A STUDY OF STATE BONDING AND INSURANCE PROBLEMS

BULLETIN No. 41

Nevada Legislative
Counsel Bureau

DECEMBER 1960

A STUDY OF THE PROBLEMS INCIDENT TO THE BONDING OF PUBLIC OFFICIALS AND THE QUESTION OF SOVEREIGN IMMUNITY OF THE STATE FROM SUITS SOUNDING IN TORT, AND THE ACQUISITION OF INSURANCE TO PROTECT PUBLIC BUILDINGS AND CONTENTS FROM LOSS BY FIRE OR OTHERWISE

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CARSON CITY, NEVADA

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The primary purpose of the Counsel Bureau is to assist citizens and officials in obtaining effective State government at a reasonable cost. The plan is to search out facts about government and to render unbiased interpretation of them. Its aim is to cooperate with public officials and to be helpful rather than critical. Your suggestions, comments, and criticisms will greatly aid in accomplishing the object for which we are all working--the promotion of the welfare of the State of Nevada.

Senate Concurrent Resolution No. 7--Committee on Banks, Banking and Corporations

FILE NUMBER 39

SENATE CONCURRENT RESOLUTION--Memorializing the Legislative Counsel Bureau to study the field of state liability and sovereign immunity, and problems surrounding bonding and public liability insurance for public officials.

WHEREAS, Questions have arisen concerning the liability of the State of Nevada for damages at the suit of any citizen, and for the defaults and negligence of its officers, agents and employees; and

WHEREAS, There is a serious question of the adequacy of the bond trust fund to protect the state in the event of major defalcations by any state officers, agents or employees; and

WHEREAS, The complex question of sovereign immunity from suits for damages has never been completely answered in this state; and

WHEREAS, There is an urgent need for the answers to the many problems facing the state in the field of the state's liability for damages for any such defalcations or negligence, and in this connection, whether the personal bond of state officers should be vulnerable to a suit by a citizen for defalcation, negligence or malfeasance, or whether a policy of liability insurance should protect the state from the defalcation, negligence or malfeasance of its officers, agents and employees; and

WHEREAS, There is a doubt as to the sufficiency of the bond trust fund to adequately protect the state in view of the number and amounts of the outstanding bonds; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, That the Legislative Counsel Bureau is hereby memorialized to study the entire field of state liability and sovereign immunity, together with problems surrounding bonding and public liability insurance as methods of protecting political subdivisions and citizens from the defaults, negligence or malfeasance or public officials, agents and employees; and be it further

RESOLVED, That a report relative thereto be presented to the 1960 Session of the legislature of the State of Nevada for study and consideration.

1960 SESSION

NEVADA LEGISLATURE

SENATE RESOLUTION NO. 9

BY SENATORS WHITACRE, BROWN, GALLAGHER AND SEEVERS:

Memorializing the Legislative Counsel Bureau to make a study to determine the amount and cost of public liability insurance and fire and other insurance on public buildings purchased by the State and its political subdivisions.

WHEREAS, The Legislative Counsel Bureau, pursuant to Senate Concurrent Resolution No. 7, adopted March 18, 1959, has made a study of the entire field of state liability and sovereign immunity and the problems surrounding bonding and public liability insurance; and

WHEREAS, The report of that study has been filed with the Legislature and explained to the Legislative Commission; and

WHEREAS, Recommendations have been made in the report which will require further information on the question of public liability insurance, particularly with regard to the total amount of liability insurance purchased by the State and the cost thereof; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, That the Legislative Counsel Bureau be, and hereby is, memorialized and authorized to make whatever study is necessary to determine the total amount of public liability insurance purchased by this State and its political subdivisions, and now in force, and also to make such study as is reasonably possible to determine the amount of such insurance purchased in the past by all state agencies, boards, commissions and officers, the premiums and all costs paid for such insurance by such governmental entities, to the end that the Legislature and other officials will be informed of the financial needs of the agencies in the field of such insurance; and be it further

RESOLVED, That the Legislative Counsel Bureau also make a comprehensive study of the amount of fire and other insurance now and heretofore placed on public buildings and property in this State, the premiums paid therefor and the amount of losses paid to the insured agencies pursuant to such insurance contracts; and be it further

RESOLVED, That the Legislative Auditor is requested to render such assistance in connection with the studies herein authorized as is necessary to the end that the study may be thorough and successful; and be it further

RESOLVED, That the result of such study be reported to the 1961 Session of the Legislature.

1960 SESSION

NEVADA LEGISLATURE

SENATE RESOLUTION NO. 11

BY THE COMMITTEE ON JUDICIARY:

Memorializing the Legislative Counsel Bureau to study further the Bond Trust Fund Act.

WHEREAS, The bond and insurance study executed by the Legislative Counsel Bureau pursuant to Senate Concurrent Resolution No. 7 of the 1959 Session of the Nevada Legislature contains recommendations concerning:

(1) The bonding of Nevada public officials by corporate surety bonds instead of by Nevada bond trust fund bonds.

(2) The inadequacy of the bond trust fund in its present amount with relation to present coverage.

(3) The inflexibility of the bond trust fund bonds as compared to corporate surety bonds.

(4) The bond trust fund bonds not being full faithful performance bonds as required by present statutes.

(5) The advisability of the repeal of the provisions of the Bond Trust Fund Act, and the enactment of statutes requiring the use of corporate surety bonds instead of bond trust fund bonds for the bonding of public officials in this State; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, That the Legislative Counsel Bureau be memorialized to execute a further study of the feasibility and desirability of retaining the Bond Trust Fund Act for defalcations by public officials only, with cost comparisons with corporate surety bonds; and be it further

RESOLVED, That a report relative thereto be presented to the 1961 Session of the Nevada Legislature for study and consideration.

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SCOPE OF THE STUDY

The study has been completed in two parts and is limited to the following subjects:

1. The law of suretyship as it relates to the bonding of public officials;

2. A study of the statutes of Nevada in particular, and other states in general appertaining to the bonding of public officials;

3. A comparison of the protection afforded the State by the bonding of officials under the provisions of the Bond Trust Fund Act, with the protection afforded by the use of corporate surety bonds;

4. The adequacy of the bond trust fund as presently constituted;

5. The advisability of statute revision so as to limit the coverage of our official bonds to the loss of public funds and property, and to protect the State from liability for the tortious misconduct of its officers and employees by the purchase of liability insurance;

6. May the State maintain its sovereign immunity from suits sounding in tort, yet authorize the purchase of comprehensive liability insurance by the several divisions of government in order to protect its officers and employees and persons who are injured through the negligence or willful misconduct of such officers and employees;

7. Finally, a study of decisions of our Supreme Court, the federal courts, and the courts of other states dealing with bonding and insurance questions connected with this study.

PART I

INSURANCE

A STUDY OF THE PROBLEMS INCIDENT TO THE BONDING OF PUBLIC OFFICIALS AND THE QUESTION OF SOVEREIGN IMMUNITY OF THE STATE FROM SUITS SOUNDING IN TORT, AND THE ACQUISITION OF INSURANCE TO PROTECT PUBLIC BUILDINGS AND CONTENTS FROM LOSS BY FIRE OR OTHERWISE

This study is, as set forth in the "Scope of the Study," concerned with the problems connected with the bonding of public officers and providing legislative authority for the acquisition of public liability insurance by the state and its political subdivisions. It would appear, therefore, that is is a two-part problem. In substance, that is correct; however, each part has a myriad of subheads, and each subhead bristles with legal questions. For many of these problems there is no clear judicial answer.

As to the insurance question alone, the Supreme Court of the United States some few years ago said:

> There probably is no topic of law in respect of which the decisions of state courts are in greater conflict or confusion.[1]

Again in a more recent case,[2] the same court, in commenting on the same subject said:

> A comparative study of the cases in the 48 states will disclose an irreconcilable conflict. More than that, the decisions in each of the states are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound.

For a proper understanding of the insurance phase of our question, it is necessary to discuss at some length the liability or non-liability of a state and its political subdivisions to suits sounding in tort. By this is meant, suits seeking a monetary award for injuries to persons or property.

The word "tort" means literally "wrong." (Originally from the Latin <u>torquere</u> "to twist" and Latin, <u>tortos</u> "twisted") In English we use the auxiliary infinitive "to be" in connection with "wrong;" i.e. "to be wrong." Whereas, in French the auxiliary "to have" is used in connection with "wrong;" i.e. "avoir tort" means "to be wrong," and instead of saying "I am wrong," the French say: "I have wrong;" i.e. "J'ai tort."

So, in legal verbiage the French word "tort" is used instead of the more easily understood English word "wrong." Thus, when we mention "suits sounding in tort" we mean any suit seeking damages for injuries to persons or property caused by the wrongful act of another.

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[1] Brush vs. Commissioner of Internal Revenue, 300 U.S. 352.

[2] Indian Towing Co. vs. U.S., 350 U.S. 61.

For instance, all the following are considered "torts" in law: assault, battery, slander, libel; also injuries sustained in a collision with an automobile; or by falling due to a faulty condition of a sidewalk, street, stairway, etc. or by a failing object. In short, any injury to one's person or property occurring through the negligence or willful misconduct of another is a tort in law and gives rise to a legal action for damages; that is, if the tort is committed by a private person or a private corporation or its officers, employees and agents. If the tort is committed by an employee or official of a governmental agency, the injured person may, more often may not, sue the agency for which the tort feasor works.

DOCTRINE OF SOVEREIGN IMMUNITY

It may be shocking to the ears of many to hear that, as a general rule, if the injury is caused by a governmental (federal, state or municipal) officer, employee or agent, while in the performance of a "governmental" function, the injured person has no right of action for damages against the federal or state government or any agency thereof, in the absence of a statute granting such right. The injured person may or may not have a right of action against the officer, or employee who is the tort feasor; i.e. "the wrongdoer." This is true no matter how serious or disabling the injury is, and no matter how negligent or willful the conduct of the wrongdoer.

It seems amazing that in a government described as: "of, by, and for the people" such a harsh and vicious rule should exist. But exist it does, with an amazing virility that has withstood the myriad attempts of jurists, statesmen and law writers to bring about its demise.

This immunity from suit is generally termed "sovereign immunity" and the doctrine has plagued lawyers and judges ever since its illegitimate judicial birth in an English court almost two centuries ago.[1]

Dean Stason, of Michigan University Law School, in commenting on the rule there enunciated, said:

> Ever since . . . lawyers and judges who have been concerned with the question of liability of local governmental units for their torts have wallowed in a sea of utter confusion.[2]

As also pointed out in the same article "the doctrine that immunized the state itself from liability" was of greater antiquity had great vitality and widespread influence in the law--and was founded upon the ridiculous premise that "the King can do no wrong."

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[1] Russell vs. Men of Devon, 100 Eng. Rep. 359 (KB1700)

[2] 29 N.Y.U.L. Rev. 1321.

This was a corollary of the antiquated and false contention that kings had "divine rights;" that their succession to the throne was because of the desire of deity, and that their power to rule was a God-granted right, and therefore they were not subject to suits in courts of their country at the instance of ordinary mortals.

As ridiculous as the doctrine was when originated in England, a monarchy, it was asinine for the American courts to adopt it in this country with a government of and by the people.[1] But adopt it they did, and for years it was as immutable as the laws of the Persians.

However, change is inevitable; the law is a dynamic force, although to those who seek its improvement, it often seems static or to move only with glacial speed. Changes in the archaic doctrine of sovereign immunity have been brought about by men of courage and vision in the judicial, legal and legislative field.

As long ago as 1861, President Lincoln, in his first annual message to Congress, cried out against the tragic consequences of sovereign immunity, saying:

> It is as much the duty of government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals.[2]

This subject will be considered in greater detail later.

The argument for sovereign immunity, if originally made today, would subject the contender to scorn and riducule. Yet, the rule of sovereign immunity continues on, "too strongly engrafted in our jurisprudence to be questioned at this time, except in those cases in which immunity is waived." These last words in quotes are taken from Justice Badt's opinion in the case of Gurley vs. Brown, 65 Nevada at page 250. In that case, the court had just quoted from a Montana case as follows:

> The rule is of long standing that the king can do no wrong. From that simple statement, grew up the further equally fallacious idea that a state or nation can do no wrong and hence may not be sued without their consent.

Justice Badt aptly termed this a "lament" and said, ". . . the immunity of the state and its political subdivisions often results in injustice and leaves an injured person without right of redress." He then made the above quoted statement that the rule was too firmly engrafted in our system of jurisprudence to be changed except by a statutory enactment, and also stated: "The State of Nevada has never waived such immunity. . ."

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[1]Street, Governmental Liability 1, 1953.

[2]Cong. Globe 37th Cong., 2nd Session, p. XIV, appendix p. 21862.

THE TORT LIABILITY OF OFFICERS AND
EMPLOYEES OF STATES AND GOVERNMENTAL SUBDIVISIONS

One who is uninformed in this field of law would undoubtedly believe that if the courts have gone to the length they have to protect the state or its various subdivisions of government, it would certainly continue that immunity or protection to the officers or employees that really make the wheels of government turn. Such, however, is not the case. It may be generally stated that an officer who exercises what the courts prefer to call discretionary power is immune from tort liability the same as the agency of government for which he labors, but the public employee whose tasks are regarded as ministerial and in the performance of which he has no discretion, is liable.

The reasons given for extending the immunity of the state to officers exercising discretionary functions, usually are the desire that such officers, in performing their discretionary functions, proceed in a fearless manner in carrying them out. The fear being that if they were in danger of suits for an excess of jurisdiction or an improper decision in their discretionary acts they would be hesitant to perform their duties in a fearless, forthright manner. This may well be true, but it certainly is just as important, if not clearly so, relatively so, that all public employees perform their duties without fear of personal loss or the expense of having a lawsuit defended for them if, in their functions or activities, they cause damage. It certainly seems as reasonable to extend the protection to the employees as to the officers or officials. But such, however, is not the law. It is generally, as has been stated, if the officer has discretion, then he cannot be sued for injuries sustained by his negligence or by an improper choice of a course to pursue in such discretion. On the other hand, if the employee is what is considered ministerial, that is having no choice in his function but subject solely to the direction of a superior, then if in his activity someone is injured the employee is not afforded the protection of the immunity the sovereign enjoys.

It would appear wise if we are to embark upon a program of waiving liability and immunity, and permitting lawsuits against the state and subdivisions, to give some protection to the employee and to the officer. For, it may be as difficult to determine whether the officer was acting within the scope of his discretionary power as it is to determine non-governmental function from a governmental function. It therefore seems advisable and wise, if legally possible, and it appears that it can be, to afford the employee or the officer the same protection as is furnished the agency. Certainly, neither the officer nor the employee should be given or accorded protection from his intentional, willful acts that cause injury or damage. On the other hand, if an employee is guilty of nothing more than, as Professor Davis calls it "momentary human misjudgment," he certainly should be given protection.

It should be noted that in the federal tort claims act a judgment against the government or governmental agency is a bar to a suit against the employee. It is to the ultimate benefit of the state or government to afford such protection in order to attract employees and other persons into governmental service. As a matter of fact, the doctrine of master and servant--or liability fixed by what is termed the doctrine of respondent superior--in ordinary industrial activity between private individuals, partnerships or corporations, though the plaintiff in a negligence action invariably names the active participant, the employee, as well as the corporate employer, seldom if ever do they attempt to make any recovery from the employee because of the simple fact he's usually impecunious.

However, custom may dictate in private employment, it is well as I have stated, that in embarking on a program that is herein recommended, we endeavor to give the employee as much protection as we can, bearing in mind that protection from his own intentional, willful acts or wrongdoings should never be accorded him, but only in a case of inadvertance or what are the normal frailties of human misjudgment that we should accord him the same protection as we accord to his employer--the governmental agency for which he labors. For, as Professor Davis has pointed out in his admirable work on administrative law at page 515, section 26.02, "The overwhelming judgment of businessmen is that the enterprise, not the individual employee, should bear the losses that result from unintentional harms in carrying on business activities." Certainly if the employee is employed by the state or a governmental agency thereof, the state or the governmental agency should not bear any loss that results from the intentional wrongdoing of such an employee. However, if we removed the immunity from the government or the agency thereof, an injured plaintiff is undoubtedly going to look to the governmental unit or the state for recovery for the simple reason, as above stated, that in most instances the employee is financially unable to respond in damages in any substantial amount.

In this connection we should also settle whether or not the government should have any right to recover from the employee after being held liable for the employee's negligence. It is submitted that it is far better to more or less follow the Federal Tort Claims Act and have the government or the agency involved bear the loss, rather than the employee who is certainly financially unable in most instances to respond in any substantial amount of damages. As has been stated, it is believed that the protection suggested can be afforded the employee.

That question came before the Supreme Court of the United States in the case of United States against Gilman, 347, U.S., 507. The single question was whether the government could ask the employee to indemnify it after the government was held liable for injuries caused by the driver's negligence in driving a government automobile. The court unanimously held for the employee although the Federal Tort Claims Act provides that a judgment against the United States is a complete bar to any action against the employee growing out of the same injuries. The court, however, as Professor Davis points out, declared that the problem presented was one in which Congress had taken no position. The court rather subtly hinted, or at least you can get that from the court's opinion, that the presence of liability insurance carried by the government was an influencing factor, but in the decision the court stated, "Perhaps the cost in the morale and efficiency of employees would be too high a price to pay for the rule in indemnity."

It would appear that the court, basing its decision upon a question of public policy and not upon the tort claims act or any statutes, and as a matter of fact, contrary to the common law concept of an employee's liability to his employer in case his negligence causes injury, would certainly seem to indicate that the reasons given by the court may be just as applicable to state and local governmental employees involved in similar cases. Certainly it indicates that it would be a wise provision if we provided in the proposed waiver statute that a judgment against a state or its governmental agency would be a bar to any further action or proceedings against the employee.

As to the furnishing of counsel and of defraying the expenses of such a lawsuit in case an employee is named as party plaintiff, the insurance carrier usually agrees in the policy to do this.

THE GOVERNMENTAL--NON-GOVERNMENTAL DISTINCTION

As indicated above, there are certain areas of operation in which a state or a subdivision thereof may be held liable for the torts of its officers or employees. At the basis of this liability lies the distinction between governmental and municipal functions. As a general rule, if the injury occurs in the exercise of a governmental function, the plaintiff is denied a recovery, because of the rule of law that the sovereign is immune from suits sounding in tort, when engaged in governmental activity; whereas, if the function then being exercised was non-governmental, commonly called proprietary, the state and its political subdivisions are answerable as any other individual or private corporation. See Dillon, Municipal Corporation's 5th Edition 1911, section 1625 et seq.;also 6th Edition 1913, section 2604 et seq.

Lest we be led astray or into error and believe that the mere establishment of a rule eliminates the problem or simplifies it, it is well to remember that the difference between governmental and non-governmental or, as it is so often called--the proprietary or municipal function--is not clearly drawn. As a matter of fact, there is a considerable area of confusion separating what is clearly governmental and that which is purely municipal or proprietary. Functional capacity of municipal corporations is universally admitted by courts, but the line of demarcation between these groups is not clearly defined. The multifarious activities of states and cities are divided, for our purposes, into two groups, variously termed as stated above: on the one hand, governmental, public, legislative or discretionary, on the other, proprietary, ministerial, private, corporate or municipal.

In recent years, the activities of states and municipal corporations have assumed an unparalleled scope. The exercise of broad powers and functions, in the natural course of events, has often resulted in injury to persons and property occasioned by the torts or wrongful misconduct of servants or officers of the city or the state. As a consequence, the question of the liability of states and their subdivisions of government for injuries suffered through the torts of their officers and employees has frequently come before the courts. Most writers, as pointed out above, state that the basis of this liability or non-liability lies in the distinction between governmental and proprietary functions. However, this is not strictly the case. Although if the injury occurs in the exercise of a governmental function the plaintiff is denied a recovery, whereas if the function then being exercised was municipal or proprietary, the city, county or the state is answerable for its wrong as is any other individual.[1]

The danger to administrators in the governmental--non-governmental rule is that what may be held governmental today may not be held so a day hence. In a 1925 Florida case, the court stated:

> The immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court.

A little later on in the decision the court further stated, "The immunity of the state from suit applies where a contract or property interest of the state is involved."

It is to be noted, therefore, that in Florida as late as 1925 the immunity rule was included or interpreted to mean that the state was immune from suits even based upon contracts which the state, through proper officials, had previously entered.[2]

In a 1948 Florida decision, Bragg vs. Board of Public Instruction, 36 Southern 2nd, 222, the court held that the school board was not liable in an action sounding in tort for an injury caused by the school to a student therein. In an earlier Florida case, Arundel Corp. vs. Griffin, 103 southern, 422, the court held that a county, was not liable for suits sounding in tort. This was the undoubted law in Florida until 1957, when the Supreme Court decided the case of Hargrove vs. Town of Coa Beach, 96 Southern 2nd, 130.

In the Hargrove case, a widow of a person who died from smoke suffocation after being locked in a jail unattended during the night, brought an action against the city for the wrongful death of her husband caused by the alleged negligence of a police officer acting in the course of his employment. The lower court sustained a motion to dismiss the complaint against the town upon the previous decisions of the Supreme Court of Florida, holding that the state and its various political subdivisions were immune from suits sounding in tort for the wrongful acts of the state officers and employees.

The court stated that the appellant recognized the prior decisions on the subject of sovereign immunity and that the court was being asked by the appellant to recede therefrom, in other words to abandon the doctrine of sovereign immunity.

The court, apparently ignored the constitutional provisions and the decisions sustaining the doctrine of sovereign immunity under such constitutional provisions. For, in the decision at page 132, the court made this bold statement:

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[1]49 Am. Jur., p. 288, sec. 76, and cases there cited.

[2]Hampton vs. State Board of Education, 105 Southern, 323.

> We, therefore, feel that the time has arrived to declare this doctrine anachronistic not only to our system of justice but to our traditional concepts of democratic government.

After reviewing the history of the doctrine, and criticizing its beginning, the court stated with regard to the respondent's contention that any recession from the rule of immunity should come from the legislature and not by judicial decision:

> Be that as it may, our own feeling is that the court should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated.

A little later in the decision the court stated:

> In doing this (that is, ignoring the precedent and starting out anew by abondoning the doctrine) we are thoroughly cognizant that some may contend that we are failing to remain blindly loyal to the doctrine of stare decisis. However, we must recognize that the law is not static. The great body of our laws is a product of progressive thinking which attunes traditional concepts to the needs and demands of changing times. The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the twentieth century upon an eighteenth century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice.

This is very fine language and high sounding language, and perhaps expresses the desire of most judges who have to struggle with the doctrine of sovereign immunity and wishing every time such a decision has to be made that there never had been such a doctrine. But this fine sounding language is in complete discord with the constitution and the statutes of Florida. The Florida Constitution, as has been stated above, makes provision, or has a provision in it that the legislature may by general law provide for the bringing of suits against the state. But the complete answer to the court's decision and contention is found in the other cases which state clearly that the legislature has never availed itself of such a provision and that the doctrine of sovereign immunity still was firmly fixed on the judicial structure of Florida--not only judicial, but the statutory structure. And as has been pointed out repeatedly by many judges including our own Judge Badt in the case of Gurley against Brown in which it was stated that it is an iniquitous doctrine, undoubtedly, and brings about a great inequity and unfairness and has tragic consequences, but, "it is too firmly engrafted on our structure of government for a court to remove it."

The legislature, and the legislature alone, has the authority to waive the doctrine; and the legislature is limited in its power in that regard to a general law. It cannot do so by a special or private act. The courts hold regularly that where the provision is as in our constitution, provides that the waiver of immunity "may be made by general law," that precludes any other means of waiving the doctrine.

This case of Hargrove against the City of Cocoa Beach is the only case that the writer could find in which there was an express judicial waiver of the doctrine; and although the result is perhaps equitable and fairly expresses the thought of most students in this field, it is unquestionably contrary to the constitutional provisions of Florida and is strictly judicial legislation in contravention of the constitutional provision above quoted.

Recommendation is to be made later on in this report for the waiver of sovereign immunity but the recommendation will contain other necessary ingredients of a waiver of that doctrine in accordance with the constitutional provision of Nevada and the general law applicable to this field which has been built up over the ages. As is also pointed out hereafter, the mere waiver of the doctrine does not give the relief which is necessary to make the plaintiff whole after sustaining an injury. If we merely waive the doctrine, then it's like Professor Davis said, "that's merely permitting the plaintiff to visit the courthouse." In addition there must be provision made for the payment of any judgment received, for, as has been repeatedly pointed out, no victorious plaintiff may sue out a writ of execution and have the same levied on state funds. If we are to recognize this obligation, which has often been called a moral obligation, and bring it to the fruition of a legal obligation, we must also provide in addition to a right of suit for a right of payment of any judgment without any further legislative activity.

In the same year the Hargrove Case was decided, 1957, the Supreme Court of New Jersey, in a decision entitled Cloyes vs. Delaware Township, 129, Atlantic, 2nd, page one, easily imposed liability on the defendant township by finding that sewage disposal was proprietary and not governmental; but in addition the court went far afield to undermine the governmental-proprietary distinction, saying, "this test has proved of little help . . . in its present posture, the test of liability with respect to governmental activities will not, in view of many, withstand inquiry."

These two cases merely show the judicial attempt to escape from the doctrine which the court called an eighteenth century anachronism in the Florida case, and to permit injured plaintiffs to have the right to sue the state and its subdivisions the same as though they were private corporations or parties. No matter how desirable such a result is, and this writer certainly agrees with the result, it is suggested that a judicial ignoring of constitutional provisions is even more reprehensible than the ignoring of the same by a legislative body, for courts are the agency of last resort in the defining or the delineating of the limit or extent of constitutional provisions and their meanings. It is far better to permit the elected representatives of the people in the legislature to follow the constitutional provision and waive the immunity by a general act. This will be discussed more fully a little later in this report.

It is well to note that in this section we are discussing only liability insurance; that is, insurance to protect the state from liability for the negligence of its officers and employees. We have shown by the cited authorities of courts and text writers that the state is not liable for the negligent acts of those who are employed by it. This immunity is enjoyed by all political subdivisions of the state when acting in a governmental capacity. However, what is a governmental function what is non-governmental cannot be defined with certainty so as to furnish administrators with a positive guide. It is true that courts and writers have attempted to lay down guiding rules with which to measure a governmental activity to determine whether or not the exercise of the function may subject the state to suit if injuries to persons or property result. Notwithstanding all such attempts, it is only after a court has decided a case that there is certainty. It is no more or less than a case to case method, with no certainty that a future case based on the same or similar set of facts will result in a like decision.

In Florida, for example, the constitution provides that: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."[1]

REASONS FOR THE DOCTRINE AND ITS EXISTENCE

The judicial attempts to distinguish between governmental and non-governmental functions is "that quagmire that has long plagued the law of municipal corporations" mentioned in the Indian Towing case, supra page 1.

This governmental, non-governmental hocus-pocus is an endeavor to escape from the basic historical doctrine of sovereign immunity. One would think that the doctrine being judicially conceived and delivered could be judicially interred. Such however, has not been the case except in a few lonesome rulings.[2]

One outstanding writer has criticized this by saying: "Judicial responsibility for governmental irresponsibility is very grave indeed."[3]

However, the criticism is manifestly unfair. Hasn't a court the right to infer from a legislative failure to waive the immunity, that the people represented by the legislature do not wish it waived? In this connection, it must be remembered that the doctrine is older than our country. As Judge Badt stated in the leading Nevada case, mentioned supra:

> Conceding that the immunity of the state and its political subdivisions often results in injustice and leaves an injured person without right of redress, it

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[1]Fla. Const. Art. III, Sec. 22.

[2]Hargrove vs. Town of Cocoa Beach (Fla.), 96 So. 2nd 130; and Cloyes vs. Delaware Township (N.J.), 129 Atl. 2nd 1.

[3]Davis, Admin. Law, Vol. 3, p. 459.

is too strongly ingrafted in our jurisprudence to be questioned at this time, except in those cases in which the immunity is waived.[1]

The writers who criticize courts for adhering to the doctrine of sovereign immunity from suits sounding in tort overlook constitutional provisions such as in the Nevada Constitution which grants exclusive authority to the Legislature to waive the State's immunity from suit. The waiver must be by a "general law." "Provision may be made by general law for bringing suit against the state as to all liabilities originating after the adoption of the Constitution."[2]

It is to be noted that this provision has been in the constitution since 1864, without the legislature availing itself of the prerogative granted therein. The law is clear that the right to sue a state cannot be "inferred" from legislative acts that do not clearly express a legislative intent to waive the shield of immunity. "The rule is that authority to sue must be expressly given. It is therefore not to be inferred . . ."[3]

As an example of how strictly this rule is applied, the Supreme Court of the United States in 1943 thought authorization to sue the state "in the court having jurisdiction thereof" did not authorize such a suit to be brought in a federal court.[4]

So also, a congressional authority to sue the federal government does not authorize a suit in a state court. In this latter case it is interesting to note the court's allegiance to the doctrine of sovereign immunity as follows:

> The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the process of government . . . the history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent as to persons courts and procedures."[5]

However, with all due regard for the learned author of that decision, the desire for "unfettered freedom from crippling interferences" was not the original motive for the adoption of the immunity doctrine. It was a fear that unless the states had this protective armor, a plague of suits would result that would render the states financially impotent.

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[1]Gurley vs. Brown, 65 Nev., p. 250.

[2]Nev. Const., Art. IV, Sec. 22.

[3]Berryessa Cattle Co. vs. Sunset Pacific Oil Co., 87 Fed. 2nd 972.

[4]Great Northern Ins. Co. vs. Read, 322, U.S. 47.

[5]Matthews vs. Rodgers, 284 U.S. 521.

> Its (the immunity rule's) survival in this country after the Revolutionary War is attributable, in all likelihood, to the financial instability of the 'infant American states' rather than the doctrine's theoretical foundations.[1]

Nevertheless, with the original reason or basis for the doctrine no longer present, courts justify its continuing existence by the "crippling interference" argument.

Even so learned a jurist as Justice Holmes of the United States Supreme Court, supported by a unanimous court, made this amazing contention:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.[2]

How so brilliant a jurist could contend the doctrine was based on "logical" grounds or believe there could be no right to sue a state or a government for injuries caused by that state or government is most difficult to understand. It is to be noted that he was not using the term "right" in the manner of philosophical writers, but as a "legal right" to seek redress in the courts for injuries sustained by a person entitled to the protection of the law.

DANGER TO PUBLIC TREASURY ARGUMENT

The danger to the public treasury is no longer a valid argument to support the immunity doctrine, for the "infant American states" have long since attained their financial, adult status. Furthermore, liability insurance can now be purchased for a small percentage of the total coverage. This latter point will be developed fully later in this report, as that subject alone is replete with legal problems.

An interesting sidelight to the fiscal argument is that great numbers of litigants, after being denied judicial relief, take their cases to Congress or to state legislatures and often receive substantial monetary awards. The Congress has been particularly responsive to these appeals, which are termed "private bills."

For example, in the tragic Texas City disaster of 1947, a shipload of chemical fertilizer being shipped by the government for the foreign aid program exploded. 560 people were killed and more than 3,000 were injured.

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[1] Gelhorn and Schenk, "Tort Actions Against the Federal Government," Col. L. Rev. 722 (1947).

[2] Kawananakoa vs. Polyblank, 205 U.S. 349.

Property damage aggregated many millions of dollars. The plaintiffs alleged negligence on the part of all federal officials and employees engaged in the production of the chemical. The trial court found there was negligence on the part of the government throughout the entire program of production, storage, loading and firefighting. Yet the court held there was no liability and refused any recovery because the negligence that was found by the district court occurred in the performance of a "discretionary function."[1]

Although the plaintiffs lost in court, they were victorious in Congress,[2] and in granting the relief which aggregated approximately two hundred fifty millions of dollars, the Congress provided: "The Congress recognizes and assumes the compassionate responsibility of the United States for the losses sustained . . . ."

However, it did not amend the tort claims act, the provisions of which excluded such claims as in the Texas City disaster.

CONGRESS, THE LEGISLATURE AND TORT CLAIMS

The congressional settlement of tort claims is a substantial part of the work of each congress; as a general rule the cases are handled with a remarkable degree of fairness and objectiveness. However, results are obtained without resort to adversary hearings so peculiar to a judicial trial. The congress should not be burdened with making judicial-like determinations of facts applying law thereto for the purpose of enacting or rejecting a proposed private law to compensate for injuries. The congress is not constituted nor equipped to perform judicial or adjudicative functions. Such labors should be performed by courts, so that congress may apply its time to the constitutional duties of considering and enacting legislation of general application.[3]

That the work load is a great burden is evident when it is shown that in the 79th Congress 2,849 private bills were introduced in the House and 923 in the Senate, for a total of 3,772. In the 80th Congress, the total, while less than in the previous session, was 2,532.[4]

In a leading U.S. Supreme Court case holding the Reconstruction Finance Corporation liable in a tort action, the court criticized the congressional procedure with private bills as follows:

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[1]Dalehite vs. United States, 346 U.S. 15.

[2]Chap. 864, P.L. 378, Laws of 84th Cong., 1st Session, p. 809.

[3]Gellhorn & Lauer, "Congressional Settlement of Tort Claims," 55 Col. L.R. 1.

[4]Galloway, "Reform of Private Bill Procedure," 95 Cong. Rec. A2901, 2902 (1949).

> In other words, it may be said that Congress has recognized the general liability of the government . . . for the negligence of officers and employees of the United States, but the machinery for determining that liability is defective and results in overburdening the Claims Committee of Congress and Congress itself with the consideration of tort liability claims and with injury to claimants.[1]

Mention is made of the burden cast upon legislative bodies by claim bills and the criticism thereof in order to show the desirability of having persons claiming injury litigate their claims in courts before judges and juries.

It must be remembered however, that no one may be denied the right to petition a legislative body for redress of a grievance, even after failing to sustain his claim in court. That right, i.e. "to petition the Government for a redress of grievances" is guaranteed by the Federal Constitution.[2] That right is also guaranteed by the Nevada Constitution in virtually the same language.[3]

Thus, in cases when the federal or state government may be sued, a plaintiff denied relief in court may have his claim heard again by the appropriate legislative body. This is forcibly shown by the Dalehite case, supra, in which the claimants received congressional grants approximating one quarter billion dollars, after losing in the federal courts.

However, any procedure that can take much of this work load from legislative bodies is most desirable. Too much time is being spent by congress and many state legislatures in this strictly judicial task, none of which is properly equipped with either personnel or procedure to properly carry out this judicial job to any proper conclusion. The same objection applies to such claims being adjudicated by an administrative board, or so-called administrative court of claims. The appelation "quasi-judicial" when applied to such functions is wholly false. It is entirely judicial, and courts should have exclusive jurisdiction of such matters.

The congressional handling or adjudication of claims against the public treasury was condemned by John Quincy Adams almost a century and a half ago. On February 23rd, 1832, he set out in his diary his opposition stating such a function:

> . . . is judicial business, and legislative assemblies ought to have nothing to do with it. One half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative assembly is the worst of all tribunals for the administration of justice.[4]

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[1]Kiefer vs. Recon. Finance Corp., 306 U.S. at 397.

[2]U. S. Const., Amend. 1.

[3]Art. 1, Sec. 10.

[4]8 Memoirs of John Quincy Adams, 480 (1876).

More recently outstanding authorities in this field have more vigorously condemned the practice of legislative adjudication of claims.

Congressman Robert Luce writing in"American Political Science Review" in 1932 said that it was difficult for him to understand: ". . . how any reasonable man with any sense of proportion can find ground for insisting that Congress continue to burden itself with the little claims."[1]

Another writer three quarters of a century ago, wrote in opposition to legislative consideration of private causes or contests and gave his reasons for such opposition as:

> It cannot be denied that, as now constituted, our legislative bodies are not adapted to the proper determination of private contests. They have none of the elements essential to a judicial determination. The members are not impartial as judges, not unprejudiced as jurors. Their sessions are so occupied with other business, and so limited in duration, as to prohibit patient investigation.[2]

No matter how we complain of the burden cast on legislative bodies by the deluge of private bills annually, it will take constitutional change in most states to prevent it altogether. For, as stated immediately above, the federal and our state constitutions, as virtually all others, present to citizens the right "to petition the government for a redress of grievances." However, we can reduce the practice to a very small minimum by a legislative mandate for the acquisition of insurance in proper amounts, and a legislative waiver of immunity only to the amount of insurance carried.

It is to be noted that, in making such a waiver, the legislature can prescribe whatever conditions it wishes to attach to the right granted. It can make the waiver all inclusive or provide for the exclusion of certain claims as was done in the Federal Tort Claims Act. It is here submitted, however, that if exclusions are included in the waiver act, it would have the effect of burdening the legislature with private bills whenever a particular claim was barred by one of the exclusions. This contention is substantiated strongly a little later in this report by a discussion of the Dalehite case.[3] In that case the court held the plaintiffs could not recover as the case was "not within" the Federal Tort Claims Act.

It is, therefore, suggested that in the proposed waiver there be no exclusions and that the state and its agencies of government be given the same status as a defendant or private persons and corporations possess.

Consideration should also be given as to whether a plaintiff seeking relief against the state, or an agency thereof, should be limited to a hearing

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[1]26 Am. Pol. Sci. Rev., 815 (1932).

[2]VII ABA Journ., p. 264.

[3]Dalehite vs. United States, 346, U.S. 15.

before a judge sitting without a jury, or have the choice of a court or a jury trial. Insurance executives with whom this question was discussed expressed the belief that either the plaintiff or defendant should have such a choice. It is suggested, therefore, that such a proposal be followed.

It was argued and contended for years that a waiver of a state's immunity would bring a plethora of frivolous suits resulting in unjust awards and endangering the finances of the state. Experience has refuted this contention and a comparison of judicial vs. legislative adjudication of tort claims shows the reverse to be more in accord with facts.[1]

While in some populous states it may be advisable to consider special claims courts as in New York, in most states the regular court structure, it is submitted, will be able to absorb the additional load, and if too great, additional judges can be provided for within that structure.

In the more populous states, a sudden deluge of tort cases on the regular trial and appellate courts by a legislative waiver of immunity, may impair their normal and historical functions. In such states, it would perhaps be wise to establish within the constitutional judiciary a judicial court of claims to hear and determine all claims against the state. For example this has been done in Illinois in 1951;[2] by the United States in 1946;[3] by Michigan in 1951;[4] and West Virginia in 1949.[5]

New York is the only state that has completely waived its immunity from suit and did so just 20 years ago. A court of claims was created, consisting of six fulltime judges. Judgments are paid out of the claims court budget. If the appropriation is exhausted, the controller purchases the judgment as an investment for sinking funds. These funds are reimbursed from the next appropriation. This avoids the unsatisfactory wait by the successful litigant that would otherwise ensue.

It is readily apparent from a study of this field that only a very few states have effectively dealt with this very pressing and vital problem. In a surprisingly large number of states, the claimant seems to be limited to a legislative petition. However, considerable relief has been granted by piece-meal legislation or partial waiver of immunity. It seems safe to say that in most all states there has been some waiver of the immunity rule. Not so in Nevada. In the federal realm, the Federal Tort Claims Act, passed in 1946, waives a considerable amount of immunity and gave jurisdiction to the federal district courts. However, the act provices for 13 express exclusions; the injuries in the Dalehite case, supra., coming under one of those exclusions.

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[1]9 Law and Contmp. Problems, p. 259.

[2]Ill. Stats, 1951, p. 1302, by amending a previous act.

[3]Ast. of Feb. 24, 1955, C. 122, 280 S.C.A., s 2501.

[4]Mich. Stats. Ann. (1951 Supp.) s. 27.3548.

[5]W. Va. Code Ann. 1949 s. 1143.

The "crippling interference" argument is not a valid reason for the continuance of the immunity doctrine. This was conclusively shown by the passage of the Federal Tort Claims Act of 1946, and the waiver of virtually all of the doctrine by New York in 1939. Furthermore, England, by a statute which became effective in 1948, removed virtually all of the immunity doctrine; also, France abandoned the doctrine almost a century ago. And, a half-century ago, Maitland, the great English law writer said: "It is a wholesome sight to see the Crown sued and answering for its torts."[1]

A noted French legal writer in 1945, in referring to the doctrine's demise in France, said:

> The sacred dogma of national sovereignty, set forth by J. J. Rousseau (1712-1778) in magical terms that were long accepted without question is today considered a mere sophism. It is the divine right of the people substituted for the divine right of kings.[2]

In none of the instances, where there has been a waiver of immunity, has there been any "crippling interference" with governmental operations.

Some instances where state legislatures have receded somewhat from their state's immunity from suit have resulted in farcical judicial rulings, by judges who indulge in judicial vetoes of legislative acts.

For example, in a 1942 Michigan case, a seaman had sustained serious injuries because of a collision occurring between two ferry boats owned by the state. A Michigan statute had created a court of claims and gave it jurisdiction "to hear and determine all claims and demands liquidated and unliquidated ex contractu and ex delictu against the state and any of its departments."

The court, in an amazing decision, held the statute waived only immunity from <u>suit</u>, and not immunity from <u>liability</u>.

Some California cases also show to what ends some courts will go to vitiate a statute that attempts to recede from the immunity rule.

In one, a hospital district was being sued for injuries suffered by a paying patient due to malpractice. The applicable statute provided that all such hospital districts could "sue and be sued in all courts and places and in all actions and proceedings whatever."

In denying liability notwithstanding the waiver statute, the court said: "Whether the doctrine of sovereign immunity should be modified in this state is a legislative question."[3]

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[1]3 Maitland, Collected Papers 263 (1911).

[2]Jezè, Revue du Droit Public, 366- 1945.

[3]Talley vs. North S.D. Hosp. Dist., 41 Cal. 2nd 33.

Professor Davis criticized this construction as follows: "What an appalling proposition! The immunity continues even when the state expressly consents to be sued."

The late Justice Carter, often a lone dissenter, vehemently criticized the ruling as: "The archaic, outmoded, unfair and discriminatory doctrine of governmental immunity blindly followed by the majority."

In another California case,[1] the court, referring to a holding in a previous case, said: "Thus there was adopted in this state the doctrine that state consent to be sued for negligence did not waive sovereign immunity from liability for tort."

In other words, the claimant is permitted to visit the fountain, but not permitted to drink; or as stated in one critical article: "The statute . . . apparently does no more than allow plaintiffs to visit the court house."[2]

The visit would be rather expensive. The writer should have added: "and spend considerable time and money to no avail." It doesn't seem reasonable to ascribe to any legislature so perverted an intent; that is, to say in substance: "By this statute we now allow you to take your case to court; but even though you prevail and are awarded a judgment, we will not allow you to be paid."

By any process of reasoning can it be believed that a legislature intended such an absurd construction? What a hoax and fraud upon those injured. Far better economically that they suffer with their injuries rather than spend the time and money to obtain a judgment that is of no value unless the successful litigant takes his case to his legislature and has it tried again. This would entail its being presented to two committees, two houses and the governor. Why require an injured person to pursue such an expensive hollow right? If legislative action is needed, why not go there first, or afford him a right to obtain a judgment that will be paid?

Of course, in many cases even where the courts hold there is not only the waiver of immunity from suit, but also the waiver of immunity from liability, the judgment cannot act as an award of money from the state with the right to collect. This is because of a provision found in most state constitutions: "No money shall be drawn from the treasury but in consequence of appropriations made by law."[3]

Unless provision is previously made for payment of judgments, the judgment creditor must seek aid from the legislature or congress as the

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[1] People vs. Superior Ct., 29 Cal. 2nd 754 at 749.

[2] Leflar and Kantrowitz, "Tort Liability of the States," 29 N.Y.U.L. Rev. at p. 1365.

[3] Nevada Const., Art. IV, Sec. 19.

case may be.[1] There are several ways of providing for the payment of judgments that may be subsequently awarded. One is the New York method of making an appropriation of the amount estimated to be necessary for the ensuing fiscal year, but how can this be done with any accurate result? A particular agency of government may not be guilty of any tortious acts for years, then have a great number in one year. New York tries to meet this problem by having the controller buy the judgment with money from the sinking fund, which apparently always has a sufficient amount in it.

Another method, of doubtful constitutionality, is to authorize a given official or group of officials constituting a board, to pay the judgments out of any unappropriated money in the general funds. Unless the aggregate amount authorized to be paid is limited, most states will hold the provision a direct violation of the constitutional section above quoted.[2] Thus again we have the question: "How much?" which cannot help but involve the wildest guessing. This is certainly not the orderly way to evolve proper budgets.

It readily becomes apparent that the complete answer to the problem is not a general statutory waiver of sovereign immunity. That is, if we wish to fully carry out the moral, if not strictly legal, obligation of granting a right of redress to those injured by the negligent acts of public officers and employees. It is certain that we should never allow a victorious plaintiff the right to use a writ of execution against the funds of the agency against which suit was brought.[3] For, to do so would impair the ability of the agency to carry out the duties for which it was created. Nor, as shown, supra., can there be even an accurate guess as to amount that may be necessary to pay tort judgments. It would appear that the answer to our apparent dilemma is to authorize and require the purchase of liability insurance by all agencies of government in an amount which the experience of other states has shown sufficient, and to waive immunity only to the amount of insurance carried. As was indicated early in this report, the purchase of liability insurance by state agencies is a subject that bristles with legal and constitutional questions and problems.

THE PUBLIC LIABILITY INSURANCE PROBLEM

At the outset of this discussion, it must be borne in mind that no public moneys may be expended by any public official without legislative authority. A few citations will suffice to establish this as a fundamental controlling rule.

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[1] Chapman vs. State, 104 Cal. 690.

[2] Baltimore vs. O'Connor, Md. 128 Atl. 759, 40 A.L.R. 1058; Ingram vs. Colgan, 106 Cal. 113, 42 Am. Jur. 91 A.L.R. 1512 et seg.

[3] Virginia vs. West Va. 241 U.S. 531, 42 A.L.R. 1465; Chapman vs. State, 104 Cal. 690.

In a 1934 Arizona case, the court said: "Public money may not be spent, even for public purposes, unless lawful appropriation therefor has been made."[1]

So also in an Arkansas case, the court stated:

> The power of the General Assembly with respect to the funds raised by general taxation is supreme, and no state official from the highest to the lowest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation.[2]

It would serve no useful purpose to cite numerous authorities on this point, as it is too well established in law to require such a citation. The specific question we must answer is: May state funds appropriated for the proper operation of state agencies be expended for liability insurance without specific legislative authority? Judicial authorities and reason clearly indicate a negative answer.

We must not be influenced or guided in attempting to answer this question by what has been or is being done. The mere fact that states and their political subdivisions have purchased such insurance for many years without specific legislative authority without objection is no evidence whatever of the legality of such expenditures. No legal authority can be evolved or created by continued extra-legal acts. If express statutory authority is needed, then a decade or century of activity in violation of law will not change the requirement.

In an Arizona case which is directly in point in our discussion, the board of supervisors of Maricopa County insured certain motor vehicles with the Hartford Accident and Indemnity Co. against fire and theft and also against public liability and property damage.

Action was brought by a taxpayer against the defendant Hartford Accident Co., and the supervisors who had authorized the expenditure of the money. It was contended by the plaintiff that payment out of the county treasury for insurance of the kind they purchased was void, upon the main reason that neither the state nor any political subdivision thereof is liable for the negligence of its agents or officers when engaged in governmental function. It was contended in opposition that the county could be liable if operating in a non-governmental function which contention was not disputed.

The court continued a little further:

> Defendants have not called our attention to any authority of law which they claim justifies the expenditure except those which we have already discussed,

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[1] Proctor vs. Hunt, 29 Pac. 2nd 1058.

[2] Dickenson vs. Clibourn (Ark.) 187 S.W. 909; Sutton vs. U.S. 256, U. S. 575.

> nor does it occur to us that there is any. Certainly it would seem that, since counties have only the powers expressly conferred on them by statute, and their officers can only spend county money legally when the statute authorizes it, if money is spent for a purpose which is not authorized by the statute, it is spent illegally.

There is no doubt that under our law the responsibility placed upon boards of supervisors of counties is extremely honorous. Neither good faith on their part nor legal advice by the officers designated by law as their advisors will protect them against liability, if it be finally determined that the expenditure involved was not authorized by law. Then the court continues:

> Whether or not this burden is unjust is not a matter for judicial determination. It is a question for the legislative authority alone, and any appeal for relief must be made to that authority and not to the courts. We are satisfied that in this case all of the defendants acted in good faith and under legal advice, but as we have stated, that is no defense to the action.

The court, in closing, sustained the judgment of the trial court, requiring the defendants to return the monies expended for the insurance in question. It is to be noted that some or much of the insurance purchased by the supervisors was to cover vehicles and properties against fire and theft, which certainly would seem to come under a different rule than the public liability issue. The court made no distinction and required the repayment of the money in question. While this case applies to the situation of a county and an illegal expenditure of a county board of supervisors such as our county commissioners, the same rule as has been pointed out above applies to states and all agencies of government and political subdivisions of states. There are numerous other cases holding to the same rule of law. We have already cited the case of Poland against Sheboygan and Kesswick vs. the Fallowfield School District. A further citation of authorities could be made but it would be of no particular service or use other than to extend this report unduly.

It has also been contended by people in the insurance field and also injured plaintiffs attempting to make out a case against the state by reason of the fact that the state has purchased liability insurance, that the purchase of such insurance acts as, or effects, a waiver of the state's immunity from suits sounding in tort. The overwhelming majority of the courts which have considered the question have held that the mere purchase of insurance policy does not create a waiver of immunity. These courts hold to the rule above stated, that where the constitutional provision authorizes the legislature to waive immunity by general law, that is exclusive method or means of waiving such immunity.

It is also held in numerous cases involving this issue that the insurance is of no value to the state because of the fact that the state, or rather the insurance company, is only secondarily liable. Policies provided in each instance that the insuring company will pay any judgment obtained against the state or the subdivision of government insured. Courts invariably hold this to be meaningless because of the fact that there can be no judgment obtained against the state in a tort case, by reason of the negligence of its officers and employees. And, that this being so, as the court stated in the Poland vs. Sheboygan case, that if the city cannot be liable, the insurance company cannot be liable.

In some of these instances, as has been pointed out, suit was brought to recover the premiums paid upon the unenforceable insurance, and in each instance the courts held that the money was recoverable, that is the premium paid was recoverable, because of the fact that there was no consideration on the insurance company's part and that therefore they, by issuing the policy, incurred no liability whatever.

I wish to make this point crystal clear: and that is that certain reports were made when the interim study report in this matter was filed with the 1960 session of the legislature, that great sums of public money had been spent for "worthless insurance." That was not the phrase used. What was said was that the money was spent for policies of insurance which were legally unenforceable and legally worthless if the company saw fit to raise the defense of sovereign immunity.

In this connection, we have already pointed out that any provision in the policy that the company will not raise the defense of sovereign immunity is of no binding force because, as has been pointed out, the whole contract is void because of lack of consideration. Therefore, any provision in it is equally void. Thus the provision which has been placed in these policies that the carrier will not raise the defense of sovereign immunity is just simply meaningless from the legal standpoint because it does not even prevent the company from raising the defense if they see fit, and that has been done in numerous cases; and whenever it has been attempted, even in violation of the provision in the policy, the courts invariably permit the defense to be raised. As a matter of fact, the court has the perfect right to raise the defense of its own motion. The court could, of its own motion, dismiss the complaint because it cannot state a cause of action against the state or any political subdivision thereof because of the total lack of liability for suits sounding in tort.

For a citation of authorities that the purchase of liability insurance does not in any way effect a waiver of immunity, see McGrath Building Co. vs. City of Bettendorf, Iowa, 85 Northwestern 2nd, 616 at 621. In the citation of authorities by the court is a citation of a minority view represented by a Tennessee and a Kentucky case which are anomalous and which stand alone in the field. A reading of those cases will show that they are based upon certain peculiar statutes in Tennessee and Kentucky, and in no way vitiate or weaken the overwhelming majority of authorities to the effect that the purchase of liability insurance does not effect a waiver of the sovereign immunity doctrine.

It has been contended or there was mentioned in a discussion during the last session that perhaps the state was estopped to deny the lack of liability or the waiver of immunity because of the purchase of the insurance in question. The complete answer to such an argument is that no principle of estoppel can be applied against the state in such a case because all persons dealing with the state are charged with notice of the limitation of the powers of state officials and are charged with knowledge of the law and of the constitutional provisions, the same as though it were criminal. In other words, ignorance is no excuse, nor can the doctrine of estoppel apply because of the fact that everyone is charged with notice of the laws of the state and of the extent of authority of people contracting on behalf of the state. To the effect of the lack of estoppel, see State vs. Jumper Creek Drainage District, Florida, 14 Southern 2nd, 900. Also Mayor of Nashville vs. Sotherland, Tennessee case, 21 Southwestern, 674.

Before considering the authorities that must control our decisions, it would be well to consider the problem objectively as an original proposition.

As the name implies, liability insurance is a contract by which the insurer agrees to protect the insured from some liability. In the discussion at the beginning of this report, the doctrine of sovereign immunity was discussed at length. The judicial decisions for centuries have held that the state and its subdivisions are immune in governmental functions from suits so sounding in tort.

In Nevada, the Constitution affirms the doctrine by inference, but authorizes the legislature to waive the immunity by general law.[1]

The legislature thus is given the exclusive right to waive the protection of sovereign immunity. The waiver must be by general law and may not be inferred.[2] As we above stated, our Supreme Court has unequivocally ruled: "The State of Nevada has never waived such immunity . . ."[3]

We are not unmindful of the subsequent holding of the court in Hill vs. Thomas which we cited early in this report.[4] I believe a discussion of the Hill vs. Thomas case would be helpful, as the case deals with most of the questions involved in this study. Furthermore, that case must also be considered with the earlier case of Gurley vs. Brown, supra., because the latter case, as stated above, holds squarely that the state has never waived its immunity from suits sounding in tort. Whereas, the case of Hill against Thomas, decided six years later, appears to hold squarely to the contrary--the decision being based on a statute that was enacted in 1865 and has been a part of the laws of Nevada ever since.

The fact that in the Gurley case the defendants were the Reno City councilmen as individuals, while in the Hill case the state was a defendant, appears not to have influenced the decision in either case and shouldn't as all political subdivisions enjoy the same immunity as the state. The question is, can the two cases be distinguished, so that both can be said to properly express the law of this state? I believe they can be, for the reasons hereafter stated.

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[1]Const., Art. IV, Sec. 22.

[2]Berryessa Cattle Co. vs. Sunset Pacific Oil Co., 87 Fed. 2nd 972. See also: State vs. Yellowstone County, 88 Pac. 2nd 6.

[3]Gurley vs. Brown, 65 Nev. at p. 250.

[4]70 Nev. 390, 270 Pac. 2nd 179.

In the Gurley case, the defendant city councilmen were sued as individuals for injuries sustained by a person confined in the city jail during freezing weather. The plaintiff's feet were frozen and parts thereof had to be amputated. The court decided the case sqarely upon the doctrine that the sovereign is immune from suit when acting in a governmental function, and that the operation of a jail was such a function. Also, as stated above, the court held that the state had never waived its immunity from suit. This latter statement poses a difficult question in the consideration of the Hill case.

In the case of Hill vs. Thomas, the plaintiffs were injured when a deputy sheriff carelessly fired a shotgun at their car, mistaking them for fleeing criminals.

The suit was against the sheriff, his deputy, and the State of Nevada because the State had bonded the sheriff under the provisions of the bond trust fund act. The lower court dismissed the State as a defendant on the authority of Gurley vs. Brown. The Supreme Court reversed the lower court and said the Gurley case was not controlling because in that case there was no evidence whatever of a waiver of sovereign immunity. Whereas, in the Hill case, as the court said, there was a controlling statute that expressly waived the immunity from suit "in cases of this character." Thus, we have two Nevada Supreme Court cases, apparently enunciating conflicting rules of law on the same general subject; i.e., the liability of the State and its political subdivisions from suits sounding in tort. This appears at first to be clearly the case; for the statute which the court held to be an express waiver of immunity in the Hill case has been a part of our statutes continuously since 1865. Why then wasn't it considered a waiver in the Gurley case? The explanation, I believe, is that in the Hill case the court based its holding on the fact of the bonding by the state, and the provisions of NRS 282.060, which came into being as Chapter CXXXV, Statutes of 1865, page 401. However, it is here submitted that the statute is in no sense a general waiver of the State's sovereign immunity from suit.

Let us remember that the great weight of authority is that such waiver must be expressed, explicit and cannot be inferred. On pages 5 and 13, supra., we quoted from cited cases to show how strictly this rule is applied.

In another California case,[1] the court construed a statute that provided a county "shall be liable" as providing a county "shall not be liable," which caused Professor Davis to term the decision "an appalling proposition."

Now to justify my statement that both cases are correct. In the decision of the Hill case, the court, after stating the facts, including the form of the bond, reviewed the relevant statutes to show that: (1) the bond there in question was a faithful performance bond; (2) that from 1865 to the date of the decision, a relevant section of the code provided that such bonds must be conditioned for "the faithful discharge of all duties" required by law; even a law passed subsequent to the execution of the bond; (3) that, by another relevant section, of the same vintage, it was provided

[1]Stang vs. City of Mill Valley, 38 Cal. 2nd 486.

that anyone "injured or aggrieved by the wrongful act or default" of the officer bonded, may bring suit on the bond in his own name without assignment; and, finally, that when the legislature enacted the bond trust fund act, it had full knowledge of the statutes just mentioned, and therefore the bond trust fund act was enacted "with the intention of subjecting the state and the bond trust fund . . ." to the same obligations imposed upon private sureties; that is, a corporate surety bond issued for a premium.

The court on page 404, in referring to the legislative intent in enacting the bond trust fund act, said:

> . . . we are of the opinion that the legislature made it crystal clear that it did not intend to change the surety's liability on official bonds . . . but intended official bonds written by the State of Nevada as surety to serve all purposes of official bonds required by the laws of this State.

By this, the court meant that all official bonds were faithful performance bonds. The legal meaning of faithful performance bonds will be discussed thoroughly later in this report.

The only reference by the court to a waiver of immunity from suit was to suit on the State's official bonds. For example, on page 399 of the decision, under headnote 3, the court stated:

> 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. (emphasis ours)

Later in the same paragraph, the court mentions the 1865 statute as granting "a right of action on the official bond." Then again on page 400, in commenting on the effect of the 1865 statute, said:

> In our opinion the State thereby undertook to permit any person injured or aggrieved by the wrongful act or default of an officer to bring action against it directly on the bond, waiving its sovereign immunity therefrom.

And, finally, at the bottom of page 403:

> In the light of the foregoing authorities and the cited enactments of the Nevada legislature, the only conclusion which we can reach is that the State has waived its immunity from suit in cases of this character.

Please note the considered language of the court. In no part of the opinion does the court say the state has generally waived its immunity from suit, but only as to suits "on official bonds" (p. 399) and "from suit in cases of this character." (p. 403) Again on p. 400, after stating the State had consented to suit on the bond, said the State had waived its sovereign immunity "therefrom."

The words "from suits of this character" can only mean suits on official bonds, and waiving its sovereign immunity therefrom can only mean from "suits on official bonds," as that was the immediate antecedent of "therefrom."

It must be borne in mind that the bond there in question was considered a faithful performance bond, and that such bonds cover all forms of malfeasance and non-feasance in the execution of a public office.[1]

In a West Virginia case it seems humorous, except from the surety's standpoint, a surety on a police officer's faithful performance bond was held to be liable in a slander action in which it was alleged that the police officer falsely accused a merchant of putting a slug or false coin in a parking meter.[2]

As used in bonds of public and private officers, the term "faithful performance" imports not only honesty, but also a "punctilious discharge of all the duties of the office, requiring competence, diligence and attention, without any malfeasance or non-feasance."[3] The latter terms mean any "bad action" or "no action."

Thus, it should be apparent that the decisions in both Hill vs. Thomas and Gurley vs. Brown, cited supra., are sound and a correct statement of law in this state. Further, that the rule of the Hill case does not apply unless the public official causing the injury is bonded.

It therefore appears to be the law of this State that there has been no legislative waiver of immunity from suit except as to suits on official bonds, and that only because of NRS 282.060; and that as a consequence, the state and all its subdivisions are immune from suits sounding in tort, unless the tort is caused by a state official or employee who is bonded as required by law. It is well to note the last phrase, "as required by law." A further discussion will be had concerning the effect of the phrase later in this report under the subject head of Bonding of Public Officials.

We have prolonged the discussion of the two Nevada cases because of the views expressed by many in the course of this study, and in the hope we could resolve some of the doubts and fears of many over the decision of Hill vs. Thomas.

PURCHASE OF PUBLIC LIABILITY INSURANCE

Now to return to the discussion of liability insurance and the right, if any, of public officials to expend public funds in the purchase thereof. In this connection, the holding in the case of Gurley vs. Brown, supra.,

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[1]State vs. Chadwick, 10 Ore. 468.

[2]City of Mullens vs. Davidson, (W. Va. 1949) 57 S.E. 2nd 1.

[3]Hoboken vs. Evans, 31 N.J. L. 343; Harris vs. Hanson, 11 Me. 245.

and also Taylor vs. University of Nevada,[1] clearly show the State and all its agencies are immune from suits sounding in tort, when acting in governmental functions, absent official bonds. How then can public funds be used to purchase liability insurance to protect the State or any segment thereof from a liability that never existed? <u>It is respectfully submitted that no public funds may be so expended without explicit statutory authority to do so</u>. Yet, without such authority, liability insurance in fantastic amounts has been purchased by the State and all of its subdivisions for a period of years. The error of this procedure was forcefully shown by the Nevada Supreme Court in the case of Taylor vs. University of Nevada.

In the Taylor case, the University of Nevada was being sued for damages in tort for injuries sustained by a person who was injured in a fall on the campus, alleged to have been caused by the negligent conditions of the grounds.

The University was insured by a major casualty company, and had been so insured for several years. When the claim was filed, the company refused to pay, and the injured party filed suit. The insurance company raised the defense of sovereign immunity; i.e. that the State could not be sued for the negligence of its officers; and, the University being an agency of the State engaged in a governmental function, there could be no recovery. This defense was sustained by our Supreme Court, and rightly so in line with the overwhelming weight of authority. It was contended on behalf of the plaintiff that by the purchase of liability insurance, the State had waived its immunity to the extent of the policy. A few courts have erroneously sustained such a postulate, but the court in the Taylor case correctly rejected the contention. This was clearly in accord with the great weight of judicial authority, and also in accord with our constitutional provision that there can be no waiver of immunity from suit except by "general law" (Nevada Constitution, Article IV, Section 22).

In several states (Florida, Idaho, North Carolina, Virginia, Wyoming and Wisconsin), statutes have been enacted waiving sovereign immunity to the extent of liability insurance carried. However, in only two of those states (Florida and Idaho) does the statute require that liability insurance be purchased. It is easily seen that unless the statute is mandatory, rank injustice could result. For example, if A were injured by an insured agency, he could recover; whereas if B were injured by an uninsured agency, there could be no recovery. Furthermore, if there were no waiver of immunity in some form, to some extent, all the liability insurance in Christendom would avail an injured person nothing if the company refused to pay and refuse they do! (See Taylor vs. University of Nevada, supra.)

Returning to the main point under discussion many states have enacted statutes authorizing the purchase of liability insurance.[2] However, as has been repeatedly pointed out herein, the mere authority to purchase such insurance is of no avail. The statute in addition must to some extent waive

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[1] 73 Nev. 151.

[2] 1959 Duke L.J. No. 4, p. 594.

the state's immunity from suit, or require that, as a part of the insurance contract, the carrier will not raise the defense of sovereign immunity from suit. Even the latter provision is fraught with legal problems and has plagued administrators, and judges in a host of cases.

For instance, in a 1947 Wisconsin case,[1] the city bought liability insurance without statutory authority. The policy contained the covenant now usually present in such contracts that the carrier would not raise the defense of sovereign immunity. Notwithstanding this provision in the policy, the court held there was no statutory authority for the city to enter the insurance contract and the agreement therein not to raise the defense of immunity was therefore of no force.

In that case, both the city and the insurance carrier were named as defendants. The court held this was a misjoinder as the contract of insurance was one of indemnity and the insurance company could never be liable unless the city was, the company being only secondarily liable: "The city not being liable, the company is not."

In a Pennsylvania case,[2] a school district purchased liability insurance to protect school bus passengers. In the case when a parent attempted to recover for injuries suffered by a child, the court held the district was not liable and that the purchase of the insurance did not waive the district's immunity.

In this connection, it is elementary reasoning that if liability has not been waived, by the legislature as provided in the constitution, then the state is absolutely immune from suit, and there is no liability whatever. This being so, the promise of the insurance company in the contract of insurance to pay whatever judgment is obtained against the city is a hollow, empty promise and furnishes no consideration for the contract of insurance. And the courts so hold, and did so hold, in the Pohland case and the Fallowfield School District just cited supra., the insurance company is only secondarily liable and before any liability on the insurance company's part can arise by the reason of the contract of insurance the injured plaintiff must obtain a judgment against the state or the city or the governmental agency which is involved. This being impossible, the promise of the insurance company to pay is completely devoid of validity and of no consideration whatever and the courts hold the entire contract void on two grounds; one, that there is no authority whatsoever, legislative authority, that is, to expend public monies for such a contract, and two, that there is no consideration whatsoever on the part of the insurance company. This being so, then any provision in the contract is also without any legal effect or force whatever. This disposes equally, or, completely of the fallacious argument that even though the immunity of the state has not been waived that the agreement in the contract of insurance that the insurance carrier will not raise the defense of sovereign immunity is, in legal effect, a provision giving validity to the contract. The courts

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[1]Pohland vs. Sheboygan, 27 N.W. 2nd 736.

[2]Kesman vs. Fallowfield School, 29 Atl. 2nd 217.

brush such contention aside, and rightly so. It is to be noted that in many of these contracts of insurance where the waiver or agreement not to raise the defense of sovereign immunity is included, a provision is incorporated in such agreement that the defense will not be raised except by the city, the county or a school district. Apparently the procedure has been in all areas of government that if the administrator or the official handling the insurance problems believes the plaintiff has a valid case and should recover, the defense of sovereign immunity is not raised. On the other hand, if the administrator feels the case is a frivolous one and without merit, then the defense of sovereign immunity is raised and the plaintiff is barred from recovery. It matters not one iota whether this agreement not to raise the defense of immunity is included. The contracts of insurance to protect from liability are void from the beginning, and, as the courts in some cases have stated, "the expenditure of public monies for such a contract of insurance is an ultra vires act as well as a wasteful, unnecessary expenditure of public funds." This was the wording used by the court in the Fallowfield School District case cited immediately above. In addition, as has been repeatedly stated, any such an expenditure is an illegal expenditure for which the official who authorizes the same or any officials participating in such an expenditure, are liable for the return of all such monies, and in addition, under Nevada statutes, it is a crime for which the official can be removed from office, and as many authorities say, should be removed.

Furthermore, the argument or contention that the state has a moral obligation to people injured through the negligence of any state employees or officials, is a matter to be considered by the legislature and not by an administrator in the executive department. If the legislature has not seen fit to remove the sovereign immunity from suits sounding in tort, and that has been the case in Nevada since the constitution was adopted in 1864 to date, then we must assume that the people represented by the elected members of the legislature agree with the legislature that they do not wish such immunity to be waived, and that they agree with the legislature that insurance should not be purchased. As has been stated before, it would be even more reasonable or justifiable to expend the many thousands of dollars that have been expended on premiums for liability insurance to build stockades to protect from Indian raids. For, there are Indians, but there is not now, nor has there ever been in the State of Nevada any liability on the State's part or any of its political subdivisions to suits sounding in tort for recovery of damages for injuries sustained or suffered by third parties due to the negligence of state officials or employees acting in governmental functions. However, it appears to have been a retarding factor over the past century in America to a waiver of sovereign immunity that the resultant lawsuits would cause havoc with the financial structure of the state and its political subdivisions. During the last half century, however, insurance has become available at premium charges, when properly purchased, that a few years prior thereto would not have been possible.

Without insurance it is virtually impossible, or absolutely impossible, for an agency of government or the state itself to with any accuracy other than a wild guess, budget for the imponderable, that is what amount of damages in the aggregate the state would have to pay in the ensuing year or biennium. However, using the experience table of other states, we can with some degree of accuracy budget for insurance premiums to cover the cost of liability insurance if the state or the legislature thereof sees fit to waive the doctrine of sovereign immunity. And as has been pointed out previously, text writers, economists, political scientists and judges have been urging for years that states consider placing themselves in the same position as private corporations in the field of public liability. It is to be noted that before a plaintiff can recover in a damage or negligence action he must prove two or three facts by a preponderance of the evidence, i.e. he must carry the burden of proof so as to satisfy the trier of the fact whether it be the judge or a jury, that (1) he is without fault, (2) that the accident occurred by reason of and solely by the fault of the defendant and that the plaintiff sustained injuries which were the proximate cause of such negligence.

Now, let us consider the field of workmen's compensation which first came into being generally in America some 50 years ago. Contrary to the requirements of a claimant in a negligence action, the workman who is injured in an industrial accident, when employed by an employer who was insured or required to be insured under our workmen's compensation laws, no negligence will bar the claimant's recovery. The same arguments were made when workmen's compensation statutes were first being considered as have been made in opposition to the waiver of sovereign immunity. Namely, that it would play havoc with industry and cause chaos in the financial operation thereof, and unduly burden the political governments therein. Experience has shown the contrary to be true. The theory or policy being that it is better that the industry, or all the industry of a state, bear the expense of the injuries sustained by employees who make the industry possible, rather than the cost thereof fall upon the employee who, in most instances, is impecuneous and unable to pay for the cost of his own medical and hospital bills. Industry carries insurance which covers it in the case of such injuries; so, likewise, may the state and its political subdivisions carry insurance to protect from judgments obtained by plaintiffs who are injured through the negligence of officials or employees of the state.

There is another question to be considered in connection with the waiver of immunity. As has been pointed out, the immunity waiver may be conditioned; may be limited, rather recovery in such cases may be limited in amount; the plaintiff may be required to file a claim in a given number of days and bring his action in a particular court. Now, assuming that the requirement is that the injured person brings his suit in the trial court, which is our district courts in Nevada, should the plaintiff be limited to a trial without a jury or should he be given the choice of a jury or a court trial? The writer was interested when this question was posed to insurance executives, for in most instances the insurance executives representing the major carriers of America believed it would be better to permit the plaintiff or the defendant, as in most all civil actions, to have the choice of having the case heard either by a court or a jury. The statements of executives were to the effect that they were fearful that if a single judge heard the case, in case of certain well known or influential members of the community who happened to be plaintiffs, the trier of the fact might be more inclined to render a more substantial judgment than a jury of twelve people, nine of which would have to agree. It is important to the state in this regard, that experience tables in the payment of judgments are reflected in the rates of insurance and it may be well, therefore, to follow the suggestions of the carrier and permit either party to a lawsuit involving the negligence of public officials or employees to choose either that the case be tried by a judge without a jury or by a jury as in most civil actions.

In connection with the purchase of insurance by the various agencies of government and political subdivisions of Nevada, a study was made of each policy that was in force in all the cities, the counties, school districts and state agencies. The results were, to say the least, amazing. In no agency of government, at any level, was there any one or any person in the agency itself with any particular knowledge whatsoever of either insurance, the purchase thereof, or suretyship and bonding. It appears that the procedure is now and has been as far back as records show that each area of government either assigns to a group of insurance agents or one agent the problem of evaluating the buildings of the agency and the insurance needs of the agency as to the buildings and contents thereof owned by the agency, and also as to the liability insurance necessary to properly protect the agency of government. The resultant policies were a hodgepodge of coverage and rates. There appears to be no uniformity whatever, with slight exception, the rates running in the upper brackets to amounts far in excess of what should have been obtained, and what actually was obtained by the owners of business and industrial properties.

During the study, each policy was read and a record made of the amount of insurance carried, the premiums paid therefor and, if possible, the statement of values showing the value of the properties covered, whether it be buildings or automotive equipment or the contents of buildings. In the acquisition of all such insurance, with but three exceptions, the premiums, or the cost for such insurance was not even negotiated. The request for insurance coverage was turned over to either a group of agents, an agents association or an individual agent acting for the other agents, and in this connection, usually when this was done it was limited to agents who belong to a particular agents association in the area in which the agency of government functioned. Such an agent or group of agents would then have policies executed as such agents deemed necessary.

No criticism of such agents should be made on the basis of any improper conduct for there was none whatever, but it must be remembered that those who have engaged in the insurance business are so imbued with the idea of the value of insurance that they deem it essential, wise and necessary to carry insurance in amounts far in excess of what would be considered wise or advisable by private industry or institutions privately owned and operated. In no single instance did we find any agency of government being advised objectively by people trained in the insurance field and who could disassociate himself from the agent's, the underwriter's or carrier's viewpoint. In the recommendations to be hereafter made, it is the strong recommendation of this report that there be afforded both for the state and for the other agencies and areas of government trained and experienced personnel who will advise the administrators and heads of the various agencies of government of a proper insurance program that will adequately protect the state and its agencies of government in areas in which protection is needed in an amount which experience of other states and sound business practice shows to be wise.

In many other states in recent years this program has been followed and has proved most profitable and wise. Two states in particular have embarked on such programs, namely Colorado and California. Colorado has done this more recently, but in California the program has been in operation for approximately 25 years, and during all that period of time has been under the supervision and management of one person, Mr. Jack Brady. Mr. Brady operates as a division of the department of finance of the State of California, but all insurance except that for schools, cities, counties and the industrial insurance such as our Nevada Industrial Commission, is handled through Mr. Brady's office; that is the purchase thereof, the valuation of the needs and the acquisition of insurance and the determination of the amount thereof. It is interesting to note the method by which automobile insurance is purchased in California. In this connection the writer has failed to find any state or agency of government that has not saved a considerable portion of the insurance premiums when the insurance is purchased on a so-called "bid basis" over the procedure followed throughout Nevada at the state, county, city and school district levels.

RATES

In this connection, one point should be made clear. It was repeatedly stated to the writer in the investigation throughout the cities, counties and school districts that the administrators were told in numerous instances by insurance agents that the rates for insurance, both fire, extended coverage, vandalism and malicious mischief as well as comprehensive liability insurance, were set by law. It should be made crystal clear that this is simply not true. In the fire and extended coverage field, insurance companies in concert have established what is termed "rating bureaus," which bureaus, supposedly using experience table of losses as compared to coverage, have established a rate which is supposed to be fair and equitable so as to build up reserves sufficient to take care of losses and still return a sufficient income to the company to carry on its business, pay its employees and officials and still return some profit on the investment to the stockholders. There is no reason or provision of law that would preclude the purchase of insurance on a bid basis.

These cases are not an exception to the rule, but are in accord with the preponderant weight of authority.[1]

It is clearly the general rule that in the absence of express statutory authority, courts will hold the purchase of liability insurance "to be ultra-vires as well as a wasteful, unnecessary expenditure of public funds."[2] This is based upon a lack of consideration on the insurance carrier's part due to the immunity of the state or an agency thereof from suits sounding in tort. It is to be borne in mind that this doctrine applies only when the agencies insured are engaged in governmental functions. This phase of the study will be more fully developed a little later.

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[1]See 1959 Duke Law J. No. 4 (Fall), Note 22, p. 594, and cases there cited.

[2]Ibid.

The lack of consideration prevents the creation or existence of a contract. This is so because the insurance is to protect the State from liability; since there is no liability, the insurance carrier's promise is an empty one, and it accepts a premium without incurring any obligation or risk whatever. This being legally so, the insured is entitled to a return of the premium. If the carrier refuses, the courts invariably order that such restitution be made.[1] In this connection, it is interesting to note that there apparently was no demand for a return of the premium after the refusal of the carrier to pay in the case of Taylor vs. University of Nevada, supra.

In some states, it is the rule that without specific statutory authority no insurance of any kind may be purchased, not even fire insurance on public buildings and contents. In other states, the purchase of any fire insurance on public buildings or their contents is expressly forbidden by statute.

Before leaving this subject, it should be pointed out strongly that for a great number of years most all agencies of government in Nevada: state, county, city and district, have purchased liability insurance in an appalling amount, to protect from liability that never existed, without any statutory authority whatever. The fact that funds were requested in a budget by one or all agencies is no authority for such insurance acquisition, nor can it be any indication of a waiver of liability.[2]

It is now, and for years has been, the rule, without exception, that the operation of departments of education, and all schools, including state colleges and universities, is a governmental function in which the agency involved and the parent state is immune from suits sounding in tort.[3] This immunity extends to the transportation by the school district of pupils to and from school in school buses.[4] This is the unquestioned law in Nevada; yet, every school district in Nevada and the State Department of Education has for years purchased liability insurance for all of its automobiles, <u>including school buses</u>, though no liability ever existed and no statute authorized expenditure of public funds for such a purpose. The aggregate amount of public funds spent by the school districts for disability insurance annually is staggering and demands a thorough investigation and evaluation by experts in the insurance field.

We wish to emphasize here strongly that the criticism of such insurance purchases is no reflection on the sincerity or good faith of school or any other public officials. What was done was in the mistaken belief that it was simply good sound business principles to purchase such insurance. However,

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[1] Burns vs. American Casualty Co., 127 Cal. App. 198, 269 Pac. 2nd 656; 1959 Duke L.J. No. 4, p. 595, N. 24, Hartford A. & I. Co. vs. Wainscott, 19 Pac. 2nd 328.

[2] Taylor vs. University of Nevada, 73 Nev. 151.

[3] Ibid.

[4] Kesman vs. Fallowfield School, 29 Atl. 2nd 217.

a mistaken belief does not change the law or create authority where none exists. The bald fact remains, and is glaringly apparent, that huge sums of public monies have been spent without legislative authority, and therefore illegally, for liability insurance to protect from a liability that never existed. It is suggested that much of it can be recovered.

It is respectfully submitted that the legislature should, as soon as is reasonably possible, give thorough consideration to the entire insurance program at the state and local levels and decide:

1. Should the doctrine of sovereign immunity be adhered to, waived in part or entirely in all cases where injuries are caused through the negligence or willful misconduct of public officials or employees?

2. Should the State and its political subdivisions continue to purchase fire and other insurance on public buildings and contents or, in lieu thereof, establish a sinking fund program as is done in many other states to provide funds for replacement or improvement of existing buildings or the construction of new structures as growth and need demand.

It is strongly recommended that whatever course is pursued as to liability or other insurance, that a state board be created to be known as the Bonding and Insurance Board, with a membership of three,consisting of the Attorney General, who shall be Chairman, the State Treasurer and the Secretary of State. That such board be empowered to engage technical experts experienced in the fields of insurance and suretyship; that such positions be established in the classified service. That such experts be required to make a continuing study as to the insurance needs of the State and its political subdivisions, and advise the board and the legislature annually of the results of their study. The relation of the board and the technical experts to the bonding of public officials will be discussed in the section on bonding.

It is also strongly urged that whatever type or quantity of insurance is decided upon by the board and its experts and authorized by the legislature, that all of it be purchased on a bid basis, with proper specifications provided by the experts, and that the purchase thereof be made exclusively through the State Purchasing Department. Experience has shown that great savings can be made by this procedure in purchasing. In many states, the purchase of public officials' bonds and insurance is required to be made on a competitive bid basis. Invariably this procedure results in the state getting insurance at a reduced cost. The requirements can be covered by proper specifications so that adequate coverage is assured. Contrary to the contentions of some insurance writers, substantial major companies compete for the business and not, as contended, "cut-throat" or unstable companies only. In the aggregate, the saving is tremendous.

For example, in the New England area, New Hampshire places its insurance on a competitive bid basis. That state as a consequence is able to insure its liquor stock in the amount of 2¼ million dollars for an annual premium of $2,242.00. Whereas Vermont, its next door neighbor, placing similar insurance on a $1\frac{1}{2}$ million dollar stock, on a non-competitive basis pays $8,222.00 per year. Thus New Hampshire insures three-quarters of a million dollars more stock for a premium which is $6,020.00 less than that paid by Vermont.

A similar saving is made in the purchase of automobile insurance. New Hampshire liability insurance on its state automobiles at $100,000-$300,000 public liability limits and $20,000 property damage is purchased for an annual premium of $29.00 per car. Whereas Vermont, with much less coverage ($50,000 and $100,000 public liability and $10,000 property damage), pays $53.00 per car--almost double the New Hampshire premium. If New Hampshire has the same number of publicly-owned cars as Nevada (2,290), the saving over the Vermont premium would aggregate $54,960.

Comparisons are often odious and not always a reliable source of information, and in the matter of insurance coverage and cost in different states this is especially true. However, where total premiums are greatly disproportionate in two or more states,this alone is indicative that some state is paying more than should be paid, or more insurance or greater coverage is being carried than sound business and financial principles dictate. In Nevada, the latter certainly appears to be the case, and very probably both faults are present.

If we consider for a moment the basic reasons for the purchase of insurance by individuals, we can readily see that those reasons are not present when we are considering insurance coverage by a state or a division thereof.

We have already pointed out the insurance cost per car in New Hampshire and Vermont at $29 and $53, respectively.

In Nevada, the per car cost, according to numerous replies to a questionnaire, appears to be as follows: (1) cars of $1,000.00 valuation, $78.08 per year; (2) for cars of $1,500 valuation, $94.18 per year; (3) for cars of $2,000 valuation, $110.00 per year.

It is interesting and informative to compare our coverage and cost with that of California. In making the comparison, however, it must be remembered that we have 2,290 publicly-owned vehicles, whereas California has about 22,000, or ten times the number we have. But the California rate is substantially greater than ours and, whereas, our public liability limits are $50,000 and $100,000, California's coverage is $250,000 and $500,000.

Our property damage coverage is $10,000, while California has property damage insurance of $50,000. Thus it is seen that California has five times the public liability and property damage coverage we carry, yet their cost is only $32.00 per car. It is to be noted that California carries only public liability and property damage and their insurance is purchased on a competitive bid basis. If our computation of our per car cost is correct, and it is, according to data furnished, it can be seen that if rates comparable to California can be obtained enormous savings will be annually effected. This would be so if all exempt cars throughout the state were included in the bid procedure.

We mentioned at the beginning of this discussion that when an individual is considering the purchase of automobile insurance, he is impelled by certain necessary considerations. Those are that usually he has to be financially prepared to make his monthly payments on the purchase price, he must be able to keep his car in running order and be able to respond in damages for injuries caused by his negligent driving. He most probably is on a fixed salary, most of which is necessary for his and his family's existence. He therefore cannot afford to take financial risks the extent of which he can't foresee. He therefore must buy complete coverage; this he can budget for out of his annual salary. He dare not take chances. On the other hand, the state isn't forced to such a conclusion. It can budget for the possibility of certain necessary so-called minor repairs and maintenance. It need only protect itself with insurance from the danger of substantial claims for damage not foreseeable in the ordinary budgeting plans. Such claims can only come from personal injuries or property damage, and for this protection only should a state or other public agency purchase insurance. In this connection too it must be borne in mind, as has been repeatedly pointed out, supra., that no liability insurance whatever can legally be purchased without proper statutory authority. For, if there be no liability, there is nothing to be protected from, and any expenditure of public funds for liability insurance in such a case is an improper expenditure of public monies.

It appears that blanket policy coverage as far as possible results in greater savings. This applies to all types of insurance and coverage, including fire insurance, which can be on a state schedule. If exceptions are unavoidable, the number of policies should be held to the lowest minimum. For without exception it appears that the fewer the policies there are, the less the premium cost.

FIRE INSURANCE

The principles underlying fire insurance are fundamentally simple and the reasons individuals purchase fire insurance are equally simple. First, it is impossible to foresee the future to determine with any accuracy what particular building or house will burn or will not burn. Insurance is taken out because of this inability to foretell which particular house will burn. Second, insurance is possible because of the slight possibility that every house in a given group will burn in a particular period, and as a result and because of the use of statistics concerning the number of buildings that had been destroyed by fire in a given period of time, taking into consideration the type of construction, the location and the services of fire department and a classification thereof, insurance companies are able with sufficient accuracy to warrant setting given rates for given classifications of buildings in given locations, the company is able to establish a ratio of loss such as 1 to 50 or 1 to 100 or more, in order to establish a given rate for such fire insurance coverage. With such information obtained after certain years of experience, rating bureaus established by insurance companies can foretell with reasonable accuracy a proper ratio between the premium dollar and the loss dollar.

If a financial pool were set up by groups of homeowners or building owners it would be somewhat difficult for members of such group to predict with any given accuracy what losses would be sustained unless the group were sufficiently dispersed geographically so as to be located in various states or various localities in a given state. This necessity has been done away with by the formation of such pools set up by other than the house or building owners and these groups sell protection to the houseowners based upon an experience table of rates, and such rates having been established with regard to such experience table of losses. The group of outsiders, which we recognize now as the ordinary stock insurance company, is able to collect enough from the premiums to pay for any losses that ensue and pay for its cost of doing business and still have a sufficient sum for stockholders to warrant stockholders to organize such companies in order to permit the operation of what we recognize now as the conventional insurance company.

This simple illustration exemplifies the idea of sharing the risk that property owners face from loss by fire. The state is a property owner the same as individuals but in a much greater percentage of individual ownership. Furthermore, the state has buildings and groups of buildings the value of which runs into a great amount of money. Because of the geographical dispersion or location of the state's buildings, the risk of any great loss occurring is far less than that faced by property owners whose buildings are located in a small geographical area.

The ordinary houseowner, in normal financial standing, would be unable to bear the loss of his home by fire without any type of insurance to assure such a property owner of a sufficient amount of money to rebuild his home or building in case of fire. This is not exactly the same problem that a state faces because there are various avenues available to the state dealing with possible property damage or loss from fire or extended coverage. The individual houseowner simply cannot afford to take the risk of loss without some insurance coverage. The state has three primary avenues available dealing with such loss. These alternatives are: (1) no insurance whatever; (2) self-insurance; and, (3) commercial or private insurance available to the ordinary property owner. It is well to consider these three avenues available to the state in dealing with the possible loss by fire or any of the extended coverages in order to determine a proper course to pursue.

No insurance is a self-explanatory term. The plan of the government or a political subdivision thereof, operating on a no-insurance plan, is that any building destroyed or damaged will be replaced or repaired by expenditures from savings made by reason of the non-payment of premiums and from current or future revenues.

One major difference between the state as an owner and the individual homeowner is the problem the homeowner faces in case of replacement. The individual homeowner's decision on the insurance question will naturally be based on his needs, his desires and his ability to pay. On the other hand, the state, in common with all state governments in this country, has a constitutional division or separation of powers between the executive and legislative branches. The executive branch is the primary user of the real property constructed by the state, but the expenditure of funds is made by the legislative branch through the exercise of its constitutional and statutory power of appropriation of public monies.

It can be readily seen that under such a system it is possible that the desires and the needs of the users in the executive branch will not be recognized or agreed with fully, or perhaps in certain instances at all, by the legislative branch should a loss be sustained. Certainly it is generally true that the needs of the executive or administrative branch as to buildings or the replacement thereof are recognized and provided for by the legislature. It can be seen, however, that this power of appropriation may in certain instances be used as a means of embarrassing an administration. This is possible when the governor and one or both houses of the legislature represent different parties or factions of the same party.

It can be readily seen from the administration's viewpoint that a no-insurance policy can be extremely dangerous, and most embarrassing in the event of a large or catastrophic loss. The appropriation to replace such a loss may, and probably will, have to come from money which in the normal operation of a government would be earmarked for normal governmental programs, or from funds that would otherwise be set aside to perform a new governmental service. Anyone experienced in budget planning and the prediction of future revenues so as to produce a realistic budget or a budget that will be realistically developed can immediately see the dangers involved in a no-insurance program. For, a sudden demand for funds to replace a catastrophic or really large loss cannot possibly be blended into the normal budget revenue system or routine. It would therefore seem most unwise to embark on a program of no-insurance. This was forcibly shown in the State of Michigan a few years ago when a no-insurance program was indulged in, and some time shortly thereafter the university was destroyed at a loss of some six million dollars. Therefore, it becomes apparent that something other than a no-insurance program should be considered. By that it is not meant that the only other protection is the purchase of conventional insurance policies to cover the replacement costs of buildings. This brings us to the second alternative mentioned above.

This second alternative is what is commonly referred to as "self-insurance." By the use of the term we do not mean that the state or its political subdivisions simply enters the insurance field, but that a procedure is embarked upon by which a sinking fund is established and appropriated to in order to form a cushion to pay for losses that may exceed the aggregate amount estimated, based upon a table of experience.

The first step in such a program is an act of the legislature establishing such a fund and setting aside from unappropriated funds a specific sum based upon previous loss experience to cover estimated losses for the ensuing budget period. As has been pointed out, in connection with this appropriation of a specific sum based with some reasonable accuracy upon previous loss experience, a substantial sum must also be set aside into a sinking or building fund, whatever term it is wished to be used. This, as has been stated, is to form a cushion in case loss goes higher than expected. After the inception of such a program, regular appropriations may be made to the various divisions and departments of government from which these agencies pay into the sinking fund a premium or an amount that bears a reasonable relation to the value of the buildings or other properties with which the administrator of such division or department is charged, or has been entrusted to his custody.

If the experience table upon which the losses were estimated or the rate of loss continues as the table indicates or as one writer stated, "If luck is with the state," the income from the monies paid into the fund by the various agencies of government, or the amount thereof not needed to pay losses, may be invested in bonds or some form of security permitted by law to form an increasingly large reserve against the time when the state may suffer large or catastrophic losses.

In connection with such a program it is possible and advisable at the inception thereof to carry certain amounts of commercial insurance to protect against losses in excess of the normal, for such a period of time as will permit the sinking or reserve fund to be built up to a maximum amount originally established by the legislature or subsequently determined by the legislature to be a reserve fund to assure the payment of any losses that may occur in the future.

If the annual premiums, or what has been termed "set asides," are of a sufficient amount, and, as has been said, if the government is lucky through having no large or catastrophic losses, and if commercial insurance is carried for a while as a safety factor, a large reserve may be set up which can remove the danger of complete depletion of the sinking fund by an exceedingly large or catastrophic loss.

It can be seen that without a cushion of sufficient size or a buffer protection such as that furnished by commercial insurance policies, the state would indeed be in need of some luck, a considerable amount perhaps, during the first few years.

A self-insurance program might be very well planned and approved by experts, but unless it is so devised that it will in a given period of time accumulate a reserve fund sufficient to take care of great or catastrophic losses, the administration may be more than embarrassed and suffer severe criticism and accusations of malfeasance or non-feasance in office that would be merited, and the legislature would then have to be appealed to the same as if there had been no insurance whatever.

It is essential, therefore, that in the consideration of a self-insurance program that, (1) there must be appropriated in the beginning a sufficient reserve fund to make certain the payment of losses or the rebuilding or the repair of buildings needed for the operation of the government; and (2) that each agency of government be required to pay into the sinking fund from its annual or biennial appropriations a sufficient sum to help build the fund into an aggregate amount, previously or thereafter determined by the legislature upon the advice of experts, to remove the possibility of demands upon the legislature for future catastrophic losses. And finally, that during the embryonic or period of time in which the fund is being built, commercial insurance should be carried in such an amount as would protect the state until its reserve fund assumed the proportions necessary to make certain the payments of any catastrophic losses or any great losses that may be occasioned or sustained.

The remaining alternative is the procuring of commercial insurance as has been done in the past in Nevada. This alternative has the advantage that from the moment of coverage or payment of the premium, the great portion of the risk is shifted from available tax revenues to the insurance carrier at a price. It must be borne in mind that insurance companies exist to make profits; this is true whether the company be a mutual or a stock company. Over a long period of time the price which the state has to pay for the insurance against the great loss or a series of losses must, of course, exceed the amount which the insurance carrier pays to the state as the result of normal losses. If the state's premium, or aggregate premiums, approximates its loss experience, then the other patrons of the insurance company would have to carry the burden of paying for part of the state's losses. With a loss experience that could be termed good, the premium cost and loss cost would be of such a difference that it would be considered profitable to induce the abandoning of the commercial insurance program. However, as in the Michigan experience above mentioned, immediately or shortly after the insurance program was terminated a substantial loss may be sustained.

It is clearly apparent, therefore, that the state must either follow one of the two alternatives mentioned above. That is, a program of self-insurance coupled with the establishing of a reserve fund and commercial insurance for protection against great losses or to adhere to the program heretofore followed in Nevada of covering all buildings with commercial insurance policies.

From a study of the loss experience table in Nevada at all levels of government, it would seem exceedingly wise and advisable for the state to seriously consider the second alternative mentioned above of self-insurance coupled with the other protective features mentioned. A review of the insurance premiums paid and losses paid, at least during the preceding five years, would show the advisability of a self-insurance program. A record of the premiums paid and losses paid has been prepared and will be attached to this report as appendix 1.

In connection with the self-insurance program, it should be noted that wherever any public buildings are financed from what may be termed trust monies such as the Nevada Industrial Commission or similar funds which are in the nature of trust funds, and an amortization plan used to finance the property so that revenues would be produced in amounts necessary to assure the replacement of the original building costs, the program would have to provide assurance of the replacement of such property or the repair thereof in case of loss or destruction so that the funds from which the buildings were built would be in no danger of having the source of their repayment disappear entirely. In such instances it would be necessary, perhaps, to completely cover such buildings with commercial insurance until such a time as the sinking fund would be able to replace such buildings in case of loss.

It is to be noted that where a self-insurance program is used the commercial insurance carriers that would insure against greater or catastrophic losses would pay nothing on any loss until damage to the subject of risk, or to the buildings covered by the self-insurance program would exceed a given amount. For instance, a figure could be set at $100,000. or $200,000. that the fund would be liable to pay, and unless such a sum was exceeded, that is to say unless a loss exceeded the sum set, as what might be termed the deductible factor, the insurance carrier would be required to pay nothing. Because of this deductible factor, the state would be able to command a very low premium rate, for such commercial insurance policies. As the sinking fund grew, the deductible factor could be increased and the premium rate go lower each year as the deductible factor or amount increased.

At the inception of the program or subsequently as experience dictated, the fund could be set at a maximum so that money in the fund in excess of the maximum amount set and not necessary for the payment of losses could be used in purchasing reinsurance or for making improvements, or the construction of new state buildings. The improvements to existing buildings could be in reduction of fire hazards or increasing protection against such hazards, such as automatic sprinkling systems or the improvement of high pressure water systems or other improvements that would reduce the possibility of fire losses.

The statute inaugurating such a self-insurance program could provide that money in the fund might be invested in school, local, state and national bonds, the income from which would be credited to the fund. Strict controls should be provided so that only the soundest investments would be permitted so as to maintain a proper degree of liquidity or that "quick assets" would be available. This, perhaps, would need the advice of investment experts, which is already being availed of by at least the Nevada Industrial Commission, if not other agencies of government. It would seem unwise to permit the purchase of corporate shares, at least during the formative period of the fund, as a requirement of liquidity would be great in case of loss of buildings housing vital areas of governmental activity. The experience of other states would seem to indicate that such a self-insurance program, and I refer to the program as outlined, having the protective features of a sufficient initial fund coupled with proper reinsurance and a requirement of the payment of annual premiums, so-called, by the various agencies of government, would be a wise and apparently a revenue producing function. A review of some of the state programs indulging in such a self-insurance program shows that the income from the funds of such program are sometimes sufficient to provide funds for the construction of entirely new and needed state buildings.

A 1958 report of the commissioners of the state sinking fund in South Carolina indicates that the original fund was created in 1900 with assets of $73.75 and insurance of $10,000. The report shows that for the period 1957 and ending 1958 the fund had $445,178,768. worth of insurance in force and had assets of $12,190,000. From the beginning, or rather after the beginning of the fund of 1900, there were various changes made by the creation of the "State Highway Sinking Fund," "The Funded Debt Sinking Fund," "The Insurance Sinking Fund" and "The Reinsurance Sinking Fund" as well as a fund termed "The Ordinary Sinking Fund."

It appears that over the years the fund, or the income therefrom, has been used to build numerous state, county and school buildings; and as indicated in the breakdown, the insurance in effect on June 30, 1958, of the total heretofore given, amounted to $47,000,000. in round figures, on county property, $272,000,000 on school property, and $125,000,000 on state property. It apparently has been the custom or procedure of that fund to construct state, county or school buildings with the earnings of the fund, and then, by an amortization program charge them, that is charge each agency for the building keeping the title to the building in the name of the fund until the original cost plus certain charges for the use of the money as rental or interest has been returned in full. The fund from the beginning of the construction of such buildings carrying insurance thereon, and charging the particular agency for the insurance and maintaining the three requirements of an original appropriation for the so-called safety cushion, the charge annually for the premiums for the state fund insurance and a reinsurance program above a given amount for great or catastrophic losses.

The report shows that the fund sustained for the year 1957-58, fire losses on state property, in the amount of $14,298, and on county property $271,000. and on school property $116,000. For the same period the funds sustained extended coverage losses (this is for windstorn, tornado and similar losses), on state property in the amount of $14,000.; on county property $5,442,000; and on school property in the amount of $108,838. The recapitulation shows that the total extended coverage loss paid by the fund was $128,613. and the total fire loss paid for the year was $131,223. It would appear, certainly under these amounts and under the statute, that the insurance carrier would not have been called upon to pay any losses by reason of the reinsurance factor because, as heretofore explained, in these programs the fund must first pay up to the maximum it is bound under the statutes and agreements before it may call upon the reinsurance carrier to pay anything.

Before such a program could be instituted in Nevada it would be necessary to have a complete inventory and description as well as a statement of values of all the buildings owned by the state and by the other agencies of government that might be permitted to participate in the sinking fund insurance program. It would certainly appear wise, if such a program were embarked upon in Nevada, to permit all the subdivisions of government to insure with the fund. In this way it would permit the fund to grow at a more rapid rate, but it would also require an appropriation or an allocation by all the political subdivisions insuring, in proportion to the amount of insurance carried, and would, perhaps, necessitate a greater reinsurance program for the agencies below the state level.

It would also be necessary to procure the advice of an expert or experts in order to determine the amount of appropriation necessary to institute the program and also the amounts which would be required in annual premiums from the various agencies of government based upon the amount of their capital investments in buildings and other structures.

There appears to be no complete inventory and statement of values maintained or kept current by the state. It is certainly recommended that this be done at an early date and that the inventory contain a description of each building, its location, the type of construction, the date of construction, the original cost as well as present replacement value, in order to determine the amount of insurance necessary for a proper protective program. It is recommended that what has heretofore been termed a bond and insurance board in the recommendations in the report furnished the Legislature in 1960, if a sinking fund program was to be instituted it might well be called the "Division of Sinking Funds, Property and Insurance" or some similar title and that the directors or commissioners thereof, whatever they are termed, be authorized to engage through the personnel commission the experts and needed personnel, all of whom perhaps should be in the classified service in order to set up proper qualifications for such personnel, particularly those required to have experience, education and training in the insurance and suretyship field.

The experience in other states certainly indicates beyond doubt that in the purchase of reinsurance or the purchase of any insurance and bonds should be made through the Purchasing Department on a bid basis. Certainly the invitation to bid should not be thrown wide open, but rather after a survey or an examination of the financial standings, the background of experience and the manner in which certain companies have processed losses, there should be a list of eligible companies approved by the board having the authority therefor, and that in the invitation to bid the invitation should be made only to those approved companies. This is not for the purpose of favortism, but to make certain that the state and its subdivisions of government will be insured only in companies able to write the amount of insurance necessary, which companies certainly should be approved for doing business in Nevada, and also that the state and the other subdivisions of government will be assured that insurance is written in companies that will properly process and adjust losses. Certainly if losses occur the state nor any agency of government would want to face lawsuits to effect settlement, but rather have settlement adjusted within a reasonable length of time so that if any losses were to be paid by such carriers they would be paid prior to the time a rebuilding program would be begun.

This procedure is followed in most all other states, particularly in California, and has proved that it certainly is a wise and advisable procedure to follow.

Some states do require in their law that in the purchase of reinsurance, or so-called direct insurance, upon state or government property no purchase may be made except through a duly licensed resident agent. This is certainly a matter of policy to be determined by the legislature. However, it must be borne in mind that if the sinking fund is established, the agency administering the fund actually becomes an insurer or an insuring agency, and its agreements to purchase reinsurance are certainly in the nature of reinsurance contracts between insurance, or between insuring companies. It certainly appears, because of this, that the fund should be authorized if it appears desirable to deal directly with insurance companies rather than through agents, and leave the matter of commissions to the carrier. Unless such a procedure or program was permitted and a formalized procedure established and publicized, which would be binding upon the public agencies interested in the reinsurance business, each new administration upon taking office would be faced with the dispensation of patronage which could be comparable to the patronage system for filling state positions or jobs.

It appears to have been the custom in the past over a great number of years in the purchase of insurance, and this is borne out by a previous questionnaire which was answered by the various agencies of government, that the insurance for any given agency of government has been placed merely as a matter of patronage, and the percentage of premiums conventionally set aside as agents' commissions has been divided among agents that were determined to be entitled to a percentage of this largess whether or not the agent in question ever wrote a policy. There seems to be no more reason for such a division of percentage or profit in the purchase and sale of insurance than there would be in the purchase and sale of any commodity purchased by the state or its subdivisions. For instance, if one particular automobile agency sold a fleet of cars, certainly any demand by an agent selling similar automobiles in other cities or locations in Nevada, or rather the demand of such an agent for a share of the profits would certainly be looked upon with a jaundiced eye and promptly rejected. This has not been the case with insurance, and there seems to have been not only here but in other states the general thought that anyone in the insurance business is entitled to a little of the political pie and that when the state or any subdivision buys insurance the ordinary commissions must be split up among all the agents, even among agents representing carriers who do not participate in any of the insurance program.

This procedure or problem has caused a great deal of pressure and political influence to be brought to bear upon school officials as well as city, county and state officials. It is certainly the right of the state or its subdivisions to buy proper insurance coverage in a company of sufficient financial standing to insure proper protection, for the best price such insurance can be purchased. And it seems improper in the expenditure of public monies to have considered in the purchase price of such insurance an amount necessary for commissions to be divided up among individual members of insurance agents associations as is presently done, or among all the agents representing a given carrier. This procedure seems to make no more sense than all the grocers of Nevada demanding a certain percentage of the purchase price of the groceries and other supplies purchased by the various state agencies such as the prisons, hospitals or the industrial school.

Suggestion of such possibilities or procedures for purchasing reinsurance certainly presents difficult problems which will be met with considerable resistance. It must be pointed out, however, that if the state may procure its insurance with considerably reduced premiums direct from the companies, the savings effected would undoubtedly, make available a sufficient amount of money to operate the entire personnel and pay the overhead of the organization charged with the administration of such fund.

The system of allocation and distribution of insurance business as presently in effect and which has been in effect for decades certainly leads people to suspect that the allocation and the handling of such business is on a patronage basis whether this is true in fact. If there is no patronage involved, then those authorized to conduct the insurance purchases are certainly unjustly suspect. It certainly seems beyond refutation that a program based upon bid invitations to all carriers who are found to be financially sound and possessed of a record of performance cannot be criticized and would exclude the liklihood of allocation of business upon a patronage basis and would certainly place the agency charged with the purchase of such administration beyond such undeserved criticism and would certainly remove many of the personal headaches with which administrators are now afflicted in the acquisition of proper insurance coverage. From conversations had with various administrators in different levels of government in the state during the study leading up to this report, I believe such a program of insurance purchase would be welcomed.

In 1957, a committee of the California Legislature conducted an investigation which dealt more with auto and liability insurance rather than fire and extended coverage, and a paragraph in their report certainly seems to bear out the reasoning leading up to the recommendations made above. In this report the author wrote as follows:

> The overwhelming proof of the existence of political favoritism in the selection of brokers to receive commissions on insurance, and fear on the part of the administration of offending politically powerful individuals inhibited improvement in the administration of the insurance program and made it apparent that there is a need for corrective legislation in the area of insurance administration.

It should be emphasized here that in California as well as the study here in Nevada there is not the slightest hint of any improper conduct or dishonesty. The only objection is that unless such a program as recommended be indulged in or initiated, we will--and I refer to each agency of government--continually be plagued with the pressure of the interested parties for a share in the patronage. Certainly it is a relatively harmless type of patronage, but whatever kind of patronage it is, patronage means buying support; and buying support is contrary to the ethical standards of government as well as contrary to the principles of ordinary sound business. Certainly when tax money is being spent by public administrators, economy or low cost should ordinarily be the goal, assuming that proper specifications for the coverage as well as the bidding companies have been established in the procedure.

In such a program, a prime problem is that the business might fall to a few large companies. It perhaps would be wise to consider with regard to cost, a proper distribution of the business in order that any given company might not carry too much of the business, which of itself may be a violation of good insurance practice. This danger or problem could be eliminated by a requirement either in the statute or in rules or regulations that the insurance be divided into multiples of a given number of thousands of dollars. For instance, in building insurance it could be provided that no one carrier might write insurance on public buildings in an amount greater than X number of dollars or X number of multiples of thousands of dollars. Or the requirement that any given company having previously bid successfully and obtained the maximum amount of insurance permissible either under the statute or rules and regulations would be precluded from bidding until certain eventualities. By this is meant new buildings constructed, the company's financial condition improved or some such a delineation so as to prevent the possibility of a few large carriers procuring great majority of the insurance business of the state.

RATES

Under this subdivision the writer would like to make something clear that apparently is not clear to public administrators purchasing insurance.

There is nothing in any law that would prevent a state or any agency of government from procuring business, insurance business or insurance coverage upon a bid basis direct from a carrier. Notwithstanding this fact, however, many administrators, particularly school superintendents, have been advised by insurance agents that insurance cannot be purchased upon a bid basis because "the law," as the term is used, establishes the rates. In other words, the rates are established as a matter of statute. This is absolutely erroneous. Rates as most people experienced in the purchase of insurance know or should know, are established by rating bureaus which are supported by groups of insurance carriers, and function on behalf of the carriers. It is true the theory is that such functions are merely for the establishment of equitable rates, and by equitable are meant rates which would permit a company to earn income sufficient to pay their overhead costs and losses and return a fair amount to their investors. However, it must be noted that those who manage rating bureaus are virtually employees of insurance carriers. They do not always approach the problems objectively and certainly the study leading up to this report shows beyond a question of a doubt that there seems to be no rhyme nor reason for the rates that are charged for all types of insurance in Nevada. For example in three separate agencies of government below the state level the administrator thereof, believing that for a time they had been paying too much for their comprehensive liability insurance, insisted upon bids. The result in one instance was a reduction from some $4,700. per year to approximately $2,500. per year for the same coverage. In the two other instances mentioned, at least one-half of the prior premium was saved. One administrator requested the insurance agent with whom he was dealing to furnish bids upon fire and extended coverage upon buildings and was informed that this was impossible, that it would be contrary to law because rates were set by law.

The tabulation of the ratio between the premium dollar and the loss dollar in every area of coverage will show that the rates in most every instance were far in excess of what they should be. Nor does it appear that there was any thought given in the determination of a rate, as to the location of the building, the type of construction or the type of fire department service available. The rates seem to be whatever the agent or some person in his office thought advisable. There seems to be almost as many rates as there are policies. In one instance in a given area of government, one agent insuring the same property during the same period of time on three separate policies used three different rates. Certainly we know that rates are changed by reason of experience tables, but it certainly doesn't appear in the instance mentioned that there was any reason for an increase in rates because there had been absolutely no loss.

It is well known that in governmental insurance there is a reduction to which the state or the agency is entitled based upon the dispersion or the multiple locations of the buildings or property covered by the insurance. In this study we found no such reduction. As a matter of fact, the relation between the premium dollar and the loss dollar in most all property insurance is simply far beyond what any reason would dictate. In only one agency of government and one area thereof was any substantial loss found over the five-year period covered by the study. Furthermore in many instances of increased premiums for fire insurance there had been a negligible amount of loss in either dwellings, that is private dwellings, business or industrial property or in the property of the agency of government insured. Yet the rates continually were raised from time to time without any factual background or experience of losses warranting any such an increase.

It is suggested by reason of this that irrespective of whether or not the recommendations in this report are adopted by the legislature that some study should be made objectively by some disinterested agency of government into the matter of rates. For it appears without possibility of refutation that in many instances the rates, particularly for fire and extended coverage, are far in excess of that which would be considered proper or which are necessary for a company to earn a sufficient amount of money to warrant its existence.

Cost-Loss Considerations

The records compiled by the fire underwriting companies for the 20-year period 1929-49 show the cost-loss ratio for all stock companies for all fire coverage was 50%. In other words, for each premium dollar collected, fifty cents was paid out for losses.[1] From the remaining 50%, the companies pay the overhead cost of doing business, set aside reserves for extraordinary losses and provide for dividends to stockholders.

A committee of the National Association of Insurance Commissioners in a 1949 report recommended a factor of six percent for catastrophees and that fire insurance rates should be revised downward when "actual profits" exceeded 8 percent and revised upward when "actual profits" declined below 4 percent.

In this connection it should be noted that the 50 percent cost-loss ratio was determined by considering the losses for all coverage. Numerous state and national studies of the cost-loss ratio for school building coverage exclusively have shown that it was "almost without exception" a great deal less than that for commercial and other building coverage.

For example, the cost-loss ratio for school building coverage for the period 1921-30 was 28.7 percent; for the period 1931-37, 26.9 percent; and for the period from 1938 to 1945, the ratio was 31.9 percent. Thus, the average loss ratio for the period of 1921 to 1945 was 29.1 percent, or almost 20 percent less than the 50 percent ratio for all coverage.

Another study of 141 school districts in Canada and the United States for the period 1938 to 1945 indicated a cost-loss ratio of 31.9 percent.

It is important to note that in these studies the insurance losses on school buildings in cities, villages and strictly rural areas was considered, and that the ratio of losses to premiums paid was higher in village areas and the rural areas than in cities.

In many instances, the data furnished by such studies were used in obtaining lower fire insurance rates. In other instances, when lower rates were refused, some school districts established self-insurance programs by establishing sinking funds with re-insurance to cover excessive losses, as hereafter recommended.

It has been the experience of all states and school districts that, whenever a self-insurance program has been proposed, it has been opposed with arguments of "socialism" and "government in business." Such contentions are

1 Best's Insurance Guide (1950).

groundless as the state is not entering the insurance business to sell insurance to private persons or business or industrial corporations. It is merely underwriting a portion of the risks of the state, and of its political subdivisions that care to join in the program. In this latter connection, if such a program is enacted, it may be advisable to give the school districts and other political subdivisions the option to join or not join in the program.

In connection with such a proposal, it should be noted that it is not even comparable to the industrial insurance program of the Nevada Industrial Commission, which writes insurance for all business and industry of Nevada required by law to carry such insurance.

It is also to be borne in mind that several states do not insure public buildings at all; that some forbid it by law; and some have engaged in a self-insurance program such as herein recommended.

It is submitted that the experience table of cost-loss ratios in this state at all levels of government indicate that fire insurance rates are excessive and that a self-insurance program with proper reserves and reinsurance would be a fruitful field for substantial savings of tax money.

CONCLUSIONS AND RECOMMENDATIONS

In conclusion it is strongly recommended that there be established an ex officio board or commission such as a bonding and insurance board or a sinking fund board of commissioners, or some ex officio board having authority to engage personnel experienced in the insurance field. It is further recommended that consideration be given to the coverage in the various insurance categories to the end that unwise coverage will not be purchased. In this connection, it is well to consider the experience or the practice of other states. For example, the State of California does not carry any collision or upset or comprehensive or fire or theft. It carries only public liability in substantial amounts, that is the minimum of $250,000. and a maximum of $500,000. for each accident, and property damage in the amount of $100,000.

It seems unwise from the standpoint of the state or other agencies of government to carry every conceivable sort of automobile coverage. As pointed out above, the individual carries collision, upset, comprehensive or other such categories of insurance because in his financial program he would be unable to take from his monthly earnings an amount sufficient to pay for any extensive repairs to an automobile or to replace his automobile in case of fire or acquire another in case of theft. He can, however, within his means budget for the coverage of such protection, hence his need for insurance.

On the other hand, the state is in an entirely different position, and may take care of such losses sustained without any serious impairment of its functions or the functions of the various agencies of government. In the normal course of events there simply would not be a sufficient number of losses to seriously impair financial operations of a governmental agency. Hence, the recommendation that serious consideration be given to limiting coverage only to public liability for injury sustained by persons and property damage for injuries to property by reason of the operation of state automobiles.

Finally, supplementing the purchasing recommendation, it is urged that the purchase of insurance be done only after proper specifications are drawn by experienced technicians to insure a sufficient and proper coverage and that the Purchasing Department, with the aid of such specifications, advertise for bids and require that such bids comply with the specifications which can require certain specific policy provisions to insure a proper coverage. It is believed that the savings effected by such an insurance program and the manner of purchasing insurance would far exceed the amount necessary to defray the costs or expenses of such a new agency, such as a bond and insurance board or commission.

PART II

BONDING OF PUBLIC OFFICIALS

During the course of the insurance study, the question arose repeatedly as to whether the state or any of its political subdivisions could purchase insurance from mutual companies. The request was made to the Attorney General's office for an answer to that question; and the Attorney General answered in the affirmative in opinion no. 190 issued November 14, 1960. But the policies issued by mutual companies must provide clearly in their provisions that such policies are non-assessable and, I quote from the Attorney General's opinion, "are clearly marked thereon to be 'without contingent liability.'"

In this connection, however, attention is called to the provisions of NRS 682.210 mentioned in the Attorney General's opinion on page 4 that mutual companies may issue policies without contingent liability only when a surplus equal to the capital stock of a stock company doing the same kind or kinds of business, but cannot issue such policies during any time it shall not have such a surplus. To state this restriction is to show the dangers involved. In any such case it would be wise to consult with the insurance commissioner as to the status of such a mutual company in order to see whether at that particular time they are qualified to do business in Nevada, that is to issue policies of insurance without contingent liability to agencies of government.

It is strongly recommended that the legislature consider the problem hereinabove discussed, and enact legislation making it mandatory for all governmental administrators, department and division heads to report to the Bond and Insurance Board the insurance needs of their particular agencies; that such reports be evaluated by the technical experts of the Board and that the Board, on the advice of such experts, require the Purchasing Department to procure such insurance as is determined to be necessary to properly protect the State and any of its subdivisions through a competitive bid procedure. The Board's technical experts shall draft necessary specifications for all insurance bids.

BONDS OF PUBLIC OFFICIALS

BONDS AND OATHS OF OFFICE

The election or appointment of a public officer does not of itself always entitle the official to assume the office he desires. Election or appointment is only the initial step in a chain of events which must take place before the official can enter upon the performance of his duties. There are at least two of these events that must take place in most every instance. They are the taking of the oath of office to the effect that he will faithfully perform the duties of his office; the other event is the furnishing of the official bond of his office usually required by the statute that creates such an office. Until the oath is taken and the bond given, the officer as a general rule cannot assume the duties of his office nor perform any functions of the office.

There is a distinct connection between the oath of office and the official bond. The form of the oath is fixed either by the constitution of a state or by its statutes or both. In Nevada, the provision is in both the Constitution and statutes. The NRS section is merely a codification of the constitutional provision.[1]

The Nevada Constitution does not appear to have any provisions making the filing of an official bond a prerequisite to office. However, the Nevada statutes are replete with bond requirements. It is usually the legislative custom, when enacting a statute which creates a new office, to provide for a qualifying bond. Such a bond is usually termed a "faithful performance" bond. This term is usually found in most all official bonds; the statute providing that before the official assumes his office he shall furnish a surety bond by which the surety binds itself or themselves that the officer "shall well and faithfully perform the duties of his said office or position as required by law." These words truly cover a multitude of sins and wrongdoings. The extent of the legal meaning of the words "faithful performance" bonds will be later discussed in a comparison of our bond trust fund bonds with corporate surety "faithful performance" bonds. It should, however, be pointed out here that <u>our bond trust fund bonds are not now, and never have been, "faithful performance bonds</u>." This fact alone presents legal problems of considerable magnitude and complexity which can be better explained and discussed under a separate section of this report.

PURPOSE OF OFFICIAL BONDS

Under this heading it is well to define or explain the legal implications of public official bonds--to explain what they are, and are not, in legal contemplation.

Bonds are often confused with insurance policies. This is in error, because there are considerable differences between the two. An insurance policy or contract is a two-party agreement by which the insurer agrees to pay directly to the insured losses suffered by the insured which may be covered by the terms and conditions of the policy.

On the other hand, a bond (also a contract) binds the surety to pay, <u>not to the principal</u>, but to the beneficiary, often called the "obligee," losses which the beneficiary has suffered because of derelictions of the principal. These derelictions do not have to be culpable or illegal acts; they may be negligent acts, errors, omissions, or any act which causes or permits a loss by some intervening agent. For example, a loss by burglary, holdup, fire or an unexplainable loss.

A person, in buying an insurance policy, is protecting <u>himself</u> against possible loss; whereas a public official bond is not purchased to protect the person named as principal, but to protect <u>third persons</u>, i.e. <u>the public</u>, the state, etc. from losses occasioned by acts or failure to act on the part of the principal. This sounds elemental, but it is a considerable area of confusion.

A distinct basic difference between insurance and bonds is that usually the insurer in case of a loss pays to the insured the loss sustained with no

[1]Const., Art. XV, Sec. 2, and NRS 282.020.

right to recover anything by way of contribution from the insured, even though the insured violated a law in connection with the loss or was guilty of willful misconduct--for example, driving a car recklessly or while drunk or otherwise in violation of law.

On the other hand, as a firm part of the law of suretyship, if the surety is required to pay the beneficiary a loss caused by the principal, the surety has the legal right to demand contribution or restitution from the principal. That is why bond premiums are so relatively low in comparison with insurance.

HISTORY OF SURETYSHIP

The beginning of this field of law termed "Suretyship," is lost in antiquity. However, a corporate suretyship, where a bond or undertaking is furnished for a fee, is of comparatively recent origin.

It was after 1875 that the first corporate surety company was formed, and it wasn't until about 1880 that the first public official corporate surety bond was furnished. Theretofore, bonds were furnished by personal sureties, or in lieu thereof, property, either real or personal, was pledged. Often the personal sureties were relatives and more often friends of the official required to be bonded. In most all cases, it was a gratuitous act; however, incidental benefits often flowed to the sureties because of their supposed gratuitous act. For example, often bankers or bank stockholders would become surety for officials authorized to deposit public funds; and, as a consequence, large deposits, often long-term, would be deposited in the bank in question.

Notwithstanding that there generally was some consideration for the surety agreement, most courts looked upon it as a generous act without fee or reward, and, as a result, applied the rule of strict construction. This rule often allowed the surety to escape the payment of a loss a corporate surety would now pay without a complaint. For example, if the bond agreement required certain acts on the beneficiary's part tending to prevent loss, and the beneficiary failed to perform all the acts, the surety would be excused.

For instance, if periodic audits were required either by law or agreement, and not made for some of the periods in which a default occurred, the sureties would usually not be required to pay the losses occurring that could have been prevented by the required audits.

We do not mean to indicate that courts will hold corporate sureties liable even though statutory safeguards are ignored, for certainly if money counts and audits are required by law and not made as provided, a surety would certainly be entitled to show that if the counts or audits had been made as the law provided the default would have been discovered sooner and the amount of loss greatly reduced. We mean only to point out that the cases prior to 1880 may not be reliable in cases of corporate sureties.

It is imperative, therefore, for all money handling officials to examine the statutes carefully and to make certain that all statutory safeguards are complied with not only to prevent losses in the first place, but to prevent the possibility of a valid defense based on the failure to observe the safeguards.

Many statutes provide that the bond must be made in contemplation not only of existing law, but laws subsequently passed during the period the bond is in force. For example, NRS 282.050 subsection 2 provides that every official bond shall be surety for the faithful discharge of all duties required by "any law enacted subsequently to the execution of such bond."

CORPORATE SURETY BONDS

With the advent of the corporate surety bond for public officers, the courts began an about face. The reasoning was that the surety company assumed a risk for a fee which had been established on an experience table based on the relation of coverage to loss. The old rule of "strict construction in favor of the sureties" was changed completely to a "strict construction against the surety." Where surety bonds were furnished for the faithful or honest handling of public funds, the surety became a virtual insurer, and some amazing decisions resulted.[1]

As has been stated above, in connection with the discussion of personal sureties, the rule was always in favor of the sureties unless the principal was clearly at fault. This was the Common Law rule, and public officers were considered bailees and the law of bailments was applied.[2] Good faith and diligence was a defense. On the contrary, now the public officer is considered a debtor and is so held to be by the courts. It is true, as always, there is not a unanimity of opinion in the several state courts, but the doctrine of strict liability prevails in most all jurisdictions.

The theoretical basis of the rule is that the officer takes office fully aware of his liability and that by his bond and the statute defining his duties, "he has contracted to become an insurer."[3]

The rule is usually applied so rigidly that even theft, holdup, loss by fire or bank failure, cannot be a defense.[4]

In one instance, a treasury official and his surety were held liable for the loss of unissued treasury notes destroyed by fire without fault or negligence on the part of the official.[5] This absolute liability rule seems to be too harsh to be justified by reason. However, it is the overwhelming weight of authority with only a few modern cases contra. Courts justify the doctrine by the "public policy" argument.

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[1]City of Philadelphia vs. National Surety Co. 173 Atl. 181.

[2]Jordan vs. Baker (Ky.) 66 S.W. 2nd 84, 93 A.L.R. 1059.

[3]State vs. Gramm (Wyo.) 52 Pac. 533.

[4]Aetna C. & S. Co. vs. Wilmington (Del.) 160 Atl. 749.

[5]Smythe vs. U.S., 188 U.S. 156.

In an 1896 New York case,[1] the court held a supervisor liable for the loss of public money caused by a bank failure. The court based its decision squarely upon public policy, saying:

> As before intimated, we must consider and decide this question upon general principles and in the light of public policy.
>
> In the case of an officer disbursing the public moneys much may be said in favor of limiting his liability where he acts in good faith and without negligence, and strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. When considering this side of the case it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect.
>
> It is at this point, however, that the question of public policy presents itself, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents.
>
> Without regard to decisions outside of our own jurisdiction, we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability which requires a public official to assume all risks of loss and imposes upon him the duty to account as a debtor for the funds in his custody.

An early Dakota Territory case shows the inflexibility and harshness of the rule as applied by courts.[2] The case is particularly interesting in that it occurred before the advent of corporate suretyship, but the court nevertheless followed the harsh rule of absolute liability.

The defendant was a probate judge and ex officio county treasurer and a fire destroyed all his records and money. He had previously requested that a fire proof safe be purchased which request was refused. This fact was pleaded as a defense. The court brushed the argument aside stating:

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[1]Tillinghast vs. Merrill, 45 N.E. 375, 34 L.R.A. 678.

[2]Clay County vs. Simonsen, 46 N.W. 592.

> The fact that plaintiff failed to furnish a safe on request of defendant Simonsen is no excuse for the non-performance of his obligation. He became personally responsible, and in the absence of any statutory provision, must provide for the safekeeping of the funds and property coming into his hands, the same as a common carrier. (Halbert et al v. The State, 22 Ind. 125).

These harsh rules, with some exceptions, came into being after the advent of corporate surety bonds, and courts undoubtedly were influenced by the new type of suretyship wherein there was a compensated surety who entered the hazardous business as a profit-making enterprise. The belief being that if defaults exceeded the aggregate of bond premiums, the surety companies would of certainty increase the rates.

Prior to the early nineteen thirties and the plague of bank failures, it was the invariable rule, with few exceptions, that a public official was liable for the loss of public monies by bank failures no matter how diligent and careful he was in selecting the bank.[1]

As a result of this strict rule, during the bank failures of the early nineteen thirties surety companies paid out more than forty million dollars because of the loss of public funds deposited in banks that failed. As a consequence, it was virtually impossible to procure surety bonds to cover such losses.

This rule, which held public officers and the bonding companies liable for public funds lost through bank failures has been repealed by statute in most states, and statutory authority enacted for the deposit of public funds. If the statutes are followed, no liability attaches to the officer should a loss occur through a bank failure. Such deposits are further protected in most states by comparable deposits of securities with the depositing agency equal to the deposit.

NRS 282.280 (subsection 2) may lull some officials into a false sense of security. It reads:

> Surety bonds issued under the provisions of NRS 282.230 to 282.350, inclusive, shall not apply to losses resulting from acts of God or nature, fire, burglary, holdup or other cause over which the person bonded exercised no control or influence, was free from participation therein, and provided he exercised reasonable diligence in safeguarding the funds and securities committed to his care.

It is important to note that this section does not free the official from liability. It provides <u>only</u> that the bond trust fund <u>bonds</u> shall not be surety for losses resulting from "acts of God or nature, fire, burglary, holdup or other cause over which the person bonded exercised no control or influence" etc. It perhaps was the intent of the author of the section to free money handling officials from the onerous burden of absolute liability, but the section does not so provide. As it is now worded it frees the bond trust fund, but not the public official.

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[1]Nat. Surety Co. vs. Salt Lake Co., 5 Fed. 2nd 34; Tillinghast vs. Merrill, (N.Y.) 45 N.E. 375; 93 A.L.R. 821.

The various exemptions contained in the section, it must be emphasized, are limited to bond trust fund bonds by the terms of the statute. What about the officials covered by corporate surety bonds or personal surety bonds? Under the well-known rule of exclusion, expressed by the Latin maxim, "Expressio unius est exlusio alterius," it would appear that the exclusions are limited solely to the bond trust fund bonds.

The maxim is interpreted to mean that the mention of one thing or class of things in a statute implies the exclusion of all others. In a California case,[1] the court stated: "Under this maxim, if a statute specifies one exception to a general rule . . . other exceptions are excluded."

Thus, in light of judicial decisions, it seems certain that the exceptions stated do not apply to personal surety bonds, or to corporate surety bonds. There are many of the latter in spite of the provisions of NRS 282.240 requiring all officials to be bonded under the bond trust fund act.

If, as stated, officers covered by personal and corporate surety bonds cannot enjoy the benefits of the stated exemptions, they may find themselves in a precarious position in case of a loss by fire, holdup, etc. They might well face financial ruin. For, as we have set forth above in the comparison of bonds to insurance, the surety has the absolute right of contribution from the principal in case of payment for any loss for a bonded official. This right applies to the bond trust fund as a surety, although it appears never to have been availed of.

It should be noted that although the bond trust fund act was initially enacted in 1933, and materially changed and strengthened in 1937, public official bonds have been required by statute ever since Nevada became a state. The equivalent of NRS Sections 282.040 to and including 282.150 has been a part of our statutes ever since 1865. Unfortunately, when the State entered the bonding business, those who drafted the original statutes did not check the then existing law in order to prevent conflicts. As a result, there are conflicts which no expert in suretyship and bonding can resolve with certainty. For example, as pointed out in the discussion of the case of Hill vs. Thomas, supra., the provisions of NRS Section 282.060 have been in Nevada statutes since 1865.

That important section is a mandatory requirement that:

> Every official bond shall be in force and obligatory upon the principal and sureties thereon to and for the State of Nevada and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity.

Subsection 2 further provides that any person so injured or aggrieved "may bring suit on the bond in his own name without any assignment."

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[1] People vs. One Ford Truck, 129 Pac. 2nd 641.

This section, as previously stated, was the section upon which the Supreme Court based its decision in the Hill and Thomas case. It is submitted that a consideration of the wording of that section will demonstrate that, unless there was an implied repeal of NRS 282.060 by the adoption of the bond trust fund act, and the 1957 amendment to NRS 282.230, by which the liability for tortious acts was deleted, all official's bonds cover not only fiscal defaults, but also liability for tortious acts and wrongful misconduct of all officials and employees required by law to be bonded. A strong argument can be made for the contention that there was an implied repeal although there is a legal presumption to the contrary.[1]

The rule of law as to the doctrine of implied repeal used by courts in the construction of statutes is that where a later law is in irreconcilable conflict with an earlier law on the same subject, the earlier law is repealed by inference. The question is always: What was the legislative intent?[2]

The presumption against an implied repeal arised when there is no express repeal.[3] Courts most generally hold that what clearly appears to be an express repeal is only an implied repeal. These holdings are found in cases in which an omnibus repealer, such as "All laws in conflict herewith are hereby repealed." For the question always arises: "What laws are in conflict?"[4] However, a guide courts most always use is: Where the latter act embraces the subject of the earlier act and is clearly a substitute therefor, the former is repealed by the latter.

If we apply the rule to our problem, it would seem to appear that the doctrine of implied repeal should apply. For both statutes embrace the same subject matter and are clearly repugnant. NRS 282.060 states that the bonds shall protect from fiscal defaults and tortious misconduct; whereas NRS 282.230 by the 1957 amendment was amended by deleting all liability except for fiscal defaults. The question, however, was made academic by the adoption of the 1959 amendment to NRS 282.230, which restored the wording deleted by the 1957 amendment.

Thus, again, the State and all its subdivisions having officials bonded under the bond trust fund become liable, at least to the extent of the bond, for damages caused by the tortious misconduct and other wrongful acts of such bonded officials. It is submitted that the risk the fund assumes as surety on public official bonds for damages sustained by individuals because of the negligence of public officers and employees is far too great for the bond trust fund that now aggregates less than $500,000. This becomes glaringly apparent when it is learned that there is a suit now pending against the State and an officer bonded by the bond trust fund in which the plaintiff is seeking damages exceeding $400,000. It is perhaps not remotely possible that the judgment if for the plaintiff will approximate any major portion of the sum prayed for.

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[1]Chilson vs. Jerome, 102 Cal. App. 635; Bookbinder vs. U.S., 287 Fed. 790.

[2]Smith vs. Mathews, 155 Cal. 752.

[3]Gould vs. Bennett, 276 N.Y.S. 113.

[4]Drew vs. Mumford, (Nev.) 206 N.W. 159.

However, the exposure is ever present and the possibility of judgment in a tort case in excess of the amount of the fund is not something remote. Bear in mind that we have been discussing only the risk incident to damages for tortious acts, a hazard usually covered by liability or indemnity insurance. When the bond trust fund is measured from a suretyship standpoint, the results are equally disturbing, if not shocking.

BOND TRUST FUND EXPOSURE

In a survey made for this study by one of the state auditors sometime last August, it was established that the fund has assumed risks aggregating $5,828,200. by reason of becoming surety for around 865 officers and employees.

It is a general presumption of law that official duty is performed, and performed faithfully, in the manner provided by law. However, in light of experience in this and other states, this is a violent presumption, not in accord with historical fact. Shortly after Nevada became a state, a high state official embezzled approximately $130,000; about a half-century later, another high state official with the connivance of another state official embezzled over half a million dollars. Since 1953 the bond trust fund has paid out more than $97,000. approximately $80,000. of which was to cover fiscal losses caused by embezzlement or theft. Had the official who stole the half million been covered by the bond trust fund, it is tragically apparent the fund would not have had assets to the amount of the theft.

Most everyone is familiar with the Illinois public official scandal, in which more than three million dollars of state funds were stolen by a man who was generally believed to be the soul of honor and integrity and who was then confidently believed to be the next governor of Illinois. This will be further discussed in a later part of this report in which it will be recommended that there be no discretion in the matter of public bonding.

Referring again to the extent of the risk the bond trust fund has assumed, it is most important to consider some state and federal laws and regulations controlling bonding of public officials by corporate surety companies. It is a federal rule as well as some states, including California, that no corporate surety company may bond in one instance in an amount over 10 percent of its total capital and surplus. This is a sound rule based upon experience tables over a long period of time. Nevada's bond trust fund has at least four officials bonded for $250,000. each, and several more for from $50,000. to $200,000. Such coverage is entirely out of proportion to recognized principles of suretyship. Although these are not "faithful performance" bonds in the legal sense of that term, they are surety for all fiscal defaults as well as a virtual indemnity policy to cover all damage caused by torts. This latter liability, or the extent thereof, is beyond the realm of human ability to predict within the widest range. For example, a particular agency of government may go for years of activity without a single tort claim, and then in one year have a plethora of suits based on torts, the judgments in which may aggregate millions. Consider for an instant the Texas City disaster, mentioned above, in which the damages exceeded a quarter billion dollars. With insurance, the total cost can be spread out; the annual premiums estimated and budgeted for. Protection for such eventualities belongs in the field of casualty insurance, not suretyship. Such coverage certainly should not be attempted by a fund as small as our bond trust fund, which has already issued public official bonds far in excess of any safe limit. That risk alone is enough to give a manager of a corporate surety company of similar financial status heart failure.

A very serious question is presented by a conflict of our Nevada statutes. I refer to the so-called basic statutes creating an office, in which or in a nearby statute, it is provided that before the officer appointed or elected may assume the duties of his office he must furnish a "faithful performance bond." <u>The bonds furnished under the bond trust fund act are not now and never have been faithful performance bonds</u>. The problems caused by this conflict may be the most momentous and troublesome that Nevada public officers have ever faced. To understand these problems and the frightening consequences that might occur, it is necessary to go into some basic laws of suretyship and just what "faithful performance" bonds really are in the law of suretyship.

Most statutes dealing with the bonding of public officials require that the official bonds be worded as follows: "That he shall faithfully perform the duties of his office." It is also the rule by the great weight of authority that the statute requiring the bond and providing for the conditions thereof is to be considered an integral part of the bond, whether set forth therein or not; and, conditions which attempt to limit or restrict the surety's liability contrary to law are ignored as surplusages.[1]

WHAT ARE FAITHFUL PERFORMANCE BONDS?

In an early Nevada case, the court, in referring to the meaning and legal intent of a public official fiathful performance bond, stated:

> It is apparent that a bond requiring a faithful performance of duty is as binding upon the principal and his sureties as if all the statutory duties of the officer were inserted in the bond.[2]

In that case, the county treasurer was robbed by armed men and the public money forcibly taken from him. He defended by stating the facts and that he was not guilty of any want of care and that the money had been taken from him "without fault of negligence" and had been taken by "irresistible force."

The court answered the contention by citing several cases in point and adding:

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[1]Lawrence vs. Amer. Surety Co. (Mich.) 249, N.W. 3, 88 A.L.R. 535.

[2]State vs. Nevin, 19 Nev. 162.

> He (the treasurer) knew the extent of his obligations when he entered it, and he realized the fruits of this obligation by the enjoyment of the office . . . The obligation to keep safely the public money is absolute, without any condition, express or implied.

In State vs. Moore, 74 Mo. 413, the county treasurer, without statutory authority, deposited public funds in a bank for safekeeping, because the county at the time was "being overrun with tramps, thieves, robbers and public enemies." The bank failed and the money was totally lost.

The court brushed aside the attempted defense, saying:

> Such an answer as this, we think, is insufficient to shield the defendant from liability, in any view which can be taken of the matter . . . the obligation assumed by the defendant in his bond . . . can only be met . . . by making delivery or payment . . .

In another federal case, arising in Louisiana, and heretofore mentioned,[1] a superintendent of the mint in New Orleans had received $25,000. in treasury notes, which through no fault of his own were destroyed by fire. It is interesting to note that the money was not yet an obligation of the government, as it had not been publicly issued. The court nevertheless held the official and his surety absolutely liable.

We have above mentioned the West Virginia case in which a police officer and his surety were held liable for a judgment awarded in a slander action based upon the officer falsely accusing a merchant of putting a slug or fake coin in a parking meter.

Without unduly prolonging this report by an unnecessary citation of cases, the surety upon a faithful performance bond has been held liable in damages for slander, libel, false arrest, malicious prosecution, for expenditure of public funds without statutory authority, for failure to properly assess property for tax purposes, for failure to collect taxes, for loss of public property, for money lost due to burglary, robbery and holdup, for forgery and for diversion of public monies, also for acts of the principal's deputies, assistants and subordinates even involving incompetence and dishonesty.

In cases of officials who do not handle public funds or property, they and their sureties have been held liable for improper directions and errors of judgment causing loss, for false arrest, improper or excessive attachments, for seizing wrong property by virtue of writs and by levying on property exempt from execution--in short, for all possible errors or omissions.

In the loss of public property question, it is to be noted that our bond trust fund act does not mention public property. Yet, property of great value is regularly entrusted to public officials. If such property

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[1] Smythe vs. U. S., 188 U.S. 156.

were lost through the negligence or the errors or omissions of an official covered by a full faithful performance bond, payment to the amount of the loss would be made. However, no such protection is afforded any of the beneficiaries under our official bond trust fund bonds.

In this connection, the employees of an eastern electronics firm a few years ago were all covered by faithful performance bonds. Extensive thievery was discovered, by which a great quantity of valuable electronic materials were taken. The surety was required to pay to the company for the loss, in excess of four million dollars.

To sum up, the meaning of faithful performance, as we have asserted under the insurance discussion, is considered by the overwhelming weight of authority to mean:

> . . . not only honesty, but also a punctilious discharge of all the duties of the office, requiring competence, diligence and attention, without any malfeasance or nonfeasance, errors or omissions. (Black's Law Dictionary)

CONFUSION IN NEVADA STATUTES

At this point of our discussion, I believe it advisable to call attention to problems and conflicts in our statutes dealing with the bonding of public officials. I refer to the sections beginning with NRS 282.010 to and including 282.350. The so-called bond trust fund act begins with NRS 282.230 and ends with 282.350. Let us consider these provisions first.

NRS 282.230 is the section creating the fund and setting forth the purpose thereof. When this section was first enacted in 1933 (Statutes, 1933, page 161), the purpose was expressed as limited solely to protect the State from fiscal defaults "or other wrongful acts on the part of officials . . . whose official duties have to do with the handling of funds." This latter underscored provision has always been in the statute and still remains; although as we pointed out above, NRS 282.060 has always been in the law since 1865, thus making the bonds also cover tortious acts.

NRS 282.240 has been a part of our bonding provisions since the creation of the bond trust fund in 1933. This section required that every state, county and township official and his deputy, and officials of incorporated cities and irrigation districts and their deputies ". . . required by law" in their official capacity to furnish a bond, shall apply to the board of examiners for surety. Subsection 2 then requires that all such officials, if qualified, shall be issued a bond trust fund bond. Please note that the requirement is mandatory that all officials and their deputies required by law to be bonded shall apply for and be issued a bond trust fund bond.

If we refer to the basic statutes creating offices, they invariably require a faithful performance bond. Our bond trust fund bonds are not now truly faithful performance bonds, and with the adoption of the 1957 amendment clearly were not in any view faithful performance bonds. The requirement of a faithful performance is clearly mandatory not directory or permissive because of the word "shall." The rule is:

Shall, when used in constitutions and statutes, leaves no way open for the substitution of discretion.[1]

SURETY COMPANY AND PERSONAL BONDS

Notwithstanding this mandatory provision that all officers shall be bonded by state bond trust fund bonds, NRS 282.170 provides that "every state, district, county, township and city officer . . . required by law" to be bonded "may have a surety company" execute the bond. This section was enacted in 1925 and as stated the bond trust fund was created in 1933. Since the two sections cannot stand together, they being in irreconcilable conflict, the latter, in point of time of enactment, must prevail. The doctrine of implied repeal in this instance appears to have been recognized by the National Surety Association, as a letter from the general manager, a copy of which I have, advised their members that public officials in Nevada were restricted to bonds of the state bond trust fund. This being so, not only corporate surety bonds but bonds with personal sureties are excluded. This is so, in spite of the provisions of NRS sections 282.090, 282.120, 282.150, 282.160, 282.180, 282.190, 282.200 and 282.210, all of which expressly or by inference authorize personal surety bonds. Yet in response to a questionnaire sent out in this study, replies showed that numerous state, county, city and district offices are covered with corporate surety bonds, and it is safe to assume that there are still some personal surety bonds in effect. Certainly the day of personal surety bonds for public officials is or should be one of the distant past. There has been no need for them for decades. The premiums for officials' bonds are paid from the funds of the agency he serves, if he is required by law to be bonded. This subject is akin to the problem of insurance buying without statutory authority and will be treated more fully a little later in this report.

The lack of protection incident to personal surety bonds was forcefully demonstrated in the embezzlement by the state treasurer in 1927 of over half a million dollars. He was bonded by several personal sureties and when the default was discovered, and his bond was being considered, some of his bondsmen had died, and the estate of one at least had been probated and distributed; some had left the State and others were unable to make good the amount they were surety for.

The requirement that sureties justify, i.e. prove their worth, or that they can qualify as required by NRS 282.150, is no evidence that they will remain in possession of the same wealth or even remain solvent. In case of a fiscal default, the State wants money paid into its treasury without a resort to a law suit or being forced into a compromise as was done in the embezzlement case of 1927, in which a loss of $516,000. was compromised for slightly more than $100,000. Sound business principles demand that personal surety bonds be forbidden in the bonding of public officials.

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[1]Boone Co. Coal Co. vs. Davis, (W.Va.) 56 S.E. 2nd 907.

ARE QUALIFICATION REQUIREMENTS MET BY BOND TRUST FUND BONDS?

The most disturbing question of all is posed by the conflict between the basic statutes creating various offices, and NRS 282.240, making bond trust fund bonds the exclusive surety for all public officers who are required by law to be bonded, subject, however, to the provisions of NRS Section 282.250, giving the Board of Examiners the right to reject an application for a bond.

As we have shown above, by authorities and discussion, our bond trust fund bonds are not faithful performance bonds. In addition to the basic statute requirements, NRS 282.050, subsection 2, provides that every official bond shall be conditioned for the faithful discharge of all duties, even such duties that may be imposed by future legislation.

The grave question posed by the conflict mentioned is this: "In view of the basic requirement that public officers shall 'before entering upon any of the duties of office make and execute a faithful performance bond,' is this requirement complied with by procuring and filing a bond trust fund bond?" There are serious doubts in the minds of experts in the bonding field as to a proper answer to the question. It would certainly appear the answer should be in the negative as to the bonds furnished when the act limited their coverage to fiscal matters only. Or, again do we have a repealer by inference? This might well be argued in the cases in which the basic creative statute was enacted before the bond trust fund act was enacted. However, when offices have been created by statute since the enactment of our bond act, the reverse would seem to be true. That is, if a basic statute creating an office and requiring a faithful performance bond of the occupant of the office was enacted after the creation of our bond trust fund act, the legislative intent would seem to be that the bond requirement in the latter statute must be met. Now, let us assume for the sake of a hypothetical case, that in a certain office the bond requirement would not be met or satisfied by furnishing a bond trust fund bond. If so, then the person elected or appointed to that office has never qualified for the office and is not even a defacto officer. This fact may be true in numerous cases.

There are other conflicts of major importance. For example, there are three separate statutes setting forth provisions for the furnishing, approval and filing of a bond by the Secretary of State. These conflicts are the result of piecemeal legislation on this important subject and show the need for this study and corrective legislation.

FORM OF THE BOND

The writer is not unmindful of the form of bonds now issued under our bond trust fund; nor that the bond is worded as, and purports to be, a faithful performance bond; also that the bonds are worded as if they would be surety for the loss of public property. However, merely calling a bond a faithful performance bond does not make it such. This is always the question of the extent of coverage or protection delineated by the applicable statutes; for as pointed out, supra., the statutes form an integral part of all official bonds.

NRS Section 282.230 states the purpose of the bond fund; i.e. to protect against a loss of public funds and losses through tortious misconduct or other wrongful acts. There is no mention anyplace of a loss of public property.

VARIANCE BETWEEN STATUTE AND BOND

There is always a question when there is a variance between the form of the bond and the requirements of the statutes. If the bond coverage is in excess of the statute either as to the extent of the coverage or the amount of the penalty, many courts hold the excess is void.[1] Also, if there is no statutory requirement for a bond, there are numerous decisions holding the bond to be void and of no effect. On the other hand, there are more recent decisions which hold that the bond can be enforced up to the amount of the statute as a statutory bond and the excess enforced as a common law bond.[2] However, there are many courts that adhere to what appears to be the general rule that if there is no statute requiring a bond none may be required, and, if furnished, the bond is void. These cases also hold that any condition of the bond in excess of the statute is void.

There are strong contentions made by many experts in the field of suretyship that the modern and prevailing view as to variation between bonds and the statutes is that if the bond exceeds the statutory requirement, the excess will be enforced as a common law bond, and there are cases in accord with that view.

However, Professor Simpson in his recent work on Suretyship at page 416 states:

> The statute, in pursuance to which a bond such as this, (a public official bond) is read into the bond, and the parties cannot by contract or otherwise limit the statutory obligation.

There he was referring to a case where the penal sum of the bond was less than the statute required, and in such a case clearly the surety is liable in the amount of the statute requirement.[3]

A few states, although hard to believe, hold an opposing view; that even though the penal sum of the bond is less than required by the statute, the provisions of the bond will prevail.[4]

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[1]U.S. vs. Ambrose 2 Fed. 552; Charleston vs. Dawson (W.Va.), 101 S.E.728.

[2]Peters vs. Bechdolt (Ind.), 192, N.E. 116; Philadelphia vs. Nat. Surety Co. (Pa.) 173 Atl. 181.

[3]Beaver County vs. Home Indemnity Co., (Utah), 52 Pac. 2nd 435.

[4]U.S.F. & G. Co. vs. McMurdy, (Ga.), 180 S.E. 633 (1935); Thunder Hawk School Dist. vs. Western Surety Co. (S.D.), 235 N.W. 921 (1931).

This ridiculous proposition appears to be the rule adopted in the Restatement of Law by the American Law Institute.[1]

Simpson also states that where an official bond is broader in scope than required by statute, or where the penal sum of the bond is larger than required, the surety's liability is limited to the statutory requirement.[2]

In an Iowa case,[3] the court held: "Where an official bond is exacted without authority, the bond is void for want of consideration."

It has been repeatedly stated by courts that where an official bond is required of an officer without statutory requirement, the bond is without legal effect. See:

State vs. Heisey, (Iowa), 9 N.W. 327;
State vs. Bartlett, 30 Miss. 624;
Logan vs. Harvey, (Okla.), 52 Pac. 402;
Askay vs. Maloney, (Ore.), 179 Pac. 899.

It is, however, difficult at present to determine which is the majority rule. It is submitted, that if there is no statutory requirement of any bond, then, under the law applicable to public officers and the expenditure of public funds, no bond may be purchased with public money. If, however, a public official purchases a bond with his own funds to protect against losses in his agency, the bond should be held valid without any statutory requirement therefor. The contention that absent a statute there is no consideration, appears specious.

DISCRETION AS TO BOND OR NO BOND

In many sections of NRS, discretion is given to certain officers to require or not require bonds. This certainly is not good public policy; for, if an official is entrusted with public funds or whose duties include the handling of public funds, there should be a mandatory requirement for a bond. It is to be noted that public funds are involved and the public should be protected against the possibility of loss. The hometown contention about good old Tom or Dick or Harry being the soul of honesty can be far from the truth. They may have had such a reputation merely because they never had an opportunity to steal. There should be no exceptions, and we intend to recommend that all who handle funds or property must be bonded; further, that all others whom the bond and insurance board believe should be bonded in the interest of public safety and welfare, must furnish bond in an amount determined by the board.

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[1] Restatement of Suretyship, Sec. 169.

[2] Charleston vs. Dawson, 101, S.E. 728.

[3] Haeg vs. Pine, 121 N.W. 1019.

ADMINISTRATIVE REGULATION OF BONDING

We do not believe it is the best practice to set the amount of the bond by statute. Short experience may show the folly of the statutory amount; yet, it may not be changed until the legislature meets again. We believe it is far the better practice to allow the bond and insurance board to set the penal sum of all official bonds, the amount of which may be changed as necessity and good surety practice warrant.

It is apparent that there are many state officers and employees who do not require the full coverage of faithful performance bonds. This is the case where the official's sole duty is the custody of money or securities. In these cases, a simple honesty bond is all that good suretyship practice requires. It is, therefore, believed that the board should be given statutory authorization to determine and require the type and amount of the bond that public protection dictates. In numerous cases, additional duties require an increased bond. If the board has the necessary authority, it can anticipate, through its continuing study, and provide in advance for the increase of the bond.

TYPES OF BONDS

A glaring fault in our bond trust fund is its inflexibility; that is, only one type of bond may be issued, and the same premium rate of 5% must be paid in all cases. The rate question is of no importance to the State itself, but it certainly is important to the cities, counties and districts.

At the State level, the State figuratively moves the money from one pocket to another, except in the case of losses, which will be discussed later. Whereas all the other levels of government pay the 5% from their funds into the State bond trust fund. It should be frankly admitted that the bond trust fund has been selling an inferior product for a superior price. This is not true for all offices, for in some tax-collecting or treasurer classifications, the corporate rate is higher, but they are fully faithful performance bonds.

COMPARISON OF RATES

STATE OFFICIALS

As pointed out, the rate question is of small concern to the State; however, some corporate rates for State official faithful performance bonds are very interesting and prove our rate is excessive.

For example, in only one class is the corporate rate higher than ours--that is for clerks of supreme or appellate courts, the rate for which is $7.50 per thousand. In seven other classifications the rates are equal to ours, but for eight classes the rates are lower. The following rates are of the latter kind:

	Per M
Attorney General	$2.00
Banking department: all officers, examiners, assistants and employees except reservers of liquidators	2.50
Governor & Lt. Governor (no bond required in Nevada)	1.50
Industrial Commission	3.00
Inspector of Mines	4.00
Insurance Dept. (all)	2.50
License & Bullion Tax Agent	2.50
Sheep or Stock Commissioners & Inspectors	4.00
Superintendent State Police	4.00
Superintendent State Printing	4.00
Tax Commission	2.50

COUNTY OFFICIALS

In three classes the corporate rate exceeds our state rate. However, for Agricultural and Horticultural Commissioners, the rate is $3.50 per thousand; County Commissioners at $2.50.

CITIES AND TOWNS

In this division, three rates are higher; eleven are the same and only fire department personnel are lower, that rate being $2.50.

It must be borne in mind that all the above rates apply to individual faithful performance bonds.

We have pointed out the objection to our bond trust fund act on the ground of inflexibility. Irrespective of the coverage required according to good suretyship practice, we have only one type of bond to sell and all officials in this State are required to buy it.

In corporate suretyship, the surety industry has made available several types of bonds to meet the needs of all agencies of government. In addition to the individual bonds which cover a single official or employee for a specific amount, there is available:

(1) Name schedule bonds which cover officials or employees listed in a schedule attached to the bond;

(2) Position schedule bonds covering officials and employees who may, while the bond is in force, occupy and perform the duties of the positions listed in the schedule attached to the bond, each position being covered for a specific amount;

(3) Public employees blanket bonds.

Each bond may have four insuring agreements:

(1) Honesty blanket bond coverage, against loss sustained by the insured through any fraudulent or dishonest act or acts committed by any of the employees to an amount not exceeding in the aggregate the stated limit of liability;

(2) Honesty blanket position bond coverage, against loss sustained by the insured through any fraudulent or dishonest act or acts committed by any of the employees, the amount of indemnity on each of such employees being the stated limit of liability;

(3) Faithful performance blanket bond coverage, against loss caused to the insured through the failure of any employee to perform faithfully his duties or to account properly for all monies and property received by virtue of his position or employment to an amount not exceeding in the aggregate the stated limit of liability;

(4) Faithful performance blanket position bond coverage, against loss caused to the insured through the failure of any of the employees to perform faithfully his duties or to account properly for all monies and property received by virtue of his position or employment the amount of indemnity on each of such employees being the stated limit of liability.

A similar blanket bond is also available to cover all public officials of a county, city, town, township, village or borough. Such bonds cover all eligible personnel of an insured agency unless excluded. In such bonds, it is permissible to exclude individuals whom the surety is unwilling to bond, officers and employees otherwise bonded. By the use of riders, additional indemnity can be provided to furnish any needed coverage. Discounts are available in generous amounts based on the number of years the bond is in force and for the manner of payment. There are no charges and no deductions for a normal increase or decrease of employees during the premium period except where a merger or consolidation takes place. Experience ratings are also made which can effect a lower rate. Such bonds are drawn so as to cover up to 4,000 persons, with a decreasing rate for the greater the number.

The rate begins at five or less persons, for which the premium charge for a $5,000 bond is $73.10; for ten or more people, the annual charge is $100.49--an increase of $27.39 for the five additional people. If twenty additional employees are added, the total charge is $248.46--the charge for the additional thirty being $175.36, or about $5.84 per person for the $10,000 coverage. As the increase gets into the hundreds the increase for each additional employee goes below $1.00 and in the greatest number possible, the increase declines to $.30 per person. These bonds are <u>honesty blanket position bonds</u>.

It is readily seen that the surety industry has available every type of bond that can be needed, and by the use of blanket or schedule bonds, major savings can be effected. As new personnel is hired, the bond automatically covers without the necessity of constant watch to see that persons required to be bonded are in fact covered. It is to be noted that "dishonesty coverage" only is a cheaper form of coverage than faithful performance coverage and in a great number of classes is all that is needed.

Recent developments in the corporate suretyship field, now permit the use of one master bond to cover all officers and employees of a state with a variety of coverages. California has this year procured such a bond to cover approximately 80,000 persons.

In such a bond there can be faithful performance for those who need it; honesty coverage for others, position schedule and all sorts of needed protection. The saving effected by using such a bond is tremendous.

FINANCIAL STATEMENTS

NRS Section 282.270 requires that the State Board of Examiners shall cause all bonds and complete financial statements to be filed in certain State, county and city offices. This is a harsh and needless provision. These financial statements should be kept in confidential files as is done in corporate surety practice. A public official should not be embarrassed by having his complete financial status made a part of public records.

Referring again to the provisions of NRS 282.280, Subsection 2, discussed supra., it must be remembered that in the constitutional oath each official must take and subscribe he swears to faithfully perform the duties of his office. We have already discussed the legal meaning of faithful performance and the consequences incident to a failure to so perform. This is especially applicable to money-handling officers. They are held in law to be insurers of the funds committed to their care. This has been dramatically portrayed by the cited cases involving loss through fire and holdup. Let us suppose armed robbers enter the State Treasurer's Office and take from him or a deputy all the funds then there. NRS 282.280, Subsection 2, provides the loss is not covered by the bonds. However, there is no section saying the treasurer is not liable, and he certainly appears to be subject to the absolute law liability of a money-handling public official. So after the holdup he stands in his office sadly viewing his empty safe, facing certain financial ruin, having been required to furnish a bond that in that event isn't worth the paper it was written on. What a tragic circumstance for a public official to experience when he is totally free from any culpability. This liability of the official should without any question be also the liability of the surety, and it absolutely is in the law applying to corporate suretyship.[1] If the bond trust fund continues, we certainly should authorize the purchase of broad form money and securities insurance to cover money-handling officials wherever possible. This type of coverage is in the insurance field and not suretyship. Therefore, it affords no right to the carrier to demand contribution for any losses paid.

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[1]Stearns, Law of Suretyship, Fifth Ed. p. 333; American Law Inst., Restatement of Suretyship, p. 500.

It protects the State or other governmental agencies from loss by robbery, burglary or mysterious disappearance, such as losses that cannot be explained and frees the official involved from the onerous and often ruinous duty to make contribution to the surety for the loss. It does not cover embezzlement or any intentional wrongdoing by the administrator or his deputies.

STATUTORY CONFUSION

In addition to the conflicing sections heretofore mentioned, there are a great many more that authorize, even require, certain officers to furnish corporate surety bonds, and in some sections the meaning is not clear.

For example, NRS 541.130 requires the secretary-treasurer and other agents of water conservancy districts to furnish "surety bonds in accordance with the provisions of Chapter 282." It is true that the bond trust fund act is a part of Chapter 282, but it is equally true that chapter also has sections providing for personal and corporate surety bonds. Confusion is rampant. The following are some other sections causing conflicts. In this connection, I wish to recall a statement made earlier in this report concerning the possibility of repeal of some sections by the passage later of statutes that conflict with the earlier ones. It may be that statutes which authorize the furnishing of surety bonds supersede the act creating the fund.

The fund covers bonds of state, county, township, incorporated city and irrigation district officers and employees only. Thus absent a requirement in statutes creating new public bodies or districts, that their officers place their bonds in the fund, such officers presumably can place their bonds with private bonding companies. This leads only to confusion. The official bonding system in Nevada is, therefore, in a sense half slave and half free. Here are some examples from the statutes:

Improvement Districts -	Board of Directors	§309.100
	Secretary-Treasurer	§309.120
Water & Sanitation Districts -		
	Board of Directors	§311.090
	Treasurer	§311.100
Power Districts -	Board of Directors	§312.120
	Secretary-Treasurer	§312.170
Drainage Districts -	Board of Supervisors	§540.190

"Bond in form prescribedbby law for the official bonds of county officers." Does this mean a bond in the fund?

	Treasurer	§540.230

Water Conservancy Districts -
Secretary-Treasurer and other agents §541.130

(An express provision "Surety bonds in accordance with the provisions of Chapter 282.") Does this mean pursuant to the fund act or Section 282.170? See below under Subdivision 2 of this caption.

Soil Conservation Districts -
Officers and Employees §548.155
District Supt. §548.315

Swimming Pool Districts - §11 of Senate Bill 88 of 1957.

Members of board shall qualify with "corporate surety bonds."

City of Caliente Charter - Chapter 289, Laws of 1957, §21.

Bonds of all officers "shall be issued by the State of Nevada or by a reliable bonding company . . ."

General Improvement Districts - §16 (4) of Senate Bill 20 of 1959.

Treasurer shall file "a corporate fidelity bond."

County Treasurers - Note the provisions for county treasurers' bonds in §249.030 which may be "personal or corporate surety." Similarly regarding sheriffs in §248.020--"bond with two or more resident sureties or by any qualified surety company."

It is important to note also Section 282.170 which seems to be in direct conflict with Section 282.240 (2) of the fund act. The former act passed in 1925 in Subsection (1) clearly permits "state, district, county, township and city officers to place their bonds with duly admitted surety companies." The latter section says that such officers (but restricted as to district officers to irrigation districts) "shall apply to the state board of examiners for surety." It will take a decision of the Supreme Court of Nevada to resolve this conflict, if the question is ever raised.

I believe it is not an exaggeration to say that if the money-handling public officials throughout Nevada, covered by the bond trust fund bonds, knew their personal financial danger, there probably would be the greatest exodus from public service in history.

IS THE FUND ADEQUATE FOR ITS POTENTIAL LIABILITIES?

The answer must be a thunderous and stentorian "No!" We are engaged in a business as hazardous to the finances of the State and the personal finances of officials as Russian roulette is to life.

The fund remains now as liable to the same degree as it was when Hill vs. Thomas, 270 P. (2nd), 179, was decided in 1954. It is open to suit by aggrieved members of the public for all "tortious misconduct or other wrongful acts" committed by officials bonded in the fund and in some instances (such as in Hill vs. Thomas) picks up liability for acts of their deputies. Generally these acts will be open and notorious. On the other hand, losses of a fidelity nature (fiscal defaults) are calculatedly not notorious. They are hidden for many years and when they come to light may well be catastrophic. Every newspaper reader in the country is aware of the case of Orvill Hodge, State Auditor of Illinois, whose reputation for probity was excellent until his defalcation of about three and one-half million dollars of public money came to light. Similar is the case of former Governor Hoffman of New Jersey, who committed suicide leaving a statement admitting embezzlements of approximately $350,000. We are aware that Nevada has also had very substantial hidden losses of this kind at various times in its history. Is the fund adequate to absorb such hidden losses and the potential liability arising from tortious misconduct of bonded officials? The fact that the fund has been in existence for a long time is no proof that it will be adequate to withstand potential catastrophic loss.

It may surprise many people to learn that since 1953, the bond trust fund has paid embezzlement losses aggregating $80,000. For all that is known, there may be existing undiscovered losses sufficient to wipe out the fund. When millions of dollars in public funds are being daily handled by numerous officials and employees, there is an ever-present danger that even the most painstaking audit will not prevent. By a destruction of records or by fabrication of false records thieves can conceal their embezzlements for years. In this connection, it is important to learn another facet of the law of suretyship. An uninformed person may well believe that where a $10,000 bond is required that the penal sum of $10,000 is the maximum liability the surety has taken. Such, however, is not always the case.

Let us consider an official who, upon entering office, furnished a $10,000 bond; each year in office he merely pays a renewal premium. After a number of years, for example, four, a loss of $40,000 or more is discovered occurring in each year up to amount of the penal sum; the surety must pay the $40,000 even though the bond was $10,000 for each year. Hidden losses are the bane of suretyship. Conniving embezzlers conceal their thievery for years, and, like the Hodges scandal or the default of the State Treasurer in Nevada, discovered in 1927, the results are truly catastrophic.

In this latter connection, that default really led to the creation of the bond trust fund; that, and financial collapse of the early '30's. Many surety companies failed; some major ones had to be taken over. Some were saved by federal aid. Bank failures caused gigantic losses of public funds. This financial chaos, coming on the heels of the treasurer's default, made it most difficult for Nevada officials to get qualifying bonds. Then the bond trust fund act was born of a dire need that has not existed for years. Suretyship coverage can now be purchased for any need at any time. It is a highly complex and hazardous business, requiring skilled personnel of experience in the field. The States does not belong in it, any more than in the banking business or a gambling casino.

THE RISK FROM TORTIOUS ACTS

This subject has been discussed at some length previously in this report and in the discussion of the fidelity exposure of the fund. As we demonstrated in that discussion, the fund is woefully inadequate even for the fidelity coverage in which we can be guided somewhat by the experience ratio of coverage to loss in this and the other states. As to the potential liability, that may raise from "tortious misconduct and other wrongful acts," there isn't the remotest possibility of any person or group of persons making any such determination.

In this connection, it is the belief of the Attorney General that, as our statutes now read, the State's liability for damages arising because of torts of bonded officers is not limited to the amount of the bond of the officer involved. Whether that view is or is not correct, we know that we have approximately $6,000,000. of exposure for some 800 officials and employees throughout the State, covered by a fund of less than half a million. I believe we have mentioned above that in the Department of Highways alone, we have four officers bonded for $250,000. each, or an aggregate of one million dollars. A suit is pending in that department in which damages exceeding $400,000. are being sought. Our other heavily bonded officials are required to travel often by automobile and in this day of excessively large jury awards, the fund could be wiped out overnight and judgments in excess of the fund obtained against the State, which the legislature would certainly be morally, if not legally, bound to honor.

Insurance and suretyship are highly complex and hazardous enterprises that should be left strictly to the experts. It has been purely good luck rather than any judgment that we have thus far avoided ruin.

THE FUND OPERATION IS A NON-GOVERNMENTAL ACTIVITY

This fact must be admitted, and the legal consequence thereof is that, as to that function, the State has no immunity from suit. The fund has no standing whatever different from a corporate surety company in the bonding business. It is absolutely liable for the torts of the officers and employees engaged in its administration. If one of such persons should, while delivering a bond or doing any other act as a part of the fund's business, be involved in a serious accident in which even a few people were injured, the whole fund would be in jeopardy.

It must be reiterated that we are not here dealing with insurance policies but suretyship bonds in which the surety has an absolute right of contribution from the principal for losses paid to the beneficiary. So the brutal truth is that the bond is not for the benefit of the officer, but for the benefit of the agency in which the officer is situated. Furthermore, if the fund paid out losses either for fiscal defaults or tort judgments, it would be mandatory for the fund to seek restitution from the official whose bond was involved. This right of contribution is one factor in the fixing of corporate surety rates. All of our bonded officials constantly face complete financial ruin because of the legal exposure of the fund to damages by reason of tortious misconduct. Such risks should only be covered by liability insurance, and the liability insurance heretofore purchased without statutory authority is just a waste of paper of no legal effect if the carrier refuses to pay without suit.

It is strongly recommended that the State should flee the bonding and suretyship business as if from a plague.

CONCLUSION AND RECOMMENDATIONS

There is little to say by way of conclusion. The report and the authorities therein cited and quoted appear to direct an inescapable course of conduct. It is therefore respectfully recommended:

(1) That there be created an ex officio State board to be known as the Bond and Insurance Board, consisting of the Attorney General as chairman, the State Treasurer and the Insurance Commissioner.

(2) That said board be authorized to engage such technical experts as the board deems necessary, experienced in the field of suretyship and insurance.

(3) That such experts be in the classified service and that the Personnel Commission shall draft qualification specifications for such classifications so as to insure that those engaged will be thoroughly qualified.

(4) That such experts make a continuing study of the insurance and bonding problems and needs applicable to the State and its political subdivisions, and report the results periodically to the board and the legislature.

(5) That all public officers and employees shall be bonded by corporate surety bonds exclusively, with such bonds as the experts deem advisable.

(6) That the bond trust fund act be repealed and the money remaining in the fund be transferred to the State General Fund. The State must necessarily remain liable on bonds now in existence and for undiscovered losses on previous bonds.

(7) That the experts, so far as possible and advisable, require either a master single bond or blanket or schedule bonds rather than individual bonds; that faithful performance bonds be required only when necessary, and simple honesty bonds, and broad form money and securities insurance used where that protection is possible.

(8) A mandatory statute be enacted requiring the purchase of comprehensive liability insurance coverage for all agencies of government and public officials and employees employed therein.

(9) That such insurance be purchased through the State Purchasing Department, on specifications designed to assure the proper coverage.

(10) That the bond and insurance board cause a study to be made as soon as may be of all the insurance needs of the State and its subdivisions, and consideration be given to the question of establishing of a sinking fund program for insuring buildings and contents, as is done in other states. Further, that no insurance be carried on historic or irreplaceable objects.

(11) That all the basic qualification statutes be repealed and one omnibus statute enacted, providing that before entering upon the duties of office, all public officers shall make, execute and deliver a bond as required by law in the form and amount determined by the bond and insurance board.

(12) That a statute be enacted authorizing suits sounding in tort to be filed against the State and any political subdivision and officer or employee thereof whose negligence was responsible for injuries sustained by anyone; that, to the extent of the insurance coverage only, the immunity of the State and all political subdivisions from suit and liability be waived.

(13) As an alternative to the abolishing of the bond trust fund in the event the legislature desires to retain it, the provisions of Chapter 282 of NRS should be changed in order to permit cities and counties and subdivisions of government below the State level to purchase corporate surety protection, instead of being limited to bond trust fund bonds.

(14) If retained, the bond trust fund act should be amended so that in writing bonds the administrators would have available to them all the flexibility of corporate suretyship.

(15) Further, if retained, all sections of the act making the bonds surety for tortious or wrongful acts of those bonded by trust fund bonds should be repealed and protection afforded therefor by an authorized insurance program.

This study was begun and completed by Harrison W. Call,[1] Consultant to the Nevada Legislative Counsel.

J. E. SPRINGMEYER
Legislative Counsel

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[1]A.B., Stanford, 1928;
Juris Doctor, Stanford Law School, 1930.

A SUMMARY OF

INSURANCE COVERAGES AND COSTS FOR

THE STATE OF NEVADA AND ITS POLITICAL

SUBDIVISIONS

An addenda to "A Study of State Bonding and Insurance Problems," Bulletin No. 41, Legislative Counsel Bureau

In order to place a proper evaluation on the material presented here, something should be said about the manner in which it was assembled and the method by which the annual costs were computed.

The major part of the information was extracted by an actual examination of the existing policies. When, for a variety of reasons, the policies were not readily obtainable, the help of the various public officials and, in some cases, of the agents writing the insurance was solicited and received.

Without commenting upon the quality of the management or the record-keeping applied to the insurance programs of the various governmental units, it can safely be stated that this summary represents a conservative statement of both coverages and costs, since we are morally certain that there were policies and endorsements to policies that we did not find readily at hand. Further, we endeavored to hold to a uniform point in time for all agencies - July 1960; thus, increases in fire coverage and added payments under audit provisions of liability and fleet policies generally do not appear here.

As to the computation of annual premium costs, we believe that two specific examples will serve as ample illustration:

(1) The majority of fire insurance policies were written for a five year period, although a lesser number were written for three years and for other periods of time. Increases and decreases were usually made by endorsement of existing policies, often at changed rates for the coverage. As an example, a policy was written on October 1, 1956, for $235,000, with an expiration date of October 1, 1961. Endorsements to increase the policy were written for $4,000 on June 23, 1957; for $60,000 on November 27, 1957; for $30,000 on May 22, 1958; and for $16,000 on November 1, 1958, for a total coverage of $345,000 at the time of our review. The rates charged for the first two endorsements were the same as for the original policy, but the later endorsements varied from the original rate. To arrive at the annual cost of the total policy, we computed the annual cost of each segment and arrived at an annual cost for the total coverage. In those cases where any material refund for reduction of rates was in evidence, we took cognizance of it in our computations.

(2) The blanket policy for the Department of Highways was written originally for the period July 1, 1957, to July 1, 1962, with amendments in subsequent years. A review of one of the many policies among which the total coverage is distributed reveals successive rates of 2.184, 2.093, 2.346, 1.962 and the currently effective rate at January 1, 1961, of 1.747 for each $100 of insurance.

Only a careful audit of all policies and endorsements would reveal the actual cost, so we have used the 2.083 rate at which the bulk of this insurance was written and which appears to most nearly project the cost of the existing coverage.

In a few other instances we used such a rationalization to arrive at costs.

SUMMARY OF INSURANCE COVERAGES AND THE
ANNUAL PREMIUM COSTS TO
THE STATE OF NEVADA AND ITS POLITICAL SUBDIVISIONS

FIRE INSURANCE

Amount of Insurance Carried

State (Pg. 2)	$29,085,240.
Cities (Pg. 3)	10,396,555.
Counties (Pg. 4)	17,804,427.
Schools (Pg. 5)	58,666,646.
Total Coverage	$115,952,868.

	STATE OF NEVADA	POLITICAL SUBDIVISIONS CITIES	COUNTIES	SCHOOL DISTRICTS	TOTAL ANNUAL PREMIUMS
Annual Premium Costs					
Fire & Lightning	$ 56,111.26	$ 19,745.07	$ 33,184.97	$ 86,764.62	$195,805.92
Extended Coverage	---	6,745.29	8,662.52	28,341.71	43,749.52
Vandalism & Malicious Mischief	---	1,046.45	1,174.35	1,688.39	3,909.19
Total Annual Fire Insurance Costs	$56,111.26	$ 27,536.81	$ 43,021.84	$116,794.72	$243,464.63
PUBLIC LIABILITY INSURANCE					
Under Comprehensive Liability & Fleet Policies (Pgs. 6-9)	$82,720.02	$132,060.74	$ 70,933.08	$ 35,857.75	$321,571.59
Under Misc. Policies (Pg. 10)	3,037.30	6,688.18	9,615.48	9,292.42	28,633.38
Total Annual Public Liability Insurance Costs	$85,757.32	$138,748.92	$ 80,548.56	$45,150.17	$350,204.97
INSURANCE OF "OWNED PROPERTY"					
"Physical Damage" Coverage on Owned Vehicles Under Comprehensive Liability Policies (Pgs. 6-9)	$ 33,316.50	$ 17,043.89	$ 17,136.12	$ 8,606.43	$ 76,102.94
Misc. other insurance on "Owned Property" (Pg. 10)	5,818.56	3,799.68	12,522.92	2,154.50	24,295.66
Total "Owned Property" Insurance Costs	$ 39,135.06	$20,843.57	$ 29,659.04	$10,760.93	$100,398.60
Total Annual Cost of All Insurance Coverages	$181,003.64	$187,129.30	$153,229.44	$172,705.82	$694,068.20

FIRE INSURANCE

STATE OF NEVADA

	AMOUNT OF INSURANCE COVERAGE UNDER BLANKET POLICIES				ANNUAL PREMIUM COST
	BUILDINGS	CONTENTS	TOTAL		
DEPARTMENT OF HIGHWAYS	$4,466,045.	$1,058,695.	$5,524,740.	(See (1))	$23,126.56
OTHER STATE AGENCIES	21,765,000.	1,795,500.	23,560,500.	(See (2))	32,984.70
STATE OF NEVADA - TOTAL	$26,231,045.	$2,854,195.	$29,085,240.		$56,111.26

(1) Fire and Lightning coverage only. Rates during life of present Highway Department Department policies have varied. Rates of 2.184, 2.093, 2.346 and 1.962 have been in effect at various times. For the computation above we have used the rate 2.093 at which the bulk of the policy was written. A new and lower rate became effective January 1, 1961, at 1.747 and additional coverage of approximately $160,000.00 has been placed at that rate but is not included above.

(2) The present rate for state blanket policies is .669, a reduction from .700 at July 1, 1960. The higher rate appears to have been charged on all, or nearly all, of this insurance. The cost shown above is computed at .700. In addition to the coverage above, the State has insured under separate policies for the periods of construction new buildings under contracts amounting to over $3,000,000, and contractors are insuring an additional $1,223,450 of such construction contracts. These buildings will be added to the blanket coverage upon completion and acceptance by the State.

This construction-project insurance paid by the State, together with some fire insurance which did not come under the blanket policies, cost another $2,681.37 annually; which amount is in addition to that shown above, since we did not examine the policies until this report was nearly completed.

FIRE INSURANCE

SIXTEEN INCORPORATED CITIES IN NEVADA

CITIES INSURED	Fire Insurance Coverage	ANNUAL PREMIUM COST Fire and Lightning	Extended Coverage	Vandalism & M. M.	Total
Boulder	$ 556,000.	$ 1,478.96	$ 828.44	$ 127.88	$ 2,435.28
Caliente	103,000.	595.34	98.88	-	694.22
Carson	102,900.	242.99	85.10	-	328.09
Elko	560,000. EQDA 80,000.	1,965.60	537.60 EQDA 122.40	50.40	2,676.00
Ely	175,000.	274.05	144.90	15.40	434.35
Fallon	194,400.	433.80	128.39	-	562.19
Gabbs	36,800.	289.62	44.16	3.68	337.46
Henderson	240,000.	634.81	209.63	19.78	864.22
Las Vegas	3,300,000.	5,082.00	2,287.11	363.00	7,732.11
Lovelock	14,500.	127.25	14.89	1.27	143.41
North Las Vegas	239,500.	762.82	155.42	21.57	939.81
Reno	3,900,741.	5,868.69	1,421.58	389.04	7,619.31
Sparks	508,222.	940.21	350.67	45.74	1,336.62
Wells	31,500.	85.17	29.45	-	114.62
Winnemucca	257,492.	752.59	213.33	-	965.92
Yerington	96,500.	271.17	73.34	8.69	353.20
	$10,396,555.	$19,745.07	$6,745.29	$1,046.45	$27,536.81

FIRE INSURANCE

SEVENTEEN COUNTIES IN NEVADA

COUNTIES INSURED	Fire Insurance Coverage	ANNUAL PREMIUM COST Fire and Lightning	Extended Coverage	Vandalism & M. M.	Total
Churchill	$ 495,600.	$ 2,070.94	$ 478.42	$ -	$ 2,549.36
Clark	4,800,000.	6,288.00	1,584.00	432.00	8,304.00
Douglas	233,710.	644.81	229.05	-	873.86
Elko	1,936,380.	3,988.94	1,092.12	-	5,081.06
Esmeralda	58,750.	233.44	19.44	-	252.88
Eureka	82,000.	521.50	43.69	-	565.19
Humboldt	503,032.	884.42	407.21	-	1,291.63
Lander	158,600.	738.20	112.41	-	850.61
Lincoln	82,100.	257.09	72.47	-	329.56
Lyon	238,725.	646.11	217.08	1.33	864.52
Mineral	698,910.	2,705.50	593.96	7.49	3,306.95
Nye	628,010.	3,236.21	403.76	51.78	3,691.75
Ormsby	141,800.	298.73	102.16	-	400.89
Pershing	231,610.	381.07	175.53	.50	557.10
Storey	100,000.	426.65	227.00	-	653.65
Washoe	7,002,900.	8,533.15	2,505.86	674.73	11,713.74
White Pine	412,300.	1,330.21	398.36	6.52	1,735.09
	$17,804,427.	$33,184.97	$8,662.52	$1,174.35	$43,021.84

FIRE INSURANCE

SEVENTEEN COUNTY SCHOOL DISTRICTS IN NEVADA

SCHOOL DISTRICTS INSURED	Fire Insurance Coverage	ANNUAL PREMIUM COST Fire and Lightning	Extended Coverage	Vandalism & M. M.	Total
Churchill	$1,709,000.	$ 2,696.75	$ 1,261.68	$ 145.38	$ 4,103.81
Clark	19,776,000.	30,021.84	13,141.20	-	43,163.04
Douglas	1,507,101.	2,227.14	1,050.06	141.92	3,419.12
Elko	3,500,000.	7,839.99	2,302.14	292.32	10,434.45
Esmeralda	29,450.	160.58	42.12	-	202.70
Eureka	324,000.	1,232.98	202.90	26.70	1,462.58
Humboldt	1,537,000.	2,795.05	1,224.11	130.78	4,149.94
Lander	565,000.	1,103.36	387.92	50.98	1,542.26
Lincoln	969,300.	1,734.44	736.98	-	2,471.42
Lyon	1,877,200.	3,731.82	1,200.18	157.97	5,089.97
Mineral	1,778,000.	3,349.24	1,369.79	147.00	4,866.03
Nye	1,155,310.	3,012.18	723.76	94.14	3,830.08
Ormsby	1,675,900.	2,083.03	1,461.47	141.89	3,686.39
Pershing	1,198,925.	1,944.53	1,074.59	100.66	3,119.78
Storey	235,160.	366.85	253.97	21.16	641.98
Washoe	17,537,756.	17,401.36	-	-	17,401.36
White Pine	3,291,544.	5,063.48	1,908.84	237.49	7,209.81
	$58,666,646.	$86,764.62	$28,341.71	$1,688.39	$116,794.72

PUBLIC LIABILITY INSURANCE

STATE OF NEVADA

VEHICLE FLEET INSURANCE	PUBLIC LIABILITY INSURANCE LIMITS Bodily Inj.	Prop. Dam.	Annual Premiums	Physical Damage Premiums
Department of Highways	25/50,000	5,000	$63,296.32	$ 7,496.23
Other State Agencies	50/100,000	10,000	19,423.70	25,820.27
STATE OF NEVADA - TOTAL			$82,720.02	$33,316.50

PUBLIC LIABILITY INSURANCE

SIXTEEN INCORPORATED CITIES IN NEVADA

CITIES INSURED	PUBLIC LIABILITY INSURANCE LIMITS Bodily Injury	Prop. Damage	Annual Premiums*	Physical Damage Premiums**
Boulder	100/300,000	25/50,000	$ 4,643.31	$ 1,437.03
Caliente	100/300,000	10/25,000	1,476.72	484.40
Carson	100/300,000	25,000	1,739.89	967.35
Elko	100/300,000	25,000	5,109.00	448.97
Ely	25/50,000	5,000	1,806.32	-
Fallon	100/300,000	50,000	2,957.39	719.24
Gabbs	100/300,000	10/25,000	932.13	402.96
Henderson	100/300,000	50,000	6,274.83	1,016.17
Las Vegas	250/500,000	100/300,000	40,760.74	480.10
Lovelock	100/300,000	15/50,000	1,251.37	409.27
North Las Vegas	100/300,000	10/50,000	12,893.87	2,611.96
Reno	250/500,000	100,000	42,845.65	5,697.10
Sparks	100/200,000	10/25,000	3,911.45	1,224.81
Wells	100/200,000	5/25,000	1,523.65	245.17
Winnemucca	100/300,000	10,000	2,205.42	448.96
Yerington	50/100,000	10/100,000	1,729.00	450.40
			$132,060.74	$17,043.89

* Includes relatively minor amounts for medical benefits premiums.

** Costs shown here were for such coverages as comprehensive, fire, theft, collision, etc. on owned vehicles, paid in connection with comprehensive liability policies.

PUBLIC LIABILITY INSURANCE

SEVENTEEN COUNTIES IN NEVADA

COUNTIES INSURED	PUBLIC LIABILITY INSURANCE LIMITS Bodily Injury	Prop. Damage	Annual Premiums*	Physical Damage Premiums**
Churchill	50/100,000	10,000	$ 1,025.13	$ 1,120.29
Clark	100/500,000	25/100,000	12,243.13	95.47
Douglas	100/300,000	10/25,000	3,058.85	1,368.16
Elko	10/20,000	10/25,000	5,097.53	1,676.94
Esmeralda	50/100,000	5/25,000	1,647.64	467.46
Eureka	25/50,000	5/50,000	1,791.30	1,086.99
Humboldt	100/300,000	5/25,000	1,974.43	728.36
Lander	50/100,000	5/25,000	3,030.92	416.75
Lincoln	50/300,000	10,000	1,445.27	420.18
Lyon	25/200,000	5,000	935.14	212.25
Mineral	100/500,000	5/25,000	4,379.31	807.01
Nye	50/100,000	5,000	3,138.75	1,011.01
Ormsby	100/300,000	25,000	890.42	300.74
Pershing	100/300,000	10,000	2,188.20	728.00
Storey	50/100,000	5,000	1,274.38	414.00
Washoe	100/300,000	5/25,000	24,375.00	5,400.00
White Pine	100/300,000	25,000	2,437.68	882.51
			$70,933.08	$17,136.12

* Includes relatively minor amounts for medical benefits premiums.

** Costs shown here were for such coverages as comprehensive, fire, theft, collision, etc. on owned vehicles, paid in connection with comprehensive liability policies.

PUBLIC LIABILITY INSURANCE

SEVENTEEN COUNTY SCHOOL DISTRICTS IN NEVADA

SCHOOL DISTRICTS INSURED	PUBLIC LIABILITY INSURANCE LIMITS Bodily Injury	Prop. Damage	Annual Premiums*	Physical Damage Premiums**
Churchill	100/500,000	5/25,000	$ 2,302.69	$ 386.76
Clark	100/300,000	10,000	5,752.19	512.20
Douglas	100/300,000	5,000	1,055.07	229.99
Elko	100/500,000	10/25,000	2,674.64	472.58
Esmeralda	50/100,000	5,000	334.71	226.60
Eureka	100/300,000	10/25,000	1,458.78	364.69
Humboldt	100/300,000	10/25,000	1,957.10	466.21
Lander	100/300,000	5,000	102.84	38.80
Lincoln	100/300,000	5/25,000	940.86	-
Lyon	100/500,000	100,000	2,217.70	1,258.00
Mineral	100/300,000	10/25,000	2,262.69	618.57
Nye	100/300,000	10/25,000	1,514.48	461.79
Ormsby	100/300,000	5/25,000	1,555.09	445.47
Pershing	100/300,000	10/25,000	1,256.06	589.28
Storey	100/300,000	10,000	165.92	-
Washoe	100/500,000	100,000	8,151.00	1,489.00
White Pine	25/300,000	5/25,000	2,155.93	1,046.49
			$35,857.75	$8,606.43

* Included medical benefit premiums.

** Costs shown here were for such coverages as comprehensive, fire, theft, collision, etc. on owned vehicles, paid in connection with comprehensive liability policies.

MISCELLANEOUS OTHER INSURANCE COSTS

	ANNUAL PREMIUM COSTS				
	STATE OF NEVADA	CITIES	COUNTIES	SCHOOL DISTRICTS	TOTAL
Boiler Insurance	$3,037.30	$ 915.78	$ 5,603.64	$ 7,727.82	$17,284.54
Misc. Liability Coverages (False arrest, errors and omissions, valuable documents, etc.)	-	4,404.00	3,695.01	-	8,099.01
Misc. Corporate Surety Bonds	(not determined)	1,368.40	316.83	1,564.60	3,249.83
Total Misc. Coverages of Essentially "Liability Insurance" nature	$3,037.30	$6,688.18	$ 9,615.48	$ 9,292.42	$28,633.38
Misc. Property Insurance (Inland marine, floaters, etc. on "owned" vehicles and equipment)	$5,818.56	$1,856.60	$11,197.65	$ 1,404.24	$20,277.05
Policies insuring losses by robbery, burglary, misplacement, etc.	-	1,943.08	1,325.27	750.26	4,018.61
Total Misc. Insurance of "owned property" losses	$5,818.56	$3,799.68	$12,522.92	$ 2,154.50	$24,295.66
TOTAL ANNUAL PREMIUMS	$8,855.86	$10,487.86	$22,138.40	$11,446.92	$52,929.04

NOTE: It is probable that, because of the widespread custody of these policies, we have not examined a considerable number that should be included here. After this schedule was completed we reviewed a variety of property floaters, surety bonds, and other policies purchased for various State agencies at an annual cost of approximately $2,500, in addition to the amounts shown above.

RESUME OF FIRE INSURANCE LOSSES RECOVERED
AND AN ESTIMATE OF FIRE INSURANCE PREMIUM COSTS
TO THE STATE OF NEVADA AND ITS POLITICAL SUBDIVISIONS
FOR THE FIVE-YEAR(1) PERIOD JULY 1, 1955 to JUNE 30, 1960

Governmental Agency Insured	5-Year Premium Cost Est.(2)	Loss Payments Received: Fire and Lightning	Extended Coverage	Vandalism and M.M.	Total	% of Loss Total to Prem. Paid	Net of Premiums Over Losses
State of Nevada:							
Highway Department	$ 92,506.24	$ 4,237.23	-	-	$ 4,237.23	4.58	$ 88,269.01
Other State Agencies	131,938.80	19,126.87			19,126.87	14.50	112,811.93
	$224,445.04	$23,364.10			$23,364.10	10.41	$201,080.94

(1) Both premium costs and losses for the school districts are for a 4-year period, since county-wide school districts have been in existence only since 1956.

(2) Since this information was nowhere obtainable, we based our estimates on the amounts shown on Pages 2-5 as the annual cost of the insurance in effect at the end of the period. To allow for additions and increases in values insured through the period, we used a multiplier of 4 to compute the five-year premiums and a multiplier of 3.2 for the four-year school costs.

Governmental Agency Insured	5-Year Premium Cost Est.(2)	Loss Payments Received: Fire and Lightning	Extended Coverage	Vandalism and M.M.	Total	% of Loss Total to Prem. Paid	Net of Premiums Over Losses
Cities:							
Boulder	Not included, because of recent incorporation.						
Caliente	$ 2,776.88	-	-	-	- 0 -	- 0 -	$ 2,776.88
Carson	1,312.36	-	-	-	- 0 -	- 0 -	1,312.36
Elko	10,704.00	2,300.00	2,700.00 E.Q.D. 1,400.00	-	6,400.00	59.79	4,304.00
Ely	1,737.40	-	-	-	- 0 -	- 0 -	1,737.40
Fallon	2,248.76	-	-	-	- 0 -	- 0 -	2,248.76
Gabbs	1,349.84	190.00	-	-	190.00	14.08	1,159.84
Henderson	3,456.88	-	-	1,100.00	1,100.00	31.82	2,356.88
Las Vegas	30,928.44	2,356.61	1,646.01	313.33	4,315.95	13.95	26,612.49
Lovelock	573.64	341.79	-	-	341.79	59.58	231.85
North Las Vegas	3,759.24	-	40.50	-	40.50	1.08	3,718.74
Reno	30,477.24	Unable to determine			5,000.00(3)	16.40	25,477.24
Sparks	5,346.48	-	600.00	-	600.00	11.22	4,746.48
Wells	458.48	-	-	-	- 0 -	- 0 -	458.48
Winnemucca	3,863.68	34.12	280.81	-	314.93	8.15	3,548.75
Yerington	1,412.80	-	-	-	- 0 -	- 0 -	1,412.80
	$100,406.12				$18,303.17	18.23	$82,102.95

(2) See Note (2) on page 11 of this report.

(3) Estimated by insurance agent. Reno comptrollers office believes this may be excessive.

Governmental Agency Insured	5-Year Premium Cost Est. (2)	Fire and Lightning	Loss Payments Received: Extended Coverage	Vandalism and M.M.	Total	% of Loss Total to Prem. Paid	Net of Premiums Over Losses
Counties:							
Churchill	$ 10,197.44	-	$ 500.00	-	$ 500.00	4.90	$ 9,697.44
Clark	33,216.00	-	-	-	4,009.52	17.88(4)	29,206.48
Douglas	3,495.44	246.75	73.90	-	320.65	9.17	3,174.79
Elko	20,324.24	-	5,500.00	-	5,500.00	27.06	14,824.24
Esmeralda	1,011.52	-	-	-	- 0 -	- 0 -	1,011.52
Eureka	2,260.76	-	-	-	- 0 -	- 0 -	2,260.76
Humboldt	5,166.52	-	599.40	-	599.40	11.60	4,567.12
Lander	3,402.44	-	-	-	- 0 -	- 0 -	3,402.44
Lincoln	1,318.24	-	-	-	- 0 -	- 0 -	1,318.24
Lyon	3,458.08	-	-	-	- 0 -	- 0 -	3,458.08
Mineral	13,227.80	-	367.40	-	367.40	2.78	12,860.40
Nye	14,767.00	2,194.31	200.00	-	2,394.31	16.21	12,372.69
Ormsby	1,603.56	-	-	-	- 0 -	- 0 -	1,603.56
Pershing	2,228.40	-	310.10	-	310.10	13.92	1,918.30
Storey	2,614.60	-	-	-	- 0 -	- 0 -	2,614.60
Washoe	46,854.96	3,849.26	309.74	90.00	4,249.00	9.07	42,605.96
White Pine	6,940.36		No breakdown		538.35	7.77	6,402.01
	$172,087.36				$18,788.73	10.92	$153,298.63

(2) See Note (2) on Page 11 of this report. (4) Percentage based on estimated premiums for three years, $22,420.

Governmental Agency Insured	5-Year Premium Cost Est. (2)	Loss payments Received: Fire and Lightning	Extended Coverage	Vandalism and M.M.	Total	% of Loss Total to Prem. Paid	Net of Premiums Over Losses
School Districts (1):							
Churchill	$ 13,132.19	$ 4,279.50	$1,245.75	-	$ 5,525.25	42.07	$ 7,606.94
Clark	138,121.73	4,924.78	2,934.47	-	7,859.25	5.69	130,262.48
Douglas	10,941.18	-	278.11	-	278.11	2.54	10,663.07
Elko	33,390.24		No breakdown		4,025.56	12.05	29,364.68
Esmaralda	648.64	-	-	-	- 0 -	-	648.64
Eureka	4,680.26	-	27.50	-	27.50	0.59	4,652.76
Humboldt	13,279.80	2,059.96	-	515.22	2,575.18	19.39	10,704.62
Lander	4,935.23	-	-	-	- 0 -	-	4,935.23
Lincoln	7,908.54	-	-	-	- 0 -	-	7,908.54
Lyon	16,287.90		No breakdown		1,629.58	10.00	14,658.32
Mineral	15,571.30	-	1,710.56	-	1,710.56	10.99	13,860.74
Nye	12,256.25	1,830.91	513.35	-	2,344.26	19.13	9,911.99
Ormsby	11,796.45	163.18	1,056.96	-	1,220.14	10.34	10,576.31
Pershing	9,983.30	-	-	573.56	578.56	5.80	9,404.74
Storey	2,054.34	-	-	40.00	40.00	1.95	2,014.34
Washoe	55,684.35	98,000.00(5)	-	1,500.00	99,500.00	178.69	(43,815.65)
White Pine	23,071.39	-	296.46	104.00	400.46	1.74	22,670.93
	$373,743.09				$127,714.41	34.17	$246,028.68
GRAND TOTAL, pgs. 11 thru. 14, inc.	$870,681.61				$188,170.41	21.61	$682,511.20

(1) and (2) See Notes (1) and (2) on Page 11 of this report. (5) Billinghurst School fire in 1958.