examiner to specialize in medical determinations; evidence would assume an authoritative and useful character. Only by revising its antiquated coroner system and by channeling the medical and legal responsibilities to men technically trained to perform those functions can Indiana adequately meet the public needs.

THE NEED FOR A LIBERAL BUSINESS ENTRY STATUTE IN INDIANA

The adversary system of law is premised on the general theory that facts should be proved by a witness produced in court and subject to cross-examination. Because of a corresponding interest in obtaining all the facts necessary for proper adjudication of the dispute by the court or jury, deviations from this principle are being made when the trustworthiness of an offered item is substantially above reproach. The restrictiveness of common law rules of evidence has, in many jusidictions,[1] engendered the passage of legislation permitting records, relied upon daily by businessmen in the conduct of their affairs,[2] to be admitted and evaluated by courts and juries. Indiana has not yet enacted such a statute,[3] and reliable records of this type are subject to exclusion as evidence by the rules of hearsay[4] and *res gestae*[5] as applied by its courts. The present

1. CAL. CODE CIV. PROC. ANN. (EVID.) §§ 1953e-53h (1946); DEL. CODE ANN. § 4310 (1953); FLA. STAT. § 92.36 (1953); GA. CODE ANN. § 38-711 (1954); MINN. STAT. ANN. §§ 600.01-.04 (West 1947); MONT. REV. CODES ANN. §§ 93-801-1 to -01-4 (1947); NEB. REV. STAT. § 25-12, 108-11 (Supp. 1953); N.J. STAT. ANN. §§ 2A:82-34 to -37 (1952); N.D. REV. CODE § 31-0801 (1943); OHIO REV. CODE ANN. § 2317.40 (1954); ORE. REV. STAT. §§ 41.680-.710 (1953); PA. STAT. ANN. tit. 28, §§ 91a-91d (Supp. 1954); TEX. STAT., art. 3737e (Supp. 1952); WASH. REV. CODE §§ 5.44.100-.120 (1951); WYO. COMP. STAT. ANN. §§ 3-3122-25 (1945). See MORGAN *et al.*, THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM 52-53 (1927).

2. MORGAN *et al.*, *op. cit. supra* note 1, at 51; Comment, 2 HASTINGS L.J. 40, 43 (1951). See notes 53-55 *infra* and accompanying text.

3. Two attempts to enact the UNIFORM BUSINESS RECORDS AS EVIDENCE ACT in Indiana have failed, the bills having died in Senate committees. IND. S. JOUR. 552, 572, 783 (1937); IND. S. JOUR. 551, 570 (1943). See note 46 *infra* for the pertinent provisions of this act. Indiana has adopted legislation permitting reproduced business records to be admitted in evidence as original records. IND. ANN. STAT. §§ 2-1649-51 (Burns Supp. 1955).

4. Bank of Poneto v. Kimmel, 91 Ind. App. 325, 168 N.E. 604 (1929); Over v. Dehne, 38 Ind. App. 427, 75 N.E. 664 (1906); Dodge v. Morrow, 14 Ind. App. 534, 43 N.E. 153 (1895); The First Nat'l Bank of Porter County v. Williams, 4 Ind. App. 501, 31 N.E. 370 (1891).

5. Hitt v. Carr, 201 Ind. 17, 162 N.E. 409 (1928); Pittsburg, Cincinnati & St. Louis R.R. Co. v. Noel, 77 Ind. 110 (1881); Equitable Life Assurance Society v. Campbell, 85 Ind. App. 450, 150 N.E. 31, 151 N.E. 682 (1926); Marks v. Box, 54 Ind. App. 487, 103 N.E. 27 (1913).

limitations upon admissibility, more liberal than at common law,[6] and the modern statutory reform present the question of the feasibility of adopting business entry legislation in this state.

Significantly, the common law of most states admits business records in evidence more often as an exception to the hearsay rule than as part of the *res gestae*.[7] The latter doctrine, however, based primarily on Professor Greenleaf's treatise,[8] is found in many Indiana decisions[9] and those of other states.[10] Justification for the *res gestae* rule of exclusion is that only business records which are contemporaneous verbal acts belonging to, and explaining, the main fact in issue are trustworthy enough to be weighed as evidence.[11]

To be admissible as *res gestae* business records must meet certain specific requirements: The entrant must make the entries within a rea-

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6. See note 29 *infra* and accompanying text for a discussion of the liberal features of the Indiana law.

7. See 32 C.J.S., *Evidence* § 683 (1942). The admissibility of business records in evidence as an exception to the hearsay rule is discussed at length in 5 WIGMORE, EVIDENCE §§ 1517-61 (3d ed. 1940).

8. 1 GREENLEAF, EVIDENCE §§ 115-20 (6th ed. 1899). Greenleaf considers *res gestae* as original evidence and distinguishes between it and hearsay. He argues that writings by a third person, not under oath, are not hearsay where the statements are the inseparable concomitant of the principal fact in controversy. "In such cases it is obvious that the writings . . . are not within the meaning of hearsay, but are original . . . facts, admissible in proof of the issue." *Id.* at § 100. Professor Thayer has criticized this view that declarations that are part of the *res gestae* are admitted in evidence as not being within the scope of the hearsay rule. He states that Greenleaf has given "a vague reach and diffusion" to the *res gestae* doctrine and "his views, in some respects very ill-considered, have slipped unquestioned into the opinions of some American courts." THAYER, LEGAL ESSAYS 262-63 (1908). Thayer contends that the *res gestate* rule, in any sense that it belongs to the law of evidence, should be considered as an exception to the hearsay rule. *Id.* at 266. A more recent authority states that the term, *res gestae*, is a substitute for reasoning and produces confusion of thought. He suggests a proper classification of statements admissible now as *res gestae* and advocates the termination of the use of this phraseology by the courts. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 232-39 (1922).

9. See Hitt v. Carr, 201 Ind. 17, 162 N.E. 409 (1928); Place v. Baugher, 159 Ind. 232, 64 N.E. 852 (1902); Fleming v. Yost, 137 Ind. 95, 36 N.E. 705 (1893); Davis Construction Co. v. Granite Sand and Gravel Co., 90 Ind. App. 379, 163 N.E. 240 (1929); Catherwood v. Ford, 86 Ind. App. 228, 156 N.E. 567 (1927); J. P. Smith Shoe Co. v. Curme-Feltmen Shoe Co., 71 Ind. App. 401, 118 N.E. 360 (1919); Marks v. Box, 54 Ind. App. 487, 103 N.E. 27 (1913); Indianapolis Outfitting Co. v. Cheyne Electric Co., 52 Ind. App. 153, 100 N.E. 468 (1913).

10. See Roche v. Roche, 286 Ill. 336, 121 N.E. 621 (1918); Hansen v. Kaperonis, 243 Iowa 1257, 55 N.W.2d 284 (1952); Carozza v. Williams, 190 Md. 143, 57 A.2d 782 (1948); Anchor Milling Co. v. Walsh, 108 Mo. 277, 18 S.W. 904 (1891); Linden v. Thieriot, 96 App. Div. 256, 89 N.Y. Supp. 273 (1904); Osterling v. Allegheny Trust Co., 260 Pa. 64, 103 Atl. 528 (1918).

11. 1 GREENLEAF, EVIDENCE §§ 100, 115, 120 (16th ed. 1899); Fleming v. Yost, 137 Ind. 95, 97, 36 N.E. 705, 706 (1893); Marks v. Box, 54 Ind. App. 487, 501, 103 N.E. 27, 33 (1913); Hunter v. State, 40 N.J.L. 495, 537 (1878).

sonable time after the transaction,[12] in the regular course of his business duty,[13] have personal knowledge of the facts,[14] and have no motive to enter the transaction falsely.[15] The Indiana decisions express the additional necessity that the records be original.[16] The non-availability of the recorders as witnesses is not a prerequisite for admissibility; however, if available, the proponent must produce them as well as the records.[17]

The exception made to the hearsay rule for business entries[18] has had two distinct developments in this country, one admitting records made by a party,[19] and the other, the regular entries exception, admitting those made by third persons.[20] Statutes removing the incompetency of parties in civil suits eliminated any need for this distinction,[21] and it is no longer of any significance in this state.[22] The usual justification for the regular entries exception to the hearsay rule is that the trustworthiness of entries made in the regular course of business and the necessity to resort to records as proof when the participants are not available as

12. 1 GREENLEAF, EVIDENCE § 115 (16th ed. 1899); House v. Beak, 141 Ill. 290, 296, 30 N.E. 1065, 1067 (1892); Hitt v. Carr, 201 Ind. 17, 29, 162 N.E. 409, 413 (1928); State *ex rel.* Romona Oolitic Stone Co. v. Central States Bridge Co., 49 Ind. App. 544, 549, 97 N.E. 803, 805 (1912).

13. See note 12 *supra.*

14. 1 GREENLEAF, EVIDENCE § 115 (16th ed. 1899); Equitable Life Assurance Society v. Campbell, 85 Ind. App. 450, 464, 150 N.E. 31, 36, 151 N.E. 682 (1926); Marks v. Box, 54 Ind. App. 487, 502, 103 N.E. 27, 33 (1913). See Osterling v. Allegheny Trust Co., 260 Pa. 64, 103 Atl. 528 (1918).

15. 1 GREENLEAF, EVIDENCE § 115 (16th ed. 1899). The Indiana decisions do not stress this requirement.

16. Equitable Life Assurance Society v. Campbell, 85 Ind. App. 450, 464, 150 N.E. 31, 36, 151 N.E. 682 (1926); State *ex rel.* Romona Oolitic Stone Co. v. Central States Bridge Co., 49 Ind. App. 544, 549, 97 N.E. 803, 805 (1912).

17. 1 GREENLEAF, EVIDENCE §§ 115, 120 (16th ed. 1899); Fleming v. Yost, 137 Ind. 95, 98, 36 N.E. 705, 706 (1893); Marks v. Box, 54 Ind. App. 487, 501, 103 N.E. 27, 32 (1913). See Hansen v. Kaperonis, 243 Iowa 1257, 55 N.W.2d 284 (1952).

18. See 5 WIGMORE, EVIDENCE §§ 1521-32 (3d ed. 1940); MORGAN *et al., op. cit. supra* note 1, at 51-53.

19. 5 WIGMORE, EVIDENCE § 1517 (3d ed. 1940). This was known as the shopbook rule and its basic requirements were: the party kept no clerk; the entry was not a cash transaction; the party had a good reputation for honest and correct dealing; the records had an honest appearance; and that some of the articles charged were delivered or some of the services charged were performed. Ray, *Business Records—A Proposed Rule of Admissibility,* 5 SW. L.J. 33, 34 (1951). See 5 WIGMORE, EVIDENCE §§ 1536-58 (3d ed. 1940); 2 MORGAN, BASIC PROBLEMS OF EVIDENCE 265-66 (1954). For an extensive discussion of the shopbook rule and its development in this country, see Radtke v. Taylor, 105 Ore. 559, 210 Pac. 863 (1922).

20. 5 WIGMORE, EVIDENCE § 1517 (3d ed. 1940); Norville, *The Uniform Business Records As Evidence Act,* 27 ORE. L. REV. 188, 189 (1948).

21. 5 WIGMORE, EVIDENCE §§ 1559-60 (3d ed. 1940); MCCORMICK, EVIDENCE § 282 (1954); Ray, *supra* note 20, at 34.

22. State *ex rel.* Romona Oolitic Stone Co. v. Central States Bridge Co., 49 Ind. App. 544, 549, 97 N.E. 803, 805 (1912); Johnson v. Zimmerman, 42 Ind. App. 165, 171-72, 84 N.E. 541, 544 (1908) (concurring opinion).

witnesses[23] vitiate whatever danger inheres in a lack of opportunity to cross-examine.[24]

The common law requirements of the regular entries exception[25] are analogous to those needed to frustrate exclusion under the *res gestae* rule; in addition, the regular entries exception requires preliminary proof that the participants are not available as witnesses.[26] In *Culver v. Marks*,[27] however, the court indicated that the application of the regular entries exception in Indiana is more liberal than at common law. This case admitted business entries even though the participants were available and appeared as witnesses, on the ground that necessity to admit them was shown by their non-recollection of the facts recorded.[28] Unfortunatley, only a few reported decisions in this state follow this liberal trend and admit business records under the regular entries exception.[29] Instead, numerous decisions exclude or admit business entries on the basis of the *res gestae* doctrine.[30]

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23. 5 WIGMORE, EVIDENCE §§ 1521-22 (3d ed. 1940); MCCORMICK, EVIDENCE § 281 (1954); Ginsburg, *The Admissibility of Business Records in Evidence*, 29 NEB. L. REV. 60, 61, 68 (1949).

24. See 2 MORGAN, *op. cit. supra* note 19, at 216, 220; 5 WIGMORE, EVIDENCE § 1362 (3d ed. 1940).

25. Under this exception to the hearsay rule the proponent of the records must show that the participants are unavailable; that the entries are original, made in the regular course of business, within a reasonable time of the transaction recorded; and that they were made by participants having personal knowledge of the facts. Norville, *supra* note 21, at 192-93. See 5 WIGMORE, EVIDENCE §§ 1523-32 (3d ed. 1940) (discussion of each limitation).

26. See note 25 *supra*. The significant distinction between the regular entries exception and the *res gestae* rule is that under the exception the proponent must show necessity in the form of non-availability of the participants as witnesses. The *res gestae* rule is more liberal for necessity does not have to be proved, the entries being direct evidence of the litigated transaction. Fleming v. Yost, 137 Ind. 95, 98, 36 N.E. 705, 706 (1893). Under the regular entries exception the records are admitted as evidence to prove their own truth, but under the *res gestae* rule they are admitted to prove the transaction in issue of which they are a natural part. *Ibid.*

27. 122 Ind. 554, 23 N.E. 1086 (1889).

28. *Id.* at 563, 23 N.E. at 1089.

29. State *ex rel.* Romona Oolitic Stone Co. v. Central States Bridge Co., 49 Ind. App. 544, 97 N.E. 803 (1912) (records admitted apparently on the basis of both the regular entries and *res gestae* rules); Cleland v. Applegate, 8 Ind. App. 499, 35 N.E. 1108 (1893). See Johnson v. Culver, 116 Ind. 278, 19 N.E. 129 (1888). Liberal decisions have held that the absence of an entry that would have been made in the regular course of business if the transaction in question had occurred is admissible evidence that the transaction did not occur. Schneider v. State, 220 Ind. 28, 35, 40 N.E.2d 322, 324 (1942); Marks v. Orth, 121 Ind. 10, 12, 22 N.E. 668, 669 (1889). A liberal trend was also indicated by a case holding that ledger sheets were admissible in evidence as original records. Polus v. Conner, 92 Ind. App. 465, 467, 176 N.E. 234, 235 (1931).

The *res gestae* rule is liberal to the extent that it does not require the showing of non-availability. See notes 17 and 26 *supra* and accompanying text.

30. See note 9 *supra*.

The particular limitations of the *res gestae* rule are manifest in decisions refusing business entries as evidence under this exclusion.[31] In *Equitable Life Assurance Society v. Campbell,*[32] for example, business records of the insurance company made at the home office in New York from reports made by its Louisville agency, showing non-payment of premiums, were excluded as not part of the *res gestae.* The court said, "[T]he entries offered in evidence were not original entries made by one having knowledge of the facts, or to whom the facts had been reported by one transacting the business. . . ."[33] This holding clearly shows that the *res gestae* rule is beset with restrictions which the business entry statutes were designed to obviate.[34]

Modern legislation is based on model statutes, which are the result of an awareness of a need for reform in evidence law.[35] The Commonwealth Act,[36] originally adopted in New York,[37] has served as a model for the act enacted by Congress[38] and a number of state statutes.[39] Under this act, the proponent must prove, to the satisfaction of the court,[40] that the record was made in the regular course of business[41] and that it was the regular course of business to make the entries at the time of the

31. See *e.g.,* Hitt v. Carr, 201 Ind. 17, 29-30, 162 N.E. 409, 413 (1928); Marks v. Box, 54 Ind. App. 487, 500-02, 103 N.E. 27, 33 (1913).

32. 85 Ind. App. 450, 150 N.E. 31, 151 N.E. 682 (1926).

33. *Id.* at 464, 150 N.E. at 36.

34. See 5 WIGMORE, EVIDENCE § 1520 (3d ed. 1940); Norville, *supra* note 21, at 194-95; Comment, 2 HASTINGS L.J. 40, 42-43 (1951).

35. See 2 MORGAN, *op. cit. supra* note 19, at 271; MCCORMICK, EVIDENCE § 289 (1954); Ray, *supra* note 20, at 38-39.

36. In 1925, a Committee of fifteen was appointed by the Commonwealth Fund of New York to examine and report on the admissibility of business records and other rules of evidence needing liberalization. This committee included Morgan and Wigmore among other eminent scholars, and their report was published in 1927. 9 U.L.A. 386 (1951); Ray, *supra* note 20, at 39. The Commonwealth Act is as follows:

> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence, or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

MORGAN *et al., op. cit. supra* note 1, at 63.

37. N.Y. CIV. PRAC. ACT § 374-a.

38. 49 STAT. 1561 (1936), as amended, 28 U.S.C. § 1732 (1952).

39. CONN. GEN. STAT. § 7903 (1949); MD. ANN. CODE GEN. LAWS art. 35, § 68 (1951); MASS. ANN. LAWS c. 233, § 78 (Supp. 1954); MICH. COMP. LAWS § 617.53 (1948); R.I. GEN. LAWS c. 538, § 1 (1938).

40. See note 36 *supra* for the provisions of the Commonwealth Act.

41. *Ibid.*

transaction or within a reasonable time thereafter.[42] All other circumstances shown may affect the weight of the entries as evidence but not their admissibility.[43]

Many states[44] have adopted a similar statute[45] approved by the Commissioners on Uniform State Laws.[46] Except for change and reduction in wording,[47] the only important distinction between the model statutes are that the Uniform Act contains the term "condition" among the facts that may be recorded,[48] requires that the records be testified to by a custodian or other qualified witness,[49] and gives the court more discretion to determine the record's reliability prior to admitting it.[50] Although the Uniform Act, by placing more discretion in the court, provides a desirable flexibility, predictability of admission based on precise standards such as those found in the Commonwealth Act seems more satisfactory to the parties of the action.[51]

Regardless of which of the model acts is deemed preferable, a statute based upon either of them would be more liberal than the *res gestae* rule; and business records now excluded, such as those in the *Campbell* case,

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42. *Ibid.*

43. *Ibid.*

44. See note 1 *supra*. A convenient table of the states that have adopted modern business entry legislation patterned after the Uniform Act is found in 9 U.L.A. 385 (1951, Supp. 178, 1954).

45. The Conference in the present act has attempted to devise a standard wording that will uniformize the provisions of the Commonwealth Act. 9 U.L.A. 386 (1951).

46. The pertinent provisions of the UNIFORM BUSINESS RECORDS AS EVIDENCE ACT are as follows:

"§ 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.

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

9 U.L.A. 387 (1951). The American Law Institute, in its MODEL CODE OF EVIDENCE, has also proposed a business records statute. The only significant addition that the Model Code makes is a section providing that evidence of the absence of an entry in a record may be shown to prove the non-occurrence of the transaction in issue. MODEL CODE OF EVIDENCE rule 514 (1942).

47. See Ray, *supra* note 20, at 40-41 for a concise explanation of the distinctions between the Commonwealth and Uniform Acts. An informative graphic comparison of the two model statutes is found in Norville, *supra* note 21, at 198.

48. See notes 36 and 46 *supra* for the provisions of the Commonwealth and Uniform Acts.

49. See note 46 *supra*.

50. *Ibid.*

51. MCCORMICK, EVIDENCE § 289 (1954). Proposed business entry legislation should require specific findings by the trial judge as a condition precedent to the admissibility of the records instead of giving him broad discretion. Ray, *supra* note 20, at 45. In practice statutes based on the Commonwealth and Uniform Acts are given substantially the same effect by the courts. 2 MORGAN, *op. cit. supra* note 19, at 274.

would in many instances be admitted because the proponent would not have to prove that the records are original or that the participants had personal knowledge.[52] The legislation would conform more to the needs of modern business practices than the present law. Businessmen, who daily conduct their enterprises on the basis of extensive records, look with disfavor upon courts excluding them as evidence on a patently technical ground.[53] The rapid growth of employment and accounting systems[54] indicate that the requirements of the regular entries and *res gestae* rules are no longer practical. Under modern business usage, there is lack of motive, and little opportunity, to falsify entries made in a large accounting department because of the employee's impersonal relation to the records.[55] The trustworthiness afforded by these business practices argue strongly for the adoption of a statute favoring the liberal admission of business records.

The enactment would have the additional advantage of compelling both parties to an action and the court to rely upon one distinct standard of admissibility, the code, rather than upon the dual standards now available under the Indiana law. A statute would relieve the courts of the burden of determining whether the record is offered to show the truth of its own terms[56] or as direct proof of the transaction in issue.[57]

A contention that the present status of the law is adequately liberal in view of restrictive applications of the codes in other jurisdictions[58] has but superficial merit. The United States Supreme Court held in *Palmer v. Hoffman,*[59] that the federal statute did not admit as evidence accident

52. See notes 36 and 46 *supra.*

53. MORGAN *et al., op. cit. supra* note 1, at 51, 57-61; Ray, *supra* note 20, at 36. See New York Life Ins. Co. v. Taylor, 147 F.2d 297, 307, (D.C. Cir. 1944) (dissent).

54. MORGAN *et al., op. cit. supra* note 1, at 57-61. It is conceded that not all businesses utilize complex systems of accounting, but Morgan indicates that correspondence with many manufacturers reveals that numerous operations are required to complete a transaction, that it is frequently impossible to later identify the person who performed any particular part of it, and that the maker of the final entry usually has no personal knowledge of the transaction recorded. *Id.* at 61.

55. 5 WIGMORE, EVIDENCE § 1522 (3d ed. 1940); Comment, 2 HASTINGS L.J. 40, 42-43 (1951). Instead, the motive is to keep the records accurate because of the rigors of supervision and the complexities of accounting systems. *Ibid.*

56. See note 26 *supra.*

57. *Ibid.*

58. See, *e.g.,* Masterson v. Pa. Ry. Co., 182 F.2d 793 (3d Cir. 1950); Clainos v. United States, 163 F.2d 593 (D.C. Cir. 1947); Roge v. Valentine, 255 App. Div. 475, 7 N.Y.S.2d 958 (1938); Geroeami v. Fancy Foods & Products Co., 249 App. Div. 221, 291 N.Y. Supp. 837 (1937); 5 WIGMORE, EVIDENCE § 1530a, n. 1 (3d ed. 1940). "The interpretation of the new statutes has not always found the Courts ready to give full effect to the spirit of the statutes." *Id.* at § 1530a.

59. 318 U.S. 109, 318 U.S. 800 (1943). In Indiana accident reports required by statute are not admissible as evidence in any civil or criminal trial arising out of the accident. IND. ANN. STAT. § 47-1920 (Burns 1952).

reports made by a railroad engineer in the course of his employment, on the ground that such reports were not primarily intended for the internal business of the railroad but for litigation. The result in this case has been sharply criticized on the basis that the language of the federal statute clearly admits any report if it is the regular course of business to make it.[60] The New York court similarly limited its statute in *Johnson v. Lutz*[61] by excluding records made in the regular course of business from information obtained from an outside course. It is arguable that both decisions illustrate only that courts, in deciding preliminary questions of fact under the codes, have the power to exclude records which they deem untrustworthy.[62]

These strict judicial interpretations probably, however, reflect the tendency of some judges to cling to the tenets of common law rules which were controlling prior to the adoption of the codes.[63] Since the present law in this state is more liberal than the common law of some of the states which have enacted statutes,[64] there is a basis for believing that the judiciary in Indiana would apply the act with a truly charitable interpretation. Consequently, the liberal aspects of the present Indiana law are, in this sense, an argument for, rather than against, the enactment of a liberal business entry statute.

Another possible contention opposed to adoption is that business records otherwise excluded as privilege or as opinion would be admitted under a code.[65] Although the statutory rule of privilege may be implicitly repealed by the codes,[66] it still influences the decisions reached by the

60. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 156 (1947); Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 566 (1946). But see Note, 43 COLUM. L. REV. 392 (1943).

61. 253 N.Y. 124, 170 N.E. 517 (1930).

62. See New York Life Ins. Co. v. Taylor, 147 F.2d 297, 310 (D.C. Cir. 1944) (dissent).

63. 5 WIGMORE, EVIDENCE § 1530a, n. 1 (3d ed. 1940). ". . . [I]t is hard to set the professional mind working on new formulas." *Id.* at § 1530a.

64. See note 29 *supra*.

65. See MCCORMICK, EVIDENCE § 290 (1954); Note, 48 COLUM. L. REV. 920, 931-32 (1948).

66. Norville, *supra* note 21, at 210-11. The significant provisions of the Indiana statute are as follows:

> "The following persons shall not be competent witnesses:
>
> . . .
>
> Third. Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases.
>
> Fourth. Physicians, as to matter communicated to them, as such, by patients in the course of their professional business, or advice given in such cases.
>
> Fifth. Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches.
>
> Sixth. Husband and wife, as to communications made to each other."

IND. ANN. STAT. § 2-1714 (Burns 1946). Most of the decisions discussed in the text consider the patient-physician privilege in regard to the admissibility of hospital records. Presumably, the same results would attach to the other types of privileged communica-

courts.[67] Thus, hospital records have been excluded as privileged communications between doctor and patient.[68] It is noteworthy, however, that a recognized authority discounts the desirability of this privilege and advocates its discontinuance as a rule of evidence.[69]

In considering the opinion rule, the federal court, in *New York Life Ins. Co. v. Taylor*,[70] held that hospital records containing a psychiatric diagnosis were not admissible under the federal statute because they involved opinion and stated that the application of the act should be limited to records made of routine observations. This holding, reflecting the view reached in some states,[71] has been the subject of much criticism by commentators,[72] who contend that the opinion rule is antiquated and should

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tions found in the Indiana statute. There are many limitations on the patient-physician privilege, and it can be easily waived. See Stayner v. Nye, 227 Ind. 231, 85 N.E. 2d 496 (1948); Stalker v. Breeze, 186 Ind. 221, 114 N.E. 968 (1917). The patient-physician exclusion is abrogated in workmen's compensation proceedings in Indiana. "No fact communicated to . . . any physician . . . who may have attended or examined the employee . . . shall be privileged, either in the hearings provided for in this act . . ., or in any action at law brought to recover damages against any employer . . . subject to the compensation provisions of this act." IND. ANN. STAT. § 40-1227 (Burns 1952).

67. See, *e.g.*, Buckminster's Estate v. Comm'r of Int. Rev., 147 F.2d 331 (2d Cir. 1944) (where an implied waiver of the privilege was found); Kinbacher v. Schneider, 194 Misc. 969, 89 N.Y.S.2d 350 (1949) (hospital records held privileged); Palmer v. John Hancock Mut. Life Ins. Co., 150 Misc. 669, 270 N.Y. Supp. 10 (1934) (record of diagnosis was privileged); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947) (privilege strictly construed).

68. Sher v. DeHaven, 199 F.2d 777 (D.C. Cir. 1952); Vilardi v. Vilardi, 200 Misc. 1043, 107 N.Y.S. 2d 342 (1951); Hurd v. Republic Steel Corp., 275 App. Div. 725, 87 N.Y.S.2d 64 (1949). ". . . [C]ourts have generally held that hospital records are within the privilege to the extent that they incorporate the statements made by the patient to the doctor and the physician's diagnostic findings." MCCORMICK, EVIDENCE § 290 (1954). An opinion of the Indiana Attorney General indicates that hospital records are not admissible under the confidential communication rule, although no Indiana decision has specifically reached this result. OPS. IND. ATT'Y GEN. 202-08 (1945). For a decision indicating that such records should be excluded as privileged communications, see Mathews v. Rex Health and Accident Ins. Co., 86 Ind. App. 335, 157 N.E. 467 (1927).

69. 8 WIGMORE, EVIDENCE § 2380a (3d ed. 1940). "There is little to be said in favor of the privilege, and a great deal to be said against it. The adoption of it . . . is earnestly to be deprecated." *Ibid.* "The injury to justice by the repression of the facts . . . is a hundredfold greater than any injury which might be done by disclosure." *Ibid.* Restrictive exclusionary rulings and precedents due to the Indiana competency and privilege statutes indicate the need for legislative reform. Note, 27 IND. L.J. 256, 277 (1952). "Implication of waiver from surrounding circumstances constitutes a potentially effective means of limiting claims of privilege which unduly obstruct introduction of testimony." *Id.* at 278.

70. 147 F.2d 297 (D.C. Cir. 1944).

71. Skoller v. Short, 35 N.Y.S.2d 68 (1942); *In re* O'Grady's Estate, 254 App. Div. 691, 3 N.Y.S.2d 778 (1938); Lane v. Samuels, 350 Pa. 446, 39 A.2d 626 (1944); Cline v. Evans, 127 W. Va. 113, 31 S.E.2d 681 (1944). See Paxos v. Jarka Corp., 314 Pa. 148, 171 Atl. 468 (1934) (decided prior to passage of business entry legislation).

72. Morgan, *supra* note 60, at 562. Morgan suggests that the test laid down by the case is unworkable and places an impossible burden on the court which would have to determine whether the particular diagnosis is one on which competent physicians might differ. *Id.* at 564. See Notes, 33 GEO. L.J. 349 (1945); 18 So. CALIF. L. REV. 60

not exclude records admissible under the codes. Recent federal cases sharing this view, disagree with the result reached in *Taylor* and admit hospital records which otherwise would be subject to exclusion under the opinion rule.[73] These divergent attitudes expressed by the authorities lead irresistably to the conclusion that a business entry statute would not automatically admit records otherwise excluded under the rules of opinion and privilege. Instead, a statute would offer the courts the opportunity to reappraise the value of these rules in light of contemporary criticism.

It is recommended that Indiana enact a business entry statute patterned after one of the model codes. The assurance of trustworthiness furnished by the internal consistency of business records in modern commercial practice is a compelling argument for the adoption of such an act. Moreover, it would coalesce the duality of hearsay and *res gestae* as rules of exclusion into one clear standard of admissibility and would have the additional salutary result of eliminating the abstruse *res gestae* terminology from the judicial vocabulary. Arguments against passage, emphasizing that the present law is adequate or that the rules of opinion and privilege would be circumvented by a statute are deceptive. These objections overlook that adoption of liberal legislation would in many cases admit entries which are now excluded under the *res gestae* rule, and they neglect to consider that a code would permit the courts to re-evaluate opinion and privilege as rules of evidence. Once a policy favoring liberal admissibility of evidence is accepted, no cogent argument against adoption of business entry legislation can be advanced.

(1945); 54 YALE L.J. 868 (1945). To apply the much misused opinion rule to exclude business entries cannot be justified. 5 WIGMORE, EVIDENCE § 1533 (3d ed. 1940).

73. Medina v. Erickson, 24 U.S.L. WEEK 1062 (9th Cir. Oct. 19, 1955); Landon v. United States, 197 F.2d 128 (2d Cir. 1952) (holding that the fact the entry reflected opinion went to weight and not admissibility); Korte v. New York N.H. & H. R.R. Co., 191 F.2d 86 (2d Cir. 1951), *cert. denied*, 342 U.S. 868 (1951). But see Baltimore & O. R.R. v. O'Neill, 211 F.2d 190 (6th Cir. 1954) (excluding report not an automatic reflection of observations).