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REPORT
OF THE
N. J. RULES OF EVIDENCE
STUDY COMMISSION.

(SCR 28, 1966; SCR 1, 1967)

APRIL, 1967

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Senator William T. Hiering
Assemblyman Joseph J. Maraziti
Assemblyman Joseph J. Higgins
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REPORT OF THE
RULES OF EVIDENCE STUDY COMMISSION.

(SCR 28, 1966; SCR 1, 1967).

TO THE SENATE AND GENERAL ASSEMBLY OF NEW JERSEY:

The undersigned Commissioners now serving under the concurrent resolution, SCR 28 (1966) and reconstituted by SCR 1 (1967), respectfully report that:

I.

The Commission was charged with the function of studying and reviewing the proposed rules of evidence publicly announced by the Supreme Court of New Jersey in September, 1964 and filed by it with the President of the Senate, the Speaker of the General Assembly, and the Governor. Following such study and review, the Commission was charged with recommending such action as it shall deem appropriate to be taken by the Legislature pursuant to Article III of chapter 52 of the laws of 1960 (C. 2A:84A-33 et cetera).

II.

The Commission first undertook a consideration of the prior history in this State in connection with the subject of evidence law.

Current work in this field stems from the Model Code of Evidence approved in 1942 by the American Law Institute. That draft was itself the product of a prolonged study undertaken by Edmund M. Morgan as Reporter, John M. Maguire as Assistant Reporter and John H. Wigmore as Chief Consultant. They were assisted by

an eminent Committee on Evidence and a considerable body of competent consultants.

The Model Code then became the basis for a draft of proposed Uniform Rules of Evidence prepared by a committee of the National Conference of Commissioners on Uniform Laws. The chairman was Judge Spencer A. Gard of Kansas. Its draft was approved in 1953 by the Conference and by the American Bar Association. In 1954 it was approved by the American Law Institute.

The first detailed study in New Jersey was by a Committee on the Revision of the Law of Evidence, which reported to the Supreme Court of New Jersey in May, 1955. That committee was an exceptionally able one, and was composed of Alfred C. Clapp, Lester A. Drenk, Frederick W. Hall, Arthur W. Lewis, Arthur J. O'Dea, Lewis Tyree, Joseph Weintraub and Nathan L. Jacobs, Chairman. Its report, which included a wealth of reference to local materials provided by Professor Tyree, has been a valuable research tool in the subject.

By J.R. 15 (1955), the Legislature established a Commission to study the improvement of the law of evidence. That Commission, headed by John O. Bigelow, undertook the preparation of a draft of rules to be enacted by statute. The theory of that commission was that in any comprehensive set of evidence rules, some provisions or parts of rules would be of a legislative nature and others might be of a procedural nature, making it realistically impossible to separate them effectively and safely. Besides, any attempt at separation would run the risk of destroying the compatibility of provisions within the entire set of rules, especially if the Legislature and the Supreme Court should hold different views of policy. In addition, to the extent that it would be desirable to have the body of rules, or some part of it, apply to proceedings before tribunals other than a court (e.g., municipal and state agencies, both administrative and quasi-judicial), court rules could not apply and legislation would be necessary in any event.

Following the main report of November, 1956, the Commission filed a supplemental report suggesting that for the sake of simplicity of operation as well as flexibility, the enabling legislation might well include an arrangement for updating of the content of the rules from time to time by a mechanism involving the joint participation and mutual agreement of all three branches of government, modelled upon the statute, 28 U.S.C.A. sec. 723b and 723c, by which the federal Congress made it possible for the United States Supreme Court to serve the function of initiating and proposing procedural rules to be adopted for the federal courts.

While the subject continued to be one of considerable interest after the 1957 hearings on the Commission report, the directions for a workable solution did not develop immediately. In January, 1958, the suggestion advanced by the supplemental report of the Bigelow Commission was carefully evaluated in an editorial in the New Jersey Law Journal entitled "An Approach to Evidence Revision" (81 N.J.L.J. 16). In that editorial, the major elements considered essential for a workable arrangement were analyzed and enumerated, to provide a basis on which theoretical difficulties of jurisdictional function could be rendered moot.

A bill along these lines was drawn and introduced in 1959, and was employed as a vehicle for thorough consideration within and among governmental and professional circles. A review of the content was presented in a series of Law Journal editorials published from October 8, 1959 to November 12, 1959. The concept of a common participation in the rules process by both the Legislature and the Supreme Court was dealt with in the editorials of October 8, 1959 (82 N.J.L.J. 500) and of November 12, 1959 (82 N.J.L.J. 560), and was firmly endorsed.

The 1959 bill was not enacted, but substantially the same bill, with a number of corrections and improvements, was introduced in 1960 as Senate Bill 73 and Assembly Bill 106. The

1960 version was enacted by unanimous vote in both Houses, and became "The Evidence Act, 1960 " (chapter 52).

The 1960 statute constructed this arrangement:

- (a) it enacted as law the rules on basic definitions and scope;
- (b) it enacted as law the rules on privilege;
- (c) it made a number of corrections and improvements in existing statutes, such as the "Dead Man's Act" (N.J.S.2A:81-2);
- (d) it established a mechanism by which rules of evidence could be proposed by the Supreme Court, to have the force and effect of law, provided the subject of the rules was first presented at a Judicial Conference and then discussed, then filed with both Houses and the Governor, and not objected to by joint resolution passed by both Houses and signed by the Governor.

In 1962, the Essex County Bar Foundation undertook an exhaustive study of the materials then available, through a project committee headed by Morris N. Hartman and with the participation of a substantial number of lawyers with broad trial experience. The results of that study were published in a report dated March 11, 1963.

At about the same time, the Supreme Court established an official committee headed by Mr. Justice Jacobs, to undertake a review of all materials published to date and to recommend the content for proposed rules. That committee, like the Foundation Committee, included a substantial number of experienced trial lawyers as well as others who had participated in the earlier studies. That report was issued in March, 1963.

The next phase involved a detailed review of these various reports by the justices of the Supreme Court. Following a full review at the Judicial Conference, a long series of conferences was held during which each rule, and the phrasing or expression, was analyzed and debated in detail. From these extended and detailed discussions, in which the practical aspects of the rules were given considerable weight, the Supreme Court itself prepared and announced the proposed rules of September, 1964, these being the version with which the present Commission is most immediately concerned.

III.

This Commission was divided at an early stage into a number of study groups, each assigned to review a particular group of rules. These studies were supplemented by notes of particular areas that had tended to be the subject of a difference in view during most of the earlier studies, accompanied by the considerations then advanced on each side.

The reports of the study groups sifted down the areas for further discussion to a specific list of rules, and these in turn were taken up in detail at meetings of the Commission as a whole.

To supplement this review, notice was given of a public hearing, with care taken to direct attention to the specific draft text under consideration, and encouraging those who could not attend to submit their comments in writing.

Following the final review, a list of specific rules was prepared, in each case with notations of the tentative view of the Commission in respect to deletion or modification. Arrangements were then made to meet with the Supreme Court, which was supplied with copies of the study memorandum.

The Commission then participated with the Supreme Court in a detailed review and discussion of the rules noted, and from this conference mutual agreement was reached for disposition of all the items involved. The conference was an extremely gratifying experience, as it was plain throughout the discussions that both groups were motivated to find mutually satisfactory dispositions in order to bring to fruition a massive effort that had begun more than a dozen years ago. The members of the Court were not only fully receptive to the comments and views of the Commission, but in a number of instances developed positive suggestions for phrasing and expression to accomplish the views of the Commission.

In addition to the review and resolution of problems involving specific rules, the underlying concept of the mechanism provided by The Evidence Act, 1960, was also discussed. That mechanism is intended to provide a means by which rules of evidence can be approved by the mutual consent of the Supreme Court, as the

initiating source, and the Legislature and Governor as the reviewing and approving source. This joint and cooperative approach makes it possible to adopt a modern set of rules of evidence without generating collateral and unrelated issues in respect to the source of authority. At the same time, its use in no way carries any implication whether the subject of a rule, whether included among those adopted under this procedure or not, lies within the legislative or the procedural rule-making powers. For example, the parol evidence rule was not dealt with by the Uniform Rules draft, nor is it dealt with by the present rules. That rule is regarded as a rule of substantive law and not merely a rule of evidence. Winoka Village, Inc. v. Tate, 16 N.J. Super. 330, at 334 (App. 1951); hence, while the Legislature alone might modify that rule, or while a rule modifying the parol evidence rule may effectively be adopted pursuant to The Evidence Act, 1960, it seems clear that this could not be done by the court alone under the power to adopt rules of practice and procedure. Presumably, if a change in that rule were to be made, it could be prospective only, in view of constitutional limitations. Section 42 of the Evidence Act, 1960, embodies this concept.

In addition, sec. 40 of that Act, while providing that rules adopted pursuant to its requirements may supplant existing statutory law, requires that in order to have this effect the specific statute to be so affected is to be expressly identified by footnote to the rule.

Finally, it was mutually agreed that all the rules should take effect on the opening of the courts on September 11, 1967, to provide time for all concerned to be familiarized with the final text.

IV.

The particular rules in which changes were made at the conference with the Supreme Court, and the nature of the changes, are as follows:

Rule 9(3). (Judicial Notice). In view of the change in the scope of pretrial conferences, the reference to this stage was deleted and the 10 day period was enlarged to 20 days. The provision to allow some other period when circumstances require provides the needed flexibility.

Rule 20. (Credibility). The criterion for allowing evidence to support credibility was changed to that of meeting a charge of recent fabrication of testimony.

Rule 55. (Other Crimes, etc.). The exception which allows proof of other crimes or civil wrongs was rephrased to limit such proof to some other fact in issue (other than a disposition to commit crime, etc.).

Rule 56(2). (Opinions of Experts). This rule was rephrased for clarity to cover both the expert who has personally observed the facts on which his opinion is based and the one who takes facts provided by others. In both cases, the new phrasing makes clear that the underlying facts are to be established at trial.

Rules 59 and 61. (Appointment by Experts). These provisions are not to be included in the rules.

Rule 63. (Hearsay Exclusion). The reference to exceptions based on other authority was deleted as unnecessary.

Rule 63(1)(b). (Previous Statements). This was clarified by a cross-reference to Rule 20.

Rule 63(5). (Dying Declarations). The wording was rephrased to limit this rule to statements of the victim.

Rules 63(7) and 63(9). (Admissions by Parties and Vicarious Admissions). These rules were rephrased for simplicity and clarity, and to make it apparent that under Rule 63(9), the vicarious statement must be made during the existence of the relationship. The existence of the agency, or the like, must be established independently, and not from the content of the hearsay statement. See Rule 8.

Rule 63(13). (Business Entries). The language is clarified to conform to the change in Rule 1(13), making it clear

that the initial business record may be in a form that is not itself a "writing". This is essential to deal with business records kept on computers. See, Fiordalisi, "Legal Problems in the Large-Scale Public Electronic Data Processing System", 66J M.U.L.L. 53; Freed, "Evidence", in "Computers and The Law (CCH, 1966), p. 102.

Rule 63(15). (Reports of Public Officials). This rule was rephrased to make clear that the official must be under a duty both to perform or observe and to report.

Rule 63(18). (Marriage Certificates). The cross-reference to Rule 64, requiring advance notice, was deleted.

Rule 63(20). (Conviction of Crime). The detail reference to numbered rules of practice was deleted. The reference to "crime" was particularized to refer to "indictable offense".

Rules 63(23), (24), (26), and (27). (Family History). The word "racial" was deleted as unduly restrictive.

Rule 63(30). The caption was altered from "Commercial Lists" to "Commercial Publications". No change is made in the rule.

Rule 63(31). (Learned treatises). This rule is not to be included among those to be adopted.

Rule 63(32). (Trustworthy statements). This rule is rephrased to make clear that the trustworthy quality is to be evaluated from the circumstances.

Rule 64. (Discretionary Exclusion). This rule involved technical changes to reflect amendments made elsewhere.

For a comprehensive understanding, the fulltext of all the rules to take effect are appended to this report.

V.

All of the materials so far published on this subject make it clear that with the achievement of the present goal, much remains to be done.

In New Jersey, the first important accomplishment consisted of the adoption of The Evidence Act, 1960. That law,

as noted above, settled the definitions and scope, revamped the privilege rules, and established a mechanism for further revision on a cooperative basis between the Supreme Court and the Legislature.

The settlement of differences on the 1964 proposal marks the second major achievement in the revision process.

What remains now is a stocktaking or review of all evidence law, whether embodied in constitutions, statutes, rules, or case law.

Section 43 of The Evidence Act, 1960, expressed a legislative policy that such a review be undertaken under Supreme Court supervision, to the end that a comprehensive compilation and restatement may be prepared and published, gathering together the various principles, whatever the source of their authority. This step, perhaps the most vital from a long-range point of view, is essential for further improvement of the law.

Now that all New Jersey statutes have been recorded in full text on computer tapes, it is feasible to search for and identify all existing provisions involving matters of evidence. The exhibits appended to this report illustrate the wide variety of materials now in the books which create conclusive presumptions, ordinary presumptions, and measures of presumptive evidence or prima facie proof.

Work is understood to have begun to provide the same kind of reliable access to decisional law. In any event, it is obvious that for further improvement to be realistic, a reasonably complete survey of the existing materials is an essential prerequisite. Otherwise, neither the Supreme Court nor the Legislature can have the kind of confidence needed for further modifications.

The present step is therefore important, not only for the changes and clarification which it will itself provide, but also for the foundation it will construct for still further accomplishments. In achieving these goals, the public may take confidence in the fact that a mature Legislature and a mature Court recognize that the doctrine of the separation of powers among the three

branches of government does not require that each shall pull in a different direction; the public interest is best served when all three pull together.

Respectfully submitted,

Frank J. Guarini, Jr.,
Chairman.

APPENDIX I

New Jersey Law Journal

Established 1878

JOSEPH HARRISON, Editor

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THURSDAY, JANUARY 9, 1958

AN APPROACH TO EVIDENCE REVISION

Among all the States, New Jersey has made the greatest advance toward adoption of long-needed improvements to the law of evidence. There has been a scholarly analysis by a Supreme Court Committee, followed by a thorough review by a Legislative Commission. There has been widespread approval of the general objectives by bar association committees which have themselves conducted detailed studies. There is every reason to believe that the proposed improvements are not only approved, but are generally desired. The method of implementation has been the primary obstacle. Now a new proposal has been advanced to solve the mechanical and jurisdictional problems which have impeded adoption.

Former Governor Driscoll has suggested an approach similar to that now in effect between Congress and the federal Supreme Court. Under that system rules adopted by the court are filed with the legislative body and become effective if not disapproved in a stated period. This approach overcomes the concern of some that Legislative enactment might create too rigid a mold, and it also provides a check by which the general public policy of the State may be brought to bear through elected representatives of the people.

If this proposal is to be transformed into reality, it is worth considering the major aspects of the arrangement so that the basic acceptability of the solution may be displayed.

1. The mechanism of delegation is analogous to that employed in New Jersey in the case of the former Chancery and Practice Acts, and similar to that employed by Congress as to the United States Supreme Court;

2. There should probably be a system established for advance publication of proposed changes, in time, say, for full discussion at the Judicial Conference, so that detailed study can be completed before official notice to the Legislature of intention to adopt one or more changes. At its best, such a system would discover points of disagreement and provide means for their resolution in advance so that the Legislature's need to disapprove would be reduced;

3. The enabling act will probably need to fix a date or a formula for the giving of notice of intention to adopt, so that the 60 day period will not run at a time when the Legislature is not in actual session;

4. The statute will itself need to indicate the extent to which rules adopted by the Court shall have force outside of the courts as before administrative agencies; this is particularly obvious in the case of privileges;

5. The enabling act should expressly provide that rules adopted pursuant to its terms shall supersede existing statutes, as was done in Ch. 190, P. L. 1936, and to avoid unintended or unexpected changes, it should probably require in such case that the particular statute to be superseded and the particular rule adopted to replace it be expressly identified;

6. There may be need for a basic general provision that no new rule shall be operative before its effective date insofar as such rules might conflict with the protection of Art. IV, Sec. VII, par. 3, or where retroactivity might be substantially unfair;

7. It may be desirable to incorporate a Legislative mechanism for processing any Concurrent Resolution offered during the 60 day period, to insure that all such questions raised will actually be put to a vote without regard to existing or future rules of procedure on other matters.

Given appropriate implementation, and solution of the various technical and practical aspects of the arrangement, there is no reason why it would not work extremely well. Our modern courts do not have the reluctance to act within a legislative framework as did our former courts before 1948. If the example of the United States Supreme Court is any index, it is noteworthy to observe that it has made active and intelligent use of its corresponding power under Congressional Statute, and that it has acted only after thorough discussion and approval of its proposed rules so that Congress has never felt it necessary to disapprove a rule of court.

There can be expected an equally effective result here, based, as it would be, upon mutual respect and understanding and a common desire to do that which is good and approved by both branches of government.

Four Out of Ten Firms Investigated Found In Violation of Federal Wage-Hour Law

Regional Director Frank J. investigated last year.

ABA Announces National Media Awards Program

Chicago — National public service awards program in recognition of "outstanding contributions" by the press, radio, television and motion picture industry to public understanding of the nation's legal and judicial systems is being inaugurated by the American Bar Association.

Symbol of the awards will be an engraved gavel.

The awards program, which was authorized by the ABA Board of Governors, is open to all representatives of the media of information and entertainment. Awards will be announced and presented at annual meetings of the Association, starting with the 81st convention in Los Angeles, Calif., next Aug. 25 to 29.

The "American Bar Association Gavel" will be presented for noteworthy service on the part of the media in any of the following subject areas:

—Increasing public understanding of the intrinsic values of our systems of law and justice.

—Cooperating with the organized bar to improve court administration, or in other bar activities in the public interest.

—Explaining the role of the lawyer in American life.

An awards committee of five, including top officials of the ABA, will determine recipients. The committee has set February 15, 1958, as the deadline for entries to be judged for awards to be presented in 1958.

Articles or programs initiated during 1957 will be eligible for award consideration, the committee said. The number of awards, if any, presented in any given year will be within the discretion of the judges.

In the case of published articles, both the author and the newspaper or magazine publishing the material would be recognized. The inscribed gavel would be presented to the author, with an appropriate certificate going to the publication itself. Similar dual awards may be made in the case of dramatic productions.

In authorizing the inauguration of the national awards program, the ABA Board of Governors stated:

"Legal subjects are being discussed and portrayed with increasing frequency by the media of information and entertainment. The American Bar Association wishes to recognize constructive efforts to inform people of the essential roles of lawyers and courts as bulwarks of a free society. We believe such efforts on the part of the media are in the public interest also because they contribute to the aim of the bar to improve court administration and maintain high professional standards. The ABA awards are intended to accord national recognition to truly outstanding public service of this type."

Members of the ABA Committee on Media Awards administering the program are: Chairman, Richard P. Tinkham, Hammond, Ind., former member of the Association's Board of Governors and present chairman of the Committee on Public Relations; ABA President Charles S. Rhyne, Washington, D. C.; James L. Shepherd, Jr., Houston, Tex., chairman of the House of Delegates; Tappan Gregory, Chicago, editor-in-chief of the

Testimonies of Judges and

and

A testimony tendered by Morris Co. Thomas J. Sta. A. Tommaso, A. Hegarty, Superior Court, Jan. 9, 1958, in the Spirit Club, Mt. Kestown, New Jersey, began promptly and the bar open at 6:15. Ticket is \$6.00.

Reservation with Owen Washington

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THURSDAY, OCTOBER 8, 1959

THE PROPOSED EVIDENCE ACT OF 1959

In this issue and the five next succeeding, we plan to discuss the most important legislative proposal under our new practice in the field of law reform, the Evidence Bill of 1959. In this issue we shall discuss the background of the Bill and outline its contents briefly. The remainder of the editorials will discuss critically the Bill, Article by Article.

The universal conclusion reached by the leading writers and by the various commissions and committees of lawyers, judges and scholars who have studied the law of evidence has been that it is badly antiquated and in need of reform and simplification. Thus the American Law Institute proposed a Model Code of Evidence in 1942. Upon failure of the Model Code to gain widespread acceptance it was referred to the National Conference of Commissioners on Uniform Laws. A committee of the conference after a four year study drafted the Uniform Rules of Evidence, which were published in 1953. The avowed purpose of the drafters was to make a more simple body of rules than the Model Code and one which would be sufficiently moderate in its reforms to gain broad immediate acceptance.

The New Jersey Supreme Court in 1954 appointed a distinguished committee of judges, practicing lawyers and professors, under the chairmanship of Justice Nathan L. Jacobs, to study the problem. This committee, using the Uniform Rules of Evidence as a basis, recommended their adoption with certain changes, principally of a minor nature, in a report in May, 1955.

In October, 1955, the Legislature appointed a Commission under the chairmanship of former Judge John O. Bigelow. In its report of November, 1956, the legislative commission also recognized a need for codification and recommended adoption of the Uniform Rules with further modifications which in general tended to bring them more closely in line with existing New Jersey law, especially in the field of privileges. From that point further progress seemed to flounder over the question of how the rules should be adopted, whether by the court, as rules of procedure or by the legislature, as substantive law.

The present bill hopefully attempts to resolve the dilemma of mode of promulgation by adopting a method similar to the federal system where Congress has conferred upon the Supreme Court the power to adopt rules of procedure subject, in essence, to veto by Congress. Article III of the proposed bill provides that the New Jersey Supreme Court may adopt rules of evidence after full discussion at a judicial conference. The rules are to take effect if not cancelled by joint resolution of the Legislature within a specified period, and they are subject to change or cancellation at any subsequent time by statute or subsequent rule adopted under the specified procedure.

Article I contains, in Rule 1, definitions which hold little that is controversial, although they should be carefully reviewed when the Supreme Court considers the adoption of a general body of rules. Rule 2 provides that the rules shall apply also in formal hearings before administrative agencies except where relaxed pursuant to statute applicable to the particular agency. However, rules dealing with privileges may not be relaxed under the foregoing exception. It is questionable whether such hearings require formal rules of exclusion as strict as those in court proceedings. The provision points once more to the need for the adoption of an Administrative Procedure Act to meet the special needs in this area.

Article II sets forth rules of privileges which the legislature has considered to be too fundamentally involved with substantial rights and public policy to be left to judicial formulation in the first instance. These rules will be discussed in detail in the next three editorials.

Article IV comprehends certain miscellany, of which the most important is the modification of the "Dead Man's Act". It will be dealt with in the fifth editorial.

The final editorial will discuss the method of promulgation of the rules and our conclusions as to the desirability of passage of this important legislation.

over all fields of Law and the instructors are experts in their respective fields. The schedule of lectures is as follows:

October 12th — Peter J. Devine, Jr., on liability arising out of automobile accidents, and defenses to such action.

October 19th — George F. Neutze, on workmen's compensation; liability of the employer and rights of the employee — As to who are workmen covered by the act and their rights, such as domestics and help around the house.

October 26th — Joseph Lipkin, on buying and selling homes and real estate; relationship of landlord and tenant and mortgages.

November 2nd — William Lipkin, on creditor's rights, adjustment of debts and bankruptcy law.

November 9th — James Hunter, III, on purchase and sale of personal property, including buying things on installment plan and rights of buyer and seller.

November 16th — Hon. William R. J. Burton on divorce, marriage and adoption.

November 23rd — Thomas M. Farr, on wills, administration of estates and creation of trusts.

November 30th — Thomas Bantivoglio, on taxes - income and property.

The school which opened September 28th, has already featured Joseph Tomaselli, who lectured on Civil Rights, particularly as relates to arrests, warrants, accusations and jury duty, and William S. Zink, who spoke on liability arising out of injuries on properties, distinguishing between various types of persons on the property, such as invitees and licensees, adults and minors.

Medico-Legal Aspects of Head Injuries Subject of Two Day Course

The Law-Science Academy of America and the Law-Science Foundation of America, will conduct a two-day Short Course on "Medicolegal Aspects of Injuries of the Head, Neck and Face", in Philadelphia on Saturday and Sunday, November 21st and 22nd, 1959, at the Bellevue-Stratford Hotel. This Short Course has been put on several times previously and has been well received. The course of instruction is designed to serve primarily the interest of trial lawyers concerned with personal injury problems.

There will probably be from 20 to 40 participating lecturers. These will be drawn from both sides of the Trial Bar, and from the ranks of distinguished medical authorities. Primarily, they will be experts from the immediate area. This two-day session should give a good grasp of scientific principles and trial techniques in the field of head, neck and face injuries.

The Academy and Foundation will also follow the policy of granting members of the Junior Bar, a 50% tuition scholarship. This scholarship will be available to lawyers who have practiced for five years or less. They will be permitted to register for the two-day session at one-half price, upon presentation of an application or letter signed by the President of their Junior Bar Association.

Further information can be obtained from The Law-Science Institute, University of Texas, Austin 12, Texas.

by Sen. Joseph C. (D-Wyo.), who has advised by the Treasury Department's "National," "United Federal" were by the names or independent agencies to public.

Congressional committees were advised that the agencies, in connection with debtors, "Claims Office," "Office" and "Treasury" with a Washington mark.

Conviction under could mean a fine a term of a year in

New Methods Judicial Circ

Manchester, Vt. Chief Justice Earl W. of Congress the judiciary "does forward-looking and accept new methods

Citing the problem of delays in courts, he told delegates of Second Judicial Circuit meeting that, "Our conditions are longer and more complicated. High volume new techniques."

The conference was by judges and lawyers, Mont. Connecticut York.

Employment Tax Being District

Publication No. 1 Employment Tax Form mailed to employers latter part of October the blank forms in title will enable employers comply with the laws income tax withholding Social Security (F.I.C.A.)

Form W-3, "Reconciling Income Tax Withholding Wages" will not be in Publication No. 333 Form W-3 will be with Form 941 or 941-Ter's Quarterly Federal turn" for the fourth

Publication No. 393 the following forms for immediate use of an employer Form W-2, "Withholding statement—1959" to be to employees not later than January 31, 1960. The booklet contains enough forms for employees.

Form W-4, "Employee's withholding Exemption Certificate" for use by new employees receiving their first pay other employees who wish to change a provision. The booklet contains enough forms for six

Form 941a, A card sheet for the employer more employees than listed on his quarterly Form 941.

Form 7018, "Order for Payment Tax Forms" for additional forms from district director.

Check List, A list for determining whether a notice for Form 941, the annual of employers of four under the Federal Unemployment Tax Act.

Mr. Mayer, Newark Director of Internal Revenue advised employers, upon the publication, to find a safe place or turn in their accounting department to the individual who their returns.

Charles B. Collins Ward J. Herbert Morris M. Schnitzer
Marshall Crowley Andrew L. Kaufman David Stoffer
Dickinson R. Debevoise Hamilton F. Kean George Warren
Raymond Del Tufo, Jr. John F. Lynch Julius Wildstein
Harold H. Fisher William Miller Willard G. Woelper
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THURSDAY, NOVEMBER 12, 1959

THE PROPOSED EVIDENCE ACT OF 1959 Method of Adoption of Rules, Miscellaneous Provisions of Article IV and Conclusion

This is the final editorial of a series of six on the proposed Evidence Act of 1959.

I. Article III, Method of Adoption of Rules.

The proposed Act provides in Article III that the Supreme Court may adopt rules of evidence after discussion at a judicial conference, whose membership shall at least include members of the various courts, Bar Associations, the Legislature, the Attorney General, the County Prosecutors, law schools, and the public. The Court is to publicly announce these rules on September 15th of each year, and they are to take effect on July 1st of the following year unless cancelled, in whole or part, by a joint resolution of the Senate and General Assembly signed by the Governor, or unless this period of time is eliminated by such a joint resolution so that the effective date of the rules is advanced. It is further provided that any rule is subject to change at any time by statute or by a subsequent rule adopted pursuant to the method described above. No rule thus adopted is to "abridge, enlarge or modify any substantive right or eliminate the right of trial by jury".

This proposed scheme of promulgation is intended to be a practical resolution to the conflicting positions of those who hold that the courts should appropriately make rules governing the admissibility of evidence in judicial proceedings, and those urging that the subject matter is properly within the province of the Legislature. This conflict has been the obstacle to the progress of evidence reform. The method proposed is similar to that whereby the United States Supreme Court, by authorization of Congress, promulgates rules of procedure, which have included some rules governing the admissibility of evidence in the Federal Courts. It gives recognition to the facts that comprehensive legislative enactment can result in excessive rigidity and that the courts have more familiarity with the subject matter, while making provision for full participation by the elected representatives of the people.

The proposed bill bids fair to provide a technically satisfactory solution to the mechanical problems presented; and while constitutional questions may arise with respect to the powers of the branches of government, they will not be substantially greater or different than those now lurking in that ill-defined area where procedure fades into substance. We, therefore, endorse these provisions of the bill, believing that this resolution of the thorniest problem of making evidence progress and reform viable is a promising one.

It is further provided that the Court may cause to be published compilations and restatements of the entire law of evidence in this state, together with editorial notes, tables, and references, and indications as to the source of each rule. This would, of course, be a great aid to the profession and thus in itself constitute a substantial step forward in securing justice to litigants.

II. Article IV - Miscellaneous Provisions

Article IV of the proposed Evidence Act of 1959 contains certain provisions which are more of a technical than of a substantive nature. That Article, however, does touch upon three matters of considerable importance in the law of evidence; (i) the "Dead Man's Act," (ii) the admissibility of public records and (iii) judicial notice of the common or statute law of other states.

New Jersey's "Dead Man's Act" is presently set forth in R.S. 2A:81-2, by which when one party to a civil action is a lunatic or the estate of a deceased person, the other party is incompetent to testify as to any transaction with or conversation by the lunatic when of sound mind or by the decedent. The proscription falls if the representative of the decedent or guardian of the lunatic testifies as to any such transaction or conversation or if the action is founded on any allegation of fraud or the like.

The justification for such acts has been said to be to provide for equality between the parties by silencing the party still able to testify, thus protecting an estate from fraudulent claims. There has been a flood of criticism of the "Dead Man's Act" by authors, legislators and many committees which have studied them, and most have concluded that the Act serves more to defeat just claims than to prevent spurious ones. A number of states have enacted legislation abolishing or modifying the "Dead Man's Act", and it is omitted altogether from the Uniform Rules of Evidence.

The proposed Evidence Act of 1959 takes a bold and a constructive step by eliminating our version of the "Dead Man's Act." It does require, however, that a party who asserts a claim or affirmative defense against a lunatic or representative of a decedent supported by oral testimony of a promise, statement or act of the lunatic when of sound mind or of the decedent shall be required to establish the claim or defense by clear and convincing proof. By imposing this

greater burden on a party in this type of civil action than in types, the proposed statute attempts to ensure that the test of the living and sane party shall not be given undue weight because the person who might be able to contradict his test cannot do so.

Section 47 of the proposed Act touches lightly upon the problem of the admissibility of reports and findings of public officials existing New Jersey statute (R.S. 2A:82-16) provides for the admission of any public record of any foreign state, county or city the Federal Government which is admissible to prove the therein under the laws of such state or under federal law. The Act also provides the method by which such report shall be proved. The only change which the proposed Evidence Act makes is to provisions relating to proof of certain documents filed with the Interstate Commerce Commission and Federal Communications Commission.

Case-by-case adjudication gives to the judicial process the impact of actuality and thereby saves it from the hazards of generalizations insufficiently nourished by experience. 337 U.S. 682, 705 (1949). The self-styled legal scholar of today more often than not

man, to the extent that he is capable of dispensing justice, is only likely to achieve that end when called upon to resolve an actual clash of interests. The greatness of our decisional law arises from the fact that, being born of strife, it rests upon the firm foundation of experience.

As succinctly stated by Mr. Justice Frankfurter, dissenting, in *Larson v. Domestic and Foreign Commerce Corporation*, "The process of solidification. The proposed Evidence Act, as such, it possesses a destructive weakness. It necessarily inheres in much legislation—a lack of composure that cannot be cured, because the man does not yet exist whose mind can penetrate all future eventualities as to intelligently provide a specific result if and they should occur."

Finally, as most perceived by Mr. Justice Johnson concurring in *Gibbons v. ...* "One-half the doubts arise from the defects of usage." 9 Wheat. 1, 6 L. 78 (1824). It is sometimes difficult to determine what court means by the language

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It would be difficult to draft a rule which would operate in all circumstances in view of the very large number and variety of federal and state official records. This difficulty is likely by the differing conclusions reached by the authors of the Rules of Evidence and by the New Jersey Supreme Court's Committee on the Revision of the Law of Evidence. New Jersey's present statutory rule, however, is a weak approach to the problem. Admissibility is made dependent upon the fortuitous circumstance of the law of another jurisdiction and not upon the basic probability of the record in question or upon the fairness of permitting its admission in evidence. The only object of the amendment is to correct the ruling in *State v. Black*, 31 N.J. 418 (App. Div. 1954) where the court disregarded the fact that the Interstate Commerce Commission does not itself publish tariff assigns an official number to tariffs privately printed by the carrier and filed with the Commission. The remaining area of the Act is left for appropriate future rule such as Uniform Rule 68.

In addition, the proposed Act modifies R.S. 2A:82-27 which provides that when the common or statute law of any state is pleaded in an action in New Jersey, the court shall take judicial notice but if it is not pleaded, it shall be presumed that the common law of that state is the same as New Jersey common law. In view of the ready availability of the decisions of other states interpreting common law and of the public statutes of other states, it is somewhat unreasonable to create the presumption that their common law is the same as New Jersey's under any circumstances, and particularly to create such a presumption merely because a party has to plead such law.

The proposed Act improves the situation substantially by extending the scope of judicial notice to cover the law of another state as well as of another state and also by permitting judicial notice of such law, if, instead of pleading it, a party gives notice to the court and each adverse party (i) at or before the pretrial conference, (ii) at least 10 days before the trial when there is no trial conference or (iii) within such other time as the court fix by order. While fairness may not always require the warning an adverse party of one's contentions as to foreign law in the of common law or public statutes, the proposed Act does reduce chances that one will be precluded from proving foreign law by failing to plead it.

III. In conclusion, we take our stand in support of the proposed Act. True, the bill is a cautious approach to a large problem, various of our editorials we expressed disagreement with some of its provisions. Undoubtedly, some lawyers will have similar or reservations. However, we feel that, from a long range view these criticisms are out-weighted by the potential gains which be achieved by its passage. The enactment of this bill could up an era of good will and cooperation between the Legislature and the Court, which in time could bring about the enactment of a modern law of evidence which will serve the needs of justice.

DAVID M. SATZ

"David M. Satz was a good man," said the clergy of his faith eulogizing him before his mourning family and friends. Mr. Satz, untimely passing on Friday, November 6th, had shocked his friends from all walks of life throughout Essex County, New Jersey and beyond.

Dave Satz was widely known as a considerate lawyer, a spirited citizen and as an ardent son of Harvard. Many, indeed the young men (some now grown to maturity) who can gratefully recall the time and efforts he gave so freely, to help them in educational and professional careers. His kindness, his great satisfaction in helping others, his many volunteer activities on behalf of the bar, the community and his university, gave the ring of sincerity to his devout religious professions. They were the prime elements of his success in life. Measured by his beneficent influence on many lives and by his precept and example of selfless service his fellow man, Dave enjoyed a success rare and enduring.

Everyone who knew him will readily grasp the full significance of the simple words of eulogy:

"David M. Satz was a good man."

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THURSDAY, JUNE 2, 1960

EVIDENCE REVISION — A LEGISLATIVE ACHIEVEMENT

"... the good is oft interred with their bones."
It is sometimes said of legislatures — and this is not confined to New Jersey — that they receive attention only when they are criticized, and that their good works go unnoticed.

The truth of that observation may be debatable, but it certainly should not be true of the recent passage by the Legislature of "The Evidence Act, 1960" (Senate No. 73; Assembly No. 106). Approved by both Houses without a single dissenting vote, this enactment is an achievement of which the 1960 Legislature can well be proud, and for which it deserves the highest commendation.

The subject of the Act is not likely to attract much public interest — yet it is one in which the public has the greatest interest, for it holds the promise of another great step forward in improving the administration of justice. Its enactment chalks up another "first" for New Jersey, making it the first state to take action on the tireless labors begun by Dean Wigmore, and then carried forward by Edmund M. Morgan and John M. Maguire, by the American Law Institute with its Model Code, and by the National Conference with its Proposed Uniform Rules, upon which New Jersey's Act is built.

Much remains to be done, but the passage of the Act provides the means. Sponsored and supported by both parties in both Houses, it is proof that the legislative process is indeed capable of excellent and statesmanlike performance. This is particularly true here because the subject was one which had been delicate, due to the inherent problem of jurisdiction as between the legislative and judicial branches.

Thus, instead of the conflict and wasteful litigation which some had feared, the Legislature has produced a sound and practical solution based on common participation and cooperation by all three branches of government, while in no way impairing the duties and powers with which each is charged or entrusted by the Constitution.

This excellent performance, in which the search for a solution was the paramount effort, marks a standard which, if followed in the future with respect to many other matters of public concern now pending, would give New Jersey one of the best legislative systems in the land.

CRISIS IN EDUCATION: THE LAWYER'S ROLE

A recent editorial emphasized the urgent necessity for assumption of individual responsibility to counter what appears to be a process of slow disintegration of the moral fabric of our society. Another area which critically demands such individual realization and action is that of education. The lawyer's role in the drive to attain fruition of this goal may indeed be one of the most significant.

In its recently issued thirty-eighth yearbook, entitled "Professional Administrators for American Schools", the American Association of School Administrators has admirably advocated a reevaluation of institutions which train individuals for teaching careers. The program includes creation of standards, and a varied, enlightened curriculum which includes instruction on the "power" factors of school and community life:

"... the association calls for a housecleaning of the universities and schools of education that have trained many of them and will be turning out the public-school leaders of the future. The spiderwebs the administrators

Voice of the Bar

Comment and criticism invited

Editor, New Jersey Law Journal
I have just finished reading the article in the May 26, 1960 edition of the Law Journal reporting the session of the Special Forum on School Law conducted by the Municipal and School Law Committee of the New Jersey State Bar Association during its annual meeting at Atlantic City.

While your article accurately reports the discussion held at the forum, it reports two statements purporting to represent the law applicable to bus transportation of private school students. Unfortunately the article gives the impression that the law is well settled concerning these points. This is not the fact.

The article states that, "Where an established route exists, it is mandatory that parochial and private school children be given transportation along the established route." There is no question that this statement represents the law as applied to non-profit schools. However, the article further reports that, "Where no established route exists, a school district is not permitted to furnish transportation to parochial and private school children." I strenuously challenge the accuracy of this statement. It is true that this latter statement represents the position taken by the State Department of Education. The question as to whether or not the statute (R.S. 18:14-8) permits a school board to voluntarily transport non-profit private school students, regardless of whether or not they reside on an established route, has not been adjudicated in this state. It seems to me, a fair reading of R.S. 18:14-8 does give a school board this right.

A further point which has yet to be adjudicated in this State is the question as to whether or not the 14th Amendment to the Federal Constitution does not require the transportation of students attending non-profit private schools.

Until these latter two questions have been adjudicated, I think the statement of the law as reported in your article to the effect that non-profit private school students not residing on an established school route may not be voluntarily transported, is premature.

Very truly yours,
Samuel A. Christlano

backed by superior knowledge. They said bluntly that many state departments of education were 'woefully handicapped by the pressure of political forces' and therefore 'are often impotent in enforcing standards' on weak institutions.

This amounted to a demand that 'the profession' itself impose such standards—presumably in the manner in which the medical profession demands certain standards of accredited medical schools. (Hechinger, *Educating the Educators*, News Analysis, New York Times, Feb. 3, 1960, p. 4, column 3).

Though admirable and realistic, the Association's analysis to emphasize adequately one salient fact — reform of our graduate and secondary school education which provides the background for the specialized training and gives the student foundation upon which to fulfill the requisites of professional study. In this area, education is of primary importance. By the imposition of standards here by outside groups becomes reality, it would be desirable for educational institutions in group to indulge in internal reconstruction:

"The question is whether a close scrutiny of the graduate professional training, should not be supplemented by a critical look at the standards and content of the undergraduate years. The association's commission points out that its reform proposals for the graduate programs will require a great deal of effort and money. Therefore, it may be wise to begin with the undergraduate colleges of the

Report and Resolutions

The following committee report and resolution were unanimously adopted by the Camden County Bar Association on May 24th:

On July 11, 1957, the President of the Camden County Bar Association appointed a committee to make a study of the problem of indigent criminal representation and to make recommendations. On October 22, 1957, the committee made a report which was adopted by resolution urging legislation and enactment of the following conclusion:

"Whereas, it is the conclusion of the Camden County Bar Association that the adoption of a trial basis of a public defense system and an assigned counsel system with fees in several of the counties in this State would enable the public, the bench, the bar to compare and assess benefits obtained from these systems." (80 N. J. L. J. 537)

On May 17, 1958, the Joint Section of the State Bar Association and the Criminal Law Committee co-sponsored a resolution calling for the enactment of legislation to provide an assigned counsel system with fees, or the alternative, a public defense system, at the option of the counties throughout the State. This resolution was adopted by the New Jersey State Bar Association (81 N. J. L. J. 265). The plan was very similar to that commended and adopted by resolution of the Camden County Bar Association.

On February 15, 1960, Senate Bill No. 131 (reprinted in full 83 N. J. L. J. 150) was introduced and referred to the Judicial Committee and likewise Assembly Bill No. 492 was introduced which Bills permit "the establishment of public defenders, the respective boards of the freeholders of the various counties or, in the alternative, compensation of counsel assigned by the County and Superior Courts to represent indigent defendants in criminal cases. These Bills reflected the affirmative action taken by the New Jersey State Bar Association. Bills are designed to furnish proven indigent defendant, accused of a crime with full protection of his constitutional rights, and provide either a full time public defender, or the alternative, assigned counsel, to be compensated for

APPENDIX II

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OR REBUTTING A COMPLAINT BEFORE THE BOARD.

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