MINUTES

ASSEMBLY JUDICIARY COMMITTEE
April 15, 1977
7:00 a.m.

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

Chairman Barengo brought this meeting to order at 7:00 a.m.

Senate Bill 1:

Senator Ty Hilbrecht testified in support of this bill as its sponsor, having been sworn in. He stated, basically, that this bill is a technical amendment to the Professional Corporations Act which is Chapter 89 of NRS. The purpose of the amendment is to provide professional corporations a position of equality with all other corporations under Nevada law with respect to the variety of employee benefit programs that the corporation may utilize. He then explained to the committee the reasons this bill is required. In summary, he stated that the purpose of this bill would simply provide that there is a single exception to the rule that says that every person holding stock in a professional corporation must be licensed to practice that specific profession. That one exception applies to what is known as an eligibile individual account plan, meaning employee stock ownerships plan, as well as, certain classes of profit sharing plans. He detailed the language provided on page 2 for the committee.

Chairman Barengo showed Sen. Hilbrecht some proposed amendments to this bill, Sen. Hilbrecht perused them and found nothing wrong with them. He had no objection to the adoption of them.

Senate Bill 2:

Senator Ty Hilbrecht testified in support of this bill as its sponsor, having been sworn in. He explained that this bill addresses itself, in part, to the same thing that Assembly Bill 441 does, however, he said after talking to Mr. Swackhamer who asked him to introduce the bill, he thought it was important that they suggest SB 2 which goes somewhat further than AB 441. He explained some differences between the bills. An important difference, he stated, was in SB 2 commencing on line 20, page 1. He stated that there had been a requirement in Nevada law which provided for some reason that publications for foreign corporations had to be made in Carson City, Nevada. What does happen under Nevada law is that a Notice of Revocation Charter is sent out to the corporation and under the law, the consequences that follow result from that notice and not from this published one. Therefore, it was felt that it was appropriate that these be eliminated from the law. Sen. Hilbrecht noted that page 2, section 3 of the bill modifies the number of insertions or publications required by foreign corporations in any newspaper in the state which is required of foreign corporations, a brief statement of affairs. His understanding is that the language which does modify the number of publications has been agreed upon by the newspapers as being a more reasonable requirement than the existing law and at the same time providing the notice that they feel the public is entitled to. William Swackhamer

Secretary of State, having been sworn in, concurred with the comments made by Sen. Hilbrecht. He added that he feels that this publication is an inappropriate expenditure of public funds. He also suggested a change after line 43, the word Nevada, change the period to a comma and say "in three consecutive issues" and delete the rest of the language.

Mr. Joe Jackson, Secretary Manager of the Nevada State Press Association, having been sworn in, testified against this bill. Attached hereto and marked as Exhibit "A" is a copy of Mr. Jackson's testimony.

Senate Bill 260:

Chief Civil Deputy District Attorney of Washoe County, Larry D. Struve, having been sworn in, testified on this bill. A copy of his testimony is attached hereto and entered as Exhibit "B".

Mr. Mike Dyer, Deputy Attorney General for the State of Nevada, having been sworn in, testified on this bill. He stated that in the last few years they have had a tremendous amount of suits against state employess and particularly against agency heads and members serving on Boards and Commissions and this is the basic reason for the bill. He stated that most of these individuals who serve without compensation or for the $40.00 per day. He gave an example. He also stated that the reason for the provision regarding the agency administrator in the case of a lesser employee, certify within a certain time period that a person was acting in good faith in the scope of his employment is because that is the key to the defense of any state employee. He stated that he derived from Mr. Struve's testimony that the counties have a different problem with this bill than the state has and this probably derives from the fact that the County is covered by insurance. State employees are not. The real thrust of this statute is that unless coverage is provided for persons who you are asking to serve as high-ranking officials in state government, you will not get any people to serve that are going to be beneficial to the state. Mr. Dyer stated that he had no objections to the amendments suggested by Larry Struve insofar as it effects county defendants, however, they would like it to read exactly as written with respect to state defendants.

Mr. Remo Fratini, a partner in the independent insurance firm in Reno, Lucini and Associates and a member of the Nevada Independent Insurance Agents, having been sworn in, testified on this bill. He stated that they believe, in principal, the ideas in SB 260 are good in trying to give the public office employees additional protection, however, his basic question is the question of the constitutionality of limiting the liability for the state individuals. Mr. Fratini made reference to an Opinion which was requested by the Nevada Independent Insurance Agents of Vargas, Bartlett and Dixon, Attorneys at Law, Reno, Nevada, which is attached hereto and marked as Exhibit "C".

Senate Concurrent Resolution 2:

Mr. Jim Thompson, Attorney General's Office, having been sworn in, testified on this bill, stating that SCR 2 and SCR 9 have both been approved by the Senate and although SCR 9 is a much later expression than SCR 2 and both these bills are diametrically opposed to one another. He explained this to the committee. He stated that he believes that SCR 9 is a much better approach to the problem. If the Select Committee on Public Lands fails, then, he feels it is time to address the problem of whether or not the Attorney General should be sent off to go into Court to get title to these lands. Secondly, he feels that SCR 2, as it is

written, offers some false hope to the public.

Senate Bill 142:

David Hagen, Esq., having been sworn in, testified in support of this bill on behalf of the State Bar Association of Nevada. It is merely a clean-up measure.

Senate Bill 20:

Chairman Barengo asked Mr. David Hagen, representing the Nevada Bar Association, what his feelings might be on this bill. Chairman Barengo introduced a letter from the law firm of Laxalt, Berry and Allison in support of this bill. Said letter is attached hereto and marked as Exhibit "D". Mr. Hagen stated that it would be his obligation to support it. In addition, he did state that he sees nothing wrong with it.

Senate Concurrent Resolution 2:

Senator Blakemore, having been sworn in, testified in support of this bill as its sponsor. Chairman Barengo informed Sen. Blakemore of earlier testimony wherein the committee was advised that this SCR 2 is in direct opposition to the expression contained in SCR 9 which has passed both houses and gone to the Governor for signature. Sen. Blakemore stated that this bill came out of a study and was drafted by the Legislative Counsel Bureau. He stated that the Attorney General was concerned with the fact that this mandated him and he wished to see an amendment that would remove "that he be mandated". Senator Blakemore stated that he has no objection to that. He stated, regarding the main thrust of the bill, that he doesn't really see, inasmuch as it is a Resolution, that we are doing any great violence. In fact, he felt that this is rather tender compared to what some of the other western states are doing.

Senate Bill 260:

Senator Gary Sheerin, having been sworn in, testified in support of this bill, as its sponsor. Sen. Sheerin explained that there are problems with personal liability of public employees. He stated that the thrust of the bill is two things. If a public employee has an act that is wanton or malicious then this employee will be liable; there will not be a $25,000.00 limitation and nobody is going to pay for that employee's defense. However, if you have an employee whose act is simply one of omission, but, it is still within his scope of duties, the $25,000.00 which applies to the State is going to apply to the individual. The State or the local subdivision will furnish you counsel to defend and that has been the real problem to employees to date, that they have to go out and get their own counsel.

COMMITTEE ACTION:

Senate Bill 2, Mr. Ross moved for a DO PASS AS AMENDED, Mr. Polish seconded the motion. The motion carried unanimously.

Senate Bill 1, Mr. Ross moved for a DO PASS AS AMENDED, Mr. Banner seconded the motion. The motion carried unanimously.

Senate Bill 20, Mr. Ross moved for a DO PASS, Mr. Banner seconded the motion. The motion carried unanimously.

Senate Bill 142, Mr. Banner moved for a DO PASS, Mr. Ross seconded that motion. The motion carried unanimously.

Assembly Bill 173, the committee first voted on a few proposed amendments to this bill. Attached hereto and marked as Exhibit "E" is a copy of a Memorandum to Albert Cartlidge from Clinton E. Wooster outlying the area of objections on the first reprint.
With regard to objection (a) contained in said memorandum, Mr. Coulter moved TO REMOVE "TREBLE DAMAGES" and insert "ACTUAL DAMAGES", Mr. Sena seconded the motion. The motion carried unanimously.
With regard to objection (b), Mr. Sena moved to retain the word "periodic", Mrs. Hayes seconded the motion. The motion carried unanimously.
With regard to objection (c), Mr. Ross moved to accept their proposal in (c), Mr. Sena seconded the motion. The motion carried unanimously.
With regard to objection (d), Mrs. Wagner moved to accept their proposal in (d), Mr. Coulter seconded the motion. The motion carried unanimously.
Mr. Coulter then moved to accept all of the amendments as proposed on pages 2 through 9 of said memorandum, Mr. Sena seconded the motion. The motion carried unanimously.
Mrs. Wagner then moved on the bill to DO PASS AS AMENDED, Mr. Coulter seconded the motion. The motion carried unanimously.

Senate Bill 72, Mrs. Wagner moved for a DO PASS, Mr. Sena seconded the motion. The motion passed unanimously.

Senate Bill 77, Mr. Polish moved for a DO PASS, Mr. Ross seconded the motion. The motion carried unanimously.

Senate Bill 82, Mr. Ross moved for a DO PASS, Mrs. Hayes seconded the motion. The motion carried unanimously.

Senate Bill 131, Mr. Ross moved for a DO PASS, Mrs. Hayes seconded the motion. The motion carried unanimously.

Senate Bill 81, Mr. Ross moved for an INDEFINITE POSTPONEMENT, Mr. Coulter seconded the motion. Mr. Polish voted "no", Mr. Banner voted "no", and Mrs. Hayes voted "no". The motion carried.

Senate Bill 133, Mrs. Hayes moved for an INDEFINITE POSTPONEMENT, Mr. Ross seconded the motion. Mr. Barengo abstained from voting. The motion carried.

Senate Bill 201, Mr. Polish moved for a DO PASS, Mr. Sena seconded the motion. The motion carried unanimously.

Senate Bill 209, Mr. Sena moved for an INDEFINITE POSTPONEMENT, Mr. Ross seconded the motion. The motion carried unanimously.

At this point, after lengthy discussion as to upcoming agendas, Mr. Ross moved to SUSPEND THE RULE OF FIVE-DAY NOTICE ON AGENDAS, Mr. Sena seconded the motion. The motion carried unanimously.

Mr. Ross moved for adjournment at 9:55 a.m., Mr. Sena seconded the motion. The motion carried unanimously.

Respectfully submitted,

Anne M. Peirce

Anne M. Peirce, Secretary

7550.

Nevada State Press Association

Joe Jackson, Secretary Manager
2375 South Arlington Ave.
Reno, Nevada 89509

POSITION STATEMENT of Nevada State Press ASSOCIATION re SB 2 before the Assembly Judiciary Committee.

Senate Bill 2 would:

1- Delete the requirement that the Secretary of State publish a list of foreign corporations doing business in Nevada which are in default through failure to pay the required fees. Such a list must now be published five times in the week prior to the first Monday in November, in a newspaper published in Carson City. (NRS 78.175; bill page 1, line 20).

2- Reduce the number of times foreign corporations doing business in Nevada must file statements each year of their last calendar year's business in a Nevada newspaper of their selection from five consecutive times to three times in one week, with allowances made for publication in semiweekly or triweekly newspapers. Under SB 2 the secretary of the corporation filing the statement would notify the assessor of each county in which the corporation is doing business, but would not have to file a copy of the statement with the assessors.

3- The Secretary of State would still be required to compile a list of defaulting corporations each year and notify the county clerks. He would also be required to notify each corporation of the forfeiture of its charter. But he would no longer be required to publish the list, and that is why the Nevada State Press Association opposes this section of SB 2. We submit that SB 2 deprives public officials and the public, corporation stockholders, and especially Nevada attorneys and others who act as resident agents for the corporations of their right to know.

Senate Bill 2 also provides a "foot in the door" whereby public notices of all kinds could be severely curtailed or deleted altogether.

How does SB 2 deprive the public? The public is deprived of the right to know which corporations have been operating illegally in this state, which has tailored its corporation laws to accommodate the corporations. But the "foot in the door" proposition poses the real threat. Slackening of legal advertising could be extremely detrimental to rural communities served by newspapers. We submit, too, that once is not enough. Reductions in the times of insertions would deprive the citizen who happened to not read the paper on a particular day of information which could affect his welfare.

This proposal to curtail information comes at a time when legislators everywhere, Nevada's in particular, and at the federal level are voting more and more to let the people know. Public information is the name of the game.

The requirement that lists of defaulting corporations be published has been in effect for many years. Nor has the necessity for dropping the requirement been fully demonstrated. Secretary Swackhamer has said he believes that this requirement no longer provides a real benefit in these days, and is costly, around $7500 a year. Sen Mel Close told the Senate his Judiciary Committee had looked into the matter and reached the conclusion that publication does no substantial good. But Sen. Gary Sheerin of Carson City opposed the bill in a brief floor speech, saying he believed the bill does deprive the public of the right to know. And five senators including Sheerin voted against the bill.

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EXHIBIT A

As for the claim publishing the lists does no substantial good, NSPA did a little checking, and found some attorneys who maintain that the list serves a useful purpose; two, in fact, expressed dismay at the prospect the list might be dropped. To be honest, we must tell you that the Nevada law firm which handles the most corporation business doesn't refer to the list at all. Because of its size, with many secretaries this firm can keep track of the corporations in its own way. But SB 2 affects the smaller firm which has no other way of being informed as to whether or not the corporation he represents is in default.

One Carson City lawyer told us: "I feel publication of the lists should be continued. Lawyers check the lists to see if the companies they represent are in default. The lists are the only notification the law firms ever receive. Consideration should be given, too, to the fact that a substantial incorporating business exists in Nevada."

A district judge told us publication of the lists is something on which law firms rely pretty heavily, that such publication is the only notification a resident agent ever receives.

A Reno attorney told us he feels publishing the lists is a good idea. He feels it does serve a useful purpose: "we have to check the lists for various reasons and many local law firms check the lists carefully."

Circulation of the lists is somewhat limited because of the requirement they be published in Carson City. That requirement came about because in the early days Carson City was the state's legal center just as Reno was the business center. Attorneys acting as resident agents subscribed to the Carson papers, not only in Reno but throughout the state. Auditors, tax assessors, tax collectors, county clerks an the general public watched for the lists. We submit that they still do. As an example, Jack McCloskey, Hawthorne publisher, says he reads the lists carefully, and claims that on more than one accasion he has noted the name of a friend and neighbor and has saved them from difficulty by notifying them.

Concerning the costs involved, between 12,000 and 15,000 corporations are licensed to do business and the list each year contains around 4,400 names, or $1.63 a corporation. The secretary can notify the corporation for the cost of a 13 cent stamp. But what about all the other people affected who never get notified? And why should the state be required to pay the publication costs in the first place? The corporations should be required to pay the costs through increased registration fees when they start doing business.

If it is felt that circulation of the lists is restricted at present, they could be rotated between Carson City and the Reno and Las Vegas papers. Publishing them is still the best way, making them available to the public, public officials, stockholders and the resident agents.

The factor of getting "a foot in the door" requires careful consideration. If the Legislature in 1977 deletes the requirement of publishing the corporation listsand no one complains, then the next session could well go a step further and some day there might be no public notices, public bodies could move in secrecy, keeping the public in the dark. This could have a devastating effect on the welfare of Nevada and Nevadans. Public officials say they wish to cut down on public notices, or "legals" to save money. Why? So they can spend it someplace else? After all, it is the taxpayer's money which is being spent, to let the taxpayer know what his government is doing. It is his right to read it in his newspaper, not on the courthouse wall. The public, through its representatives in these legislative halls, should resist these attempts to encroach on public rights.

Respectfully submitted

Joe Jackson

Washoe County District Attorney
Courthouse, Room 129
Reno, Nevada 89503
April 15, 1977

Assembly Judiciary Committee
Nevada Legislature
Carson City, Nevada

Re: S.B. 260

Dear Judiciary Committee Members:

The following comments are a summary of remarks to be presented at the hearing on the above bill scheduled on April 15, 1977. This statute would limit tort liability of public officers and employees in the State of Nevada and would establish certain procedures by which a legal defense would be provided to public officers and employees named in lawsuits involving tort liability.

In principle, this proposed legislation is commendable in its effort to clarify an area of the law that has perplexed civil deputy D.A.'s throughout Nevada. The concensus appears to be that under the language of current statutes in Chapter 41 of NRS, there is no statutory limit on the amount of damages that can be awarded against an individual officer or employee named in a tort action under NRS 41.031. Thus, the degree of exposure to liability of public officers and employees is a confusing and complex question. S. B. 260 would resolve that confusion.

However, the current language of S. B. 260 as it relates to the duty and obligation of a political subdivision to tender the defense of one of its officers and employees poses difficulties to local legal officers that should be clarified before S. B. 260 is enacted into law. In order to assist the staff of your Committee in reporting the areas of clarification, the following written comments have been provided:

A. Section 1 of S. B. 260, p. 2,ll. 1-5 should include in the meaning of a "public officer" and "employee" respectively a reference to an elected or appointed public official whose office is created by law and an employee of any such official.

B. Section 2 of S. B. 260, p. 2. line 13, should be amended to delete the phrase "provided such statute or regulation is valid". As presently worded, this language is either inconsistent or nonsensical.

C. Section 4 of S. B. 260 has many portions that need clarification, including the following:

1. On p. 3, lines 1-2, reference is made to the "chief legal officer of the political subdivision." However, no definition is given of a "chief legal officer." In Washoe County there are many political subdivisions that have no legal officers, such as Chapter 318 Districts, fire protection districts, conservancy districts, etc. In others, the legal officer is a private attorney retained by the governing board. Can private legal counsel retained by a district be an "officer?"

EXHIBIT B

2. On p. 3, lines 6-21, a procedure is outlined for certifying the defense of officers and employees named in tort actions under NRS 41.031. It is not clear what the grounds for certifying a defense shall be. If the grounds on which an officer or employee must be defended are 1) that the act or omission of such person was in good faith and 2) that the act or omission was in the scope of the person's public duties, then the statute should say so in clear, unambiguous language. Current wording does not do this, and it appears an "agency administrator" may render an independent decision of whether or not a case should be certified for defense, even if the act or omission was in good faith and in the scope of employment.

3. Can an "agency administrator" render a legal judgment whether or not a case should be certified for defense? What if the chief legal officer and the "agency administrator" disagree whether or not a case should be certified for defense? The statute appears to require a chief legal officer to be bound by the decision of the "agency administrator", even though the defense of an action is the responsibility of the legal officer. It is suggested that the final decision of certifying a defense should rest with the legal officer.

4. On p. 3, lines 18-21, the chief legal officer of a political subdivision must determine within 10 days from certification whether "his" defense of the action would create a conflict of interest between the political subdivision and the person. This language contemplates that the chief legal officer of a political subdivision will be arranging for and appearing on behalf of the defendants. Such language could preclude an insurance carrier from tendering the defense of a political subdivision, which would place an awesome burden on some offices, such as the Civil Division of our Office. Most political subdivisions purchase liability insurance, and in accordance with the insurance contracts, the defense of the political subdivision and its employees is under the exclusive control of the insurance carrier. Thus, some provision must be written into the language of S.B. 260 that provides that a "defense" as contemplated in NRS 41.0337 includes a defense provided by an insurer of a political subdivision. Section 996 of Title I of California Government Code could serve as a good example:

> "§996. A public entity may provide for a defense pursuant to this part by its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense. . . ."

The above lines 18-21 are also unclear whether or not a chief legal officer must tender the defense of an officer or employee of a political subdivision when there is a conflict of interest between such officer or employee and another co-officer or employee who is also a named defendant of the political subdivision. Most importantly, there is no provision in S.B. 260 to relieve a chief legal officer of the duty to defend an officer or employee in the event a conflict of interest exists between the person and the political subdivision. In sections 4 and 5 of S.B. 260, the attorney general appears to have an option not to defend a case when such a conflict of interest exists. No such option is provided for the chief legal officer of a political subdivision. This oversight must be corrected.

5. On p. 3, lines 24-32, the chief legal officer of a political subdivision would be required to appear in an action and move or plead on behalf of an officer or employee until a decision is made whether or not to defend the person. This appears inconsistent in that the filing of a pleading or motion on behalf of a defendant in a lawsuit constitutes the tendering of a defense of that defendant. In the event the chief legal officer decides not to continue to defend an officer or employee after an appearance is made on the person's behalf, what must he do if the officer or employee refuses to procure his own counsel? It would appear doubtful that the Legal Profession's Code of Ethics would permit an attorney of record to abandon the defense of an action in the face of a protest from the defendant being represented. The usual procedure is to allow an attorney to continue to defend an action subject to a reservation of rights. In the case of an officer or employee of a political subdivision, no provision is made for such a person to recover court costs and attorneys' fees if a defense is not tendered by the chief legal officer of the political subdivision. However, this remedy is provided in Section 5 with respect to actions of the attorney general. Accordingly, officers and employees of political subdivisions may be very reluctant to procure their own attorney if a defense is refused. Thus, the dilemma for a chief legal officer as noted above is a very real possibility. It is recommended that no legal duty be imposed on a chief legal officer to appear in a case if a decision is made not to defend.

6. Why was no provision included in S. B. 260 for a chief legal officer of a political subdivision to employ special counsel, when it is appropriate to do so? The attorney general is empowered to do so in Sect. 4 of the act. Similar authorization should be given to legal officers of political subdivisions.

Thank you for your consideration of the above points. It is urged that S.B. 260 be amended to correct these problems, so as to alleviate unanticipated burdens on local legal officers of political subdivisions.

Sincerely,

Larry D. Struve
Chief Civil Deputy District Attorney

O P I N I O N

TO: Nevada Independent Insurance Agents Association

BY: Vargas, Bartlett & Dixon, Ltd.

DATE: March 17, 1971

QUESTION PRESENTED: Does the limitation upon the waiver of immunity by the State of Nevada, and its political subdivisions, for damages in excess of $25,000.00 as provided in N.R.S. 41.035, extend to its employees?

I.

THE GENERAL COMMON LAW AND ITS DEVELOPMENT IN NEVADA PRIOR TO 1965

The State of Nevada had enacted no statute prior to 1965 which related to the extent to which Nevada, as a soverign or its political subdivisions, waived immunity for liability for torts committed by its employees acting within the scope and course of its authority, nor was there any statute regarding the extent to which the State's employees were immune from liability for torts committed by them personally, acting within the scope and course of their employment, by the State. Until 1965, Nevada had followed substantially the common law that existed prior to the time when Nevada became a State, and as it was developed in its own case law over the years. A discussion of the recent statutory enactments regarding sovereign immunity and immunity of the sovereign's employees, should be considered only in light of Nevada's case law background.

It had long been established, prior to Nevada becoming a State, that a State could not be held liable for torts committed against its citizens, basically on the theory that "the king can do no wrong". The basic concept is well stated in Prosser, Law of Torts, Third Edition, Section 125, at pages [illegible], where it states:

EXHIBIT C

"The first of these immunities, taken as a group, are those of governments. All these may or may not have had their roots in Roman Law, the origin of the idea underlying them and the common law seems to have been the theory, allied with the divine right of Kings, that 'the King can do no wrong' together with a feeling that it was necessarily a contradiction of his sovereignty to allow him to be sued as of right in his own courts. It was not, however, until the 16th Century, in the days of quite absolute monarchs, that this became fully coupled with the qualifications that for every act of the King some minister was also responsible. When the individual sovereignwas replaced by the broader conception of the modern state, the idea was carried over that to allow a suit against a ruling government without its consent was inconsistent with the very idea of supreme executive power...

Just how this fuedal and monarchistic doctrine ever got itself translated into the law of the new and belligerently democratic republic in America is today a bit hard to understand. In 1821, Chief Justice Marshall gave no reasons when he declared that, without its consent, no suit could be commenced or prosecuted against the United States. Following this, it soon became established that the government could not be sued without its consent."

Prosser continues on page 1001, regarding State Sovereign Immunity as follows:

"The sovereign immunity likewise carried over from the English crown to the several American states. There was one abortive attempt on the part of Chief Justice Marshall to change the rule; but it led only to the Eleventh Amendment to the Federal Constitution, protecting any state from suit by a private citizen in the Federal courts. Thereafter the doctrine became firmly established, that there is no state liability in tort unless consent is given. The immunity is said to rest upon public policy; the absurdity of a wrong committed by an entire people; the idea that whatever the state does must be lawful, which has replaced the king who can do no wrong; the very dubious theory that an agent of the state is always outside of the scope of his authority and employment when he commits any wrongful act; reluctance to divert public funds to compensate for private injuries; and the inconvenience and embarrassment which would descend upon the government if it should be subject to such liability.

In all of the states, however, consent has been given, to a greater or a lesser extent." (emphasis added)

Whether or not immunity has been extended to employees of the sovereign depend largely upon the type of act for which he is sought to be held to be responsible. A distinction arose in the common law as to whether the act was "discretionary" or merely "ministerial" the latter of which would impose liability. Other states drew the distinction as to whether the employees of the sovereign acts were made honestly and in good faith or maliciously and not in good faith. With regard to the distinction between the "discretionary" and "ministerial", Prosser, supra, states as follows at pages 1016-1017:

> "Other acts, involving less personal judgment, are classified as "ministerial" only, and are done improperly at the officer's peril, regardless of his good faith. Such are the preparation of ballots, the registration of voters, the recording of documents, the filing of papers, the care of prisoners, the driving of vehicles, the repair of highways, the collection of taxes, the signing of licenses once they are authorized, the taking of acknowledgments, and dipping sheep. It seems almost impossible to draw any clear and definite line, since the distinction, if it exists, can be at most one of degree."

In Restatement, 2nd, Agency, Section 347(1) the same conclusion is reached but is stated differently. In that section, it is stated as follows:

> "An agent does not have the immunities of his principal although acting at the direction of his principal."

As an illustration of the above quoted section, the Restatement gives the following:

> "A, the driver of a municipal fire wagon, drives recklessly to a fire, injuring T. Aside from statute, A is liable to T, although the municipality is not."

The principle of law regarding sovereign employee immunity is also well stated in Vol. 5-A, Frumer & Friedman, Personal Injury, "Public Officers and Employees" Section 1.03(2) at pages 171-176, as follows:

> "It is well established in many courts, both state and Federal, that the test of whether an officer

> or employee acting within the scope of his authority is immune from a suit in tort depends on whether he was exercising a discretionary or quasi-judicial function as distinguished from merely ministerial duties.
>
> When his duties are discretionary or quasi-judicial, i.e., requiring personal deliberation, decision and judgment, and to be performed or not according to his own judgment as to what is necessary and proper, a public officer or employee is immune from a suit in tort, provided he acted within the scope of his authority or, in some jurisdictions, without an improper motive.
>
> On the other hand, duties which are absolute, certain and imperative, involving merely the execution of a set task, are classified as ministerial, and a public officer or employee may be liable for negligence or misconduct in discharging them."

Nevada recognized the doctrine of Sovereign Immunity six years after it became a state in the case of McDonough v. Virginia City, 6 Nev. 90 (1870). In the McDonough case, a private individual brought suit against the Mayor and the aldermen of Virginia City for damages sustained by him when he fell at the intersection of two public streets. McDonough's claim was that it was the duty of Virginia City to keep public streets in good repair, and that the duty was not met. The Nevada Supreme Court held that the power to open and maintain streets were each discretionary. Once a city decided to "open" a street, the Court held, it must do so without negligence. Likewise, if the city decided to "maintain" the street it must also do so without negligence. However, the City of Virginia apparently only decided to "open" the street and did not decide to "maintain" it. Therefore, the Court held that the city had exercised its "discretion" in not to "maintain" the streets and that the plaintiff's only cause of action would be to allege that the street was improperly "opened". The Court stated on pages 94-95:

> "In the last case (Rochester W.L. Co. v. City of Rochester, 3 Coms 463) it was held that the City of New York having opened sewers, was bound to keep them in good condition; for, said the Chief Justice, 'it would be highly unjust to allow that after constructing these works the corporation might refuse to keep them in repair, and thus leave the streets in which they have been placed in a worse condition than before they were put there'. Will the same rule apply to the City of Virginia with respect to the streets? No; because the law in express terms leaves the matter of repairing the streets discretionary with the authorities, as it does the opening of streets in the first instance. Had the

law simply provided that the streets might be opened, then the rule would apply here; but their having gone further and left the repairing and keeping in order discretionary, it cannot be held that the City is liable for a refusal to repair a street which, in the first instance, was properly opened and put in good condition. It is, like an individual under like circumstances, liable not for what it does not do, but for what it does in a careless and negligent manner; ... If the defect in the street where the plaintiff received his injuries was not the result of wear and tear, but it was left in that condition by the authorities when they opened the street, then the city is liable for injuries resulting therefrom to those exercising proper care. But if the street was, when opened, put in good condition, and the defect occurred afterwards, but not by the direct act of defendant, is not liable."
(clarification added)

As can be seen, even though the logic of the McDonough case may seem dubious, it was an early attempt by the Nevada Supreme Court to develop guidelines, by defining acts as "discretionary" or "nondiscretionary", as to when the doctrine of sovereign immunity should or should not be imposed.

The precise question was next discussed, but with different results, in 1928 in the case of Pardini v. City of Reno, 50 Nev. 392, 263 P. 768 (1928). The Pardini case was an action brought by the Estate of a deceased woman who was riding in an automobile which was driven over an unguarded concrete retaining wall constructed by the authority of the City of Reno. The complaint alleged that the City of Reno negligently failed to maintain an appropriate railing or barrier along the retaining wall. The defendant, relying upon the McDonough case, argued that the construction of a retaining wall was a "discretionary" act because the City Charter of the City of Reno did not require the maintenance of its roads but left it discretionary within the city officials. The Court, while confirming the rationale of the McDonough case, held, basically, that the erection and maintenance of a railing or barrier along the road was "reasonably necessary" to insure the safety of the traveling public and therefore it was a question for the jury as to whether or not this failure to do so was negligence. The Court stated at 50 Nev at pages 400-401:

> "We do not understand from the complaint that the plaintiff seeks to recover for an injury resulting from a defective plan designed for the improvement of Ralston and Maple Streets, but for one resulting from the negligence of the defendant in not carrying the improvements as planned into execution. The prosecution of the work itself-the carrying of the improvements into execution-being purely ministerial in character, the doctrine invoked has no application. The immunity extended to legislative or discretionary acts of a municipal corporation does not apply to corporate acts of a purely ministerial character. (citing the McDonough case)."

It is interesting to note that the Pardini case expressly refused to resolve the issue as to whether or not it would be even consitutional for the State of Nevada to enact a statute which exempted a city from liability for "nondiscretionary" or "ministerial" acts. (50 Nev 400).

As can be seen, the rationale utilized by the courts in distinguishing between "discretionary" and "nondiscretionary" acts of a city is equally applicable to the discretionary and nondiscretionary (i.e., ministerial) act of employees of the state and its governmental subdivisions.

Six years after the Pardini case was decided, the Nevada Supreme Court discussed a similar issue in the case of McKay v. Washoe County General Hospital, 54 Nev. 336, 31 P.2d 759 (1934) and although the result in McKay can be argued as being technically correct, the rationale utilized by the Nevada Supreme Court was completely unique. In McKay, the plaintiff was a patient who sought to sue the individual members of the Board of Hospital Trustees, on the grounds that they negligently failed to provide the plaintiff-patient with a skilled nurse, since she had dropped a chemical in the patient's eye which caused permanent blindness. The Court completely refused to discuss whether the hospital trustees' acts were either "discretionary" or "nondiscretionary" and the Court did not even cite the Pardini case, although requested to do so by the plaintiff in his brief to the Nevada Supreme Court. Instead the Court decided to look to the legislative "intent" of the Legislature, and held that because the Legislature only authorized the County to establish a public hospital, which hospital would (a) own no property, (b) have no income or means of raising money, and (c) no ability to

pay any judgment, there was a legislative intent that the hospital, and its trustees, could not be sued absent express legislative provisions. Basically, the rationale of the McKay decision could be said to be that when a public noncorporate entity has no property or means of income, no action may be brought against it or its trustees absent express legislative intent. No cases were cited by the McKay opinion which utilized that rationale.

Next was the case of Las Vegas v. Schultz, 59 Nev. 1, 83 P.2d 1040 (1938) wherein Schultz, a passenger in an automobile, was injured in a night time collision between the car in which he was riding and some piles which were negligently left lying on the streets of the City of Las Vegas. Schultz brought an action against the city claiming that the city negligently failed to remove the obstructions or give adequate warning of them. It was argued on behalf of the city that the Nevada Legislature had absolved the city of that responsibility, since it placed the sole burden of maintaining streets upon the State Highway Commission. The Nevada Supreme Court, in that case, extended the doctrine further than in both McDonough and Bardini, and held that since the city had the power to remove obstructions or give adequate warnings, by its charter, it had a common law duty to do so, and that its failure to do so was, as a matter of law, a "nondiscretionary" or "ministerial" act.

In the case of Cursly v. Brown, 65 Nev. 245, 193 P.2d 693 (1948) a question of personal liability of the members of the Reno City Council was discussed. In that case, a prisoner sought to sue the city council members personally (but not the city) for failing to maintain a keeper at the jail whose partial duty would be to maintain an appropriate temperature within the jail. The plaintiff, a prisoner, sought damages for the freezing of his feet as a result of such failure. It was provided in the Reno City Charter that the City Council may, but need not, appoint a keeper for the city jail, and they had not done so. The trial court held the complaint did not state sufficient facts to state an individual cause of action against the several council members and the Nevada Supreme Court

approved that holding. The Court used a two-fold rationale, as follows:

a. A decision as to whether or not to appoint a keeper for the city jail was a "governmental" function provided for in the charter, and therefore was a "discretionary" act which afforded immunity; and

b. The decision as to whether or not to appoint a keeper was one which the council members could only perform as a body (i.e., as the city council), and one for which they could not be personally held responsible.

The holdings, as above stated, were in line with the earlier cases which had discussed [illegible]. However, the Court did, in addition, state that if the plaintiff could allege and prove that the discretion of the council members, as individuals, was exercised by either their corruption or malice, they could be held personally responsible even though their acts were "discretionary" within the traditional definitions. That additional statement by the Court injected a new consideration into sovereign employee liability in the State of Nevada.

Three years after the Gurnsly case was decided, the issue of immunity of counties for the torts of its employees was discussed in Granite Oil v. Douglas County, 67 Nev. 309, 219 P.2d 191 (1950). The Granite Oil case involved an action brought against the county for the negligent installation of gasoline pumps and similar equipment at the Douglas County Airport, which installation had been done in conjunction with a contract entered into by a private corporation. For the first time, the issue was squarely placed before the Nevada Supreme Court as to whether or not (a) the activities of installing and maintaining an airport were "proprietary" in nature, and (b) if so, whether or not the negligent performance of such acts were immune from liability. The Nevada Supreme Court did not deny that

the McKay case may have been poorly reasoned, and squarely held that (a) engaging in an airport business was "proprietary" in nature, and (b) that such proprietary acts where negligently performed, were not immune from liability to those injured thereby. The Court stated on Page 403 as follows:

> "We hold that Douglas County was authorized by statute, in its discretion, to engage in the airport business in its proprietary capacity, and having so engaged, was not protected by the rule of sovereign immunity from liability for its torts in that capacity; and that the statutory declaration that such activity, if entered into, was a public and governmental function, for a public purpose, and a matter of public necessity, was not equivalent to a declaration of immunity."

In Hill v. Thomas, 70 Nev. 389, 270 P.2d 179 (1954) an action was brought against the Nye County Sheriff, the Nye County Deputy Sheriff, and the Constable of the Tonopah Township, individually, and against the State of Nevada as the surety on the official bonds of the officers. The complaint alleged that each of the officials above named committed tortious acts against the plaintiff by virtue of the reckless discharge of a shotgun, and alleged that the State of Nevada had waived its immunity by virtue of the statutory provisions which make the State of Nevada a surety for the "defalcation, misappropriation of public funds and other wrongful acts of state or county officials". In that case, the Court assumed that the Nye County Sheriff, the Nye County Deputy Sheriff, and the Constable of the Tonopah Township were individually liable, regardless of whether the State was a surety by virtue of legislative enactment. The Court held, specifically, that, by virtue of the fact that the state became the surety for the wrongful acts of those officers, it, in effect, waived its immunity. The Court stated on Page 395 as follows:

> "We are of the opinion that if a bond written by a private surety conditioned for the faithful performance of the duties of a peace officer would be liable under the circumstances related in plaintiff's complaint, then the State of Nevada is similarly liable as surety on bonds written under the Bond Trust Fund Act of 1937."

The Court continued on Page 399:

> "We are of the opinion that the Legislature of the State of Nevada, by express statute, has given

consent to suit against it on official bonds."

The holding of the Hill case undoubtedly resulted in the legislative enactment of N.R.S. 41.0335, as shall be discussed below.

Also in 1954, in the case of Bloom v. So. Nev Hospital, 70 Nev. 533, 275 P.2d 885 (1954) another attempt was made to hold the individual trustees of a county hospital liable for the use of defective equipment in its hospital. The Court, without much discussion, relied upon the McKay case, discussed earlier, and held that the individual trustees, nor the hospital itself, could be held liable for the negligent acts alleged in the complaint. As it will be recalled, the McKay case mentioned, as one of its reasons for finding immunity, that the hospital was given no means, by statute, to acquire income. Since the McKay case, and prior to the Bloom case, and in 1929, Section 2228 of Nevada Compiled Laws was enacted which empowered the trustees "by proper legal action to collect claims due, owing and unpaid to said public hospital from any person dealing with the same ..." The Court held that the earlier distinction mentioned in the McKay case was not applicable, and the authority granted the trustees did not "breathe corporate life" into the institution they represented. Thus, the Bloom case continued to provide immunity to hospital trustees, regardless of whether or not the trustees were able to collect funds owing and unpaid to the hospital.

The problem regarding the liability of hospital trustees was finally laid to rest in 1957 in the case of Hughey v. Washoe County, 73 Nev. 22, 306 P.2d 1113 (1957). In the Hughey case, a complaint was brought against Washoe County, as a political subdivision, and against the Washoe County Commissioners personally, for alleged negligence which was caused by an employee of the Washoe Medical Center. The trial court dismissed the complaint on the grounds that it failed to state a cause of action in view of the McKay and Bloom decisions above discussed. The Nevada Supreme Court, in Hughey, reversed the trial court's ruling, holding that a cause of

action was stated against Washoe County, even though the hospital, and its trustees, were still immune from liability. The rationale of the Hughey decision was that even though the hospital, and its employees, still remained immune from suit, the county did not. It was argued by the respondent that Washoe County should not be held liable, since all control over the hospital was vested in the trustees, who are elected by the voters of the county. Nevertheless, the Nevada Supreme Court rejected the respondent's arguments, and held that, even though the Washoe County, through its commissioners, did not have managerial control, the county was not relieved of liability. The Court stated on Page 23 as follows:

> "It does not follow from the fact that the hospital is without independent legal entity that there is no public responsibility for torts committed by its employees. The hospital is a county institution established, owned, and supported by the county. The hospital having no entity apart from the county it must follow that the county is the party legally responsible for obligations of the hospital."

It should be mentioned, at this juncture, that the Nevada Supreme Court in the Bloom case, the McKay case, and the Hughey case, at no time intimated that the employee who actually committed the tort would not be personally responsible for his tortious acts. The only question in the McKay and Bloom case was whether the hospital, and its trustees, would also be liable, on the doctrine of agency, and the only question involved in the Hughey case was whether the Washoe County, and its commissioners, would be liable, additionally.

In the case of Taylor v. State and University, 73 Nev. 151, 311 P.2d 733 (1957) it was claimed that both the State of Nevada and the University of Nevada had waived its sovereign immunity by virtue of the fact that it had, by legislation, approved a budget which contained allotments for the purchase of liability insurance. The Nevada Supreme Court held that such an appropriation does not, in itself, constitute a waiver, although it could constitute such a waiver of sovereign immunity if "the request of funds for the purchase of insurance showed an intent to insure against a liability from which the state is immune" (73 Nev. 154), which intent was not

present in that case. The Court, however, did make specific recognition of the fact that sovereign immunity did not extend to its state employees, and the purchase of insurance for state employees, while proper, did not also waive immunity. The Court stated at 73 Nev. 154 as follows:

> "We may note, as have other courts, that it is one thing for an agency to provide a measure of public protection through the insuring of its agents and employees against liability for tort. It is quite another thing to expose the sovereign itself to liability."

In 1963, Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963) was decided. In Rice, an action was brought against Clark County, as a political subdivision, and against its commissioners individually, for injuries sustained by the plaintiff by virtue of alleged negligent maintenance of its roads and highways. The defense by the county was that the maintenance of roads and highways was a "governmental function", and therefore county immunity existed. The Nevada Supreme Court quoted a case which criticized greatly the doctrine of sovereign immunity and made two novel observations: First, it held that it made no difference whether the maintenance of roads was "governmental" or not, since it should be liable for its torts in that area regardless. Second, it held the doctrine of county immunity was court imposed and therefore could be court-rejected without affirmative action of the State Legislature. The Court stated on page 255 as follows:

> "It is contended that it is for the Legislature and not the courts to remove immunity. We so stated in Taylor v. State and University, supra. There we were considering the liability of the State of Nevada and the University of Nevada for negligence. Here, where only a county's liability is involved, we do not hesitate to say that since its immunity was court made, this court as well as the Legislature is empowered to reject it. ... Moreover, in Granite City v. Douglas County, supra, without a legislative action, we wiped out county immunity from tort liability when a county is engaged in a proprietary function."

With respect to the individual liabilities of the county commissioners, the Court in Rice also stated on page 259 as follows:

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> "If, in this case, sovereign immunity does not extend to the county as such, obviously it would not extend to the individual county officials either."

The next case involving immunity was one year later, in 1964, when the rationale in Rice was strictly followed. In Truckee-Carson Irrigation District v. Baber, 80 Nev. 263, 392 P.2d 46 (1964) an action was brought against TCID for damages resulting from an overflow of water from the banks of a ditch under its control and management, and a jury returned a verdict against it. It was argued, on appeal, that an irrigation district was a "governmental agency" and "therefore the defense of sovereign immunity is a bar to any claim against it." In rejecting that argument, the Court relied on its decision one year ago and stated at 392 P.2d 47 as follows:

> "If a county, which is a political subdivision, cannot assert the doctrine of sovereign immunity as a defense to a tort action, Rice v. Clark County, 79 Nev. 253, 382 P. 2d 605, a fortiori an irrigation district, which is not a political subdivision of the state, cannot assert such a defense."

As will be recalled, the Rice case held that the doctrine of sovereign immunity did not extend to counties, or its commissioners, for the negligent failure to maintain roads, based partially on the rationale that in that area of the law (negligent road maintenance) there should be no such doctrine. That rationale was undercut entirely in the case of Hardgrave v. State, 80 Nev. 74, 389 P.2d 243 (1964). In Hardgrave an action was brought against the State of Nevada for the negligent construction of a drainage system on State Highway Route 28, which negligence caused the accumulation of ice and subsequent damage to an individual who was hit by a skidding automobile. Two justices of the three man court held (there was a heated dissent by Justice Thompson, which dissent was later adopted in Welsh v. Clark County School District, infra) and reaffirmed the doctrine of State sovereign immunity and held that no cause of action was stated against the State for its negligent maintenance of roads. Justice Thompson, in his dissent, stated:

"It seems to me that the rule of governmental immunity from tort liability should be abolished in this state once and for all. ... Adherence to stare decisis in dealing with the immunity of the state and its political subdivisions is a tribute to confusion and not to certainty. Many proofs are available (citing Hill, supra and Taylor, supra) ... The pattern of inconsistency is quite noticeable in the court's treatment of the public road cases (citing Pardini, supra; McDonough, supra; and Barnes, supra) ... Particularly puzzling is the scope of a county hospital's liability in tort (citing McKay, supra; Bloom, supra; and Hughey, supra)... It is most difficult, if not impossible, to square the results of the decided cases in this area with the law. It appears that "adherence to precedent" is a lame reason for requesting affirmance in this case."

In Walsh v. Clark County School District, 82 Nev. 414, 419 P.2d 774 (1966) the Nevada Supreme Court had cause to determine, after the Legislature had enacted statutes regarding sovereign immunity (which are discussed below) the state of the common law in the State of Nevada prior to the enactment of N.R.S 41.031, which deals with immunity. Prior to the enactment of N.R.S. 41.030, a seven year old boy died as a result of a fall from a school building, and an action was brought against the Clark County School District. The issue was whether the district, as a political subdivision of the State of Nevada, enjoyed the immunity discussed in the Hardgrave case. The Court, in Walsh, reaffirmed the rationale in Rice and overruled Hardgrave. The Court stated as follows:

"The Nevada law regarding the rule of governmental immunity from tort liability was confused and uncertain before the enactment of N.R.S. 41.031. ... We prefer the rationale of Rice v. Clark County, and the dissenting opinion of Hardgrave v. State, and hold that the Clark County School District did not enjoy immunity from tort liability when the present cause of action arose."

In view of the foregoing, it can be said that the law of immunity in the State of Nevada was in many cases unclear prior to the 1965 enactment of the statute waiving and clarifying the sovereign immunity law, but it can probably be said that the following rules of law were fairly well settled through its case law prior to its enactment:

a. The doctrine of sovereign immunity was recognized by the courts, but gradual exceptions to the doctrine developed over the years;

b. The State of Nevada, its political subdivisions, and

incorporated towns are immune from the governmental acts which are discretionary in nature;

c. Public officials are immune from liability for the performance of acts which are discretionary in nature, as long as the discretion is exercised in good faith and without malice;

d. When (a) discretion is exercised to perform an act or (b) an act is non-discretionary in nature, neither the State, its political subdivisions, an incorporated town, or any of its employees, are exempt from liability;

e. A county hospital and its trustees are immune from liability although (a) the county which establishes the hospital, and (b) the hospital employees who perform a negligent act are subjected to unlimited liability;

f. Whenever, in view of the foregoing, a state, its political subdivision, an incorporated town, or its employees are subject to liability, the liability was unlimited as to each of them.

As will be seen, the statute enacted in 1965 codified some of the foregoing rules, and clarified and modified the rest.

II.

MODIFICATION OF THE NEVADA COMMON LAW BY STATUTE IN 1965

In 1965, the Legislature of the State of Nevada, waived, generally, its long established immunity from tort liability by the enactment of N.R.S. 41.031, which reads as follows:

"The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive, or the limitations of NRS 41.040. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the state, and their liability shall be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive. An action may be brought under this section against the State of Nevada, any agency of the state, or any political subdivision of the state. In an action against the state or any agency of the state, the State of Nevada shall be named as defendant, and the summons shall be served upon the secretary of state."

[illegible] 41.031 [illegible] 41.031, [illegible] awards as follows:

> 1. No [illegible] in an action at law in tort brought [illegible] NRS 41.031 [illegible] sum of $25,000 to or for the benefit of any claimant. No such award may include any amount as exemplary or punitive damages or as interest prior to judgment."

The basic question presented is whether N.R.S. 41.035, in view of the language of N.R.S. 41.031, and the case law background prior to the enactment of both statutes, limits the liability of state employees to $25,000 as well as the governmental entities themselves.

With regard to that question, it should first be noted that Nevada also, by its legislative enactment in 1965, granted complete immunity to sovereign employees from liability in six major areas, which are as follows:

> 1. Pursuant to NRS 41.032(1) no action may be brought against a governmental employee "based upon act or omission of an employee of the state or any of its agencies or political subdivision, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, provided such statute or regulation has not been declared invalid by a court of competent jurisdiction.

> 2. Pursuant to NRS 41.032(2) no action may be brought against a governmental employee which is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any employee of any of these, whether or not the discretion involved is abused."

> 3. Pursuant to NRS 41.033(1) no action may be brought against a governmental employee which is based upon "failure to inspect any building, structure or vehicle, or to inspect the construction of any street, public highway or other public work to determine any hazards, deficiencies or other matters, whether or not there is a duty to inspect."

> 4. Pursuant to NRS 41.033(2) no action may be brought against a governmental employee which is based upon "failure to discover such hazard, deficiency or other matter, whether or not an inspection is made." (referring to NRS 41.033(1).

5. Pursuant to NRS 41.0335(1) no action may be brought against any sheriff which is based solely upon any act or omission of a deputy (although an action may be brought upon his bond or insurance policy), pursuant to N.R.S. 41.0335(2).

6. Pursuant to NRS 41.0335(2) no action may be brought against a chief of a police department which is based solely upon any act or omission of an officer of such department, (although an action may be brought upon his bond or insurance policy), pursuant to N.R.S. 41.0335 (2).

As can be seen, no action can be brought against any governmental employee if his acts come within any of the six areas described above, and that particular governmental employee's immunity is complete. There is only one provision in the N.R.S. which limits liability of any person to sums less than $25,000, which statute is N.R.S. 41.035(2) and reads as follows:

"2. The limitations of Subsection 1. upon the amount and nature of damages which may be awarded apply also to any action sounding in tort and arising from any recreational activity or recreational use of land or water which is brought against:

...

(b) Any person with respect to any land or water leased or otherwise made available by such person to any public agency.

..."

Since the legislative enactment regarding sovereign immunity, there have been two cases which have interpreted the statute, namely Harrigan v. City of Reno, 86 Nev. ____, 475 P.2d 94 (1970) and State v. Silva, 86 Nev. ____, ____ P.2d ____ (1970). In Harrigan v. City of Reno, the Nevada Supreme Court held that, even though an act by a government and its employees may be "discretionary", once the government through its employees, decides to undertake an act, it is subject to liability if it is negligently carried out. In Harrigan, the Court stated at 475 P.2d 96 as follows:

"While whether or not to put in a parking lot is a policy decision, the rules of safety cannot be ignored by the government once the affirmative act of construction is undertaken. In this case, because the negligent conduct of omitting danger signs and guard rails was part of the operational phase, it is actionable."

In State v. Silva, the question whether the construction and maintenance of an honor camp was "discretionary" or not was presented. The Court ruled that, when in doubt, it would find that the governmental act was non-discretionary, and favor a waiver of immunity. The Court stated as follows:

> "In a close case we must favor a waiver of immunity and accommodate the legislative scheme. Only when we conclude that discretion alone is involved may we find immunity from suit."

In State v. Silva, the Court further held that (a) the $25,000.00 limitation provided in N.R.S 41.035(1) was not unconstitutional as a violation of the equal protection clause, and further held that (b) the purchase of insurance by the State in excess of $25,000.00 was not a waiver of the $25,000.00 limitation.

In determining whether or not the $25,000.00 limitation applies to State employees as well as its governmental subdivisions, it must be borne in mind that when the doctrine of sovereign immunity was first recognized in the State of Nevada, and continuously throughout, the doctrine has been opposed only to insulate the government and its political subdivisions, and not its employees. At no time during the entire case period in the State of Nevada has liability of state employees been limited, except where they are in a position of exercising discretion. There is no mention in either the Harrigan or the Silva cases that liability of employees would be limited to $25,000.00.

Second, in order to arrive at a conclusion as to whether or no the $25,000.00 limitation extends to state employees, it must be borne in mind that N.R.S. 41.031 waives pre-existing immunity, and does not in any way seek to limit existing exposure. N.R.S. 41.031 at no time mentions governmental employees, but refers only to (a) the State of Nevada, and (b) all political subdivisions of the State. As it will be recalled, N.R.S. 41.035(1) which limits liabilit to $25,000.00 refers only to that immunity which is waived under N.R.S. 41.031. Therefore, it would appear clear that N.R.S 41.035(1)

does not apply to state employees for two reasons: First, no liability is waived as to state employees in N.R.S. 41.031 because liability at all times existed prior to its enactment. Second, N.R.S. 41.031, by its terms, refers only to (a)"the State of Nevada" and (b)"all political subdivisions of the State".

Third, the application of N.R.S. 41.035(1) (which limited liability to $25,000.00) must be viewed in light of other statutory provisions within the same chapter. A review of Chapter 41 shows that a definite distinction is drawn between that liability which is waived in N.R.S. 41.031 and liability from which state employees become statutorily immune, as can be shown in the following three specific areas:

1. NRS 41.032 draws a definite distinction by providing that "no action may be brought under NRS 41.031 or against [illegible]" (emphasis added).

2. NRS 41.03 draws, additionally, the same distinction by providing that "no action may be brought under NRS 41.031 or against [illegible]" (emphasis added).

3. NRS 41.038 provides, in part, as follows:

"The State and any political subdivision may:

(a) Insure itself against any liability arising under NRS 41.031.

(b) Insure any of its officers or employees against [illegible] resulting from an act or omission in the scope of his employment."

(emphasis added)

As can be seen from the foregoing statutes, the whole legislative scheme applies at N.R.S. 41.031 and has nothing to do with waiving or limiting liabilities of governmental employees as N.R.S. 41.031(1) is inconsistent with the manner in which it is to be applied by N.R.S. 41.031.

Fourth, as a matter of statutory construction, if N.R.S. 41.035(1) were to be applied to state employees, it would involve an

abrogation of the common law, since, as can be shown the common law imposes unlimited liability upon state employees. Unless the intent is clear in N.R.S. 41.035(1), which it is not, that liability of state employees was to become limited by its provisions, a Court would construe this statute strictly in an effort to retain the common law provisions. Thus, in the absence of express legislative intent (of which there is an absence) it would appear that a Court would continue to expose state employees to unlimited liability in accordance with the common law, regardless of the foregoing remarks.

Nevada is rather unique in its statutory scheme involving partial waiver of immunity, and it appears that only four other states have partial immunity statutes, to-wit: Illinois (IRS 1963, Chapter 37, Page 439.8); Wisconsin (WSA Section 896.43); Minnesota (MSA Section 466.04, 1963); Kentucky (KRSA Section 44.070-44.170, 1963). Those states either (a) specifically limit liability as to state employees, (b) provide for insurance of state employees, or (c) waive immunity only as to certain political subdivisions and employees. There appear to be no cases which interpret a statutory scheme similar to that of Nevada.

In view of the foregoing, it is the opinion of this firm, subject to the few exceptions above referred to wherein Nevada sovereign employees are completely immune, sovereign employee liability is unlimited under the present statutory scheme in the State of Nevada.

III.

EFFECT OF PROPOSED N.R.S. 16A ON SOVEREIGN EMPLOYEE LIABILITY

There has been proposed before the Committee on the Judiciary in the Nevada Assembly, Assembly Bill No. 164, by Mr. Homer, which would amend N.R.S. 41.039 by deleting its present provisions and substituting in its stead and place the following provisions:

"1. No award for damages in an action sounding in tort brought against an employee or elected or appointed officer of the State of Nevada or of a political subdivision of the State of Nevada, while in the course of his employment or in the performance of his official duties, may exceed the sum of $25,000 to or for the benefit of any claimant, except that, in those cases where insurance coverage has been procured by the State of Nevada to cover the risk involved in the case, the award may be over $25,000, with execution on such award being limited to the policy limits.

2. The judgment against the State of Nevada or a political subdivision of the State of Nevada in an action brought under NRS 41.031 shall constitute a complete bar to any action or any execution of a judgment against the employee or elected or appointed officer, by reason of the same subject matter, against the employee or elected or appointed officer whose act or omission gave rise to the claim.

3. The remedy against the State of Nevada provided in NRS 41.031 for injury or loss of property or personal injury or death resulting from the act or omission of an employee or elected or appointed official of the State of Nevada or a political subdivision thereof while in the course of his employment shall, after the effective date of this act, be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or official, or his estate, whose act or omission gave rise to the claim.

4. The attorney general shall defend or cause to be defended any civil action or proceeding brought in any court against any employee or elected or appointed official of the State of Nevada by reason of his act or omission while in the course of his employment with the State of Nevada."

With regard to the proposed A.B. 164, as quoted above, some initial observations can be made, taking each subsection and considering it separately:

Subsection 1.

First, Subsection 1 would appear to cure the presently existing gap in the statutory scheme in the State of Nevada which does not limit liability of state employees, and A.B. 164 would effectively limit sovereign employee liability by its provisions.

Second, Subsection 1 appears to be unclear because it provides that liability may exceed $25,000 "where insurance coverage has been procured by the State of Nevada", but does not consider situations wherein insurance has been procured by a political subdivision of the State of Nevada. It could be interpreted that

insurance purchased by a political subdivision of the State of Nevada would be unauthorized, and therefore, liability could at no time exceed $25,000 for a political subdivision and its employees, reverting to a rule laid down in Harrigan v. City of Reno, supra.

Subsection 2.

Subsection 2 appears to state that once a judgment has been taken against either the State of Nevada or a political subdivision, no subsequent action may be brought against the employee or officer for his act which gave rise to the cause of action against the State of Nevada or the political subdivision, and further, that if a judgment has been obtained against the employee or officer, no execution can be taken after judgment has been entered against the State or the political subdivision. However, the provision can be used to leave remedy-less the person who obtains a judgment against a political subdivision which does not have $25,000 in assets, since it would imply that the judgment [illegible] though it could not be collected [illegible] further [illegible] upon a judgment against an employee of a political subdivision. [illegible] should be clarified to avoid needless [illegible] and perhaps could best be remedied by providing [illegible] no execution [illegible] against a [illegible] employee [illegible] to the [illegible] amount of the judgment [illegible] against the State or political subdivision.

Section 3.

[illegible] appears [illegible] say that no person may [illegible] without [illegible] as a party the political subdivision [illegible] of Nevada, pursuant to NRS 41.031.

[illegible] can be argued that the above comments [illegible] and successfully limits [illegible]

employer liability to $25,000, or to the extent of insurance coverage if the coverage exceeds $25,000. However, the drafting of the bill fills the law with many needless uncertainties and appears to raise many questions which could be answered by the proper drafting.

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February 8, 1977

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PERSONAL AND
CONFIDENTIAL

Robert Barengo, Chairman
House Judiciary Committee
Legislative Building
Carson City, Nevada 89701

Dear Bob:

I would appreciate whatever support you can give in favor of the passage of SB20, as amended, when it reaches your committee. This bill, designed to allow board of director meetings or committee meetings by telephone or other communication means, is a modernization effort in keeping with present-day needs and allows us a corporate advantage on par with Delaware and other states. The bill was approved by the Bar Association Corporations Committee.

Kindest personal regards.

Sincerely,

PETER D. LAXALT

PDL/nsb

cc: Richard A. Miller, Esq.
Southwest Forest Industries

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EXHIBIT D

ALBERT E. CARTLIDGE
Certified Public Accountant, Ltd.

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April 14, 1977

Assemblyman Robert Barengo
Nevada State Legislature
Carson City, Nevada 89701

Dear Assemblyman Barengo:

NORTHERN NEVADA APARTMENT ASSOCIATION - AB173

Enclosed is a memo from Clinton Wooster, the Association's attorney, in connection with AB173, Landlord-Tenant Bill. Mr. Wooster prepared the memo after our review of the first reprint of AB173 and you will note we have numerous exceptions to the first reprint since provisions therein vary considerably in certain sections with amendments completed by Mr. Nash as a result of our meeting and agreements.

The enclosed memo also indicates our further objections to treble damages, periodic rent payments, exclusion for three dwelling houses instead of six rental units and reference to real estate brokers and salesmen in that particular section and presumptions if there is no rental agreement. Steve Coulter called earlier this morning and indicated your committee would accept our position on the four points, therefore, if the first reprint is corrected as to apparent errors and changes made by the bill drafter's office plus the four objections we had to the Nash amendments, the bill should be complete and agreeable to our people.

Please feel free to call me or Clinton Wooster if you have questions regarding the enclosed memo.

Sincerely,

ALBERT E. CARTLIDGE, CPA, LTD.

Albert E. Cartlidge

AEC:bc
Enclosure

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EXHIBIT E

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PLEASE REPLY TO ___OFFICE

April 14, 1977

M E M O R A N D U M

TO: Albert E. Cartlidge, Chairman
Northern Nevada Association
Legislation Committee

FROM: Clinton E. Wooster

RE: A.B. 173

My comments on the first reprint of A.B. 173 are as follows:

1. The four areas of disagreement between Rusty Nash and myself have all been resolved in the first reprint in favor of the tenants' position. The Bill should still be further amended to incorporate the four major objections that we had to the Nash proposed amendments. These are:

   (a) The elimination of treble damages in Section 27(7) and Section 45.

   (b) The definition of rent in Section 16 should be amended to delete the word "periodic".

   (c) Section 24(3) should be amended by deleting sub-sections (a), (b) and (c), and more importantly, this section should be further amended to comply with the agreed-upon amendments presented to the Assembly Judiciary Committee so that 24(3) begins as follows: "If there is no written agreement, it is rebuttably presumed that:"

   (d) The exclusion for small landlords now contained in Section 20.5 is now so fouled up that I would suspect both the tenants and the landlords would oppose Section 20.5(2), but the basic point remains to be made that the landlords request that the exclusion be expanded from three to six dwelling units and that the small landlords be excluded from the operation of the Act.

2. My next comments deal with the failure of the bill drafter to follow the agreed-upon amendments. Although all of these failures have significance and impact, there are four particular areas that I feel very strongly must be included in the Act, and have been agreed to by both tenants and landlord representatives. First, in Section 58 the bill drafter did not follow the proposed language of the Nash Amendment. I think it is important to do so, and the language was taken directly from the Uniform Residential Landlord and Tenant Act. The sentence deleted reads as follows: "The party to whom a net amount is owed shall be paid first from the money paid in the court, and the balance by the other party." Instead, the bill drafter inserted the following sentence: "The money paid in the court shall be awarded to the prevailing party." I think it is important that we use the original proposed language. It appears in the Uniform Act and gives explicit instructions as to how the monies are to be paid. The Assembly Judiciary Committee should be reminded that this Act in most instances will be interpreted and enforced by Justices of the Peace who may or may not be trained in the law and the provisions of this section in particular, which are critical to the landlord's position, should be exactly as proposed.

Secondly, the bill drafter has deleted certain beginning recitals that in the Nash Amendment were Sections 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6. I think these are important to be included, particularly because of the misunderstanding by the bill drafter of our intent with regard to the small landlord. New Section 2.3 makes it clear that the common law principles of contract, real property, etc. still govern unless specifically changed by the Act. It is desirable to have this included in the Act, particularly of what was done by the bill drafter in amending Section 20.5 to exclude small landlords.

Thirdly, this brings me to Section 20.5 which now contains affirmative statements that a small landlord is specifically not required to comply with. This was never our intent on either the landlord or tenant representatives in preparing the proposed amendments. Our intent, which possibly was unclear, was simply that the small landlord should be governed by certain provisions of the Act which incorporate existing statutory law. All other provisions of the Act would not apply to the small landlord, but he would still be governed by certain common law duties and responsibilities as stated in the proposed new Section 2.3, which was not added to the Bill.

Now the Bill as amended presents the very undesirable situation, particularly from the tenants' point of view, but a situation I am sure also concurred in by the landlords that a small landlord specifically need not comply with certain basic responsibilities of habitability and repair that may be common law duties. For example, the habitability provision of A. B. 173 is very detailed and specific. We did not want to burden the small landlord with all the specifics of the habitability provision of A.B. 173. On the other hand, it was never our intention to specifically not require habitability for small landlords.

I belabor this point only because I know the tenants' gorups will be greatly aroused by the proposals contained in Section 20.5 and the landlords will be accused of insisting that this be part of the Act. This was never our intent.

Fourth, Section 33(1)(b) omits a very important and significant provision. It should read, as agreed by both landlord and tenant representatives that "Plumbing facilities which conform to applicable law in effect at the time of installation * * *"

3. Finally, let me enumerate the various amendments that both groups had proposed but do not appear in the first reprint of A.B. 173.

Proposed new Sections 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6 have not been incorporated in the new Bill.

Section 3 should read at line 15 Sections "3.5 to 19 inclusive."

Proposed new Section 9.5 defining the landlord has not been included in the new Bill. Section 20.5 of the new Bill is not in accordance with the proposed amendment.

Section 24(2) is not in accordance with the proposed amendment. We had proposed a separately signed record of inventory rather than a separate record of inventory.

Section 24(3) does not provide for a "rebuttable presumption".

Section 24 does not contain a provision taken from the Uniform Act which we had proposed as 24(5) reading as follows: "In the absence of any agreement, either written or oral, the tenant shall pay as rent the fair rental value for the use and occupancy of the dwelling unit."

This is a significant omission from our agreed-to amendments.

Section 33(1)(b) as previously discussed does not contain language "in effect at time of installation."

Section 38(6) does not include our proposed amendment. Sub-section (6) should read as follows: "The tenant has notice of the rule or regulation at the time he enters into the rental agreement or after it is adopted in accordance with this Section."

Section 42 does not contain our proposed amendment. The first sentence of Section 42 refers only to "habitable condition" and this should be amended to read "habitable condition as required by this Chapter."

Section 43 fails to include the word "or" at the end of sub-section (1). I appreciate that this may not be technically necessary in accordance with the ordinary rules of statutory construction, but I feel it is extremely desirable because the Act will be interpreted by persons not familiar with the usual rules of statutory construction.

Section 44(1)(a) does not include the word "or" and the same reasons as discussed above apply.

Section 53(3) does not contain the proposed amendment specifically referring to statutory provisions for disposition of vehicles.

Section 54, line 42 should read "the landlord may bring an action for possession and rent." The present language uses "possession or rent" and these should not be alternatives.

Section 58 deletes the sentence previously discussed taken from the Uniform Act reading as follows: "The party to whom a net amount is owed should be paid first from the money paid into court and the balance by the other party."

These appear to be the major objections to the revised version of A.B. 173.

Clinton E. Wooster