

1071.

PUBLIC RECORDS—INDUSTRIAL COMMISSION OF OHIO—MEMBER OF PUBLIC MAY INSPECT—PURPOSE—AUDIT OR SURVEY OF WORKMEN' COMPENSATION—LIMITATION—PRESERVE SAFETY OF RECORDS—NO INTERFERENCE WITH DUTIES OF COMMISSION—SCOPE OF RECORDS FOR INSPECTION—EXCEPTION: ANNUAL REPORTS MADE UNDER SECTION 1465-45 G. C. OR OTHER INFORMATION FURNISHED BY EMPLOYERS.

SYLLABUS:

1. *A member of the public may inspect the public records of the Industrial Commission of Ohio, for the purpose of making an audit or survey of the administration of the Workmen's Compensation fund, subject only to the limitations that such inspection does not endanger the safety of the record or unreasonably interfere with the discharge of the duties of the commission.*

2. *In making such an inspection, the person or persons making the same are entitled to examine all public records of the Industrial Commission, as provided in Sections 871-9, 1465-40 and 1465-41, General Code, including (1) sessions of the commission, (2) official record of proceedings, (3) separate record of proceedings relating to claims, (4) statistical data compiled from annual reports and other information from employers, (5) actuarial audits, and (6) such of the bookkeeping records as do not fall within the provisions of Sections 1465-45 and 1465-46, General Code. By the express terms of Section 1465-46, an inspection may not be made of the information contained in the annual report required to be made under Section 1465-45 or of other information furnished to the commission by employers in pursuance of the provisions of said section.*

COLUMBUS, OHIO, August 21, 1939.

HON. J. W. BEALL, *Chairman, The Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR: I have your letter of recent date requesting my opinion. Your letter sets out in full a communication received from the Citizens Tax League of Ohio, Inc., advising you of the desire and intention of said League to have a "survey" of the Industrial Commission of Ohio made by an accountant, and requesting the cooperation of your Commission. Your letter then continues as follows:

"In view of Section 1465-46, which section provides that certain information is for the exclusive use and information of the Industrial Commission and which section provides certain pen-

alties to the employes who are divulging such information, the question has been raised as to the authority of the Industrial Commission to comply with the request made in the above mentioned letter.

You will recall that Section 1465-55A, as amended and effective August 18, 1937, provides for certain audits of the State Insurance Fund. The first audit as contemplated in said section was recently completed and the report of Messrs. Woodward and Fondiller, Inc., Consulting Actuaries, New York, has been completed and said audit has been published by the Industrial Commission of Ohio.

It is obvious that the audit or survey requested could not help but interfere with the usual course of the large volume of business that was handled by the Commission daily.

The Commission, therefore, would respectfully request your opinion:

1. As to the authority of the Industrial Commission of Ohio to grant the audit or survey as requested by the Citizens Tax League of Ohio, Inc.

2. Should you feel that the Industrial Commission does have authority to grant such request for audit and survey, what information or data may be lawfully furnished said Citizens Tax League of Ohio, Inc.?"

Sections 1465-40, 1465-41 and 1465-45, and Section 871-9, of the General Code of Ohio are pertinent to your inquiry, as is Section 1465-46, referred to in your letter. These sections provide in part as follows:

Section 1465-40.

"The board shall be in continuous session and open for the transaction of business during all the business hours of each and every day, excepting Sundays and legal holidays. *All sessions shall be open to the public*, and shall stand and be adjourned without further notice thereof on its records. *All proceedings of the board shall be shown on its record of proceedings, which shall be a public record*, and shall contain a record of each case considered, and the award made with respect thereto, and all voting shall be had by the calling of each member's name by the secretary and each vote shall be recorded as cast."

Section 1465-41.

"* * * Any investigations, inquiry or hearing which the board is authorized to hold, or undertake, may be held or under-

taken by or before any one member of the board. *All investigations, inquiries, hearings and decisions of the board, and every order made by a member thereof, when approved and confirmed by a majority of the members, and so shown on its record of proceedings, shall be deemed to be the order of the board.*"

Section 1465-45.

"Every employer shall keep and maintain records of, and furnish the industrial commission of Ohio upon request, all information required by it to carry out the purposes of this act. In the month of January of each year, every employer of the state employing three or more employes regularly in the same business, or in or about the same establishment, shall prepare and mail to the commission at its main office in the city of Columbus, Ohio, *a statement containing the following information, viz.: the number of employes employed during the preceding year from January 1st to December 31st, inclusive; the number of such employes employed at each kind of employment and the aggregate amount of wages paid to such employes*, which information shall be furnished on a blank or blanks to be prepared by the commission; and it shall be the duty of the commission to furnish such blanks to employers free of charge upon request therefor. Every employer receiving from the commission any blanks, with directions to fill out the same, shall cause the same to be properly filled out so as to answer fully and correctly all questions therein propounded, and to give all the information therein sought, or if unable to do so, he shall give to the commission in writing good and sufficient reasons for such failure. The commission may require that the information herein required to be furnished be verified under oath and returned to the commission within the period fixed by it or by law. The commission or any member thereof, or any person employed by the commission for that purpose, shall have the right to examine, under oath, any employer, or the officer, agent or employe thereof for the purpose of ascertaining any information which such employer is required by this act to furnish to the commission.

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Section 1465-46.

"*The information contained in the annual report provided for in the preceding section, and such other information as may be furnished to the commission by employers in pursuance of the provisions of said section, shall be for the exclusive use and information of said commission in the discharge of its official duties,*

and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commission is a party to such action or proceeding; but the information contained in said report may be tabulated and published by the department, in statistical form, for the use and information of other state departments and the public. Any person in the employ of the commission or of the department of industrial relations, except such as are so authorized by the commission or the director of the department of industrial relations, who shall divulge any information secured by him while in the employ of the commission or the department of industrial relations in respect to the transactions, property, claim files, records or papers of said commission or department or in respect to the business or mechanical, chemical or other industrial process of any company, firm, corporation, person, association, co-partnership or public utility to any person, other than members of the commission or to the superior of such employe of the commission or of the department of industrial relations shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) and shall thereafter be disqualified from holding any appointment or employment with the commission or the department of industrial relations."

Section 871-9.

"* * * The sessions of said commission shall be open to the public and shall stand and be adjourned without further notice thereof on its record. *All of the proceedings of said commission shall be shown on its record, which shall be a public record*, and all voting shall be had by calling each member's name by the secretary, and each member's vote shall be recorded on the record of proceedings as cast. Said commission shall keep a separate record of its proceedings relative to claims coming before it for compensation for injured and the dependents of killed employes which record shall contain its findings and the award in each such claim for compensation considered by it and in all such claims the reason or reasons for the allowance or rejection thereof shall be stated in said record. * * *" (Emphasis the writer's.)

You do not specifically advise what may be included in the terms "information or data" as used in your letter.

For the purpose of answering your inquiry, it will be necessary to consider in some detail the types of records of the Industrial Commission which may be involved in the contemplated audit or survey. For this pur-

pose I am classifying such records as follows (which, of course, may not be exactly your classification thereof):

- (1) Sessions of the Commission.
- (2) Records of proceedings of the Commission.
- (3) Separate records of proceedings of the Commission relating to claims.
- (4) Annual Reports of employers.
- (5) Statistical data.
- (6) Audits.
- (7) Bookkeeping records.
- (8) Claim files.

You will notice that it is expressly provided in both Sections 871-9 and 1465-40 of the General Code that all sessions of the commission are required to "be open to the public" and that all proceedings of the commission shall be shown on its record, or record of proceedings, which "shall be a *public record*", while Section 1465-41 provides that all "investigations, inquiries, hearings and decisions" of the commission, when shown on the record of its proceedings, shall be deemed to be the orders of the commission.

The apparent duplication in Sections 871-9 and 1465-40 is readily explained by the legislative history of these sections.

Sections 1465-40 and 1465-41 were enacted in the first Workmen's Compensation Law, passed May 31, 1911 (102 v. 524), before the adoption in 1912 of Section 35, Article II of the Constitution. This act created what was called the "State Liability Board of Awards." On March 12, 1913, and after the adoption of Section 35, Article II, *supra*, the act creating the Industrial Commission was passed (103 v. 95), section 12, providing in part that the Industrial Commission should "supersede and perform all the duties of the State Liability Board of Awards" and as successor thereof should "be vested with and assume and exercise all powers and duties cast by law upon said State Liability Board of Awards". This act did not repeal or otherwise affect Sections 1465-40 and 1465-41. See *Kinsinger, etc., v. Board of Education*, 101 O. S. 298 (1920).

It will be observed that Sections 871-9 and 1465-40 are, in so far as the question here presented is concerned, identical in substance and almost identical in form, except that Section 871-9 requires the keeping of a separate record relative to claims for compensation. This was recognized by the Industrial Commission in the Bulletin published by it on January 1, 1924, containing the Workmen's Compensation Law of Ohio with annotations, it being stated in a note under Section 1465-40:

"NOTE. This section was not repealed by the industrial commission act. See Section 9 of that act for a similar section. (G. C. Sec. 871-9; 103 O. L., 97.)"

The Supreme Court of Ohio has expressly held that the separate records relating to claims *are public*. In the case of *State ex rel v. Industrial Commission*, 130 O. S. 269 (1935), the first branch of the syllabus reads:

“Under the provisions of Section 871-9, General Code, the Industrial Commission of Ohio is required to keep a public record showing not only its proceedings, findings and awards, but also ‘the reason or reasons for the allowance or rejection’ of each compensation claim presented for its consideration.”

I am aware of the facts that the meetings of your commission are publicly held; that the commission’s official record of proceedings are open to the public and available for inspection; and that the separate records of the proceedings of your commission relating to claims are recognized by you as public records and made available for public inspection. I am likewise aware that weekly reports of the decisions of your commission relating to compensation claims are published and widely distributed to interested members of the public (*Merriman & Sutherly Reports on Decisions of Ohio Industrial Commission*; *Gongwer State Reports*). Obviously, therefore, your inquiry is not concerned primarily with (1) sessions of your commission, (2) the records of proceedings of your commission, nor (3) the so-called separate records of proceedings relating to claims.

With reference to my classification (4), Annual Reports of Employers to your commission, the provisions of Sections 1465-45 and 1465-46 of the General Code seem to be conclusive.

Since their original enactment, Sections 1465-45 and 1465-46 of the General Code have been twice amended, but the amendments are not here material. Section 1465-45 makes it mandatory that all employers keep and maintain the records of and furnish the commission upon request all information required by it to carry out the provisions of the Workmen’s Compensation Act. It further provides for an annual report showing, first, the number of employees employed during the preceding year; second, the number of such employees employed at each kind of employment; and, third, the aggregate amount of wages paid such employees. The commission is further empowered to examine any employer under oath for the purpose of ascertaining any information which such employer is required to furnish.

By Section 1465-46, General Code, it is provided that “the information contained in the annual report” required by Section 1465-45 and such other information as may be furnished *in pursuance of the provisions of said section* shall be for the exclusive use and information of such commission in the discharge of its official duties and shall not be open to the public or used in any court in any pending action or proceeding, unless the commission is a party to such action or proceeding,

although the commission is authorized to tabulate and publish in statistical form the information it obtains for the use and information of state departments *and the public*.

The five sections above quoted in part are obviously in *pari materia* and must be construed together in order to ascertain the legislative intent. It is clear that, from the provisions of Sections 871-9, 1465-40 and 1465-41, the Legislature intended that the records mentioned in these sections should be public records, but that the information provided for in Sections 1465-45 and 1465-46 should be confidential and not open to the public.

It is not difficult to see why the Legislature required that this latter information should be for the exclusive use of the commission. Obviously, the information to be furnished is intimately connected with the private business of the several employers required to furnish it, and to facilitate the work of the commission the Legislature wisely made the necessary provisions to assure employers that they might freely give information as to the conduct of their business without making it available to their competitors, or to others who might use it to the employers' disadvantage. This particular information, (4), is, therefore, not included in the records open to the public.

With reference to (5), Statistical Data, the provisions of Section 1465-46, General Code, give a specific answer. Therein we find this provision: "but the information contained in said report (annual report required from employers) may be tabulated and published by the department, in statistical form, for the use and information of other state departments *and the public*." This provision is permissive rather than mandatory in its terms but it seems entirely clear that should statistical data be compiled from the information supplied by the employers in their annual reports, such statistical information becomes a public record.

With reference to (6), Audits, the provisions of Section 1465-55a, General Code, seem to give a clear answer. Said section reads as follows:

"The Industrial Commission is hereby authorized and required to have actuarial audits of the state insurance fund made from time to time as the industrial commission shall deem appropriate. At least one such audit shall be made between the date when this act becomes effective and December 31, 1938, and at least one such audit shall be made in each five year period after the calendar year 1938. Such audits shall be made by recognized insurance actuaries who shall be selected in such manner as the industrial commission determines. Such audits shall cover the premium rates, classifications and all other matters involving the administration of the state insurance fund. The expense of such audits shall be paid from the state insurance fund."

It seems obvious from the statutory provision that the purpose of the actuarial audit therein provided for is that the public may be informed as to the condition and status of the affairs of the Industrial Commission and the State Insurance Fund. Your letter indicates that your commission clearly recognizes that such an audit when made becomes and is a public record. I am aware that the audit to which your letter refers has been generally distributed to interested members of the public.

With reference to (7), Bookkeeping Records of your commission, a categorical answer cannot be given. It is my understanding that your bookkeeping records include the records of your actuarial department and of your auditing department. I am of the opinion that the records of your actuarial department in so far as they incorporate and refer to detailed information taken from the annual reports, payrolls and other confidential information supplied by employers identifiable as such, are not public records. It would seem to me that this must follow inescapably from the provisions of Section 1465-45 of the General Code. The records of the auditing department may, on the other hand, be public records in contemplation of the statute, recording, as they do, income, disbursements, surplus accounts, reserve accounts, investment accounts, etc. Such as these records as do not include as a part thereof such confidential information as falls within the prohibition of Section 1465-45, General Code, may properly be made available for public inspection.

With reference to (8), Claim Files, which are the original records pertaining to claims for compensation, the investigation thereof, reports of witnesses, physicians, and hearings, and incorporating affidavits, correspondence, etc., would seem not to be of any interest to your correspondent in its contemplated survey. Accordingly, it is unnecessary to determine, for the purpose of this opinion, whether or not they are public records. However, I suggest the following considerations which may be pertinent: (a) the application of the claimant contains a waiver in favor of the Industrial Commission of Ohio for the use of the information therein contained; said waiver does not run to the public generally; the same may be said regarding information furnished by the claimant's employer, including wage statements; (b) the report furnished by the claimant's attending physician, which frequently forms a part of the file, may relate to examination and findings which before a court are privileged (See *Baker vs. Industrial Commission*, 135 O. S., 491); (c) it may be contrary to public policy to have made available to the public generally the confidential information contained in most of said files—for example, in some cases reports of tests for loathsome diseases, etc.; (d) said claim files are specifically referred to in the provisions of Section 1465-46 of the General Code.

It seems logical to assume that the Legislature did not consider said claim files and the information therein contained public records without qualification or reservation, since it leaves to the commission (and the

director of the Department of Industrial Relations) alone the discretion to authorize the disclosure of such information and prohibits and penalizes any disclosure not so authorized.

With reference to those records of your commission which clearly are not public records, it seems clear that the commission does not have any discretion in the matter of making such records available to members of the public not officially authorized to inspect said records.

With reference to those records which are clearly public records, the question arises as to (a) what limitations, if any, there may be as to the members of the public who may exercise the privilege of inspection and as to (b) what conditions or limitations, if any, may be placed upon the exercise of the inspection.

Whatever may have been the rule at common law as to whether or not a person, who has no special interest, might compel the inspection of public records (and the commentators and text writers differ on this question), it is settled in Ohio "that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people; therefore, anyone may inspect such records at any time, subject only to the limitation that such inspection does not endanger the safety of the record or unreasonably interfere with the discharge of the duties of an officer having custody of the same." See 25 O. Jur., 45. In the same authority at page 7, it is said "that where a person is by law or by authority of law required to make a report or return of his acts or a statement of facts, such report or return is a public record of such act or facts", and further, that public records generally include legislative, executive, and judicial records. At page 8 it is said:

"Many departments of government are required by statute to keep records of their proceedings and reports. For example, the state industrial commission is required to keep a record of its proceedings, likewise the civil service commission, and many other offices and departments. The reader is referred to the particular statute governing the particular body or department in which he is interested. All such records fall within the definition of a public record already given, and are the property of the office, not the officer. * * *"

A succinct but excellent exposition of the law relating to the inspection of public records is contained in a case note in 27 Michigan Law Review, at page 221. In commenting on the case of *Nowack vs. Fuller, Auditor General*, 243 Mich., 200, 219 N. W., 749, 60 A. L. R., 1351 (1928), it was said as follows:

"A newspaper publisher, citizen and taxpayer, was refused permission by the auditor general to inspect records in his office

showing how a certain appropriation was spent. The plaintiff asked a writ of mandamus to compel the defendant auditor general to allow him to make such an inspection. HELD, the records were public records and therefore open to inspection by everyone, but as granting mandamus is discretionary the court may demand that the plaintiff show a special interest. The plaintiff had such an interest and was entitled to his writ. *Nowack v. Fuller* (Mich. 1928), 219 N. W., 749.

At common law every citizen had the right to inspect any public record. At first this right was absolutely without qualification. In *Herbert v. Ashburner*, 1 Wils. K. B. 297, the court refused even to hear the defendant, saying 'These are public records which everybody has a right to see.' Later cases, however, while not denying the right, held that since mandamus was a discretionary remedy, the court could require the plaintiff to show a special interest or else refuse relief. The modern decisions all adopt this view but the cases in which relief has been refused on this ground are very few. See *Payne et al. v. Staunton, County Clerk*, 55 W. Va. 202, 46 S. E. 927 (poll books). Most cases refusing the plaintiff a writ are based on one of three grounds not at all inconsistent with the principal case. First: Cases in which the plaintiff failed to make his request to inspect of the proper officer or refused to abide by reasonable regulations for such inspection. *Dist. of Columbia vs. Baker-smith*, 18 App. D. C., 574. Second: *Cases involving records that are ordered to be kept secret by statute*, such as jury rolls. *State ex rel Denson, et al. v. Miller*, 204 Ala. 234, 85 So. 700. Third: *Cases holding that the record sought to be examined was not a public record or was privileged as being within the protection of such statutes as the physician-patient confidential communication statutes*, for example insane asylum reports. *Mass. Mutual Life Ins. Co. Board of Trustees of Mich. Asylum for the Insane*, 178 Mich. 193, 144 N. W. 538, 51 L. R. A. (N. S.) 22. The result reached in the principal case *is in accord with the overwhelming weight of authority* and represents a sound view from a standpoint of public policy as well." (Italics the writer's.)

In the *Nowack* case, Judge McDonald, who delivered the opinion of the court, said at page 1353 (A. L. R.):

"In the absence of any statutory grant of inspection, the question in issue must be determined by a consideration of the general common-law principles relative to the right of citizens to inspect public documents and records. If there be any rule of the English common law that denies the public the right of

access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people. Every citizen rules. In Michigan the people elect by popular vote an auditor general. They prescribe his duties and pay his salary. He is required to keep a true account of the expenditure of all public moneys, and is answerable to the people for the faithful discharge of his duties. He is their servant. His official books and records are theirs. Undoubtedly it would be a great surprise to the citizens and taxpayers of Michigan to learn that the law denied them access to their own books, for the purpose of seeing how their money was being expended and how their business was being conducted. There is no such law and never was either in this country or in England. Mr. Justice Morse was right in saying: 'I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records.' *Burton v. Tuite*, 78 Mich. 374, 7 L. R. A. 73, 44 N. W. 285.

There is no question as to the common-law right of the people at large to inspect public documents and records. The right is based on the interest which citizens necessarily have in the matter to which the records relate."

Three Ohio cases touching the question here involved are *Wells v. Lewis, Auditor*, 12 O. D. (N. P.), 170 (Superior Court of Cincinnati, 1901); *Krickenberg v. Wilson, Mayor*, 3 O. N. P. (N. S.) 179; 15 O. D. (N. P.) 779 (1905); and *State ex rel vs. Ditty et al. Tax Commission*, 12 O. N. P. (N. S.) 319, 23 O. D. (N. S.) 31 (1911). Each of these cases cite with approval and follow the *Burton* case and the *Nowack* case, *supra*, decided by the Supreme Court of Michigan.

The second, third and fourth branches of the headnotes in the *Wells* case read:

"2. The right to inspect public records is not confined to persons having a private interest to be subserved by such inspection; and the inspection is not limited to such records and such parts of them as affect such interest.

3. Public records are the people's records. The officials in whose custody they happen to be are mere trustees for the people any one of whom may inspect such records at any time, subject only to the limitations that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the same.

4. The right to inspect public records is a property not

political right, and will be enforced by courts of equity in a case calling for the exercise of the powers of such courts."

It is unnecessary to quote from or to comment on the court's opinion in this case other than to say that the opinion is an exhaustive discussion of the rules of law here involved.

The Dittey case is peculiarly applicable here. In that case Judge Rathmell, of the Franklin County Common Pleas Court, held as stated in the headnote:

"The proceedings of the Tax Commission of Ohio constitute a public record, and subject to proper regulations these records are open to inspection by any and all persons who choose to examine them, regardless of their interest or lack of interest in the subject-matter."

In his opinion, Judge Rathmell said at page 319:

"The common law rule contended for by defendants—that the right to inspect public records is confined to those who have an interest in the subject-matter to which the record relates—is not a general rule, and has not only been denied as obtaining in this country (78 Mich. 363), but its application limited. And it pretty generally is held that subject to proper regulations and restrictions the public records are open to the inspection of any and all persons who choose to examine them, regardless of whether or not they have any definite interest in the subject-matter thereof. (24 Ency. of Law, p. 183)

There is good authority it seems that where a person is by law or by authority of law required to make a report or return of his acts or a statement of facts, that such is a public record of such acts or facts. (24 Ency. of Law, and com.; 34 Ill. 297)

The law governing the tax commission requires a sworn statement of certain officers constituting the reports sought to be inspected. The same law makes the record of the proceedings of the commission a public record. (Section 4, 102 O. L., 224)

We are of the opinion that the maxim urged by defendants does not apply so as to necessarily imply that these reports are not public records. It places beyond dispute that the *record of proceedings of the commission is a public record*. The reports are not robbed of their public character under the other rule cited in the absence of an express exclusion by the statute."

In view of the foregoing, and in specific answer to your question, it is my opinion, and you are advised:

1. A member of the public may inspect the public records of the Industrial Commission of Ohio, for the purpose of making an audit or survey of the administration of the Workmen's Compensation fund, subject only to the limitations that such inspection does not endanger the safety of the record or unreasonably interfere with the discharge of the duties of the commission.

2. In making such an inspection, the person or persons making the same are entitled to examine all public records of the Industrial Commission, as provided in Sections 871-9, 1465-40 and 1465-41, General Code, including (1) sessions of the commission, (2) official record of proceedings, (3) separate record of proceedings relating to claims, (4) statistical data compiled from annual reports and other information from employers, (5) actuarial audits, and (6) such of the bookkeeping records as do not fall within the provisions of Sections 1465-45 and 1465-46 of the General Code. By the express terms of Section 1465-46, General Code, an inspection may not be made of the information contained in the annual report required to be made under Section 1465-45 or of other information furnished to the commission by employers in pursuance of the provisions of said section.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1072.

LEASE—RESERVOIR LAND, STATE TO E. V. KNOBLOCK,
DESIGNATED PORTION, LAKE ST. MARYS OR GRAND
LAKE AUGLAIZE COUNTY.

COLUMBUS, OHIO, August 21, 1939.

HON. DON G. WATERS, *Commissioner, Division of Conservation and Natural Resources, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certain reservoir land lease in triplicate, executed by the State of Ohio, through you are Commissioner of the Division of Conservation and Natural Resources to E. V. Knoblock of Detroit, Michigan.

By this lease, which is one for a term of fifteen years and which provides for an annual rental of \$27.00, there is leased and demised to the lessee above named, permission to occupy and use for cottage site purposes only, that portion of the outer slope of the easterly embankment