
Exceptional Business Hearsay - A Transactional Analysis of Illinois Supreme Court Rule 236

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Patrick D. Halligan, *Exceptional Business Hearsay - A Transactional Analysis of Illinois Supreme Court Rule 236*, 24 DePaul L. Rev. 633 (1975)

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EXCEPTIONAL BUSINESS HEARSAY— A TRANSACTIONAL ANALYSIS OF ILLINOIS SUPREME COURT RULE 236

*Patrick D. Halligan**

The interpretation of Illinois Supreme Court Rule 236, Admission of Business Records in Evidence, has been the subject of numerous recent Illinois appellate court opinions. These decisions have by no means ended debate as to the scope of the Rule. This Article analyzes the Rule by detailing various aspects of the environment surrounding business records. In addition, Mr. Halligan examines business records used in criminal proceedings and the relation of the Illinois Deadman's Act to the Rule. This Article in detailing the requirements for the business records exception and distinguishing the exception from other hearsay exceptions and other evidentiary rules emphasizes the dangers inherent in over extending the Rule to evidence lacking essential elements of trustworthiness.

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I. INTRODUCTION

SINCE 1966, Illinois Supreme Court Rule 236¹ has been the basis of the business records exception to the hearsay rule of evidence for Illinois. However, inasmuch as the adoption of this Rule is not a break from the Illinois common law tradition, pre-Rule court decisions have by no means been abandoned.² Moreover, the Rule need not be analyzed in terms of Illinois decisions alone, because the language of the Rule was an outright adoption of the Commonwealth

1. RULE 236. ADMISSION OF BUSINESS RECORDS IN EVIDENCE

(a) 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 as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business," as used in this rule, includes business, profession, occupation, and calling of every kind.

(b) This rule does not apply to the introduction into evidence of medical records or police accident reports.

ILL. REV. STAT. ch. 110A, § 236 (1973).

2. See Tone, *Comments on the New Illinois Supreme Court Rules*, 48 CHI. BAR REC. 46, 51 (Feb.-Mar. 1967).

Fund Act developed by the Commonwealth Committee of New York in 1927.³ Illinois was first introduced to the Committee's language in 1940 when the Municipal Court of Chicago adopted the Commonwealth Fund Act as Rule 70.⁴ Eight years later, Congress used the same language when it passed the Federal Business Records Act.⁵ That Act remained the source of federal law on the exception until recent passage of the new Federal Rules of Evidence.⁶ Therefore, the extensive litigation which arose under the various enactments of the Commonwealth Fund Act is available when considering Rule 236.⁷

By analyzing the elements and policy of Rule 236, this Article will attempt to clarify four sources of confusion which have been found in judicial opinions discussing the business records exception. First, discussions of the exception are often unmindful of the concept of "double hearsay." A business record, itself hearsay, may be received in evidence though it records independent pre-existing hearsay, if the independent pre-existing hearsay itself comes within one of the exceptions to the hearsay rule.⁸ Second, the business

3. See Committee Comments to Rule 236, ILL. ANN. STAT. ch. 110A, § 236 (Smith-Hurd 1968) [hereinafter cited as Rule 236, Committee Comments].

4. CIVIL PRACTICE RULES OF THE MUNICIPAL COURT OF CHICAGO, Rule 70 (1940). See also Note, *Admissibility of Hospital Records and Charts in Illinois*, 41 ILL. L. REV. 282 n.3 (1946).

5. 28 U.S.C. § 1732(a) (1970).

6. See Pub. L. No. 93-595, § 2(b) (Jan. 2, 1973). The business records exception to hearsay is now incorporated in FED. R. EVID. 803(6):

Records of a Regularly Conducted Activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

7. The language of paragraph (a) of Rule 236 is that of the federal statute [28 U.S.C. § 1732(a) (1970), (repealed by Pub. L. No. 93-595, § 2(b) (Jan. 2, 1975))] and the Chicago Municipal Court rule with only minor language changes. This Committee believes that it is desirable to retain this often-interpreted language without substantial change in the interest of having established judicial construction to work with.

Rule 236, Committee Comments, *supra* note 3.

8. An early example of multiple levels of hearsay can be found in Pennsylvania

records exception is often confused both with other hearsay exceptions, *e.g.*, past recollection recorded, and with altogether different evidentiary rules, *e.g.*, limitations on documentary evidence such as the best evidence rule. Third, the courts have failed to afford legal definitions for the broad conclusory labels that form the elements of the exception. Such terms as originality, regularity, and circumstantial trustworthiness are aggregate notions that need to be broken down into their component concepts. Fourth, corroborative evidence which is independently probative of the contested transaction is often incorrectly used to establish a foundation for the business records evidence. Evidence with independent probative value should be distinguished from evidence relevant to the circumstances of the making of a record offered on the same issue.

In discussing the cases construing Rule 236 and comparing them to prior case law, greater precision can be gained by an approach which analyzes the environment surrounding significant aspects of business records. The setting of each aspect has great bearing on whether the trial judge will admit the record. It is suggested that the courts begin to articulate the standards that govern each environmental setting. This author will proceed through the various aspects of business records, examine the relevance of the environment surrounding each aspect, and consider the impact of the environment upon admissibility.

II. THE OWNER OF THE RECORD

A. *The Owner's Use of the Record*

The conventional rationale of the hearsay exception for business records is that the record's use in business circumstantially indicates trustworthiness.⁹ This rationale suggests that the owner of the

Co. v. McCaffrey, 173 Ill. 169, 50 N.E. 713 (1898). In *McCaffrey*, policemen arriving on an accident scene interrogated bystanders and later reported to their sergeant. The report of the sergeant was excluded as "mere hearsay." *Id.* at 178, 50 N.E. at 716. The opinion indicates that it is the statements of bystanders that are more objectionable than those of the policemen to their sergeant, though both levels are hearsay.

9. The legal literature refers to notions which suggest repetitive transactions and records. See, *e.g.*, C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 282 (1954) [hereinafter cited as MCCORMICK] where two specified rationales stemming from the concepts of use and reliance are mentioned. The first is established habit which induces precision and the second is checking by superiors to insure accuracy.

records is engaged in on-going transactions with others. Thus the owner of the record must be a business or other regularly conducted activity and the record must in some degree have been occasioned by the activity. Rule 236 explicitly states that one's occupation in a calling or profession may be a business; but where one's calling ends and personal life begins is uncertain. A private diary is not a business record,¹⁰ yet the records of a self-employed person may qualify.

1. *Historical Development*

The requirement of use in business originated in the Shop-book Rule.¹¹ In the eighteenth century this rule was limited to small claims and was accompanied by many other restrictions,¹² including corroboration, supplementary oath of the foundation witness, and a showing that the reputation of the book was good. The rule operated only to prove open account transactions and not cash loans or payment. The foundation witnesses, required to substantiate the "shop-book," included the workman or other informant whose first hand observations were the subject of the record. An instructive and leading Illinois case on point is *House v. Beak*,¹³ which involved the sale of goods. Both the delivery man and the bookkeeper testified to the books of the seller/plaintiff. The bookkeeper's source of entries was the delivery man. On trial the seller's books, showing a balance for goods delivered, were admitted. The ruling was affirmed. The opinion gives the rationale that the testimony of

See also E. CLEARY, HANDBOOK OF ILLINOIS EVIDENCE § 17.33 (1963) [hereinafter cited as CLEARY] where the repetitive nature of transactions is emphasized.

The word "regular" in the modern statutes of which Rule 236 is a part, is intended to capture the essence of the traditional rationale. ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(6), 56 F.R.D. 307, 308 (1973).

10. See *Windmiller v. McCartney*, 108 Ill. App. 2d 264, 247 N.E.2d 631 (4th Dist. 1969), where a personal recordbook used by defendant for recording loans was held to be a private diary and not a business record. The opinion cites *MacKenzie v. Barret*, 148 Ill. App. 414 (1st Dist. 1909), in which checkbook stubs were excluded from evidence. It appears that persons and households are not activities competent to generate admissible business records unless they are occasioned by one's calling or profession.

11. For a history of the Shop-book Rule, see 5 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1518 (3d ed. 1940) [hereinafter cited as WIGMORE].

12. See McCORMICK, *supra* note 9, § 281-82.

13. 141 Ill. 290, 30 N.E. 1065 (1892).

the delivery man and bookkeeper and their oaths were sufficient foundation.¹⁴ The concern that the bookkeeper did not have personal knowledge was overcome by the testimony of the delivery man that he had provided him with correct information. The court went on to find that the reputation of the book was good.¹⁵

Modern authorities indicate that reputation and corroboration are no longer particular requirements but probably are maintained in the notion of regularity. The recent formulations¹⁶ retain all such factors as proper elements for weighing by the trier of fact. It is suggested that in all business records cases, a proponent of the record should be required to elicit from the foundation witness what uses are made of the record by the owner and what, if any, use is made of the record in dealing with others.

2. *The Rationale of Use in Business*

The rationale that use in business circumstantially indicates trustworthiness is enunciated in *Chicago & Alton Railroad Co. v. American Strawboard Co.*¹⁷ In *Strawboard*, a straw dealer sued a railroad for fire caused by locomotive sparks. At the Strawboard Company, weigh clerks prepared scale tickets and then transcribed the weights onto "stock sheets" and discarded the scale slips. The "stock sheets" were used for inventory control purposes and their accuracy was important in the operation of the business. Over objection, they were received in evidence after each clerk who had prepared them had testified. There was also much oral testimony to show the same fact for which the sheets were offered, that is, the amount of straw burned and extent of damages suffered. The ruling was affirmed in both appellate¹⁸ and supreme¹⁹ courts.

14. *Id.* at 298-99, 30 N.E. at 1068.

15. The court quotes prior authority to the effect that reliance by others on the offered books by voluntarily settling accounts must be shown. It does not appear that a disinterested witness was required. The opinion excuses the requirement since the evidence showed defendant himself had settled on the figures in the bookkeeper's records in prior transactions, a sort of admission by a party of their reliability. *Id.* at 299, 30 N.E. at 1068.

16. See generally ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULES OF EVIDENCE 803(6), 56 F.R.D. 307, 308-09 (1973).

17. 190 Ill. 268, 60 N.E. 518 (1901).

18. *Chicago & A.R.R. v. American Strawboard Co.*, 91 Ill. App. 635 (2d Dist. 1900).

19. *Chicago & A.R.R. v. American Strawboard Co.*, 190 Ill. 268, 60 N.E. 518 (1901).

In upholding the admission of the "stock sheets," the Supreme Court of Illinois indicated that an owner must do more than merely use the records; he must also *rely* on them. That the "stock sheets" were used by the Strawboard Company for inventory control purposes was sufficient evidence of reliance. Thus, the owner of business records must not only be engaged in on-going transactions with others, but must also rely on the records in managing his affairs.

B. Owner as a Party

Traditionally, business records were excluded when the owner was a party and the witness to the recorded transactions was conveniently available.²⁰ Admission of such documents might be justified, however, because of the size of the concern and the large numbers of informants and entrants. The present general rule is that hearsay business records of a party are not to be excluded solely because the declarants may be available to testify.²¹ Nevertheless, scrupulous proof of business purpose should be required for certain business records, such as office memoranda concerned with negotiations and disputes prepared by a party for his internal files, since such records are inherently suspect. Where such foundation is not established on direct examination, admission should be denied.

III. CONTENTS OF THE RECORDS

Whether evidence will be admitted under the business records exception depends not only on the nature of the organization gen-

20. See *Rude v. Seibert*, 22 Ill. App. 2d 477, 482, 161 N.E.2d 39, 41 (4th Dist. 1959) (dictum).

21. *House v. Beak*, 141 Ill. 290, 30 N.E. 1065 (1892) and *Rude v. Seibert*, 22 Ill. App. 2d 477, 161 N.E.2d 39 (4th Dist. 1959) both indicate the books of a party to the lawsuit are not disqualified. But it is fair to say they indicate close scrutiny of a party's books by the trial court is proper. A traditional suspicion of the books of a party is shown in the cases, including *Strawboard*, the case cited by Professor Cleary to show the irrelevance to the exception of participation in the case by the owner. See note 139 *infra*. McCORMICK, *supra* note 9, § 282, explains the view of the common law that no party should be allowed to make evidence for itself. An *ex parte* document is undeniably suspect. And the fear expressed in the common law concerning making evidence is still a matter of which judges and practitioners ought to be vigilant. See also *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957); *United States v. Evans*, 45 C.M.R. 353 (1972), where police lab reports were admitted as

erating the record but also on the characteristics of the records themselves.

A. Originals

Traditionally, courts have admitted only original entries under the business records exception. The underlying rationale for this limitation is that the use of originals reduces the errors of transcription, interpretation, and computation. Courts have looked at originality from both a temporal and sequential viewpoint. Originality has been defined both as prepared at or near the time of the transaction and as the first permanent original.²²

business records in prosecutions for drug possession. These cases are discussed at text accompanying notes 225-36 *infra*.

22. CLEARY, *supra* note 9, § 17.36 gives that definition and cites *People v. Dime Savings Bank*, 350 Ill. 503, 183 N.E. 604 (1932), which arose on a bill in equity against a receiver of a bank to establish a priority lien. Like many cases cited in this chapter of CLEARY, a full brief of the case demonstrates it is not so liberal an authority as Professor Cleary asserts. In fact the business records exception was not precisely in issue.

A county treasurer, who had a deposit account at the insolvent bank, kept a "Day Book" in which collected taxes and bank deposits were posted daily by an employee, Miss Simpson, who also made out the daily bank deposit slips. In addition the county treasurer kept duplicate tax receipts and a collector's book which were required by statute. Miss Simpson was not the only employee making tax receipts, but she alone posted the "Day Book" from the tax receipts made on the day in question. Miss Simpson testified at trial and although the "Day Book" and the duplicate tax receipts were offered into evidence the statutory collector's book was not. The duplicate deposit slips were apparently not available and were not offered into evidence. On a finding for plaintiff the receiver appealed. The ruling which received the "Day Book" into evidence was approved even though the case was reversed on other grounds. The rationale on this point are instructive, although probably dicta. *Id.* at 509-10, 183 N.E. at 606-07. The court pointed out that the identity of particular taxpayers was not an issue and was of no concern to the receiver. If it had been an issue the collector's book would be the original or first permanent entry. But the "Day Book" was a competent original to show the relation between tax receipts and bank deposits on any given day. Thus, as in *Strawboard*, the character of a record as an original, depends on the nature of the issue to which it is offered as evidence. The same book, competent in one type of case, might not be competent in another suit. The court states as rationale that Miss Simpson's entries were originals even though they were taken from duplicate receipts, since the latter were not permanent. *Id.* at 510, 183 N.E. at 607.

The authority of the case for business records is weakened by the observation that the "Day Book" is probably an official register of government acts since it is required to be kept by the county treasurer as a record of regular transactions in his office. *Id.* at 511, 183 N.E. at 607. See also, 4 CALLAGHAN'S ILLINOIS EVIDENCE § 8.16, at 419-20 [hereinafter cited as CALLAGHAN].

Regardless of the definition of originality, courts have scrutinized the purpose for which the evidence is to be admitted in order to determine whether the originality requirement has been met. In *Chicago & Alton Railroad Co. v. American Strawboard Co.*²³ the court upheld the admission of inventory "stock sheets" (compilations of the unavailable scale tickets) for the purposes of proving damages in a tort action. Consequential damages in tort may be proved with fair accuracy, but consequential damages in contract require reasonable certainty. Failure of an informant's or entrant's memory may justify admission of non-original records to prove damages in tort on a theory of necessity.²⁴ However, such a failure would not excuse destruction of originals in a contract case. A practical reason for such a distinction still operates. An owner of records may reasonably be required to preserve originals when he knows a dispute may arise (*e.g.*, before settling with one's seller or when defects, the bases of a potential suit or counterclaim, arise), but still should be able to prove loss when it is caused by an unpredicted event occurring even after destruction of the originals.

Where a record is clearly not an original, it has traditionally been received so long as the original entries on which it is based are first offered in evidence. This practice has been followed when the non-original is a mere computation from the basic data in evidence, aiding the trier of fact in evaluating voluminous original material. In such a case, the non-original is received not so much as an exceptional item in its own right but as a summary of other, original items. *Chisholm v. Beaman Machine Co.*²⁵ exemplifies the stringent past application of this principal. In *Chisholm*, a case of implied contract for time and materials in repairing machines, the plaintiff's workers kept their time for various jobs on small pieces of paper they put into a locked metal box. Each day the foreman reviewed the slips for reasonableness, initialed them as approved, and submitted them to the bookkeeper who posted them, never later than

23. 190 Ill. 268, 60 N.E. 518 (1901).

24. The *Strawboard* court pointed out the "stock sheets" were the only method of proving the extent of loss since "no witness can carry such numerous details in his memory." *Id.* at 271, 518 N.E. at 519. The latter comment suggests past recorded recollection and not the business records exception to the hearsay rule. Perhaps the entire opinion is obiter dictum in this respect.

25. 160 Ill. 101, 43 N.E. 796 (1896).

the next day after receiving them. The foreman was in the shop every day and had done some of the manual work himself and understood the scope of the work. All 5,000 time slips were preserved and offered along with the job books. The foreman and bookkeeper compared all 5,000 slips with the books in the days just before trial and each testified the books were true and accurate. The foreman testified the time slips were accurate in his opinion; that he had done some of the work himself²⁶ and had observed the other men doing most of the rest. The plaintiff's offer of his own books was sustained and the supreme court affirmed, assuming²⁷ that the introduction of the slips was necessary.²⁸ Since the permanent records and temporary memoranda both had been prepared near enough in time so as to satisfy the temporal aspect of the originality requirement, the insistence on the production of the available constituent documents probably indicates an unarticulated concern with the problem of multiple hearsay.

The common law took hearsay level by level,²⁹ seeking an exception for each level. For example, the business records exception might be used a number of times in sequence to qualify composite records, if the purposes of the originality requirement are substantially fulfilled.³⁰ Similarly, different exceptions to hearsay may be

26. He was a sort of *primus inter pares*.

27. There was no objection to the underlying time slips but rather to the summaries of the bookkeeper.

28. 160 Ill. at 110, 43 N.E. at 798.

29. It is the multiple level hearsay character of some records that makes important the requirement that the source of information being relied upon is reliable and simultaneously that the source has both an opportunity to observe the recorded transaction and a business duty of accurate reporting.

30. The possibility of sequential use of the business records exception is vaguely intimated, but by no means decided, in the products liability case of *Ocasio-Morales v. Fulton Machine Co.*, 10 Ill. App. 3d 719, 295 N.E.2d 329 (4th Dist. 1973), in which the defendant, apparently to show that it did not manufacture the defective product, offered into evidence certain blueprints of a nonparty. The prints were made in 1964 by consolidating, for purposes of practicality, smaller prints made in 1946. The larger, newer prints were received over objection on grounds of the best evidence rule. In affirming this evidentiary ruling, the appellate court concluded that the 1964 prints were originals since the consolidation was done in the "ordinary course of business." The point seems to be that a record constructed from prior documents becomes an original for the purposes of the best evidence rule if the consolidation is for a business reason. But the court comments in reference to the consolidated prints that "since the firm's manufacturing business depended upon the accuracy of its prints, it would have had no reason to falsify them," *id.* at 723, 295 N.E.2d at 332, and this is a statement of the underlying rationale for the business

used in sequence to except multi-level hearsay.³¹

Trial courts are advised to consider separately each level of hearsay to determine if an exception is established. Where the exception invoked at a particular level is business records, then part of the inquiry will be a question as to inter-level originality. That is, where the business records exception is invoked at one level, the court should require proof the record was prepared within a reasonable time after the prior source level.

To determine whether the constituent documents should be required for introduction of a compilation where no special dispute about the reliability of the compilation arises, we should analogize

records exception and not related to any part of the best evidence rule. Thus, the last quoted language implies that the court failed to first apply the business records hearsay exception and then apply an exception to the best evidence exclusion of secondary evidence. Instead, the court treated the best evidence objection as an objection to multiple hearsay and rejected the plaintiff's objection by multiple applications of the business records exception and by finding that the purpose, if not the traditional letter of the originality requirement of that exception, was fulfilled.

The purpose of the business records originality requirement was largely fulfilled in *Ocasio-Morales* since the consolidated blueprints were only a photographic collage of pre-existing prints. No changes or interpretations were part of the consolidation. Fundamentally, the consolidations were only photographic copies and the opponent therefore objected that the copies were not best evidence.

However, no hearsay objection to the consolidated prints was raised, only the best evidence objection was argued. Thus, the part of the opinion discussing the consolidations as things prepared in the regular course of business is not direct authority for construction of Rule 236 and much less for sequential application of the exception to the rule against hearsay embodied in that Rule. But the opinion suggests how the proponent of the new prints could have proceeded had the objection to them been hearsay.

The proponent would emphasize the business character of the earlier prints and the character of the new prints as merely accurate copies, the accuracy having been tested and established by their use in business. In particular the technique suggested by the opinion would be to lay a foundation for the old prints and then prove their contents by the best available copy, *i.e.*, the new collage. If the proponent would use this approach the originality requirement of the business records exception would clearly be fulfilled because the new collage prints would not be treated as business records. The new records are not themselves treated as business records. They are secondary evidence of the contents of material within the hearsay exception. What the *Ocasio-Morales* case says is that business purpose must be shown for consolidation as well as for initial preparation of the pre-existing constituent records. The added requirement is an elaboration not of the rule against hearsay and its exceptions but of the best evidence rule.

31. As an extreme example consider a dying declaration contained in a police report. Would not the fact that the declaration of the person is exceptional remove the "mere hearsay" source defect in *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N.E. 713 (1898) (discussed at note 8 *supra*), leaving the business records exception to operate on the later levels of hearsay, such as reports by the officers to their sergeant?

to the rules concerning the production of entrants³² and look to the blueprints branch of *Ocasio-Morales v. Fulton Machine Co.*³³ The impracticality of producing, authenticating, and offering the constituent and temporary or obsolete parts should be shown prior to excusing their absence. And, as the cited case explicitly indicates, it must be shown that the compilation was done in the course of business and for a business purpose prior to litigation.³⁴

The nature of the compilation, its use in the business, and the strength of the foundation evidence produced are facts to be weighed with the presence or absence of written information or memos as part of the foundation shown on an offer of compilations. Other parts of foundation proof may substitute for missing documents.³⁵ But in any case, the compilation must be an original, either in the older sense that it was prepared from the raw reports near in time to the events and was used thereafter as the permanent record of those events, or in the modern sense of the blueprints in *Ocasio-Morales* in which the prints were made for business convenience after an admittedly long period of initial use of the constituent parts and the compilation was made with care and used and relied on thereafter.

Where the constituent data has been lost, the non-originals prepared from them may sometimes be received.³⁶ But more recent lit-

32. See text accompanying notes 153-66 *infra*.

33. 10 Ill. App. 3d 719, 295 N.E.2d 329 (4th Dist. 1973). This aspect of *Ocasio-Morales* is discussed at note 30 *supra*.

34. Distinguish the bulky records exception in which it appears that the fact the summary was prepared for purposes of trial is not a disqualifying circumstance. Remember, however, that the person preparing the summary must testify and no substitute foundation witness will satisfy the requirement.

35. See, e.g., *Windmiller v. McCartney*, 108 Ill. App. 2d 264, 247 N.E.2d 631 (4th Dist. 1969).

36. An obvious example is *Richardson Fueling Co. v. Seymour*, 235 Ill. 319, 85 N.E. 496 (1908) which involved a general assumpsit for coal sold and delivered to a ship. The evidence showed the coal boat captain entered in a book the amounts beside buyers' names, conforming to receipts signed by a receiving boat crew member. The captain usually (but sometimes a member of his crew) took the receipts from the buyers' crew. He always posted his books himself and kept possession of all receipts. The receipts were delivered to opposing counsel who lost them. The book was admitted without the receipts. The ruling was affirmed. The rationale stated was that loss by the opponent excused the production of the original entries. *Id.* at 323, 85 N.E. at 497. It is suggested the case is really one of estoppel *in pais*.

igation³⁷ suggests that overly extended summaries may not be received even for the limited purpose of rehabilitation of an impeached witness, despite the foundation testimony of the person who prepared them. In some situations, the originality requirement has been used as the basis for excluding expert accounting testimony. A particular problem has been caused by the attempt to allow auditors or other experts to testify to their audit findings when the books they examined are not in evidence. The essence of the problem has been treated as hearsay,³⁸ rather than assumption by the expert of facts not in evidence, though the latter might be a proper objection. In an older case,³⁹ a book kept for a special purpose was

37. See *Scully v. Morrison Hotel Corp.*, 118 Ill. App. 2d 254, 254 N.E.2d 852 (1st Dist. 1969) and language of Rule 236 which indicate the preservation of the requirement that entries be originals. As before the concept is flexible varying with the nature of the case and relationship of the parties to each other and to the transactions recorded.

Under the *Scully* holding, over-extended summaries are not permitted without production of the constituent records. In brief, *Scully* preserves the essence of *Chisholm v. Beaman Machine Co.*, 160 Ill. 101, 43 N.E. 796 (1896), and *Richardson Fueling Co. v. Seymour*, 235 Ill. 319, 85 N.E. 496 (1908), as to production of constituents. The records in *Scully* were offered to prove damages. The lost records were not operative. Their specific contents were not an ultimate issue in the case but only important as to proof of the value of work done. Thus the case is not so much a best evidence opinion as one touching upon multilevel hearsay as in *Chisholm* and *Richardson Fueling*. See notes 29-30 *supra* and 215-16 *infra*.

38. See *Weinzelbaum v. Abbell*, 49 Ill. App. 2d 442, 200 N.E.2d 43 (1st Dist. 1964), where the court decided it is error not to strike testimony on direct when cross examination reveals the witness's knowledge is based on hearsay reports to him. It is that notion that runs through the accountant cases. Such incompetency would seem more fundamental than an expert witness assuming facts that are not in evidence. The latter incompetency is basically a rule of ordering of proof, breach of which is harmless where there is a subsequent introduction of proof of the assumed facts. The originality issue suggests the same problem of evidence based on hearsay. But since business records are all hearsay when offered to show the truth of their contents the originality restriction is designed to prevent multiple hearsay.

39. *LeRoy State Bank v. Keenan's Bank*, 337 Ill. 173, 169 N.E. 1 (1929). This is an important case demonstrating the relation and confusion between hearsay and certain other rules of evidence. Unfortunately the case discusses every doctrine except hearsay. At one point it says the books are the "best evidence." *Id.* at 191, 169 N.E. at 8. Next it says experts should not be permitted to summarize or prove written records by "parol." The rule excluding parol evidence, which is a rule of substantive law and not of evidence, had no place in the opinion where no one was attempting to prove a contemporaneous agreement inconsistent with any written memorandum of agreement. Another part of the case concerned ambiguity in a guaranty but that did not relate to the expert testimony. It is clear the court intended to talk about hearsay and the need to prevent compounding of hearsay by limitation to original entries. This is indicated by the tenor of the discussion of an exception to the rule against "parol" proof of written records. The opinion states that in the

excluded as a non-original record of bank transactions also recorded in bank papers which had been preserved. The opinion testimony of accountants based on a study of the book was found incompetent where they had not also studied the underlying documents.

B. *Factual Entries*

The original entry requirement outlined in the preceding section overlaps with the requirement of factuality since the more removed from the constituent events, the more conclusory (non-factual or aggregative) a record is likely to be. Since evidence classified as a business record is not immune from other evidentiary objections, conclusions, and irrelevant or extraneous material contained in business records are still incompetent. A particular source of evidence incompetent for both of these reasons is hospital records. By the very language of Rule 236, the admissibility of hospital records continues to rest on Illinois common law.

Even if certain conclusory statements were otherwise admissible,⁴⁰ it appears that they still would not qualify for admission under Rule 236. The Rule specifically applies to factual entries recording "acts, events, and transactions" and does not apply to "conditions." The recent Advisory Committee's note⁴¹ indicates such an omission should be regarded as significant. That is, adoption of the Commonwealth Fund Act in preference to the Model

case of "voluminous" books where only the "general result" is sought and where the general result can be obtained by mere "computation" from the voluminous originals then a "competent witness" who had examined all the originals may in the discretion of the trial court testify to his findings or testify he computed schedules and the schedules may be received in evidence. *Id.* at 191-92, 169 N.E. at 8. But in all cases the opponent must be allowed to examine the expert from both his schedules and from the originals. At a minimum, the originals must be produced. In *LeRoy State Bank*, defense counsel did not invoke the voluminous record exception or, if he did, did not assert the exclusion of the records on cross-appeal as an abuse of the discretion of the trial court. Since the case was a suit against personal guarantors of assets of a defunct bank, multilevel hearsay is the concern more than best evidence. In essence the specific contents of the constituent papers was not independently in issue but only their general result as to proof of damages. Thus best evidence was not the *real* problem. See notes 29-30 *supra* and 215-16 *infra*.

40. The broad rule is that opinions are admissible if made by a qualified expert. See generally MCCORMICK, *supra* note 9, ch. 3.

41. ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(6), 56 F.R.D. 307, 309 (1973).

Business Records as Evidence Act which does include the word "condition," indicates a desire to exclude records containing conclusion, diagnoses, findings, and interpretations, however expert. This was the pre-Rule Illinois position.⁴² The leading Illinois case⁴³ involved narrative comments by two hostile young nurses on the bedside chart of a decedent. The opinion indicated that the nurses might have used the records to refresh memory,⁴⁴ but that the records themselves were improper either as business records or as past recollection recorded.

Conclusory and argumentative statements are most likely to be found in narrative memoranda such as file copies of letters sent outside the organization. Cases on such letters of a party offered by himself are discussed in sections 3b and 4 of this Article dealing with the association of the declarant to the transaction and his situation in the dispute.⁴⁵

C. Recurring Records

The commentators⁴⁶ agree that a casual entry is not admissible and that the trustworthiness characteristics of use and reliance in business imply recurring records. Besides providing continuing tests by reliance over time, recurrence instills habits of precision.⁴⁷ McCormick⁴⁸ argues that the routine nature of a job is the essential thing and not the accumulation of records. And later,⁴⁹ he argues that admissibility of a non-recurring entry was intended by

42. See CLEARY, *supra* note 9, § 17.35, citing *Wright v. Upson*, 303 Ill. 120, 135 N.E. 209 (1922).

43. *Wright v. Upson*, 303 Ill. 120, 144, 135 N.E. 200, 218 (1922).

44. When a record is merely used to refresh a witness's memory, it is not received or read aloud and is not shown to the trier of fact.

45. The term "self-serving" is frequently used to object to the admission of narrative memoranda and letters. This is not a recognized objection since all evidence in chief offered by a party to advance his case could be considered "self-serving." The phrase can be used to mean parol evidence, conclusions, or argument. But in most legitimate objections using the phrase which the author has heard the proper objection would be hearsay and argumentative. The former objection is avoided by a proper assertion of the business records exception. The latter is not.

46. See CLEARY, *supra* note 9, § 17.35; MCCORMICK, *supra* note 9, § 283.

47. See ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(6), 56 F.R.D. 307, 308 (1973).

48. MCCORMICK, *supra* note 9, § 287.

49. *Id.* at § 289.

drafters of both the Commonwealth and Model Acts. However, he does not point to any rule language in this regard. McCormick's position seems to be that although an employee was only infrequently required to record his observations, a fact recorded would be admissible so long as the employee had a duty to observe the recorded matter and did so on recurring occasions. Thus, both the Commonwealth Fund Act and the Model Business Records as Evidence Act have incorporated the prior emphasis on routine but may be more liberal in admitting isolated yet job-required records or memos.⁵⁰ The use in the rule of the word "regular" in two places suggests this emphasis.

At first view, two recent Illinois cases appear greatly to liberalize the admissibility of isolated memoranda. But when one subjects the cases to close scrutiny, other rationales for the decisions develop and justification for characterizing them as representing an expansion of the business records exception fades. In *Lustig v. Robin*,⁵¹ the plaintiff, a real estate broker who knew that the defendant was interested in purchasing land, notified Robin as to the availability of certain property. After the defendant/purchaser had consummated the sale, the plaintiff broker brought suit to recover his fee for locating the site. The seller of the property had listed the parcel with a third party, the Arthur Rubloff Company. R. J. Adelman, a Rubloff employee, had made memos "of the progress of the transaction leading to the sale of the property to defendants," and had placed them in the file established for the property. When the plaintiff introduced some of these memos into evidence,⁵² Adelman testified that his employer required him to prepare them. Although the opinion does not elaborate as to the contents of the memos, we can assume that they contained either matters directly observed by Adelman or, more likely, the substance of various communications Adelman had with the parties to

50. See ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(6), 56 F.R.D. 307, 308 (1973).

51. 6 Ill. App. 3d 126, 285 N.E.2d 165 (1st Dist. 1972).

52. Though unclear it appears from the situation and business of Rubloff and the nature of the case that the Adelman memos were offered by plaintiff not so much to prove the truth of facts recited but merely to show the relative timing and frequency of contacts by plaintiff and defendant with seller's agent. If offered for that purpose no significant hearsay problem even arises.

the suit. In either situation, the memos would have been admissible without the business records exception. Since Adelman appeared as the foundation witness, the evidence might have been admissible either as records of his past but now exhausted recollection or as cumulative of his reports of admissions of a party opponent. The brief opinion affirmed the trial court's admission of the memos. The appellate court's ruling was proper even if Adelman had an independent recollection since in that situation the error would be only non-prejudicial cumulation or repetition of *viva voce* testimony. The form and content of the records in the case was matter of fact, probably redundant with testimony and not surprising from other evidence admitted by the court. In any event, the case does not change the law of exceptional business hearsay.

Newark Electronics Corp. v. City of Chicago,⁵³ another recent Illinois case dealing with the admissibility of an isolated memorandum, involved a negligence action for property damage caused when an unprotected water valve froze, broke, and flooded plaintiff's business. Plaintiff compiled its flood damage and offered the compilation in evidence under Rule 236. Since this was the first time that plaintiff's premises had been flooded, such reports had not been prepared previously. The city did not object that the report contained opinions on value but rather that the record was not "recurring."⁵⁴ The court agreed that a literal reading of the Rule supports the conclusion that only recurring records come within the exception.⁵⁵ The court further observed that not all recordings of a business are admissible. The justices, referring to the ruling of the trial court in admitting the compilation, stated "[i]t is not what we would have done had the issue been initially presented to us."⁵⁶ Although the justices said that they have "scrutinized closely the circumstances, methods, integrity and, hence, probative value" of the compilation, they do not share the circumstances with the reader. The court concluded its opinion with an unartful comment that admission was not an "abuse of discretion." Since it was the clear

53. 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1st Dist. 1970).

54. The City also objected that the report was prepared with a view toward litigation. The court summarily found no merit to this objection. *Id.* at 1028, 264 N.E.2d at 873.

55. *Id.*

56. *Id.* at 1029, 264 N.E.2d at 873.

opinion of the justices that the evidence should not have been admitted, the true rationale of the case is the quite different doctrine of "harmless error." The court said that it was in the course of business to ascertain damage; that it was not "unexpected" such a compilation might be made.⁵⁷ The implication of this view is that an atypical response to an unusual event or a one-time record of a not unusual event would be inadmissible and prejudicial. It is apparent from the technical nature of the objection of the defendant city and the scrutiny of the appellate court that the compilation and foundation evidence for it must have been impressive and business-like.⁵⁸

Several things should be clear from *Newark*. First, a non-recurring record is admissible only when the event recorded is non-recurring.⁵⁹ Second, properly read, the opinion states that admitting the damage report was error. Third, the affirmance in the case does not imply reversal of exclusion would have been ordered. Finally, *Newark* also demonstrates the liberality allowed a litigant in proving tort damages.

D. Subject Matter of the Records

While accounting, shipping, and production records are the most common forms of evidence which qualify for the business records exception, Cleary⁶⁰ indicates Illinois courts have admitted a variety of other documents. The contents of the records most frequently have involved quantitative information such as weights and numbers.⁶¹ Cases decided under both the Commonwealth and Model Acts still limit admissibility on the nature of the contents. In fact, in the federal jurisdiction, which adopted the Commonwealth Act,⁶² the limited phrasing of the Act has caused federal courts to

57. This court stated that it was "business-like" to make such a compilation. *Id.* at 1028, 264 N.E.2d at 873.

58. If the damage report was prepared by the persons responsible for plant maintenance with occasion and duty to observe and record other facts of the premises' condition the McCormick version of the requirement of regularity, "routine of a job," would in any case be met.

59. The distinction between the record and the event recorded is illustrated by comparison of Section III and Section IV of this Article.

60. CLEARY, *supra* note 9, § 17.35.

61. See CALLAGHAN, *supra* note 22, §§ 8.12-8.67 where he discusses the varieties admitted in past cases.

62. See notes 5-6 and accompanying text *supra*.

be very cautious about going beyond "traditional business records."⁶³

Courts should not rest their decisions merely on the type of document, but should delve into the underlying factors of the record's trustworthiness. Admittedly, however, the record is more likely to contain traditional quantitative entries when the nature of the business is routine, when the owner strongly relies on and uses the record, and when the record is a factual one. Such familiar factual records produced under conditions of trustworthiness should require less corroboration of foundation evidence⁶⁴ of the sort described later in this Article. Thus while less familiar type records should not categorically be excluded under the new Rule, a greater scrutiny of circumstances of their preparation and quantity of proof of use and reliance by the proponent should be required.⁶⁵ Indeed it appears that Rule 236 favors familiar quantitative records and looks for sound foundation and corroboration when less conventional records are offered.

E. *Absence of an Entry*

McCormick⁶⁶ is of the opinion that a witness should be allowed to state that he has searched business records for a record of a particular transaction and has found none. The committee drafting the Federal Rules,⁶⁷ doubting that the problem is one of hearsay alone, suggests that the problem is simultaneously hearsay and circumstantial evidence. The latter problem is obvious: Is the absence of a trace of something evidence that it did not happen? The question is

63. See ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(6), 56 F.R.D. 307, 309 (1973).

64. *Windmiller v. McCartney*, 108 Ill. App. 2d 264, 247 N.E.2d 631 (4th Dist. 1969) reminds us that elements of reliability and corroboration are inversely related.

65. For example, the subject matter of the memos in *Lustig v. Robin*, 6 Ill. App. 3d 126, 285 N.E.2d 165 (1st Dist. 1972), was evidently non-quantitative. The foundation was clear, the only entrant having been called as a witness. The essence of the memos was admissions of a party in past recorded recollections of a person who heard the admissions. The contents of the memorandum in *Newark Electronics Corp. v. City of Chicago*, 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1st Dist. 1970), was quantitative and of traditional business information.

66. MCCORMICK, *supra* note 9, § 289.

67. ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(7), 56 F.R.D. 311 (1973).

one of degree. In traditional terms the border between circumstantial evidence and excludable collateral matters is indefinite. But the problem of hearsay is also present. Is not proof of the absence of an entry in essence proof that absent entrants have said out of court that the recorded transactions are the only transactions?

The presence of hearsay is at issue in criminal cases brought under blue sky laws where the accused objects to evidence of an absent record when used to prove that a required document was not filed.⁶⁸ The defendant in this situation will object that the evidence violates a state constitutional right to confront witnesses "face to face." To permit proof of absence of an entry generally under Rule 236, the court should require both a full business records foundation and a showing that the records are designed to comprehend all transactions of the type in question. The former requirement touches on hearsay, the latter on circumstantial evidence.

68. That the issue is one of hearsay is illustrated by an Illinois case in which an out of court statement by the Secretary of State expressly stating that a certain transaction had not occurred was offered in evidence. *People v. Love*, 310 Ill. 558, 142 N.E. 204 (1924), was a criminal prosecution for aiding and abetting non-compliance with the securities registration law. The substantive statute in question made it an offense not to file certain documents with the Secretary. Love was an officer of an issuing corporation, some of whose unregistered stock one Ambrosius sold to one Howard with the alleged aid of Love. The Illinois Supreme Court affirmed a judgment of conviction of guilty after a trial at which there was received in evidence over defense objection a certificate of the Secretary stating that the issuer "has not complied" with the statute and "has not filed the documents and statements specified and required in and by said acts." *Id.* at 561, 142 N.E. at 205. The statute made such a certificate prima facie evidence of non-compliance. The court agreed the conclusion on an ultimate issue (essentially that the accused's alleged principal had perpetrated a crime) was inadmissible and should have been masked or otherwise excluded. But it found the error harmless in light of the substantive definition of the crime as failure to file and declared the remaining parts of the certificate were within the familiar exception to hearsay established in prior cases for official records. The opinion states the certificate itself is an official act, required to be done. *Id.* at 563-64, 142 N.E. at 206. The logical problem is that on that formulation only the fact the Secretary prepared a certificate is provable by the certificate and not the factual recitals in the certificate. The certificate recites no prior "act" of the Secretary. A better rationale would have been that the blue-sky statute itself establishes a special rule of admissibility. The probable reason the court insisted the certificate made as required is an "official record" was the Illinois constitutional provisions granting accused persons the right to meet witnesses "face to face." See ILLINOIS CONSTITUTION art. II, § 8 (1870). The "official records" exception antedates 1870; the blue-sky law does not. It is sufficient for our purposes to say that *People v. Love* acknowledges a hearsay problem, rests on peculiar substantive law, and relies on the spirit of the public records exception.

IV. NATURE OF THE TRANSACTION⁶⁹A. *Recurring Event*

The usual requirement, discussed in an earlier section⁷⁰ and implied by Rule 236 of a recurring record, implies a recurring event. We concluded in discussing *Newark Electronics Corp. v. City of Chicago*⁷¹ that a recurring record is required when the event recorded is recurring. *Newark* also suggests that the only non-recurring events which may be the subject of an admissible record are ones not unexpected in business generally yet not controlled by the owner of the record. The prior law⁷² also required a recurring event and recurring record of it. The notion is that the recorded event must be in a continuum of similar events⁷³ to be the subject of an admissible record. The redundant use of the word "regular" in Rule 236 suggests a similar requirement. This interpretation of the Rule is in accord with the theory advanced by McCormick⁷⁴ that the events should occur in "the routine of a job." McCormick argues that a recurring record should not be required but seems to agree that facts recorded ought to be at least generally of a sort recurring in the job of the person making the entry.

B. *Observation of the Transaction*⁷⁵

The recent Federal Committee Report⁷⁶ indicates that the en-

69. Though logically prior to Section III on the Contents of the Records this Section IV is more convenient to develop here since Section IVB, Observation of the Transaction, overlaps so much with Section V on the Situation of the Informant or Entrant.

70. See text accompanying notes 46-59 *supra*.

71. 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1st Dist. 1970). *Newark* is discussed at text accompanying notes 53-59 *supra*.

72. See CLEARY, *supra* note 9, § 17.35, citing *Kibbe v. Bancroft*, 77 Ill. 18 (1875).

73. *Kibbe v. Bancroft*, 77 Ill. 18 (1875), which dealt with the character of an isolated delivery of a certificate of deposit, used the phrase "events as they occur." *Id.* at 19-20.

74. MCCORMICK, *supra* note 9, §§ 287-289.

75. In discussing the proximity of the event to the entrant, the maker of the record, this section overlaps with Section V of this article, dealing with the Situation of the Informant or Entrant.

76. ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(6), 56 F.R.D. 307, 308-09 (1973).

trant's source of information and participation of the entrant in the transaction have occasioned considerable litigation under the Commonwealth Fund Act, the source of Rule 236.⁷⁷ The federal cases cited indicate an insistence that a person (informant) both with first hand knowledge and under a business duty to the owner be the entrant's source of information and that in general an unbroken chain of duty from observation to recordation be evident. McCormick⁷⁸ argues, concerning first hand knowledge of the informant, the same result for both the Commonwealth and Model Acts. He points out⁷⁹ the general insistence in the common law for personal knowledge of a declarant/informant. Indeed if a witness on the stand is limited to his first hand knowledge, should not the law insist more fiercely that the statement of an out of court declarant such as the entrant, a maker of a business record, have been made by him either on personal knowledge or, at a bare minimum, on information from one with such knowledge and with a business duty equal to that of the maker of the record?⁸⁰ Cleary⁸¹ makes the same point citing a police report case. The reservation in Rule 236 of police reports indicates a continued reliance on the requirement of first hand knowledge and business duty.⁸² It is the *coincidence* of duty

77. *Id.* at 310-11. A few federal cases collected in the COMMITTEE'S NOTE have required that the source of the information has actually participated in the act recorded, but these cases are scattered and are not the prevailing rule. Indeed, *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957) (this decision is discussed at text accompanying notes 225-30 *infra*) cuts the other way excluding the reports of agents. The opinion thought their role in the recorded sale made their memoranda unreliable. Participation requirements, however, are the British and Canadian rules. See R. CROSS, EVIDENCE, 407 (3d ed. 1967) [hereinafter cited as CROSS]; WIGMORE, *supra* note 11, at 1524.

78. MCCORMICK, *supra* note 9, §§ 286-289.

79. *Id.* §§ 283-286.

80. One point for emphasis is required. The modern requirement of a duty bound source of first hand information does not imply that source must appear and testify. See MCCORMICK, *supra* note 9, § 289. The foundation witness need not have first hand knowledge. But he must be able to testify both that his source had such knowledge and that his source observed or acted under a business duty of accuracy to their common employer. *Id.* The older cases, like *Pittsburgh C.C. & St. L.R.R. Co. v. City of Chicago*, 242 Ill. 178, 89 N.E. 1022 (1909), required also that the source testify or his absence adequately be explained. That requirement has largely passed. But the existence of such a knowledgeable person *in the employ of the owner* of the record is still a requirement.

81. CLEARY, *supra* note 9, § 17.35.

82. See also *Paliokaitis v. Checker Cab Co.*, 324 Ill. App. 21, 57 N.E.2d 216 (1st Dist. 1944).

accurately to record business events and the personal knowledge of such events that is required. Without such coincidence the report is based on "mere hearsay" of persons not under any business duty, supervision, or habit and so is itself mere hearsay.

1. *An Historical Example*

In discussing the duty of accuracy and opportunity to observe, McCormick⁸³ cites with approval an older Illinois opinion, *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. City of Chicago*,⁸⁴ which compares two distinct types of business records in great detail. The facts of this case highlight many of the issues discussed so far in this Article.

Pittsburgh Railroad involved a railroad which sought indemnity from a municipality for riot⁸⁵ damage to cars in its 59th Street Yard under a statute authorizing such suit. In dispute was the value of destroyed cars and whether the cars were in transit or not. The opinion indicated railroad forms P. L. 508 and P. L. 66 were prepared by incoming freight conductors and stated yard spotting information.⁸⁶ The 508's were sent to Pittsburgh; the P. L. 66's stayed in Chicago where they were posted to a record called the Borner record which had been kept continuously for over 20 years. The Borner record was used by the railroad to locate cars. All fifty conductors who had made the various 508's and 66's testified as did the Borner record clerk. No 66's were available but the evidence was largely duplicative of the 508's. The 508's and Borner record were offered to show location and transit status of cars.⁸⁷

Another record, the "Record of Car Equipment" was a compilation of repair reports from both the railroad's own yards and from manufacturers. The manufacturers' reports were accompanied by inspectors' reports prepared by railroad employees who inspected newly purchased cars tendered by the manufacturer before acceptance. The "Records of Car Equipment" had been kept by a succes-

83. MCCORMICK, *supra* note 9, § 286.

84. 242 Ill. 178, 89 N.E. 1022 (1909).

85. The riot arose out of the Pullman strike of 1894. *Id.* at 182-83, 89 N.E. at 1023.

86. *Id.* at 192-93, 89 N.E. at 1026-27.

87. *Id.*

sion of four clerks since 1876, the most recent two of whom testified. They also testified they recognized the handwriting of a third of the four clerks and stated he was dead but that his duties had been like their own. These "Records of Car Equipment," called "Historical Reports," were used in business for maintenance management and capital budgeting. They were received into evidence on the issue of damages. A great deal of corroboration of the various reports came in. A change of venue having been granted, the case was tried by jury in DuPage County over a period of four months. Verdict and judgment for plaintiff were affirmed.⁸⁸

The rationale for approving admission of the Borner record is separately stated by the court. The sources of the information in the Borner record were the conductors, all of whom were under a *duty to the railroad* and all of whom had *personal knowledge of the facts they recorded* in P. L. 508's and P. L. 66's at the time of the entry. The absence of the P. L. 66's was excused by the court since the P. L. 508's were virtual equivalents and the corroboration of the Borner report was substantial, and the foundation testimony of the conductors and Borner record clerk was very complete. The opinion⁸⁹ found the P. L. 508's and the circumstances of the person's making them to be satisfactory proof that the source of the information⁹⁰ residing in the Borner report was accurate when considered against the "nature and character of the business to which the evidence relate[s]." ⁹¹ All fifty conductors having testified, there was no serious issue about reliability of the information source of the Borner record clerk. The "Historical Report," on the other hand, was in a sense more like a police report. The source of information, in part, was a third party, the manufacturer, whose duty to the purchasing rail-

88. *Id.* at 193-95, 89 N.E. at 1027.

89. *Id.* at 193, 89 N.E. at 1027.

90. Unfortunately the opinion refers to the P.L. 508's as "best evidence." It is clear from the context, however, the court is referring to the requirement that adequate proof of an accurate source be shown. We have noted the same confusing use of the phrase "best evidence" to refer to the source-reliability issue in *Chisholm v. Beaman Machine Co.*, 160 Ill. 101, 43 N.E. 796 (1896). See discussion of *Chisholm* at text accompanying notes 23-28 *supra*.

91. *Id.* This language is suggestive of that found in *Stettauer v. White*, 98 Ill. 721 (1881), and *House v. Beak*, 141 Ill. 290, 30 N.E. 1065 (1892), "satisfactory as the transactions are susceptible" of showing, which also related to the *source* of the information recorded by the record keeper.

road was of a lower order than the duty of an employee. No doubt that is why plaintiff's counsel made a showing about the reports of the inspectors who did have a duty to the railroad to verify the manufacturer's report. The repair reports fulfilled the requirement of coinciding duty and knowledge since they apparently came from the road's own shops. The majority of the repair reports supporting the "Historical Report" were unavailable. The court excused their absence on two principles. One was necessity. "It would be well nigh impossible to preserve and produce the originals."⁹² The use of the word "originals" shows greater precision in this part of the opinion. The second rationale expressed by the court was that the "Historical Reports" were only offered as aids to the jury "in arriving at the value of the case" and were "not conclusive." The court pointed out that exact proof of damages was impossible and that the "Historical Reports" were cumulative. Thus, the purpose for which the evidence was admitted had a bearing on its admissibility.⁹³

2. *A Recent Example*

The most recent Illinois case on the requirement of coinciding knowledge and duty indicates that Illinois courts will interpret Rule 236 to require both. In *Benford v. Chicago Transit Authority*,⁹⁴ a personal injury case, plaintiff worked for Hotpoint Company. Defendant offered in evidence three items contained in the Hotpoint Company personnel records for plaintiff. The first item was a Hotpoint Form clearing plaintiff for return to work. The second was a letter from plaintiff's physician recommending return to work on June 26, 1967, and the third was his three year employee attendance record. The three exhibits were offered by defendant apparently to rebut evidence of lost time damages.

The trial court determined that an inadequate foundation was laid and thus excluded all three records. The appellate court, finding a proper foundation as to two but not the third of the reports, reversed in part and remanded the case for re-trial on the issue of

92. 242 Ill. at 196, 89 N.E. at 1028.

93. See also *Chicago & A.R.R. v. American Strawboard Co.*, 190 Ill. 268, 60 N.E. 518 (1901); *Newark Electronics Corp. v. City of Chicago*, 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1st Dist. 1970).

94. 9 Ill. App. 3d 875, 293 N.E.2d 496 (1st Dist. 1973).

damages only. The remand instructions ordered the employer's clearance for the plaintiff to return to work and the plaintiff's three year attendance record received and the doctor's letter excluded. While the doctor had knowledge of the facts (recuperation of the plaintiff patient), he did not owe a duty to the *owner of the records*. That is, he owed a duty to his patient but not to Hotpoint. The opinion does not use the duty vocabulary but instead bases its reasoning on the fact that the doctor's report was not "made" by Hotpoint.⁹⁵ But the case makes crystal clear that Illinois courts are in conformity with the majority rule which requires a coincidence both of personal knowledge of the recorded facts and of a business duty of accuracy owed to the owner of the records, on the part of the person recording the facts or reporting the facts to the record keeper.

*C. Negotiations and Disputes Embodied in Ex Parte
Memoranda*

The courts should carefully scrutinize "records" describing attempts to negotiate disputes or extensive evidence construing ambiguous agreements. Such events are often said to be recorded in file copies of letters sent by the proponent of the evidence himself. The dangers of deceit in the admission of such evidence are obvious. Prevention of deceit and of the temptation for it ought to be one goal of the law of evidence. Skepticism about such evidence is appropriate as a practical matter and as a matter of our adversarial tradition. The traditional antidote to perjury, cross-examination, is absent if *ex parte* records of negotiations, settlements, and the like may come in evidence as business records since the whole point of that and most exceptions to hearsay is that the out of court speaker or writer is not required to appear and testify independent of his memoranda. Anyone who has ever worked in a large organization requiring preparation of memoranda of problem areas or of communications with other organizations knows that the files in which such memos are kept are cradles for those children of afterthought, excuses. Extension of the business records exception to such material would trap many honest but weak persons whose guarded lies,

95. *Id.* at 877-78, 293 N.E.2d at 498-99.

made to placate their superiors, become unanticipated evidence in court. In short, the circumstantial unreliability of *ex parte* memoranda of negotiations and conferences with an adversary or promisee is so great that no exception to the hearsay rule should be allowed for them.

The key words limiting the preceding paragraph are "hearsay" and "*ex parte*." If a document is offered as an operative document, it is not hearsay because it is not offered to prove a fact recited in it. What documents are operative is a question of substantive law.⁹⁶ The second limitation to the preceding comments is *ex parte* character, for in bi-lateral communications admissions may be found which are admissible as such. In discussing *Lustig v. Robin*,⁹⁷ we noted bi-lateral conversations are admissible as admissions through the report of a third party who is the medium of, or is at least present at, the communications. The essence of the hearsay exception in *Lustig* is admissions of a party rather than business entries.

The interesting question is where can a litigant offer writings prepared, not by the opponent but by himself or a third party, as an admission of the opponent. How litigant *A* can bind litigant *B* to words composed *ex parte* by *A* is a marvel of the common law of evidence. The touchstone word is "silence." Cleary⁹⁸ explains the familiar rule that one party may offer his own out of court statement of a fact to prove that fact if the out of court statement is made to the opponent under circumstances in which it would be convenient and natural for the opponent to object to or dissent from the statement but the opponent does not do so. The doctrine usually applies only to face to face verbal statements and is called an admission of a party by silence.⁹⁹

96. If the documents are offered as evidence of surrounding circumstances or as operative oral agreements, they are not hearsay because they are not offered to show the truth of their contents. What is operative is a substantive law question not within the scope of this article. Such questions of substantive law are often discussed under the heading "parol evidence." The objection to parol evidence is that it is irrelevant, not that it is hearsay.

97. 6 Ill. App. 3d 126, 285 N.E.2d 165 (1st Dist. 1972). *Lustig* is discussed at text accompanying notes 51-52 *supra*.

98. CLEARY, *supra* note 9, § 17.13.

99. See S. GARD, ILLINOIS EVIDENCE MANUAL, comment to Rule 196, at 225 (1963) [hereinafter cited as GARD]; Annot., 55 A.L.R. 460 (1928); Annot., 34 A.L.R. 560 (1925); Annot., 8 A.L.R. 1163 (1920).

There is some dicta in at least one case,¹⁰⁰ however, that admission by silence may operate in the case of routine statements of account where the other evidence unmistakably indicates the recipient was engaged in business with the maker of the account in transactions of the type stated.¹⁰¹ But the general rule remains that failure to answer a letter or demand is not an admission by silence.¹⁰² In such a case the unanswered *ex parte* letter is excluded unless it comes within an exception to hearsay other than admissions. There is nothing in Rule 236 or recent case law to suggest documents clearly excludable under the rules concerning hearsay as applied to unilateral business correspondence are now to be admitted as business records. Any other rule would require a person to answer every idle letter, a duty the law does not impose.¹⁰³

D. Cash Transactions

Business records of cash transactions, such as cash journals, are not susceptible to the dangers of untrustworthiness which engulf records of negotiations and conferences. Although the reputability of cash transactions records are ascertainable through an evaluation of their use and reliance, the courts have traditionally stated that the business records exception does not extend to them. The reason cash transactions records are excluded is that they are hearsay, lacking a just necessity for an exception since notes and receipts are better proof which may be conveniently obtained. Thus, in this one area the law requires higher order documentary proof by excluding less probative documentary proof as a policy motivated

100. *Larson v. R.W. Borrowdale Co.*, 53 Ill. App. 2d 104, 203 N.E.2d 77 (1st Dist. 1964). The opinion is obiter dicta in the portion that deals with business records. There was no objection to the letter about which the opinion refers and the opposing side had even attached a copy of it to its initial pleading. The admission of the letter was not a ground of appeal asserted by either side. The main part of the case is discussion of the limits to which a witness may explain intended meaning, a parol evidence or relevancy point.

101. *Id.* at 116, 203 N.E.2d at 83, citing *Greenberg v. Childs & Co.*, 242 Ill. 110, 89 N.E. 679 (1909); *McCORMICK*, *supra* note 9, § 247, *CALLAGHAN*, *supra* note 22, § 10.51.

102. *See, e.g.*, *City of Chicago v. McKechney*, 205 Ill. 372, 68 N.E. 954 (1903).

103. *Cf. Schwarzschild & Sulzberger Co. v. Pfaelzer*, 133 Ill. App. 346 (1st Dist. 1907) where a letter has been answered a different rule applies if, but only if, the answer admits or tends to admit a factual assertion made in the initial letter. In such a case the first letter is admitted only to make any such admission in the second letter intelligible.

by the convenience of insisting on a note or a receipt. The general rule is that a party may prove his case by whatever mode he chooses and is not required as a matter of the law of evidence to choose a better mode. That is, any mode satisfying the applicable burden of proof is sufficient. In jury trials especially, any tendency to exclude one mode because another is better would intrude on the province of the jury. The cash transactions rule, although a rule of preferred evidence, does not seriously violate the general rule, since it is applicable only to hearsay evidence.

In *Windmiller v. McCartney*,¹⁰⁴ an Illinois appellate court stated that Rule 236 incorporates this prior position that the business records exception does not extend to cash transactions.¹⁰⁵ The policy stated is that a lender should be encouraged by the law to require a note or a receipt when transferring money. McCormick suggests that the modern statutes ought to be construed to remove the doubt about the admissibility of records of cash transactions,¹⁰⁶ but he does not cite adequate authority to cancel the authorities cited earlier by him.¹⁰⁷ Nor has the Illinois appellate court adopted the construction for which McCormick argues. The cash transactions limitation requiring either a note or receipt or *viva voce* testimony of the lender or payor to prove a cash transaction and excluding other types of evidence is a rare example in our jurisprudence of a hierarchical rule of evidence. The limitation relates not merely to proof of an interlocutory fact or foundation fact, but to proof of elements of a cause of action or the substantive defense of payment.¹⁰⁸

V. SITUATION OF THE INFORMANT OR ENTRANT

A. Duty

In analyzing the source of the information in the record, we discussed the business duty of the informant.¹⁰⁹ Besides the duty of

104. 108 Ill. App. 2d 264, 247 N.E.2d 631 (4th Dist. 1969).

105. The *Windmiller* opinion states that this limitation will be continued since nothing in the history of Rule 236 indicates an intention to change it.

106. MCCORMICK, *supra* note 9, § 289.

107. *Id.* at § 282.

108. A discussion of an apparent hierarchical rule relating to proof of foundation facts or what we might call interlocutory facts can be found in a later section of this Article. See text accompanying notes 255-61 *infra*.

109. See *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N.E. 713 (1898) (dis-

the informant, a shown duty to the employer on the part of the record maker (entrant) who receives the information is also required.¹¹⁰ Even though the entrant does not testify as a foundation witness,¹¹¹ the absent entrant must still have had a duty and the fact of his duty must be proven.

B. Motive

In discussing certain transactions such as negotiations, disputes and breaches that ought not to be provable by hearsay unless as admissions, the motive to make excuses was noted.¹¹² Even commentators desiring to narrow the hearsay rule acknowledge a power to exclude business records if circumstances indicate untrustworthiness.¹¹³ This scrutiny is a duty of the court.¹¹⁴ The duty of the jury to weigh the credibility of evidence once received does not relieve the court of its interlocutory duty.¹¹⁵

The key example of a record prepared under circumstances showing a motive to fabricate is a document prepared with a view toward trial.

cussed at note 8 *supra*); *Benford v. Chicago Transit Auth.*, 9 Ill. App. 3d 875, 293 N.E.2d 496 (1st Dist. 1973) (discussed at text accompanying notes 184-87 *infra*); *Paliokaitis v. Checker Taxi Co.*, 324 Ill. App. 21, 57 N.E.2d 216 (1st Dist. 1944).

110. See *CLEARY*, *supra* note 9, § 17.35; *MCCORMICK*, *supra* note 9, § 283; ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(6), 56 F.R.D. 307, 308-09 (1973).

111. *McCormick* explains that the foundation witness need not be the entrant and that that is the essence of the Model and Commonwealth Acts. *MCCORMICK*, *supra* note 9, § 286. See also *Benford v. Chicago Transit Auth.*, 9 Ill. App. 3d 875, 293 N.E.2d 496 (1st Dist. 1973) concerning personnel files, where the foundation witness had not even been working in the personnel department at the time the records were made. *Benford* is discussed at text accompanying notes 184-87 *infra*.

112. See Section IV C *supra*.

113. See ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(6), 56 F.R.D. 307, 309-10 (1973).

114. For an example of a decision examining motive in a general context see *Chicago & A.R.R. v. American Strawboard Co.*, 190 Ill. 268, 269, 60 N.E. 518, 519 (1901). The purpose of the records was to correctly advise the appellee company of the amount of stock or straw which it had on hand. The information contained in the records was to aid the appellee company in the proper transaction of its own business and thus had to be accurate, for the company could have no purpose or intent to deceive itself. On the contrary, the controlling motive in the preparation of the "stock sheets" was to accurately and truthfully set down the facts as they existed.

115. In criminal cases allocation to the jury of issues concerning the credibility of some forms of hearsay is constitutionally limited. See *Jackson v. Denno*, 378 U.S. 368 (1964).

In *Ocasio-Morales v. Fulton Machine Co.*,¹¹⁶ a products liability case, plaintiff sought to introduce an engineering report prepared at the request of the defendant by the Kawin Company, a testing laboratory. The preparer of the report had died. The report was offered to show the unreasonably dangerous condition of defendant's product. Plaintiff argued that the report should have been admitted as a business record of the Kawin Company, a testing laboratory in the business of preparing such reports.¹¹⁷

The appellate court, in upholding the exclusion of the report, mentioned the underlying reliance rationale of the business records exception.¹¹⁸ Summarizing McCormick,¹¹⁹ the justices stated that "[t]he credibility of any business record depends upon the regular, prompt, and systematic nature of the entries and the fact that they are relied on in the operation of a business."¹²⁰ The court explicitly mentioned Rule 236. The metallurgist's report was found to be "not a routine business entry." As an added ground, the court stated that the report was made subsequent to the accident "with a view to possible litigation." The fact that the opponent rather than the proponent of the evidence commissioned the report did not change the court's conclusion. The view-toward-litigation objection is thus an avoidance of the business records exception cutting to the very rationale of the business records exception. It is a sort of re-objection or reply after the exception is asserted to avoid the rule against hearsay.

In brief, since a document prepared for trial is not for use in business, the basic circumstance forming the rationale of the business records exception cannot apply.¹²¹ Thus, motive is a very proper factor to weigh in determining admissibility. But it is the

116. 10 Ill. App. 3d 719, 295 N.E.2d 329 (4th Dist. 1973).

117. The name of the foundation witness is not given and the opinion does not discuss his competency.

118. 10 Ill. App. 3d at 725, 295 N.E.2d at 334.

119. See MCCORMICK, *supra* note 9, §§ 281-90.

120. 10 Ill. App. 3d at 725, 295 N.E.2d at 334.

121. *Newark Electronics Corp. v. City of Chicago*, 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1st Dist. 1972) (compilation-computation of water damage to goods and machinery prepared with a view toward litigation) is not in conflict despite affirmance on a record in which such a record was received. Because the ground of affirmance was harmless error, the appellate court found the ruling by the trial court to be incorrect but not so prejudicial as to warrant reversal.

record's character as hearsay rather than the motive that makes the record incompetent. Motive to fabricate avoids the business records exception to hearsay but is not itself the grounds of exclusion.

Motive is a one-edged sword. Thus, absence of motive to fabricate does not constitute an exception to hearsay and such absence does not justify the admission of hearsay that does not come within an established exception. The confusion of the courts in failing to consider motive only as a rejoinder to assertion of an exception to hearsay and not as a determinant of what is hearsay is illustrated by cases¹²² which characterize evidence as "self-serving"¹²³ rather than hearsay. The phrase "self-serving" is the one most used by confused lawyers in this respect. Since "self-serving" is not an analytically separate rule of exclusion, it ought not be used. Cases using this phrase, fortunately few, are found to be referring to hearsay.¹²⁴ Happily, the recent *Ocasio-Morales v. Fulton Machine Co.*¹²⁵ case puts the motive notion in proper perspective. Even though the records in that case were prepared by a third party, the principles and rationale of the motive rejoinder should apply *a fortiori* to the situation where the records are of a party and where the temptation to fabricate is no less and often may be stronger. Lawyers using the awkward phrase "self-serving" are probably motivated by their impression that out of court statements of a party himself are an even more dangerous form of hearsay than the out of court statements of third persons.

C. Opportunity to Observe

In previously discussing the duty requirement, we stated the re-

122. The general rule is that a party cannot by self-serving declarations make evidence for himself concerning his dealings with the other party or the liability of such other party, and such self-serving declarations are incompetent.

Kirkpatrick v. United Fed. of Postal Clerk's Benefit Ass'n, 52 Ill. App. 2d 457, 462, 202 N.E.2d 136, 138 (5th Dist. 1964). See also *Village of Morton Grove v. Gelchsheimer*, 16 Ill. 2d 453, 158 N.E.2d 70 (1959); *Anglo-Calif. Trust Co. v. Essanay Film Co.*, 324 Ill. 249, 155 N.E. 26 (1927); *Cooke Co. v. Miller Brewing Co.*, 316 Ill. 46, 146 N.E. 459 (1925); *Home Life Ins. Co. v. Franklin*, 303 Ill. App. 146, 24 N.E.2d 874 (1st Dist. 1940).

123. See *McCORMICK*, *supra* note 9, § 279 at 675, for a discussion of the use of the term "self-serving" in connection with declarations.

124. See cases cited at note 122 *supra*.

125. 10 Ill. App. 3d 719, 295 N.E.2d 329 (4th Dist. 1973).

quirement that the information in the record must be based on first hand knowledge.¹²⁶ Analytically, the opportunity to observe could as well have been placed in this section as a situation of the entrant or informant. The essential requirement is that at least one employee has had both the opportunity and the duty to observe the facts recorded.

D. *Habit*

McCormick¹²⁷ and *Ocasio-Morales*¹²⁸ indicate that habit and routine of a sort instilling accuracy in the reporting and recording employees should usually be shown.

VI. BUSINESS USES OF THE RECORDS

A. *Reliance*

Reliance in business on the records offered has been and remains the essential element of the business records exception. This requirement connotes either binding oneself in dealing with others¹²⁹ or acceptance of correctness of information as the basis of business planning.¹³⁰ By paying an employee working on a variable hours basis, the owner is relying on the payroll record by binding himself in dealing with others. But asking to be paid by another does not constitute binding oneself¹³¹ except in the trivial sense that one might have demanded more. To make the test of reliance mean anything, something more than a mere request for payment should usually be required.

B. *Litigation*

The opposite of use and reliance in business is preparation for litigation. Documents prepared for litigation do not relate to busi-

126. See text accompanying notes 76-95 *supra*.

127. MCCORMICK, *supra* note 9, § 281.

128. See *Ocasio-Morales v. Fulton Machine Co.*, 10 Ill. App. 3d 719, 725, 295 N.E.2d 329, 334 (4th Dist. 1973); MCCORMICK, *supra* note 9, § 281; CLEARY, *supra* note 9, § 17.33.

129. See *Rude v. Seibert*, 22 Ill. App. 2d 477, 161 N.E.2d 39 (4th Dist. 1959) (paying one's employee).

130. See *Pittsburgh C.C. & St. L.R.R. v. City of Chicago*, 242 Ill. 178, 89 N.E. 1022 (1909) (railroad routing and maintenance management); *Chicago & A.R.R. v. American Strawboard Co.*, 190 Ill. 268, 60 N.E. 518 (1901) (inventory control).

131. See *Rude v. Seibert*, 22 Ill. App. 2d 477, 161 N.E.2d 39 (4th Dist. 1959).

ness decision-making. Neither are they documents by which one binds oneself except in the trivial sense that after they are offered in evidence, one is bound by one's own testimony that they are accurate. Litigation preparation is a circumstance indicating unreliability,¹³² making the evidence incompetent. That is, the language of Rule 236 to the effect that circumstances of making relate not to competency but only to credibility is not to be read literally because some circumstances of reliability have to do with the exceptionally admissible character of records, that is, with their character as regular business records. *Lustig v. Robin*¹³³ and *Newark Electronics Corp. v. City of Chicago*¹³⁴ make clear the court has a duty to scrutinize the circumstances of the making and to preserve from the jury seriously unreliable evidence. These duties of the court cannot be delegated to the jury.

C. Use by Parties and Non-Parties

We have previously discussed¹³⁵ the relevance of the issue whether the owner of the records can be a party to the lawsuit. This issue is discussed again in this section because it is sometimes said¹³⁶ that because of the underlying rationales of use and reliance found in all business records, the records of a party are equally admissible as those of a stranger. McCormick¹³⁷ surveys the cases and finds the modern majority American rule generally to be that the records of a party are as admissible as those of a non-party. The British, the earlier American, and some more recent American cases hold a different view.¹³⁸ *Chicago & Alton Railroad Co. v.*

132. See *Ocasio-Morales v. Fulton Machine Co.*, 10 Ill. App. 3d 719, 295 N.E.2d 329 (4th Dist. 1973); ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(6), 56 F.R.D. 307, 310 (1973).

133. 6 Ill. App. 3d 126, 285 N.E.2d 165 (1st Dist. 1972). *Lustig* is discussed at text accompanying notes 51-52 *supra*.

134. 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1st Dist. 1970). *Newark* is discussed at text accompanying notes 53-59 *supra*.

135. See text accompanying notes 20-21 *supra*.

136. See, e.g., CLEARY, *supra* note 9, § 17.22, citing *Chicago & A.R.R. v. American Strawboard Co.*, 190 Ill. 268, 60 N.E. 518 (1901).

137. MCCORMICK, *supra* note 9, § 283.

138. See *People v. Wells*, 380 Ill. 347, 44 N.E.2d 32 (1942); *Nelson v. Union Wire Rope Corp.*, 39 Ill. App. 2d 73, 187 N.E.2d 425 (1st Dist. 1963); *Secco v. Chicago Transit Auth.*, 6 Ill. App. 2d 266, 127 N.E.2d 266 (1st Dist. 1955). These

*American Strawboard Co.*¹³⁹ suggests that more vestiges of the common law incompetency of a party as a witness have survived in Illinois than elsewhere.

This suspicion about evidence offered by a party finds its way into the law of the business records exception for three reasons. First is the practical observation that in many situations the records of a party may be less credible as a matter of fact than those of a third person. The second reason is that a statute¹⁴⁰ dealing with the issue of competency of a party has often been misconstrued¹⁴¹ as intending to deal with the business records exception generally. The statute is the Deadman's Act which governs the admissibility of records of a party,¹⁴² at most, in certain classes of cases and not in others. It is not certain whether the statute was intended to define the type of business records admissible in those classes of cases or only the type foundation evidence required, leaving to other sources the definition of the classes of records themselves to be ad-

are the leading recent Illinois cases preceding the adoption of Rule 236, cited as liberalizing cases. All three involved records of third parties. *Nelson*, in particular, states that admissibility will be more liberal in the case of third party records.

139. 190 Ill. 268, 60 N.E. 518 (1901). Although *Strawboard* is most frequently cited for the proposition that records of a party should be received as readily as those of a third party without any additional scrutiny, *see, e.g.*, CLEARY, *supra* note 9, § 17.33, the facts of *Strawboard* do not justify that position. In *Strawboard* the inventory records were received on the issue of damages only in a tort case. The opinion states they would not be admissible in a contract case between *Strawboard* and its supplier. The opinion states that the tortiously caused fire was unpredictable but the need for *Strawboard* to settle with its supplier would not be unpredictable. Thus, the average probability of fabrication of records of straw on hand would be toward understatement. But the railroad cannot complain of prejudice in the admission of unreliable hearsay to prove the amount of fire damage where the bias is in the other direction. The implication is that where that unusual factor is not present, as in the hypothetical settlement of accounts, the justices would exclude records of a party. In brief *Strawboard* is cited by Professor Cleary for a proposition opposite from the apparent opinion of the justices deciding the case.

140. ILL. REV. STAT. ch. 51 § 3 (1973).

141. *See Rude v. Seibert*, 22 Ill. App. 2d 477, 161 N.E.2d 39 (4th Dist. 1959), which indicates the confusion resulting from a failure to see the act as part of the problem of incompetency of a party. Whether the statute is concerned only with the competency of a party foundation witness or also with the competence of records of a party will be considered in Section XII of this Article.

142. The records of a third person in privity with the unqualified party may also be excluded. As an extreme example we recall a third person can be employed to "make evidence" for a party as the commission of an engineer to make a report after the accident in *Ocasio-Morales v. Fulton Machine Co.*, 10 Ill. App. 3d 719, 295 N.E.2d 329 (4th Dist. 1973), indicates, and in such a case the evidence ought to be excluded as it was in the cited case.

missible, on proper foundation, by exception to the rule against hearsay. The construction of that statute is taken up in a later section of this Article.¹⁴³ The third reason for added scrutiny about records of a party is a realization that the basic rationale of business reliance may be absent. That is, preparation with a view toward prosecution or litigation is possible where it is the party or one employed by a party who has prepared it.¹⁴⁴

VII. PURPOSE SERVED BY THE RECORDS AT TRIAL

In the preceding section we discussed the use of the record generally. We now pass to the question of use on trial.

A. Definition of Hearsay

The issue of whether a business record is admissible arises because the record is "mere hearsay." But hearsay is involved only when a hearsay purpose at trial motivates the offer. When the purpose is only to show fulfillment of a condition like demand or notice, a written demand or notice is not hearsay since it is not being submitted into evidence to prove the truth of the matter asserted.¹⁴⁵ But factual statements in or accompanying the demand or notice are hearsay and should be masked or excluded from the jury.¹⁴⁶ Thus, the purpose for which offered determines if a document is hearsay and, if it is, may determine whether it is an excep-

143. See Section XII *infra*.

144. Evidence so procured or prepared should be excluded whether commissioned by proponent of the hearsay or even by the opponent of the report as in *Ocasio-Morales*. It would be adroit to argue that the report of a forensic laboratory is prepared in the ordinary course of the business of such a laboratory. But the speciousness consists in the fact that their business, however reputable and professional, is, in a sense, to make evidence. Thus, to admit its reports would depend on the ability to say their hearsay is admissible because it is their business to produce hearsay. While the Illinois courts have avoided such specious notions, the Seventh Circuit has employed just such a bootstrap in *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957). *Ware* is discussed at text accompanying notes 225-30 *infra*.

145. See, e.g., *Schwarzschild & Sulzberger Co. v. Pfaelzer*, 133 Ill. App. 346 (1st Dist. 1907).

146. A similar point is made in the concurring opinion of *United States v. Ware*, 247 F.2d 698, 701-02 (7th Cir. 1957). This opinion is discussed at text accompanying notes 227-30 *infra*. The concurrence distinguished between the fact that a test was conducted and the facts found by the test. Even the fact that a test was made is hearsay when stated by a technician in writing out of court. But, it is a fact provable as exceptional hearsay business records.

tionally admissible class of hearsay. For example, proof of liability is distinguished from proof of damages in applying the exception.

B. *Proving Damages*

The doctrine of business records is wider when proving damages, especially unliquidated damages.¹⁴⁷ Liability and damages are both ultimate issues in a case, credibility of witnesses is not. That fact has implications for application of the hearsay rule and its exceptions.

C. *Impeachment and Rehabilitation*

In various sections¹⁴⁸ of this Article, we have discussed circumstances making records unreliable. We now consider the use of records to show that other evidence is unreliable. In particular, if the only purpose for which a record is offered is to show the falsehood or credibility of a witness, it is not "independent" or "primary" evidence but only evidence for impeachment or rehabilitation. Evidence offered only for impeachment cannot be hearsay because it is not presented to show the truth of the matters contained but rather to show the lack of credibility of a witness. Independent evidence is offered to prove a fact other than credibility of a witness. Evidence admissible only as impeachment can never, therefore, establish a claim or defense without independent evidence on each material element of the claim or defense.¹⁴⁹ The distinction is between impeachment of a witness and contradiction of his testimony.¹⁵⁰ Thus the hearsay doctrine is irrelevant in such

147. See *Pittsburgh C.C. & St. L.R.R. v. City of Chicago*, 242 Ill. 178, 89 N.E. 1022 (1909); *Chicago & A.R.R. v. American Strawboard Co.*, 190 Ill. 268, 60 N.E. 518 (1901). See also *Newark Electronics Corp. v. City of Chicago*, 130 Ill. App. 2d 1029, 264 N.E.2d 868 (1st Dist. 1970); *Secco v. Chicago Transit Auth.*, 6 Ill. App. 2d 266, 127 N.E.2d 266 (1st Dist. 1955).

148. See Sections IIB, IIIA-VIC *supra*.

149. See *Jones v. Lukas*, 122 Ill. App. 2d 162, 258 N.E.2d 147 (3d Dist. 1970), where a doctor repudiated his opinion given earlier in a medical report. Preparation of the medical report was admitted by the doctor and received but only as impeachment of the doctor. Despite the hearsay report, summary judgment for the opponent was granted and affirmed. The opinion makes clear the proponent is not being bound by or made to vouch for the adverse opinion of her doctor witness. The ground of judgment and affirmation was simple failure to produce sufficient or prima facie evidence. *Id.* at 166, 258 N.E.2d at 149.

150. Uncontradicted and substantially unimpeached evidence received as primary evidence and not merely as impeachment is binding on the trier of fact unless it is

parts of a case unless the manner of use of a document in rehabilitation or impeachment misleads a jury¹⁵¹ into regarding it as primary evidence.

Having discussed at length the attributes of records and their relation to issues in the case, we are now prepared to move to a subject conceptually different from but interrelated to the prior sections.

VIII. ESTABLISHING A FOUNDATION FOR THE RECORDS

We have been analyzing the business records exception by discussing various aspects of the record's preparation and the use of the record at trial. We will now discuss how the attributes of the records are presented to the court. In establishing a foundation for the records, we are concerned with who is the proper foundation witness, the basis of the foundation witness' information, and the items to which the foundation witness should testify.

A. *Foundation Witnesses*

As this section evolves we shall see that the person most qualified to be the foundation witness is the maker of the record, the entrant. If the informant/declarant appears and can independently recall, then no issue of hearsay even arises. The general rule is that the foundation witness must know the circumstances of the informants and entrants.¹⁵² The witness should know not only the circumstances of preparation for the class of records in question but that the particular records are and were in that class at the relevant time.

contrary to the familiar laws of nature. The cases indicate that bias and interest in the outcome are not sufficient impeachment to allow the jury to disregard uncontradicted testimony even of a party or an accused despite a very suspicious sound to it. See *Kelly v. Jones*, 290 Ill. 375, 125 N.E. 334 (1919). Evidence either substantially impeached or contradicted by any other primary evidence is not binding. Where evidence is substantially impeached but not contradicted it is not binding. But if the uncontradicted evidence is on the defense side on a material issue then a directed verdict is required not as a matter of the doctrine of uncontradicted testimony but as a matter of burden of proof. See Section XVB *infra*, for a further discussion of uncontradicted evidence.

151. See *Scully v. Morrison Hotel Corp.*, 118 Ill. App. 2d 254, 254 N.E.2d 852 (4th Dist. 1969); see also *Paliokaitis v. Checker Taxi Co.*, 324 Ill. App. 21 (1st Dist. 1944) (involving prejudicial overuse on cross examination to discredit of incompetent police reports).

152. See *Benford v. Chicago Transit Auth.*, 9 Ill. App. 3d 875, 293 N.E.2d 496 (1st Dist. 1973).

Authenticity can be established by circumstantial evidence provided by a foundation witness, but a witness with personal knowledge of authenticity is preferable.

1. *Informants and Entrants*

Prior to adoption of Rule 236 the Illinois cases were divided on the issue of who should be required as a foundation witness.¹⁵³ Some cases held that all available informants and entrants must be called to testify.¹⁵⁴ Cleary¹⁵⁵ and McCormick¹⁵⁶ point out that such restrictive requirements tend to reduce the business records exception to a sort of accumulated record of past recollection of many persons. McCormick¹⁵⁷ says the liberalization of rules about foundation witnesses should rest not on the principle of strict necessity but on that of practical unavailability of all the informants and entrants. Learned Hand, in *Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co.*,¹⁵⁸ stated that the entrant's probable lack of independent recollection, apparent from the nature of the records and the owner's business, makes the missing witnesses practically unavailable. This is the same rationale stated expressly in *Secco v. Chicago Transit Authority*¹⁵⁹ cited by the Rule 236 drafting committee.¹⁶⁰ Thus, probable lack of recollection is, like death, illness, and non-residence, a form of unavailability. This showing of unavailability¹⁶¹ is required by the Hand opinion which states that for a record to show unavailability, "it ought to appear the missing en-

153. See CLEARY, *supra* note 9, § 17.35 citing the conflicting cases of *People v. Small*, 319 Ill. 437, 150 N.E. 435 (1926) and *Stettauer v. White*, 98 Ill. 72 (1881).

154. The leading restrictive case is *Stettauer v. White*, 98 Ill. 72 (1881). *Stettauer* stated the common law requirement that all entrants must be produced and found their absence fatal.

155. CLEARY, *supra* note 9, § 17.34.

156. MCCORMICK, *supra* note 9, § 280.

157. *Id.* § 288.

158. 18 F.2d 934 (2d Cir. 1927).

159. 6 Ill. App. 2d 266, 127 N.E.2d 266 (1st Dist. 1955).

160. Committee Comments, *supra* note 3.

161. WIGMORE, *supra* note 11, § 1521, explains the history of this particular requirement by stating that a presumption of practical unavailability has been established for larger organizations. Hand and Wigmore are in accord in giving the trial judge a discretion to require production for cross examination of any entrant or informant where the nature of the dispute "renders it desirable," as Wigmore puts it. *Id.* § 368.

trants if called would in the nature of things have no recollection of the events recorded."¹⁶² Thus, explanation of the unavailability of entrants is a requirement, but such unavailability includes inability to remember which can be presumed if the nature of the transaction recorded, passage of time, and other facts make such a presumption not improbable.

The unavailability of the witnesses satisfies the necessity principle of admitting hearsay evidence.¹⁶³ This principle of necessity is really a principle of convenience. That is, there is a policy to limit the number of required witnesses in the case where the work of many entrants is involved. But this policy of convenience implies balancing.¹⁶⁴ The convenience of a disinterested third party entrant should weigh more heavily than the convenience of an interested party entrant, and the size and complexity of the case may outweigh convenience. While it seems clear not every entrant is required, it is not correct to say that a proper foundation can, in every case, be laid by one single foundation witness.¹⁶⁵ One weight in the necessity scale is the importance of the issue to which the evidence is relevant, discussed earlier in this Article.¹⁶⁶ *Secco* compares the practical cost of producing the entrant with probable value to the opponent of an opportunity to cross-examine her. All of these modern views point to weighing of interests by the trial court and the weighing of the character of the records at the same time. The importance of the case and the nature of the issue in the case to which the evidence is directed should also be a part of this balancing. Thus comes the difficulty in the cases of keeping rules about foundation evidence separate from rules about character of the records themselves.

162. 18 F.2d at 938.

163. See MCCORMICK, *supra* note 9, § 288.

164. "The judge must be satisfied from the whole situation that the added credence to the document which the testimony of the entrants will bring does not justify the expense and difficulty of getting them to trial." 18 F.2d at 938. See also MCCORMICK, *supra* note 9, § 252 at 606.

165. The number of foundation witnesses necessary will depend on the nature of the records and their manner of preparation. Their composite character is an obvious key factor. Nevertheless, the attributes of the records are analytically distinct from the number and competency of foundation witnesses. Compare cases collected in CALLAGHAN, *supra* note 22, § 8.60 concerning foundation witnesses with *id.* § 8.16 concerning attributes of records themselves.

166. See Section VII *supra*.

2. Supervisors

In a large organization a supervisory official, who at least understands the purpose of and division of labor within an entire records system and has, preferably, some duty for the integrity of that system qualifies as a foundation witness. The latter factor, a duty for the system's integrity, gives some meaning to the oath of the foundation witness.¹⁶⁷

McCormick¹⁶⁸ states that checking and habit are hallmarks of systems producing exceptional hearsay. There ought to be some showing that there is a system of audits or review where the entrants themselves do not appear. This is another reason to suggest that a supervisor of the entrants is a good candidate as a foundation witness. The supervisor of records ought to have had duties connected with the records at the time they were prepared.¹⁶⁹ Not only their exceptional character as business records but their authenticity must be shown.

In *LeRoy State Bank v. Kennan's Bank*,¹⁷⁰ the supervisory officer, a bank cashier, was ruled incompetent when he admitted entries were made by others besides himself. The correctness of that decision by the trial court had to be assumed as law of the case, since no cross appeal had been filed by the proponent of those records. The case is weak authority but highlights one point. The testimony of a supervisor is not more probative than that of an entrant. On the contrary, the closer a person is to the subject of a record, the more probative his testimony. It is only where not all the entrants are produced that their superior rather than one of their number is the more probative witness. Perhaps the best single foundation witness is a worker/foreman or a sort of *primus inter pares* as in *Chisholm v. Beaman Machine Co.*¹⁷¹

167. Steadfast insistence on the point would constitute a reversion to the institution of the supplementary oath mentioned in McCORMICK, *supra* note 9, § 282, and should be urged, but not required.

168. *Id.* § 283.

169. See *People v. Small*, 319 Ill. 437, 150 N.E. 435 (1926); *Benford v. Chicago Transit Auth.*, 9 Ill. App. 3d 875, 293 N.E.2d 496 (1st Dist. 1973).

170. 337 Ill. 173, 169 N.E. 1 (1929).

171. 160 Ill. 101, 43 N.E. 796 (1896). See discussion of *Chisholm* at text accompanying notes 25-28 *supra*.

A more recent case which illustrates the use of a supervisor as a foundation witness is *Secco v. Chicago Transit Authority*.¹⁷² In *Secco*, a personal injury case, plaintiff claimed three weeks lost time from school. The defense offered school attendance records in evidence. Attendance records are kept by teachers, but the school principal was the foundation witness. The records were admitted. The ruling was affirmed by the appellate court which relied on then existing Chicago Municipal Court Rule 70 which was similar to Rule 236. The rationale is that the impracticality of appearance of the original entrant (teacher) would not be outweighed by greater probative value since it is likely the teacher would have no independent recollection of one child's attendance after a long delay but could only lay a foundation for the record as past recorded recollection.¹⁷³ In reference to the required finding of the trial judge that the record was made in the regular course of business, Rule 70 stated, "such finding may be based upon the testimony of any witness who is familiar with the regular course of the business at the time in question."¹⁷⁴ The Rule was held valid under the Municipal Court Act as a rule regulating practice. A school principal is a supervisory official yet one close to the subject of the records and involved in the subject of attendance, truancy and the like.

Another recent case, *Nelson v. Union Wire Rope Corp.*,¹⁷⁵ involved a work injury. The chief chemist of Sheffield Steel Company, which supplied wire strands to defendant manufacturer, testified concerning certain production monitoring test reports offered by defendant. It was established that he was the supervisor of the laboratory at Sheffield; that the entries were made under his control and were in the handwriting of his subordinates who actually performed the tests as part of their job; that he had "checked over" the particular entries; and, that he periodically "checked over" the work of his chemists in the laboratory. The Union Wire Rope Corporation was found

172. 6 Ill. App. 2d 266, 127 N.E.2d 266 (1st Dist. 1955).

173. *Id.* at 269-70, 127 N.E.2d at 268.

174. Civil Practice Rules of the Municipal Court of Chicago, Rule 70 (1940). Municipal Court Rule 70 is quoted verbatim in the opinion. The power of the Municipal Court to promulgate the rule was affirmed by construing the statute establishing the court. 6 Ill. App. 2d at 268, 127 N.E.2d at 267.

175. 39 Ill. App. 2d 73, 187 N.E.2d 425 (1st Dist. 1963).

not guilty.¹⁷⁶ The finding in its favor was affirmed by a reviewing court in which only two justices participated in the decision. The rationale so far as it relates to the chemists' reports is separately stated.¹⁷⁷ The court pointed out the records were those of a non-party and stated the rule is more liberal in such cases, citing *People v. Small*,¹⁷⁸ but distinguishing *Wright v. Upson*.¹⁷⁹ In *Wright v. Upson* only one of the two nurse entrants, neither of whom was superior to the other, testified. But in *Nelson* the foundation witness was the supervisor of the entrants.¹⁸⁰ The court adopted the reasoning of Municipal Court Rule 5, renumbered from 70 since the time of the *Secco* case. *Nelson* thus suggests that either the supervisor of a number of entrants or all of those entrants must be called and one entrant of many is not a competent foundation witness.

The principle of the *Nelson* case was extended one step by *People v. Wells*¹⁸¹ in which the accused was prosecuted for disturbing the peace by making annoying phone calls. The phone company installed a device on its lines recording each number called from the accused's phone and the exact time of each call.¹⁸² The device makes the number called controlling so that the calling phone cannot be used for another call until the receiver at the number called is hung up. The records of calls on the device compared to notations of time and duration by the victim thus constitute strong evidence of the source of a particular call. The conviction in the case was reversed for other reasons, but the dicta approved the ruling on the phone device record. The foundation witness was the commercial manager of the phone company who supervised the technician who

176. *Id.* at 110, 187 N.E.2d at 441.

177. *Id.* at 105-06, 187 N.E.2d at 439.

178. 319 Ill. 437, 150 N.E. 435 (1926).

179. 303 Ill. 120, 135 N.E. 209 (1922).

180. The court rejects the argument that Illinois Revised Statutes chapter 51, section 3 (1974) controls. The opinion reads section 3 of that statute *in pari materia* with section 2, reaching the conclusion that section 3 applies only to cases where a party foundation witness would be rendered incompetent by the Deadman's Act. See also Section XII *infra*.

181. 80 Ill. App. 2d 187, 224 N.E.2d 288 (5th Dist. 1967).

182. Query, was the record made by the device a business record under the current standards of *Ocasio-Morales v. Fulton Machine Co.*, 10 Ill. App. 3d 719, 295 N.E.2d 329 (4th Dist. 1973)? Query, is the record of an electrical connection made by a machine even hearsay? It is suggested that the only issue in the case concerning the phone record was one of authenticity.

installed the device. The manager was considered a competent foundation witness. The court found the "circumstantial probability of trustworthiness" so great that the technician did not need to testify. The extension of the *Nelson* principle consists in the fact that the testifying manager was the supervisor of only one entrant.¹⁸³

In *Benford v. Chicago Transit Authority*¹⁸⁴ the court was confronted with a supervisor/foundation witness who was not employed in the department which generated the record when the record was made, but who was the custodian of the records at the time of trial. The witness stated that she assumed those duties approximately three years after the particular records in question were created. At the time the records were created she was employed in another department of the same employer.¹⁸⁵ She testified she knew the records in question had been prepared in the usual course of business. Her knowledge of that fact might have been first hand or based on hearsay of her predecessors or others in the originating department or might have been an opinion formed by her from circumstantial evidence acquired by her working with a great number of records established before her present tenure. The opinion does not say which basis of her knowledge was offered.¹⁸⁶ On the ques-

183. Of the most recent cases, *Lustig v. Robin*, 6 Ill. App. 3d 126, 285 N.E.2d 165 (1st Dist. 1972), and *Newark Electronics Corp. v. City of Chicago*, 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1st Dist. 1970), are not directed to the issue of the foundation witness but rather instead to the character of the records themselves. The error, though found harmless on the particular record, in respect of the records in *Newark*, was the subject of the opinion. In *Lustig*, the one entrant, Mr. Adelman, was the foundation witness. Thus, no discussion of the competency of a supervisor of entrants was occasioned. The case rests on the doctrine of admissions of a party in any event. And yet more recent is *Benford v. Chicago Transit Auth.*, 9 Ill. App. 3d 875, 293 N.E.2d 496 (1st Dist. 1973), which indicates a restrictive view of the competency of supervisors and custodians even in the case of very routine records of a third party. Thus, the most recent cases indicate *Nelson* and *Wells* ought to be read as limited to their facts.

184. 9 Ill. App. 3d 875, 293 N.E.2d 496 (1st Dist. 1973).

185. The supervisor was employed in the billing department prior to her transfer to the personnel department, the originating department of the record. *Id.* at 877, 293 N.E.2d at 498.

186. Such an opinion might be competent. Or, in the alternative, she might have reported the circumstances and her findings from a comparison of many records, allowing the court to conclude from the circumstantial evidence reported. That alternative or testimony from knowledge, based perhaps on experience with her own records or the like, would be a competent foundation. It seems unlikely her only source of knowledge was hearsay from longer tenured personnel department employees.

tion of knowledge, the opinion makes it clear the foundation witness need not have been the entrant, but does not suggest that the witness may swear that the records were regularly kept on other than personal knowledge.¹⁸⁷

That is, a foundation witness need not know the facts contained in the records. If he or she did, such records would be cumulative of *viva voce* non-hearsay testimony. But the witness must have personal knowledge of the facts to which he does testify, the facts constituting the foundation. The essence of the rule is an exception for the contents. No hearsay exception for foundation facts is established by the rule. To say that *Benford* established that a foundation witness' testimony may be based on hearsay is incorrect since then any stranger could be a competent foundation witness. A foundation witness is not required to testify to the contents of records but is required to testify and lend his oath to the foundation facts. Proof of foundation facts is regulated by the ordinary rules of evidence, including the rule against hearsay. *Benford* says only that personal knowledge of foundation facts need not have been acquired by direct participation in the acts recorded or act of recording them and no more. Personal knowledge is still required. Distinguished from knowledge is duty. First hand knowledge of foundation facts (as opposed to the facts recorded) will be required of foundation witnesses. The duty required by the exception is a business duty of accuracy by the informants and entrants. The foundation witness must know what were the duties of the informants and entrants and from that knowledge testify that the informant and the entrants generated the records in the course of *their* duty.

B. *Unavailability as a Substantive Condition*

A refinement necessary to avoid confusion is the distinction between the foundation witnesses and the conditions to be shown by them as to informants and entrants not called as witnesses. As part of the foundation under *House v. Beak*¹⁸⁸ and *Stettauer v. White*¹⁸⁹ it was necessary to show that entrants were unavailable. This re-

187. It would still be possible to disqualify a witness on that ground not as a matter of Rule 236 but as a part of the doctrine of *Weinzelbaum v. Abbell*, 49 Ill. App. 2d 442, 200 N.E.2d 43 (1st Dist. 1964).

188. 141 Ill. 290, 30 N.E. 1065 (1892).

189. 98 Ill. 72 (1881).

quired showing justified use of a foundation witness or witnesses other than all entrants. But the circumstance of unavailability is not so much an attribute of the records as are the factors mentioned in Sections 1 to 6 of this Article. Yet it is a foundation fact logically different from the issue of who may competently establish the fact. The obvious practical relationship between the two questions explains their common grouping under this Section 7.

The distinction is made by Learned Hand in his opinion in *Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co.*,¹⁹⁰ in which that eminent jurist affirmed the trial court in admitting business records without the testimony of all entrants. Their unavailability was not explicitly explained by the foundation witness. Instead of objecting on the ground of no foundation, the opponent phrased his objection as one disputing the competence of the foundation witness. The narrow holding of the case thus is that the admission was proper because the correct objection was not made. The witness was competent to explain unavailability. He had not done so but his failure was unobjected. So puny a rationale is not really the intended opinion of the court. Rather it is the alternative rationale that their probable lack of independent recollection, apparent from the nature of the records and of the owner's business, makes the missing witnesses practically unavailable.¹⁹¹

It is Hand's distinction between sufficiency and competency of foundation witnesses on the one hand and sufficiency of exceptional or foundation facts on the other that divides the subject of this section from that of the next.

C. *Foundation Evidence*

How much about the preparation of the record must be revealed by the foundation witnesses? The foundation witnesses must show existence of the underlying elements of the business records exception. That is, the testimony first must show that the record is a factual record repeatedly made of a recurring type event, initiated by one with a business duty to the owner of the record both to observe first hand and to report accurately, and prepared as a first perma-

190. 18 F.2d 934 (2d Cir. 1927).

191. *Id.* at 938.

ment record near the time of the occurrence. Next, and above all else, the foundation evidence must show that the owner habitually uses the records in business activity other than for litigation and compromise of disputes and relies upon them as binding even when detrimental. Finally, the foundation evidence should reveal the circumstances and methods of preparation of the records and demonstrate their integrity and reasonable probative value.

IX. RELATED HEARSAY EXCEPTIONS

Having fully analyzed the business records exception, we are now in a position to consider some of the other exceptions to hearsay and their pertinence to business records. The following section highlights the connection between the business records exception and other hearsay exceptions.

A. *Past Recorded Recollection*

The business records exception and past recorded recollection are equated when the foundation witness is the informant who has exhausted his recollection of the acts recorded but can recall exercising accuracy in recording.¹⁹²

B. *Refreshing Recollection*

Any document or object may be used to refresh a person's memory which is exhausted and is capable of being refreshed. Records used for this purpose may be totally incompetent, unfair, or scandalous. They do not themselves become evidence. While a person's memory may be refreshed by a business record, such use of the record does not involve the business records exception since the record is not being submitted into evidence.¹⁹³

C. *Admissions by a Party*

We have previously discussed admission by silence or failure to

192. See *Richardson Fueling Co. v. Seymour*, 235 Ill. 319, 85 N.E. 496 (1908); *Lustig v. Robin*, 6 Ill. App. 3d 126, 285 N.E.2d 165 (1st Dist. 1972); *Secco v. Chicago Transit Auth.*, 6 Ill. App. 2d 266, 127 N.E.2d 266 (1st Dist. 1955); CLEARY, *supra* note 9, § 17.32; McCORMICK, *supra* note 9, § 280.

193. See *Wright v. Upton*, 303 Ill. 120, 135 N.E. 209 (1922).

answer assertions.¹⁹⁴ The investigation concerned what statements of the proponent of the evidence may be introduced by him as part of the admissions of the opponent. But more obvious is the use of a party's own records against him as admissions. The part of records containing admissions is sometimes¹⁹⁵ quite routine. But where the records of the other party are offered to show an admission, that party has a right to introduce so much of the remainder¹⁹⁶ of the record as is necessary to the understanding of the part initially received. This is the counterpart to the answered letter doctrine in which statements of the proponent necessary to the comprehension of the admission are admitted.

D. Official Records

Official acts may be proved by hearsay records required to be kept by the government.¹⁹⁷ Authentication by certificate without a foundation witness is permitted,¹⁹⁸ and the best evidence rule does not apply to prohibit copies.¹⁹⁹ In *People v. Love*²⁰⁰ the certificate of the Secretary of State was offered to prove not so much an act of the Secretary as the violation of defendant. But it readily could have been limited to proof of a negative: *viz.* that the Secretary had not received and filed the registration statements required. If official acts are provable by certified record, inaction ought to be provable by certificate. The more difficult case experienced in federal courts has been the evaluative report.²⁰¹ This problem is greater

194. See text accompanying notes 98-99 *supra*.

195. See *Duboc Paper Co. v. Flint*, 207 Ill. App. 367 (1st Dist. 1917). In *Duboc* the issue was whether the promise in a letter was a new promise made at the time of the letter or the restatement of a prior verbal promise which the promisor belatedly put in writing. The statute of frauds made the issue controlling. Notations on file copies of invoices concerning the guarantee of defendant were received as admissions of a party.

196. See *McCORMICK*, *supra* note 9, § 132. The same is true when part of a document or statement or conversation is received to impeach or rehabilitate. *Zadura v. Debish*, 5 Ill. App. 3d 695, 284 N.E.2d 28 (1st Dist. 1972). Authenticity must in any event be proved for all parts of a document offered for whatever purpose.

197. See *CLEARY*, *supra* note 9, § 17.39.

198. See *id.* § 14.5.

199. See *id.* § 14.15. See also *People v. Dime Sav. Bank*, 350 Ill. 503, 183 N.E. 604 (1932) involving records of the treasurer's acts in receiving and depositing taxes.

200. 310 Ill. 558, 142 N.E. 204 (1924).

201. See ADVISORY COMMITTEE'S NOTE TO PROPOSED FEDERAL RULE OF EVIDENCE 803(6), 56 F.R.D. 311, 312 (1973).

than the problem of factuality discussed previously.²⁰² Even where a report is highly factual but records the actions and is offered to prove the actions, not of officials but of persons investigated or observed by officials, the essence of the official records doctrine is absent.²⁰³ Where records of an official agency are offered as business records rather than as official records, authenticity should be proved by more than certificate and presumably best evidence rules apply. In Section XV we will return to official records in our discussion of due process of law. In Section XI we will compare the doctrines of official records and business records and will attempt to demonstrate the state has no business records of or about its discretionary functions, especially its police functions.

E. Admissions Against Interest

Admissions by a dead or absent third person against his pecuniary interest are provable as exceptions to hearsay.²⁰⁴

F. Bulky Records

As an exception to both the hearsay and best evidence rules, the contents of bulky records may be proved by computational summaries prepared by a competent witness made available for cross-examination from the originals. A previous section²⁰⁵ compares this exception with business records and outlines situations of multiple hearsay calling for employment of both exceptions.

X. OTHER RELATED OBJECTIONS

The following section discusses non-hearsay evidentiary objections which could affect the admissibility of business records.

A. Authenticity

The term authenticity has been mistakenly used to describe circumstantial reliability.²⁰⁶ An objection to authenticity goes not to

202. See Section IIIB *supra*.

203. Cf. *United States v. Ware*, 247 F.2d 698, 707 (7th Cir. 1957) (concurring opinion).

204. See *CLEARY*, *supra* note 9, § 17.22.

205. Section IIIA *supra*.

206. See, e.g., *People v. Small*, 319 Ill. 437, 150 N.E. 435 (1926).

reliability but genuineness. Hearsay to one side, a proponent of business records evidence must show that the documents offered are what they purport to be; *viz.*, records prepared in a certain time and place and not bogus records. Issues of authenticity though factual are usually for the judge to resolve.²⁰⁷

B. *Weight and Sufficiency*

Objections to weight and sufficiency are usually made at the close of the opponent's case. But the rules governing admission of certain types of evidence are sometimes contained in interlocutory requirements of weight and sufficiency. Though discussed in those terms in *Smith v. Champaign-Urbana City Lines*,²⁰⁸ the rules concerning paid bills are not really of that character but are a hearsay exception. A better example of such a rule is proof of a trade usage or custom which must be accomplished by testimony of several witnesses.²⁰⁹ Unless the proponent produces more than one witness he may not produce any on the point.

How much weight should hearsay be given? Evidence received without exception must be given "due weight."²¹⁰ Since the factors affecting admissibility of exceptional hearsay are circumstances of reliability they also affect credibility and should be argued by counsel and weighed by the trier. Failure to object to competency does not waive the right to attack credibility.

C. *Relevancy*

The contents of business records may be either irrelevant on their face or irrelevant because of a failure to connect the evidence to the particulars of the case. In *Wright v. Upson*²¹¹ the records consisted of a mass of obviously extraneous material, while in

207. 29 AM. JUR. 2d, *Evidence* § 849 (1967).

208. *Smith v. Champaign-Urbana City Lines*, 116 Ill. App. 2d 289, 252 N.E.2d 381 (1969).

209. See *Bissel v. Ryan*, 23 Ill. 517 (1860); *Metro-Goldwyn Mayer v. American Broadcasting Co. Great States*, 8 Ill. App. 3d 836, 291 N.E.2d 200 (1st Dist. 1973); *Traff v. Fabro*, 337 Ill. App. 83, 84 N.E.2d 874 (1st Dist. 1949).

210. *Bunch v. Rose*, 10 Ill. App. 3d 198, 293 N.E.2d 8 (4th Dist. 1973).

211. 303 Ill. 120, 135 N.E. 209 (1922).

*Smith v. Champaign-Urbana City Lines*²¹² the alleged irrelevancy consisted in the alleged failure to prove the relation of the facts recorded to the other transactions in the case. Evidence irrelevant on its face might be called legal or pleading irrelevancy. Failure to "connect up" is a special or factual issue of relevancy. Whether factual relevancy issues are interlocutory factual questions for the judge or are jury questions is beyond the scope of this Article.²¹³

D. Competency of Foundation Witnesses

The competency of a foundation witness under either Rule 236 or under section 3, chapter 51 of the Illinois Revised Statutes is, like other witness competency questions, an interlocutory factual question for the judge to decide.

E. Conclusions

Business records otherwise admissible may be objectionable because they were not factual but conclusory.²¹⁴ A later section contains further discussion of hearsay conclusions.

F. Best Evidence, Parol Evidence, and Jargon Objections

The deplorable and unrecognized objection, "speaks for itself," has confused hearsay, the best evidence rule²¹⁵ of documentary evi-

212. *Smith v. Champaign-Urbana City Lines*, 116 Ill. App. 2d 289, 252 N.E.2d 381 (1969).

213. See Morgan, *Functions of Judge and Jury in Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929); Halligan, *Speedy Trial and the Criminal Appeals Act*, 55 MARQUETTE L. REV. 457, 460-68, 486-95 (1972).

214. See *Wright v. Upson*, 303 Ill. 120, 135 N.E. 209 (1922); *Paliokaitis v. Checker Taxi Co.*, 324 Ill. App. 21, 57 N.E.2d 216 (1st Dist. 1944). See also discussion at text accompanying notes 40-45 *supra*.

215. The Rule relates to the accuracy of documents. The best evidence rule relates to issues about the *contents* of a document and requires proof of contents of a document by production and offer of the original or one of the duplicate originals intended by the parties to operate as an original. Testimony as to the contents of a document is prohibited unless it is shown that the original and all verbatim copies are unavailable to the proponent who has exercised diligence in attempting to locate and produce them. The concept of "original" is different from that of business records. It refers not to time or sequence of preparation in relation to other documents, but rather, it refers to the intent to be bound by the contents and existence of the document. The original is not the only type of proof in all cases but is preferred and required unless it is not available. The best evidence rule is thus a hierarchical rule rather than a fixed rule of exclusion or a definitional element of an exception to a rule of exclusion. The best evidence rule applies to business records. Usually

dence, and the substantive parol evidence rule.²¹⁶

The assertion of the parol evidence doctrine and of the best evidence rule is sometimes made by use of the phrase "speaks for itself." Infrequently the intent of the objector using the phrase is assertion of hearsay. But most frequently judges and lawyers using the phrase have no clear idea what doctrine they mean. The phrase is second only to "self-serving" as an annoyance and an obfuscation. But its most pernicious result is not the confusion of doctrine or the exclusion of evidence so much as its wasteful effect in persuading an occasional judge that the contents of a document received in evidence may be communicated to the jury only by showing it to them to read themselves. The weight of authority is that

photocopies or summaries are not admissible even if offered for a non-hearsay purpose. Similarly the oral evidence of a witness who has memorized a material document verbatim is not the best evidence of its contents. Such testimony may be called parol evidence in the literal sense of parol as oral. But it is not parol evidence in the sense of the substantive law doctrine called the parol evidence rule. One of the practical effects of the best evidence rule when applied to proof of contents of operative documents is enforcement of the substantive parol evidence doctrine.

216. That rule forbids with various exceptions testimony to alter the unambiguous terms of an operative written instrument. The verbatim oral restatement hypothesized in the note preceding would not violate any such rule but would violate the best evidence rule. The difference of the colloquial from the ordinary meaning of the word parol has caused a confusion between the rules. Proof that a document is operative or proof that it is relevant must usually be made without hearsay. Use of business records to prove a case against a defendant usually presupposes other proof of dealing between the parties. For example in *Reed v. Baggott*, 5 Ill. App. 257 (1st Dist. 1880), alleging an implied contract for work performed, the evidence showed Mr. Reed ordered some repair work on premises in question which were owned by his wife, the defendant. Mr. and Mrs. Reed testified Mr. Reed was not her agent. In prior years he had been, and at that time an account bearing her name was established by plaintiff on his books. The earlier work was apparently paid for. Plaintiff admitted on cross examination he did not know and had never spoken to Mrs. Reed. Mr. Reed had not been named a defendant. Judgment for defendant was affirmed. Whether the books were admitted or excluded is uncertain. But the court comments that "the plaintiff could not bind Mrs. Reed by making entries against her in his books, unless such entries were made with her assent." Similarly, it was stated in *Larson v. Borrowdale*, 53 Ill. App. 2d 104, 116, 203 N.E.2d 77, 83 (1st Dist. 1964) (dictum) that the admission by silence exception operates, if at all as to writings, only where independent evidence shows existence of an established business relationship and then only as to statements of account. The parol evidence rule does not apply to non-operative documents, sometimes called collateral documents. There is no rule a party may not prove the fact recited in a collateral document by other means. Indeed, a party must so do if the collateral document be unexcepted hearsay. That is, a collateral or non-operative document is one whose contents are important as proof of a fact; not as an independently significant act or deed or the like in themselves. The best evidence rule, however, does apply to collateral documents if their contents per se are sought to be proved.

once received a document may be read to the jury by a witness or lawyer.²¹⁷

The vigilant lawyer must prepare his case within the confines of all rules concerning hearsay and documentary evidence.²¹⁸ Evidence excluded by one rule is just as surely excluded as if by another and compliance with one is not compliance with all.

Having treated the business records exception and related rules of evidence we are now in a position to examine how the exception operates in two special categories of cases, and how well it measures up against constitutional standards. The first category of cases we must investigate are the criminal cases.

XI. CRIMINAL CASES

A. *Right to Confrontation and Hearsay*

That the founders sought to preserve the right of confrontation by constitutional limitation in the sixth amendment indicates that the essence of the incompetence of hearsay is a fundamental principle of our law.²¹⁹ But while confrontation is the principle on which

217. 29 AM. JUR. 2d, *Evidence* § 839 (1967); S. HUNTER, TRIAL HANDBOOK FOR ILLINOIS LAWYERS § 246 (3d ed. 1969) [hereinafter cited as HUNTER]. However, asking a witness what a document in evidence says which was not prepared by him, and then contradicting his testimony is improper as argumentative. Occasionally, lawyers object to such quarrelsome use of documents on cross-examination by use of the phrase "speaks for itself." In such a context, the phrase means "cross-examination is not the place to point out contradictions in the evidence that are not specifically impeaching of credibility." Of course a sincere attempt to awaken the conscience or refresh the memory of the witness is proper. But that does not require a witness to read anything aloud. It is accomplished by showing a document to a witness and asking to him to read it silently.

218. The point here is to insist that summaries and compilations present not only best evidence and, depending on their use to vary another writing, parol evidence substantive law questions but hearsay problems as well. Indeed a summary is an out of court statement built upon out of court statements or what we may call multiple hearsay.

219. The most dramatic implementation of the confrontation clause has been made in connection with the right to legal counsel at such proceedings as line-up identifications. See *United States v. Wade*, 388 U.S. 218 (1967). With reference to line-ups and confrontation, assume a crime victim correctly and positively identifies a perpetrator in a fairly conducted police line-up, in the presence of an officer, and in the presence of counsel for the accused. Defense counsel questions the witness unsuccessfully to develop difficulties of perception, memory, articulation, and bias while notes are made by the officer. If the victim suffers blindness before trial, may he testify to his successful line-up identification or is such testimony hearsay?

the hearsay rule rests it is not the definition of the rule.²²⁰ The right to confrontation does not necessarily eliminate all hearsay problems. For example, the bulky records requirement that the maker of the summary be produced for cross examination does not overcome the problem of the hearsay nature of the underlying documents.²²¹ The relationship of hearsay business records and confrontation rights was demonstrated in *State v. Tims*,²²² in which the court held that the Model Business Records as Evidence Act could not be used in criminal proceedings to permit introduction of reports offered to show results of a medical examination of a rape victim when the foundation testimony was by one other than the examining physician. The rationale was the right of confrontation. But the court in dicta said the report might be received if offered through and substantiated by the person who conducted the examination. However, the report is still hearsay, regardless of who the foundation witness may be. Thus on the one hand the right of confrontation is not precisely coextensive with the rule against hearsay. On the other hand, the existence of an exception²²³ to hearsay does not necessarily excuse denial of confrontation.²²⁴

Is a statute excepting and admitting such hearsay constitutional? If the victim dies before trial, may the officer testify as to what happened at the line-up? It is suggested that the testimony of the blind victim or of the officer is hearsay but constitutionally should be permitted.

220. See 21 AM. JUR. 2d, *Criminal Law* § 341 (1965), for a discussion of the sixth amendment and the rule against hearsay.

221. *LeRoy State Bank v. Keenan's Bank*, 337 Ill. 173, 169 N.E. 1 (1929).

222. 9 Ohio St. 2d 136, 38 Ohio Op. 2d 328 (1967).

223. Other forms of hearsay admissible under state statutes and case law have failed constitutional tests. One example is the co-conspirator exception to the hearsay rule. See *California v. Green*, 339 U.S. 149 (1970); *Dutton v. Evans*, 400 U.S. 74 (1970). For federal jurisdiction cases see *United States v. Puco*, 476 F.2d 1099 (2d Cir. 1973); *United States v. Adams*, 466 F.2d 681 (9th Cir. 1971). Federal review of state hearsay exceptions will continue under the sixth amendment guarantee of confrontation which was first held obligatory on the states in *Pointer v. Texas*, 380 U.S. 400 (1965).

224. If the confrontation required in *State v. Tims* were provided this would, in most cases, remove the need for use of the report, if the physician remembers the exam in question. When his memory is exhausted, the past recorded recollection exception will usually be available. But the suggestion in *State v. Tims* is that even where the physician recalls the examination, the report may be received. This suggests the possibility of use of the business records exception to avoid the requirement of past recorded recollection when there has not been exhaustion of memory. Such a procedure allows the state to highlight the testimony of one witness, to anticipate impeachment which may not occur, and to present to the trier of fact a written memo-

B. Official Records and Business Records

Factual official records of government agencies have been a source of problems in the federal courts. Consider *United States v. Ware*,²²⁵ a prosecution for drug possession. Agents, having bought packets containing heroin from the accused, made memoranda on envelopes in which they placed the packets and delivered them to a government chemist who analyzed the contents and prepared a memorandum of his findings. The agents testified but the chemist did not. The memorandum of the chemist was received in evidence as were the memoranda of the agents. Conviction was reversed and the case remanded with instructions to exclude the memoranda of the agents but not the chemist's report. The rationale in the case for exclusion of the agents' memos was that they were unreliable even if they were regularly kept, and were prepared with a view toward prosecution.²²⁶ The chemist's report is regarded, however, as a business entry. In his concurrence, Judge Schnackenberg expresses the opinion the chemical report should also be excluded. In his opinion he notes that the report is not merely a record of an act or observation but is an inquiry into the fact.²²⁷ He comments that the record is proper proof that a test was made but should not be proof of the fact found by the test.²²⁸ He says no prior case goes as far as the majority. The entire rationale of the business records rule falls down in the case of such a report. The police department is not an organization relying on its reports in the conduct of its affairs. Its appropriation does not depend on the accuracy of its results but on its success in helping secure convictions. No prosecutorial agency has ever committed itself to be bound by its laboratory findings.

The requirement in *Brady v. Maryland*,²²⁹ developed since

randum of the testimony of one of the witnesses. Where such is the intent or probable result, the records should be excluded. Or, at a minimum, the contents should be communicated only once to the jury and custody of the records should not be granted to it during its deliberations. Such protection is especially important in criminal cases, not only as an aspect of the right of confrontation but as an aspect of the right to a fair trial.

225. 247 F.2d 698 (7th Cir. 1957).

226. *Id.* at 700.

227. *Id.* at 701-02.

228. *Id.* at 702.

229. 347 U.S. 83 (1963).

Ware, that the prosecution make exculpatory evidence available to the defense on its own initiative may alter the force of this observation as would any proven custom of an agency in discharging persons on the basis of laboratory tests. But the stigma that one can "make evidence" would still cause concern. The gist of the exception is use of and reliance on records in dealings other than litigation. Police laboratories' only "business" is litigation preparation. Since the case reversed conviction on other grounds (the memos of the agents) the discussion of chemist reports was dicta as Judge Schnackenberg indicates. No subsequent appeal is found.²³⁰

An even more contrived opinion, however, is the Court of Military Appeals' opinion, *United States v. Evans*,²³¹ which may be one of the most insincere opinions in American jurisprudence. A drug conviction was upheld on a record in which a state police lab report was received without defense objection. In fact, the defense counsel stated he had no objection. Hearsay received without objection may be weighed by the trier of fact. But under its statutory limitation, the United States Court of Military Appeals has jurisdiction to review only questions of law. It does not have authority to review findings of fact. In spite of the waiver by the accused and the limits of its own jurisdiction, the court rather pretentiously states it must still decide if the report met the requirements of the business records exception. The opinion volunteers it did in jurisdictionally unauthorized *obiter dicta*. It cites *United States v. Ware* but fails to mention the Schnackenberg concurrence or that the court reversed on the admissibility of the agents' memos. The tone of *Evans* suggests the court is undertaking the inquiry out of benevolent concern for the accused.²³² But the explicit mention of the doctrine of waiver leaves the reader without the slightest doubt conviction would have been affirmed regardless of the court's analysis of the police lab reports. One can only suspect that the court had determined in advance to seek an occasion to pronounce a liberal rule of admissibility of lab reports and that it seized impatiently on the first

230. It is suggested that the majority comments about the chemist report would not be law of the case on subsequent appeal for two reasons: the comments were dicta, and the defense could not appeal the dicta having obtained reversal.

231. 45 C.M.R. 353 (1972).

232. *Id.* at 355.

brief mentioning the subject without regard to the particular record before it. The opinion is particularly disappointing in the military jurisdiction where the potential now exists of field laboratories under uneven circumstances manned by unqualified "G. I." chemists under the close control of military commanders generating hearsay evidence sufficient to convict a multitude of youthful petty offenders. *Evans* could be read to allow the Army to make evidence on which it need not itself rely.

The recently adopted Federal Rules of Evidence should be construed to overrule both *Ware* and *Evans* as to the admissibility of police lab reports. Rule 803(8) states that governmental investigation reports, while admissible in civil cases unless inherently untrustworthy, are admissible only against the government in criminal cases.²³³ This federal rule liberally admits a report recording an act of government while limiting the admissibility of a finding of fact about something outside the government. This distinction was the essence of Judge Schnackenberg's concurrence in *Ware*. And it was probably to avoid this distinction that the majority in both *Ware* and *Evans* analyzed the records as business records rather than as official records. Yet it is interesting to note that the authentication and foundation in those cases was not accomplished with foundation witnesses from the laboratories in question but apparently was accomplished by certificate. In essence the cases expand the official records rule to include records not only of acts taken but of findings about the acts of others. The act of testing is governmental but the facts found decidedly are not, as the concurrence in *United States v. Ware* states.

In a previous section of this Article²³⁴ it was stated that the doctrine of business records is alien to the notion of government discretion. It is suggested that investigative reports are not business records and should not be received as such. The *Ocasio-Morales v. Fulton Machine Co.*²³⁵ requirements of use and reliance should no less be insisted upon in the case where the state is the owner of records. The conclusion to be derived from the basic rationale of the business records exception is that in its police and governmental

233. FED. R. EVID. 803(8).

234. See Section IX D *supra*.

235. 10 Ill. App. 3d 714, 295 N.E.2d 325 (1st Dist. 1973).

functions the state has no business records since in the exercise of police and governmental functions the state is not bound by its records but acts with discretion. In the case of proprietary functions the state may use and rely on business records but such use and reliance should clearly be shown. Hopefully the reader will not find it an extreme comment by this author to say that cases like *United States v. Ware* and *United States v. Evans* constitute a more serious threat to freedom than the largely vanished third degree interrogation ever was, for the hearsay of a coerced confession can be rebutted by the accused but the hearsay of a government technician who has not appeared in court and who has disposed of the physical evidence cannot be rebutted.²³⁶

XII. THE DEADMAN'S ACT

Section three of the Illinois Deadman's Act,²³⁷ although of limited applicability, does concern exceptional business hearsay. A comprehensive discussion of Rule 236 requires mention of the statute in order to alert the reader to the rare potential conflicts between these two authorities.²³⁸

The Deadman's Act is applicable only to cases in which the opponent of the records is a representative defined²³⁹ in the statute,

236. In Illinois civil cases, and a fortiori in criminal cases, there is no reason to regard the hearsay of state employees any differently from the hearsay of other persons. Indeed state employees are often more pretentious than other citizens. See *Patton v. Armstrong*, 6 Ill. App. 3d 998, 286 N.E.2d 351 (5th Dist. 1972). In that case, a child custody suit, a report of a case worker of the Department of Family Services was drafted in conclusory psychological jargon and delivered to the trial court who received it in evidence and weighed it. The appellate court opinion evidences genuine and proper outrage at the trial court in receiving such rank hearsay. The opinion reminds us that there is nothing special about state employees; their bias and ability to observe, recall, and relate must be tested. *Id.* at 999-1001. The essential element of the exception to the rule against hearsay for official reports, says the opinion, is recodation of official acts and not the reports of acts of others. The thought of justification of the report as a business record is not discussed. But the result should be no different. The state does not rely to its detriment on such reports. The state makes mistakes in its discretionary functions but she and her employees do not suffer. Only we citizens do.

237. ILL. REV. STAT. ch. 51 §§ 1 *et seq.* (1973).

238. See generally WIGMORE, *supra* note 11, §§ 1519, 1561(1); CLEARY, *supra* note 9, §§ 8.7-8.14.

239. ILL. REV. STAT. ch. 51 § 2 (1973). See also *Nelson v. Union Wire Rope Co.*, 39 Ill. App. 2d 73, 187 N.E.2d 425 (1st Dist. 1967); CLEARY, *supra* note 9, § 17.34; WIGMORE, *supra* note 11, § 1519.

typically an executor of the estate of a decedent. The purpose²⁴⁰ of the Act is to prevent some instances of uncontradictable perjury, *i.e.*, where absence of the decedent prevents contradiction of evidence the statute may be applied to exclude such evidence. The evidence excluded is that given by a party opponent.²⁴¹ Uncontradictable evidence given by a nonparty is not excluded, notwithstanding the fact that absence of the decedent makes it uncontradictable.

Where business records contain out of court statements of a party then their introduction contravenes the purpose of the Act. That is, hearsay of a party *a fortiori* contravenes the Act if his judicial testimony to the same effect would contravene it. One simple model contemplated by the Act is a shop-book of entries of a recurring kind arising in a small proprietary business, the actions entered therein having been either performed or recorded by the proprietor. Such records are a sort of alter ego to the proprietor; they are practically a memorandum of his own past recorded recollection. Nevertheless, section 2 and section 3 of the Act, when read together, allow the admission of such indirect testimony of a party but limit the admission to certain situations and specific records and require foundation witnesses of certain types. The exception created for books and records is necessary to prevent unjust avoidance by estates of ordinary business debts.

Conversely, if the party was neither informant nor entrant the purpose of the Act is not involved, the Act should not apply, and no exemption is necessary. This sort of reasoning may be the imperfectly stated rationale of an exemption from the requirements²⁴² of the Act for large corporations whose records are routinely generated by many persons. The corporate exemption, however, should not apply where in fact the preparation of the records was done, or the information recorded in them was provided by a person who is effectively a party in interest. In such circumstances, the corporate party proponent should comply with section 3 of the Act. Cases not involving records support this view by analogy. In particular a cor-

240. CLEARY, *supra* note 9, § 8.7.

241. ILL. REV. STAT. ch. 51, § 2 (1973).

242. Rude v. Seibert, 22 Ill. App. 2d 477, 482, 161 N.E.2d 39, 41 (4th Dist. 1959) *citing* National Malleable Castings Co. v. Iroquois Steel & Iron Co., 333 Ill. 588, 165 N.E. 199 (1929).

porate stockholder,²⁴³ not a party to a lawsuit against an estate, has been ruled incompetent to testify to transactions he had with the decedent. This is not so much piercing the corporate veil as construing an evidentiary statute to effect the legislative purpose.

As an example, consider two salesmen employed by a company. One is a large shareholder and a director whose compensation varies in part with the collection of the sales price. The second is a salaried nondirector who owns no stock. Both prepare memos of orders taken and submit them to the same clerk who makes routine permanent ledger entries for business purposes. On the analysis given here the Act applies to entries from the work of the first man and would be admissible only if the proponent complies with section 3 of the Act but not to those arising from the work of the second.

When the Act does not apply, then upon a hearsay objection Rule 236 and its judicial gloss govern the case without statutory conflict. However, when the Act does apply, the trial court, upon an objection invoking the Act, must consider a number of questions. The first is what type of records are admissible. This is the question of attributes. The language of the Act and Rule 236 are similar on this point, and since Rule 236 has been construed²⁴⁴ to require the same kind of originality, regularity and duty to observe as are required by the Act, no conflict on this account appears between the Act and the law of business hearsay. A change in Rule 236 to allow records not regularly kept would create a possible divergence of standards not now present. The existence or not of such divergence depends on construction of legislative intent in section 3 of the Act. Did the legislature intend an open ended definition of "regular"? Did they intend the definition or any judicial redefinitions to conform to usages found in the law of hearsay? Or did they intend an instantaneous codification and crystallization of the judicial meaning of the word prevailing at the time of enactment? What would be the effect of re-enactment? These questions²⁴⁵ are

243. *Scott v. Couch*, 271 Ill. 395, 111 N.E. 272 (1915); *Cronin v. Supreme Council Royal League*, 199 Ill. 228, 65 N.E. 323 (1902).

244. The cases which discuss these requirements of Rule 236 appear in the text accompanying notes 22-39, 47-58, 109-111 *supra*.

245. *Stettauer v. White*, 98 Ill. 72 (1881) regarded the law as a codification, freezing further expansion. See also *Presbyterian Church v. Emerson*, 66 Ill. 269

left to other writers at other places. At a minimum the attributes of books and records required by the Act cannot reasonably be construed to be less demanding than those required by the law of hearsay including Rule 236.

Besides attributes the court must answer questions regarding external foundation facts. These relate to the presence or absence of foundation witnesses. Unlike attribute questions, which touch upon reliability of the records themselves, this second class of questions touches upon necessity or convenience. If the Act is applicable, then the section 3 conditions must be met, at least when the foundation witness is a party. Following *Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co.*²⁴⁶ a potential third question is competency of the foundation witness. The Act does not distinguish the second from the third question. Literally it talks only of the third, that is, in form it states when a party may be a foundation witness. But the language of the section, when read in the light of common law and the remainder of the Act, indicates an intention that the trial court consider the two factors mentioned above. Indeed the gist of section 3 of the Act is that if reliability conditions (attributes) and necessity conditions (extrinsic facts) be fulfilled, no special limitation on witness competency of parties will apply to foundation witnesses. The requirements will be the same as those established for other cases by other rules of evidence; *viz.*, personal knowledge not of particular records but of the record keeping system in general. Thus the answers given to the first two questions make the third question trivial.

Another interpretation of the Act is possible. The actual enabling language of section 3 reads "any party or interested person may testify to his account book . . . and thereupon the said account book . . . shall be admitted as evidence." The omitted parts are the substance of that which the party may establish by testimony: attributes and other foundation facts. But the Act does not, strictly construed, say what the attributes or other facts must be but

(1872). *House v. Beak*, 141 Ill. 290, 30 N.E. 106 (1892) on the other hand, viewed the act as enlarging the business records exception although it was silent on the question of judicial jurisdiction to enlarge the exception further. WIGMORE, *supra* note 11, § 1519 finds no bar to further enlargement, even for cases within the act.

246. 18 F.2d 934 (2d Cir. 1927).

only what genre of facts a party witness may establish. Arguably section 2 of the Act is literally a prohibition only on who may take the stand. In relevant part it reads: “. . . no adverse party or person directly interested . . . shall be allowed to testify . . .” but the word “testify” is not defined. To illustrate the point, what if a recurring customer with knowledge of the books establishes that their attributes fulfill Rule 236, common law, and the Act, but does not establish unavailability of entrants. Should records which contain uncontradictable hearsay of a party be admitted in a case opposing an executor? The strict grammatical approach would say yes because no party has “testified.”²⁴⁷ That is, the records containing hearsay statements of a party which comply with Rule 236, whether or not that Rule conflicts with the attribute definitions of the Act, should in a representative case be admitted so long as the foundation witness be not a party or interested person, even if the entrants are available.

One objection to the narrow interpretation is that it so severely limits the application of the Act in aiding representative litigants as to make it virtually a dead letter. It is an interpretation based on grammar to the exclusion of the legislative purpose to protect representative litigants. A logical corollary to the grammatical approach would in some circumstances unfairly increase the cost and burdens of litigation for opponents of representatives without accomplishing the legislative purpose; *i.e.*, where the party neither performed nor recorded the act, so that the legislative purpose is not on point, nevertheless the party or interested person may not be the foundation witness unless the employees of the party are dead or absent from the state. These anomalies justify rejection of the strict grammatical approach.

The following procedure is suggested for trial courts.

When objection invoking the Act is to the records themselves, ask these questions:

A1. Is the opponent a representative? If no, overrule and admit the records. If yes, go to 2.

247. When the hearsay statement of a party is introduced, the party has effectively testified for the purposes of the Deadman's Act. Whether or not his statement is “testimony” for other purposes is another issue.

A2. Was a party either entrant or informant? If no, overrule and admit regardless of who is the foundation witness since no party is testifying either directly or by hearsay.²⁴⁸ If yes, ask question 3.

A3. Is the thing recorded a conversation or occurrence with the decedent? If no, overrule the objection and admit the record because its admission would not constitute indirect testimony of an event or conversation with the decedent. If yes, ask question 4.

A4. Are the conditions²⁴⁹ of necessity in section 3 of the Act fulfilled? If no, sustain the objection and exclude the record. It is hearsay of a party to an event or conversation with the decedent, and its exclusion by section 2 of the Act is not exempted by section 3. If yes, ask question 5.

A5. Do the attributes of the record show regularity? If no, exclude them. If yes, admit them.

Where the estate objects only to statutory competency of the foundation witness, it is proper to overrule in all cases. The following analysis demonstrates that conclusion. First, ask questions A1, A2, A3. If any one is answered no, it is proper to overrule and allow the witness to testify because the Act is inapplicable. If all are answered yes, then, for analysis, turn to B1.

B1. Is the foundation witness a party or interested person? If no, the court should overrule and allow him to testify because the Act does not make nonparties incompetent and should admit the records unless a separate objection be made to the records. If yes, we must ask question B2 to complete the argument.

B2. Is there also an objection to the records themselves? If no, we should overrule the objection and allow the foundation witness to testify because he is not testifying to the contents of a conversation or event with the decedent, but only to the method it was recorded; the contents are self-contained and by hypothesis there is no objection to them.

If the estate objects on both grounds, what procedure is proper? The court should simply proceed as in an objection to the records

248. Here the act is construed to effect legislative purpose.

249. The conditions are extrinsic to the records, but their fulfillment is a condition relating to their admissibility.

and ask questions A1 to A5. If the records are inadmissible, the issue of competency is moot. If the records be admissible it follows, by the affirmative answers to A4 and A5, that even a party is competent and objection to competency of the foundation witness may be overruled. We have now demonstrated what was called the triviality of the third question earlier in this section.

One trap to be avoided is failure to object to hearsay. To invoke the Act is not to object to hearsay. For example, consider an objection invoking only the statute. If A1 is answered no, the objection should be overruled despite an irregular and nonbusiness hearsay character of any records in question. Failure to assert the rule against hearsay waives that objection. We leave as an exercise for the reader to ponder the logical order of deliberation the court should use when the Act and hearsay are both asserted as objections vis a vis the records themselves.

XIII. OVERALL PROBATIVE VALUE: THE DISCRETION TO EXCLUDE

Should records and foundation testimony which satisfy the technical requirements of Rule 236 always be admitted? The requirement stated in *Newark Electronics Corp. v. City of Chicago*²⁵⁰ that the trial court "scrutinize the circumstances, methods, and integrity" of the records suggests that the court has discretion to exclude records which, under the circumstances of the particular case, lack the reliability which business records are usually considered to have.²⁵¹ Thus while the trial judge has a *discretionary power to exclude* evidence which technically meets the requirements of the exception, he does not have such power to admit hearsay evidence which does not satisfy the Rule's requirements.²⁵² Illinois courts have never suggested that admission of unexceptional hearsay is

250. 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1st Dist. 1970).

251. An honest appearance is a traditional factor sometimes expressed as a separate requirement tested by neatness, internal consistency, and an absence of unexplained erasures. See WIGMORE, *supra* note 11, § 1551. In addition, argumentative or "self-serving" contents tend to disqualify a business record. 30 AM. JUR. 2d, *Evidence* § 939 (1967).

252. Any reading of *Newark* or *Lustig* to the contrary fails to recall the employment of the harmless error doctrine in those opinions. See discussion at text accompanying notes 51-59 *supra*.

free from error. Such error may be harmless but it is still error. On the other hand, the discretion to exclude technically exceptional hearsay which is unreliable is similar to the doctrine of *Veer v. Hagemann*,²⁵³ which states that the judge, at his discretion, can refuse evidence which will tend to confuse the jury. As cases in the following section indicate, such initial scrutiny of reliability by the court is not an invasion of the power of the jury. In *Ocasio-Morales*,²⁵⁴ which explicitly refers to Rule 236, the exclusion of the Kawin Company engineering report indicates that the language of the rule, *i.e.*, certain factors touch upon weight but not admissibility, is not intended to relieve or remove from the trial court the duty to scrutinize circumstances. In that case, the Kawin Company report did meet the literal requirements of Rule 236 but was properly excluded.

The language in *Windmiller v. McCartney*²⁵⁵ concerning corroboration of the records by the foundation witness, indicates that the discretion to exclude extends to two types of cases: those in which the foundation testimony is unreliable and those in which the records themselves and the foundation testimony taken together do not appear reliable as a whole. In cases involving less reliable records, the judge has the discretion to require testimony of key informants or entrants as a condition to admission.

In Illinois, the discretion to require additional foundation evidence or foundation witnesses could well be based on the requirement, stated in the line of cases from *Stettauer v. White*²⁵⁶ through *Rude v. Seibert*,²⁵⁷ that proof of reliability of sources be as satisfactory as the case allows. We have rejected the hierarchical principle, suggested by the distortion in *Chisholm v. Beaman Machine Co.*,²⁵⁸ *Pittsburgh C.C. & St. L.R.R. Co. v. City of Chicago*,²⁵⁹ and *People v. Small*,²⁶⁰ of the "satisfactory" language in *Stettauer* to

253. 334 Ill. 23, 165 N.E. 175 (1929).

254. 10 Ill. App. 3d 719, 295 N.E.2d 329 (1st Dist. 1973).

255. 108 Ill. App. 2d 264, 247 N.E.2d 631 (4th Dist. 1969).

256. 98 Ill. 72 (1881).

257. 22 Ill. App. 2d 477, 161 N.E.2d 39 (4th Dist. 1959).

258. 160 Ill. 101, 43 N.E. 796 (1896).

259. 242 Ill. 178, 89 N.E. 1022 (1909).

260. 319 Ill. 347, 150 N.E. 435 (1926).

the phrase "best evidence." Yet on interlocutory factual issues, unlike ultimate factual issues, hierarchical principles are not totally foreign and their application is not indefensible in such a context. Presuming a discretion to exclude for failure to comply with requirements for additional foundation or for overall lack of reliability, how do we rationalize that discretion with the burden of proof discussion following and with the rejection of hierarchical theories? The concept is a gestalt notion. Each particular foundation fact or required circumstance of reliability should normally be provable by any competent means by a preponderance of the probabilities. But if overall the reliability is weak, then a discretionary power exists either to exclude or to require proof of other circumstances indicating reliability; for example, by refusing to presume that the missing entrant, if called, would not remember²⁶¹ but insisting instead on his production, or by requiring proof of reliance on the records by the *viva voce* testimony of a non-record-keeping managerial employee who actually paid money or allocated resources through use of the record provided by the record makers. It is fair to say that vestiges of *Stettauer* remain in our law of evidence and that imposition of additional requirements of foundation proof by the trial court is proper and probably necessary to avoid exploitation and abuse by dishonest litigants of the liberal minimum standards of Rule 236. The conduct of the hearing necessary to exercise of discretion to exclude will be considered in the next section.

XIV. INTERLOCUTORY HEARING

A. *The Presence of the Jury*

Whether the trial judge should take foundation evidence outside the presence of the jury is a question which involves several conflicting interests. Interlocutory hearing avoids prejudice if the records should be excluded, but will usually result in repetition of testimony if it is determined that the records should be received since the jury properly should have facts concerning reliability. This is necessary in order for the jury to be able to decide credibility and weight and so that the opponent may insist on his right to

261. See *Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co.*, 18 F.2d 934 (2d Cir. 1927); *Secco v. Chicago Transit Auth.*, 6 Ill. App. 2d 266, 127 N.E.2d 266 (1st Dist. 1955).

cross examine the foundation witnesses and to present to the jury facts impeaching the records. Where the danger of collateral matter is apparent, as in *Veer v. Hagemann*²⁶² and in criminal cases,²⁶³ the interlocutory hearing is required. Where the competency of the foundation witness is seriously in dispute, an interlocutory hearing ought to be conducted as upon *voir dire*.²⁶⁴ At a minimum, the court should reserve ruling on admission of evidence until after cross examination of the foundation witness; in a jury trial, the contents of documentary evidence should carefully be kept from the jury until it has been received.²⁶⁵ Where, for practical reasons, the proponent must have his witness refer to an exhibit, the court should allow the opponent to interrupt direct examination to cross examine only as to the circumstances or authenticity of the document or thing. That procedure will avoid prejudice and the necessity of a motion to strike and exclude.²⁶⁶ Evidence may also be excluded by a pre-trial order after hearing. Such a hearing may be initiated by motion to suppress or, as it is sometimes called, motion *in limine*.²⁶⁷

Where the dispute is serious and the use to which records are to be put is important, the duty to "scrutinize the circumstances, methods, and integrity" implies that a full preliminary or interlocutory taking of evidence may be required.²⁶⁸ What standard of proof is the judge to apply in such a hearing?

262. 334 Ill. 23, 165 N.E. 175 (1929).

263. See *People v. Guido*, 321 Ill. 397, 152 N.E. 149 (1929).

264. See JONES, LAW OF EVIDENCE IN CIVIL CASES § 796 (1924).

265. See, e.g., *People v. King*, 29 Ill. 2d 150, 193 N.E.2d 790 (1965), which involved admission of a photograph whose competency was disputed.

266. See HUNTER, *supra* note 217, § 404.

267. *LeMaster v. Burns*, 130 Ill. App. 2d 918, 266 N.E.2d 114 (5th Dist. 1971); *Wolfe v. Whipple*, 112 Ill. App. 2d 255, 251 N.E.2d 77 (3d Dist. 1969); *Bruske v. Arnold*, 100 Ill. App. 2d 428, 241 N.E.2d 191 (3d Dist. 1968). In *Whipple* the motion *in limine* was actually an objection during trial disposed of by interlocutory hearing. Tax returns of plaintiff were offered both to impeach and to contradict or mitigate the lost income damages case of plaintiff. Plaintiff objected on grounds the income was from collateral sources and should not be revealed. Technically, the proper objection would be irrelevant; the collateral source rule is a rule not of evidence but of substantive law. The remand of the case directed a pretrial evidentiary hearing to determine if the income was from collateral sources. See also HUNTER, *supra* note 217, § 365; I. GOLDSTEIN & F. LANE, TRIAL TECHNIQUE § 7.09 (2d ed. 1969).

268. *Newark Electronics Corp. v. City of Chicago*, 130 Ill. App. 2d 1021, 264 N.E.2d 868 (1st Dist. 1970).

B. *The Standard of Proof*

Both the existence of the circumstances of regularity, originality, and reliance necessary to make business record hearsay exceptional and the competency of the foundation witness should be shown by proof by a preponderance of probabilities.²⁶⁹ Where such circumstances do not exist it is error to admit the records. Where they do exist severally but the "overall probative value" is less than that usually expected of business records, then the court has discretion to exclude, as was developed in a previous section.²⁷⁰

C. *Cross Examination, Contradiction, and Impeachment*

Even after a full interlocutory hearing, a ruling to admit business records is not the end of the matter. On cross examination, the opponent may inquire into all the circumstances of their making and may rebut the records²⁷¹ or impeach the foundation witness. Mention of these adversary procedures leads to the final section of the Article in which some of the issues of due process that hearsay and its exceptions spawn are indicated.

XV. HEARSAY AND DUE PROCESS OF LAW

A. *Delegation of Adjudication*

The right of confrontation is essential in our adversary system. When the hearsay evidence goes to the underlying facts in dispute, its admission amounts to abdication of the power to adjudicate and thus denies the opponent the right to a trial. In *Patton v. Armstrong*,²⁷² a report, commenting on the credibility of parties, was admitted into evidence. The reliance by the court on the report allowed an absent person to usurp the central function of the trier of fact. But does not a report based on communications to the report maker or founded on testimony of other than the report maker and his informants partake of this same defect?

269. See *Lego v. Twomey*, 404 U.S. 477 (1972) (testing an Illinois conviction).

270. See Section XIII *supra*.

271. See, e.g., *Chisholm v. Beaman Machine Co.*, 160 Ill. 101, 43 N.E. 796 (1896); *House v. Beak*, 141 Ill. 290, 30 N.E. 1065 (1892); *Rude v. Seibert*, 22 Ill. App. 2d 477, 161 N.E.2d 39 (4th Dist. 1959).

272. 6 Ill. App. 3d 998, 286 N.E.2d 351 (5th Dist. 1972).

B. Discretion of the Trier of Fact

Are uncontradicted hearsay business records, accepted into evidence, binding on the trier of fact? The modern persuasion is to decide cases on the basis of evidence presented rather than evidence not presented. Yet it is suggested that to bind the trier of fact to uncontradicted hearsay is to deny the opponent not only the right of confrontation but also the due process right to a deliberative trial of facts. Hearsay is inherently unreliable. And the trier of fact ought to have the right to disregard it in every case, but especially where the proponent has not voluntarily presented all the circumstances of its utterance to the trier for its deliberation. This is different from saying business records cannot determine a *prima facie* case but is only to say that in many instances they may not.²⁷³

C. Waiver and Objection

The form of evidence offered in *ex parte* trials involving liquidated damages is almost exclusively business records offered by the attorney for plaintiff. The admission of the records into evidence is not improper. But that is not to say the court should be bound in an *ex parte* proceeding or any other by such records. *Bunch v. Rose*²⁷⁴ requires that unobjected to evidence be given due weight. However, due weight may approach zero weight. In essence the *Bunch* case requires merely that the trier and reviewer deliberate upon the evidence admitted without objection. Rejection of it as incredible is possible upon such deliberation. The same principle applies to exceptionally admissible evidence. The trier should be free

273. An illustration of the interrelation between the rules excluding hearsay and rules of weight and sufficiency are paid bills as proof of value. Examination of case law, *see, e.g.*, *Byalo v. Matheson*, 328 Ill. 269, 159 N.E. 242 (1927), indicates that paid bills have been considered as raising questions of relevancy and of sufficiency to sustain a *prima facie* case. In the last cited case the objection to the paid bill had been "best evidence" by which the lawyer may have meant hearsay of a mechanic or service salesman. However, the opinion considers the issue in the case to be weight and sufficiency. But in essence the problem raised by a paid bill is hearsay because it is offered to show that the stated values are the fair market values of the installed work. That is, the bill is an opinion of value made out of court by a garage employee. They also constitute hearsay opinion of the reasonable necessity of repairs. The insistence upon payment is insistence upon a circumstantial indication of trustworthiness, justifying an exception to the hearsay rule.

274. 10 Ill. App. 3d 198, 293 N.E.2d 8 (4th Dist. 1973).

to reject hearsay after deliberation. The absence of objection does not bolster the evidence. It merely allows it to be received.

XVI. CONCLUSION

The right to exclude hearsay and, conversely, the right to present exceptionally admissible hearsay are substantial adversarial rights. Indeed, the variety and complexity of limitations on exceptional business hearsay which we have examined indicate the importance attached to those rights by those uniquely adversary tribunals, courts of common law.

The intent of this Article has been to separate and compare the various limitations on exceptional business hearsay and in the process to disclose how the law of evidence in Illinois has accommodated the legitimate needs of bureaucratically structured modern business to the adversarial structure of proceedings governed by such law. The reconciliation has been achieved by steadfastly excluding both hearsay not clearly within established exceptions and hearsay technically within such exceptions but otherwise suspicious. The conviction remains in Illinois that on substantial and genuinely disputed issues the parties ought to report their facts in court and to submit to trial both those facts and the demeanor of the persons reporting them.

DE PAUL LAW REVIEW

Volume 24

Spring 1975

Number 3

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