CHAPTER XI.

CORPORATE RECORDS AND DOCUMENTS. — CUSTODY. — RIGHT OF INSPECTION.

§ 293 (231). **Power to appoint Clerk pro tem.** — Corporations have *the incidental power*, if the regular clerk is temporarily absent, *to appoint a private person* a *clerk pro tem.*, for the purpose of making the entries of what is transacted at the corporate meeting. His entries, made by the direction of the corporate authorities, or entries made by the regular clerk from memoranda furnished by the clerk *pro tem.*, are competent evidence of the proceedings of the meeting.[1]

§ 294 (232). **Amendment of Record.** — The clerk or officer of a New England town,[2] *who has made an erroneous record*, may, while in office (but not afterwards), or after a re-election to the same office, *amend the same according to the truth*, being liable, like a sheriff who amends his return, for any abuse of the right; as, where he makes a fraudulent or untruthful amendment, the town *is not concluded or*

[1] Hutchinson *v.* Pratt, 11 Vt. 402 (1839). See also Rex *v.* Mothersell, 1 Stra. 93, also referred to *infra*. Board of public works of a city is a *quasi* corporation, and the *nature of its duties*, laying out streets, establishing grades, sewers, &c., requires it to keep a record of its proceedings, although no such record is in terms provided for. Larned *v.* Briscoe, 62 Mich. 393 (1886). *Sufficiency of memoranda.* Louisville *v.* McKegney, 7 Bush (Ky.), 651 (1870). Failure of clerk to take *oath of office* does not invalidate his record. Stebbins *v.* Merrit, 10 Cush. (Mass.) 27; *ante*, sec. 214. *Signature of chairman* to minutes affixed at a day subsequent to the meeting held sufficient, under a statute requiring the minutes of corporate meetings to be signed by the chairman. Miles *v.* Bough, 3 Gale & D. 119; Inglis *v.* Railway Co., 16 Eng. Law & Eq. 55. See also *ante*, chapters relating to Corporate Meetings and Corporate Officers; *post*, sec. 331; Logansport *v.* Crockett, 64 Ind. 319 (1878), citing text.

[2] *Ante*, secs. 29, 30, as to New England towns. New Haven, &c., Railroad Co. *v.* Chatham, 42 Conn. 465. Speaking of the records of the town of Concord, Massachusetts, Ralph Waldo Emerson in his Concord Address says: "I have read with care the town records themselves. They exhibit a pleasing picture of a community almost exclusively agricultural, where no man has much time for words, in his search after things; of a community of great simplicity of manners, and of a manifest love of justice. I find our annals marked with a uniform good sense. The tone of the record rises with the dignity of the event. These soiled and musty books are luminous and electric within. The old town clerks did not spell very correctly, but they contrive to make intelligible the will of a free and just community."

bound by an erroneous record, whether made by design or accident, unless when it would on general principles be estopped.[1]

[1] Cass *v.* Bellows, 11 Fost. (31 N. H.) 501 (1855); Harris *v.* School District, 8 Fost. (28 N. H.) 58, 66 (1853); Gibson *v.* Bailey, 9 N. H. 168; Whittier *v.* Varney, 10 N. H. 291; Welles *v.* Battelle, 11 Mass. 477; Low *v.* Pettengill, 12 N. H. 340; Pierce *v.* Richardson, 37 N. H. 306; Scammon *v.* Scammon, 8 Fost. (28 N. H.) 429; President, &c. *v.* O'Malley, 18 Ill. 407 (1857); Mott *v.* Reynolds, 27 Vt. (1 Wms.) 206 (1855); Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590 (1850); compare Covington *v.* Ludlow, 1 Met. (Ky.) 295, below cited.

The *necessity and reasonableness of the doctrine stated in the text* are thus expounded by *Parker*, C. J., in Welles *v.* Battelle, 11 Mass. 477, 481 (1814): "We have had frequent occasion to perceive the great irregularity which prevails in the records of our towns and other municipal corporations; and the courts have always been desirous to uphold these proceedings, where no fraud or wilful error was discoverable. Too much strictness on subjects of this nature would throw the whole body politic into confusion (Kellar *v.* Savage, 17 Me. 444). For it cannot be expected that, in all corporations, persons will be every year selected who are capable of performing their duty with the exactness which would be useful or convenient. . . . The first entry made by the clerk here [that an officer was *sworn* into office] was certainly defective, but the defect is properly cured by the subsequent entry of the existing clerk, he being the same person that officiated at the time of the first entry. He will be sufficiently watched by interested parties, to render a deviation from truth neither safe nor easy." The doctrine of the case in 11 Mass. 477 was followed and applied in Chamberlain *v.* Dover, 13 Me. 466 (1836), where it was further held that the municipal body was not bound by an erroneous record of a clerk, even though the plaintiffs, confiding in its correctness, had made a building contract with the "contracting and building committee" named in the record. The meeting in this case, which attempted to confer this power upon the committee, was not a legal one, because not held at the time and place appointed; and it was considered by the court that the plaintiff's remedy was against the committee, and not against the town, if the former acted without authority. See further as to correcting and amending records, Williams *v.* School District, 21 Pick. 75, holding that where two different, but not contradictory records were made up by the clerk from memoranda taken at the meeting, both were originals and competent testimony.

Clerk cannot amend records after he is out of office. School District *v.* Atherton, 12 Met. (Mass.) 105 (1846); Hartwell *v.* Littleton, 13 Pick. (Mass.) 229, 232 (1832). *Contra*, to the effect that he may amend, though out of office at the time, see Gibson *v.* Bailey, 9 N. H. 168 (1838); Gibson *v.* Bailey followed in Missouri in one case, Kiley *v.* Cranor, 51 Mo. 541, 543 (1873). But may, while he is *in office*. Bishop *v.* Cone, 3 N. H. 513 (1821); Hoag *v.* Durfey, 1 Aiken (Vt.), 286 (1826); Chamberlain *v.* Dover, 13 Me. 466 (1836). That *successor* cannot make the amendment. State *v.* Williams, 25 Me. 555, 561; 29 Me. 523; Taylor *v.* Henry, 2 Pick. (Mass.) 397. But the corporation might, in proper cases, authorize the successor to supply the omitted, or correct the erroneous, entry. Hutchinson *v.* Pratt, 11 Vt. 402, 419. Bonds of a city which by statute are directed to be signed by the mayor, but which were in fact *signed by the ex-mayor*, were held to be void even in the hands of a *bona fide* holder for value. Coler *v.* Cleburne, 131 U. S. 162 (1889).

In *New Hampshire* it is the practice to allow these amendments only upon the order of the Supreme Court or Court of Common Pleas by the officer by whom they were made, even after he has ceased to hold the office. A clear case must be made out. The court do not permit any erasures or interlineations of the original record, but require the amendment to be written upon a separate piece of paper, signed by the proper officers, and with it a copy of the order allowing the amend-

§ 295 (233). **Same subject.** — In a case in Vermont, the clerk of the town, *pending the trial, amended the record* by adding his signature as clerk to the record of the warning for the meeting in question. His right to do so, though he had meantime been out of office, but was again restored, was sanctioned by the Supreme Court, Redfield, C. J., remarking: "We think, in general, it must be regarded as the right of the clerk of a town or other municipal corporation, while having the custody of the records, to make any record according to the facts. His having been out of office, and restored again, could not deprive him of that right. But even an officer could not alter or amend a record upon the testimony of third persons ordinarily, and ought not to do it upon his own recollection, unless in very obvious cases of omission or error, of which the present might fairly be regarded as one, probably. Such amendments should ordinarily be made by the original documents or minutes."[1]

§ 296. **Right of Clerk to amend Records ex parte.** — The right of *the clerk ex parte* to *amend the records* of the proceedings of town corporations was very thoroughly considered in a case in Connecticut.[2] The statute of that State requires town-clerks to keep the record books of their respective towns, and to enter truly all the votes and proceedings of the town. The town-clerk made an entry showing that at a town-meeting held in 1843, the town assumed to the plaintiff a liability to commence January 1, 1844. If the time thus stated was the true time, the plaintiff had a cause of action against the town. In 1849 the clerk, not upon his own personal knowledge, or upon any written memorandum, but on the information of others (with the correctness of which, however, he was perfectly satisfied), amended the record so as to show that the liability of the town was not, by the vote, to commence until April 1, 1844. If this was the true time, the plaintiff had no cause of action. The majority of the court (three judges against two) held that the clerk,

ment; and this paper is annexed to the original record. Pierce *v.* Richardson, 37 N. H. 306, 311, *per Bell*, J.

[1] Mott *v.* Reynolds, 27 Vt. (1 Wms.) 206, 208 (1855). Amendments in open court of town record by clerk of the town, pending trial to which the clerk is a party, and to meet a particular decision of the court, disregarded. Hadley *v.* Chamberlin, 11 Vt. 618 (1839). Commented on and distinguished. Mott *v.* Reynolds, 27 Vt. (1 Wms.) 206 (1855).

[2] Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590 (1850). The subject of amendments of the records of the proceedings of a common council in *Connecticut*, when it can be made by the clerk and when by order of court upon *mandamus*, is considered in Samis *v.* King, 40 Conn. 298 (1873). Parties to *mandamus* to compel the clerk of a city to amend record. Farrell *v.* King, 41 Conn. 448 (1874); Logansport *v.* Crockett, 64 Ind. 319 (1878).

still continuing in office, was competent to amend the record; that *this power is derived solely from his official character* and does not depend on the permission of the court in which the record is offered as an instrument of evidence, nor on inquiry into the truth of it as originally made, or as amended, and that such a record is, in such an action, conclusive evidence of its own truth. The dissenting judges, without denying the power of amendment in all cases, were of opinion that, in view of the lapse of time and the absence of written memoranda or personal recollection by the clerk, the clerk had no authority to make the amendment, and that the correct course would have been to make application to the proper court by legal process, *e. g.*, *mandamus*, to correct the mistake in the record, if one existed, and thus give the opposite interested party an opportunity to show that the record was already right. It would seem, under the special circumstances, that the dissenting view was the better one.

§ 297 (234). **When Record amended, and by whom.** — Where the *clerk makes up the record* of the proceedings of the council, and it is *read and approved* at the same or at a subsequent meeting, the author doubts the authority of the clerk, *on his own motion, to amend it afterwards* without the direction of the council. The council, unless private rights have attached, may, doubtless, order the record of its own proceedings, even after it has once been approved, to be corrected according to the facts. The Court of Appeals of Kentucky, without determining the extent of the power of the same council at a subsequent meeting to correct errors and omissions in the journal entry of proceedings at a previous meeting, decided that this could not be done *by an entirely new board* in respect to the official action of their predecessors; and it was accordingly held that where the records, as kept, showed only that in August, 1854, an ordinance was reported, a new council could not, in 1856, add to the records words showing that the *ordinance had passed*, nor could the *fact of its passage be shown by extrinsic evidence.*[1]

[1] Covington *v.* Ludlow, 1 Met. (Ky.) 295 (1858); see, also, Lexington *v.* Headley, 5 Bush (Ky.), 508 (1869); Graham *v.* Carondolet, 33 Mo. 262; State *v.* Jersey City, 1 Vroom (30 N. J. L.), 93, 148, and *ante*, chapters on Corporate Meetings and Ordinances; *post*, sec. 310; *ante*, sec. 290. A public corporation may, like every court of record, *amend its records nunc pro tunc*. Commissioners *v.* Hearne, 59 Ala. 371; Musselman *v.* Manly, 42 Ind. 462; Vawter *v.* Franklin College, 53 Ind. 88; Logansport *v.* Crockett, 64 Ind. 319; Mayhew *v.* Gay Head, 13 Allen, 129; Steckert *v.* East Saginaw, 22 Mich. 104; Pontiac *v.* Axford, 49 Mich. 69; Delphi *v.* Evans, 36 Ind. 90; Chamberlain *v.* Evansville (*nunc pro tunc* entry supplying clerical omission), 77 Ind. 542 (1881), citing text.

§ 298 (235). **When Parol Evidence admissible, and when not.** — *Parol evidence* may, if necessary, be admitted *to apply a resolution or recorded vote of a town to its proper subject-matter,*[1] *but not, in general, to explain, enlarge, or contradict its terms or meaning,* in respect to matters (as, for example, laying out a highway or street) regularly within the jurisdiction of the town or its officers, and where the entry of record is made in pursuance of statute requirement.[2] Where the record of a meeting states that "the inhabitants met and adjourned the meeting," *parol evidence may be admitted to show* when and where the meeting was held, how many were present, and how many afterwards came, and, finding no meeting, went home.[3]

§ 299 (236). **Same subject.** — *Parol evidence in a collateral action* cannot be received *to contradict the records* of a public corporation, required by statute to be kept in writing, or to show a *mistake* in the matters as therein recorded. Thus, if the records of a school

[1] Baker *v.* Windham, 13 Me. (1 Shep.) 74 (1836). In this case the town of Windham entered upon its records the following: "Voted to indemnify *Benj. Baker* in his costs in the action against *A. Small*, which have or may arise in the same on account of *Gray* line." In an action by Baker against the town to recover costs of a suit which he had brought against Small, parol evidence was adjudged to have been rightly admitted to show that Baker brought the action in his name against Small, on account of the *Gray* line, at the request of the selectmen of Windham, for the purpose of settling a disputed line between that and the adjoining town, with the express agreement that the town should pay all costs, and to show that these facts were before the town when the vote was passed, and also to show that the suit so instituted was conducted under the advice and direction of the authorities of the town.

[2] Manning *v.* Fifth Parish, &c., 6 Pick. (Mass.) 16; Wild *v.* Deig, 43 Ind. 455 (1873); Crommett *v.* Pearson, 18 Me. 344; see Leavitt *v.* Eastman, 77 Me. 117; Covington *v.* Ludlow, 1 Met. (Ky.) 295; Cabot *v.* Britt, 36 Vt. 349; Lexington *v.* Headley, 5 Bush (Ky.), 508 (1869); Galbraith *v.* Littiech, 73 Ill. 209; Pittsburgh *v.* Cluley, 74 Pa. St. 262; *post*, sec. 310; *ante*, sec. 291. Parol evidence is not admissible where no sufficient reason is shown for not producing the record of proceedings, which is the primary evidence. Aurora *v.* Fox, 78 Ind. 1 (1881).

[3] Chamberlain *v.* Dover, 13 Me. 466 (1836). But parol evidence of an adjournment to another day cannot be given so as to validate acts done on the day adjourned to. Taylor *v.* Henry, 2 Pick. (Mass.) 397. Where a statute requiring a record to be made of the persons sworn into office is directory, if the record is not made, the fact may be shown by parol or other competent evidence. Kellar *v.* Savage, 17 Me. (5 Shep.) 444 (1840). In Meth. Chapel Corp. *v.* Herrick, 25 Me. 354, it was *held*, that to establish a resulting trust in the corporation [with respect to lands], it could not prove by parol evidence the authority of the committees to act for it; the authority should appear, and could only be shown by its records. Further, as to what facts may be shown by parol, West Bath *v.* Co. Comm'rs, 36 Me. 74; 35 Me. 373; Smith *v.* County Comm'rs, 42 Me. 395; Leavitt *v.* Eastman, 77 Me. 117; Long *v.* Battle Creek, 39 Mich. 323; Kohlhepp *v.* West Roxbury, 120 Mass. 596; Oliphant *v.* Comm'rs, 18 Kan. 386 (1877); Austin *v.* Allen, 6 Wis. 134; Anderson *v.* Comm'rs, 12 Ohio St. 635 (1861); Gurnsey *v.* Edwards, 26 N. H. 224; Lewis, Em. Dom. sec. 605, and cases; *ante*, sec. 268, and note; *post*, sec. 310.

district show that the district voted to authorize their clerk to call and warn "their *annual* meetings," parol evidence in an action by the district is not admissible to prove that the real vote of the district was to authorize the clerk to call and warn *all* district meetings.[1] So, where the record of a town stated the warning to have been on the 17th, and the meeting to have been held on the 19th of January, parol evidence cannot be admitted to show that, by mistake, the clerk inserted the "19th" instead of the "29th." The remedy is, to have him correct the record, if in office, according to the truth.[2]

§ 300 (237). **Proof of omitted Facts by Parol.** — But a *distinction* has sometimes been drawn between evidence *to contradict facts* stated on the record and evidence to *show facts omitted* to be stated upon the record. Parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence.[3] Thus,

[1] School District *v.* Atherton, 12 Met. (Mass.) 105 (1846); Morrison *v.* Lawrence, 98 Mass. 219; Mayhew *v.* Gay Head, 13 Allen (Mass.), 129. The cases are not uniform on the subject of the collateral impeachment of the record of public boards and bodies. See Lewis, Em. Dom. chap. xxvi. and cases.

[2] Durfey *v.* Hoag, 1 Aiken (Vt.), 286 (1826). Where the *record recited that the rules were suspended*, without showing by what vote, it was conclusively presumed in a collateral proceeding to be correct, and oral evidence to prove otherwise was rejected. Eldora *v.* Burlingame, 62 Iowa, 32. So in *Connecticut*, if a town corporation makes an erroneous record of its proceedings, this cannot be contradicted in a collateral action. In such an action the record is conclusive. If false, and the corporation will not correct the record, a party interested may, by *mandamus*, compel it to make the correction. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590 (1850). Upon this point, all the judges, though differing on other points, seemed to agree. So, on an appeal from an assessment for a city street, — *Held*, that *parol evidence was not admissible* to prove that the common council agreed to an arrangement proposed by the appellant and recommended by the committee on streets, that in consideration of his opening and grading certain streets without expense to the city, he should not be called on to pay any assessment when the street in question should at some future time be laid out. It seems that such an agreement, however proved, would be of no validity. Gilbert *v.* New Haven, 40 Conn. 102 (1873); see Nichols *v.* Bridgeport, 23 Conn. 189; *post*, chap. xix.; *supra*, sec. 295.

Purchasers of such paper [bonds issued by cities for stock in railroads] look at the form of the paper, the law which authorized it to be issued, and the *recorded* proceedings on which it is based. Therefore, as against purchasers, the record cannot be contradicted by parol evidence. *Per Clifford*, J., in Bissell *v.* Jeffersonville (action on municipal bonds), 24 How. (U. S.) 287, 298. See chapter xiv. on Contracts, *post*, as to the rights of holders of such securities.

[3] Moor *v.* Newfield, 4 Greenl. (Me.) 44 (1826). "The only legal mode of proving *facts on record* is by the record itself, or by an attested copy of it." *Ib., per Mellen*, C. J.; School District *v.* Atherton, 12 Met. (Mass.) 105, 113 (1847), *per Dewey*, J.; Langsdale *v.* Bonton, 12 Ind. 467; Indianapolis *v.* Imberry, 17 Ind. 175, 179; Delphi *v.* Evans (referring to previous cases), 36 Ind. 90 (1871); Bigelow *v.* Perth Amboy, 1 Dutch. (N. J.) 297