

1953

Margaret Conover and Lorraine Beach v. Board of Education, Nebo School District, et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

— FILED —
MARGARET CONOVER and
LORRAINE BEACH,

SEP 28 1953

Plaintiffs and Appellants,

Clerk, Supreme Court, Utah

—vs.—

BOARD OF EDUCATION, NEBO
SCHOOL DISTRICT, HAROLD
CHRISTENSEN, LA VON
PAYNE, L. J. CRABB, WILL-
IAM F. BROADBENT, DR.
JESSE ELLSWORTH, Board
Members, and B. L. ISAACS,
Clerk of said Board,
Defendants and
Respondents.

✓
Case
No. 8048

Brief of Appellants

RICH, ELTON and MANGUM,
by Max K. Mangum,
Attorneys for Appellants

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Brief of Appellants

This is primarily a case involving questions of law. The case was tried below upon the pleadings, no direct evidence having been introduced by either side (R. 23, lines 2-23, incl.). Let us therefore take a look at the pleadings to determine the facts before this Appellate Court.

STATEMENT OF FACTS

The defendants, hereinafter called respondents, are residents and taxpayers of the Nebo School District, residing and owning property in Springville, Utah (R. 10, R. 14).

The defendants, hereinafter called respondents, are the Board of Education of the Nebo School District, the individual members thereof, and the clerk of said school board (R. 10, R. 14).

On February 18, 1953, the Nebo School District held a Board of Education meeting. (R. 10, R. 14).

The respondents admit each of the foregoing statements so there is no issue of fact as to those matters (R. 14).

The respondents admit that on February 19, 1953, appellants called in person at the office of said Nebo School District in Spanish Fork, Utah, and requested the opportunity to examine and copy the minutes of the meeting held February 18, 1953 (R. 15).

Respondents further admit that appellants were advised by the clerk's office that until the clerk's tentative notes of the minutes had been first read and approved at a subsequent meeting of the Board that they were not available for inspection (R. 15).

Respondents admit that at the time of appellants' requested opportunity to examine and copy said minutes that the clerk had then transcribed his

tentative notes so as to present **them** to the Board at the next succeeding meeting for Board approval as official minutes (R. 15).

Appellants allege and defendants admit that immediately following some decisions at board meetings and without awaiting approval of minutes at subsequent meetings, action has been taken and obligations have been incurred by the Board in compliance with said decisions reached at Board meetings (R. 11, R. 15).

The respondents admit (R. 16) that refusal of the clerk's office to permit the inspection of Board minutes was based in part at least upon the following communication:

“DEPARTMENT OF PUBLIC INSTRUCTION

E. ALLEN BATEMAN, Superintendent

State Capitol

Salt Lake City 1, Utah

February 16, 1953

“Mr. B. L. Isaac

Clerk Board of Education

Nebo School District

Spanish Fork, Utah

Dear Mr. Isaac:

“In answer to your letter of February 13, 1953, I would give my opinion as follows:

“1. The minutes of a board of education do not become official until they have been approved by the Board.

2. It is the board's privilege to determine whether tentative copies of minutes shall be sent to each board member immediately following the meeting or whether the clerk should not distribute them until the next meeting of the board of education when they could be read and approved in the same meeting.

"3. The board of education should determine its own policy with reference to the release of tentative minutes to any other persons than members of the board or whether a board member should be permitted to give tentative copies of minutes to any other person.

"In other words, I think all of the questions raised in your letter are questions on policies which your own board of education should determine.

Sincerely yours,
E. Allen Bateman
State Superintendent of
Public Instruction"

EAB-1s

Respondents admit that appellants as taxpayers and citizens are entitled to current and timely information with respect to the activities of their School Board (R. 16).

In addition to the foregoing admissions by respondents, they made certain allegations of their own. However, all of these additional allegations by respondents are denied by virtue of Utah Rules of Civil Procedure, Rule 8 (d).

Thus for purposes of this appeal those matters admitted by respondents are the only facts before this court.

ARGUMENT

Point 1

THE FINDINGS OF FACT ARE NOT SUPPORTED BY THE RECORD.

Finding of Fact No. 4 (R. 27) by the court below, contains the following statement, “but that such decisions have been arrived at at such meetings at which the plaintiffs have been at liberty to attend, or concerning which they have been at liberty to secure information from anybody in attendance, the entries in the journal being merely evidence of the official action.” The quoted language is an allegation of respondents which is not admitted by appellants in the pleadings. Rule 8 (d) of Utah Rules of Civil Procedure provides that such an allegation shall be taken as denied or avoided. Thus, there is no support whatever in the record for the foregoing finding. The finding is irrelevant and immaterial to the issue before the court anyway, and has no bearing whatsoever on the matter for consideration. In **Conover v. Board of Education**, 110 Utah 454, 175 P 2nd 209, this same Board argued that because a taxpayer could easily obtain more detailed information if it was desired, by going to the district clerk and obtaining the records, that therefore the Board did not need to publish the detailed information. Now it would appear that the Board feels that because a taxpayer could go to a board meeting and

learn first hand what transpired, that it need not make its records available to the public. This court in the Conover case *supra*, held that it was not impressed with such an argument. Assuming that appellants had the right to attend the Board meetings, this has nothing to do with their statutory right to inspect and copy public writings.

The foregoing comments as to findings No. 4 are just as pertinent and applicable to finding No. 6. Finding No. 6 (R. 28) is as follows:

“6. That the meetings of the Board are public and no attempt has been made by the Board to restrict plaintiffs’ attendance at such meetings or to prevent them from obtaining information from anyone in attendance thereat as to the happenings at the meeting, but the Board claims the right to reserve their tentative notes of proceedings until they have been approved by the Board and entered into the journal, maintaining that until they have been entered in the journal, they are not public records.”

Thus, this finding should be stricken from the record.

Findings of Fact No. 7 and 8 (R. 28-30, incl.) are as follows:

“7. Previous to the meeting in question, release by the Clerk of tentative notes of proceedings prior to their checking and approval by the Board has involved inaccuracies in reporting the business transacted by said Board and its proceedings and that because of such

fact, the Board has adopted the procedure of having tentative notes submitted to it for checking and for approval before they are accepted as minutes of meetings; that there has been no effort made to suppress any information as to action or proceedings taken by the Board, nor to prevent in any way the attendance of the plaintiffs, or any interested citizen, at Board meetings or to prevent the plaintiffs or anyone else from examining all of its minutes and other official records at the earliest practicable time; that all records, including the journal, have been properly kept by the Clerk and they have always been available for inspection to the plaintiffs and that the minutes of the particular meeting referred to by plaintiffs within a reasonable time after February 18th, 1953, were approved by the Board and entered in the journal and since then, at all times, have been available to the plaintiffs and all other citizens for inspection and copying; that the plaintiffs, by reason of motives personal to themselves, have demanded the right to inspect and take copies of tentative notes or transcriptions thereof by the Clerk before such notes or transcriptions have been approved by the Board and entered in the official journal kept by the Clerk under Section 56-6-15, Utah Code Annotated, 1953, and have demanded that the Clerk immediately transcribe the minutes of meetings and make them immediately available to citizens, including plaintiffs, for their inspection and copying; that the defendants claim that the said tentative notes are not public writings and that the plaintiffs cannot dictate the method used by the Clerk and the Board of Education in insuring the accuracy of the official journal.

“8. That at no time have the defendants or any of them withheld from the plaintiffs or refused to permit them to inspect or to have full access to the official journal of the said Board of Education, including all official minutes or public writings concerning the said meetings and that said journal as kept by the Clerk of the Board has been, at all times, and is available for the inspection of plaintiffs, or any of them, or any other citizens. That the action of the Clerk of said Board and that of said Board in not having the said tentative notes entered in the journal as official minutes of said meeting until approved by the Board to assure their accuracy at the following meeting of the Board was, and is, reasonable and that the demand of the plaintiffs for a release of said tentative notes as public writings the day following said meeting was not reasonable or timely.”

All of the statements in the foregoing findings No. 7 and 8 are mere allegations of respondents, not admitted by appellants. Since Rule 8 (d) Utah Rules of Civil Procedure provides that such allegations shall be taken as denied or avoided, there is no basis in this record for either of these findings of fact. The same argument as to relevancy which is made with respect to Finding No. 4 is equally applicable and will not be restated here.

POINT II

THE TRANSCRIBED TENTATIVE NOTES OR MINUTES ARE PUBLIC WRITINGS

The question before this court is simply this:
Are the transcribed notes made by the clerk of the

Board of Education official documents within the meaning of Section 78-26-1 (3), Utah Code Annotated 1953, before being approved by the Board of Education at a subsequent meeting?

Section 78-26-1 provides that public writings are divided into four classes: Laws, judicial records, other official documents and public records kept in this State, of private writings. Of the four classifications, the one under which we contend the notes of the school clerk fall is "official documents."

The word "documents" has been given the following definition in 27 C. J. Sec. at page 1311:

"Anything bearing a legible or significant inscription or legend, that which conveys information; hence, a written or printed instrument; anything that may be read as communicating an idea; some writing, like a deed, a will, a letter, or an account rendered or stated; any matter expressed or inscribed upon any substance by means of letters, figures, or marks, or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter.* * * The word is of very comprehensive signification, and applies to recorded words whether written, printed, lithographed or photographed, the thing on which the words are recorded being immaterial."

"The clerk of each Board of Education shall attend all meetings of the board, shall keep an accurate journal of its proceedings, and have the care and custody of the seal, records and papers of such board * * *". 53-6-15, Utah Code Annotated 1953.

Under the section of the Utah Code just quoted the clerk of the school board is the one who is required to keep the accurate journal of the Board's proceedings. It is the statutory duty of the clerk—**not the Board**—to keep the journal. His entries and notes made at the time of the meeting are official documents, admissible as evidence in court.

As authority for this statement Utah Code Annotated 1953, Section 78-25-4 provides:

“An entry made by an officer or board of officers, or under the direction or in the presence of either, in the course of official duty, is prima facie evidence of the fact stated in such entry.”

Section 78-25-3 reads:

“Entries in public or other official books or records made in the performance of his duty by a public officer of this State, or by any other person in the performance of a duty specially enjoined by the law, are prima facie evidence of the facts stated therein.”

Since there is no statutory requirement that the Board itself either keep the minutes or approve the minutes, and since the clerk is required by law to keep an accurate journal of the proceedings, his notes and records must of necessity be considered official documents. Courts of common law have for many centuries recognized that entries made in the course of official business by public officers are admissible in evidence, despite the hearsay rule.

Section 78-25-4, Utah Code Annotated 1953, provides that an entry made by an officer or Board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

The notes and minutes taken by the clerk during the actual conduct of an official meeting of the Board of Education are "entries made by an officer in the presence of a board of officers in the course of official duty."

An entry has been described as committing in writing, that which is written, whether words or figures, and has been defined as the act of making or entering a record or a setting down in writing of particulars. It has also been described as that which is entered. The act of setting down or causing to be set down in writing is the making of an entry. 30 C J S 267-8.

In the case of **Bissell vs. Beckwith**, 32 Conn. 509, 517, the court stated that "an entry is a setting down in writing."

In **Thomason vs. Ruggles**, 69 Cal. 465, 11 Pac. 20, the Supreme Court of the State of California had before it for determination the question whether a certain constitutional amendment had been properly adopted. One of the requirements present in the Constitution of California required that proposed amendments be **entered** in the journals of both Houses, with the ayes and nays taken thereon.

When the particular amendment was proposed it was not entered at length, that is, written out in full in the journal of both Houses. It was written out in full in the journal of one of the Houses. The entry was made in the other by identifying reference only. In the course of the opinions written by the Justices in this case, Judge McKee said, "to 'enter' a paper upon a public journal of record is to inscribe, to enroll, to record it, Webster's Dictionary; 'entering'; 'entry, as a matter of record, is the act of setting down or causing to be set down in writing; recording or causing to be recorded, in due form', Abbott's Law Dictionary 430, word 'entry' ".

Certainly, in view of the authorities just quoted, the act of the School Board clerk, in committing to writing the activities at a School Board meeting, is the making of an "entry" in the course of his official duties. This being the case, such notes and entries are "official documents."

Under the Utah Statutes two classes of "entries" are prima facie evidence of the facts stated therein. Included in the first class are entries in public or other official books or records. (Section 78-25-3 Utah Code Annotated 1953). Included in the second class are entries made by an officer or board of officers in the presence of either in the course of official duty. With respect to the second class of entries, the statute recites no requirement as to the place of the entry. (Section 78-25-4 Utah Code Annotated 1953). Thus under section 78-25-4, it is immaterial whether the entry is made in an official

book or record, so long as it is made in the presence of a board of officers in course of official duty. When these two requirements are met the entry is, by statute, accorded status as an official document. Under common law rules official documents are admissible as prima facie evidence of the facts stated therein. Thus sections 78-24-3 and 4, supra, are in effect, statutory recognition of the fact these two classes of “**entries**” are official documents. When the clerk of the school board attends an official board meeting and makes notes of the transactions of said meeting he is, as an officer making “an entry *** in the presence of” a board of officers, “in the course of official duty.” This follows because the law makes it the duty of the **clerk** of each school board to attend all meetings of the board and keep an accurate journal of its proceedings. The taking of notes during the actual progress of the meeting is a natural and proper part of the process of “keeping an accurate journal.” If for any reason such as the death of the Clerk the journal had not been made up, but the Clerk’s transcribed notes prepared in the form for submittal to the Board were available, would any court in Utah deny the admissibility of such notes? We do not believe so.

The court decisions of Kentucky and Alabama lend considerable support to the argument that notes taken during official meetings by a clerk are “official documents”. Under the well established rule in these courts amendments nunc pro tunc to minutes of political subdivisions can **only** be made when the amendment is supported by some note or memorandum made concurrently with the holding

of the original meeting. Thus the original notes of a clerk are accorded official status and accepted as official documents upon which to base a nunc pro tunc amendment. See **Jeffers v. Wharton** 197 So. 352, 29 Ala. App. 428; **Rickets v. Hiawatha Oil & Gas Co.**, 189 S.W. 2d 858, 300 Ky. 548 (Ky. 1945); **Jefferson County v. Case** 12 So. 2d 343, 244 Ala. 56 (Ala 1943).

In the case of the **State v. Hunter**, 127 W.Va. 738, 34 S.E. 2d 468, the Supreme Court of Appeals of West Virginia in 1945 discussed rather fully the meaning of "public records". In this case the owner and publisher of a newspaper brought a mandamus action to compel the clerk of the court to permit the examination of the chancery praecipe book insofar as memorandum written in such book relates to suits for divorce. The West Virginia statute provided "the records and papers of every court shall be open to the inspection of any person, and the clerk shall, when required, furnish copies thereof. * * * *". The court held in this case that the memorandum book was not a record or paper within this code provision, pointing out that there was no statute requiring that such a book be kept. The keeping of this record was for the convenience of the clerk and was not required as part of his duties. In the course of reaching these conclusions, the court commented upon public records as follows:

"A public record has been defined as 'a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done' Bouviers Law

Dictionary, Rawle's Third Revision, Vol. 3, page 2843. The foregoing definition is quoted with approval in the case of *Coleman vs. Commonwealth*, 25 Grat., Va., 865. The officer making such record must have authority to do so, but that authority does not necessarily rest on express legislative enactment. 'Whenever a written record of the transactions of a public officer, in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that written memorial, whether expressly required so to do or not; and when kept it becomes a public document * * *', *Coleman v. Commonwealth*, supra *** In order to attain the status of a public record, the writing must be made by an officer duly authorized and empowered to act in the premises, or under the supervision of such officer."

The duties of the clerk in recording the actual happenings of the School Board meeting are purely ministerial and do not involve the exercise of any discretion whatsoever. The clerk's function is merely to write or register in proper form the transactions of the body to which he belongs. As a matter of fact, the definition of the word "clerk" for legal purposes is substantially as just given: "One who keeps, or records, or writes, or registers the transactions of the body." C. J. Sec., Vol. 14, PP 1206, definition of "clerk".

In the case of *State ex rel Lovell vs. Tinsley*,Mo..... (1951), 236 S. W. 2d 24, the court had before it a mandamus petition to require a clerk of a school

board to correct his minutes so as to reflect the truth. In a lengthy carefully considered opinion the court allowed the writ. The following comments from page 28 were made by the court:

“Obviously, recording and reciting the business transacted at a meeting, and writing or rewriting the minutes to speak the truth, does not call on respondents for the exercise of discretion, but rather involves only the mechanical, ministerial act of faithfully recording and certifying to the truth concerning what happened. Truth is established, fixed, constant, eternal. It is not subject to the exercise of discretion or construction. It is not variable. In reporting the truth, the clerk has no latitude, power of free decision, or room to decide at will or according to his pleasure.”

Diligent search has only uncovered one Utah case which might be helpful on this point. In **Emmertson vs. State Tax Commission**, 93 Utah 219, 72 Pac. 2d 467, the court had before it the question of whether to revoke a driving license because the driver had been convicted of a certain criminal offense. The Tax Commission was required by mandatory provision of law to revoke the driving license upon receipt by it of a “record of conviction.” The only question before the court was whether a “record of conviction” had been received. The court points out that “record” is a word of equivocal meaning, and the popular meaning of this word was largely relied upon by the court in its decision. The important part of the decision, from our standpoint,

was the court's reliance upon the definition of "record" given by Bouvier, as follows: "A written memorial made by a public officer authorized by law to perform that function and intended to serve as evidence of something written, said or done."

Black's Law Dictionary defines "record" as a "written account of some act, transaction or instrument drawn up under authority of law by a proper officer, and designed to remain as a memorial or permanent evidence of the matters to which it relates."

Webster's New International Dictionary defines "record" as "that which is written or transcribed to perpetuate knowledge of acts or events; reduction to writing as evidence; also the writing so made."

Each of these definitions is quoted in the Emmerston case *supra*, by this court.

Certainly under these definitions the entries made by the clerk in the course of his official duties are "records", yes, even public records.

In the case of **Morrison vs. White**, 10 Cal. App. 2d 261, 52 Pac. 2d 261 (California 1935), it was contended that a special election was not properly authorized by the county board of supervisors in that the minutes authorizing the election and fixing the date as of August 28, 1934, was not actually written into the journal of the board until sometime after September 1, 1934. The journal purported to show that on June 11, 1934, a resolution was passed by which an election was called. It appeared from

the testimony of the clerk of the board that rough minutes of the board were kept by the clerk and that from these rough minutes the entries in the journal were thereafter made. The court said:

“The time the entries are actually made in the journal appears to us to be merely a clerical detail incidental to the calling and holding of the special election, and the transcribing of the minutes themselves were purely clerical and not jurisdictional.”

In order for the court to have reached this conclusion it must have considered the rough notes made by the clerk at the time of the actual meeting as original documents and also as official documents. Otherwise the court could not have permitted the transcribing from these rough notes into the official journal at a subsequent date to have been proper and merely a clerical ministerial duty.

Any statute in derogation of the common law right of inspection of public records should be construed strictly. On the contrary, any statute which allows the inspection of public records should be construed liberally in favor of the right of inspection. 76 C. J. Sec. 137.

In further support of his position we cite **Sears, Roebuck and Co. vs. Hoyt**, 107 N.Y.S. 2d 756. In this case the New York court stated that the provisions of general municipal law, providing that certain records are public records and open to inspection, should be liberally construed for the protection of taxpayers.

The basic reason behind the common law rule and the statutory provisions allowing the general public to have access to all public writings is that the public at large are entitled to know what goes on in official bodies during their deliberations. The purpose of requiring by statute that journals shall be kept is to provide a means whereby the public can verify the actions and can at all times know what has officially transpired in the meetings of public bodies. Since respondents have by their pleadings admitted that the actions taken at school board meetings are efficacious and controlling, and since respondents have further admitted that the clerk of the school board did take notes at the meeting, and that the clerk has transcribed his tentative notes, certainly appellants are entitled to see these transcribed notes, without having to await the approval of these notes by the Board. The duty of the clerk is ministerial, and appellants assume that he has honestly and correctly recorded the actual decisions and actions taken at the school board meeting. This being so, appellants are entitled to see these notes without awaiting any approval by the board.

Under the laws of the State of Utah, school boards, being creatures of statute, have no powers beyond their statutory grant. This rule was announced in the case of **Bertognoli vs. Baker**,Utah, 215 Pac. 2d 626. Being creatures of law, and having only those specific powers granted them by the law, school boards cannot assume powers unto themselves not specifically given by statute. Nowhere in the laws of the State of Utah is it provided that the

journal kept by the clerk pursuant to the mandate of law must be approved by the school board **before it shall be considered "the journal of the clerk."** On the other hand, appellants do not deny the right of the school board to insist upon corrections at any time that the journal of the clerk contains errors. This, however, does not mean that the journal is not an official document until approved by the board. On the contrary, appellants recognize that any public body such as a school board has the inherent power to require amendment of minutes of its proceedings to reflect the truth.

The high court of Connecticut in a very old case went about as far as any court has ever gone in considering this very matter. In the case of **Samis vs. King**, 40 Conn. 298 (1873) the court had before it a case wherein the following facts were at issue. We quote from this decision:

"The charter in its twentieth section provides that the city clerk shall be clerk of the common council and shall make and keep true records of all the votes and proceedings of the common council, and also provides that such records shall be in all courts evidence of the truth of the matters therein recorded. And the clerk is required to be sworn to the faithful performance of his duties.

"If he should happen to make a mistake in his record he may be corrected if erroneous by mandamus, but the record, until amended **by him** (court's underscoring) or by order of court on mandamus, is the proper evidence of what took place at the meeting of May 26th,

and was properly so regarded by the Superior Court.”

The question in the Samis case just quoted was whether the official record of this meeting certified to by the clerk was evidence of what took place or whether the record as attempted to be amended at a subsequent meeting of the council was to be treated as the true record.

In 32 C. J. Sec., at 478, the following statement is made:

“When a formal record * * * has not yet been made up, those entries, such as the files and the entries in the minute books which are permitted to stand in the place of it, are admissible in evidence as the record.”

Substantially the same doctrine is set forth in 45 **American Jurisprudence** at page 421, wherein the following statement is made:

“The public character of records is not ordinarily to be determined by the manner in which they are kept or by any formal characteristics. The fact that the information contained in original public documents has been or may be found in books wherein it has been classified and arranged for more convenient access does not deprive such public documents of their character. Thus, a stub receipt book in a city treasurer’s office which contains the record of cancelled certificates of tax sales, the list of lots redeemed from sales for special city taxes, and also the list of lots sold to the city for delinquent taxes and afterward as-

signed to individuals are public records within the meaning of a statute which provides for inspection of such records, notwithstanding that all data contained in such books are, at the convenience of the treasurer, to be entered in record books which are accessible to the public. Likewise, where a public officer has prepared a report based on questionnaires filed in his office, the questionnaires do not thereby lose their character as public documents.”

Certainly the notes and entries of the clerk of the School Board would be admissible in evidence as the record at any time prior to the preparation by the clerk of the formal “journal”. If for any reason such as death of the clerk, the journal had not been made up, the transcribed notes of the clerk taken during the course of an official meeting would be admissible under the provisions of Section 78-25-4, Utah Code Annotated 1953.

During the argument of this case in the lower court a great deal of emphasis was made by counsel for the respondents on the “busy-body” nature of appellants activities in this case. Appellants do not apologize for their activities, but on the contrary are very proud of their interest in the actions of their school board. As taxpayers and parents of school children they are vitally interested in all actions and decisions of their school board. A school building program is currently one of the problems of the Nebo School Board. Appellant’s request to see the school board minutes just as soon as the clerk had transcribed his notes was not just to satisfy

an idle curiosity, but was a legitimate effort to follow accurately and promptly the activities of their board. This so-called "busy-body" activity on their part was met by the amazing attitude of the Board that its actions and decisions, **even tho recorded by its own clerk**, were to be denied to the public until some indefinite time in the future when the Board might see fit to put its stamp of approval on the clerk's record of the proceedings. The duty of the **clerk** to keep an accurate journal is purely ministerial and does not involve the exercise of any discretion whatsoever. In fact, the clerk's function is merely to register the transactions of the body to which he belongs. This simply requires that he record the truth, which is eternal. Both counsel in the argument below and the lower court in its opinion, labor over the contemplated inaccuracies of a journal in which direct entries might be made by a clerk without first submitting the entire proposal to the Board for its clearance. The lower court asks who could know best what was proposed and who proposed it, seconded it and how the vote went. The court answers the inquiry by asserting that the ones who proposed, seconded and voted upon a matter would be most apt to know accurately what had transpired. Experience with deliberative bodies has long since shown the contrary to be true. A clerk who is not emotionally involved in a heated controversy but who merely sits on the sidelines and acts as a reporter noting down the transactions **as they occur** is bound to be more accurate than the faulty memory of individuals considering the detailed matters a month later. Our wise legislative

mandate that the clerk “shall attend all meetings of the board, shall keep an accurate journal of its proceedings,” places this responsibility on the clerk, not the board.

Who is the administrative officer of the school board? Suppose the Board at a proper meeting authorizes and directs the clerk to place an order for the purchase of miscellaneous school supplies. Both counsel for respondents and the lower court concede that the clerk could properly proceed to consummate the purchases. **But**, they say that the same clerk can’t be trusted to accurately record the above Board proceedings until the Board at a later meeting has approved the tentative notes for accuracy. Thus the clerk can act in behalf of the Board as its administrative officer and carry out to complete fulfillment decisions of the Board, but he can’t put these same decisions in a record so the public might know about Board actions beforehand or at least concurrently.

The pleadings and stipulations in this case show conclusively that “the clerk had assembled his notes apparently made concurrently with the meeting and had transcribed them into a tentative copy for submission to the Board for rejection, amendment or approval as the Board might direct,” (memorandum decision of Lower Court R-45) before the appellants requested the opportunity to see the minutes. Thus, there is absolutely no question about the fact that the clerk had completed his ministerial duties by having recorded the transactions of the Board meet-

ing, except for the mechanical job of either placing or copying these notes into the journal.

The clerk did not say in this case that **he** was still considering what should be entered as the minutes of the meeting. He had assembled his notes and transcribed them into the form which he **must** have considered accurately reported the Board's proceedings. He was satisfied that he had to the best of his ability done his statutory duty. Yet respondents contend that the public is still to be denied the opportunity to see these notes until some vague time in the future when the Board might meet and approve the notes for entry in the journal.

Appellants contend that the official "**Journal**" of the Board meetings is not the only public writing connected with school board operations that appellants are entitled to inspect. In fact appellants readily concede that the transcribed notes they asked to see on Feb. 19, were not at that time in such form and location as to constitute them as the "journal." **This is not the issue of this case.** The real issue is whether the entries made by the clerk in the course of his official duty, i.e., the making of notes during the meeting, the assemblage of those notes and the transcribing of them into a copy ready for submission to the Board, constitute an official document (Sec. 78-26-1 Utah Code Annotated 1953).

The lower court erroneously states the issue as follows: "Are notes, or memoranda, of the proceedings of the school board, taken by the clerk for his own convenience in entering the 'accurate' record

into the 'journal', 'other official documents', so as to bring them within subsection (3), 78-26-1 above and subjecting them to inspection by any citizen as set forth in Sec. 78-26-2 above?" (R-38) This statement of the issue completely overlooks the fact that at the time plaintiffs requested the opportunity to inspect the minutes, the clerk had "transcribed his tentative notes so as to present them to the Board at the next succeeding meeting of the Board for approval as official minutes." (Defendants answer paragraph 5 R-15). The clerk at the time of the request by appellants, had already, (1) attended the meeting in question, (2) made notes during such meeting, (3) transcribed these notes, (4) and put them into the form for actual submittal to the Board for its approval. Thus it cannot be argued as the lower court does in its memorandum decision that appellants were requesting the right to inspect "hasty memoranda made by the clerk under pressure of the business of a session of the Board and burdened with error which reason and common knowledge would expect to exist." (page 6 memo decision R-39).

The memorandum decision of the lower court fails completely to note or discuss the fact that the statute imposes the duty of keeping the journal on the **clerk** of the Board, not the Board itself. In fact under the decision of the lower court, the Board must approve the contents of the journal entries before the clerk can make up the journal. To better illustrate the error of the court in this respect, let's assume a hypothetical situation, as follows:

Assume the Board at a duly called meeting passes a resolution to raise the salary of a certain teacher effective two months later. Assume further that the Board instructs the clerk not to show the resolution in its minutes or journal for that meeting. Now assume that the clerk insists upon recording the resolution in the journal. Obviously under Section 53-6-15, Utah Code Annotated 1953, the clerk should and would prevail if he insisted on his right to keep the journal accurate by including the resolution. This extreme example illustrates very forcefully the importance of the legislative mandate that the clerk keep the journal. The lower Court ruling has amended the statute by providing that the Board shall determine the contents of the journal before the clerk can make entries therein.

The right of the Board to order a correction of previous minutes is an independent power common to any similar public body. The right to correct error existing in previous minutes does not alter the statutory mandate that the **clerk** shall keep the journal. It should be noted, however, that the proper parliamentary manner to correct a journal is to show the correction in the subsequent entry, not to go back and erase or rewrite the original journal entry.

The importance of the issue before this court can not be minimized or overlooked. We live in a democracy where all powers of government are derived from the consent of the governed.

Knowledge of what, when and how a governmental agency is proposing to act is absolutely es-

sential to the body politic. This knowledge to be of any real value must be timely and completely current. Taxpayers and citizens, such as appellants, are not mere students interested in the **history** of what transpired a month previously. They are the source of all the powers and authority vested in respondents, and are justly entitled to know promptly and on a current basis exactly what respondents have done, what they are doing and what they contemplate doing in the future. Furthermore, they are entitled to gather these facts from the official source, the transcribed notes or minutes of the clerk of the School Board, and not be required as suggested by the pleadings of respondents and the findings of the trial court to gather the information second handed from neighbors who might have attended the meetings of the Board.

Appellants are utterly unable to understand why respondents feel it is proper for respondents to keep the minutes of their meetings secret from the public until after the minutes have been read and approved at subsequent meeting. Accuracy of the journal is not and cannot be accepted as a valid justification for withholding knowledge from the public. In the first place respondents have admitted that actions have been taken and obligations have been incurred by the Board without awaiting approval of their minutes. As previously indicated in this brief, the clerk of the school board being the administrative officer of the board must have on innumerable occasions carried out mandates of the Board long prior to approval of the journal covering

such mandates. This court can take judicial knowledge of this in view of respondents admission that actions are taken without awaiting approval of the minutes. If the clerk can be trusted to carry out mandates and decisions surely he should be trusted to report the decisions accurately. The statutes impose the duty of keeping the journal on the clerk anyway, and not on the board.

However, let us for the moment assume the existence of a careless, inaccurate clerk. Assume that he is inaccurate in two respects:

1. He reports the Board actions in error;
2. He misunderstands the Board's decisions and personally takes erroneous action.

Now, assume that the erroneous report (Board Journal) is promptly published. It is almost a certainty that by virtue of releasing the erroneous minutes that the error of action will be disclosed immediately and corrected. Why? Because citizens and taxpayers, such as appellants, having current and timely knowledge of the clerk's actions could be counted upon to discuss the clerk's actions with Board members.

Even if the foregoing assumptions and argument are totally invalid, we submit that it is far more vital that the public be given prompt and current access to Board minutes, than it is to delay public access for a month just to try to insure more accuracy in the journal. After all, if the clerk makes erroneous journal entries, **they can be corrected at**

the next meeting. However, erroneous actions in many instances might be irrevocable. If by releasing the minutes as soon as the clerk transcribes them, an erroneous action could be averted, that would be far more important than to safeguard personal embarrassment because of errors by withholding the minutes just to have one more chance at accuracy.

CONCLUSION

Appellants assert in their complaint (R. 13) that respondents are legally obligated to make the minutes of their meetings immediately available for inspection and copying by having said minutes promptly transcribed and available for inspection. On the basis of the pleadings and record in this case there can be no dispute that the clerk **had** transcribed his notes at the time appellants requested the opportunity to examine the minutes. Therefore, as to the particular request involved, a determination that the transcribed notes are public writings would require a reversal of the lower court's decision on this point.

However, appellants are seeking further relief, as noted in paragraph two of their prayer (R. 13). This court is requested to declare the law of the State of Utah with respect to respondent's obligation **promptly** to transcribe the minutes of their meetings. The obligations to transcribe the notes or minutes currently and promptly is independent of the obligation to permit inspection and copying

of the minutes, although the two are necessarily related.

Appellants sincerely request this court, pursuant to 78-33-2, Utah Code Annotated 1953, to establish and declare the law of Utah on this important public question.

Respectfully submitted,
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