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REPORT  
OF THE  
Committee on the Revision of  
the Law of Evidence  
TO  
The Supreme Court  
of New Jersey

MAY 25, 1955

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TO THE CHIEF JUSTICE and  
ASSOCIATE JUSTICES OF THE SUPREME COURT\*:

The need for reform and simplification of the law of evidence has long been recognized. James Bradley Thayer, writing in 1898, viewed the law of evidence as a piece of illogical, though not irrational, patchwork "not at all to be admired, nor easily to be found intelligible"<sup>1</sup>. Dean Wigmore, in the preface to his first edition in 1904, recognized that the body of the law of evidence was encumbered by inconsistent rulings which tended to obscure underlying reasoning and clog simplicity<sup>2</sup>.

- \* The Committee was appointed on October 7, 1954 to consider a revision of the principles of evidence. Its members are Alfred C. Clapp, Senior Judge, Part A, Appellate Division of the Superior Court; Lester A. Drenk, practicing attorney and former Judge of the Burlington County Court; Frederick W. Hall, Superior Court Assignment Judge for the counties of Hunterdon, Morris, Ocean, Somerset, Sussex and Warren; Arthur W. Lewis, practicing attorney and former Senator from Burlington County; Arthur J. O'Dea, Judge of the Bergen County Court; Lewis Tyree, Professor of Evidence at the Rutgers University School of Law; Joseph Weintraub, practicing attorney and acting counsel to the Governor; and Nathan L. Jacobs, Justice of the Supreme Court, Chairman. Hamilton F. Kean, a member of the New York bar and Law Secretary to Justice Jacobs, acted as Secretary to the Committee.

1 *Preliminary Treatise on Evidence*, 509 (1898).

2 1 *Wigmore, Evidence*, xiv (1940). Compare Ladd, "A Modern Code of Evidence", 27 *Iowa L. Rev.*, 214 (1942):

"The law of evidence in the past met with more resistance to change than any other subject. Constant application of the rules and adherence to precedent had a habit-forming effect which has caused acceptance of the principles of admissibility and exclusion without question as to their merits or to the realistic service which they performed in the trial of factual issues. During the nineteenth century they were looked upon with almost religious sanctity without consideration being given to whether their source was a historical accident, a social policy of the time of their origin, an outgrowth of a formalism then found in pleading and procedure generally, or was based upon a sound principle of logic and psychology. Discrimination was not made between principles fundamentally sound and those fantastic in their origin. Generally speaking, it was enough that the rule had been stated and being a rule of evidence its sins were whitewashed and its virtues exalted. In a large measure evidence rules were learned rather than thought through, and efforts were directed toward their classification rather than their criticism".

In 1922 a committee of the Legal Research Committee of the Commonwealth Fund undertook a five year study of evidence rules and recommended the enactment of statutes calculated to bring about reforms<sup>3</sup>. In 1933 the United States Supreme Court, in rejecting an ancient common law rule of exclusion, stated unequivocally that it has a duty to reject ancient rules of evidence where "present day standards of wisdom and justice" so require<sup>4</sup>. In 1938 a Committee on Improvements in the Law of Evidence, with Dean Wigmore as chairman, reported as follows to the American Bar Association<sup>5</sup>:

"All will agree that the body of the rules of evidence, in their skeleton framework, are wise and wholesome—in short, they are a valuable and unique contribution to the world's expedients in the investigation of truth. What is lamented is their infinitesimal, meticulous, petty elaboration into a mass not capable of being perfectly mastered and used by everyday judges and practitioners . . . This raises the question: Can the rules of evidence be simplified, by formulating a short code which shall contain only their wise essentials, but shall still be practicable? We believe that the time has arrived when such a formulation should be seriously considered and attempted."

Thus by 1939 Dean Wigmore could write that<sup>6</sup>:

"The last decade, however, has seen the opening of a new phase in the profession's attitude toward the Rules of Evi-

3 *Morgan, Chaffee, Gifford, Hinton, Hough, Johnston, Sunderland, Wigmore, The Law of Evidence, Some Proposals for its Reform* (1927).

4 *Funk v. United States*, 290 U. S. 371, 382, 78 L. Ed. 369, 375 (1933). See also Rubinson "Changing Rules of Evidence in the Federal Courts", 1 *U. Chi. L. Rev.* 785 (1934).

5 *Report of the Committee on Improvements in the Law of Evidence*, 63 *Rep. Am. B. A.* 570, 576 (1938). Compare *Stephen's Digest of Law of Evidence*, xxvii (1904):

"I do not think the law can be in a less creditable condition than that of an enormous mass of isolated decisions, and statutes assuming unstated principles; cases and statutes alike being accessible only by elaborate indexes. I insist upon this because I am well aware of the prejudice which exists against all attempts to state the law simply, and of the rooted belief which exists in the minds of many lawyers that all general propositions of law must be misleading and delusive, and that law books are useless except as indexes."

6 1 *Wigmore, supra* at vii.

dence, viz. a disposition to reconsider the rules' weaknesses, and a willingness—even a determination—to improve that body of law in every possible part. So that the marked trend of the present period is a forward movement, destined within the coming generation to renovate radically the rules and the practice under the rules.”

However, in spite of this increasing recognition of the need for reforms and the success of many jurisdictions in promulgating modern rules of practice, little was being accomplished in the way of actual change<sup>7</sup>.

In 1939 the American Law Institute began work on a Code of Evidence. Professor Edmund M. Morgan of the Harvard Law

<sup>7</sup> See McCormick, “Tomorrow’s Law of Evidence”, 24 *A. B. A. J.* 507 (1938); Tracy, “What Progress in Reform of Evidence Rules?”, 20 *J. Am. Jud. Soc.* 80 (1936). Compare Dean Ladd in 27 *Iowa L. Rev.*, *supra* at 213:

“This did not mean that the prevailing rules met with satisfaction or that there was no attempt to escape their rigidity. The method of accomplishing a change was seldom to challenge the rule outright, but rather to create an exception or some other means of avoidance. To illustrate, a trial lawyer would feel the futility of destroying the rule that you cannot impeach your own witness, so he would proceed by claiming surprise at the discordant testimony of the witness and would attempt to refresh his recollection by calling to his attention prior inconsistent statements. Likewise, although failing to establish a document as a regular entry and book of account, the lawyer would proceed to introduce it as a memorandum of past recollection recorded. The dead man statute is webbed with means for its avoidance, such as in the situation in which a witness may be incompetent to testify to a communication made to him personally, but may testify to a communication of similar content if he overheard it when made to another. No better illustration of escape from strict law is found than in the hearsay rule of exclusion, upon which exception after exception has been built up where the evidence is needed and an excuse may be found for its admission on the theory of circumstantial probability of trustworthiness of the statement. Thus even through the period in which the rules of evidence were being elevated to an incontestable position, they were constantly being challenged by efforts to escape their rigid barriers.

“The larger part of the law of evidence is basically sound and should be preserved. Much of it is unsound and has outworn its usefulness if it ever was useful. All of the law of evidence needs clarification and simplification.

“Nearly every forward-looking member of the bench and bar realizes that evidence has been a neglected subject from the standpoint of a comprehensive overhauling.”

School was designated Reporter, and a distinguished Committee was appointed to assist him<sup>8</sup>. Dean Wigmore consented to act as Chief Consultant, the advice of sixty-seven other consultants was solicited<sup>9</sup>, and tentative drafts were presented to many state bar associations for criticism<sup>10</sup>. Professor Morgan in a foreword pointed up the general nature of the problem faced as follows<sup>11</sup>:

“The rules of evidence have been developed in myriads of cases, wherein the later judges have felt themselves bound by the doctrine of stare decisis to adhere to the pronouncements of their predecessors but bound also to avoid the absurdities which the simple application of these pronouncements would produce. In attempting to escape this dilemma they have engrafted qualifications, refinements and exceptions upon the earlier rules, so that the law of evidence has grown irregularly and in haphazard fashion, one rule seeming to have no relation in reason to another. If an observer confines his view to a single compartment of the subject, he may not be shocked by sight of the creature he finds therein; it may be curious but it will probably have some semblance of unity or uniformity. If, however, he breaks down the partitions between the compartments, he is amazed that anyone should contemplate turning into a single arena such diverse and antagonistic creatures. To put it in another way, the law of evidence is now where the law forms of action and common law pleading was in the early part of the nineteenth century. Furthermore the rules of evidence

8 Wilbur H. Cherry, University of Minnesota Law School; William G. Hale, University of Minnesota Law School; Augustus N. Hand, United States Circuit Court of Appeals, Second Circuit; Learned Hand, United States Circuit Court of Appeals, Second Circuit; Mason Ladd, University of Iowa College of Law; Henry T. Lummus, Supreme Judicial Court of Massachusetts; John M. Maguire, Harvard Law School; Charles T. McCormick, University of Texas Law School; Robert P. Patterson, United States Circuit Court of Appeals, Second Circuit; and Charles E. Wyzanski, Jr. of Boston, Massachusetts. Lewis, “Introduction” in *Model Code of Evidence*, III, IX (A. L. I., 1942).

9 *Id.* at III, XVI.

10 Ladd, “A Modern Code of Evidence” in *Model Code of Evidence*, 329, 331 (A. L. I., 1942).

11 *Model Code of Evidence*, *supra* at 5. See also 1 *Wigmore*, *supra* at viii.

have become so complicated as to invite comparison with those of equity pleading, of which Story wrote that the ability to understand and apply them 'requires various talents, vast learning, and a clearness and acuteness of perception, which belong only to very gifted minds.' "

After two years of careful study, the Model Code of Evidence was presented in the hope that it would be adopted by the various states.

In New Jersey a rule of the Model Code was applied by Advisory Master Van Winkle who added the following comment<sup>12</sup>:

"Members of the bar know that this Model Code of Evidence came into existence because of the general dissatisfaction with much of the law of evidence and after extended discussions and the labors of many judges and practicing lawyers selected as well qualified by experience to declare rules of evidence that would make a proceeding in a court a really rational proceeding. The Code was promulgated with the purpose and in the hope that irrational rules of evidence would be liquidated by legislation or judicial decisions."

Chief Justice Vanderbilt likewise commended the Model Code as "an authority that should be given attention in adapting the law of evidence to the needs of the times"<sup>13</sup>. Elsewhere there has been increasing recognition that much of the New Jersey law of evidence is antiquated and out of keeping with present day needs<sup>14</sup>. Yet our courts have still failed, in the main, to refer to the Model Code, to reappraise ancient rules or, in many instances, to search for the reasons behind the rules applied<sup>15</sup>.

12 *In re Petagno*, 24 N. J. Misc. 279, 286 (Ch. 1946).

13 Concurring opinion in *Robertson v. Hackensack Trust Co.*, 1 N. J. 304, 320 (1949).

14 See Editorial, *The Model Code of Evidence*, 75 N. J. L. J. 4 (1952); Tyree, "Evidence", 9 *Rutgers L. Rev.* 287 (1954). The multiplicity of rules and the resulting confusion are evident from a reading of the latest textbook on New Jersey Evidence Law. *Kosene, Evidence Law in New Jersey* (1954).

15 See Tyree, "Evidence", 5 *Rutgers L. Rev.* 246 (1950); 6 *Rutgers L. Rev.* 290 (1951); 7 *Rutgers L. Rev.* 257 (1952).

The Model Code produced a wealth of critical discussion throughout the country<sup>16</sup>. It did not, however, bring about many changes in law, probably due to the sweeping nature of the reforms suggested. The need remained for "that reasonable revision which would excise nonsensical distinctions and details while preserving and unifying the sound core of hard-headed wisdom"<sup>17</sup>.

An awareness of this continuing need led the American Law Institute in 1949 to refer its Model Code of Evidence to the National Conference of Commissioners on Uniform State Laws. It was recognized that some of the departures from tradition set forth in the Model Code had been too drastic for widespread acceptance, and that "they should be modified in such respects as

16 See *c. g.* Ladd, "A Modern Code of Evidence", 27 *Iowa L. Rev.* 213-231 (1942); "Symposium—Should Missouri Adopt Proposed Evidence Code", 14 *Mo. L. Rev.* 252 (1944); Wickheim, "A Code of Evidence for Wisconsin? Introduction" 1945 *Wis. L. Rev.* 77 (1945); Hale "Report of Committee on Administration of Justice on Model Code of Evidence; a Reply", 22 *Cal. S. B. J.* 188 (1947); Maguire, "Evidence: Common Sense and Common Law" 155 (1947); Broderick and Broden, "Future of the Model Code of Evidence", 23 *Notre Dame Law* 226-232 (1948); McCormick, "Impressions of the Proposed Missouri Evidence Code", 17 *Kan. City L. Rev.* 4 (1948); Morgan "Some Comments on the Proposed Missouri Code of Evidence", 17 *Kan. City L. Rev.* 12-23 (1948); Windolph "A Code of Evidence for Pennsylvania—Pro", 20 *Pa. Bar Ass'n. Q.* 214 (1949); Wingerd, *et al* "A Code of Evidence—Contra", 20 *Pa. Bar Ass'n. Q.* 220 (1949); Morgan, "Future of the Law of Evidence", 29 *Tex. L. Rev.* 587 (1952).

17 Morgan and Maguire, *Cases on Evidence*, viii (1951). See also Morgan "The Law of Evidence 1941-1945", 59 *Harv. L. Rev.* 481 (1946); McCormick, *Evidence*, XI (1954); Cleary, "Evidence as a Problem in Communicating", 5 *Vand. L. Rev.* 277 (1952), where the author describes the atmosphere of the law of evidence as "hellish dark, and smells of cheese" and states: "The law of evidence is sagging to the point of collapse under its own weight. It has cracked visibly in the administrative sphere, and what saves it in the courts is probably a rather general ignorance of what is actually between the covers of Wigmore, plus the fact that lawyers and judges often seem to be downright ashamed to push the rules to their logical extremes. Evidence in action is, happily perhaps, somewhat different from evidence in books. Nevertheless, among people who are thoughtful about such things there is general agreement that something ought to be done."

The only sizable progress in the law of evidence has come about through adoption of Uniform Acts in limited fields. See 9 *U. L. A. Evidence Acts* (Supp. 1954).

will express a common ground of acceptability in the jurisdictions and by the tribunals which the rules are expected to serve"<sup>18</sup>. A nationally representative committee was appointed by the Conference to prepare Uniform Rules<sup>19</sup>. A committee of the American Law Institute was designated to serve in an advisory capacity<sup>20</sup>. It was determined that in addition to simplification and modification, the study should be especially directed to giving the Rules "the slant of the practising lawyer and the judge on the bench"<sup>21</sup>. A four year comprehensive study culminated in the drafting of the Uniform Rules of Evidence. These were approved by the National Conference of Commissioners on Uniform Laws at its meeting of August 17th to 22nd, 1953, and by the American Bar Association the following week. Since adoption they have been cited with general approval by the New Jersey Supreme Court and the Appellate Division<sup>22</sup>.

Recognizing the intrinsic merit of the Uniform Rules, this Committee determined to use them as a base for its study. It has

- 18 *National Conference of Commissioners on Uniform State Laws, Preface, Uniform Rules of Evidence*, 161 (1953).
- 19 Judge Spencer A. Gard, Iola, Kansas, Chairman; Mason Ladd, Dean, University of Iowa Law School; Charles T. McCormick, University of Texas Law School; Lucian E. Morehead, Plainview, Texas; Maynard E. Pirsig, Dean, University of Minnesota Law School; John C. Pryor, Burlington, Iowa; Robert E. Woodside, Attorney General, Harrisburg, Pennsylvania; Joe E. Estes, Dallas, Texas.
- 20 E. M. Morgan, Chairman, School of Law, Vanderbilt University; Judson F. Falknor, University of California Law School; Learned Hand, Second Circuit, United States Court of Appeals; James R. McElroy, University of Alabama School of Law; John M. Maguire, Harvard Law School.
- 21 Address of Judge Gard, Chairman of the drafting committee before Evidence Roundtable of Association of American Law Schools at Chicago, Illinois, December 28, 1953, quoted in Falknor, "1953 Annual Survey of American Law of Evidence", 29 *N. Y. U. L. Rev.* 953, 986 (1954). See also Gard, "Kansas Law and the New Uniform Rules of Evidence", 2 *Kan. L. Rev.* 333, 338 (1954); Levin, "Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes", 103 *U. of Pa. L. Rev.* 1, 6 (1954); Chadbourn, "The Uniform Rules and the California Law of Evidence", 2 *U. C. L. A. L. Rev.* 1, 5 (1954).
- 22 See *c. g. Stanley Co. of America v. Hercules Powder Co.*, 16 *N. J.* 295, 306 (1954); *State v. Doto*, 16 *N. J.* 397, 405 (1954); *State v. Roscus*, 16 *N. J.* 415, 422 (1954); *Miller v. Trans. Oil Co.*, 33 *N. J. Super.* 53, 58 (App. Div. 1954), *aff'd* 18 *N. J.* — (1955).

examined each proposed Rule, has compared it critically with existing New Jersey law, and has reached a conclusion as to the desirability of its adoption. The Uniform Rules coincide to a great extent with existing New Jersey law. Where substantial differences do exist they are in fields where there has been almost universal recognition that present evidential rules are undesirable and fail to meet modern needs. The Committee has, therefore, recommended that the main body of the Uniform Rules be adopted as written.

It has not been considered to be within the province of the Committee to determine which rules of evidence are procedural and thus within the rule-making power of the Supreme Court, and which are substantive requiring legislative attention. It suffices to note that the authorities almost everywhere recognize that most are procedural<sup>23</sup>. The federal and New Jersey experiences in promulgating practice rules, after public study and consideration, have been largely successful; similar policy considerations should apply in dealing with evidence rules<sup>24</sup>.

A brief review of the structure of the proposed Rules and their more significant changes follows. Rule 7 is the keystone, providing that all logically relevant evidence is admissible unless excluded by another of the proposed rules. The rules of exclusion are divided into six chapters, respectively entitled Witnesses, Privileges, Extrinsic Policies Affecting Admissibility, Expert and Other Opinion Testimony, Hearsay Evidence, and Authentication and Contents of Writings. There are also chapters dealing with Judicial Notice and Presumptions. Certain New Jersey rules of exclusion which the Committee believes should be abol-

23 See *Dravo v. Fabel*, 132 U. S. 487, 33 L. Ed. 421 (1889); *Thompson v. Missouri*, 171 U. S. 380, 43 L. Ed. 204 (1897); *Restatement, Conflict of Laws* (1934) §§ 585, 595-598; Callahan and Ferguson, "Evidence and the New Federal Rules of Civil Procedure", 45 *Yale L. J.* 622, 641 (1936); Sunderland, "Character and Extent of the Rule-Making Power Granted U. S. Supreme Court and Methods of Effective Exercise", 21 *A. B. A. J.* 404, 406-407 (1935); Green, "To What Extent May Courts Under Rule-Making Power Prescribe Rules of Evidence", 26 *A. B. A. J.* 482 (1940). Cf. *R. R.* 4:16-4.

24 See *Report of the Committee on Improvements in the Law of Evidence*, 63 *Rep. Am. B. A.* 570, 571 (1938); Gard, "New Uniform Rules of Evidence", 2 *Kan. L. Rev.* 333, 338 (1954).

ished and which are not included within the scope of other proposed rules have been dealt with in the comment to Rule 7. The most notable of these is the universally criticized "dead man's" statute<sup>25</sup>.

The effect of the proposed revision of the law of judicial notice is in the main to clarify existing law, with slight modifications to accord with the best modern authorities.

With regard to presumptions, the Committee has accepted a modification of the present New Jersey law as to the effect on the presumption of the subsequent introduction of contrary evidence. This effect by Rule 14 is made to depend on the probative value of the facts from which the presumption is derived as evidence of the presumed fact. This is a more rational approach than the present inflexible rule that all prima facie presumptions must disappear.

With regard to the chapter entitled "Witnesses," the most substantial change results from the effort of the Committee to eliminate the prejudicial effects often resulting in criminal cases where the prosecution is allowed to impeach credibility by evidence of any prior conviction of crime. Beside influencing the jury on issues other than credibility, this practice has created a general reluctance among criminal defendants to take the stand even in the face of full comment upon failure to do so. Thus testimony which should be most productive of truth is unavailable. While preserving full comment in Rule 39, it is proposed by Rule 21 that for purposes of impairing credibility only those crimes most highly probative of lack of veracity shall be admissible, and these only when the defendant has introduced evidence the sole purpose of which is to support credibility.

The proposed rules make no highly significant change in our law with respect to privileges.

In the chapter entitled "Extrinsic Policies" there are included certain traditional exclusionary rules. It is also explicitly provided in Rule 45 that the judge may exclude relevant evidence where he finds that its probative value is substantially out-

25 N. J. S. 2A :81-2. Compare Judge Goodrich in *Wright v. Wilson*, 154 F. 2d 616, 620 (3rd Cir. 1946): "The rule excluding a survivor's testimony seems to stand in the almost unique situation of being condemned by all of the modern writers on the law of evidence."

weighed by the risk that its admission will either necessitate undue consumption of time, create substantial danger of prejudice or confusion, or unfairly and harmfully surprise the adversary. This recognizes that no workable system of rules can attempt to delineate for the trial judge every instance where exclusion may be proper.

The chapter on "Expert and other Opinion Testimony" would make significant and what are believed to be highly desirable changes. In the first place, the hypothetical question would no longer be mandatory in every instance of expert opinion. This would eliminate much of the time-consuming and often wasted controversy over its proper form. Secondly, provision is made for court-appointed experts where desirable in addition to those called by the parties. These would be chosen as far as possible by agreement of the parties, and charged as costs in the case.

The "hearsay" exceptions are liberalized to some extent by the proposed rules, in keeping with the theory that a trial is a search for truth. Care has been taken, however, in each case, that justification on the basis of necessity or a special guarantee of trustworthiness is present. Virtually all the exceptions to the "hearsay" rule are presently recognized in one form or other in our law.

No substantial change is recommended with respect to the rules regarding Authentication and Content of Writings.

The parol evidence rule has not been treated either by the drafters of the Uniform Rules of Evidence or by this Committee<sup>26</sup>.

This report is submitted in the hope that it will receive full study from the bench, bar and other interested persons. While the views expressed therein are those of the Committee and represent unanimous opinions in many instances, it is not to be inferred that all members agree with all comments.

Respectfully submitted,

ALFRED C. CLAPP,	ARTHUR J. O'DEA,
LESTER A. DRENK,	LEWIS TYREE,
FREDERICK W. HALL,	JOSEPH WEINTRAUB,
ARTHUR W. LEWIS,	NATHAN L. JACOBS, Chairman.

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26 See *Atlantic Northern Airlines, Inc. v. Schwimmer*, 12 N. J. 293 (1953).

## APPENDIX

(This includes each of the Uniform Rules of Evidence, promulgated by the National Conference of Commissioners on Uniform State Laws, accompanied in each case by the Official Comment of the Conference and the Recommendation and Annotation of this Committee.)

### I. GENERAL PROVISIONS

#### Rule 1. Definitions.

(1) "Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay.

(2) "Relevant evidence" means evidence having any tendency in reason to prove any material fact.

(3) "Proof" is all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or non-existence of such fact.

(4) "Burden of Proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion."

(5) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact.

(6) "Conduct" includes all active and passive behavior, both verbal and non-verbal.

(7) "The hearing" unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing.

(8) "Finding of fact" means the determination from proof or judicial notice of the existence of a fact. A ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state.

(9) "Guardian" means the person, committee, or other

representative authorized by law to protect the person or estate or both of an incompetent [or of a *sui juris* person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

(10) "Judge" means member or members or representative or representatives of a court conducting a trial or hearing at which evidence is introduced.

(11) "Trier of fact" includes a jury and a judge when he is trying an issue of fact other than one relating to the admissibility of evidence.

(12) "Verbal" includes both oral and written words.

(13) "Writing" means handwriting, typewriting, printing, photostating, photography and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.

#### Drafters' Comment

**Subdivision (1).** This rather broad definition of evidence indicates the scope of the subject and shows we are dealing with the means of proof in legalistic fact finding as contrasted to scientific experimentation or the gossip of the streets. It is consistent with three important principles: (a) that opinion testimony and hearsay are treated from the standpoint of weight and admissibility and so far as relevancy is concerned are tested by the same standards as any other evidence, (b) that presumptions are not evidence, and (c) that presumptions do not arise from evidence but from established basic facts proved by evidence or judicially noticed. All deductions from evidence are inferential, i.e., inferred from what is perceived or demonstrated.

**Subdivision (2).** The only test of relevancy is logic. With this simple statement we must be content. Nothing could be gained in a code of rules by making it a thesis on the subject of logic. The courts will have to continue to decide what inferences might reasonably be drawn from knowledge or from perception in or outside of the court room on the basis of common sense. No attempt is made in these rules to catalogue, even generally, what evidence is relevant to what issues.

**Subdivision (3).** This definition is drawn with the idea that all proof is the cumulative effect of evidence. Facts judicially noticed need not be proved as they are established or found in the action independently of evidence. Also in the case of presumptions, they do not arise from evidence but from basic facts which may be established by evidence.

**Subdivision (4).** "Burden of proof" is defined in order to distinguish it plainly from the burden of taking the lead or of going ahead or producing evidence. The language of the definition is consistent with tra-

ditional concepts and is chosen in preference to the A.L.I. Model Code definition of "Burden of Persuasion," which defines in terms of the result rather than in terms of the nature of the obligation.

**Subdivision (5).** This means the obligation not to sit by, or fail to take the lead in the production of evidence where the duty of initiative is on a party to introduce evidence or to make *prima facie* proof. It may be said in essence to be the obligation to introduce evidence to avoid the risk inherent in its non-production.

**Subdivision (8).** This rule rejects the principle of the definition of Rule 1 (5) of the A.L.I. Model Code of Evidence which defines "finding a fact" as "determining its existence is more probable than its non-existence." The weighing of probabilities represents the mental process of arriving at the result, but the actual finding has a legal significance far beyond a finding of probability. Hence the definition recognizes that when a fact is found it exists or is established in legal contemplation.

#### Recommendation

It is recommended that this rule be adopted with the insertion of the following definition as (11) :

"Perceive" means acquire knowledge through one's own senses."

The subsequent definitions should be renumbered accordingly.

#### Committee Annotation

1. Rule 1 defines basic terms. These definitions are useful as promoting uniformity and clarity. Most are not susceptible of serious controversy.

2. The definition of relevant evidence as "evidence having any tendency in reason to prove any material fact", would not materially change existing New Jersey concepts. New Jersey courts early in the present century accepted Stephen's definition of relevancy "that any two facts . . . are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders possible the past, present or future existence or non-existence of the other." *Fishman v. Consumers Brewing Co.*, 78 N. J. L. 300, 302 (*Sup. Ct.* 1909); *State v. Claymonst*, 96 N. J. L. 1, 4 (*Sup. Ct.* 1921); *Stephen, Digest of Evidence*, 4 (1904). This was simplified to evidence "as will tend to prove a fact or facts in issue". *Feickert v. Feickert*, 98 N. J. Eq. 444, 452 (*Ch.* 1926). *Cf. DeCicco v. Marlou Holding Co.*, 137 N. J. L. 186, 189 (*E. & A.* 1948).

Wigmore, noting that courts in practice have tended to require a higher probative value for admissibility than the above criteria (logical relevancy) would indicate, recognized that there was a concept of "legal relevancy"; in order for something to be legally relevant it must have a closer connection with the probandum than is required by logical relevancy. 1 *Wigmore, Evidence*, 409 (1940). But compare the same author, §10. He expressed no opinion, however, on the question of what should be the proper nomenclature. This will be dealt with further in the annotation to Rule 7 which provides that all relevant evidence is admissible except where excluded by a particular rule. It suffices at present to recognize, as Wigmore points out, that courts have often declared matters "irrelevant" which are not so by any logical test. However, discussion of whether all "relevant" evidence

should be admissible becomes intelligible only through the adoption of some definition of relevance. The logical concept formulated in the Uniform Rules is one which finds support in New Jersey cases. *Miller v. Trans. Oil Co.*, 33 N. J. Super. 53, 58 (App. Div. 1954), aff'd, 18 N. J. — (1955). It likewise has the support of the vast majority of the authorities. See *Thayer, Preliminary Treatise on Evidence*, 265 (1898); *McKelvey, Evidence*, 127 (1897); *Michael and Adler, The Nature of Judicial Proof* (1931); *Trautman, "Logical or Legal Relevancy—A Conflict in Theory"*, 5 *Vand. L. Rev.* 385, 388 (1952); *ALI, Model Code of Evidence*, Rule 1 (12), Montrose, "Basic Concepts of the Law of Evidence", 70 *L. Quart. Rev.* 527 (1954). It would seem that these authorities are correct in their conclusion that only confusion can result where evidence, inadmissible because of slight probative value, is characterized as "irrelevant", thus providing the word "relevancy" with a cloudy legal meaning. See also 1 *Morgan, Basic Problems of Evidence*, 160 (1954).

3. The definitions of burden of proof and burden of producing evidence do not add anything to concepts previously expressed by our courts. See *Seiken v. Todd Dry Dock, Inc.*, 2 N. J. 469, 475 (1949); *Kresse v. Metropolitan Life Insurance Co.*, 111 N. J. L. 474, 477 (E. & A. 1933). The practical effect of the distinction will be discussed in connection with the rules on presumptions.

4. The definition of "perceive" has been inserted here rather than in Rule 62 where it appears in the Uniform Rules because the word appears in several places in the rules prior to Rule 62.

## **Rule 2. Scope of Rules.**

Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced.

### **Drafters' Comment**

These rules are made applicable to court proceedings and are not specifically extended to administrative tribunals with fact-finding or semi-judicial power. This is true partly because the rules are designed for adoption by courts under their rule-making power as well as by legislation and there would exist the question of the extent to which the courts could impose the rules upon other tribunals. Also considerable modification and use of alternative language in the rules would be necessary to make them fit every fact-finding situation. However, there is no good reason why the same rules should not be employed in one type of tribunal as well as in another. In fact the hope of uniformity not merely among courts, but between courts and administrative agencies is one of the major factors of justification for these rules. They can be very readily adapted to fit any situation and it is hoped that they may provide the pattern for all inquiries where evidence is introduced. It is not intended that these rules should

modify any other procedural rules under which the rules of evidence are relaxed for specified purposes.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

Rule 2 provides that the rules of evidence shall apply to all court proceedings except where they are relaxed by rule or statute. This uniformity seems to be the New Jersey practice. The difference in scope of review of criminal and civil cases will be discussed in its proper place.

### **Rule 3. Exclusionary Rules Not to Apply to Undisputed Matter.**

If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.

#### **Drafters' Comment**

This rule eliminates the necessity of strict proof of matters as to which there is in fact no real dispute, even though the matter may be in issue under the pleadings.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

1. Rule 3 provides that where there is no bona fide dispute between the parties as to a material fact, the exclusionary rules shall not apply, subject to the discretion of the judge under Rule 45 and any valid claim of privilege. There is apparently no expression of such a rule in our law. The Comment to a similar rule of the Model Code indicates that it was approved by the Commonwealth Fund Committee and by the American Bar Association in adopting the report of its Committee on Improvement of the Law of Evidence. *ALI, Model Code of Evidence*, 77 (1942). See also *Vanderbilt, Minimum Standards of Judicial Administration*, 322 (1949). The effect of the rule would be to give the judge the initial power to determine whether material facts are genuinely disputed. A negative finding would permit admissibility in spite of such objections as extrinsic policies or the hearsay rule.

2. The practical effect of Rule 3 should be salutary in giving the judge a greater discretion in overruling technical objections. It would save time in preventing legal wrangles over admissibility. On the other hand, it is arguable that as a practical matter it would be difficult for a judge to determine that a dispute is bona fide. It may be suggested also that appellate courts might become involved in much litigation over the correctness of the initial determination as to the genuineness of the dispute. On

the balance, the same policies favoring summary judgments militate towards adoption of the rule. It is novel, but the goals are clearly desirable.

#### **Rule 4. Effect of Erroneous Admission of Evidence.**

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding.

##### **Drafters' Comment**

This is the same as Rule 6 of A.L.I. Model Code of Evidence. It is designed to prevent reversals for errors which in the opinion of the court probably did not affect the finding or verdict. It rejects the theory that any error which might have affected the result is ground for reversal. But if the court believes that the error had a substantial influence on the result a reversal should follow.

##### **Recommendation**

It is recommended that this rule be adopted with the addition of the following clause: " , however the appellate court may notice plain errors affecting substantial rights of a party, although they were not brought to the attention of the trial court."

##### **Committee Annotation**

See annotation to Rule 5.

#### **Rule 5. Effect of Erroneous Exclusion of Evidence.**

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

### Drafters' Comment

The substance of the comment under Rule 4 is applicable to Rule 5. Same as Rule 7 of the Model Code of Evidence.

### Recommendation

It is recommended that this rule be adopted, with the addition of the following clause:

"however the appellate court may notice plain errors affecting substantial rights of a party, although they were not brought to the attention of the trial court."

### Committee Annotation

1. Under Rule 4 a judgment or decision is not to be reversed on the grounds of erroneous admission unless there appears on the record a timely objection which makes clear the specific ground of the objection. The New Jersey rule is similar except for the situation in which a party has had no opportunity to object to a ruling or order. See R. R. 4:47; R. R. 1:5-1; R. R. 2:5; *Raab v. American Cas. Co.*, 4 N. J. 303 (1950); *Anderson v. Modica*, 4 N. J. 383 (1950). Cf. *Beam v. Kent*, 3 N. J. 210 (1949). R. R. 1:5-1, R. R. 1:5-3 and R. R. 2:5 do provide that the court may notice plain errors affecting substantial rights although they were not brought to the attention of the court. However, our courts have been loathe to apply this escape in the case of failure to interpose timely objection to the introduction of evidence. See *State v. Bogen*, 13 N. J. 137, 142 (1953); *State v. Picciotti*, 12 N. J. 205, 211 (1953); *State v. Taylor*, 5 N. J. 474, 480 (1950); *State v. Donohue*, 2 N. J. 381, 388 (1949); *Springdale Park v. Andriotis*, 30 N. J. Super. 257, 265 (App. Div. 1954). But cf. *In re Stern*, 11 N. J. 584, 590 (1953) (objection to instruction). In a recent criminal case the exception was applied to reverse a conviction where the assistant prosecutor had made a remark, unobjected to, re the failure of defendant to take the stand as a witness. This was characterized by the Appellate Division as sufficiently "shocking" to dictate reversal. *State v. Ferrell*, 29 N. J. Super. 183 (App. Div. 1954). The policy behind the necessity for timely objection is obvious; the escape apparently will only be applied where a shocking miscarriage of justice would result. It seems desirable that the "plain error" rule be retained to take care of extreme cases.

2. Rule 5 provides that for a judgment to be set aside on the basis of erroneous exclusion of evidence it must appear of record that the proponent of the evidence has either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers. R. R. 4:44-3 provides that "In an action tried by a jury, if an objection to a question . . . is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness". New Jersey appellate courts have followed the aforementioned principle of Rule 5. *State v. Hogan*, 20 N. J. Super. 1, 9 (App. Div. 1952); *Gibson v. Penn. R. R. Co.*, 14 N. J. Super. 425, 435 (App. Div. 1951); *Steffler v. Schroeder*, 12 N. J. Super. 243, 248 (App. Div. 1951). The reason for this requirement is similar to that of Rule 4; the trial court is not clairvoyant, and must know the substance of the evidence to rule properly

on admissibility. See McCormick, "The Procedure of Admitting and Excluding Evidence", 31 *Texas L. Rev.* 128 (1952).

3. Rules 4 and 5 both provide that for reversal the appellate court must be of the opinion that a different ruling would probably have had a substantial effect on the result of the trial. It must believe that evidence erroneously admitted "probably had a substantial influence in bringing about the verdict or finding", and that evidence erroneously excluded "would probably have had a substantial influence in bringing about a different verdict or finding". In New Jersey R. R. 1:5-1 and R. R. 2:5 provide that errors in admission or rejection of testimony in criminal trials shall be cause for reversal only if "it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury". R. R. 1:5-3 and R. R. 2:5 provide that in civil appeals a denial of the relief sought must appear to the court "to be inconsistent with substantial justice". These rules have been frequently resorted to by appellate courts in New Jersey. See *Cauco v. Galante*, 8 N. J. 233 (1951); Tyree, "Evidence", 5 *Rutgers L. Rev.* 246 (1950), 6 *Rutgers L. Rev.* 290 (1951).

The older view in New Jersey was that any error which might have affected the result is ground for reversal. This position, or a similar one, was the law of England between 1830 and 1875, and obtained recognition in a majority of American jurisdictions in the late 1800s. 1 *Wigmore, supra* at 367. In spite of a statute attempting to change it, New Jersey courts clung to the older approach so that further legislation requiring prejudice for reversal was adopted. See St. 1894, c. 163; *Kohl v. State*, 59 N. J. L. 445 (*E. & A.* 1896); St. 1898, c. 237, § 136; R. S. 2:195-16. Subsequent to this New Jersey courts became more reticent in finding "prejudice", and this has been the modern tendency. See also *State v. Simon*, 71 N. J. L. 142 (Sup. Ct. 1904). Cf. *Arata v. Sullivan*, 63 N. J. L. 46 (Sup. Ct. 1899). As the purpose of the suggested provisions in the Rules is to reject the old doctrine, the general tendency in New Jersey is in accord. See U.R.E., comment, Rule 4; *ALI, Model Code of Evidence, supra* at 79. The results reached in our courts are probably substantially the same as they would be under the Uniform Rules, although the test of the Uniform Rules may give a clearer guide to the appellate courts in the exercise of their function. The difference in wording in New Jersey in criminal and civil cases on its face gives the appellate court the opportunity to reverse more readily for the benefit of defendants in criminal cases.

## **Rule 6. Limited Admissibility.**

When relevant evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

### **Drafters' Comment**

The alternative choice here would be a rule which would leave the jury without guidance, except for such help as the judge might give them in a

jurisdiction which permits the judge to comment generally on the evidence. Since these rules do not expressly authorize comment it seems wise to provide a means for the jury to be advised by the judge of a restricted purpose for which evidence is admitted, even though being human, they may give it more scope than it is entitled to. Without this rule there would be no way a jury could be furnished with the same guide which would bind the judge were he sitting as the fact finder. As some safeguard against a likelihood the jury would ignore the instruction the judge would have the right under Rule 45 to exclude the evidence if the fact as to which the evidence is admissible could be proved by other evidence.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

Rule 6 provides that evidence, admissible as to one party or for one purpose and inadmissible as to another party or for another purpose, shall upon request to the judge be restricted to its proper scope and the jury instructed accordingly. This is the New Jersey rule. *Trenton Passenger Ry. Co. v. Cooper*, 60 N. J. L. 219, 223 (E. & A. 1897); *Gindin v. Baron*, 16 N. J. Super. 1, 8 (App. Div. 1951). It is supported by the weight of authority, and is indispensable as a practical rule. 1 *Wigmore, supra* at 300.

### **Rule 7. General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules.**

Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.

#### **Drafters' Comment**

This rule is essential to the general policy and plan of this work. It wipes the slate clean of all disqualifications of witnesses, privileges and limitations on the admissibility of relevant evidence. Then harmony and uniformity are achieved by writing back onto the slate the limitations and exceptions desired. All of the other rules, except the very few touching upon related matters or procedure, revolve around and are limitations on and modifications of Rule 7. This is not a new approach. It follows the pattern of the A.L.I. Model Code of Evidence, which in turn was based on the concept of Professor Thayer and others that all things relevant or logically probative are prima facie admissible unless limitations are imposed by another rule.

Thus all relevant hearsay would be admissible under this rule but for Rule 63 which bars hearsay generally, with carefully specified exceptions.

Illegally acquired evidence may be inadmissible on constitutional grounds—not because it is irrelevant. Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

1. Rule 7 states in effect that all relevant evidence is admissible and any person may testify to anything except as otherwise provided in the rules. This is the keystone to the whole scheme of the Uniform Rules. The principle has been recognized by New Jersey Statute in the section on privileges. N. J. S. 2A:81-4.

2. We have previously discussed the definition of relevancy as "evidence having any tendency in reason to prove any material facts". U. R. 1. Under Rule 7 logical relevancy *prima facie* makes for legal admissibility; the fact that the probative value is slight does not make for inadmissibility in the absence of some other exclusionary policy as expressed in another rule. This has found recent expression in the opinion of the New Jersey Supreme Court in *In re Vince*, 2 N. J. 443, 457 (1949):

"To the end that the whole relevant truth be obtained, it is to be recalled that the cardinal principle is that all relevant evidence is to be admitted unless some specific rule forbids it. *Hampton v. Pennsylvania R. R. Co.*, 115 N. J. L. 168, 169 (*E. & A.* 1935); 1 *Wigmore, Evidence* (3rd Ed. 1940), § 10, p. 293."

See also *Simon v. Graham*, 17 N. J. ... (1955).

However, *Wigmore*, as we have seen (annotation to U. R. 1, *supra*) stresses the practice of courts of excluding evidence as insufficiently probative. 1 *Wigmore, supra* at 409. He cites the conclusion of Chief Justice Cushing that there is a "legal relevancy" which is distinct from "logical relevancy". *Supra* § 12; *State v. LaPaige*, 57 N. H. 245 (1876). In spite of this he concurs in the general proposition that "all facts having rational probative value are admissible, unless some specific rule forbids". *Supra* at 293. Unfortunately his emphasis on "legal relevancy", which ignores policies in finding as the law a point above logical relevancy which must constitute legal relevancy, tends to destroy the significance of the proposition. It is small wonder that courts have reflected a general confusion in determining at what point relevancy becomes legal. See 31 C. J. S. *Evidence* § 159 (1942); Trautman, "Logical or Legal Relevancy—A Conflict in Theory", 5 *Vand. L. Rev.* 385, 390 (1952) and cases cited therein.

Thayer, (*supra* at 265), lays down the same basic proposition that all relevant evidence is admissible except where exclusionary rules intervene following it with the observation that "some things are rejected as being of too slight a significance". *Supra* at 266. However, in his case there is evident no approval of a concept of "legal relevancy". His stress is on countervailing policy as the only justification for exclusion. In discussing the future of the law of evidence he lays down as one of his leading principles "that everything which is thus [logically] probative should come

in, unless a clear ground of policy or law excludes it". *Supra* at 530. The Model Code of Evidence adopted the Thayer approach in Rule 9 (f) which made all relevant evidence admissible, although this was subject to Rule 303 providing that the trial judge might in his discretion exclude relevant evidence where its probative value was outweighed by certain policy considerations, namely, that it would (a) necessitate undue consumption of time, (b) create substantial danger of undue prejudice or of confusion, or (c) unfairly surprise the adversary. Uniform Rule 45 follows this. Thus under the Uniform Rules as well as the Model Code, courts would be unable to exclude on some hazy notion of legal relevancy. Courts might still exclude evidence of slight probative value, presumably for the most part for the same reasons as formerly, but they would be forced to recognize the policy guiding their acts. See James, "Relevancy, Probability and the Law". 29 *Cal. L. Rev.* 689, 702 (1941). This approach has been increasingly recognized by modern courts. See *Miller v. Trans. Oil Co.*, 33 *N. J. Super.* 53, 58 (*App. Div.* 1954), *aff'd* 18 *N. J.* — (1955); Trautman, *supra* at 91, notes 26, 27. It has the support of the living writers on evidence.

3. The much criticized exclusionary statute, the "Dead Man's Act", N. J. S. 2A:81-2 has no place in the proposed rules.

Under the common law rule parties were excluded from testifying in their own suits, and witnesses were incompetent whenever it appeared they had an interest in the subject matter of the controversy. *American and English Encyclopedia of Law*, (2d Ed. 1899) 543; Greenleaf, *Treatise on the Law of Evidence*, (Lewis's Ed. 1899) § 329. Although legislation has abrogated the common law rule, N. J. S. 2A:81-1, a vestige of the former disqualification has been preserved in our Dead Man's Act. Under this statute, N. J. S. 2A:81-2, in civil actions, when one party is deceased at the time of trial, the survivor is incompetent to testify, unless the decedent's representative removes the proscription by offering himself as a witness on his own behalf and testifies as to any transaction with or statement by the decedent. When the action is founded on any allegation of fraud, breach of trust, willful default or undue influence, the statute renders the defendant competent. It is to be borne in mind that the same rules apply if a party has been adjudged a lunatic. The statute, by amendment, was extended in 1931 to cover such cases. L. 1931, c. 163, p. 305. The purpose of the statute, as has been stated in numerous cases, was to obtain "equality between the parties to such a suit, by silencing the one who may, by his own mouth, be able to testify to transactions and conversations with the decedent, possibly to disadvantage of his estate." *Pontery v. Peters*, 118 *N. J. L.* 581, 585 (*E. & A.* 1937).

A more severely criticized statute would be difficult to find. See *Morgan, Basic Problems of Evidence*, 85 (1954); *Vanderbilt, Minimum Standards of Judicial Administration*, 334 (1949). Wigmore has stated that such statutes rest on "superficial reasoning", and the exclusion of such evidence precludes honest claims of the living and there is no more justification for saving "dead men's estates from false claims than to save living men's estates from loss by lack of proof." 2 *Wigmore on Evidence*, (3d ed. 1940) § 578. In 1927 a committee, consisting of some of the leading specialists in the field of evidence from our schools of law and judges who had taken a

particular interest in the subject, (acting under the auspices of the Commonwealth Fund) considered these statutes as found in the various states. It concluded as follows:

“. . . to attempt to justify these exclusionary statutes upon the theory that it is unfair to permit the survivor to speak when the lips of the decedent are sealed is to commit a double blunder. It overlooks the fact that court and jury will inevitably scrutinize with great care the testimony of the survivor under such circumstances, and it assumes that the only method of effecting substantial equality is by closing the mouth of the survivor without considering the alternative of making admissible self-serving declarations of the decedent.”

Morgan, Chafee, Gifford, Hinton, Hough, Johnston, Sunderland, Wigmore. *The Law of Evidence, Some Proposals for its Reform*, (1927). In 1938 the Committee on Improvements in the Law of Evidence of the American Bar Association observed that “of late years, it has often been reproached as an anachronism and an obstruction to truth—partly on the ground that its inherent details are highly technical and have no relation to the psychology of veracity . . . and partly on the ground that it obstructs honest claims as often as it defeats unjust claims” 63 *A. B. A. Report* 581 (1939). For early judicial expression of disapproval see the opinion of Justice Corliss of the North Dakota Supreme Court in *St. John v. Lofland*, 5 *N. D.* 140, 143, 64 *N. W.* 930, 931 (1895).

The critics seem to agree that the statute is unsound in looking upon all survivors with suspicion and concluding that dishonesty outweighs honesty. Further, the statute is unsound because it does not render the witness totally incompetent. He is incompetent only as to certain matters, and if he is attempting to fabricate a claim, there is still ample opportunity to do so by testifying with respect to matters not excluded and still sufficient to establish a claim. The dishonest are not hampered, but the honest are victimized.

Certain of our sister states have adopted remedial statutes looking in the direction of removing the incompetency of survivors. The Virginia statute allows the survivor to testify, but his unsupported testimony cannot establish a claim. The statute (Virginia Code (1950) § 8-286) provides:

“In an action or suit by or against a person who, from any cause, is incapable of testifying or by or against the committee, trustee, executor, administrator, heir or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action or suit, if such adverse party testifies, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence.”

It is to be noted that the statute removes the incompetency, but apparently in consideration of the underlying basis of the interest-disqualification rule has provided for offsetting factors, the necessity of corroboration and the admission of all declarations of the deceased.

This type of statute, which requires corroboration, has been criticized as favoring the estate of the decedent. 4 *Wigmore, Evidence A* 2065 (1940).

Moreover, it presents for controversy questions as to what types of actions the statute applies, *Merchants Supply Co. v. Hughes Ex'rs*, 139 Va. 212, 123 S. E. 355 (1924), what kinds of transactions require corroboration, *American Surety Co. v. Hannah*, 143 Va. 291, 130 S. E. 411 (1925), and there is always the question of sufficiency of corroboration. The Virginia statute also restricts the admissions of the decedents' declaration to cases in which the adverse party testifies.

Rhode Island and Massachusetts have also enacted legislation rendering the survivor competent and at the same time making provision for the hearsay declarations of the decedent. Rhode Island Gen. Laws (1938), c. 538; Mass. Gen. Laws (1952), c-233 §§ 65, 66. The Massachusetts statute (see favorable comment with reference thereto in concurring opinion in *Robertson v. Hackensack Trust Co.*, 1 N. J. 304, 315 (1949)) and the Rhode Island statute are restricted to causes of action "supported by oral testimony of a promise or statement" made by the deceased. And there is the further requirement that the decedents' declarations tend "to disprove or show the improbability of making such promise or statement." The Connecticut statute is devoid of these limitations. General Statutes, Conn. (1949) §§ 7895, 7896, 7897.

The Connecticut type statute commends itself because there is less likelihood of encountering the difficulties previously noted to be present when the testimony of the survivor is admitted only under certain circumstances.

Certain of the statutes following the recommendation of the Commonwealth Fund Committee, (see *Morgan, et al., Law of Evidence, Some Proposals for Its Reform*, p. 49 (1927)) have incorporated a provision, that to be admissible, the trial judge must find that the declarations were made in good faith. With respect to this requirement there seems to be some merit to the argument of the minority of the Commonwealth Fund Committee on Evidence that the trial judge might make such preliminary finding a mere formality. See *Morgan, et al., Law of Evidence, supra*, p. 49. The Connecticut statute does not have such a provision.

4. The proposed rules contain no restriction as to plaintiff's evidence with respect to medical expenses incurred.

Not all jurisdictions are in accord as to whether a plaintiff may testify in re the amount paid or liability incurred for medical expenses in the absence of proof of their reasonable value. Among the jurisdictions that adhere to the rule that it is necessary to show the reasonableness of the medical expense are: Alabama—*Conway v. Robinson*, 216 Ala. 495, 113 So. 531 (*Sup. Ct.* 1927); Michigan—*Alt. v. Konkle*, 237 Mich. 264, 211 N. W. 661 (*Sup. Ct.* 1927); Montana—*Storm v. City of Butte*, 35 Mont. 385, 89 Pac. 726 (*Sup. Ct.* 1907); Oklahoma—*Derr Construction Co. v. Geruth*, 29 Okla. 538, 120 Pac. 523 (*Sup. Ct.* 1911); Oregon—*Coblentz v. Jaloff*, 115 Ore. 656, 239 Pac. 825 (*Sup. Ct.* 1925); South Dakota—*Ellwein v. Town of Roscoe*, 42 S. Dak. 298, 174 N. W. 748 (*Sup. Ct.* 1919); Texas—*Galveston, etc. R. Co. v. Hodnett*, 155 S. W. 678 (*Tex. Civ. App.* 1913); Washington—*Jorgeson v. Hanford*, 79 Wash. 56, 139 Pac. 648 (*Sup. Ct.* 1914).

A more liberal rule has been followed in other jurisdictions where it is held that proof of payment of medical expenses is some evidence of the reasonableness of the amounts charged. In these jurisdictions the founda-

tion of reasonableness need not be laid for the admissibility of plaintiff's testimony re the amount paid for medical expenses: California—*Dewhirst v. Leopold*, 194 Cal. 424, 229 Pac. 30 (Sup. Ct. 1924); Georgia—*Georgia Railway and Electric Co. v. Tompkins*, 138 Ga. 596, 75 S. E. 664 (Sup. Ct. 1912); Kentucky—*Louisville & I. R. Co. v. Frazee*, 179 Ky. 488, 200 S. W. 948 (Ct. of App. 1918); Utah—*Barlow v. Salt Lake & U. R. Co.*, 57 Utah 312, 194 Pac. 665 (Sup. Ct. 1920); Wisconsin—*Gerbing v. McDonald*, 201 Wis. 222, 229 N. W. 860 (Sup. Ct. 1930).

The recent case of *Garafola v. Rosecliff Realty Co., Inc.*, 24 N. J. Super. 28 (App. Div. 1952) shows New Jersey to be in the former group. In *Garafola* the court held that where there was no proper proof of the reasonableness of charges made for medical and hospital services rendered an infant, the trial court properly excluded the testimony of the infant's father as to the amount of such services. Earlier cases evidence greater liberality in admission.

In *Sanders v. Hudson & Manhattan R. R. Co.*, 121 N. J. L. 406 (Sup. Ct. 1938), affirmed per curiam 122 N. J. L. 376 (E. & A. 1939) our courts were faced with a similar problem. There the defendant argued that the lower court erred in permitting plaintiff to testify as to the amount paid by her for medical attention as there was no proof to support the necessity of treatment or fairness of the charges made. The court apparently rejected defendant's argument and held that such testimony was admissible. See also *Brodsky v. Red Raven Rubber Co.*, 111 N. J. L. 453 (E. & A. 1933). As evincing a clear rejection of the necessity of laying a foundation of reasonableness, the *Sanders* case is weakened by the court's grounding its decision also on a practice point, which ground may have been the basis of the holding. Defendant at the trial below had made no motion to strike plaintiff's testimony as incomplete and this the court held barred the defendant from challenging plaintiff's failure to produce proof of reasonableness.

In *Brodsky v. Red Raven Rubber Co.*, *supra*, the plaintiff testified, without objection, that he had spent 18 days in the hospital and described the treatment he received, and was permitted by the court over objection to state the amount of the bill rendered by the hospital. Plaintiff further testified, without objection, that he visited the doctor a certain number of times, and when asked if he knew the amount of the bill of the doctor, counsel for appellants said "I object. That is improper proof." The question was not then answered, but was later propounded and objected to as being irrelevant and immaterial. Objection was overruled and plaintiff permitted to testify as to the amount of the bill. This was held to have been proper. (111 N. J. L. at 455).

The court did not indicate whether the testimony is admissible because a foundation of reasonableness need not be laid or because the objection was general and did not particularize. It is interesting to note that the court in its opinion states in some detail the nature of the questions and objections. This would seem to point in the direction that the decision was grounded on a practice question and not on rejection of the requirement that reasonableness be laid as a foundation.

It would seem that the position taken in *Garafola, supra*, represents the present law in New Jersey, but the soundness of this approach merits consideration. The insistence of proof of reasonableness is apparently the safeguard against a collusive charge of a speculative fee. But when the charge has been paid there is little ground for such suspicion, and plaintiff would always be open to cross examination as to a fictitious payment. The payment of the bill of a physician has been held to be reasonable prima facie evidence. *Barlow v. Salt Lake & Utah Railway Co.*, 57 *Utah* 312, 194 *Pac.* 665 (*Sup. Ct.* 1920). It is submitted that the present rule imposes an undue hardship on plaintiffs, especially where the recovery sought is small and the cost of bringing physicians into court would be exorbitant when viewed in terms of the recovery sought. As a practical matter it would indeed be a rarity for a physician to testify that the bill he rendered was other than reasonable.

In every case where a party has incurred expense as the result of another's wrong, only so much is recoverable therefore as is reasonable under the circumstances. The party so claiming must show to the jury what is reasonable as a basis of their finding. *Sutherland Damages* (2d Ed.) § 2674. Under proper instructions it would seem that they would have a basis for their findings. As was stated in *Western Gas Construction Co. v. Danner*, 38 *C. C. A.* 528, 532, 97 *Fed.* 882 (9th *Cir.* 1899) :

" . . . reasonableness of charge (for medical expense) does not solely depend upon testimony of experts, although such testimony is proper and entitled to weight, and is usually given as an aid to the jury in determining the proper amount to be allowed; but the jury have the right, in this connection, to consider the character and extent of plaintiff's injury, and the extent and character of the medical services and treatment he received and from all the evidence determine the amount that should be given."

5. One New Jersey rule which finds no support in the Uniform Rules is the "Federal Rule" which is also the law in a majority of other American jurisdictions and which limits the scope of cross-examination to matters raised on direct. *State v. Centalozza*, 18 *N. J. Super.* 154 (*App. Div.* 1952); *Kiernan v. Mauer*, 13 *N. J. Super.* 18 (*App. Div.* 1951); Tyree "Evidence", 7 *Rutgers L. Rev.* 257, 264 (1952); 6 *Rutgers L. Rev.* 290, 299 (1951). To this has been grafted an old exception; in 1887 Chief Justice Beasley announced that the practice was to permit a testifying party to be cross-examined as to the whole case, this being a discretionary matter and not subject to review for error. *Disque v. State*, 49 *N. J. L.* 249 (*Sup. Ct.* 1887). See *Weiss v. Weiss*, 95 *N. J. L.* 125, 128 (*E. & A.* 1920). This has been extended so that the Appellate Division apparently now inclines to the view that cross-examination of a party-witness is a matter of right on relevant matters. See *State v. Bartell*, 15 *N. J. Super.* 450 (*App. Div.* 1951), *aff'd*, 10 *N. J.* 9 (1952); Tyree, "Evidence", 7 *Rutgers L. Rev.* 257, 265 (1952). However, the latitude of cross-examination designed to test credibility is discretionary, subject only to the consequences of its abuse.

The "Federal" and New Jersey rule is not the traditional common law one. See *State v. Zellers*, 7 *N. J. L.* 220, 229 (*Sup. Ct.* 1824); 6 *Wigmore, supra* at 532. Under this the examiner could question on any matter

relevant to the issues of the case. *Fulton Bank v. Stafford*, 2 *Wend.* 483, 485 (1829). But in 1840 Justice Story sponsored the "federal rule", *Philadelphia & T. R. Co. v. Stimpson*, 14 *Pet.* 448, 461 (1840), which was quickly adopted in New Jersey. *Donnelly v. State*, 26 *N. J. L.* 463, 494 (*Sup. Ct.* 1857). This rule originally permitted discretionary departures. In several jurisdictions there have been departures from this allowance of discretion, but New Jersey courts have been loathe to find reversible error. In most of the New Jersey cases appellants contend that evidence was erroneously excluded on cross-examination, and the appellate court merely reiterates that the proper rule is to exclude matters not raised on direct. *E. g.*, *State v. Labell*, 135 *N. J. L.* 392, 398 (*Sup. Ct.* 1947); *Robbins v. Thies*, 117 *N. J. L.* 389, 396 (*E. & A.* 1936); *State v. Zeilman*, 75 *N. J. L.* 357, 362 (*Sup. Ct.* 1907); *Donnelly v. State*, *supra*; *Disque v. State*, *supra*. The interference with trial court discretion has come where the appellate court has felt that the excluded matter did relate to matter raised on the examination in chief. *Baus v. Trenton & C., Traction Corp.*, 100 *N. J. L.* 364, 368 (*E. & A.* 1924); *Prout v. Bernards Land & Sand Co.*, 77 *N. J. L.* 719 (*E. & A.* 1909). But in criminal cases there may not be this discretion; at least the examiner makes the witness his own by this conduct. See *State v. Murphy*, 87 *N. J. L.* 515, 529 (*E. & A.* 1915). And the *Centalonza* case, *supra* at 159, indicates that the Appellate Division may intend to confine discretion to civil cases.

The arguments for and against the "federal" rule have been ably set forth in 6 *Wigmore*, *supra*, §§ 1887-1888. The orderly presentation of proof is the major argument for the rule. Yet as it prevents a witness from telling his whole story at one sitting it may actually cause confusion. Furthermore, it causes controversy over the proper scope of the examination. Likewise, there is presented to the calling party the opportunity of suppressing part of the facts, thus requiring the opposing counsel to make the witness his own. This may be dangerous, especially where a witness is hostile. And where a husband or wife is involved, the examiner may not be able to recall the witness at all; the court is left with half the story. *N. J. S.* 2A:81-3. For these reasons and others a return to the "orthodox" rule was advocated by the Committee of Fifteen appointed by the U. S. Supreme Court in 1936 to prepare a Code of Federal Rules of Civil Procedure, and by the American Bar Association's Committee on the Improvement of the Law of Evidence. Wigmore strongly supported this position. 6 *Wigmore*, *supra* at 544.

It is probably unnecessary to specifically call for a return to the orthodox rule. The Model Code in Rule 105(b) left the matter to the discretion of the trial judge, and the Uniform Rules by silence seem to adopt this position. The important thing is to escape from any inflexible implications of the federal rule. The trial court should, in the interest of orderly presentation of the evidence in each case, be able to adopt the "federal" rule, the "orthodox" rule, or some intermediate rule. See 1 *Morgan, Basic Problems of Evidence*, 61 (1954); 6 *Wigmore*, *supra*, §§ 1867, 1889.

## **Rule 8. Preliminary Inquiry by Judge.**

When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

### **Drafters' Comment**

This is a somewhat drastic modification of the very complicated Rule 11 of the A.L.I. Model Code. Several new features should be noted: (a) Simplification in leaving the determination of burdens on preliminary matters to common sense rather than rule of thumb, (b) requiring, if request is made, hearings on confessions to be out of the presence of the jury, and (c) adding a saving clause to make sure that the jury is entitled to hear evidence of weaknesses in admitted evidence.

### **Recommendation**

It is recommended that this rule be adopted.

### **Committee Annotation**

1. Rule 8 provides that when competency or admissibility or privilege is subject to a condition the fulfillment of which is at issue, this shall be determined by the judge. This is the normal and desirable common law rule and is the New Jersey practice. See *State v. Bunk*, 4 N. J. 461 (1950); *Moosbrugger v. Swick*, 86 N. J. L. 419 (Sup. Ct. 1914); *State v. Monich*, 74 N. J. L. 522 (E. & A. 1912); 9 *Wigmore, supra*, § 2550; Thayer, *supra* at 258; Maguire and Epstein, "Preliminary Questions of Fact in Determining the Admissibility of Evidence", 40 *Harv. L. Rev.* 392 (1927); Morgan, "Functions of Judge and Jury in the Determination of Preliminary Questions of Fact", 43 *Harv. L. Rev.* 165, 175 (1929). Otherwise there might be cumbersome delays. Furthermore, the aim of the exclusionary rule is likely to be frustrated if left to the jury; it is hard for the jury to disregard the undesirable matter even if it overcomes a natural reluctance to enforce exclusionary rules.

2. It has been argued that if the only objection to admissibility is lack of relevance in view of the possible non-existence of another fact being determined, and if there is sufficient evidence of each fact offered to justify a finding of its existence, the evidence should be admitted subject to the

determination of the jury under proper instructions from the judge. 1 *Morgan, Basic Problems of Evidence*, 43. This suggestion as a general proposition has not, however, had widespread acceptance. In many cases it might tend to burden the trial with irrelevant matter and confuse the jury. See 9 *Wigmore, supra*, § 2550. With respect to confessions the federal practice and that of some of the states is to charge the jury that they must pass anew on the voluntariness of the confession, but this is not the New Jersey practice. *State v. Tune*, 17 *N. J.* 100, 114 (1954); *State v. Vaszorich*, 13 *N. J.* 99, 110 (1953); *State v. Walker*, 15 *N. J.* 485, 490 (1954); *State v. Compo*, 108 *N. J. L.* 499, 502 (*E. & A.* 1932). See 3 *Wigmore, supra*, § 861. The New Jersey practice which is in effect to charge the jury that they can disbelieve the confession leads to the same result; no jury believing a confession involuntary could give it significant weight in its determination.

3. The rule further provides that such matters may be determined out of the presence of the jury and must be on request where confessions are involved. At least where the confessions are subsequently admitted the New Jersey courts have not criticized the practice of holding the hearing before the jury. *State v. Dolbow*, 117 *N. J. L.* 560, 562 (*E. & A.* 1937). The reason given for this is that the jury itself would later be called upon to determine the credit to be accorded the confession thus admitted. Of course this argument would be inapplicable where the confession was excluded as involuntary. The danger of prejudice militates against allowing this sort of preliminary matter to be heard by the jury.

4. An escape is provided that "this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility". The purpose of this is to insure that a jury will have the opportunity to hear evidence of weaknesses in the admitted evidence. It seems eminently desirable, and there does not appear to be any suggestion in New Jersey law that it is improper.

## II. JUDICIAL NOTICE

### Rule 9. Facts Which Must or May Be Judicially Noticed.

(1) Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

(2) Judicial notice may be taken without request by a party, of (a) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state, and (b) the laws of foreign countries, and (c) such facts as are so generally known or of such

common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (d) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.

(3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.

#### Drafters' Comment

Rules 9, 10, 11 and 12 state in four rules the subject matter of Model Code Rules 801 to 806. In keeping with the Uniform Act on Judicial Notice of the law of foreign states, judicial notice of the public law of other states is made mandatory. This is the principal difference from the Model Code. Municipal ordinances and departmental regulations are along with other things made the subject of optional judicial notice unless a request is made, whereupon it becomes mandatory. Sufficient safeguards are provided to protect the adverse party and to require the parties to furnish the judge with sources of information.

#### Recommendation

This rule should be adopted, with the addition of the following sentence: "These matters should where practicable be raised at the pre-trial conference."

#### Committee Annotation

1. It would seem advisable in many instances that prior notice be given an adversary along with a reasonable opportunity to the court to determine in advance the accuracy of such facts proposed for judicial notice. This is provided for in Section (3). The Uniform Judicial Notice of Foreign Law Act, N. J. S. 2A:82-27, requires that foreign law must first be pleaded and then the Court shall take judicial notice thereof. See *Leary v. Gledhill*, 8 N. J. 260 (1951). This seems unduly rigid in view of the modern de-emphasis on pleadings. The requirement has caused undue confusion and litigation. See *Colozzi v. Bevko, Inc.*, 17 N. J. 194, 202 (1955). It is recommended by the sentence added to section 3 that requests to take judicial notice be brought up at the pre-trial conference. If they are not, and timely notice at the trial is not given to the court and to the adverse party, the court may decline to notice the requested matters.

2. As to facts of general knowledge so well known as not to be subject to reasonable dispute, our common law apparently has not mandatorily imposed the obligation on the court to take judicial notice thereof. *Palestroni v. Jacobs*, 8 N. J. Super. 438 (*Bergen Co. Ct.* 1950), reversed on other grounds 10 N. J. Super. 266 (*App. Div.* 1950). But cf. Editorial, "Judicial Notice", 75 N. J. L. J. 136 (1952). The proposed change would seem to

work no undue hardship. The requirements that the fact be universally known and not reasonably subject to dispute must of course be strictly observed. See *Westerdale v. Kaiser-Frazer Corp.*, 6 N. J. 571, 574 (1951).

3. The rule may work another minor change in permitting judicial notice of municipal ordinances to a greater extent than allowed heretofore. See *K. S. S. Realty Co. v. Ostroff*, 100 N. J. Eq. 128 (Ch. 1927), aff'd, 101 N. J. Eq. 771 (E. & A. 1927); *Galen Hall Co. v. Atlantic City*, 76 N. J. L. 20 (Sup. Ct. 1908).

4. The burden on the trial judge is eased by section 3 of rule 10. This provides that if the information readily available to him is insufficient to enable him to notice the matter judicially, he shall decline to do so.

5. On the subject generally see *Lakewood Express Serv. v. Board of Public U. Com'rs*, 1 N. J. 45 (1949); *Carlo v. The Okinite-Callender Cable Co.*, 3 N. J. 253, 260 (1949); *Morgan*, "Judicial Notice", 57 *Harv. L. Rev.* 269 (1944); *McCormick*, "Judicial Notice", 5 *Vand. L. Rev.*, 296 (1952).

### **Rule 10. Determination as to Propriety of Judicial Notice and Tenor of Matter Noticed.**

(1) The judge shall afford each party reasonable opportunity to present to him information relevant to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed.

(2) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (a) the judge may consult and use any source of pertinent information, whether or not furnished by a party, and (b) no exclusionary rule except a valid claim of privilege shall apply.

(3) If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince him that a matter falls clearly within Rule 9, or if it is insufficient to enable him to notice the matter judicially, he shall decline to take judicial notice thereof.

(4) In any event the determination either by judicial notice or from evidence of the applicability and the tenor of any matter of common law, constitutional law, or of any statute, private act, resolution, ordinance or regulation falling within Rule 9, shall be a matter for the judge and not for the jury.

#### **Drafters' Comment**

See Comment under Rule 9. Clause (4) of Rule 10 is suggested by the Uniform Judicial Notice of Foreign Law Act so as to make it clear that determinations of applicable law are not properly questions of fact for the jury but are for the judge to determine. This is true whether evidence is

offered on the issue of what the law is or whether the rule of judicial notice is strictly invoked. In this respect the old common law rule is changed. The issue of what the foreign law is, was commonly one of fact for the jury.

#### **Recommendation**

This rule should be adopted.

#### **Committee Annotation**

1. Section (1) of Rule 10 recognizes that each party should be granted the opportunity to present evidence as to the propriety of judicial notice. See 9 *Wigmore, Evidence*, 535 (1940).

2. Section (2) recognizes that exclusionary rules except privileges do not apply to matters properly the subject of judicial notice. This is a reasonable corollary to Rule 3 which provides that such exclusionary rules shall not apply where there is no bona fide dispute as to a material fact.

3. Sections (3) and (4) of the rule are statements of our present established New Jersey common law rule and the Uniform Act, N. J. S. 2A :82-29.

### **Rule 11. Instructing the Trier of Fact as to Matter Judicially Noticed.**

If a matter judicially noticed is other than the common law or constitution or public statutes of this state, the judge shall indicate for the record the matter which is judicially noticed and if the matter would otherwise have been for determination by a trier of fact other than the judge, he shall instruct the trier of the fact to accept as a fact the matter so noticed.

#### **Drafters' Comment**

This rule goes a little farther than Model Code Rule 805 in that it requires the judge to specify not only facts which he notices judicially but also his findings with respect to foreign laws, municipal ordinances and the like. Of course the jury is entitled to be apprised of the facts judicially noticed which it would otherwise be their province to determine.

#### **Recommendation**

Rule 11 should be adopted.

#### **Committee Annotation**

1. Although matters finally judicially noticed are "conclusive" on the jury, this of course does not in any way detract from the opportunity of the adversaries provided in Rule 10 (1) to present evidence as to the propriety of judicial notice. The conclusiveness of the final determination springs naturally from the nature of the matters subject to judicial notice; they are either pure matters of law or matters not reasonably susceptible of dispute. See *State v. Cromwell*, 6 *N. J. Misc.* 221 (*Sup. Ct.* 1928); *Morgan, Basic Problems of Evidence*, 13 (1954).

2. Although a court may properly take notice of a governmental report as an official statement, this does not of course mean that the truth of the contents are judicially noticed. Cf. *U. S. v. Aluminum Co. of America*, 148 F. 2d. 416, 446 (2d. Cir. 1945).

3. The determination to take judicial notice is of course subject to review on appeal. The requirement that it be placed on the record safeguards the rights of the parties in this respect.

## **Rule 12. Judicial Notice in Proceedings Subsequent to Trial**

(1) The failure or refusal of the judge to take judicial notice of a matter, or to instruct the trier of fact with respect to the matter, shall not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

(2) The rulings of the judge under Rules 9, 10 and 11 are subject to review.

(3) The reviewing court in its discretion may take judicial notice of any matter specified in Rule 9 whether or not judicially noticed by the judge.

(4) A judge or a reviewing court taking judicial notice under Paragraph (1) or (3) of this rule of matter not theretofore so noticed in the action shall afford the parties reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.

### **Drafters' Comment**

This is the same as Model Code Rule 806.

### **Recommendation**

It is recommended that this rule be adopted.

### **Committee Annotation**

As matters subject to judicial notice are not jury questions, there is no valid reason why appellate courts should not avail themselves of the process. Remand to the trial court for a new trial would be time-consuming and useless. The parties' right to present information to the court, specifically granted in section (4), meets any objection that they might be denied their day in court on the issue. Cf. *In re Selser*, 15 N. J. 393 (1954).

### III. PRESUMPTIONS

#### Rule 13. Definition.

A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

#### Drafters' Comment

This rule embodies in one simple definition the substance of (1) and (2) of A.L.I. Model Code of Evidence Rule 701. No separate definition of "basic fact,"—the fact or facts from which the presumption is drawn, is deemed necessary. Nor is a specific definition of inconsistent presumptions deemed necessary as the term is self defining. The rule limits presumptions to situations where the assumption must be made, at least initially, from established basic facts which give it birth. Thus we are not dealing generally with the mental process of drawing inferences from evidence but are dealing with the process of presuming facts from other facts. Of course, the establishing of the facts on which the presumption is based is accomplished in the same manner, by evidence or by judicial notice, or by the pleadings or stipulation as any other fact is established. Where the presumption depends on what the jury finds with respect to the basic facts, it arises or not in accordance with such findings.

#### Recommendation

Rule 13 should be adopted.

#### Committee Annotation

1. The legal term presumption has been used with a wide variety of meanings (*Morgan, Basic Problems of Evidence*, 30-31, (1954); *Wigmore* 3rd ed. 2491-2492) and is without a specific modern definition in our state. This definition from the Morgan school of thought (*Cases and Materials on Evidence, Morgan & Maguire*, 3rd ed. 1951, pg. 73) emerging from the Model Code Rule 701 affords a clear, concise modern definition of the term supported by the principles of the law of presumptions in this state. *Meltzer v. Division of Tax Appeals*, 134 N. J. L. 510 (*Sup. Ct.* 1946).

2. The term must of course be distinguished from the "inference", which is a deduction which may permissibly be drawn by the trier of fact. *Meltzer v. Division of Tax Appeals, supra*; *Black, Law Dictionary*, 958 (1944).

## Rule 14. Effect of Presumptions.

Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

### Drafters' Comment

Let us suppose that facts are proven from which a presumption, based wholly or partly on probability, arises. Nearly all presumptions are of this sort. Among the most common examples are the presumption against suicide, the presumption of death from seven years disappearance without tidings, the presumption that a vehicle driven by a regular employee of the owner was being driven in the course of the owner's business, and the presumption of due delivery to addressee of a letter properly addressed, stamped and mailed. If the basic facts of any of these presumptions are established and the adversary offers evidence contrary to the presumed fact, and thus the existence of the presumed fact is left in dispute, how shall the trial judge submit the issue to the jury?

One solution would be a rule to the effect that the presumption, having served its purpose, should be disregarded and not mentioned in the instructions. This is the Thayer view and the one embodied in the Model Code of Evidence by a vote of 59 to 42, contrary to the recommendation of Professors Morgan and Maguire, the draftsmen of the Code. The Thayer view has been approved in a substantial number, perhaps a majority, of recent decisions which have considered the question. Examples are *Ryan v. Metropolitan Life Ins. Co.*, 206 Minn. 562, 289 N.W. 557 (1939) (presumption against suicide); *Kirschbaum v. Metropolitan Life Ins. Co.*, 133 N.J.L. 5, 42 A. 2d 257, 158 A.L.R. 743 (1945) (same); Decennial Digests, Trial, key nos. 205, 237(4).

On the other hand, there is a strong argument for the view that the jury needs guidance in this situation if they are to give due effect to the probabilities and frequently the substantive policy on which the presumption is based. Before the Thayer discovery came into vogue, the practice of instructing on the effect of presumptions was the established tradition. Wigmore, who accepted and popularized the Thayer view, nevertheless acknowledged in the last edition of his treatise, the need for advising the

jury that they could give special weight to the course of experience as embodied in the presumption. 9 Wigmore, Ev. 2498a, pp. 340, 341, Par. 21, 22 (3d ed. 1940). Examples of recent cases approving the practice of advising the jury of presumptions: *Wellisch v. John Hancock Mutual Life Insurance Co.*, 293 N.Y. 178, 56 N.E. 2d 540, 542, 1944 (quoting judge's instruction on presumption against suicide with seeming approval); *Hamilton v. Southern R. Co.*, 162 F. 2d 884, 888, 889, syl. 6, 7, C.C.A. Va., 1947 (presumption of negligence); *Karp v. Herder*, 181 Wash. 583, 44 P. 2d 808, syl. 6, 1935 (presumption of due care, opposed by direct testimony of negligence, instruction that presumption continues "until overcome by evidence" approved by five to four). This practice is especially widespread in the case of statutory presumptions.

If the jury are to be advised, by what kind of instruction? In some states it has been customary to tell them that the presumption is "evidence." It has sometimes been suggested that they are to be told that it shall stand until met by evidence "of equal weight." The most natural and helpful thing to tell them is that they may find in accordance with the presumptions unless they believe the evidence to the contrary. This was the traditional type of instruction until Thayer pointed out the two meanings of the "burden of proof" and convinced the schools and then the courts that a presumption shifted only one of the burdens, that is, the duty of producing evidence. But there is no reason in the nature of things why it should not shift both the burden of evidence and the burden of persuasion. Accordingly we find the courts reverting from time to time to the ancient, common-sense practice of charging the jury as to certain presumptions having a substantial backing of probability, that the presumption stands until overcome in the jury's mind by a preponderance of evidence to the contrary. In other words, the presumption is a "working" hypothesis which works by shifting the burden to the party against whom it operates of satisfying the jury that the presumed inference is untrue. This often gives a more satisfactory apportionment of the burden of persuasion on a particular issue than can be given by the general rule that the pleader has the burden. One looks rather to the ultimate goal, the case or defense as a whole, the other to a particular fact-problem within the case. Moreover, an instruction that the presumption stands until the jury are persuaded to the contrary, has the advantage that it seems to make sense and will be more readily understood by the jury than the other types of instructions on presumptions. Examples of decisions approving this type of instruction: *Wyckoff v. Mutual Life Ins. Co.*, 173 Ore. 592, 147 P. 2d 227 (1944) (presumption against suicide); *Lewis v. New York Life Ins. Co.*, 113 Mont. 151, 124 P. 2d 579 (1942) (presumption of accidental death stands unless controverted by "preponderance of evidence") and see *Banks v. Metropolitan Life Ins. Co.*, 142 Neb. 823, 8 N.W. 2d 185 (1943) (presumption of death from seven years disappearance stands "unless overcome by evidence," approved).

## Recommendation

Rule 14 should be adopted.

### Committee Annotation

1. This rule is contrary to the present New Jersey rule, Thayer's position, that once evidence is adduced which would support a finding of non-existence of the presumed fact, the presumption disappears. *Kirschbaum v. Metropolitan Life Insurance Co.*, 133 N. J. L. 5 (E. & A. 1945); *Hughes v. Atlantic City &c., R. R. Co.*, 85 N. J. L. 212 (E. & A. 1914). This rule is also contrary to the proposed rule in the Model Code 704. However, as suggested by Professor Morgan ("Presumptions and Burden of Proof", 47 *Harv. L. Rev.* 59 (1933)) where the facts from which the presumption arises have some probative value as evidence of the presumed fact, it would seem an undue rejection of their significance to deny them any effect once conflicting evidence is introduced.

An example of such a presumption is that of receipt arising from the proper mailing of a letter which can be rested on the rational basis that letters so mailed are almost always properly delivered. Therefore the fact that the letter was mailed can be considered logically probative of the issue of receipt. Thus the burden of proof should be shifted to the party who in the particular instance alleges non-receipt. Most of our present day presumptions would likewise shift the burden of proof under the proposed rule.

2. Where the presumption has no such rational basis, the present New Jersey rule would be applied. See *In re Weeks*, 29 N. J. Super. 533 (App. Div. 1954). Very few of our presumptions fall into this category. One example would be that when a person has been missing seven years the time of death is presumed to be at the expiration of the seven year period. See *Burkhardt v. Burkhardt*, 63 N. J. Eq. 479 (Ch. 1902). This presumption clearly has its only basis in convenience. Absence for seven years raises no rational inference that death occurred at the particular moment the seven year period expired. Thus there is no reason that the presumption should survive upon the introduction of evidence indicating the contrary.

3. There is an intermediate area where it may not be entirely clear into which category the presumption falls. One such instance may be the presumption of sanity. One writer has concluded that the basic fact supporting this presumption is the existence of a particular human being which has no probative value. *McBaine*, "Burden of Proof-Presumptions", 2 *U. C. L. A. L. Rev.* 13, 23 (1954). However this presumption does rest on the rational basis that insanity is the rare exception rather than the rule, and so perhaps the burden of proof should shift. Consideration should be given to changing the wording of Rule 15 to make it clear that all presumptions having a basis in probability rather than convenience should fall into this category.

4. On this subject generally see Morgan, "Instructing the Jury on Presumptions and Burden of Proof", 47 *Harv. L. Rev.* 59 (1933); Morgan, "Some Observations Concerning Presumptions", 44 *Harv. L. Rev.* 906 (1931); Gausewitz, "Presumptions in a One-Rule World", 5 *Vand. L. Rev.* 324

(1952); McCormick, "Charges on Presumptions and Burden of Proof", 5 *N. C. L. Rev.* 291 (1927); Reaugh, "Presumptions and Burden of Proof", 36 *Ill. L. Rev.* 703, 819 (1952); Levin, "Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes", 103 *U. of Penn. L. Rev.* 1 (1954); McBaine, "Burden of Proof-Presumptions", 2 *U. C. L. A. L. Rev.* 13 (1954).

## **Rule 15. Inconsistent Presumptions.**

If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.

### **Drafters' Comment**

The courts adopting the Thayer theory of presumptions insist that conflicting presumptions cancel each other. But in view of Rule 14, which does not follow the Thayer doctrine, a different solution for conflicting presumptions must be found. The best and simplest solution, and that most consistent with good sense is to leave it to the judge to determine, with what help he can get from case precedents, whether either presumption has the preponderance of public policy in its favor, and if so, to instruct the jury accordingly.

The principal class of cases where the question of preponderance of weightier policy arises is the situation where rights are asserted under a second marriage, but no direct evidence is available of a death or divorce terminating the first marriage before the second. Most courts say the presumption of innocence or of the validity of a marriage is "stronger" than the presumption of continuance of life or continuance of marriage. See the collection of cases 14 *A.L.R.* 2d 35-44. Morgan agrees, 44 *Harv. L. Rev.* 932. In most other situations both presumptions would be disregarded on the ground that neither was entitled to greater weight than the other. Of course, the judge would always be confronted with the problem, whenever the situation would arise, of determining whether to give greater consideration to a presumption having a rational connection with its basic facts, than he would give to a presumption of convenience or statutory policy based on facts having no probative value, if the two presumptions are inconsistent.

### **Recommendation**

Rule 15 should be adopted.

### **Committee Annotation**

This is the present New Jersey rule. *Sillart v. Standard Screen Co.*, 119 *N. J. L.* 143 (*Sup. Ct.* 1937). In this case a woman whose husband had been missing for less than seven years remarried; the presumption of validity of the second marriage was held to outweigh the presumption of the continued existence of the first husband. In effect the former presumption was "founded on weightier considerations of policy and logic."

See also Levin, "Pennsylvania and the Uniform Rules", 103 *U. of Penn. L. Rev.* 1, 21 (1954).

**Rule 16. Burden of Proof Not Relaxed as to Some Presumptions.**

A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by Rules 14 or 15 and the burden of proof to overcome it continues on the party against whom the presumption operates.

**Drafters' Comment**

This rule takes the place and serves the purpose of A.L.I. Model Code of Evidence Rule 703 relating to the presumption of legitimacy, but is stated in broader terms and made of general application to any other similar situations which may now or hereafter exist. It simply states as an exception that in such cases as presumption of legitimacy of a child born in wedlock the presumption does not fail when a mere preponderance of the evidence would indicate a contrary finding, but continues with its original force until overcome by the degree of proof required by the law of the particular state to overcome it. This rule would probably not be necessary in the case of presumption of innocence in criminal cases. The presumption of innocence is not based on "basic facts" but simply is a rule fixing the nature of the burden on the prosecution, not only of producing evidence but also of persuasion. But for those who may look upon it as a presumption within the meaning of these rules (a fallacy according to Wigmore, Third Ed., Sec. 2511), it may furnish assurance that the presumption of innocence is not intended to be disturbed.

**Recommendation**

Rule 16 should be adopted.

**Committee Annotation**

This rule saves certain established presumptions of the civil and criminal law based on long established public policy such as the presumption of innocence from the effects of the new rule 14 a or b. This of course would not change existing New Jersey law.

## IV. WITNESSES

### Rule 17. Disqualification of Witness. Interpreters.

A person is disqualified to be a witness if the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of these rules relating to witnesses.

#### Drafters' Comment

This rule states in a different form the broad disqualifying conditions for witnesses as does Model Code Rule 101. This seems a simple, logical approach to the problem without arbitrary use of a disqualifying age, or specific reference to sanity. The policy of the rule is that matters of the witness's opportunity for perception, knowledge, memory, experience and the like go to the weight to be given to his testimony rather than to his right to testify. Exclusion of testimony on the ground of privilege is covered by the article on Privileges. Clause (1) of Model Code Rule 102 defining "interpreter" is omitted as unnecessary. Clause (2) is added to this rule making interpreters subject to the rules the same as any other witness.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

1. This rule should be analyzed in connection with Rule 7 which, in general, abolishes the right to disqualify a witness except where the rules provide otherwise. Qualifying to be a witness is to be distinguished from possession of knowledge, and the rules respecting credibility and privilege are to be kept in mind. The cumulative effect of Rule 17, in the light of the broad and sweeping provisions of its aforesaid companion rule, is to reaffirm a most substantial part of our law, as developed over the years, but in some particulars it would abrogate several statutory provisions unless they are otherwise saved either by enlarging or supplementing Rule 17.

Rule 101 of the Model Code for all practical purposes would appear to be the same as the Uniform Rule 17. It should be noted, however, that in the Code every person is "qualified \* \* unless", while in the Uniform Rule a person is "disqualified \* \* if". The supporting trend in favor of disqualification is seemingly better fortified by the conference suggestion in Rule 17. It should be observed in passing that the last sentence of Rule 17 imposes the binding powers of the Rule upon interpreters, thus

making it unnecessary for a separate provision such as Rule 102 of the Model Code.

2. While certain phases of our present legislative policy would be nullified by the limitations of Rule 17, nevertheless the over-all fundamentals of our law would be augmented and strengthened. N. J. S. 2A:81-1, which has had a long and acceptable history in this State, is in derogation of the common law. It relates to civil and criminal proceedings, and removes the disqualification of witnesses for the following reasons:

- (a) Conviction of crime;
- (b) Interest in the result of the action or trial as a party or otherwise;
- (c) Incapacity or incompetency of any other party represented in the action; or
- (d) Marital relationship.

The Rules, under study, purport to go much further, recognizing, as did Vice Chancellor Bird in the case of *Rice v. Rice*, 18 A. 457 (*Ch.* 1889) (not officially reported), that:

"The tendency of modern judicial thought and of legislative action is undoubtedly in favor of admitting every person to be sworn and to testify as a witness in every cause, and respecting every question arising therein."

and they would override his conclusion:

"Nevertheless I am quite clear that neither judicial determination nor legislative authority in New Jersey support this generous view."

Moreover, Rules 7 and 17 purport to avoid any argument as to the application of the maxim *expressio unius est exclusio alterius* as they, in effect, abolish all disqualifications not specifically mentioned in Rule 17. This, therefore, emphasizes the importance of Rule 17 which is the "catch basin", so to speak, for any exceptions to such a broad policy and naturally focuses attention upon the advisability of incorporating therein all or any of our present statutory disqualifications, should it be determined that there be merit in so doing.

The conflicting legislation in question, not saved by Rule 17, is only mentioned here briefly. These statutes are:

(a) N. J. S. 2A:81-2 which is frequently referred to as the "dead man's" statute. The design of that rule of evidence is: ". . . . to produce equality between the parties, by silencing the one who may, by his own mouth, be able to testify to transactions and conversations with the decedent, possibly to the disadvantage of his estate unless the representative of that estate should, by his own conduct, remove the interdict." *Yuritch v. Yuritch*, 139 N. J. Eq. 439, (*Ch.* 1947).

Literally, the hundreds of reported decisions (see N. J. S. A. annotations) interpreting and applying this statute augers well for its abolishment. It is the source of much useless litigation, and as stated by Dean Mason Ladd:

"The dead man statute is webbed with means for its avoidance, such as in the situation in which a witness may be incompetent to testify to a communication made to him personally, but may testify to a communication of similar content if he overheard it when made to another." 27 *Iowa Law Review* 214 (1942); *Evidence*, A. L. I. 330.

And as pointed out by Professor Morgan in his Foreword to the Model Code: “. . . . by this ineffective statutory attempt to prevent dishonest claims, honest claims are nullified.” See also the Committee annotation to Rule 7.

(b) *N. J. S. 2A:81-3*, is limited to criminal actions and renders *incompetent* a husband or wife from giving evidence against the other except to prove the fact of marriage or unless testifying as a complainant at trial on indictment.

The harsh rule at common law which prohibits a husband or wife from being a witness to litigation in which either was a party or had an interest has been modified by *N. J. S. 2A:81-1* but, nevertheless, the party-spouse disqualifying rule in criminal cases, as a remnant of the common law, still prevails in this State.

While the Uniform Rules would negative this statute, the party-spouse privilege would be preserved if Rule 23(2) be adopted.

(c) *R. S. 19:3A-26*. The perjury and subornation sections of our election laws punishes the culprit by fine and imprisonment at hard labor or both and he is deemed “to be an *incompetent* witness thereafter for any purpose within this State until such time as he has been pardoned”. (emphasis supplied)

(d) *N. J. S. 3A:3-22*. This enactment disqualifies beneficiaries as *incompetent* to prove any signature to a will. Note, suggested Rule 71 regarding proof of attested writings. Note also, *N. J. S. 3A:3-6*, which acknowledges competency of beneficiary to testify concerning execution of will but invalidates any beneficiary devise, legacy or interest.

3. Considering the disqualifications recognized by the Rule 17, it should be observed *in limine*, that our case decisions have uniformly recognized that it is an individual privilege to be a witness, which is one of the distinguishing rights of a free citizen, and that such rights cannot be impugned, interrupted or taken away unless for lawful causes and by lawful means. *Den v. Vanclève*, 5 *N. J. L.* 589 (*Sup. Ct.* 1819). The personal causes relating to incapacity are principally three—“the want of discretion, as in the case of infants; the want of intellectual powers, as in the case of idiots, lunatics and madmen; and the want of religious principles and belief in the being, perfection and providence of God”. *Ibid.* 652. (emphasis supplied)

Two types of disqualifications are comprehended by Rule 17, and they embrace “without arbitrary use of a disqualifying age or specific reference to sanity”, infants, aged, insane and the illiterate; subdivision (b) of the Rule specifically incapacitates as a witness anyone incapable of understanding the duty of a witness to tell the truth. The common law element of religious principles is omitted as a disqualifying factor. The suggested Rule would, in qualifying a witness, remove the last vestige of the common law adherence to any scruples of religious faith or dogma.

At common law no person could be a witness to a judicial proceeding unless he believed there was a God who would punish him if he swore falsely. *Omichund v. Barker*, 1 *Atk.* 21; 11 *English Ruling Cases* 126 (1744), cited in *State v. Levine*, 109 *N. J. L.* 503, 506 (*Sup. Ct.* 1932). In fact, belief in a Divine Being was a prerequisite to the capacity to take

an oath. *Wigmore, Evidence, 3 ed. Secs. 518, 1816. Hartogensis, Denial of Rights to Religious Minorities and Non-Believers in the United States, 39 Yale L. J. 659.* An atheist or agnostic, for instance, could not meet this test and accordingly could not testify.

While this incapacity has been abandoned in most jurisdictions, (see *Wigmore, Evidence, Sec. 1828, note 1*, where a list of constitutional and statutory provisions has been compiled), nevertheless, New Jersey still requires the ordinary witness, not a party to the action, to maintain belief in the obligation of an oath and that God will punish for a falsehood. *State v. Levine, supra; Den v. Vancleve, supra; Donnelly v. State, 26 N. J. L. 463, aff'd. 26 N. J. L. 601 (E. & A. 1857)*; see *In re Breidt and Lubetkin, 84 N. J. Eq. 222, 225 (Ch. 1915)* for a discussion of the sanctity of an oath.

The witness's belief in God is to be presumed until the contrary is made to appear. It is to be presumed that all persons living in Christian countries believe in God and anyone objecting has the burden of proof. *Donnelly v. State, supra.* Defect in religious faith is never presumed, 1 *Greenleaf on Evidence, Sec. 370.*

Although such belief is essential one may now by statute affirm if he be conscientiously scrupulous of taking an oath. *R. S. 41:1-6.* Our courts have held that this means "scruples conscientiously founded upon religious belief," and infidelity from a religious point of view constitutes an absolute bar to the non-party right to testify. *State v. Levine, supra.* A witness however who has no objection to being sworn, may not be affirmed, to give evidence. *Williamson v. Carroll, 16 N. J. L. 217 (Sup. Ct. 1837).*

This rigid rule at Common Law has been modified in our State only insofar as a party to a suit is concerned, our decisions holding that the statutory right of a party to testify on his own behalf amounts to a civil right within the meaning of our State constitutional provision that no person shall be denied the enjoyment of any civil right because of his religious principles. 1844 Constitution, *Art. 1, Sec. 4.* (1947 Constitution counterpart, *Art. 1, Sec. 5*). See *Percy v. Powers, 51 N. J. L. 432, (Sup. Ct. 1889)*; *State v. Levine, supra.* Some states by constitution or statute *e. g.* California, New York, Texas and Pennsylvania, prohibit disqualification because of opinion in matters of religious belief. See *McCormick, Evidence 141 (1954 n. 4, also n. 5 re: comments on Gillars v. United States, 182 F. 2d 962, 969, 970 (C. A. D. C. 1950)* where the Federal Code and Practice Rules interpreted, "in the light of reason and experience" have been expanded to remove the Common Law religious disability.

4. Aside from the question of religious belief, our well settled adjudications, respecting personal incapacity, are reaffirmed by Rule 17 and from the abundant authorities the following are mentioned to illustrate basic decisional law not in conflict with the rule.

The capacity and responsibility of an infant under the age of 14 to testify is to be determined by the trial court. *State v. MacLean, 135 N. J. L. 491 (Sup. Ct. 1947), Carlutz v. Gavin, 132 N. J. L. 52 (Sup. Ct. 1944), affirmed 133 N. J. L. 61 (E. & A. 1945), LoBiondo v. Allan, 132 N. J. L. 437 (Sup. Ct. 1945).* But "the Court should be convinced that a child is sufficiently mature to intelligently relate what he witnessed". *Tracy, Handbook of the*

*Law of Evidence*, 126 (1952). There is no precise age within which children are excluded from testifying. The ultimate determination is within the discretion of the court. *State v. Tolla*, 72 N. J. L. 515 (E. & A. 1905). And when the court has ruled favorably, the testimony thereafter cannot be rejected on the ground that it is uncertain. *Eberte v. Stegman*, 98 N. J. L. 879 (E. & A. 1923). If there be evidence from which the trial judge may find capacity, the exercise of judicial discretion should not be disturbed. *State v. Cracker*, 65 N. J. L. 410 (Sup. Ct. 1900). When one is over the age of 14 years, he is presumed to be competent to be sworn and to testify. *State v. Labriola*, 75 N. J. L. 483 (E. & A. 1907). There is no presumption against the capacity of a witness on the ground that he is 65 years of age. *Smith v. Drake*, 23 N. J. Eq. 302 (Ch. 1873).

Proof that a witness was subject to convulsive fits was not evidence that his mind was not sufficiently clear to qualify as a witness. *James v. Stonebanks*, 1 N. J. L. 227 (Sup. Ct. 1794). Where a court interrogated a witness challenged as of unsound mind and found he was mentally incompetent, it was not error for the court to refuse to admit the witness to testify to the contrary. *State v. Mohr*, 99 N. J. L. 124 (E. & A. 1923), which case followed the doctrine of the Federal Courts expressed in *District of Columbia v. Charles H. Armes*, 107 U. S. 519 (1882). Another federal case of importance is that of *Wheeler v. United States*, 159 U. S. 523 (1895), and an interesting law review article for consideration is *The Competency of Children as Witnesses*, 39 Va. L. Rev. 358 (1953).

## **Rule 18. Oath.**

Every witness before testifying shall be required to express his purpose to testify by the oath or affirmation required by law.

### **Drafters' Comment**

To avoid the possibility that Rule 7 taken together with Rule 17 specifying disqualifying conditions, might be interpreted as eliminating the necessity of the oath or affirmation, this rule is included. It assumes that the witness has the necessary qualifications and is therefore capable of understanding his duty to tell the truth.

### **Recommendation**

It is recommended that this rule be adopted.

### **Committee Annotation**

1. It is to be observed that this Rule contemplates oaths or affirmations "required by law". This preserves our present statutes on the subject of oaths and eliminates any controversy in that respect. See Title 41 of the Revised Statutes, *Oaths and Affidavits* and, in particular, R. S. 41:1-6 appertaining to affirmations in lieu of oaths which is in keeping with the view of practically all jurisdictions (exceptions, Oklahoma and Virginia) *Wigmore, Evidence* (3d ed.), Sec. 1828. Note also that our Supreme Court Rules define "Oaths" as including "affirmations", R. R. 3:1-3.

The perjury statute is to be found in R. S. 41:3-1.

2. Arguments have been advanced supporting a proposal to totally extinguish the oath formality, but it is significant that in no jurisdiction has the use of the oath been so abolished. *Wigmore, Evidence* (3rd ed.), Secs. 1827, 1838. And in Sec. 1823 of the same work the distinction between the capacity to take an oath and the moral qualifications to testify is emphasized. An oath has been defined in substance as an affirmation of the truth rendering one wilfully asserting an untrue statement punishable for perjury. *U. S. v. Klink*, 3 *F. Supp.* 208, (*D. C. Wyo.*, 1933). Judicial determinations support the encyclopedic statement that an oath is: "an appeal by a person to God to witness the truth". 67 *C. J. S., Oaths and Affirmations*, Sec. 2, p. 4. Chancellor Walker has said that "the administration of an oath means something or nothing", and after referring to *Blackstone* (4 *Bl. Com.* 43), proceeded to quote the essence of a Common Law oath from 29 *CYC* 1298, which reflects belief in a God. See *In re: Breidt and Lubetkin*, 84 *N. J. Eq.* 222 (*Ch.* 1915). In the absence of constitutional or statutory provisions a witness should be sworn in a form and mode which he regards as binding upon his conscience. 67 *C. J. S.*, Sec. 6, p. 8. Justice Heher, in *Brown v. Board Fire and Police Commissioners*, 11 *N. J. Misc.* 943 (*Sup. Ct.* 1933), had before him on review, proceedings that were questioned because "a Bible or other religious script" was not "used at the hearing to make their (the witnesses') testimony binding". Speaking for the court, the Justice held this point was without substance. There is a presumption that oaths are correct and legal. *Coxe v. Field*, 13 *N. J. L.* 215 (*Sup. Ct.* 1832).

3. The object of the law in requiring an oath is to get to the truth by obtaining a hold on the conscience of the witness. *Wigmore, supra* (Sec. 1818). Minors should be sworn before testifying even though there is a doubt as to their theological understanding. *Meeks Motor Freight v. Ham's Adm'r.*, 302 *Ky.* 71; 193 *S. W. 2d* 745, 748, cited under Rule 103 *Model Code of Evidence*.

The outstanding case in New Jersey is that of *State v. Levine*, 109 *N. J. L.* 503 (*E. & A.* 1932) wherein Justice Case wrote the opinion sustaining the proposition that an oath must precede the giving of testimony, holding a "ceremonial induction" is necessary, citing *Anderson v. Barnes*, 1 *N. J. L.* 302 (*Sup. Ct.* 1793) where reversal was granted because evidence was allowed without the witness being sworn; also *Williamson v. Carroll*, 16 *N. J. L.* 217 (*Sup. Ct.* 1837), in which it was held that "prima facie every witness is to be sworn and all evidence is to be given under oath": and also, *Pullen v. Pullen*, 4 *A.* 82 (*Ch.* 1886) (not officially reported) where Vice Chancellor Bird, on a motion to expunge the testimony of a witness because she had not kissed the Bible, said: "the solemn invocation, affirmation or declaration is the substance". For a definition of "voir dire" which in short means "To speak the truth", see *Springdale Park v. Andriotis*, 30 *N. J. Super.* 257, 262 (*App. Div.* 1954).

Lord Chief Justice Willes is credited with developing the theory that "a belief, if genuine of a sure punishment, whether material or spiritual, in the present existence, would be no less efficacious a preventive of falsehood than a belief in a punishment after death". *Omichund v. Barker*, 1 *Atk.* 21; 11 *English Ruling Cases* 126 (1744). The English Courts have apparently now

declared the distinction immaterial, and the Courts in this country in recent years have reached a similar result. See *Wigmore, supra* (1817 b); and cases there collected. A significant case is that of *Gillars v. U. S.*, 182 *Fed. 2d* 962 (C. A. D. C. 1950).

Rule 18 assumes the witness has the necessary qualifications and merely requires an oath or affirmation as "required by law". Our Legislature has not prescribed a form of oath for witnesses so that this Rule would not be inconsistent with the proposed Common Law change suggested by Rule 17 (b).

## **Rule 19. Prerequisites of Knowledge and Experience.**

As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

### **Drafters' Comment**

Because of the broad character of Rule 7 it seems advisable to make it definitely clear that we do not intend to dispense with the necessity for laying the foundation, sometimes referred to as "qualifying" the witness. That is the purpose of this rule. Rule 19 also embodies the substance of Model Code Rule 104 giving the judge some discretion to reject testimony for completely unreliable foundation proof.

### **Recommendation**

It is recommended that this rule be adopted.

### **Committee Annotation**

1. The personal knowledge rule had its genesis in medieval days and has prevailed through the years in New Jersey without the necessity for declaratory statutes. Chief Justice Gummere in *State v. Claymonst*, 96 *N. J. L.* 1, 4 (*Sup. Ct.* 1921) declared that: "It is elementary law that a fact material to the issue is provable by any person who has knowledge thereof." See also *Scinner v. Public Service &c, Transport*, 107 *N. J. L.* 159 (*E. & A.* 1930). Our decisions have always been consistent on this point following the common law insistence upon the most reliable source of information, and where the witness admits not having personal knowledge, his testimony has been properly excluded. *Sothorn v. VanDyke*, 114 *N. J. L.* 1, 6 (*E. & A.* 1934); *State Highway Com. v. National Fireproofing Corp.*, 127 *N. J. L.* 346

(*E. & A.* 1941); *Guzzi v. Jersey Central Power & Light Co.*, 12 *N. J.* 251 (1953).

In other words, it cannot be assumed that the average witness has knowledge, therefore it "must be made to appear beforehand", *Wigmore on Evidence* (3d ed.), Sec. 654. Accordingly, the accepted rule that he who objects to competency has the burden of proof, is subject to knowledge qualification, *Wigmore, Evidence* (3d ed.), Secs. 654 and 364. But, admittedly, there are exceptions to the orthodox rule and common observers, although non-experts, may under given circumstances of special opportunity for observation, testify to their opinion as conclusions of fact. *Kocis v. State*, 56 *N. J. L.* 44 (*Sup. Ct.* 1893); *Clifford v. State*, 60 *N. J. L.* 287 (*Sup. Ct.* 1897); *Walsh v. Board of Education of Newark*, 73 *N. J. L.* 643 (*E. & A.* 1906); *Crosby v. Wells*, 73 *N. J. L.* 790 (*E. & A.* 1906); *Murphy v. North Jersey St. Ry. Co.*, 81 *N. J. L.* 706, (*E. & A.* 1911); *State v. Koettgen*, 89 *N. J. L.* 678, (*E. & A.* 1916); *State v. Morris*, 98 *N. J. L.* 621, (*Sup. Ct.* 1923) affirmed 99 *N. J. L.* 526, (*E. & A.* 1923); *State v. Laster*, 71 *N. J. L.* 586, (*E. & A.* 1904); *Roeltgen v. Public Service Railway Co.*, 2 *N. J. Misc.* 471, (*Sup. Ct.* 1924); *State v. Doro*, 103 *N. J. L.* 88, (*E. & A.* 1926); *State v. Holt*, 128 *N. J. L.* 599, (*Sup. Ct.* 1942). The admissibility of such testimony however "rests upon actual observations and its weight is dependent, *inter alia*, upon the available opportunities and attentiveness devoted to the observations". *Gretowski v. Hall Motor Express*, 25 *N. J. Super.* 192, (*App. Div.* 1953). In the *Gretowski* case, Judge Jayne enumerated some of the broad varieties of unscientific suggestions that would not otherwise be reproducible, citing 7 *Wigmore on Evidence*, Sec. 1977, et seq.; 20 *Am. Jur.*, Sec. 805 et seq.; *Senecal v. Drollette*, 304 *N. Y.* 446, 108 *N. E.* 2d 602, (*Ct. App.* 1952).

Opinions are not to be substituted for facts. *Helstowski v. Greenberg*, 2 *N. J. Misc.* 1094, (*Sup. Ct.* 1924); *Brundred v. The Patterson Machine Co.*, 4 *N. J. Eq.* 294, 305, (*Ch.* 1843).

While the law presumes competency of the witness, *Donnelly v. State*, 26 *N. J. L.* 463, at p. 506, (*Sup. Ct.* 1857), the foregoing cases make it clear that "knowledge" is not presumed. In other words, a party offering testimony has the burden of laying a foundation showing that the witness had an adequate opportunity to observe and in fact did observe. A well reasoned opinion in the Appellate Court of Maryland, *Lambert v. State*, 78 *A.* 2d 378 (1951) explains: "But the result of the observation of a witness need not be positive or absolute certainty. It is sufficient if the witness had an opportunity of personal observation and got some impressions from this observation". Cf. *Crosby v. Wells*, 73 *N. J. L.* 790, 798, (*E. & A.* 1906) as to experiential qualifications for opinion evidence and *Precipio v. Insurance Co. of Penna.*, 103 *N. J. L.* 589, (*E. & A.* 1927) for the indisputable foundation rule applicable to admissibility of expert testimony. E. g., Qualification of witness as real estate expert was not proper subject for judicial notice. *Grand View Garden v. Borough of Hasbrouck Heights*, 14 *N. J. Super.* 167, (*App. Div.* 1951).

The requirement of firsthand knowledge is succinctly stated by Professor McCormick in his recently published Hornbook which contains excellent footnote references. See *McCormick, Evidence*, Ch. 3, Sec. 10 (1954). A most enlightening article, *The Competency of a Witness* is to be found in 23

*Iowa L. Rev.* 482 (1938-9) in which the author, quoting from *Jones, Evidence*, Secs. 2085 and 2083, recognizes that generally the party objecting has the burden of proving that the witness is incompetent and that the objection must be made as soon as the fact of incompetency is known, otherwise it is waived but, however, in referring to fact narration, the author comments: "The witness must affirmatively establish himself as having the fact knowledge."

Prof. Wigmore discusses the inadvisability of using the term "knowledge" as a prerequisite of a witness being permitted to testify in any matter, noting, in particular, that the matter concerned is not strictly the witness' knowledge but his opportunity of observation and his actual observation; and in his characteristically analytical approach to the subject, he postulates that it is "impossible to speak with accuracy of a witness' 'knowledge' as that which the principles of testimony require", maintaining that the rules of evidence are primarily concerned with the witness' "opportunities of observing and his actual observation." *Wigmore, Evidence* (3d ed.), Sec. 650. He continues (Sec. 657):

"Upon this principle, the testimony of one claiming to have knowledge has constantly been rejected when it appeared that he lacked personal observation."

Even as to expert witness knowledge or observation is an essential element of testimonial qualification. *Guzzi v. Jersey Central Power & Light Co.*, 12 *N. J.* 251, (1953); *Rempfer v. Deerfield Packing Corp.*, 4 *N. J.* 135 (1950).

The Federal decisions, from an early date, are likewise in accord with the knowledge requirement qualification. *Luther v. Borden*, 48 *U. S.* 1, 7 *How.* 1, 12 *L. Ed.* 581 (*R. I.* 1849). For text on subject jurisdiction following this Rule, see 70 *C. J.*, Witnesses, Secs. 111 to 119; 58 *Am. Jur.* Witnesses, Secs. 113 to 117.

2. Fortunately, the competency of a witness is a question for the trial court. This precept has been uniformly followed in this state. As said by Chief Justice Brogan, in *Maisto v. Maisto*, 123 *N. J. L.* 401, at p. 402, (*Sup. Ct.* 1939): "Now whether a witness is qualified to testify is a question for the court to determine as a fact."

The Supreme Court of New Jersey in stating that the qualifications of expert witnesses are left to the discretion of the trial court and its decision is conclusive unless clearly shown to be erroneous as a matter of law, cited many earlier authorities. *Rempfer v. Deerfield Packing Corp.*, 4 *N. J.* 135 (1950). Since the *Rempfer* case, the Superior Court has cited the principle, as laid down therein, many times. See also *Electric Park Co. v. Psychos*, 83 *N. J. L.* 262 (*Sup. Ct.* 1912), where on appeal it was held that a judgment would not be reversed on assigned error of this character unless there be a clear abuse of discretion in rejecting or allowing such testimony. Similarly, *Lo Biondo v. Allan*, 132 *N. J. L.* 437 (*Sup. Ct.* 1945); 58 *Am. Jur.* 145, Witnesses, Secs. 212 and 213.

Corollary to the court passing on the credibility of witnesses, the court should also be satisfied that the evidence itself is credible. *Daggers v. Van Dyck*, 37 *N. J. Eq.* 130 (*Ch.* 1883); *Second National Bank v. O'Rourke*, 40

*N. J. Eq.* 92 (Ch. 1885); *Harris v. Barrett*, 75 *N. J. Eq.* 386 (Ch. 1909); *Di Brigida v. Di Brigida*, 116 *N. J. Eq.* 208, (E. & A. 1934); *Gilson v. Gilson*, 116 *N. J. Eq.* 556, (E. & A. 1934); *McKeon v. Delaware &c. R. R. Co.*, 100 *N. J. L.* 258, (Sup. Ct. 1924). It should be borne in mind however that the court should not reject testimony on the sole ground of its improbability. It is the impossibility of the testimony that should be discredited. *Berckmans v. Berckmans*, 16 *N. J. Eq.* 122, (Ch. 1863), affirmed 17 *N. J. Eq.* 453, (E. & A. 1864); *Boylan ads Mecker*, 28 *N. J. L.* 274, (Sup. Ct. 1860); *Day v. Hopping*, 95 *N. J. Eq.* 680, (E. & A. 1923); *Rains v. Rains*, 127 *N. J. Eq.* 328, (E. & A. 1940).

3. Conditional admission of evidence as provided by this Rule provokes attention. In a Connecticut gambling case, *Sofas v. McKee et al.*, 100 *Conn.* 541, 124 *A.* 380 (S. C. E. 1924), testimony was allowed conditionally. Said the court: "It is obviously not practical to require a witness to detail the sources of his information as to every fact to which he testifies before he is permitted to directly state the fact as something known to him," pointing out the court's protective controls through the media of a motion to strike and the court's charge to the jury. Cf. *Cleveland T. V. Co. v. Marsh*, 63 *Oh. St.* 236, 58 *N. E.* 821, (Sup. Ct. 1900), which held it was error to allow a witness to testify over the objection of the other side without first showing knowledge on the subject; and *State v. Prescott*, 70 *R. I.* 403, 404; 40 *A.* 2d 721 (Sup. Ct. 1944) where testimony was excluded for want of necessary foundation.

There is obviously some danger in a jury case in permitting a witness to testify and then at a later stage in the proceedings to learn that the witness was not qualified. Although this danger can greatly be mitigated through cross examination, striking from the record and the charge to the jury, nevertheless the practical result is that an impression may have been firmly established and, human nature being what it is, consciously or sub-consciously, may not be eradicated.

The principle here involved is not unlike accepting conditionally during the trial, evidence objected to as privileged and, on this point, see *Maguire, Evidence Common Law and Common Sense*, 215, 216 (1947) and note the conclusion that ". . . tentative acceptance is likely to spell complete ruination to the purposes for which the privilege was created. . . . In short, there cannot normally be any effectively revocable exposure of many privileged matters, and the words 'tentative' or 'conditional' have no true application."

The quotation, "The human mind is not a blackboard to be erased when the information is to be no longer utilized", is taken from *Admissibility as Evidence in Chicf*, 30 *Cornell L. Q.* 511, at p. 514, wherein reference is made to 133 *A. L. R.* 1454, 1466, for discussion of the difficulties in controlling psychological reactions without conclusions, and the statement: "We cannot take a drug for its salutary purposes without receiving at least a part of the poison." For this reason the discretion given to the trial judge under this rule should be exercised with caution.

## Rule 20. Evidence Generally Affecting Credibility.

Subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility.

### Drafters' Comment

Rules 20 to 22 state in separate rules the subject matter of the somewhat complicated Model Code Rule 106. Rule 20 is the same as the Model Code in permitting a party to impeach his own witness. This appears to be a universally acceptable and desirable concept, to avoid resort to fictions to escape the anachronism that a party is bound by the testimony of a witness which he produces. It makes the witness the witness of the court as a channel through which to get at the truth.

### Recommendation

It is recommended that this rule be adopted.

### Committee Annotation

1. The prohibitions against one impeaching his own witness, followed in New Jersey, are eliminated by this rule. Our statutes are not sufficiently comprehensive on this phase of impeachment. *Wigmore, Evidence* (3d ed.), Sec. 896, indicates that the history of the rule against impeaching one's own witness is "singularly obscure, considering its practical frequency and importance."

At early common law "it was inconceivable that a party should gainsay his own witness" who was, in those days, an "oath helper". The history of this prohibitory rule is elaborately stated in *Wigmore, supra*. It is now axiomatic in this State that a party offering a witness will not be permitted afterwards to impeach his character for truth and veracity. See the early case of *Beake's Executors v. Birdsall*, 1 N. J. L. 12 (*Sup. Ct.* 1790) where it was held that a party could not discredit his witness; also the leading case of *Ingersoll v. English*, 66 N. J. L. 463 (*Sup. Ct.* 1901). Compare *Brown v. Bulkley*, 14 N. J. Eq. 294 (*Ch.* 1862) where conflict was recognized concerning "subscribing witnesses".

Impeachment is an attack upon a witness' general reputation for truth and veracity. *Lenz v. Public Service Railway Co.*, 98 N. J. L. 849, 851, (*E. & A.* 1923). The court's opinion in this case is noteworthy for distinguishing between impeaching and attacking the credibility of a witness. The foundation and object of the Rule has been said by V. C. Pitney in *Thorp v. Liebrecht*, 56 N. J. Eq. 499 (*Ch.* 1898) to be for the protection of the witness against the unfair use of the subpoena process. While one may not impeach his own witness, he may, however, show that such witness has made other and different statements from those to which he has testified, for this is contradicting, not impeaching. *Fox v. Forty-four Cigar Co.*, 90 N. J. L. 483 (*E. & A.* 1917). The allowable purpose for developing such contradictions is to neutralize the testimony. This doctrine of neutraliza-

tion has recently been considered and discussed at length by our new Supreme Court in the case of *State v. Cooper*, 10 N. J. 532, 560 (1952), citing with approval *Ingersoll v. English*, *supra*.

2. Contradicting for the purpose of neutralizing testimony is not impeaching and is permissible. Where a party is surprised by adverse testimony of his witness, the trial court may, in its sound discretion, permit him to offer proof of his contrary statement previously made, not for the purpose of impeachment or proving the truth of such statements but rather to "discredit" or neutralize the effect of such adverse testimony. *State v. D'Adame*, 84 N. J. L. 386 (E. & A. 1912). Note, in this case, the court did not accept the former statement as a replacing one but merely to neutralize the other. Said the court, at p. 396, "the prior statement is not hearsay because it is not used assertively, i. e. testimonially." Self-contradicting statements should be allowed to offset harmful, adverse testimony. *State v. Bassone*, 109 N. J. L. 176 (E. & A. 1932). In fact, the trial court upon request, and should without request, so limit the effect of such proof. See *Moon v. Lewis*, 116 N. J. L. 521 (E. & A. 1936). The admission and extent of neutralization testimony is discretionary with the court, and is not reviewable unless an abuse is shown. *Munson v. Johnson*, 110 N. J. L. 564 (E. & A. 1933). Of particular interest is *State v. Hogan*, 1 N. J. 375 (1949) wherein the court, by a per curiam opinion, refers to Lord Mansfield's statement that legal discretion means "sound discretion guided by law", and not by whim or humor; the opinion in the lower court, 137 N. J. L. 497 (*Sup. Ct.* 1948), concluded that a party may cross-examine his own witness who testifies in a different manner than expected, for the sole purpose of "neutralizing or wiping the slate clean" of the unexpected adverse testimony which is clearly to be distinguished from impeachment. In *State v. Bien*, 95 N. J. L. 474 (E. & A. 1920) it was said that the effect of such cross-examination is to make a hostile witness, but our former highest appellate court has not limited neutralization of testimony to witnesses showing hostility, animosity or partiality, and so stated in *Stappenbeck v. Jagels Fuel Corp.*, 131 N. J. L. 215 (E. & A. 1943).

The right to neutralize testimony is only allowed upon a showing of surprise, which is an elementary requisite. *State v. MacRorie*, 86 N. J. L. 401 (*Sup. Ct.* 1914), and the evidence must be directed to that limited portion of the testimony, *State v. D'Adame*, *supra*. Both of these cases were cited with approval by our Supreme Court in *State v. Cooper*, *supra*. Note also cases collected by the Appellate Division of the Superior Court in *Ciardella v. Parker*, 10 N. J. Super. 537 (*App. Div.* 1950). Cf. however *State v. Perillo*, 18 N. J. Super. 549 (*App. Div.* 1952) where it was held reversible error to admit certain evidence under the guise of neutralizing testimony. and the case of *State v. Kwiatowski*, 83 N. J. L. 650 (E. & A. 1912), which admitted prior testimony for the purpose of refreshing memory which was distinguished from an attempt to impeach character for truth and veracity.

3. The dangers incident to impeachment or neutralizing testimony with respect to prior unsworn statements have been recognized and have been generally avoided by our courts. If the surprise is "fanciful" or the real purpose is an obvious circumventing of the hearsay rule, the courts have refused to admit the evidence. See *State v. Kysilka*, 85 N. J. L. 712 (E. & A.

1913). Also apropos is the decision in *State v. Rappise*, 3 N. J. Super. 30, 33 (App. Div. 1949), in which controversy the prior statement was not made in the presence of defendant and was not subject to cross-examination. The court quoted from *Wigmore, Evidence* (3d ed.), Sec. 1018, to the effect that:

“prior self-contradictions, when admitted, are not to be treated as assertions having any substantive or independent testimonial value”.

It also quoted from the concurring opinion of Justice Van Syckel in *Kohl v. State*, 59 N. J. L. 445 (E. & A. 1896) that such evidence has “no probative force whatsoever” and the court should have so instructed the jury. Furthermore, a foundation is necessary, *Crothers v. Caroselli*, 125 N. J. L. 403, 408 (E. & A. 1940).

The rule as to non-party witness is defined in *State v. D'Adame*, *supra*; *Goglia v. Janssen Dairy Co.*, 116 N. J. L. 396, (E. & A. 1936); *State v. Guida*, 118 N. J. L. 289 (Sup. Ct. 1937); all referred to in *Link v. Eastern Aircraft etc., General Motors Corp.*, 136 N. J. L. 540, 542 (E. & A. 1947). A different rule prevails as to a party witness for in such cases if contradicting declarations are admitted into evidence they may be used as affirmative proof. *Link v. Eastern Aircraft etc., General Motors Corp.*, *supra*, citing *Newhouse v. Phillips*, 110 N. J. L. 421 (E. & A. 1933); *Ambrose v. Indemnity Insurance Co. of North America*, 124 N. J. L. 438 (E. & A. 1940); *Schloss v. Trounstone*, 135 N. J. L. 11 (Sup. Ct. 1946); *Dobrowolski v. Glowacki*, 136 N. J. L. 167 (E. & A. 1947). Cf. *Buchanan v. Buchanan*, 73 N. J. Eq. 544 (Ch. 1907) where complainants made defendant their witness and were precluded from impeaching her credibility.

4. The lack of uniformity among the decisions throughout our foreign states can best be illustrated by reference to 1 *Morgan, Basic Problems of Evidence*, 64 (1954) wherein it was questioned whether or not statements contradictory to testimony would fall within the prohibition of the rule. The Professor borrowed a phrase from *Wigmore*, saying that the decisions “are in a state of variegated inconsistency”, and proceeded to list a choice of classifications, six in number:

- (1) In some states the evidence is strictly excluded.
- (2) In a goodly number of others it is admitted where the proponent satisfies the trial judge that the testimony has taken him by surprise. The self-contradiction of the witness may be shown either on cross-examination or by other evidence.
- (3) Some courts hold that the proponent may ask the witness questions which reveal the content of the self-contradiction but only for the ostensible purpose of refreshing his recollection and inducing him to correct his testimony.
- (4) Others say that there is no objection to any incidental impeachment involved in the process of attempting to refresh memory.
- (5) A few permit such questions only when the witness is shown to be hostile, and
- (6) In some twelve to fifteen jurisdictions the matter is regulated by statute.

5. A classic discussion on the question of impeachment of one's witness is to be found in 3 *Wigmore, Evidence* (3d ed.), Secs. 896-918. *Wigmore* favors complete abolition of this common law rule, maintaining that there

is no substantial reason for preserving it: "the remnant of a primitive notion". Dean Ladd, while admitting that the American courts vacillate upon the rule, suggests that the problem be solved by a law providing in effect:

"No party shall be precluded from impeaching a witness because the witness is his own."

See *Ladd, Impeachment of One's Own Witness—New Developments*, 4 *U. of Chicago L. R.*, 69 (1936). In that article, the Dean refers to the rule as having its "roots in trial by compurgation", notes the false premises of the rule, points out the legislative trend toward its liberalization and then mentions the *Commonwealth Fund Committee* (1927) comment:

"The rule prohibiting impeaching of one's own witness . . . has no shadow of good sense in any of its parts."

The authoritative reasons assigned for this prohibitory rule of common law heritage can be briefly crystalized as three in number, viz:

- (1) A party should be bound by his witness and vouchsafe for his credibility;
- (2) A party ought not to have the means to coerce his witness; and
- (3) The apprehension that contradictory statements, not admissible as hearsay, may be accepted as substantive testimony.

The first of these reasons seems to be very weak especially today when, more frequently than not, a party has very little to say concerning who his witnesses may be, and for the most part, they may be total strangers, except of course, expert and character witnesses; the second assigned reason is even weaker, for a wavering, vacillating, uncertain and coercible witness should certainly be subject to attack; and the third argument can well be overcome through proper exercise of discretion on the part of the court.

Any design or device that deprives a party of the opportunity of exhibiting the truth through all available sources is, to any such restrictive extent, amenable to constructive criticism. A witness should not be partisan, but should be an aid to the court "as a channel through which to get to the truth". *National Conference Committee Comment on Rule 20*.

## **Rule 21. Limitations on Evidence of Conviction of Crime as Affecting Credibility.**

Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

### **Drafters' Comment**

This rule is the same as the Model Code. It logically limits evidence of conviction for impeachment purposes to crimes involving dishonesty or false

statement. To impeach an accused who takes the stand evidence of his prior conviction of such a crime cannot be used against him unless and until he has offered evidence to support his credibility. The policy of this rule is to encourage defendants in criminal actions to take the stand. Rule 23(4) in the part on privileges permits counsel to comment on a defendant's failure to testify. The two go hand in hand.

This rule would correct the abuse of smearing rather than discrediting a defendant who takes the stand.

#### Recommendation

It is recommended that this rule be adopted, with possible modification as suggested in the annotation (3).

#### Committee Annotation

1. Rule 21 limits the admissibility of evidence of a witness' conviction of a crime for the purposes of impairing credibility to those situations in which the prior crime involved dishonesty or a false statement. It further prohibits the introduction of such evidence to impeach an accused in a criminal proceeding until he has offered evidence admissible solely to support his credibility.

2. New Jersey law contains no such limitations. By statute conviction of "any crime" is admissible. N. J. S. 2A:81-12. See *State v. Cioffe*, 128 N. J. L. 342 (Sup. Ct. 1942); Tyree, "Evidence", 7 *Rutgers L. Rev.* 257, 267 (1952). Cf. *State v. Block*, 119 N. J. L. 277 (Sup. Ct. 1938); *Thomas v. Devine*, 104 N. J. L. 361 (E. & A. 1928). And the New Jersey rule has received a liberal construction to include anything part of the record of conviction, a plea of *non vult*, a conviction for which there has been a pardon, as well as to allow impeachment of the state's own witnesses at the beginning of the examination. *State v. Rodia*, 132 N. J. L. 199 (E. & A. 1944); *State v. Henson*, 66 N. J. L. 601 (E. & A. 1901); *State v. Fox*, 12 N. J. Super. 132 (App. Div. 1951); *State v. Tansimore*, 3 N. J. 516 (1949). The resulting opportunities open to prosecutors have led to abuses which in some cases have resulted in reversal. In *State v. Tansimore, supra*, at 535, a first degree murder case, the prosecutor in his summation exhorted the jury not to "let this man, twice bloody, go twice unbowed". Although this clearly seems an attempt to escape the confines of the rule restricting the use of the testimony to impairment of credibility, it did not constitute reversible error. But in *State v. Costa*, 11 N. J. 239 (1953), the prosecutor clearly overstepped permissible bounds. Five other defendants were indicted for the same crime, but they had entered pleas of *non vult*. Each of these was called as a witness early in the trial and questioned as to these pleas. They were then dismissed and not recalled to testify as to the facts of the case until much later in the trial. And although the salient facts had been admitted by these witnesses the indictments themselves were later received in evidence over defendant's objections. This was held to be error, as the record can only be produced if the witness denies the conviction. And under the circumstances where the possibility of prejudice was great it was incumbent on the trial judge to instruct the jury as to the limited significance of the evidence in his charge and perhaps also when the proofs were admitted.

*Supra*, at 249. See Tyree, "Evidence", 8 *Rutgers L. Rev.* 222, 235 (1953). In another case decided in 1953, the Court recognized impropriety in searching questions by a prosecutor who has knowledge that there are no such convictions. *State v. Greely*, 11 *N. J.* 485, 493 (1953). Cf. *State v. Cooper*, 10 *N. J.* 532 (1952). And in another the Court rejected the testimony of other witnesses as a proper method of proof. *State v. Orecchio*, 16 *N. J.* 125, 136 (1954). Cf. *State v. Nagy*, 27 *N. J. Super.* 1 (*App. Div.* 1953); Tyree, "Evidence", 9 *Rutgers L. Rev.* 287, 300 (1954).

The law of other jurisdictions is varied as to what crimes may be used to impeach. See 3 *Wigmore, Evidence* (3d ed. 1940), Secs. 980 and 987; *McCormick, Cases on Evidence*, 155 (1948); *Morgan, Basic Problems of Evidence*, 68 (1954). The majority of jurisdictions have more stringent requirements for admissibility than New Jersey, some restricting it to "infamous" crimes, others to "felonious" ones. Closest to the suggested rule are those statutes and cases which confine the types of crime to those that are "infamous" or involve "moral turpitude". Most of these are offshoots of the old common law complete disqualification as a witness as a result of conviction of felonious and "dishonest" crimes.

It must be considered whether the possible abuses and prejudice to the jury from the liberal admission resulting from the present New Jersey law outweigh any greater insight into credibility which the jury may derive from evidence of crimes not involving dishonesty or false statement. Does evidence of conviction of other crimes have a substantial bearing on credibility? To what extent does its admission improperly influence the jury on the other issues of the case? The answers to these questions will of course vary from case to case. But if a fixed rule is to be laid down, the experience of recent New Jersey cases indicates that the suggested rule might well have a desirable inhibiting effect on prosecutors. Although one may not agree with Wigmore that the prior conviction of crimes not involving dishonesty has no logical relevance to credibility, any possible correlation does not seem sufficiently great to outweigh possible abuses. See 3 *Wigmore, supra*, at 550.

3. It is noted that the Uniform Rule would admit testimony of a crime involving "*dishonesty or false statement*". The term "dishonesty" is a term which has many connotations. In a sense it is difficult to conceive of an "honest" crime, but apart from that questionable aspect of the interpretation of the term, it is anticipated that much litigation would result before specific interpretations by the Courts would put at rest the possible misconstructions which the use of such expressions might invite.

Encyclopedically stated the word "dishonesty" is ". . . not a term of art, but one to be measured by the common speech of men; its meaning extends beyond acts which would be criminal, and is not restricted to such conduct as imports a criminal offense; and has been specifically defined as an absence of integrity, a disposition to betray, cheat, deceive, or defraud; bad faith, course of conduct generally characterized as lacking in principle, a disposition to defraud, deceive or betray, a faithlessness, want of integrity in principle or in fairness or straightforwardness; fraud". See 27 *C. J. S. Dishonesty*, p. 147; also 41 *C. J. S. Honesty*, p. 324.

Our State Supreme Court, in *State v. Snover*, 63 N. J. L. 382, (*Sup. Ct.* 1899) had the occasion to consider somewhat in detail the meaning of the word "honesty", a term converse to the term "dishonest" used throughout the proposed Rule. A quotation from which case will serve to broadly indicate the various meanings, inferences and innuendoes that may well be provoked:

"The word 'Honesty', from the Latin '*honestus*', is essentially a word that takes its meaning from its context. Primarily, it means 'suitable', 'becoming' or 'decent'—meanings that obviously lend themselves to diverse contexts. In monied transactions it means financial integrity; in affairs of state it means loyalty; in matters of friendship it means steadfastness; and so on. In sexual relations it imports chastity. This is an accepted signification.

In Webster's International Dictionary it is said to mean 'chastity, modesty'.

As early as 1385 Chaucer so used it, saying,

'Why lyked me they yelow heer to see  
more than the boundes of myn honestie.'

In 1621, Burton, in the '*Anatomy of Melancholy*', wrote 'It was commonly practiced in Diana's Temple for women to go barefoot over hot coals to try their honesties.'

Shakespeare constantly so used it, notably in the phrase, 'Wives may be merry and yet honest too.' *Merry Wives*, IV., 2.

In 1661, Pepys, in the Diary of August 11th, gives it this sense.

In 1711, Steele, in the '*Spectator*', No. 118, paragraph 2, says, 'The maid is *honest*, and the man dares not be otherwise.'

In Fletcher and Rowly's '*Maid of the Mill*' it is said, 'Her honesty was all her dower.'

In 1749, Fielding in '*Tom Jones*', XV, VIII., writes, 'Miss Nancy was, in vulgar language, soon made an honest woman.'

And Scott, in '*St. Ronan's Well*', chapter 25, gives it a like meaning.

The only conclusion from these citations is that common usage has given to the word 'honesty', the meaning of sexual propriety when the context so requires."

It is therefore suggested that the first sentence of this proposed rule might be altered by substituting the words "fraud, veracity" in the place of the word "dishonesty", so that this sentence would read:

"Evidence of the conviction of a witness for a crime not involving (dishonesty) *fraud, veracity* or false statement shall be inadmissible for the purpose of impairing his credibility."

Such a change would encompass such crimes as Forgery and Counterfeiting (N. J. S. 2A:109-1 to 11), Frauds and Cheats (N. J. S. 2A:111-1 to 27), and Perjury and False Swearing (N. J. S. 2A:131-1 to 7). "Dishonesty" might presumably encompass such crimes as Bribery and Corruption, Compounding and Concealing Crimes, and Embezzlement, Conversion and Misappropriation. If it is considered desirable that these crimes be included, consideration should be given to enumerating them so that litigation may be avoided.

4. The suggested rule protecting the accused from such testimony until he raises the issue of credibility has little direct basis in precedent. An

accused person, once he takes the stand, may almost invariably be impeached in the same fashion as any other witness. See *U. S. v. Gross*, 103 *F. 2d* 11, 13 (7th Cir. 1939); 3 *Wigmore, supra*, Secs. 890, 891. On the other hand there is a well recognized rule, where "character" is concerned, that only where defendant offers his good character for a trait can the state counter with evidence of his bad character. 1 *Wigmore, supra*, Sec. 57; *Morgan, supra*, at 176. Cf. *State v. Christy*, 26 *N. J. Super.* 459, 465 (*App. Div.* 1953); *People v. Zackowitz*, 254 *N. Y.* 192 (1930); Tyree, "Evidence", 8 *Rutgers L. Rev.* 231 (1953). But in New Jersey as elsewhere this rule has not been followed in the case of *impeachment* by evidence of prior convictions. See *State v. Cooper, supra*, at 555; *State v. Rodia, supra*, at 200.

The purpose of the proposed change is to encourage defendants in criminal actions to take the stand. As a judicial proceeding is a search for truth such a policy is valid. And the same policies which frown upon evidence of character traits or similar occurrences to prove the crime at hand militate against allowing similar evidence to be introduced in the guise of impeachment. Cf. Stone, "The Rule of Exclusion of Similar Fact Evidence", 51 *Harv. L. Rev.* 988 (1938); *Wigmore, supra*, Secs. 192 to 196. If those special rules protecting defendants who testify in criminal cases are to have value, it seems unreasonable to allow this. And the possibility of prejudice to a jury on the merits is again a factor to be considered. On the balance, in spite of the lack of precedent, the proposed rule seems sound. At least the trial judge should have the discretion to exclude where he fears prejudice.

5. This rule should be considered in connection with Rule 39 wherein this committee recommends that full comment on the failure of the accused to take the stand be allowed. The adoption of Rule 21 would help to resolve the dilemma facing criminal defendants in the direction of encouraging them to take the stand. Thus the search for truth would be aided while the possibility of prejudice would be minimized.

## **Rule 22. Further Limitations on Admissibility of Evidence Affecting Credibility.**

As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be

inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

#### Drafters' Comment

Clause (a) is a rejection of the rule originating in *Queens Case*, 2 B & B 286 (1820) which has been abandoned in England but still represents the law of many American decisions. The rule of *Queens Case* has been severely criticized by writers (see *Wigmore on Evidence*, Third Edition, Sections 1259 to 1263). The middle ground solution provided by this rule is suggested by Judge Learned Hand's opinion in *U. S. v. Dilliard*, 101 F. 2d 829.

Clause (b) is contrary to court decisions which exclude evidence of prior contradictory statements which were not brought to the attention of the witness while testifying. This rule gives the witness all protection necessary by leaving it to the discretion of the judge. Any other approach is too technical and unrealistic.

Clause (c) places the same limitation on character testimony for impeachment purposes as is provided by Rule 21 for evidence of conviction of crime, in that it must relate to honesty or veracity.

Clause (d), as contrasted to Rule 46, prohibits proof of specific instances of conduct to prove a character trait where the purpose is impeachment.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

1. *Rule 22(a)*. The question as to whether or not it should be necessary to show to a witness a writing which contains any portion thereof inconsistent with any part of his present testimony appears to have been first dealt with in *Queen Caroline's Case*, 2 B. & B. 284, 286-90, 129 *Eng. Rep.* 976, 11 *Eng. Rul. C.* 183 (1820). In that case, the court determined that before a cross-examiner would be permitted to question a witness concerning any statements made by the witness in writing, or to inquire of the witness whether or not the said witness had ever written a particular letter, it was first necessary to show to the witness the writing and to afford him an opportunity to read it. The rule of the *Queen's Case*, *supra*, requiring that the writing be shown to the witness has been followed in the majority of our courts in this country. See cases collected, *Wigmore, Evidence*, (3d ed.), Sec. 1263, p. 518. So obstructive did the powerful Victorian cross-examining barristers find the rule in the *Queen's case* that they secured its abrogation by Parliament in 1854. *McCormick, Evidence*, Ch. 4, Sec. 28, p. 53.

*Wigmore* indicates that the rule did not seem to exist before 1820 and wherever it was approved it seemed to be advanced directly by adopting the ruling in the *Queen's Case*. It is his theory that many of the courts in our country adopted the rule without knowledge of its statutory abolition in England. The reason subscribed for this belief is that the learned author of *Greenleaf on Evidence*, died in 1853, the year before the abrogation

statute, leaving the Queen's case elaborately treated as law in his text, while the statute was only noted in an obscure corner of the later editorial notes. It would seem that many courts in this country adopted a supposed rule which had been repudiated in its jurisdiction of origin a generation before.

The law is entirely well settled in our own jurisdiction that where an attack is made upon the credibility of a witness and the witness is being examined in reference to a statement made by him in writing inconsistent with any part of his testimony, the proper procedure is to lay a foundation by calling the attention of the witness to the contents of the paper, and then asking him whether he had not made the statements contained therein. *Maulsbury v. Shure*, 12 *N. J. Misc.* 137, 141 (*Sup. Ct.* 1934); *State v. Cappiello*, 107 *N. J. L.* 249, 252 (*E. & A.* 1930) citing *State v. Pitman*, 98 *Id.* 626 (*Sup. Ct.* 1923) and *State v. Lodico*, 88 *Id.* 394 (*E. & A.* 1915). In an earlier case, *Daum v. North Jersey Street Railway Co.*, 69 *N. J. L.* 1 (*Sup. Ct.* 1903), *aff'd. per curiam* 70 *N. J. L.* 338 (*E. & A.* 1904), a statement was offered for the purpose of impeaching the witness, the facts set forth therein being said to be contradictory of evidence given by him on the witness stand, and the court held: ". . . it was necessary for the plaintiff in error to have first inquired of the witness whether he had not made a statement setting for the facts which were contained in it; and this was not done." This *Daum* case was cited with approval by our former Court of Errors and Appeals in *Wassmer v. Public Service Electric and Gas Co.*, 122 *N. J. L.* 367, 372-3 (1939) wherein Justice Donges, in writing the opinion, declared: "It is improper to read a question without first exhibiting the paper and seeing if he signed it." See also McGrath, *New Jersey Trial Evidence*, Sec. 401, p. 420, quoting the rule as stated by Greenleaf.

The federal view is not as demanding on the cross examiner as the rule in the *Queen's Case*, *supra*, which requires that the writing be shown to the witness, and under the federal rule the requirements are met if the memory of the witness is sufficiently refreshed by necessary inquiries so as to give the witness an opportunity to explain, if he can and desires to do so. In *United States v. Dilliard*, 101 *F. (2d)* 829, 837 (*C. C. A. 2d* 1938), Learned Hand, J. stated:

"Fairness usually does require that the witness shall be told when and where he made the putatively contradictory statement; but that is really all that the Supreme Court has ever exacted, and we think more is not necessary."

McCormick in his work on Evidence notes the advantage of such a rule as set forth in the *Queen's Case*, *supra*, requiring that the writing be shown to the witness, and then in contrast brings to light its objectionable features. In support of the rule is the following:

"Innocent and well-meaning witnesses write letters and forget their contents and later testify mistakenly to facts inconsistent with the assertions in the letters. Their forgetfulness may need to be revealed, and their present testimony thus discredited to that extent. They should not, however, be invited by subtle questioning to widen the gap between their present statements and their past writings, and then be devastated by a dramatic exposure."

On the other hand, the objection to the requirement that the writing must be first shown to the witness is that:

"While reading the letter the shifty witness will be warned by what he sees not to deny it and will be swiftly weaving a new web of explanation." *McCormick, Evidence*, Sec. 28, p. 53.

The difficulty lies in any attempt to determine into which of the two categories a particular witness should be placed. The trial judge would seem to be the most appropriate person to determine this question since his position is one of impartiality and he has the opportunity to observe the demeanor of the witness. Rule 22(a) affords protection to the honest witness who may not be able to remember the circumstances of his prior written statements and overcomes the practical objections which have been accentuated by the decisions following the disputed pronouncement in the *Queen Caroline Case*.

It should be remembered, however, that while in New Jersey as noted in *State v. Salimone, infra*, contradictory statements by a witness may always be shown if there be a suitable foundation and the matter stated is material and relevant, nevertheless, the contents of the written prior statements used to contradict the witness are admissible solely to discredit the witness and for no other purpose. They are ineffective as direct and affirmative proof of the facts to which they relate. *Goglia v. Janssen Dairy Company*, 116 N. J. L. 396 (E. & A. 1936). Commenting on the admissibility of contradictory statements of a witness, our Appellate Division recently made reference to Professor *Wigmore's* quotation from the words of Chief Baron Gilbert: ". . . it is 'the repugnancy of his evidence' that discredits him, obviously the Prior Self-Contradiction is not used assertively; i. e. we are not asked to believe his prior statement as testimony, and we do not have to choose between the two. . . ". See *State v. Salimone*, 19 N. J. Super. 600, 608 (App. Div. 1952); and *Kulinka v. Flockhart Foundry Co.*, 9 N. J. Super. 495, 501 (App. Div. 1950) quoting 28 R. C. L., Sec. 219, p. 633. Cf. *Link v. Eastern Aircraft and General Motors Corp.*, 136 N. J. L. 540 (E. & A. 1947) holding that prior contradictory declarations of a party to the litigation who becomes a witness are admissible by the opposing party to neutralize the testimony of the declarant and that such evidence once admitted is affirmative proof. Authorities were there collected in support of the Rule as to non-party witnesses and also the party witness Rule. Also worthy of note is *Wasil v. Gula*, 12 N. J. Misc. 53 (Sup. Ct. 1933) and cases therein mentioned.

A statement containing matter contradictory of testimony given by a witness is not admissible in evidence even though signed by the witness, where the statement was not written by him and he denies having stated the contradictory matter, *Altieri v. Public Service Railway Co.*, 103 N. J. L. 351 (E. & A. 1926) but in *Alm v. Reinhardt*, 129 N. J. L. 564 (E. & A. 1942), a statement signed by a witness containing matter contradictory was held evidential for the purpose of having the jury determine whether or not the witness had actually written the body of the instrument. Proper precautionary instructions from the court, however, was recognized in that case to be essential, the court saying: "Should the jury have determined that the witness did not write the body of the instrument it would have given the

paper no further consideration but, the jury concluding otherwise, the defendant would be entitled to its value as affecting the credibility of the witness." Most jurisdictions have adopted this somewhat arbitrary rule relating to prior contradictory statements of witnesses. *Notes and Comments, Evidence*, 30 Cornell L. Q. 1944-45, p. 511, and f.n. cases.

Although recognizing that the reasons for this orthodox rule are clear and obvious, McCormick directs attention to the contrary view that sometimes such statements should be received as "substantive" evidence of the truth, *McCormick, Evidence* Sec. 39 pp. 73, 74. Doubtless a compelling and forceful argument is that, the frailty of the human memory being what it is, the accuracy of remembrance will vary in some proportion to the lapse of time between the factual events and the time of recollection. The "curve of forgetting" is an acknowledged factor and it seems apparent that when confronted with two conflicting statements, by the same witness respecting the same incident, the one nearer to the time of the incident is more likely to be accurate. An exhaustive discussion with analytical data on this subject is to be found in *Gardner, The Perception and Memory of Witnesses* 18 Cornell L. Q. pp. 391, 393, 394. It should here be noted that the hearsay exceptions, of the Model Code, Rule 503, as well as its counterpart in the Uniform Rules, i. e., Sec. 63(1), permits the admissibility of any statement, oral or written, of a person who is present at the trial and subject to cross examination and, although these exceptions are not now followed in this State, see *A. L. I. Restatement In The Courts* 1954 Supplement 642, and cases therein cited, they are nonetheless meritorious and in fact Advisory Master Van Winkle, in rendering an opinion for the Court of Chancery, commended the Rule sponsored by the American Law Institute. See *In re Petagno*, 24 N. J. Misc. 279 (Ch. 1946).

2. *Rule 22(b)*. To discredit an unworthy witness is the duty of trial counsel and the use of prior inconsistent statements is one of the methods employed. *Weilbacher v. Rudlin*, 125 N. J. L. 631 (E. & A. 1940). The general rule followed in New Jersey is that anything which a witness has said or written prior to his examination in court may be brought forth to corroborate or impeach his testimony. *Crane v. Sayre*, 6 N. J. L. 110 (Sup. Ct. 1821). And whenever the statement of a party is put in evidence, all that was said or written by him at the same time and upon the same subject matter is admissible. *State v. Cohen*, 97 N. J. L. 5, 9 (Sup. Ct. 1922). The limitation upon the rule is set forth in *State v. Then*, 118 N. J. L. 31 (Sup. Ct. 1937), aff'd. 119 N. J. L. 429 (E. & A. 1938), where the court said: "The proof should be confined to those matters only which are the subject matter of inquiry or investigation." These last two cases were cited with approval in *State v. DePaola*, 5 N. J. L. 19 (1950).

The discretion of the trial court in regulating and limiting the range of cross examination is very great and extends to matters affecting the credibility of the witness. *Prout v. Bernards Land and Sand Company*, 77 N. J. L. 719 (E. & A. 1909); *State v. Lerman*, 107 N. J. L. 77, 81 (E. & A. 1930). Indeed, cross examination must be confined to matters which were the subject of direct examination or relevant to the issues or which tend to affect credibility. *Kierman v. Mauer*, 13 N. J. Super. 18 (App. Div. 1951); *Alexander v. Marech*, 13 N. J. Misc. Rep. 425, aff'd. 116 N. J. L. 246 (E. & A.

1936). Similarly have our Federal Courts held that the self contradiction of a witness by prior statements may be shown only on a matter material to the substantive issues of the trial. *Gordon v. U. S.*, 73 S. Ct. 369, 344 U. S. 414, 97 L. Ed. 477.

The test of collateralness and the rule excluding contradiction of collateral testimony is considered in the review of *Commonwealth v. Petrillo*, 341 Pa. 209, 19 A. (2d) 288 (1941), contained in Vol. 8, *U. of Pitt. L. Rev.* p. 77 (1941). For cases dealing with the inadmissibility of prior inconsistent statements when they are collateral or irrelevant, see 112 A. L. R. 113. In *Laurino Co. Inc. v. Daly Bldg. Corp.*, 21 N. J. Super. 556, 564 (App. Div. 1952) it was indicated that there may be cross examination on collateral matters to test credibility. Many of the cases, however, reveal that contradictory statements by a witness ". . . may always be shown except when the matter stated is collateral or irrelevant". *State v. Salimone*, 19 N. J. Super. 600 (App. Div. 1952) approving *Weilbacher v. Rudlin*, *supra*, citing *Fox v. Forty-Four Cigar Co.*, 90 N. J. L. 483 (E. & A. 1917); *State v. Black*, 97 N. J. L. 361 (Sup. Ct. 1922); *State v. Lerman*, 107 N. J. L. 77 (E. & A. 1930). These last mentioned cases are authorities for the proposition that "a suitable foundation" must first be laid before such contradictory statements may be shown. Authorities on the subject of laying a foundation for prior inconsistent statements are collected in 31 A. L. R. 1413; 158 A. L. R. 810; 93 A. L. R. 1285; 98 A. L. R. 152; 103 A. L. R. 1347; 141 A. L. R. 697. The *Salimone* case, *supra*, was discussed in *Tyree, Evidence 7, Rutgers L. Rev.* 1, pp. 257, 266 for the proposition that a foundation must be laid. See also *State v. Pitman*, 98 N. J. L. 626 (Sup. Ct. 1923); *State v. Corson*, 109 N. J. L. 144 (E. & A. 1936); and the case of *State v. Lodico*, 88 N. J. L. 394 (E. & A. 1915) which used this language: "If it was desired by this testimony to affect the credibility of Maria Diano, it could only be made admissible by first asking her whether she had not made such contradictory statement to the recorder." The witness' attention should be clearly directed to all the circumstances of time, place and person under which the contradictory statement was made. *State v. Bassano*, 109 N. J. L. 176 (E. & A. 1932).

The doctrine of the "*Queen's Case*", *supra*, is not limited to written but encompasses verbal statements as well. Originally, in New Jersey, a foundation was not necessary as to prior oral inconsistent statements. Chief Justice Ewing, in *Fries v. Brugler*, 12 N. J. L. 79 (Sup. Ct. 1830) in dealing with a non-party witness, stated: "The necessity of propounding the question to the witness as to the foundation of the production of other proof has, so far as I am informed, never been recognized here, and is not the law of our courts . . ." Some few years later, the court of Errors and Appeals applied the rule (*Queen's Case*) in requiring a foundation for the reception of contradictory evidence upon cross examination of a witness who was also a party to the cause. *McBlain v. Edgar*, 65 N. J. L. 634 (E. & A. 1901). Both of these cases, together with the "*Queen's Case*", were considered by the same Appellate Court in 1912 when confronted with the question as to whether or not it was necessary to give a non-party witness preliminary warning before introducing prior inconsistent statements, allegedly made by the witness, and the court concluded: "We think

that the application of the rule must rest largely in the discretion of the trial judge, depending upon the circumstances of each case, and upon whether there was a fair opportunity to adhere to the rule without working injustice." *State v. D'Adame*, 84 N. J. L. 386, 398 (E. & A. 1912). To the same effect was the conclusion of our Supreme Court in 1948 in *State v. Hogan*, 137 N. J. L. 497, 501 (Sup. Ct. 1948). The foundation requirement is followed in the Federal Courts. The contradictory declarations of witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation. *The Charter Morgan v. Kouns*, 5 S. Ct. 1172, 115 U. S. 69, 29 L. Ed. 316 (1885). A witness cannot be impeached by proving a statement different from the one sworn to, unless he has been examined as to his having made such statement. *Conrad v. Griffey*, 57 U. S. 38, 167 How. 38, 14 L. Ed. 835.

In dealing with this phase of the Rule, it may be well to bear in mind the approach by Professor *Morgan* in his writings for the A. L. I., *Basic Problems of Evidence*, vol. 1, p. 70 (1954) in which he postulates: "Extrinsic evidence of the prior statements is admissible subject to the following qualifications:

- (1) "The matter concerning which the prior statement was made must not be collateral.
- (2) "The prior statement is by some courts excluded if it is phrased in terms of opinion.
- (3) "In most jurisdictions the witness while on the stand must have had his attention brought to the prior statement in such manner that he may have had the opportunity to deny or explain it.
- (4) "If the witness concedes the making of the statement, there is no error in rejecting the extrinsic evidence.
- (5) "It must, of course, be noted that the prior statement is not to be used as evidence of the truth of the matter asserted, if there is a limiting instruction."

Consideration should be given to the question whether the word "honesty" is objectionable for the reasons given in the annotation to Rule 21. Perhaps the word "truth" should be substituted for it.

3. *Rule 22(c)*. The judicial determinations in our State, over the years, have been universally consistent in recognizing and adhering to the objectives sought by these Sections (c) and (d) of Rule 22. The authorities are abundant and those mentioned herein are intended to be selective rather than complete.

There can be no question but that a general reputation for truth and veracity is pertinent to the question of credibility, but emphasis should be placed on the distinction heeded in *Lenz v. Public Service Railway Co.*, 98 N. J. L. 849 (E. & A. 1923), wherein the court said:

"Impeachment, as heretofore defined by this court, is an attack upon a witness' general reputation for truth and veracity, and is not, strictly speaking, the effect which is produced upon the credibility of his testimony by proof of contradictory statements made by him upon a matter in issue or relevant thereto."

citing *Fox v. Forty-four Cigar Co.*, 90 N. J. L. 483, 488; and again noted by the same court in *State v. Lerman*, 107 N. J. L. 77, 81 (E. & A. 1930).

An attempt to impeach the character of a witness is limited to his reputation in his neighborhood for truth and veracity. See *King v. Ruckman*, 20 N. J. Eq. 316, 357 (Ch. 1869), in which case the impeaching witness testified that he would not believe the witness under oath. Such testimony was insufficient. A leading case decided in the same year is that of *Atwood v. Impson*, 20 N. J. Eq. 150, 157 (Ch. 1869) wherein the opinion of the Chancellor is quite elucidating on point. He wrote, *inter alia*: "But the proof of character is both meagre and not such as the law requires . . . general reputation in the community where he is known, is the test and the only test which the law allows as to character." Moreover, the witness' personal opinion is neither desired nor admissible and it may not be asked of the witness whether his opinion would be changed if he had known that the defendant had been previously tried and acquitted of a similar charge. Note, *State v. Mairs and Mairs*, 1 N. J. L. 518, 521 where a witness was asked his opinion as to the general character of the prosecuting witness, as to his being a peaceable or quarrelsome man. The court found this to be inadmissible, commenting that: "A man may be a boxer or a bully and yet speak the truth upon oath." See also *State v. Williams*, 16 N. J. Super. 372, 376-377 (App. Div. 1951) for a collection and discussion of authorities; also 15 A. L. R. 1035.

It is to be observed that such testimony is limited to the reputation of the witness at the time of the trial or close proximity thereto. *State v. Shuster*, 62 N. J. L. 521, 524 (Sup. Ct. 1898). In that case, reputation evidence where witness resided 18 years before, was inadmissible. To a similar effect was *State v. Sprague*, 64 N. J. L. 419, 423 (Sup. Ct. 1900). The recognized procedure when seeking to impeach another witness is to ask the one impeaching if he knows the reputation of the other person for truth and veracity. If he answers, yes, he must be asked what that reputation is and, if he answers that it is bad, he may then be asked if from his knowledge of such reputation he would believe the witness under oath. *State v. Polhemus*, 65 N. J. L. 387 (Sup. Ct. 1900); *Blue v. Snitzler*, 11 N. J. Misc. 813 (Sup. Ct. 1933); Cf. *Ippolito v. Turp*, 12 N. J. L. 403 (Sup. Ct. 1941); *State v. Sbrilli*, 136 N. J. L. 66 (Sup. Ct. 1947). For encyclopedic statement, see 58 *Am. Jur.*, Witnesses, p. 395, Sec. 730. In the case of *State v. Tomassi*, 75 N. J. L. 739 (E. & A. 1907) the defendant offered evidence to show the general bad character of the deceased for the purpose of impeaching her veracity and thus discredit the dying declaration, and it was held: ". . . immaterial upon the question of her veracity." A parallel conclusion was reached by the Court of Errors and Appeals in *Arthur v. Arthur*, 98 N. J. Eq. 393 (E. & A. 1925). Compare, however, the Federal case allowing bad character to be shown, *Garver v. United States*, 164 U. S. 694, 41 L. Ed. 602, 17 Sup. Ct. 228 (1897); 16 A. L. R. 411, 6 L. R. A. 79.

The argument has been advanced from some quarters that the Rule should permit an attack against the general reputation and character of the witness. Wigmore sets forth the reasons pro and con. Our courts, by considerable majority, have limited any inquiry as to the character

of a witness to his "reputation for truth and veracity". 3 *Wigmore Evidence* (3d ed.) Sec. 922 p. 447 and Sec. 923 p. 450 n. 1, for collection of the case decisions in various jurisdictions.

4. *Rule 22(d)*. A witness may be discredited by evidence attacking his character for truth and veracity but not by the proof of particular independent facts, though bearing upon the question of veracity. *State v. Hendrick*, 70 *N. J. L.* 41 (*Sup. Ct.* 1903), and there is no distinction in the application of the principle where the witness is the defendant in a criminal proceeding (*Id.* 45). This case and the rule are restated in a recent decision by our Appellate Division in *State v. Hatch*, 21 *N. J. Super.* 394, 399 (*App. Div.* 1952). In *Ippolito v. Turp*, *supra*, it was said that "Every man is supposed to be capable of supporting his general reputation whenever it is attacked but not to meet specific transactions not an issue in the cause", citing for reference the prevailing rule on the admission of specific acts as a part of the proof of reputation. 22 *C. J.* 481, Sec. 579, et seq. Foreign state adjudications are somewhat uniform in holding that for the purpose of attacking the credibility of a witness it is not permissible to discredit the witness by evidence of particular independent facts. A general review of this subject is found in 58 *Am. Jur.*, Sec. 758, p. 411. A Federal case decided by the U. S. Supreme Court would seem to be somewhat broader than that prevailing in New Jersey or advocated by the Uniform Rules. In *Teese v. Huntingdon*, 64 *U. S.* 2, 23 *How.* 2, 16 *L. Ed.* 479 (1859), it was held in effect that the first inquiry with respect to a witness whom it is sought to impeach must be restricted either to the general reputation of the witness for truth and veracity or to his general character and it cannot be extended to particular facts or transactions.

As stated in *Wigmore* "witnesses have rights as well as parties; it is too often the case that they are set up as marks to be shot at." He continues, "But it certainly is the duty of the law and of the judges to see that due regard is paid to these rights, and that the witness-box does not necessarily become, in the words of an old Southern judge, 'the slaughterhouse of reputations'". 3 *Wigmore, Evidence* (3d ed.) Sec. 983, p. 511.

There does not seem to be any discord among the decisions or text written respecting the merits of *Rule 22(d)*.

## V. PRIVILEGES

### Rule 23. Privilege of Accused.

(1) Every person has in any criminal action in which he is an accused a privilege not to be called as a witness and not to testify.

(2) An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.

(3) An accused in a criminal action has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

(4) If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom.

#### Drafters' Comment

**Subdivision (1).** By virtue of the Federal Constitution and the Constitutions of the states or by judicial decision, this rule is law in every jurisdiction. Although there is considerable variation in the phrasing of the privilege in different states, this "*neither enlarges nor narrows* the scope of the privilege as already accepted, understood, and judicially developed in the common law." 8 Wigmore, Evidence (3rd ed.), s. 2252, notes 4 and 5. This rule adopts rule 201 (1) of the American Law Institute Model Code of Evidence.

**Subdivision (2).** This abolishes the rule, still existing in some states, and largely a sentimental relic, of not requiring one spouse to testify against the other in a criminal action. It limits the privilege to confidential communications between the spouses, but is broader than Rule 28 in that the accused has the privilege under this rule in criminal actions regardless of whether he is or not the communicating spouse. Exception (b) is necessary to prevent the accused from offering evidence of communications favorable to himself and then claiming the privilege as to those which are unfavorable.

**Subdivision (3).** History, logical analysis, and the weight of authority support this rule (8 Wigmore (3rd ed.), s. 2265) which adopts rule 201 (2) of the American Law Institute Model Code of Evidence. Constitutional immunities cannot, of course, be affected by this rule. We are dealing here solely with the subject of privilege.

**Subdivision (4).** The right of comment upon the accused's failure to testify is here limited to comment in argument of counsel. To allow such comment is consistent with the inducements offered to a defendant to take the stand in his own behalf by Rule 21. With the restrictions on admissibility imposed by Rule 21 for the protection of the accused, it can hardly be claimed that comment on his refusal to testify undermines the privilege. While these rules do not cover comment by the judge, the right of comment by counsel seems to be so closely related to the considerations of admissibility as to require notice here.

#### Recommendation

It is recommended that Sections (1) and (3) of this rule be adopted and that Section (2) be deleted and Section (4) combined with Rule 39.

#### Committee Annotation

1. It will be observed that Section (1) is not the privilege against self-incrimination; under this rule an accused has a privilege not to be called or to testify as to non-incriminating matters. In general see *1 Morgan, Basic Problems of Evidence* 139 (1954); 8 Wigmore § 2268 (2). The rule is a codification of *State v. Edelman*, 19 N. J. Super. 350, 357 (App. Div. 1952).

The privilege extends to all stages of a criminal proceeding, including the preliminary hearing before the magistrate. *1 Morgan, supra*, 139. It has been argued that there is not too much reason for the privilege. See Comment to Model Code Rule 201 (1). However the Model Code and the Uniform Rules have both adopted it. *Morgan* at p. 139, *supra*, suggests that the privilege should extend to the grand jury room. But the rule he drew for the Model Code and the present rule refer to "an accused", and there is no accused before the grand jury; hence it seems that the rule does not cover a grand jury proceeding.

As perhaps suggested in *State v. Edelman*, when A and B are indicted in one indictment and the trial severed, there is no reason why A should not be called as a witness in B's trial, subject of course to the privilege against self-incrimination. Cf. *State v. Brien et al.*, 32 N. J. L. 414 (Sup. Ct. 1868) decided before L. 1871, c. 40, p. 12, N. J. S. 2A:81-8, which abrogated the disqualification of a party in a criminal case. To clarify this point the words "at his own trial" might be added to this section of the rule.

2. Section (2) does not appear in the Model Code. Its sole purpose is to give the accused a privilege where a confidential communication is made by his spouse to him. The policy supporting the marital privilege with respect to confidential communications is to secure freedom from apprehension in the mind of the one desiring to make a communication. The "communicating spouse" should be allowed the privilege; but there is no

reason to extend that privilege to the spouse to whom the communication is addressed, 8 *Wigmore* § 2340, merely because he is accused of a crime.

Rule 23 (2) seems designed to continue the notions underlying N. J. S. 2A:81-3, a statute which under the Uniform Rules (Rule 7) would be abolished. This statute is a remnant of the common law preventing a husband or wife from testifying against his spouse in most criminal actions. See *State v. Caparole*, 16 *N. J.* 373 (1954). An attempt (8 *Wigmore* 2228) is sometimes made to justify the statute on the ground that there is a natural repugnance against compelling a spouse to be the means of condemning his life partner. Or as stated in *State v. Caparole*, *supra*, quoting *Foley v. Loughran*, 60 *N. J. L.* 464, 473 (*E. & A.* 1897), the statute is found on a “*supposed public policy*” in the maintenance of marital confidence. Such statutes as these are now pretty generally discredited.

Rule 28 (2) (d) gives the accused all the protection to which he is fairly entitled. The situation seems to boil down to this. The accused in a criminal action has no right to object if his spouse is willing to waive her privilege and testifies against him disclosing something she communicated to him; it is submitted, contrary to Rule 23 (2) that the State's case should not suffer by keeping that proof out when the policy behind the privilege is not violated. However under Rule 28 (2) (d) he can get the benefit of her testimony even though she objects; the accused thus is not required to suffer because of the policy behind the privilege.

3. The intent of Section (3) is to limit the scope of the accused's privilege in the presence of the court to “the employment of legal process to *extract from the person's own lips* an admission of guilt.” 8 *Wigmore* § 2263. It is something of a corollary to exception (a) of Proposed Rule 25 (Uniform Rule 25 (b)), but the two have no logical connection and are to be carefully distinguished. Rule 23 (3) deals only with the accused in court, while Uniform Rule 25 treats a privilege which attaches to “every natural person.”

4. Section (4) should be combined with proposed Rule 39, which see.

## **Rule 24. Definition of Incrimination.**

A matter will incriminate a person within the meaning of these Rules if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation.

### **Drafters' Comment**

The design of the privilege against self-incrimination is to protect the accused against punishment. It is not designed to prevent the compulsory disclosure of criminal conduct where for any reason punishment is im-

possible. This definition follows rule 202, American Law Institute Model Code of Evidence.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

1. The words "matters disclosed" are sufficiently general to have reference to matters disclosed in argument as well as evidence before the court. See *In re Pillo*, 11 N. J. 8, 19 (1952); *United States v. Coffey*, 198 F. 2d 438, 440 (C. A. 3, 1952). Indeed the *Pillo* case at p. 19, quoting *Hoffman v. United States*, 341 U. S. 479, 487 (1951), indicates that the judge may do a little sharp guessing; he will be "governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."

A matter is incriminating under the Rules if it forms a basis for a reasonable inference. This is a rejection of the rule obtaining in some Federal and other courts which enables a witness to claim the privilege if he fears the answer to a question will supply a *clue* from which incriminating evidence might be obtained—such as "if the witness be asked to disclose his residence, and then in his residence be found a man who discloses the whereabouts of stolen goods". 8 *Wigmore* § 2261. This extension of the rule is mentioned but not accepted in *In re Pillo*, 11 N. J. 8, 20 (1952). Wigmore strongly rejects the rule. 8 *Wigmore* § 2261. See too *I Morgan, Basic Problems of Evidence* p. 134.

There is some loose language of *Hoffman v. United States*, 341 U. S. 479, 486 (1951) which has been cited supporting the "clue" rule:

"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure *could* result."

*In re Pillo*, though it does at pp. 19 and 20 rely upon the *Hoffman* case, does not approve this passage.

The word *law* might best be substituted for the word *laws* because it is opined that the latter word applies more aptly to statutes than to both common and statutory law.

2. The phrase in the rule "under the law of *this State*" is supported by *In re Pillo*, 11 N. J. 8, 16 (1952). The committee has not taken a position on the question whether possible prosecutions in other jurisdictions should be embraced by the protection.

A strong statement of the opposite view is expressed in *People v. Den Vye*, 318 Mich. 645, 29 N. W. 2d 284, 287 (*Sup. Ct.* 1947):

"It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution."

There are a number of reasons for the privilege. Primarily, the prosecution should not be permitted to trust to compulsory self-disclosure as a source of proof and to protect an individual against harassments. Cer-

tainly State Prosecutors in Grand Jury investigations and otherwise are not going to investigate Federal crimes or crimes of foreign jurisdictions. The privilege of course goes to protect a witness in other connections, but at least to some extent the argument of the Michigan decision cannot be sustained on this rationale.

The Michigan argument is most striking where a State investigation may lead to a federal prosecution in the same State, or vice versa (there is less likelihood of a State investigation leading to a prosecution in another State). But there is an impressive line of U. S. Supreme Court cases settling this very problem. See *1 Morgan, Basic Problems of Evidence* p. 132.

As Morgan says at p. 131, the problem really resolves itself into a question as to whether the privilege as generally recognized should be broadened.

3. The words "permanently immune" would not seem to apply aptly to the lapse of the period of the Statute of Limitations. The matter might well be elaborated in the last sentence by redrafting the entire rule as follows:

"A matter will be deemed to expose a person to a criminal prosecution within the meaning of these Rules if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor. But he is not exposed to criminal prosecution if the prosecution is barred by the statute of limitations or he has been previously convicted or acquitted of the violation or has become for any reason permanently immune from punishment therefor."

4. It may be of interest to note the number of immunity statutes in this State including: N. J. S. 2A:87-2 (absolute immunity to the woman in abortion, see *In re Vince*, 2 N. J. 443, (1949); N. J. S. 2A:93-9 (permissive immunity in trial of indictment under N. J. S. 2A:93-7, 8—bribery of labor representatives or foremen); R. S. 4:12A-17 (milk control board proceedings); R. S. 11:1-15 (Civil Service Commission proceedings); R. S. 17:29B-13 (insurance investigations by the Banking Commissioner); R. S. 18:25-11 (investigations under Anti-Discrimination Law); R. S. 19:34-58 (Election law—indictments thereunder—immunity now permissive); R. S. 23:10-12 (fish and game law prosecutions); R. S. 43:21-11 (j) (Unemployment Compensation Commission proceedings); R. S. 48:2-36 (Public Utility Commission proceedings); R. S. 48:1-19, 20 (Investigations under Securities Law); R. S. 50:5-11 (Proceedings under the Shellfish Act); R. S. 52:13-3 (State Legislative investigations); R. S. 58:1-29 (State Water Policy Commission proceedings). It might be noted that three of these statutes specifically exclude implied grants of immunity to corporations. R. S. 48:2-36, 49:1-19, 20, 58:1-29, *supra*. It may also be noted that most of these statutes explicitly exclude a grant of immunity for perjury while testifying.

R. S. 2A:81-17.1, *cf.* R. S. 40:69A-167, may also be mentioned as bearing on the problem of self-incrimination. This statute provides for forfeiture of the employment, tenure and pension of any state, county or municipal

employee who refuses to testify or pleads self-incrimination before any grand jury, court, commission or other body of the State.

5. It will be observed that no attempt has been made to define the words "penalty" and "forfeiture of his estate" found in Rule 25 as proposed and in N. J. S. 2A:81-5. What these words have reference to is not clear. See *Wigmore* § 2256 and 2257; *1 Morgan, Basic Problems of Evidence* p. 138. However the very dearth of cases on the matter shows that it is not a matter of major importance.

### **Rule 25. Self-Incrimination: Exceptions.**

Subject to Rules 23 and 37, every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him, except that under this rule,

(a) if the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness; and

(b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition; and

(c) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis; and

(d) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced; and

(e) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it; and

(f) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing

the corporation or association or the conduct of its business require him to record or report or disclose; and

(g) subject to Rule 21, a defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of fact does not have the privilege to refuse to disclose any matter relevant to any issue in the action.

#### Drafters' Comment

This rule covers the subject matter of American Law Institute Model Code of Evidence Rules 203, 204, 205, 206, 207 and 208. The policy of stating the subject matter of Rules 204-208 as exceptions to the main rule avoids the use of cumbersome cross-references. It seems more desirable to collect all of the material into one section on the subject of self-incrimination, than to be compelled to thumb back and forth from one rule to another in order to understand the meaning. This portion of the Model Code is replete with such cross references and considerable objection has been made to it on this account.

Special comment on the exceptions should be made:

(a) Sets forth the generally accepted rule and is Rule 204 of the Model Code.

(b) This is Rule 205(a) of the Model Code. In general practice and by the majority of jurisdictions the practice of taking fingerprints, photographs, Bertillion measurements and physical and mental examinations is sanctioned. If an accused person were to refuse to be moved from the jail to the court-room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given such a claim. And yet no lesser claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused. 8 Wigmore, Evidence (3rd Ed.), pp. 374, 375.

(c) This is Rule 205(b) of American Law Institute Model Code of Evidence. It is necessary here to be consistent with the policy of the Uniform Act on Blood Tests to Determine Paternity. Resistance to the forceable extraction of body fluids is not justified on the ground of privilege against self-incrimination, but may be warranted on the ground of violation of the right of personal immunity, if proper safeguards, such as supervision by a physician, are not provided. The rule does not attempt to solve that constitutional question, but limits its application strictly to the privilege against self-incrimination. A sample of spittle or a sample of stomach contents may be equally incriminating and they are on the same ground under this rule. But the taking of the sample from the stomach by stomach pump may be viewed very differently from the other when it comes to the question of safeguards to be taken to assure non-violation of the right of security of one's person.

(d) Follows Model Code Rule 206.

(e) and (f). Adopt Model Code Rule 207 and are supported by the trend of modern authorities.

(g) There is considerable conflict in the cases as to the extent of the waiver when the accused voluntarily testifies. This rule extends the waiver only to matters relevant to the issues, meaning thereby to retain the privilege as to facts merely affecting credibility. 8 Wigmore, Evidence (3rd ed.), s. 2276(b).

#### Recommendation

It is recommended that the following rule be adopted:

“Subject to Rules 23 and 37, no witness shall be compelled to answer if the court finds it is likely that the answer will expose him to a criminal prosecution or penalty or to a forfeiture of his estate, except that under this rule,

“(a) no person has the privilege to refuse to submit to an examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition; and

“(b) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis; and

“(c) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter exposing him to a criminal prosecution, or a penalty or forfeiture of his estate, if the court finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced; and

“(d) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it; and

“(e) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation or association or the conduct of its business require him to record or report or disclose; and

“(f) subject to Rule 21, a defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of the facts does not have the privilege to disclose any matter relevant to any issue in the action, though by so testifying, he does not waive the privilege as to any matter affecting credibility.”

#### Committee Annotation

1. The change proposed at the beginning of the rule—except the words “the court finds it is likely that”—is taken verbatim from N. J. S. 2A:81-5. It might be noted that Justice Brandeis, dealing with the problem covered by Uniform Rule 25 (d) (proposed Rule 25 (c)), said for the Supreme Court in *McCarthy v. Arndstein*, 266 U. S. 34, 41 (1924);

“To permit him to retain possession, because surrender might involve disclosure of a crime, would destroy a property right. *The constitutional privilege relates to the adjective law.* It does not relieve one from compliance with the substantive obligation to surrender property.

"Section 21a (having to do with the examination of a bankrupt as to his assets), on the other hand, deals specifically and solely with the adjective law,—with evidence and witnesses."

It could possibly be argued that the privilege against self-incrimination constitutes one of those rights referred to in Art. 1, Sec. 1 of the New Jersey Constitution. It was said in *In re Vince*, 2 N. J. 443, 449 (1949) that

"Nor is a similar provision to be found in the Constitution of this State. Respondent's contentions that her constitutional rights were infringed are therefore without merit."

However in *State v. Toscano*, 13 N. J. 418, 423 (1953) the matter was put this way:

". . . Our State constitution contains no *express* provision embodying the privilege . . ." (italics inserted).

Iowa has no express privilege stated in its Constitution but the Supreme Court of Iowa has held that the privilege is included in the due process clause of the Iowa Constitution. See Comment to Model Code Rule 203.

2. The Uniform Rule refers to "every natural person". It has been held in *Bd. of Health, Weehawken Tp. v. N. Y. Central R. Co.*, 10 N. J. 284, 287 (1952) that the privilege does not extend to corporations. Indeed the word "witness" in our statute and rule confirms this; a corporation cannot be a witness.

3. It will be observed that the provision in the Uniform Rule which has reference to a disclosure "to a public official of this State or any governmental agency or division thereof", has been deleted. If this language were to be adopted, "public official of this State" should be changed to "public official in this State." More important than that, the Supreme Court's power to make rules extends to practice and procedure *in the courts*; there is no authority in the Supreme Court to promulgate a rule as to administrative proceedings.

4. Professor Morgan argues with some force that the self-incrimination privilege should apply to confessions obtained or sought by the police. *Morgan*, 34 *Minn. L. Rev.* 1, 27 (1949). There is some authority for this position. See 1 *Morgan, Basic Problems of Evidence* p. 130. However the weight of authority is to the contrary. See *Notes*, 18 *L. R. A. (N. S.)* 768, 50 *L. R. A. (N. S.)* 1077, 5 *A. L. R. 2d* 1404, 1425. *State v. Bunk*, 4 N. J. 461, 469, 470 (1950) goes no further than to hold that a confession is voluntary even though the person making the confession has not been advised of the privilege.

*Wigmore*, § 2266, infers from the separate histories of the rule excluding involuntary confessions and the privilege of self-incrimination, that the privilege has no application to the matter of confessions. The history of the matter is not too persuasive an argument.

It seems, as Morgan has said, that a police examination has none of the safeguards of a judicial proceeding (37 *Minn. L. Rev.* 28). If the privilege has any real meaning, it should be made applicable there.

However if such a change in the law (that is, the overruling of *State v. Bunk*) is deemed advisable, it could be accomplished by including it in an amendment to Rule 63 (6) having to do with confessions. Indeed, this

would be the only way the matter could be dealt with by rule of court; for as above stated, police officials cannot be controlled by rule of court, although the admission of confessions can.

5. It will be perceived that the injection of the words "the court finds it likely that" in the provision is an embodiment with some modification of Uniform Rule 25 (a). A separate paragraph (a) was set up in the Uniform Rules because the main paragraph of Rule 25 has to do not only with actions in court but also with administrative proceedings.

Uniform Rule 25 (a) and Model Code Rule 204 leave it to the judge to find whether "the matter *will*", or will not, "incriminate the witness". This is a stronger test than that laid down in *In re Pillo*, 11 *N. J.* 8, 20 (1952), and *Hoffman v. United States*, 341 *U. S.* 479, 487 (1951). The *Pillo* case quoting *United States v. Weisman*, 111 *F. 2d* 260, 262 (*C. C. A.* 2, 1940) said:

"Obviously a witness may not be compelled to do more than to show the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects."

6. *N. J. S. 2A:81-8* should be repealed or superseded. It provides:

"On the trial of an indictment, the defendant shall be admitted to testify, if he offers himself as a witness."

This matter is covered by Rule 7 (a).

7. It has been held that where the party and the witness are separate persons, the witness must be left to make the claim for himself; he has no right to be attended by personal counsel; and neither such counsel nor the party may claim the privilege for him. Furthermore that the party's counsel may not, as such, give warning of the privilege to the witness or require the judge to do so. See *State v. Mohr*, 99 *N. J. L.* 124, 129 (*E. & A.* 1923). It has been said further that the same applies when the party and witnesses are identical, and Wigmore supports this position. *Vineland v. Maretti*, 93 *N. J. Eq.* 513, 521 (*Ch.* 1922); *Wigmore*, § 2270. Where the witness and party are identical, counsel should be permitted to raise the point and ask that the witness be apprised of his rights; and the judge may, and when he believes that justice requires it, *should* of his own motion apprise the witness (whether or not he is a party) of his rights. See *1 Morgan, Basic Problems of Evidence* p. 150. See *Wigmore*, § 2269. A magistrate in a preliminary proceeding is under *R. R. 3:2-3 (b)* obliged to inform the defendant of his rights in this regard. Although the above New Jersey cases were cited, the point was not passed upon in *Bd. of Health, Weehawken Tp. v. N. Y. Central R. Co.*, 10 *N. J.* 284, 288 (1952). It would seem that this is a matter that can be left to common law.

8. *State v. Alexander*, 7 *N. J.* 585, 591 (1951) is the first case squarely to pass upon the matter treated in Rule 25 (a) and (b) as proposed, and it follows Wigmore's rule that the privilege against self-incrimination does not apply to non-testimonial disclosures. It might be said, in passing, that neither this case, nor the proposed rule, disposes of the question argued by Morgan (see *1 Morgan, Basic Problems of Evidence* p. 141) that the privilege "applies to non-verbal conduct used in place of words"—even though our Supreme Court in the *Alexander* case italicized (as Wigmore does) the words that the privilege prevents only "the employment of legal

process to *extract from the person's own lips* an admission of guilt." A nodding of the head, as expressing yes or no, is surely within the privilege.

It will be perceived that Uniform Rule 23 (3) states that an accused has no privilege to refuse "to do any act" in the presence of the judge or the trier of fact. As has been noted above, that rule has no logical connection with the privilege against self-incrimination.

9. No New Jersey cases have been found on the points involved in Sections (c), (d) and (e) proposed above, but these rules restate the law of the United States Supreme Court and other jurisdictions.

Proposed Rule 25 (c) is supported by a convincing line of cases in the United States Supreme Court: *Wilson v. United States*, 221 U. S. 361 (1911); *In re Fuller*, 262 U. S. 91 (1923); *McCarthy v. Arndstein*, 266 U. S. 34 (1924); and *United States v. White*, 322 U. S. 694 (1944). Further see comment to Model Code Rule 206.

*Wigmore*, § 2259 c and the decided weight of authority support proposed Rule 25 (d), while 25 (e) adopts the doctrine of *Essgee Company v. United States*, 262 U. S. 151 (1923) and *United States v. Austin-Bagley Corporation*, 31 F. 2d 229 (C. C. A. 2, 1929). In the latter case the principle was referred to as "well settled law."

10. In *State v. Zdanowicz*, 69 N. J. L. 619 (E. & A. 1903) the question dealt with in Proposed Rule 25 (f) was apparently (see *People v. Tice*, 131 N. Y. 651, 30 N. E. 494, [Ct. App. 1892], abstracted in the case) considered but not decided. A number of jurisdictions hold that the voluntary testimony by an accused is a waiver as to all facts, including those merely affecting credibility. *Wigmore*, § 2276, argues for the rule, adopted here, that the waiver extends only to matters relevant to the issue—meaning thereby that the privilege remains as to facts affecting merely credibility. It seemed advisable in drafting this rule to make it clear what is meant by "relevant to any issue in the action"; it might be said that credibility is relevant to the issue.

The words "subject to Rule 21" seem to mean simply that Rule 25 (f) cannot be used to break down the limitations set forth in Rule 21.

## **Rule 26. Lawyer-Client Privilege.**

(1) **General Rule.** Subject to Rule 37 and except as otherwise provided by Paragraph 2 of this rule communications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) if he is the witness to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client, or (iii) as a result of a breach of the lawyer-client

relationship. The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative. The privilege available to a corporation or association terminates upon dissolution.

(2) **Exceptions.** Such privileges shall not extend (a) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by *inter vivos* transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer, or (d) to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness, or (e) to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients.

(3) **Definitions.** As used in this rule (a) "Client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent, (b) "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship, (c) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer.

#### Drafters' Comment

This rule embodies the subject matter of Model Code Rules 210, 211, 212, and 213. It is restated in this form to avoid numerous cross-references. It goes further than the Model Code by preventing disclosure of communi-

cations overheard by eavesdroppers, agents of the client in transmitting the communication and the like, so long as the communication was in the course of professional confidence.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

1. Section (1) (c) (i) and (ii), contrary to Model Code Rule 210 (c) (ii) and (iii), privileges the testimony of eavesdroppers and interlopers. It has been persuasively argued that this is not sound. The contention is that the risk that someone will overhear a privileged communication or will surreptitiously read or obtain possession of a privileged document should be borne by the client. As Wigmore says, the means of preserving the secrecy is in the hands of the client or his agent (that is, the attorney), and since the privilege is in derogation of the general testimonial duty, it would be improper to extend the privilege. 8 *Wigmore* § 2326. As Morgan says, "It is not to be forgotten that the privilege is a privilege to suppress the truth." 1 *Morgan, Basic Problems of Evidence* 101 (1954). In this state a well-considered case in effect sustains the Model Code provision and rejects the Uniform Rule on the point. *State v. Loponio*, 85 *N. J. L.* 357 (*E. & A.* 1913).

To eliminate the extension of the privilege to such eavesdroppers, Section (1) (c) (i) and (ii) might be revised as follows:

"(i) as the representative of the client or of the lawyer in transmitting the communication, or (ii) as one to whom disclosure was reasonably necessary in order to secure its transmission or to accomplish the purpose for which it was transmitted."

Similarly Section (1) (c) (iii) of the rule could be tightened and clarified by revision in the following form:

"(iii) as a result of an intentional breach by the lawyer of his duty not to disclose it and to see that it is not disclosed by his agent or servant." See Model Code Rule 210 (c) (iii).

2. The Uniform Rule makes it permissive with the lawyer as to whether or not to assert the privilege on behalf of the client; it imposes no duty on the lawyer. The next to last sentence of the rule might well be re-drafted to impose such a duty:

"The privilege may be claimed by the client in person, or if incompetent, by his guardian, or if deceased, by his personal representative; but the lawyer, if he is a witness, has a duty to assert it for his client, unless the client instructs him not to do so. The privilege available to a corporation or association terminates upon dissolution."

This would codify *State v. Toscano*, 13 *N. J.* 418, 424 (1953); *In re Selser*, 15 *N. J.* 393, 404 (1954); 1 *Morgan, Basic Problems of Evidence* 105 (1954).

3. The provision of Uniform Rule 26 (2) (e) does not seem to clearly disclose its intent, which is that no one of the clients has a privilege as against another of them; yet each still retains a privilege as against third persons. It also limits itself to communications made by a client whereas the privilege extends to communications made by the lawyer to a client

which often reveal the substance of the client's communications to him. See *1 Morgan, Basic Problems of Evidence* 101 (1954), *Russell v. Second National Bank of Paterson*, 136 N. J. L. 270, 279 (E. & A. 1947), Uniform Rule 26 (3) (b).

Striking subsection (e) and substituting the following sentence might be preferable:

"When two or more persons acting together become clients of the same lawyer as to a matter of common interest, no one of them has as against another of them any such privilege as to communications between them, or either of them, and the lawyer with respect to the matter."

This is Model Code Rule 211 adding the words "between them, or either of them, and the lawyer," which cover more explicitly the idea that Professor Morgan apparently intended to cover, namely, communications by one client to the lawyer in the absence of the other client. *1 Basic Problems of Evidence* 104 (1954).

The rule comports with New Jersey law. *Gulick v. Gulick*, 39 N. J. Eq. 516 (E. & A. 1885).

4. There is some question as to a policy in Rule 26 (3) (c) which would protect a communication made to a New York lawyer pretending to give advice as to New Jersey law. See *1 Morgan, Basic Problems of Evidence* 99 (1954).

5. That the privilege belongs to the client is recognized in New Jersey. *Russell v. Second National Bank of Paterson*, 136 N. J. L. 270, 279 (E. & A. 1947). It is for his protection. *State v. Toscano*, 13 N. J. 418, 424 (1953); *In re Selser*, 15 N. J. 393, 404 (1954). Even if the opposite party consents, an attorney cannot disclose a privileged communication. *Rowland v. Rowland*, 40 N. J. Eq. 281, 283 (E. & A. 1885).

6. Any question as to the scope of the confidence can be developed by case law. Thus it seems to be the law that the privilege does not permit the concealment of the identity of a client. *State v. Toscano*, 13 N. J. 418, 424 (1953). Further see *Palatini v. Sarian*, 15 N. J. Super. 34, 43 (App. Div. 1951), making some close distinctions between communications where attorney's acts went beyond the practice of the law. The communications there seem to have been from plaintiff's attorney to his opponent, the defendant; and if so, they were of course not privileged, and it was unnecessary for the court to go further in its decision.

7. To give rise to the privilege, there must be a lawyer-client relationship and a professional confidence, as stated in Lines 4 and 5 of the rule. This point has been made in our cases. *In the Matter of Stein*, 1 N. J. 228, 236 (1949); *In re Selser*, 15 N. J. 393, 407 (1954). There is no privilege as to communications to the lawyer after his employment has terminated. *Fox v. Forty-four Cigar Co.*, 90 N. J. L. 483, 489 (E. & A. 1917), but consultation for the purpose of retaining the lawyer is privileged. *State v. Loponio*, 85 N. J. L. 357, 363 (E. & A. 1913).

8. Rule 26 (2) (d) is not the law in this State. *Anderson v. Searles*, 93 N. J. L. 227 (E. & A. 1919) said in effect this would be "astounding" if it were the law. The New Jersey rule seems to be that the attorney may testify as to the execution of the will, *Veazey's Case*, 80 N. J. Eq. 466 (E. & A. 1912), but not as to its "preparation and concoction." The

rule proposed would overrule the *Anderson* case. Chafee, criticizing the *Anderson* case, deploras "such fine discriminations." 35 *Harv. L. Rev.* 687 (1922). It seems that if a client has his lawyer attest the document, he should be held to have waived the privilege as to "preparation and concoction" also.

In fact the testimony sought to be adduced in *Anderson v. Searles*, 93 *N. J. L.* 227 (*E. & A.* 1919) would have been admissible under the theory expressed in Rule 26 (2) (b), but that theory was doubtless not called to the court's attention. Parenthetically Rule 26 (2) (b) renders admissible in a will contest or a will construction suit the testimony of an attorney who acts for a testator in the drawing or making of a will, but does not attest it. This is sound.

9. The privilege extends to documents submitted an attorney as well as oral communications. *Matthews v. Hoagland*, 48 *N. J. Eq.* 455, 464 (*Ch.* 1891).

10. Disclosures to an agent of the attorney are protected by Rule 26 (3) (b). *Wigmore* § 2301. So a disclosure to a stenographer is privileged. *State v. Krich*, 123 *N. J. L.* 519, 521 (*Sup. Ct.* 1939). Of course a disclosure in presence of strangers is not privileged. *Roper v. State*, 58 *N. J. L.* 420 (*Sup. Ct.* 1896); *Carr v. Weld*, 19 *N. J. Eq.* 319 (*Ch.* 1868).

11. Rule 26 (2) (a) which is verbatim Model Code Rule 212, is quoted and supported by the majority and minority opinions in *In re Selser*, 15 *N. J.* 393, 409, 415 (1954).

12. Model Code Rule 105 (e), which is not adopted in the Uniform Rules, provides that if the client is neither party nor witness, the judge in his discretion may of his own motion exclude a privileged communication. This appears to be the New Jersey law. *Cf. Rowland v. Rowland*, 40 *N. J. Eq.* 281, 283 (*E. & A.* 1885).

## **Rule 27. Physician-Patient Privilege.**

(1) As used in this rule, (a) "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician, or submits to an examination by a physician; (b) "physician" means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the state or jurisdiction in which the consultation or examination takes place; (c) "holder of the privilege" means the patient while alive and not under guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient; (d) "confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted

in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(2) Except as provided by paragraphs (3), (4), (5) and (6) of this rule, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

(3) There is no privilege under this rule as to any relevant communication between the patient and his physician (a) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged mental incompetence, or in an action in which the patient seeks to establish his competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offence other than a misdemeanor, or (b) upon an issue as to the validity of a document as a will of the patient, or (c) upon an issue between parties claiming by testate or intestate succession from a deceased patient.

(4) There is no privilege under this rule in an action in which the condition of the patient is an element or factor of the claim

or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

(5) There is no privilege under this rule as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

(6) No person has a privilege under this rule if the judge finds that sufficient evidence, aside from the communication has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

(7) A privilege under this rule as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication.

#### **Drafters' Comment**

The common law recognized no privilege for communications between physician and patient. Many states have created such a privilege by statute. There is little harmony among such states either with respect to the subject matter or the interpretation of such statutes. At the 1950 meeting of the National Conference of Commissioners on Uniform State Laws it was voted that the physician-patient privilege should not be recognized. Professional ethics give the patient broad and efficient protection against the disclosure of confidences by the doctor outside of the courtroom. There is grave doubt whether it is in the public interest to extend the right of the patient to the closing of the doctor's lips as a witness in an action where the condition of the patient is a material and relevant matter. All privileges are blockades to the ascertainment of the truth and should be conservatively and reluctantly granted. Nevertheless, at the 1953 meeting the Conference reversed its previous action and by a close vote decided to include the privilege and adopted the rules of the Model Code of Evidence on that subject. Rule 27 incorporates the provisions of Model Code Rules 220 to 223.

#### **Recommendation**

It is recommended that Uniform Rule 27 be rejected. In its place the substance of N. J. S. 2A:81-10 is recommended, as follows:

"No person engaged on, connected with or employed on any newspaper

shall be compelled to disclose, in any legal proceeding or trial, before any court or before any grand jury of any county or any petit jury of any court the source of any information procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed.

"As used in this section the word 'court' means and includes the supreme court, the superior court, the county courts, the juvenile and domestic relations courts, the county district courts, the criminal judicial district courts, the surrogate's courts, any municipal court, any inferior court of limited criminal jurisdiction and any tribunal, commission or inquest operating under any order of any of the above enumerated courts."

#### Committee Annotation

1. The physician-patient privilege does not represent the law in this State (notwithstanding R. S. 24:18-40). Though there are some who favor the rule (*In re Selser*, 15 N. J. 393, 404 (1954), quotes Lord Chancellor Brougham as urging the adoption of such a rule), it is submitted that this privilege is not needed in order to protect a confidence vital to the relationship of physician-patient; and the interests of justice override such considerations as the honor of the medical profession. 8 *Wigmore* § 2380a. Chafee, after some study of the point, comes to the conclusion that the privilege cannot be justified. *Chafee, Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* 52 *Yale L. J.* 607 (1943).

2. Wigmore strongly criticizes the newspaperman's privilege § 2286, but the proposed rule conforms with New Jersey legislation.

### Rule 28. Marital Privilege—Confidential Communications.

(1) **General Rule.** Subject to Rule 37 and except as otherwise provided in Paragraphs (2) and (3) of this rule, a spouse who transmitted to the other the information which constitutes the communication, has a privilege during the marital relationship which he may claim whether or not he is a party to the action, to refuse to disclose and to prevent the other from disclosing communications found by the judge to have been had or made in confidence between them while husband and wife. The other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege.

(2) **Exceptions.** Neither spouse may claim such privilege (a) in an action by one spouse against the other spouse, or (b) in an action for damages for the alienation of the affections of the other, or for criminal conversation with the other, or (c) in a criminal action in which one of them is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person com-

mitted in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either, or (d) in a criminal action in which the accused offers evidence of a communication between him and his spouse, or (e) if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort.

(3) **Termination.** A spouse who would otherwise have a privilege under this rule has no such privilege if the judge finds that he or the other spouse while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter.

#### **Drafters' Comment**

This rule embodies the subject matter of Model Code Rules 214, 215, 216, 217 and 218. There is one substantial difference. In every state it is recognized that there are exceptions or limitations to the enforcement of the marital privilege. 8 Wigmore, Evidence (3rd ed.), Sec. 2338. The exceptions designated are for the most part well recognized today, although (a) is stated in broader terms than the Model Code. The exception adopts Wigmore's suggestion that the privilege should not exist where either party needs the evidence in any action between them.

#### **Recommendation**

Rule 28 (2) and (3) should be adopted as is, except that 28 (2) (b) should be stricken and the provisions 28 (2) (c), (d) and (e) relettered (b), (c) and (d), respectively. Rule 28 (1) should be rewritten as follows:

"(1) *General Rule.* Except as provided in Rule 37 and Paragraphs 2 and 3 of this rule, if the court finds that a communication has been made in confidence by one spouse to the other while husband and wife, the spouse making the communication has a privilege not to disclose it and not to have it disclosed by the other spouse. If the spouse making the communication is absent, the other spouse may claim the privilege on his behalf, and if the spouse making the communication is incompetent or deceased, his guardian or personal representative may claim it on his behalf. For the purposes of this rule, spouses shall not be deemed to be husband and wife if they are divorced from bed and board."

#### **Committee Annotation**

1. The draftsmen of the Uniform Rule endeavored to shorten the more extended provisions in the Model Code. The proposed text seeks to clarify the Uniform Rule and eliminate inept verbiage.

For example, the Uniform Rule provides that a spouse who makes "the" communication has a privilege to prevent disclosure of communications

(sic) found by the judge to be confidential communications. Again there is interlarded in this sentence the cumbersome definition found in Model Code Rule 214 (b): "a spouse who transmitted to the other the information which constitutes the communication, has a privilege."

2. The Uniform Rule leaves out Model Code Rule 214 (d) defining a "confidential communication between spouses" as meaning "information transmitted by a voluntary act of disclosure by one spouse to the other without the intention that it be disclosed to a third person and by a means which, so far as the communicating spouse is aware, does not disclose it to a third person." This is a matter dealt with by the common law—at any event in this State. *State v. Young*, 97 N. J. L. 501, 505 (E. & A. 1922); *State v. Laudise*, 86 N. J. L. 230, 231 (E. & A. 1914); cf. *Wolfe v. United States*, 291 U. S. 7 (1934).

See too *Wood v. Chetwood*, 27 N. J. Eq. 311 (Ch. 1876), holding that communications between a husband and wife who may be said to be confiduciaries cannot be deemed to be of a confidential character. As above stated, the definition of a confidential communication can be left to be developed by the courts. Thus a "communication" includes an imparting of information via an act of one of the spouses. See 5 *Vand. L. Rev.* at 594 (1952); *Wigmore*, § 2337.

Again it is a rule of the common law and need not be codified, that marital communications are presumptively confidential. *Blau v. United States*, 340 U. S. 332 (1951); 8 *Wigmore* § 2336.

3. The Uniform Rule (unlike the Model Code) states that the communicating spouse has the privilege only "during the marital relationship." This has been eliminated. The communicating spouse should have the privilege even though the other spouse is dead.

4. The Uniform Rule and the Model Code both state that a spouse, whether or *not* a party, may "prevent" the other spouse from disclosing the communication. This is strange and perhaps an inadvertence. Does it mean that if the spouse is not a party, he has a right to make an objection? Again the Uniform Rule speaks of communications "had or made". What do the words "had or" add to this thought? Both of these thoughts have been eliminated from the proposed text.

5. The last sentence of Uniform Rule 28 (1) is not to be found in the Model Code. However it seems commendable to attempt to codify the last sentence in Comment b to Rule 215 of the Model Code, that "the spouse to whom the communication is made will ordinarily have authority to claim the privilege for the absent spouse." Hence the proposed rule changes this sentence of the Uniform Rule so as to make it applicable only in the case where the communicating spouse is absent.

6. Under Model Code Rule 214 (a) the privilege does not apply to communications made between spouses "legally separated" or divorced. By "legally separated" presumably reference is made to separation through the judgment of a court *mensa et thoro*. The draftsmen of the Uniform Rules have dropped out this idea. In other words, communications between such spouses are privileged. It is felt that the Model Code is better and the provision has been restored.

The draftsmen of the Uniform Rules also omitted any provision whereby the privilege could be claimed by the personal representative of a deceased

communicating spouse. The Model Code provision in this respect has been retained. The privilege extends after death, and someone should be authorized to claim that privilege for the decedent after his death.

7. Uniform Rule 28 (a) (d), Model Code Rule 216 and the proposed rule give an accused a chance to offer evidence of a confidential communication if he thinks it will be of help to him—and this notwithstanding that his spouse has the privilege and will not waive it. The Model Code (Rule 216) comment on this provision states that it has been adopted—

“to prevent the striking injustice which has been done in a few criminal cases where defendant spouse was not allowed to testify to a communication from the other spouse, although the mental effect produced by it might well have reduced the grade of the offense.”

8. Uniform Rule 28 (2) (b) is omitted because N. J. S. 2A:23-1 abolishes a cause of action for alienation of affections or for criminal conversations.

9. The theory of Uniform Rule 28 (3) is stated in the comment to the identical provision, Rule 218, Model Code, as follows:

“The theory of the rule is that a spouse ought not to be able to select for disclosure from among the communications upon a given subject those which he deems favorable, and to suppress the rest.”

Some fuller discussion is found in *1 Morgan, Basic Problems of Evidence* 97, (1954). The distinction between Uniform Rule 28 (3) (Model Code Rule 218) and Uniform Rule 37 (Model Code Rule 231) is that, first, under the latter rule the disclosure is made by the holder of the privilege *with knowledge of the privilege* while under the former rule there need be no such knowledge; second, the latter rule waives the privilege when there is a disclosure as to a part of “the specified matter” which is asked for in the question objected to, while the former rule waives the privilege when there is a disclosure as to the “same subject matter.” While this last is not a too fortunate distinction, it has been passed. In general see *Wigmore* § 2340.

10. Rule 7 abolishes these statutes: N. J. S. 2A:81-3, 2A:81-7 and 2A:100-6, second sentence. If it is thought better to be explicit on the matter, Rule 28 (4) could be added reading thus:

“A spouse may testify for or against the other in a civil or criminal action, except as provided in this Rule.”

N. J. S. 2A:100-6, second sentence, which has been taken from the Uniform Desertion and Non-Support Act, § 6, second sentence, will be found embodied in Rule 28 (2) (c), the last 10 words. As to N. J. S. 2A:81-3, 2A:81-7, see comment to Rule 23, Section 2.

11. The marital privilege should be strictly confined generally speaking. Cf. *In re Seiser*, 15 N. J. 393, 406 (1954).

## **Rule 29. Priest-Penitent Privilege; Definition; Penitential Communications.**

(1) As used in this rule, (a) "priest" means a priest, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization; (b) "penitent" means a member of a church or religious denomination or organization who has made a penitential communication to a priest thereof; (c) "penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the penitent is a member.

(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that (a) the communication was a penitential communication and (b) the witness is the penitent or the priest, and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent.

### **Drafters' Comment**

This rule permits either priest, broadly defined, or penitent to claim the privilege. While the privilege was not recognized under the common law, it has been sanctioned by statute in a majority of jurisdictions and on the ground of public policy has adequate basis for recognition. 8 Wigmore, Evidence (3rd ed.), Secs. 2394-2396. This rule follows American Law Institute Model Code of Evidence Rule 219. The privilege is intentionally limited to communications by communicants within the sanctity and under the necessity of their own disciplinary requirements. Any broader treatment would open the door to abuse and would clearly not be in the public interest.

### **Recommendation**

It is recommended that this rule not be adopted but rather that N. J. S. 2A:81-9 be adopted verbatim as a rule. The statute provides:

"A Clergyman, or other minister of any religion, shall not be allowed or compelled to disclose in any court, or to any public officer, a confession made to him in his professional character, or as a spiritual advisor, or as a spiritual advisor in the course of discipline enjoined by the rules or practice of the religious body to which he belongs or of the religion which he professes."

### Committee Annotation

1. The statute, adopted L. 1947 c. 324, has never been cited.
2. No such privilege existed at the common law of this State. *Bahrey v. Poniatishin*, 95 N. J. L. 128, 129 (E. & A. 1920); *State v. Morehous*, 97 N. J. L. 285, 295 (E. & A. 1922).
3. Uniform Rule 29 is verbatim Rule 219, Model Code.
4. *Comparison between New Jersey Statute and Uniform Rule.* Under the rule the privilege belongs to the penitent, and he can waive it by a partial disclosure to any one, or waive it in other ways, thereby compelling the priest to testify. The statute seems preferable.
5. Under the rule the penitent has a privilege to refuse to disclose his confession whereas under the statute he has no privilege at all. Although the rule is better here, such disclosures almost always would be hearsay and therefore the matter is not important.
6. Under the rule the person confessing must be a *member* of the church. What, if technically he is not a member? There seems no reason for such a restriction.
7. Under the rule the minister must be authorized or accustomed to hear confessions and must be under a duty to keep them secret. The statute which is broader seems preferable.
8. The rule applies to officers of a religious denomination, even though not a minister; and to officers of a religious *organization* even though not a church.
9. Under the rule the confession must be (1) made secretly and (2) in confidence and (3) deal with culpable conduct. This appears unimportant. Under the statute if the matter was public, someone else could testify to it, moreover, the word "confession" in N. J. S. 2A:81-9 implies a confidence.
10. The rule peculiarly provides that any person, even though not a party, has a privilege to prevent a penitent or priest from disclosing the confession. How does a person, not a party, make an objection?
11. Neither the statute nor the rule covers the advice or communication of the priest.

### Rule 30. Religious Belief.

Every person has a privilege to refuse to disclose his theological opinion or religious belief unless his adherence or non-adherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness.

#### Drafters' Comment

This privilege adopts American Law Institute Model Code of Evidence Rule 224 and is generally recognized either expressly or in practice.

#### Recommendation

It is recommended that the Uniform Rule be adopted.

#### Committee Annotation

1. No New Jersey cases have been found. See 8 *Wigmore* § 2213.

### **Rule 31. Political Vote.**

Every person has a privilege to refuse to disclose the tenor of his vote at a political election unless the judge finds that the vote was cast illegally.

#### **Drafters' Comment**

This states the generally accepted rule in support of the desirability and necessity of observing the secrecy of the ballot and adopts American Law Institute Model Code of Evidence Rule 225.

#### **Recommendation**

It is recommended that the Uniform Rule be adopted.

#### **Committee Annotation**

1. *R. S. 19:29-7* authorizes a judge in an election contest to compel a voter to disclose for whom he voted provided the judge is satisfied that the voter was not qualified to vote. This comports with the rule.

2. No New Jersey case has been found. The rule represents the law generally. 8 *Wigmore* § 2214.

### **Rule 32. Trade Secret.**

The owner of a trade secret has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose the secret and to prevent other persons from disclosing it if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

#### **Drafters' Comment**

This rule follows American Law Institute Model Code of Evidence Rule 226. The privilege is not absolute and will yield if fraud or injustice will result. The limits of the privilege are uncertain. Compare *Putney v. Du-Bois Co.*, 240 Mo. App. 1075, 226 S.W. (2d) 737 (1950) with *Spain v. U. S. Rubber Co.*, 94 N. H. 400, 54 A. (2d) 364 (1947). The term "trade secrets" is not limited to secret formulas, ingredients and processes but includes customers' lists and related matter. 8 *Wigmore*, Evidence (3rd ed.), Sec. 2212.

#### **Recommendation**

It is recommended that the Uniform Rule be adopted.

#### **Committee Annotation**

1. No New Jersey case has been found, but the Rule seems to state the law in other jurisdictions. See 8 *Wigmore* § 2212; 70 *C. J.* 743.

### **Rule 33. Secret of State.**

(1) As used in this Rule, "secret of state" means information not open or theretofore officially disclosed to the public involving the public security or concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations.

(2) A witness has a privilege to refuse to disclose a matter on the ground that it is a secret of state, and evidence of the matter is inadmissible, unless the judge finds that (a) the matter is not a secret of state, or (b) the chief officer of the department of government administering the subject matter which the secret concerns has consented that it be disclosed in the action.

#### **Drafters' Comment**

This rule adopts but broadens the scope somewhat of American Law Institute Model Code of Evidence Rule 227. Either the witness or a party may object to a question calling for disclosure. The judge may also exclude such evidence without objection. Generally see 8 Wigmore, Evidence (3rd ed.), Secs. 2378, 2378(a), 2379; Haydock, "Some Evidentiary Problems Posed by Atomic Energy Security Requirements." 61 Harv. L. Rev. 468 (1948).

#### **Recommendation**

It is recommended that the rule be adopted.

#### **Committee Annotation**

1. No New Jersey case has been found. See 8 *Wigmore* §§ 2378, 2378a, 2379.

### **Rule 34. Official Information.**

(1) As used in this Rule, "official information" means information not open or theretofore officially disclosed to the public relating to internal affairs of this State or of the United States acquired by a public official of this State or the United States in the course of his duty, or transmitted from one such official to another in the course of duty.

(2) A witness has a privilege to refuse to disclose a matter on the ground that it is official information, and evidence of the matter is inadmissible, if the judge finds that the matter is official information, and (a) disclosure is forbidden by an Act of the Congress of the United States or a statute of this State, or (b) disclosure of the information in the action will be harmful to the

interests of the government of which the witness is an officer in a governmental capacity.

#### Drafters' Comment

See comment under Rule 33. This adopts American Law Institute Model Code of Evidence Rule 228.

#### Recommendation

It is recommended that the rule be adopted.

#### Committee Annotation

1. Rule 34 (2) (a) has reference to New Jersey statutes such as these:

*R. S. 54:32A-47*, which makes records of the State Tax Division relative to the administration of Chapter 32A of the Taxation Law (having to do with taxation of foreign corporations) "confidential and privileged", and they cannot be disclosed either by the head of the division or an employee

*R. S. 54:33-8*, which makes inheritance tax returns and data gathered by the State Tax Division "privileged communications".

Further see *Wigmore* § 2378 n. 7.

2. There is a question whether this rule can be squared with *Thompson v. German Valley R. Co.*, 22 *N. J. Eq.* 111 (*Ch.* 1871), which holds that in the case of a subpoena duces tecum served on the Governor, he will be allowed to withhold any paper or part of it, if in his opinion his official duty requires him to do so. Rule 34 should not be changed on that account. There is no more sanctity to the production of a paper than to a subpoena commanding the personal appearance of the Governor, which, as the cited case says, can always be commanded.

3. The privilege here has nothing to do with the affairs of a municipality which are not of such importance as to be entitled to be privileged. *Cf. Eggers v. Kenny*, 15 *N. J.* 107, 120 (1954).

### Rule 35. Communication to Grand Jury.

A witness has a privilege to refuse to disclose a communication made to a grand jury by a complainant or witness, and evidence thereof is inadmissible, unless the judge finds (a) the matter which the communication concerned was not within the function of the grand jury to investigate, or (b) the grand jury has finished its investigation, if any, of the matter, and its finding, if any, has lawfully been made public by filing it in court or otherwise, or (c) disclosure should be made in the interests of justice.

#### Drafters' Comment

See 8 *Wigmore*, Evidence (3rd ed.), Sec. 2362. This rule adopts American Law Institute Model Code of Evidence Rule 229. Here, as in Rule 41, the interests of the public in preventing disclosure until after the grand jury

has completed its investigation and made public its finding, may be protected by the witness, a party or the judge.

#### Recommendation

It is recommended that the Rule be adopted.

#### Committee Annotation

1. The law in other jurisdictions justifies this rule. 8 *Wigmore* §§ 2362, 2363.

2. It has been said broadly in this State that a witness may testify as to what was said by and to him before the grand jury. *State v. Fish*, 90 *N. J. L.* 17, 19 (*Sup. Ct.* 1917), reversed on other grounds 91 *N. J. L.* 228 (*E. & A.* 1917); *State v. Borg*, 8 *N. J. Misc.* 349, 350, affirmed at p. 705 (*Sup. Ct.* 1930). Rule 35 seems preferable.

3. *State v. Bovino*, 89 *N. J. L.* 586 (*E. & A.* 1916) holds it proper to impeach a witness by self-contradictory testimony given before the grand jury. *State v. Silverman*, 100 *N. J. L.* 249 (*Sup. Ct.* 1924) held it was proper to ask a witness what he testified to before the grand jury. The principle behind these decisions does not conflict with the Rule.

4. The rule does not deal with the immunity of the members of the grand jury, as to which see *State v. Borg*, 8 *N. J. Misc.* 349, affirmed at p. 705 (*Sup. Ct.* 1930); *State v. Silverman*, 100 *N. J. L.* 249 (*Sup. Ct.* 1924); *State v. McFeeley*, 134 *N. J. L.* 463 (*Sup. Ct.* 1946); *State v. Donovan*, 129 *N. J. L.* 478 (*Sup. Ct.* 1943).

### Rule 36. Identity of Informer.

A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

#### Drafters' Comment

"This privilege is well established and its soundness cannot be questioned." 8 *Wigmore*, *Evidence* (3rd ed.), Sec. 2374, p. 752. The provisions of (a) and (b) are necessary limitations on the privilege inherent in its purpose and policy. This rule adopts American Law Institute Model Code of Evidence Rule 230.

#### Recommendation

It is recommended that the Rule be adopted.

### Committee Annotation

1. There seem to be no New Jersey cases, but the law in other states supports the rule. 8 *Wigmore* § 2374.

### Rule 37. Waiver of Privilege by Contract or Previous Disclosure.

A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.

#### Drafters' Comment

*Clause (a).* This clause recognizes the right of a person to contract with another to waive his privilege even though the other person is not a party to the action. "The theory underlying the clause is that a personal privilege to suppress the truth is not the subject of piecemeal waiver by bargain or otherwise." Comment to American Law Institute Model Code of Evidence Rule 231. See 8 *Wigmore*, Evidence (3rd ed.), Secs. 2275, 2275(a).

*Clause (b).* The most common application of this clause is compulsory disclosure, on cross-examination, of incriminating material part of which was disclosed in the direct examination. The clause, however, goes much farther. As to the privilege against self-incrimination it goes beyond the majority of the decisions. Its principle is recognized generally as to privileged communications, but there is a conflict of opinion in application. American Law Institute Model Code of Evidence, p. 170. See McKelvey, Evidence (5th ed. 1944), Sec. 295.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

1. The person who holds the privilege alone may waive it. *In re Selser*, 15 N. J. 393, 404 (1954), speaking of the attorney-client privilege. There are a number of cases in this State stating that the privilege against self-incrimination may be waived by the person entitled to it. *State v. Auld*, 2 N. J. 426, 436 (1949).

2. The words "in the same trial or in an earlier cause" could be inserted in part (b) in order to make clear the intention of the rule. In this respect the rule is contrary to the decided weight of authority in other jurisdictions. See 1 *Morgan*, *Basic Problems of Evidence* 152 (1954) stating that it is settled that a person who has testified to an incriminating matter in an earlier proceeding or in an earlier stage of the same proceeding may nevertheless claim his privilege at a later trial; see 8 *Wigmore* 450 *et seq.* stating likewise that the waiver is limited to the particular proceeding in

which the testimony is involved. The rule modifies this in only a limited respect, and it seems to be justified; it is limited to a "specified matter" when part of that very matter has been previously disclosed.

It has always been recognized and does not conflict with the settled rule above stated, that the testimony itself voluntarily submitted at a prior hearing can be used at a subsequent hearing. See in accord *State v. Rommel*, 3 *N. J. Misc.* 204, 209 (*Sup. Ct.* 1925), affirmed on opinion 102 *N. J. L.* 226 (*E. & A.* 1925); *State v. Gregory*, 93 *N. J. L.* 205, 209 (*E. & A.* 1919). But this is different from the rule proposed, namely, that a waiver as to fact X becomes a waiver as to fact Y when X is part of Y.

3. Some cases talk of waiver when in fact what is meant is that there is no privilege. See *State v. Young*, 97 *N. J. L.* 501 (*E. & A.* 1922) referring to the marital privilege when in fact there was no such privilege as the communication was not confidential, there being a third party present.

4. The distinction between proposed Rule 25 (f) and Rule 37 is obvious. Rule 37 constitutes a waiver as to a "specified matter" when a part of the matter has been disclosed; under proposed Rule 25 (f) a defendant in a criminal action who testifies as to any matter waives the privilege as to any other matter relevant to any issue in the case.

### **Rule 38. Admissibility of Disclosure Wrongfully Compelled.**

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it.

#### **Drafters' Comment**

This adopts American Law Institute Model Code of Evidence Rule 232. It states the generally accepted view. It safeguards the privileges against disclosure by their very violation and protects against improper compulsory disclosure. See 8 Wigmore, *Evidence* (3rd ed.), Sec. 2270.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

1. This rule provides that evidence of a statement or other disclosure in a previous case is inadmissible against a declarant who is a party to the present case, where there was error in compelling the admission in the prior case.

2. As in several other rules, the word "judge" could best be changed to "court."

### **Rule 39. Reference to Exercise of Privileges.**

Subject to Paragraph (4), Rule 23, if a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

#### **Drafters' Comment**

The American Law Institute Model Code of Evidence Rule 233 which allows the judge and counsel to comment on the exercise of a privilege is not adopted except as provided in Rule 23, paragraph (4), and thus is contrary to American Law Institute Model Code of Evidence Rules 201(3) and 233. While there are substantial arguments in favor of allowing comment generally (8 Wigmore, Evidence (3rd ed.), Secs. 2272, 2272(a)), a majority of the jurisdictions do not allow it. If the judge cannot comment on the evidence introduced, *a fortiori*, he cannot comment on the failure to introduce evidence when such failure is in accord with a recognized privilege not to introduce evidence. A recognized privilege not to introduce evidence should not be impaired by giving the judge any right to comment on the exercise of the privilege to the prejudice of the one exercising the privilege. Comment by counsel is "argument" and in a different category than comment by the judge.

#### **Recommendation**

The following rule, which is a combination of Model Code Rules 201 (3) and 233, is recommended.

"If a privilege to refuse to disclose a matter, or not to have it disclosed by another, is claimed and allowed, or if an accused in a criminal action does not testify, the court and counsel may comment thereon, and the trier of fact may draw all reasonable inferences therefrom."

#### **Committee Annotation**

1. Three possible courses could be taken here, either to adopt the rule above stated, or to leave the matter to the common law of New Jersey, or to adopt the Uniform Rule.

2. Dealing with the last alternative first, it is to be observed that the draftsmen of the Uniform Rules, in their endeavor to put across a practical code of rules, had to recognize, as Morgan says (*1 Morgan, Basic Problems of Evidence* 158 (1954)) :

"In most jurisdictions by statute and in a few others by judicial decisions, no inference may be drawn against a person by reason of his claim of the privilege."

In most jurisdictions, then, there is a practical legislative obstacle blocking any attempt to alter this rule. The Uniform Rules under Rule 23 (4), however do go so far as to permit the Prosecutor (as distinguished from the court) to comment on the failure of an accused to testify. This is an unsatisfactory compromise of principle. If it is wrong to undercut the privilege by commenting on the failure to testify, it is wrong to have the Prosecutor make the comment.

The draftsmen of the Uniform Rules in their comment seem to indicate that the reason they did not provide for comment by the court in Rule 23 (4) was because "these rules do not cover comment by the judge." However, contrary to that last assertion, Rule 39 does cover comment by the judge where an accused or a witness invokes the self-incrimination privilege while he is on the stand, as distinguished from comment for failure to take the stand, the matter dealt with in Rule 23 (4).

New Jersey is not faced with the practical considerations that troubled the draftsmen of the Uniform Rule. Hence it is recommended that the Uniform Rule be not adopted.

3. The next alternative is to leave the matter to the common law of New Jersey. We have a recent case of the Supreme Court on the point. *State v. Costa*, 11 N. J. 239, 253 (1953). That case, however, lays down a rule providing that "comment is *ordinarily* improper." If a rule is adopted on the matter some litigation may be forestalled. As Chief Justice Case has said in *State v. Anderson*, 137 N. J. L. 6 (*Sup. Ct.* 1948), dealing with cases on this point:

"Our appellate courts have not always been entirely clear in their expressions on the subject."

There have been many decisions on the point in this state (see *State v. Costa*) and great masses of them in other states. As Morgan comments (*supra* at p. 158) four columns are required to list the decisions from 1930 to 1951 supplementing the note in 68 A. L. R. 1102, 1108.

4. It is urged then that the recommended rule be adopted.

The New Jersey rule, as stated in the *Costa* case, is that ordinarily comment is

"improper unless there is evidence of inculpatory acts or conduct of the accused which, if true, must be within his personal knowledge and in some degree impute his guilt or tend to prove some element of the offense, and which facts he can disprove by his own oath as a witness if the facts be not true."

Thus it was held in *State v. Edelman*, 19 N. J. Super. 350, 354 (*App. Div.* 1952), that where the evidence pointing to guilt was entirely circumstantial, there is no right to make any comment. The New Jersey limitations on the rule proposed by the Model Code Rule are not persuasive.

The whole argument in favor of no comment is that comment undercuts the privilege—the prosecutor should not rely on extracting admissions from the defendant but should seek the truth elsewhere. It can be doubted whether the mere right to make a comment on the failure to testify induces

the prosecutor to refrain from seeking the truth elsewhere. Moreover, when a judge is commenting on the proofs offered, he should be able to call to the jury's attention the inference to be drawn from the defendant's failure to take the stand, whether the case is circumstantial or testimonial.

It must be borne in mind in considering the Uniform Rule that the draftsmen of that rule decided not to deal with the matter of comment by the court on the evidence (see p. 162 of the Uniform Rules, referring doubtless to Model Code Rule 8) because a majority of the jurisdictions do not allow it. As these draftsmen say in the note to Rule 39:

"If the judge cannot comment on the evidence introduced, *a fortiori* he cannot comment on the failure to introduce evidence when such failure is in accord with a recognized privilege."

5. The Model Code separated Rules 201 (3) and 233 making a logical distinction between an accused's privilege not to testify and a privilege not to testify as to incriminating matters. Rule 201 (3) deals with the situation where an accused is asked to testify as to non-incriminating matters. This is, however, not a familiar distinction to the practicing lawyer, and hence it is suggested that these two rules be combined as above stated.

6. It is important to distinguish between comment by reason of a party's invocation of the privilege and that by a witness other than a party. In the latter case there can be no weighty objection on the ground that the comment will lessen the value of the privilege. No rights or duties of the witness are to be adjudicated, and the comment in the action can do him no harm. Further see comment to Model Code Rule 233 and *1 Morgan, supra*, p. 159.

7. Finally Rule 21 protects the accused who takes the stand from the damaging inquiry by the state as to prior convictions of crime-limited, of course, in theory to his credibility. Thus a defendant is encouraged to take the stand and fully participate in the judicial inquiry as to his guilt or innocence free of harassment from one of a prosecutor's most effective and easily abused impeaching devices.

Present New Jersey practice permitting impeachment by any prior conviction and, on the other hand, allowing in many cases comment by prosecutor and judge on a defendant's failure to testify is not unlikely to present a real dilemma to an accused. See Tyree, 5 *Rutgers L. Rev.* 251 (1950) discussing *State v. Tansimore*, 3 *N. J.* 516 (1949). Rule 21 should end this dilemma, and the accused who need not fear such impeachment would seem to have scant cause for complaint as to comment on his failure to take the stand.

## Rule 40. Effect of Error in Overruling Claim of Privilege.

A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.

### Drafters' Comment

This rule adopts American Law Institute Model Code of Evidence Rule 234. See for example, 8 Wigmore, Evidence (3rd ed.), Secs. 2196, 2241, 2321.

### Recommendation

It is recommended that this rule be adopted.

### Committee Annotation

1. If the court disallows the claim of privilege and in effect compels self-incriminating evidence to be given by a witness, the party has no right to claim that error has been committed; he cannot claim that he is hurt by the truth. However if the court wrongfully sustains a claim of privilege, excluding relevant evidence, then the party injured thereby may claim that error has been committed. If the wrongful exclusion of relevant evidence deprives a party of the right of cross-examination, he is entitled to have stricken the pertinent matter given by the witness on direct examination. *1 Morgan, Basic Problems of Evidence* 152 (1954). *Wigmore* § 2270.

2. The proposed rule states the New Jersey law. *Fries v. Brugler*, 12 *N. J. L.* 79, 81 (*Sup. Ct.* 1830); *State v. Mohr*, 99 *N. J. L.* 124, 129 (*E. & A.* 1923). Interrogatories to a witness A in a depositions proceeding cannot be objected to by a party B. *Phelps v. Phelps*, 133 *N. J. Eq.* 392, 396 (*E. & A.* 1943).

3. The above authorities have reference to the privilege against self-incrimination; but the same is true with respect to the attorney-client privilege. See *1 Morgan, supra*, 105, 106; *Wigmore* § 2321. However Chafee disagrees. See 35 *Harv. L. Rev.* 685-687 (1922).

Wigmore's view is followed in *State v. Snook*, 93 *N. J. L.* 29, 30 (*Sup. Ct.* 1919)—a decision affirmed by an equally divided Court, 94 *N. J. L.* 271 (*E. & A.* 1920), six judges disagreeing with the Supreme Court on the point.

Suppose L is the lawyer, C the client and D the defendant. Particularly in connection with the lawyer-client privilege, it seems that there is no such sanctity here as to warrant D to secure a reversal because the privileged communication was erroneously admitted; there is no good reason why D (as distinguished from C) should be given a privilege to suppress the truth.

## VI. EXTRINSIC POLICIES AFFECTING ADMISSIBILITY

### Rule 41. Evidence to Test a Verdict or Indictment.

Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

#### Drafters' Comment

This rule adopts what is almost universally the law, although it is said that there may be a trend toward the result that we may no longer hear that jurors may not "impeach their verdict." That result has only been vaguely hinted at and is a long way from being a reality, desirable as it may be in the thinking of some competent minds. The rule does not impose limitations on testimony as to the existence of conditions or the occurrence of events bearing on the verdict, although many states do not permit testimony by jurors as to matters occurring in the jury room. The limitation imposed by this extends only to that testimony which concerns the mental or emotional effects on the jurors of such conditions or occurrences. Perhaps some verdicts would be saved if jurors were allowed to testify to the effect on them of the supposed misconduct. On the other hand verdicts would be lost in like manner and considerations of public policy make it continue to seem unwise to explore jurors' minds except as revealed by the verdict.

#### Recommendation

It is recommended that the rule be adopted.

#### Committee Annotation

The rule of exclusion here is a very narrow one. It does not prevent a juror from testifying as to the existence of conditions or the occurrence of events bearing upon the verdict. It merely prevents testimony as to the effect upon the juror of such conditions or occurrences. The New Jersey view is in accord. Affidavits concerning the mental operations of jurors are inadmissible and were rejected in *Bragg v. King*, 104 N. J. L. 4 (*Sup. Ct.* 1928) when offered to show that the verdict was one caused by misunderstanding the charge of the judge, and in *Lindauer v. Teeter*, 41 N. J. L. 255 (*Sup. Ct.* 1879) to prove the jurors did not understand the effect of their verdict. The Court has frequently called the rule one which prevents a juror from impeaching his own verdict. This label is an unfortunate and incorrect one, for the rule at times prevents a juror from saving his verdict. Thus in *Palestroni v. Jacobs*, 10 N. J. Super. 266 (*App. Div.* 1950), the trial court incorrectly supplied the jury with a dictionary at their request. At ¶ 272, the Court stated:

"It is no answer the jury may think they were not influenced by the definition. The law holds it impossible for them to say what effect it had upon their minds . . . The test is capacity of the irregular matter to influence, not whether influence in fact resulted."

*Accord: In re Collins*, 18 *N. J. Misc.* 492 (*Cir. Ct.* 1940); *cf. State v. Auld*, 2 *N. J.* 426, 432 (1949). Testimony of this character is almost universally excluded. The rule is a sound one which preserves the privacy of the jury room and prevents tampering with jurors to destroy their verdict. 53 *Am. Jur.* § 1105. As stated by Professor Wigmore:

" . . . the verdict as uttered is the sole embodiment of the jury's act, and must stand as such without regard to the motives or beliefs which have led up to their act." 8 *Wigmore* § 2349.

## **Rule 42. Testimony by the Judge.**

Against the objection of a party, the judge presiding at the trial may not testify in that trial as a witness.

### **Drafters' Comment**

This rule does not prevent a judge from testifying as a witness when his duty calls upon him to disqualify himself as presiding judge at the trial. It simply recognizes the impropriety and the bad public policy of a judge testifying as a witness even as to formal matters, in the trial over which he is presiding. Formal and undisputed matters can ordinarily be proved in better taste and just as easily by witnesses other than the judge. Where the judge is needed on more material matters his role as a witness would be known sufficiently in advance to provide for a judge pro tem or transfer to another court.

### **Recommendation**

It is recommended that the rule be adopted.

### **Committee Annotation**

1. New Jersey law is in complete accord. Thus, in *State v. DeMaio*, 69 *N. J. L.* 590 (*Sup. Ct.* 1903), *affirmed* 70 *N. J. L.* 220 (*E. & A.* 1904), at page 592, the Court stated: "A party cannot call a judge as a witness in a cause where the court is held by a single judge and thus destroy the court." *Accord: Crawford v. Hendee*, 95 *N. J. L.* 372 (*Sup. Ct.* 1921). However, the fact that a witness may be a judge does not disqualify him from testifying in a cause over which he is not presiding and so he is both competent and compellable to so testify. *State v. Donovan*, 129 *N. J. L.* 478 (*Sup. Ct.* 1943). *Cf.* 36 *A. B. A. J.* 630 (1950); 6 *Wigmore, Evidence* § 1909.

2. The rule is an embodiment of the common law rule prevalent in most jurisdictions. 157 *A. L. R.* 315 (1945). The primary reason for the rule is that if a presiding judge were to testify in a cause, the jury would be prejudiced in favor of the party for whom he testified. Thus the modern rule remains that a judge is not a competent witness in a case over which he is presiding.

## **Rule 43. Testimony by a Juror.**

A member of a jury sworn and empanelled in the trial of an action, may not testify in that trial as a witness.

### **Drafters' Comment**

Here a clear choice of policy has been made, which is at substantial variance from the corresponding Model Code Rule.

### **Recommendation**

It is recommended the rule be adopted.

### **Committee Annotation**

1. This rule is directly contrary to the old rule that existed in New Jersey prior to the Revision of 1952 and what it may be today. *R. S. 2:27-233* provided that "a juror having knowledge of a point in issue shall, during the trial, disclose his knowledge in open court, if called as a witness." This statute was not enacted in the 1952 Revision of Title 2.

In *State v. Spencer*, 21 *N. J. L.* 196 (*Hudson Oyer and Terminer* 1846) at page 198, the court stated, ". . . a bystander who witnesses a homicide, or any other breach of the peace, is a perfectly competent juror, as much so as a witness to a bond or other contract between private parties would be on a trial concerning such bond or contract. It is a common occurrence, both in civil and criminal causes, to see jurors on the panel called as witnesses to prove some material facts in their knowledge relating to the matter in question."

A person is not disqualified as a juror because he has been summoned as a witness and a challenge for cause will not lie. *State v. Langhans*, 94 *N. J. L.* 17 (*Sup. Ct.* 1919), *reversed* on other grounds 95 *N. J. L.* 213 (*E. & A.* 1920). However, to avail oneself of a fact known to a juror, it is essential that the juror be sworn and examined as any other witness. *DeGray v. N. Y. & N. J. Telephone Co.*, 68 *N. J. L.* 454 (*Sup. Ct.* 1902).

2. At the common law, a person otherwise qualified as a witness was not rendered incompetent because he was a member of the jury in that case. If he is called as a witness and gives crucial evidence, whether he may remain a juror is the subject of conflict, but it appears that the majority view makes the ruling of the trial judge final except for an abuse of discretion. 58 *Am. Jur.* § 151. Professor Wigmore (6 *Wigmore* § 1910) feels that a juror should be permitted to testify. He is of the opinion that the names of all important witnesses would be known in advance of trial and they might be excused on *voir dire* so that as a rule the only time a juror would be called would be to testify as to formal, undisputed matters. Certainly the position of Wigmore is sound. *Quere* however, is not an absolute rule of exclusion preferable as a safeguard? There may arise the situation where a juror has an "awakening" for the first time when he hears the evidence presented. Thus he may suddenly remember that he was there when the accident, etc. happened. To permit him to testify would

be to jeopardize the rights of the litigant against whom he testifies. For this reason the Act seems sound as far as it goes. However, to *permanently* exclude such testimony also seems undesirable. *Quaere*, Should the rule rather provide that there should be an automatic mistrial? Perhaps under the rule if the trial court felt that the testimony of the juror was sufficiently important to the determination of the issues he could declare a mistrial.

#### **Rule 44. Testimony of Jurors Not Limited Except by these Rules.**

These rules shall not be construed to (a) exempt a juror from testifying as a witness, if the law of the state permits, to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict or the indictment, except as expressly limited by Rule 41; (b) exempt a grand juror from testifying to testimony or statements of a person appearing before the grand jury, where such testimony or statements are the subject of lawful inquiry in the action in which the juror is called to testify.

##### **Drafters' Comment**

On any subject which is a proper subject for judicial inquiry a juror, either petit or grand, may be a witness to give relevant testimony under Rule 7. Rules 41 and 43 impose some limitations as does also Rule 35 (communications to grand juries). Rule 44 is included here out of an abundance of caution to make it clear that we do not intend by implication to impose other limitations, except as they are imposed by other law of the state.

##### **Recommendation**

It is recommended that the rule be adopted.

##### **Committee Annotation**

1. The drafters' comment to this rule must be read to appreciate its significance:

"Rule 44 is included here out of an abundance of caution to make it clear that we do not intend by implication to impose other limitations, except as they are imposed by other law of the state."

Rule 44 is thus limited by four things:

- a. Rule 41 prevents inquiry into the mental processes of the juror in an attack on a verdict or indictment.
- b. Rule 43 prevents a petit juror in a case from being a witness in that case.
- c. Evidence of communications made to the grand jury are inadmissible unless the prerequisites of Rule 35 are met.
- d. Any exclusionary principle of the law of the state. It is upon the fourth limitation of Rule 44 that we shall now turn.

In New Jersey, at the present time, a grand juror takes the following oath of secrecy pursuant to R. S. 2A:73-3:

"You as members of this grand inquest to sit in behalf of the State of New Jersey . . . shall diligently inquire and due presentment make of all such matters and things as shall be given to you in charge, or in any way come to your knowledge, touching the present service, the counsel of the State and your own counsel you shall keep secret."

*Cf.* 127 A. L. R. 265, 272.

In the early case of *Imlay v. Rogers*, 7 N. J. L. 347 (*Sup. Ct.* 1800), a grand juror was not permitted to testify that a witness in a subsequent trial had made an inconsistent statement before the grand jury. In *State v. Bovino*, 89 N. J. L. 586 (*E. & A.* 1916), the Court stated that *Imlay, supra*, was expressly overruled and set forth the principle that a witness may be impeached by prior contradictory testimony given by him before the grand jury. In *Bovino*, however, the clerk of the grand jury was called and testified concerning the remarks made by the witness. See also *State v. Silverman*, 100 N. J. L. 249 (*Sup. Ct.* 1924); *State v. Cerlignone*, 133 N. J. L. 424 (*Sup. Ct.* 1945); *State v. Goldman*, 14 N. J. Misc. 463 (*Sup. Ct.* 1936). In none of the aforementioned cases, however, was the court confronted with the impeaching process being done by a grand juror. *Quaere*, Would such an impeachment be a valid one?

In *State v. Borg*, 8 N. J. Misc. 349 (*Sup. Ct.* 1930), a grand juror was held to be incompetent to testify as to whether he protested against an indictment because there was no evidence to support it. The court held that even if the grand juror desired to set forth the statements made by him in the jury room, he would not be allowed to do so. The case expressly rejected the opinion of Wigmore that the grand juror has a privilege which exists in his behalf as to all statements made by him in the jury room which he may, if he so desires, waive. In *State v. Donovan*, 129 N. J. L. 478 (*Sup. Ct.* 1943), at page 482, the court stated, "It has long been settled in this State that the illegality or incompetency of evidence taken before a grand jury does not afford the subject matter to sustain a motion to quash an indictment. . . ." Grand jurors are thus not competent to testify as to the details of the evidence produced before them in an attack on the indictment, but they may be asked whether *any* evidence was produced in support of the accusation and whether a quorum voted for the indictment. *State v. Donovan, supra*, and similarly, it has been held that it is permissible to interrogate a grand juror as to the activities of an alleged "business committee" of that group. *State v. McFeely*, 134 N. J. L. 463 (*Sup. Ct.* 1946).

It is well settled that a petit juror will not be permitted to testify as to his misconduct or the misconduct of the other jurors while in the jury room. *Brewster v. Thompson*, 1 N. J. L. 36, 32 (*Sup. St.* 1790), [refused evidence that jurors cast lots for verdict]; *Den v. M'Allister*, 7 N. J. L. 46 (*Sup. Ct.* 1823) and *State v. Vansciver*, 7 N. J. L. J. 268, (*Burlington Quarter Sessions* 1884) [refused evidence that other juror made improper statement in the jury room].

However, affidavits of petit jurors in their own exculpation when charged with some sort of misconduct are admissible. *Kennedy v. Kennedy*, 18

*N. J. L.* 450 (*Sup. Ct.* 1842); *Douglas v. Kabalan*, 22 *N. J. Misc.* 200 (*Sup. Ct.* 1944). Similarly, a juror is competent to testify as to improper attempts to influence him outside the jury room. *Den, ex dem. Chews v. Driver*, 1 *N. J. L.* 193 (*Sup. Ct.* 1793); and to the fact that he went to the scene of the accident to personally examine the facts, *Capozzi v. Butterwei*, 2 *N. J. Super.* 593 (*Law Div.* 1949); and to the fact that through a mistake, the foreman misstated in open court the verdict upon which the jury had agreed. *Peters v. Fogarty*, 55 *N. J. L.* 386 (*Sup. Ct.* 1893).

2. The Rule here specifically states that there is no change intended in the law of the State. The Rule is inserted to make sure that prior rules are not construed to otherwise exempt jurors from testifying. For this reason the Rule may not be entirely satisfactory. Rule 41 exempts a juror from testifying as to his mental operations. The cases in our and other jurisdictions permit a juror to testify regarding objective conduct of a juror *outside* the jury room. Between the two extremes lies the situation where a juror desires to testify, in an attack upon the verdict or indictment, to misconduct; that is, objective events occurring in the jury room during the deliberations. Such testimony is excluded in a majority of jurisdictions. See 8 *Wigmore* § 2354. *Quacre*, Is there any policy in the law which should forbid a juror from testifying that he and his associates cast lots for the verdict?

#### **Rule 45. Discretion of Judge to Exclude Admissible Evidence.**

Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

##### **Drafters' Comment**

This applies to frequently arising situations where the trial may get out of hand by the injection of collateral issues having only slight probative value and which would tend to confuse the jury, or have illegitimate emotional appeal. Obviously the judge should have some discretion to prevent the trial from going off on tangents of relative unimportance. Likewise some protection is needed from unfair surprise with respect to such matters. This represents the sort of thing which the trial judge does every day in actual practice and which is sanctioned here, in the assurance that the results of rare and harmful abuse of discretion will be readily corrected on appeal. It is a rule of necessity. Its sanction cannot be escaped if we are to have orderly and efficient trial procedure.

##### **Recommendation**

It is recommended the rule be adopted.

### Committee Annotation

1. The New Jersey courts have frequently reiterated the proposition that the trial court is vested with discretion in ruling upon the remoteness of certain evidence and in the absence of an abuse of this discretion there will be no reversal. See, *e. g.* *Worcester Loom Co. v. Heald*, 78 N. J. L. 172 (Sup. Ct. 1909); *Millman v. U. S. Mortgage & Title Guaranty Co.*, 121 N. J. L. 28 (Sup. Ct. 1938); *Iverson v. Prudential Insurance Co.*, 126 N. J. L. 280 (E. & A. 1940); *Bosze v. Metropolitan Life Insurance Co.*, 1 N. J. 5 (1948); *Orcutt v. Hoyt*, 6 N. J. 46 (1950). When, therefore, relevant evidence is attacked as being too remote and as prejudicial, great weight is accorded to the decision of the trial court. The rule, if adopted, would not change the law of New Jersey in this respect.

2. This rule may make a change in the evidence law of this jurisdiction in one aspect at least, inasmuch as it qualifies Rule 55. Thus, the judge could, in his discretion, exclude proof of other crimes, *i. e.*, prevent any collateral inquiry even though such inquiry might tend logically to prove a fact in issue, if he were to find that the admission of such evidence would cause delay, surprise, prejudice or confusion. Similarly, if he were to feel that the danger of the trial of collateral issues was small, he would be free to admit logically relevant evidence in his discretion.

The Rule accepts the opinion of Wigmore [see 2 *Wigmore* § 444] that "the true solution of the conflicting considerations, then, is that evidence of the sort, when relevant, should be admitted, unless in the discretion of the trial court, it seems to involve a serious inconvenience by way of unfair surprise or confusion of issues." The rule is a wise one and should be enacted. The mere fact that a collateral issue may be raised is not of itself sufficient reason to exclude relevant evidence. True collateral inquiry at times will have the effect of prejudice and delay. However, pursuant to this Rule, it will be in the power of the trial judge to exclude such evidence. At the same time, we will not be forced by a rigid rule to exclude logically relevant evidence which may not be prejudicial and which may tend toward a correct determination of the cause.

For an excellent discussion of this Rule, see *Benis v. Temple*, 162 Mass. 342, 38 N. E. 970 (1894).

3. The Rule begins, "Except as in these rules otherwise provided." *Quaere*, Is Rule 47 the only time the Rules otherwise provide? If Rule 47 is the only time that the Rules do otherwise provide, perhaps this should be expressly set forth.

### Rule 46. Character—Manner of Proof.

When a person's character or a trait of his character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, however, to the limitations of Rules 47 and 48.

### Drafters' Comment

This rule deals with the rather rare situations where character is an ultimate issue (*i.e.*, a fact necessary to liability, defense or damages) as contrasted with the use of character merely as circumstantial evidence of another fact. Instances of the former are the issue of character for chastity in seduction cases, and character for competence in wrongful discharge actions or in suits charging the master with employing an unfit fellow-servant. These are in contrast with the cases wherein character, *e.g.*, for negligence, is offered to show that the person probably acted negligently on a particular occasion. In the former situations where character is in issue it is necessary to prove it, and the danger of prejudice which comes from showing character by particular acts is outweighed by the necessity of ascertaining the fact of character. The suggested Rule is similar to the Model Code Rule 305, and (as to proof of particular acts) is supported by 1 Wigmore, Evidence, secs. 202-213, which gives a wide array of illustrations.

### Recommendation

It is recommended that the rule be adopted.

### Committee Annotation

1. This rule contemplates the situation where because of a principle of substantive law the character of a person is in issue. Evidence regarding such character is offered not merely as evidential of the doing of an alleged act, but to prove a fact necessary to establishing liability, a defense or damage. In such a situation, the Act permits specific acts of the party in question to establish his character. The time when character is an ultimate issue is very rare in New Jersey because of the substantive law of this State.

In a prosecution for seduction under R. S. 2A:142-1 and 2, the chastity of the seduced woman is not in issue. The words are "of good repute for chastity". Thus, in *Foley v. State*, 59 N. J. L. 1 (*Sup. Ct.* 1896), the defendant charged with seduction offered to show that on two prior occasions the prosecutrix had sexual intercourse with different men. The court stated, at page 2:

"By force of the statute that issue was whether the prosecutrix was 'of good repute for chastity'; the offer was to show the immaterial fact that she was not a chaste woman. The crimes consist, under the conditions stated, in the seduction of the woman, whether she be chaste or unchaste, provided she is chaste in the public estimation."

In a prosecution for rape or carnal abuse, the character of the complaining witness is not in issue. R. S. 2A:138-1. Where the issue of consent is disputed, evidence of the unchaste character of the woman is admissible. *O'Blenis v. State*, 47 N. J. L. 279 (*Sup. Ct.* 1886). However, here the evidence is to establish the probability of the doing of an act and is not an ultimate issue in the case. Similarly, in slander or libel cases, evidence may be offered of the bad character of the plaintiff to mitigate damages, but only general reputation is in issue for the tort is one which injures the reputation and, accordingly, specific instances to evidence character are not admissible. *Pier v. Speer*, 73 N. J. L. 633 (*E. & A.* 1905) and *Fodor v. Fuchs*, 79 N. J. L. 529 (*E. & A.* 1910).

2. There are, however, at least certain instances where the Act would be applicable and where it seems the Act makes no change in the evidence law of this State. For instance it is a crime by virtue of *R. S. 2A:133-2* to permit a building owned or controlled by you to be used for the purpose of prostitution knowing that it is used as such. The State, of course, must establish the inmates of the house are using it for the purpose of prostitution. The character of the inmates becomes an ultimate issue in the cause. Evidence of the conduct of frequenters of the place tends to establish the character of the people and of the place where they gather. Accordingly, specific instances of conduct will be admitted. *State v. Koettgen*, 88 *N. J. L.* 51 (*Sup. Ct.* 1915); *cf. State v. Littman*, 88 *N. J. L.* 392 (*E. & A.* 1915).

*Continental Match Co. v. Swett*, 61 *N. J. L.* 457 (*Sup. Ct.* 1898) illustrates another situation where specific instances of conduct has been admitted to evidence "character" in New Jersey. The case involved a suit for breach of a contract of employment. The defense was the incompetency of the plaintiff. The plaintiff offered proof that in another factory his work in the same capacity was satisfactory. The court stated at 458:

"The competency or incompetency of the plaintiff was the issue and the natural proof was the character of his work under proper conditions. Suppose the defendant had broken the contract as soon as made, or learning of the plaintiff's incompetency, would it not have been lawful, in a suit for the breach, for the defendant to show such incompetency by proof of the result of the plaintiff's work for other employees? No one could deny that such proof would be competent or that it could be met by counter-proof of the same character."

The discussion in 1 *Wigmore* §§ 202-213 covers the entire field here.

3. Compare *Smith v. Prudential*, 83 *N. J. L.* 719 (*E. & A.* 1912) where in an action upon an insurance policy reputation for intemperance was held inadmissible to prove misrepresentation as to temperance.

## **Rule 47. Character Trait as Proof of Conduct.**

Subject to Rule 48, when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved in the same manner as provided by Rule 46, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove his guilt or innocence of the offense charged, (i) may not be excluded by the judge under Rule 45 if offered by the accused to prove his innocence, and (ii) if offered by the prosecution to prove his guilt, may be admitted only after the accused has introduced evidence of his good character.

### Drafters' Comment

As contrasted to Rule 46 (character an issue) this rule definitely requires rejection of evidence of specific behavior to prove a character trait except evidence of conviction of a crime. As applied to criminal cases the rule accepts the common law in that it prevents the prosecution from producing evidence of the accused's bad character unless he has first introduced evidence of his good character. The admission or rejection of character evidence depends primarily on the court's conception of its relevancy. Like the Model Code Rules, this rule permits the prosecution after the defendant has produced evidence of his good character, to prove prior convictions as evidence of criminal propensity and likelihood of guilt.

### Recommendation

It is recommended that the rule be adopted.

### Committee Annotation

1. Rule 47 provides that when a person's character is relevant it may be proved by testimony in the form of opinion, evidence of reputation, and evidence of conviction of crime. In a criminal action, character evidence may not be excluded by the judge, but it is the right of the defendant only to initiate the inquiry.

There are two fundamental problems which have arisen with evidence of this nature: (1) When is it "relevant"? and (2) How is it to be evidenced?

2. As a general rule, character evidence is not admissible in a civil action. *Rittenhoffer v. Cutter*, 83 N. J. L. 613 (E. & A. 1912). However, there are situations where it has been held relevant to an issue being litigated. Thus evidence of the general bad character of the plaintiff before and after an alleged slander was held admissible on the theory that a plaintiff is entitled to lower damages for defamation where his previous reputation was bad, *Sayre v. Sayre*, 25 N. J. L. 235 (Sup. Ct. 1855); and in an action for malicious prosecution where injury to character was alleged evidence by the defense tending to show the general bad reputation of the plaintiff was admissible. *O'Brien v. Frasier*, 47 N. J. L. 349 (Sup. Ct. 1885).

In criminal cases, "It is the right of a person charged with crime to have all the relevant testimony including that relating to his good character or reputation, considered by the jury in every case, and if, on such consideration there exists reasonable doubt of his guilt, even though that doubt be engendered merely by his previous good reputation he is entitled to an acquittal." *Baker v. State*, 53 N. J. L. 45, 47 (Sup. Ct. 1890). Furthermore, in an indictment for rape, evidence of the bad reputation for chastity of the prosecutrix is relevant on the issue of consent. *O'Brien v. State*, 47 N. J. L. 279 (Sup. Ct. 1885).

3. Assuming "relevancy", a more difficult problem arises in a consideration of the problem of how testimony regarding character should be evidenced. The character of the accused in a criminal case may only be opened up by him and the State must wait until the accused either produces character witnesses or takes the stand. *State v. Christy*, 26 N. J. Super. 459 (App. Div. 1953); *Zabruskie v. State*, 43 N. J. L. 640 (E. & A. 1881).

The recommended mode for presenting such evidence is set forth in *State v. Baldanzo*, 106 N. J. L. 498 (E. & A. 1930) [approving the recommended method suggested in *State v. Polhemus*, 65 N. J. L. 387 (Sup. Ct. 1900)]. The witness should be asked, "Do you know the reputation of the defendant as of the date of the alleged wrongful act for [the trait in issue] in the community wherein he resides?" If the answer is in the affirmative, "What is that reputation?"]

In New Jersey, it is the reputation which one has in the community up to the time of the commission of the offense only which is admissible. *State v. Baldanzo*, *supra*; *State v. Sprague*, 64 N. J. L. 419 (Sup. Ct. 1900); *State v. Williams*, 16 N. J. Super. 372 (App. Div. 1951). Furthermore, it is the community wherein the subject resides that is the object of the inquiry and the fact that the defendant enjoyed a good reputation while he was on a brief assignment ordinarily has no probative force and its admissibility, if admissible at all, involves the exercise of sound judicial discretion. *State v. Sbrilli*, 136 N. J. L. 66 (Sup. Ct. 1947). The inquiry as to reputation must be confined to the reputation of the accused regarding the trait that is in issue. *State v. Snover*, 63 N. J. L. 382 (Sup. Ct. 1899); *State v. Barts*, 132 N. J. L. 74 (Sup. Ct. 1944), *affirmed* 132 N. J. L. 420 (E. & A. 1944). Character must be evidenced solely by reputation and it is the community estimate and not the personal opinion of the witness which is admissible, *State v. Danser*, 116 N. J. L. 487 (E. & A. 1936); and as the inquiry is confined to general reputation, particular acts or specific facts used to illustrate character are inadmissible. *Ippolito v. Turp*, 126 N. J. L. 403 (Sup. Ct. 1941); *Bullock v. State*, 65 N. J. L. 557, 577 (E. & A. 1900); *State v. Taylor*, 92 N. J. L. 135 (Sup. Ct. 1918). See 8 *Rutgers Law Review* 231 (1952-1953). Cf. *State v. Steensen*, 35 N. J. Super. 103 (App. Div. 1955).

The universal view is that while the inquiry into character is closed to the State, the defendant has a right to bring forth his good character in resolving the probabilities of guilt. 1 *Wigmore* § 56 and § 57. The rule in this respect makes no changes. The problem then arises as to how character is to be evidenced by the accused or the State when the inquiry is opened. There are three conceivable ways:

A. Specific instances of conduct—almost all jurisdictions exclude such evidence. 1 *Wigmore* § 193.

B. Opinion testimony—here there is a conflict of authority, but the majority of jurisdictions exclude such testimony. 7 *Wigmore* § 1986. Cf. 33 *Iowa Law Review* 735 (1948).

C. Reputation—this is the generally accepted mode—5 *Wigmore* § 1608.

*Michaelson v. U. S.*, 335 U. S. 469 (1948) is an excellent opinion from the point of view of research for Justice Jackson sums up the entire field of character evidence in the opinion.

The only specific instances permitted here would be convictions of crime. These convictions could be excluded by the trial court under Rule 45 if he were to find that their probative value was outweighed by their inconvenience. Furthermore this Rule must be read in connection with Rule 55. Under that Rule convictions are admissible only as tending to prove some material fact other than disposition to do wrong.

Opinion evidence should certainly be admissible. If we assume the relevancy of character evidence, we should endeavor to obtain the most accurate way of showing character. There can be no doubt that opinion evidence is more accurate than reputation evidence. 7 *Wigmore* §§ 1981, 1982. Also an excellent discussion by Mason Ladd in 24 *Iowa Law Review* 498 (1939).

4. It is suggested that the use of the word "relevant" in line (2) is unfortunate in view of the proposed departure from "legal relevance" in Rule 1. It is suggested that for it there be substituted the word "admissible".

### **Rule 48. Character Trait for Care or Skill—Inadmissible to Prove Quality of Conduct.**

Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality of his conduct on a specified occasion.

#### **Drafters' Comment**

This rule probably conduces to saving of time and avoids distraction of attention from the main question of what was actually done on the particular occasion. It follows Model Code Rule 306(3) and represents what is probably the most widely prevailing practice. See *Wigmore*, Evidence, Secs. 65, 92, 97. Notes, Habit, custom or reputation of one killed or injured, as evidence of negligence, 15 A.L.R. 125, 18 A.L.R. 1109.

In a substantial number of states, including California and Illinois, an exception to the rule excluding character evidence on the issue of particular negligent conduct, is made where there are no eye-witnesses. See *Young v. Patrick*, 323 Ill. 200, 153 N.E. 623, 1926; *Linde v. Emmick*, 16 Cal. App. 2d 676, 61 P. 2d 338, syl. 23, 1936.

#### **Recommendation**

It is recommended the rule be adopted.

#### **Committee Annotation**

1. The New Jersey law would seem to be in accord. The only direct statement which can be found on this proposition was in *Sutton v. Bell*, 79 N. J. L. 507 (E. & A. 1910), at page 509 (see also, however, *Rapp v. Butler-Newark Bus Line*, 103 N. J. L. 512 (Sup. Ct. 1927) at page 515, affirmed, 104 N. J. L. 444 (E. & A. 1928) and *Shelly v. Brunswick Traction Co.*, 65 N. J. L. 639 (E. & A. 1901)), wherein the Court stated:

"No one, I fancy, contends that a specific act of negligence may be thus proved or that the legal proof of negligence can be, in anywise, abated by evidence that the defendant was a careless man or of a careless disposition, any more than the commission of a specific crime could be proved by showing the criminal disposition of the accused."

2. 1 *Wigmore* § 65 states that in most jurisdictions such evidence is excluded. See also 15 A. L. R. 125 (1921), 18 A. L. R. 1109 (1922). Pursuant to this rule, inquiry is blocked on the question of whether one has a careful disposition. It seems that such evidence should be excluded.

Character as to care otherwise might be evidenced by opinion or by reputation. *Rule 47.* Such evidence is of such small probative force that an absolute rule of exclusion seems desirable.

3. On the other hand, we must distinguish character evidence from evidence regarding habit. Habit evidence regarding negligence it seems should be freely admitted. 1 *Wigmore* § 97. See Annotation to Rule 49.

### **Rule 49. Habit or Custom to Prove Specific Behavior.**

Evidence of habit or custom is relevant to an issue of behavior on a specified occasion, but is admissible on that issue only as tending to prove that the behavior on such occasion conformed to the habit or custom.

#### **Drafters' Comment**

See comment under Rule 50.

#### **Recommendation**

It is recommended the rule be adopted.

#### **Committee Annotation**

1. The New Jersey position seems to be contrary to the rule. In *Smock v. Smock*, 11 *N. J. Eq.* 156 (*Ch.* 1856), a writing sought to be established as a will was found on the death of the decedent with the name of the testator torn off, and the question was whether the name was torn off with the intent to revoke. In deciding the case, the Court admitted evidence that the testator for many years had cancelled instruments, as notes and the like, by tearing off his name. The evidence was an important factor in determining the intent of the testator when he did the act. In *Park v. Miller*, 27 *N. J. L.* 338 (*Sup. Ct.* 1859), the question arose as to whether a guarantee was made and evidence was offered to show that a factor was in the habit of making entries in his book designating what sales were guaranteed and which were not, to show that he did not guarantee all. The Court, at page 351, stated, "The question before the jury was, did or did not the plaintiff guaranty to the defendants the proceeds of this particular sale? This could not be proved by the habit of the plaintiffs with regard to other sales, in fact, much less by proving their habit of entries in their books."

Later, in *Cook v. Phillips*, 109 *N. J. L.* 371, 86 *A. L. R.* 539 (1933) (*E. & A.* 1932), a question arose as to whether certain documents were mailed. The only evidence of mailing was given by two witnesses who testified they dictated and signed the mail and left it to be picked up by another employee whose duty it was to take the letters to the mailing department. The Court stated, at page 373, "We do not think that the mere dictation or writing of a letter, coupled with evidence of an office custom with reference to the mailing of letters, is sufficient to constitute proof or corroborative circumstances sufficient to establish the fact that the custom in the particular instance had in fact been followed."

Thus, to establish mailing, it is essential that more than evidence of the custom be produced. This testimony must be coupled with that of the person whose duty it is to carry out the custom to the effect that if the mail was there, he mailed it. See *Borgia v. Board of Review*, 21 N. J. Super. 462 (App Div. 1952).

The decision of *Cook v. Phillips*, *supra*, thus led the Appellate Division to state at 468,

“In our own State, the rule allowing proof of custom or habit seems to be conditioned upon a showing of corroborative circumstances indicating that the custom had been followed in the particular instance.”

*Notkin v. Brookdale Gardens*, 28 N. J. Super. 9, 15 (App. Div. 1953); *cf.* however *McGee v. Kraft*, 110 N. J. L. 532 (E. & A. 1933). Note also *Shelly v. Brunswick Traction Co.*, 65 N. J. L. 639 (E. & A. 1900).

The admissibility of a person's habit as evidential that he did the act in question is conceded. 1 *Wigmore* § 92. The New Jersey rule of requiring corroborative testimony that the habit in fact had been carried out in the particular instance should be disregarded. The very fact that there is a habit should be sufficient from inference that behavior on a specified date conformed to that habit. To require corroborative evidence that on that date the behavior did conform to the proven habit would be to defeat the purpose of the rule and put an unnecessary hurdle in the path of the attorney with circumstantial proofs only.

## **Rule 50. Opinion and Specific Instances of Behavior to Prove Habit or Custom.**

Testimony in the form of opinion is admissible on the issue of habit or custom. Evidence of specific instances of behavior is admissible to prove habit or custom if the evidence is of a sufficient number of such instances to warrant a finding of such habit or custom.

### **Drafters' Comment**

Rules 49 and 50 state the substance of Rule 307 of A.L.I. Model Code of Evidence. It is sometimes difficult to distinguish between character and habit, especially when the quality in question is skill or care. To have the habit of being careful generally is to have a careful disposition or character, while to have the habit of doing a particular thing in a careful manner is not, properly speaking, to have a careful disposition, for one might well be careless in all other respects. There is some conflict in the authorities as to the admissibility of evidence of habit of a person when offered to prove that his behavior on a particular occasion conformed to the habit, but there is no serious conflict concerning evidence of custom. Where evidence of habit or custom is admissible, the majority of decisions admit evidence of specific instances to prove it, whereas there is general agreement in excluding evidence of specific instances in proof of character, where character is to be used as the basis for an inference to behavior. This Rule makes evidence of specific instances admissible if the number offered is

sufficient to justify an inference of habit, subject to the provision of Rule 45 that the value of the evidence be not, in the opinion of the judge, outweighed by the disadvantages which its receipt would involve. (Comment taken from Model Code Rule 307.)

#### **Recommendation**

It is recommended that the rule be adopted.

#### **Committee Annotation**

The rule is settled that where relevant, specific instances of behavior are admissible to prove habit or custom. 2 *Wigmore* § 375. *Quere*, the admissibility of opinion on the issue of habit? Opinion testimony to show habit or custom, it might be argued, should not be admissible as it would be too unreliable. Could a witness testify that in his opinion the plaintiff was in the habit of going at 60 miles per hour down one-way streets without being called upon to give one instance where he saw such behavior?

*Note*: Because of the few New Jersey cases which deal with the admissibility of habit or custom evidence, there was no discussion in any case which has been found which would show the proper way to evidence such habit or custom.

### **Rule 51. Subsequent Remedial Conduct.**

When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

#### **Drafters' Comment**

This states the well settled common law rule.

#### **Recommendation**

It is recommended that the rule be adopted.

#### **Committee Annotation**

1. The leading New Jersey case in this area is *Perry v. Levy*, 87 N. J. L. 670 (E. & A. 1915), wherein the Court stated, at page 672, “. . . the great weight of authority, in the courts of the United States and England, is that evidence of changes and repairs made subsequently to the injury, or as to precautions taken subsequently to the injury, or as to precautions taken subsequently, to prevent recurrence of injury is not admissible as showing negligence or as amounting to an admission of negligence.” [Note also the case of *Rynar v. Lincoln Transit Co., Inc.*, 129 N. J. L. 525 (E. & A. 1942), where evidence that a driver of the defendant had been discharged after the accident was held to be incompetent as an implied admission.]

2. Nevertheless, such evidence, though incompetent for one purpose, may frequently come in as another issue. In *Perry v. Levy*, *supra*, the evidence that the landlord defendant repaired the roof which fell was held compe-

tent toward establishing his control over the area. The evidence was thus competent to establish his liability, but not to establish the fact that initially he failed to exercise due care.

In *Pirozzi v. Acme Holding Company of Paterson*, 5 N. J. 178 (1950); *Messier v. City of Clifton*, 24 N. J. Super. 133 (App. Div. 1952), cert. granted 12 N. J. 247 (1953); *Dubonowski v. Howard Savings Institution*, 124 N. J. L. 368 (E. & A. 1939); *Daniels v. Brunton*, 7 N. J. 102 (1952), evidence of subsequent repairs held competent to establish control. Cf. however *Spinelli v. Golda*, 6 N. J. 68 (1951). In *Millman v. U. S. Mortgage & Title Guaranty Co.*, 121 N. J. L. 28 (Sup. Ct. 1938); *Whellkin Coat Co. v. Long Branch Trust Co.*, 121 N. J. L. 106 (Sup. Ct. 1938); and *Jerolaman v. Belleville*, 90 N. J. L. 206 (E. & A. 1917), evidence of subsequent repairs was held to be admissible to prove the condition existing as of the time of the alleged wrong. Finally, in *Lombardi v. Yulinsky*, 98 N. J. L. 332 (Sup. Ct. 1923) to affect the credibility of a witness. See 6 *Rutgers Law Review*, page 293 (1950-1951).

3. As stated by the comment to the rule, this states what is well settled and certainly wisely so. There is an annotation in 170 A. L. R. 1, 7 (1947) which sums up the law of the various jurisdictions in the United States. The general rules are the same throughout the United States and the application of them varies only slightly.

## **Rule 52. Offer to Compromise and the Like, Not Evidence of Liability.**

Evidence that a person has, in compromise or from humanitarian motives furnished or offered or promised to furnish money, or any other thing, act or service to another who has sustained or claims to have sustained loss or damage, is inadmissible to prove his liability for the loss or damage or any part of it. This rule shall not affect the admissibility of evidence (a) of partial satisfaction of an asserted claim on demand without questioning its validity, as tending to prove the validity of the claim, or (b) of a debtor's payment or promise to pay all or a part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty.

### **Drafters' Comment**

In this rule the words "humanitarian motives" are designed to cover the rather common occurrence of calling an ambulance, paying a doctor bill, repairing or restoring property and the like, with no thought of liability or of compromising a possible liability. The significance of exceptions (a) and (b) is obvious.

### **Recommendation**

It is recommended that this rule be adopted.

**Committee Annotation**

See annotation to Rule 53.

**Rule 53. Offer to Discount Claim, Not Evidence of Invalidity.**

Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, is inadmissible to prove the invalidity of the claim or any part of it.

**Drafters' Comment**

Same as subsection (2) of Model Code of Evidence Rule 309.

**Recommendation**

It is recommended that this rule be adopted.

**Committee Annotation**

1. The first sentence of Rule 52 and the body of Rule 53 should, for the sake of clarity, be read together. The first sentence of Rule 52 envisages the situation where a prospective defendant offers something to one allegedly damaged in compromise of his liability to that party, while Rule 53 contemplates the converse situation of the prospective plaintiff accepting something in consideration of his claim. In both situations, the Act provides that evidence regarding the compromise is inadmissible. It seems that this would clarify the New Jersey position, which is as follows:

Under the early cases, the courts would make the broad general statement that an unaccepted offer of compromise could not be put into evidence. *Lehigh Valley Terminal Ry. Co. v. Currie*, 54 N. J. Eq. 84 (Ch. 1895), affirmed 54 N. J. Eq. 700 (E. & A. 1896); *Miller v. Halsey*, 14 N. J. L. 48 (Sup. Ct. 1833); *Wrege v. Westcott*, 30 N. J. L. 212 (Sup. Ct. 1862).

Then in *Richardson v. Int. Pottery Co.*, 63 N. J. L. 248 (E. & A. 1899), a change came when the Court of Errors and Appeals stated (at p. 249):

"It is well settled that such admissions [offers to compromise] are competent unless it is expressly stated that they are made without prejudice or unless the party making them has been led to believe by the conduct of the adversary that a compromise may be effective."

The new rule of admissibility still appears to be with us. *Mortimer v. Keppler*, 3 N. J. Misc. 1036 (Sup. Ct. 1925); *Beachner v. Jengo*, 89 N. J. L. 325 (E. & A. 1916). Cf. *Somerville Water Co. v. Somerville*, 78 N. J. Eq. 199 (Ch. 1910).

The opinion of *Rynar v. Lincoln Transit Co., Inc.*, 129 N. J. L. 525 (E. & A. 1942) is worthy of note for the language of the court may be used as a springboard to overrule the *Richardson* case, *supra*. In the *Rynar* case, questions were asked of witnesses which elicited the testimony that these witnesses had been involved in the same accident as the one sued upon and had made settlement with the defendant. Defendants argued the testimony was prejudicial as it might convey to the jury the impression that the defendant had admitted liability in the case. The plaintiff argued that he had a right to bring out any possible bias on the part of the witnesses.

The upper court solved the problem by having the matter left with the discretion of the trial judge, indicating, however, which way its discretion would be exercised.

At page 529, the court said:

"The law favors compromises and because it favors them does not permit the bare fact of their occurrence to be interpreted as a guilty admission. It is clear—there is no contention otherwise—that the disputed evidence of settlements was not admissible for the purpose of building up a case of liability against the bus company or its driver. On the other hand, if the testimony upon which a witness was being cross-examined was the misshapen product of a prejudiced mind, the cross-examiner was entitled to show it."

2. The exceptions to Rule 52 are not worthy of comment: (a) is established law; and (b) is covered by *N. J. S. 2A:14-24*.

3. As to the problem of whether an offer to settle a claim should be admissible in evidence against the party making it, Professor Wigmore states [4 Wigmore § 1061]:

"The solution is a simple one in its principle, though elusive and indefinite in its application; it is merely this, that a concession which is hypothetical or conditional only can never be interpreted as an assertion representing the party's actual belief, and therefore cannot be an admission; and, conversely, an unconditional assertion is receivable, without any regard to the circumstances which accompany it."

And at 4 *Wigmore* § 1061(c):

"The true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a specific belief that the adversary's claim is well-founded, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered."

Thus let us assume "A" sues "B" for \$10 and "B" offers \$5. The offer of "B" is not evidential. But if "B" admitted that \$5 was due and offered it, then the admission and the offer are evidential. What is then crucial in determining the admissibility should not be the occasion of the utterance as suggested in the New Jersey cases, but rather its form. This rule seems to be accepted in the majority of United States jurisdictions. 4 *Wigmore* § 1062.

## **Rule 54. Liability Insurance.**

Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible as tending to prove negligence or other wrongdoing.

### **Drafters' Comment**

This states in the language of the A.L.I. Model Code of Evidence Rule 310 the generally accepted rule on the subject. It does not, of course, ex-

clude evidence of liability insurance where relevant upon an issue other than the quality of the insured's conduct.

#### **Recommendation**

It is recommended the rule be adopted.

#### **Committee Annotation**

The leading New Jersey case which is in complete accord with the principle set forth by this Rule is *Sutton v. Bell*, 79 N. J. L. 507 (E. & A. 1910). The trial court in that case instructed the jury:

"The only bearing the fact of insurance has upon the case is to enable you to determine whether or not Mr. Bell was insured against loss, made him careless or reckless; whether or not a man having insurance against loss will be as careful as he would be if he had no insurance."

In reversing, the Court of Errors and Appeals stated, at page 509:

"It requires no special insight to perceive that this instruction involves the proposition that a man who has been rendered careless by reason of his being insured against loss, may be more likely to be careless in a given case than if such state of carelessness had not been engendered in him . . . No one . . . contends . . . that the legal proof of negligence can be in anywise, abated by evidence that the defendant was a careless man or of a careless disposition, any more than the commission of a specific crime could be proved by showing the criminal disposition of the accused."

Here again we have a rule which is almost universally conceded. The relevant authorities are in 2 *Wigmore* § 282(a) and in an excellent annotation—4 A. L. R. 2d 748 (1949).

### **Rule 55. Other Crimes or Civil Wrongs.**

Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

#### **Drafters' Comment**

This states the generally accepted rule rejecting evidence of another crime or civil wrong as proof that a person committed a crime or civil wrong on a specified occasion. The limitation is directed against the idea that when it is shown that a person committed a crime on a former occasion there arises an inference that he has a disposition to commit crime and therefore committed the crime with which he is now charged. An effort has been

made to make the purpose of the rule more immediately apparent than does Model Code of Evidence Rule 311. Hence we have followed the pattern of cataloguing the type of things which may be proved by such evidence. This is not generally good policy but in this instance an exception to the better rule of drafting seems helpful. It must be understood, however, that the specifications are only exemplary and not exclusive. The illustrative material could be eliminated without hurting the rule except to the extent that the one applying it would have to hunt harder for its meaning.

### Recommendation

It is recommended the rule be adopted.

### Committee Annotation

This rule taken in conjunction with Rule 45 limits the scope of collateral inquiry. The rule of *res inter alios acta* has been frequently considered by the courts of this State. The following are the cases which have dealt with the problem:

1. Admissibility of similar but disconnected events in a civil action [a chronological summary]. The leading case on this problem is *Temperance Hall Association, of Trenton v. Giles*, 33 N. J. L. 260 (Sup. Ct. 1869). This case involved an action to recover damages for injuries sustained by falling into an area opening into a sidewalk. The defendant offered to prove that over 60,000 persons had passed the area without accident. The court held the evidence inadmissible and stated, at page 264:

“The reason for excluding all evidence of this character is, that it would lead to the trial of a multitude of distinct issues, involving a profitless waste of time of the court, and tending to distract the jury from the real point in issue, without possessing the slightest force as proof of the matters of fact involved.”

2. Admission of prior crimes to establish the guilt of the accused.

The rule is well settled that the State may not prove other crimes committed by the defendant merely to show that the defendant had a disposition to commit crime and therefore was likely to commit the crime charged in the indictment. *State v. Fay*, 127 N. J. L. 77 (Sup. Ct. 1941). However, “. . . whenever the defendant's guilt of an extraneous crime tends logically to prove against him some particular element of the crime for which he is being tried, such guilt may be shown.” *State v. Raymond*, 53 N. J. L. 260 (Sup. Ct. 1891). The problem is therefore a question of relevancy and if the evidence is found to be relevant, the fact that it may disclose criminal activity does not require its exclusion. *State v. Grillo*, 11 N. J. 173 (1952).

Evidence of prior criminal activity has been held to be admissible in the following instances:

(a) The sex cases.

On an indictment for carnal abuse previous similar acts between the same parties may be put into evidence. *State v. Andoloro*, 108 N. J. L. 47 (Sup. Ct. 1931); *State v. Di Giosia*, 3 N. J. 413 (1950).

(b) Prior acts tending to establish a motive or plan to do the act charged in the indictment. In *State v. Donahue*, 2 N. J. 381 (1949), the

court admitted evidence of prior beatings which the defendant in a homicide case gave his victim to establish malice in him toward her.

(c) Prior acts showing knowledge or intent. It is upon this ground that most of the cases admit evidence of prior wrongdoing. The rule is aptly set forth in *State v. Popeck*, 83 N. J. L. 318 (*Sup. Ct.* 1912), at page 319, where the court said:

“. . . when the act done by the defendant, and charged to be criminal, may reasonably be innocent, and is criminal only when performed with a criminal intent or with knowledge of a certain fact, other acts of the defendant, though criminal, may be adduced to prove that he had such specific knowledge or intent and in this category is embraced the reception of stolen goods.”

(d) Prior acts tending to establish the identity of the defendant.

In *State v. Raymond*, *supra*, at page 264, the court stated that prior acts of misconduct are relevant “. . . when the circumstances of the crime charged and those of an extraneous crime indicate they were both committed by the same person—as if two buildings should be fired by similar contrivances.”

It is, of course, impossible to catalogue the many cases which have admitted prior acts of misconduct. The search has not been whether the prior act fits into the established group where most of our cases have fallen. The test has been held to be solely one of “legal relevancy”. See 7 *Rutgers Law Review* 261 (1951-1952); 8 *Rutgers Law Review* 231 (1952-1953).

The rule in criminal cases is that evidence of other crimes is inadmissible solely to show propensity to commit crime. Unfortunately, however, the courts frequently state the general rule to be that evidence of other crimes is inadmissible and then list certain exceptions—when the former crimes tend to establish intent, motive, etc. The Rule here adopts the universal rule of requiring independent relevancy. It should be noted, however, that admission of these crimes are all made subject to the discretion of the trial court by virtue of Rule 45. This is certainly a wise decision. An accused should be protected against adverse bias by evidence of his implication in other crimes. However, if disclosure of other crimes is merely incidental to proof otherwise material, it should be admitted. There is thus a balancing of interests which must be made by the trial court.

*Note:* As to admissibility of other civil wrongs, see *Rule 45*. Cases dealing with other crimes to show intent, 105 *A. L. R.* 1283, 1288 (1936); the sex exception, 167 *A. L. R.* 559, 565 (1947); sufficiency of evidence of other crimes, 3 *A. L. R.* 784 (1919); to prove identity, 63 *A. L. R.* 602 (1929). 51 *Harvard L. R.* 988 (1938), in general. 24 *Iowa L. R.* 471 (1939), to show scienter.

## VII. EXPERT AND OTHER OPINION TESTIMONY

### Rule 56. Testimony in Form of Opinion.

(1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

(2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

(3) Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission.

(4) Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

#### Drafters' Comment

This rule does not open the door quite so wide for testimony in the form of opinion as does Model Code of Evidence Rule 401. It accepts opinion testimony as the normal while this rule treats it as exceptional. This rule states affirmatively the conditions under which such testimony is admissible and presumes scrutiny by the judge as a condition to letting it in. Clause (3) removes the necessity of cumbersome preliminary findings and resulting delay and presumes that the judge finds the conditions fulfilled unless he excludes the testimony. The statement of the rule in this form is more consistent with the general theory of admissibility under the rules, less apt to be abused, and more understandable.

#### Recommendation

It is recommended that this rule be adopted—but possibly broadened so as not to appear to exclude negative knowledge.

#### Committee Annotation

Sec. (1) of the rule deals with the witness testifying in a lay capacity and not as an expert.

It is to be observed that there appears to be no great difference between

Sec. (1) of the rule and the present law in New Jersey. *State v. Miller*, 71 N. J. L. 527 (E. & A. 1905); *Beck v. Monmouth Lumber Co.*, 137 N. J. L. 268 (E. & A. 1948); *Matter of Vanauken*, 10 N. J. Eq. 186 (Ch. 1854); *Stackhouse v. Horton*, 15 N. J. Eq. 202 (Prer. 1854); *Genz v. State*, 58 N. J. L. 482 (Sup. Ct. 1896); *Re McCraven*, 87 N. J. Eq. 28 (Ch. 1916). Attention is called to the fact that such opinion evidence is admissible if the judge finds:

- (a) Such opinions or inferences may be rationally based on the perception of the witness and are helpful to a clear understanding of his testimony, or
- (b) Such opinions or inferences may be rationally based on the perception of the witness and are helpful to the determination of the fact in issue.

In either case the key to the interpretation to the rules lies in the fact that the judge must determine that the opinions or inferences, of the witnesses must be rationally based on the perception of the witness.

For the general history of the development of the opinion rule see 7 *Wigmore, Evidence* § 1917 (1940).

Particular attention is called to the use of the words "perception of the witness". For the purpose of this comment the phrase has been understood to mean that the witness had an "opportunity to observe" and "actually observed" facts on which his opinion or inference is based. 2 *Wigmore, supra*, § 650 *et seq.*

Sec. (1) thus excludes the lay witness from testifying as to his opinion or inference if such opinion or inference is not based on his own perception. *State v. Deegan*, 133 N. J. L. 263 (E. & A. 1945); *State v. Myers*, 7 N. J. 465 (1951); *Kirschbaum v. Metropolitan Life Insurance Co.*, 133 N. J. L. 5 (E. & A. 1945).

Sec. (2) Rule 56 concerns the testimony of expert witnesses.

Here again the proposal does not appear to be in conflict with N. J. Law. *Beck v. Monmouth Lumber Co.*, 137 N. J. L. 268 (E. & A. 1948); *Keaveney v. Newark Ladder and Bracket Co. Inc.*, 23 N. J. Super. 99 (App. Div. 1953); *Max v. Max*, 123 N. J. L. 580 (Sup. Ct. 1940); *State v. Shiren*, 15 N. J. Super. 440 (App. Div. 1951).

The section provides that the judge find the expert witness' opinions or inferences are based on facts or data perceived by or personally made known to the witness at the hearing and within the scope of the special knowledge, skill, experience or training possessed by the witness.

Sec. (3) provides that unless the judge excludes the testimony he shall be deemed to have made the necessary finding for its admission.

No cases have been found in New Jersey as to this particular point.

It appears to be an excellent provision. Unless this or a similar provision be made, long, tedious, preliminary examinations and findings thereon must be made. Delay and abuse of trial procedure to consume time will be eliminated by the adoption of this provision. Rule 57 permits the judge to require the examination of a witness concerning the data upon which his opinion or inference is based. This should cure any objection as to the judge's discretion to permit a preliminary examination if required.

Sec. (4) provides that opinion or inference testimony otherwise admissible shall not be excluded because it embraces the ultimate issues to be decided by the trier of the fact.

No cases have been found in New Jersey as to this particular provision. It appears to be, however, a necessary inclusion in the acceptance of opinion or inference testimony. The mere fact that a witness or witnesses express an opinion or an issue to be decided by the trier of the fact does not in any way usurp the power of such trier; rather it is merely the testimony of such witness which may or may not be accepted by the trier. 7 *Wigmore, supra*, § 1921.

### **Rule 57. Preliminary Examination.**

The judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.

#### **Drafters' Comment**

This is the same as Model Code of Evidence Rule 401(2).

#### **Recommendation**

This rule should be adopted.

#### **Committee Annotation**

Rule 57 in its suggested form is necessary so that the judge may have the power to require a preliminary examination of a witness, who is to give opinion or inference testimony. 7 *Wigmore, Evidence* § 1922.

### **Rule 58. Hypothesis for Expert Opinion Not Necessary.**

Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross examination he may be required to specify such data.

#### **Drafters' Comment**

This rule does away with the necessity of following the practice (grossly abused) of using the hypothetical question, but does not forbid its use. It is consistent with the provisions of the Model Expert Testimony Act drafted by this Conference. See *Wigmore on Evidence* (3rd Ed.), Sec. 686.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

This rule eliminates the necessity for a hypothetical question but does not prohibit its use. It permits, unless the judge requires otherwise, the expert

witness to state his opinion and reasons therefor without first specifying the data on which it is based. The rule further provides that the witness may be required to specify such data on cross examination.

The proposed rule is at variance with the law in New Jersey. *Malynak v. State*, 61 N. J. L. 562 (E. & A. 1898); *Rempfer v. Deerfield Packing Corp.*, 4 N. J. 135 (1950); *Zaklukiewicz v. Western Electric Co.*, 16 N. J. Super. 189 (App. Div. 1951); *Winter v. Metropolitan Life Insurance Co.*, 129 N. J. L. 187 (Sup. Ct. 1942); *Beck v. Monmouth Lumber Co.*, 137 N. J. L. 268 (E. & A. 1948); *Beam v. Kent*, 3 N. J. 210 (1949). However, it appears to be one well worthy of consideration. Anyone who had had to rule for five consecutive hours on the framing and reframing of one hypothetical question until it ultimately was permissible, only to have the witness answer "I don't know" has nothing but the strongest desire for the proposed rule's adoption.

Wigmore well states "The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to the intolerable obstruction of the truth". 2 *Wigmore, supra*, § 686.

All of the best thinking appears to be in accord that the abuse of the hypothetical question can only be corrected by eliminating it as a requirement for the expression of opinions. There appears to be general agreement that the offering party should be given the option of using it; and permitting the opposing party on cross examination to call for specification of the data which the witness has used as the basis of the opinion. Judge Learned Hand, "Lectures on Legal Topics," 1921-22 (New York 1926).

## **Rule 59. Appointment of Experts.**

If the judge determines that the appointment of expert witnesses in an action may be desirable, he shall order the parties to show cause why expert witnesses should not be appointed, and after opportunity for hearing may request nominations and appoint one or more such witnesses. If the parties agree in the selection of an expert or experts, only those agreed upon shall be appointed. Otherwise the judge may make his own selection. An expert witness shall not be appointed unless he consents to act. The judge shall determine the duties of the witness and inform him thereof at a conference in which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the judge or any party. He may be examined and cross-examined by each party. This rule shall not limit the parties in calling expert witnesses of their own selection and at their own expense.

### Drafters' Comment

This rule is patterned after Rule 28 of the Federal Rules of Criminal Procedure, and is oriented to the rules of the Model Code of Evidence relating to expert witnesses, to the Model Expert Testimony Act promulgated by the Conference in 1937, to the Uniform Act on Blood Tests to Determine Paternity and to the Uniform Rules of Criminal Procedure. The rule embodies the substance of Model Code Rules 403 and 407. It varies from Federal Rule 28 in providing that where the parties agree upon the experts the judge must appoint those agreed upon. It follows the federal rule and rejects Model Code Rule 404 and Section 3 of the Model Act of the Conference in permitting without restriction the calling of experts by the parties at their own expense. The rather elaborate procedural provisions of Model Code Rules 405 and 408 are omitted, and, as in the federal rule, the mechanics of exposing the appointee to opportunity for perception and presenting his findings are left largely to the implied powers of the judge.

Rules 59 and 60 are in the same procedural category as comment by the judge on the evidence and the general control of the judge over the trial. (See Model Code Rule 105.) But because of the urgent necessity, generally acknowledged, of correcting abuses in the use of expert testimony, the rules have been incorporated here to call attention to the desirability of getting them included in the procedural law either as a part of these rules or by separate statutory enactment.

"Precedents beginning in the fourteenth century show the judges availing themselves of the aid of experts without formally calling them as witnesses; from that time to this expert testimony has been received in the common law courts. The necessity for it is everywhere conceded. The abuses which have developed since experts have come to be witnesses for litigants, are everywhere deplored, not only by the bench and bar but also by members of the other learned professions. (See 2 Law and Contemporary Problems, 401-527, Duke University, and other references collected in 2 Wigmore, Evidence (3rd Ed. 1940), Sec. 563, Note 2.) Expert witnesses are all too frequently merely expert advocates. The most shocking exhibitions occur in criminal prosecutions and personal injury actions, but the evils are not thus confined. The National Conference of Commissioners on Uniform State Laws had this subject under consideration for three years, and in 1937 recommended a Uniform Act. In 1938 the Committee of the American Bar Association on Improvement of the Law of Evidence approved this Act." (From comments on Chapter V of the American Law Institute Model Code of Evidence.)

### Recommendation

This rule is recommended for adoption.

### Committee Annotation

1. The suggested rule is a departure from the law as we have known it in New Jersey. Patterned after Rule 28 of the Federal Rules of Criminal Procedure, it varies therefrom in that it provides where the parties agree upon the experts the judge must appoint those agreed upon. It follows the federal rule in permitting, without reservation, the calling of experts by the parties at their own expense; and in that the mechanics of giving the

appointee an opportunity for perception and presenting his findings are left largely to the implied powers of the judge.

2. For some time there has been much dispute as to value of expert opinion, when offered by the respective parties. The charge has long been made that experts can be found to testify as to any proposition, if the fee be adequate. As a consequence not only has there arisen a distrust of the professional expert witness in the minds of the bench and bar but also in the public mind. The proposed rule is one of three types of concrete proposals which have been made to cure the situation.

One such proposal is to submit scientific facts in issue to an official jury of experts instead of the usual jury. This suggestion is so contrary to constitutional law as to find no adherent among lawyers.

Another is to appoint only official experts as witnesses to take the place of all partisan experts. This, too, so interferes with the constitutional and traditional right of parties to produce such witnesses as they may think useful, that it finds no supporters in the bar.

The third proposal is as contained in the suggested rule.

It appears that the rule suggested is the most practicable for the correction of existing abuses.

It had been hoped that a study and trial application of a rule, similar to this, and proposed rules 60 and 61, made in New York, under a grant from the Ford Foundation, would have been available prior to the filing of this report. Such study and report has not as yet come to hand.

3. Where there are two schools of scientific thought on a particular problem the court should obviously draw on both, rather than presenting only one view.

## **Rule 60. Compensation of Expert Witnesses.**

Expert witnesses appointed by the judge shall be entitled to reasonable compensation in such sum only as the judge may allow. Except as may be otherwise provided by statute of this state applicable to a specific situation, the compensation shall be paid (a) in a criminal action by the [county] in the first instance under order of the judge and charged as costs in the case, and (b) in a civil action by the opposing parties in equal portions to the clerk of the court at such time as the judge shall direct, and charged as costs in the case. The amount of compensation paid to an expert witness not appointed by the judge shall be a proper subject of inquiry as relevant to his credibility and the weight of his testimony.

### **Drafters' Comment**

Rule 28 of the Federal Rules of Criminal Procedure provides that the judge may fix the compensation of the expert appointee to be paid out of such funds as may be provided by law. This Rule 60 goes further and is perhaps less realistic than the federal rule by fixing the responsibility for

payment of the compensation allowed. In this respect it follows the pattern of precedent expressions by both the American Law Institute and the National Conference of Commissioners on Uniform State Laws. It seems quite obvious that this particular rule would have to be adopted by legislative enactment, as the rule-making power of the courts could hardly extend to establishing a general basis for involuntary liability for costs of this character. This may be an argument against going further than the federal rule does. But with the thought that it will furnish a rational model for separate legislation, when such appears to be necessary, the rule is submitted in this form.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

Rule 28 of the Federal Rules of Criminal Procedure provides that the judge may fix the compensation of the expert appointee to be paid out of such funds as may be provided by law. Suggested Rule 60 provides a procedure for the judge to establish the fees of the expert appointees and to assess such fees as costs; against the County in criminal cases; and equally between the parties in civil matters.

The New York study heretofore mentioned, it is understood, at first used a fund to defray the costs of experts, granted by the Ford Foundation. It is understood, however, that the actual costs were so slight that the unexpended balance has been returned to the Foundation as not required.

2. It would seem properly within the discretion of the court to vary the "equal portions" requirement where undue hardship would otherwise result.

### **Rule 61. Credibility of Appointed Expert Witness.**

The fact of the appointment of an expert witness by the judge may be revealed to the trier of the facts as relevant to the credibility of such witness and the weight of his testimony.

#### **Drafters' Comment**

Since experts appointed by the judge will ordinarily be impartial witnesses, the fact of their appointment should be disclosed to the trier of the facts in order that their testimony may be properly valued.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

The rule permits the appointment of an expert by the court to be made known to jury as relevant to his credibility and the weight of his testimony. This again is an attempt to cure the abuse of the use of expert witnesses and is a natural adjunct to suggested Rule 59. Since such court appointed experts will have no false sense of "loyalty" to a fee paying party they will ordinarily be impartial witnesses. It therefore appears to be necessary, to disclose the appointment to the jury, so that such experts

testimony might be properly evaluated. Furthermore, such appointment and disclosure thereof will have a strong tendency to curb the over zealous partiality of partisan experts.

It appears that the suggested Rules 59 and 61 read together will do much to raise the level of all expert testimony. The fact that the use of partisan experts is permitted will be sufficient to curb any bias or error on the part of court appointed expert.

## VIII. HEARSAY EVIDENCE

### Rule 62. Definitions.

As used in Rule 63 and its exceptions and in the following rules,

(1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(2) "Declarant" is a person who makes a statement.

(3) "Perceive" means acquire knowledge through one's own senses.

(4) "Public Official" of a state or territory of the United States includes an official of a political subdivision of such state or territory and of a municipality.

(5) "State" includes the District of Columbia.

(6) "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(7) "Unavailable as a witness" includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter, or (c) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying,

or to the culpable neglect of such party, or (b) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the exercise of reasonable diligence and without undue hardship, and that the probable importance of the testimony is such as to justify the expense of taking such deposition.

#### **Drafters' Comment**

The definition of "statement" makes it clear that it is intended to include as hearsay the conduct of a declarant, whether verbal or non-verbal, where it amounts to a communication to another or an expression.

The definition of a "a business" is from the Uniform Business Records as Evidence Act.

In view of the fact that unavailability of the declarant is an important condition under a number of exceptions, a safe definition of "unavailable as a witness" becomes absolutely essential. The objective is to assure that unavailability is honest and not planned in order to gain an advantage. This definition gives the judge considerable discretion to reject the offer if he is not satisfied that the absence of the declarant is legitimately explained. Responsibility is placed on the proponent to take the deposition of the declarant if he is out of the jurisdiction of the court and the deposition can be taken by the use of due diligence and without undue hardship.

The other definitions need no comment.

#### **Recommendation**

It is recommended that this Rule be adopted with the exception of (3). The subsequent definitions should be renumbered accordingly.

#### **Committee Annotation**

1. Par. (1) represents the generally recognized principle that evidence of conduct should be classified as hearsay wherever the conduct as described by the witness from the witness stand requires the trier of fact to treat the person as to whose conduct the testimony relates as if he were testifying upon the issue which the evidence is offered to resolve. Although early American writers (including Greenleaf) did not recognize the possible hearsay aspect of evidence of the conduct of a person later writers have done so. See, Morgan, "Hearsay", 25 *Mississippi L. Jour.* 1 (1953); cf., Falknor, "Silence as Hearsay", 89 *U. of P. L. Rev.* 192 (1940); McCormick, "The Borderland of Hearsay", 39 *Yale L. Jour.* 489 (1930). No New Jersey decision has been found, however, dealing with conduct as hearsay.

2. R. R. 4:16-4 (c) defines unavailability of a witness whose depositions are to be used, in somewhat different terms than are employed in Par. (7), and this will be discussed further in connection with Rule 63 (3).

3. The definition of "perceive" should be omitted, as it is recommended that it be included within the definitions of Rule 1.

4. Paragraph (7) (proposed paragraph (6)) is discussed in connection with Rule 63 (3).

### **Rule 63. Hearsay Evidence Excluded—Exceptions.**

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

#### **Drafters' Comment**

This rule follows Wigmore in defining hearsay as an extra-judicial statement which is offered to prove the truth of the matter stated. It must be read in connection with the definition of "statement" in Rule 62, which treats non-verbal conduct used by the declarant in the place of words as within the definition of hearsay. The policy of the rule is to make all hearsay, even though relevant, inadmissible except to the extent that hearsay statements are admissible by the exceptions under this rule. In no instance is an exception based solely upon the idea of necessity arising from the fact of the unavailability of the declarant as a witness. In this respect this rule is a drastic variation from A.L.I. Model Code of Evidence Rule 503(a) which recognizes a finding of unavailability as the sole criterion for the admissibility of a large body of hearsay statements. The Model Code theory is that since hearsay is evidence and has some probative value it should be admissible if relevant and if it is the best evidence available. That policy is rejected by the Conference of Commissioners on Uniform State Laws. The traditional policy is adhered to, namely that the probative value of hearsay is not a mere matter of weight for the trier of fact but that its having any value at all depends primarily upon the circumstances under which the statement was made. The element of unavailability of the declarant or the fact that the statement is the best evidence available is a factor in a very limited number of situations, but for the most part is a relatively minor factor or no factor at all. Most of the following exceptions are the expressions of common law exceptions to the hearsay rule. Where there is lack of uniformity among the states with respect to a particular exception a serious effort has been made to state the rule which seems most sensible or which reflects the weight of authority. Where possible the language of the exceptions as stated in the Model Code of Evidence Rules has been used, but liberality has been the policy where it has seemed that improvement of expression could be made. The exceptions reflect some broadening of scope as will be noted in the comments under the particular sections. These changes not only have the support of experience in long usage in some areas but have the support of the best legal talent in the field of evidence. Yet they are conservative changes and represent a rational middle ground between the extremes of thought and should be acceptable in any fact-finding tribunal, whether jury, judge or administrative body.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

The adoption of this rule is somewhat *pro forma*, since it is in the nature of a preface to the schematic treatment of the thirty-one exceptions that

comprise the thirty-one subdivisions that follow. As the Comment indicates, the shift in Rule 63 is from the emphasis placed on the unavailability of the declarant in Rule 503 (a) of the Model Code, to the circumstances under which the statement was made. In most cases these circumstances generate an equivalent of some sort (traditionally and euphemistically called "a guaranty of credibility") of cross-examination. It is also noteworthy that in the following exceptions the element of necessity emphasized in the common law of the unavailability of the declarant is entirely absent (viz., Rule 63 (1), 63 (10), 63 (11), 63 (12), 63 (13), etc.) while in others it is a predicate for admissibility (Rules 63 (3), 63 (23), 63 (24), 63 (25) etc). This shift in emphasis cannot be evaluated in the abstract. Only by separate consideration of each of the thirty-one exceptions can an appraisal be made.

### **(1) Previous Statements of Persons Present and Subject to Cross Examination.**

A statement previously made by a person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;

#### **Drafters' Comment**

This rule adopts A.L.I. Model Code of Evidence Rule 503(b). It has the support of modern decisions which have held that evidence of prior consistent statements of a witness is not hearsay because the rights of confrontation and cross examination are not impaired. Other decisions have admitted evidence of prior inconsistent statements for its full value, not limited merely to impeachment. When sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

1. The rule proposes a substantial change in the existing law. It embodies Rule 503(b) of the Model Code.

2. The impact of the proposed rule on New Jersey practice can best be appraised by stating the existing law in a number of situations as disclosed by the leading New Jersey cases in these respective areas of the law:

A. *Admissibility of extra-judicial utterances of a witness as evidence-in-chief, i. e., testimonially for the truth of the matter declared, to buttress or bolster the testimony of the declarant given as a witness in open court (in contradistinction to its limited admissibility on the issue of the witness' credibility when offered in rehabilitation of a witness whose credibility has been assailed by evidence of prior inconsistent statements).* It is the settled law of this state that extra-judicial declarations of a witness may not be offered to corroborate a witness' sworn testimony from the witness stand. The

rationale behind this exclusion is that truth gains nothing by repetition. *State v. Griffen*, 19 N. J. Super. 581, 89 A. 2d 67 (App. Div. 1952). When, however, a credibility issue is raised as when it is charged that a witness' testimony was recently contrived, or concealed or suppressed prior to trial, or that the witness (particularly in criminal actions testifying for the State) has come under the influence of the Prosecutor who has held out some incentive to the witness, evidence of prior consistent utterances of the witness is admitted by established rule, but only on the limited issue (with cautionary charge on request) of credibility. *State v. Neiman*, 123 N. J. L. 341, 8 A. 2d 713 (Sup. Ct. 1939), *aff'd*, 124 N. J. L. 562, 12 A. 2d 860 (E. & A. 1940). See further, for comment in more detail, 7 *Rutgers L. Rev.* 257, 276 (1952). Even its admissibility on the limited issue of credibility is to be allowed "with caution and within the narrow limits of the rehabilitation of credibility rule." *State v. Griffen*, *supra*. Cf., *State v. Kane*, 9 N. J. Super. 254, 75 A. 2d 849 (App. Div. 1950), and comment, 6 *Rutgers L. Rev.* 290, at page 302 nn. 53, 54.

B. *Limited Admissibility of Prior Inconsistent Statements.* When a witness is sought to be discredited by virtue of a previous extra-judicial utterance contrary to his statement in sworn testimony, evidence of such prior declaration is admissible on the limited issue of the witness' credibility. Offered not to prove the truth of the declaration, but solely to show the statement was made, and thus from *the fact of the utterance* of a contrary nature to the testimony, the witness is discredited, *i. e.*, is not to be believed on his testimony. Other than that—it cannot be received in evidence. *State v. Saccone*, 7 N. J. Super. 263, 72 A. 2d 923 (App. Div. 1950). Similarly, in "neutralizing" one's own witness. *Rhodehouse v. Director General*, 95 N. J. L. 355, 111 Atl. 662 (E. & A. 1920); *Alexander v. Marech*, 13 N. J. Misc. 425, 178 Atl. 278 (Sup. Ct. 1935), *aff'd*, 116 N. J. L. 246, 183 Atl. 459 (E. & A. 1936). The jury should on request be charged as to its limited function: *Moloney v. Public Service Railway Co.*, 92 N. J. L. 539, 106 Atl. 376 (E. & A. 1919). New Jersey's leading and oft-cited authority is, *State v. D'Adame*, 84 N. J. L. 386, 86 Atl. 414, 417 (E. & A. 1913). The admissibility of a prior inconsistent statement, therefore, does not call for a choice by the jury as to which statement to believe. *State v. Salimone*, 19 N. J. Super. 600, 89 A. 2d 56 (App. Div. 1952) *cert. denied*.

C. *The Turn-Coat Witness in Criminal Prosecution.* A recognized area in which extra-judicial utterances might well implement the administration of criminal justice is when the State is left without evidence because of "lapse-of-memory" of its witnesses due to fear of reprisals, vengeance, etc. of their criminal associates. It might be argued that this special situation can best be dealt with by a special rule establishing admissibility only in criminal actions. Cf., McCormick, "The Turn-Coat Witness; Previous Statements as Substantive Evidence", 25 *Texas L. Rev.* 573 (1947); Leflar, "Theory of Evidential Admissibility—Statements Made Out of Court", 2 *Ark. L. Rev.* 26 (1948).

D. *Prior Identifications.* Previous identifications should be admissible to corroborate an identification made in open court, whether it be established by the witness or third persons. This view is strongly supported by Professor Wigmore. 4 *Wigmore* § 1130. Cf., Borchard, "Convicting the Innocent" (*Yale Univ. Press*, 1932). Here again a special rule might estab-

lish admissibility without an across-the-board rule such as is proposed in Rule 63(1). Cf., *N. Y. Code Crim. Proc.* § 393-b. The only New Jersey decision relating to a prior identification that has been found, predicated admissibility on the silence of the accused under accusation of the victim. *State v. Claymonst*, 96 *N. J. L.* 1, 114 *Atl.* 155 (*Sup. Ct.* 1921). Cf., *State v. Sorge*, 125 *N. J. L.* 445, 15 *A. 2d* 776 (*E. & A.* 1940).

E. *Rape Prosecutions.* Prior accusations of the prosecuting witness in rape prosecutions are admitted under the principle of "fresh complaint." *State v. Ivins*, 36 *N. J. L.* 233 (*Sup. Ct.* 1873). The principle has been extended to prosecutions for assault with intent to commit rape but not to related offenses of grievous assault and battery. *State v. Griffin*, 19 *N. J. Super.* 581, 89 *A. 2d* 67 (*App. Div.* 1952). Cf., *State v. Saccone*, 7 *N. J. Super.* 263, 72 *A. 2d* 923, 924 (*App. Div.* 1950). The corroborating testimony of third persons is admissible only as to the fact that complaint was made. Admissibility does not extend to narratives of the details of the ravishment. *State v. Longley*, 6 *N. J. Misc.* 965, 143 *Atl.* 217 (*Sup. Ct.* 1923, reversible error). In New Jersey its admissibility as recognized hearsay stems from "inveterate usage" rather than because of any clearly defined exception to the hearsay rule. *State v. Rodesky*, 86 *N. J. L.* 220, 90 *Atl.* 1099 (*E. & A.* 1914); *State v. Salomine*, 19 *N. J. Super.* 600, 89 *A. 2d* 56 (*App. Div.* 1952). Clearly distinguishable are extra-judicial statements by a party-witness. These are of course admissible as evidence-in-chief, *i. e.*, testimonially, since they qualify for admissibility under the law of "admissions against interest"—a well established exception to the hearsay rule. *McBain v. Edgar*, 65 *N. J. L.* 634, 48 *Atl.* 600 (*E. & A.* 1901); *Ambrose v. Indemnity Insurance Co. of North America*, 124 *N. J. L.* 438, 12 *A. 2d* 693 (*E. & A.* 1940). Such out-of-court statements may be used as substantive evidence in the cause by either party once they have been received as admissions by the party against whom they were first offered. *Link v. Eastern Aircraft, &c., General Motors Corp.*, 136 *N. J. L.* 540, 57 *A. 2d* 8 (*E. & A.* 1948). Cf., *Schloss v. Trounstine*, 135 *N. J. L.* 11, 49 *A. 2d* 677; Uniform Rules 63 (7) 63 (8) and 63 (9) *infra*. No New Jersey decision has been found indicating any disfavor with the present practice. A small minority of cases allows such evidence substantively on the theory that the declarant is in court and subject to cross-examination. See *DiCarlo v. U. S.*, 6 *F. 2d* 364 (*2d Cir.* 1925); Morgan, *1 Basic Problems of Evidence* 69-71 (1954). When, however, the credibility of the prosecuting witness has been assailed, evidence of previous narratives of the details of the assault are admissible in rehabilitation. *State v. Orlando*, 119 *N. J. L.* 175, 194 *Atl.* 879 (*Sup. Ct.* 1937); *State v. Saccone*, 7 *N. J. Super.* 263, 72 *A. 2d* 923 (*App. Div.* 1950). See, 4 *Wigmore* § 1134; annotation, 157 *A. L. R.* 1355. A question of fairness to the accused might arise by allowing in evidence out-of-court declarations of the prosecutrix. However presumably the trial court would exclude under Rule 45 where the danger of prejudice presented itself.

F. *Divorce Actions.* In certain types of divorce actions, admissibility of statements by a petitioning spouse anent intimate marital relations is recognized as a specialized form of corroborating evidence. Since case law supports admissibility, the proposed rule would work no change in

the existing law in this limited type of divorce litigation. *Haskell v. Haskell*, 99 N. J. Eq. 309, 131 Atl. 876 (E. & A. 1926). Cf. *Capozzoli v. Capozzoli*, 1 N. J. 540, 64 A. 2d 440 (1949).

G. With regard to "past recollection recorded", this is presently admissible. *Kazanjian v. Atlas Novelty Co.*, 34 N. J. Super. 362 (App. Div. 1955). Under the proposed rule and Rule 45 the trial judge would presumably be able to relax the present requirements for admissibility where the witness is present and available for cross-examination.

## **(2) Affidavits.**

state;

Affidavits to the extent admissible by the statutes of this

### **Drafters' Comment**

Because of the general use of affidavits under statutory sanction in ex parte and formal proceedings, discovery procedure, proof of process and the like, and because affidavits are hearsay and inadmissible under the general prohibition of Rule 63, an express exception is necessary to preserve their admissibility and to avoid the possible result of implied repeal of such sanctioning statutes.

### **Recommendation**

It is recommended that this rule be adopted after inserting after the word "statutes"—"or by Rules of Court."

### **Committee Annotation**

The rule merely preserves the *status quo ante* and, as indicated in the Comment, is necessary, because of Rule 62, to avoid a change in the admissibility of affidavits ordained by statutes or by Rules of Courts. Its adoption, therefore, is *pro forma*, by reason of the recognized fact that affidavits are hearsay notwithstanding the fact that they are made under oath. See 6 *Wigmore* §§ 1710. The Missouri Code (§ 11.15) contains a similar precautionary declaration of intention to continue the admissibility of affidavits insofar as their admissibility may be sanctioned by statutory or constitutional provisions, or by court rules. (See R. R. 4:44-1, R. R. 4:58-1, etc.; R. S. 19:33-1; R. S. 17:9A-257; R. S. 2:50-12, etc.).

## **(3) Depositions and Prior Testimony.**

Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered

against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;

#### **Drafters' Comment**

The definition of hearsay makes this exception necessary. Clause (a) does not require that the deponent be unavailable as a witness in order for the deposition to be used at the trial of the action in which the deposition was taken. Clause (b) is justified by the fact that the witness on the former occasion or the deponent in the deposition in the other case has since died or otherwise become unavailable and a source of reliable evidence would be lost if it were not possible to use it in another action where the same issue is involved. The fact is that evidence of this type resulting from formal interrogation in pending litigation where the adverse party had an opportunity to be present is apt to be more reliable than evidence admissible under some of the other orthodox and well recognized exceptions where the right of cross examination has never existed and the declarant is unsworn.

The admissibility of former deposition testimony is limited to that which has been taken for use as testimony in the trial of an action and not testimony which results from the taking of discovery depositions or in connection with any discovery procedure. It should be noted that the testimony may be used against those in privity with the former adversary.

A question may be raised with respect to the use of former testimony by the prosecution in a criminal case, whether such use would violate the right of the accused to be confronted by his witnesses. As in several other areas, the constitutional question may or may not be a barrier to the use of the testimony. We are dealing in this rule with the question of hearsay and with that subject only.

#### **Recommendation**

1. It is recommended that clause (a) be adopted.
2. It is recommended that clause (b) (i) be adopted.
3. It is recommended that clause (b) (ii) be adopted with the possible inclusion of the words "in civil cases" following ", or (ii)".

#### **Committee Annotation**

(Note: In the following discussion refer to Uniform Rule 62 (7) (Proposed Rule 62 (6)) defining the term: "Unavailable as a witness.")

1. Clause (a) overlaps to a degree Revised Rules of Courts (1953). Rule 4:16-4 (c) allows depositions of any witness to be used by any party against the other party for any purpose *if* the judge finds that the witness is dead, out of the State without the procurement of the party offering the deposition, unable to attend because of age, sickness, infirmity or imprisonment, or that the party has been unable to procure the attendance

of the witness by subpoena. The Court is further given discretion to allow the use of depositions in any case where under exceptional circumstances the interests of justice will be promoted. Clause (a) avowedly does not require that the deponent be unavailable. Thus it is incongruent with R. R. 4:16-4 (c). Revised Rules of Court, 4:16-4 (b), permits the depositions of a party to be used by the adverse party for any purpose—there being no requirement of unavailability. So far, therefore, as a deponent-party goes, the proposed Uniform Rule and Rule of Court are compatible.

2. *Clause (b) (i)* This part of the rule provides that when, at a hearing the judge finds a witness is unavailable, testimony given in another action (or deposition taken for use in another action) is admissible when offered against a party (or his successor in interest) who offered it in the trial of another action. This part of the Rule is in conflict with *Bageard v. Consolidated Traction Co.*, 64 N. J. L. 316, 45 Atl. 620 (E. & A. 1900). The Court, while recognizing its admissibility for the purpose of discrediting the party by showing that both he and his witness testified differently on the former occasion to the same state of facts, rejected the testimony when offered by the adversary "as proof of what was deposed." The Court observed:

"Of course a party is not bound in one trial by the testimony of a witness produced by him upon a previous trial of the same issue. He may have been disappointed in such a testimony. It may have been false or mistaken testimony."

It is submitted that the proposed Uniform Rule is sounder practice. In the first place, it is not a question of "being bound" by the former testimony. It is merely a question of admissibility—of using evidence that otherwise would be lost since the witness is unavailable. The proponent of the witness can refute it by evidence *aliunde* of the witness if the testimony was false or the witness mistaken. It should be noted in this connection that under the proposed Rules, a party is not prohibited from impeaching his own witness. See Rule 20. Failure so to do when one's own witness proves adverse may well spell out an adoptive admission. See Rule 63 (8). Former testimony—no matter by whom offered or against whom—involves only minimal hazards of hearsay (use of words, sincerity, memory, and perception) since the witness ran the gamut of cross-examination at the first hearing. See, Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," 62 *Harv. L. Rev.* 177 (1949). To suppress such testimony because now offered by the adversary of the original proponent of the witness is not in furtherance of the quest for truth. That its use boomerangs on its first proponent is irrelevant to this inquiry.

3. *Clause (b) (ii)* This clause embodies the well-established "reported testimony" exception to the hearsay rule but with certain modifications not supported in New Jersey decisions. The comment will relate to the following topics:

- A. The relation of the Rule to existing New Jersey statutes.
- B. The definition of "unavailable as a witness" of the Rule as compared with New Jersey statutory and case law.
- C. The orthodox "same-parties-same issues-rule" followed in New Jersey.

D. Relaxation of rule in compensation proceedings: "Identity of Opponent Rule."

E. Further relaxation under "same incentive to cross-examine" as embodied in the Uniform Rule.

F. Application in criminal actions.

A. *The relation of the Rule to existing New Jersey Statutes.* Three statutes relate to the use of former reported testimony in a subsequent action: (i) R. S. 9:17-24 which makes the testimony of the mother taken at a former hearing of a bastardy action, admissible in a second proceeding where in the interim the mother dies, becomes insane or leaves the state. The proposed Rule would work no substantial change in the practice under this statute; (ii) N. J. S. 2A:81-13, makes admissible in an action that has been revived by or against a decedent, the previous testimony of a decedent-party taken at the first trial of "a civil action", the death of the party occurring in the interim; (iii) N. J. S. 2A:81-14, a similar enabling act with respect to the admissibility of a witness's testimony in a "civil action" when taken by the official stenographer of the Court, the witness having died before a new trial of the action. Under this last statute, it has been held that non-stenographic notes of a police court judge are inadmissible in a civil suit between the same parties if the judge does not testify to what was said. *Ross v. Nevin Bus Lines*, 9 N. J. Misc. 412, 154 Atl. 198 (Sup. Ct. 1931). It is to be noted, that these last mentioned statutes have been held not to be exclusive of the common law exception as recognized in earlier decisions. *Welch v. County of Essex*, 6 N. J. Super. 422, 68 A. 2d 787 (Essex Co. Ct. 1949), *aff'd* in part, 6 N. J. Super. 184, 70 A. 2d 779 (App. Div. 1950). Further, unavailability is predicated only on death in the last named statutes, whereas in the bastardy act it is predicated on either death, infirmity or absence from the state. The last named statutes also apply only in a civil action.

B. *The definition of "unavailable as a witness" of the Rule as Compared with New Jersey Statutory and Case Law.* Rule 62 (7) defines unavailability broadly *inter alia* to include death, insanity, physical infirmity and absence from the jurisdiction. Only the bastardy act (R. S. 9:17-24, *supra*) defines "unavailability" in comparable terms. The other statutes, as to a decedent party-witness, and a decedent witness, predicate unavailability only on death. Only R. R. 4:16-4 (c) with respect to the use of depositions of a witness, defines "unavailability" in terms as comprehensive as those of the Uniform Rule (with minor variations). In 1870, "unavailability" was defined under the common law exception to include death, insanity or physical infirmity but absence from the jurisdiction was rejected. *Berney v. Mitchell*, 34 N. J. L. 337 (1870). In a later decision, it was suggested that "unavailability" might have been predicated on absence from the jurisdiction had it been shown that upon "diligent inquiry" the witness could not be found. *N. Y., L. E. & W. R. R. Co. v. Haring*, 47 N. J. L. 137 (E. & A. 1885). No case has been found since either under the common law approach or the statute which accepts any predicate for unavailability except death. The broad base for unavailability found in the Rules is supported by the weight of recent decisions generally, and operates to expand the common law exception—one of soundest exceptions to the hearsay rule. See 5 Wigmore § 1396.

C. *The Orthodox "Same-Parties-Same Issues" Rule Followed in New Jersey.* The New Jersey decisions until 1949 followed consistently the orthodox common law rule that the parties and the issues must be the same in the second as those in the first, if the "reported testimony" in the first action is to be admitted in the second action. *Sokobin v. Ornstein*, 108 N. J. L. 304, 158 Atl. 468 (E. & A. 1932); *Lupino v. Sestanovich*, 115 N. J. L. 217, 178 Atl. 769 (E. & A. 1935); *First National Bank of Toms River v. Levy*, 125 N. J. L. 458, 16 A. 2d 555. Cf., *Franzen v. E. I. DuPont de Nemours & Co.*, 51 F. Supp. 578 (D. C. N. J. 1943), *aff'd* 146 F. 2d 837 (C. A. 3rd 1953); *Berney v. Mitchell*, *supra*. Some relaxation of the identity of parties requirement is suggested in an early equity decision when the party against whom the former testimony, although not a party to the former proceeding, was present thereat, heard it read, and being subsequently examined himself in the same proceeding assented thereto. *Beeckman v. Montgomery*, 14 N. J. Eq. 106 (Ch. 1861). A further relaxation is suggested when the party against whom the testimony is in privity with a party to the first action. See, *Wanner v. Sisson*, 29 N. J. Eq. 141 (Ch. 1878). The trend in modern decisions is to accept the relationship of privity as sufficient to establish substantial identity of parties for the purpose of rendering "reported testimony" admissible. See, 31 C. J. S., Evidence § 384 *et seq.*; Katzman, 9 Rutgers L. Rev. 555 (1955).

D. *Relaxation of Rule in Compensation Proceedings: "Identity of Opponent Rule."* In 1949, the matter of identity of parties was re-examined in a workmen's compensation matter. Although the petitioner in the first proceeding was not the same as the second, yet the respondent was the same, the "reported testimony" having been received in evidence against him in the first proceeding, and the witness' testimony (who was the petitioner) he dying in the interim, was offered by a different petitioner in the second proceeding. Since the defendant in the first had the same incentive to cross-examine then as now, the evidence was allowed. *Welch v. Essex County*, *supra*. The law of that decision was followed in *Hagerman v. Lewis Lumber Co.*, 24 N. J. Supr. 120, 93 A. 2d 632 (App. Div. 1954) *aff'd*, 13 N. J. 315, 99 A. 2d 513 (1953). See comment, 8 Rutgers L. Rev. 222, 241 (1953) 9 *id.* 287, 301-302 (1954). Although these were compensation hearings, there is no suggestion that the relaxation of the rule of "same parties" is in anyway related to the nature of the hearing.

E. *Further Relaxation Under the "Same Incentive" to Cross-Examine as Embodied in the Uniform Rule.* In the proposed Rule it is not even required that the person against whom the testimony was, and is now being offered in the two actions, be the same. All that is requisite is that the issue be "such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered." (Emphasis supplied). For identity of opponent, therefore, is substituted, similarity of interest and motive in the respective adverse parties to cross-examine. This similarity of interest and incentive would seem to be an adequate basis for admissibility in the second action at least in civil actions. The Model Code, Rule 511, goes even further in making the testimony admissible in the second action "for any purpose"

for which it was admissible in the first unless the judge finds (a) the declarant is available as a witness and (b) in his discretion rejects the evidence. The Uniform Rule, however, does not go so far, but of course is contrary to the rule followed in New Jersey Acts at Law. See N. J. Dept. of Labor—*Lieberman v. Warman*, 19 N. J. Misc. 417, 20 A. 2d 604 (1941); State Board of Tax Appeals—*Donio v. Atlantic City*, 20 N. J. Misc. 105, 25 A. 2d 26 (*Bd. of Tax Appeals*, 1942).

F. *Application in Criminal Cases.* Only one New Jersey decision has been found dealing with the admissibility of “reported testimony” in a second criminal trial. The parties and the issue were of course the same. Admissibility was sustained, the Supreme Court citing the previous civil decisions—a clear *petitio principii*. *State v. Hogan*, 132 N. J. L. 148, 39 A. 2d 226 (*Sup. Ct.* 1944), *rev'd on other grounds*, 133 N. J. L. 59, 42 A. 2d 562 (*E. & A.* 1945). The Constitution of 1844, as does the Constitution of 1947, Article I, par. 10, insures the right of confrontation, but the *Hogan* opinion made no reference to a possible infraction of constitutional right. If as Wigmore suggests, confrontation is merely a way of insuring the right to cross-examine and that right was accorded at the first trial, the *Hogan* opinion is sound. See 5 *Wigmore*, §§ 1365, 1395. It might be argued that the Uniform Rule, however, in admitting “reported testimony” when in the first action was offered not necessarily against the present defendant in a criminal action would infringe upon his right “to be confronted by his accusers.” It would seem better on the whole to confine (b) (ii) to civil actions.

#### **(4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally.**

A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;

##### **Drafters' Comment**

Clause (a) covers spontaneous statements of narration made simultaneously with perception. Clause (b) covers statements of narration not necessarily simultaneous with perception but made while the declarant is under the excitement of the event. Both clauses are necessary because under (a) the element of excitement is not necessary but spontaneity is the sole test. Both are well recognized exceptions. Clause (c) is new and

represents a carefully considered middle ground between the liberal extreme of the A.L.I. Model Code of Evidence and the ultra conservative attitude opposing any liberalization in the exceptions to the rule against hearsay. In the tentative draft on hearsay presented at the 1951 meeting of the Conference an exception was included in the language of the 1938 recommendation of the American Bar Association, letting in hearsay statements of persons who are unavailable as witnesses because of death or insanity. A statute has existed in Massachusetts since 1898 recognizing death as the justifying factor. The committee after carefully reconsidering the problem has felt that there was no sound basis for recognizing necessity on account of death or insanity as distinguished from real unavailability for any cause. Consequently a solution was sought which would let in narrative statements not falling within the definition of (a) or (b), but still having substantial basis for trustworthiness. Thus Clause (c) was adopted and the American Bar recommendation rejected. Unavailability is here recognized as an essential justifying factor. Also the trial judge is necessarily given considerable discretion. Clause (c) is drafted so as to indicate an attitude of reluctance and require most careful scrutiny in admitting hearsay statements under its provisions. The fact remains that there is a vital need for a provision such as this to prevent miscarriage of justice resulting from the arbitrary exclusion of evidence which is worthy of consideration, when it is the best evidence available. "Unavailability" is carefully defined in Rule 62 so as to give assurance against the planned or fraudulent absence of the declarant.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

1. Three somewhat distinct principles are embodied in the three clauses of the above Rule. The first two relate to that familiar exception to the hearsay rule, as properly described—"spontaneous declarations" but in New Jersey more frequently, but not always, tagged as a "res gestae" exception. Both are predicated on "spontaneity" as the so-called guaranty of trustworthiness and equivalent of cross-examination. Neither demands the unavailability of the declarant. Clause (b) presupposes a greater intensity of spontaneity because of the requirement of utterance under "stress of nervous excitement." Strict contemporaneity is a requisite of Clause (a) but not of Clause (b). In Clause (c) there is no requirement of spontaneity. The predicate here for admissibility is the unavailability of the witness coupled with a preliminary finding by the trial judge that the declaration was made (i) at a time of recent perception; (ii) with clear recollection; (iii) in good faith, and (iv) prior to the commencement of the action.

2. Clauses (a) and (b) embody what is essentially New Jersey law. Clause (c) would be a departure.

A. *Clause (a): Spontaneous Declarations: The So-Called "Non-Exciting Event Exception"*. This exception admits strictly contemporaneous declarations in the absence of an exciting event but made while the declarant was perceiving the event or condition which the statement narrates, de-

scribes or explains. *Kelley v. Pitney*, 98 N. J. L. 773, 121 Atl. 593 (E. & A. 1923); *State v. Kane*, 77 N. J. L. 244, 72 Atl. 39 (Sup. Ct. 1909); cf., *Hunter v. State*, 40 N. J. L. 495 (E. & A. 1878). While this type of utterance lacks the especial element of spontaneity generated by excitement, it is nevertheless spontaneous in that it articulates the declarant's reaction contemporaneously with the perceived event or condition.

*Spontaneous Declarations in the Absence of an Exciting Event.* See note, 46 Col. L. Rev. 430 (1946) reviewing the authorities. It accords with both the Model Rule 512 (a) and Missouri Code, Sec. 11.02 (a) (1). It is recommended by Professor Morgan, "A Suggested Classification of Utterances Admissible as Res Gestae", 31 Yale L. Jour. 229, at p. 237 (Class 6) (1922). Also by Dean McCormick, "Some Evidence Questions in Personal Injury Cases Suggested by a Recent Texas Decision", 21 Texas L. Rev. 218, at p. 308 (1942). It is supported by only a minority of jurisdictions. The leading case supporting it is *Houston Oxygen Co. v. Texas*, 139 Texas 1, 161 S. W. 2d 474 (1942). New Jersey cases have admitted many such utterances under the broad *res gestae* umbrella without having pin-pointed the basis of their admissibility as spontaneity. *Rainess v. Grant Finishing Co. Inc.*, 133 N. J. L. 611, 45 A. 2d 678 (E. & A. 1946). Having in mind that this exception would permit the declarant to prove his own declaration without verification of the auditor, or proof by the auditor without opportunity to cross-examine the declarant, and in all cases, whether dis-serving or self-serving, some limitation might be desirable to compensate for the absence of nervous excitement with an increased hazard of contrivance or calculated utterance even though contemporaneously made. Suggested for consideration are:

- (1) Preliminary specific finding by trial judge of intrinsic trustworthiness, and/or
- (2) verification by auditor if established by declarant, himself, and/or
- (3) exclusion if self-serving, and/or
- (4) only when declarant not available for cross-examination.

B. *Clause (b): Spontaneous Declarations: The So-Called "Exciting Event Exception"*. This clause codifies the well-recognized exception sometimes and unhappily referred to as a part of the *res gestae*, but more appropriately referred to as a "spontaneous declaration". New Jersey's leading decision dealing with the state of mind exception contains *obiter* which fully support this exception. *Hunter v. State*, 40 N. J. L. 495 (E. & A. 1878). See also, *Castner v. Sliker*, 33 N. J. L. 507 (ejaculatory utterances in an affray); *Riley v. Weigand*, 18 N. J. Super. 66, 86 A. 2d 698 (App. Div. 1952) extensive review of New Jersey decisions. Since it is limited to utterances made under "stress of nervous excitement," it is a codification of that specific area of spontaneous utterances commonly referred to as the "exciting event" exception to the hearsay rule. The declaration can be proved by a third person or the declarant himself. *Trenton Passenger Ry. Co. v. Cooper*, 60 N. J. L. 219, 37 Atl. 730 (E. & A. 1897). It is well grounded psychologically, since under excitement self-interest is submerged and ordinary incentives to contrive, falsify or fabricate are at a minimum. *Murphy v. Brown & Co.*, 91 N. J. L. 412, 103 Atl. 28 (Sup. Ct. 1918); *State v. Doro*, 103 N. J. L. 88, 134 Atl. 611 (E. & A. 1926). But this

theory, however, has not gone unchallenged. See, Hutchins & Schlesinger, "Some Observations on the Law of Evidence," 28 *Col. L. Rev.* 432, 439 (1928), indicating observations of a calm observer are more trustworthy than of an excited one. It is supported by Wigmore when made while under stress and before there is time to contrive. 6 Wigmore 1750. It is substantially in accord with the Model Code Rule 512. It is supported by Professor Morgan. See, Morgan, "A Suggested Reclassification of Utterances Admissible As Res Gestae," 31 *Yale L. Jour.* 229 at p. 239 (1922). New Jersey decisions recognize that such utterances are a part of the *res gestae* and have an added guaranty of trustworthiness in that they are uttered spontaneously under stress of nervous excitement. *Andricsak v. National Fireproof Corp.*, 4 *N. J. Super.* 220, 66 *A. 2d* 731, *rev'd* 3 *N. J.* 466, 70 *A. 2d* 750 (1950).

The Rule contains no limitation with respect to the self-serving as opposed to the disserving utterances. This also is supported in New Jersey decisions. The Rule has no precise requirement of contemporaneity of utterance with the event perceived, merely providing for utterance "while" the declarant was under stress of excitement. It presumably allows for a time lag, commonly referred to as the "interval of time" theory, so long as the impact or spell of the event is projected in a continuance of the "nervous excitement" thereby induced. This coincides with New Jersey law. *Atamanik v. Real Estate Management, Inc.*, 21 *N. J. Super.* 357, 91 *A. 2d* 268 (*App. Div.* 1952). No case in New Jersey has been found admitting utterances antecedent to the event—but there is outside authority that an impending accident can generate enough "excitement" to qualify such an utterance made anteriorly to the event.

The exception commonly admits declarations of bystanders as well as participants which accords with New Jersey decisions. New Jersey decisions impose no requirement that the declarant be unavailable. *Trenton Passenger Ry. Co. v. Cooper*, *supra*. There is also authority for the admissibility of ejaculated utterances of observed automobile license numbers when the witness derived them through an intermediary, though on what theory is not clearly articulated in the decisions. *Rathburn v. Brancatella*, 93 *N. J. L.* 222, 107 *Atl.* 279 (*E. & A.* 1919).

The shift in emphasis provided by the Rule to "nervous excitement" rather than an utterance accompanying an act, would accelerate the abandonment of such weasel terms as "res gestae," "verbal acts," both of which lack specific content, obfuscate, and confuse and have been generally condemned by jurists and writers alike over a long period of time. But they have proved to be hardy weeds. And "res gestae" is not without its latter day champions. See Slough, "*Res Gestae*," 2 *Kansas L. Rev.* 246 (1953).

3. *Clause (c). Admissibility Grounded on Necessity of Statements Contemporaneously Made.* No New Jersey decisions have been found supporting the Rule as proposed or, as modified, and recommended. The only authority indicating approval and possible acceptability is found in a concurring opinion by Vanderbilt, C. J., in *Robertson v. Hackensack Trust Co.*, 1 *N. J.* 304, 320, 63 *A. 2d* 515, 522-523 (1949) and an earlier opinion by Van Winkle, A. M., in, *In re Petagno*, 24 *N. J. Misc.* 279, 48 *A. 2d* 909. The

requirement that the perception be recent, recollection clear, and the statement made in good faith contain some guarantee of trustworthiness. This guarantee is somewhat similar to that present where "past recollection recorded" is admitted, although in the instant problem the witness is unavailable for cross-examination. The proposed rule seems advisable, although as indicated in the Drafters' Comment careful scrutiny by the trial judge is warranted, and he should be allowed considerable discretion to exclude.

## **(5) Dying Declarations.**

A statement by a person unavailable as a witness because of his death if the judge finds that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery;

### **Drafters' Comment**

Because of the limited character of exception (4) a specific exception covering dying declarations is necessary. The rule here stated follows the more logical rule as it exists in some jurisdictions but broadens the scope of admissibility beyond that permitted in many jurisdictions where the use of dying declarations is limited to homicide cases. Kansas pioneered in broadening the scope of this exception. See 91 Kan. 468; 106 Kan. 836; 124 Kan. 327; Wigmore (3rd Ed.), Vol. V, page 224.

### **Recommendation**

It is recommended that this rule be adopted without change.

### **Committee Annotation**

1. The rule embodies the essence of the long established common exception familiarly known as a "dying declaration." It is of course predicated on the unavailability of the declarant and the awesomeness of the moment when death is known to be pending. In these particulars there is no change.

2. The Rule further calls for a finding by the trial judge that not only was the declarant conscious of death and believed there was no hope, but further that the declaration was made voluntarily and in good faith. No New Jersey decision has been found indicating specifically the necessity for a preliminary finding that the declaration was made "voluntarily and in good faith." But no case has been found in which these specific issues were raised. Numerous New Jersey decisions have stated the necessity of a preliminary finding that the declarant was conscious of his impending death and believed that there was no hope of recovery. This requirement was perhaps even more emphatically stated by Chief Justice Beasley in 1888: "Death shortly to ensue must be an absolute certainty, so far as the consciousness of the person making the accusation is concerned. If there is the least hope, no matter how faint, the requisite certainty of belief does not exist." *Peak v. State*, 50 N. J. L. 179, 12 Atl. 701, 706 (*Sup. Ct.* 1888). Numerous New Jersey decisions affirm the duty of the

trial judge to make a preliminary finding that the declaration was made at a time that the declarant was conscious of impending death and had lost hope of recovery. *State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 (E. & A. 1916). But there is no rule of practice that requires him to exclude the jury: in this, and the analogous case of determining the voluntariness of the confession, the matter has rested in the discretion of the trial judge. *State v. Yarrow*, 104 N. J. L. 512, 141 Atl. 85 (E. & A. 1928). Rule 8 of the Uniform Rules establishes a similar discretionary rule (with the exception of confessions. See, *infra*). The determination of consciousness of death is a court question. Having been determined by the court in favor of admissibility, the jury may not reject it because of a contrary belief. *State v. Agnesi*, 92 N. J. L. 53, 104 Atl. 299 (Sup. Ct. 1918); *cf.*, *State v. Compo*, 108 N. J. L. 499, 158 Atl. 541 (E. & A. 1932); *accord*, 5 *Wigmore* § 1451. An early New Jersey decision established the rule that anything that would disqualify a witness from testifying will disqualify the declarant and his dying declaration. The dying declarant was thus said to have "oath capacity" or religious belief. But every person is presumed to be a believer and the burden of showing otherwise is upon the one objecting to the dying declaration. *Donnelly v. State*, 26 N. J. L. 601 (E. & A. 1857), *aff'g*, 26 N. J. L. 463 (Sup. Ct. 1857); *State v. Agnesi*, 92 N. J. L. 53, 104 Atl. 299 (Sup. Ct. 1918). But Professor Wigmore finds the awesomeness of the moment sufficient to support the trustworthiness of the declaration. 5 *Wigmore* § 1443; *cf.*, Uniform Rule 17; *N. J. Constitution of 1947*, Art. I, Section 10.

3. In New Jersey dying declarations are admissible (i) only in homicide cases when the death of the declarant is the subject of the charge, (ii) abortion cases in which the mother dies. *Donnelly v. State*, *supra*; *State v. Myer*, 65 N. J. L. 233, 47 Atl. 486 (E. & A. 1900); *State v. Bricker*, 99 N. J. L. 520, 123 Atl. 296 (E. & A. 1924). No New Jersey case has been found that recognized admissibility in a civil action. It is implicit in the *Donnelly* case, that admissibility is limited to homicide prosecutions (and abortion prosecutions by later decision). See, *Jenks v. Breen*, 42 N. J. Eq. 325, 5 Atl. 647 (Ch. 1886) inadmissible as proof of title; *Post v. Anderson*, 11 N. J. Misc. 1, 163 Atl. 666 (Sup. Ct. 1932), *aff'd*, 111 N. J. L. 303, 168 Atl. 622 (E. & A. 1933). In extending admissibility to civil actions and recognizing it generally without any requirement that the death of the declarant must be the subject of the charge, as well as abolishing any requirement as to the religious beliefs of the declarant (by omitting any reference thereto in the Rule) the proposed Rule liberalizes the exception along lines urged by Professor Wigmore and numerous writers in legal periodicals. 5 *Wigmore* §§ 1430 *et seq.* See, Smith, "Dying Declarations," 3 *Wisc. L. Rev.* 193 (1925). Correction of Sergeant East's early error in restricting the exception to homicide cases is long overdue.

## (6) Confessions.

In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was

conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same;

#### **Drafters' Comment**

This exception adopts the substance of A.L.I. Model Code of Evidence Rule 505 except that it is not required that the suffering inflicted or threatened be "physical" or that it be to the accused himself. Threats to a member of his family may render the confession involuntary. The general requirement that the confession must not be under compulsion, etc., is added. These changes bring the exception more in line with *Ashcraft v. State of Tennessee*, 322 U.S. 143. The last sentence of Rule 8 insures that the circumstances of making the confession may be presented to the jury even after the judge had held the preliminary inquiry and let the confession come in.

#### **Recommendation**

It is recommended that this Rule be adopted without change.

#### **Committee Annotation**

1. This Rule is to be read in connection with Rule 8, with reference to the preliminary finding by the trial judge of "voluntariness." This Rule proposed a slight departure from the existing New Jersey practice. Heretofore, the practice in this state with regard to conducting the preliminary inquiry in or out of the presence of the jury permits a discretionary ruling from the bench. *State v. Yarrow*, 104 N. J. L. 512, 141 Atl. 85 (E. & A. 1928). Rule 8, however, provides that if requested (apparently by either the state or the accused), the matter shall be heard "out of the presence and hearing of the jury." Doubtless this change was proposed as a safeguard against the defendant's being prejudiced by the jury's learning of a confession, which is later rejected by the trial judge as inadmissible as a matter of law. This change in New Jersey practice would seem to be desirable.

2. In two other particulars, Rule 63 (6) proposes what appear to be departures in the existing practice of this State. With respect to a preliminary hearing, the Rule apparently makes no distinction between a confession (wherein the accused admits guilt fully) and a criminal admission, which goes to some inculpatory fact but does not concede the central fact of guilt. The language of the Rule is "a previous statement by him relative to the offense charged." New Jersey cases indicate that a preliminary hearing must be had only on a confession as such (in contra-

distinction to a criminal admission). *State v. Donato*, 106 N. J. L. 397, 148 Atl. 776 (E. & A. 1930); *State v. Lustberg*, 11 N. J. Misc. 51, 164 Atl. 703; *cf.*, Rule 505 of the Model Code which contains a definition of a confession. The Uniform Rules, however, although including a definition of "statement", (Rule 62 (1)) do not undertake to define a "confession", other than the language quoted above. The difficulty of drawing a line between confessions and admissions of a lesser, inculpative degree is to be weighed against the trial inconvenience of a preliminary hearing on the admissibility of any statement made by the accused. On balance, the Rule as drawn by the Commissioners seems desirable. See, McCormick, *Some Problems and Development in the Admission of Confessions*, 24 *Texas L. Rev.* 239 (1946). It is to be noted that Rule 63 (6) requiring a preliminary hearing on the admissibility of a confession is confined to a criminal action. The Rule has no application when a confession is offered in a civil action. *Patten v. Freeman*, 1 N. J. L. 113 (*Sup. Ct.* 1791).

3. Noteworthy too is the practice in New Jersey of admitting "confessions by conduct," or an admission of guilt by non-denial when a co-conspirator admits guilt in the presence of the accused which goes undenied. Rule 63 (6) in using the word "statement" (as defined in Rule 62 (1)) leaves unaffected the practice, heretofore followed in this State, of not requiring a preliminary hearing. *State v. Toohey*, 6 N. J. Super. 97, 70 A. 2d 180 (*App. Div.* 1950); *cf.*, *State v. Reda*, 11 N. J. Misc. 493, 165 Atl. 413 (*Sup. Ct.* 493); *State v. Picciotti*, 12 N. J. 205, 96 A. 2d 406 (1953).

4. In one other particular—in the area of psychological coercion, the proposed Rule appears not to coincide strictly with existing New Jersey law. The Rule, in Clause (a), refers to "threats of infliction of suffering upon him (the defendant) or another." (Emphasis supplied). New Jersey decisions indicate, however, that a confession is not rendered inadmissible unless the promises, threats and the like relate to some benefit to be derived by the defendant in the proceeding. This would seem to exclude the psychological coercion of threats of infliction of pain on relatives, accused's fiancée, and the like. See, *State v. Beard*, 16 N. J. 50, 106 A. 2d 265 (1954); *cf.*, *State v. Pierce*, 4 N. J. 252, 72 A. 2d 395 (1950) (threats to arrest accused's mother). The Rule, however, is in keeping with the modern trend and merits adoption as drawn.

5. In no other particular does the Uniform Rule appear to change any principle developed in the hundreds of New Jersey decisions, since *State v. Guild*, 10 N. J. L. 178 (*Sup. Ct.* 1828), that relate to the law of confessions.

## **(7) Admissions by Parties.**

As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement;

### Drafters' Comment

This and exceptions (8) and (9) cover the admissibility of admissions by a party or by those by whose statements he is bound. They adopt the policy of Model Code Rules 506, 507 and 508.

### Recommendation

It is recommended that this Rule be adopted without change.

### Committee Annotation

1. The Rule embodies the general theory of the admissibility of admissions (usually referred to in New Jersey decisions as "admissions against interest"). Admissions are generally regarded as an exception to the hearsay rule notwithstanding the quirk that there would seem to be little sense in one insisting upon, or being accorded a right, to cross-examine oneself; *cf.*, *Mueller v. Seaboard Commercial Corp.*, 5 N. J. 28, 73 A. 2d 905 (1950). See comment to Section 11.18 of the Missouri Code. The admissibility of extra judicial utterances of a party to an action at law when offered by his adversary is too elementary a rule to need supporting citations. It is noteworthy, however, that the utterance is only admissible when offered *against* the party making the statement; however, once it has been received in evidence it becomes evidence in the cause to the benefit of which both parties are entitled. *Link v. Eastern Aircraft, &c., General Motors Corp.*, 136 N. J. L. 540, 57 A. 2d 8 (E. & A. 1948); comment, 61 *Harv. L. Rev.* 1447 (1948). The rule that forbids a party from offering self-serving statements is equally applicable to litigation involving multiple defendants when the purpose is to shift liability from one to another. *Ferry v. Settle*, 6 N. J. 254, 78 A. 2d 260 (1950); comment, 6 *Rutgers L. Rev.* 290, 315 (1951). The leading case on the basis of admissibility of admissions is *Schloss v. Tounstine*, 135 N. J. L. 11, 49 A. 2d 677 (*Sup. Ct.* 1946). In this very careful opinion by Heher, J., admissibility is predicated on the quality of inconsistency of the proffered admission with the admitter's case as made out in his pleadings or disclosed in his proofs. Although this language might be regarded as reminiscent of Professor Wigmore's theory (later discarded) of the limited office of an admission, admissions are recognized as substantive evidence in all New Jersey decisions. See *Link v. Eastern Aircraft, etc., supra*; *cf.* Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 *Yale L. Jour.* 555 (1921); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 *Univ. of Pa. L. Rev.* 484 (1937). (Under Rule 63 (1)). The distinction between admissions of parties, and prior inconsistent statements of a witness, seems to be more or less obliterated; *cf.* *State v. Rappise*, 3 N. J. Super. 30, 65 A. 2d 266 (*App. Div.* 1949). The fact that testimony of a party's extra-judicial utterance is derived from an adversary's witness does not operate to render it admissible if self-serving. *State v. Unsworth*, 85 N. J. L. 237, 88 *Atl.* 1097 (E. & A. 1913). That a person who is a party to an action in a representative capacity, must in making the statement, have been acting in such representative capacity, seems to embody that which was implicit in previous New Jersey decisions. See, *Hewes v. Hurff*, 69 N. J. L. 263, 55 *Atl.* 275 (E. & A. 1903).

## (8) Authorized and Adoptive Admissions.

As against a party, a statement (a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth;

### Drafters' Comment

See comment under exception (7) of this Rule.

### Recommendation

It is recommended that this Rule be adopted without change.

### Committee Annotation

1. *Clause (a)* declares the previously established rule that the admissions made by a person who is authorized by a party to make a statement for him concerning the subject of the statement, are admissible against the party so authorizing. The law of agency, accordingly, determines admissibility and when the authority to speak is denied a preliminary issue of fact is raised to be determined under Rule 8. Numerous New Jersey decisions are wholly in accord with this clause of the Rule. In proving the fact of the agency, the agent's extra-judicial statements are not admissible. He may, however, testify from the witness stand to establish the agency. *Wilson v. Savino*, 10 N. J. 11, 17, 89 A. 2d 399, 402 (1952). This clause should be read together with Rule 63 (9) (a).

2. *Clause (b)* declares the settled rule of an adoptive admission, or admission by non-denial. The principle is equally recognized in civil and criminal actions. *Ollert v. Ziebell*, 96 N. J. L. 210, 114 Atl. 356 (E. & A. 1921); charge of malpractice by patient undenied by dentist. In criminal actions, the leading case is still *Donnelly v. State*, 26 N. J. L. 601 (E. & A. 1857); *State v. Laudise*, 86 N. J. L. 230, 90 Atl. 1098 (E. & A. 1914); accusation by wife of paternity by the husband of an infant child in the presence of a third person, undenied by the husband; *State v. Claymonst*, 96 N. J. L. 1, 114 Atl. 155 (Sup. Ct. 1921) identification by a child of the accused as the perpetrator of a crime which was undenied. New Jersey decisions do not regard the person's arrest as depriving such person's silence under accusation of its usual admitting effect. *State v. Claymonst*, *supra*. An early case refused to apply the principle against a party offering a witness, when such party's adversary in a later action offered the witness' testimony *against* the original proponent of the witness. *Bageard v. Consolidated Traction Co.*, 64 N. J. L. 316, 45 Atl. 620 (E. & A. 1900). *But see*, Uniform Rule 63 (3) *supra*. A recent decision in the Appellate Division, commenting on the weight of the inference of assent from silence, observed that in criminal actions, the principle should be applied with caution, since "silence" alone is a "weak reed" to rely on for there are many legitimate explanations for silence. *State v. Bulach*, 10 N. J. Super. 107, 76 A. 2d 692 (App. Div. 1950). The mere fact that the statement of a stranger was made in the presence of "the party against whom it is offered as an

adoptive admission does not *per se* establish admissibility." Circumstances may well exist rendering a reply inexpedient. *State v. Toohy*, 6 *N. J. Super.* 97, 70 *A. 2d* 180 (*App. Div.* 1950); *Kiernan v. Mauer*, 13 *N. J. Super.* 18, 80 *A. 2d* 116 (*App. Div.* 1951); comment, 6 *Rutgers L. Rev.* 290, 306 (1951); such as when a person maintains silence on the advice of counsel. *State v. Kane*, 9 *N. J. Super.* 254, 75 *A. 2d* 894 (*App. Div.* 1950) *semble*. The essential requirement is the conduct or words of the party against whom the admission is offered, manifested his adoption or his belief "in the truth of statement". See 7 Wigmore § 2115.

## **(9) Vicarious Admissions.**

As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

### **Drafters' Comment**

See comment under exception (7) of this Rule.

### **Recommendation**

It is recommended that this Rule be adopted.

### **Committee Annotation**

This Rule is substantially the same as Rule 508 of the Model Code. The three clauses of the Rule relate to distinguishable situations and will be discussed separately. Each clause relates to what are commonly classified as "vicarious admissions". Notably absent are those admissions by persons who are privy in title, or ownership, or obligation. These, somewhat in line with Professor Morgan's views expressed in, *The Rationale of Vicarious Admissions*, 42 *Harv. L. Rev.* 461 (1929), have been eliminated from Rule 63 (9). They are, however, included in Rule 63 (10), which is the counterpart of Rule 509 of the Model Code.

1. *Clause (a). Distinguishing Statements by Agents Who Are Authorized by the Principal to Make a Statement Concerning the Subject Matter of the Statement and, Statements by Agents or Employees Concerning a Matter Within the Scope of the Agency or Employment.* It has been pointed out in connection with Rule 63 (8) (a) that when an agent is authorized to make a statement concerning the subject of the statement, it is admissible

against the principal, irrespective of whether it relates to an agency transaction that is pending at the time. *Hollander v. Smith & Smith*, 10 N. J. Super. 82, 76 A. 2d 697 (App. Div. 1950), cert. denied, 6 N. J. 398, 79 A. 2d 108 (1951); accord, Rule 68 (8) (a), supra. This principle is not to be confused with statements made by an agent in connection with and concerning a matter within the scope of the agency or employment: here it has been held that the statement must be in the course of execution of the agency—the effect of which requirement is to exclude narratives of past events. *Hansen v. Eagle-Pitcher Lead Co.*, 8 N. J. 133, 84 A. 2d 281 (1951). The proposed rule would seem to eliminate this requirement. For an interesting decision pointing up this distinction between an authority to speak (Rule 68 (8) (a)) and to do an act in execution of the agency in the doing of which statements are made which—notwithstanding the lack of authority to speak for the principal—are admissible against the principal as a “vicarious admission” (Rule 63 (9) (a)). See, *Arenson v. Skouras Theatres Corp.*, 131 N. J. L. 303, 36 A. 2d 761 (E. & A. 1944). Earlier decisions are in accord: *Jones v. Mount Holly Water Co.*, 87 N. J. L. 106, 93 Atl. 860 (1915) (with citations); *Marmorstein v. State Theatres Corp.*, 6 N. J. Misc. 66, 140 Atl. 8 (Sup. Ct. 1928), aff’d 106 N. J. L. 574, 146 Atl. 915 (E. & A. 1929) (manager’s statement to a policeman in reference to an unruly patron of a theatre—“Take him out”). But statements or admissions of fault or of alleged notice of defects in the premises, not in execution of any agency or employment, are not admissible against the principal or employer. *Raffetto v. Warner Bros. Theatres Inc.*, 121 N. J. L. 333, 2 A. 2d 595 (1938). (Contrawise, if a spontaneous utterance either with or without the nervous stress of an exciting event) (Rule 63 (4), supra) *Blackman v. West Jersey & Seashore R. R. Co.*, 68 N. J. L. 1, 52 Atl. 370 (Sup. Ct. 1902); *Hansen v. Eagle-Pitcher Lead Co.*, supra. Whether the doing of the act in the course of which the statement was made was “a matter within the scope of the agency or employment” is a question of fact calling for preliminary ruling to determine the admissibility of the statement. *Ashmore v. Penna. Steam Towing and Trans. Co.*, 38 N. J. L. 13 (Sup. Ct. 1875); *Ryle v. Manchester Bldg. & Loan Assn.*, 74 N. J. L. 840, 67 Atl. 87 (E. & A. 1907). It is not enough that an employee’s statement relates to the subject of the employment: it must appear that the statement was made in the performance of the duties of employment. *Barcello v. Biel*, 137 N. J. L. 606, 61 A. 2d 42 (E. & A. 1948). The New Jersey decisions rationalize the admissibility of declarations of this sort—under the Latin phrase *dum fervet opus*, *Mueller v. Seaboard Commercial Corp.*, 5 N. J. 28, 73 A. 2d 905 (Sup. Ct. 1950). A requirement—sometimes imposed—that the statement be made while the matter to which it relates is pending, shows a regrettable tendency to confuse the principle of spontaneous declarations (more frequently called “res gestae” in New Jersey) with vicarious admissions. *Hollander v. Smith & Smith*, supra. Clause (a) would thus broaden admissibility.

2. Clause (b). *Vicarious Admissions; Co-Conspirators, Joint Tortfeasors and the Like, Participating in a Plan to Commit a Crime or Civil Wrong.* This clause codifies New Jersey law in adopting the criterion of admissibility of “while the plan was in existence.” *State v. Fischman*, 108 N. J. L. 550, 156 Atl. 678 (E. & A. 1931) (rejecting the Federal Rule of “in further-

ance of the objectives of a going conspiracy"; *Krulewitch v. U. S.*, 336 U. S. 440, 69 S. Ct. 716 (1949); and comment, 42 *Harvard L. Rev.* 464 (1929)). But statements made prior to the formation of the conspiracy are admissible only on the limited issue of motive, if not too remote in point of time. *State v. Lieberman*, 80 N. J. L. 506, 79 Atl. 331 (Sup. Ct. 1911), *aff'd* 82 N. J. L. 748, 82 Atl. 1134 (E. & A. 1912); *State v. Simon*, 113 N. J. L. 521, 174 Atl. 867 (Sup. Ct. 1934), *aff'd* 115 N. J. L. 207, 178 Atl. 728 (1935); 52 *Michigan L. Rev.* 1159, 1172 (1954)—a "freak decision". The principle is of course inapplicable to statements made after the conspiracy has come to an end. *State v. Herbert*, 92 N. J. L. 341, 105 Atl. 796; *cf. State v. Dougherty*, 86 N. J. L. 525, 93 Atl. 98 (Sup. Ct. 1915). New Jersey, in accord with Clause (b), does not confine admissibility to criminal actions. It is equally applicable in civil actions where two or more persons combined to defraud another. *Patten v. Freeman*, 1 N. J. L. 113 (Sup. Ct. 1791); *Stewart v. Johnson*, 18 N. J. L. 87 (Sup. Ct. 1840). New Jersey decisions predicate admissibility on the *ad hoc* agency theory (or "partners in crime"). *State v. Dougherty*, 86 N. J. L. 525, 93 Atl. 98. Earlier authorities suggested "res gestae." Thayer, "Declaration as a Part of the Res Gestae", 15 *American L. Rev.* 71, 80 (1881); *cf.*, 4 Wigmore § 1080a.

3. Clause (c). *Declaration of a Third Party Tending to Establish a Legal Liability of the Declarant Which is in Issue Between the Proponent of the Evidence and His Adversary.* An examination of New Jersey decisions has disclosed only a few cases in which the proposed rule might apply. One involves the admissibility of a principal's declarations against a surety. In this instance, a New Jersey case has held the admissions of the principal make competent evidence against the surety, based on the privity of their joint obligation. *Town of Union v. Bermes*, 44 N. J. L. 269 (Sup. Ct. 1882); or independently of privity, on the principle of *res gestae*. *Town of Union v. Bermes*, *supra*. In a compensation case a statutory *ad hoc* agency seems to have been spelled out. *Amend v. Amend*, 12 N. J. Super. 425, 79 A. 2d 742 (*Essex Co. Ct.*, Law Div. 1950); R. S. 34:15-96; *cf.*, *Federal Insurance Co. v. Engelhorn*, 141 N. J. Eq. 349, 57 A. 2d 478 (E. & A. 1948). But when the cause is an independent one, the admission of a third person is excluded. *Dziadosc v. American Casualty Co.*, 114 N. J. L. 137, 176 Atl. 150 (E. & A. 1935). Similarly in a criminal action for having received stolen goods (a statutory offense), this offense was regarded as a separate one from the theft of the goods. Thus, since the proceedings were independent, the admission of the thief by way of a plea of *non vult* was held not competent against the defendant as a vicarious admission. *State v. Fox*, 12 N. J. Super. 132, 79 A. 2d 76 (*App. Div.* 1951). (Similarly as to an admission by another receiver not acting in concert with the defendant); *cf.*, *State v. Rom*, 77 N. J. L. 248, 72 Atl. 431 (Sup. Ct. 1909). See, 6 *Rutgers L. Rev.* 290, 307 (1951). It would seem that with the broadening of the admissibility of declarations against interest (Rule 63 (10)) *infra*, these decisions would go the other way under the proposed rule. Consideration should be given to the question whether Clause (c) is necessary in view of Rule 63 (10).

## (10) Declarations against Interest.

Subject to the limitations of exceptions (6), a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true;

### Drafters' Comment

This exception, as does Model Code Rule 509, changes the prevailing rules by making declarations against interest admissible even though the declarant is available as a witness, and by recognizing the value of declarations against his social, as well as his pecuniary or proprietary interest. No attempt is made here to lay down a guide, as does the Model Code, for the determination of what portions of a statement containing declarations against interest, are admissible.

### Recommendation

It is recommended that this rule be adopted.

### Committee Annotation

1. The rule departs in three particulars from orthodox law that has been generally followed in the United States: (a) The declarant need not be dead (or otherwise unavailable), as required under common law principles, (b) a declarant against so-called "penal interests" is admissible under the Uniform Rule, as well as, (c) a declarant against social standing, neither one of which qualified under the common law exception which was restricted to declarations "against pecuniary or proprietary interests."

2. New Jersey decisions, while not numerous, tend to support the common law requirements: (i) that the declarant be dead, (ii) that only declarations against pecuniary or proprietary interests are "against interest" within the purview of the exception, (iii) that it was against interest at the time it was made. *Turner v. Cole*, 116 *N. J. Eq.* 368, 173 *Atl.* 613, *aff'd* 118 *N. J. Eq.* 497, 179 *Atl.* 113. See, Jefferson, "Declarations Against Interest: An Exception to the Hearsay Rule", 58 *Harv. L. Rev.* 1 (1944). New Jersey adheres to the orthodox rule that it is the disserving character of the fact uttered (rather than the uttering of it) that gives it trustworthiness: if preponderantly disserving, it is nevertheless admissible although it has a self-serving aspect. *Shields v. Ivey*, 52 *N. J. L.* 280, 19 *Atl.* 261 (*Sup. Ct.* 1890). Endorsements of part payments on a note, if made before the note is outlawed by the limitation act, satisfy the rule of preponderance, since in reducing the amount of the note, the part payment is disserving in main. It is only when the payment is made after the bar has fallen that the self-serving aspect preponderates. *Christopher v. Wilkins*, 64 *N. J. Eq.* 354, 51 *Atl.* 728 (*E. & A.* 1902). *Cf.*, R. S. 2A:114-25. When the

declaration includes facts which are "neutral," *i. e.*, neither dis-serving nor self-serving. New Jersey law allows the declaration in evidence as proof of the neutral fact recited. *Christopher v. Wilkins*, *supra*, citing the English decision of *Higham v. Ridgway*, 10 *East*. 109 (K. B. 1808) so holding, with seeming approval. This is on the theory that the neutral fact is so connected with the dis-serving part of the declaration that it is equally trustworthy. *Accord*: Rule 509 (2) of the Model Code. No new decision has been found indicating that any other interest than a pecuniary or proprietary one will suffice to support the exception. *Myers v. Myers*, 75 *N. J. L.* 610, 68 *Atl.* 82 (*E. & A.* 1907). Declarations stating the declarant to be under either a contract or tort liability are "adverse declarations" within the meaning of the exception. *Ehling v. Diebert*, 128 *N. J. Eq.* 115, 15 *A. 2d* 655 (*Ch.* 1940), *aff'd* 129 *N. J. L.* 11, 17 *A. 2d* 777 (*E. & A.* 1941). No case has been found in which a New Jersey court allowed or disallowed a declaration against penal interest as within or without the exception, but it is not to be supposed that Mr. Justice Pitney, in *Donnelly v. U. S.*, 228 *U. S.* 243 (1913), did not express what he thought the inarticulated rule of New Jersey to be, (Mr. Justice Holmes to the contrary notwithstanding).

3. From the foregoing, it is clear the Uniform Rule, as proposed, departs from what would seem to be settled in this State, in extending the exception to include penal and social interests adversely affected by the declaration. As to the former, it has the support of Mr. Holmes' dissent in the *Donnelly* case which has gathered, since its utterance, support from a respectable group of minority states. See note, 21 *Minn. L. Rev.* 181. *Cf.*, *State v. Friedman*, 4 *N. J. Super.* 187, 66 *A. 2d* 555 (*App. Div.* 1949) allowing affidavit of third person admitting the commission of a crime for which defendant had been convicted, on motion for a new trial. In addition, Professor Wigmore's advocacy of the so-called minority rule is cogent and convincing. 6 Wigmore, §§ 1476, 1477. From this, a logical extension to declarations against social interest, involving stigma or community hatred or disapproval, would seem to follow as proposed in the Uniform Rule. The rule in eliminating the traditional requirement that the declarant be dead is of course in sharp contrast to the existing body of law. In keeping with the general approach of the Uniform Rules to the hearsay rules by the broadening of the scope of the exceptions, and further because the inherent trustworthiness of such declarations (perhaps more trustworthy than when given in open court) adoption of the rule is recommended.

## (11) Voter's Statements.

A statement by a voter concerning his qualifications to vote or the fact or content of his vote;

### Drafters' Comment

This is, of course, subject to the privilege which the voter has not to reveal the tenor of his vote under Rule 31. It is said that the real reason behind this widely accepted exception is the temptation of the voter to misrepresent after litigation has begun, and the likelihood of the truth of previous statements made by him relative to the subject.

### **Recommendation**

It is recommended that this rule be not adopted.

### **Committee Annotation**

The matter is minuscule. In Wigmore's Treatise, not a case has been decided since 1940 relative to the matter, if the absence of any cited authority (save a statutory reference of Ontario) can be accepted as conclusive. Professor Wigmore (6 Wigmore §§ 1712, 1713) examines the exception in some detail and in § 1712 (b) at page 52 states convincingly the reasons making such an exception undesirable. The proposed rule is similar to Rule 510 of the Model Code. The comment, thereto, is not highly persuasive. Rule 510 integrated with Rule 503 of the Model Code which is embodied in Rule 63 (1) of the Uniform Rules, to which refer for further comment.

### **(12) Statements of Physical or Mental Condition of Declarant.**

Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition;

### **Drafters' Comment**

Clause (a) of this exception, broadly speaking, is accepted in almost all modern decisions. See Wigmore, Evidence, Secs. 1725-1731. Decennial Digests, Evidence, key no. 268, 269, 271(6). E. W. Hinton's survey, States of Mind and The Hearsay Rule, 1 U. Chi. L. Rev. 394, is comprehensive and illuminating. Another valuable survey is McBaine, Admissibility in California of Declarations of Physical or Mental Condition, 19 Calif. L. Rev. 231, 367, 1931.

Where the fact to be proved is the declarant's state of mind, emotion or sensation at the time of the declaration, dissent from the unqualified rule is negligible. The same is true where the declared condition is to be used as the basis for an inference to the same or another condition at a later date not too remote. A little more hesitation appears where the desired inference is to a condition at an antecedent date; but in multitudes of wills cases dealing with issues of revocation and undue influence the evidence is received. Most of the modern authorities allow such evidence to be used as tending to prove that declarant later acted pursuant to his declared state of mind, except in a few groups of cases. In prosecutions for homicide many courts refuse to admit evidence of threats by the decedent against the

defendant upon the issue of aggression unless either there is a lack of other evidence on the issue or there is other evidence that the decedent was the aggressor; a number also reject evidence of threats by third persons against the decedent.

The exception applies only to statements asserting the existence of the specified condition, offered as tending to prove the truth of the assertion. A state of mind or emotion or physical sensation may be proved by circumstantial evidence. For example, a wife's feelings toward her husband may be evidenced by her declarations to him that she has been accepting gifts from a stranger and has been taking automobile trips with him and the like, regardless of the truth of the statements.

A declaration of a presently existing subjective condition has some quality of spontaneity and is probably more likely to accord with the fact than a recollection of the same condition as later given expression in testimony in an action. This is the theory of the common law rule and is accepted herein.

Clause (b) admits evidence of declarations of past pain by a declarant when made to a physician. A case illustrating the need for this extension of the exception is *Meaney v. U. S.*, 112 F. 2d 538, 130 A.L.R. 973. Wigmore calls this view "rational and practical" and cites decisions from several states in accord. Evidence, 1722(c).

#### Recommendation

It is recommended that this Rule be adopted.

#### Committee Annotation

1. This Rule embodies generally the established exception under which statements of mental or physical condition of the declarant were from reasons of necessity and recognized trustworthiness, admitted in evidence testimonially notwithstanding their hearsay aspect. The first clause embodies what is usually referred to as the "state of mind" exception. It also embodies what is sometimes referred to as an exception with a double guaranty of trustworthiness, statements to a physician of present physical condition, which by Clause (b) is extended to statements of past symptoms when made to a treating physician. Within Clause (a) however fall the bulk of New Jersey decisions. Admissibility presupposes a preliminary finding of good faith, at least if that issue is raised. That involves a fact issue not always easily resolved. See *Robertson v. Hackensack Trust Co.*, 1 N. J. 304 (1949), where the majority of the court were not satisfied that the statement was not contrived or calculated by the deceased declarant, whereas the contrary view was expressed in a concurring opinion by the Chief Justice.

2. *New Jersey Decisions on the "State-of-Mind" Exception.* The leading case still is *Hunter v. State*, 40 N. J. L. 495 (E. & A. 1878) cited and followed in, *Mutual Life Ins. Co. v. Hillman*, 145 U. S. 285, 12 S. Ct. 909 (1892). The existence of proof of an intent or plan to do an act, is received as evidence of the probable doing of it. *Schloss v. Trounstone*, 135 N. J. L. 11, 49 A. 2d 677 (Sup. Ct. 1946); cf., Seligman, An Exception to the Hearsay Rule, 26 *Harv. L. Rev.* 146 (1916). Similarly as to declarations of a testator to make a specific testamentary disposition. *State v. Ready*,

78 N. J. L. 599, 75 Atl. 564 (E. & A. 1909). The declaration may be somewhat remote in point of time from the litigated act, in which case the remoteness, though not a ground for exclusion, affects the weight of the evidence. *State v. Cerciello*, 86 N. J. L. 309, 90 Atl. 1112 (E. & A. 1914) (threats of defendant to kill the decedent made "some months" prior to the homicide). Thus, declaration of the decedent that he was going to take a ride with defendant is admissible. *State v. Lang*, 108 N. J. L. 98, 154 Atl. 864 (E. & A. 1931). Threats of decedent against the defendant are admissible on 2 issues: (1) the justification offered in a plea of self-defense; (2) who was in fact the aggressor (communication being essential only on the first issue). *State v. Len*, 108 N. J. L. 439, 158 Atl. 749 (Sup. Ct. 1932); *State v. Myers*, 7 N. J. 465, 81 A. 2d 710 (1951). Similarly, declarations of intent on the issue of domicile. *In re Harrison*, 20 N. J. Super. 162, 89 A. 2d 293 (Hudson Co. Ct., Prob. Div. 1952); comment, 7 Rutgers L. Rev. 257, 274 (1952); 6 Wigmore § 1725.

3. *New Jersey Decisions on Declaration to Treating Physicians.* Numerous New Jersey decisions affirm the rule that statements made by a patient to a treating physician of his physical condition, symptoms—subjective and otherwise—are admissible hearsay. The particular circumstance that gives added trustworthiness to such declarations is the incentive of the patient to get well by truthful statements. *State v. Gedicke*, 43 N. J. L. 86 (Sup. Ct. 1881); *State v. Gruich*, 96 N. J. L. 202, 114 Atl. 547 (E. & A. 1921). They are admissible when offered either for or against the patient—notwithstanding in the first instance their self-serving character. *Clayton v. Jersey Central Power & Light Co.*, 19 N. J. Super. 546, 89 A. 2d 61 (App. Div. 1952). The rule that renders such statements admissible equally qualifies a physician to base an expert opinion on such declarations. *Koske v. D. L. & W. R. R. Co.*, 104 N. J. L. 627, 142 Atl. 43 (E. & A. 1928). New Jersey decisions, however, exclude narratives of past events, such as the cause of an injury and the like that are diagnostically or medically unrelated to the treatment of the case. *Clayton v. New Jersey Power & Light Co.*, *supra*. But past symptoms, sensations and feelings that are related to treatment fall within the exception. *State v. Gruich*, 96 N. J. L. 202, 114 Atl. 547 (E. & A. 1921) quoting with approval from *Roosa v. Boston Loan Co.*, 132 Mass. 429 (Clause (b) of Rule 63 (12) is in accord). See 6 Wigmore §§ 1719, 1722 (a) and (b), approving; *Cf.*, *State v. Shiren*, 9 N. J. 445, 88 A. 2d 601 (Sup. Ct. 1952) (on "history of the case"). Within the area of admissibility, under the foregoing rule, is a statement by the abortioneer to a treating physician as to the technique employed by the abortionist. *State v. Lisena*, 21 N. J. Misc. 180, 32 A. 2d 513 (Essex Co. Ct. Quart. Sess. 1943). But the name of the abortionist would be hearsay. *State v. Gedicke*, 43 N. J. L. 86, 93 (Sup. Ct. 1881). New Jersey decisions also limit the exception (as does Rule 63 (12) (b) with respect to part symptoms) to statements made to a treating physician, thus excluding statements made to a physician of both present and past symptoms, when made to qualify him as an expert witness. *Consolidated Traction Co. v. Lambertson*, 60 N. J. L. 452, 38 Atl. 683 (E. & A. 1897); *Seitz v. Seitz*, 1 N. J. Super. 234, 64 A. 2d 87 (App. Div. 1949). Professor Wigmore approves a more flexible rule, 6 Wigmore § 1721 (with respect to declara-

tions of present symptoms Rule 63 (12) (a) may change New Jersey law as to a non-treating physician).

### **(13) Business Entries and the Like.**

Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;

#### **Drafters' Comment**

This rule embodies the substance of the Uniform Business Records as Evidence Act. The word "business" is defined in Rule 62, and includes every kind of institution, making it clear that conduct for profit is not essential. Instead of prescribing as does Model Code Rule 514 that the memorandum must be made by the person having knowledge of the act, event or condition or must be transmitted by such person in the course of the business for inclusion in the memorandum, the broader policy of the Uniform Act is adopted leaving it up to the judge to determine whether or not the sources of information, method and time of preparation reflect trustworthiness.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

This rule is in effect the same as the Uniform Business Records as Evidence Act, heretofore adopted in New Jersey. *N. J. S. 2A:82-34-37*. This rule does not specify the qualifications of the witness who shall supply the testimony necessary for the foundation. *N. J. S. 2A:82-35* provides for such testimony by "the custodian or other qualified witness". The omission from the rule is of no significance.

In *Tsibikas v. Morrof*, 12 *N. J. Super.* 102 (*App. Div.* 1951), an attorney's note books containing entries bearing largely on the extent of his legal services, were excluded by the trial court in a controversy between attorney and client. On appeal, it was stated (p. 111) that the books "might well have been admitted" under the statute, but since the attorney had testified to the matters in question, there was no prejudice. In *Cimino v. Roselli*, 16 *N. J. Super.* 138 (*Ch. Div.* 1951), an annulment action involving the issue of the wife's mental capacity, the records relating to her confinement in an institution were admitted, but a right to move to strike was reserved pending further consideration.

#### **(14) Absence of Entry in Business Records.**

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

##### **Drafters' Comment**

It would seem that the failure of a business record to recite an event which would normally be noted in the record if the event had occurred, would be circumstantial evidence of its non-occurrence. But it has been held that in order to draw such an inference, resort must be had to a consideration of the silence of the record as a negative recital by the record which would be hearsay, the same as an affirmative recital of the happening of the event. To remove any doubt that may exist, this exception is included in order to make available as an exception to the hearsay rule inferences arising from absence of entry in business records kept in regular course of business.

##### **Recommendation**

It is recommended that this rule be adopted.

##### **Committee Annotation**

There appears to be no decision in New Jersey. The principle is implicit in R. R. 4:45-2 which provides for such certificates with respect to official (public) records, and isolated statutes authorize like certificates.

#### **(15) Reports and Findings of Public Officials.**

Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;

##### **Drafters' Comment**

The exception deals with writings made by public officials in the performance of their official functions. The writing may or may not be kept in a public office. It may be, and often will be, contained in a register, or record or file maintained in a public office. On the other hand, it may consist of a certificate held by a private person which has never been filed,

copied, recorded or even noted in any sort of file or volume in a public office. So long as it was made by an official in the performance of the functions of his office and concerns acts, events or conditions which it was the function of the writer to do, or observe, or about which it was his function to make findings or conclusions after investigation, it falls within this exception.

This exception goes beyond the common law, for it admits statements as to matters not within the knowledge of the reporter or of the recorder. Such a result is reached in Connecticut without the aid of statute, *Branford Trust Co. v. Prudential Ins. Co.*, 102 Conn. 481, 129 A. 379, 42 A.L.R. 1450, and in a number of states by statute. Protection is given the adverse party by Rule 64. If he has notice a reasonable time before the evidence is offered, he can prepare to meet it by summoning the maker of the writing or the persons upon whose information it is made, or by gathering material to refute it or to decrease its apparent value.

#### Recommendation

It is recommended that this rule be adopted with possible modification as suggested below.

#### Committee Annotation

1. The common law requirement of personal knowledge was accepted in *State ex rel. Reeves v. Ferguson*, 31 N. J. L. 107, 118 (*Sup. Ct.* 1864). *Quere* whether this requirement was relaxed in *Barber v. Hochstrasser*, 136 N. J. L. 76 (*Sup. Ct.* 1947) which upheld the admission of the record of a local board of health to the effect that a specified individual (apparently the son of defendant) had reported that his dog had bitten a person. The *Barber* case cited the *Reeves* case but is silent on this issue.

2. The limitations upon the common law rule led to numerous statutes making specific exceptions to it. See, for example, N. J. S. 2A:82-10 relating to names of owners of motor vehicles and holders of drivers' licenses, construed not to embrace age of applicant for driver's license in *Kiely v. MacMurray*, 5 N. J. Misc. 1091, 139 A. 343 (*Sup. Ct.* 1927). Compare also, N. J. S. 2A:82-17 and 18 which provides that certification or the certificate of acknowledgment or proof or authentication required to entitle the instrument to recording, shall be *prima facie* evidence of due execution; construed not to embrace an assignment of a claim for premiums although duly acknowledged, *Robertson v. Burstein*, 105 N. J. L. 375 (*E. & A.* 1929). N. J. S. 2A:82-24 provides that the notation of a public officer of the date and time of day of recording, registering or filing in his office is *prima facie* evidence thereof. As to records of protest of bills of exchange and promissory notes, see N. J. S. 2A:82-6, and as to certificates of protest, see N. J. S. 2A:82-7. *Cf.*, N. J. S. 2A:83-4 to 6 relating to findings of presumed, or actual death, etc., made by Federal officials under statutes concerning the armed forces.

N. J. S. 2A:82-16 provides that any public record of any foreign state or department of federal government which is admissible to prove the facts therein under the law of such state or under federal law may be proved here as evidence of such facts.

3. *Wigmore, Evidence* (3d ed. 1940), Vol. 5, Sec. 1638, advocates general principles which would eliminate recourse to specific situational legislation.

The Uniform Act for the Use of Official Reports as Evidence, adopted in a few states, is quite similar to the proposed rule, providing, as does Rule 64, for service of a copy upon opposing parties before trial, but adding expressly the right to cross-examine the person making the report or furnishing the information therein, with the qualification, that "the fact that such testimony may not be obtainable shall not affect the admissibility of the report or finding unless, in the opinion of the Court, the adverse party is unfairly prejudiced thereby." *Wigmore, op. cit., supra*, Sec. 1673.

4. The common law exception (1) rested upon the premise that public officials are impartial recorders of their acts and observations, and (2) excused the appearance of the officials largely to avoid drains upon their time. The proposed expansion of the rule (a) to eliminate the requirement of personal knowledge and (b) to include findings or conclusions based upon investigation is consonant with the premise of official impartiality, but expands the evidentiary area to limits which it is difficult to estimate. The provision for notice in Rule 64, with the right, apparently implicit, to examine the official at or before trial, would seem to run counter to the common law objective of preserving the working time of the reporting officials.

A process of specific exceptions permits a weighing of fairness in each situation and has that virtue. But the rule, as proposed, being blanket in its terms, requires consideration of the many situations which seem to fall within its language. Some illustrations may help. Would the following be admissible against all persons in *every case* in which its findings or conclusions of fact are pertinent: (1) a policeman's report of investigation; (2) a probation report; (3) the findings of fact (accident; extent of resulting disability) made in a workmen's compensation case; (4) the findings of fact by a court; (5) legislative findings; (6) administrative findings made in legislative process or in quasi-judicial proceedings, as for example the findings of the Director of Motor Vehicles, or other licensing agencies on revocation proceedings; (7) reports of crime commissions; (8) reports of agencies charged with investigations of catastrophes; (9) reports of grievance committees (not now admissible; *Stein v. Schmitz*, 137 *N. J. L.* 725 (*E. & A.* 1948)); (10) grand jury presentments. The list could be expanded. Under the common law rule, judicial findings could not be admitted except under principles of *res judicata*. Does the proposed rule extend into that area? Under the common law rule, none of the suggested reports would be admissible beyond the record of primary personal observations or actions of the officials themselves, and even there, it is doubtful that, for example, a policeman's report of his observations would be deemed to be within the rule. A further problem suggests itself. At least to some extent the common law rule is applicable in criminal causes notwithstanding the constitutional right to be confronted by witnesses. See *Wigmore, op. cit., supra*, Sec. 1672, page 698, *cf.*, *State v. Donohue*, 2 *N. J.* 381 (1949), and *State v. Abdul Hamid Suleiman*, 2 *N. J. Misc.* 1016, 126 *A.* 425 (*Sup. Ct.* 1924). What extensions would be accomplished by the proposed rule?

5. In some situations the introduction of reports might encumber rather than facilitate trial. Where the findings and conclusions reached upon

official investigation involve the very issues of the case, the normal trial of those issues would be complicated by exploration of the sources of the official report with comparisons of those sources with the proof at the trial, to avoid the impact of the official's conclusions.

6. Although Rule 64 requires notice before trial, it, unlike the uniform act, does not authorize the trial court to exclude the report on the basis of unfairness if the right of cross-examination is unavailable. Some limitation in terms of fairness may be necessary, although in itself it is not a solution because (a) it is a vague standard when applied to proof which may go to the heart of a case; and (b) litigants must know before trial whether proof of moment will be excluded and hence primary sources of proof be required.

It is difficult to contrive a rule which in all situations will be (a) fair, (b) productive, and (c) predictable. In the last analysis, it is the function of a judicial trial to ascertain facts and factual conclusions, and this by a process of examination and cross-examination. It is arguable that extra-judicial findings should not be admissible beyond those limited areas in which such findings will aid without, however, preempting the courtroom process. The circumstance that the official's finding is merely evidential may not be, realistically, a sufficient safeguard. If the ultimate sources of information are available, they may as well be produced, as probably they would be to meet the report. And if the ultimate sources are unavailable, the problem changes in turn to the overall problem of relaxation in such circumstances.

Such considerations have led one member of the committee to propose the following modification to the rule:

**RULE 63 (15) *Reports and Findings of Public Officials.*** Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, other than officers sitting in judicial or quasi-judicial proceedings, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation, unless, with respect to findings of fact or conclusions bearing directly upon a substantial issue in dispute, the judge before or at the trial shall upon application of any party find that such findings of fact or conclusions are not reasonably trustworthy or that their introduction will embarrass a fair trial or complicate or lengthen the trial or that a reasonable opportunity can not be afforded the parties to examine under oath the sources furnishing the information upon which they were based;

#### **(16) Filed Reports, Made by Persons Exclusively Authorized.**

Subject to Rule 64, writings made as a record, report or finding of fact, if the judge finds that (a) the maker was authorized by statute to perform, to the exclusion of persons not so authorized,

the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as so required by the statute;

#### Drafters' Comment

This exception deals with records made by persons who are sometimes said to be *ad hoc* public officials, such as physicians, undertakers and ministers of the gospel but it is not confined to them. It is applied to those whose business or profession requires action in matters usually made the subject of vital statistics and health regulations, and who are under a duty to make and file reports of specified acts, events or conditions.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

1. The rule embodies the principle underlying *N. J. S. 2A:82-12*, relating to records of marriage, birth and death. Record of birth was held to be admissible to prove age of parents. *Katz v. New York Life Ins. Co.*, 125 *N. J. L.* 358 (*Sup. Ct.* 1940), *aff'd* 126 *N. J. L.* 370 (*E. & A.* 1941). *Metropolitan Life Ins. Co. v. Levy*, 133 *N. J. Eq.* 77 (*Ch.* 1943). Death certificate was held admissible as to death and cause of death, *Nestico v. D. L. & W. R. R.*, 4 *N. J. Misc.* 418, 133 *A.* 83 (*Sup. Ct.* 1926), but not to prove that deceased met injury while at work, since such information is not required to be included in report, *Macko v. Herbert Hinchman & Son*, 24 *N. J. Super.* 304 (*App. Div.* 1953). In *Schacffer v. Krestovnikow*, 88 *N. J. Eq.* 523 (*Ch.* 1918), *aff'd* 89 *N. J. Eq.* 549 (*E. & A.* 1918), it was held, *inter alia*, that baptismal records of a Russian parish priest were inadmissible because of absence of duty to keep them.

The proposed rule is not limited to the foregoing and would undoubtedly embrace other required reports, such as reports by physicians of communicable diseases, but would not include compliance reports by persons required to show their own activities under regulatory statutes.

2. The proposed rule adds a requirement not now present, to wit, notice under Rule 64.

3. The proposed rule requires a finding by the judge that the maker was authorized by statute to perform the functions reflected in the writing. If this means that preliminary proof must be offered that the person making the report was a physician, or authorized to perform marriages, etc., the requirement exceeds the customary practice. Ordinarily, such records are accepted without such proof, and the statute requires none. Perhaps there should be a qualification to the effect that the authority of the individual reporting need not be proved unless it is disputed after notice is given under Rule 64.

## **(17) Content of Official Record.**

Subject to Rule 64, (a) if meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein, (b) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record;

### **Drafters' Comment**

There is some question whether clause (a) is necessary as an exception to the hearsay rule. If the record is made admissible it then becomes a matter of proving the content of the record either by the original record or some other means such as a certified copy. Perhaps it would be equally appropriate to take care of this problem in the sections on authentication and content of records as we have done in Rule 72 in connection with photographic copies. But it fits nicely here.

### **Recommendation**

It is recommended that this rule be adopted.

### **Committee Annotation**

The proposed rule is in accord with *R. R. 4:45-1* and 2 and *Federal Rule 44(a)*. Prior to *R. R. 4:45-2*, it was held that a certificate of the Commissioner of Motor Vehicles was not admissible to prove the non-issuance of a license. *Meyer v. Creighton*, 83 *N. J. L.* 749 (*E. & A.* 1912). Isolated statutes authorize such certificates. *R. S. 45:6-30, 31* (State Board of Registration and Examination in Dentistry); *R. S. 45:9-20* (State Board of Medical Examiners); *R. S. 45:14-28* (Board of Pharmacy).

## **(18) Certificate of Marriage.**

Subject to Rule 64 certificates that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that (a) the maker of the certificate at the time and place certified as the time and place of the marriage was authorized by law to perform marriage ceremonies, and (b) the certificate was issued at that time or within a reasonable time thereafter;

### **Drafters' Comment**

The common law decisions are in conflict. The exception applies only to marriage certificates which are unrecorded. In most instances it would be the certificate delivered to the couple by the marrying official at the time of the marriage ceremony.

### **Recommendation**

It is recommended that this rule be adopted.

#### Committee Annotation

N. J. S. 2A:82-12 provides that "Any original certificate of marriage \* \* \* shall be received as *prima facie* evidence of the facts therein stated in all courts and places".

The proposed rule requires a finding of issuance within a reasonable time after marriage. The statute does not so provide but the requirement is probably of no practical significance. The requirement for notice under Rule 64 goes beyond the statute, and the requirement of a finding that the maker was authorized to perform marriage ceremonies is not ordinarily experienced in practice. Perhaps there should be a proviso that such proof need not be adduced unless demanded after notice under Rule 64.

#### (19) Records of Documents Affecting an Interest in Property.

Subject to Rule 64 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that (a) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (b) an applicable statute authorized such a document to be recorded in that office;

#### Drafters' Comment

This applies only to the original public record of an instrument. The manner of proving the record is taken care of by the rules covering authentication and proof of content.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

In effect, this rule differs from the provisions of existing statutes in minor respects hereinafter stated. *N. J. S. 2A:82-20* provides that the record of any instrument recorded pursuant to law shall be received, except that it shall not be received (a) if the instrument was recorded as an ancient deed or after the lapse of 10 years from the date of acknowledgment or proof, unless the original is accounted for, or (b) when the production of the original is required by notice under *N. J. S. 2A:82-23*, which latter section in turn excuses production of original upon appropriate showing of non-availability. *N. J. S. 2A:82-17* and *18* provide that the certificate of acknowledgment or proof or other authentication required for recording shall be *prima facie* evidence of due execution. The cited provisions of our statute combine to constitute the record of a recorded instrument, proof of due execution, and, of course, the content of the instrument. The proposed rule requires notice under Rule 64, and that notice with the demands that

could follow, would be as practical a treatment of the problem as is now provided by our statute.

Insofar as the rule is applicable to instruments recorded in other states or nations, it differs from *N. J. S. 2A:82-16*, in that the latter gives the foreign record such evidentiary effect as is provided by foreign law, whereas the proposed rule would give evidentiary effect without regard to foreign law.

*N. J. S. 2A:82-22* deals with record of an entry or abstract of a mortgage. I assume that the proposed rule will include record of less than an entire document where authorized by law.

In *State v. Engle*, 21 *N. J. L.* 347 (*Sup. Ct.* 1848), it was held that a certified copy of a power of attorney concerning land in New Jersey, recorded in New York, was not admissible here.

## **(20) Judgment of Previous Conviction.**

Evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment;

### **Drafters' Comment**

Analytically a judgment of conviction is hearsay and is for that reason rejected by the majority of courts when offered to prove the defendant's guilt in another action in which the issue of guilt is material. Where a person has had an opportunity to defend himself and has entered a plea of *nolo contendere* or a plea of guilty or has been found guilty beyond a reasonable doubt, the judgment entered on the plea or verdict would seem to have sufficient value to be worth consideration by a trier of fact, and necessarily includes a finding of all facts essential to sustain the judgment in the case in which rendered. Despite the logic of this theory there is widespread opposition to opening the door to let in evidence of convictions particularly of traffic violations in actions which later develop over responsibility for damages. In other words, trials and convictions in traffic courts and possibly in misdemeanor cases generally, often do not have about them the tags of trustworthiness as they often are the result of expediency or compromise. To let in evidence of conviction of a traffic violation to prove negligence and responsibility in a civil case would seem to be going too far and for that reason this rule limits the admissibility of judgments of conviction under the hearsay exception to convictions of a felony. In this respect the rule is much narrower than Rule 521 of the Model Code of Evidence.

### **Recommendation**

It is recommended that this rule be adopted.

### **Committee Annotation**

1. This rule compromises with opposition by confining its operation to convictions for a "felony". Appropriate terminology should be substituted for "felony".

2. *N. J. S. 2A:81-12* provides that "\* \* \* no conviction of an offender shall be received in evidence against him in a civil action to prove the truth

of the facts upon which the conviction was based." Our cases consistently reject such proof. *Kowalski v. McAdoo*, 93 N. J. L. 340 (*Sup. Ct.* 1919), *aff'd*, 96 N. J. L. 293 (*E. & A.* 1921), *cert. den.*, 257 U. S. 649 (1921); *Schoharie County Cooperative Dairies, Inc. v. Eisenstein*, 22 N. J. Super. 503 (*App. Div.* 1952); *Mead v. Wilcy Methodist Episcopal Church*, 23 N. J. Super. 342 (*App. Div.* 1952); *Sorbello v. Mangino*, 108 N. J. Eq. 292 (*Ch.* 1931) in which dissatisfaction was expressed. A plea of guilty, of course, is admissible as an admission against interest. *Stewart v. Stewart*, 93 N. J. Eq. 1 (*Ch.* 1921). A conviction on a plea of *nolo contendere* or *non vult* may not be shown. *State ex rel. Peacock v. Hudson Quarter Sessions*, 46 N. J. L. 112 (*Sup. Ct.* 1884); *State v. Henson*, 66 N. J. L. 601 (*E. & A.* 1901); *Schireson v. State Board of Medical Examiners*, 129 N. J. L. 203 (*Sup. Ct.* 1942), *rev'd* 130 N. J. L. 570 (*E. & A.* 1943); *In re 17 Club, Inc.*, 26 N. J. Super. 43 (*App. Div.* 1953). Inconsistent with the foregoing is *Tucker v. Tucker*, 101 N. J. Eq. 72 (*Ch.* 1927) which relaxed the rule in an uncontested action for divorce.

3. The proposed rule has the bulk of its support outside of judicial opinion. For it, the argument is that since the burden of proof in a criminal cause is more exacting, the jury's finding is entitled to significance. The policies which underlie the doctrine of *res judicata* are obviously applicable. On the other hand, one member of the committee has argued that (1) a defendant in a criminal cause does not have the opportunities for discovery which may alter the course of the civil case; (2) The proposed rule might encourage utilization of the criminal process for private result and complicate the disposition of criminal causes by a consideration of private interests—a consideration which may be foreign to the true remedial or rehabilitative objectives of the criminal law; (3) Since proof of the verdict in a criminal case would call for a reappraisal by one jury of the verdict reached by another, it is doubtful that its force could be confined to mere evidence; (4) Moreover, the civil trial may be protracted by comparisons of proof in the two trials in an effort to undermine the force of the conviction. There would be more reason (not enough to warrant it) for a rule which would make the result in a criminal case *conclusive* of the facts found, rather than to have the conviction hover in a vague, complicating and uncontrollable role as mere evidence in the civil suit.

On the balance these factors seem to be outweighed by the stronger arguments calling for admission.

## **(21) Judgment against Persons Entitled to Indemnity.**

To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if offered by a judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for

damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;

#### Drafters' Comment

This states the substance of A.L.I. Model Code of Evidence Rule 522. The comment thereunder is adopted here as follows: "This is a statement of the doctrine applied by a number of courts in cases where an indemnitee is suing his indemnitor on a contract of indemnity, or a warrantee is suing his warrantor or a surety his principal. It is frequently applicable in actions on official bonds, but its use is not limited to cases where the duty to indemnify or save harmless arises from contract. The cases are in conflict; the Rule adopts the more liberal view, and makes generally applicable the principle underlying a group of decisions."

#### Recommendation

It is recommended that this rule be adopted with possible modification as suggested below.

#### Committee Annotation

The comment to this rule states that it is not limited to enforcement of a duty to indemnify or save harmless arising out of contract.

Where the duty rests in contract, the judgment has been held to be *prima facie* evidence in any event, and to be conclusive evidence if the defendant had notice of and opportunity to defend the action. *Joseph W. North & Son v. North*, 93 N. J. Eq. 70 (Ch. 1921); *aff'd*, 93 N. J. Eq. 508 (E. & A. 1921). A judgment in replevin is conclusive against the surety on this bond, *McClellan v. F. A. North & Co.*, 14 N. J. Misc. 760, 187 A. 337, *aff'd* 118 N. J. L. 168 (Sup. Ct. 1936); *Wood Motor Car Co. v. Bankers Indemnity Ins. Co.*, 122 N. J. L. 87 (E. & A. 1938), which result seems to be independent of the proposed rule. The proposed rule might diminish recourse to our third-party practice in situations in which it is in fact available.

The proposed rule seems broad enough to embrace actions under the Joint Tort Feasors Statute, N. J. S. 2A: 53A-1 to 5, but as to the issue of damages only, since the judgment could hardly "prove the wrong of the adverse party". In *Sattelberger v. Telep*, 14 N. J. 353 (Sup. Ct. 1954) it was held that due process required "that as to the asserted prerequisite liability in tort, the contribution proceeding is to be treated as if it were an action for damages by the injured party against the defendant from whom contribution is claimed. The defendant in contribution is not concluded by the judgment in the principal action to which he was not a party" (p. 366). The Court added: "The judgment in tort cannot serve as more than *prima facie* evidence of the fulfillment of the condition prerequisite to the statutory action for contribution" (p. 367, emphasis added). The latter statement does not seem to go the length of admitting the judgment as *prima facie* evidence of either liability or damages.

It is a debatable question whether the judgment should be evidence as to liability or damages in an action in which the right to indemnity does not rest upon contract. In tort actions, damages are so commonly a disputed

issue as to which a right to be heard should exist, that it has been suggested by one member of the committee that the rule be confined to contract actions. On the other hand the effect of the prior judgment under the proposed rule would not be *res judicata*; the prior judgment would seem to have considerable probative value in the indemnity litigation, and this may justify its admission.

## **(22) Judgment Determining Public Interest in Land.**

To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land, if offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;

### **Drafters' Comment**

This exception has considerable support in the decisions and is sound in reason. A judicial determination of the nature of the title or of the boundaries of the public domain should have evidentiary value in determining disputes over titles or boundaries between private parties where there is relevancy because a tie exists between the two situations.

### **Recommendation**

It is recommended that this rule be adopted.

### **Committee Annotation**

There apparently is no authority in this State on this point. The rule seems reasonable.

## **(23) Statement Concerning One's Own Family History.**

A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable;

### **Drafters' Comment**

This exception and exceptions (24), (25) and (26) in the aggregate embody A.L.I. Model Code of Evidence Rule 524. That rule is long and complex and it seemed that it would be better understood and easier to apply if broken down into the four separate exceptions here presented. While the Model Code Rule contains some departures from the common law they appear to be valid and no good reason exists for not following the Model Code pattern. At common law much evidence of slight value may be admissible

to prove facts relating to pedigree, and it is in cases of this sort that Rule 45 may be applied to exclude what amounts to gossip or rumor or is otherwise of trifling worth.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

1. Presumably this rule will overturn the following limitations under our case law: (1) Statement that declarant was *not* married to a certain person was held inadmissible in *Hubatka v. Maierhoffer*, 81 N. J. L. 410 (E. & A. 1911); criticized as unsound in *Wigmore, Evidence* (3rd Ed. 1940), Vol. 5, Sec. 1491, fn. 2, page 313. Requirement of existence of relationship by blood or marriage was stated generally in *Barsotti v. Bertolino*, 121 N. J. Eq. 346, 348 (E. & A. 1937), where Court left open question of admissibility of statement that declarant was not the mother of a child as to whom she stood *in loco parentis*. Since such statements relate to status of the declarant, they should be admitted notwithstanding that their substance embodies a denial of relationship of blood or marriage. If there is doubt as to whether the proposed rule will reverse these decisions, the rule should be amended. (2) Declarant must be deceased and hence proof of disappearance is not enough. *In re Petagno*, 24 N. J. Misc. 279, 48 A. 2d 909 (Ch. 1946). The proposed rule requires only a showing that declarant is "unavailable". (3) Pedigree exception does not include statement as to place of birth. *Independence v. Pompton*, 9 N. J. L. 209 (Sup. Ct. 1827) criticized as unsound in *Wigmore, Evidence* (3d Ed. 1940), Vol. 5, Sec. 1501, pages 322-3. (4) Where marriage is the issue in the cause, pedigree exception does not include statements relating to existence of that marriage. *Westfield v. Warren*, 8 N. J. L. 249 (Sup. Ct. 1826); criticized as unsound in *Wigmore, Evidence* (3d Ed. 1940), Vol. 5, Sec. 1503, pages 324-5.

2. A statement by declarant that he is the parent of the child is admissible without independent proof of the existence of the relationship. *Morgan v. Susino Construction Co.*, 130 N. J. L. 418 (Sup. Ct. 1943), *aff'd*, 131 N. J. L. 329 (E. & A. 1944). Where the statement relates to the relationship between the declarant and another, the statement should be admissible without more. The difficulty supposed to reside in permitting such statements in effect to prove themselves, arises from erroneously viewing the statement as relating to the pedigree of another (see rule 63(24)), whereas, of course, it relates to the pedigree of the declarant himself.

3. A family bible is admissible. *In re Hennion*, 131 N. J. Eq. 293 (Prerog. 1942), but it must be proved to be in fact the family's bible, *Golden Star Fraternity v. Conklin*, 60 N. J. L. 565 (E. & A. 1897). A document purporting to set forth a family tree, prepared by one other than the declarant but accepted as such by the declarant, is admissible. *In re Blau*, 4 N. J. Super. 343 (App. Div. 1949).

#### (24) Statement Concerning Family History of Another.

A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or

other similar fact of the family history of a person other than the declarant if the judge (a) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family, and (b) finds that the declarant is unavailable as a witness;

**Drafters' Comment**

See comment under exception (23) of this Rule.

**Recommendation**

It is recommended that this rule be adopted.

**Committee Annotation**

See comment to Rule 63 (23).

It is generally stated that but slight proof is required as to the relationship between declarant and the family. *In re Hennion*, 131 N. J. Eq. 293, 296 (*Prerog.* 1942). In that case, testimony of persons not related was also admitted as to family tree, and perhaps the basis was the principle in this proposed rule.

**(25) Statement Concerning Family History Based on Statement of Another Declarant.**

A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;

**Drafters' Comment**

See comment under exception (23) of this Rule.

**Recommendation**

It is recommended that this rule be adopted.

**Committee Annotation**

See annotation to Rule 63 (23) with respect to admissibility of family bible.

**(26) Reputation in Family Concerning Family History.**

Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legiti-

macy, race-ancestry or other fact of the family history of a member of the family by blood or marriage;

**Drafters' Comment**

See comment under exception (2) of this Rule.

**Recommendation**

It is recommended that this rule be adopted.

**Committee Annotation**

See annotation to Rule 63 (23) with respect to admissibility of family bible.

**(27) Reputation—Boundaries, General History, Family History.**

Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community, or (c) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;

**Drafters' Comment**

Most of the decisions limit evidence of reputation to a reputation of a former generation. With that qualification, Clause (a) is accepted in most American states, but in England is limited to matters affecting public lands; the result stated in Clause (b) is reached by common law or statute in a number of states; the few authorities are in conflict concerning Clause (c).

**Recommendation**

It is recommended that this rule be adopted.

**Committee Annotation**

1. *Comment on clause (a)*: Height of a dam may not be proved by reputation. *Runk v. Ten Eyck*, 24 N. J. L. 756 (E. & A. 1853)
2. *Comment on clause (b)*: Apparently no New Jersey cases.
3. *Comment on clause (c)*: Such evidence admitted to prove death in *Schaffer v. Krestovnikow*, 88 N. J. Eq. 192 (Ch. 1917), 88 N. J. Eq. 523 (Ch.

1918), *aff'd* 89 N. J. Eq. 549 (E. & A. 1918); to prove marriage in *Wallace's Case*, 49 N. J. Eq. 530 (Prerog. 1892) and *In re Franchi*, 119 N. J. Eq. 457 (Prerog. 1936), *aff'd* 121 N. J. Eq. 47 (E. & A. 1936); to prove wealth in breach of promise suit, *Smith v. Compton*, 67 N. J. L. 548 (E. & A. 1902) and in slander suit, *Bahrey v. Poniatishin*, 95 N. J. L. 128 (E. & A. 1920).

## **(28) Reputation as to Character.**

If a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed;

### **Drafters' Comment**

This changes the law in the majority of jurisdictions by making reputation among intimate associates admissible. This exception in connection with Rule 22 will do away with the quibbles found in some cases as to general reputation for general moral character, and general reputation for specific traits of moral character.

### **Recommendation**

It is recommended that this rule be adopted.

### **Committee Annotation**

The Rule permits proof of reputation "in a group with which he then habitually associated", and thus would properly overturn *State v. Brady*, 71 N. J. L. 360 (Sup. Ct. 1904) which excluded proof of reputation at place of employment; *cf.*, *State v. Unger*, 103 N. J. L. 18 (Sup. Ct. 1926). *Quaere* as to its effect upon holding that neither honorable discharge nor good conduct medal are competent evidence of good reputation, in *State v. Sbrilli*, 136 N. J. L. 66 (Sup. Ct. 1947) and *State v. Unger, supra*.

A man's reputation may extend beyond his community, as in the case of a prominent business man or public official. A witness from a distant community may not meet the requirement of the home-community test, and yet, realistically, his testimony should be admitted. Presumably the phrase quoted in the preceding paragraph of this comment would permit such testimony.

## **(29) Recitals in Documents Affecting Property.**

Evidence of a statement relevant to a material matter, contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the

statement was made have not been inconsistent with the truth of the statement;

#### Drafters' Comment

There is much uncertainty in the common law decisions concerning the admissibility of recitals in dispositive documents. Most of the cases have to do with ancient writings. Of these a few can be explained only upon the ground that a statement in an ancient writing of any sort is admissible as evidence of the truth of the matter stated. The great majority, however, require the writing to be a constitutive document, and the statement to be corroborated in some way. Since the recitals, whether ancient or recent, when not inconsistent with subsequent dealings with the land or chattel, are likely to be true, the present rule makes no distinction based on the age of the document.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

1. This rule makes admissible the recitals in a document affecting an interest in property whether that document be ancient or not, and this notwithstanding the availability of the declarant. With respect to this rule the drafters accepted almost in toto the language of Rule 527 of the Model Code of Evidence (1942). The wording of the earlier rule is identical, except for the use of "realty and personalty" wherever the word "property" appears in the present rule.

2. The general rule is that recitals in a deed or document of title are mere hearsay and are inadmissible in evidence as against a third person who claims by a paramount title. *Thompson, Real Property*, (Perm. Ed. 1940) § 3186; *Wigmore, Evidence*, (3d Ed. 1940) § 1573. This rule is subject to qualification as evidenced by our early New Jersey cases with respect to ancient documents. An ancient document is one not less than thirty years old. *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365 (Ch. 1890); *Stockton v. Frabizio*, 130 N. J. L. 12 (Sup. Ct. 1943), citing 22 C. J. § 1164 *Ancient Documents*, p. 945.

In *Havens v. Sea Shore Land Co.*, *supra*, a recital in an ancient deed made by one Joseph Lawrence as follows: "Which I bought of John Curtis, which was left to him by his father, David Curtis, deceased, which he bought of Elisha Lawrence, deed bearing date July 9th, 1770" was held to be competent evidence to show that John Curtis had made a deed to Joseph Lawrence for the land conveyed to Lawrence. Similarly, see *Fuller v. Saxton*, 20 N. J. L. 61 (Sup. Ct. 1843) where the recital contained in the will referred to an antecedent deed, and *McGrath v. Norcross*, 78 N. J. Eq. 120 (Ch. 1911), affirmed 82 N. J. Eq. 367 (E. & A. 1913) where the recital in an ancient deed referred to a lost prior survey. But courts in their language have not always clearly distinguished between the ancient document rule with respect to authentication and the competency of recitals in ancient documents as assertions of the truth of what is recited. *Newbold's Executors v. Lamb*, 5 N. J. L. 526 (Sup. Ct. 1819).

On the facts, in *Havens v. Sea Shore Land Co.*, *supra*, possession or other corroborating circumstances were not required, but *Rollins v. Atlantic City Railroad Co.*, 73 N. J. L. 64 (*Sup. Ct.* 1905) held otherwise. This requirement of possession or other corroborating circumstances apparently is a fourth requisite (the others being: 30 years' existence, natural custody, unsuspecting appearance) for having an ancient document admitted in evidence without direct proof of its execution, which is a matter of authentication. But the language employed by the court in *Rollins*, *supra*, at page 73 does not make this clear:

“\* \* \* a recital, whether of an ancient deed, will, lease, or pedigree may be (admitted when) supported by any testimony which renders credible the truth of the fact recited”.

By loose language it would seem that the court has failed to make clear the difference between the requirements for having the ancient document admitted and the competency of its recitals when admitted.

However, this requirement of corroborating circumstances which New Jersey appears to have adopted with respect to admitting an ancient document has been incorporated as a safeguard in Rule 63 (29). Under the rule the judge must find that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement. In *Rollins v. Atlantic City Railroad Co.*, *supra*, to render the ancient document admissible it was held that there must be corroborating circumstances, and these may be long possession consistent with the fact recited, or the fact that no persons have claimed title adversely to such recital, or by the fact that the ancient deed has been on record for a long time and grants have been made repeatedly by its grantee and successors in title without question. Therefore, when a recital in an ancient deed is held competent in New Jersey, it has been admitted on the same grounds as it would have been under Rule 63 (29), for even before there is a consideration of the evidentiary value of the recitals the ancient document, to be admitted, must be supported by corroborating circumstances.

3. It does not appear that New Jersey has extended the hearsay exception of declarations in documents beyond recitals in deeds and wills. Other jurisdictions have extended the doctrine to various types of documents. See *Wickes, Ancient Documents and Hearsay*, 8 *Texas L. Rev.* 450, 455 (1930) for collection of cases. Professor Wickes is of the opinion, from his examination of the decisions, that there is a very large and growing body of authority in favor of the admission of recitals in ancient writings as evidence of the truth of the fact recited regardless of the nature of the writing.

Although New Jersey does not seem to have so extended the principle, in certain instances there has been accorded evidentiary value to recitals in documents which were not ancient. Subject to contradiction, recitals in wills and codicils thereto as to the testative domicile are evidential of the domicile. *In re Benson's Will*, 92 N. J. Eq. 618 (*Prerog. Ct.* 1921), affirmed 93 N. J. Eq. 671 (*E. & A.* 1922); *Cromwell v. Neeld*, 15 N. J. Super. 296 (*App. Div.* 1951). Recitals of consideration received is admissible. *Atlantic Northern Airlines v. Schwimmer*, 12 N. J. 293 (1953). These cases rather than typifying true hearsay exceptions may be explained as

merely as laying down a rule of burden of proof presuming a consideration or testative domicile, 5 *Wigmore, Evidence*, § 1573, but it would seem these cases represent a hearsay exception more in accord in the liberal approach of *Rule 63* (29).

By statute, recitals in other than ancient documents have been given evidentiary value. Whenever a collector of taxes or other officer authorized by law in any municipality sells real property for unpaid taxes, assessments, or other municipal charges, and issues a certificate of sale, *R. S. 54:5-52* provides that such certificate is presumptive evidence of the facts recited therein and is conclusive after two years from the record of the certificate of sale. Also see *R. S. 46:6-3* dealing with the recital of the letter of attorney in a deed executed by virtue of a letter of attorney.

4. The Uniform Rules do not recognize the attestation clause as a specific exception to the hearsay rule, though it is recognized by leading writers in the field. *Morgan, Basic Problems of Evidence*, p. 317; 5 *Wigmore, Evidence*, § 1505, and is recognized in New Jersey.

On proof of the authenticity of the signatures of the subscribing witnesses to a document in case of their failure of memory, death, insanity or other casualty or absence beyond the reach of process, an attestation clause is evidence of what they recited therein did, in fact, take place. *Mundy v. Mundy*, 15 *N. J. Eq.* 290 (*Prerog. Ct.* 1858); *Allaire v. Allaire*, 37 *N. J. L.* 312 (*Sup. Ct.* 1875), affirmed 39 *N. J. L.* 312 (*E. & A.* 1876); *Worman v. Seybert*, 78 *N. J. L.* 176 (*Sup. Ct.* 1909); *Bioren v. Nesler*, 77 *N. J. Eq.* 560 (*E. & A.* 1912). The qualifications essential to establish a recognized exception to the hearsay rule are a necessity for the evidence, and a circumstantial guarantee of trustworthiness. 5 *Wigmore, Evidence* (3d Ed. 1940) § 1420. While there is no legal necessity for the use of ancient documents as a source of testimony, there is the practical difficulty of finding another source of information. It is a rule of convenience. *Foulk v. Brown*, 2 *Watts* 214 (*Pa.* 1834). However, the mere lapse of time does not afford any guarantee of veracity. *Budlong v. Budlong*, 48 *R. I.* 144, 149, 136 *Atl.* 308, 311 (*Sup. Ct.* 1927).

"A statement untrue when it was made is untrue after the lapse of thirty years; and the fact that it is old is not relevant to prove that it is true. Nor does the fact of survival for that length of time impute truth to its recitals."

Note, 33 *Yale L. J.* 412, 417. Thus the elimination of the requirement of antiquity would seem to be salutary. See *Wickes, Ancient Documents and Hearsay*, 8 *Texas L. Rev.* 450 (1930) for a defense of the rule.

### (30) Commercial Lists and the Like.

Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them;

### Drafters' Comment

The principle of this exception is generally recognized. It has been applied to reports of judicial decisions. It is applicable to unofficially published law reports as well as to those officially published, foreign as well as domestic. The cases dealing with the admissibility of market reports, lists of prices current, registers of pedigreed animals and the like differ only as to the requirements of preliminary proof of trustworthiness.

### Recommendation

It is recommended that this rule be adopted.

### Committee Annotation

1. The principle of this exception is generally recognized, 6 *Wigmore, Evidence* (3d Ed. 1940) § 1702; Morgan, *Basic Problems of Evidence* (1954) p. 276; 43 *A. L. R.* 1184, 1192 (1926), and appears to be the law in New Jersey.

Our cases in this area deal with the admissibility of market reports and price lists. In *More-Jonas Glass Co. v. W. J. & C., R. R. Co.*, 76 *N. J. L.* 708 (*E. & A.* 1909), in an action to recover damages for the destruction of property by fire, a witness qualified to testify as to the market value of glass bottles was allowed to consult trade price lists and discount sheets, which he knew were promulgated by authority of manufacturers and universally recognized by the trade, for the purpose of refreshing his memory as to the market value of the bottles listed thereon. The case does not indicate whether the lists themselves were also offered in evidence. Ordinarily, if the writing is used to refresh memory and for that purpose alone, it is merely an outside stimulus to the witness and does not go into evidence. *Springer v. Labow*, 108 *N. J. L.* 68 (*Sup. Ct.* 1931).

In *Crowley v. E. Homan Co.*, 3 *N. J. Misc.* 968 (*Sup. Ct.* 1925) it was held to be error to permit a witness to testify from a book known as the "Blue Book of National Used Car Market Report", published by the Chicago Automotive Trade Association. Apparently the court failed to find there that showing of trustworthiness which it had emphasized as necessary in *Horst Co. v. Breidt City Brewery*, 94 *N. J. L.* 230 (*E. & A.* 1920) where the issue was the propriety of excluding the brewers' bulletin published in a newspaper showing price quotations of hops. Apparently from the Court's language in *Horst Co.*, *supra*, the bulletin would have been admitted had there been extrinsic proof of its reliability.

The recent decision of *State v. Carrano*, 27 *N. J. Super.* 382 (*App. Div.* 1953) held admissible "The Morning Telegraph", a newspaper devoted exclusively to racing information and used as a source of information by bettors, bookmakers, and others interested in betting. The Court apparently considered it a "trade" publication and analogous to printed market reports of current prices, standard price lists, and similar commercial compilations which are commonly received as exceptions to the hearsay rule. The opinion quotes with approval parts of §§ 1704 and 1706 of *Wigmore, Evidence* (3d Ed. 1940), wherein that text writer recognizes the exception. This case would seem to indicate that the principle of the proposed rule is the law in New Jersey.

2. The comment of the drafters of this rule indicates that it is applicable also to reports of judicial decisions. In this connection, it should be noted that *N. J. S. 2A:82-26* provides that when the common law or statute law of any state or foreign jurisdiction is pleaded in an action in any court of this state, the usual printed books of such reports shall be plenary evidence of such decisions. *N. J. S. 2A:82-25* provides that when the statute law of any state or foreign jurisdiction is pleaded in any court of this state, statute books and printed laws, printed by the authority of such states or jurisdiction, shall be received as evidence of the statute law thereof. *N. J. S. 2A:82-8* renders admissible as evidence of the facts, matters and things set forth in certified copies of writs, pleadings and court orders of the courts of this state.

Unofficially published law reports are within the scope of *Rule 63 (30)*. Whether they are admissible under *N. J. S. 2A:82-26* would seem to turn on the construction to be given "usual printed books of such reports". In *Garris v. Kline*, 119 *N. J. L.* 435 (*E. & A.* 1938), certified copies of two opinions from the highest court of Virginia were held admissible under *L. 1900, c. 150, § 26, p. 370*, a predecessor of our present statute. It is to be observed that *N. J. S. 2A:82-25* provides with respect to statute books from other states or foreign jurisdiction that they are admissible, if not printed by the authority of such state or foreign jurisdiction, if it is proved that such book or printed law is received in the courts of said state as a statute book thereof or pamphlet containing its session laws, or in case of a foreign jurisdiction, that such books or printed law is what it purports to be. No such provision has been provided with respect to judicial reports in *N. J. S. 2A:82-26*. It would seem that the omission of any reference to official reports in *N. J. S. 2A:82-26* and the use of the language "usual printed books" therein points to the admissibility of unofficial reports.

3. A statute which renders admissible a commercial compilation is *R. S. 56:7-30*. Where an offense in violation of the Unfair Cigarette Sales Act of 1953, *R. S. 56:7-18 et seq.*, is committed, a cost survey which has been made of the trading area in which the offense allegedly occurred is competent evidence to prove the cost to the person complained against.

### **(31) Learned Treatises.**

A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

#### **Drafters' Comment**

Only a few courts receive the evidence made admissible by this exception. The extent to which and the conditions under which a learned treatise may be used upon cross-examination are the subject of much conflict. The restrictions upon its use are in the last analysis based upon the reason

that to permit the expert to be tested by the statements in a treatise is indirectly to get the content of the statement before the jurors who will use it as evidence of the truth of the matter stated. This exception will eliminate all prohibitions upon the use of a treatise for purposes of cross-examination which would not equally apply to the use of testimony or proposed available testimony of another expert for the same purpose.

#### Recommendation

It is recommended that the rule be adopted.

#### Committee Annotation

1. New Jersey does not recognize this exception. Moreover, in all states except Alabama the courts have refused to establish an exception to the hearsay rule for pertinent statements in a treatise written by a recognized authority. *Morgan, Basic Problems of Evidence* (1954), p. 319; 65 *A. L. R.* 1102 (1930).

In this state such treatises were early held inadmissible. *New Jersey Zinc Co. v. Lehigh Zinc Co.*, 59 *N. J. L.* 189 (*E. & A.* 1896). The rule was affirmed in *State v. MacRorie*, 86 *N. J. L.* 401 (*Sup. Ct.* 1914). And where an expert was asked a question concerning the probability of two fingerprints being alike, each from different persons and he answered “\* \* \* the Encyclopedia Britannica gives the probabilities as 1 in 62 million”, this was held to be an improper reference, but admissible here as counsel below had failed to make an objection to the ruling of the court refusing to strike out the answer. *Lamble v. State*, 96 *N. J. L.* 231 (*E. & A.* 1921). Federal courts applying New Jersey law have reiterated the well-established rule. *Western Union Telegraph Co. v. Ammann*, 296 *F.* 453 (*3d Cir.* 1924); *E. I. DuPont DeNemours & Co. v. White*, 8 *F. 2d* 5 (*3d Cir.* 1925).

2. An exception to the general rule excluding learned treatises has been made with respect to tables of mortality. Held admissible were Carlisle's Table of Mortality [*Camden & Atlantic Railroad Co. v. Williams*, 61 *N. J. L.* 646 (*E. & A.* 1898)]; *Dickerson v. Mutual Grocery Co.*, 100 *N. J. L.* 118 (*E. & A.* 1924); *Auer v. Sinclair Refining Co.*, 103 *N. J. L.* 372 (*E. & A.* 1927)]; Mortality Tables in Dickinson Chancery Precedents [*Hendershot v. N. Y., S. & W. R. R. Co.*, 5 *N. J. Misc.* 727 (*Sup. Ct.* 1927), *affirmed* 104 *N. J. L.* 436 (*E. & A.* 1928), *cert. denied* 277 *U. S.* 602 (1928)]; Mortality tables generally used by life insurance companies [*Graumann v. Ward*, 7 *N. J. Misc.* 953 (*Sup. Ct.* 1929); *Hampton v. Pennsylvania R. Co.*, 115 *N. J. L.* 168 (*E. & A.* 1935)]. But a mortality table printed in the American and English Encyclopedia of Law was held inadmissible where it was not shown to have been in actual use for the purpose for which such tables are intended or to have acquired a reputation for accuracy. *Notto v. Atlantic City Railroad Co.*, 75 *N. J. L.* 826 (*E. & A.* 1908).

3. In *Slonim v. Globe Indemnity Co.*, 20 *N. J. Super.* 594 (Law Div. 1952), there was involved the construction of a burglary insurance policy. The court resorted to various insurance publications as extrinsic aids in ascertaining the proper meaning of the contract. Whether these publications were in evidence is not indicated in the opinion. They may have been judicially noticed by the court.

Similarly in *Ross v. Marx*, 24 N. J. Super. 25 (App. Div. 1952), cert. denied 14 N. J. 466 (1954), it is not clear whether the scientific treatise was in evidence based on an exception to the hearsay rule or was judicially noticed. Below the County Court had ruled that a negative finding in blood grouping tests is conclusive on the issue of paternity. The Appellate Division in rejecting this concept grounded its decision in part on the possibility of mutations. The Journal of the American Medical Association, 149 J. A. M. A. 699 (June 14, 1952), which contained a report entitled "Medicolegal Application of Blood Grouping Tests" was cited by the court as authority on this theory of mutations. As previously stated, how this report came before the court is not clear. See Tyree, *Evidence*, 8 *Rutgers L. Rev.* 222, 229 (1953). It may have been judicially noticed by the Appellate Division, or admitted based on an exception to the hearsay rule.

4. The use of the treatise as evidence of the truth of the matter asserted must be distinguished from its use on cross-examination. (For conflicting views as to the extent to which such treatises may be used to test the expert, see 82 A. L. R. 440 (1933).) The New Jersey rule was laid down in *New Jersey Zinc Co. v. Lehigh Zinc Co.*, *supra*. Books of science are generally inadmissible as evidence to prove the opinions contained in them, but if a witness refers to them as an authority for his own opinion, they will be received, but then only for the purpose of contradicting him.

5. The objections to recognizing the learned treatises exception are that: (1) such an offer of evidence purports to employ testimonially a statement made out of court by a person not subject to cross-examination; (2) science is always shifting and concepts accepted by men of science and learning shift so rapidly as to make their writings only of temporary value; (3) there is the danger of confusing the jury by technical passages without oral comment and simplification; (4) treatises may be used unfairly by taking passages which are explained away or contradicted in other books; and (5) a trial would be turned into a battle of books. See 6 *Wigmore, Evidence* (3d Ed. 1940) § 1690 for arguments opposing each of these contentions.

6. Experts rely in large measure upon treatises and other writings published by authorities in their respective fields. Often their expertness is based upon such writings. It is absurd to listen to testimony based on the assertions of the treatise writer while rejecting the assertions themselves. *Morgan, Basic Problems of Evidence* (1954) p. 319.

It seems inconsistent, if not unfair, for a court to reject learned treatises as hearsay when offered by the parties, and yet cite medical works and the like as a foundation of fact for subjects involved in their decisions. See, e. g. *Board of Medical Examiners v. Plager*, 118 N. J. L. 434 (Sup. Ct. 1937); *Slonim v. Globe Indemnity Co.*, *supra*; *Ross v. Marx*, *supra*.

Further the jury should not be denied access to the collected learning of the past. If all evidence on questions of art and science are excluded, except to the extent that the witness himself has discovered or demonstrated the correctness of what he testified to, the inquiry has been restricted to narrow limits. *Stoudenmeir v. Williamson*, 29 Ala. 558 (Sup. Ct. 1857).

Professor Wigmore says the proper rule would be for the Court to allow the use of a printed treatise, approved and read aloud by a witness expert in that subject. The Court, in its discretion, considering all the circumstances, could have the author summoned if available. 6 *Wigmore, Evidence* (3d Ed. 1940) § 1691.

**Rule 64. Discretion of Judge under Exceptions (15), (16), (17), (18) and (19) to Exclude Evidence.**

Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

**Drafters' Comment**

The exceptions enumerated in the foregoing rule all relate to proof by evidence of a secondary character, such as the official report, copy of a record, unrecorded marriage certificate and the like which the adverse party should ordinarily have an opportunity to check against the original record in order to test its accuracy for what it purports to be. Thus the rule offers the necessary protection against surprise in situations when the proponent should ordinarily as a matter of course provide the other party with a copy or the right to inspect. No such protection is needed under the exceptions permitting the use of original records.

**Recommendation**

It is recommended that this rule be adopted.

**Committee Annotation**

This rule provides the necessary protection against surprise. If the adverse party has notice a reasonable time before the secondary evidence referred to in the rule is offered, he can prepare to meet it. This is in keeping with the spirit of fairness embodied in our present Rules of Court, and further would afford the adversary the opportunity to check the copy for accuracy.

**Rule 65. Credibility of Declarant.**

Evidence of a statement or other conduct by a declarant inconsistent with a statement received in evidence under an exception to Rule 63, is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement. Any other evidence tending to impair or

support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

#### Drafters' Comment

This rule has to do with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. This is the generally recognized rule.

#### Recommendation

It is recommended that this rule be adopted.

#### Committee Annotation

1. The first sentence of this rule provides for discrediting, by inconsistent statement or conduct, declarants whose hearsay declarations have been admitted under exceptions to the hearsay rule, though he had no opportunity to deny or explain such inconsistency. The second sentence of the rule permits the credibility of the aforementioned declarant to be impaired or supported upon any ground which the law would regard as competent had this declarant been a witness.

2. As hearsay statements are testimonial in nature, it is only proper to discredit them in the usual ways when they are admitted. Dying declarations and the attestation clause are the exceptions to the hearsay rule most commonly subjected to this form of attack. The attempt to apply the principle to the other exceptions is rare, though the principle is equally applicable to them. 3 *Wigmore, Evidence* (3d Ed. 1940) § 1033.

The words of Justice Whelpley in *Boylan v. Meeker*, 28 *N. J. L.* 274, 294 (*Sup. Ct.* 1860) with respect to an attestation clause ("an exalted piece of hearsay evidence", Clapp, *Wills and Administration*, 5 *N. J. Pract.* § 85), shows New Jersey to be in accord generally with the principle expressed in *Rule 65*:

"\* \* \* whenever the attestation is offered in evidence as proof of the execution of the instrument, any evidence which would have been competent against the witness, had he been sworn, will be competent to overthrow the force of his declaration, offered in evidence, instead of his testimony. Why should his declaration not under oath have greater sanctity than his testimony?"

Further, New Jersey has allowed credibility to be impaired by virtue of inconsistent statements. In *Reformed Dutch Church v. Ten Eyck*, 25 *N. J. L.* 40 (*Sup. Ct.* 1855) statements of a subscribing witness which were inconsistent with the presumption arising from his signature as an attesting witness to a deed were held admissible.

Also, in *Otterson v. Hofford*, 36 *N. J. L.* 129 (*Sup. Ct.* 1873) statements inconsistent with the fact of the due execution of the will had been made out of court by the third subscribing witness who had not been called. The court stated that the defendant was standing in part on the testimony of this absent witness and held the inconsistent statements admissible.

3. Under *Rule 65* inconsistent statements or conduct are admissible to discredit one whose hearsay statement is in evidence, even though no opportunity was afforded to deny or explain the inconsistency. In all

probability the rule concerning the necessity of laying a foundation has been discussed in the comments to *Rule 22*, and further remarks at this point are unnecessary.

However, it is to be noted that various jurisdictions have differed widely on the question of whether one whose hearsay statement is in evidence must be given an opportunity to explain or deny prior to admission. The cases pointing up this controversy in the area under discussion deal primarily with dying declarations. There is one line of decisions following the early Ohio case of *Wroe v. State*, 20 *Ohio St.* 460 (*Sup. Ct.* 1870) which exclude such evidence on the ground that no predicate had been laid as is required when living witnesses are thus sought to be discredited. See *Wharton, Criminal Evidence*, (11th Ed. 1935) § 571. Other jurisdictions, adopting what seems to be the sounder view, admit the statements. See 16 *A. L. R.* 411 (1922). Justice Feld in *People v. Lawrence*, 21 *Cal.* 368 (*Sup. Ct.* 1863) aptly stated the reasons leading to admission when he said that though the condition of the person making a declaration in the last hours of life under a sense of impending dissolution might compensate for the want of an oath, it can never make up for the want of cross-examination, and, therefore, there would be no justice in any rule which would deprive the accused in such circumstances of the right to discredit the deceased by proof that he had made contradictory statements as to the homicide and its cause.

In *Battle v. The State of Georgia*, 74 *Ga.* 101 (*Sup. Ct.* 1884), the Supreme Court of Georgia said that the same public policy which requires dying declarations to be received in evidence to promote justice requires the admission in evidence of contrary or inconsistent statements of the deceased.

It would seem that New Jersey would hold the inconsistent statements admissible in case of dying declarations in view of the position taken in *Otterson v. Hofford*, *supra*. If inconsistent statements may be introduced with respect to an absent attesting witness, who speaks through the attestation clause, *a fortiori*, it should be admissible with respect to the dying declaration. And the principle should be equally applicable to any declarant whose hearsay statement is in evidence.

4. In commenting on this rule only a brief reference has been made to the necessity of laying a foundation when credibility is sought to be impaired by prior inconsistent statement or conduct. Neither has neutralization as distinguished from impeachment been discussed, as these principles along with rehabilitation were probably examined in the comments to *Rules 21* and *22*.

5. The second sentence of *Rule 65* provides for the admission of evidence other than inconsistent statements and conduct to impair or support the credibility of the declarant. But this evidence is admissible only if it would have been admissible had the declarant been a witness.

This appears to be in accord with New Jersey law. In *State v. Tomassi*, 75 *N. J. L.* 739 (*E. & A.* 1908), it was held that a dying declaration could be discredited by showing the bad reputation of the declarant for truth and veracity, but not by showing that the general character of the declarant was bad. There is language in *Donnelly v. State*, 26 *N. J. L.* 463 (*Sup. Ct.* 1857) affirmed 26 *N. J. L.* 601 (*E. & A.* 1857) which indicates that

disbelief of the deceased in accountability after death and a future state of rewards and punishment would render the declaration inadmissible. The common law rule was that absence of belief in God and of a belief in accountability after death was sufficient to render the dying declaration incompetent. But by virtue of statutory enactments or constitutional provision, in most jurisdictions at the present time, such belief is not essential. 26 *Am. Jur.* 436 § 402. However, it would seem that such disbelief would affect the credibility of the declarant's statements when they are admitted in evidence. See collected cases 16 *A. L. R.* 411, 415 (1922); 167 *A. L. R.* 147 (1947).

6. No New Jersey cases were found dealing with the rehabilitation of a declarant whose hearsay statement is in evidence, but it would seem that subject to the general rule with respect to supporting a witness' credibility, *State v. Neiman*, 123 *N. J. L.* 341 (*Sup. Ct.* 1939), *aff'd* 124 *N. J. L.* 562 (*E. & A.* 1940) such declarations if they can be impaired should be allowed to be supported.

### **Rule 66. Multiple Hearsay.**

A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

#### **Drafters' Comment**

Probably the most frequent occasion for the application of this rule is the record of the "history" given by an accident victim upon arrival at the hospital, contained in the patient's hospital record. If the record shows that the patient said he was injured by running into the side of a truck, the Business Entries Exception (Rule 62 (13)) could be relied upon to show that the patient made the statement, and if the patient brought suit against the truck-owner, the statement could be used against the plaintiff as an admission (Rule 62 (7)). See, *e.g.*, *Watts v. Delaware Coach Co.*, 58 *A. 2d* 689, syl. 6, 7 (*Del. Super.* 1948); *Scott v. James Gibbons Co.*, 192 *Md.* 319, 64 *A. 2d* 117, syl. 5 (1949). Other possibilities for qualifying the patient's statement under an exception to the hearsay rule are the exceptions for spontaneous exclamations, dying declarations and declarations against interest.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

1. *Rule* 63 renders inadmissible all hearsay evidence except as otherwise provided in subsections (1) through (31) of that rule. Multiple hearsay is generally excluded as there is no provision which makes double hearsay admissible. *Rule* 66 admits hearsay within hearsay where both the original and included hearsay fall within exceptions to the hearsay

rule. No New Jersey cases were found specifically discussing the principle of this rule.

Generally hearsay within hearsay is inadmissible, but New Jersey has admitted such evidence. *Dillon v. Heller*, 99 *N. J. L.* 68 (*Sup. Ct.* 1923) noted 37 *Harv. L. Rev.* 770 (1924), 33 *Yale L. J.* 564 (1924). Here a baptismal certificate by a church official, executed in the course of business, which recited the date of birth was admitted to establish age. But see *State v. Snover*, 63 *N. J. L.* 382 (*Sup. Ct.* 1899); *Supreme Assembly v. McDonald*, 59 *N. J. L.* 248 (*E. & A.* 1896); *Hancock v. Catholic Benevolent Legion*, 67 *N. J. L.* 614 (*E. & A.* 1902). The *Dillon* case is apparently limited to its facts and cannot be considered as establishing the broad principle that multiple hearsay is admissible.

2. The drafters of the proposed rule indicate that the most frequent occasion for the application of the rule is the hospital record reflecting the patient's history given by the patient upon his arrival at the hospital.

In this state, the adoption of the Uniform Business Records as Evidence Act, *N. J. S.* 2A:82-35, in 1949 would seem to eliminate any doubts as to the admissibility of hospital records to show the injury and treatment. This seems to be the viewpoint of those jurisdictions which have adopted similar legislation. See 144 *A. L. R.* 727 (1943). Whether it is evidential of the truth of a patient's statement (unrelated medically to the treatment) contained in the record has been a matter of great concern to the courts. (A discussion of the admissibility of hospital records at common law can be found in 10 *Texas L. R.* 510 (1932); as to admissibility of hospital records under the Federal Act (Model Business Records Act, 28 U. S. C. Sec. 695) see 17 *So Calif. L. R.* 165 (1944); 41 *Mich. L. Rev.* 996 (1943); 43 *Col. L. R.* 392 (1943); 56 *Harvard L. R.* 458 (1942); 40 *Mich. L. R.* 219 (1942); as to admissibility under the uniform statute 24 *Minn. L. R.* 958 (1939); 27 *Calif. L. R.* 466 (1939); 25 *Va. L. R.* 627 (1939). In general, see 75 *A. L. R.* 378 (1931); 120 *A. L. R.* 1124 (1939); 135 *A. L. R.* 1258 (1941); 144 *A. L. R.* 727 (1943)). When the record professes to state the cause of the injury, courts have excluded it as self-serving. *Schmitt v. Doehler Die Casting Co.*, 143 *Ohio St.* 421, 55 *N. E. 2d* 644 (*Sup. Ct.* 1944), reversed 74 *Ohio App.* 244, 58 *N. E. 2d* 224 (1943) or because the recorder had no personal knowledge of the facts recorded. *Lane v. Samuels*, 350 *Pa.* 446, 39 *A. 2d* 626 (*Sup. Ct.* 1944), or as pure hearsay. *Sadjak v. Parker-Wolverine Co.*, 281 *Mich.* 84, 274 *N. W.* 719 (*Sup. Ct.* 1937). New Jersey has admitted a hospital record containing a "history" given by the patient. *Opdyke v. Halbach*, 123 *N. J. L.* 123 (*Sup. Ct.* 1939). And this was prior to the adoption of the Uniform Business Records as Evidence Act, *N. J. S.* 2A:82-35.

3. With respect to business entry statutes, courts have failed to recognize explicitly that these statutes are applicable in admitting the first step of hearsay, while the second step may be admitted because a further exception to the hearsay rule is appropriate. See 48 *Col. L. R.* 920 (1948). The courts have indicated either that the record containing the hearsay statement should be admitted, e. g. *Erickson v. Commercial Casualty Ins. Co.*, 265 *App. Div.* 327, 39 *N. Y. S. 2d* 72 (3d Dept. 1942); *Pollack v. Metropolitan Life Ins. Co.*, 138 *F. 2d* 123 (3d Cir. 1943) without pointing

up this distinction. But certain of the courts have stated that the included hearsay statement is admissible if in itself it meets the requirements of an independent exception. *Watts v. Delaware Coach Co.*, 58 A. 2d 689 (Del. Super. 1948); dicta *Commonwealth v. Harris*, 351 Pa. 325, 332, 41 A. 2d 688, 692 (Sup. Ct. 1945); concurring opinion, *Pollack v. Metropolitan Life Ins. Co.*, *supra*. This is the view of the drafters of Uniform Rules of Evidence. Their position is supported by certain writers who have suggested that if a statement falls within the scope of some other exception to the hearsay rule it should be admissible when entered in the record irrespective of its relation to the diagnosis or treatment. See 23 *Texas L. R.* 176, 186 (1945); 48 *Col. L. R.* 920, 928 (1948). But Professor Hale in 14 *So. Calif. L. R.* 99 (1941) states that no cases were found which had carried the law this far.

4. In commenting on *Rule 66* the drafters thereof have cited *Watts v. Delaware Coach Co.*, *supra*. However, that case does not fully support the broad principle advocated by the rule. *Watts*, *supra*, holds that a declaration against interest regularly entered in the hospital records may be received in evidence, but only if it is so related to the complaint or injury involved as to facilitate diagnosis and treatment. Apparently a statement medically irrelevant would be excluded. *Scott v. James Gibbons Co.*, 192 Md. 319, 64 A. 2d 117 (Ct. of App. 1949), the other case cited by the drafters, admitted the hospital record insofar as it showed the patient had been injured in an automobile accident, but particulars of said accident were not admissible. These cases, although cited by the drafters, do not seem to support the broad principle of the rule. They do represent, however, the more liberal approach, and that most nearly in accord with *Rule 66*.

The patient's statements to his treating physician with respect to his physical condition are admissible, though hearsay. *State v. Gedicke*, 43 N. J. L. 86 (Sup. Ct. 1881). Statements regarding past events, not medically related to the treatment, are excluded. *Clayton v. Jersey Central Power & Light Co.*, 19 N. J. Super. 546 (App. Div. 1952); cert. denied 10 N. J. 314 (1952); *State v. Gruich*, 96 N. J. L. 202, 204 (E. & A. 1921).

5. If *Rule 66* is adopted it would seem that this would affect a change in New Jersey law. For example, if the treating physician's record is admissible under *Rule 63* (13), and it would seem to be, then statements recorded therein that would meet the requirements of any other hearsay exception would also be admissible. Similar would be the case where the first step was admission under *Rule 63* (12), Statements of Physical or Mental Condition of Declarant.

## IX. AUTHENTICATION AND CONTENT OF WRITINGS

### Rule 67. Authentication Required; Ancient Documents.

Authentication of a writing is required before it may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law. If the judge finds that a writing (a) is at least thirty years old at the time it is offered, and (b) is in such condition as to create no suspicion concerning its authenticity, and (c) at the time of its discovery was in a place in which such a document, if authentic, would be likely to be found, it is sufficiently authenticated.

#### Drafters' Comment

This rule recognizes the principle that there must be some evidence of the genuineness of the document or other writing. Authenticity may be proved as any other fact by evidence which warrants a finding of authenticity. After this is done, the writing is entitled to be received in evidence. The part relating to ancient documents adopts the common law rule as an alternative method of proving authenticity.

#### Recommendation

It is recommended that this rule be adopted deleting the special ancient document rule as indicated:

“Authentication of a writing is required before it may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law. [If the judge finds that a writing (a) is at least thirty years old at the time it is offered, and (b) is in such condition as to create no suspicion concerning its authenticity, and (c) at the time of its discovery was in a place in which such a document, if authentic, would be likely to be found, it is sufficiently authenticated.]”

#### Committee Annotation

1. The first two sentences of this rule state the basic principle of authentication which is clearly the law in all jurisdictions. 7 *Wigmore, Evidence* § 2130 et seq. (1940). Testimonial or circumstantial evidence may be offered to prove the authenticity of a document. The trial judge passes on the sufficiency of the evidence so offered to make a prima facie case and take the issue of genuineness to the jury without the opposing party first offering contrary proof on the issue. The better rule would seem to be that the ruling of the court on sufficiency carries no evidentiary weight, 7 *Wigmore* § 2135. For example, our former Supreme Court termed the “presumption” of authenticity arising out of receipt of a letter in response

to a letter sent by the receiver a rule concerning evidence shifting the burden of going forward with the proof but leaving the ultimate burden on the one asserting the authenticity of the document. Uncontradicted proof of inauthenticity, it was held, should have taken the question from the jury despite the "presumption." *Dunn v. Goldham*, 111 N. J. L. 249 (*Sup. Ct.* 1933).

Thus the general authentication rule here proposed obviously does no more than state the applicability of existing case law which requires authentication except, of course, where there is an admission. *R. R.* 4:26-1. *Cf. R. R.* 4:8-4 concerning the authenticity of a signature on a promissory note. Its import here as elsewhere would be no more than a restatement of existing law.

As to that law, see the following: *Dayton v. Boettner*, 82 N. J. L. 421 (*E. & A.* 1911) (witness to execution of document), as to subscribing witnesses, see Rule 71, N. J. S. 2A:82-2, *Robertson v. Burstein*, 105 N. J. L. 375 (*E. & A.* 1929); N. J. S. 2A:82-85 (printed statutes of other states), see generally Rule 68 and, as to the former practice, compare *Hale v. Ross*, 3 N. J. L. 373 (*Sup. Ct.* 1811) with *Van Buskirk v. Mulock*, 18 N. J. L. 184, 189 (*Sup. Ct.* 1840); *Notto v. Atlantic City Railroad Co.*, 75 N. J. L. 826 (*E. & A.* 1908), *Dickerson v. Mutual Grocery Co.*, 100 N. J. L. 118, 122 (*E. & A.* 1924), *Auer v. Sinclair Refining Co.*, 103 N. J. L. 372, 375 (*E. & A.* 1927) (life insurance mortality tables); *In re Blau*, 4 N. J. Super. 343, 350 (*App. Div.* 1950) (letter and family tree); and *Leunis Co. v. Singer*, 102 N. J. L. 68 (*Sup. Ct.* 1925) (letter in reply to another letter).

The admissibility of business records as an exception to the hearsay rule is discussed under Rule 62 (13), see N. J. S. 2A:82-34 et seq. N. J. S. A. 2A:82-35 sets forth the authentication requirements for such records. See also the earlier cases: *Diamant v. Colloty*, 66 N. J. L. 295 (*E. & A.* 1901), *Bayonne v. Standard Oil Co.*, 81 N. J. L. 717 (*E. & A.* 1910), *Benoliel v. Homac*, 87 N. J. L. 375, 376 (*Sup. Ct.* 1915) (books of account). Accord: *Johnson v. Hoffman*, 7 N. J. 123, 130 (1951). See as to water meter readings and records: *Grobart v. Passaic Valley Water Comm.*, 134 N. J. Eq. 413 (*Ch.* 1943), affirmed 135 N. J. Eq. 38 (*E. & A.* 1944), but *cf. Bayonne v. Standard Oil Co.*, 81 N. J. L. 717, 722 (*E. & A.* 1910), *supra*.

The statute (L. 1949 c. 124, N. J. S. 2A:82-35, *supra*) appears to have liberalized the former practice as to hospital records. See *Cohen v. Bradley Beach*, 135 N. J. L. 276 (*E. & A.* 1947), *Sullivan v. Coast Cities Coaches, Inc.*, 126 N. J. L. 300 (*Sup. Ct.* 1941), affirmed 127 N. J. L. 226 (*E. & A.* 1941). *Cf. Petrosimo v. Public Service Coordinated Transport*, 1 N. J. Super. 19 (*App. Div.* 1948). Notes, 3 *Rutgers L. Rev.* 301 (1949), 4 *Rutgers L. Rev.* 270 (1949).

On the matter of authenticating a document as a corporate act, see *Robertson v. Burstein*, 105 N. J. L. 375 (*E. & A.* 1929), *Wanner v. Columbia Casualty Co.*, 7 N. J. Misc. 753 (*Sup. Ct.* 1929), *Van Houten v. Dainty Quality Laundry Corp.*, 115 N. J. Eq. 516 (*Ch.* 1934). As to an agent's authority as it bears on authentication, compare *Hill v. Adams Express Co.*, 74 N. J. L. 338 (*Sup. Ct.* 1907) with *Fuld v. Adams*, 108 N. J. L. 373, 375 (*E. & A.* 1931).

2. Authentication of exhibits other than writings are not covered by these rules. See the following: *Garafola v. Rosecliff Realty Co. Inc.*, 24 *N. J. Super.* 28, 42 (*App. Div.* 1952), *Kellam v. Akers Motor Lines, Inc.*, 133 *N. J. L.* 1, 3 (*E. & A.* 1945), *Haring v. Banks*, 7 *N. J. Misc.* 605, 607 (*Sup. Ct.* 1929), affirmed 106 *N. J. L.* 569 (*E. & A.* 1930), *cf. United N. J., etc. Co. v. Golden*, 104 *N. J. L.* 385 (*E. & A.* 1928), *Robinson v. Payne*, 99 *N. J. L.* 135, 143 (*E. & A.* 1923), *Greco v. Schmidt*, 101 *N. J. L.* 554, 556 (*E. & A.* 1925), *Gindin v. Baron*, 16 *N. J. Super.* 1, 8 (*App. Div.* 1951) (X-rays), but see *Joy v. Flax*, 101 *N. J. L.* 43 (*Sup. Ct.* 1925). See also *State v. Fox*, 25 *N. J. L.* 566, 602 (*Sup. Ct.* 1856) involving a "model" of the deceased's wounds. On the matter of telephone conversations, see *State v. Dillingham*, 134 *N. J. L.* 229 (*E. & A.* 1946), *Citrin v. Tansey*, 107 *N. J. L.* 368 (*E. & A.* 1931).

In passing, authentication offered after the exhibit is improperly admitted will, of course, cure the error. *Dayton v. Boettner*, 82 *N. J. L.* 421 (*E. & A.* 1911), *supra*, *State v. Pisano*, 33 *N. J. Super.* 559, 563 (*App. Div.* 1954). And the whole matter of authentication has been termed primarily within the trial court's discretion. *Day v. Beyer*, 5 *N. J. Misc.* 1069 (*Sup. Ct.* 1927), *Dumphy v. Thompson*, 3 *N. J. Misc.* 1086, 1088 (*Sup. Ct.* 1925).

3. The second part of the rule states the principle of ancient documents—a special and somewhat formalized rule of authentication of long standing in the common law. 7 *Wigmore* § 2137 et seq. The rule, of course, substitutes *ex necessitate* age and other circumstances for proof of the subscribing witnesses or others who except for the lapse of time could prove the document.

The uniform rule proposed seems to comport generally with the few reported New Jersey cases. E. g. *Havens v. Sea Shore Land Co.*, 47 *N. J. Eq.* 365, 373 (*Ch.* 1890) (extended discussion by Van Fleet, V. C.), *Osborne v. Tunis*, 25 *N. J. L.* 633, 663 (*E. & A.* 1856). See also *Stockton v. Frabizio*, 130 *N. J. L.* 12 (*Sup. Ct.* 1943) (page from an 1873 atlas), *McGrath v. Norcross*, 78 *N. J. Eq.* 120, 130 (*Ch.* 1911), affirmed on opinion 82 *N. J. Eq.* 367 (*E. & A.* 1913) and *Fuller v. Sawton*, 20 *N. J. L.* 61, 65 (*Sup. Ct.* 1843) (recitals of prior deeds in the ancient deed). It sets forth the three requirements upon which the cases here and elsewhere agree: age, unsuspecting appearance and natural custody. 7 *Wigmore* § 2138-40.

A caveat may be added, however. *Wigmore* (§ 2141) treats a fourth requirement which pertains in some jurisdictions in one form or another: possession of the land by the one claiming title under an ancient deed or will and his predecessors in title. In *Havens v. Sea Shore Land Co.*, 47 *N. J. Eq.* 365, 378 (*Ch.* 1890), *supra*, the New Jersey law is stated as requiring "other equivalent or satisfactory proof" where the possession requirement is not met. In that case the court found such proof in the fact there had been in other deeds three different assertions of title on the basis of the ancient conveyance in question. Accord: *Osborn v. Tunis*, 25 *N. J. L.* 633, 663 (*E. & A.* 1856). See also R. S. 46:21-2, dealing with imperfectly acknowledged deeds recorded for six years and requiring "evidence of corresponding enjoyment or other equivalent or explanatory proof." *Cf.* R. S. 46:16-8, 7 *Wigmore* § 2143, *supra*.

The paucity of recorded cases indicates that this matter is not highly significant, but it could—if desired—be added to the Uniform Rule as drafted by inserting the following:

“\* \* \* be likely to be found, [and (d), in the case of a deed or will of land, that the party (by himself or his predecessors in title) has been in possession of the land since the document’s purported execution or that some additional circumstance appears giving an equivalent inference of genuineness], it is sufficiently authenticated.”

However, it is felt that in the interest of brevity the “ancient document” rule should be eliminated from specific mention. It would appear to fall within the purview of the second sentence of the rule, and as an unimportant, albeit formalized, means of authentication does not seem to merit special notice in broad general rules of evidence.

### **Rule 68. Authentication of Copies of Records.**

A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if (a) the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (c) the office in which the record is kept is within this state and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within the state, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

### Drafters' Comment

This rule simplifies the methods of proving the authenticity of copies of official records and embodies the provisions of Rule 44 of the Federal Rules of Civil Procedure.

### Recommendation

It is recommended that R. R. 4: 45 be retained in place of Rule 68.

### Committee Annotation

1. Rule 68 is similar to R. R. 4: 45, although there are several differences. Both rules are derived from Rule 44(a), *Federal Rules of Civil Procedure*, and Rule 517, Model Code of Evidence (1942). See Tentative Draft Comment to R. R. 4: 45, 2 *N. J. Practice* 446 (1954).

The function of the rule is limited to providing methods of authentication. Cf. *Vanadium Corp v. Fidelity and Deposit Co.*, 159 *F. 2d* 105, 109 (2d Cir. 1947). The admissibility of the copies of official records is provided for in Rule 63(17). (Compare R. R. 4: 45, combining the functions of Rules 63 (17) and 68.) The admissibility of the original records, as distinguished from their copies, is also of course beyond the scope of Rule 68. See Rule 63; 5 *Wigmore, Evidence*, 511, et seq. (1940); R. R. 4: 45, providing that official records, "when admissible", may be proved by copies.

2. Section (a) of Rule 68 corresponds with Section (a) of R. R. 4: 45-1, but the latter follows the simpler wording of Rule 44(a), Fed. R. Civ. P. The use of an official publication to evidence a record is provided for by statute in New Jersey in a few instances. See N. J. S. 2A: 82-16 (printed rate schedules, etc., of the Interstate Commerce Commission); N. J. S. 2A: 82-25 (printed statute books of any state or foreign jurisdiction); N. J. S. 2A: 82-26 (reports of judicial decisions); cf. N. J. S. 2A: 82-27, et seq., Uniform Judicial Notice of Foreign Law Act.

Illustrative of this section's possible applications are *United States v. Aluminum Co. of America*, 1 *F. R. D.* 71, 2 *F. R. Serv.* 446 (*S. D. N. Y.* 1939), (Senate Documents reprinting letters and memoranda of a government official admitted on common law grounds, but discussing Rule 44(a)); and *Minnehaha County, S. D. v. Kelley*, 150 *F. 2d* 356 (8th Cir. 1945) (Official publication of weather bureau showing rainfall admitted in reliance on Rule 44(a)). Compare *State v. Black*, 31 *N. J. Super.* 418 (*App. Div.* 1954), where proof of an I. C. C. tariff was apparently attempted by means of a private publication, admission of which was held error.

The evident premise of the rule is that the official publication proves itself; no attestation is necessary. See Tentative Draft Comment, *N. J. Practice, supra*. This method of proof by official printed copies is generally recognized. *United States v. Aluminum Co. of America, supra*; 5 *Wigmore, supra*, 842. Little discussion of its necessity seems required, particularly since the advent of administrative agencies. See, e. g., *State v. Black, supra*.

3. Since Section (b) of Rule 68 logically follows Sections (c) and (d) (see R. R. 4: 45-3), it will be discussed later.

Section (c) of Rule 68 is the equivalent of the first sentence of R. R. 4: 45-1(b). The general method of proving an official record by a certified copy is provided for in numerous statutes. E. g., N. J. S. 2A: 82-8 to 16:

N. J. S. 2A: 11-55; see 5 *Wigmore, supra*, § 1680, note 1, collecting New Jersey statutes among others.

Rules 68 and R. R. 4: 45, however, in contrast to the Federal rule and the statutes cited, do not specify that the copy must be "certified". This avoids a possible interpretation requiring a more complicated procedure. See *Ehrlich v. Mulligan*, 104 N. J. L. 375, 380 (E. & A. 1928), holding that a copy attested at the foot thereof to be a "true" copy was not a "certified" copy, certification requiring a statement that the copy was on file in the particular office. Federal Rule 44(a) specifically calls not only for a "certified" copy, but for a separate certificate of legal custody. The draft comment to R. R. 4: 45, however, notes that unlike the federal rule, a record made within this state need not be accompanied by a certificate of custody. 2 N. J. Practice, *supra*, 446. The intent of Rule 68 and R. R. 4: 45 seems to be not only to eliminate the accompanying certificate, but to provide that an attestation such as that in *Ehrlich v. Mulligan, supra*, be sufficient.

This method accords with the general theory of authenticating documents. A presumed genuineness is accorded to the attestation. Since the office is within the state, the court may then judicially notice the attesting officer's identity and his legal custody of the records. 5 *Wigmore, supra*, 760.

4. Section (d) of Rule 68 and the equivalent Sections (b) (1) and (b) (2) of R. R. 4: 45-1 require in addition to the attested copy, an accompanying certificate of legal custody authenticated by an official seal. R. R. 4: 45 adds the provision, not found in Rule 68 or the other rules cited, that the seal need be only "purportedly" the official seal. See Tentative Draft Comment, N. J. Practice, *supra*. The added term expressly assigns presumed genuineness to the seal, although this seems implicit in the other rules cited. See 5 *Wigmore, supra*, 761.

The rule extends somewhat the early theory of authenticating copies of out of state records. The overall concept has been that where the attesting officer is from outside the state, the court cannot judicially notice his identity and his custody of the records. These facts are established instead by the seal of some official, which is accorded a presumed genuineness, the seal itself becoming the evidence of the attesting officer's custody and identity. 5 *Wigmore, supra*, 761, 762; 7 *Wigmore, supra*, 637, 639. At common law only the seal of the highest official of the foreign jurisdiction and perhaps the seal of a foreign court, were honored with such a presumption. *Ibid.* However, statutes extended the presumption to a court's seals, e. g., 28 U. S. C. § 1738; N. J. S. 2A: 82-8, and to seals of lower officials having custody of non-judicial records, e. g., 28 U. S. C. § 1739; N. J. S. 2A: 82-16. The approach is no longer new, and its necessity can hardly be questioned when confronted with present complex government structures.

5. Section (b) of Rule 68 corresponds with R. R. 4: 45-3. A possibly important difference is that R. R. 4: 45-3 expressly allows alternative methods of proof provided by statute, besides those afforded at common law. Rule 68(b), following the Model Code, omits the reference to statute, although it provides for common law methods. (Compare Rule 44(a), providing for both methods.) In that context it seems arguable that Rule 68 intends to exclude the statutory methods of proof as such. (Of course, many of the methods provided by statute more than meet the minimum

requirements of Rule 68, e. g., N. J. S. 2A: 82-10, providing for authentication of transcripts of the division of motor vehicles by certification of the commissioner; and 28 U. S. C. §§ 1738, 1739.)

Whether an exclusion of statutory methods is wise seems a question beyond the scope of this comment. Not only methods of authentication, but the admissibility of the original records and of their copies is provided for by the various statutes. (E. g., N. J. S. 2A: 11-55; N. J. S. 2A: 82-8, et seq.) Whether the authentication provisions of these statutes are or should be superseded by Rule 68 seems to depend on whether their admissibility provisions are still in force. (See Rule 63).

A uniform method of authentication seems highly desirable (see 5 *Wigmore, supra*, 806), but care should be taken not to prevent proof by simpler and tested methods. For example, authentication of a copy of a rule of the division of motor vehicles by seal of the commissioner (N. J. S. 2A: 82-10) does not seem to meet the requirements of Section (c) of Rule 68. (R. R. 4: 45-1(b)). Nor is it a common law method in New Jersey, as the later discussion indicates. Moreover, any attempt to exclude statutory methods of authentication should be explicit. This could not of course affect methods of proof under 28 U. S. C. Sections 1738 and 1739. See *Title Guarantee and Trust Co. v. Trenton Potteries Co.*, 56 N. J. Eq. 441, 446 (E. & A. 1897).

Proof under common law rules of evidence should still be available. Code methods are merely more convenient alternatives. 5 *Wigmore, supra*, 763, 764. The usual example of authentication at common law is proof by "examined" or "sworn" copies. *McCormick, Evidence*, 418 (1954); *State v. Black, supra*. However, in New Jersey at common law, a copy of a judicial record was admissible under certain conditions, and in that event it was authenticated by certification under seal of the court. See *Traction Co. v. Board of Works*, 57 N. J. L. 313, 316 (*Sup. Ct.* 1894), *affd.* 58 N. J. L. 362 (E. & A. 1895); *Snowden v. Johnson*, 3 N. J. L. 60 (*Sup. Ct.* 1808). So for judicial records at least, the older methods of certifying copies under seal would still be available. See *Dickinson v. Rinke*, 11 *Fed. Rules Serv.* 489, 498 (S. D. N. Y. 1948), holding authentication by court seal proper at common law, although this method did not conform to the provisions of Rule 44 (a); 7 *Wigmore, supra*, 647.

In the United States generally, the common law rule has also been that copies of non-judicial records certified by their lawful custodian are admissible. *McCormick, Evidence*, 615, 417 (1954); 5 *Wigmore, supra*, 706, 740. But New Jersey has followed the English rule that to admit certified copies of non-judicial records, specific authorization is required. *Traction Co. v. Board of Works, supra*. Thus in New Jersey proof of copies of non-judicial records is confined to those methods provided by statute or rule.

6. It is recommended that R. R. 4: 45 be adopted as Rule 68. Its wording is simpler and more carefully thought out and its arrangement is better. It is not so different, however, as to lose the virtues of a uniform rule.

The provision in R. R. 4: 45 for the admission of copies of records should be omitted if Rule 63(17), making the same provision, is adopted. Attention should be given to the problem of excluding the various statutory methods of authentication. In this connection, as noted, Rule 63 and other

rules pertaining to the admissibility of the originals must be considered. See 5 *Wigmore, supra*, 511, *et seq.*

### **Rule 69. Certificate of Lack of Record.**

A writing admissible under exception (17) (b) of Rule 63 is authenticated in the same manner as is provided in clause (c) or (d) of Rule 68.

#### **Drafters' Comment**

Clause (a) of exception (17) under the hearsay rule is subject to Rule 68 regarding authentication since the writing would be a copy of an official record. The certificate of absence of a record referred to in clause (b) of exception (17) is not a copy of a record, so this rule is necessary to provide for authentication of the certificate in the same manner as is provided for copies of records.

#### **Recommendation**

It is recommended that the present R. R. 4: 45-2 be retained in place of this rule.

#### **Committee Annotation**

This rule corresponds to R. R. 4: 45-2. It is merely an adjunct of provisions for authenticating copies of records. Although a separate provision for certificates of lack of record is necessary (see *Meyer v. Creighton*, 83 N. J. L. 749 (E. & A. 1912), holding a certificate of lack of record not admissible under a statute providing for authentication of copies of papers), placing it in a separate rule seems a complicating step.

### **Rule 70. Documentary Originals as the Best Evidence.**

(1) As tending to prove the content of a writing, no evidence other than the writing itself is admissible, except as otherwise provided in these rules, unless the judge finds (a) that the writing is lost or has been destroyed without fraudulent intent on the part of the proponent, or (b) that the writing is outside the reach of the court's process and not procurable by the proponent, or (c) that the opponent, at a time when the writing was under his control has been notified, expressly or by implication from the pleadings, that it would be needed at the hearing, and on request at the hearing has failed to produce it, or (d) that the writing is not closely related to the controlling issues and it would be inexpedient to require its production, or (e) that the writing is an official record, or is a writing affecting property authorized to be recorded and actually recorded in the public records as described in Rule 63, exception (19).

(2) If the judge makes one of the findings specified in the pre-

ceding paragraph, secondary evidence of the content of the writing is admissible. Evidence offered by the opponent tending to prove (a) that the asserted writing never existed, or (b) that a writing produced at the trial is the asserted writing, or (c) that the secondary evidence does not correctly reflect the content of the asserted writings, is irrelevant and inadmissible upon the question of admissibility of the secondary evidence but is relevant and admissible upon the issues of the existence and content of the asserted writing to be determined by the trier of fact.

#### **Drafters' Comment**

*Paragraph (1).* This rule applies to all writings as defined in Rule 1 (13). The common law rule is generally understood to apply only to "documents." This rule, mostly in harmony with the common law and wholly sensible and reasonable, does not require the production of the original when the failure to produce it is satisfactorily explained (clauses (a), (b), (c)); does not require the production of the original if relevant only to a "collateral" issue and if it would be inexpedient to require it (clause (d)); does not require the production of recorded originals affecting property or of official records (clause (e)). The "Best Evidence Rule" at common law as well as here is a preferential rather than an exclusionary rule. Its object is to prevent a litigant from depriving the trier of fact, by fraudulent design, of the benefit of the only certain proof of the content of a writing, the writing itself. As to public records and recorded originals proof by duly authenticated copies of the record as elsewhere provided in these rules, serves the purpose nearly as well. No distinction is made between grades of secondary evidence, and purported copies of ordinary writings are treated as secondary and not preferential in the same sense as any other type of evidence of content.

*Paragraph (2).* The purpose of this paragraph is to indicate the separation of functions between the judge and the trier of fact. The function of the judge is to pass on the preliminary question of whether secondary evidence may be offered. In so doing he must assume that the original writing existed and is not the writing produced at the trial, even though the opponent offers evidence to prove that such a writing never existed or that a writing which he produces is in fact the original. The issues raised by these claims as well as the issue of whether the secondary evidence correctly reflects the content of the original are questions for the trier of fact.

#### **Recommendation**

It is recommended that this rule be adopted, with possible modification as to paragraph 2.

#### **Committee Annotation**

1. The adoption of the rule would work no radical change in New Jersey law. For a general discussion of the "best evidence" rule in New Jersey see "The Best Evidence Rule—A Criticism", 3 *Newark L. Rev.* 200 (1938).
2. The proposed rule confines the best evidence doctrine to writings. This is in accordance with the best authority and with the origins of the

doctrine. *Thayer, Preliminary Treatise on Evidence*, 489 *et seq.* (1898); *McKelvey, Evidence*, 342 (1898); 4 *Wigmore, Evidence* § 1181 (1940); 2 *Morgan, Basic Problems of Evidence*, 333 (1954). This seems likewise to be the tenor of the New Jersey cases.

3. The listed exceptions have all been recognized in one form or another in New Jersey. Their theory has been said to be "that production of the primary evidence is out of the party's power". *Biehler v. Great American Indemnity Co.*, 127 *N. J. L.* 114, 116 (*Sup. Ct.* 1941); *Johnson v. Arnwine*, 42 *N. J. L.* 451, 454 (*Sup. Ct.* 1880).

(a). The loss or destruction of the writing was early recognized as the most common exception. *Seward v. Vandergrift*, 3 *N. J. L.* 481 (*Sup. Ct.* 1812). In *Johnson v. Arnwine*, *supra* at 454, Justice Depue comprehensively discussed the requirements of proof, summarizing the requirements as follows:

"As a general rule, the party is expected to show that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him."

If suspicion hangs over the instrument, the inquiry of the trial judge will be "most rigid". See also *Koehler v. Schilling*, 70 *N. J. L.* 585, 586 (*Sup. Ct.* 1904).

(b). New Jersey's courts have declined to state flatly that secondary evidence is admissible merely because the original is out of the jurisdiction. There must be "some effort . . . made to secure the original documents", which perhaps includes the taking of depositions in the foreign jurisdiction. See *Roll v. Everett*, 73 *N. J. Eq.* 697, 700 (*E. & A.* 1908).

(c). New Jersey likewise requires a demand where the writing is in the control of the opponent. *Felder v. Friedman*, 124 *N. J. L.* 514, 517 (*E. & A.* 1940); *Prell v. Staff*, 12 *N. J. Misc.* 504, 506 (*Sup. Ct.* 1934). Apparently, though, no New Jersey case holds that notification "by implication from the pleadings" is sufficient. This wrinkle, however, appears to be in keeping with the spirit of our present practice; parties should not be encouraged to suppress evidence which they have good cause to know will be important to the case.

(d). New Jersey has long recognized a "collateral issue" exception. *Rathbun v. Brancatella*, 93 *N. J. L.* 222, 224 (*E. & A.* 1919); *Hartman v. Dobar*, 80 *N. J. L.* 250, 251 (*Sup. Ct.* 1910). The rationale of the exception is that where the significance of the evidence is not great the burdens of enforcement of the rule would be so great that the attendant cost and delay would outweigh the additional safeguards imposed by the rule.

(e). This exception makes copies of official records admissible, when properly authenticated. See also Rule 63(17); Rule 68. In New Jersey this is accomplished by R. R. 4:45-1 which states that "an official record or an entry therein, when admissible for any purpose, may be evidenced . . . by a copy," duly authenticated. See also *N. J. S. 2A:82-20*.

A statute (*N. J. S. 2A:82-23*) provides that where a party gives his opponent timely notice that production of an original public record is to be required, no copy will be allowed unless the original has been lost or destroyed or cannot be produced. Whether this statute is still effective in

view of R. R. 4:45-1 and *Winberry v. Salisbury*, 5 N. J. 240 (1950) is uncertain at present.

The rule carries the exception to writings "affecting property authorized to be recorded". These are likewise admissible in New Jersey under N. J. S. 2A:82-20 as copies of instruments "recorded in any public office" and probably under R. R. 4:45-1 as copies of "official records". New Jersey does not confine the admission to documents affecting property. As such recorded documents would seem generally to be of this class, the distinction is perhaps not too important.

4. Paragraph (2) delineates the function of the judge and jury. *Johnson v. Arnwine*, *supra*, at 458 declared it to be the function of the court to determine the admissibility of the evidence, and questions preliminary to it such as proof of loss. See also *Koehler v. Schilling*, 70 N. J. L. 585, 586 (*Sup. Ct.* 1904). The rule provides that evidence offered by the opponent to show (a) non-existence, (b) that the writing offered is the original, or (c) that the asserted secondary evidence does not correctly reflect the writing, is not admissible upon the question of admissibility, although it will be relevant and admissible to the question before the triers of fact. There can be no quarrel with (b). If the writing is the original an argument over this is unnecessary prior to admissibility. With regard to (a) and (c), it is arguable that a disagreement over the accuracy of the evidence as a reflection of an original writing is properly for the jury and could only delay proceedings were it argued prior to admissibility. No New Jersey cases have, however, been found on this point. Wigmore discusses as a "plain principle" the proposition that the absent document must still be authenticated. 4 *Wigmore*, *supra*. §1188. Some cases have, however, said that evidence of existence and execution must come before evidence of loss. *Id.* at 333. Others have reversed the order, and Wigmore believes that it is properly left to the discretion of the court. In this respect the rule departs from the usual policy of the Uniform Rules of enlarging the discretion of the trial court.

## **Rule 71. Proof of Attested Writings.**

When the execution of an attested writing is in issue, whether or not attestation is a statutory requisite of its effective execution, no attester is a necessary witness even though all attesters are available unless the statute requiring attestation specifically provides otherwise.

### **Drafters' Comment**

This rule is a departure from the common law rule as generally understood requiring a satisfactory explanation for failure to produce the attesting witnesses before evidence from another source would be received of the execution of an attested writing where an attestation was necessary to its legally effective execution. This rule permits the signing by the maker and attestation by the witnesses to be evidenced and established in the same way as any other disputed matter. The credibility of an attesting witness is determined in the same way as that of any other witness.

This rule is silent upon the adequacy of evidence to support a finding of execution. Since the necessity for calling any attestors is removed, no restrictions as to admissibility or adequacy of evidence to establish any material matter are applicable to an attested document which are not applicable to an unattested document.

*Reasons for Change.* The requirement that a document such as a will be attested as a condition of its validity is a requirement of substantive law, designed to ensure solemnity in execution and to disclose the identity of a number of persons able to give evidence of the circumstances of the execution. How the execution and attestation may be proved is a question of evidence. To insist upon retaining the procedural provisions of the English common law is to insist upon a survival of medieval formality without practical basis. If the object of the enactment requiring attestation is to prevent imposition upon the courts and parties by evidence which can be too easily manufactured, the statute should specifically state the method of proof deemed necessary to accomplish this purpose. In what circumstances the attestors must be called and what will serve to excuse a failure to call them can easily be set forth. But a system of rules of evidence ought not to preserve an anachronistic formality on the theory that a legislative requirement of attestation purports to regulate the method of proof of the attested document in the absence of language expressing a purpose to do so. (Comments taken from Model Code of Evidence Comments on Model Code Rule 603.)

#### Recommendation

It is recommended that the rule be adopted.

#### Committee Annotation

1. Proposed Rule 71 is in substance the same as Model Code of Evidence Rule 603. It embodies the modern rule of not requiring the calling of the attesting witnesses to prove the execution of attested documents, "unless the statute requiring attestation specifically provides otherwise."

2. The early New Jersey cases followed the common law rule that the attesting witnesses to documents must be called to prove the execution of such documents, or their absence accounted for to the court. *Paterson v. Schneck*, 15 N. J. L. 434, (*Sup. Ct.* 1836), promissory note; *Boyle v. Knauss*, 81 N. J. L. 330, (*Sup. Ct.* 1911), bill of sale; 4 *Wigmore on Evidence*, (3d Ed.), § 1290. Death (*Armstrong v. Glover*, 15 N. J. L. 186, (*Sup. Ct.* 1835)), or physical absence from the jurisdiction of the court (*Servis v. Nelson*, 14 N. J. Eq. 94, (*Ch.* 1861)) was sufficient legal cause for failure to produce such witnesses. *Van Dorn v. Van Dorn*, 3 N. J. L. 270, (*Sup. Ct.* 1810). See also *Lugosch v. Public Service Ry. Co.*, 100 N. J. L. 48, (*Sup. Ct.* 1924).

In the case of excused absence of attesting witnesses, the courts allowed "secondary evidence" to be offered.

"Where the attesting witness is thus unavailable, proof of his handwriting is admissible as secondary evidence, and is prima facie evidence of the due execution of the instrument." *Worman v. Seybert*, 78 N. J. L. 176, (*Sup. Ct.* 1909).

By the enactment of Chapter 207, Laws of 1927, R. S. 2:98-2, the common law rule as to all attested documents other than wills and codicils was revised.

“. . . by force of the Act of 1927 proof by subscribing witness or explanation of his absence has now become unnecessary; in other words, that the document may be proved as though it had no subscribing witness . . .” *Robertson v. Burstein*, 105 N. J. L. 375, (E. & A. 1929). See also Comment, 4 *Wigmore on Evidence*, *supra*, § 1290.

The present act, N. J. S. 2A:82-2, and the Act of 1927 are substantially identical, the only differences being refinements of language. The present New Jersey view presents a somewhat unique situation in that N. J. S. 3A:3-2 requires wills and codicils to be attested, but does not require the attesting witnesses to be produced to prove the execution of the document. The authorities and case law indicate the New Jersey rule to be that probate in common form “may be granted in the Superior or Surrogate’s Court on the clear proof of one witness, reduced to a deposition, provided the attestation clause is not defective, and the testator does not sign with a cross.” *Clapp, N. J. Practice, Wills and Administration*, § 81. Where the testator signs with a cross or where the attestation clause is defective, the depositions or production of two witnesses is required. *Clapp, supra*, § 84. When probate is in solemn form, or when the will is lost or spoliated, the proponent is required to put on the stand the two subscribing witnesses or to establish to the satisfaction of the court that diligent search could not produce them. When the matter is uncontested, the court will of its own motion require the calling of the two subscribing witnesses. *Clapp, supra*, § 84. In such cases the court might still, absent other equally convincing proof, require production of the witnesses. It is to be noted that in certain circumstances it might be entirely proper for the court to require production of witnesses before granting probate.

2. Special statutory exceptions to the general rule recited heretofore have been enacted. N. J. S. 3A:3-20. When a resident of New Jersey dies while a member of the armed forces of the United States or within two years from the date of his discharge, and no subscribing witness is available to prove the will, the will may be admitted to probate, if it is not otherwise defective. N. J. S. 3A:3-21. Where the only subscribing witness living is not available to prove the will because of membership in the armed forces of the United States, the will shall be admitted to probate upon proof of the signature of such witness, providing it is otherwise able to be probated. The will or codicil may be proved by other evidence, in the case of death, insanity, or jurisdictional absence of the attesting witness. *Allaire v. Allaire*, 37 N. J. L. 312, (E. & A. 1875).

3. Professor Morgan is strongly in favor of the proposed rule. His position is stated in Comment (b) to Rule 603 of the Model Code of Evidence, page 305:

“. . . To insist upon retaining the procedural provisions of the English common law is to insist upon a survival of medieval formality without practical basis.”

*Cf.*, 4 *Wigmore, Evidence*, § 1290. Further, in support of the proposed rule it may be said that in a great number of wills drawn, the attesting witnesses are employees of the scrivener of the will; they rarely know the testator and rarely remember the circumstances surrounding the attestation. On the other hand, the possibility of such witnesses being able to aid the probate by pertinent testimony remains. Further, the requirement of

the presence of such witness at probate acts as an added safeguard to the authenticity of the instrument and may operate as a deterrent against those who might attempt to circumvent the attesting requirements at the time of the execution. Thus, there is some justification for requiring witnesses in some instances. The proposed rule merely insures that where there is adequate evidence to warrant probate it shall not be denied because a formal requirement of producing every witness has not been met.

### **Rule 72. Photographic Copies to Prove Content of Business and Public Records.**

The content of any admissible writing made in the regular course of "a business" as defined by Rule 62 or in the regular course of duty of any "public official" as defined by said rule, may be proved by a photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction or by an enlargement thereof, when duly authenticated, if it was in the regular course of such business or official activity to make and preserve such copies or reproductions as a part of the records of such business or office. The introduction of such copy, reproduction or enlargement does not preclude admission of the original writing if it is still in existence.

#### **Drafters' Comment**

While the volume has been shortened somewhat, this rule states the substance of the Uniform Photographic Copies of Business and Public Records as Evidence Act. The Uniform Act relates solely to the proof of the content of business and official records specifically made admissible under the exceptions to the hearsay rule (Rule 63). Consequently it is not deemed necessary to include this rule as a separate exception to the hearsay rule any more than it is deemed necessary to state as an exception the secondary evidence rule (Rule 70). Both relate to proving the content of admissible writings. Authentication of photographic copies would be in the same manner as authentication of any other writing depending on its nature. For instance, a photographic copy of a business record could be proved by any evidence which would establish its authenticity or the photographic copy of an official record could be proved by proper attestation and certification as required by Rule 68.

#### **Recommendation**

It is recommended that this rule be adopted.

#### **Committee Annotation**

N. J. S. 2A:82-38, "Photographic, photostatic, etc. copies as competent evidence," is substantially identical with the provisions of Sec. 3 of the Uniform Photographic Copies of Business and Public Records as Evidence Act. Proposed Rule 72 is a shortened form of that Act and effects no substantive change.





