Deed of Trust and the obligations secured hereby shall remain in full force and effect as if no acceleration had occurred.

20. Assignment of Rents; Appointment of Receiver; Lender in Possession. As additional security hereunder, Borrower hereby assigns to Lender the rents of the Property, provided that Borrower shall, prior to acceleration under paragraph 18 hereof or abandonment of the Property, have the right to collect and retain such rents as they become due and payable.

Upon acceleration under paragraph 18 hereof or abandonment of the Property, Lender, in person, by agent or by judicially appointed receiver, shall be entitled to enter upon, take possession of and manage the Property and to collect the rents of the Property including those past due. All rents collected by Lender or the receiver shall be applied first to payment of the costs of management of the Property and collection of rents, including, but not limited to, receiver's fees, premiums on receiver's bonds and reasonable attorney's fees, and then to the sums secured by this Deed of Trust. Lender and the receiver shall be liable to account only for those rents actually received.

21. Future Advances. Upon request of Borrower, Lender, at Lender's option prior to full reconveyance of the Property by Trustee to Borrower, may make Future Advances to Borrower. Such Future Advances, with interest thereon, shall be secured by this Deed of Trust when evidenced by promissory notes stating that said notes are secured hereby.

22. Reconveyance. Upon payment of all sums secured by this Deed of Trust, Lender shall request Trustee to reconvey the Property and shall surrender this Deed of Trust and all notes evidencing indebtedness secured by this Deed of Trust to Trustee. Trustee shall reconvey the Property without warranty and without charge to the person or persons legally entitled thereto. Such person or persons shall pay all costs of recordation, if any.

23. Substitute Trustee. Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon the Trustee herein and by applicable law.

24. Waiver of Homestead. Borrower waives all right of homestead exemption in the Property.

25. Assumption Fee. If there is an assumption pursuant to paragraph 17 hereof, Lender may charge an assumption fee of US $.....

IN WITNESS WHEREOF, Borrower has executed this Deed of Trust.

.....
—Borrower

.....
—Borrower

STATE OF NEVADA, ...County ss:

On this.....day of....., 19...., personally appeared before me, the undersigned, a notary public in and for the County and State aforesaid,..... .....known to me to be the person described in and who executed the within and foregoing instrument, and who acknowledged to me that ..he.. executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in said county of ....., the day and year in this Certificate first above written.

My commission expires:

.....
Notary Public

County of....., State of Nevada

REQUEST FOR RECONVEYANCE

TO TRUSTEE:

The undersigned is the holder of the note or notes secured by this Deed of Trust. Said note or notes, together with all other indebtedness secured by this Deed of Trust, have been paid in full. You are hereby directed to cancel said note or notes and this Deed of Trust, which are delivered hereby, and to reconvey, without warranty, all the estate now held by you under this Deed of Trust to the person or persons legally entitled thereto.

Date:..... .....

(Space Below This Line Reserved For Lender and Recorder)

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal and Interest. Borrower shall promptly pay when due the principal of and interest on the indebtedness evidenced by the Note, prepayment and late charges as provided in the Note, and the principal of and interest on any Future Advances secured by this Deed of Trust.

2. Funds for Taxes and Insurance. Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly installments of principal and interest are payable under the Note, until the Note is paid in full, a sum (herein "Funds") equal to one-twelfth of the yearly taxes and assessments which may attain priority over this Deed of Trust, and ground rents on the Property, if any, plus one-twelfth of yearly premium installments for hazard insurance, plus one-twelfth of yearly premium installments for mortgage insurance, if any, all as reasonably estimated initially and from time to time by Lender on the basis of assessments and bills and reasonable estimates thereof.

The Funds shall be held in an institution the deposits or accounts of which are insured or guaranteed by a Federal or state agency (including Lender if Lender is such an institution). Lender shall apply the Funds to pay said taxes, assessments, insurance premiums and ground rents. Lender may not charge for so holding and applying the Funds, analyzing said account or verifying and compiling said assessments and bills, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. Borrower and Lender may agree in writing at the time of execution of this Deed of Trust that interest on the Funds shall be paid to Borrower, and unless such agreement is made or applicable law requires such interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for the sums secured by this Deed of Trust.

If the amount of the Funds held by Lender, together with the future monthly installments of Funds payable prior to the due dates of taxes, assessments, insurance premiums and ground rents, shall exceed the amount required to pay said taxes, assessments, insurance premiums and ground rents as they fall due, such excess shall be, at Borrower's option, either promptly repaid to Borrower or credited to Borrower on monthly installments of Funds. If the amount of the Funds held by Lender shall not be sufficient to pay taxes, assessments, insurance premiums and ground rents as they fall due, Borrower shall pay to Lender any amount necessary to make up the deficiency within 30 days from the date notice is mailed by Lender to Borrower requesting payment thereof.

Upon payment in full of all sums secured by this Deed of Trust, Lender shall promptly refund to Borrower any Funds held by Lender. If under paragraph 18 hereof the Property is sold or the Property is otherwise acquired by Lender, Lender shall apply, no later than immediately prior to the sale of the Property or its acquisition by Lender, any Funds held by Lender at the time of application as a credit against the sums secured by this Deed of Trust.

3. Application of Payments. Unless applicable law provides otherwise, all payments received by Lender under the Note and paragraphs 1 and 2 hereof shall be applied by Lender first in payment of amounts payable to Lender by Borrower under paragraph 2 hereof, then to interest payable on the Note, then to the principal of the Note, and then to interest and principal on any Future Advances.

4. Charges; Liens. Borrower shall pay all taxes, assessments and other charges, fines and impositions attributable to the Property which may attain a priority over this Deed of Trust, and leasehold payments or ground rents, if any, in the manner provided under paragraph 2 hereof or, if not paid in such manner, by Borrower making payment, when due, directly to the payee thereof. Borrower shall promptly furnish to Lender all notices of amounts due under this paragraph, and in the event Borrower shall make payment directly, Borrower shall promptly furnish to Lender receipts evidencing such payments. Borrower shall promptly discharge any lien which has priority over this Deed of Trust; provided, that Borrower shall not be required to discharge any such lien so long as Borrower shall agree in writing to the payment of the obligation secured by such lien in a manner acceptable to Lender, or shall in good faith contest such lien by, or defend enforcement of such lien in, legal proceedings which operate to prevent the enforcement of the lien or forfeiture of the Property or any part thereof.

5. Hazard Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage", and such other hazards as Lender may require and in such amounts and for such periods as Lender may require; provided, that Lender shall not require that the amount of such coverage exceed that amount of coverage required to pay the sums secured by this Deed of Trust.

The insurance carrier providing the insurance shall be chosen by Borrower subject to approval by Lender; provided, that such approval shall not be unreasonably withheld. All premiums on insurance policies shall be paid in the manner provided under paragraph 2 hereof or, if not paid in such manner, by Borrower making payment, when due, directly to the insurance carrier.

All insurance policies and renewals thereof shall be in form acceptable to Lender and shall include a standard mortgage clause in favor of and in form acceptable to Lender. Lender shall have the right to hold the policies and renewals thereof, and Borrower shall promptly furnish to Lender all renewal notices and all receipts of paid premiums. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, provided such restoration or repair is economically feasible and the security of this Deed of Trust is not thereby impaired. If such restoration or repair is not economically feasible or if the security of this Deed of Trust would be impaired, the insurance proceeds shall be applied to the sums secured by this Deed of Trust, with the excess, if any, paid to Borrower. If the Property is abandoned by Borrower, or if Borrower fails to respond to Lender within 30 days from the date notice is mailed by Lender to Borrower that the insurance carrier offers to settle a claim for insurance benefits, Lender is authorized to collect and apply the insurance proceeds at Lender's option either to restoration or repair of the Property or to the sums secured by this Deed of Trust.

Unless Lender and Borrower otherwise agree in writing, any such application of proceeds to principal shall not extend or postpone the due date of the monthly installments referred to in paragraphs 1 and 2 hereof or change the amount of such installments. If under paragraph 18 hereof the Property is acquired by Lender, all right, title and interest of Borrower in and to any insurance policies and in and to the proceeds thereof resulting from damage to the Property prior to the sale or acquisition shall pass to Lender to the extent of the sums secured by this Deed of Trust immediately prior to such sale or acquisition.

6. Preservation and Maintenance of Property; Leaseholds; Condominiums; Planned Unit Developments. Borrower shall keep the Property in good repair and shall not commit waste or permit impairment or deterioration of the Property and shall comply with the provisions of any lease if this Deed of Trust is on a leasehold. If this Deed of Trust is on a unit in a condominium or a planned unit development, Borrower shall perform all of Borrower's obligations under the declaration or covenants creating or governing the condominium or planned unit development, the by-laws and regulations of the condominium or planned unit development, and constituent documents. If a condominium or planned unit development rider is executed by Borrower and recorded together with this Deed of Trust, the covenants and agreements of such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Deed of Trust as if the rider were a part hereof.

7. Protection of Lender's Security. If Borrower fails to perform the covenants and agreements contained in this Deed of Trust, or if any action or proceeding is commenced which materially affects Lender's interest in the Property, including, but not limited to, eminent domain, insolvency, code enforcement, or arrangements or proceedings involving a bankrupt or decedent, then Lender at Lender's option, upon notice to Borrower, may make such appearances, disburse such sums and take such action as is necessary to protect Lender's interest, including, but not limited to, disbursement of reasonable attorney's fees and entry upon the Property to make repairs. If Lender required mortgage insurance as a condition of making the loan secured by this Deed of Trust, Borrower shall pay the premiums required to maintain such insurance in effect until such time as the requirement for such insurance terminates in accordance with Borrower's and Lender's written agreement or applicable law. Borrower shall pay the amount of all mortgage insurance premiums in the manner provided under paragraph 2 hereof.

Any amounts disbursed by Lender pursuant to this paragraph 7, with interest thereon, shall become additional indebtedness of Borrower secured by this Deed of Trust. Unless Borrower and Lender agree to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof, and shall bear interest from the date of disbursement at the rate payable from time to time on outstanding principal under the Note unless payment of interest at such rate would be contrary to applicable law, in which event such amounts shall bear interest at the highest rate permissible under applicable law. Nothing contained in this paragraph 7 shall require Lender to incur any expense or take any action hereunder.

8. Inspection. Lender may make or cause to be made reasonable entries upon and inspections of the Property, provided that Lender shall give Borrower notice prior to any such inspection specifying reasonable cause therefor related to Lender's interest in the Property.

NOTE

US $..... ....., Nevada
City
....., 19....

FOR VALUE RECEIVED, the undersigned ("Borrower") promise(s) to pay..... ....., or order, the principal sum of .....Dollars, with interest on the unpaid principal balance from the date of this Note, until paid, at the rate of..... .....percent per annum. Principal and interest shall be payable at..... ....., or such other place as the Note holder may designate, in consecutive monthly installments of..... .....Dollars (US $.....), on the..... .....day of each month beginning....., 19..... Such monthly installments shall continue until the entire indebtedness evidenced by this Note is fully paid, except that any remaining indebtedness, if not sooner paid, shall be due and payable on.....

If any monthly installment under this Note is not paid when due and remains unpaid after a date specified by a notice to Borrower, the entire principal amount outstanding and accrued interest thereon shall at once become due and payable at the option of the Note holder. The date specified shall not be less than thirty days from the date such notice is mailed. The Note holder may exercise this option to accelerate during any default by Borrower regardless of any prior forbearance. If suit is brought to collect this Note, the Note holder shall be entitled to collect all reasonable costs and expenses of suit, including, but not limited to, reasonable attorney's fees.

Borrower shall pay to the Note holder a late charge of.....percent of any monthly installment not received by the Note holder within.....days after the installment is due.

Borrower may prepay the principal amount outstanding in whole or in part. The Note holder may require that any partial prepayments (i) be made on the date monthly installments are due and (ii) be in the amount of that part of one or more monthly installments which would be applicable to principal. Any partial prepayment shall be applied against the principal amount outstanding and shall not postpone the due date of any subsequent monthly installments or change the amount of such installments, unless the Note holder shall otherwise agree in writing. If, within five years from the date of this Note, Borrower make(s) any prepayments in any twelve month period beginning with the date of this Note or anniversary dates thereof ("loan year") with money lent to Borrower by a lender other than the Note holder, Borrower shall pay the Note holder (a) during each of the first three loan years .....percent of the amount by which the sum of prepayments made in any such loan year exceeds twenty percent of the original principal amount of this Note and (b) during the fourth and fifth loan years .....percent of the amount by which the sum of prepayments made in any such loan year exceeds twenty percent of the original principal amount of this Note.

Presentment, notice of dishonor, and protest are hereby waived by all makers, sureties, guarantors and endorsers hereof. This Note shall be the joint and several obligation of all makers, sureties, guarantors and endorsers, and shall be binding upon them and their successors and assigns.

Any notice to Borrower provided for in this Note shall be given by mailing such notice by certified mail addressed to Borrower at the Property Address stated below, or to such other address as Borrower may designate by notice to the Note holder. Any notice to the Note holder shall be given by mailing such notice by certified mail, return receipt requested, to the Note holder at the address stated in the first paragraph of this Note, or at such other address as may have been designated by notice to Borrower.

The indebtedness evidenced by this Note is secured by a Deed of Trust, dated..... ....., and reference is made to the Deed of Trust for rights as to acceleration of the indebtedness evidenced by this Note.

....

....

....
Property Address

(Execute Original Only)

AB 251

SUGGESTED AMENDMENT

p 2, LINE 1

THE CHIEF, UPON REQUEST OF AN AGENCY, SHALL ASSIGN A HEARING OFFICER . . .

George Bennett, Exec.
State Bd of Pharmacy

EXHIBIT D

STATE OF CALIFORNIA—AGRICULTURE AND SERVICES AGENCY EDMUND G. BROWN JR., Governor

DEPARTMENT OF Consumer Affairs

CONTRACTORS' STATE LICENSE BOARD
1020 N STREET, SACRAMENTO, CALIFORNIA 95814
TELEPHONE: (916) 445-7500

March 8, 1977

Mr. Robert Stoker
Registrar of Contractors
328 South Wells Avenue
Reno, Nevada 89502

Dear ~~Mr. Stoker:~~ Bob

Following our recent telephone talk, I thought you might be interested in my opinion on public members on the Contractors' State License Board and the matter of Hearing Officers or Administrative Law Judges as they are called in California.

The first public member was appointed to the California Board in 1962. He was an asset to the Board, primarily, I believe, since he came from a family of contractors going back three generations and secondly he was appointed at a time when the California Board was considering contractor bonding. Being in the bonding business, he was able to offer lots of practical expertise in the implementation of the bonding law to the Agency regulatory functions. He neither substantially contributed nor presumed to have the expertise to contribute to the Board policy making processes in the area of defining, limiting, adding to or repeal of Board Rules relating to the various trade practices. He realized his limited knowledges of the construction business. Two more public members were added by law in 1973 and these two members also were no problem to the Board in its primary policy making role since both were businessmen engaged in owner-builder activities of considerable magnitude and, therefore, were possessed of considerable knowledge in the field of building techniques and materials used in various trade practices.

In 1976 and 1977 four more public members were added to the Board so California now has six public members, one labor member and six contractor members. In June, 1977, one more public member will replace one of the contractors whereupon there will be seven public members.

EXHIBIT 168 E

Perhaps the Agency and the public will be as fortunate with the newest public members as it has been with the past public appointees; however, I have an opinion that the issue of consumerism per se will be the dominating motivation of the newer public members rather than the overall public interest considerations determined by how contractors should be qualified, classified and licensed and how complaints against contractors should in their opinion best be handled. I hope I may be wrong and that the entire 13 person Board in its deliberations will be always aware that their primary policy should be designed to produce a better contractor to deal with consumers rather than the contract between the parties. To do this will involve some personal knowledge of the methods of contracting activities in all the many trade classifications for which California issues licenses.

Board hearings resulting in policy making decisions concern primarily the scope and limitations of trade classifications. These hearings involve in-depth study and discussion of construction operations, techniques and pertinent trade knowledges--something one cannot expect from the average public member, therefore, one can wonder as to the quality of the ultimate policy, rule or regulation if determined by nonexpertise public member participation.

Since 90% of the consumer complaints (excluding the nonlicensee complaints) involve construction matters, the California Deputy Registrar investigator must have construction background experience to investigate those complaints and the Contractors' State License Board re quires that its Deputy Registrars have such experience to qualify for the job. His experience expertise is daily put to use not only in investigating construction complaints but in arbitration and conciliation of those complaints as well as testifying in administrative hearings and in the courts on construction practices, methods of construction, construction codes, techniques, etc., a task certainly not suited to a person with nonconstruction experience. The same thinking extends to hearing judges who are required by law to be attorneys in California and who hear disciplinary cases referred to administrative hearings by the Registrar. In over 500 disciplinary cases last year involving approximately 1,000 licensees, the Registrar's staff not only made the investigations, but also filed the accusations and represented the Registrar at those hearings instead of the Office of the Attorney General whose Deputies are used as legal counsel in less than one-half of the disciplinary actions. The Registrar unfortunately cannot bypass the Office of Administrative Hearings except in those many cases where stipulations are arrived at between the accused contractor and the Registrar prior to hearing whereby the large expense of using the Office of the Attorney General

and Hearing Judges is precluded. The same is true in default matters. The Registrar's Office is able to bypass the Office of the Attorney General in those instances whereby much money is saved. Even though the Registrar's Office precluded the use of the Hearing Judges last year in many cases, (defaults, stipulations) and the Office of the Attorney General in over one-half of the 500 cases filed for action, the legal cost to the California Board by use of Administrative Law Judges and Deputy Attorney Generals totaled approximately $900,000. If the Board were to use the Hearing Judges and the Office of the Attorney General for all of its disciplinary actions, the legal costs alone would exceed over $2,000,000. That is why we do so much of our quasi-judicial legal work with our lay staff. The Legislature will not budget such large sums for legal matters.

Practically all of our disciplinary actions primarily relate to acts and/or omissions involving construction trade practices and, therefore, our construction experienced staff are on familiar ground in conducting their investigations into construction complaints and also in proceedings involving filing accusations and representing the Registrar in such matters. Once they gain some knowledge of the simple laws of evidence and the routine of drafting accusations, the Deputies are ready to present such cases before Hearing Judges when required without the use of Deputy Attorney Generals. Also once they are experienced in complaint investigations usually involving construction projects and in the techniques of arbitration and conciliation they are able by stipulated agreements between the complaining person, the contractor and the Registrar's Office to preclude the use of both Hearing Judges and Deputy Attorney Generals. By doing this, the California Board reduces its legal bill in excess of $1,000,000 per year.

All things considered, a properly trained staff having construction background experience and knowledges involving administrative procedure requirements can save the Agency great amounts of money if they are allowed by State law (as they are in California) to do lots of the rather simple legal type work in the area of administrative hearings.

Just a few random thoughts, Bob, rather loosely expressed, but I know you will get their message--which simply is --do not involve the use of Administrative Law Judges and legal counsel in many matters which in my opinion can be handled more simply and practically by a lay staff, experienced in construction and properly trained in the techniques of investigation and administrative procedures.

I hope this information will be of some use to you.

Sincerely,

LEO B. HOSCHLER
REGISTRAR OF CONTRACTORS

LBH:mw

ASSEMBLY BILL NO. 251—ASSEMBLYMEN BARENGO, HAYES AND ROSS

FEBRUARY 1, 1977

Referred to Committee on Judiciary

SUMMARY—Creates hearing division in department of administration. (BDR 18-473)

FISCAL NOTE: Local Government Impact: No. State or Industrial Insurance Impact: Yes.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to administrative procedure; creating the hearing division of the department of administration; providing procedures for administrative hearings; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 233B of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 9, inclusive, of this act.

SEC. 2. *For the purposes of sections 2 to 9, inclusive, of this act, unless the context clearly requires otherwise, the following terms have the meanings ascribed to them in this section:*

1. "Chief" means the chief of the hearing division of the department of administration.

2. "Division" means the hearing division of the department of administration.

SEC. 3. *1. The chief may employ, subject to the provisions of chapter 284 of NRS and within the limits of legislative appropriations, any technical, clerical and operational staff as the operations of the division require.*

2. The chief may employ, subject to the approval of the director and the limitations imposed by subsection 1, a sufficient number of hearing officers to perform the duties of the division. Each hearing officer shall:

(a) Be licensed to practice law in this state;

(b) Be selected with special reference to his expertise in subject matters which may be involved in hearings which he may be called upon to conduct; and

(c) Except as provided in subsection 3, not engage in any other gainful employment.

3. The chief may, from time to time, employ attorneys for particular hearings if necessary to accomplish the duties of the division.

SEC. 4. *The chief shall assign a hearing officer to each proceeding arising under this chapter, and may, upon request of an agency, assign a hearing officer and other required persons to assist in the conduct of proceedings not arising under this chapter. Employees assigned to an agency for a hearing or hearings remain employees of the division.*

SEC. 5. *1. A hearing officer shall disqualify himself and withdraw from any case in which he has a personal interest or conflict of interest, or in any situation in which he cannot conduct a fair and impartial hearing.*

2. Any party may request the disqualification of a hearing officer by filing an affidavit with the chief or with the head of the agency. The affidavit shall be filed before the taking of evidence, and shall state the grounds upon which it is claimed that the hearing officer is not qualified or a fair and impartial hearing cannot be accorded. If the hearing officer was to hear the case alone, the chief shall determine his qualifications. If officials of the agency were to hear the case, the agency shall determine the qualifications of the hearing officer.

SEC. 6. *1. Each hearing officer employed by the division may, upon application of the agency or any other party to a hearing, issue subpenas requiring attendance and testimony of witnesses or production of evidence, or both.*

2. Each hearing officer or other employee of the division designated for the purpose may administer oaths and affirmations and examine witnesses.

SEC. 7. *1. Each hearing in a contested case arising under this chapter shall be conducted by a hearing officer. The agency may elect to direct the hearing officer to hear the case alone, or it may assign one or more of its personnel to hear the case with the hearing officer and render a decision on behalf of the agency.*

2. A hearing in a contested case not arising under this chapter may be conducted by a hearing officer, either alone or in the company of one or more of the personnel of the agency, or by one or more of the personnel of the agency without the hearing officer.

3. The hearing officer shall rule on all matters of law, including the granting or denial of motions and the admissibility of evidence. The rulings of a hearing officer who is hearing a case in the company of officials of an agency may be overruled by a majority of the officials of the agency, but each ruling remains part of the official record of the hearing.

4. A hearing officer who is hearing a case alone will render a decision, give notice of it in writing to the parties and certify the record to the agency.

5. The decision of the agency officials who hear a case, with or without a hearing officer, constitutes final agency action subject to judicial review.

SEC. 8. *1. Within 30 days after receipt of notice of the decision of a hearing officer, any party may request in writing that the agency review the decision for the purpose of determining whether to grant a hearing before the officials of the agency or to affirm or reverse the decision.*

2. Within 30 days after receipt of a request for review, the officials

of the agency shall review the decision of the hearing officer and grant or deny a hearing, affirm or reverse the decision of the hearing officer.

3. If a hearing before the agency is granted, it shall be held within 60 days after receipt of the request for review, and it shall be a hearing de novo. If a hearing officer is required by section 7 of this act, the hearing shall be conducted by a hearing officer other than the hearing officer who rendered the original decision together with the officials of the agency.

4. After the hearing and consideration of the evidence, the agency shall render its decision in writing, setting forth the reasons therefor. The decision of the agency supersedes the decision of the hearing officer and is binding on the parties. The decision constitutes final agency action subject to judicial review.

5. If a hearing before the agency is denied, if the decision of the hearing officer is affirmed or if the agency receives no request for review within the specified time, the decision of the hearing officer constitutes final agency action subject to judicial review. If the decision of the hearing officer is reversed, that order constitutes final agency action for any party aggrieved by the reversal.

SEC. 9. *1. The director shall adopt regulations setting forth the charges to be made for the services of a hearing officer and other personnel of the department.*

2. Money collected by the department for the services of hearing officers and other employees shall be deposited in the state general fund.

SEC. 10. NRS 233B.124 is hereby amended to read as follows:

233B.124 Where, in a contested case, a majority of the officials of the agency who are to render the final decision *or conduct a review of the decision of a hearing officer* have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file, within 20 days, exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.

SEC. 11. NRS 233B.126 is hereby amended to read as follows:

233B.126 Unless required for the disposition of ex parte matters authorized by law, *hearing officers and* members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity to all parties to participate. An agency member may, subject to the provisions of NRS 233B.123:

1. Communicate with other members of the agency.
2. Have the aid and advice of one or more personal assistants.

SEC. 12. NRS 232.213 is hereby amended to read as follows:

232.213 1. The department of administration is hereby created.

2. The department consists of a director and the following divisions:
(a) Budget division.
(b) *Hearing division.*
(c) Personnel division.

SEC. 13. NRS 232.215 is hereby amended to read as follows:

232.215 The director:

1. Shall appoint a chief of the personnel division.

2. Shall appoint a chief of the budget division, or may personally serve in this position if he has the qualifications required by NRS 353.175.

3. *Shall appoint a chief of the hearing division or serve as chief.*

4. Is responsible for the administration, through the divisions of the department, of the provisions of chapter 284 of NRS, NRS 353.150 to 353.246, inclusive, *sections 2 to 9, inclusive, of this act* and all other provisions of law relating to the functions of the divisions of the department.

[4.] 5. Has [such] other powers and duties [as] provided by law.

SEC. 14. NRS. 284.376 is hereby amended to read as follows:

284.376 1. Within 30 days after receipt of notice of a transfer pursuant to the provisions of NRS 284.375, a permanent classified employee who has been transferred without his consent may, in writing, request a hearing [before the hearing officer of the personnel division] to determine whether the transfer was made for the purpose of harassing [such employee.] *him.*

2. The hearing officer [shall grant the employee] *assigned by the hearing division of the department of administration shall conduct* a hearing within 20 working days after receipt of the employee's written request unless the time limitation is waived, in writing, by the employee or there is a conflict with the hearing or review calendar of the hearing officer, in which case the hearing shall be scheduled for the earliest possible date after the expiration of the 20 days. The technical rules of evidence do not apply at [such] *the* hearing.

3. [After the hearing and consideration of the evidence, the hearing officer shall render his decision in writing, setting forth the reasons therefor.

4.] If the hearing officer determines that the transfer was made for the purpose of harassing the employee, the transfer shall be set aside and the employee shall be returned to his former position. If [such] *the* transfer caused the employee to be away from his original headquarters, the employee shall be paid expense allowances [as] provided [in NRS 281.160] *by law* for the period of time the transfer was in effect.

[5. The decision of the hearing officer is binding on the parties, but is subject to review and rehearing by the commission.]

SEC. 15. NRS 284.390 is hereby amended to read as follows:

284.390 1. Within 30 days after receipt of a copy of the statement provided for in subsection 2 of NRS 284.385, an employee who has been dismissed, demoted or suspended may, in writing, request a hearing before [the hearing officer of the personnel division] *a hearing officer assigned by the hearing division of the department of administration* to determine the reasonableness of such action. If an employee utilizes an

internal grievance adjustment procedure adopted by the commission, such employee shall have 30 days following the final disposition of the internal proceeding to request, in writing, a hearing before the hearing officer.

2. The hearing officer shall [grant the employee] *schedule* a hearing within 20 working days after receipt of the employee's written request unless the time limitation is waived, in writing, by the employee or there is a conflict with the hearing or review calendar of the hearing officer, in which case the hearing shall be scheduled for the earliest possible date after the expiration of the 20 days.

3. At the hearing, [of such appeal,] technical rules of evidence do not apply.

4. [After the hearing and consideration of the evidence, the hearing officer shall render his decision in writing, setting forth the reasons therefor.

5.] If the hearing officer determines that the dismissal, demotion or suspension was without just cause as provided in NRS 284.385, such action shall be set aside and the employee shall be reinstated, with full pay for the period of dismissal, demotion or suspension.

[6. The decision of the hearing officer is binding on the parties, but is subject to review and rehearing by the commission.

7. Within 30 days after receipt of notice of the decision of the hearing officer rendered pursuant to this section, the employee or the appointing authority may, in writing, request that the commission review such decision for the purpose of determining whether to grant a hearing before the commission.

8. Within 30 days after receipt of a request for review pursuant to subsection 7, the commission shall review the decision of the hearing officer and shall either grant or deny a hearing before the commission.

9. If a hearing before the commission is granted, it shall be held within 60 days after receipt of the request for review and it shall be a hearing de novo. The technical rules of evidence do not apply at such hearing.

10. After the hearing and consideration of the evidence, the commission shall render its decision in writing, setting forth the reasons therefor. The decision of the commission supersedes the decision of the hearing officer and is binding on the parties. The decision constitutes final agency action subject to judicial review in accordance with the provisions of NRS 233B.130 to 233B.150, inclusive.

11. If a hearing before the commission is denied, or if the commission receives no request for review within the specified time, the decision of the hearing officer constitutes final agency action subject to judicial review in accordance with the provisions of NRS 233B.130 to 233B.150, inclusive.]

SEC. 16. NRS 616.543 is hereby amended to read as follows:

616.543 [1.] No judicial proceedings shall be instituted for compensation for an injury or death under this chapter unless:

[(a)] *1.* A claim for compensation is filed as provided in NRS 616.500; and

[(b) A final decision of the appeals officer has been rendered on such claim.

2. Judicial proceedings instituted for compensation for an injury or death under this chapter shall be limited to judicial review as prescribed by NRS 233B.130 to 233B.150, inclusive.]

2. Final administrative action has been taken on the claim.

SEC. 17. NRS 616.544 is hereby amended to read as follows:

616.544 If an appeal is taken to the district court from a final *administrative* decision [of the appeals officer and such] *and the* appeal is found by the district court to be frivolous or brought without reasonable grounds, the district court may order costs and a reasonable attorney's fee to be paid by the party taking [such] *the* appeal.

SEC. 18. NRS 284.091, 284.377, 284.391, 284.392, 284.393, 616.542 and 616.5421 are hereby repealed.

[421 US 35]

HAROLD WITHROW et al., etc., Appellants,

v

DUANE LARKIN

421 US 35, 43 L Ed 2d 712, 95 S Ct 1456

[No. 73–1573]

Argued December 18, 1974. Decided April 16, 1975.

SUMMARY

To enforce certain statutory provisions regulating the practice of medicine, a Wisconsin statute empowers an examining board to warn and reprimand a physician, temporarily suspend his license, and institute criminal or license revocation proceedings. When the examining board instituted an investigation of the plaintiff-physician, he brought an action, seeking injunctive relief, against the board in the United States District Court for the Eastern District of Wisconsin. Following earlier denials of the physician's motions for temporary restraining orders, the District Court granted such a motion and granted a motion to convene a three-judge court, concluding that when the board moved from purely investigative proceedings to a hearing regarding suspension of the physician's license, a question concerning the due process rights of the physician arose (368 F Supp 793). In compliance with the restraining order, the board did not hold the contested hearing it had previously scheduled, but it did hold a final investigative session and issued a "decision" finding that the physician had engaged in conduct proscribed by statute. The three-judge court preliminarily enjoined the board from using the statute giving the board various enforcement powers, and held that the statute was unconstitutional as violative of due process of law in that the board could suspend the physician's license at the board's own hearing on charges evolving from the board's own investigation (368 F Supp 796). Subsequently, the District Court modified its judgment by withdrawing the declaration of unconstitutionality and enjoining enforcement of the statute against the plaintiff-physician only, the court finding that the physician's challenge to the statute's constitutionality had a high likelihood of success.

On direct appeal, the United States Supreme Court reversed and re-

Briefs of Counsel, p 931, infra.

EXHIBIT F

manded. In an option by WHITE, J., expressing the unanimous view of the court, it was held that the District Court erred in restraining the board's hearing and in enjoining enforcement of the statute, that there was little likelihood that the physician's challenge would be successful on the merits, and that the procedure whereby the board both investigated and adjudicated the physician's case did not violate due process of law.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Injunction §§ 89.5, 150 — state statute — restraining order — subsequent declaration of unconstitutionality

1. Since a state statute should not be declared unconstitutional by a Federal District Court if a preliminary injunction is granted to a plaintiff to protect his interests during the ensuing litigation, a Federal District Court should not declare unconstitutional a state statute regarding suspension of a physician's license to practice medicine and errs in enjoining the utilization of such a stat-

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

1 AM JUR 2d, Administrative Law § 78; 42 AM JUR 2d, Injunctions §§ 194–200

7 AM JUR PL & PR FORMS (Rev ed), Constitutional Law, Forms 2, 3, 11, 24; 11 AM JUR PL & PR FORMS (Rev ed), Federal Practice and Procedure, Forms 1951 et seq.

USCS, Constitution, 14th Amendment

US L ED DIGEST, Administrative Law § 8; Constitutional Law § 751; Injunction § 149

ALR DIGESTS, Administrative Law § 9; Constitutional Law § 604; Injunction § 208

L ED INDEX TO ANNOS, Due Process of Law; Injunction; Physicians and Surgeons

ALR QUICK INDEX, Administrative Law; Due Process of Law; Injunctions; Physicians and Surgeons

FEDERAL QUICK INDEX, Administrative Law; Due Process of Law; Injunctions; Physicians and Surgeons

ANNOTATION REFERENCES

Necessity and propriety (under 28 USCS § 2281) of three-judge Federal District Court in suit to enjoin enforcement of state statute or administrative order. 15 L Ed 2d 904.

Suspension or revocation of medical or legal professional license as violating procedural due process. 98 L Ed 851.

Construction and application of Administrative Procedure Act. 94 L Ed 631; 95 L Ed 473; 97 L Ed 884.

Disqualification of original trial judge to sit on retrial after reversal or mistrial. 22 ALR Fed 709.

ute against any licensee, where the plaintiff-licensee has been granted a restraining order against a contested hearing pursuant to the statute; the question before the Federal District Court is not whether the act is constitutional or unconstitutional, but is whether the showing made raises serious questions, under the Federal Constitution, and discloses that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants.

Injunction § 150 — amended judgment — findings and conclusions — reasons for issuing injunction

2. An amended judgment wherein a Federal District Court, preliminarily enjoining enforcement of a state statute against the plaintiff, finds that the plaintiff would suffer irreparable injury, if the statute were to be applied against him and that the plaintiff's challenge to the constitutionality of the statute has a high likelihood of success, satisfies the requirement of findings and conclusions under Rule 52(a) of the Federal Rules of Civil Procedure and satisfies the requirement of Rule 65(d) of the Federal Rules of Civil Procedure that an order granting an injunction set forth the reasons for its issuance.

Appeal and Error § 1700 — lack of specificity — refusal to remand

3. Even though a decision to vacate and remand to a Federal District Court for fuller emendation of the findings, conclusions and judgment would be justified in view of their lack of specificity, nevertheless, the United States Supreme Court will not remand the cause where such action would not add anything essential to the determination of the merits, the District Court's decision turned upon the sequence of functions followed by the appellants and not upon any factual issue peculiar to the case, the United States Supreme Court has jurisdiction under 28 USCS § 1253, and a remand would be a costly procedure to emphasize points that have already been made and recognized by both parties as well as by the District Court.

Courts § 225.5 — three-judge court — injunction against enforcement of state statute — high likelihood of success of constitutional challenge

4a, 4b. The requirement, under 28 USCS §§ 2281, 2284, of a three-judge Federal District Court for entering a preliminary or permanent injunction against the enforcement of a state statute on the grounds of unconstitutionality of the law, includes preliminary injunctions against enforcement of state statutes based on "a high likelihood of success" of the constitutional challenge to the statutes.

Injunction § 149 — preliminary injunction against enforcement of statute — abuse of discretion

5. A Federal District Court abuses its discretion in preliminarily enjoining enforcement—as against the physician being investigated by a state medical examining board—of a state statute permitting the board to temporarily suspend a physician's license, where it is unlikely that the physician will ultimately prevail on the merits of his claim that for the board to temporarily suspend his license at its own contested hearing on charges evolving from its own investigation would constitute a denial of the physician's rights to procedural due process.

Constitutional Law § 746 — fair trial — due process

6. A fair trial in a fair tribunal is a basic requirement of due process.

Constitutional Law § 751 — due process — administrative adjudication

7. The due process requirement of a fair trial in a fair tribunal applies to administrative agencies which adjudicate as well as to courts.

Constitutional Law § 778.5 — due process — bias of adjudicator

8. Cases in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him are situations where the

probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable under due process of law.

Administrative Law § 8; Constitutional Law § 751 — due process — bias in administrative adjudication — presumptions and burden of proof

9. To carry its burden of persuasion, the contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication must overcome a presumption of honesty and integrity in those serving as adjudicators, and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Constitutional Law § 751 — administrative board — bias

10. The processes utilized by a state medical examining board empowered to warn or reprimand physicians, to suspend licenses, and to institute criminal actions or revoke licenses, do not in themselves contain an unacceptable risk of bias violative of due process where, although the investigative proceeding is closed to the public, the physician and his counsel are permitted to be present throughout; the physician's counsel actually attends the hearings and knows the facts presented to the examining board; and no specific foundation is presented for suspecting that the board has been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing.

Administrative Law § 8; Physicians and Surgeons § 2 — evidence revealed in investigative procedures — fairness in later adversary hearing

11. The mere exposure of a state examining board—empowered to warn or reprimand physicians, to suspend licenses, and to institute criminal actions or revoke licenses—to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing.

Administrative Law § 8 — state administrators — fairness

12. State administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

Injunction § 149 — restraining order and preliminary injunction — erroneous entry of

13. A Federal District Court errs in entering a restraining order against holding a contested hearing by a state medical examining board and in granting a preliminary injunction against the enforcement of a state statute permitting the board to temporarily suspend a physician's license, where such injunction is based on the untenable view that it would be unconstitutional for the board to suspend a physician's license at its own contested hearing on charges evolving from its own investigation.

Administrative Law § 8; Physicians and Surgeons § 2 — proceedings of state medical board — prejudice not shown

14. Prejudice and prejudgment of a state medical examining board is not shown where, following the entry of a restraining order against the board's holding a contested hearing to determine whether a physician's license should be temporarily suspended, the board makes and issues formal findings of fact and conclusions of law asserting that there is probable cause to believe that a physician has engaged in various acts prohibited by state statutes, such findings and conclusions being verified and filed with the district attorney for the purpose of initiating license revocation and criminal proceedings.

Administrative Law § 91; Constitutional Law § 751 — administrative agencies' involvement in investigation and enforcement hearings — Administrative Procedure Act — due process

15. The procedure whereby the members of administrative agencies receive the results of investigations, approve the filing of charges or formal complaints instituting enforcement proceedings, and then participate in the ensuing hearings, violates neither the Administrative Procedure Act (5 USCS §§ 551 et seq.) nor due process of law.

Constitutional Law §§ 751, 778.5 — due process — reversal of decision — reconsideration by same judge or administrator

16. It is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions the second time around.

Constitutional Law § 751 — findings by state medical board — due process

17. A state medical examining board stays within the accepted bounds of due process where, after the board conducts an investigation, it issues findings and conclusions asserting the commission of certain acts and ultimately concludes that there is probable cause to believe that a physician has violated state statutes.

Constitutional Law § 751 — charge and adjudication by same agency — due process

18. Since the initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes, the fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation.

Constitutional Law § 751 — investigative and adjudicatory functions in one agency — due process — particular circumstances — unfairness

19. Although the combination of investigative and adjudicatory functions in an administrative agency does not, without more, constitute a due process violation, a court is not thereby precluded from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.

SYLLABUS BY REPORTER OF DECISIONS

Wisconsin statutes prohibit various acts of professional misconduct by physicians and empower a state examining board to warn and reprimand physicians, to temporarily suspend licenses, and to institute criminal action or action to revoke a license. When the board notified appellee licensed physician that a closed investigative hearing, which appellee and his attorney could attend, would be held to determine whether appellee had engaged in certain proscribed acts, appellee brought an action against appellant board members seeking injunctive relief and a temporary restraining order against the hearing on the ground that the statutes were unconstitutional and that appellants' acts with respect to appellee violated his constitutional rights. The District Court denied the restraining order, and the board proceeded with the hearing, and after hearing testimony notified appellee that a "contested hearing" would be held at which the board would determine whether his license would be temporarily suspended. The court then granted appellee's motion for a restraining order against the contested hearing on the ground that a substantial federal due process question had arisen. The board complied with the order and did not proceed with the contested hearing but instead held a final investigative session and made "findings of fact" that appellee had engaged in certain proscribed con-

Cooke, Roberts

fact and "conclusions of law" that there was probable cause to believe he had violated certain criminal provisions. Subsequently, a three-judge court declared that the statute empowering the board temporarily to suspend a physician's license without formal proceedings was unconstitutional and preliminarily enjoined the board from enforcing it on the ground that it would be a denial of due process for the board to suspend appellee's license "at its own contested hearing on charges evolving from its own investigation." After appellants appealed from this decision the District Court modified the judgment so as to withdraw its declaration of unconstitutionality and to preliminarily enjoin its enforcement against appellee only, stating that appellee would suffer irreparable injury if the statute were applied to him and that his challenge to its constitutionality had a high likelihood of success. *Held:*

1. The three-judge court's initial judgment should not have declared the statute unconstitutional and erroneously enjoined the board from applying it against all licensees. Mayo v Lakeland Highlands Canning Co. 309 US 310, 84 L Ed 774, 60 S Ct 517.

2. While a decision to vacate and remand for fuller emendation of the District Court's findings, conclusions, and judgment would be justified in view of their lack of specificity, such action, under the circumstances, would not add anything essential to the determination of the merits and would be a costly procedure to emphasize points already made and recognized by the parties as well as by the District Court.

3. The District Court erred when it restrained the board's contested hearing and when it preliminarily enjoined the enforcement of the statute against appellee, since on the record it is quite unlikely that appellee would ultimately prevail on the merits of the due process issue.

(a) The combination of investigative and adjudicative functions does not, without more, constitute a due process violation as creating an unconstitutional risk of bias.

(b) Here the processes utilized by the board do not in themselves contain an unacceptable risk of bias, since, although the investigative hearing had been closed to the public, appellee and his attorney were permitted to be present throughout and in fact his attorney did attend the hearings and knew the facts presented to the board; moreover, no specific foundation has been presented for suspecting that the board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing, the mere exposure to evidence presented in nonadversary investigative procedures being insufficient in itself to impugn the board's fairness at a later adversary hearing.

4. The fact that the board, when prevented from going forward with the contested hearing, proceeded to issue formal findings of fact and conclusions of law that there was probable cause to believe appellee had engaged in various prohibited acts, does not show prejudice and prejudgment, and the board stayed within accepted bounds of due process by issuing such findings and conclusions after investigation. The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes, and the fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation.

Reversed and remanded. See 368 F Supp 796.

White, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Betty R. Brown argued the cause for appellants.

Robert H. Friebert argued the cause for appellee.

Briefs of Counsel, p 931, infra.

Mr. Justice White delivered the opinion of the Court.

The statutes of the State of Wisconsin forbid the practice of medicine without a license from an examining board composed of practicing physicians. The statutes also define and forbid various acts of professional misconduct, proscribe fee splitting, and make illegal the practice of medicine under any name other than the name under which a license has issued if the public would be misled, such practice would constitute unfair competition with another physician, or other detriment to the profession would result. To enforce these provisions, the examining board is empowered under Wis Stat Ann §§ 448.17 and 448.18 (1974) to warn and reprimand, temporarily to suspend the license, and "to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute . . . ."[1] When an investigative proceeding before the

[421 US 38]

Examining Board was commenced against him, appellee brought this suit against appellants, the individual members of the Board, seeking an injunction against the enforcement of the statutes. The District Court issued a preliminary injunction, the appellants appealed, and we noted probable jurisdiction, 417 US 943, 41 L Ed 2d 664, 94 S Ct 3066 (1974).

I

Appellee, a resident of Michigan and licensed to practice medicine there, obtained a Wisconsin license in August 1971 under a reciprocity agreement between Michigan and Wisconsin governing medical licensing. His practice in Wisconsin consisted of performing abortions

[421 US 39]

at an office in Milwaukee. On June 20, 1973, the Board sent to appellee a notice that it would hold an investigative hearing on July 12, 1973, under Wis Stat Ann § 448.17 to determine whether he had engaged in

1. "No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or osteopathy, or any other system of treating the sick as the term 'treat the sick' is defined in s 445.01(1)(a), without a license or certificate of registration from the examining board, except as otherwise specifically provided by statute." Wis Stat Ann § 448.02(1).

"The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under s 488.06, that are inimical to the public health. The examining board shall have the power to warn and to reprimand, when it finds such practice, and to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute, and the attorney general may aid the district attorney in the prosecution thereof." § 448.17.

"A license or certificate of registration may be temporarily suspended by the examining board, without formal proceedings, and its holder placed on probation for a period not to exceed 3 months where he is known or the examining board has good cause to believe that such holder has violated sub (1). The examining board shall not have authority to suspend a license or certificate of registration, or to place a holder on probation, for more than 2 consecutive 3-month periods. All examining board actions under this subsection shall be subject to review under ch 227." § 448.18(7).

Section 448.18(1)(g) prohibits "engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public." Fee splitting is proscribed by § 448.23(1). Section 448.02(4) regulates the use of a name by a physician in his practice other than the name under which he was licensed.

Appellee maintains that he has legal and factual defenses to all charges made against him. Brief for Appellee 28–29, n 13.

certain proscribed acts.[2] The hearing would be closed to the public, although appellee and his attorney could attend. They would not, however, be permitted to cross-examine witnesses. Based upon the evidence presented at the hearing, the Board would decide "whether to warn or reprimand if it finds such practice and whether to institute criminal action or action to revoke license if probable cause therefor exists under criminal or revocation statutes." App 14.

On July 6, 1973, appellee filed his complaint in this action under 42 USC § 1983 [42 USCS § 1983] seeking preliminary and permanent injunctive relief and a temporary restraining order preventing the Board from investigating him and from conducting the investigative hearing. The District Court denied the motion for a temporary restraining order.

On July 12, 1973, appellants moved to dismiss the complaint. On the same day, appellee filed an amended complaint in which injunctive relief was sought on the ground that Wis Stat Ann §§ 448.17 and 448.18 were unconstitutional and that appellants' acts with respect to him violated his constitutional rights. The District Court again denied appellee's motion for a temporary restraining order, but did not act upon appellants' motion to dismiss. On July 30, 1973, appellants submitted an amended motion to dismiss.

[421 US 40]

The Board proceeded with its investigative hearing on July 12 and 13, 1973; numerous witnesses testified and appellee's counsel was present throughout the proceedings. Appellee's counsel was subsequently informed that appellee could, if he wished, appear before the Board to explain any of the evidence which had been presented. App 36–37.

On September 18, 1973, the Board sent to appellee a notice that a "contested hearing"[3] would be held on October 4, 1973, to determine whether appellee had engaged in certain prohibited acts[4] and that

2. The notice indicated that the hearing would be held "to determine whether the licensee has engaged in practices that are inimical to the public health, whether he has engaged in conduct unbecoming a person licensed to practice medicine, and whether he has engaged in conduct detrimental to the best interests of the public." App 14.

3. Apart from his claim that the tribunal at the contested hearing would be biased, appellee has not contended that that hearing would not be a full adversary proceeding. See Wis Stat Ann §§ 227.07–227.21. See also Daly v Natural Resources Board, 60 Wis 2d 208, 218, 208 NW2d 839, 844 (1973), cert denied, 414 US 1137, 38 L Ed 2d 763, 94 S Ct 883 (1974); Margoles v State Board of Medical Examiners, 47 Wis 2d 499, 508-511, 177 NW2d 353, 358-359 (1970). No issue has been raised concerning the circumstances, if any, in which the Board could suspend a license without first holding an adversary hearing.

4. The notice stated that the hearing would be held "to determine whether the licensee has practiced medicine in the State of Wisconsin under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice medicine in this state, which practicing has operated to unfairly compete with another practitioner, to mislead the public as to identity, or to otherwise result in detriment to the profession or the public, and more particularly, whether the said Duane Larkin, M.D., has practiced medicine in this state since September 1, 1971, under the name of Glen Johnson." It would also "determine whether the licensee has permitted persons to practice medicine in this state in violation of sec 448.02(1), Stats, more particularly whether the said Duane Larkin, M.D., permitted Young Wahn Ahn, M.D., an unlicensed physician, to perform abortions at his abortion clinic during the year 1972." Finally the Board would "determine whether the said Duane Larkin, M.D., split fees with other persons during the years 1971, 1972, and 1973 in violation of sec 448.23(1)." App 45–46.

based upon

[421 US 41]

the evidence adduced at the hearing the Board would determine whether his license would be suspended temporarily under Wis Stat § 448.18(7). Appellee moved for a restraining order against the contested hearing. The District Court granted the motion on October 1, 1973. Because the Board had moved from purely investigative proceedings to a hearing aimed at deciding whether suspension of appellee's license was appropriate, the District Court concluded that a substantial federal question had arisen, namely, whether the authority given to appellants both "to investigate physicians and present charges [and] to rule on those charges and impose punishment, at least to the extent of reprimanding or temporarily suspending" violated appellee's due process rights. Appellee's motion to request the convening of a three-judge court was also granted, and appellants' motion to dismiss was denied. 368 F Supp 793, 795–796 (ED Wis 1973).

The Board complied and did not go forward with the contested hearing. Instead, it noticed and held a final investigative session on October 4, 1973, at which appellee's attorney, but not appellee, appeared.[5] The Board thereupon issued "Findings of Fact," "Conclusions of Law," and a "Decision" in which the Board found that appellee had engaged in specified conduct proscribed by the statute. The operative portion of its "Decision" was the following:

"Within the meaning of sec 448.17, Stats, it is hereby determined that there is probable cause to believe that licensee has violated the criminal provisions of ch 448, Stats, and that there is probable cause for an action to revoke the license of the licensee for engaging in unprofessional conduct.

[421 US 42]

"Therefore, it is the decision of this Board that the secretary verify this document and file it as a verified complaint with the District Attorney of Milwaukee County in accordance with sec 448.18(2), Stats, for the purpose of initiating an action to revoke the license of Duane R. Larkin, M. D., to practice medicine and surgery in the State of Wisconsin and initiating appropriate actions for violation of the criminal laws relating to the practice of medicine." App 59–60.

On November 19, 1973, the three-judge District Court found (with an opinion following on December 21, 1973) that § 448.18(7) was unconstitutional as a violation of due process guarantees and enjoined the Board from enforcing it. Its holding was:

"[F]or the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as § 448.18(7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the interven-

5. Appellee unsuccessfully sought a temporary restraining order against this hearing. See Record on Appeal, Entry 21.

tion of an independent, neutral and detached decision maker, we concluded that it was unconstitutional and unenforceable." 368 F Supp 796, 797 (ED Wis 1973).

Judgment was entered on January 31, 1974, by which it was "Ordered and Adjudged that § 448.18(7), Wis Stats, is unconstitutional and that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18(7), Wis Stats."

Appellants took an appeal from that decision, and we noted probable jurisdiction on June 10, 1974. Subsequently, on July 25, 1974, the District Court, at the initial suggestion of appellants but joined in by a crossmotion of appellee, modified its judgment so as to withdraw

[421 US 43]

its declaration of unconstitutionality and to enjoin the enforcement of § 448.18(7) against appellee only. The amended judgment declared that appellee would suffer irreparable injury if the statute were applied to him and that his challenge to the statute's constitutionality had a high likelihood of success.[6]

II

[1] Appellants correctly assert that the District Court's initial judgment conflicted with this Court's holding in Mayo v Lakeland Highlands Canning Co. 309 US 310, 84 L Ed 774, 60 S Ct 517 (1940), that a state statute should not be declared unconstitutional by a district court if a preliminary injunction is granted a plaintiff to protect his interests during the ensuing litigation. "The question before [the District Court] was not whether the act was constitutional or unconstitutional . . . but was whether the showing made raised serious questions, under the federal Constitution . . . and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants." Id., at 316, 84 L Ed 774, 60 S Ct 517. The January 31, 1974, judgment should not have declared § 448.18(7) unconstitutional and it erroneously enjoined the Board from utilizing the section against any licensee.

The District Court, however, has subsequently modified its judgment to eliminate the declaration of unconstitutionality

[421 US 44]

and to enjoin application of the statute only as against appellee.[7] Since appellants are no longer forbidden to apply the statutes to other persons, this issue in the case has been effectively settled.

[2-4a] We have also concluded that the amended judgment makes inappropriate extended treatment of appellants' contentions that the District Court failed to make the findings and conclusions required by Fed Rule Civ Proc 52(a), and failed to include in the order granting the injunction the reasons for its issuance as required

6. The modified judgment reads as follows:

"IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18(7), Wis Stats, against the plaintiff, Duane Larkin, M. D., on the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success." Suggestion of Mootness or in the Alternative Motion to Reconsider Appellee's Motion to Dismiss or Affirm 21-22.

7. See n 6, supra.

by Rule 65(d).[8] The District Court's
[421 US 45]
opinion and initial judgment were deficient in this respect, but its amended judgment found what the court said was contained in its prior opinion[9]—that appellee would suffer irreparable injury if the statute were to be applied against him and that appellee's "challenge to the constitutionality of said statute has a high likelihood of success."[10] Cf. Brown v Chote, 411 US 452, 456, 36 L Ed 2d 420, 93 S Ct 1732 (1973). While a decision to vacate and remand for fuller emendation of the findings, conclusions, and judgment would be justified in view of their lack of specificity,[11] we doubt that such action, in the circumstances present here, would add anything essential to the determination of the merits. The District Court's decision turned upon the sequence of functions followed by appellants and not upon any factual issue peculiar to this case. We have jurisdiction under 28 USC § 1253 [28 USCS § 1253],[12] and a

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remand at this juncture would

8. Appellants contend in addition that appellee's motion for a temporary restraining order and injunctive relief did not state with particularity the grounds for such relief as required by Fed Rule Civ Prac 7(b), and that the motion went beyond the subject matter of the action since the amended complaint challenged only the conducting of the ex parte investigative hearing by the Board. Our review of the record leads us to the conclusion that whatever deficiencies appellee's motion might have had, they are insufficient to require reversal of the District Court decision giving injunctive relief. We also find that the motion was within the subject matter of the case as defined by the amended complaint. See App 23.

Appellants also contend that appellee offered *no* evidence upon which injunctive relief could be based. This case, however, turns upon questions of law and not upon complicated factual issues, and the District Court has found both that appellee's challenge to § 448.18(7) has a high likelihood of success on the merits and that appellee would be irreparably injured absent injunctive relief. If the District Court is correct in its constitutional premise that an agency which has investigated possible offenses cannot fairly adjudicate the legal and factual issues involved, then its conclusion that appellee would suffer irreparable injury by having his license temporarily suspended by such an agency is not irrational, and we will not disturb it. Cf. Gibson v Berryhill, 411 US 564, 577 n 16, 36 L Ed 2d 488, 93 S Ct 1689 (1973).

Finally, we do not agree with appellants' contention that the District Court should have entirely refrained from deciding the merits of this case and from interfering with the state administrative proceeding. Gibson v Berryhill, supra, at 575–577, 36 L Ed 2d 488, 93 S Ct 1689.

9. "In addition, the plaintiff requests that the modified judgment should recite specific grounds not previously included in the judgment but contained in the earlier memorandum decision of this court. . . . We conclude that the plaintiff's position is well taken." Suggestion of Mootness or in the Alternative Motion to Reconsider Appellee's Motion to Dismiss or Affirm 19.

10. See n 6, supra.

11. See Schmidt v Lessard, 414 US 473, 476–477, 38 L Ed 2d 661, 94 S Ct 713 (1974); Gunn v University Committee, 399 US 383, 388–389, 26 L Ed 2d 684, 90 S Ct 2013 (1970).

12. "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

[4b] Under 28 USC §§ 2281 and 2284 [28 USCS §§ 2281 and 2284], a three-judge district court is required for entering a preliminary or permanent injunction against the enforcement of a state statute on the grounds of the unconstitutionality of the law. That requirement includes preliminary injunctions against enforcement of state statutes based on "a high likelihood of success" of the constitutional challenge to the statutes. See Brown v Chote, 411 US 452, 36 L Ed 2d 420, 93 S Ct 1732 (1973); Goldstein v Cox, 396 US 471, 24 L Ed 2d 663, 90 S Ct 671 (1970); Mayo v Lakeland Highlands Canning Co, 309 US 310, 84 L Ed 774, 60 S Ct 517 (1940).

be a costly procedure to emphasize points that have already been made and recognized by both parties as well as by the District Court.

III

[5] The District Court framed the constitutional issue, which it addressed as being whether "for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process." 368 F Supp, at 797.[13] The question was initially answered affirmatively, and in its amended judgment the court asserted that there was a high probability that appellee would prevail on the question. Its opinion stated that the "state medical examining board [did] not qualify as [an independent] decision maker [and could not] properly rule with regard to the merits of the same charges it investigated and, as in this case, presented to the district attorney." Id., at 798. We disagree. On the present record, it is quite unlikely that appellee would ultimately prevail on the merits of the due process issue presented to the District Court, and it was an abuse of discretion to issue the preliminary injunction.

[6–8] Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 US 133, 136, 99 L Ed 942, 75 S Ct 623 (1955). This applies to administrative agencies which adjudicate as well as to courts. Gibson v Berryhill,

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411 US 564, 579, 36 L Ed 2d 488, 93 S Ct 1689 (1973). Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, supra, at 136, 99 L Ed 942, 75 S Ct 623; cf. Tumey v Ohio, 273 US 510, 532, 71 L Ed 749, 47 S Ct 437, 50 ALR 1243 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome[14] and in which he has been the target of personal abuse or criticism from the party before him.[15]

[9] The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a

13. After the District Court made its decision, the Board altered its procedures. It now assigns each new case to one of the members for investigation, and the remainder of the Board has no contact with the investigative process. Affidavit of John W. Rupel, M. D., Suggestion of Mootness or in the Alternative Motion to Reconsider Appellee's Motion to Dismiss or Affirm 7. That change, designed to accommodate the Board's procedures to the District Court's decision, does not affect this case.

14. Gibson v Berryhill, 411 US, at 579, 36 L Ed 2d 488, 93 S Ct 1689; Ward v Village of Monroeville, 409 US 57, 34 L Ed 2d 267, 93 S Ct 80 (1972); Tumey v Ohio, 273 US 510, 71 L Ed 749, 47 S Ct 437, 50 ALR 1243 (1927). Cf. Commonwealth Coatings Corp. v Continental Casualty Co. 393 US 145, 21 L Ed 2d 301, 89 S Ct 337 (1968).

15. Taylor v Hayes, 418 US 488, 501–503, 41 L Ed 2d 897, 94 S Ct 2697 (1974); Mayberry v Pennsylvania, 400 US 455, 27 L Ed 2d 532, 91 S Ct 499 (1971); Pickering v Board of Education, 391 US 563, 578–579, n 2, 20 L Ed 2d 811, 88 S Ct 1731 (1968). Cf. Ungar v Sarafite, 376 US 575, 584, 11 L Ed 2d 921, 84 S Ct 841 (1964).

presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Very similar claims have been squarely rejected in prior decisions of this Court. In FTC v Cement Institute, 333 US 683, 92 L Ed 1010, 68 S Ct 793 (1948), the Commission had

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instituted proceedings concerning the respondents' multiple basing-point delivered-price system. It was demanded that the Commission members disqualify themselves because long before the Commission had filed its complaint it had investigated the parties and reported to Congress and to the President, and its members had testified before congressional committees concerning the legality of such a pricing system. At least some of the members had disclosed their opinion that the system was illegal. The issue of bias was brought here and confronted "on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations." Id., at 700, 92 L Ed 1010, 68 S Ct 793.

The Court rejected the claim, saying:

"[T]he fact that the Commission had entertained such views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities." Id., at 701, 92 L Ed 1010, 68 S Ct 793.

In specific response to a due process argument, the Court asserted:

"No decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed

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an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." Id., at 702–703, 92 L Ed 1010, 68 S Ct 793 (footnote omitted).

This Court has also ruled that a hearing examiner who has recommended findings of fact after rejecting certain evidence as not being probative was not disqualified to preside at further hearings that were required when reviewing courts held that the evidence had been erroneously excluded. NLRB v Donnelly Garment Co. 330 US 219, 236-237,

91 L Ed 854, 67 S Ct 756 (1947). The Court of Appeals had decided that the examiner should not again sit because it would be unfair to require the parties to try "issues of fact to those who may have prejudged them . . . ." 151 F2d 854, 870 (CA8 1945). But this Court unanimously reversed, saying:

"Certainly it is not the rule of judicial administration that, statutory requirements apart . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing." Donnelly Garment Co., supra, at 236–237, 91 L Ed 854, 67 S Ct 756.

More recently we have sustained against due process objection a system in which a Social Security examiner has responsibility for developing the facts and making a decision as to disability claims, and observed that the challenge to this combination of functions "assumes too much and would bring down too many procedures designed,

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and working well, for a governmental structure of great and growing complexity." Richardson v Perales, 402 US 389, 410, 28 L Ed 2d 842, 91 S Ct 1420 (1971).[16]

16. The decisions of the courts of appeals touching upon this question of bias arising from a combination of functions are also instructive. In Pangburn v CAB, 311 F2d 349 (CA1 1962), the Board had the responsibility of making an accident report and also reviewing the decision of a trial examiner that the pilot involved in the accident should have his airline transport pilot rating suspended. The pilot claimed that his right to procedural due process had been violated by the fact that the Board was not an impartial tribunal in deciding his appeal from the trial examiner's decision since it had previously issued its accident report finding pilot error to be the probable cause of the crash. The Court of Appeals found the Board's procedures to be constitutionally permissible:

"[W]e cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required. Particularly is this so in the instant case where the Board's prior contact with the case resulted from its following the Congressional mandate to investigate and report the probable cause of all civil air accidents." Id., at 358.

See also Duffield v Charleston Area Medical Center, Inc. 503 F2d 512 (CA4 1974); Kennecott Copper Corp. v FTC,, 467 F2d 67, 79–80 (CA10 1972), cert denied, 416 US 909, 40 L Ed 2d 114, 94 S Ct 1617 (1974); Intercontinental Industries Inc. v American Stock Exchange, 452 F2d 935 (CA5 1971), cert denied, 409 US 842, 34 L Ed 2d 81, 93 S Ct 41 (1972); FTC v Cinderella Career & Finishing Schools, Inc. 131 US App DC 331, 338, 404 F2d 1308, 1315 (1968); Skelly Oil Co. v FPC, 375 F2d 6, 17–18 (CA10 1967), modified on other grounds sub nom Permian Basin Area Rate Cases, 390 US 747, 20 L Ed 2d 312, 88 S Ct 1344 (1968); Safeway Stores, Inc. v FTC, 366 F2d 795, 801–802 (CA9 1966), cert denied, 386 US 932, 17 L Ed 2d 805, 87 S Ct 954 (1967); R. A. Holman & Co. v SEC, 366 F2d 446, 452–453 (CA2 1966), cert denied, 389 US 991, 19 L Ed 2d 482, 88 S Ct 473 (1967); SEC v R. A. Holman & Co. 116 US App DC 279, 323 F2d 284, cert denied, 375 US 943, 11 L Ed 2d 274, 84 S Ct 350 (1963).

Those cases in which due process violations have been found are characterized by factors not present in the record before us in this litigation, and we need not pass upon their validity. In American Cyanimid Co. v FTC, 363 F2d 757 (CA6 1966), one of the commissioners had previously served actively as counsel for a Senate subcommittee investigating many of the same facts and issues before the Commission for consideration. In Texaco, Inc. v FTC, 118 US App DC 366, 336 F2d 754 (1964), vacated on other grounds, 381 US 739, 14 L Ed 2d 714, 85 S Ct 1798 (1965), the court found that a speech made by a commissioner clearly indicated that he had already to some extent reached a decision as to matters pending before the Commission. See also Cinder-

[421 US 51]

That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely. Within the Federal Government itself, Congress has addressed the issue in several different ways, providing for varying degrees of

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separation from complete separation of functions to virtually none at all.[17] For the generality of agencies, Congress has been content with § 5 of the Administrative Procedure Act, 5 USC § 554(d) [5 USCS § 554(d)], which provides that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function, but which also expressly exempts from this prohibition "the agency or a member or members of the body comprising the agency."[18]

It is not surprising, therefore, to find that "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process . . . ." 2 K. Davis, Administrative Law Treatise § 13.02, p 175 (1958). Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mecha-

ella Career & Finishing Schools, Inc. v FTC, 138 US App DC 152, 158–161, 425 F2d 583, 589–592 (1970). Amos Treat & Co. v SEC, 113 US App DC 100, 306 F2d 260 (1962), presented a situation in which one of the members of the Commission had previously participated as an employee in the investigation of charges pending before the Commission. In Trans World Airlines v CAB, 102 US App DC 391, 254 F2d 90 (1958), a commissioner had signed a brief in behalf of one of the parties in the proceedings prior to assuming membership on the Board. See also King v Caesar Rodney School District, 380 F Supp 1112 (Del 1974).

For state court decisions dealing with issues similar to those involved in this case, see Koelling v Board of Trustees, 259 Iowa 1185, 146 NW2d 284 (1966); State v Board of Medical Examiners, 135 Mont 381, 339 P2d 981 (1959); Board of Medical Examiners v Steward, 203 Md 574, 102 A2d 248 (1954). See also LeBow v Optometry Examining Board, 52 Wis 2d 569, 575, 191 NW2d 47, 50 (1971); Kachian v Optometry Examining Board, 44 Wis 2d 1, 13, 170 NW2d 743, 749 (1969).

17. See 2 K. Davis, Administrative Law Treatise § 13.04 (1958); K. Davis, Administrations Law Treatise § 11.14 (1970 Suppl.

18. The statute provides in pertinent part: "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

"(A) in determining applications for initial licenses;

"(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

"(C) to the agency or a member or members of the body comprising the agency."

See also 2 K. Davis, supra, §§ 13.06-13.07 (1958).

systems in this country will not yield to any single organizing principle.

[421 US 53]

Appellee relies heavily on In re Murchison, supra, in which a state judge, empowered under state law to sit as a "one-man grand jury" and to compel witnesses to testify before him in secret about possible crimes, charged two such witnesses with criminal contempt, one for perjury and the other for refusing to answer certain questions, and then himself tried and convicted them. This Court found the procedure to be a denial of due process of law not only because the judge in effect became part of the prosecution and assumed an adversary position, but also because as a judge, passing on guilt or innocence, he very likely relied on "his own personal knowledge and impression of what had occurred in the grand jury room," an impression that "could not be tested by adequate cross-examination." 349 US, at 138, 99 L Ed 942, 75 S Ct 623.[19]

Plainly enough, Murchison has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications. The court did not purport to question the Cement Institute case, supra, or the Administrative Procedure Act and did not lay down any general principle that a judge before whom an alleged contempt is committed may not bring and preside over the ensuing contempt proceedings. The accepted rule is to the contrary.

[421 US 54]

. . . Ungar v Sarafite, 376 US 575, 584–585, 11 L Ed 2d 921, 84 S Ct 841 (1964); Nilva v United States, 352 US 385, 395–396, 1 L Ed 2d 415, 77 S Ct 431 (1957).

[10–12] Nor is there anything in this case that comes within the strictures of Murchison.[20] When the Board instituted its investigative procedures, it stated only that it would investigate whether proscribed conduct had occurred. Later in noticing the adversary hearing, it asserted only that it would determine if violations had been committed which would warrant suspension of appellee's license. Without doubt, the Board then anticipated that the proceeding would eventuate in an adjudication of the issue; but there was no more evidence of bias or the risk of bias or prejudgment than

19. Appellee also relies upon statements made by the Court in Pickering v Board of Education, 391 US, at 578–579, n 2, 20 L Ed 2d 811, 88 S Ct 1731 (1968). In that case, however, unlike the present one, "the trier of fact was the same body that was also both the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal." Ibid. In any event, the Court did not analyze the question raised by this case because the appellant in Pickering had not raised a due process contention in the state proceedings.

The question of the constitutionality of combining in one agency both investigative and adjudicative functions in the same proceeding was raised but did not require answering in Gibson v Berryhill, 411 US, at 579 n 17, 36 L Ed 2d 488, 93 S Ct 1689.

20. It is asserted by appellants, Brief for Appellants 25 n 9, and not denied by appellee that an agency employee performed the actual investigation and gathering of evidence in this case and that an assistant attorney general then presented the evidence to the Board at the investigative hearings. While not essential to our decision upholding the constitutionality of the Board's sequence of functions, these facts, if true, show that the Board had organized itself internally to minimize the risks arising from combining investigation and adjudication, including the possibility of Board members relying at later suspension hearings upon evidence not then fully subject to effective confrontation.

inhered in the very fact that the Board had investigated and would now adjudicate.[21] Of course, we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice. The processes utilized by the Board, however, do not in themselves contain an unacceptable risk of bias. The

[421 US 55]

investigative proceeding had been closed to the public, but appellee and his counsel were permitted to be present throughout; counsel actually attended the hearings and knew the facts presented to the Board.[22] No specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. Without a showing to the contrary, state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." United States v Morgan, 313 US 409, 421, 85 L Ed 1429, 61 S Ct 999 (1941).

[13] We are of the view, therefore, that the District Court was in error when it entered the restraining order against the Board's contested hearing and when it granted the preliminary injunction based on the untenable view that it would be unconstitutional for the Board to suspend appellee's license "at its own contested hearing on charges evolving from its own investigation . . . ." The contested hearing should have been permitted to proceed.

IV

[14] Nor do we think the situation substantially different because the Board, when it was prevented from going forward with the contested hearing, proceeded to make and issue formal findings of fact and conclusions of law asserting that there was probable cause to believe that

[421 US 56]

appellee had engaged in various acts prohibited by the Wisconsin statutes.[23] These findings and conclusions were verified and filed with the district attorney for the purpose of initiating revocation and criminal proceedings. Although the District Court did not emphasize this aspect of the case before it, appellee stresses it in attempting to show prejudice and prejudgment. We are not persuaded.

[15, 16] Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the

21. Appellee does claim that state officials harassed him with litigation because he performed abortions. Brief for Appellee 8–9. He also has complained "about the notoriety of his case during the 'secret' [Board] proceedings." Id., at 20 n 8. The District Court made no findings with respect to these allegations, and the record does not provide a basis for finding as an initial matter here that there was evidence of actual bias or prejudgment on the part of appellants.

22. After the initial investigative hearing, appellee was also given the opportunity to appear before the Board to "explain" the evidence that had been presented to it. App 37.

23. See supra, at 41–42, 43 L Ed 2d, at 720–721.

warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction. It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.[24] We

[421 US 57]

should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around. See Cement Institute, 333 US, at 702–703, 92 L Ed 1010, 68 S Ct 793; Donnelly Garment Co. 330 US, at 236–237, 91 L Ed 854, 67 S Ct 756.

[17] Here, the Board stayed within the accepted bounds of due process. Having investigated, it issued findings and conclusions asserting the commission of certain acts and ultimately concluding that there was probable cause to believe that appellee had violated the statutes.

The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. Here, if the Board now proceeded after an adversary hearing to determine that appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit

[421 US 58]

of a more complete view of the evidence afforded by an adversary hearing.

[18] The initial charge or determination of probable cause and the

24. "The Act does not and probably should not forbid the combination with judging of instituting proceedings, negotiating settlements, or testifying. What heads of agencies do in approving the institution of proceedings is much like what judges do in ruling on demurrers or motions to dismiss. When the same examiner conducts a pre-hearing conference and then presides at the hearing, the harm, if any, is slight, and it probably goes more to impairment of effectiveness in mediation than to contamination of judging. If deciding officers may consult staff specialists who have not testified, they should be allowed to consult those who have testified; the need here is not for protection against contamination but is assurance of appropriate opportunity to meet what is considered." 2 K. Davis, Administrative Law Treatise § 13.11, p 249 (1958).

ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised. But in our view, that is not this case.[25]

[19] That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high. Findings of that kind made by judges with special insights into local realities are entitled to respect, but injunctions resting on such factors should be accompanied by at least the minimum findings required by Rules 52(a) and 65(d).[26]

[421 US 59]

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

25. Quite apart from precedents and considerations concerning the constitutionality of a combination of functions in one agency, the District Court rested its decision upon Gagnon v Scarpelli, 411 US 778, 36 L Ed 2d 656, 93 S Ct 1756 (1973), and Morrissey v Brewer, 408 US 471, 33 L Ed 484, 92 S Ct 2593 (1972). These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review. Gagnon, supra, at 785–786, 36 L Ed 2d 656, 93 S Ct 1756; Morrissey, supra, at 485–486, 33 L Ed 2d 484, 92 S Ct 2593; see also Goldberg v Kelly, 397 US 254, 271, 25 L Ed 2d 287, 90 S Ct 1011 (1970). Allowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present here. Under the controlling statutes, the Board is at no point called upon to review its own prior decisions.

26. The District Court noted that the Board had presented its findings of fact and conclusions of law to the district attorney for the purpose of initiating any appropriate revocation or criminal proceedings, 368 F Supp, at 798, but made little of it and apparently did not deem the transmittal to a third party critical in light of "local realities." See Gibson v Berryhill, 411 US, at 579, 36 L Ed 2d 488, 93 S Ct 1689. The District Court is, of course, free to give further attention to this issue upon remand.

Ron RUDIN and Ron Rudin Realty and Construction Co., Appellants,

v.

NEVADA REAL ESTATE ADVISORY COMMISSION, Respondent.

No. 6085.

Supreme Court of Nevada.

July 7, 1970.

Appeal by licensees from decision of the Eighth Judicial District Court, Clark County, Alvin N. Wartman, J., affirming Real Estate Advisory Commission's decision suspending real estate licenses of licensees for period of six months for several violations of state real estate code. The Supreme Court, Thompson, J., held that where licensees were charged with several violations of state real estate code, individual licensee's assertion of his Fifth Amendment privilege not to answer question concerning one of several charges upon ground that his answer might tend to incriminate him concerned only one of several violations alleged, and there was ample evidence to support Real Estate Advisory Commission's findings in respect to each violation including subject concerning which individual licensee refused to give testimony, any adverse inference drawn from such refusal to testify, although impermissible, was harmless with regard to Commission's suspension of licensees' real estate licenses.

Affirmed.

1. Brokers ⇐3

Where record showed that copy of "complaint analysis" prepared by chief investigator for state Real Estate Advisory Commission was made available to licensees' counsel during hearing and could have been used to cross-examine chief investigator had licensees' counsel elected to do so, and licensees' counsel did not request continuance for purpose of studying report as he could have if time was needed to do so, tardy delivery of report did not prejudice licensees in their hearing before Commission for alleged violations of real estate code. N.R.S. 645.001 et seq., 645.310, subds. 3–5.

2. Constitutional Law ⇐318

Generally, combination of investigating, prosecuting and judging functions in one administrative agency does not constitute denial of due process.

3. Constitutional Law ⇐287

Where investigation of licensees' alleged violation of state real estate code was conducted by investigators, licensees' prosecution was conducted by counsel for state Real Estate Advisory Commission, and decision was made by Commission itself after Commission had heard evidence and examined exhibits and changed proposed decision propounded by prosecutor as to penalty, thus establishing exercise of an independent judgment by the Commission, preparation of proposed findings and decisions by prosecutor did not result in denial of due process to licensees. N.R.S. 645.001 et seq., 645.310, subds. 3–5.

4. Brokers ⇐3

Where decision of state Real Estate Advisory Commission suspending real estate licenses of licensees for six months for separate violations of state real estate code was supported by substantial evidence and was clothed with presumption of validity, and, when hearing on matter occurred, neither real estate code nor administrative procedure act required submission of proposed findings and decision to the adversary, failure of counsel for Commission to submit copy of proposed findings and decision to licensees' counsel was not cause to set aside agency decision. N.R.S. 233B.126, 645.001 et seq., 645.310, subds. 3–5.

5. Constitutional Law ⇐268
Witnesses ⇐293½

Self-incrimination clause of Fifth Amendment is applicable to the states and to disciplinary proceedings for misconduct. U.S.C.A.Const. Amend. 5.

6. Brokers ⇐3

Where licensees were charged with several violations of state real estate

EXHIBIT G

individual licensee's assertion of his Fifth Amendment privilege not to answer question concerned only one of several violations alleged, and evidence to support Real Estate Advisory Commission's findings in respect to each violation including subject concerning which individual licensee refused to give testimony was ample, any adverse inference drawn from such refusal to testify, although impermissible, was harmless with regard to Commission's suspension of licensees' real estate licenses. N.R.S. 645.001 et seq., 645.310, subds. 3-5; U.S.C.A.Const. Amend. 5.

W. Owen Nitz, Las Vegas, for appellants.

W. Bruce Beckley, Las Vegas, for respondent.

OPINION

THOMPSON, Justice:

The district court affirmed a decision of the Nevada Real Estate Advisory Commission suspending the real estate licenses of the appellants for a period of six months for several violations of the real estate code, ch. 645 NRS.[1] The appellants contend that the administrative hearing before the Commission was unfair and denied them due process. The appellants were properly notified of the charges against them, of the hearing to be held thereon, and were represented throughout by competent counsel of their choice. Their contention that the administrative hearing was unfair rests mainly upon three incidents which, in combined effect, are claimed to have destroyed any possibility of a fair hearing. The incidents are: first, the appellants were not timely served with a copy of a report relating to the matter as required by statute; second, counsel for the Commission, who acted in the role of prosecutor, prepared proposed findings and decision and sent them to the Commission without notice to the appellants; third, the Commission, in deciding the matter, drew an impermissible inference from appellant Ron Rudin's refusal to testify with regard to one aspect of the charges against him.

[1] I. NRS 645.680(4) provides that at least 20 days prior to the hearing the licensee shall receive "copies of any and all communications, reports, affidavits or depositions in possession of the real estate division touching or relating to the matter in question." The chief investigator for the Commission had prepared a "complaint analysis" during the course of his investigation of Rudin. The licensees, Rudin and Rudin Realty and Construction Co., did not receive a copy of that document prior to the hearing. The Commission's explanation for failing to deliver it to the licensees is that it is an internal document and not within the contemplation of the statute. We do not decide this point since the record shows that a copy was made available to counsel for the licensees during the hearing and could have been used by him to cross-examine the chief investigator had he elected to do so. Cf. Mears v. State, 83 Nev. 3, 8, 422 P.2d 230 (1967); Walker v. State, 78 Nev. 463, 468, 376 P.2d 137 (1962); State v. Bachman, 41 Nev. 197, 208, 168 P. 733 (1917). If time was needed to study the report, a continuance for that purpose could have been requested. Counsel did not so request. In these circumstances the tardy delivery of the report did not prejudice the licensees. Nevada Tax Commission v. Mackie, 75 Nev. 6, 12, 333 P.2d 985 (1959).

2. After the hearing, counsel for the Commission, who prosecuted the matter, prepared proposed findings and decision and submitted them to the Commission without notice to the appellants-licensees. The proposals were adopted verbatim except as to the penalty to be imposed.

[1] ... significant violations concerned ... handling of money in a manner contrary to NRS 645.310(3), (4), (5). Although the sufficiency of the evidence is questioned, our review of the record shows substantial evidence to support the decision. We shall not recite it for to do so would serve no useful purpose.

[2, 3] It is not uncommon in administrative law to find the combination of investigating, prosecuting and judging functions. As a general proposition, such a combination, standing alone, does not constitute a denial of due process. 2 Davis, Administrative Law Treatise § 13.02. Such combination of functions possesses the potential for unfairness, but unfairness is not its inevitable consequence. In the matter at hand that combination did not exist. The investigation was conducted by investigators, the prosecution, by counsel for the Commission, and the decision was made by the Commission itself. There is nothing to suggest that the prosecutor decided the case. The Commission heard the evidence and examined the exhibits. This alone sets this proceeding apart from Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938), so heavily relied upon by the appellants. The Commission was free to accept, modify or reject the proposed findings and decision submitted by counsel. Indeed, the proposed decision was changed as to penalty, thus establishing the exercise of an independent judgment by the Commission. It is preferable that one trained in law prepare those documents. In court litigation the findings and judgment routinely are prepared by counsel for the prevailing party. We see no sound reason for denouncing that practice in administrative agency matters.

[4] Counsel for the Commission did not submit a copy of the proposed findings and decision to counsel for the licensees. When this hearing occurred, neither the real estate code nor the administrative procedure act required such submission to the adversary. The administrative procedure act now seems to require it. NRS 233B.126. In any event, it is a preferred practice. In this instance, however, the failure to do so does not give us cause to set aside the agency decision since it is supported by substantial evidence and is clothed with the presumption of validity. Randono v. Nevada Real Estate Commission, 79 Nev. 132, 379 P.2d 537 (1963). We may not assume that the decision would have been different had counsel for the licensees been afforded an opportunity to object the proposed findings and decision.

3. In finding against the licensees the Commission noted that Ron Rudin had refused to answer a question concerning one of the several charges, upon the ground that his answer might tend to incriminate him. It was his privilege to claim that constitutional protection, and no effort was made to compel an answer. The licensees contend, however, that it was impermissible for the Commission to draw an adverse inference from such refusal to answer.

[5, 6] The self-incrimination clause of the Fifth Amendment is applicable to the states [Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed.2d 653 (1964)] and to disciplinary proceedings for misconduct, Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). In Spevack, the High Court ruled that a lawyer could not be disbarred solely because he refused to testify at a disciplinary proceeding on the ground that his testimony would tend to incriminate him. The dishonor of disbarment and the deprivation of a livelihood cannot be the price exacted for asserting the privilege. A violation of this Fifth Amendment privilege may, however, be harmless in the context of a particular case. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Before such a violation may be deemed harmless we must be able to declare our belief that it was harmless beyond a reasonable doubt. Chapman v. California, supra. We so declare in this instance. The appellants-licensees were charged with several violations. Rudin's assertion of his Fifth Amendment privilege concerned only one of those violations. There was ample evidence to support the Commission's findings in respect to each violation including the subject concerning which Rudin refused to give testimony. In these circumstances, the inference from such refusal to testify, though [illegible]

ble, was truly harmless with regard to the result reached.

4. Other assertions of error have been examined and are without merit. The district court properly sustained the Commission.

Affirmed.

COLLINS, C. J., and ZENOFF, BATJER and MOWBRAY, JJ., concur.

J. L. AZEVEDO and United States Fidelity and Guaranty Company, Appellants,
v.
Bolton F. MINISTER, Respondent.
No. 6096.

Supreme Court of Nevada.
July 9, 1970.

Suit concerning enforceability of an oral agreement to purchase 1500 tons of hay. The First Judicial District Court, Carson City, Richard L. Waters, Jr., J., upheld validity of agreement, and appeal was taken. The Supreme Court, Mowbray, J., held that record supported finding that confirming memorandum referring to bales of hay remaining to be hauled on buyer's purchase and asking when buyer planned to haul balance of hay and sent on January 21, after oral agreement was made in early November, was sufficient to come within provision of Uniform Commercial Code eliminating defense of statute of frauds when there are confirming memoranda.

Judgment affirmed.

1. Frauds, Statute of ⇐121

Uniform Commercial Code seeks to limit defense of statute of frauds to only those cases where there is a definite possibility of fraud. N.R.S. 104.2201.

2. Sales ⇐1.5

Sale of hay is within definition of sale of "goods" within meaning of Uniform Commercial Code. N.R.S. 104.2105, subd. 1, 104.2107, subd. 2.

See publication Words and Phrases for other judicial constructions and definitions.

3. Frauds, Statute of ⇐129(1)

Statute of frauds is no defense to portion of oral contract that has been performed. N.R.S. 104.2201, subds. 2, 3(c).

4. Frauds, Statute of ⇐158(1)

Under provision of Uniform Commercial Code eliminating defense of statute of frauds when there are confirming memoranda, party alleging contract still has burden of proving that oral contract was entered into before the written confirmation. N.R.S. 104.2201, subd. 2.

5. Frauds, Statute of ⇐158(4)

Record supported trial judge's finding that memoranda sent by seller of hay referring to bales of hay yet to be hauled on buyer's purchase and asking when buyer planned to haul balance of hay sufficiently made reference to oral agreement between parties to come within provision of Uniform Commercial Code eliminating defense of statute of frauds for oral agreement when there are confirming memoranda. N.R.S. 104.2201, subd. 2.

6. Frauds, Statute of ⇐159

What is a reasonable time in which confirming memoranda must be sent after oral contract is made so as to come within provision of Uniform Commercial Code eliminating defense of statute of frauds when there are confirming memoranda must be decided by trier of facts under all circumstances of case. N.R.S. 104.2201, subd. 2.

7. Frauds, Statute of ⇐158(4)

Record supported trial judge's finding that confirming memorandum sent January 21 after oral agreement for purchase of hay was made in early November and buy-

CHAPTER 233B

NEVADA ADMINISTRATIVE PROCEDURE ACT

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233B.010 Short title. This chapter may be cited as the Nevada Administrative Procedure Act.
(Added to NRS by 1965, 962)

233B.020 Minimum procedural requirements for regulation-making, adjudication procedure for executive agencies; judicial review; applicability of chapter.
1. By this chapter, the legislature intends to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies of the executive department of the state government and for judicial review of both functions, excepting those agencies expressly exempted pursuant to the provisions of this chapter. This chapter confers no additional regulation-making authority upon any agency except to the extent provided in subsection 1 of NRS 233B.050.
2. The provisions of this chapter are intended to supplement present statutes applicable to specific agencies. Nothing in the chapter shall be held to limit or repeal additional requirements imposed on such agencies by statutes or to limit such requirements otherwise recognized by law.
3. The state board of education is an agency subject to the provisions of this chapter for the purpose of regulation making but not with respect to any contested case.
(Added to NRS by 1965, 962; A 1973, 472)

233B.030 Definitions. In this chapter, unless the context otherwise requires:
1. "Agency" means each public agency, bureau, board, commission, department, division, officer or employee of the executive department of the state government authorized by law to make regulations or to determine contested cases, except:
(a) The governor.
(b) Any penal or educational institution.
(c) Any agency acting within its capacity as administrator of the military affairs of this state.
(d) The state gaming control board.
(e) The Nevada gaming commission.
(f) The state board of parole commissioners.
(g) The welfare division of the department of human resources.
(h) The state board of examiners acting pursuant to chapter 217 of NRS.
2. "Contested case" means a proceeding, including but not restricted to ratemaking and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing. Nothing contained in this section shall be construed to require a hearing where not otherwise required by law or regulation.
3. "License" means the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission

required by law. "Licensing" means the agency procedure whereby the license is granted, denied, revoked, suspended, annulled, withdrawn or amended.

4. "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party in any contested case.

5. "Person" means any individual, partnership, corporation, association, political subdivision or public or private organization of any character other than an agency.

6. "Regulation" means each agency rule, standard, directive or statement of general applicability that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior regulation, but does not include:

(a) Statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;

(b) Declaratory rulings issued pursuant to NRS 233B.120;

(c) Intra-agency memoranda;

(d) Agency decisions and findings in contested cases;

(e) Regulations concerning the use of public roads or facilities which are indicated to the public by means of signs and signals; or

(f) Any order for immediate action, including but not limited to quarantine and the treatment or cleansing of infected or infested animals, objects or premises, made under the authority of the state board of agriculture, the state board of health, the state board of sheep commissioners or any other agency of this state in the discharge of a responsibility for the preservation of human or animal health or for insect or pest control.

(Added to NRS by 1965, 962; A 1967, 807; 1971, 661; 1973, 1406; 1975, 1790)

233B.040 Regulations: Adoption; enforcement. Unless otherwise provided by law, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions. If adopted and filed in accordance with the provisions of this chapter, such regulations shall have the force of law and be enforced by all peace officers. In every instance, the power to adopt regulations to carry out a particular function is limited by the terms of the grant of authority under which the function was assigned.

(Added to NRS by 1965, 963; A 1971, 804)

233B.050 Regulations of practice; public inspection of regulations, orders, decisions and opinions; validity.

1. In addition to other regulation-making requirements imposed by law, each agency shall:

(a) Adopt regulations of practice, setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency.

(b) Make available for public inspection all regulations adopted or used by the agency in the discharge of its functions.

(c) Make available for public inspection all final orders, decisions and opinions except those expressly made confidential or privileged by statute.

2. No agency regulation, rule, final order or decision shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as required in this section, except that this provision shall not be applicable in favor of any person or party who has actual knowledge thereof.

(Added to NRS by 1965, 963)

233B.060 Notice of adoption, amendment, repeal of regulation; hearings; emergency regulations; reasons for agency action.

1. Prior to the adoption, amendment or repeal of any regulation, the agency shall give at least 30 days' notice of its intended action, unless a shorter period of notice is specifically permitted by statute.

2. The notice shall:

(a) Include a statement of either the terms or substance of the proposed regulation or a description of the subjects and issues involved, and of the time when, the place where, and the manner in which, interested persons may present their views thereon.

(b) Be mailed to all persons who have requested in writing that they be placed upon a mailing list, which shall be kept by the agency for such purpose.

The agency shall at the time of giving the notice deposit one copy of the text of the proposed regulation with the secretary of state, and keep at least one copy available in its office from the date of the notice to the date of the hearing, for inspection and copying by the public. The notice shall state the address or addresses at which the text of the proposed regulation may be inspected and copied. After the agency has filed the original and copies of the adopted regulation pursuant to NRS 233B.070, the secretary of state may discard the deposited copy of the proposed regulation.

3. All interested persons shall be afforded a reasonable opportunity to submit data, views or arguments, orally or in writing. With respect to substantive regulations, opportunity for oral hearing must be granted if requested by any interested person who will be directly affected by the proposed regulation. The agency shall consider fully all written and oral submissions respecting the proposed regulation.

4. If an agency finds that an emergency exists, and such a finding is concurred in by the governor by written endorsement on the original copy of a proposed regulation, a regulation may be adopted and become effective immediately upon its being filed in the office of the secretary of state. A regulation so adopted may be effective for a period of not longer

than 120 days, but the adoption of an identical regulation under subsections 1 to 3, inclusive, is not precluded.

5. No regulation adopted after July 1, 1965, is valid unless adopted in substantial compliance with this section, but no objection to any regulation on the ground of noncompliance with the procedural requirements of this section may be made more than 2 years after its effective date. Regulations in effect on July 1, 1965, shall continue in effect until amended or repealed in accordance with the provisions of this chapter, if an original and two copies are deposited with the secretary of state on or before July 1, 1965.

6. Upon adoption of a regulation, the agency, if requested to do so by an interested person, either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, and incorporate therein its reason for overruling the consideration urged against its adoption.

(Added to NRS by 1965, 964; A 1973, 621; 1975, 1157, 1413)

233B.070 Effective date of regulations; duties of secretary of state; agencies to furnish public with copies.

1. Regulations shall become effective 30 days after an original and three duplicate copies of each regulation are filed with the secretary of state, except where:

(a) A later date is required by statute;

(b) An earlier date is permitted by statute;

(c) A later date is specified in the regulation; or

(d) The agency finds that an emergency exists, and such finding is concurred in by the governor, by written endorsement upon the original regulation.

2. Each regulation shall include a citation of the authority pursuant to which it, or any part of it, was adopted.

3. The secretary of state shall cause to be endorsed on the original and duplicate copies of each regulation filed the time and date of the filing thereof, and shall maintain a file of such regulations for public inspection together with suitable indexes therefor.

4. No adopted regulation, which attempts to incorporate an agency's ruling, order or similar pronouncement by referring to the general subject of such, or to where such may be found, or to both, shall be effective.

5. The secretary of state shall deliver a duplicate copy of each adopted regulation to the Nevada legislative counsel bureau.

6. Each agency shall furnish a copy of its regulations to any person who requests a copy, and may charge a reasonable fee for such copy based on the cost of reproduction if it does not have funds appropriated or authorized for such purpose.

(Added to NRS by 1965, 964; A 1975, 1158, 1414)

233B.080 Inactive files of secretary of state. When any regulation filed with the secretary of state expires by its own terms or is superseded

or revoked, and the adopting agency so informs the secretary of state, the secretary of state shall cause the same to be placed in an inactive file.
(Added to NRS by 1965, 965)

233B.090 Rebuttable presumption of regularity of adoption, filing of regulation. The secretary of state's authenticated file stamp on a rule or regulation shall raise a rebuttable presumption that the rule or regulation was adopted and filed in compliance with all requirements necessary to make it effective.
(Added to NRS by 1965, 965)

233B.100 Petitions for adoption, filing, amendment, repeal of regulations; required action by agency. Any interested person may petition an agency requesting the adoption, filing, amendment or repeal of any regulation and shall accompany his petition with relevant data, views and arguments. Each agency shall prescribe by regulation the form for such petitions and the procedure for their submission, consideration and disposition. Upon submission of such a petition, the agency shall within 30 days either deny the petition in writing, stating its reasons, or initiate regulation-making proceedings in accordance with NRS 233B.060.
(Added to NRS by 1965, 965)

233B.110 Declaratory judgment actions to determine validity, applicability of regulations.
1. The validity or applicability of any regulation may be determined in a proceeding for a declaratory judgment in the district court in and for Carson City, or in and for the county where the plaintiff resides, when it is alleged that the regulation, or its proposed application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. A declaratory judgment may be rendered after the plaintiff has first requested the agency to pass upon the validity of the regulation in question. The court shall declare the regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency.
2. Any agency whose regulation is made the subject of a declaratory action under subsection 1 shall be made a party to the action. Any agency may institute an action for a declaratory judgment, as provided in subsection 1, concerning any regulation adopted and filed by it or any other agency.
3. Actions for declaratory judgment provided for in subsections 1 and 2 shall be in accordance with the Uniform Declaratory Judgments Act (chapter 30 of NRS), and the Nevada Rules of Civil Procedure. In all actions under subsections 1 and 2, the attorney general shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard.
(Added to NRS by 1965, 965; A 1969, 317)

233B.120 Petitions for declaratory orders, advisory opinions; disposition. Each agency shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability of any statutory provision, agency regulation or decision of the agency. Declaratory orders disposing of petitions in such cases shall have the same status as agency decisions. A copy of the declaratory order or advisory opinion shall be mailed to the petitioner.

(Added to NRS by 1965, 966)

233B.121 Notice of hearing in contested case; contents of record.

1. In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.
2. The notice shall include:

(a) A statement of the time, place and nature of the hearing.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and regulations involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

3. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.
4. Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.
5. The record in a contested case shall include:

(a) All pleadings, motions and intermediate rulings.

(b) Evidence received or considered.

(c) A statement of matters officially noticed.

(d) Questions and offers of proof and objections, and rulings thereon.

(e) Proposed findings and exceptions.

(f) Any decision, opinion or report by the hearing officer presiding at the hearing.

6. Oral proceedings, or any part thereof, shall be transcribed on request of any party.
7. Findings of fact shall be based exclusively on substantial evidence and on matters officially noticed.

(Added to NRS by 1967, 808)

233B.122 Certain agency members prohibited from taking part in adjudication. No agency member who acts as an investigator or prosecutor in any contested case may take any part in the adjudication of such case.

(Added to NRS by 1967, 808)

233B.123 Evidence in contested cases. In contested cases:

1. Irrelevant, immaterial or unduly repetitious evidence shall be excluded. Evidence may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonable and prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

2. Documentary evidence may be received in the form of authenticated copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

3. Each party may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though such matter was not covered in the direct examination, impeach any witness regardless of which party first called him to testify, and rebut the evidence against him.

4. Notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

(Added to NRS by 1967, 808)

233B.124 Procedure when majority of agency officials who are to render final decision have not heard case or read record; service of proposal for decision; oral argument. Where, in a contested case, a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file, within 20 days, exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.

(Added to NRS by 1967, 809)

233B.125 Contents of adverse written decision, order; notice; copies. A decision or order adverse to a party in a contested case shall be in

writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact and decisions shall be based upon substantial evidence. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency regulations, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by certified mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

(Added to NRS by 1967, 809)

233B.126 Limitations on communications of agency members, employees assigned to render decision, make findings of fact and conclusions of law. Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity to all parties to participate. An agency member may, subject to the provisions of NRS 233B.123:

1. Communicate with other members of the agency.
2. Have the aid and advice of one or more personal assistants.

(Added to NRS by 1967, 809)

233B.127 Application of chapter to grant, denial or renewal of licenses; summary suspension of licenses.

1. When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.
2. When a licensee has made timely and sufficient application for the renewal of a license or for a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.
3. No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by certified mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending

proceedings for revocation or other action. Such proceedings shall be promptly instituted and determined.

(Added to NRS by 1967, 810)

233B.130 Judicial review of final decisions in contested cases.

1. Any party aggrieved by a final decision in a contested case is entitled to judicial review thereof under this chapter. This section does not limit utilization of trial de novo review where provided by statute, but this section provides an alternative means of review in those cases. Any preliminary, procedural or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency decision would not provide an adequate remedy.

2. Proceedings for review shall be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the act on which the proceeding is based occurred, within 30 days after the service of the final decision of the agency or, if a rehearing is held, within 30 days after the decision thereon. Copies of the petition shall be served upon the agency and all other parties of record.

(Added to NRS by 1965, 966; A 1969, 318; 1975, 495)

233B.140 Stay of agency decisions; record of proceedings; taking of additional evidence; limitations on judicial review; grounds for reversal, modification.

1. The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

2. Within 30 days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under view. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

3. If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decisions with the reviewing court.

4. The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be

taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

5. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Added to NRS by 1967, 810)

233B.150 Appeals from final judgments of district court. An aggrieved party may obtain a review of any final judgment of the district court by appeal to the supreme court. The appeal shall be taken as in other civil cases.

(Added to NRS by 1967, 811)

233B.160 Applicability of chapters 612, 704 of NRS. Insofar as any provision of this chapter conflicts with any provision of chapter 612 or 704 of NRS, chapter 612 or 704 of NRS shall govern.

(Added to NRS by 1967, 811)

The next page is 7121

MIKE O'CALLAGHAN
GOVERNOR

ROGER S. TROUNDAY
DIRECTOR

STATE OF NEVADA
DEPARTMENT OF HUMAN RESOURCES
CAPITOL COMPLEX
ROOM 600, KINKEAD BUILDING
505 E. KING STREET
CARSON CITY, NEVADA 89710
TELEPHONE (702) 885-4730

DEPARTMENTAL DIVISIONS
AGING SERVICES
CHILD CARE SERVICES
HEALTH
MENTAL HYGIENE-MENTAL RETARDATION
REHABILITATION
WELFARE
YOUTH SERVICES AGENCY

February 28, 1977

Assemblyman Bob Barengo
Chairman, Assembly Judiciary Committee
Legislative Building
Carson City, Nevada 89701

Dear Mr. Barengo:

In late January, your Committee heard testimony on A.B. 24. During the course of the testimony, Mr. Jack Butler took exception to any administrative hearing on parole revocation. At the conclusion of the hearing, you asked for amendments to the bill.

The attached correspondence has just been received from Dr. Butler and the Clark County Juvenile Court. As you will note, the suggested amendments delete any reference to administrative hearings.

For the larger Judicial Districts, judicial hearings do not present any problem. In many of the Judicial Districts having only one Judge and large geographical areas, prompt "due process" could present a problem. It is for this reason that we feel there out to be provision for administrative review.

The concept of the bill is an important one and we feel that legislation is needed to protect the rights of parolees from the two youth institutions.

We will be happy to appear before your committee for further testimony if you like.

If you have further questions, do not hesitate to call.

Sincerely,

Orville A. Wahrenbrock
Chief Assistant

OAW/jb
Attach.

1211

EXHIBIT H

Juvenile Court Services
Clark County

25 February 1977

1212

Mr. O. Wahrenbrock
Kincead Building
Capital Complex
Carson City, Nevada 89710

Dear Mr. Wahrenbrock:

Per our telephone conversation of the 25th of February, please find enclosed proposed Amended Sec.1 N.R.S. 210.240, and Sec. 2. N.R.S. 210.250.

Sincerely,

JACK E. BUTLER
Chief Referee

JEB:bjm

Enclosure

3401 EAST BONANZA
LAS VEGAS, NEVADA 89101 • 702/649-3611

AB - 24

Sec. 1. N.R.S. 210.240 is hereby amended to read as follows:

1. When [, in the opinion of the superintendent, an inmate deserves], an inmate is eligible for parole according to regulations established for that purpose, and parole will be to the advantage of the inmate, the superintendent may grant parole under such conditions as he deems best.

2. Each person paroled shall be [provided with], placed in a reputable home and [a school] enrolled in an educational or work program. The school may pay the expenses incurred in providing such a home. [which expenses shall be paid from funds made available to the school for such purpose.]

3. When any person so paroled has proven his ability to make an acceptable adjustment outside the school, the superintendent shall petition the committing court, requesting dismissal of all proceedings and accusations pending against such person.

4. No person who violates the conditions of his parole shall be returned to the school without the benefit of a suspension modification or revocation hearing.

Sec. 2. N.R.S. 210.250 is hereby amended to read as follows:

1. If the superintendent or parole officers are of the opinion that a parole should be suspended, modified or revoked said officials shall petition the committing court for a hearing. Pending a hearing the District Court Judge or his appointed master may order the parolee to be returned to the school or held in a local juvenile facility, if one exists in the committing court's district.

2. If the person paroled requests time to prepare for the hearing, the district court judge or his appointed master shall grant a reasonable time.

Sec. 2, 210.250 Cont.

3. The hearing may be held by the district court judge of the committing jurisdiction or his appointed master, who shall render a decision within 10 days after the conclusion of the hearing.