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EVIDENCE — MUNICIPAL ORDINANCES — ADMISSION OF EVIDENCE OF ENACTMENT WHEN RECORD IS SILENT — In a suit by a village to require the removal of the equipment of an electric distribution company from the streets of the village, the company sought to introduce in evidence a copy of a purported ordinance giving it a twenty-five year franchise. There was no mention of such an ordinance in the record of proceedings of the village council. *Held*, such evidence is not admissible to show the acts of a municipal council when the records of its proceedings are available. *Village of Deshler v. Southern Nebraska Power Co.*, 133 Neb. 778, 277 N. W. 77 (1938).

That records of the proceedings of municipal legislative bodies are generally held admissible in evidence is due to an exception to the hearsay rule which applies to certain records of public proceedings. The fact that the records are kept in performance of official duty is sufficient to guarantee their trustworthiness, and the unwillingness to require the keeper of them to leave his duties to appear as a witness is justification for permitting his absence.[1] However, in some cases the record is not only admissible as an exception to the hearsay rule, but is essential under the rule requiring documentary originals to be produced. This is the situation where there is a mandatory requirement that certain entries relative to the passing of the ordinance appear in the record.[2] In such a case the entry in the record is not evidence of the council's act, but is the legal act itself, and must be produced unless production is not feasible [3] or a statute allows other evidence to be used instead.[4] In such type of case, when the record is silent as to the passage of an ordinance there can be no evidence offered to the effect that an ordinance was in fact passed.[5] If, however, the silence of the

[1] 3 WIGMORE, EVIDENCE, 2d ed., §§ 1630, 1639, 1661(2) (1923); 1 GREENLEAF, EVIDENCE, 16th ed., § 483 (1899).

[2] Steckert v. City of East Saginaw, 22 Mich. 104 (1870); Pickton v. City of Fargo, 10 N. D. 469, 88 N. W. 90 (1901); Farmers Telephone Co. v. Washta, 157 Iowa 447, 133 N. W. 361 (1912); City of New Franklin v. Edwards, (Mo. App. 1929) 23 S. W. (2d) 235.

[3] 2 WIGMORE, EVIDENCE, 2d ed., § 1218 (1923).

[4] Ark. Stat. (Pope, 1937), § 9557; 3 Mich. Comp. Laws (1929), § 14180; 1 Mo. Rev. Stat. (1929), § 1663.

[5] People v. Rhodes, 231 Ill. 270, 83 N. E. 176 (1907), and cases cited in note 2, supra.

journal is due to a lost or destroyed entry, then other evidence may be admitted to show the contents of that entry.[6] In those cases where the aforementioned rule does not apply, there is a diversity of opinion in regard to the use of evidence other than the record of the council to prove the acts of the council. The very great weight of authority is that the record is preferred evidence to the extent that no other evidence may be admitted to vary or contradict it.[7] Making the record conclusive evidence is justified by the desirability of making certain the status of official acts upon which the public relies, without the possibility of their being overthrown by the use of parol evidence.[8] A distinction is sometimes made when a creditor of the municipality who has relied upon an act of the council seeks to show that the act in fact was validly enacted.[9] And even where no other evidence is allowed to vary or contradict the record, such other evidence is sometimes admitted when the records are silent in regard to certain acts of the council. In such a situation a number of courts will allow parol evidence to prove certain steps in the passage of an ordinance.[10] And where no records were kept, although required by statute, parol evidence has been admitted to prove the ordinance.[11] If there are strong enough reasons of policy for the records to be conclusive as to the action of the municipality, it would appear more consistent to hold, as did the principal case, that the silence of the record is as conclusive as to the nonexistence of the act as an entry in the record would be to its existence.[12] In case of error in or omission from the record, the proper remedy would be to have the record corrected, and for this purpose mandamus will lie.[13]

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[6] 3 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 918 (1928); City of Brunswick v. Scott, 219 Mo. App. 45, 275 S. W. 994 (1924).

[7] Campbell v. City of Hackensack, 115 N. J. L. 209, 178 A. 794, 98 A. L. R. 1225 at 1229 (1935); Penton v. Brown Crummer Inv. Co., 222 Ala. 155, 131 So. 14 (1930); Chippewa Bridge Co. v. Durand, 122 Wis. 85 at 103, 99 N. W. 603 (1904); 2 DILLON, MUNICIPAL CORPORATIONS, 5th ed., § 556 (1911).

[8] Campbell v. City of Hackensack, 115 N. J. L. 209, 178 A. 794, 98 A. L. R. 1225 at 1229 (1935).

[9] 2 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 655 (1928); City of Troy v. Atchison & N. R. R., 11 Kan. 519 at 529 (1873); Wheat v. Van Tine, 149 Mich. 314, 112 N. W. 933 (1907).

[10] Gove v. City of Tacoma, 34 Wash. 434, 76 P. 73 (1904); Weatherhead v. Cody, 27 Ky. L. Rep. 631, 85 S. W. 1099 (1905); Chase v. Michigan United Rys., 165 Mich. 493, 131 N. W. 118 (1911); Matson v. Mitchell, (Iowa, 1920) 179 N. W. 173.

[11] Traction Co. v. Canal Co., 1 Pa. Super. 409 (1896); City of Denver v. Spencer, 34 Colo. 270, 82 P. 590, 7 Ann. Cas. 1042 at 1045 (1905) (charter created Park Board).

[12] Village of Bellwood v. Galt, 321 Ill. 504, 152 N. E. 591 (1926); Morrison v. City of Lawrence, 98 Mass. 219 (1867); City of Highland Park v. Reker, 173 Ky. 206, 190 S. W. 706 (1917).

[13] Campbell v. City of Hackensack, 115 N. J. L. 209, 178 A. 794, 98 A. L. R. 1225 at 1229 (1935); Penton v. Brown Crummer Inv. Co., 222 Ala. 155, 131 So. 14 (1930).