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EVIDENCE-SCOPE OF THE BUSINESS ENTRY EXCEPTION TO THE HEARSAY RULE UNDER PRESENT STATUTORY MODIFICATION

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EVIDENCE—SCOPE OF THE BUSINESS ENTRY EXCEPTION TO THE HEARSAY RULE UNDER PRESENT STATUTORY MODIFICATION—The business entry exception to the hearsay evidence rule has been prolific of legal literature and litigation.[1] Originally the law regarded all

[1] "Whole monographs have been written on it." HANDBOOK OF THE NAT. CONF. OF COMMS. ON UNIFORM STATE LAWS 350 (1936). The Committee of the Commonwealth Fund of New York collected over 1,800 cases, MORGAN, THE LAW OF EVIDENCE 53 (1927). See also: annotations collected in 144 A.L.R. 727 at 731 (1943); 52 L.R.A. 545 (1901); cases and comments collected in Radtke v. Taylor, 105 Ore. 559, 210 P. 863 (1922); Kinnare, "Account Books as Evidence in Illinois," 11 CHI.

business entries as inadmissible in evidence to prove the truth of the facts recorded.[2] However, at early common law the shopkeeper could not himself testify to the truth of a transaction, since he was an interested party; and if he kept no clerk, or his clerk were unavailable, no one else could so testify.[3] In response to this evidentiary dilemma there appeared a double-barreled exception to the hearsay rule; namely, that business entries by a party (The Shopbook Rule), and business entries by a third person (The Regular Entries Rule) were admissible to prove their truth.[4] Courts and legislatures so fused and confused the two rules, however, that their application in any given case became highly unpredictable.[5] In addition, admission of a business entry was conditioned upon meeting certain technical prerequisites,[6] which, as business grew in size and complexity, often became impossible or impracticable of attainment.[7] Hence, rules, which originated in aid of the litigant who was bereft of proof, so developed that Justice Cardozo could say in summation "that many of the simplest things of life, transactions so common as the sale and delivery of merchandise, are often the most difficult to prove."[8]

KENT L. REV. 278 (1933); Metz, "Uniform Business Records as Evidence Act," 6 UNIV. PITT. L. REV. 9 (1939); 47 HARV. L. REV. 1044 (1934); 24 IOWA L. REV. 751 (1939); 24 MINN. L. REV. 958 (1940); 54 YALE L.J. 868 (1945).

[2] An early English practice of admitting such entries despite their hearsay character was prohibited by statute in 1609. 5 WIGMORE, EVIDENCE, 3d ed., § 1517 (1940).

[3] Tracy, "Introduction of Documentary Evidence," 24 IOWA L. REV. 436 at 454 (1939).

[4] 5 WIGMORE, EVIDENCE, 3d ed., § 1517 et seq. (1940).

[5] MORGAN, THE LAW OF EVIDENCE, c. 5 (1927); 24 IOWA L. REV. 751 (1939). When the Supreme Court, in Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477 (1943), was called upon to interpret the federal statute, based on the Model Act, the Court added to the confusion by likening the statute to a liberalized version of the early shop book rule, whereas in truth the basis was the regular entries rule. See Morgan, "The Law of Evidence, 1941-1945," 59 HARV. L. REV. 481 (1946). Some of the lower federal courts have fallen into the same error. In Clainos v. United States, (App. D.C. 1947) 163 F. (2d) 593, the federal statute was called simply the "Federal Shopbook Rule."

[6] Summarized by Professor Wigmore, 5 WIGMORE, EVIDENCE, 3d ed., § 1521 et seq. (1940).

[7] An insistence on the necessity of calling as witnesses all persons who had a part in making the entries, robbed the exception of most of its vitality. Impartial investigation disclosed that to compile a record of a completed sale of linoleum one concern would make use of 43 persons, who might be any of 150 individuals, many of whom could never be identified. 5 WIGMORE, EVIDENCE, 3d ed., § 1520 (d) (1940). Judge Learned Hand commented, ". . . nobody need ever pay a debt, if only his creditor does a large enough business." Mass. Bonding & Ins. Co. v. Norwich Pharmacal Co., (C.C.A. 2d, 1927) 18 F. (2d) 934 at 937.

[8] Cardozo, "A Ministry of Justice," 35 HARV. L. REV. 113 at 121 (1921). "A man from up-state comes down to Detroit, goes to a hotel, has meals . . . sent to his

1. *Statutory Modification*

Long awaited reform began in 1927 when the Committee of the Commonwealth Fund of New York brought forth their Model Act for the Proof of Business Transactions.[9] Utilizing experience gained under this act, the Commissioners on Uniform State Laws approved in 1936 a Uniform Act on Business Records.[10] Admittedly a prime purpose of both these statutory modifications has been to relieve the burden cast on litigants by the common law, which required as a precedent to admitting business entries that witnesses, speaking from personal knowledge, trace the transaction every step of the way.[11] Often overlooked, however, has been a purpose to widen the scope of admissible entries.[12] The breadth given to the terms "business" and "business entries" by the statutory definitions has operated to extend the exception into fields not hitherto encompassed by it. The adoption of one or the other of these acts by twenty states, and by the United States, has rendered timely a consideration of their present area of operation. So

room, orders some laundry sent out, has some long distance calls, sends some telegrams, and goes out to a store and buys some merchandise and has it charged to the hotel and the hotel pays the bill; he buys newspapers; everything is charged to his room. Then he slips out of the hotel without paying. He goes back home and they sue him at his residence some 400 miles distant from the hotel. How . . . , under strict principles of evidence, are they ever going to prove that case against him? Will they bring the bell boy, and the woman who did the laundry and the cigar clerk and all the rest?" Tracy, "Some Problems in the Introduction of Documentary Evidence," PROCEEDINGS, MICH. LAW SCHOOL INSTITUTE 280 at 299 (1940).

[9] The definitive scope of the act is as follows: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence. . . . The term business shall include business, profession, occupation and calling of every kind." MORGAN, THE LAW OF EVIDENCE 63 (1927). Adopted substantially in the following jurisdictions: Alabama, Connecticut, Illinois (only in Chicago Municipal Court by Rule 70), Maryland, Massachusetts, Michigan, New York, Rhode Island, Wisconsin, and all federal courts. See 5 WIGMORE, EVIDENCE, 3d ed., § 1520 (d) (1940); id. § 1520 (Supp., 1947).

[10] Of which the definitive provisions are: "Section 1. (Definition) The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not. Section 2. (Business Records) A record of an act, condition or event shall, . . . , be competent evidence. . . ." 9 U.L.A. 264 (1942). Adopted substantially in: California, Delaware, Hawaii, Idaho, Minnesota, Montana, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, and Wyoming, 9 U.L.A. 64 (Supp., 1946).

[11] Ulm v. Moore-McCormack Lines, (C.C.A. 2d, 1940) 115 F. (2d) 492; Loper v. Morrison, 23 Cal. (2d) 600, 145 P. (2d) 1 (1944); Bethlehem-Sparrows Point Shipyard Inc. v. Scherpenisse, (Md. 1946) 50 A. (2d) 256; 5 WIGMORE, EVIDENCE, 3d ed., § 1530 (a) (1940).

[12] Henderson v. Allis-Chalmers Mfg. Co., 65 Idaho 570, 149 P. (2d) 133 (1944); Gile v. Hudnutt, 279 Mich. 358, 272 N.W. 706 (1937); Douglas Creditor's Assn. v. Padelford, (Ore. 1947) 182 P. (2d) 390.

similar are the acts in definitive terms,[13] and so interchangeably have the courts cited them,[14] that for this purpose nothing would be gained by a two-way classification of cases according to statute.

2. Scope of the Modification

a. *Business records.* The common law exception concerned itself primarily with the sale transaction, but limited proof thereof to records made in books of original entry.[15] Under the statutes a business using complex accounting systems may now, in a proper case, introduce the original sales ticket or entry, the "Hard Sheets" or loose leaf ledger to which the transactions may next be transferred, and, of course, the final "books of account."[16]

Another troublesome restriction at common law was the limitation of admissible entries to those made primarily in "books of account."[17] The extent to which this concept has been relaxed is illustrated by the recent inclusión of an air mail stamp, affixed in the regular course of business, within the exception.[18] In addition, the scope has been expanded so as to permit the introduction of bank books, a composition book, the history sheet of a corporate trustee, and employment records.[19] Index cards of various sorts, such as a broker's card listing property for sale, cards listing insurance and rental receipts, a hotel registration card, and the time card of an employee have been admitted.[20] Admissible also

[13] Notes 9 and 10, supra.

[14] Loper v. Morrison, 23 Cal. (2d) 600, 145 P. (2d) 1 (1944); Henderson v. Allis-Chalmers Mfg. Co., 65 Idaho 570, 149 P. (2d) 133 (1944); 35 CAL. L. REV. 434 (1947); 24 MINN. L. REV. 958 (1940).

[15] 5 WIGMORE, EVIDENCE, 3d ed., § 1532 (1940).

[16] Upon a proper showing: sales ticket admitted absent statute, a fortiorari admissible under statute, Maney v. Cherry, 170 Okla. 469, 41 P. (2d) 82 (1935); "Hard Sheets," Thompson v. Machado, 78 Cal. App. 870, 178 P. (2d) 838 (1947); Loose leaf ledger, H.F. Shepherdson Co. v. Central Fire Ins. Co., 220 Minn. 401, 19 N.W. (2d) 772 (1945); "Books of Account," Robinson v. Puls, 28 Cal. (2d) 664, 171 P. (2d) 430 (1946); People v. Jones, 61 Cal. App. (2d) 608, 143 P. (2d) 726 (1943); Grogan v. Michael, 349 Pa. 369, 37 A. (2d) 715 (1944).

[17] 5 WIGMORE, EVIDENCE, 3d ed., § 1532 (1940).

[18] United States v. Leathers, (C.C.A. 2d, 1943) 135 F. (2d) 507.

[19] Bank books, Crowley v. Atkinson's Estate, 297 Mich. 15, 296 N.W. 864 (1941); composition book, Arques v. Nat. Superior Co., 67 Cal. App. (2d) 763, 155 P. (2d) 643 (1945); history sheet, Waters v. Kings County Trust Co., (C.C.A. 2d, 1944) 144 F. (2d) 680, cert. den., 323 U.S. 769, 65 S.Ct. 121 (1944); employment records, Klat v. Chrysler Corp., 285 Mich. 241, 280 N.W. 747 (1938).

[20] Broker's listing card, Weimann v. Sheppard, (Mun. Ct. App. D.C. 1944) 37 A. (2d) 847; card listing insurance receipts, Grogan v. Michael, 349 Pa. 369, 37 A. (2d) 715 (1944); card listing rental receipts, Rapp v. United States, (C.C.A. 9th, 1944) 146 F. (2d) 548; hotel registration card, Valli v. United States, (C.C.A. 1st, 1938) 94 F. (2d) 687, cert. dismissed, 304 U.S. 586, 58 S.Ct. 1053 (1938); time card, People v. Richardson, 74 Cal. App. (2d) 528, 169 P. (2d) 44 (1946).

were bills of lading, invoices, the production records of a manufacturing concern, and of an oil well.[21] Letters, inter office memoranda, and a memorandum of a telephone conversation were admitted.[22] Finally, a number of assorted items such as daily oil gauge reports, insurance applications, laundry tags, order folders, and a ship's log were held admissible.[23]

b. *Medical records.* The courts varied in their attitude toward the admissibility of hospital records under the common law exception.[24] A trend toward admission has been given fresh impetus in jurisdictions adopting the statutory modifications. Items admitted, under these statutes, have run the gamut of hospital activities. The admission card, bedside notes of a physician, case histories of patients, a nurse's chart, and the birth record of a child have been put in evidence.[25] The ready admission of such items as a cardiogram, clinical charts of temperature, pulse, and respiration, an electro-encephalogram, a record of hypo-

[21] Bill of lading, United States v. Kessler, (D.C. Pa. 1945) 63 F. Supp. 964; invoices, United States v. Garvey, (C.C.A. 2d, 1945) 150 F. (2d) 767; United States v. Kaibney, (C.C.A. 2d, 1946) 155 F. (2d) 795; production records of a manufacturing concern, In re Eisenberg, (C.C.A. 3d, 1942) 130 F. (2d) 160; and of an oil well, Doyle v. Chief Oil Co., 64 Cal. App. (2d) 284, 148 P. (2d) 915 (1944).

[22] Letters, Sheehan v. Municipal Light & Power Co., (C.C.A. 2d, 1945) 151 F. (2d) 65. But compare the exclusion of letters in Amtorg Trading Co. v. Higgins, (C.C.A. 2d, 1945) 150 F. (2d) 536; Everts v. Matteson, 68 Cal. App. (2d) 577, 157 P. (2d) 651 (1945). Inter office memo admitted, Henderson v. Allis-Chalmers Mfg. Co., 65 Idaho 570, 149 P. (2d) 133 (1944); and memoranda of a telephone conversation, United States v. Moran, (C.C.A. 2d, 1945) 151 F. (2d) 661.

[23] Daily oil gauge reports, Doyle v. Chief Oil Co., 64 Cal. App. (2d) 284, 148 P. (2d) 915 (1944); insurance applications, Davidson v. John Hancock Mutual Life Ins. Co., 152 Pa. Super. 63, 31 A. (2d) 585 (1943); laundry tags, Oakland California Towel Co. v. Zanes, (Cal. App. 1947) 184 P. (2d) 21; order folders, Publishers' Book Bindery Co. v. Ziegelheim, 184 Misc. 559, 54 N.Y.S. (2d) 798 (1945); ship's log book, Zurich v. Wehr, (C.C.A. 3d, 1947) 163 F. (2d) 791; Gelderman v. Munson Steamship Line, 232 App. Div. 776, 249 N.Y.S. 920 (1931).

[24] Courts rejecting them did so either as not coming within the scope of the exception, or, in a given case, by a strict insistence on the technical prerequisites of the exception. Hale, "Hospital Records as Evidence," 14 So. CAL. L. REV. 99 (1941); 38 MICH. L. REV. 219 (1939). Either position would be almost equally fatal to admission for difficulties inherent in the proof of business records. Notes 5-8, supra, inhere also in hospital records.

[25] Admission card, Gile v. Hudnutt, 279 Mich. 358, 272 N.W. 706 (1937); Weis v. Weis, 147 Ohio St. 416, 72 N.E. (2d) 245 (1947); bedside notes, Ribarin v. Kessler, 78 Ohio App. 289, 70 N.E. (2d) 107 (1946); case histories, Bethlehem-Sparrows Point Shipyard v. Scherpenisse, (Md. 1946) 50 A. (2d) 256; People v. Kohlmeyer, 284 N.Y. 366, 31 N.E. (2d) 490 (1940); Conlon v. John Hancock Mutual Life Ins. Co., 56 R.I. 88, 183 A. 850 (1936); nurse's chart, Loper v. Morrison, 23 Cal. (2d) 600, 145 P. (2d) 1 (1944); birth record, Yager v. Yager, 313 Mich. 300, 21 N.W. (2d) 138 (1946).

dermic injections, and a prescription,[26] indicates that records of specific physical facts, as opposed to opinion or diagnosis,[27] are most likely to win approval.

In addition to recordations within the hospital itself, office records of a practicing physician, and records of a visiting nurse, have been admitted under this heading.[28]

c. *Governmental records.* Under the "Public Records" exception to the hearsay rule a number of governmental reports were admissible at common law.[29] This exception, like the one relating to business entries, was too narrow, and too encumbered with petty rules to operate adequately in aid of proof.[30] Significantly, several recent cases have ruled in favor of the admissibility of governmental records under the business entries statutes. For example, county relief records, a food analysis by a state chemist, a monthly labor report by a state department of public works employee, a birth certificate by a state bureau of vital statistics, a blood test by a state board of health, records of a state school for mental deficients, and a post office form have been

[26] Cardiogram and prescription, Freedman v. Mutual Life Ins. Co. of N.Y., 342 Pa. 404, 21 A. (2d) 81 (1941); clinical charts, Gile v. Hudnutt, 279 Mich. 358, 272 N.W. 706 (1937); electro-encephalogram, Mayole v. B. Crystal & Sons, 266 App. Div. 1008, 44 N.Y.S. (2d) 411 (1943); "shots," Wilson v. State, 243 Ala. 1, 8 S. (2d) 422 (1942). Clearly the record of the cost of the medical treatment should fall within the statutory exception, Ducat v. Goldner, 77 Cal. App. 332, 175 P. (2d) 914 (1946).

[27] Compare the vigorous argument in New York Life Ins. Co. v. Taylor, (App. D.C. 1945) 147 F. (2d) 297, over the admissibility of a diagnosis by a psychiatrist on a psychoneurotic condition. The majority thought the opinion too conjectural to be admitted without cross-examination. A statement that the patient suffered from "Alcoholism" was rejected where the entrant had not been shown to be a qualified medical expert, Lane v. Samuels, 350 Pa. 446, 39 A. (2d) 626 (1944). The problem is examined at some length in 38 MICH. L. REV. 219 (1939).

[28] Office records, Freedman v. Mutual Life Ins. Co. of N. Y., 342 Pa. 404, 21 A. (2d) 81 (1941); nurses' records, McCarthy v. Maxon, (Conn. 1947) 55 A. (2d) 912. In about three-fifths of the states certain confidential communications between physician and patient are privileged by statute, Hale, "Hospital Records as Evidence," 14 So. CAL. L. REV. 99 at 108 (1941). A question then arises as to whether the adoption of one of the business entry statutes repeals or modifies this privilege. It has been held in Ohio that, absent waiver, physician-patient communications carried into a hospital record would still be privileged, Weis v. Weis, 147 Ohio St. 416, 72 N.E. (2d) 245 (1947). A Michigan statute provided for the admission in evidence of duly filed death certificates prepared by a physician. An argument that the physician-patient privilege extended to communications carried into the death certificate was rejected, Krapp v. Metropolitan Life Ins. Co., 143 Mich. 369, 106 N.W. 1107 (1906). Hale examines the issue in his article, supra, p. 108 et seq.

[29] 5 WIGMORE, EVIDENCE, 3d ed., § 1630 et seq. (1940).

[30] A number of state statutes were aimed at removing some of the restrictions. Amplifying on these, Professor Wigmore suggested a uniform statute liberalizing the common law exception. See 5 WIGMORE, EVIDENCE, 3d ed., § 1638 (1940).

held admissible.[31] In view of the advantages gained by thus extending the types of admissible entries, and simplifying their proof, it may be expected that further attempts will be made to bring this type of record within the statutory scope.

d. *Army and Navy records.* A goodly proportion of our present population have themselves, or have relatives who have, Army or Navy service records. Inevitably, litigation turning on proof of facts relating to such service will increase. Already there have been admitted in evidence a discharge certificate from the Navy, a death certificate from the Secretary of War, a certificate compiled by a Rear Admiral in the Coast Guard, letters and telegrams from a commanding officer in the Army, and records from a Marine Hospital.[32] Hence precedent exists for the introduction of a growing number of Army and Navy records under the business entries statutes.

e. *Miscellaneous records.* Litigants have sought to bring records compiled in an assorted group of occupations and callings before the court. Successful to date have been an accountant's chart, a coroner's death certificate, a document prepared by a process server, and the minutes and cash books for a church.[33] Although the lawyer and the policeman have so far been singularly unsuccessful in these attempts,[34]

[31] Relief records, Brown v. County of Los Angeles, 77 Cal. App. 903, 176 P. (2d) 753 (1947); food analysis, Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A. (2d) 224 (1938); labor report, Gelbin v. N.Y., N.H. & H. R.R., (C.C.A. 2d, 1933) 62 F. (2d) 500; birth certificate, Pollack v. Metropolitan Life Ins. Co., (C.C.A. 3d, 1943) 138 F. (2d) 123; blood test, Wilson v. State, 243 Ala. 1, 8 S. (2d) 422 (1942); school records, Hall v. State, 248 Ala. 33, 26 S. (2d) 566 (1946); post office forms, Dias v. Farm Bureau Mutual Fire Ins. Co., (C.C.A. 4th, 1946) 155 F. (2d) 788.

[32] Discharge, Gunter v. Claggett, 65 Cal. App. (2d) 636, 151 P. (2d) 271 (1944); death certificate, letters and telegrams from a commanding officer, Bebbington v. California Western States Life Ins. Co., (Cal. App. 1946) 171 P. (2d) 495. Compare Lundblad v. United States, 98 Ct. Cl. 397 (1943), excluding a letter from a military officer. Certificate by Coast Guard Officer admitted, United States v. Conti, (D.C. Mass. 1946) 64 F. Supp. 187, and Marine hospital records, Ulm v. Moore-McCormack Lines, (C.C.A. 2d, 1940) 115 F. (2d) 492.

[33] Accountant's chart, United States v. Mortimer, (C.C.A. 2d, 1941) 118 F. (2d) 266, cert. den., 314 U.S. 616, 62 S.Ct. 58 (1941); coroner's death certificate, Hunter v. Derby Foods, (C.C.A. 2d, 1940) 110 F. (2d) 970; but statements in a coroner's certificate based on what the court considered an insufficient foundation were rejected, Nelson v. Lee, (Ala. 1947) 32 S. (2d) 22; Shiovitz v. N.Y. Life Ins. Co., 281 Mich. 382, 275 N.W. 181 (1937). Process server's report admitted, DeHart v. Allen, 26 Cal. (2d) 829, 161 P. (2d) 453 (1945); also church books, Zinaman v. Stivelman, 272 N.Y. 580, 4 N.E. (2d) 813 (1936).

[34] Entries in a lawyer's case record card were rejected in Matter of Roge v. Valentine, 255 App. Div. 475, 7 N.Y.S. (2d) 958 (1938); and an attorney's record rejected in Buckley v. Altheimer, (C.C.A. 7th, 1945) 152 F. (2d) 502. The Supreme Court was worried over the too ready introduction of records prepared by law firms in handling their business, Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477 (1943). In Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), one of the earliest cases

there appears to be no definitive objection to bringing their case, or any other "business, profession, occupation and calling,"[35] within the acts.

3. *Conclusion*

Obviously, present statutory modifications of the business entry exception do not make relevant that which is irrelevant; nor competent that which is incompetent.[36] To some extent, however, they may have worked an erosion on the hearsay rule itself.[37] But clearly there has been a two-fold expansion of the exception: vertically in the types of human activity which may now be regarded as encompassed within it; and horizontally in the kinds of records which may be considered "business entries."[38] Certain it is that the last step is yet to be taken,[39] and

arising under the Model Act, a police report based on statements of bystanders at an accident was rejected. McWilliams v. Lewis, (App. D.C. 1941) 125 F. (2d) 200, admitted a police report. An attempt to admit a police photograph of the defendant, containing notations on the back, as a business entry failed in Clainos v. United States, (App. D.C. 1947) 163 F. (2d) 593.

[35] Note 9, supra. See also, 35 CAL. L. REV. 434 (1947); 11 BROOKLYN L. REV. 78 (1941).

[36] Nor do they make the record immune to other standard evidentiary objections such as that the entry is "self serving." Schmitt v. Doehler Die Casting Co., 143 Ohio St. 421, 55 N.E. (2d) 644 (1944). Nor is the opinion without a proper foundation. Nelson v. Lee, (Ala. 1947) 32 S. (2d) 22; Shiovitz v. N.Y. Life Ins. Co., 281 Mich. 382, 275 N.W. 181 (1937); Lane v. Samuels, 350 Pa. 446, 39 A. (2d) 626 (1944), or unreliable, notes 37 and 40, infra.

[37] Controversy rages hottest around this issue. The important point is absence of cross examination. *B* is told by *A* that *A* received an injury, from which *A* later dies, in the course of his employment. In a suit on behalf of *A*'s estate in a jurisdiction relaxing the hearsay rule in Workman's Compensation cases, held, *B* may testify as to *A*'s statement, but *B*'s testimony is entirely without probative value. Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916). On the same facts except that *B* incorporates *A*'s statement in a written record of *A*'s subsequent medical treatment, in a jurisdiction having the Model Act in force, held, that portion of the record containing *A*'s statement is inadmissible [Kelly v. Ford Motor Co., 280 Mich. 378, 273 N.W. 737 (1937)]; the complete record, including *A*'s statement, is admissible, Bethlehem-Sparrows Point Shipyard v. Scherpenisse, (Md. 1946) 50 A. (2d) 256 (1946). Compare Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477 (1943) rejecting the routine accident report of *D*'s deceased engineer. See comments by Maguire, 56 HARV. L. REV. 458 (1943); Morgan, "The Law of Evidence, 1941-1945," 59 HARV. L. REV. 481 (1946).

[38] A court desiring to exclude entries may do so by definition, that the entry was not made in a type of activity which might be considered a "business" (stenographer held not engaged in any business within the meaning of the Act), Ingram v. City of Pittsburgh, 346 Pa. 45, 29 A. (2d) 32 (1942); or if made within a "business" the entry did not pertain to such "business" and hence was not a "business entry," Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477 (1943); entry in hospital record that deceased was "shot by a white man" not an entry made in the regular course of (hospital) business, Commonwealth v. Harris, 351 Pa. 325, 41 A. (2d) 688 (1945).

[39] Mr. Barrow of the Illinois Bar suggested in "Business Entries before the Court," 32 ILL. L. REV. 334 (1937), some modifications of both acts. The American Law

that the courts have been slow to adopt the position suggested by proponents of reform "that one question only would govern the admissibility of business records. Was the writing or record made in the regular course of business?"[40] Nevertheless, proof of "many of the simplest things of life," and some of the more complex ones, has been greatly simplified, and a tool has been fashioned for the resourceful attorney, who, faced with an apparently hopeless problem in documentary proof, may successfully salvage his case by bringing it within the statutory exception.[41]

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Institute in their Model Code of Evidence, Rule 514 (1942) substantially followed the Model Act for the Proof of Business Transactions but provided the trial judge with discretion to rule out unreliable records. Suggestion has been made that the Wisconsin statutes be amended to conform closely to the American Law Institute proposals, Filachek and Spohn, "Business Entries and the Like," 1947 WIS. L. REV. 96.

[40] 14 MICH. S.B.J. 35 at 36 (1934). Should this be the only test? The rationale of the common law rules was expressed in the theory that "it is the truth telling habit of such business records that makes them admissible. . . . The law therefore does not turn its back on them when in search of truth. Moreover, it realizes that the identity of the recorder has not much to say in the ordinary case as to the truth of the record. It is rather its purpose, character, manner of keeping and the habit and necessity for truth telling that makes for its competency as evidence. . . ." Tiedt v. Larsen, 174 Minn. 558 at 564, 219 N.W. 905 (1928).

But the common law exception was based upon the presumed authenticity of the types of entries then encompassed within it. The statutes, however, have rendered admissible a whole host of new types of entries whose trustworthiness is untested by time; see in particular notes 27 and 37, supra, without cross-examination, and without any mechanics for barring untrustworthy records. Faced with this problem the Supreme Court in Palmer v. Hoffman, 318 U.S. 109 at 114, 63 S.Ct. 477 (1943) invoked a judicial limitation embodied in a test of admissibility based on "the character of the records and their earmarks of reliability. . . ." This was considered an unnecessary restriction of the statutes by some: Maguire, "Hoffman v. Palmer," 56 HARV. L. REV. 458 (1943); Morgan, "The Law of Evidence, 1941-1945," 59 HARV. L. REV. 481 (1946); and commended by others, 43 COL. L. REV. 392 (1943). Significantly, the American Law Institute in their Model Code of Evidence provided just such a judicial limitation, by giving the trial judge discretion to rule out unreliable records. Note 39, supra.

[41] Stella Cheese Co. v. Chicago, St. Paul, Minneapolis & Omaha R.R. Co., 248 Wis. 196, 21 N.W. (2d) 655 (1946).