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Business Records in Louisiana as an Exception to the Hearsay Rule

Business records are extra-judicial statements, and are therefore excludable as hearsay if offered to prove the facts contained in them,¹ unless one of the exceptions to the hearsay rule can be invoked.² The purpose of this Comment is to discuss the admissibility of business records in evidence in Louisiana under exceptions to the hearsay rule peculiarly applicable to such records. Business records may be admissible under common law exceptions to the hearsay rule not confined to business records — such as declarations against interest,³ admissions of a party,⁴ and past recollections recorded⁵ — and under special Louisiana statutes — such as those relating to proces verbal,⁶ charity and veterans hospital records,⁷ and other official records.⁸ How-

1. 2 JONES, EVIDENCE 550, § 289 (5th ed. 1958). Business records may not be hearsay if used for their non-assertive value, such as proof of verbal acts or operative facts. For a discussion of hearsay in Louisiana, see Comment, 14 LOUISIANA LAW REVIEW 611 (1954).

2. Professor Wigmore lists fourteen exceptions. 5 WIGMORE, EVIDENCE 208-09, § 1426 (3d ed. 1940).

3. See McCORMICK, EVIDENCE 546-54, §§ 253-57 (1954); 5 WIGMORE, EVIDENCE 259-90, §§ 1455-77 (3d ed. 1940).

4. See McCORMICK, EVIDENCE 502-45, §§ 239-52 (1954). It should be noted that Professor Wigmore does not consider admissions of a party as an exception to the hearsay rule; he considers such evidence admissible because the hearsay rule is "satisfied." See 4 WIGMORE, EVIDENCE 2-5, § 1048 (3d ed. 1940). For rules applicable in Louisiana criminal cases see LA. R.S. 15:449-450, 454 (1950).

5. See McCORMICK, EVIDENCE 590-95, §§ 276-80 (1954). This is the rule normally used to admit business records in evidence when the persons concerned with making the particular entries are available for testimony.

6. LA. R.S. 15:35 (1950) provides in part: "Upon the trial of the case the procès verbal of the inquest shall be competent evidence of death and the cause thereof, but not of any other fact." (As amended, La. Acts 1952, No. 150, § 1; La. Acts 1956, No. 425, § 1).

7. LA. R.S. 13:3714 (1950), as amended, La. Acts 1952, No. 519, § 1: "Whenever a certified copy of the chart or record of either of the charity hospitals of this state and any of the veterans hospitals in the state of Louisiana, signed by the director, assistant director, superintendent or secretary of the hospital in question, is offered in evidence in any court of competent jurisdiction, it shall be received in evidence in such court, as prima facie proof of its contents, provided that the party against whom the said record is sought to be used shall have the right to summon and examine those making the original of said record as witnesses under cross-examination."

Before legislation preceding this statute was passed (La. Acts 1936, No. 108, and La. Acts 1938, No. 90, § 1), hospital records were inadmissible as hearsay. *Gaines v. Acme Industrial Life Ins. Soc.*, 155 So. 276 (La. App. 1934); *Williams v. Locicero*, 142 So. 856 (La. App. 1932); *Dolan v. Metropolitan Life Ins. Co.*, 123 So. 379 (La. App. 1929). An exception was made in workmen's compensation cases. *Abelleira v. Johnson Iron Works Co.*, 137 So. 908 (La. App. 1931); *Harrison v. Joseph Rathbone Lumber Co.*, 132 So. 797 (La. App. 1931).

This statute allows charity hospital records to be admitted as prima facie evidence. *State v. Kelly*, 237 La. 956, 112 So.2d 674 (1959); *Futrell v. Pacific Indemnity Co.*, 79 So.2d 903 (La. App. 1955). However, statutory requirements must be strictly adhered to. *Fenerty v. Culotta*, 80 So.2d 537 (La. App. 1955);

ever, these rules are outside the scope of this Comment. It is hoped that this study will be of some value in drafting a projet for a Louisiana Code of Evidence. Instruction to prepare such a code has been given to the Louisiana State Law Institute by the legislature.⁹

Before turning to Louisiana law, it will be useful to discuss briefly the common law exceptions peculiar to business records—the shop book rule, and the regular entries in the course of business exception.

Common Law Rules for Business Records

The *shop book rule* was developed in England in the seventeenth century and was later adopted in the United States. Its purpose was to allow small shopkeepers and craftsmen who kept their own books to use them as proof of debts owed on open account, and thereby avoid the harshness of the rule which prohibited a party from testifying in his own behalf.¹⁰ In time, there developed many technical and inflexible requirements apparently in an effort to insure that the entries were trustworthy and that their admission into evidence was a matter of some necessity. Among these requirements were the following: (1) the party must file a "suppletory" oath, (2) the books must bear an honest appearance, (3) witnesses must testify from actual dealings

Sampson v. Life & Casualty Ins. Co. of Tennessee, 175 So. 148 (La. App. 1937).

For a general discussion of hospital records as evidence, see Hale, *Hospital Records as Evidence*, 14 SO. CALIF. L. REV. 99 (1941) and McCormick, *The Use of Hospital Records as Evidence*, 26 TUL. L. REV. 371 (1952). Professor Wigmore advocates an exception to the hearsay rule for hospital records. 6 WIGMORE, EVIDENCE 36, § 1707 (3d ed. 1940). Hospital records are admissible under the business entries exceptions in the MODEL CODE OF EVIDENCE rule 514, and the UNIFORM RULES OF EVIDENCE rules 62(G) and 63(13).

8. See LA. R.S. 13:3711 (1950): "Copies of any books, records, papers or other documents of any of the executive and administrative departments, boards, and agencies of this state, and copies of any books, records, papers, or other documents of any of the political corporations, bodies politic, boards, departments and agencies of this state and the parishes and municipalities thereof, when certified as being true copies by the official, officer or employee in whose custody they may be, shall be admitted in evidence in all courts of this state, equally with the originals of such books, records, papers or other documents." See also LA. CODE OF CIVIL PROCEDURE art. 1394 (1960).

See also LA. R.S. 13:3712(A) (1950), as amended, La. Acts 1958, No. 316, § 1: "Certified copies of books, records, papers or other documents provided in R.S. 13:3711 shall be prima facie proof of the existence and contents of the originals and of any act, transactions or occurrence or event as a memorandum of which such books, records, papers or documents were kept or made."

9. La. Acts 1956, No. 87, § 2: "The Louisiana State Law Institute is instructed to prepare a comprehensive projet for a Louisiana Code of Evidence, covering the rules of evidence for both criminal and civil cases."

10. See MCCORMICK, EVIDENCE 597, § 282 (1954); 5 WIGMORE, EVIDENCE 347-48, § 1518 (3d ed. 1940).

that the party is an honest bookkeeper, (4) the records must have been made regularly, (5) the rule was applicable only to proof of open accounts for goods and services furnished the defendant, (6) other proof of actual delivery of part of the goods must be made, and (7) the party must not have had a bookkeeper.¹¹ Abolition of the rule that a party cannot testify in his own behalf and development of the broader regular entries in the course of the business exception have removed the need for the shop book rule.¹² Accordingly, in England the shop book rule has been absorbed by the regular entries exception, but courts in the United States continue to refer to it, with resulting confusion.¹³

The *regular entries in the course of business* exception developed later than the shop book rule and is much broader in scope. This exception governs admissibility in evidence of third parties' books as well as those of individual parties. Necessity and reliability, the two basic principles of most hearsay exceptions, form the basis for the regular entries exception. This exception may be succinctly stated as follows: A permanent record made in the ordinary course of business, by a person unavailable for testimony, from personal knowledge of the facts recorded or from information furnished by one having a business duty to observe and report the facts, is admissible as proof of the facts recorded, in the absence of a strong motive to misrepresent, if the record is the first collected and recorded memorial.¹⁴

Louisiana Criminal Cases

Soon after Louisiana became one of the United States, its courts accepted the common law rules of evidence¹⁵ which were used in criminal as well as civil cases, except as modified by

11. See McCORMICK, EVIDENCE 597, § 282 (1954); 5 WIGMORE, EVIDENCE 394-414, §§ 1536-58 (3d ed. 1940).

12. McCORMICK, EVIDENCE 598, § 282 (1954); 5 WIGMORE, EVIDENCE 415-18, § 1560 (3d ed. 1940).

13. McCORMICK, EVIDENCE 298, § 282 (1954); 5 WIGMORE, EVIDENCE 351, 418-20, §§ 1518, 1561 (3d ed. 1940).

14. See generally McCORMICK, EVIDENCE 596-613, §§ 281-90 (1954); 5 WIGMORE, EVIDENCE 347-94, §§ 1517-33 (3d ed. 1940).

15. See Comment, 14 LOUISIANA LAW REVIEW 568 (1954), which reaches this conclusion, pointing out that the common law rules of evidence were adopted by the Crimes Act of 1805 for the prosecution of crimes therein enumerated, and that in civil cases the Spanish rules of evidence had been repealed by common consent, as held in *Planters Bank v. George*, 6 Mart. (O.S.) 670 (La. 1819).

statute.¹⁶ The Louisiana Code of Criminal Procedure of 1928¹⁷ codified, and to some extent modified, these rules in criminal cases. Article 434 of the Code of Criminal Procedure provides that hearsay evidence is inadmissible, "except as otherwise provided in this Code." Since no provision is found in the Code for admissibility of business records, it is arguable that business records are inadmissible because they are hearsay. No consideration of this contention has been found in appellate opinions. Also, the exception for former testimony is well recognized in Louisiana although no provision is made for it in the Code of Criminal Procedure.¹⁸ However, no Louisiana criminal cases have been found admitting business records, except under special statutes, that is, those governing the admissibility of public records,¹⁹ charity hospital records,²⁰ and proces verbal.²¹ Two Louisiana criminal cases hold business records inadmissible, relying in part upon common law authorities and reasons, but no general rule can be drawn from them. In both of these cases the records were excluded because it was not shown that the bookkeeper was unavailable for testimony, nor that the entries were made from first-hand knowledge.²²

Louisiana Civil Cases — Influence of the Civil Code

Article 230 of the Civil Code of 1808²³ provided that a mer-

16. See Comment, 14 LOUISIANA LAW REVIEW 568, 570 (1954) : "[T]he courts continued to apply common law evidence rules in all proceedings until the adoption of the Code of Criminal Procedure in 1928."

17. Title 15 of the Louisiana Revised Statutes of 1950.

18. See Comment, 20 LOUISIANA LAW REVIEW 146 (1959).

19. E.g., *State v. Kelly*, 237 La. 956, 112 So.2d 674 (1959) (police stolen car report held admissible because an official record). See LA. R.S. 13:3711-12 (1950), quoted in note 8 *supra*.

20. E.g., *State v. Kelly*, 237 La. 956, 112 So.2d 674 (1959) (record of charity hospital held admissible under LA. R.S. 13:3714 (1950), quoted in note 7 *supra*.)

21. E.g., *State v. Wilburn*, 196 La. 113, 198 So. 765 (1940); *State v. Hayden*, 171 La. 495, 131 So. 575 (1930). See LA. R.S. 15:35 (1950), quoted in note 6 *supra*.

22. In *State v. Savage*, 213 La. 1011, 36 So.2d 20 (1948), records of a live-stock auction barn were held inadmissible in a prosecution for theft of a cow because the records were not identified at the trial by the person making the records and the entries were not shown to have been made from first-hand knowledge. The court cited LA. R.S. 15:434, 436 (1950) as well as WHARTON, CRIMINAL EVIDENCE and C.J.S.

In *State v. Goldstein*, 187 La. 353, 174 So. 873 (1937), the books of the defendant, a second-hand dealer being prosecuted for receiving stolen goods, were held inadmissible when identified at the trial only by his wife, because (1) the bookkeeper was not shown to be unavailable, (2) the witness was not familiar with the bookkeeping procedure, and (3) the entries were not shown to have been made contemporaneously with the transactions and from first-hand knowledge.

23. "Merchants' books do not prove against persons who are not in trade, the sale and delivery of the articles there entered." This article was taken from Article 1329 of the Code Napoleon.

chant's books may not be used to prove sale and delivery of goods against one not a merchant. An 1824 case used Spanish law to extend this rule by holding that a merchant's books are inadmissible even against another merchant.²⁴ Article 2244 of the Code of 1825 combined this extended rule with the rule of Article 231 of the 1808 Code²⁵ that a merchant's books can be offered in evidence against him if taken as a whole. Article 2244 of the 1825 Code is now Article 2248 of the Revised Civil Code of 1870 and reads as follows:

"The books of merchants can not be given in evidence in their favor; they are good evidence against them, but if used as evidence, the whole must be taken together."

This article has been held inapplicable where the books offered belong to a third party²⁶ or where the books are not considered those of a merchant. Early jurisprudence also established several limitations or exceptions,²⁷ but the article was used many

24. *Syndics of T. Johnston v. Breedlove*, 3 Mart. (N.S.) 508 (La. 1824).

25. "Merchants' books are good evidence against the merchants themselves, but whoever wishes to avail himself of that evidence, must admit the books to prove what they contain contrary to his pretensions." This article was taken from Article 1330 of the Code Napoleon.

26. Inventories taken by several persons not parties to the suit were held admissible in *Istrouma Mercantile Co. v. Northern Assur. Co. Ltd. of London*, 183 La. 855, 165 So. 11 (1935), where the inventories were corroborated by each other and by testimony. Books of a grocer not a party to the suit were held admissible in *Sturgis v. Imperial Hotel*, 144 So. 268 (La. App. 1932). One may use an insolvent's books to prove himself a creditor in a suit against other creditors. *Hernandez v. His Creditors*, 15 La. Ann. 87 (1860). A certificate of demand on a note signed by a notary was properly admitted under the general rule that books of a deceased clerk are admissible. *Lathrop v. Lawson*, 5 La. Ann. 238 (1850) (cited common law authorities).

Where an employee keeps the books, the books are considered to be the books of the employer and not the employee. Thus a bookkeeper may offer his employer's books against the employer's interest even though the books were kept by the bookkeeper. *Didier v. Augé*, 15 La. Ann. 398 (1860). A passbook kept with a merchant belongs to the customer who retains possession even though entries are made by the merchant. *Succession of McLaughlin*, 14 La. Ann. 398 (1859). Books belong to the defendant-employer though kept by the plaintiff's son. *Rayne v. David Taylor & Co.*, 12 La. Ann. 765 (1857).

Business records kept by a predecessor in business were held admissible in *Willard Storage Battery Co. v. Caddo Transfer & Warehouse Co.*, 160 La. 909, 107 So. 618 (1926).

27. A party may use his books to refresh his memory on the witness stand, though the books themselves are inadmissible. *Flower v. Downs*, 6 La. Ann. 538 (1851); *Kendall v. Bean*, 12 Rob. 407 (La. 1846); *Morgan v. Bickle*, 2 Mart. (N.S.) 377 (La. 1824).

Partnership books are admissible against a partner because of the mutual agent theory. *John Calder & Co. v. Their Creditors*, 47 La. Ann. 346 (1895); *Carpenter v. Camp*, 39 La. Ann. 1024 (1887); *Pratt v. McHatton*, 11 La. Ann. 260 (1856) (the rule that partnership books are admissible for and against partners applies only to entries made during the existence of the partnership); *Armistead v. Spring*, 1 Rob. 568 (La. 1842); *Jordan v. White*, 4 Mart. (N.S.) 335 (La. 1826). In *Succession of Magi*, 107 La. 208, 31 So. 660 (1901), the court ad-

times in the 1800's to exclude a merchant's books offered in his favor.²⁸

Louisiana courts apparently early recognized the harshness of the rule,²⁹ for no case of the present century has been found which applies the first part of Article 2248 by excluding a merchant's books offered in his favor. However, the latter portion of Article 2248 stating that a merchant's records are admissible against his interest seems still acceptable to the courts.³⁰ In every case in the 1900's holding a party's business records admissible in his favor, Article 2248 has been ignored or dismissed as inapplicable, for reasons which appear to be logically inadequate.³¹ A 1942 decision excluding business records was based

mitted books of a business run by the executor against one of the heirs under the partnership rule.

A corporation's books are admissible to prove facts about ownership because this is vital to its existence. *Hincks v. Converse*, 38 La. Ann. 871 (1886).

28. *Brown v. Pike*, 34 La. Ann. 576 (1882); *Lyons v. Teal*, 28 La. Ann. 592 (1876); *Conery v. Hayes*, 19 La. Ann. 325 (1867); *Byrne, Vance & Co. v. Grayson*, 15 La. Ann. 457 (1860); *Porche v. LeBlanc*, 12 La. Ann. 778 (1857); *Kendall v. Bean*, 12 Rob. 407 (La. 1846).

29. See *Herring v. Levy*, 4 Mart.(N.S.) 383 (La. 1826), where a party's books were held admissible in his favor because they were kept by a clerk who had died before the trial. See also two early Louisiana cases using common law regular entries rationale instead of Article 2244 as a basis for excluding books: *White v. Wilkinson*, 12 La. Ann. 359 (1857) (a party's books were held inadmissible because the entries were not made from actual knowledge of the entrant); *Herring v. Levy*, 4 Mart.(N.S.) 383 (La. 1826) (extracts from books introduced in a party's favor were held inadmissible). The court in the latter case referred to the common law practice of admitting books kept by a clerk deceased before the trial and stated that such should be the rule in Louisiana, but that the rule should not be extended to extracts from books.

30. See *Jennings v. Prejean*, 216 La. 645, 44 So.2d 325 (1950); *Hill v. Hill*, 115 La. 490, 39 So. 503 (1905); *Consolidated Companies v. Spinella*, 181 So. 42 (La. App. 1938). For older Louisiana cases admitting business records against one's interest, see *New Orleans Canal & Banking Co. v. Leeds & Co.*, 49 La. Ann. 123, 21 So. 168 (1896); *Southern Mutual Ins. Co. v. Pike*, 32 La. Ann. 483 (1880); *Spears v. Spears*, 27 La. Ann. 537 (1875); *Didier v. Augé*, 15 La. Ann. 398 (1860); *Parker v. Jonte*, 15 La. Ann. 290 (1860); *Hernandez v. His Creditors*, 15 La. Ann. 87 (1860); *Succession of McLaughlin*, 14 La. Ann. 398 (1859); *Rayne v. Taylor & Co.*, 12 La. Ann. 765 (1857); *Donaldson v. Walker*, 7 Rob. 329 (La. 1844); *Marmiche v. Commagere*, 6 Mart.(N.S.) 657 (La. 1828).

This same result is obtained at common law by exceptions to the hearsay rule not peculiar to business records—declarations against interest and admissions of a party—therefore, further discussion of this facet of Article 2248 is outside the scope of this Comment.

31. In *Crosby v. Little River Sand & Gravel Development*, 212 La. 1, 31 So.2d 226 (1947), records concerning a large construction project were held admissible. The court satisfied itself that the records were reliable and made the following remark: "This court in recent years has greatly relaxed the stringent rule of Article 2248, and under modern business methods to apply the rule would in many instances work grave injustices." *Id.* at 12, 31 So.2d at 229.

In *Willard Storage Battery Co. v. Caddo Transfer & Warehouse Co.*, 160 La. 909, 107 So. 618 (1926), carbon copies of warehouse receipts were held admissible as proof of issuance of the originals. The court stated that Article 2248 of the Civil Code was inapplicable to facsimiles kept by warehousemen, without elaborating further on the point.

In *Shea v. Sewerage & Water Board of New Orleans*, 124 La. 299, 50 So. 166

upon other reasoning,³² although the same result could have been obtained by applying Article 2248. It is submitted that the rule in Article 2248, that a merchant's books are inadmissible in his favor, has little, if any force in Louisiana today.

Louisiana Civil Cases — Modern Jurisprudence

Louisiana courts, in deciding questions of admissibility of business records, have generally applied the reasoning of the common law entries exception and shop book rule. However, these rules have not been endorsed as a whole. It may prove helpful to analyze the Louisiana cases in light of the *elements* of the regular entries exception and shop book rule.

Necessity. To satisfy the necessity requirement of the common law regular entries exception it must be shown that the entrant is unavailable for testimony.³³ Louisiana cases support this requirement.³⁴ In many common law jurisdictions the neces-

(1909), the court held records of a large construction project admissible. Article 2248 was dismissed with the following statement: "Of course, the rule is that a litigant's books are not admissible in evidence in his favor; but that rule is not without its exceptions . . . [After citing several common law sources, the court continued] All these reports, etc., were made at a time unsuspecting, and for the purpose of keeping a true and correct record. We think that, under the peculiar circumstances of this case, and in view of the practical impossibility of trying the case in any other way, the court can accept the said exhibits as correct." *Id.* at 332, 50 So. at 177.

In *Cascio v. Standard Oil Co. of New Jersey*, 32 So.2d 66 (La. App. 1947), the court held admissible a medical report by a company doctor who died before the trial, citing *American Jurisprudence* as authority. Also mentioned was the rule that in workmen's compensation cases the judge shall not be bound by technical rules of evidence. La. Acts 1926, No. 85. The rule of Article 2248 was not mentioned.

In *Royal Products v. Johnson*, 191 So. 329 (La. App. 1939), the court held the books admissible because the bookkeeper was insane. However, the records were considered of insufficient weight to overcome denials of indebtedness by the opposing party because the transaction could have been verified by other means. The court stated: "The stringent provisions of Article 2248 of the Civil Code have been relaxed in numerous cases and particularly in matters where the party who made the book entries was either dead or incapable of giving testimony." *Id.* at 330.

32. *Britton v. Holloman Lumber Co.*, 7 So.2d 202 (La. App. 1942). The court held a party's books inadmissible in his favor because they were incomplete and not properly kept. Article 2248 was not mentioned.

33. See 5 WIGMORE, EVIDENCE 204, 366-69, §§ 1421, 1521 (3d ed. 1940). All persons concerned with recording a transaction must be shown to be unavailable for testimony for some good reason such as death, insanity, illness, or absence from the jurisdiction.

34. Several Louisiana cases have excluded business records because the entrant was available for testimony: *Builliard v. New Orleans Terminal Co.*, 185 La. 924, 171 So. 78 (1936) (records of drawbridge tenders were held inadmissible because the entrants testified at the trial; therefore their testimony was available); *Receivership of Dugdamaonia Shingle & Lumber Co.*, 118 La. 242, 42 So. 789 (1907) (books of a receivership were held inadmissible in favor of the receiver because the bookkeeper should have testified); *Daniels v. Union Oil Mills*,

sity requirement may be satisfied by showing *mercantile inconvenience* — where the burden upon modern business organizations of producing all the employees concerned with recording a transaction would outweigh the value of such testimony.³⁵ This principle seems to have been recognized in a Louisiana case admitting in evidence records of a large construction project.³⁶ In the Uniform Rules of Evidence,³⁷ and the Model Code of Evidence,³⁸ the necessity requirement has been abandoned completely.

Contemporaneity of the entry with the transaction. Louisiana courts have recognized the fact that reliability is enhanced if entries are made at or near the time of the transaction.³⁹ The regular entries exception and the shop book rule require that the entry and the fact recorded be sufficiently connected in time to suggest reliability.⁴⁰ In addition, the entry must have been made from personal knowledge or from information furnished by one having a business duty to observe and report the facts recorded.⁴¹

Business duty. A Louisiana workmen's compensation case

Inc., 161 So. 614 (La. App. 1935) (coroner's report was held inadmissible where coroner could have been produced at the trial).

However, Louisiana courts have admitted business records where the entrant was unavailable. In *Cascio v. Standard Oil Co. of New Jersey*, 32 So.2d 66 (La. App. 1947), a medical report by a company physician who died before the trial was held admissible in evidence in a workmen's compensation suit where the physician's signature was identified by another company doctor. In *Royal Products, Inc. v. Johnson*, 191 So. 329 (La. App. 1939), books were held admissible where the bookkeeper was insane at the time of the trial. However, they were given very little weight because the transaction could have been verified by other means.

35. See McCORMICK, EVIDENCE 606, § 288 (1954); 5 WIGMORE, EVIDENCE 368, § 1521 (3d ed. 1940).

36. *Crosby v. Little River Sand & Gravel Development*, 212 La. 1, 31 So.2d 226 (1947). The court admitted job sheets which were daily summaries of job cards. The job cards were made by laborers punching time clocks and many other persons. The job cards were destroyed in the regular course of business without fraud; therefore the company had no other means of proof than the job sheets or testimony of many different workers. The bookkeeper testified at the trial as to the bookkeeping procedure, but could not testify from first-hand knowledge concerning the facts recorded.

37. UNIFORM RULES OF EVIDENCE 63(13).

38. MODEL CODE OF EVIDENCE rule 514 (1942).

39. In *Crosby v. Little River Sand & Gravel Development*, 212 La. 1, 31 So.2d 226 (1947), the court held admissible records of a large construction project and emphasized the fact that the records were made daily from supporting memoranda made by the individual workers. See notes 31 and 36 *supra*. In *Shea v. Sewerage & Water Board of New Orleans*, 124 La. 299, 50 So. 166 (1909), the court held admissible records concerning a large construction project and mentioned that the records were made at an "unsuspicious" time. See note 31 *supra*.

40. See McCORMICK, EVIDENCE 601, § 285 (1954); 5 WIGMORE, EVIDENCE 375, 405, §§ 1526, 1550 (3d ed. 1940).

41. See McCORMICK, EVIDENCE 602-03, § 286 (1954); 5 WIGMORE, EVIDENCE 376-91, 408-10, §§ 1530, 1555 (3d ed. 1940).

mentioned the presence of a professional duty to record and report as a basis for admitting a medical report.⁴² A business duty to a third person to do the act and record it is not required in jurisdictions within the United States, as it is in England, but its presence is recognized as tending to increase circumstantial probability of trustworthiness.⁴³

Regular course of business. The requirement that the records be kept in the regular course of business is perhaps the most difficult element to define. The scope of the term "business" has been expanded by some common law courts in recent years to cover records of non-profit institutions, as well as records kept in the regular course of a profession, though many still adhere to a narrower definition.⁴⁴ From Louisiana cases admitting hospital records,⁴⁵ it might be inferred that Louisiana courts would accept a broad definition today, though older cases have excluded hospital records.⁴⁶ The "regularity" element of the regular entries exception defies useful definition, except to say that casual, isolated entries are excluded.⁴⁷ No reported Louisiana cases have held records inadmissible because they were not in the regular course of business. The following records, have been held admissible, but the regular course of business element was not mentioned: hospital records,⁴⁸ daily summaries of records of large construction projects,⁴⁹ and carbon copies of warehouse receipts.⁵⁰

42. *Cascio v. Standard Oil Co. of New Jersey*, 32 So.2d 66, 68 (La. App. 1947). In holding admissible the medical report by a company physician, the court said: "This report was made by the deceased doctor in the discharge of his professional duties and was admissible in evidence."

43. See McCORMICK, EVIDENCE 598-99, § 283 (1954); 5 WIGMORE, EVIDENCE 372-73, § 1524 (3d ed. 1940).

44. See note 43 *supra*.

45. *Succession of Holland*, 236 La. 8, 106 So.2d 697 (1958). The court used hospital records to determine whether treatment had caused the decedent to become legally incapable of making a will. In *Shepard v. Whitney National Bank*, 177 So. 825 (La. App. 1938), the court admitted the history portion of a hospital record as proof of the statements made therein. LA. R.S. 13:3714 (1950), applying to charity hospital records, was mentioned, but the decision was not based upon this statute because the records in this case were not state charity hospital records.

46. *Gaines v. Acme Industrial Life Ins. Soc.*, 155 So. 276 (La. App. 1934); *Williams v. Locicero*, 142 So. 856 (La. App. 1932); *Dolan v. Metropolitan Life Ins.*, 123 So. 379 (La. App. 1929).

47. McCORMICK, EVIDENCE 603-05, § 287 (1954); 5 WIGMORE, EVIDENCE 373-75, § 1525 (3d ed. 1940).

48. *Succession of Holland*, 236 La. 8, 106 So.2d 697 (1958); *Shepard v. Whitney National Bank*, 177 So. 825 (La. App. 1938). See note 45 *supra*.

49. *Crosby v. Little River Sand & Gravel Development*, 212 La. 1, 31 So.2d 226 (1947); *Shea v. Sewerage & Water Board of New Orleans*, 124 La. 299, 50 So. 166 (1909). See notes 31, 36, and 39 *supra*.

50. *Willard Storage Battery Co. v. Caddo Transfer & Warehouse Co.*, 160 La.

Honest appearance of books and motive to misrepresent. A Louisiana court, in a suit for wages due, excluded books of a party who had a reputation for not paying workers promptly because the books were incomplete and were inadequately kept.⁵¹ A case holding records admissible mentioned that the records themselves and the circumstances under which they were made were "unsuspicious."⁵² Similar requirements under the shop book rule and the regular entries exception are that the books must bear an honest appearance,⁵³ and that the existence of a strong, fairly positive counter motive to misrepresent will be reason for exclusion.⁵⁴

Production of original records. Copies may be used only if the original cannot be produced as determined by the ordinary rules relating to written evidence.⁵⁵ Thus an early Louisiana case held extracts from business records inadmissible.⁵⁶ However, carbon copies of warehouse receipts have been held admissible as proof of issuance of the originals.⁵⁷

The question under the regular entries exception as to which books or records in a bookkeeping system should be introduced is governed by the rule that the first regular and collected record is proper.⁵⁸ Thus a journal or book of original entry may be introduced without having to account for any scattered supporting memoranda. Two Louisiana cases hold admissible summaries of daily records of large construction projects where it would be physically impossible for the court to examine all supporting memoranda,⁵⁹ or where the supporting memoranda were destroyed in the regular course of business and without fraud.⁶⁰

Identification of records at the trial. No technical requirements as to who should identify the records at the trial have been developed at common law, but the elaborate foundation

909, 107 So. 618 (1926). See note 31 *supra*.

51. Britton v. Holloman Lumber Co., 7 So.2d 202 (La. App. 1942). See note 32 *supra*.

52. Shea v. Sewerage & Water Board, 124 La. 299, 50 So. 166 (1909). See notes 31 and 39 *supra*.

53. See 5 WIGMORE, EVIDENCE 405-06, § 1551 (3d ed. 1940).

54. See *id.* at 375, § 1527.

55. See *id.* at 393, 414, §§ 1532, 1558.

56. Herring v. Levy, 4 Mart. (N.S.) 383 (La. 1826). See note 29 *supra*.

57. Willard Storage Battery Co. v. Caddo Transfer & Warehouse Co., 160 La. 909, 107 So. 618 (1926). See note 31 *supra*.

58. See 5 WIGMORE, EVIDENCE 412-14, § 1558 (3d ed. 1940).

59. Shea v. Sewerage & Water Board of New Orleans, 124 La. 299, 50 So. 166 (1909). See notes 31 and 39 *supra*.

60. Crosby v. Little River Sand & Gravel Development, 212 La. 1, 31 So.2d 226 (1947). See notes 31, 36, and 39 *supra*.

necessary for admission under the regular entries exception requires explanation by one familiar with the record-keeping procedure. The Uniform Rules of Evidence provision requires explanation of the entries and the circumstances surrounding their making by the custodian or other qualified witness.⁶¹ Business records admitted in Louisiana cases have been identified and explained by the chief bookkeeper of a large organization,⁶² and by the records custodian.⁶³

Records of a third party. Properly applied, the common law regular entries exception treats records of third parties no differently from other records.⁶⁴ Louisiana cases have admitted records of third parties without mentioning any restrictions.⁶⁵ These Louisiana decisions do not openly declare a special category for books of third parties nor do they elaborate on this point. The most that can be said is perhaps that Louisiana courts will be more liberal in admitting in evidence records of third parties.

Conclusion

The modern Louisiana cases can be summarized as follows. Records of industrial and commercial organizations, as well as medical reports and hospital records are admissible as proof of their assertions if: (1) persons concerned with recording the information are unavailable for testimony, or production of such persons would be a needless burden; (2) the first collected record available to or usable by the court is introduced;

61. UNIFORM RULES OF EVIDENCE rule 63(13).

62. *Crosby v. Little River Sand & Gravel Development*, 212 La. 1, 31 So.2d 226 (1947). See notes 31, 36, and 39 *supra*.

63. *Willard Storage Battery Co. v. Caddo Transfer & Warehouse Co.*, 160 La. 909, 107 So. 618 (1926). See note 31 *supra*.

64. See 5 WIGMORE, EVIDENCE 349, §1518 (3d ed. 1940): "It was understood to cover all entries made 'by a person, since deceased, in the ordinary course of his business', whether a person wholly unconnected with the parties, or the clerk of a party, or the party himself; and it is this general exception that to-day is universally recognized."

65. *Willard Storage Battery Co. v. Caddo Transfer & Warehouse Co.*, 160 La. 909, 107 So. 618 (1926) (facsimiles of warehouse receipts held admissible as proof of issuance of the originals); *Hernandez v. His Creditors*, 15 La. Ann. 87 (1860) (one may use an insolvent's books to prove himself a creditor); *Oxnard v. Locke*, 13 La. 447 (1839) (auctioneer's books were held admissible where the auctioneer died before the trial); *Travelers Ins. Co. v. Quin*, 92 So.2d 303 (La. App. 1957); *Brackvitch v. Checker Cab Co.*, 79 So.2d 920 (La. App. 1955); *Alpaugh v. Krajcer*, 57 So.2d 700 (La. App. 1952) (records of repairmen held admissible in support of plaintiff's testimony); *Sturgis v. Imperial Hotel*, 144 So. 268 (La. App. 1932) (books of grocer not a party to the suit held admissible to corroborate plaintiff's testimony). In none of the above cases were any tests for reliability or necessity mentioned.

(3) the records are identified at the trial by one familiar with the bookkeeping procedure; and (4) the evidence seems reliable after considering such factors as (a) contemporaneousness of the entry with the occurrence or fact recorded, (b) first-hand knowledge of the entrant, (c) existence of a business or professional duty to record or report the facts in the regular course of business, (d) completeness and honest appearance of the books, (e) absence of fraud in making the entries or in destroying the supporting memoranda, and (f) perhaps, whether the books belong to a third party. Also, a merchant's books are admissible in evidence against him. The above is a summary rather than a rule because the cases have been decided in apparent isolation from each other and the opinions have not attempted to define a comprehensive standard for admissibility of business records. Individual elements of the regular entries exception and shop book rule have been used as bases for individual decisions, yet neither of these common law rules has been endorsed substantially and openly by the courts. Also, a literal interpretation of the Code of Criminal Procedure or of Article 2248 of the Civil Code would limit the above summary by making it inapplicable in criminal cases or to books of merchants. Therefore, it can be said that uncertainty reigns in this area by the law.

The lack of a certain body of principles and rules to determine admissibility of business records in Louisiana in both criminal and civil cases points up the need for legislation in this area. Modern patterns for such legislation exist within the United States. Widespread criticism of the regular entries exception as being harsh and unrealistic under modern business conditions⁶⁶ has led to several reform proposals which have enjoyed fairly widespread acceptance.⁶⁷ All these proposals elimi-

66. E.g., McCORMICK, EVIDENCE 606-09, § 289 (1954); 5 WIGMORE, EVIDENCE 361-66, § 1520 (3d ed. 1940); Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 121 (1921).

67. In 1927 a model act was published by the Commonwealth Fund of New York which later served as a starting point for the *Uniform Business Records as Evidence Act*, published in 1936 by the National Conference of Commissioners on Uniform State Laws. The Uniform Act reads as follows (Sections 3, 4, and 5 dealing with uniformity of interpretation, short title, and repeal are omitted):

"Section 1. Definition.—The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

"Sec. 2. Business Records.—A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or

nate the requirements of showing unavailability of the persons concerned with recording the transaction⁶⁸ and allow the trial

event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Rule 514 of the *Model Code of Evidence* published in 1942 by the American Law Institute is very similar and reads as follows:

"Rule 514, Business Entries and the Like

"(1) A writing offered as a memorandum or record of an act, event or condition is admissible as tending to prove the occurrence of the act or event or the existence of the condition if the judge finds that it was made in the regular course of a business and that it was the regular course of that business for one with personal knowledge of such an act, event or condition to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record, and for the memorandum or record to be made at or about the time of the act, event or condition or within a reasonable time thereafter.

"(2) Evidence of the absence of a memorandum or record of an asserted act, event or condition from the memoranda or records of a business is admissible as tending to prove the non-occurrence of the act or event or the non-existence of the condition in that business, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events, or conditions at the time thereof or within a reasonable time thereafter, and to preserve them.

"(3) The word business as used in Paragraphs (1) and (2) includes every kind of occupation and regular organized activity, whether conducted for profit or not."

See also UNIFORM RULES OF EVIDENCE 63(13), 63(14).

An interesting mixture of the language of the Uniform Act and the Model Code, supplemented by clarification of ambiguities revealed by cases interpreting modern legislation, was adopted by Texas in 1951. This statute is discussed in McCORMICK, EVIDENCE 608-09, § 289 (1954); and Ray, *Business Records — A Proposed Rule of Admissibility*, 5 Sw. L.J. 33 (1951). The Texas statute reads as follows:

TEX. REV. CIV. STAT. art. 3737e (Supp. 1951): "Section 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:

"a. It was made in the regular course of business;

"b. It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;

"c. It was made at or near the time of the act, event or condition or reasonably soon thereafter.

"Section 2. The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record but shall not affect its admissibility.

"Section 3. Evidence to the effect that the records of a business do not contain any memorandum or record of an alleged act, event or condition shall be competent to prove the non-occurrence of the act or event or the non-existence of the condition in that business if the judge finds that it was the regular course of that business to make such memoranda or records of all such acts, events or conditions at the time or within reasonable time thereafter and to preserve them.

"Section 4. 'Business' as used in this Act includes any and every kind of regular organized activity whether conducted for profit or not. (Acts 1951, 52nd Leg., p. 345, ch. 321.)"

68. *Ettelson v. Metropolitan Life Ins. Co.*, 164 F.2d 660, 667 (3d Cir. 1947); *Hofman v. Palmer*, 129 F.2d 976, 985 (2d Cir. 1942), aff'd, 318 U.S. 109 (1943). See 2 JONES, EVIDENCE 558, § 294 (5th ed. 1958); Green, *The Model and Uni-*

judge wide discretion in determining whether the records are sufficiently reliable to be admitted. Business is defined broadly enough to include commercial, industrial, professional, and non-profit activities. It is submitted that Louisiana should consider future legislation in order to provide a guide for admitting business records, thereby eliminating much of the uncertainty in this area of Louisiana law.

Robert A. Hawthorne, Jr.

Real Rights in Louisiana

It is the purpose of this Comment to examine the nature of the real right in Louisiana in the light of the Civil Code, the Louisiana jurisprudence, and French and common law materials.

The real right in France is apparently seen as a right held by one person against all other persons in the world,¹ with the object of the right being the thing upon which it is exercised. As a correlative to the right, all persons owe an obligation to abstain from disturbing the holder of the right in his enjoyment of it. An example is the right of ownership. The owner of property has a right against all men that they should abstain from disturbing him in the exercise of his ownership. This right can be asserted against all the world, and thus the owner can be said to have rights of pursuit of the property into the hands of adverse possessors, and preference over any ordinary creditor of the possessor. Under French law, then, the rights of pursuit and preference are the two major advantages that the holder of any real right has over the holder of a mere personal right or right of credit.²

The real right in Louisiana as explained in the Civil Code is not quite so comprehensive, however. Though the Code does not deal specifically with real rights, it is clear that the real right is a necessary correlative of the real obligation, which is defined as any obligation attached to immovable property.³ The characteristics of a real obligation, and consequently of a real right,

form Statutes Relating to Business Entries as Evidence, 31 TUL. L. REV. 49, 54 (1956).

1. I PLANIOL, CIVIL LAW TREATISE (A TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 2160 (1959).

2. *Id.* § 2165.

3. LA. CIVIL CODE art. 2010 (1870).