

1953

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

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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MARGARET CONOVER and LORRAINE  
BEACH,

Plaintiffs and Appellants,

VS.

BOARD OF EDUCATION, NEBO SCHOOL  
DISTRICT; HAROLD CHRISTENSEN,  
LAVON PAYNE, L. J. CRABB, WILLIAM F.  
BROADBENT, DR. JESSE ELLSWORTH,  
Board Members; and B. L. ISAAC, Clerk of  
said Board,

Defendants and Respondents,

NO. 8048

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## BRIEF OF RESPONDENTS

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Attorneys for Respondents



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## BRIEF OF RESPONDENTS

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### STATEMENT OF FACTS

We cannot accept the Statement of Facts set out in appellants' brief as a complete or proper statement. We cannot accept the premise of amici curiae's brief, which also is based on erroneous fact assumptions.



The case was submitted and decided upon an agreed statement of facts, comprised of the allegations of the complaint admitted by the defendants and the affirmative allegations of the answer which were, by stipulation, taken to be true. The plaintiffs, in effect, interposed a demurrer to the answer and the case was determined on this basis. By this stipulation the plaintiffs waived the introduction of evidence by defendants in support of their answer and now cannot be heard to say that the stipulation should be ignored and the issues of fact determined against the defendants, contrary to the findings of the court because defendants took plaintiffs at their word and rested upon the stipulation. Yet, plaintiffs and appellants in their brief, in effect, take that very position. Their purported Statement and Point 1 in the brief disregard the admitted facts necessary for a proper understanding of the case.

Reference is made to the transcript, consisting of three pages of the record on appeal (22-24). The following was the understanding:

“MR. MANGUM: If the Court please, I believe that a stipulation at this time would be in order, and I believe, if I understand it, Mr. Christensen will agree to stipulate that the matter be submitted on the pleadings.

MR. CHRISTENSON: Yes, Your Honor.

MR. MANGUM: (continuing) In this case, without the taking of any additional testimony, I assume, Mr. Christenson, that the denials which the law gives me, as to matters pleaded in the answer, are still available to me? There are some things pleaded there in the answer that I would not necessarily agree to, but I don't believe they are essential in the trial of this matter.

MR. CHRISTENSON: Of course I am standing on my



answer, if the court please. I have admitted all I can admit, and I think all I should admit, and we think that on the basis of the facts alleged in the answer, that we are entitled to prevail. And as I understand it, on the basis of the facts stated in the answer, together with our admissions of the facts stated in the complaint, to the extent that we have admitted them, Mr. Mangum believes that the plaintiffs are entitled to prevail. And it is on that basis that we are submitting the matter.

MR. MANGUM: Right.

THE COURT: All right. The record may so show." (File, page 23).

The court's findings of fact refer to this stipulation in the following words:

"The above entitled cause came on duly and regularly for hearing before the court, Hon. Wm. Stanley Dunford, Judge, sitting without a jury on the 22nd day of April, 1953; and it having been stipulated that the cause should be submitted to the court on its merits on the admissions made, and facts alleged, in the answer which should be taken as true . . . . the court now makes the following FINDINGS OF FACT . . . ."

The appellants and amici curiae in disregard of the stipulation, have briefed the case on the basis of part only of the facts before the trial court.

When the plaintiffs called in person at the Nebo School District office, and asked to be permitted to examine, and copy, the minutes of the meeting in question, said minutes were not available and only tentative notes of such minutes had been transcribed, subject to the approval of the Board



of Education; that said tentative notes had not been approved, and had not been entered in, or made a part of, the journal which was kept by the clerk of the said Board of Education (Finding 3. p. 27; Answer 4-5, p. 19).

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 of the meeting (Finding 6, p. 28; Answer 10, p. 16).

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 the board and its proceedings and 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 citizens 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, but that plaintiffs by reason of motives personal to themselves have demanded that the clerk immediately transcribe his notes and make them available for inspection and copying; that all records, including the journal, have been properly kept by the clerk and they have always been available for inspection of 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 have been available to plaintiffs and other citizens for inspection



(Finding 7, pp. 28-29; Answer, Third and Fourth Defenses, pp. 17-19).

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 board, including all official minutes or public writings concerning the said meetings and that said journal as kept by the clerk 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 the 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 plaintiffs for a release of said tentative notes as public writings the day following said meeting was not reasonable or timely (Finding 8, pp. 29-30; Answer, para. 11 and Third and Fourth Defenses, pp. 17-19).

### POINTS OR QUESTIONS TO BE DETERMINED

The appellants argue that the findings of fact of the trial court are not supported by the record. Implicit in the brief of amici curiae is the same assumption. We have already set out the facts in this respect and will not repeat them. Yet for the sake of raising the direct issue we will briefly discuss the point in our argument. The only other contention of appellants is that "The transcribed tentative notes or minutes are public writings" (App. Brief, p. 8 et seq). Counsel for amici curiae apparently concedes that the controlling question is whether the tentative notes demanded by appellants were public writings (their brief, pp. 3, 14, 15-



18). However, his brief primarily is based on the assumption that the record in question was a public writing or record. From this he argues that if newspapers are denied access to public writings, constitutional rights will be infringed or the public interest impaired. Let this be conceded—and we would be among the last to argue against it if the premises of the argument were valid. Most of the brief of amici curiae begs the question; more, before a less deliberate body it would involve danger through tyranny of concept without reference to facts of confusing and prejudicing the real merits of the controversy.

The “issues”, as stated on pages 3 to 4 of the brief of amici curiae, and the points indexed and discussed therein, do not entirely correspond. Counsel, himself, points out that he is presenting the issues mentioned “collectively, since they are all interrelated with the position which the amici curiae wish to present to this Court.” Under these circumstances, we see no point in attempting to follow the detailed presentation on these collateral phases, statement by statement. We will attempt to answer them under the last division of our argument which seems designed to permit joinder of issue on the primary contentions of amici curiae.

We therefore will present our case under the following points:

I. The findings of the trial court, which accept as true the allegations of fact contained in the answer in accordance with the express stipulation of the parties, is supported by the record, for it was by so stipulating that appellants avoided the introduction of evidence which might have been more unfavorable to their contention.

II. The notes demanded by appellants were not “public writings.”



III. To hold that the notes in question were public writings or that the appellants, rather than the clerk and the board, should dictate the exact time such notes should be transcribed, completed or entered in the journal would necessarily involve the result that tentative memoranda representing mere steps in mental or administrative processes would be subject at any time to demands for copying, certification, publication and introduction in evidence as proof of final action, to the impairment or destruction of the functions of public agencies, including courts; the deceiving and confusion of the public and to the injury of the general welfare.

IV. No constitutional, or other, rights of freedom of the press are involved in a refusal to treat as a public writing that which is not a public writing; the complaint and fact being not that any information was actually denied or withheld, or that the tentative notes were accurate, but that the respondents failed to recognize and release as an official, or public, writing, the tentative notes on which an accurate journal record would be based after correction and upon the completion of the mental and administrative processes reasonably necessary to insure their accuracy.

V. Conclusion: The judgment of the trial court was correct and sound that under the admitted circumstances set out in the answer the tentative notes made by the clerk which were demanded by the plaintiff before their approval by the board and prior to their entry in the journal were not public writings within the purview of Sec. 78-26-1, UCA, 1953; that the notes or memoranda taken by the clerk for his own convenience in the process of entering an accurate record in the journal are not public records; that a clerk has a right to take reasonable steps in assuring the accuracy



of journal entries contemplated by the statute; that the steps taken by the respondent for this purpose were not unreasonable, and that the Court may not require the immediate release of such tentative notes as public records with the incidents of certification, publication as official action, and admissibility in evidence, as sought by the appellants in this case.

## ARGUMENT

**I. The findings of the trial court, which accept as true the allegations of fact contained in the answer in accordance with the express stipulation of the parties is supported by the record, for it was by so stipulating that appellants avoided the introduction of evidence which may have been more unfavorable to their contention.**

We have set out the stipulation in our statement of fact. That stipulation probably authorized the court to make findings on mixed questions of fact and law more unfavorable to appellants' contention than it did. Yet, in its findings it did not seek to preclude appellants on anything but stipulated **facts**. Respondents were prepared to prove the allegation of fact in their answer. The details of appellants' motives and conduct, we surmise, were known by appellants to be less favorable to them than the relatively brief allegations of the answer. In any event, appellants stipulated that the case might be submitted upon the allegations of the answer. This, in effect, was a demurrer to the sufficiency of the answer, or tantamount to a motion by appellants for judgment on the pleadings or summary judgment. In such event the allegations of the answer and all reasonable inferences therefrom should be taken as true and the demurrer should be sustained or motion granted only if the facts shown were insufficient as a matter of



law. *Orpheus Vaudeville Co. v. Clayton Inv. Co.*, 41 Utah 605, 128 Pac. 575; *R. J. Daum Constr. Co. v. Child*, 247 Pac. 2d 817, ———Utah————; 12(c) URCP.

After setting out various findings of the court, appellants state (Appellants' Brief, p. 8) that they are "mere allegations of respondents, not admitted by appellants." Thus, the basis of this surprising contention in view of the stipulation made by appellants in open court, is stated to be that "Rule 8(d). . . . provides that such allegations shall be taken as denied or avoided . . . ." This rule covers general averments in a pleading to which no responsive pleading is required or permitted, they being "Taken as denied or avoided." It manifestly has no reference to stipulated facts, or a submission of a case as on motion for judgment on the pleadings.

No findings having been pointed out which are not fully supported by the facts on which it was stipulated the case should be submitted, and appellants being in error as to the applicability of rule 8(d), URCP, we submit that the findings of the trial court should be sustained.

## **II. The notes demanded by appellants were not public writings.**

Actually, the determinative issue in this case is whether the notes demanded by appellants under the circumstances and at the time demanded were public writings as contemplated by Section 78-26-1 and 2, UCA, 1953. The appellants, as well as amici curiae base their claim to the right of inspection upon this statute. (Appellants' brief, p. 25; brief of amici curiae, p. 13). Even the recent book written under commission of the American Society of Newspaper Editors and slanted from the standpoint of a claim to full freedom



of access by newspapers, concedes that such right of access by newspapers, as well as citizens in general, is limited to what may be considered under statutory definition or common law "public writings or records." (Harold L. Cross, "The People's Right to Know", Columbia University, 1953).

The right of inspection by the express terms of our statute is limited to "public writings." Section 78-26-2, UCA, 1953, is as follows:

"Right to Inspect and Copy. Every citizen has a right to inspect and take a copy of any public writing of this state except as otherwise expressly provided by statute."

The last authority cited in the brief of amici curiae, *Nowack vs. Fuller*, 219 N. W. 749, 60 A. L. R. 1351, points out that when a statute specifically enumerates public records for inspection, it excludes others.

Therefore, if the notes in question were public writings the right of inspection and copying existed, as well as to have certified copies furnished (Sec. 78-26-3, UCA, 1953), and if they were not public writings such right did not exist.

On this issue we take the liberty of quoting from the memorandum decision of the trial court:

"What are public writings? Section 78-26-1, UCA, 1953, says:

'Public writings are divided into four classes

- (1) Laws
- (2) Judicial records
- (3) Other official documents
- (4) Public, records, kept in state, of private writings.'



"Minutes of the School Board are neither 'laws' or 'judicial records' nor are they in their nature, 'private writings', as the only purpose of their existence is to 'keep an accurate journal' (53-6-15, UCA 1953) of the doings of a 'body corporate' having an 'official seal' (53-4-8, UCA, 1953). They are kept by clerk (53-6-15, UCA, 1953) who is elected by the school board (53-6-3, UCA, 1953) and who may be removed by it during his two-year term by a two-thirds vote (53-6-7, UCA, 1953).

"Thus the question narrows to this: 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 the sub-section (3), 78-26-1 above and subjecting them to inspection of any citizen as set forth in Sec. 78-26-2 above?

"In determining this question we must keep in mind that the records sought by the plaintiffs are 'public records' (so as to make the plaintiffs' demand for inspection and copying efficacious under Section 78-26-2, if at all, only by reason of the statute. Thus we must carefully observe the language employed by the Legislature in setting up what would be considered 'official documents' of the school board.

"Section 53-6-15 enjoins upon the clerk the duty of keeping a 'journal'. 'Journal' is defined by The New Merriam-Webster Dictionary, Second Edition, Unabridged, as:

'(3) A diary: An account of daily transactions or events.

(4) The record of transactions kept by a deliberative body or assembly. Specif. The record of daily proceedings of a legislative body kept by a clerk.'



“Thus the official record of the board kept by the clerk, is not merely an account book, nor merely a minute book, nor merely a narrative of acts and duties performed by the board, but it is all of them combined.

“At this point in our analysis, special attention must be paid to the word ‘accurate’ in connection with the word ‘journal’. That word is defined by the same Webster authority as:

‘In exact or careful conformity to truth or to some standard of requirement, exp. as the result of care; free from failure, error or defect; exact as an accurate calculator; accurate knowledge.’

“Certainly it cannot be successfully disputed that the legislature in its enactment of 53-6-15 deliberately inserted ‘accurate’ as a limitation of the word ‘journal’ or that the legislative design was to have it given full weight under its ordinary definition, and in light of its ordinary usage. It did not thus contemplate that 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 in it, should be deemed an ‘accurate journal’. The legislature had in mind such common error when it inserted the qualifying word, and it had in full contemplation, the damage which may be done the administration of our public school system if false or inaccurate reports of official acts should reach the public. It has deliberately provided the safety qualification against error by insertion of the word ‘accurate’. Thus it must be held that memoranda of the happenings at a meeting are subject to determination of their accuracy before they become official documents.

‘How is the clerk to determine whether or not his tentative notes prepared for insertion into the official journal are accurate? In the first place, it seems evi-



dent that his efforts should be reasonably calculated to produce accuracy. In other words, he could not, under a pretense of determining accuracy, withhold entry from the journal for weeks while he engaged in a lengthy hocus pocus not calculated in reason to result in verification of his proposed entries. He must have his record of meetings truly and accurately deflect the actual happenings at such meetings, for the reason that it isn't the record which authorizes and makes official the actions taken by the board. Rather, when a matter is properly presented and lawful action has been taken upon it by the body which has jurisdiction to act, their action, and not the record of their action constitutes the authority to proceed in accordance therewith. *State ex rel Sheridan Pub. Co. v. Goodrich*, 140 S. W. 620. *Henshaw vs. State*, 47 N. E. 157. *City of Talladega v. Jackson Tinney Lumber Co.*, 95 So. 455.

"The record is to be made after the official action taken, by entry in an accurate history thereof into the journal."

(File 38-40).

Appellants say that the issue is not whether the tentative notes were at the time involved in such a condition as to be a part of the "journal", but whether they were "an official document" (p. 25). If they were not a part of the journal they would not be a part of the record the law requires the clerk to keep.

Appellants argue that it is not the prerogative of the board to require approval of minutes kept by the clerk before they are entered in the journal. It may well be, as they urge, that if there were an issue between the school board and the clerk as to the manner of keeping the minutes there would be significance to a distinction between the supervisory powers of the board, which appoints and can remove the



clerk, and the statutory duties of the clerk to keep an accurate record. However, there is no such issue here. The clerk in cooperation with the board has determined the means best adapted for making accurate entries in the journal. Certainly, cooperation to this end between the clerk and the board is not against public policy, nor subject to question by the appellants.

We think the trial court rightly pointed out the following additional reasons:

“Is it reasonable, then, for the board to require its own approval before proposed entries in the journal are accepted for recordation as the official history of the acts taken by the board? It appears that this question can best be answered by posing others, viz: What other means would be so well calculated to produce the statutory requirement for accuracy? Who could know what was proposed in a motion so well as the one who proposed it, the one who seconded it, and the ones who voted upon it? Neither the pleadings nor the arguments suggest any other means equally calculated to produce accuracy, and the court can conceive of none.

“The statute does not prescribe at what time or how soon after the happening that an item of the event must be recorded in the ‘accurate’ journal’. Under such circumstances, and the rule is so universal as to require no citation of authority to support it, where the law fixes no limitation upon the time, it must be reasonable. No facts are before the court as to the time expiring between meetings of the board, nor the time expiring after the approving meetings before the minutes of meetings are actually entered into the official journal, but it does appear that the plaintiffs in the instant case demanded an inspection of the clerk’s notes, which by then had been transcribed but had not been verified by the board nor entered in the journal, on the morning



following the meeting in question. How early the next morning, or whether the board had met in the interim, does not appear. The burden is upon the plaintiffs to prove their cause by a preponderance of the evidence, and there being nothing in the stipulation to indicate to the contrary, the court must, and accordingly does hold that the demand was not timely made because no opportunity had been had by the board to determine or establish the accuracy of the clerk's proposed entries and to order the 'accurate' entries to be made in the journal.

"What the plaintiffs sought to inspect was not public record under the provisions of 78-26-1, *supra*, and plaintiffs were therefore not entitled to inspect them under the authority to inspect public writings under the provisions of 78-26-2, *supra*.

"The plaintiffs' primary contention is that the notes taken by the clerk at the board meeting, and particularly after such notes have been transcribed for presentation to the next meeting of the board for approval, although not yet made part of the 'journal' are admissible as evidence of the matters contained therein in an action at law or equity under the provisions of 78-25-3 and 78-25-4, UCA, 1953, and that, therefore, they are themselves public records coming within the class of 'other official documents' denominated by 78-26-1, and are thus subject to inspection and copying as provided by 78-26-2. In considering this question, it must be kept clearly in mind that Section 53-6-15 does not require, or even provide for, the taking of the memoranda by the clerk during board meetings, or the transcription of any tentative copies thereof for approval of the board. Its requirement is that the clerk shall keep an 'accurate journal'.

"Such materials are thus not 'entries in public or other official books or records made in the performance



of duty' as provided in 78-25-3, nor are they entries 'made by an officer or board of officers, or under the direction or in presence of either in the course of official duty' as provided in Section 78-25-4. The same Webster authority cited above, so far as the definition is applicable to the problem here involved, defines 'entry' as an 'act of making or entering a record, as an entry of a sale. Also that which is entered; an item; a putting upon record in proper form or order'. Inscription of notes by the clerk, or the tentative transcription thereof prior to entry in the 'accurate journal' any more than the clerk's individual recollection of the items of business transacted at a meeting of the board, are not 'official documents', and because they are not, they are not admissible in evidence as a public record, *Steiner v. McMillan* (Mont.), 195 Pac. 836; *State v. Ray* (Mont) 2944 Pac. 368; *Steel v. Johnson* (Wash) 115 P.2d 145, and are not within the provision of the statute granting citizens the right of perusal."

Appellants go further than merely to contend that they have the right to inspect public writings—they assume the prerogative of dictating or having the court at their behest dictate the time and the manner in which the clerk transcribes the minutes and enters the minutes in the journal. They conclude their brief by contending in effect that even though the clerk might have been justified in declining to turn over the particular notes requested by them at the particular time, yet the court should declare that as of that time, the clerk should have made his accurate entries in the journal so that it would have been available immediately to appellants.

We think this is rather presumptive on the part of appellants, and that it would be beyond the prerogative of the court to dictate exactly when and how the clerk as an ad-



ministrative matter was to perform his duties, in opposition to the board, entrusted with his supervision, and contrary to the judgment of the clerk himself. There is nothing in the statute which required the accurate entry in the journal to be made immediately; and indeed, if there were such a requirement, the failure to allow proper time would preclude the very accuracy enjoined.

We believe that the trial court was correct in holding that it was not unreasonable for the clerk to take proper time to insure accuracy of the entry. We quote from pages 45-47 of the memorandum decision:

“As pointed out in the recital of facts *supra*, the board meeting in question was held on February 18, 1953. During some hour of the following day the demand was made by plaintiffs to examine the minutes of the meeting. By that time the clerk has 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 may direct. While it is clear that the board requires such approval before entry of the minutes into the journal, and that such approval is accomplished at the succeeding meeting, there is no indication as to how frequently or infrequently such meetings are held. Certainly if the succeeding meeting were scheduled for the afternoon or evening of the 19th no one could say that the delay caused by the rule of the board would be an unreasonable restriction. Likewise if the board was not to meet for a month after the meeting in question, the time would as clearly be unreasonable, under the urgency of the argument, at least, of the plaintiffs, that actions would be taken in the interim affecting substantial rights of citizens which would likely render plaintiffs' contrary efforts *ex post facto* if so much time were consumed.



“It is easily conceivable that the variation in length of ‘a reasonable time’ in order to complete the ‘journal’ may be great depending upon the nature of the business transacted, e. g. if the board had voted to employ all school funds in its hands in construction of a street railway to pick up and deliver pupils to the schools and the proposed contract of construction were to be signed within the week, such a matter is not the same at all as an action taken by the board to change the type of notebooks to be supplied for the succeeding year. The duty of the clerk to have his proposed entries in the journal determined to be accurate would have added to it a duty of action so immediate as to allow no other duty to interfere with promptness in the first instance, while he would conceivably have no duty of urgency at all in the second.

“Where ‘accuracy’ of the journal is enjoined by the express wording of the statute, the legislature contemplated that some reasonable means would be devised by the board to insure that quality. The legislature did not specifically prescribe such means, and therefore left it to the sound discretion of the board, which appoints and supervises the duties of the clerk, to devise such processes of its own as would meet its duty to insure both accuracy, and reasonable promptness as is enjoined by the law insuring all citizens the right of inspection and copying.

“Of common necessity there must always be some time between formal action of any legislative or administrative body and the formation of the ‘official documents’ evidencing the act. Thus, so long as the board here acted with reasonable promptness and dispatch, having in mind the nature of the business, and all of the facts and circumstances surrounding it, the body discharged the duty imposed upon it by law, and no citizen is entitled to complaint that the ‘accurate’ jour-



nal' which is the only 'official document' respecting actions of the board, had not been prepared instanter for their inspection and copying.

"Nothing appearing in the record to indicate that the defendants unreasonably delayed preparation of its official record, or denied the plaintiffs inspection when it was prepared, it follows that the plaintiffs' petition for a decree requiring the defendants to promptly transcribe the minutes of their meetings and make them immediately available for inspection and copy must be and is accordingly denied."

(File 45-47).

Section 53-6-15, UCA, 1953, in addition to providing that the clerk shall keep an accurate journal of its (the board's) proceedings, also provides that "He shall perform such other duties as the board or its committee shall require." It is not contemplated that the clerk should work at loggerheads with the board, but rather that he should cooperate with the board. If he thinks, as appears from the record here, that the discharge of his duty with respect to making accurate entries in the journal can best be accomplished by having the assistance of the board, this should not render his action any less proper or reasonable.

We call attention to the case of *Kent, et al v. School District*, (Okla) 233 Pac. 431, in which the court stated (p. 432): "Comp. Stat. 1921, para. 10355, defines the duties of the clerk but nowhere requires that he shall record the minutes of any meeting before the meeting adjourns. It is the general, if not the unvarying, custom in this state for the minutes of deliberative and administrative boards, covering either regular or special meetings, to be recorded and presented for adoption at the next succeeding regular meet-



ing. In the absence of conflicting statute, no reason is apparent why this rule should not control in school board meetings."

The entries in the journal are merely a means of proof or record of official action and do not constitute the action. Appellants emphasized in their complaint, and emphasize in their brief, that the school board has on occasion taken action based upon resolutions adopted in meetings even before the entries were made in the journal. They err in assuming that such action would not be proper. Of course, when it comes to the proof of the action taken at the meeting the journal entries are the best evidence.

Appellants have cited cases holding that in the absence of an official writing such as a journal entry, the clerk's tentative notes may be looked to to define the action taken at a meeting. This, of course, does not make the clerk's tentative notes the official writings or record but merely secondary proof as to what actually occurred. Under certain circumstances, the testimony of persons present may be looked to in the absence of an official record to show what action actually was taken. Yet, could it be contended that the declaration of a third person so looked to, even though in writing, were official records?

As of possible interest in this connection, reference is made to the annotation, "Necessity, Sufficiency and Effect of Matters of Record of Meetings of School Board," 12 ALR 235, and the cases cited therein, and in the Blue Book supplements to such annotations.

We submit that the tentative notes of the clerk were not a "public writing" within the contemplation of the statute.



**III.** To hold that the notes in question were public writings or that the appellants rather than the clerk and the board can dictate the time such notes should be transcribed, completed or entered in the journal would necessarily involve the result that tentative memoranda representing mere steps in mental or administrative processes would be subject at any time to demands for copying, certification, publication and introduction as proof of final action, to the impairment or detriment of public agencies, including courts; the deceiving and confusing of the public and to the injury of the general welfare.

Section 78-26-2, UCA, 1953, dealing with the right to inspect and copy public writings has been quoted. Section 78-26-3, UCA, 1953, provides that every public official having the custody of a public writing which a citizen has the right to inspect is bound to give him, on demand, a certified copy of it on payment of the legal fee therefor. Rule 44(e) URCP, defines an official record consistent with the statute, and Rule 44(a) governs the admissibility in evidence of an authenticated copy, and Rule 44(d) provides that a copy of any official record or entry thereof in the custody of a public officer of this state or the United States, certified by the officer having custody thereof, to be a full, true and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the courts of this state in like manner and with like effect as the original could be if produced.

If it were to be held that the tentative notes of the clerk in question were public writings or official records within the purview of Sec. 78-26-2, giving the right to inspect and copy, they would, of course, be public writings for the purposes of Sec. 78-26-3, concerning the furnishing of certified copies, and they would be an official record for the purpose



of admissibility as evidence upon the certification of the custodian.

The court found, based upon the stipulation of fact, that in the past the clerk had released tentative notes prior to their checking, which involved inaccuracies. It was a fair, usual and wise precaution to avoid this that the means were adopted which appellants now question. If appellants are correct, they would have the right not only with respect to the tentative notes in question, but with respect to the tentative or rough notes or memoranda of any clerk of court or clerk of any other public body to demand inspection and certified copies, and their introduction in evidence in any court. Mere steps in the mental or ministerial processes of a clerk in the making up of an accurate record would thus be published or otherwise established as the final record at any stage. If this were so, a newspaperman, or any other citizen, could demand the tentative memorandum of the clerk of this honorable Court or of a trial court before any final entries are made, and indeed, while an argument is progressing, no matter how rough, misleading, or incomplete their form; could publish them in their unfinished, rough and perhaps misleading form, to the disaster of public service.

The appellants and amici curiae have no vested rights in the mental or ministerial processes of clerks, whether they be school board clerks or clerks of this honorable Court, so long as public writings in the statutory sense are not involved. The appellants and amici curiae take the position that the notes of the clerk are necessarily public writings, no matter how tentative, incomplete or inaccurate.

There is nothing in the record to show that the particular notes in question were complete or accurate, and the



court found upon the stipulated record that they were merely tentative. So contending, undoubtedly appellants would treat or publish as official and final any notes released. Unless public bodies, in cooperation with their clerks, can adopt reasonable measures to insure the verity of minutes before their release as public writings, the public interest would irreparably suffer without any benefit whatsoever to the cause of a free press or the people's right to know the truth, but with aid and comfort to the cause of misinformation and distortion. The same thing applies to every governmental activity. If appellants and amici curiae can dictate how and when records are to be transcribed and that they must be released as official without checking or approval of any kind, they can carry such demands into every office in the state, to the utter disaster of public administration.

Suppose all clerks, including the clerk of this honorable Court, is bound to release as an official writing anything put down in tentative or memorandum form without checking or revision at the time anyone may demand inspection. If an entirely erroneous record, unverified or in rough form, be made with the idea of revision, under this theory it still would have to be released and certified to as an official writing at any stage in the process of formulating it, so long as it was in writing. If this were so, some weird "public writings" would result, including possibly a notation on the pad of the clerk of this Court, if perchance he should check over this brief, that "The attorney for respondent is guilty of the constant repetition of an obvious point." This may be true, but it may have no place in the clerk's official record. Before any such record is **required** to be released as a public writing, the clerk in connection with the Court, should at least be permitted to check it over; before the repetition in



the Court's mind becomes inescapable, the writer will pass to other phases of the case. In all earnestness, we do contend, however, that the position of appellants and amici curiae on general principles and upon examination from practical, as well as legal, standpoints is untenable.

We do not believe that the authorities cited by appellants, the reasoning of those authorities, sustain appellants' position; indeed, the cases cited indicating that memoranda may be looked to as a foundation of nunc pro tunc entries or orders, in the absence of official writings, only emphasize the position of the respondents. So, also in many states can other forms of testimony be utilized to show what the action actually was in the absence of official writings, but this does no mean that such oral testimony or such other secondary evidence can be looked to as a substitute for official writings rather than as an aid to their formulation.

The case of *State v. Hunter*, 127 W. Va. 38, 34 S. E. 2d 468, while containing a general definition of a public record, which appellants seem to prefer to our statutory definition, involves a holding directly opposed to appellants' contention. *Morrison v. White*, 10 Cal. Appl. 61, 252 P.2d 261, shows that the time the entry is actually made in the journal is a mere detail under the control of the responsible officer, but it likewise fails to support appellants' position. Other authorities cited by appellants also seem not to support their position, but to sustain in principle the reasoning involved in respondents' position. There seems to be no point of further analyzing these decisions as even appellants do not seem to contend that any of them are directly in point.

To adopt the contention of appellants, we submit, would bring into our law and practice several disastrous doctrines.



including the doctrine that the individual citizen, or the court at his request, should determine in detail in point of time and specific manner the means to be used by clerical or administrative officers in discharging the duties entrusted peculiarly to them; the doctrine that in any stage in an administrative, clerical or mental process carried on by a public officer the particular status of his record in its incomplete and unfinished form can be demanded, and thus frozen, and its certification required as a public writing; the doctrine that the requirement that the clerk keep an accurate journal should be interpreted as meaning that any memoranda written out by the clerk as a preliminary to keeping that accurate journal must, itself, be considered as the accurate journal, notwithstanding its incompleteness or inaccuracies; and the doctrine that clerks may not lawfully act in cooperation with their supervisory boards in discharging the duties entrusted to them.

We submit that both from the standpoint of law and of practice, the contentions of the appellants are not well taken, and that measured from either standpoint the determination of the trial court was correct.

**IV. No constitutional or other rights of freedom of the press are involved in a refusal to treat as a public writing that which is not a public writing; the complaint of the appellants and amici curiae, and the facts, being not that any information was actually denied or withheld or that the tentative notes of the clerk were accurate or complete when demanded, but that the respondents failed to recognize and release as official and public writings the tentative notes on which an accurate journal record would be based after correction and upon the completion of the mental and administrative processes reasonably necessary to insure their accuracy.**



The impressive array of amici curiae has no controlling point in this case. In almost every proceeding before this Court, the rule to be announced will affect more or less large numbers of persons throughout the state in similar situations; yet the weighing of the issues by the number is not a procedure which has any place or hope here, and is not a procedure necessarily conducive to correct results. We may, therefore, be pardoned for our failure to enlist as participants the numerous clerks, offices and agencies——indeed, the great body of our citizenry——to be adversely affected by a reversal of the decision of the trial court herein. We believe that it goes without saying that if newspapers or any other elements in our society can demand and publish, or establish, as final official writings, the rough notes or memoranda of the record keepers before they purport to be accurate public records of any proceeding, the proper administration of the very Government, including courts, whose protection the newspapers require, would be rendered impossible.

There is no showing whatsoever in this case that anyone was deprived of the right to ascertain the true facts concerning the meeting of the school board. It is admitted that the meeting was public and that anyone had the right to attend or to secure information from any source. There is no showing that the defendants did not have full information of what happened at the meeting, or that the clerk himself would not give them all information in his possession. The only showing is that he declined to release his tentative notes as official writings at that time. It is established that within a reasonable time and in the discharge of his statutory duties, the clerk did in fact enter an accurate record of the proceedings in the journal required by



law to be kept by him, and that such record, or any other official record, has never been denied appellants or anyone else by the clerk or by the board. This is not a case involving freedom of the press,, as amici curiae seeks to show; no one has sought to prevent publication of any proceedings or to suppress any official records; no one seeks to. This is a case where the appellants demanded the release, not of an official writing, but unreasonably demanded that tentative notes not comprising an official record be released as an official writing for use as such. If freedom of the press is to be destroyed in this country, it may well be by recognition of similar ill-advised contentions as here made, leading to such abuse and injury to the public welfare and the processes of government as to create a reaction incompatible with full support for this great doctrine.

We refer again to the recent book, "The People's Right to Know" (Harold L. Cross, Columbia University, 1953), in which we believe one would expect to find the most favorable presentation of the claim of newspapers to freedom of access to information, since the book was commissioned by the National Newspaper Alliance. The brief of amici curiae on the general subject of freedom of the press sets out some of the cases contained in the publication mentioned, but a vast array of others, or on other phases of the problem, but with particular reference to rights of newspapers, is set out by Mr. Cross, including a large number of cases concerning, and references to, "Records Not Subject to Public Inspection." Mr. Cross, in stating the general rules as to records, lays down the following principles, supporting his statement with numerous authorities:

- "1. The record must be 'public' in the legal sense. A record which is kept by public officers in public offi-



ces in the business of the public is not necessarily a 'public record' in the sense of being subject to inspection.

"It is clear that the mere fact that a document or paper is deposited or on file in public office or is with or in the custody of a public officers does not make it a public record. The term 'record' is ordinarily applied to public records only. Generally there is no single test which may be applied to determine what are and what are not public records. The primary test is definition, which is dealt with in Chapter IV.

"2. The term 'public' should be read with the word 'record' in the state statutes. Records which are subject to inspection, except as otherwise provided by statutes, are those only which are public. That is the case whether or not the particular statute uses the word 'public.' Thus, the Florida statute in terms grants any citizen a right of inspection of 'All state, county and municipal records . . . ' (Appendix 3). Nevertheless, the only records subject to the right of inspection are those that are public, and that means only those held 'public' by the courts or in opinions of the Attorney General.

"The effect of this is that there must be read into the state statutes regarding inspection, whether contained there or not, the word 'public'. This applies, as stated, to Florida and other states. Most state statutes, however, use the term 'public' to modify 'records'. (Appendix 3) . . . "

(P. 33).

Mr. Cross also concedes at various points in his fine book that if the ordinary citizen does not have the right to inspect a writing as a public writing, a newspaper or a newspaperman does not.



If amici curiae herein question these basic propositions, we can best refer the Court to the exhaustive study mentioned, which certainly is from the viewpoint most favorable to their contentions. If they do not question these propositions, most of the arguments and authorities cited in their brief lose their point. To say that the general citizen is not entitled to the right to inspect unless there is involved a public writing in connection with which subject the right is created by the statute, while a newspaperman has an unlimited right of inspection by virtue of the statute is not arguing for freedom of the press, but for special privilege inconsistent with our theory of Government.

An analysis of the cases cited has not proved productive of facts and situations in point. We have no quarrel with the rules of statutory construction that all pertinent or related statutes must be construed together, in support of which it was considered necessary by amici curiae to cite numerous cases; but it is not shown by the cases or by any reasoning of theirs that in construing the pertinent statutes, together or singly, the writing in question was a "public writing" within the contemplation of the Utah statute or that the failure of the clerk to release it as such public writing impaired in any way the freedom of the press.

We do not question that a newspaper has the right to immediate access to public writings so as to acquaint the public with the action of the board, but we do deny that a newspaper can, or that a court should, dictate unreasonable and impracticable standards as to the making of the public record, such as is attempted by the appellants here.

Several of the cases relied most strongly upon by amici curiae turn on specific statutes not having any counterpart in our law. For instance, in re: Becker, 192 N. Y. Supp.



754, Sec. 54 of the general municipal law was involved, providing that all "Books, minute, entries or accounts and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of or with any officer, board or commission . . . . are hereby declared to be public records . . . . " Records, receipts and disbursements in the mayor's office were deemed to come within this statutory definition. Also, *Sears Roebuck Co. v. Hoyt*, 107 N. Y. Suppl. 2nd 756, turned on a special statute, as did a number of the other cases cited. In *re: Hays* 73 So. 362, cited by amici curiae on p. 22 of their brief, arose on motion to quash a rule upon the defendant newspaperman to show cause why he should not be attached for contempt, and involved a law allowing inspection of the records of the city, except those of the law and police departments. It is therein indicated that the publishers of newspapers have no higher rights than others to publish the conduct of the courts and that such rights are limited by the obligation to observe respect for truth and fairness.

Except for the general principles of freedom of the press with which we heartily concur, we believe that what has been argued concerning public writings and the facts in this case in relation thereto, answer the contentions of amici curiae as fully as the limitations of this brief will permit. We submit that amici curiae have added no good reason why the judgment of the trial court should not be sustained.

## CONCLUSION

The judgment of the trial court was correct and sound, that under the admitted circumstances set out in the answer the tentative notes made by the clerk which were demanded



by the appellants before their approval by the board and prior to their entry in the journal were not public writings within the purview of Sec. 78-26-1, UCA, 1953; that the notes or memoranda taken by the clerk for his own convenience in the process of entering an accurate record in the journal are not public records; that a clerk has a right to take reasonable steps in assuring the accuracy of the journal entries contemplated by the statute; that the steps taken by the respondents for this purpose were not unreasonable, and that the Court may not require the immediate release of such tentative notes as public writing with the incidents of certification, publication as official action, and admissibility in evidence, as sought by the appellants in this case.

The findings of the trial court are adequately supported by the record. The conclusions of the trial court are in accordance with the law, every fair concept of freedom of the press, and are practicable from the standpoint of reason and administration. The contentions of the appellants and amici curiae, if adopted, would lead to confusion and public injury. The judgment of the trial court should be affirmed, with costs to respondents.

Respectfully submitted,

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