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Right to Inspect Public Records

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reasonable compensation for his pain and suffering. However, the court has abrogated the jury's privilege of basing an award upon its own knowledge and experience in favor of the speculation on the part of one having a definite pecuniary interest in the size of plaintiff's recovery.

Jackson W. White

RIGHT TO INSPECT PUBLIC RECORDS—William Owen, who was twice charged with murder, was tried and convicted on one of the charges. A motion for a new trial was filed. At a hearing on the motion,[1] Owen requested that the members of the press be excluded so that he could make a statement in the privacy of the judge's chambers. The request was granted. In the presence of the judge, the court stenographer and counsel for the defense and Commonwealth, Owen made his statement which was taken in shorthand by the stenographer. The petitioner, a newspaper publisher, requested that it be furnished a transcribed copy of these notes for the sole purpose of disseminating the news. The judge and the stenographer refused the request. Petitioner then demanded that a writ of mandamus be issued compelling compliance with his request. *Held*: Petition dismissed. It was not determined whether the shorthand notes were public records. However, the court held that even if they were, the petitioner had no greater right to inspect them than any other member of the public. Since Kentucky has neither constitutional nor statutory provisions for the inspection of public records, the right of inspection is as it existed at common law, *i.e.*, the one claiming the right of inspection must have an interest which would enable him to maintain or defend an action for which the document or record sought could furnish evidence or necessary information.[2]

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[1] The majority opinion states that either the motion or the other charge was called. The dissent asserts that this was a hearing on the motion for a new trial. With respect to the holding, it is immaterial which case was called.

[2] By way of dictum, the court excluded certain records from this doctrine when it said:

> [I]n order to effectuate the notice-giving purpose of various recording acts such interest shall hereafter be *presumed* as to the following records:
>
> (1) Records of all papers, documents and instruments required or permitted by statute to be recorded, or noted of record, in books provided by public funds for that purpose.
>
> (2) All financial records required by statute to be kept in books so provided. (Emphasis added).

Courier-Journal & Louisville Times Co. v. Curtis, 335 S.W.2d 934, 937 (Ky. 1959). Does this mean a conclusive presumption or one that is rebuttable? If the true purpose of these records is to be effectuated, the presumption will have to be conclusive. The court should have employed more definite language.

Courier-Journal & Louisville Times Co. v. Curtis, 335 S.W.2d 934 (Ky. 1959), *cert. denied,* 81 Sup. Ct. 272 (1960).

This comment does not question whether the untranscribed notes should be classified as public records; nor does it evaluate the propriety of allowing this information to be withheld in this particular situation. In both instances there are persuasive arguments for either view.[3] The purpose of this comment is to make a critical analysis of the rule which restricts the right to inspect public records by requiring the petitioner to show a *legal* interest. In addition, various relevant decisions will be reviewed to determine the most desirable rule.

At the early common law, the courts were seldom called upon to enforce the right to inspect public records except where the inspection was desired to obtain information for use in litigation.[4] If the petitioner could not show this legal interest, some courts would refuse to issue the writ of mandamus.[5] The rule was formulated that this was the *only* situation in which the writ should be issued to allow inspection of public records.[6] Thus, the Kentucky court, still following this strict concept of the common law, will not issue the writ unless the petitioner exhibits a legal interest in the records desired to be inspected.[7]

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[3] In the concurring opinion it was argued that there was no public record to which petitioner had the right of access. The argument was that if the notes of the defendant's statement had not been taken, no one would seriously contend that the trial judge should be compelled to tell what was said there. The circumstance of transcribing the statement is not important enough to convert the transcription into a public record. Conversely, the dissent was of the opinion that a public record did exist. Two arguments were advanced to support this position: First, since the statement was recorded during a proceeding to determine whether there should be a new trial, it was a part of the court record. Second, since Ky. Rev. Stat. §§ 28.410-.450 (1960) provide for the position of an official court reporter and Love v. Duncan, 256 S.W.2d 498 (Ky. 1953) held that the court reporter is a public officer, his notes of a proceeding when transcribed become a public record.

The concurring opinion urged that the situation merited withholding the information. It reasoned that since the judge had promised that newspaper reporters would not be present, the defendant believed they would not be given access to his statement. Therefore, the judge should not be required to break faith with the defendant. The dissent responded that the information should not be withheld in this situation because this is a step toward the "Star Chamber" proceedings in a country where our Constitution provides the accused shall have a public trial.

[4] 45 Am. Jur. *Records and Recording Laws* § 17 (1943).

[5] The King v. Merchants Tailors' Co., 2 B. & Ad. 115, 109 Eng. Rep. 1086 (K.B. 1831); *In re* Caswell, 18 R.I. 835, 29 Atl. 259 (1893) (advisory opinion).

[6] For a discussion of this point, see Nowack v. Fuller, 243 Mich. 200, —, 219 N.W. 749, 750 (1928).

[7] Fayette County v. Martin, 279 Ky. 387, 130 S.W.2d 838 (1939), was cited as controlling authority in the principal case. But, as the dissent argues, the reference made to the common-law rule in the *Martin* case is only dictum, since the decision was based on statutory *interpretation.*

If the only use of public records were in litigation, there could be no reason to denounce the common-law doctrine. However, unquestionably these records serve other purposes. One of the most important purposes of any public record is to keep an accurate account of what occurs in the exercise of duties by a public official. Every citizen should have unrestrained access to these records in order to ascertain whether the official has properly observed the provisions of the law. Another use of a public record is to give a newspaper publisher information with which to compile news articles. If the press is denied the right to inspect these records, its business of disseminating news could be seriously hindered. Since these records do not exist solely for use in litigation, there is no reason to require a person who desires to inspect them to show a legal interest. Clearly, this rule has no basis in reason or justice.[8]

Many jurisdictions have recognized the undesirability of this rule and have refused to follow it. Although the views of these courts are not harmonious, the various holdings can be grouped conveniently into three categories. At one extreme are those jurisdictions which require the petitioner to have a *special* interest not enjoyed by the other members of the public;[9] this interest has been presumed in the cases of abstractors,[10] attorneys[11] and newspaper publishers.[12] At the other extreme are the courts which hold that a person has the right to inspect public records even to satisfy idle curiosity.[13] The remaining decisions on this subject fall in the wide range between these two views.[14]

If the common-law doctrine requiring a legal interest as a pre-

[8] This criticism was directed toward the common-law doctrine in Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749 (1928). In that case the court granted the right to inspect public records to a newspaper company which did not have a legal interest. In 42 Harv. L. Rev. 133 (1928), the author feels that the inspection was granted because the petitioner was a representative of the public. However, the language used in the opinion strongly indicates that the petitioner was allowed to inspect so that its business of disseminating news would not be impaired.

[9] Holcombe v. State *ex rel.* Chandler, 240 Ala. 681, 200 So. 739 (1941).

[10] See State *ex rel.* Cole v. Rachac, 37 Minn. 372, 35 N.W. 7 (1887); Shelby County v. Memphis Abstract Co., 140 Tenn.(13 Thompson) 74, 203 S.W. 339 (1918).

[11] Brewer v. Watson, 61 Ala. 310 (1878).

[12] Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749 (1928).

[13] People *ex rel.* Stenstrom v. Harnett, 131 Misc. 75, 226 N.Y. Supp. 338 (Sup. Ct.), *aff'd*, 224 App. Div. 127, 230 N.Y. Supp. 28, *aff'd*, 249 N.Y. 606, 164 N.E. 602 (1928); Butcher v. Civil Serv. Comm'n, 163 Pa. Super. 343, 61 A.2d 367 (1948).

[14] Taxpayers Ass'n v. City of Cape May, 2 N.J. 27, 64 A.2d 453 (1949) (the inspection must not hamper the conduct of public business); Bend Pub. Co. v. Hauer, 113 Ore. 105, 244 Pac. 868 (1926) (the inspection must be for a lawful purpose and not to satisfy mere curiosity, and the official in charge may make rules and regulations he deems necessary).

requisite to inspection of records is rejected, what rule should be adopted? Since these records have uses which are common to every member of the public, there is no reason to require the petitioner to exhibit a special interest. Accordingly, the best rule is to allow inspection by every member of the public without requiring any interest to be shown in the records. It is true that if the rule requiring a special interest were followed—and a newspaper publisher were deemed to have this interest—the public could be kept informed by the press on matters contained in the records. However, this would preclude any first-hand inspection. The public would be enlightened only after the information, which is subject to the publisher's interpretations, had been transmitted through the newspaper. Furthermore, there is no assurance that the press would even trouble to inspect the records. If unrestrained access is allowed, on the other hand, every member of the public will be given an opportunity to personally inspect the records and still the newspaper company will have the right to inspect the records for its news articles. The only plausible objection against this position is that an undue burden may be placed on the official in charge of the records due to excessive requests to inspect. Since, as a general rule, only interested persons will take the trouble and time to inspect the records, the possibilities of this happening are highly remote.

It may appear that adherence to the proposed rule will make inspection of these records an absolute right. However, as the writ of mandamus is not issued as a matter of right but is granted in the sound discretion of the court,[15] the court will still retain the means of regulating this right to inspect public records. The net effect, nevertheless, is that since the requirement of a legal or special interest will not have to be satisfied, more petitioners will be given the right to inspect these records for reasons beneficial to them.

Frank N. King, Jr.

STATUTORY INTERPRETATION—STATE WELFARE PROGRAM—FEDERAL ENCLAVES—Through cession[1] and purchases[2] the United States acquired land lying totally within the geographical boundaries of Arapahoe County, Colorado for use as a military installation (Fort Logan). The state granted the federal government "exclusive jurisdiction" but re-

15 United States Fid. & Guar. Co. v. Steele, 241 Ky. 848, 45 S.W.2d 469 (1932); Daniel v. Warren County Court, 4 Ky. (1 Bibb) 496 (1809).

1 Colo. Rev. Stat. Ann. § 142-1-22 (1953) (originally enacted in 1887).
2 Colo. Rev. Stat. Ann. § 142-1-24 (1953) (originally enacted in 1909).