Application of such a rule where there is arguably reliance present seems to involve a further implicit recession from the position taken in *Miller v. Lawlor*, where the Court did not mention any "exclusively referable" test, but stated that sole reliance was not needed, that "it is sufficient that without it plaintiffs would not have acted".[53] Although the action involved in *Miller v. Lawlor* was affirmative, buying a house, whereas the acts in *Vrba* were negative, as not redeeming, both support possible arguments of reliance, and it is believed that the acts in *Miller v. Lawlor* could not have been said any more to be "exclusively referable" to the claimed contract than the acts in *Vrba*. Yet in the *Miller* case the Court permitted oral evidence of the promise and the reliance, including explanations as to reasons for buying the house, but apparently would not do so in the *Vrba* case.

Arguments have raged for many years, and probably will continue, as to the mischief prevented or caused by the Statute of Frauds. Regardless of the explanation for the decision in the *Vrba* case by other reasons, such as insufficiency of evidence of the promise, the reannouncement of ideas of attempting to fit reliance elements into a mold of "purchase money" and "exclusively referable" concepts, apparently abandoned in the *Miller* case,[54] is a discouraging sign to those who believe the Statute does more harm than good.

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complete absence of conflict); Carlson v. Carlson, 233 Iowa 1133, 11 N.W.2d 383 (1943); In re Estate of Hayer, 234 Iowa 299, 12 N.W.2d 520 (1944) (applies to action at law as well as in equity); Fairall v. Arnold, 226 Iowa 977, 285 N.W. 664 (1939); IOWA ANNOTATIONS § 197-VIII; CORBIN, § 430.

[53] 245 Iowa 1144, 1155, 66 N.W.2d 267, 274 (1954).

In Lynch v. Lynch, 239 Iowa 1245, 1253, 34 N.W.2d 485, 489 (1948), referred to in note 51, *supra*, involving argument of executed oral gift of land, the Court used the following test: "Nor is it necessary that there be any actual change of possession where the donee is in possession at the time of the gift, the change in the character of possession being sufficient. . . Such gifts may be established provided the facts and circumstances fairly tend to show the alleged gift. Lembke v. Lembke, supra [194 Iowa 808, 187 N.W. 863 (1922)]. The degree of proof need not be to an absolute certainty but only a reasonable certainty." This does not read like an "exclusively referable" test.

It should be observed that, in other states without a statute such as in Iowa, the "part performance" doctrine is based upon underlying concepts, in varying proportions, of substitute evidence of a contract and the injustice or "equities" involved: CORBIN, §§ 421 *et seq.*; WILLISTON, § 494.

Of course the Court might conclude, in the *Vrba* case, as in *Swift v. Petersen*, 240 Iowa 715, 37 N.W.2d 258 (1949), even if the "promissory estoppel" test were used, that the inaction did not follow in reliance on, or because of, the promise.

[54] The writer of the recent case note on *Miller v. Lawlor*, in 24 U. OF CIN. L. REV. 394 (1955), thought that the need for unequivocal reference would eventually be eliminated in Iowa.

MICROFILMING OF BUSINESS RECORDS

DONALD C. BYERS*

For many businesses of today the space and cost problems presented by the necessity for preservation of their records could be reduced drastically by microfilming these records and destroying the originals.[1] But what legal problems arise if microfilming is undertaken? The records may be needed in dealings with tax and other governmental agencies, and in litigation with customers, creditors, debtors, and others. The principal legal problem is, if a business be required to produce evidence of a transaction, to what extent would microphotographic reproductions be admissible in evidence as proof, either in court or before an administrative tribunal, where the original records have intentionally been destroyed. This problem is intensified because many businesses have multi-state operations, and must be concerned with possible variance in rules of admissibility from state to state.[2]

Answering the basic inquiry calls for a brief analysis of the common law approach to the problem, and its statutory modifications, which in many states culminated in express statutory authority for admission of photographic copies of business records. Jurisdictions within the United States can today be divided into three major classifications: those having no statutory provision on the subject; those having adopted the Uniform Photographic Copies of Business and Public Records as Evidence Act; and those having statutes which differ from the Uniform Act. Consideration will be given to the varying admissibility requirements in each classification. Ordinarily, however, no reference will be made to statutes pertaining to limited classes of activities, such as banks, or public records.[3]

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[1] Cost of microfilming may be much less than the value of the filing cabinets released. This and other examples of space and cost savings have been described in various articles including: Note, *Photographic Copies of Business and Public Records as Evidence*, 34 IOWA L. REV. 83, 85 (1948); Note, *Evidence—Status of Microfilmed Business Records*, 48 MICH. L. REV. 489 (1950). In some systems originals of sales tickets are not destroyed after microfilming, but are returned to the customer.

Unless otherwise indicated by context, the term "microfilming" as used herein should be interpreted to cover any process of reproduction of original records by photographic techniques.

[2] Discussions of the problem may be found in the two law review notes cited in the preceding footnote, and: Noll, *The Present Legal Status of Microphotographed Business Records*, 86 J. ACCOUNTANCY 28 (1948); Annotation, 142 A.L.R. 1270 (1943). See also the latest pocket part to 4 WIGMORE, EVIDENCE § 1223 (3d ed. 1940).

[3] For an example of such a statute, see IOWA CODE § 528A.3 (1954) (bank records may be photostated and are admissible).

The Common Law Approach; Its Development and Modification

Two well-known common law rules are relevant to our problem. The first of these, the "regular entries" or "business records" exception to the hearsay rule, is concerned directly with the admissibility of the original record; and the second, the "best evidence" rule, with whether copies of an admissible original may be admitted in evidence in lieu of the original.

Wigmore considers the origin of the "business records" rule to be in a common law custom, at least as early as 1600, to receive "shop-books of 'divers men of trades and handicraftsmen' in evidence of 'the particulars and certainty of the wares delivered'."[4] By 1832 in England this exception was recognized as covering "all entries made 'by a person, since deceased, in the ordinary course of his business', whether a person wholly unconnected with the parties, or a clerk of a party, or the party himself."[5] However, for a part of this period a statute, adopted in 1609, limited the use which could be made of parties' shop-books more severely, and similar statutes were widely adopted in the American Colonies. The development of the rule in the various American states often differed from that occurring in England, and there were sharp differences in application between the various states.[6]

The difficulties that the complications of each state's rule posed for interstate business led to demands for statutory relief.[7] In 1927 a model act for "Proof of Business Transactions" was published by a committee appointed by Commonwealth Fund, of New York. This Act was the source of legislation in several states.[8] The Uniform Business Records as Evidence Act was approved by the National Conference of Commissioners on Uniform State Laws in 1936, and has been adopted or is the source for laws in at least twenty-four states.[9] The Uniform Business Records Act differs

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[4] 5 WIGMORE, EVIDENCE § 1518(1) (3d ed. 1940).

[5] *Ibid.*

[6] *Id.* § 1518(2).

[7] *Id.* § 1520; 9 UNIFORM LAWS ANN. 385 (1951).

[8] 5 WIGMORE, EVIDENCE § 1520 (3d ed. 1940); 9 UNIFORM LAWS ANN. 386 (1951). States presently using or borrowing from this model act for their legislation include: Alabama [ALA. CODE Tit. 7, § 415(1) (1940, 1952 Cum. Supp.]; Arkansas [ARK. STAT. ANN. §§ 28-928, 28-929 (1948)]; Connecticut [CONN. GEN. STAT. c. 305, § 1675c (1949 Rev.)]; Maryland [FLACK'S ANN. CODE OF MD. Art 35, § 68 (1951)]; Michigan [MICH. COMP. LAWS § 617.53 (1948)]; New York [N. Y. CIV. PRAC. ACT § 374-a]; Rhode Island [R. I. GEN. LAWS c. 538, § 1 (1938)]. Wigmore is very critical of the legislative attempts to improve on the model act, in Maryland and Rhode Island. 5 WIGMORE, EVIDENCE § 1520 n. 6 (3d ed. 1940). In other jurisdictions the model act was used but later replaced with one based on the Uniform Business Records Act. United States [49 STAT. 1561 (1936)]; Hawaii [HAWAII STAT. 1937, p. 139]; Maine [Maine Laws c. 60 (1933)]; Massachusetts [MASS. GEN. LAWS c. 233, § 78 (1932)]; and Oregon [ORE. CODE ANN. § 9-719 (Supp. 1935)].

[9] 28 U.S.C. § 1732(a) (1952); ARIZ. REV. STAT. § 12-2262A,B (1956); DEERING'S CAL. CODE CIV. PROC. §§ 1953e-h (1946); DEL. CODE ANN. § 4310(a) (1953); FLA. STAT. ANN. § 92.36 (1943, 1955 pocket parts); Ga. Laws 1952, No. 762; Hawaii Stat. 1941, p. 178; IDAHO CODE §§ 9-413—

from the Commonwealth Fund Act primarily in clarifying certain clauses, and in adding a requirement that some appropriate person testify to the record. In 1937 another form of regular business entries statute was proposed for Illinois.[10] These three acts are quoted in Appendix "I".

The origin of the so-called "best evidence" rule[11] apparently is even more ancient than that of the "business records" rule, although initially it was concerned with failure to produce an original where there was no copy but only oral testimony as to the original's contents. This was at the time when the document was not thought of as evidence of a right but as the right itself; and loss of the document meant loss of the right. At this stage the rule did not apply to all writings, however; primarily it affected only documents under seal and judicial records.[12] As concepts and procedure changed, the rule was expanded until, by the 1800's, it clearly required production of the original writing to prove its contents rather than testimony as to its contents, or rather than copies of the original, except in certain limited situations. At an early stage it was recognized that copies could be used (or oral testimony) where the original was in the hands of third persons, or in the custody of the law (as public records), or had been destroyed by fire. Eventually, loss for other reasons was recognized to excuse production of the original and permit secondary evidence as to its contents.[13] But there was concern that the party desiring to prove the contents of the original might himself have destroyed it, and his testimony as to its contents be deliberately false and misleading. In an early New Jersey case it was held that a party who voluntarily destroyed the original, without mistake or accident, would not be permitted to use secondary evidence, regard-

9-416 (1948, 1955 Cum. Pocket Supp.); MINN. STAT. ANN. §§ 600.01-600.04 (1947); Mo. REV. STAT. §§ 490.660-490.690 (1949); REV. CODE MONT. Tit. 93, §§ 801-1—801-4 (1947); REV. STAT. NEB. 1943 §§ 25-12,208—25-12,111 (1956 Reissue); Nev. Stat. 1951 c. 16; N. H. REV. STAT. ANN. §§ 521:1-521:5 (1955); N.J. STAT. ANN. §§ 2A:82-34—2A:82-37 (1952); N.D. REV. CODE § 31-0801 (1943); OHIO REV. CODE § 2317.40 (Anderson's Desk Ed. 1953); ORE. COMP. LAWS ANN. §§ 2-819—2-819e (1940, 1943 Pocket Part); PURDON'S PENNA. STAT. ANN. §§ 91a-d (1930, 1956 Cum. Ann. Pocket Part); S.D. CODE § 36.1001 (1939) (adopted by Supreme Court Rule); VERNON'S TEX. STAT. Art. 3737e (1952 Supp.); VT. STAT. §§ 1753-1756 (1947 Revision); WASH. REV. CODE §§ 5.44.100-5.44.120 (1953); WYO. COMP. STAT. ANN. §§ 3-3122—3-3125 (1945, 1955 Cum. Pocket Supp.).

[10] 5 WIGMORE, EVIDENCE § 1520 (3d ed. 1940); Barrow, *Business Entries Before the Court*, 32 ILL. L. REV. 334 (1937). Mr. Barrow's discussion indicates some of the problems that may arise in interpreting and applying the other two acts. Several states have adopted business records acts apparently not based on any of the three proposed acts. ILL. REV. STAT. c. 51, § 3 (1953); WIS. STAT. § 327.25 (1955). The history of the three acts is also discussed in *Ulm v. Moore-McCormack Lines*, 115 F.2d 492, 494-5 (2d Cir. 1940).

[11] "The sooner the phrase is wholly abandoned, the better." 4 WIGMORE, EVIDENCE § 1174 (3d ed. 1940).

[12] 4 WIGMORE, EVIDENCE § 1177 (3d ed. 1940).

[13] *Id.* §§ 1192-1197.

less of his motive for the destruction.[14] However, most courts now seem willing to admit secondary evidence despite willful destruction of the original, where there is no suggestion of any fraudulent motive.[15] Even under this more liberal view, the question remained as to what proof was necessary before microfilmed records were admissible.

One possible theory for admissibility was that the microfilming, being done in the regular course of business, was admissible under the "business records" rule, and if so it would be necessary only to prove *the film* as primary evidence and the enlargement of the relevant portion of it as the copy. Support for this theory was found in *United States v. Manton*,[16] where "recordak" records of checks were admitted over the objection that they were not the best evidence, and the absence of the originals had not been accounted for. These records were held admissible, the Court relying in part upon a federal statute which in substance is the Uniform Business Records as Evidence Act.[17] The Court also stated that these records should, because of their place in the bank routine, be considered not secondary but primary evidence.[18]

In the only case on the point from a state court, *People v. Wells*,[19] the Illinois Court refused to follow the *Manton* decision, because it thought the latter controlled by the federal statute and that, at least without a comparable statute, the microfilm was only secondary evidence. This view would require laying the necessary foundation for introduction of secondary evidence before admission of a microfilmed record.

As businessmen were recognizing the value of microfilming their records, clarification of the records' legal status was essential. In a number of legislatures, acts on the subject varying in details were passed in 1947 and 1948.[20] Some of these were modifications of the various business records statutes to include photographic copies. As uniformity of legislation would be helpful, the Con-

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[14] Broadwell v. Stiles, 8 N.J.L. 58 (1824); cited with approval in Clark v. Hornbeck, 17 N.J.Eq. 430, 451 (1865).

[15] 4 WIGMORE, EVIDENCE § 1178 (3d ed. 1940); Note, 34 IOWA L. REV. 83, 86 (1948); Note, 48 MICH. L. REV. 489, 494 (1950).

[16] 107 F.2d 834 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940). The opinion in the circuit court was by Justice Sutherland, sitting as Circuit Judge. See also Norville, *The Uniform Business Records as Evidence Act*, 27 ORE. L. REV. 188, 219 (1948).

[17] Now 28 U.S.C. § 1732(a) (1952).

[18] "These recordaks are made and kept among the records of many banks in due course of business and are within the words of 28 USC [Sec. 1732(a)]. Their accuracy is not questioned. They represent, in the course of a year perhaps millions of transactions. No one at all familiar with bank routine would hesitate to accept them as practically conclusive evidence. As proof of payment, they constitute not secondary, but primary evidence." 107 F.2d 834, 844 (2d Cir. 1938).

[19] 380 Ill. 347, 44 N.E.2d 32 (1942). Recordak reproductions were introduced, in a forgery case, as primary proof, without explanation or excuse for failure to produce the original checks.

[20] 9 UNIFORM LAWS ANN. 413 (1951).

ference on Uniform Laws in 1949 approved the Uniform Photographic Copies of Business and Public Records as Evidence Act, and this Act[21] or its substance has been adopted in more than thirty jurisdictions. It is reprinted herein in Appendix "II".

The Present Status: States Without Statutes on Microfilming

The states which have no general statutory provision making microfilmed records admissible as primary evidence are Mississippi, West Virginia, and, possibly, Texas. Both Mississippi and West Virginia allow certain public records to be recorded by photographic processes.[22] Neither has a business records statute, nor any decisions regarding admissibility of photographic copies.

In 1951 Texas adopted a business records statute which apparently has borrowed from the various model acts, with some additional features but containing no provision respecting microfilmed records.[23] It also has a statute authorizing building and loan associations to microfilm their records and providing that such copies are to be deemed originals.[24]

The West Virginia Court has already admitted secondary evidence, where the original was lost or destroyed, although it was not concerned with intentional destruction.[25] It is reasonable to assume that Mississippi and West Virginia would follow the trend of the common law decisions admitting the copy, where it was made and the original destroyed in the ordinary course of business. While the Texas statute might be interpreted as applicable to such copies, on the basis of *Manton,* it is also possible for Texas courts, especially in view of the specific provision for building and loan associations, to apply the common law approach to filmed records of other businesses.[26]

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21 Hereafter, the Uniform Photographic Copies of Business and Public Records as Evidence Act will be referred to as the Uniform Act.

22 MISS. CODE ANN. § 878 (1942, Recompiled 1956) permits the clerk of the chancery court to record written instruments by handwriting, typing, use of printed forms, or photostat or other equally permanent photographic process. W.VA. CODE § 5714(1) (1949, 1953 Cum. Supp.) permits photographing or microfilming of public records. This provision is similar to MO. REV. STAT. § 109.130 (1949), reprinted in Appendix III-J.

23 VERNON'S TEX. STAT. Art. 3737e (1952 Supp.).

24 VERNON'S TEX. STAT. Art. 881a-12 (1952 Supp.).

25 Edgell v. Conaway, 24 W.Va. 747 (1884).

26 Photostatic copies of plats and of indemnity bonds have been admitted into evidence in the Texas courts. In *Manziel v. Railroad Commission,* 197 S.W.2d 490 (Tex. Civ. App. 1946), involving a plat, there was no discussion of the admissibility problem. In *Parrish v. Humble Oil & Refining Co.,* 251 S.W.2d 418 (Tex. Civ. App. 1952), involving the same plat, the attack apparently was on the admissibility of the original itself, rather than use of a copy. *State v. Brown,* 257 S.W.2d 796 (Tex. Civ. App. 1953), was a suit on a bond. The trial court had admitted a photostatic copy over objection that it was "not competent to constitute proof of the various facts, and is immaterial and irrelevant and hearsay" as to defendant. The reviewing court agreed that the copy was admissible over this objection, but stated that a proper objection would have been "violation of the Best Evidence Rule". There appears to have been no explanation for failure to produce the original.

The Present Status: Adoption of the Uniform Photographic Copies of Business and Public Records as Evidence Act.

The Uniform Act has been adopted, entirely or in substance, as federal law[27] and by the following states and territories: Arkansas, California, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming, Alaska and Hawaii.[28] Uniform Laws Annotated also lists Alabama and Georgia as having adopted the

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[27] 28 U. S. C. § 1732(b) (1952) is section 1 of the Uniform Act, plus the sentence appearing in note 62, *infra*.

[28] ARK. STAT. ANN. § 28-932 (1948, 1955 Cum. Pocket Supp.); DEERING'S CALIF. CODE CIV. PROC. §§ 1953i-k (1946, 1955 Pocket Supp.) [California has a section pertaining to photocopying of public records, similar to ARIZ. REV. STAT. § 12-2262D (1956) (see Appendix III-B), DEERING'S CALIF. CODE CIV. PROC. § 1920b (1946); and § 1953(1) provides that the Uniform Act does not affect admissibility under § 1920(b).]; COLO. REV. STAT. §§ 52-2-1—52-2-4 (1953, 1955 Cum. Supp.) [see note 62, *infra*]; CONN. GEN. STAT. § 3159(d) (1955 Supp.) [combining the Commonwealth Fund Act with Uniform Act § 1, qualified to exclude from coverage official records; photographs of the latter are covered in CONN. GEN. STAT. c. 435, §§ 8883-8889 (1949 Rev.)]; FLA. STAT. ANN. § 92.35 (1943, 1955 pocket parts); IDAHO CODE §§ 9-417—9-419 (1948, 1955 cum. pocket supp.) [§§ 9-328—9-330 relate to official records, and the Uniform Act has been revised to delete reference to such records]; IOWA CODE § 622.30(2) (1954) [Uniform Act § 1 only, amended as indicated in note 59, *infra*. The Bill, originally H.F. 36 (1951), did not refer to the Uniform Law as such either in its title or in its explanation]; GEN. STAT. KAN. §§ 60-2854a-c (1949, 1955 Supp.); KY. REV. STAT. §§ 422.105, 422.106 (1955); Maine Pub. Laws 1955 c. 264; FLACK'S ANN. CODE OF MD. Art. 35, § 69 (1951); 8 ANN. LAWS MASS. c. 233, § 79E (Recompiled 1956) [additions noted *infra*, notes 58, 61; §79A permits introduction of certified copies, photographed or otherwise, of public records and records of banks, insurance and trust companies, and hospitals; § 79D, apparently also in effect, is quoted in note 51, *infra*]; MINN. STAT. ANN. § 600.135(1), (3),(4) (1947, 1956 Cum. Pocket Parts) [see note 31, *infra*]; REV. CODE MONT. Tit. 93, §§ 801-5, 801-6 (1947, 1956 pocket parts); REV. STAT. NEB. 1943 §§ 25-12,112—25-12,114 (1956 Reissue); Nev. Stat. 1953 c. 50; N.H. REV. STAT. ANN. §§ 520:1-520:3 (1955); N.J. STAT. ANN. §§ 2A:82-38—82-40 (1952); N.M. STAT. ANN. §§ 20-2-20—20-2-22 (1953, 1955 Pocket Supp.) [§§ 71-4-6—71-4-9, relating to microfilming of public records, were left in force]; N.Y. CIV. PRAC. ACT. § 374-b; N.C. GEN. STAT. §§ 8-45.1, 8-45.2, 8-45.4 (1944, Recompiled 1953) [§ 8-45.3 authorizes state department of revenue to photograph records, including tax returns, and when certified as a true and correct copy the photograph is admissible where an original would be.]; N.D. REV. CODE § 31-08011 (1943, 1953 Supp.); OKLA. STAT. Tit. 12, §§ 521-523 (1951); PURDON'S PENNA. STAT. ANN. Tit. 28, §§ 141-143 (1930, 1956 Cum. Pocket Parts); S.D. CODE § 36.1003 (1939, Supp. 1952); [Added by Supreme Court Rule; § 36.0601-1 relates to photostating and microfilming official records]; UTAH CODE ANN. § 78-25-16 (1953) [Uniform Act § 1 was added as a proviso to a section forbidding evidence of contents of a writing other than the writing itself, with five specified exceptions and the proviso]; Vt. Laws 1953 c. 138; VA. CODE § 8.279.1 (1950, 1956 Cum. Supp.) [See note 31, *infra*]; WASH. REV. CODE § 5.44.125 (1953); WIS. STAT. § 327.29 (1955); WYO. COMP. STAT. 1945 ANN. §§ 3-3132, 3-3133, 3-3135 (1955 Cum. Pocket Supp.) [§ 3-3134 is quoted in note 62, *infra*]; Alaska Laws 1951 c. 22; Hawaii Laws 1951, Act 104.

Uniform Act in substance, but because of the variations found in the language of their statutes these are included in the next section.[29]

The Uniform Act requires, principally, that: (1) the microfilming or photocopying be done in the regular course of business; (2) it be done by a process which accurately reproduces or forms a durable medium for accurate reproduction of the original record; and (3) the reproduction be "satisfactorily identified". There have been no decisions interpreting this Act.[30]

The Act does not define "regular course of business". Occasionally such a definition has been added.[31] The term is also used in the Uniform Business Records Act, and probably would be held to have the same meaning in each act.[32] It would seem that a routine procedure of making reproductions should be established, so that a set sequence of making original and photocopy could be shown. The longer the period is between microfilming projects, the greater the possibility is they would be held not to be "in the regular course of business".

The requirement for accurate reproduction is not further delineated in the Act. Some of the special acts, noted in the next section, refer to photographic or reproduction standards that must

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[29] 9 UNIFORM LAWS ANN. (1956 Cum. Pocket Part) 291. See Appendix III-A, III-D. The same listing fails to include Arkansas, Connecticut, and Utah, as states which have adopted the Uniform Act.

[30] See, however, Fairmont Aluminum Co. v. Commissioner, 22 T.C. 1377 (1954) (holding that adoption of the Uniform Act, in the circumstances of the case, was not such a change in legal climate within the meaning of *Commissioner v. Sunnen*, 333 U.S. 591 (1948), as to foreclose the defense of collateral estoppel).

[31] MINN. STAT. ANN. § 600.135(2) (1947, 1956 Cum. Pocket Part):
"The phrase 'in the regular course of business' as used in subdivision 1 with reference to making reproductions of originals not held in a custodial or fiduciary capacity nor required by law to be preserved and also with reference to destroying such originals shall be construed to include reproducing at any time and destroying at any time, respectively, if done in good faith and without intent to defraud, and with reference to making reproductions of originals held in a custodial or fiduciary capacity shall be construed to mean reproducing at any time in good faith and without intent to defraud and whether or not made with the intention of thereafter destroying such originals. Neither the manner in which an original is destroyed, whether voluntarily or by casualty or otherwise, nor the fact that it was destroyed while it was held in a custodial or fiduciary capacity shall affect the admissibility of a reproduction. This subdivision shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.";
VA. CODE 1950 § 8-279.2 (1956 Cum. Supp.):
"Reproduction in the regular course of business shall be construed to include reproduction at a later time, if done in good faith and without intent to defraud."

[32] See Palmer v. Hoffman, 318 U.S. 109, 144 A.L.R. 719 (1943); Intermondale Trading Co. v. North River Ins. Co. of New York, 100 F.Supp. 128 (S.D.N.Y. 1951); Higgins v. Loup River Public Power District, 159 Neb. 549, 68 N.W.2d 170 (1955).

be met;[33] in any event, reproduction in color or exact size would not seem called for ordinarily.

"Satisfactorily identified" would seem to require proof such as that necessary to lay the foundation for admissibility of any original business record, offered as made in the regular course of business. There is an additional problem in many states, however; for the document admitted ordinarily is not the microfilm itself but an enlargement thereof.[34] The Act specifically permits admission of the enlargement if the microfilm is in existence and available for inspection under direction of the Court. Should the microfilm have been destroyed, it is possible that evidence such as would permit admission of copies where originals were destroyed or lost would be sufficient to permit admission of the enlargements.[35]

Many of the states adopting the Uniform Act have modified it in various ways. In a number of instances only section 1, or sections 1 and 2, of the Act has been adopted. Others have eliminated coverage of public records, usually because that type of record is covered in other statutory provisions. Several make it clear that evidence admissible under other provisions is not excludible because of the Uniform Act. Virginia forbids destruction of the original where its validity has been questioned. Wyoming has a provision regarding scale.[36]

The Present Status: Adoption of Other Types of Microfilm Statutes.

States whose statutes are within this category include: Alabama, Arizona, Delaware, Georgia, Illinois, Indiana, Louisiana, Michigan, Missouri, Ohio, Oregon, Rhode Island, South Carolina, and Tennessee. The various statutes are set forth in Appendix "III", and will be summarized in the following discussion.

The Alabama statute appears to be the Commonwealth Fund model business records statute modified to apply to photographic copies. It requires the making of the copies in the regular course of business, at the time of the transaction or within a reasonable time thereafter, calls for some kind of identification, treats the

[33] For example, Illinois' reference to standards approved by the National Bureau of Standards, note 41, *infra*, and Appendix III-E. CONN. GEN. STAT. § 8883 (1949 Rev.), referring to photography of official records, requires use of a process approved by the state examiner of public records.

[34] ARIZ. REV. STAT. § 12-2262D (1956) provides, in part: ". . . A reproduction may be offered in evidence through the use of a projector." A single roll of film may contain records of over a thousand different items. Cutting the film may destroy it and will upset indexing of the rolls.

[35] *See* Note, 34 IOWA L. REV. 83, 88 (1948).

[36] These modifications are described in detail in notes 54-65, *infra*.

film or its enlargement as itself an original, and presumes them to be true and correct reproductions of the original records.[37]

Arizona's statute, which was added to its Uniform Business Records Act, does not require that the reproduction be made in the regular course of business, but does require reproduction accurately in all details other than color or size. The reproduction has "the same force and effect as the original", and therefore would apparently be admissible as primary evidence.[38]

Delaware's provision is also an addition to the Uniform Business Records Act, and treats photographs of admissible records as competent evidence if the identity of and the mode of making them are testified to, and if the trial court concludes that the original was destroyed or disposed of in good faith in the regular course of business and the mode of making is such as to justify admission of the photograph. This would seem to require testimony as to the whereabouts of the original.[39]

The Georgia statute makes admissible a microphotograph made in the regular course of business to preserve the original thereby, without accounting for the original. Enlargements or facsimiles are treated exactly as under the Uniform Act.[40]

Illinois has expanded its business records statute to treat photographic copies as originals, if made in the regular course of business, where they comply with the minimum standards for quality for permanent photographic records approved by the National Bureau of Standards.[41]

Indiana does not require the photocopy to be made in the regular course of business. It imposes the same standards of accurate reproduction as the Uniform Act, and provides that copies so qualifying are admissible as originals.[42]

Louisiana's statute is almost identical with Indiana's. Indiana, however, authorizes disposition of the original after copying, while Louisiana requires that records pertaining to claims, taxes or reports due to the state or any of its agencies be preserved for at least five years. The Louisiana provision relating to enlargements follows the Uniform Act rather than Indiana.[43]

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[37] ALA. CODE Tit. 7, § 415(1) (1940, 1952 Cum. Supp.). See Appendix III-A. § 415(2) relates to preservation of either original or reproduction; § 415(3) defines "business" and "records".

[38] ARIZ. REV. STAT. § 12-2262D (1956). The prior parts of the section contain the substance of the Uniform Business Records Act, and a provision regarding records made by a deceased and proved to be in his handwriting. See Appendix III-B.

[39] 10 DEL. CODE ANN. c. 43, § 4310(b), the balance of the section being the Uniform Business Records Act. See Appendix III-C.

[40] Ga. Laws 1950, No. 540. See Appendix III-D.

[41] ILL. REV. STAT. c. 51, § 3 (1953). See Appendix III-E.

[42] BURNS' ANN. IND. STAT. §§ 2-1649, 2-1650 (1946, 1955 Cum. Pocket Supp.). "Business" is defined in § 2-1651. See Appendix III-F.

[43] LA. REV. STAT. c. 13, § 3733A,B (1950, 1952 Cum. Supp.). "Business" is defined, in § 3733C, exactly as in Indiana. See Appendix III-G.

Michigan has adopted a statute similar to Alabama's. In addition, it requires a motion for admission of the reproduction, with at least four days notice, and makes the granting of the motion discretionary.[44]

Although Missouri's microfilming statute is buried in a portion of the Missouri Code that carries the title "Public Records", by its terms it applies to business records as well. In substance the statute is identical with Indiana's, except that there is no reference to destruction of the originals other than provision for the procedure to be followed before public records can be destroyed.[45] It is believed that this omission does not forbid a private business to destroy its records after they have been microfilmed.

Ohio's statute is similar to Delaware's but adds that a copy of the photograph must be submitted to the adverse party a reasonable time before trial, if the original record itself would have had to be so submitted—even then, failure to submit may be excused if the court concludes that no unfair surprise resulted.[46]

Oregon does not require the photocopy to be made at or near the time of the transaction, if there is testimony as to its identity and evidence that it is the practice of the business to keep and make such reproductions to replace the original.[47]

Rhode Island permits admission of a photocopy, made in the regular course of business in order to keep a permanent record of the original, if the original is subsequently destroyed, lost, or is unavailable. This provision is an addition to the Rhode Island version of the Commonwealth Fund model business records act.[48]

South Carolina requires the copy admitted to be certified or authenticated, and permits its admission if the original has been lost or destroyed.[49]

Tennessee requires the use of film of durable material, but permits it only if the business has a custodian of such papers and records who is bonded by a surety company for at least $5,000 plus, apparently, any damages arising from misuse of the microfilm law.[50]

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[44] MICH. COMP. LAWS § 617.53 (1948). See Appendix III-H.

[45] MO. REV. STAT. §§ 109.120—109.130 (1949). See Appendix III-J. Section 109.140 provides for a certificate of reproduction by the responsible governmental official to either the governor, the county court, or the mayor, depending on whether the officer is in a state, county, or municipal position, in order to obtain authority to destroy the originals.

[46] OHIO REV. CODE § 2317.41 (Anderson's Desk Ed. 1953). See Appendix III-K.

[47] Ore. Laws 1949 c. 74. See Appendix III-L.

[48] R. I. Pub. Laws 1947-8 c. 2087, amending its business record statute, R. I. GEN. LAWS c. 538, § 1 (1938). See Appendix III-M.

[49] S. C. CODE OF LAWS § 56-103 (1953). See Appendix III-N.

[50] TENN. CODE ANN. § 24-709 (1955). See Appendix III-O.

Several other states which have unrepealed microfilming statutes which differ from the Uniform Act have also adopted the Uniform Act, at least in substance.[51]

Conclusion

Except for Tennessee, none of the states whose microfilm statutes were described in the preceding section appears to impose requirements on admissibility more stringent than those in the Uniform Act. In view of the widespread adoption of microfilming statutes, and the trend in the common law development of the best evidence rule to admit secondary evidence of documents intentionally destroyed where the court is satisfied that no fraud was involved in the destruction, microfilms may be admissible in all jurisdictions. A microfilming program once begun and carried on as part of the regular course of business should be sufficient for the Uniform Act, and photocopies meeting the Uniform Act requirements would seem readily admissible in all jurisdictions except Tennessee, although some question remains as to the attitudes of the courts of Mississippi, Texas, and West Virginia.[52]

Further, if microfilms admissible under the Uniform Act become relevant to litigation in any state where admissibility is uncertain, the problem may be resolved readily if the controversy can be brought in or transferred to federal courts, where federal

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[51] A number of states have not repealed microfilming statutes relating to official records. Massachusetts seems to have retained its general microfilming act as well as the Uniform Act. 8 ANN. LAWS OF MASS. c. 233 § 79D (recompiled 1956), is as follows:

> ". . . . A print, whether enlarged or not, from any photographic film, including any photographic plate, microphotographic film, photostatic negative or reproduction of any original record, document, instrument, plan, book or paper destroyed, lost or for any reason unavailable after such film was taken, shall be admissible in evidence in all instances that the original record, document, instrument, plan, book or paper might have been admitted in evidence, and shall have the full force and effect of said original if it is proved that (a) such reproduction was made in the regular course of any business and that it was the regular course of any such business to make such reproductions; (b) said photographic film, microphotographic, photostatic or similar reproduction was taken in order to keep a permanent record of the original; and (c) the said original was subsequently destroyed, lost or is unavailable."

§79E is the Uniform Act. Maryland has both the Uniform Act and a section which, except for slight rearrangement, is identical with Alabama's statute quoted in Appendix III-A. FLACK'S ANN. CODE OF MD. Art 35, § 68 (1951).

[52] Admission of the photographs as secondary evidence probably is not foreclosed in these states. It should also be noted that Rule 70 of the proposed Uniform Rules of Evidence apparently recedes from the policy of treating microfilms as original documents, and would seem to treat all types of evidence of the original, photographic or oral, as secondary and on the same footing as far as admissibility is concerned. See Levin, *Authentication and Content of Writing*, 10 RUTGERS L. REV. 632, 641-3 (1956).

rather than state rules of evidence would apply.[53] This would require diversity of citizenship of the litigants and an amount in controversy of at least $3,000.

It would seem desirable, if a business installs or revises a microfilming project, that the steps involved be made a permanent written record, and that changes be noted in writing, timely and accurately recorded with dates of change fixed. This will simplify identifying the steps taken and the regularity of the system, should testimony on these points be required.

APPENDIX I

A. Commonwealth Fund "Proof of Business Transactions" Model Act, 5 WIGMORE, EVIDENCE § 1520 (3d ed. 1940).

"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."

B. Uniform Business Records as Evidence Act, 9 UNIFORM LAWS ANN. 387 (1951).

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

"§ 2. 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 admission.

"§ 3. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

"§ 4. This act may be cited as the Uniform Business Records as Evidence Act.

"§ 5. All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

"§ 6. This act shall take effect . . . "

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[53] Rule 43(a), Rules of Civil Procedure for the District Courts of the United States, 28 U. S. C. (1952), in part states [italics supplied]:

"All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or of the state in which the United States court is held. In any case, *the statute or rule which favors the reception of the evidence governs* and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

C. Proposed Business Records statute for Illinois, 32 ILL. L. REV. 334 (1937); 5 WIGMORE, EVIDENCE § 1520 (3d ed. 1940).

"Sec. 1. The term 'business' shall include the operation of institutions, every kind of profession, occupation, or calling, whether or not carried on for profit. The term 'record' shall include 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, condition, occurrence, or event, including any transfer of cash. The term 'record' shall include the records made by or for a party to the suit, and the records made by or for any third person not a party to the suit.

"Sec. 2. Any record shall, in so far as relevant, be competent evidence if any person who is familiar with the regular course of the business, even though a party or interested person, testifies to its identity, the mode of its preparation, and that it appears that the record was made in the regular course of the business at or near the time of the act, transaction, condition, occurrence, or event. All other circumstances of the making of such record, including lack of personal knowledge of the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility."

APPENDIX II

Uniform Photographic Copies of Business and Public Records As Evidence Act

Sec. 1. If any[54] business, institution,[55] member of a profession or calling, or any department or agency of government,[56] in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business[57] unless[58] held in a custodial or fiduciary capacity or unless the preservation is required by law.[59] Such reproduction,[60] when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the

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[54] Alaska inserts "person" at this point. Alaska Laws 1951 c. 22, § 1.

[55] Maine adds "bank, trust company". Maine Pub. Laws 1955 c. 264.

[56] Idaho omits the reference to department or agency of government. IDAHO CODE § 9-417 (1948, 1955 cum. pocket supp.). Wisconsin adds "(Except state government)". WIS. STAT. § 327.29 (1955).

[57] Wisconsin omits all words from the preceding comma to "business". WIS. STAT. § 327.29 (1955).

[58] After initial adoption of the Uniform Act, Massachusetts amended it by adding at this point "created by a person other than a holder and". 8 ANN. LAWS OF MASS. c. 233 § 79E (Recompiled 1956).

[59] Utah changed the period to a semicolon and inserted "and" before "such". UTAH CODE ANN. § 78-25-16 (1953). Iowa changed the period to a comma and added "except if the originals are records, reports or other papers of a county officer they shall not be destroyed until they have been preserved for ten years." IOWA CODE § 622.30(2) (1954). This was not part of the law as originally adopted in 1951, but was added in 1953 when county officers were authorized to microfilm or photostat their records but to destroy only those over ten years old or to turn them over to a museum or historical society if acceptable. Iowa Laws 1953 c. 153. The balance of the 1953 law appears as IOWA CODE § 343.13 (1954). Virginia changed the period to a comma and added "or its validity has been questioned." VA. CODE § 8-279.1 (1950, 1956 Cum. Supp.). Maine omits the entire clause and makes the second sentence a continuation of the first. Maine Pub. Laws 1955 c. 264. Wyoming inserts another sentence after the period, which reads: "When the scale or dimension of such reproduction is of the essence, such scale shown in appropriate units, English measure, shall be clearly and accurately represented thereon." WYO. COMP. STAT. 1945 ANN. § 3-3132 (1955 Cum. Pocket Supp.).

[60] Virginia added after the comma "if substantially the same size as the original." VA. CODE § 8-279.1 (1950, 1956 Cum. Supp.).

original reproduction is in existence and available for inspection under direction of court.[61] The introduction of a reproduced record, enlargement or facsimile, does[62] not preclude admission of the original.[63]

Sec. 2. This act shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it.[64]

Sec. 3. This act may be cited as the Uniform Photographic Copies of Business and Public Records as Evidence Act.[65]

Sec. 4. All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.[66]

Sec. 5. This act shall take effect . . .

APPENDIX III

Other Microfilming Statutes

A. ALABAMA. ALA. CODE Tit. 7, § 415(1) (1940, 1952 Cum. Supp.).

"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, if it was made in the regular course of any business, and it was in the regular course of the business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter, may be photostated, or it may be photographed or microphotographed on plate or film, and such photostat, photographic, or microphotographic plate or film, or prints thereof, whether enlarged or not, shall be deemed to be an original record, and shall be admissible in evidence in proof of said act, transaction, occurrence, or event, in all instances that the original record might have been admissible, and shall be presumed to be a true and correct reproduction of the original record it purports to represent. All other circumstances of the making of such writing or record, or of such photostat, photographic or microphotographic plate or film or prints thereof, whether enlarged or not, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility."

B. ARIZONA. ARIZ. REV. STAT. § 12-2262D (1956).

"A reproduction, made by any photographic, photostatic, microphotographic, or similiar process of any record which would constitute competent evidence under subsections A, B or C, shall have, whether or not the original has been destroyed, the same force and effect as the original, and shall be admitted in evidence in all courts, quasi-judicial commissions and administrative agencies in this state. All circumstances surrounding the making of such reproduction when offered in evidence may be shown to affect the weight, but not the admissibility thereof.

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[61] Connecticut changed the period to a comma and added "except as provided in Chapter 435.", which chapter requires certification of photographic copies of public records. CONN. GEN. STAT. § 3159(d) (1949 Rev., 1955 Supp.).

[62] Massachusetts deleted the comma before "does" and changed "does" to "shall". 8 ANN. LAWS OF MASS. c. 233, § 79E (Recompiled 1956).

[63] "This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence." 28 U. S. C. § 1732(b) (1952). Colorado adds the same sentence, omitting the word "subsection". COLO. REV. STAT. § 52-2-1 (1953, 1955 Cum. Supp.). "Nothing in this Act shall affect the admissibility of any evidence permitted otherwise than in accordance herewith." WYO. COMP. STAT. 1945 ANN. § 3-3134 (1955 Cum. Pocket Supp.). See also the last sentence in MINN. STAT. ANN. § 600.135(2) (1947, 1956 Cum. Pocket Part), quoted in note 31, *supra*.

[64] This section was omitted by Arkansas, Connecticut, Iowa, Maine, Massachusetts, New York, North Dakota, Utah, and Virginia. Alaska added "and territories" after "states". Alaska Laws 1951 c. 22 § 2. Wisconsin substituted "This section" for "This act". WIS. STAT. § 327.29 (1955).

[65] This section was omitted by the states which omitted section 2, listed in note 64, *supra*, and also by Montana and Wisconsin. Idaho omitted "and Public". IDAHO CODE § 9-419 (1948, 1955 Cum. Pocket Supp.).

[66] This section was, apparently, omitted by the states listed in note 64, *supra*, and also by Idaho, Kansas, Nebraska and Wisconsin.

Any device used to make a reproduction shall be one which correctly and accurately reproduces the original thereof in all details; but reproduction of color and size shall not be required. A reproduction may be offered in evidence through the use of a projector."

C. DELAWARE. 10 DEL.CODE ANN. c. 43, § 4310(b) (1953).

"To the extent that a record would be competent evidence under this section, a photograph of such record shall be competent evidence if the custodian of the photograph or the person who made such photograph or under whose supervision such photograph was made, testifies to the identity of and the mode of making such photograph, and if, in the opinion of the court, the record has been destroyed or otherwise disposed of in good faith in the regular course of business, and the mode of making such photograph was such as to justify its admission. If a photograph is admissible under this section, the court may admit the whole or a part thereof. Photograph as used in this section includes but is not limited to microphotographs, a roll or strip of film, a roll or strip of microfilm, or a photostatic copy."

D. GEORGIA. Ga. Laws 1950, No. 540.

"Any photostatic or micro-photostatic or photographic reproduction of any original writing or record which may be or has been made in the regular course of business to preserve permanently by such reproduction the writing or record shall be admissible in evidence in any proceeding in any court of this State, and in any proceeding before any board, bureau, department, commission or agency of the State, in lieu of and without accounting for the original of such writing or record. Any enlargement or facsimile of such reproduction shall likewise be admissible if the original of such reproduction is in existence and available for inspection under the direction of the court or the agency conducting the proceeding."

E. ILLINOIS. ILL. REV. STAT. c. 51, § 3 (1955).

"Where in any civil action, suit or proceeding, the claim or defense is founded on a book account or any other record or document, any party or interested person may testify to his account book, or any other record or document and the items therein contained; that the same is a book, record, or document of the original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident person of the State at the time of the trial, and were made by such deceased or non-resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said book account and entries of any record or document shall be admitted as evidence in the cause. Where such book of original entries or any other record or document has been photographed, microphotographed, microfilmed or otherwise reproduced either in the usual course of business, or pursuant to any statute of this State authorizing the reproduction of public records, papers or documents, and the reproduction, in either case, complies with the minimum standards for quality for permanent photographic records approved by the National Bureau of Standards, then such reproduction shall be deemed to be an original record, book or document for all purposes, including introduction in evidence in all courts or administrative agencies."

F. INDIANA. BURNS' ANN. IND. STAT. (1946, 1955 Cum. Pocket Supp.).

Sec. 2-1649: "Any business may cause any or all records kept by such business to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately and permanently copies, reproduces or forms a medium for copying

or reproducing the original record on a film or other durable material, and such business may thereafter dispose of the original record."

Sec. 2-1650: "Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts or administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record."

G. LOUISIANA. La. Rev. Stat. c. 13, § 3733 (1950, 1952 Cum. Supp.).

"A. Any business may cause any or all records kept by such business in the regular course of its operation to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material, and such business may thereafter dispose of the original record, provided that every original record pertaining to any claim, tax, or report due the State of Louisiana or any of its agencies shall be preserved for five years from the thirty-first day of December of the year in which such claim arose, or such tax or report was due.

"B. Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts or administrative agencies for the purpose of its admissibility in evidence. An enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court."

H. MICHIGAN. Mich. Comp. Laws § 617.53 (1948).

"Any writing or record whether in the form of an entry in a book or otherwise, made as a memorandum of any act, transaction, occurrence or event shall be admissible in evidence in all trials, hearings and proceedings in any cause or suit in any court, or before any officer, arbitrators, or referees, in proof of said act, transaction, occurrence or event if it was made in the regular course of any business and 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 not its admissibility. The term 'business' shall include business, profession, occupation and calling of every kind. The lack of an entry regarding any act, transaction, occurrence or event in any writing or record so proved may be received as evidence that no such act, transaction, occurrence or event did, in fact, take place. Any photostatic or photographic reproduction of any such writing or record shall be admissible in evidence in any such trial, hearing or proceeding by order of the court, made within its discretion, upon motion with notice of not less than four (4) days. All circumstances of the making of such photostatic or photographic reproduction may be shown upon such trial, hearing or proceeding to affect the weight but not the admissibility of such evidence."

J. MISSOURI. Mo. Rev. Stat. (1949).

Sec. 109.120: "The head of any business, industry, profession, occupation or calling, or the head of any state, county or municipal department, commission, bureau or board may cause any or all records kept by such official, department, commission, bureau, board or business to be photographed, microphotographed, photostated or reproduced on film.

Such film or reproducing material shall be of durable material and the device used to reproduce such records on such film or material shall be such as to accurately reproduce and perpetuate the original records in all details."

Sec. 109.130: "Such photostatic copy, photograph, microphotograph or photographic film of the original record shall be deemed to be an original record for all purposes, and shall be admissible in evidence in all courts or administrative agencies. A facsimile, exemplification or certified copy thereof, shall, for all purposes cited in sections 109.120 to 109.140, be deemed to be a transcript, exemplification or certified copy of the original."

K. OHIO. OHIO REV. CODE § 2317.41 (Anderson's Desk Ed. 1953).

" 'Photograph' as used in this section includes but is not limited to a microphotograph, a roll or strip of film, a roll or strip of microfilm, or a photostatic copy.

"To the extent that a record would be competent evidence under Section 2317.40 of the Revised Code, a photograph of such record shall be competent evidence if the custodian of the photograph or such person who made such photograph or under whose supervision such photograph was made testifies to the identity and the mode of making such photograph, and if, in the opinion of the trial court, the record has been destroyed or otherwise disposed of in good faith in the regular course of business, and the mode of making such photograph was such as to justify its admission. If a photograph is admissible under this section, the court may admit the whole or a part thereof.

"Such photograph shall be admissible only if the party offering it shall have delivered a copy of it, or so much thereof as relates to the controversy, to the adverse party a reasonable time before trial, unless in the opinion of the court the adverse party has not been unfairly surprised by the failure to deliver such copy. No such photograph need be submitted to the adverse party as prescribed in this section unless the original instrument would be required to be so submitted."

L. OREGON. Ore. Laws 1949 c. 74.

Sec. 1. "Any photostatic, microphotographic or photographic reproduction of a writing, book entry or record made on film and made in the regular course of any business as a memorandum or a record of an act, transaction, occurrence or event, whether made at or near the time of the act, transaction or event or made subsequently, prior to the time of destruction or removal of such original records, shall be admissible in evidence in place of such original memorandum, record, document or other instrument. Such photostatic, microphotographic or photographic reproduction shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and if it is the practice of such business to keep and make such photostatic, microphotographic or photographic reproductions to replace original memoranda, records or documents."

M. RHODE ISLAND. R. I. Pub. Laws 1947-8 c. 2087.

"A print, whether enlarged or not, from any photographic film, including any photographic plate, microphotographic film, photostatic negative or similiar reproduction of any original record, document, instrument, plan, book or paper destroyed, lost, or for any other reason unavailable after such film was taken shall be admissible in evidence in all instances that the original record, document, instrument, plan, book or paper might have been admitted in evidence, and shall have the full force and effect of said original for all purposes, if the trial judge shall find: (a) that such reproduction was made in the regular course of any

business and that it was the regular course of such business to make such reproduction; (b) that said photographic film, microphotographic, photostatic or similar reproduction was taken in order to keep a permanent record of the original; and (c) that said original was subsequently destroyed, lost, or is unavailable."

N. SOUTH CAROLINA. S. C. CODE OF LAWS § 26-103 (1952).

"Any certified or authenticated copy of photographic or microphotographic or photostatic or microphotostatic film of any record, the original of which has been lost or destroyed, shall be admitted as evidence in any court of law in this State as the original of such record would have been admitted when offered by any person or governmental agency."

O. TENNESSEE. TENN. CODE ANN. § 24-709 (1955).

"Any photograph, photostat, photostatic copy or reproduction of microfilm or other photographic film of durable material, made or caused to be made by any person, firm, corporation or association, of any record or records of such person, firm, corporation, or association, or in which such person, firm, corporation, or association, has or may have a present or future interest, shall be deemed to be the original of such record or records, and shall be admissible in evidence, whenever said original would be admissible if it were offered in evidence, in all courts and before all governmental departments, commissions, officers, administrators, administrative agencies, and other tribunals or authorities and in all proceedings, in which evidence is required or may be lawfully introduced, provided, however, that such tribunal is authorized to require the production of the original if available at the time offered. Provided, that said provision shall apply only to such organizations who maintain in their employment a custodian of said papers and records, who is bonded by a surety company in an amount of not less than five thousand dollars ($5,000.00), which bond shall include therein provision that it shall also be liable for any damages which shall arise from misuse of the provisions of this section."

CONFIDENTIAL COMMUNICATIONS BETWEEN ACCOUNTANT AND CLIENT

At common law the privileged character of confidential communications between an accountant and his client has never been recognized.[1] When interpreting the common law, the courts have repeatedly said, "There is no privilege with regard to communications made to accountants."[2]

Many jurisdictions, influenced to some extent by the accounting profession and by a desire to protect the confidence a client necessarily reposes in his accountant, have granted such a privilege by statute, however. Such statutes have been passed by several states and Puerto Rico despite opposition from the American Bar Association Committee on the Improvement of the Law of Evidence.[3]

These statutes can be classified into three groups. In the first category, Arizona,[4] Maryland,[5] Tennessee,[6] and Michigan,[7] it is specifically provided that the privilege is not applicable in situations involving criminal or bankruptcy laws. All of the statutes in this group, except that of Tennessee, apply to both certified public accountants and public accountants. Tennessee mentions only certified public accountants. There are minor variations in this group, but the Michigan statute may be quoted as a fair example:

> "Except by written permission of the client, or person, or firm, or corporation employing him, or the heirs, successors or personal representatives of such employer, a certified public accountant, or a public accountant, or a person employed by a certified public accountant or by a public accountant shall not be required to, and shall not voluntarily, disclose or divulge information of which he or she may have become possessed relative to and in connection with any examination of, audit of, or report on, any books, records, or accounts which he or she may be employed to make. The information derived from or as the result of

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[1] Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949) *cert. denied*, 338 U.S. 860 (1949); Gariepy v. United States, 189 F.2d 459 (6th Cir. 1951); Brown v. United States, 224 F.2d 845 (6th Cir. 1955), *cert. denied*, 348 U.S. 905 (1955).

[2] In re Fisher, 51 F.2d 424, 425 (S.D. N.Y. 1931).

[3] 8 WIGMORE, EVIDENCE § 2286 (3d ed. 1940). In his discussion, Wigmore refers to the 1937-38 ABA Committee on the Improvement of the Law of Evidence, and cites the following from their report:

> "We recommend that the Legislatures refuse to create any new privileges for the secrecy of communications in any occupation; and particularly we recommend against any further recognition of:
>
> (A) Privilege for information obtained by *Accountants;* . . . "

[4] ARIZ. REV. STAT. § 32-743 (1956).

[5] FLACK'S ANN. CODE OF MD. Art. 75A, § 11 (1951).

[6] TENN. CODE ANN. § 62-114 (1955).

[7] MICH. COMP. LAWS § 338.523 (1948).