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Public Records--Availability for Inspection

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If, however, the line is to be drawn on the second of the court's apparent bases, *i.e.*, an act of commission against ommission, another problem arises. Many times the distinction is not clear, and a court in another jurisdiction might be hesitant in holding as the West Virginia court did in *Jenkins v. Charleston Gen. Hosp., supra.* In that case the failure of a doctor to discover an injury on examination was held mere negligence. How does one distinguish between ommission and commission in medical treatment? In many cases it might be a question of fact upon which reasonable men could differ, the end result being a certain amount of unpredicability in this area.

Members of the bar will probably differ over the real significance of the principal case. With the recent elimination of the *charitable immunities* doctrine in West Virginia, *Adkins v. Saint Francis Hosp.*, 143 S.E.2d 154 (W. Va. 1965), it seems reasonable to expect a substantial increase in malpractice and negligence actions against hospitals. Perhaps this will hasten the day when West Virginia's law respecting the liability of nurses will be clarified.

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Public Records—Availability for Inspection

Petitioner, *P*, a corporate newspaper publisher, sought a writ of mandamus to compel respondent, *R*, the state treasurer, to permit *P* to inspect certain records which *R* was required by statute to keep. These were records of state monies on deposit in designated bank depositories. *Held*, writ awarded. The records were public records, *P* had an interest in them and the inspection was for a useful and legitimate purpose; therefore, *P* was entitled to inspect the records. This right is subject to reasonable regulations to protect against loss or destruction of such records and to avoid unreasonable disruption of the functioning of the office in which they are maintained. *State ex rel. Charleston Mail Ass'n v. Kelly*, 143 S.E.2d 136 (W. Va. 1965).

The principal case illustrates two problems which have confronted the courts on numerous occassions and which, it is logical to assume, will continue to demand the attention of the courts. The problems are: (1) what are public records, and (2), who is entitled to inspect them?

There are two categories of public records: records which are made public by common law, and records expressly made public by statute.

At common law a public record is a written memorial of something written, said or done, and made by a public official authorized by law to make the record. This authority, however, does not have to be derived from an express statute. *Coleman v. Commonwealth,* 66 Va. (25 Gratt.) 865 (1874).

The second category of public records is established by specific statutes sometimes referred to as "Public Records Acts." These statutes, adopted in a few jurisdictions, are comprehensive in nature and specify which records are public, and those which are not. The statutes generally classify all state records, county records, municipal records, commission reports, and the records of townships, schools districts, agencies and legislative bodies as public records. E.g., KAN. STAT. ANN. ch. 45, § 201 (1964). The Kansas statute provides that all of the above mentioned records shall be open to the inspection of any citizen with the exception of adoption records, records of birth of illegitimate children and records specifically closed by law.

West Virginia has a statute which is similar to a "Public Records Act" though it is much narrower in scope. "The records and papers of every court shall be open to the inspection of any person . . . ." W. VA. CODE ch. 51, art. 4, § 2 (Michie 1961).

In the absence of a public records act, it is frequently difficult to predict what records will be construed as public records. Every record happening to be in the office of a public official will not be considered as a public record. Writings which are "merely incidental" to the administration of the affairs of the office ordinarily are not public records. *Steel v. Johnson,* 9 Wash.2d 347, 115 P.2d 145 (1941). In the *Steel* case the court was concerned with correspondence and private memoranda of a public official which related to some public records in his custody. In a number of cases where information sought was preliminary data being gathered in the course of a study or investigation or used by the agency in performing its duties, it has been held that the writing was not a public record. *State v. Sheppard,* 100 Ohio App. 345, 128 N.E.2d 471 (1955).

Certain records may be exempt from public inspection because of public policy even though they would otherwise have all the requisites of a public record. Generally, when inspection is withheld on grounds of public policy it is because the information sought might be detrimental to the public or against public good. *Lee v. Beach Publishing Co.*, 127 Fla. 600, 173 So. 441 (1937). Records on file in public institutions such as hospitals, concerning the condition, care and treatment of patients or inmates have been withheld from public inspection due to the privilege of public policy. *Massachusetts Mut. Life Ins. Co. v. Trustees of Mich. Asylum*, 178 Mich. 193, 144 N.W. 538 (1913). Other common examples of records which have been withheld because of public policy are certain police investigation reports, *Lee v. Beach Publishing Co., supra,* and records of adoption and birth of illegitimate children. KAN. STAT. ANN. ch. 45, § 201 (1964).

In the principal case the court held that the records of the state treasurer were public records because they were records which the law requires the state treasurer to keep. W. VA. CODE ch. 12, art. 1, § 10 (Michie 1961).

A prior holding in *State ex rel. Clark v. Long*, 37 W. Va. 266, 16 S.E. 578 (1892), stated that the records and papers of every county clerk's office are open to the inspection of any person. The court was construing a statute requiring the clerk to keep such records. The statute provided that any person shall be able to inspect such records.

In the principal case, the court cited with approval the early Virginia case of *Coleman v. Commonwealth, supra.* The *Coleman* case said that if a record is a convenient and appropriate method of discharging the duties of the office, it is not only the official's right, but his duty to keep the record, even if not expressly required to do so, and when kept it becomes a public document. Such liberal interpretations are becoming more and more common. *MacEwan v. Holm*, 226 Ore. 27, 359 P.2d 413 (1961). Despite the West Virginia court's voiced approval of the *Coleman* case, the fact remains that it has never required opening of a record which was not required by statute to be kept.

In *State ex rel. Beckley Newspapers Corp. v. Hunter*, 127 W. Va. 738, 34 S.E.2d 468 (1945), a book kept in the office of a clerk of a court of record where memoranda were made directing the

issuance of process commencing suits, was held not to be a public record though the book was purchased with public funds, bore a serial number similar to other record books and was in the custody of the clerk. The reason for the decision was that there was no statute requiring that such a book be kept.

A question yet to face the West Virginia Supreme Court is whether the Public Records Management and Preservation Act, W. VA. CODE ch. 5, art. 8, § 1-20 (Michie 1961), has the effect of opening many records not previously considered public. The primary purpose of this statute, enacted in 1961, is to provide for the efficient and orderly management, preservation and disposition of all state records.

The act creates the office of State Records Administrator, who is given authority to promulgate rules and regulations necessary to effectuate the purposes of the statute. Rules and regulations promulgated under authority of a statute have the force and effect of law. *United States v. Michigan Portland Cement Co.*, 270 U.S. 521 (1926). Will those records required to be kept by the administrator's regulations then be considered as records required by law to be kept, and therefore, be public records?

Once it has been determined that a record is a public record, it must be ascertained whether that fact alone entitles individuals as members of the public in general to inspect the records.

At common law the individual citizen as a member of the public has a right to inspect public records if required to help maintain or defend an action for which the record sought could furnish evidence or necessary information. 23 R.C.L. *Records* § 10 (1910). If inspection is refused, a citizen can only enforce his right by mandamus proceedings instituted in his behalf by the attorney general. *Nowack v. Auditor Gen.*, 243 Mich. 200, 219 N.W. 749 (1928).

In practice, if a pecuniary interest motivates one to seek inspection, he can bring the suit in his own name. If an individual has no pecuniary interest, the proceedings must be brought in the name of the attorney general. *Nowack v. Auditor Gen., supra.*

The dissenting opinion in *Payne v. Staunton*, 55 W. Va. 202, 46 S.E. 927 (1904), contains an interesting discussion of the old English rule and the modern theory on the availability of public

records for inspection. The keeper of the rolls or records was a deputy of the king. The keeper was only permitted to allow an inspection by royal subjects who had to show a special pecuniary interest, or there had to be a general public interest involved. Judge Dent's persuasive and logical dissent, although citing very few authorities, stated that the "modern popular doctrine" is that the custodian is a servant of the people and chosen by them as their trustee, and therefore, public records should be open for inspection at reasonable times, with reasonable regulations without inquiring into the purpose of the inspection.

Despite Judge Dent's advocacy of the "modern popular doctrine," the prevailing view in the United States is the old common law view, *i.e.*, that the person requesting access must have an interest in the record and the inspection must be for a legitimate purpose, but interest as a citizen and a taxpayer is sufficient in some instances. *Payne v. Staunton, supra.* The court in the *Payne* case, adopting the prevailing view, said that an inspection by a private individual for the sole purpose of obtaining evidence for criminal prosecution was not a legitimate purpose.

Public records maintained by federal officials also pose problems to one desiring an inspection. Despite the modern philosophy favoring broad rules on inspection of public records, information requested from official files may in certain instances be properly refused.

One claim of privilege in regard to federal records is what is commonly referred to as the "Housekeeping" statute. This statute gives the head of each department the authority to prescribe regulations for the custody and use of records. However, a 1958 amendment expressly provides that the statute does not authorize the withholding of information from the public or limiting the availability of records to the public. 5 U.S.C. § 22 (1964). This statute was construed in *In re Zuckert,* 28 F.R.D. 29 (D.C.D.C. 1961). The court said that records of airplane crashes could not be withheld from inspection solely on the basis of regulations established under authority of the "Housekeeping" statute.

Another privilege invoked by federal custodians is that of state secrets. State secrets are facts which if disclosed might be detrimental to the national security. *United States v. Reynolds,* 345 U.S. 1 (1953).

Today's proliferation of paper work, together with the growing size and complexity of government at all levels—local, state and national—will tend to place increasing pressure on courts and legislatures to adequately define which records are to be public, and who may have access to them. In determining the answers to these questions, it will be necessary to balance the interest of the public at large in having complete freedom of access to all of the records of government against the factors which weigh against permitting inspection. Among the factors weighing against inspection are the right of privacy of the individual in the conduct of his personal affairs, the necessity of withholding state secrets from potential enemies and the possible disruption and loss of governmental efficiency through making the records available to the public. It is hoped that those whose job it is to weigh and decide these questions will constantly recognize how vital the openness of public affairs is to the proper functioning of a democratic society. Only when the most compelling reasons dictate should the public be denied the right of free access to government records.

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Torts—Absence of Privity on Implied Warranty of Fitness

The administrator of a deceased truck driver brought action against the designer and manufacturer of a truck tire which allegedly had blown out resulting in the death of the truck driver. Damages were sought on two counts. One count was for wrongful death allegedly caused by the negligent manufacture and design of the tire, and the other was for breach of implied warranty of fitness. There was no privity of contract between the deceased and the defendants. The trial court dismissed the count based on breach of implied warranty, and a judgment was entered for defendants on the negligence count. Held, negligence count affirmed and implied warranty count reversed. The court said that neither negligence nor privity of contract is required in Indiana in an action for breach of implied warranty. This new concept of warranty bases liability on strict liability in tort. *Dagley v. Armstrong Rubber Co.* 344 F.2d 245, (7th Cir. 1965).

The principal case is indicative of a type of warranty which is different from those usually found in the sale of goods. The