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EVIDENCE - THE USE OF CORPORATE MINUTES IN EVIDENCE

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EVIDENCE — THE USE OF CORPORATE MINUTES IN EVIDENCE — In their treatment of the principles applicable to the use of corporate minutes in evidence, the courts and the text writers have, with little or no explanation, used the language of both the parol evidence rule

and the best evidence rule.[1] Most often the question is rather summarily dismissed, and the court's opinion generally discloses very little in the way of enlightening information regarding the reasons for the exclusion or the admission and effect of the offered minutes. If general propositions are to be formulated relative to the use of corporate minutes under given conditions, such propositions must be based almost entirely on what the courts have done rather than on what the courts have said. An examination of the decisions will disclose that the admissibility and effect of corporate minutes in evidence will depend largely upon the subject matter of the particular controversy, the relations of the parties to it and inter sese, and the nature of the fact which the offering party wishes to establish by the proffered minutes.[2] In proof of some facts the minutes "must" be introduced or their absence must be explained; the minutes "may" be introduced as evidence of other facts; and under some circumstances, though relevant, the minutes may be "entirely inadmissible."

1. *Admissibility*

A third party may always offer the corporate minutes as evidence of any relevant fact against the corporation; such recital is deemed an admission against interest.[3] Where the third party seeks to prove an item of business transacted at a meeting of directors or stockholders, the corporate minutes are deemed the best evidence of such act and the minutes must be offered or their absence explained.[4] But in the absence of corporate record of the minutes, the corporate proceedings may be proved by a person who attended the meeting at which the board or the stockholders acted.[5] It is incumbent upon the corporation objecting to the proof of its proceedings by parol evidence to show that such proceedings were made a part of the corporate record[6] and if the record is in the possession of the corporation, and if the corporation has failed to produce upon proper notice, the third party may prove the proceedings by parol testimony.[7] Though consisting of

[1] The theory under which the courts have apparently acted is discussed under subdivision 3.

[2] The subject is adequately discussed and many of the cases are collected in 5 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., §§ 2196-2206 (1931), and 9 ibid., §§ 4609-4661 (1931).

[3] 5 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., § 2202 (1931); Dolan v. Wilkerson, 57 Kan. 758, 48 P. 23 (1897).

[4] Cantwell v. Stockmen's Building, Loan & Savings Union, 88 Ill. App. 247 (1899).

[5] Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207 (1851).

[6] Flakne v. Minnesota Farmers' Mut. Ins. Co., 105 Minn. 479, 117 N. W. 785 (1908).

[7] Buffalo Trust Co. v. Producers' Exchange, (Mo. App. 1930) 23 S. W. (2d) 644. In Thayer v. Middlesex Mutual Fire Ins. Co., 10 Pick. (27 Mass.) 326 (1830),

the minutes of the corporation, parol evidence is admissible, regardless of by whom offered, in proof of certain kinds of facts. Thus oral evidence is admissible as evidence that the corporation acted as such,[8] to show the location of corporate property[9] and, though the corporate minutes are the best evidence of the appointment of an agent by vote,[10] oral evidence may be offered for the purpose of showing that a person acted as such agent.[11]

A statement of the conditions under which the corporation may offer the corporate minutes in its own behalf meets with no little difficulty. It is certain that the corporate minutes are not admissible against a stranger as evidence of all the facts recorded therein. Certain entries in the minutes do not purport to constitute a record of the action of the board or of the stockholders at the reported meeting; thus, minutes often contain recitals of past events and as such they are usually classified as self-serving declarations and are held inadmissible.[12] On the other hand, even such self-serving statements may be admissible if it can be shown that the stranger was present at the meeting and made no objection to the recorded statement.[13] Regardless of the presence or absence of the stranger at the reported meeting, Thompson declares that the minutes may be used against a stranger for the purpose of showing what the corporation did or what action the corporators took in effecting its organization.[14] Hence, Thompson would admit the minutes in behalf of the corporation to prove that the corporation passed the vote recited, adopted the resolution recorded, or enacted the by-law spread upon its record. The language of some of the cases indicates that the corporate minutes are in no case admissible against a stranger for the purpose of proving facts affecting property or other rights between the corporation and the stranger.[15]

the defendant corporation contended that a subpoena duces tecum should have been used, but the court held that a notice to produce was a sufficient foundation for the introduction of oral evidence.

[8] 9 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., § 4610 (1931). De facto existence may be shown by oral evidence. Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147 (1897); Ramsdell v. National River & Novelty Co., (C. C. W. Va. 1900) 104 F. 16.

[9] 9 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., § 4610 (1931).

[10] Haven v. New Hampshire Asylum for Insane, 13 N. H. 532, 38 Am. Dec. 512 (1843).

[11] Town of Concord v. Concord Bank, 16 N. H. 26 (1844).

[12] Royce v. Farmers' Life Ins. Co., 107 Kan. 245, 191 P. 581 (1920); Norman Printers' Supply Co. v. Ford, 77 Conn. 461, 59 A. 499 (1904).

[13] Dakota Coffee Co. v. Johnson, 45 N. D. 430, 178 N. W. 291 (1920). Here there was a dispute as to the price of goods sold by the corporation to the defendant.

[14] 6 THOMPSON, PRIVATE CORPORATIONS, §§ 7739-7740 (1896).

[15] Chesapeake & Ohio Ry. v. Deepwater Ry., 57 W. Va. 641, 50 S. E. 890 (1905), refused to permit the C. & O. to introduce its minutes showing a resolution

Such courts would permit the corporation to prove incidental issues by its corporate minutes; but, if the principal issue was the passage of a certain resolution by the board of directors, such resolution could not be proved by the corporate minutes alone; perhaps, it might be offered in corroboration of oral testimony of the same fact.[16] Even as against a stranger, the writer believes that it may be safely asserted, however, that most of the courts would permit the introduction by the corporation of its minutes as evidence of corporate action in corporate meetings; where the courts have actually denied the use of the minutes in proof of such action there will inevitably be found grave doubt in the mind of the court as to whether there was a proper showing of authenticity.[17]

In an action between the corporation and its stockholders or officers, the minutes are the best evidence of the acts of the corporation in stockholders' and directors' meetings.[18] It is generally held that such minutes are admissible in behalf of the corporation in proof of any facts which the minutes purport to record.[19] It is presumed that the stockholder would not permit an untrue entry to remain a part of the record; however, when the minutes are offered as evidence, not as proof of an act of the corporation in a meeting or of a condition generally, but of a private transaction between the corporation and a member, they are inadmissible.[20]

of its board of directors adopting a certain survey. Such resolution, if admitted, would have established the priority of the C. & O. to a certain piece of land claimed by the Deepwater. The court said that after proof had been received showing that the resolution had been passed, the minutes might be received as evidence of the actual terms of said resolution.

[16] Chesapeake & Ohio Ry. v. Deepwater Ry., 57 W. Va. 641, 50 S. E. 890 (1905).

[17] There was some question of authenticity in Chesapeake & Ohio Ry. v. Deepwater Ry., 57 W. Va. 641, 50 S. E. 890 (1905); this did not, however, appear to be the substantial ground of the decision.

Without a showing that the minutes of such meeting could not be produced, most courts would not permit oral proof of the proceedings of the board or of the stockholders by either the corporation or a stranger. State ex rel. Moriarty v. Smith, 72 Conn. 572, 45 A. 355 (1900); Grant-Sprague Lumber Co. v. First Nat. Bank of Drumright, 100 Okla. 73, 277 P. 104 (1924); Methodist Chapel Corp. v. Herrick, 25 Me. 354 (1845). See the cases collected in 5 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., § 2205, note 30 (1931).

[18] Corcoran v. Senora Mining & Milling Co., 8 Idaho 651, 71 P. 127 (1902), refused to permit oral proof by corporation of the passage by the board of an order of stock assessment.

[19] The minutes must be offered or their absence must be explained. 5 FLETCHER, CYCLOPEDIA CORPORATIONS, perm ed., § 2204 (1931).

[20] Trainor v. German-American Savings, Loan & Bldg. Assn., 204 Ill. 616, 68 N. E. 650 (1903).

2. *Authenticity*

Corporate minutes are not self-authenticating and, regardless of by whom they are offered, before they are admissible in evidence it must be shown that they are the minutes of the corporation.[21] As a general rule authenticity is a question for the jury, but there is a preliminary question for the court and if this preliminary showing fails to establish a prima facie case in behalf of their authenticity the court may deny their admission.[22] This preliminary question will be determined largely by an ocular inspection by the judge aided by such explanation as the parties submitting the minutes may offer.[23] Proof of authenticity may, and some cases assert must, be made by the custodian of the corporate records;[24] since ordinarily the secretary is the custodian of the minute book, it is he who usually makes this proof.[25]

Where the corporation relies upon its own minutes, a more strict proof of authenticity is required.[26] If the corporation opposes the admission of its minutes on the ground that their authenticity has not been established, it must show more than a mere irregularity in the manner of keeping the minutes offered.[27] Thus it has been held that minutes were admissible though unsigned[28] and though not in the handwriting of the secretary[29] and entries from minutes spread on the books from loose paper several months after the meeting have been admitted.[30]

It is the original recorded minutes which are considered the best evidence and, in the absence of statute, a certified copy of the minutes is not admissible.[31] Many statutes provide that certain facts may be

[21] Glenn v. Orr, 96 N. C. 413, 2 S. E. 538 (1887); Smith v. Natchez Steamboat Co., 1 How. (2 Miss.) 479 (1837). But the dictum in Fraternal Relief Assn. v. Edwards, 9 Ga. App. 43, 70 S. E. 265 (1911), relying on the Georgia Civil Code of 1910, declares as a general rule notice to produce operates to relieve both parties from the preliminary proof of the authenticity of the document which has been made the subject matter of the notice.

[22] Fraternal Relief Assn. v. Edwards, 9 Ga. App. 43, 70 S. E. 265 (1911).

[23] Fraternal Relief Assn. v. Edwards, 9 Ga. App. 43, 70 S. E. 265 (1911). Ancient records may be admitted on the basis of ocular inspection alone.

[24] Smith v. Natchez Steamboat Co., 1 How. (2 Miss.) 479 (1837).

[25] Smith v. Natchez Steamboat Co., 1 How. (2 Miss.) 479 (1837).

[26] 2 THOMPSON, PRIVATE CORPORATIONS, 1st ed., § 1852 (1895).

[27] McIlhenny v. Binz, 80 Tex. 1, 13 S. W. 655 (1890).

[28] Grand Nat. Bank of St. Louis v. Taylor, 176 Ark. 1, 1 S. W. (2d) 818 (1928).

[29] United Grocers Co. v. Eisner, 22 App. Div. 1, 47 N. Y. S. 906 (1897).

[30] Brower v. East Rome Town Co., 84 Ga. 219, 10 S. E. 629 (1889).

[31] In re Mendelbaum, 80 Misc. 475, 141 N. Y. S. 319 (1913). Boggs v. Lakeport Agr. Park Assn., 111 Cal. 354, 43 P. 1106 (1896), held that the rough notes of the minutes were as much secondary evidence as the testimony of witnesses and

proved by a certified copy of the minutes.[32] Such statutes often provide the manner of certification and, if so, the prescribed method must be strictly complied with.[33]

3. *Effect*

If no minutes exist, ordinarily either party may proceed by parol evidence. Thus in *Edgerly v. Emerson*[34] it was held that since no minutes of the meeting were kept the action of the board of directors might be shown by the oral testimony of one who was present at the time of such action. But if minutes are kept by the corporation there is a presumption that proceedings of corporate meetings not recorded in the minutes did not occur.[35] Ordinarily this presumption may be overcome by parol evidence. However, it has been held that the silence of the minutes was conclusive as regards certain action which could be performed by the corporation only in a specified manner. In *Dennis v. Joslin Mfg. Co.*,[36] an action between the corporation and a stockholder, the minutes of the corporation did not show the declaration of a dividend and the court refused to permit parol evidence in proof of its declaration. The court said that the stockholder should have proceeded either by mandamus to compel the secretary to do his duty as a recorder or by a bill to correct the record; in the absence of controlling by-law or statute, apparently, *Dennis v. Joslin Mfg. Co.* stands alone and, certainly, most of the courts have indicated that the silence of the minutes in any case only created a presumption which parol evidence might overturn.[37] When offered against either a stock-

that in the absence of an unauthenticated record, any competent secondary evidence was admissible to show the action of the board. But, if available, though it is secondary evidence, a copy of the minutes may be preferred. Supreme Lodge Knights of Pythias v. Robbins, 70 Ark. 364, 67 S. W. 758 (1902).

[32] Cantwell v. Stockman's Building, Loan & Savings Union, 88 Ill. App. 247 (1899).

[33] Nixon v. Goodwin, 3 Cal. App. 358, 85 P. 169 (1906).

[34] 23 N. H. 555, 55 Am. Dec. 207 (1851). Professor Wigmore points out that under the analogy of official judicial records a different result would be reached.

[35] Thus in Shelby v. New York Steam Co., 121 N. Y. S. (S. Ct.) 619 (1910), the plaintiff sued on a corporate scrip dividend held by him. The introduction of the scrip established a prima facie case, but the court held that since the corporation's minute book contained no entry of any resolution of directors authorizing the dividend, the burden was on plaintiff to prove by someone who was present at the meeting that a resolution for a dividend was actually passed though not recorded.

[36] 19 R. I. 666, 36 A. 129 (1896). The court argued that if parol evidence was admissible a situation might arise in which some stockholders would be able to recover the dividend whereas others would not because unable to convince the jury that there had been a declaration of a dividend.

[37] See Shelby v. New York Steam Co., 121 N. Y. S. (S. Ct.) 619 (1910), set out in footnote 36, supra.

holder or a stranger as evidence of ordinary corporate proceedings, the minutes are only prima facie evidence of the facts therein recited and, if there is a denial that the transactions therein purporting to be recorded ever occurred, parol evidence is admissible to show what actually occurred at such meeting.[38]

If the minutes are ambiguous on their face, even the corporation may offer parol evidence in explanation.[39] The corporation is not bound by false or simulated entries in the minute book, but if the corporation seeks to destroy the effect of the entries in its own minute book it must offer very strong and convincing evidence controverting their verity.[40] Moreover, if a third party has reasonably relied upon the presence of certain entries in the corporation's minute book, the corporation may, regardless of their falsity, be estopped to deny their verity.[41]

4. *Applicable Rule of Evidence?*

Having suggested the use and effect of corporate minutes in evidence, we may proceed to examine the theory under which the courts may have operated in reaching the indicated results. Professor Wigmore suggests that the minutes may be constitutive acts of the corporation, that they are not evidence of what is done, but they are what is done.[42] But if a part of the parol evidence rule, oral evidence would not be admissible to dispute the minutes; it would be neces-

[38] Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93 (1911), was an attack on the verity of the corporate minutes by a third party. Just v. Idaho Canal & Improvement Co., 16 Idaho 639, 102 P. 381 (1909), was an attack on the verity of the corporate minutes by the minority stockholders.

It is well settled that the minutes of a municipal corporation are conclusive. Perryman v. City of Greenville, 51 Ala. 507 (1874). See Routson v. Slater, 202 Ill. App. 487, (1916), as to action by the school board. But where no record is kept the proceedings of the city council may be shown by parol. Rohrbaugh v. Mokler, 26 Wyo. 514, 188 P. 448 (1920). See the note on "Admissibility of Parol Evidence to Aid, Vary or Contradict Municipal Records" in 7 Ann. Cas. 1045 (1907). Legislative records or journals cannot be impeached. 10 R. C. L. 1028 (1915). Capito v. Toppings, 65 W. Va. 587, 64 S. E. 845 (1909). One who suffers a private injury by the inaccuracy of a municipal record may proceed by writ of mandamus to compel the record to be corrected. 19 R. C. L. 903 (1916).

[39] Rose v. Independent Cherva Kadisho, 215 Pa. 69, 64 A. 401 (1906).

[40] Grand Nat. Bank of St. Louis v. Taylor, 176 Ark. 1, 1 S. W. (2d) 818 (1928). Here the question was the authority of the corporate agent to borrow money from the plaintiff.

[41] Holden v. Hoyt, 134 Mass. 181 (1883). On ordinary estoppel principles, parties other than the corporation may be estopped to deny the verity of the corporate minutes. See Charles R. Hedden Co. v. Dozier, 99 N. J. Eq. 543, 133 A. 857 (1926), in which the accuracy of the minutes was certified by the president and the secretary of the corporation; these parties were estopped by reason of such certification.

[42] 3 WIGMORE, EVIDENCE, 2d ed., § 1661 (1923).

sary for the aggrieved party to seek reformation in equity or to proceed by mandamus and compel the proper official to correct the minutes.[43] Actually it would seem that ordinarily the minutes are, in the absence of controlling by-law or statute, merely entries of oral doings of the corporation.[44]

If the minutes do not evidence an integrated act and their use is not controlled by the parol evidence rule, and if the best evidence rule is to be accorded its ordinary meaning, the minutes could hardly be classified as the best evidence of the corporate act. Under the best evidence rule, it is generally said that a writing is the best evidence of its own contents.[45] When parol evidence is offered to prove the corporate act, there is generally no effort to prove the contents of the minute book; such evidence is offered to prove that the board of directors did pass the alleged resolution or that the stockholders did vote in the manner claimed. It is clear that the best evidence rule narrowly construed would not require the use of the corporate minutes in proof of corporate acts. In this situation the courts are sensibly using the best evidence rule in its broader meaning. McKelvey asserts from our modern concept; quoting Thayer, he declares that, "It meant that the best evidence of which the nature of the case would permit was receivable."[46] Something of this same principle occassionally finds expression in modern cases; in *Best v. Equitable Life Assurance Company*[47] the Missouri court declared that the best evidence was the most natural and satisfactory of which the nature of the case would admit. Perhaps when the courts speak in terms of best evidence as to the use of corporate minutes they have in mind this broad use of the term. It would seem that under this concept of best evidence, corporate minutes may quite fairly be called the best evidence of certain facts recited therein.

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[43] Stevens v. Chatfield, 230 Ky. 194, 18 S. W. (2d) 1006 (1929).

[44] This second theory is also suggested by Wigmore. 3 WIGMORE, EVIDENCE, 2d ed., § 1661 (1923).

[45] MCKELVEY, EVIDENCE, 4th ed., 449 (1932).

[46] MCKELVEY, EVIDENCE, 4th ed., 449 (1932).

[47] (Mo. App. 1927) 299 S. W. 118. In an attempt to prove the condition of the assured's blood, the testimony of a doctor as to the contents of the hospital attendant's written report of assured's blood condition was offered. The court excluded this testimony, saying that the writing was the best evidence of the report. It will be noted that the real issue was not the contents of the report, but the condition of the assured's blood. In Louisville Ry. v. Raymond's Admr., 135 Ky. 738, 123 S. W. 281 (1909), the death certificate was held inadmissible in proof of death and the oral testimony of the attending doctor was referred to as the best evidence of the death.