S C H E D U L E - J U D G E S S E M I N A R

November 7, 8, 9, 10, 1966

MONDAY, NOVEMBER 7

9:00	- 9:25	Coffee
9:30	- 11:10	Judge Waugh
11:10	- 11:30	Coffee break
11:30	- 1:00	Judge Halpern
1:00	- 2:00	Lunch
2:00	- 4:30	Judge Gaulkin

TUESDAY, NOVEMBER 8

10:30	- 10:55	Coffee
11:00	- 1:00	Chief Justice Weintraub
1:00	- 2:00	Lunch
2:00	- 4:30	Judge Conford
6:00	- 7:15	Dinner
7:30	- 9:30	Discussion Period

1. Problems which arose during the day.

2. Other problems.

(Judges Giuliano and Artaserse will join the group for this session.)

WEDNESDAY, NOVEMBER 9

9:30	- 11:10	Judge Waugh Judge Sullivan
11:10	- 11:30	Coffee
11:30	- 1:00	Judge Waugh
1:00	- 2:00	Lunch
2:00	- 4:30	Judge Gaulkin Judge Molineux
6:00	- 7:15	Dinner
7:30	- 9:30	Discussion Period

1. Problems which arose during the day.

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THURSDAY, NOVEMBER 10

9:30	- 11:10	Justice Hall Judge Halpern Judge Matthews
11:10	- 11:30	Coffee
11:30	- 1:00	Judge Halpern
1:00	- 2:00	Lunch
2:00	- 4:30	Justice Francis Judge Gaulkin
4:30		Adjournment

JUDGES ATTENDING SPECIAL SEMINAR
November 7, 8, 9 and 10, 1966

SUPERIOR COURT

Lawrence A. Carton, Jr.
John W. Fritz
John F. Lynch
John A. Ackerman
Francis X. Crahay
John C. Demos
August W. Heckman
Norman Heine
Merritt Lane, Jr.
Samuel A. Larner
Max Mehler
Worrall F. Mountain, Jr.
James T. Owens
Joseph H. Stamler

COUNTY COURT

Atlantic

Thomas W. Rauffenbart
Augustine A. Repetto

Bergen

Raymond H. Flanagan
Martin J. Kole

Burlington

Herman Belopolsky
Paul R. Kramer
J. Gilbert VanSciver, Jr.

Camden

William E. Peel

Essex

Samuel Allcorn, Jr.
Melvin P. Antell
Van Y. Clinton
Morris N. Hartman
Francis W. Hayden
Leon W. Kapp
Leon S. Milmed
Maurice Schapira

Hudson

Benedict A. Beronio
Joseph P. Hanrahan

Middlesex

Charles M. Morris, Jr.
Baruch S. Seidman

Monmouth

M. Raymond McGowan

Ocean

William H. Huber
Thomas J. Muccifori
William E. O'Connor, Jr.

Somerset

Victor A. Rizzolo

Union

V. William DiBuono

DISTRICT COURT JUDGES ATTENDING SEMINAR NOVEMBER 8, 1966:

Bergen County	Paul R. Huot
	Arthur J. Simpson, Jr.
Camden County	Robert B. Johnson
Essex County	Howard W. Hayes
	F. Michael Caruso
	John A. Marzulli
	David H. Wiener
Hudson County	Frank A. Verga
Middlesex County	Theodore Appleby
	Herman L. Brietkopf
	Joseph J. Takacs
Union County	Ralph DeVita

JUVENILE AND DOMESTIC RELATIONS COURT JUDGES ATTENDING SEMINAR NOVEMBER 8, 1966:

Bergen County	Thomas L. Franklin
	Abraham L. Rosenberg
Hudson County	Samuel Miller
Union County	Frederick C. Kentz, Jr.

OUTLINE FOR DISCUSSION OF JUDICIAL ETHICS

1. Political Activity (Canon 28)

   a. What constitues political activity: Attendance at political meetings, testimonial dinners for political figures, membership in political organizations, making campaign contributions.

   b. Application to spouse and family.

2. Charitable Solitications (Canon 25)

   a. Direct solicitation prohibited - including solicitation of members of the bar.

   b. Use of name precluded.

   c. To what extent membership on boards, etc. of charitable, religious, educational and civic groups is permitted.

3. Business Interests (Canons 25 and 26)

   a. Cannot be active in management of private business.

   b. Should not serve as officer or board member of business corporation.

   c. To what extent investment in private business operating in New Jersey is permitted.

4. Executor or Trustee (Canon 27)

   a. May serve for member of immediate family where no litigation contemplated.

   b. May not continue to serve even though qualified prior to going on bench.

5. Appointments (Canon 12)

   a. Should never be made on partisan political basis - although political activity not a disqualification.

   b. Compensation, where fixed by judge, should bear reasonable relation to services rendered.

6. Supporting Personnel (Rule 1:25C)

   a. Applies to all those serving judge.

   b. Absolute prohibition on political activity.

   c. Cannot hold other public employment without approval of Supreme Court or outside private employment without approval of Assignment Judge.

7. Disqualification (Rule 1:25B, Canons 13 and 29)

   a. Should disqualify to avoid suspicion of partiality, but not to avoid tough case.

   b. Where disqualifying factors present, not removed by disclosure and consent of counsel.

8. Practice of Law (Rule 1:26)

a. Applicable only to part-time judges, since full-time judges absolutely prohibited.

b. Limitations extend to office associates, which includes those merely sharing office facilities.

c. Should refrain from practice in cases related to work of court - for example, Juvenile and Domestic Relations Court judges should not handle matrimonial cases.

d. Prohibition against criminal and quasi-criminal practice extends to federal courts, to administrative agencies. and to penalty proceedings in municipal courts.

9. Miscellaneous

a. May not accept fees or gratuities for performing marriages (Canon 32)

b. Testimonial dinners in honor of judges not permitted, except as guest of honor at regular bar association meeting.

c. Should not serve as officer of bar association.

d. Membership on committees, boards, etc., of other branches of government not appropriate, but may cooperate.

e. Judge should not testify as character or expert witness, but may be called as factual witness.

f. Propriety of membership in organizations with restrictive membership.

# # #

CRIMINAL LAW

I. From Arrest to Indictment

A. The function and operations of the police and the magistrates with reference to indictable offenses.

B. The function and operations of the Prosecutor.

C. The function and operations of the Grand Jury.

D. Arrest with and without warrants and searches incidental thereto.

E. Search warrants and seizures thereunder.

F. Fruits of unlawful arrests and searches.

G. Interrogation.

1. On the street.
2. In custody.

H. Motions to suppress evidence.

II. From Indictment to Trial

A. The indictment.

B. Joinder and severance.

C. Assignment of counsel.

D. Arraignment.

E. Bail

F. Assignment of investigators, etc.

G. Discovery

H. Motions addressed to the indictment.

I. Pretrials in criminal cases.

J. Guilty pleas.

K. Insanity.

1. At time of offense.
2. At time of trial.

III. The Trial

A. Drawing a jury.

B. The Voir Dire.

C. Challenges

1. For cause.
2. Peremptory.

D. Alternate jurors.

E. Exhausting the panel.

F. Preliminary instructions to the jury.

G. The Opening.

IV. Common problems during criminal trials

A. Confessions.

B. Accomplices.

C. Alibi.

D. Exclusion of witnesses.

E. Multi-defendant cases.

1. Admissions and confessions.
2. Failure of one to testify; comment by co-defendant.
3. Co-defendant testifying for State.

F. Witnesses.

1. Prosecutor pleading surprise.
2. Witness pleading self-incrimination.
3. Criminal record.

G. Summations.

H. The Charge.

1. Requests to charge.

I. Questions from the jury.

1. Answers.
2. Added charges.
3. Reading testimony
4. Further deliberation.

J. The Verdict.

1. Partial verdicts.
2. Polling the jury.

K. Acquittal and n.o.v.

L. New Trial.

1. Newly discovered evidence.
2. Misconduct of jury or court personnel
3. Other grounds.

M. Trials without juries.

N. The work of the Probation Office.

O. Presentence Investigation.

P. Sex Offenders.

Q. Sentencing.

1. Judges' options.
2. Available institutions and their work.
3. The Recidivist.
4. How probation and parole work; the functions of the Department of Institutions and Agencies, Parole Board, and the Boards of Governors of the various institutions.
5. Proceedings at sentence.
6. Reduction of sentence.

R. Post Conviction Proceedings.

ORIENTATION--NEW JUDGES

OUTLINE

I. General Guidelines for Judges.

II. General Problems Encountered in Administration of Litigation.

I. General Guidelines for Judges.

1. Introduction to Judicial Work

(a) Obtain familiarity with Court System and general jurisdiction of all courts, divisions or parts.

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(d) Obtain familiarity with Non-Judicial Offices and Institutions and personnel thereof involved in work of court--e.g., probation office, court clerks (local and at Trenton), administrative director's office, standing master, penal and correctional institutions, county and state, institutions for diagnosis and custody of criminal insane, adoption agencies, jury commissioners, agencies which cooperate in supplying counsel for indigent criminal defendants, legal aid societies

or organizations.

(e) Read "The State Trial Judges' Book," but beware of differences in New Jersey Rules and Practices from those stated therein.

2. Relationships between Judges and Others.

(a) Insistence on maintenance of decorum and dignity in courtroom and chambers. Do not permit chambers to become a "hangout" for lawyers, friends or others who have no court business there; require staff to follow same rules with respect to their offices; discourage notion that any particular lawyers or other persons have any special "entree" to Judge or his staff.

(b) Maintain cooperative relations with Law Schools and Bar Associations, attend bar meetings when able, but avoid office or committee work in bar associations which will involve excessive time or possible undue influence upon activities or policies of such associations.

(c) Be solicitous of comfort and convenience of jurors; explain to them reasons for delays between and during trials; convey to them sense of public importance of their duty, even when awaiting assignment.

(d) Protect the rights of witnesses, e.g., from badgering or harassment by counsel while at same time

insisting upon their obligation to give forthright answers to questions.

(e) Do not seek out publicity for the Judge or his work or decisions. Answer proper inquiries of press simply, concisely and without commentary. Don't interpret your opinions for the press; let them speak for themselves.

II. General Problems Encountered in Administration of Litigation.

1. Exercise of courtesy to lawyers in the courtroom, especially the young and inexperienced.

2. When speaking in court to counsel, litigants or witnesses avoid manner or tone which is personal or controversial, even when provoked. Calmness in admonition on occasions when necessary increases effectiveness and promotes dignity and sense of judge's impartiality.

3. Always address counsel in court as Mr., Miss, or Mrs., not by any present or former title (e.g., "Judge").

4. Avoid extended colloquies with counsel at trials, especially before juries; prohibit counsel addressing each other in the course of colloquy or in making or responding to objections; inquiries should be made through addressing the court. If argument

during a jury trial is necessary, conduct it at side bar if short, excuse jury if lengthy. Avoid excessive number of such occasions.

5. Development of facility of prompt rulings on evidence is desirable, but not at risk of possibly prejudicial error. If in real doubt on important ruling, take matter under advisement before decision, particularly in early phase of career when confronted with unfamiliar problem.

6. In hearing arguments, whether on motions or in non-jury dispositions, fix time limits for each side. Within such limitations hear counsel out before interrupting except where necessary for purposes of clarification. Avoid expression of definitive opinion until all argument is concluded. The taking of a position before argument is concluded may psychologically predispose toward ignoring remaining opposition argument.

7. Communications with counsel outside court in pending matter should be avoided unless both sides are present or advised. Discourage phone calls from counsel. Direct counsel to send letters instead, copy to adversary. But letters on merits should never be accepted unless previously authorized by judge. Never discuss pending litigation with counsel outside court, e.g., at bar meetings, social occasions, etc.

8. Avoid off-record discussions in courtroom. Put everything on record, no matter how minor. Reversals have resulted from disputed contentions as to what was said in off-record colloquies.

9. Control by court of objectionable statements or actions without waiting for objection by offended counsel. This occurs frequently in summations where offended counsel hesitates to object but impropriety is clear. Should be corrected on court's own motion. See Pierce v. Yaccarino, 72 N.J. Super. 252 (App. Div. 1962).

10. Decisions from bench -- generally desirable when rendered at conclusion of hearing. However, do not take bench time and require counsel to appear to hear an oral determination on a reserved matter. Letter opinion saves time of all involved.

11. Extent of participation in examination of witnesses by trial judge. This matter requires highest degree of discretion, especially in jury trial. Judge may intervene to correct or clarify obvious error or deficiency. Generally desirable to hold such questioning until completion of examination by counsel which may cover point. Judge's interrogation should never be extended or carried on in such manner as to suggest disbelief in or doubt of credibility of witness or manifest partiality to either side. See Band's Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522 (App. Div. 1960), certif. denied 33 N.J. 387 (1960).

12. Ex parte applications. Even where permitted by rule or statute, desirable to require notice if possible without delay. Verify satisfaction with all statutory or rule requirements. In injunction cases follow Rule 4:67-2 carefully. In case of labor disputes follow N.J.S. 2A:15-51 et seq. (Anti-Injunction Act), preserved as practice rule by R.R. 4:67-9.

13. Disqualification of judges. Judge disqualified if related in third degree to any party, N.J.S. 2A:15-49; disqualification where judge is a relative of counsel, State v. Deutsch, 34 N.J. 190 (1961); recent revision of rule of disqualification, 1:25B, including "where there is any other reason which might preclude a fair and unbiased hearing and judgment or which might lead counsel or the parties to think so" (emphasis supplied).

14. Read advance sheets regularly, particularly appellate decisions. If possible, keep notebook of cases involving recurrent "bread and butter" problems arising frequently. Revise charges in charge books when new decision so indicating appears; advisability in such case of calling attention of Assignment Judge thereto with the view of agreement on charge revision for benefit of all judges.

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prohibited. See R.R. 4:41-3; 4:3-4.

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18. Follow rulings of appellate courts where squarely in point even if disagreed with. Trial courts can help mold law where presented with new problems but should not attempt to change law on settled matters. See Reinauer Realty Corp. v. Paramus, 34 N.J. 406, 414-415 (1961).

Avoid suggestions to losing party to take appeal. This is responsibility of party and not of trial court. Such suggestions may generate suspicion of lack of confidence by trial judge in his decision.

19. Control of press coverage (particularly in criminal cases). See guidelines in State v. Van Duyne, 43 N.J. 369 (1964); Sheppard v. Maxwell, 384 U.S. 333 (1966). This is evolving area of the law.

Watch for indications by Supreme Court as to permissible sanctions against improper statements to press by counsel and law enforcement officers which may prejudice the fair trial of a defendant in a criminal case.

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judgment from which an appeal may be taken. See Credit Bureau Collection Agency v. Lind, 71 N.J. Super. 326 (App. Div. 1961).

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Judge should prepare his own opinions. Law clerk's proper function is research of law and not writing of text or opinion for judge.

26. Promptness on execution of remands from appellate court. It is judicial policy to complete the proceedings on appeal with utmost dispatch. Therefore, if a case is remanded to a trial court by an appellate court for further proceedings preference should be given to the execution of the proceedings on the remand and the return of the case to the appellate court where jurisdiction has been retained.

27. Some common evidence problems.

(a) As general rule, practice liberality in admission of evidence when in doubt as to competency providing testimony is relevant -- less danger of reversal in admission of relevant testimony than in exclusion thereof.

(b) Hearsay. Trend of law is to broaden exceptions to exclusion of hearsay. See new rules of evidence in this regard. Be careful not to jump to conclusion of hearsay by mere reason of the fact witness is testifying to a statement or conversation. In addition to admissibility under one of the hearsay exceptions, the statement or conversation may itself be a material fact in issue or probative thereof.

(c) Presumptions. Jury should not be informed of the existence of an applicable rebuttable presumption. Presumptions are only for use of judge in deciding whether the condition of the evidence warrants a dismissal, judgment as a matter of law, or peremptory ruling that a fact is proven. See Rule of Evidence 13; 1 (5). Distinguish the burden of proof, as to which the jury must always be charged (e.g., by a preponderance of the evidence, or by clear and convincing evidence, or beyond a reasonable doubt, as the case may be). See Rule of Evidence 1 (4).

(d) Hypothetical questions. Encourage shortening of hypothetical questions by having counsel incorporate by reference facts which witness has observed and testified to or facts testified to by another witness whom the witness has heard testify.

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27. Some common evidence problems.

(a) As general rule, practice liberality in admission of evidence when in doubt as to competency providing testimony is relevant -- less danger of reversal in admission of relevant testimony than in exclusion thereof.

(b) Hearsay. Trend of law is to broaden exceptions to exclusion of hearsay. See new rules of evidence in this regard. Be careful not to jump to conclusion of hearsay by mere reason of the fact witness is testifying to a statement or conversation. In addition to admissibility under one of the hearsay exceptions, the statement or conversation may itself be a material fact in issue or probative thereof.

(c) Presumptions. Jury should not be informed of the existence of an applicable rebuttable presumption. Presumptions are only for use of judge in deciding whether the condition of the evidence warrants a dismissal, judgment as a matter of law, or peremptory ruling that a fact is proven. See Rule of Evidence 13; 1 (5). Distinguish the burden of proof, as to which the jury must always be charged (e.g., by a preponderance of the evidence, or by clear and convincing evidence, or beyond a reasonable doubt, as the case may be). See Rule of Evidence 1 (4).

(d) Hypothetical questions. Encourage shortening of hypothetical questions by having counsel incorporate by reference facts which witness has observed and testified to or facts testified to by another witness whom the witness has heard testify.

ORIENTATION--NEW JUDGES

OPINIONS BY TRIAL JUDGES

This outline pertains to opinions, as distinguished from "findings of fact and conclusions of law" which are required under Rule 4:53-1 in contested actions tried upon the facts without a jury.

"Findings of facts" contain the bare fact findings, both as to basic facts and conclusionary facts, arrived at by the judge without any supporting explanation, or analysis or discussion of the testimony and evidence.

An opinion is a permissible substitute for findings of facts and conclusions of law and is used when the judge deems it advisable to explain and support the findings and conclusions arrived at. It is never to be employed as a device to avoid the making of the essential findings and conclusions.

The principles herein set forth apply to an opinion in a contested case tried by a judge without a jury. Suitable modifications should be made if the opinion is rendered in an appeal within the jurisdiction of a trial court or on a motion.

1. The essence of an opinion is an explanation of the reasons for arriving at a determination of the case.

2. Since a determination of a case consists of an application of the controlling principles of law to the material facts the opinion must state such facts as well as principles.

3. The material facts are either admitted or disputed. The opinion must state findings of fact as to disputed facts as well as the admitted facts.

4. The opinion may explain the findings as to disputed facts by reference to and discussion of the testimony or other evidence. There is no other justification for recounting or discussing evidence or testimony except as a form of narration of some of the undisputed facts.

5. Findings of fact may involve findings as to basic facts and as to conclusionary facts. E.g., "The defendant drove through a red light" or "The plaintiff drove at 60 miles per hour" are basic facts. "The defendant drove negligently" or "The defendant was under the influence of intoxicating liquor when driving" are conclusionary facts. Findings of facts must include findings as to all material basic facts as well as conclusionary facts. A common error of trial court opinions is to couple a recital of the testimony with findings of conclusionary facts, but omitting findings as to some of the material basic facts. This often requires a remand on appeal.

6. The applicable principles of law are either admitted or disputed. Statement of admitted principles should be supported by citation of a decided case or statute unless the point is so elementary as not to require citation. Resolve any doubt in favor

of supplying a citation. Do not cite unreported cases.

7. Exposition of the reasons for a conclusion as to a disputed issue of law should be made in as succinct a manner as may be consistent with clarity.

(a) Do not substitute extended quotations from cases for your own reasoning and exegesis.

(b) A single New Jersey decision in point is sufficient support for a statement of law. A string of citations should be avoided if a single case is authoritative. But cite the most authoritative decision available, e.g., a Supreme Court opinion, if in point, rather than an Appellate Division or lower court opinion. If there is no New Jersey decision in point secondary authorities (encyclopedias or treatises) or out-of-state decisions may be cited.

(c) An unqualified citation of a decision signifies the case is a flat holding for the statement of law set forth. If the cited decision is a dictum or a case cited for comparison use the appropriate signal, e.g., "See" or "Cf."

(d) Avoid exploration of collateral legal questions not necessary for decision of case at hand. However, an alternative basis for decision is permissible.

8. Subject to variation appropriate to special situations, the opinion should ordinarily follow this scheme:

(a) A brief statement of the nature of the action, the parties and the issues presented.

(b) A chronological statement of so much of the material facts as are admitted.

(c) The findings by the court as to disputed issues of material fact and so much of the supporting reasoning, based on the proofs, for such findings as is deemed appropriate.

(d) Statement of applicable principles of law which are undisputed and exposition of conclusions as to disputed issues of law with supporting reasoning and analysis.

(e) Determination of the court and direction as to the judgment or order to be entered.

9. Keep prose style simple. Avoid complex sentences and showy words or words which require resort to dictionary by average lawyer. If in doubt, begin a new paragraph. If a concept can be expressed in English avoid Latin. Be sparing of punctuation except where essential to clarity.

10. Read and reread your draft. Edit it carefully for content, grammar, punctuation and accuracy of citations and quotations.

11. Consult the Manual on Opinions of the Administrative Director for directions as to citation of cases, statutes and other authorities and other matters of style and form.

I. PREROGATIVE WRITS
Rule 4:88-1, et seq.

1. Former practice superceded.

2. Proceed by complaint - non-jury.

3. Motions for Summary Judgment and restraints.

4. Calendar preference.

5. Zoning cases.

(a) Time limitation to review - Rule 4:88-15(3).

(b) On filing answer notice of pretrial sent all counsel. Rule 4:29-2(b). See suggested form of notice annexed.

(c) Check list of matters to consider:

(1) Be sure all data called for is supplied.

(2) If record incomplete consider remanding. Wilson v. Mountainside, 42 N.J. 426 (1964).

(3) Normally review only on record below. Reinauer Realty Co. v. Paramus, 34 N.J. 406 (1961)

(4) Local Board's decision presumed proper. Cooper v. Maplewood Club, 43 N.J. 495 (1964).

(5) Court should not usurp legislative function. Barone v. Bridgewater Twp., 45 N.J. 224 (1965).

(6) Local Board's decision must be based on facts in the record - not conclusions of statutory criteria. Grundlehner v. Dangler, 29 N.J. 256, 272 (1959).

(7) Differences between exceptions and variances. Article by Professor Cunningham, 87 N.J.L.J. 545

(8) Distinction between variances under R.S. 40:55-39(c) and (d). Andrews v. Ocean Twp. Bd. of Adj., 30 N.J. 245 (1959). Mayer v. Montclair Bd. of Adj., 32 N.J. 130 (1960). Roman Catholic Diocese of Newark v. Ho-Ho-Kus, 47 N.J. 211 (1966).

6. Decide promptly. Carry as reserved on weekly report.

PREROGATIVE WRIT CASES

LETTER SETTING TRIAL DATE:

(Date)

(Names and Addresses
of Counsel)

Re: (Name of case and docket number)

Gentlemen:

I am hereby fixing the date of _____ at 3:00 p.m. at the Courthouse in _____, New Jersey, for the pretrial conference in the above prerogative writ action.

Counsel must confer in advance, pursuant to R.R. 4:29-3, and stipulate as many facts as can be agreed upon. Pretrial memoranda covering the same items and in the same order as are required to be specified in the pretrial order must be prepared by each attorney pursuant to the same rule and forwarded to me, along with any stipulation of facts, at the Courthouse, _____, three days before the conference date. When the suit, in whole or in part, is in lieu of certiorari to review the action of governmental bodies or agencies, or is in lieu of other prerogative writs involving such action, certified or agreed copies of all ordinances, regulations and matters involved and the record below, should be ready for presentation and marking in evidence at the pretrial conference.

Very truly yours,

, J.S.C.

cc: Assignment Judge
Assignment Clerk

II. MAGISTRATE APPEALS
Rule 3:10-1, et seq.
R.S. 39:5-11, et seq.

1. All convictions are tried by County Court de novo.

2. Magistrate or County Judge may allow bail or stay sentence pending appeal. Insist on Magistrate doing it when within his power. Rule 3:10-6; Rule 8:11-2; includes drunken driving. R.S. 39:5-22.

3. If testimony recorded below the appeal must be on the record. (several exceptions)

4. Appeal operates as waiver of all technical defects ... court may even amend or substitute charge. State v. Menke, 25 N.J. 66 (1957).

5. Cooperation with Motor Vehicle Commissioner on revocation of licenses in speeding cases.

6. Temporary driving permit if you revoke license.

7. Make your own determination and impose your own sentence. State v. Dunn, 45 N.J.Super. 224 (App.Div. 1957).

8. Have counsel submit appropriate judgment.

9. If defendant pled guilty below he may only review the sentence on appeal. State v. Mull, 30 N.J. 231 (1959); State v. Schrier, 30 N.J. 241 (1959).

10. If constitutional or controversial legal issue is involved - preserve the issue for Appellate Court.

III. WORKMEN'S COMPENSATION APPEALS
Rule 1:2-12; Rule 5:2-5; and
R.S. 34:15-66, et seq.

1. Appeals from the Division go to County Court - hearing is de novo on the record below. Grant v. Grant Casket Co., 2 N.J. 15 (1949).

2. Be sure pleadings filed within time.

3. Oral argument mandatory.

4. Court must file opinion stating its findings of fact and conclusions of law within 20 days from date of hearing.

5. The County Court may allow fees to the prevailing party for services in County Court, Appellate Division and the Supreme Court.

6. Opinion of Court below on fact finding entitled to persuasive weight by County Court. Burrock v. Tung Sol Lamp Works, Inc., 30 N.J.Super. 456 (Law Div. 1954). Zaklukiewicz v. Western Electric Co., 16 N.J.Super. 189 (App.Div. 1951).

7. Workmen's Comp. Act liberally construed in favor of employee. Renshaw v. U.S. Pipe & Foundry Co., 30 N.J. 458 (1959).

IV. COURT - NEWS MEDIA PROBLEMS

1. Supreme Court Committee

2. Unethical for attorney to release settlement figures to newspapers. (Canon 27)

   (a) Infant settlements.

   (b) Watch for judgments to evade the rule.

3. Holdings in State v.Van Duyne, 43 N.J. 369 (1964) and Sheppard v. Maxwell, 384 U.S. 333 (1966).

   (a) Conflict between right to publish news and fair trial. (First and Sixth Amendments)

   (b) Police authorities, including Prosecutors, should not prejudice a fair trial by giving news releases concerning alleged confessions, admissions, defendant's prior record, or that case is "open and shut." Law enforcement personnel, other than attorneys, should be disciplined by superiors.

   (c) Defense counsel shouldn't try his case in newspapers.

   (d) Attorneys violating these principles are subject to punishment by the Court.

   (e) Court during trial has the power and should:

      (1) limit reporters at trial.

      (2) insulate witnesses from the press.

      (3) control news releases by witnesses, police and attorneys.

      (4) censure violators.

      (5) do everything necessary to insure a fair trial.

4. No photographs in Court Room at any time.

5. Joint effort by Court, the Bar, and the news media, to reach a solution.

V. EX PARTE APPLICATIONS

1. Can be dangerous.

2. Be sure statutory or rule requirements are complied with in cases dealing with arrest, attachment, replevin, wage executions, approval of bonds, election matters, service of process, etc...

3. Extensions of time to file pleadings or for discovery. Grant only for good cause and be careful it doesn't interfere with the trial calendar.

4. If temporary relief given be sure the right to it is clear and the relief is necessary to preserve the status quo - else do it on notice only.

5. In injunction cases - follow Rule 4:67-2, et seq.

6. Insanity Committments - always check the applicable statute; normally R.S. 30:4-36, et seq. and Rule 5:2-7 are used.

VI. CONDEMNATION

Rules 4:92-1, et seq.; R.S. 20:1-1, et seq.; and New Jersey Constitution, Art. 1, par. 20.

1. Condemning authority proceeds by complaint and order to show cause why commissioners should not be appointed. State v. N.J. Zinc Co., 40 N.J. 560 (1963).

2. On return day owner may contest condemning authority's good faith and power to proceed. Bergen County v. Hackensack, 39 N.J. 377 (1963)

3. Assignment Judge appoints 3 commissioners. No politics to be involved in selection.

4. Allowances usually at rate of $100. a day.

5. Normally permit a jury view. Rule 4:92-7 and R.S. 2A:77-1. Condemning authority furnishes a bus.

6. Any person who acquires knowledge from buyer or seller may testify to comparable sales. N.J.S. 2A:83-1.

7. Commissioners report not evidential. 9 N.J.L.J. 71

8. Owner is considered the plaintiff and proceeds first. Ringwood Co. v. North Jersey District Water Supply Comm., 105 N.J.L. 165 (E.&A. 1928).

9. Appeal is de novo and wide discretion given on admission of evidence. State Hwy. v. Hudson Circle, 46 N.J.Super. 125 (App.Div. 1957).

10. Distinguish between a total and partial taking.

    (a) In former use fair market value as of date of filing complaint. (R.S. 20:1-9).

    (b) In latter use the "before and after" formula. (Difference between market value before and after injury is done). City of Trenton v. Lenzner, 16 N.J. 465 (1954). State v. Speare, 86 N.J.Super. 565 (App.Div. 1965).

11. Assessed value not evidential. Bergen County v. Little Ferry, 15 N.J.Super. 43 (App.Div. 1951)

12. Court will not consider the necessity or propriety of the taking unless fraud or bad faith exists. 18 Amer. Jur. par. 106, et seq. Bergen County v. S. Goldberg & Co. Inc., 76 N.J.Super. 524 (App.Div. 1962).

13. Struck Juries - permissible but avoid it if possible.

14. When property condemned is used for business the owner not entitled to recover for:

    (a) loss of good will

    (b) expense of moving

    (c) profits lost because of business interruption

    (d) inability to relocate

    (e) personalty abandoned.

    State v. Gallant, 42 N.J. 583 (1964)

15. In highway condemnations money now paid into court and owner may use it. Check applicable statutes for other agencies. Provisions for interest in certain cases. N.J.S. 27:7-22.

VII. CONTEMPT

Rule 4:87-1, et seq.; R.S. 2A:10-1, et seq.

1. Contempt in presence of Court. Punish summarily.

   (a) Judge certifies he saw or heard it.

   (b) Judge's order recites facts, must be signed and filed.

   (c) Procedure under Rule 4:87 not applicable.

   (d) Coming late to court. State v. Dias, 76 N.J.Super. 337 (App.Div. 1962) but see Gamble v. Talbot, 307 Fed.(2) 729.

2. No distinction between civil and criminal since September 13, 1965.

3. Follow Rule on procedure.

   (a) Designate attorney and judge to handle.

4. Right to jury trial. Highly controversial. No right to jury trial. Green v. U.S., 356 U.S. 165; In re Waterfront Comm., 39 N.J. 436 (1963); U.S. v. Barnett, 32 L.W. 4303.

   (a) In Federal Courts if criminal contempt punished beyond 6 months contemnor entitled to jury, if less no jury. Shillitani v. U.S., 34 L.W. 4460.

5. Conflict in testimony between witnesses during trial not contempt unless witness admits falsity or it is crystal clear. In re Malisse, 66 N.J.Super. 195 (App.Div. 1961); Harbor Tank v. De Angelis, 85 N.J.Super. 92 (App.Div. 1964)

6. Failure to comply with order to pay judgment.

   (a) Not contempt unless it is willful. Waldron v. Olsen, 81 N.J.L. 326 (Sup.Ct. 1911).

7. Witnesses claim of privilege.

   (a) Before holding witness in contempt court must make determination if a basis exists for the claimed

privilege. In re Boyd, 36 N.J. 285 (1962).

8. Assault in Court's presence is a contempt. Subsequent assault charge not double jeopardy. U.S. v. Mirra, 220 Fed.Sup. 361.

VIII. FRIENDLY SETTLEMENTS
Rule 4:56A

1. Generally relate to infants' claims. (May be incompetents)
2. Heard without a jury.
3. Accept medical certificate except in unusual case.
4. Parent and guardian to testify.
5. Infant to testify unless too young.
6. Check list for proof:
   - (a) Liability of defendant and adequacy of amount.
   - (b) Injury to infant.
   - (c) Medical expense.
   - (d) Infant's present condition.
   - (e) Be sure parent, guardian, and infant (if old enough) understands finality of proceedings.
   - (f) Divide amount of settlement between infant and parent. Infant's share should be net - all expenses and fees to be paid out of parent's share.
   - (g) Have counsel submit a consent judgment.
   - (h) Where feasible order infant's share held by guardian and Surrogate to save fees. R.S. 3A:7-10; 3A:7-14.1
7. When infant is not represented.
   - (a) Advise parent of right to counsel.
   - (b) Be extremely careful as to adequacy of settlement.
   - (c) Be sure parent understands the terms and finality of proceedings.
   - (d) Insurance Company pays both lawyers.

8. Approval of "Fund" cases.

   (a) Settlements on behalf of uninsured driver.

   (b) Be sure he understands judgment being entered against him.

   (c) Existence of cause of action.

   (d) Statutory proof on uninsured's financial status.

   (e) Consent judgment.

IX. MISTRIALS

1. Every effort should be made to avoid a mistrial.

   (a) Loss of Judge's time.

   (b) " " Lawyers' time.

   (c) " " Jurors' " .

2. When adjournment denied be careful counsel does not look for excuses to have a mistrial. (Give strong warning to counsel out of Jury's presence.)

3. A motion for a mistrial is addressed to the Court's sound discretion. It should be granted only if the Court feels a party has been prejudiced by what occurred; and that instructing the jury to disregard it would be ineffective. Wyatt v. Curry, 77 N.J.Super. 1 (App.Div. 1962)

4. If event occurs during early part of trial be more liberal in granting it. State v. Hunt, 25 N.J. 514 (1958)

5. If it happens late in trial - try to cure it with instruction to jury.

6. Mentioning of insurance coverage by a party, or testimony reveals an insurance adjuster involved with a party:

   (a) If inadvertent - no mistrial. Runnacles v. Doddrell, 59 N.J.Super. 363 (App.Div. 1960)

   (b) If deliberate - grant it if prejudicial to innocent party. Hansson v. Catalytic Const. Co., 43 N.J.Super. 23 (App.Div. 1956)

   (c) Applies to testimony indicating no insurance exists; or that counsel represents the "fund." Haid v. Loderstedt, 45 N.J.Super. 457 (App.Div. 1957); Dalton v. Gesser, 72 N.J.Super. 100 (App.Div. 1962) (Fund)

   (d) Consider the problem of whether attempting to cure it only re-emphasizes the prejudice. State v. Samurine, 27 N.J. 322 (1958)

X. JOINT TORTFEASORS
N.J.S. 2A:53A-1, et seq. and
Rule 4:13-6, et seq.

1. Statute creates right of contribution among joint tortfeasors (pro rata % if joint - pro tanto if not).

2. One paying more than pro rata share may recover the excess paid from joint tortfeasor.

3. As against a party a defendant need only pray for contribution in his answer.

   As to persons not parties - bring them in on motion.

4. If one joint tortfeasor is insured and the other is not insured the "Fund" will not pay.

5. In ordinary case the issue not given to jury. (A a passenger sues the two drivers B & C. B & C seek contribution from each other. The verdict in A's case is dispositive as between B & C.) Campbell v. Kukowiec, 87 N.J.Super. 238 (App.Div. 1965)

6. Applies only if the defendants are joint wrongdoers who are both liable to the plaintiff, and one pays more than his pro rata share. Adler's Quality Bakery v. Gaseteria, Inc. 32 N.J. 55, 76 (1960)

7. The J.T.F. Act cannot be used by a defendant.

   To bring in:

   (a) The unemancipated child or parent of the plaintiff. Chosney v. Konkus, 64 N.J.Super. 328 (Law Div. 1960)

   (b) The plaintiff's employer who is liable to plaintiff under the Workmen's Compensation Act. Adler's Quality Bakery v. Gaseteria, 32 N.J. 55, 75 (1960).

   (c) The plaintiff's spouse. Taibi v. DeGennaro, 65 N.J. Super. 294 (Law Div. 1961)

8. Master and servant - principal and agent - are counted as one tortfeasor. Judson v. Peoples Bank, 25 N.J. 17 (1957)

9. Contrary to prior law a release to one joint tortfeasor will not discharge the other unless so intended. Burden on the other J.T.F. to show such intent. Breen v. Peck, 48 N.J.Super. 160, aff'd. 28 N.J. 358 (1958)

10. Theobald v. Angelos, 44 N.J. 228 (1965)
A sues B, C & D for injuries arising out of an auto accident. A settles with B for $1,500.00 and with C for $88,500.00. A ultimately obtains a judgment against D for $165,000.00. The issue of whether B was a joint tortfeasor was tried in the suit against D and B was absolved from any negligence - C admittedly was negligent. The court (Weintraub) reviews existing Statute and cases and concludes for the majority:

1. The judgment of $165,000.00 should be cut in two (82,500) and a pro tanto credit of $1,500.00 paid by B should be applied and a judgment for $81,000.00 be entered for plaintiff against D.

2. Only a tortfeasor's settlement may be applied pro rata to reduce a judgment. Thus if B had been found negligent all plaintiff could recover from D would be $55,000.00 because there would have been three tortfeasors each liable for only one-third of the verdict. Since B was not negligent the amount he settled for reduces D's liability pro tanto to the amount paid by B. (I feel that credit of only $750.00 should have been given. (Why should D get it all?)
3. The philosophy of the Statute is to grant equality between tortfeasors so that one only pays his pro rata share - its not to give a tortfeasor a windfall - it places the risk of settling with less than all on the plaintiff.

4. A settling tortfeasor's agreement with the plaintiff should provide for a pro rata credit on any judgment otherwise he may be liable for contribution to another tortfeasor who pays more (unless bad faith exists)!!

5. The majority concludes that the old legal principle which holds that an injured person can receive only one satisfaction is not applicable under the J.T.F.A. Thus A actually received $1,500.00 plus $88,500.00; plus $81,000.00, or a total of $171,000.00 even though his verdict was only $165,000.00. He may gain or lose depending on what kind of a settlement he makes with tortfeasors.

6. A tortfeasor under a judgment may only get contribution from a settling tortfeasor if he pays more than his pro rata share.

7. Justice Jacobs would modify the result of the majority so as to give C the $6,000.00 excess since he cooperated by settling. He feels the one satisfaction principle should not be modified or changed in this case.

8. Justice Proctor agrees with Jacobs on the one satisfaction principle but does not agree that C should get the $6,000.00 - he would make D pay only $75,000.00

9. Justice Francis in an excellent dissent would hold that there is no such thing as a pro tanto credit. The verdict should be divided by as many parts as there are settling defendants regardless of whether they are tortfeasors or not. He feels a lot of chicanery will go on between plaintiffs and defendants depending upon what suits their purposes best in any given case. He would hold D liable for only $55,000.00. (1/3 of $165,000.00)

10. Practical problems arising from majority opinion:

    (a) If settlement made with less than all before trial do you pretry the case? (I would). Do you caution counsel not to reveal facts of settlement to jury? (I would).

    (b) If settlement made with less than all during trial do you continue the trial as to remaining

defendants or defendants? (I would). Do you tell jury of the facts of settlement? (I would tell them of the settlement but not the amounts involved and instruct them to bring in a verdict for the full amount of damages and the court would then give appropriate credits.)

(c) How and when do you try the issue of whether a settling defendant is a tortfeasor? (If settled before trial I would leave the issue go until after the trial - there may be a no cause). If settled during trial I would compel the settling defendant to stay in and get a special verdict as to whether he is a tortfeasor.)

(d) What do we do if a defendant is not solvent? (I think we should eliminate his pro rata share in fixing the amounts due from others).

INDEX #1

COMMUNICATIONS WITH JURY

State v. Sacks, 69 N.J. Super. 566 (App. Div.1961)

Juror requested to send an important message to his family, and another message was conveyed to a juror from his family. All was done in accordance with court's directions but without knowledge of the attorneys. Motion for new trial on grounds of improper communications was denied. At p. 588:

> "The standard to be applied in such cases is whether the irregular act had the capacity to influence the result, not whether influence in fact resulted."

The important cases are collected here.

Kavanaugh v. Quigley, 63 N.J. Super. 153 (App.Div.,1960)

Jury informed bailiff of its need for instruction. Bailiff told them to write it down. When the note was not forthcoming, bailiff ignored the request and didn't inform the judge. This was reversible error because bailiff breached his duty (2A:74-7) and jury was denied assistance of the court. At p. 161:

> "So it is that the failure of the bailiff to inform the judge that the jury found itself in need of the services which alone was empowered to perform severed the life line of communications between the jury and the judge. As a result the jury was deprived of the help to which it was entitled and the judge was prevented from fulfilling his duty to respond to the jury in open court, consider the nature of its problem, and guide it accordingly."

Guzzi v. Jersey Central Power & Light Co., 36 N.J. Super. 264 (App. Div., 1955)

Judge conferred with jury through attendant as to their request for transcript and food, without notice or presence of counsel. Held that since neither the trial judge nor this Appellate Court knew what was said ad verbatim between the jury and the attendant, it must be presumed to have been prejudicial.

State v. Roscus, 16 N.J. 415 (1954)

Where foreman of jury entered judge's chambers during a recess to request possibility of night sessions, held not to constitute reversible error.

Jardine Estates v. Donna Brook Corp., 42 N.J. Super. 332 (App. Div., 1956)

During deliberation of jury, court attendant entered jury room twice, without permission of court, to retrieve coats. Appellant moved for mistrial. Held that where attendant swore there were no communications with the jurors during these intrusions, motion for mistrial was properly denied.

Palestroni v. Jacobs, 10 N.J.Super. 266 (App.Div., 1950)

Trial judge, without prior notice to defendant or counsel, supplied jurors with a dictionary during deliberations.

Although supplying jury with dictionary may be proper when done correctly, i.e., notice to counsel and proper instructions to jury as to its use, error was committed as soon as judge sent dictionary to jury without notice to defendant or counsel. At p. 272:

> "It is no answer the jury may think they were not influenced by the definition. The law holds it is impossible for them to say what effect it had on their minds."

DISTINCTION BETWEEN JUDICIAL DUTY TO GRANT A DISMISSAL AND TO SET ASIDE A VERDICT

Franklin Discount Co. v. Ford, 27 N.J. 473 (1958), at p. 490:

> "A verdict may properly be set aside as contrary to the weight of the evidence, even though the state of the evidence would not justify the direction of a verdict at the close of the proofs."

Directed verdict, now motion for judgment (R.R. 4:51-1), is a determination of law, while setting aside a verdict is a factual determination. R.R. 4:51-2 (jnov) and R.R. 4:61-1 New trial.

Under motion for judgment, judge should not properly weigh the evidence. "His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus."

Under a motion to set aside a verdict the judge is necessarily required to weigh the evidence, so that he may determine whether the verdict was one which might reasonably have been reached. Mt. Adams & E.P. Inclined R. Co. v. Lowery, 74 F. 463 (6 Cir., 1896) quoted favorably in Franklin Discount Co. v. Ford, supra.

Hager v. Weber, 7 N.J. 201 (1951), at p. 210:

> "If the verdict be so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice, or partiality, it cannot serve to support the judgment."

Pawlowski v. Marino, 71 N.J. Super 120 (App. Div., 1961), at p. 124:

> "A greater degree of insufficiency in the proofs is required to take a case from the jury or to direct a verdict ~~a verdict~~ than would justify the judge's legal distinction in setting aside a verdict as against the weight of the evidence. In the latter case he is necessarily required to weigh the evidence."

Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482 (1956).

The court may not weigh the evidence pending a motion for directed verdict, but at p. 494: ". . . when the testimony of witnesses interested in the event or otherwise, is clear and convincing, not incredible in the light of general knowledge and common experience, not extraordinary, not contradicted in any way by witnesses or circumstances and so plain and complete that disbelief of the story could not reasonably arise in the rational process of an ordinarily intelligent mind, then a question has been presented for the court to decide and not the jury."

Marion v. Public Service Elec. & Gas Co., 72 N.J. Super 146 (App. Div., 1962), at p. 159:

> "The power of the court to grant a motion for a judgment of involuntary dismissal does not depend upon the total absence of testimony in support of plaintiff's case. The test is whether there is any testimony from which the jury can reasonably conclude that the facts sought to be proven are established." In accord: DeRienzo v. Morristown Airport Corp., 28 N.J. 231.

Distinction Between Judicial, etc. (Cont'd.)

Advance Piece Dye Works, Inc. v. Travelers Indemnity Co., 64 N.J. Super 405 (App.Div. 1960), at p. 414:

"No defendant in a civil action has an absolute right to a dismissal with prejudice at the end of plaintiff's case. R.R. 4:42-2 (b).

The rule . . . plainly gives a trial court the discretion to 'decline to render any judgment until the close of all the evidence.' Indeed, under this rule, just as under R.R. 4:51-1, the court may decline to enter any judgment at all in favor of defendant and may order a dismissal without prejudice instead, if that be necessary to avoid injustice."

EXHIBITS

R.R. 4:45B Exhibits

The Court Reporter shall include in the notes of the proceedings, references to all exhibits and, as to each, the offering party, a short description of the exhibit and the court directed marking. The notes shall also record the retention by the court or other disposition of each exhibit at the end of the case.

R.R 3:7-5A Exhibits

The Court Reporter shall include in the notes of the proceedings, references to all exhibits and, as to each, the offering party, a short description of the exhibit and the Court directed marking. All exhibits marked in evidence shall be placed in the custody of the clerk of the court and shall remain in such custody, unless otherwise ordered by the Court. If no notice of appeal has been filed, upon the expiration of the time for appeal, or if an appeal has been filed, upon final determination of the cause, each exhibit shall be returned to the attorney for the party on whose behalf the exhibit was offered, unless otherwise ordered by the Court.

EXPERT WITNESSES

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960), at p. 411:

"The matter of an expert's competency to testify is primarily for the discretion of the trial court. An appellate tribunal will not interfere unless a clear abuse of discretion appears."

Savoia v. F. W. Woolworth Co., 88 N.J. Super. 153 (App. Div., 1965)

In passing upon an expert's qualifications to testify, a trial judge must determine whether the expert is possessed of "peculiar knowledge or experience not common to the world which rendered his opinion founded on such knowledge or experience of some aid to the court or jury in determining the question at issue."

Rempfer v. Deerfield Packing Corp., 4 N.J. 135 (1950)

Plaintiff brought action against defendant for damages to his amusement park as a result of pollution of a lake located on plaintiff's property by the defendant in discharging waste products from their processing plant into a stream which entered the lake. Superior Court Law Division entered judgment for plaintiff. Supreme Court in reversing and remanding the case for a new trial as to damages, held that the trial court erred in admitting testimony of plaintiff's expert witness as to loss of anticipated profit because of lack of proper foundation for opinion of plaintiff's expert.

> "The qualification of experts is left to the discretion of the trial court. The time test of admissibility of expert testimony is whether the witness offered as an expert has peculiar knowledge or experience not common to the world which renders their opinions founded on such knowledge or experience any aid to the court or jury in determining the questions at issue.
>
> "The opinions of experts must be based either on facts within their own knowledge which they detailed to the jury or upon hypothetical questions embracing facts supported by evidence and relating to particular matters upon which the expert opinion is sought, which facts, for purpose of opinion, are assumed to be true."

Newman v. Great American Ins. Co., 86 N.J. Super. 391 (App. Div., 1965)

Expert testified as to his opinion solely on his calculations based on a formula obtained from a book. He did not produce his calculations when requested, and the trial court struck his testimony. On review, the App. Div. said, at p.398 that Rule 4 of the Rules of Evidence adopted by the Supreme Court on Sept. 14, 1964 provides:

> "The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk its admission will *** create substantial danger of *** misleading the jury ***."

It further states that although the Rules of Evidence are not to be effective until July 1965, Rule 4 expresses the existing law. This is especially true as to expert testimony, for "not every 'expert' is expert."

Expert Witnesses (Cont'd.)

"The mere fact that a witness is an expert in a wide general field, like engineering does not make everything he says admissible! It must appear that he knows what he is talking about with reference to the facts of the particular case."

EXPERT WITNESSES and HYPOTHETICAL QUESTIONS

Qualifications:

Schwartz v. Int. Brotherhood, 126 N.J. L.379 Supra(1941)

Precipeo v. Ins. Co., 103 N.J.L. 589, E.& A.(1927)

Cowdrick v. Pennsylvania R.R., 132 N.J.L. 131, (E. & A. 1944)

Rempfer v. Deerfield Packing, 4 N.J. 135

Carbone v. Warburton, 11 N.J. 418

Savoia v. Woolworth, 88 N.J. Super 153 (App.Div. 1965)

Cross Examination on Learned Treatises:

Ruth v. Fenchal, App.Div.37 N.J. Super 295 (1955)
Sup.Ct.21 N.J. 171 (1956)

Real Estate Brokers:

Rockland Gas Co. v. Bolo Corp., 66 N.J. Super 171, App.Div. (1961)

Practical Experience as Qualifying:

Studerus Oil v.Jersey City, 128 N.J.L. 286 (Sup.Ct. 1942)

The Hypothetical Question:

Necessity for proper foundation

Stanley Co. of America v.Hercules Powder Co., 16 N.J. 295 (1954)

Should not include opinion of another

Purpose of Expert Witnesses:

Cook v. State, 24 N.J.L. 843 (E. & A. 1855), at p. 142

"The line between questions of science or professional skill, to which an expert may legally testify, and questions of mere

judgment, which the jury alone are to answer upon the facts proved, is not always susceptible of being clearly defined. . . . .The opinion of witnesses, possessing peculiar skill, is admissible whenever the subject matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, without such assistance."

Crosby v. Wells, 73 N.J.L. 790 (E. & A. 1907), p. 142:

"It is not now needful for us to adopt a perfect and all-embracing definition of the phrase 'opinion evidence.' . . .For present purposes, opinion evidence is that which is given by a person of ordinary capacity, who has, by opportunity for practice, acquired a special knowledge which is outside of the limits of common observation, and which may be of value in elucidating a matter under consideration."

Note that the proposed Rule of Evidence No. 58 eliminates the need for hypothetical questions unless the judge so requires. This rule will allow the expert to state his opinion and reasons therefor without first specifying the facts or opinion on which it is based, but he may be required to so specify such data on cross-examination.

State v. Bertone, 39 N.J. 356 (1963), at p. 363:

"The hypothetical question combines facts and circumstances, assumed to be true, into an understandable and specific situation upon which the expert witness is asked to give an opinion. The facts incorporated therein, however, must be supported by evidence in the case, whether it be direct testimony or rational inferences deducible therefrom."

State v. Guido, 40 N.J. 191 (1963), at p. 198:

"When the hypothetical question propounded by the defense was finished, the prosecutor objected that it did not include all the evidence in the State's case. The objection was clearly unsound, since a party need not accept the contentions of his adversary in framing his question. Rather such matters may be explored on cross-examination."

McAllister v. Bd. of Education, Kearny, 79 N.J. 249 (App. Div., 1963); aff'd. 42 N.J. 56 (1964):

Where there is proof that death was due to other causes, the cause stated in the death certificate did not have to be included in the hypothetical question.

JURY MISCONDUCT

R.R. 1:25A Limitation on Interviewing Jurors Subsequent to Trial

No attorney shall himself or through any investigator or other person acting for him interview, examine or question any juror with respect to the verdict or deliberations of the jury in any action except on leave of court granted upon good cause shown.

State v. LaFera, 42 N.J. 97 (1964)

Defendant's attorney launched an all out investigation to determine possible bias of a juror, without otaining leave under R.R. 1:25A. Defendant says this is O.K. because he did not "interview" jurors.

at p. 107: "We see no difference between an intrusion upon a juror personally of which the rule (R.R. 1:25A) speaks literally and an intrusion into the juror's private relationship with others. If anything, an investigation conducted among others may be even more disturbing in that it tends to suggest to those who are interviewed that something is already known to be amiss."

At hearing of jury it was suggested that a juror had made up his mind prematurely, i.e., prior to the completion of the case.

at p. 109: ". . .but we cannot say a juror is guilty of misconduct because he reaches a conclusion before ideally he should."

"The cases turn, not upon the proposition that a juror misbehaves if he reaches a premature conviction, but rather upon the circumstances in which he disclosed it."

State v. Levitt, 36 N.J. 266 (1961)

At a hearing on the alleged misconduct of the jury, the proper practice, due to the delicacy of the problem, is to have the trial judge take the testimony of the jurors in the presence of counsel, rather than to expose jurors to questioning by others.

Evidence presented at jury hearing that defendant and his witnesses were Jewish.

at p. 272: "If the trial judge found even one juror was so biased as to prevent him or her from objectively weighing the evidence, it was sufficient to set aside the verdict."

State v. Athorn, 46 N.J. 247 (1966)

Calling jurors for investigation after they have been discharged is an extraordinary procedure which should be invoked only upon a strong showing that a litigant may have been harmed by jury misconduct.

There are two recognized exceptions to the general rule that jury verdicts shall not be disturbed because of what may have been said by jurors during their deliberations.

at p. 251: "First, where a juror informs (or misinforms) his colleagues in the jury room of facts about the case, based on his personal knowledge, which facts are not introduced into evidence at the trial, the resultant verdict may be set aside. And, where a juror by his comments in the jury room manifests racial or religious bigotry against a defendant, we have upheld the trial court's action in granting a new trial."

Statement of jurors during deliberation that "cops take bribes" was not bias requiring setting aside verdict. Id

Claim of juror that he misunderstood court's instructions, is not a ground for juror to impeach his own verdict. Id

State v. Hall, 87 N.J. Super 480 (App.Div. 1965)

Affidavit of juror that jurors met and immediately reached a 10-2 verdict without deliberation was not good cause for examination of jurors under R.R. 1:25A.

Bree v. Jalbert, 87 N.J. Super 452 (Law Div. 1965); aff. 91 N.J. Super 38 (App. Div. 1966)

Failure of jury to answer special interrogatories is a procedural error and should not be permitted to interfere with general verdict which is substantive.

Clark v. Piccillo, 75 N.J. Super 123 (App.Div. 1962)

One juror exhibited personal pictures of fork-lift truck during trial to some other jurors and asked if it was permissible to show to all the jurors. Court interrogated those jurors who had seen the picture and determined no harm had been done. He then instructed jury that only documents in evidence may be used. Motion for mistrial was denied. On appeal it was affirmed due to a lack of prejudice to any of the litigants.

MISTRIAL - RE JURORS ACTIONS (SUGGESTED PROCEDURE)

See State v. Bentley, 46 N.J. Super 193 (App. Div. 1957) at page 202:

> "Defendant claims that jurors mingled with spectators during court recesses. Here again there is an absence of proof. To say that such alleged conduct was prejudicial, defendant must show there was communication between the bystanders and the jurors, and that the jurors were influenced thereby."

In State v. Romeo, 43 N.J. 188 at p. 194 mistrials are discussed.

In State v. Romeo, one of the jurors advised the judge privately that in talking with his wife the previous night - the brother-in-law was acquainted with the defendant. The juror was examined on supplemental voir dire by the judge and both counsel, out of the presence of the jury. It appeared the jury had disobeyed the court's admonition about talking about the case. The court declared a mistrial.

These 2 cases are helpful where motions for mistrial are made. The court should proceed with caution whether to examine a juror so as not to emphasize the very thing that the attorneys contend is the basis for the motion.

PROFFER OF PROOF

R.R. 4:44-3 Record of Excluded Evidence

In an action tried by a jury, if an objection to a question propounded to a witness 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. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request may permit the evidence in rebuttal thereof to be taken down by the court reporter in full, or otherwise preserved, unless it clearly appears to the court that the evidence is not admissible on any ground or that the witness is privileged.

R.R. 3:7-8 Objections; Exceptions Unnecessary

Exceptions to rulings or orders of the court or instructions to the jury are not required in order to reserve the questions involved for review on appeal; and for all purposes for which an exception has heretofore been necessary it suffices that the defendant, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection shall not thereafter prejudice him.

State v. Pollack, 43 N.J. 34 (1964)

Proffer has a twofold purpose, at p. 40:

> "(1) to inform the trial court sufficiently so that it may reconsider its exclusionary ruling; (2) to avoid an appellate court's conclusion that it cannot find the exclusion to be harmful in the absence of showing of what counsel hoped to prove by the excluded testimony. However, the failure to make such a proffer will not invariably lead an appellate court to find no harmful error."

State v. Johnson, 46 N.J. 289 (1966)

Trial court refused to permit defendant to spread an offer of proof on the record. This was clear error. State v. Abbott, 36 N.J. 63 (1961).

Court goes on to say that where trial court refuses to allow proffer of proof, the proper procedure "would be to apply to the court of first appeal, promptly after filing the notice of appeal, for leave to supplement the record."

See: The State Trial Judge's Book, West Publishing Co., 1965; Page 104, Offers of Proof.

For guidance as to the proper taking of the proffer, see State v. Sikora, 44 N.J. 453 (1965)

REMITTITUR & ADDITUR

Fisch v. Manger, 24 N.J. 66 (1957)

Action by motorist for injuries sustained when his auto was struck from the rear by a truck while he was stopped at an intersection. Pl's motion for a new trial was dismissed after defs had consented to an increase in the verdict, and pl appealed. Supreme Court held article of Constitution providing that right of trial by jury shall remain inviolate does not preclude the t/c from conditioning the grant of a new trial upon the def's failure to consent to a prescribed increase in the verdict in favor of the pl, but that the increase in the award was still insufficient.

> The term remittitur is used to describe an order denying the defendant's application for new trial on condition that the plaintiff consent to a specified reduction in the jury's award, whereas the term additur is used to describe an order denying the plaintiff's application for a new trial on condition that the defendant consent to a specified increase in the jury's award. While it is now recognized that the two practices are logically and realistically indistinguishable, remittiturs have been recognized almost everywhere, whereas additurs are still outlawed in some, though by no means all, of the states. (at p. 72).
>
> .....we are satisfied that the practices of remittitur and additur violate none of our constitutional interdictions and, if fairly invoked, serve the laudable purpose of avoiding a further trial where substantial justice may be attained on the basis of the original trial. (at p. 80)

Moran v. Feitis, 69 N.J.Super. 531 (App.Div.1961), certif. denied 36 N.J. 299 (1962)

Action for personal injuries arising out of an auto collision. From an order of the T/C granting a new trial as to damages only unless def agreed to an additur, which the def did, the pl appealed. The Superior Court

held that fixing of amount of additur upon the basis of resolution of all doubts against pl having sustained a back injury and predicating it solely upon ~~[illegible]~~ inadequacy of verdict for head injuries was improper.

> The erroneous underestimation of the plaintiff's case may itself vitiate an additur. (at p. 538)
>
> .....the fixing of the amount of the additur upon the basis of the resolution of all doubts against this plaintiff made its use improper. (at p. 539)
>
> It is because the additur (and remittitur) must be used in a manner consistent with the right to trial by jury that the law requires the consent of the litigant adversely affected. We have hitherto held that this is the defendant in the case of the additur, and the plaintiff in the case of the remittitur. (citing cases).(at p. 540)
>
> The trial judge may not use additur (or remittitur) in all cases over the objection of the parties. He may not use it in cases in which the verdict has failed to decide issues upon which the parties were entitled to a trial by jury, as distinguished from damages arising out of said issues. It is for this reason that additur (or remittitur) may be used only in cases in which a new trial as to damages alone is proper. Esposito v. Lazar, 2 N.J. 257, 259 (1949). But the trial judge may not use the additur over the opposition of plaintiff even in such cases without due regard to what is a fair substitute for plaintiff's right to trial by jury. (at p. 540)
>
> In deciding whether to condition the grant of a new trial as to damages only by the use of additur, it seems to us a trial judge should bear in mind that if the defendant thinks the additur too high, he may protect himself, for he has the absolute right to refuse to pay it and to take a new trial by jury instead, but that the plaintiff has no such protection. If the defendant accepts the additur, the plaintiff loses his right to trial by jury and his only recourse is to appeal, as he did here and in Fisch v. Manger, supra. The converse, of course, is true in the case of the remittitur. (at p. 541)

REMITTITUR & ADDITUR

Epstein v. Grand Union Co., 43 N.J. 251 (1964)

> Remittitur (or additur) may be employed only in cases in which a new trial as to damages only is proper. (at p. 252, citing Moran v. Feitis).

Bitting v. Willett, 47 N.J. 6 (1966)

> In Fisch v. Manger, 24 N.J. 66, 72 (1957) Mr. Justice Jacobs reviewed the history of additur procedure in this State and described additur as an order denying the plaintiff's application for a new trial on the condition that the defendant consent to an increase in the jury's award as specified by the trial judge. The option of accepting an additur rests with a defendant and if defendant accepts it, the judgement should reflect the added sum without regard to plaintiff's wish. The plaintiff may then accept the judgement as thus enlarged or may appeal. (at p. 9)

Ekalo v. Constructive Service Corp.,of America, 46 N.J. 82 (1966)

Pawlowski v. Marino, 71 N.J.Super. 120 (App.Div.1961)

RE-READING TESTIMONY TO JURY

State v. Wolf
44 N.J. 176 (1965)

Jury requested that it be read the testimony of the cross-examination of a witness in reference to letters which were of importance in this case. Justice Francis held request should have been granted.

At p. 185:

> "When a jury retires to consider their verdict, their discussion may produce disagreement or doubt or failure of definite recollection as to what a particular witness said in the course of his testimony. If they request enlightenment on the subject through a reading of his testimony, in the absence of some unusual circumstance, the request should be granted."

SUPPLEMENTARY INSTRUCTIONS TO THE JURY

In Re Stern, 11 N.J. 584 (1953)

Proceeding by brother to determine sister's mental competency. Chancery Division entered judgment on verdict of mental incompetency. The Supreme Court reversed holding that where, after jury had reported disagreement after five hours deliberation following three day trial, the judge instructed the jury that it cost the State a lot of money, that retrial would take several days, and that they should see if they could not arrive at a verdict, and, within minutes, the jury returned verdict of incompetency, undue stress was laid upon economic element and importance of verdict, and therefore the sister was in substance denied a jury trial.

> "Judge may urge on attention of a jury the importance of reaching an agreement, but the agreement is not to be had at the sacrifice of conscientious conviction of individual jurors."

> "Jury's verdict should not be general average of views of individual jurors but rather a consensus of individual judgment."

> "It is within the discretionary province of the trial judge to allude to all factors making jurors' agreement desirable, including expense attendant upon retrial, but such instruction to jury is fundamentally deficient unless jurors are told that none should surrender his conscientious scruples or personal convictions to such end."

See also 19 ALR 20 1257 for annotation on "Coercion of Jury by Judge." In re Stern, supra, is cited in the supplement to that annotation.

Supplementary Instructions to the Jury (Cont'd.)

The cases of State v. Williams, 39 N.J. 471 (1963) and State v. Hutchins, 43 N.J. 85 (1964) give an excellent outline of a supplemental charge to jurors who cannot reach a decision. Although these are criminal cases, the charges suggested are easily adaptable to civil matters.

The Williams case, supra, contains two entire supplemental charges and it also contains questions by the trial judge to the jurors.

In the Hutchins case, supra, the Supreme Court suggests the following procedure at page 96:

> (a) Admonish jury at the outset not to reveal how they stand or whether they entertain predominant view.
>
> (b) Ask foreman whether he believes the jury might reach verdict after further deliberations.
>
> (c) If the trial court feels that further deliberations might produce a proper verdict, it should send the jury back with a supplemental instruction to the effect of the ones approved in State v. Williams, supra.

INDEX #2

DISQUALIFICATION OF JUDGES

State v. Deutsch, 34 N.J. 190 (1961)

On motion to withdraw plea of non vult, defendant requested judge to disqualify himself because he was the brother of the prosecutor, who was the law partner of the assistant prosecutor who was handling the case. Judge refused to disqualify himself by stating that N.J.S. 2A:15-49 applies only to relatives who are "parties", not to relatives who represent the parties.

HELD:

> The Judicial Article of our 1947 Constitution, and the Canons of Judicial Ethics, including Canon 13, are "well aware of the need for the maintenance of the purity of the judiciary and the avoidance of conduct which might tempt or undermine judicial objectivity and impartiality or impair and lessen the confidence of litigants and the public."
>
> Although the drafters of our 1947 Constitution "did not adopt a formal Rule directing that no judge shall sit in a cause in which a near relative is of counsel there is no reason to doubt that they confidently expected that when any such situation arose the cause would be remitted to another judge under the broad transferability authority which they provided." pp.209-210. "Justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11, 16 (1954).

Memo re the right of a trial judge to intrude upon the trial of a case, including his examination of witnesses and, in jury cases, his comment upon the evidence.

Examination of Witnesses

The propriety of cross-examination by a trial judge has received substantial consideration in the New Jersey courts. Extraordinarily well-documented exposition on this problem, and on a number of others concerning the trial judge's role, is to be found in Polulich v. J. G. Schmidt Tool Die & Stamping Co., 46 N.J. Super. 135 (Essex Cty. Ct. 1957). This was an appeal from an award of workmen's compensation in which the particular complaint of the respondent-appellant impugned the appointment by the (then) deputy director, on his own initiative, of an independent medical expert. In the course of holding such action proper, Judge Gaulkin explored in depth the role of the trial judge, not only citing direct authority for a succinct statement of the law, but employing other authority to justify the basic philosophy of such law. His opinion, restating as it does substantially all the knotty problems and their solutions, is worthy of quotation at length (citations are omitted):

"However, if we admit that there is no New Jersey case which holds that a trial judge has the right to call an expert designated by him as a witness, it seems to me that reasoning from the basic philosophy of our judicial system, as reflected in analogous situations since earliest times, logic compels the conclusion that the trial judge does have that right. As Wigmore pointed out, the way a court will answer questions such as these depends, in the last analysis, on the philosophy of the Court. 6 Wigmore, sec. 1845. If it is wedded to the sporting theory of justice, in which the judge is an umpire calling balls and strikes but pitching none, then the answer of course would be that the judge has no right to call any witness, expert or not. But New Jersey never accepted the sporting theory of justice, and is less inclined to do so today than ever before.

For example, contrary to the rule in many other jurisdictions, our judges have always had the right to comment on the evidence. It has even been said that in some cases it may even be the duty of the judge to do so. And it has always been the right of our trial judges to put additional questions to a witness; and that, too, in some cases, is a duty.

The judge need not wait to be asked to act on any matter by counsel. Indeed, it is often his obligation to act when counsel do not object, or when they acquiesce, or even over the objection of both counsel, for if he fails to act when he should, reversal may result for 'plain errors affecting substantial rights of the defendant, although they were not brought to the attention of the trial court.' And our appellate courts have the right to and do remand cases for more testimony, or for testimony which the parties themselves did not offer. One reason for this was well stated in Electric Park Amusement Co. v. Psichos, supra, in which the judge on his own motion stopped a witness from testifying as an expert on the ground he was not qualified. In affirming, the Supreme Court pointed out that it was essential that the trial judge have that power (Id., 83 N.J.L. at page 267) '* * * in order to prevent chaos in the trial of causes and to attain substantial justice. It is therefore clearly against the policy of the law that the legal principles which control the admission or rejection of testimony should be subject to be waived by consent of the litigants, without the consent of the court. * * *'

In Mitilenes v. Snead, supra, in sustaining the action of a trial judge who, on his own motion, excluded possibly misleading questions on cross-examination, the Appellate Division said 'neither the trial court nor the opposing party could be forced into the position of buying a pig in a poke.'

It is upon this idea that neither the litigants nor the court shall buy a pig in a poke that our discovery and pretrial procedure are bottomed. Discovery and pretrial, as we now have them, are our latest and most emphatic rejection of the sporting theory of justice.

Perhaps we do not go so far as to say, as did Edmund Burke, that 'a judge is not placed in that high situation merely as a passive instrument of the parties. He has a duty of his own, independent of them, and that duty is to investigate the truth.' But we do agree that

> 'he is not a dumb and mask-faced moderator over a contest between sensitive and apprehensive, or perhaps wily and ingenious, counsel. He is a vital and integral factor in the discovery and elucidation of the facts. * * * Therefore, on his own account, he is not obliged to rest content with the modicum of evidence which counsel may dole out, or to accept as final their showing of knowledge * * * and credibility * * * of witnesses. But beyond this it is the function of the judge to aid the jury in obtaining a comprehension of the facts equal to his own, in order that a just verdict may be reached. Therefore, whenever in his judgment the proceeding is not being conducted in a way to accomplish the purpose for which alone it is instituted, the full development of the truth, or whenever he can effect a better accomplishment of that purpose, he not only has the right, but it is his duty, to take part. Limitations upon this power appear from the statement of the purpose to be subserved, and are merely those which good sense and propriety suggest. The judge should not place himself in the attitude of helping or hurting either side, but, whenever it appears to him proper, he should fearlessly endeavor to develop the truth with all possible clearness and certainty, which ever side the truth may help or hurt.' State v. Keehn, 85 Kan. 765, 118 P. 851 (Sup. Ct. 1911), quoted in 3 Wigmore, sec. 785.

Of course, the power to take an active part in the trial of a case must be exercised by the judge with the greatest restraint, especially before a jury. As Judge Wyzanski pointed out in A Trial Judge's Freedom and Responsibility (1952), perhaps no problem troubles a trial judge as much as the question when and how to use that power. Most trial lawyers feel strongly that the judge should never 'interfere,' and when one ascends the bench the one thing he is sure of is that he will not 'meddle.' He soon learns that that is impossible -- that occasionally he must play an active role, not only to prevent injustice, but to be sure that justice is done. Wigmore (sec. 784) quotes from The Trial Judge, in which Justice Lummus made this excellent statement:

> 'The judge must never become or appear to be a partisan. But a judge need take no vow of silence. He is there to see that justice is done, or at least to see that the jury have a fair chance to do justice. If by reason of the incompetence or inexperience of counsel on one side or on both sides, the case is not being presented intelligibly to the jury, he may bring out the important facts by questions to the witnesses. If a cross-examiner has obtained a delusive verbal victory over a witness, and the jury may be misled, a question by the judge will often set the matter right at once. The objection attributed to a number of famous advocates, "If your Honor is asking that question for us, we don't want it, and if against us we object to it," may find a sympathetic response in a part of the bar, but it shows a low conception of the function of the bench. *** The judge ought not to let the jury be diverted from the real issue. The skill of counsel must not be allowed to mislead the jury by raising false issues or by appeals to emotion and prejudice. * * * It is not always easy for a judge to see his duty clearly. But a first-rate trial judge will find a tread the narrow path that lies between meddlesomeness on the one hand and ineffectiveness and impotence on the other.'"
>
> (At pp. 142-145)

The Appellate Division has expressly approved and adopted the reasoning by Judge Gaulkin in Polulich. State v. Lanza, 74 N.J. Super. 362, 374 (App. Div. 1962) affirmed 39 N.J. 595 (1963).

State v. Aeschbach, 107 N.J.L. 433 (E. & A. 1931), involved an appeal from a conviction of first degree murder. Without citing authority, the court held that questions asked by the trial judge in cross-examining the defendant "were all of them pertinent and material. The right of the Court to ask them cannot be successfully controverted." (P. 438.)

In Highway Trailer Company, Inc. v. Long Branch Auto Company, 114 N.J.L. 317 (E. & A. 1935), the trial judge asked one question of a witness for the plaintiff which, with subsequent cross-examination by the defendant, had the effect of neutralizing and

wholly nullifying the essential prior testimony of this witness. It appears that this question lost the case for the plaintiff. While the opinion does not indicate that the question of the right of the trial judge to intervene was raised, there is nothing in the opinion to indicate criticism upon the part of the Court of Errors and Appeals. As in Aeschbach, no authority is cited for the proposition that a trial judge may so intervene; his intervention was merely accepted.

In State v. King, 133 N.J.L. 480 (Sup. Ct. 1945), affirmed by an equally divided court in 135 N.J.L. 286 (E. & A. 1947), not only was intervention tolerated, but the Supreme Court said: "It is the duty of the court to examine a witness when it is deemed essential, in order to obtain a clear understanding of the testimony. 3 Wharton's Criminal Evidence (11th ed.), § 1264."

From the State v. King expression in 1945 of this concept of a "duty" to inquire, through the consolidation of philosophy, policy, and law in Polulich, to today, it has become clear in numerous cases that in the proper circumstances a trial judge may and sometimes should intervene, and that his questioning of a witness may even include leading questions.

It is proper for a trial judge, on his own initiative and within his sound discretion, to interrogate witnesses for the purpose of eliciting facts material to the trial. State v. Riley, 28 N.J. 188, 200 (1958); Riley v. Goodman, 315 F. 2d 232 (3 Cir. 1963). He may question a witness in order to clarify

existing testimony or to elicit further information from him. Ridgewood v. Sreel Investment Corp., 28 N.J. 121, 132 (1958). He may ask questions "of crucial importance to the resolution of the cause." State v. Riley, supra; Highway Trailer Company, Inc. v. Long Branch Auto Company, supra. A trial court may, within "the bounds of judicial propriety," not only inquire, but also comment during the testimony. Lawton v. Virginia Stevedoring Co., 50 N.J. Super. 564, 580 (App. Div. 1958).

In State v. Riley, supra, the court notes that since a trial judge may rightfully under certain circumstances permit leading questions by counsel, he may ask them himself. It explains this rule of law as follows:

> "* * * Indeed, Wigmore goes so far as to state that a judge's questions may always, under any and all circumstances, be leading in form since the reason for the rule against such questions does not apply to the relationship between judge and witness. The judge is not a friendly attorney who seeks to instruct the witness or whom the witness will blindly follow. * * *." (At p. 205.)

The right of a judge to intervene with leading questions also finds support in State v. Manno, 29 N.J. Super. 411, 417 (App. Div. 1954).

Under proper circumstances a court may even summon witnesses on its own initiative. Band's Refuse Removal Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522, 547 (App. Div. 1960) certification denied 33 N.J. 387 (1960); Polulich v. J. G. Schmidt Tool Die & Stamping Co., supra.

It further appears that where the circumstances warrant, a trial judge's interrogation may be lengthy. Davanne Realty Co. v. Brune, 67 N.J. Super. 500, 511 (App. Div. 1961).

The issues appear sharpest in criminal matters and particularly in connection with crimes which by their natures spawn reluctant witnesses in need of judicial support, such as rape. But the reason for the intervention and the character thereof are the controlling factors, rather than whether the litigation is civil or criminal.

Reference to Canon 15 of the Canons of Judicial Ethics provides almost completely the standards by which our courts are guided in the review of judicial intervention. State v. Guido, 40 N.J. 191 (1963), suggests that it is "difficult to improve upon the standard and caveat" therein set forth. (At p. 207.) Canon 15 is as follows:

> "15. Interference in Conduct of Trial
>
> A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.
>
> Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.
>
> He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment."

The Guido case further details the reasons for the caveat in the Canon:

> "* * * The trial judge is an imposing figure. To the jurors he is a symbol of experience, wisdom, and impartiality. If he so intervenes as to suggest disbelief, the impact upon the jurors may be critical. Hence in the usual case it is well to leave the primary burden of examination with counsel and to supplement their efforts, if necessary to clarify the scene, in a way which will lead the jurors to believe the objective is their better understanding." (At p. 208.)

From the foregoing it can be seen that the conditions under which and the extent to which a trial judge may intervene are largely matters of sound discretion. This is not to say that such discretion is without limitation. It is equally obvious that judicial self-restraint and the maintenance of an atmosphere of impartiality are essential to such intervention and, in the absence of such qualification, reversible error will be found. State v. Ray, 43 N.J. 19 (1964); State v. Homer, 86 N.J. Super. 351 (App. Div. 1965).

Comment to Jury

As early as 1869, a judge's right to comment upon the evidence "for the promotion of justice" was said to be "too well settled by repeated decisions, to be now called into question." Castner v. Sliker, 33 N.J.L. 507, 512 (E. & A. 1869). It was said in the celebrated State v. Hauptmann, 115 N.J.L. 412, 430-431 (E. & A. 1935), where many of the cases to that date are collected:

> "The brief /of appellant/ under this point ignores one of the most thoroughly settled rules in our New Jersey criminal jurisprudence. The rule is that it is always the right and often the duty of a trial judge to comment on the evidence, and give the jury his impressions of its

> weight and value, and such comment is not assignable for error so long as the ultimate decision on disputed facts is plainly left to the jury.' State v. Overton, 85 N.J.L. 287.
>
> * * *
>
> The right of the trial judge to give the jury the benefit of his individual view of the evidence, so long as he is careful to avoid controlling them by a binding instruction, is settled in this state beyond peradventure."

The judge may even express an opinion as to guilt, "so long as he plainly leaves the sole determination of all factual issues to the jury." State v. Begyn, 34 N.J. 35 (1961).

The rule is the same in civil litigation. Isherwood v. Douglas, 34 N.J. Super. 533, 543 (App. Div. 1955); Borowicz v. Hood, 87 N.J. Super. 418 (App. Div. 1965) certification denied 45 N.J. 298 (1965).

Despite the "considerable latitude" a trial judge has in this area (State v. Smith, 43 N.J. 67, 77 (1964)), it is not without limitation, and where the effect is to mislead the jury, or control its findings, such comment constitutes reversible error. Ridgewood v. Sreel Investment Corp., 28 N.J. 121 (1958); Morie v. N. J. Manufacturers Indemnity Ins. Co., 48 N.J. Super. 70 (App. Div. 1957).

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FALL CASES

Bozza v. Vornado, 42 N.J. 355 (1964)

Defendant's busy cafeteria area had litter and dirt on the floor when plaintiff fell.

HELD:

> "*** when plaintiff has shown that the circumstances were such as to create the reasonable probability that the dangerous condition would occur, he need not also prove actual or constructive notice of the specific condition." p. 360

If this dangerous condition is shown, the

> "defendants would be required to produce proof of performance of their duty of due care commensurate with the kind and nature of their business." p. 361

Wollerman v. Grand Union Stores, Inc., 47 N.J. 426 (1966)

Plaintiff slipped on a bean on the floor in front of an open fruit stand in defendant's store. The trial court granted involuntary dismissal because plaintiff failed to prove notice to defendant, either actual or constructive.

HELD:

> "*** where a substantial risk of injury is implicit in the manner in which a business is conducted, and in the total scene it is fairly probable that the operator is responsible either in creating the hazard or permitting it to arise or to continue, it would be unjust to saddle the plaintiff with the burden of isolating the precise failure."

Fall Cases (Cont'd.)

Hayden v. Curley, 34 N.J. 420 (1961)

Defendant municipality planted a shade tree, and as it grew its roots raised the sidewalk in places. This condition continued for 5 years and was readily observable when plaintiff tripped and fell. Trial court granted a dismissal because there was no showing of "active wrongdoing" by the municipality, rather a negligent failure or omission to act."

HELD:

> "The affirmative act of creation and the accompanying or subsequent omission form a sequence of events leading up to and causing injury to the traveler. Our courts have held that an affirmative act in the causative sequence resulting in injury is sufficient to sustain municipal liability. The last event in the sequence may be non-action, but the total sequence constitutes active wrongdoing." p. 425-426

Hartye v. Grand Properties, Inc., 82 N.J. Super. 82, N.J. Super. 416 (App. Div., 1964)

Plaintiff fell on sidewalk owned by defendant. Sidewalk was constructed 11 years before defendant purchased the property. Plaintiff's expert testified that a properly constructed sidewalk would last 40 years while this was deteriorating after 15 years. Therefore, negligence in the construction of the sidewalk.

Fall Cases (Cont'd.)

Hartye v. Grand Properties, Inc. (Cont'd.)

HELD:

"We know of nothing in the law which requires that a sidewalk be so constructed as to withstand the rigors of use and action of the elements for any given length of time, and we know of no requirement which calls upon an owner to construct a 40-year sidewalk, or visits liability upon him if he chooses to build a 15-year sidewalk. Nor are we aware of any principle that where a subsequent owner observes a deteriorating condition which to his eyes would appear to be the result of ordinary wear and tear, he is required to employ expert aid to determine how and of what the sidewalk was constructed by his predecessor in title." p. 421-22

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1966 JUDGES SEMINAR

THURSDAY SEPTEMBER 8, 1966

Presiding: Chief Justice Joseph Weintraub

General Discussion

Discussion: The Uniform Commercial Code

Presiding: Chief Justice Joseph Weintraub

Discussion Leader: William D. Hawkland, Dean

School of Law, State University
of New York at Buffalo

If we can, when we get this new group, work out a program, and I think we should.

JUDGE GAULKIN: I would like to add a bit to that. When I was first appointed to the County Court, we had a program like that. It was sort of skull practice to start with. We met at the Downtown Club on a number of evenings. I forget whether they were successive evenings or whether they were spaced. Each evening there was a different topic taken up. For example, as I recall it, Judge Brennan, now Justice Brennan, presided. At one session we went over pretrials, conclusions of law and fact, and so forth. We had another one at which time we went over criminal law and evidence. I recall Judge Foley was there, and so on. We did that for, as I recall, six or seven evenings.

I believe we got a good deal out of it, but not enough. Now, this idea of orienting newly appointed judges is not new. Colorado, for example, has an annual session for, purely for newly appointed judges, and it is a two day session, I think, at the University of Colorado or at Denver University. It has a program that is concentrated and participated in not only by sitting judges, but by specialists and teachers from law school. Justice Botine in New York has just arranged with New York University and the Institute of Judicial Administration to prepare an orientation course for newly appointed criminal court judges in New York, and the Institute is working on that program now. The same thing is done in a number of states throughout the country.

Now, I speak from my own experience when I first went on the bench, and I have checked with any number of newly appointed judges, and they have lived through exactly the same thing that I lived through, and I think all trial judges live through. No matter how much experience you have trying cases, and no matter how much you think you are equipped to be a judge, when you get on the bench, you find that almost immediately you are not equipped, and that there is a great deal that you have to learn and that a great many areas that you never gave thought to are there.

I am very glad that Judge Conford brought this up, because I think that particularly with the new group of judges that we are going to have, I think that this is something that merits a thorough program, much on the style of what Colorado has done.

I think California does it, and what they have intended in New York.

I don't think that it should be a hit or miss proposition. I don't think that one judge sitting down with another judge does very much good, and although the skull practice that we went through when I was appointed was good, but I don't think it is good enough.

Incidentally, I have spoken about this to someone from Rutgers Law School who runs the courses for the Practicing Law Institute. He is

perfectly willing to, he said, to help as much as we permit him to help to set up these courses.

Now, the question has come up about personnel and about how about judges in South Jersey, should they have to come up to Newark or should Newark judges have to go to South Jersey. I think that we have on the bench as many men, as many seasoned men as the schools require in South Jersey or in North Jersey. In addition to that, I think that we should get them wherever they need them, specialists, or teachers from law school.

I know, speaking for myself and my colleagues on the Appellate Division, I'm quite sure that any one of us would be willing to give time if you thought that we could be of service to such a school, and we would give time gladly because, in the long run, it would be better for us and save us a great deal of aggravation. Sitting on the Appellate Division level we see how badly judges do need this help and this instruction.

Incidentally, another thing that I think should be revived are the sessions that we had on sentencing. I think that they were very helpful. We haven't had them for quite awhile. I think that in the criminal field there is nothing in which a new judge needs more help than on the question of sentencing.

So, I endorse what Judge Conford said.

CHIEF JUSTICE WEINTRAUB: I think that we certainly can use all the help we can possibly muster. What has bothered me is how do you take care of the new judge when he comes on. You may have an annual program, but you may be picking up a man who has been sitting for six or nine months. True, better late than never. Would it be feasible to have something that we could have around to get two or three who can go to work and bring them in? We don't ordinarily get a batch of new judges. We only get a minimum. I don't know, but is there any state that has attempted to orient this? You see, in many states where you have elections, it is my guess that a lot of new judges coming in come at a certain time. What do you do in a state like ours where you pick up one or two judges? Can you think of any feasible way?

JUDGE GAULKIN: Well, the system in New York that has been arranged will contemplate immediate personal attention by specialists at N.Y.U.

CHIEF JUSTICE WEINTRAUB: You mean you have got a new man, call the specialist and run the course for one man?

JUDGE GAULKIN: No. The details haven't been worked out. I asked him to send us the material. I had in mind submitting this to the Court. I asked him to send us the material as soon as they have it ready. But the idea there is, of course, New York being so large, they just don't

have one judge at a time. They would have three or four judges at a time. They would get them in immediately to give them a birdseye view, a quick orientation for, let us say, several days or a week.

The reason for that is that in the criminal field, many of the men that are appointed never saw a criminal case in their whole career. For them, it is absolutely essential to know even what the criminal law is all about. On the civil side, although what you say is true, that it is advisable for the judge to have that information as quickly as possible, still it is better it seems to me if he has the two or three or four months after he is appointed than the present system where he doesn't have it at all.

CHIEF JUSTICE WEINTRAUB: Of course, we have attempted to give them some of that with these annual sessions that we have had. For example, the program tomorrow, I would assume, would touch a lot of things that would bother judges, maybe old as well as new. I agree with you, we ought to have a course. I would like to know how they run it and will run it in New York from the standpoint of picking up the new judge. I think he represents a distinct problem. No doubt, if we get them six months later, we are better off if we get them two in a row.

JUDGE GAULKIN: I would like to comment on what you said about such sessions as we have tomorrow. Those sessions won't do, I think, for this reason. In the first place, the seasoned judge is going to be irritated if you are going to sit there and tell him what a beginner should know, and he would be bored stiff. Secondly, the beginner who has a lot of questions is frequently embarrassed to ask questions in front of seasoned judges. Furthermore, it is the old story of children in a progressive school.

I remember I sent my boys once to a progressive camp. One boy was six years old and one was eight years old. The counsellor got all of the six and eight year old kids around and he said, "Now, you suggest what we should do." This is out of the wealth of the experience of six and eight year olds. "You tell us what to do." Of course, that is nonesense.

I think it is equally important for the trial judges who are just coming on the bench, because they can't ask the questions because they don't have the experience to ask the questions. They have a number of questions, but there will be a number of important questions that are not going to come up.

CHIEF JUSTICE WEINTRAUB: I think that it ought to be noted on the record that a new judge usually talks to the fellow in the next court-room about how do you handle this. There is always that communication. In fact, I have known some of them that come in and say, "How do you rule on this question? What do you think that we ought to do?"

JUDGE GAULKIN: That is a good way to perpetuate error, and we have found in particular counties that all of the judges pull the same boners because they learn from each other.

CHIEF JUSTICE WEINTRAUB: I think that probably is an over-statement. I know in Essex County I sat with a jury my first day on the bench. Now, with some practical problems I could get a hold of the assignment judge to find out the mechanical routine that goes on. In fact, a new man, I would like to get him where there are some good men sitting and say to him, "If you have any problems, you get a hold of so-and-so and he will steer you." I don't think it is all quite that dismal.

JUDGE HALPERN: May I suggest that we have a Society called the National Conference of State Trial Judges. We have been considering this problem for a number of years, and this past year they issued a new book which is called the Trial Judges Manual which is being kept up to date. I assume that most of the men have received that book, and I think that is an excellent piece to start for a new judge by reading and studying that manual. One other suggestion only for New Jersey. Alex Waugh is vice-president of that Association and has been actively teaching out in Colorado new judges under that program. I think we have a pretty good start right here if we want to do so.

JUDGE FUSCO: Chief, the suggestion might be that we set up three separate committees of three to five judges; one in the South Jersey area, one in the Central Jersey area and one in the Northern Jersey area. One of the judges would be a specialist in criminal law and the other civil law and possibly the other in non-jury or opinion writing. This committee of three to five judges in each of these areas would sit down and set up an outlined program of what they would do and then each time a new judge is appointed, individually or in group sessions, they will take this new judge in tow and orient him on what he has got to do. I do think it is better to do it one or two at a time than in group sessions, because in group sessions, just like a judge is hesitant to ask a question with seasoned judges around, so would a new judge appointed be hesitant to ask a question when another newly appointed judge is around. "What kind of a damned fool are you? You do not know that? You are a judge already?"

Done alone in the presence of these three or five men, or maybe one at a time, who will orient them on the separate responsibilities, you won't have this. We don't have to go anyplace else. You have got the men to do it. You don't need anyone to help to do it.

CHIEF JUSTICE WEINTRAUB: I am a little bit concerned about the logistics involved when you are going to assemble your faculty for one man. Frankly, north or south Jersey doesn't bother me. We are a small state. I think that the participants would not be terrified at the suggestion that they meet in the evening and spend a night or use a Saturday or some night.

JUDGE FUSCO: You don't assemble the faculty all at once. One man at a time.

JUDGE WAUGH: May I say first that I am intrigued by this luncheon. I always said that in Essex County there is more information given

out at lunchtime than any other time. There is an organization as Judge Halpern has suggested, and many New Jersey judges have attended these discussions, and it is my opinion that most of them are tremendously happy with the result and have gotten a good result. I am sure that the National College would be interested in such a program. The program was run for three years with money given by the Kellogg Foundation, and now the Fleichman Foundation has given a ten year grant. I think it is of some two or three hundred thousand dollars a year. I am sure that Judge Hine, who resigned from the Missouri Court and became Dean of this College would be glad to consult with our court administrator about the possibility of telescoping this for the benefit of all these new judges that we are going to have and perhaps work out a program that could be done in perhaps a week or a shorter time. They have very good notebooks and plan books, and I am sure that it would be helpful.

New Jersey has always cooperated by sending at least four or six fellows out each summer with four at Boulder this year, and I think three at Reno. I think about ten or twelve fellows from New Jersey have already done this, and they can give you some idea of how successful it has been.

CHIEF JUSTICE WEINTRAUB: I have gathered that you feel that drawing upon the personnel that has participated in the annual meetings, either as members of the faculty or as students, we could set up one here to take into tow all new judges as they come in and orient them?

JUDGE WAUGH: I think they would be willing. For instance, Justin Smith, who is on the staff there, I am sure that he would be willing to come in and try to help organize it either with judges from New Jersey who have attended, or Appellate Division judges. The one that Judge Gaulkin spoke about is that each member of the Supreme Court presided at one of those sessions at the Downtown Club when we all met.

CHIEF JUSTICE WEINTRAUB: That was before I came on the bench, because nothing like that happened to me.

JUDGE WAUGH: That happened to me, because I can remember Judge Hare, Wachenfeld and Justice Brennan.

CHIEF JUSTICE WEINTRAUB: How long did that last, do you know? Probably not too long.

JUDGE WAUGH: It was way back in about '56 or '57.

CHIEF JUSTICE WEINTRAUB: No, it was before that, because I came on the bench in May of '56, and everyone said hello to me, and that was about it.

JUDGE KOLOVSKY: How to handle the basic problem is how to handle the individual judge who is appointed during the year. As I see it, the program that Judge Conford and Judge Gaulkin and Judge Waugh spoke about is

something that is a matter of pure physical facilities. You won't be able to do it more than once a year. It seems to me that there is no alternative but that in the interim the assignment judge give the new judge a little on-the-job training. The practice varies in counties.

It seems to me that an assignment judge seeing a new judge come in could figure that he didn't get the judge until a week later and let the man actually sit with the various judges in the courthouse for a period of a week or two weeks or whatever he needs. The time is well spent. That is about as much as you can do with a new man, plus to talk with other people until he gets oriented. To try to build up some kind of a course to treat the one or two that have been appointed at one time is impossible. It is a fact that in some counties the practice has been that the new judge is told where his courtroom is and that is all he gets. He gets a case. I think it is wrong.

CHIEF JUSTICE WEINTRAUB: I agree with you. I think they used to break in a new judge by having him sit three or four or five days with another judge. That ought to be done.

JUDGE CRANE: As Alex Waugh pointed out, there are several of us who attended the National College of Trial Judges with profit, I think. I think the suggestion that we have some kind of a course set up is a good one. I am sure the College would cooperate in establishing such a course.

I think it is of sufficient importance to set it up for a week's time, and, if necessary, to take that Court time and set it up at some central location.

There is another need, too, and it seems to me that it is a need for some kind of a manual or compilation of proceedings, directives, a convenient place for judges to be assembled. I think the work of the committees that have developed the model charges perhaps could be incorporated in such a manual, or perhaps a separate manual could be devised and then, together with the discussion that Judge Kolovsky made, there would be some kind of an orientation. I think that every new judge has felt a sense of inadequacy the first time that he ascends the bench and has to really do the work of the judge.

JUDGE ARD: Chief, I was at Boulder in August, and they distributed a tremendous amount of reading material. Now, I am thinking about the immediate problem of the appointee. Certainly, it doesn't sound feasible that we could have a course each time that a man is appointed, but I do believe that you could prepare a kit of reading material. I sent home forty-two pounds of reading material by Parcel Post. Out of that, I think you can prepare, in line with what John stated, a real manual that he can use immediately that will orient him and put him on the right track.

CHIEF JUSTICE WEINTRAUB: Any other discussion on this subject? All right. Now, what else would you like to talk about? There must be a

lot of problems.

JUDGE PASHMAN: Just to support the filibuster, a rule occurs to me that perhaps can bear on some discussion this morning. I am referring to a post-conviction problem. In one of the recent decisions of the Appellate Division, the name of the case escapes me, but I think it is Marshall, the observation is clearly made that the first time around every defendant is entitled to counsel as a right pursuant to the rule. Second and third time they arouse some element of discretion to the assignment judge, if he handles it. In Passaic County I handle the post-conviction following the procedure there for four or five years. I have found that so many of these applicants the first time around are just empty gestures. Truly, there is nothing there. You don't need any special vision or determination to know that nothing is going to happen. Query: Would you suggest the advisability of reviewing this rule to the end that the same discretion that you give to the assignment judge or to any judge the second and third time around, should you not vest some discretion in the first time around? I know that this has resulted, of course, in many motions to dismiss by the prosecutor on motion days. Everything about it in so many cases points to the fact that we are going through a lot of shadow-boxing and a lot of idle gestures because there is nothing there.

CHIEF JUSTICE WEINTRAUB: I think that probably what underlies the idea of furnishing counsel on the first application was the thought that the prisoner is required to press the first time around everything that he can press, and I imagine that the thought was if he had a lawyer who sat down and talked with him, he would explore not only the empty petition that you get, which may be in the form of a letter, but he will find out if there is anything else and bring it all in and you are through.

Now, I think probably that was what was behind that thought. It may be too expensive. With time and experience we might shift from it. In the meanwhile, if we get the Public Defender or something resembling it, it may solve part of that problem. I don't know.

I suppose I ought to tell you that I have a bulletin. Our speaker's plane arrived at 10 a.m. and he is now on his way to Princeton. I think that we are doing an excellent job of filling in the gap. One more topic and I think that will do it.

JUDGE ROSEN: I might be invading a prohibited area, Chief, because it is an administrative problem. But based upon my limited experience, it seems to me on appointments on new judges, particularly on the county level, not to place them in the criminal division in view of the laws and decisions that we have in this state and the everbroadening aspect of our interpretation of the Constitution. It occurs to me that a man who is appointed immediately should not be placed in the criminal division until such time as he has a chance of becoming oriented to his problems and becomes indoctrinated in the field of criminal law. I think that perhaps by doing that, it would be a more expeditious disposition of criminal cases in many

counties. I throw that out for your thought.

CHIEF JUSTICE WEINTRAUB: Anything else? All right. Suppose we take about a ten minute recess. He ought to be here by then.

(Recess.)

CHIEF JUSTICE WEINTRAUB: As I informed you earlier, Dean Hawkland had the misfortune of tangling with air problems and was delayed. We finally managed to get him here, and we are happy that he is with us.

We have as a topic today the Uniform Commercial Code, and it is on the agenda for the reason that some of us suspect that some of us know much too little about it. It is an extremely important statutory development. I am afraid that some of us may not be aware of what might be found there, and that cases might very well be decided in ignorance of some pertinent provision, putting it very bluntly. I think that is the situation.

We were very happy when Dean Hawkland, who is an outstanding authority in this field, agreed to come here and guide us through this seminar.

Dean Hawkland, as most of you probably know, taught at Rutgers and was on the New Jersey Uniform Study Commission and has written very extensively in the area of commercial transaction and teaches commercial law with emphasis on the topics that the Code covers. So, he will bring us a wealth of experience in this very important field.

My pleasure to introduce Dean Hawkland to you.

DEAN HAWKLAND: Thank you very much, judge. Let me start by apologizing for being so late. I will take half of the blame. The airplane I was on circled around Binghamton this morning for some reason that I didn't understand. We were scheduled to stop there, and it was fogged in, and there were only about four people on the plane, and we got into Binghamton and picked up a full load. They didn't want to lose that revenue. When we got to Newark, one of your representatives met us at the airport, but couldn't find his car at the parking lot. So, I say I will take half the blame.

Since we have only got an hour before lunch, I thought that I might use it in giving you sort of a birdseye view of the entire Commercial Code and then this afternoon maybe we could come down a little closer and zero in on some of the important topics.

As you know, this is a Uniform Commercial Code which presently forty-five states have adopted. There is good reason to hope that all of the states in the Union will soon have it. There is some possibility that the State of Louisiana will not pass it because their own civil code has provisions which would have to be drastically altered to conform the language of that code to the Commercial Code. I am not sure what their technical

difficulties are, but I am told but that for Louisiana, chances are that all the states will have it, and probably within the next two years.

New Jersey was an important state as far as this Uniform Commercial Code was concerned. I will tell you a little bit about that in a minute, but New York, particularly, has resisted the Commercial Code and has succeeded pretty well in blocking it around the nation except for New England States and Pennsylvania, and brought a great deal of pressure on New Jersey to prevent New Jersey from passing it.

When the New Jersey legislature, in its wisdom, and I think it was a wise day, passed this Commercial Code, it more or less opened the flood gates. I think people realized if New York couldn't control New Jersey, and many people sort of looked upon New Jersey as a satellite to New York, anyway, they weren't going to control Ohio and Illinois and Michigan and all the rest of them.

You have seen the table of adoptions of the Commercial Code. You will see that after New Jersey picked it up, immediately the big commercial states running west of here, that is, Ohio, Michigan, Illinois and so forth, right on down the line, adopted it. Once they adopted it, then the other states got into it as well. So, what happened in New Jersey is very important.

Let's take this birdseye view and we will talk about that. The Code, as you know, is divided into ten parts, and they are called articles. Altogether the articles are subdivided into about four hundred sections. So, it is not as big a package as a lot of people would pretend. It is only about four hundred sections. Of these ten articles, eight are substantive. There are two that contain very little substance.

Article one is an article of general definitions and general principles. Rather interesting statutory technique was used in drafting the Commercial Code. Rather than repeat over and over again certain basic principles such as good faith and reasonableness and this kind of thing which overlay all commercial concepts and all the rules. Rather than in every single section saying that the parties must act reasonably and in good faith and so forth, these principles were set out at one time in article one and they are incorporated by reference, so to speak, in every other article in the Commercial Code.

You are going to make a study of the Commercial Code and you don't want to start with article one, because reading the provisions of article one you will see just a bunch of definitions which, standing alone, are almost meaningless. Then you will run across these general principles which, standing alone, will seem to you to be almost meaningless. They stick out there in meaning only when you put them into the context of the various sections which they modify.

On the other hand, no problem under the Commercial Code has been completely resolved. No research was completely done until you go to article one, I think in cases you always should keep that in mind.

There may be a definition in article one that changes things a little bit, or there may be a general principle in article one that will drastically alter what appears at first blush to be the solution to the problem. So, you always must go back to article one before you are done with the research.

Article two is the longest article in the Code and the most radical, I would think. It is the article on sales. Article two completely repealed the old Uniform Sales Act and the common law sales that New Jersey had.

It is the longest article in the Code. It consists of one-hundred and four sections. As I told you earlier, there are four hundred sections in the Code. So, measured in terms of sections, article two is about one-fourth of the Code.

Explaining that to the legislative committee in New Jersey, one of the legislatures said, "Well, there are sections and there are sections. Some are long and some are short. I would like to know just what percentage of the entire code is involved here, measured in terms of something other than section numbers of sections." He proposed that one of our first scholarly tasks in studying the Commercial Code for the legislature would be to count the lines of type in the entire Code and then count the lines of type in article two and give him the fraction that resulted. We did this and we found that article two consists of thirty-one percent of the Commercial Code when measured in terms of lines of type. Measured in terms of sections, about twenty-five percent.

There was some opposition among some legislatures and other interested groups when they found out how large article two was, or how long it was. Why do we have to have such a long sales article was the question. Inferentially, these people seemed to say, and sometimes they said it, "We prefer the shorter and the inferentially better drafted Uniform Sales Act. If you can get everything into the Uniform Sales Act that is in the Uniform Commercial Code in half the sections and half the lines of type, then what kind of progress is this in getting out this monster in article two." This was the main objection that we got on article two.

Our study in New Jersey indicated that something like forty per-cent of the cases the New Jersey Courts had handled which could be fairly characterized as sales cases were not being decided under the Uniform Sales Act. That is, there were no rules of law in the Uniform Sales Act that could serve as major premises that is worked out in a judicial opinion covering the sales problem.

In other words, in about two cases out of five, which you could fairly characterize as a sales case, the judges were forced to go to contract law, equity law or some other body of law to get their answers. This made research very difficult and it has made the judicial process somewhat uneven, because when you have got before you a case which clearly seems to be a sales

case, but there is nothing in the statute on it, you start looking around and who knows where you will end up. You may end up someplace different from where another judge may end up, and lawyers, of course, have the same problem.

What article two has done, really, is add about forty percent to the Uniform Sales Act, and what it has added is the material that used to be in our common law sales.

So, it is now much easier to research a sales case under the Uniform Commercial Code because you can find answers right in the Code on almost any kind of a sales problem that will come up. It is a much more complete statute, and I think the strength of article two is its length. This is not a sign of weakness at all. It is the real strength of the article.

Well, as I said earlier, it is a radical statute. In some respects, if there is anything in the Commercial Code that is radical, it will be found in article two. This has excited a lot of people. I will talk a little bit more about article two this afternoon and point out to you some of the provisions that have caused concern.

Article three is the article entitled Commercial Paper. Really it is the Negotiable Instruments Law. It is the old NIL brought up to date. There was a decision to change the name from Negotiable Instruments Law to Commercial Paper, because, you know, the NIL had been construed to cover some investment securities such as bonds, interim certificates and the like. A corporate bond, to be negotiable, had to conform to the Uniform Negotiable Instruments Law. This decision which came down from the New York Courts in the 1920's and gradually swept across the country was pretty tough on companies writing bonds because the formal requisites of the negotiability as set out in the NIL are very rigid and very flexible.

As you know, a great number of lawyers had spent their lives doing nothing but writing corporate bonds. It is a real art to draft a corporate bond that is negotiable on the one side and protects the obligor and the investors on the other hand. To make it crystal clear that article three on negotiable instruments and commercial paper was not to cover investment securities and the like, we changed the name to Commercial Paper and then we set out a separate article, article eight, which is entitled Investment Securities.

The bonds can be negotiable, but its negotiability now is tested by a somewhat more relaxed standard which is set out in article eight. Article three makes it clear that it covers only checks, drafts and promissory notes. It is covering the short term money paper and not the long term investment paper.

Unlike the N. I. L. or unlike the Article 2 Sales Act, Article 3 is much shorter than the N. I. L. The N. I. L., as we know or may know, is 198 sections in length whereas Article 3 is only 79 sections in length. Article 3 doesn't make very many substantive changes in the law. If you understood the N. I. L. and were comfortable working with it, you won't have any trouble at all, I think, with Article 3.

What Article 3 has done is basically rewrite the N. I. L., simplified it, consolidated it and made it more efficient. We cut it down as a result of the 79 sections.

The preliminary problem with Article 3 in New Jersey at least was that it didn't make very many changes in the N. I. L. The N. I. L., as you know, had been adopted in every state of the union word for word or practically word for word. It had achieved uniformity with the N. I. L. At least all the legislatures have passed it.

In trying to sell the Uniform Commercial Code to the New Jersey legislature the uniformity was hit very hard. Of course, it wasn't a strong argument at the time because only a hand full of states had followed the Uniform Code; Pennsylvania, Massachusetts and New Hampshire, and that would be about it. Additionally, you were open then to the counter argument, "Well, if you really want uniformity, you ought to stick with the N. I. L. because every state in the union including New Jersey has got the N. I. L. And what do you say to that?"

This was the problem we had with Article 3 and when we answered, "Well, we aren't really making any substantive changes. We give a lot of force that we should have given the N. I. L. as the Negotiable Instrument Law." The thing we thought that was wrong with that argument was that the N. I. L. uses its own terminology and one great advantage we thought that the Uniform Commercial Code would have would be that it would have a consistent terminology. We don't have ten different statutes, we got one statute that uses the same terminology throughout.

You see, a word in one article, it will mean the same as the same word means in another article and all of these words are defined, as I indicated earlier, in Article 1. This would mean, if you put in as your Article 3 the old N. I. L., that you would have to change all the language of the other articles of the Commercial Code to conform to the N. I. L. language or you would have to change the N. I. L. to conform to the language of the other articles, and basically what has happened to Article 3 is that it simply has been put into new terminology so as to conform

itself to the other articles.

Somehow words and the like which make it consistent with the sales article, the security transaction article and the investments security article and the like while maintaining the old principles in the law.

Additionally, the N. I. L. had not been drafted very well. Despite the great claims that were made for it, it was not a great work of art. There was a good bit of duplication. Five different terms, for example, were used to describe the situation of where various notices, notice of dishonor and the like were dispensed with where actually there are only two concepts of dispensation that are operative. There was a good bit of overlap in the theories and the like and by consolidating all of these things and rewriting we were able to make it more efficient and cut it down to the 79 sections.

Furthermore, although every state in the union had enacted the N. I. L., we found when studying for our legislature here that of the 198 sections there were substantial splits of authority in over 80 of the sections. Different courts had looked at the same language differently and I suppose this is inevitable to some extent. The Supreme Court of South Dakota is going to look at a commercial problem differently, probably, than the Supreme Court of New Jersey. They have got a different economic situation out there, they have got a different background, different training as Judges, different orientation and the like and inevitably you are going to get some kind of differences, but if we kept the N. I. L., what we would have done would be to perpetuate the splits in authority.

With the Code, we start afresh and at least on the surface all the states are alike. In addition, we learned alike from these splits of authority. Why should a South Dakota court hold differently on a negotiable instrument problem from a New Jersey court. Frequently, it was found that the language of the N. I. L. was really to blame. It wasn't clear enough, it wasn't mandatory enough in its sweep. It didn't give the court enough. It didn't reflect the problems, the basic differences between the courts.

So by learning where the courts differed in the past, the draftsmen were able, at least they tried to amend their ways and write a statute which would make it clear and one gratifying thing which the Commercial Code has shown us so far was that it relatively reduces the splits of authority so it seems to be working out very well.

Article 4 is an article on bank deposits and checks. In New Jersey it wasn't an important development, but in most states it was an extremely important development to have, this Article 4. New Jersey had, fortunately, the banking community and others come out with a very comprehensive bank statute at an earlier time so we had law governing the bank-customer relationship. We had statutory law on when a customer could stop payment on a check and whether an oral stop payment order was good, for how long it was good and all this kind of thing that many states had no law on at all. The only law that they had was developed on a case by case basis and frequently an effort to do it contractually by elaborate provisions on the deposit slip and this kind of thing.

As I say, New Jersey had most of this covered in statutory form and those of you that are familiar with the banking laws of New Jersey would be interested to know that Article 4 was based primarily on the New Jersey experience. I think New Jersey had the best banking law in the entire country and the draftsmen surely borrowed very heavily from New Jersey in writing Article 4. This was a very good development for those of us who were interested in getting the Commercial Code passed in New Jersey because immediately it got the banking interests on our side. As long as they found out that their own law which they sponsored worked through the New Jersey State Banker's Association and through the legislature and the like was being picked up and used, they were somewhat more interested in the Code.

Article 5 is an article that you won't see in operation very much, because it's an extremely important article, at least in the political sense. It was the stumbling block for the whole Commerical Code.

Article 5 deals with letters of credit. A letter of credit, you may not be too familiar with it because up until the Code was passed there were no banks in New Jersey that were writing letters of credit. They were just not involved in this business at all.

A letter of credit is a device which insures a foreign seller, usually, that he will be paid if he ships his goods on over. Take a situation, say, a Parisian that's selling $500,000 worth of wine to a Newark distributor. The Parisian may not know the man in Newark too well. The man in Newark doesn't know the Parisian too well. Credit information on the two is not too satisfactory.

The Newark operator doesn't really get a good line on the Parisian. He may know what his financial standing is, but he doesn't really know his modus operandi, whether he is a corner

cutter and this sort of thing. The same sort of thing is true on the other side of the ocean. The Parisian is curious about the nature of the customer with whom he is about to deal. The Parisian, therefore, would probably want cash or at least some assurance that he is going to be paid.

The Newark buyer on the other hand, wants assurance that the wine is going to be sent over and that it is what he ordered; that he doesn't get vodka or he doesn't get ferment when he orders sherry or what have you.

How do you get credit? The letter of credit developed and what it is is the Newark buyer would go to his own bank. His own bank knows him, knows his financial position and so forth, and he would have the bank write a letter of credit and a letter of credit are words to indicate simply a letter the bank writes to the Parisian saying, "Dear Sir, if you will send a bill of lading showing that you have loaded "X" number barrels of wine or whatever, and it's accompanied with invoice, maybe a Marine Insurance policy or whatever, whatever your conditions, and you attach a draft to it in the amount of $500,000, we guarantee you that we will pay the draft."

The draft is then sent to the Newark bank. It's not sent to the customer. They check to see if all the documents they requested are present. It's a routine bookkeeping kind of thing. The banker doesn't have to get out of his chair and case the wine or anything like that. If the documents are in order, they pay the draft.

And the Parisian is very happy. He knows the bank will make good on these things. The customer in Newark gets good protection because he knows the bank won't pay if these documents aren't in order. He knows the bank will check it over carefully and he knows the Parisian isn't going to give the documents unless it complies with the draft, with the bill of lading and whatever.

The banks are charged with writing a letter of credit one-eighth of one per cent of the face amount of the draft. That would mean for a $600,000 draft, to change the hypothetical slightly, the bank would charge $500 for writing a letter of credit.

In other words, the bank has to put up $600,000 of money to earn $500. You have to be awfully sure of yourself before you will do that. One-eighth of one per cent, if my arithmetic is right, of $600,000 is $500. That's the price for writing a letter of credit.

The banks in New Jersey didn't write letters of credit. Indeed, they didn't around the country. As far as our study for the legislature, we surveyed the commercial banks of the United States, we surveyed 14,000 of the 15,000. We found of the 14,000 fewer than 100 had ever written a letter of credit and only 25 were doing it on a regular basis and out of the 25 there were about 3 banks that had 95 per cent of the business. Two of the three banks were in New York City, the Chase Bank and the National City Bank were the big letter of credit writers in New York City and on the west coast the Bank of America was writing them. Those were the three big banks. Practically everything coming in from Asia, the letter of credit would be written by the Bank of America. All the stuff coming in from Europe and Africa and that area of the world, the two New York banks were handling.

Now, another interesting fact is about 90 per cent of the stuff that is imported have letters of credit. So what we are dealing with here is a billion dollar industry. You could put those facts together and come to some interesting conclusions. The New Jersey banks wouldn't write letters of credit. Why not? Because they had no experience with them. We had no statutory law in New Jersey. There was not a single case in New Jersey in all of our long history dealing with letters of credit, so any bank that wrote a letter of credit in New Jersey, put up the $600,000 and earned its $500 fee would be running a terrible risk that the court would handle the problem correctly if they did get a dispute.

How about the New York banks? Well, the New York banks through luck or pluck or whatever over their hundred years or so of doing this business had gotten into court a number of times and had all of these legal points resolved. Furthermore, the New York courts had been educated pretty much to the fact that the letter of credit requires a high degree of stability. This isn't the kind of area where you want to make radical changes over night. The New York courts realized that and were holding very firm to its conservative principles. They were going right down with their cases. The banks of New York could with great assurance write a letter of credit and know exactly what the law would be.

The banks of New Jersey had no such assurance. Few banks that had tried letters of credit in other states--Virginia, for example, a bank wrote a big letter of credit. They got into a dispute. The Virginia court mishandled the case, ruled against the bank in a case where the bank should have prevailed. This is the kind of decision that scared the banks off.

The New Jersey court probably would have handled, I believe,

being one of the best commercial courts in the country, I believe, New Jersey would have handled the case very well. And I used to tell my students when I taught in Rutgers, "If you ever get a bank as a client, try to get a letter of credit because I think we have very good courts. The bank may only be out $600,000."

What the Uniform Commercial Code did was to collect 17 sections. It's a restatement of the law of New York. This would make credit law available to all the states of the union. While they were apt to talk about other sections, they didn't like the sales article or they didn't like this, that or the other thing, the real objection stemed from the fact that they were going to lose their monopoly over the letter of credit field that the Uniform Commercial Code has. This is pretty clear because once it became apparent that the Uniform Commercial Code was going to go through in a great number of states around the country, the New York banks launched a mighty effort to have Article 5 deleted from the Code first making the argument that it didn't really belong in the Code; that this was sort of an international transactions kind of thing as opposed to domestic transactions. That is you are dealing at the international level and it would be bad enough for the United States congress to intervene in this area to say nothing of letting states get into the act.

Having failed in that argument, they then made sort of a jurisprudence argument that the letter of credit is an infant that's growing, that we shouldn't put it in a straight jacket, that we should go another hundred years and collect some more judical decisions on it and let the dust really settle, making an interesting argument for the Germans, who are great for codification. They have codified everything, the law of torts on up. They have not seen fit to codify the letter of credit. It didn't go over very well and all the states now have letters of credit and all the banks in New Jersey as well as other states are now writing letters of credit.

Why do they want to write letters of credit if they can only earn $500 on a $600,000 letter of credit? Well, the real problem, we ascertained in studying the matter, is not the fee of writing the letter of credit. The real fee is in making the loan.

You see, if you go to a Newark bank or a Trenton bank or a Camden bank or a Philadelphia bank and say, "I want to buy $600,000 worth of wine from a Parisian. I have one little problem. I don't have $600,000. What I would like to do is write the letter of credit, pay for the wine and then give me 90 days, 6 months or whatever, and I would sell the wine. I could sell it for $1,000,000.

I could surely pay you back your $600,000 and I would have a little profit, myself, on the deal."

Most of the importers are, like other businessmen, involved in credit. They want this transaction financed. If you go to a Newark bank, the Newark bank would say, "We would be glad to make the loan for you, but we can't write the letter of credit. We'd have to send this over to Chase or over to First National City."

And once you tell a customer that, he is dealing with you on a million dollar level. He's apt to go over to Chase, himself, and let them handle it one easy style and he gets all the jobs done and Chase ends up not only writing the letter of Credit, but making the loan.

So some of the biggest customers that the state had were borrowing on income transactions not from New Jersey banks, but from New York banks.

In spite of all this, the New Jersey banks have been pretty well brainwashed. They've been pretty well told by the New York banks that the Commercial Code wasn't a fair Code. For one thing, Article 4 contained a novel provision on subrogation which I'll talk to you a little bit about this afternoon. If there is anything a bank doesn't like, it's novelties.

The second thing is subrogation. That sounds like an evil thing. When they found there was a provision just like it in the New Jersey statute which was being displaced by Article 4, that the subrogation business came out of New Jersey, was a creature of New Jersey legislature, they cooled off a little bit, but it took some doing to bring these people around.

Article 5 is the big stumbling block, and I think now that we have it on the books and the New Jersey banks are writing letters of credit, you will probably see some of these cases in your area. I would implore you, if you get an Article 5 case, not to experiment. I think here is the area where you have got to be conservative. The banks need a straight reading of that Article 5. The policy is pretty well worked out. That one-eighth of one per cent, that economic fact shouldn't be over looked. They are writing these things for a song. They are putting up an awful lot of money and if you want to do the banks in, don't do them in on Article 5. You get them on Article 3 or Article 4. I would suggest a conservative attitude.

Article 6 is the article on bulk sales. This article completely repeals the old Bulk Sales Act of New Jersey. It's a

short article, the shortest of all the articles in the Commercial Code. It's only 11 sections long, rather easy to read.

I think of all the articles of the Code, however, it is the poorest drafted. It leaves open a great number of questions and New Jersey courts like the courts of other states are going to have to wrestle with many of those questions, so this afternoon, time permitting, I would like to go through Article 6 with you and tell you some of the difficulties I think are going to come up and have been coming up, and perhaps suggest to you some ways in which they might be handled.

Article 6 does have an interesting provision: 6-106 is the section number which requires the transferee of a bulk sale, namely the buyer, not only to make known the sale, but to apply the proceeds. The sales price is no longer handed over to the seller. It is distributed on a pro rata basis to the creditors. Assuming there is not enough to pay all of them, you can make a pro rata decision. You pay them all off and then give the rest to the seller.

This is a device that is designed really to take a lot of pressure off from lawyers. I think it does give creditors protection, but the real reason that that went in was not that anyone thought that creditors needed more protection. Indeed, there was a fairly serious argument in the State Bar Association about the whole proposition of bulk sales statutes. It seems rather anomalous.

We have many situations in which a person with an imperfect title to goods can, nevertheless, convey a perfect ownership; the estopel situation, the avoidable sale situation.

For instance, if you entrust your goods to a dealer under limited authority and he exceeds the authority, he still may be able to pass a perfect title on the buyer. We have many situations in which sellers with imperfect titles can make perfect titles. This is one of the rare situations in which someone with a perfect title is disabled. He is not able to even give a good title.

We have a man selling shoes on the corner of the street. He owns the shoes outright 100 per cent. He has a lot of creditors, but they don't have any lien on the shoes. They are not security creditors, they are just general creditors.

Granted they are glad when they drive by the shoe store that he is still there and he's got shoes in the window and they say to themselves, "If he doesn't pay up, I'll go to court and I'm going to get a judgment. Thank God he's got some shoes and I can move in on him."

Nevertheless, he sells these shoes to a party that personally takes subject, too, to the creditors. So then we wonder maybe we ought to scratch this sort of thing. Why should the creditors have more rights against the buyer than the seller? Why shouldn't they move in and protect themselves? This is a risk they run. Anyway, one argument went, "We got too much credit in society. These people encourage people to load up and then they run to the legislature and want protection because they don't on credit and so forth." Too there is a lot of sentiment for getting rid of the thing altogether; no sentiment that I could detect at least to give the creditors more protection.

One thing I found was that lawyers were constantly getting cases in which their client, a creditor, had been notified that a bulk sale was about to be made. Remember, under the old New Jersey Bulk Sales Law a seller was free to sell his goods to the buyer and he prepared a list of his creditors and gave them to the buyer. And now the buyer sends a notice out, "Take notice that on September 10 we are going to have a bulk sale. I am going to be buying and paying so much and so forth."

And the creditor gets this notice and he runs to his lawyer and says, "I just got this notice. What do I do?"

And lawyer says, "I'll have to research this thing." He starts researching and it's a difficult thing. His client isn't in a position where he can get a judgment quickly even in New Jersey, which is a state with solitarity for getting cases disposed of quickly. Unless you get a confession of judgment clause which may not be honored, anyway, you can't get the judgment that fast.

Can you attach? Well, you have to satisfy the statutory grounds for attachment, which usually means you have got to show he is up to some wrongdoing, that he's going to secrete his assets or get out of the state, and, of course, they're swearing up and down, "I'm just selling to this fellow."

"Well, how come you took spanish lessons?"

Come the next day, the guy who made the sale heads for Mexico.

Well, the research may end in a fault by the law professor or someone saying, "Gee, professor, I've got a lot of these. What do we do in a case like this?"

There isn't anything to advise. You advise you go down to the sale and hang around and maybe someone will give you some money. So the lawyer advises him, "Why not go down to the seller and hang around any maybe he'll pay you some money?"

So the man doesn't pay him anything and leaves the state and then the creditor said, "Why did I get this notice if I can't do anything about it?"

What 6-106 says is to require the transferees to apply the proceeds. Now, the lawyer is off the hook. He says, "Don't worry, he is not going to pay that money to the seller who will then run off to Mexico. He is going to divy it up among the creditors and you will get your pro rata share."

And this does end up giving the creditors a great deal more protection than they had and also gives the lawyers something they didn't have and the Bar Association is enthusiastically behind that particular development.

Incidentally, 6-106, if you look in the Uniform Commercial Code, is bracketed to indicate that the draftsmen were giving the legislature an option. Of course, the legislature always has an option on any section, but what the draftsmen are saying is, "You can take this or leave it without hurting our feelings. You can put this in on an optional basis."

This is because Pennsylvania had such a law in the past. Other states, of which New Jersey is one, did not have this section. Probably something was said for either one or the other and it wasn't important for our motions of uniformity. Rather than hang up the court as to whether we should have an option of proceeds rule, it was decided to put in either provision.

Every state had opted for its previous procedure. That is Pennsylvania had had an application for proceeds rule so Pennsylvania had decided to go along with it. Massachusetts, on the other hand, had not had such a rule and Massachusetts, therefore, decided to omit 6-106. When it came to New Jersey, the lawyers got into the act and pointed out the real problem is not protection of creditors. This is what they talk in law school and so forth. The real problem is the protection of the lawyer giving us something here.

We in New Jersey recommended 6-106 and the legislature went along with it.

After this happened in New Jersey, then the myth that 6-106 was just to let the State do what they have done before, that myth was exploded and now the states around the country are at least studying 6-106 to see whether a change might not be indicated.

6-106 has found fairly good acceptance. If the state takes it in, you can almost bet that it was as a result of the lawyers who

have been heavily involved in the presentation of the Commercial Code. If they don't take it in, that means that bankers or someone else less interested in the lawyers' day to day problems are interested.

Article 7 is like Article 3. It makes few substantive changes. It's the article on documents and title. It completely replaces and repeals the old Uniform Warehouse Receipts Act, the old Uniform Bills of Lading Act. Like Article 3, it consolidates the provisions of those old acts. It makes them conform, their language to the general language of the Code and without very many substantive changes at all giving us basically the Uniform Warehouse Receipts Act and Uniform Bills of Lading Act substantive law.

The carriers and warehousemen in New Jersey were enthusiastic about Article 7 and so were their backing and there were no problems at all. There are a number of interesting and important developments that have taken place in the storage and transportation industry since the Uniform Warehouse Receipts Act-Bill of Lading Act were promulgated and Article 7 does bring into law some of these changes so the carriers and warehousemen were very pleased to have it.

There are some substantive changes only in the sense that we now validate what these people had been doing, perhaps illegally, in the past. They were glad to get out from under some of the problems that were presented to them.

To give you an example of one kind of situation that Article 7 deals with, there's an illustration of what it does, there's a provision, 7-305, that permits a carrier to write a bill of lading at its destination point. There was no such provision under the Uniform Bills of Lading Act. Indeed, it was thought when that bill was promulgated that there would never be an occasion for that to happen. The Uniform Bills of Lading Act was drafted in 1906. That was before the airplane, and in those days you would be hard put to imagine a situation where a carrier would want to write it at the destination point. They would always write it at the origin point.

And the thing was that carriers would put it on the boxcar or truck or whatever. Once it's in there and counted, then you would write the bill of lading which acts as a receipt, a contract and also a document. If negotiable, the person who controls the document controls the goods because the contractor does not surrender the document unless he gets the goods.

But you can't receipt for something until you have got it and so forth, and that's the way they felt it should be.

Now, you take a modern problem. Suppose a man thinks he could

sell $10,000 worth of orchids the Saturday before Easter Sunday, for example. Orchids are grown in Honolulu. Orchids are perishable. Now he's got a problem.

He says, "If I can get the orchids in here quickly, I don't want them in Wednesday or Thursday or Tuesday because they may spoil on me, but if I could get them in, say, on Friday night so I would be ready to go Saturday morning, I can turn over $10,000, $100,000 worth of sales. I've got to have them right then."

And he orders them from a fellow in Honolulu. Now, the man in Honolulu says, "I want assurances that I will be paid."

A letter of credit has never been used in domestic transactions, although it can be handled, and I think the best way is Article 5, and that may be the way we'll do it in the future--but the best way to handle it would be for him to ship under reservation. That is he loads it on the boxcar or airplane. He gets a bill of lading payable on demand, on sight.

He sends the documents through bank channels. The bank in New York has both papers. They say, "Here's a draft on you for "X" dollars. You pay the draft and if you do we give you a bill of lading, and if you don't pay the draft, we won't give you the bill of lading and if you don't have the bill of lading, you can't get the orchids."

The only problem is that you can't get the documents through fast enough to do this. You load the plane Friday afternoon. How the dickens are you going to get the documents out to New York in time to present them?

What the banker needs and what the shipper needs is a little head start and so he goes to American Airlines a week in advance and he says, "Look, a week from Thursday I'm going to be shipping to a fellow in New York $10,000 worth of orchids and what I would like is a bill of lading stating that I already shipped them."

Well, the carrier says, "Gee, we shouldn't write a bill of lading until we ship them. It's illegal."

"Gee, there's Flying Tiger. We can do it that way so Friday morning we could ship the orchids and we could test his good faith at least."

So on that kind of pressure you get reputable airlines such as American Airlines writing bills of lading. Now, on 99 cases out of a hundred, the fellow really puts the orchids on the plane and then

through some sort of thing, feeding the estopel and so on on a nunc pro tunc basis you get the one case in a thousand where he didn't get the orchids on board. Anyway you get the poor guy who paid the draft and he's got the bill of lading and he's waiting for the airplane to come in and it's empty and you get a law suit.

Of course, American Airlines will pay, but when you read a case like that you are always mystified why would a company like American Airlines, I would ask my students, ever write a bill of lading when they didn't receive the goods. Well, their answer is they got an agent or something.

That isn't it. They didn't get to an agent and bribe him. They may in some cases if there is economic compulsion to do it.

Now, under the Uniform Commercial Code, that would be easy to do. American Airlines put the orchids on board. As soon as they are satisfied they were on there they would call their agent in New York and ask him to write a bill of lading. They could send all the way to New York, they could pin the two together and present them. The Chase Bank, for example, might have the draft. American Airlines could call its agent in New York, write a bill of lading receipting for "X" number of orchids and run it over to the Chase Bank by nine o'clock. So they run it over and pin the two together and present it the next morning. No matter how fast the jet liner is, it's not going to beat the telephone yet, at least and as long as it's done that way the telephone ought to work fine.

So this made that article very appealing since the carriers and warehousemen wanted to stay within the law.

Article 8, as I indicated to you earlier, is a special article, a new article dealing with investment securities. It isn't a blue sky law. It's not a little E.C.C. or anything like that. It's a law--it's really the Negotiable Instruments Law and it will make it possible now to write a negotiable bond even though the bond is 10,000 words in length and has sinking funds provisions, redemption provisions, tax redemption clauses and all the rest of it without offending the concept of negotiability as appears in the commercial paper section. You know, to make a promissory note negotiable you have to have an unconditional promise. This has always been the stumbling block. If you make a bond and conformed to the same requisites as the note, then how do you get these different things in?

As I said, a whole group of specialists developed in law to write these 10,000 word bonds and make them negotiable. The investment lawyers on Wall Street spent a great deal of time developing these techniques. That now is unnecessary. We realize that we have

an entirely different set of problems.

A person that buys a promissory note doesn't have time to investigate all the parties who may have signed it and the like. He is not buying it as an investment. It's a short time kind of lending arrangement in most cases.

On the other hand, the person that buys a bond is buying it for investment. He looks at a bond pretty much the way he looks at a share of stock. He will check into the company and so forth and the conditions he puts in there do not have anything to do with the negotiability. So Article 8 sets out a new concept of negotiability for investment securities.

Article 9 is the article that you have probably heard the most about and probably had the most cases under it. It's the article on security transactions. Lawyers are more excited by it than any of the other Code articles, although it's not, in my judgment at least, as radical an article as Article 2. It's radical only in that it displaced a great area of our law; it knocks out the Traditional Sales Law; it knocks out the Chattels Law; it knocks out the Trust Receipt Law; it knocks out the Law of Pledges, back liens.

All that is out the window and it's replaced with a new kind of security which has no name. It's simply called a security transaction. It's old wine in new bottles.

There is nothing in the old New Jersey laws that you cannot find--or there's nothing in Article 9, I should say, that you could not have found in the old New Jersey law. We borrowed from the chattel mortgage, we borrowed from the conditional sale, we borrowed from the pledge and so forth. We borrowed the best from all of these devices, but we haven't got anything new in Article 9 that I can see. It's a fascinating article and there is, as I say, a good bit of litigation on it because lawyers simply refuse to learn that we have a Commercial Code and they have to comply with it.

Most of the cases have been improper filing. So the lawyer says, "Gee, we always used to file the chattel mortgage here and I put this thing down there and the Clerk took my money and filed it and so forth and then it turned out it's the wrong thing. He should have filed it with the Secretary of State," which is the basic scheme in New Jersey.

We have, as you know, developed a central filing system primarily. A lot of the financing statements, the papers that were used to perfect the transactions are filed with the Secretary

of State rather than locally. Some things are filed locally.

Some lawyers, rather than learning which is local and which is central then follow the procedure of filing in both places. This only costs a couple of dollars more, anyway, and they have absolute protection. It's not bad advise, actually. When in doubt, I suppose, this is the thing to do.

I simply have said to lawyers, "You shouldn't be that much in doubt that often." There is something to be said, also, for saving the two or three dollars for the clients. Where it's crystal clear that this goes to Trenton, then there is no merit in filing it in Newark as well which a lot of them insist on doing. But filing has been the big problem for the lawyers under Article 9.

Well, I hope this afternoon we will be able to get back and review some of the articles and take a closer look at them.

JUSTICE WEINTRAUB: That was an excellent summary. I know we are all looking forward to this afternoon with great anticipation and I think we all realize there is a lot to learn about this very important statute.

I should say I see no statement from the New York bankers. The only person I heard who opposed the Commercial Code was the esteemed Governor of Tennessee. Is that correct? Why, I don't know.

A few announcements: One, luncheon for all of you will be upstairs in the Palmer Room and today you do not need the tickets. The assignment Judges, I will meet with them in the General Mercer Room on the Lobby to complete the discussion we have been unable to finish. It's a lot of work. We worked on it until nine o'clock last night.

Next, all Judges are expected to attend the annual dinner scheduled this evening. Those are the arrangements and I trust all of you will plan to be here.

Now we will recess until two o'clock.

MR. HAWKLAND: Gentlemen, I understand that the outline which I sent down has been distributed. It is somewhat more complete than many of you might have wished. I did realize that, even if my plane had been on time and the car would have been there to pick me up, and so forth, we could not get through all the sections of the code, and I thought you might want something to take back to your chambers with you in case you have some free time to study this code. This morning we took a bird's-eye view of the whole thing running through the ten articles that make it up. I thought this afternoon we might go back and look at some of the interesting sections in these various articles.

I would like to start with Article 2, which is on page 9 of your outline. As I said this morning, Article 2 is a very complete article on sales law, 104 sections in length, and extremely comprehensive. I think that is its main strength. Indeed, if you get a sales problem, be a little suspicious if you can't find the answer in Article 2, because it is almost impossible to dream up a hypothetical the answer to which cannot be found in Article 2. It is an extremely comprehensive statute. I am not saying you've got a hundred per cent coverage here, but you've got close to it. If you cannot find the answer, you better keep looking, because it's probably there someplace.

Like any comprehensive sales law, Article 2 must and does answer four basic questions, the first of which is: How do you form a sales contract? Secondly, after it is formed, what are its terms? Thirdly, how do you perform these terms? Fourthly, what happens to you if you do not perform? In other words, what are the remedies available for a breach? While Article 2 is subdivided into seven parts, really pedagogically the seven parts go to these four questions, the four basic questions.

How do you form a sales contract? If that question were put to you a few years ago before the code, you could very properly have answered that you form a sales contract the same way you form any other contract. This is not true now under the Uniform Commercial Code. When the draftsmen started their work on Article 2, they wondered whether indeed we were not painting with too broad a brush by making so much of the simple contract law applicable to sales situations, particularly in the formation area. There are contract rules that work well in special situations, say employer-employee situations. Would

such rules necessarily work well or at all in a mercantile situation such as sales? The draftsmen said, "Let's investigate this matter," and they investigated it and they found that, by and large, the simple contract rules on formation were working pretty well, but their investigation identified for them ten areas in which these rules were not working too well, and therefore ten special rules, special contract rules applicable only to sales, were developed. They appear in the two 200 sections of the Commercial Code. 2-201 to 2-210 are then these rules.

I can mention some of them. Some seem rather mild in a state like New Jersey that has pretty well developed contract law, but they may be less mild in other states. One rule that sort of indicates the draftsmen did have their eyes on a sparrow is this 2-206 (1): "If the offer is ambiguous, you construe the ambiguity against the offeror and form the contract along lines most favorable to the offeree." This has been a real problem. The offer and sales contract may take the form of a very terse statement, a telegraphic statement: "I want 100 units of goods X shipped Tuesday." This may leave the seller or offeree in a position of doubt. He does not know whether he is to ship to form the contract. The orthodox position had been that the offeror was the master of the offer, and it was up to the offeree to do exactly what he had to do, and if he did not do exactly what he had to do then we did not have a contract. What the code says is: We will construe the offer as inviting any kind of an acceptance as reasonable under the circumstances. Our study for the legislature indicates that this is no great change in New Jersey because we have case law stating here that you construe offers through the spectacles of the offeree. It is what an offeree sees and not what the offeror intended. It is really the heart of the objective manifestations that are in contract law, not what the offeror intends, but what he does, and what he does is measured pretty much by what the offeree sees.

Not all states had bought that point of view, and 2-206 brings it forward. As I said, there is no great change in New Jersey. There has been some change in the unilateral contract rules that have been difficult. Businessmen have gone to business schools and have been taught never to enter into unilateral contracts. Frequently I suspect their teachers

don't know why this is good advice, but it seems to be good advice and they urge them to do it. It's very good advice. What the Commercial Code tries to do is take some of the sting out of some of the formation rules that we had in the past in this area. One of the areas that has not been solved, although the draftsmen thought they solved it, is the beginning performance problem which is outlined on page 10. As you know, the offer to enter into the unilateral contract has been one of the very interesting concepts in law for a hundred years or so, and you can pose some really first class riddles with it. Some of these riddles have never really been resolved. In ancient days law schools used to teach the hypothetical "I will pay you $5 if you climb to the top of a greased flagpole." You may remember that kind of a hypothetical from your law school days. You have the man climbing and, just as he gets to the top, the offeror shouts, "I revoke", and under the old theory or the classic theory this was possible. The theory was you do not accept an offer to enter into the unilateral contract unless you do exactly what the offeror asks you to do, and if he asks you to get to the top and you have not done that yet, the second proposition is before an offer is accepted you can always revoke since he has not accepted because he was not at the top. You can revoke it and leave this poor guy in tough shape. This is an interesting hypothetical, and the student may say, "I doubt if I have any case like this when I get into practice." He has fun with it but does not see the practicality of it.

The practicality of it comes up in special manufacturing where the offer may be couched in language such as: "I will pay you $10,000 if you build me a machine, and I define the word 'build' as getting the last screw into place". You do not have this machine built until everything is done. Of course, it would be unthinkable to let this special manufacturer start working on that and, just as he is going to drive the last screw into place, say, "I revoke". So the law developed through Section 45 of the restatement of contract and common law that once the offeree had started in, the offeror basically loses his power of revocation. There is no acceptance really at that point. The offeree still has to go ahead and complete, make the formal acceptance,

before he can hold the other fellow for a breach, but the offeror loses the power of revocation. The trouble with that rule is it does not go far enough, depending on how you look at it, or it may have gone too far in striking the balance that used to be with the offeror in favor of the offeree. Take a marginal kind of transaction. The offeror comes to you and says, "I'll pay you $10,000 if you build a machine, and I define 'build' in such and such a way." Maybe it is a good deal for you, and maybe it is a bad deal, depending upon certain contingencies, how the market turns out, or whether you have a strike or whatever is going to happen in the future that you do not know about. If you are well advised, you may start in. You see, as soon as you start in, then he has lost the power of revokation but you are not bound because you have not accepted yet. You can sit down and watch the market. If it goes the right way, you go ahead and finish the machine and hold him. If it goes the wrong way, you quit building with impunity. 2-206 of the Commercial Code was designed to take care of that problem, but it was awkwardly formulated.

2-206 (2) was not well drafted, unfortunately, and if I can just read you the language you will see immediately what is wrong with it. It says: "Where the beginning of request to performance is a reasonable mode of acceptance, then the offeree has to notify the offeror of it or the offeror's power of revocation is revived". But it is not a reasonable mode of acceptance just starting in. So what we tried to do there failed. This gives the judge a tough problem. If the legislative history is explained to you, you might very well want to say that in one of these special manufacturing cases the offeree started his performance and that takes away the offeror's power of revocation, but 2-206 (2) fairly construed means that the offeree has got to say, "I plan to complete this job, and I have started, and so forth," and having said that, he loses his power to quit. If he does quit, he breaches, and if he does not say this, then the offeror's power of revocation is revived. This puts the two parties on parity. 2-206 (2) does not state that. Its plain language does not get you there, but that is what was intended for it. This difficulty was spotted at a fairly early point, but a number of states had already passed the code and, rather than alarm a lot of people and additionally there had been a lot of exaggerated talk about this code

going on in the legislature, that it is nigh well perfect, and this kind of thing, rather than expose this kind of weakness to the world, the editorial board--and I know this for a fact because I am on the editorial board--of this code took the position, "We will wait until the fiftieth state adopts it and we get notified of it, and then we will go back and clear some of the difficulties." In the meantime, it's there to haunt the judge who may very well get the argument: "While it plainly says this, you've got to do this," and this will produce some kind of a split of authority.

2-207 is a radical provision, I think, in terms of orthodox contract law. It is what I call in the outline the battle of conflicting forms provision of the attack on the ribbon matching approach of contract law. Ribbon matching, as I use it, is the notion that the offeror makes an offer, and it's like a blue ribbon that he's got out here, and if you want to accept that offer you've got to pin a blue ribbon on that blue ribbon, not a sky blue ribbon or a light blue or a green or anything else. You've got to match it exactly. What the offer really says is it's got to match squarely what the offeror has said or you do not have a contract. That rule is probably all right in most situations. It has not worked too well in the sales field because, as you know, most sales contracts come into being because of the use of forms. The buyer has a form which is usually called a purchase order form, and which you have all seen. It is printed, and it starts off with: "We would like to order the following described goods." There is a long space in which he types in the goods he wants to buy and what he is willing to buy, and so forth. Then at the bottom of the page, often in fairly bold print, are the words: "Subject to the terms on the reverse side hereof." Then you turn that form over and on the reverse side you find frequently in very fine print 25 conditions. The lawyer that prepared the form insists on putting these conditions in, because the buyer has told him he's going to use that form for everything from buying a broom to sweep out the office to buying inventory or heavy equipment for the plant. It's an all-purpose form and, while these 25 conditions probably never would be important, all of them in any single transaction, in the totality of transactions every one of these conditions would have some relevance, and he has all 25 of them in there.

The buyer fills out this form and shoots it off to the seller. The seller is delighted to get it, because he knows he has made a sale, and he pulls out of his desk a form which his lawyer prepared for him, frequently called an order and acknowledgement form, or sometimes just an acknowledgement form, and it will frequently start off with: "We are happy to accept your order." Then, for some reason which I have never understood, there is a long blank in which somebody has to type in word for word what is on the purchase order. If you're accepting the purchase order, why do you have to write on the acknowledgement that it consists of 39 bags of something, and so forth? You have accepted, but that is the standard way of operating, and I guess these dogs are too old to teach new tricks on that. Then on the bottom of the order acknowledgement are the magic words: "Subject to the terms on the reverse side hereof." Then you turn that form over and then you find the seller's 25 conditions, because he is using this for general selling, whether it is machinery, this, that or the other thing. He uses this form, and he sends that form back to the buyer, and then they go ahead and, in most cases, they do not realize that they never had a contract at all. They don't have a contract in these cases because it is very rare that the 25 conditions the buyer has incorporated into his offer agree with the 25 conditions that the seller has incorporated into his quote acceptance end quote, which isn't an acceptance at all. But in most cases you don't have any problem because the buyer really wanted to buy or he never would have sent his form, and the seller really wanted to sell or he never would have sent his form back, and so they go ahead, blissfully ignorant of the fact that they have no contract.

You get one case in a thousand maybe where someone becomes unhappy. He runs to his lawyer and says, "I just made a terrible deal." The lawyer says, "Bring me all the papers." In come the purchase order and the acknowledgement forms and the like. The lawyer studies them and says, "You're not hung up at all on a bad deal. Indeed, you don't even have a contract." The man says, "How's this?" "Well," the lawyer says, "the ribbons don't match," or something like this. The client doesn't really understand, but he goes home and tells his wife this was a day of great good fortune. He says, "You know the bad deal I made? It turns out it wasn't a contract at all." She says, "Why?" He says, "The ribbons don't match." She says,

"I thought you were selling feathers, not ribbons." He doesn't really understand it, but his lawyer told him that. To her the law indeed is a mysterious thing. "Your lawyer drafted a form for you, his lawyer drafted a form for him, and this doesn't result in any kind of an obligation?" The other fellow is home quoting Dickens. The law is an ass to do this kind of thing to him. The Commercial Code agrees with him. The Commercial Code states that if the offeree says that he accepts the offer and then tries to condition his acceptance, he is bound by the purchase order. If you start off with: "We are happy to accept your order," you are stuck with the terms of the purchase order. Just as we resolve the ambiguity in any offer against the offeror, we resolve the ambiguity of an acceptance against the offeree. We do not permit the offeree in sentence 1 to say, "I accept," and then in sentence 21 to say, "My acceptance is conditional." If he wants a condition, he's got to express his condition clearly. He's got to say, and in that first sentence preferably, "I can't accept your order because I don't agree with your 25 conditions." That would be the best way to do it. If that is too candid and too forthright, he can say, "I do accept your offer on condition that you buy my 25 terms on the reverse side." Now, if he does that, there is no contract. Using the terminology of the code, he expresses a definite, makes a definite and reasonable expression of acceptance. He is bound unless his acceptance expressly conditions it on his own terms. So it goes to be an expressed condition. This will cause difficulty because businessmen are not educated to this yet. Their lawyers have been educated, however, and new forms are being developed, particularly for the seller. For any lawyer now who has a commercial practice, one of the first sections he would want to learn about would be 2-207, because this should cause him to review carefully the order acknowledgement form. The purchase order form is all right. The order acknowledgement form has got to be reviewed, and law schools are teaching it, and the like, so these forms are being changed, but changing forms does not change the ways that people behave. So you change the fellow's form. Now the seller's got this form. He gets a purchase order form from the buyer. He does not read the fine print typically. He just says, "This fellow is ordering a thousand bags of sugar." He reads what is typed in there. He wants to accept, so he sends back the other form. The buyer gets the new form,

which may say in the printed part, "We cannot accept your order because we do not agree with your 25 conditions," but then in the bold print it says, "We will accept it if you will agree to our 25." Then he types in this space 250 bags of sugar or whatever it is. If the buyer sees this, he doesn't read it. He takes it in. The seller has not read his form. The buyer has not read the seller's form. They don't have a contract on the paper level.

But then a third thing almost always happens, if you look at the actual cases. The seller then ships the goods to the buyer. The buyer takes them in. Now, something goes wrong with the goods. Maybe it's the warranty. One of the 25 terms in the purchase order may have a warranty that the goods must perform in such and such a way for one year, and maybe one of the 25 conditions on the seller's form was there are no warranties, express or implied. We disclaim. So the buyer takes the goods in. He really did order them. He is glad they were shipped and, after two weeks, the goods break down. Now he brings an action or, at least, makes a complaint for breach of warranty, and the seller says, "I didn't give you any warranty in Section 7 of my terms." The other fellow says, "But I think I got a warranty. Look at Section 9 of my terms." There is the impasse. What does the Commercial Code do with this one? It recognizes that if the parties go ahead and deliver the goods and take them in we do have a contract. The big problem now is: What are the terms of that contract? It starts out with the fact that the papers themselves did not form a contract, but the conduct of the parties did. What are the terms of the contract? Well, the papers in and of themselves did not make a contract, but to the extent that they agree with one another you take all the terms out of the papers that are consistent, and they come in as terms. Usually this device is no good, because the very complaints will be on something where they disagree on their own papers. As to the warranty hypothetical that I just gave you, if that is the case, then what you do is look to the actual performance of the parties in the past. If they have had dealings in the past, find out what they themselves have done with respect to warranties. If they have not had dealings in the past, you consult the trade usage and find out what the people in this particular industry do. If you do not have an answer there, then the Commercial Code itself has an answer that it will provide for you, and the answer will be found in that

case in the warranty section itself of the code which says: "Unless the contract provides to the contrary, the following warranties are imposed on the party." Then there is a warranty of merchantability and a warranty of fitness for the purpose. It won't be exactly the warranty that the seller or the buyer puts in his purchase order, but it will be a warranty of sorts, and this is the process that you go through on. It is not a buyer's provision, however. It might work to the buyer's benefit in a warranty case. It would not work to his benefit in an arbitration case.

Suppose, for example, the buyer has a form which says, "In case of dispute, the matter will be arbitrated." Suppose the seller has a form which says, "Under no circumstances do we arbitrate." Suppose his order acknowledgement form does not have this definite seasonable expression of acceptance, so we do not get an acceptance on the paper level. But he ships the goods. You have a contract through conduct. But what are the terms? Now, what if a buyer seeks to compel an arbitration? Well, you look to see what the course of performance has been. If these parties have had a hundred disputes over the past ten years, and every one of them they arbitrated, the chances are that arbitration was to be their way of handling the disputes. If they have not, then you have to drop that technique. The second rung of the ladder is the usage. What do they do in the sugar trade or feather business, or whatever business these people are in? Do they routinely arbitrate? If the answer is yes, then you make them arbitrate. If the answer isn't yes, you don't make them arbitrate. Then the third rung of the ladder is, "We don't have anything on arbitration, because the two cancel." You look in there for a term, but there is no term in the Commercial Code that says, in the absence of statements to the contrary, the parties have to arbitrate. There is nothing like that in there, and therefore you would not compel them to arbitrate in this case. Therefore, the seller would prevail in that hypothetical. It has been described as sort of an Alice in Wonderland thing. I know it seems technical and difficult explaining it to you this way here, but 2-207 does have the merit of recognizing the fact a contract comes into existence when the parties are acting as if the contract is in existence.

Now, you then have to find what the terms are, and the techniques are set out. There is a lot of counselling that

can be given to parties that are dealing with the code, but the courts will, I think, go ahead and recognize 2-207. Unfortunately, this is one of the areas where we already have a split of authority. The Massachusetts court has taken the position that a purchase order form is not accepted by an order acknowledgement form which says, "We are happy to accept your order," period, and then on the bottom says, "Subject to the terms on the reverse side." Judge Aldrich of the First Circuit at least found this condition. In the New York courts, Judge Brightell wrote a very strong opinion saying that that is not enough, and if you are comparing the two decisions I think you will be impressed by Brightell's more than Aldrich's. I leave that to you. I leave it to the lawyers. I think it is their problem. Again, if they are good technicians, if they know their business, they ought to be able to draft an order acknowledgement form that will stand up under 2-207. If they can't do that, I don't think they ought to be practicing law. I think they ought to know how to do this. My own bias is I would not bail these fellows out by letting a doubtful order acknowledgement form pass muster. If enough courts do what New York did, you will see some tightly drafted acknowledgement order forms rather than the loose stuff that has been floating around in the past.

In the formation of sales contracts, we made some attacks on the consideration doctrine. Firm offer has been a big problem. As you know, a firm offer is one in which a merchant in writing frequently promises to keep his offer open for a particular period of time. He writes, "I offer to sell you X goods for so many dollars, and this offer is open for thirty days." A businessman receiving that offer assumes that he's got thirty days in which to shop. That's the economics of it for him. "I've got thirty days", he says, "in which to look around. If I can find a better deal, fine. If I can't, I can always go back to this fellow. He's assured me he'll hold it open for thirty days." The businessman shops, and after twenty-eight days he is convinced he cannot find a better deal. He comes back to his office and says to his secretary, "I think we better accept that offer. I can't find a better deal." His secretary says, "Before we do, I think you better read this telegram which says, 'I hereby revoke. Compliments of

the seller.'" When the buyer or offeree consults with his lawyer, he is amazed to find out that any offer can be revoked even though the fellow said he would keep it open unless there is an option situation supported by consideration. The draftsmen of the code said that we ought to hold the businessman to his word. A businessman, as opposed to an occasional inexperienced fellow, is a merchant, a fellow who is a professional. He says he will hold an offer open for thirty days. Why shouldn't we make him hold it open for thirty days? Granted, the inexperienced housewife who may be selling a sewing machine may inadvertently make a firm offer, and perhaps the standards should be lowered for her, but the guy who is in business, we ought to hold him to his word, so 2-205 says that a firm offer is irrevocable if it is made by a merchant who puts it in writing. Notice it says it's got to be in writing. We want it in writing so we do not have rascals coming in saying they set it for thirty days. This gives us proof they actually made it. 2-205 is not designed for long term options, so it provides this period of irrevocability should not exceed three months.

Here is an interesting case. If the merchant says, "I will hold it open for six months," is it open for three? I think it is, but not for three months and one day. The code unfortunately does not give the answer to that one. But this is one thing you would have to work out. I think that would be the intention, however, of the draftsmen.

One other problem on firm offers is not handled by 2-205, primarily I suppose because the draftsmen thought it was handled well enough in common law. If you look at all the cases involving firm offers, you will find they divide into two groups. One is this problem of: Can you revoke them? As I just said, the code says you can. The other is: How do you compute the time? The firm offering will say, "This is open for thirty days." When do you start the thirty days? Do you start with the date the offeree gets the offer? If you do, do you count Sundays and all this kind of thing? Then, when you get to the thirtieth day, when does it expire, noon, four o'clock, midnight, and so forth? That is a troublesome problem. Of course, if you have a good lawyer, a well trained fellow, he will handle it right. He doesn't use thirty days. That's not the way to draft a

firm offer. You are dealing with a fairly precise problem, and you ought to realize that in the drafting. You ought to say, "This offer will be held open until twelve noon, Eastern Standard Time, September 10." Then there is no question of when it starts or whether you count Sundays or holidays or anything else. You've got the precise ending day. If you do not have that kind of draftsmanship, then you've got to wrestle with the problem. New Jersey has always, I thought, handled the problem pretty well. New Jersey typically does not count the first day. They start with the second. Then you count every single day right down to the thirtieth one. There it gets a little sticky on the thirtieth one. I think the best device is if a businessman has made the offer, it ought to expire the end of a business day. If a private party has made it, it ought to expire at the end of the day. Private parties typically supposedly do business at eleven at night, where a businessman is supposed to close up his shop at four or five o'clock. Again, I hope that in the law schools in continuing legal education and the like we can encourage lawyers to handle these problems properly. If they get into trouble on these things, it isn't the fault of the Commercial Code. It's their own fault for not drafting the things properly. 2-205 takes care of, I think, the firm offer.

The other problem with consideration is the modification problem. If you look at all the cases on modifying sales contracts, you will find they also fall into two groups, and the results have been unsatisfactory in both areas. Let me give you two hypotheticals, maybe slightly exaggerated, but they would illustrate the point. A man makes a contract. Usually it would deal with future goods. "I agree to sell you a quantity of goods for $10 a unit, delivery to be made a year from today." The year goes by, and a lot of things can happen to the market in a year. Maybe during the year the bottom has fallen out of that market, so the buyer on any street corner could pick up the stuff for $2 a unit. He comes in to the seller and says to the seller, "I would like to modify the contract. I can't pay you $10 a unit for these goods. If I were to pay you that much money, you would put me into bankruptcy. If you put me into bankruptcy, you'll get fifteen cents on the dollar along with all my other creditors. On the other hand, I do not suggest we go down to the market price. I'm willing to give you $6 a

unit. That's three times the market price, and it will give you a handsome profit. It will keep me in business. You'll make a friend of me, and I'll be back to buy from you in the future, and so forth." This is what the buyer is saying to the seller.

The seller, of course, could say, "No, I don't want to modify." There's no rule saying he has to modify. He is in doubt now, however. The fellow has threatened him with bankruptcy. What do you do when you're in doubt? You probably follow an ancient commercial maxim: "When in doubt, go for the money." Here he can get $6 a unit. Well, the fellow brings the $6 in. Now, they sign the paper, the release, the waiver, the new contract, or whatever they call it. The new paper is created.

Now, the seller, of course, says, "I'm not going to stand still for this." If he's well counseled, he will wait for over four months so he is not hooked on a preference problem in bankruptcy, and then sue for a deficiency. If a man comes in and says, "We modified the contract," he can say, "There is no consideration for the modification. There is no consideration for taking $6 for $10." There is no adequacy, to use the legal term for it, and he may prevail. This is one set of cases which, while West does not digest them that way, if you read between the lines you can sort them about where about half of them fall into that group where there is a good basis for modifying. The other fellow agrees to modify and then sues for the deficiency.

The other is the bad faith effort to modify. Take the same hypothetical. A year goes by and nothing has happened to the bargain. The buyer comes and says, "You know, I've been thinking about our deal. There is no one you could ask over $5 a unit for on these goods. If I were an evil man, I would initially refuse to pay you, and if you sued me for breach I would tie up your staff with prolonged pretrial discovery and serve on you a bushel basket of interrogatories, tie up your accountant for weeks, take long depositions, this kind of thing. We could finally get to trial, and I might lie, and so forth. If I'm defeated, I could appeal, and so forth, and by the time we were done the cost accountant would say, 'you know, we only netted $5 a unit on this $10 deal.' If I were an evil man, that would be your situation, but I am

not that kind of a fellow. I'll give you $6."

Now, the guy is in doubt, and so he follows the maxim. He says, "All right. Where's your $6?" Then the man pays the $6 and now they prepare their papers, the waiver of release, or whatever it's called, and maybe the seller thinks, "I'll skin this son-of-a-gun. I'll take his $6 and then I'll sue him for the deficiency." But something happens in the second case. Anyone who is rascal enough to extort this kind of a modification has got to know, and he has thought it through, that it doesn't do any good to extort a modification if you cannot make a modification stand up. So he will cleverly work into his waiver or release or new contract, or whatever he calls it, some type of condition, a paper clip type of thing. Something gets in there that makes his modification stand up. It gets in there because he's thinking about it, whereas the other one doesn't get it in there because the other fellow isn't thinking about it. So we get the curious result that only the bad faith modifications are sustainable.

That is what was happening under the Uniform Sales Contract. The good faith modification failed, and the bad faith modification frequently stood up. 2-209 exactly reversed it in a clever way. 2-209 said that a modification does not fail simply because there is no consideration. A modification is good even if it is unsupported by consideration. That takes care of the first one. How about the extorted one? There is a provision. Remember I said this morning that the general principles of Article 1 are incorporated by reference throughout the code. There is a principle, and it is stated in Section 1-203. It says that every act that merchants do or people do that involves the Commercial Code imposes upon them the duty to act in good faith, and if they do not act in good faith whatever they have done can be undone. The second situation therefore would fall under that general principle. So the bad faith modification does not stand up just because there is consideration there. It falls because it is made in bad faith. The good faith modification stands up in spite of the absence of consideration. So we exactly reverse it, and we put those cases in line.

I am mentioning some of these things at length just to sort of give you the flavor of the code. I could go all the way

through it and do this, but I am hitting the sales ones maybe at greater length. What I want to say now is when you make a rectification of this kind, and it is a major kind of an alteration, of contract law, while you destroy one evil you are apt to create a situation in which another one can come up. If you allow modifications to stand up without consideration, then don't you encourage people to falsely assert modifications which never were made? What is to prevent people from coming in and saying, "Well, I agreed to pay $10, but don't you remember you called me one day and said you would take $5?" The other fellow doesn't remember, but your secretary does, and so forth, and it's your word against his. There's nothing in 2-209 which says it has to be in writing. However, 2-209 (2), another provision in there, gives the lawyers a way to handle the problem, and that section says that you can put in your contract a term which will be effective which states, if you provide that the contract cannot be modified except by a signed writing, then the court should not accept any evidence of a modification except by this signed writing. Now, this changes the ancient contract law Professor Corbin explained in terms of Tuesday can't control Wednesday. If on Tuesday you say, "The only way you can modify is to do certain things," why can't you get together on Wednesday and tear up that thing and agree to something else? 2-209 (2) makes some inroad, I suppose, on that theory. What it says, of course, is that Wednesday controls Tuesday. You can always get together on Wednesday and modify, but the procedure you set out on Tuesday will govern Wednesday. That is fair enough. I think the courts would go along with that. Otherwise, the whole effort to solve this modification problem is going to go down the drain, because there will be enough rascality coming in through this other opening that it will not make it feasible to do what we have done to get rid of the consideration in this particular area. So I at least tell my students that it ought to be routine in a sales contract to put in one of these no modification unless in writing clauses, and if you do put it in, the courts will sustain it because the plain meaning, the exact patent meaning, of 2-209 (2) tells the court to sustain it, and while you may have to argue against some person who is talking orthodox contract law of Tuesday controlling Wednesday, and so forth, you've got the law with you, and that is pretty important. It is important to know a theory, and it is pretty good to say, "Just look at 2-209 (2). Don't look

at what Corbin said about this. The code tells you what to do on this." I think the code is right on that. This is one of the problems you may have.

Unconscionability is something I would like to talk about. It is on page 12 of the outline. The Commercial Code adopts basically the philosophy of freedom of contract. We let the parties, within the limits of reasonableness, put any kind of a term into the contract they want. The big limitation here is unconscionability. We will not let them act in an unconscionable way. 2-302 is undoubtedly--this is a formal statement of the rule of unconscionability--is without question the most controversial section in the entire Commercial Code. It is controversial for many reasons. It is articulated in a way that is bound to be controversial. Let me read it to you: If the court as a matter of law finds the contract or any clause of the contract to have been unconsciouable at the time it was made, the court may refuse to enforce the contract or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." That's a big mouthful in view of the fact that the word "unconscionable" is not defined, and it has led a lot of lawyers to feel that this would give the courts the power to simply step in on any kind of a sales contract and say, "I don't like it. It's unconscionable. We're re-writing it, and we'll throw it out."

What does it mean? What is the purpose of this unconscionable provision? I think it goes to what Holmes talked about when he said, "Hard cases make bad law." What did Holmes mean by that? I read him as saying this, that the judge has two duties. He has a duty to stay within the law in hammering out his decisions. He has also a duty to get a just result. Now, in most cases these duties do not conflict, especially in a society such as ours. If the judge stays within the law, he is applying what the legislature has written, and presumably the legislature is convened along democratic lines and reflects what the people want. If they do not want what the legislature is doing, the recourse is to vote them out and get another legislature in, or so the theory has it at least. Or the judge is applying law that has come to us through a great deal of experience. In other words, our law is not arbitrarily set down by someone, so chances are when you stay with the law you are going to get a just result in most cases.

But every judge knows of the hard case where the law seems to be here and the justice there. When you get the hard case, what do you do? If you want to satisfy both duties, you've got to stay within the law and still get a just result, and you're in a dilemma. Many judges have solved this problem by twisting the law a little bit to make it a little different from what it was to fit this particular situation. If you're dealing with a sales contract, they may adversely construe the sales contract to make it say what it patently does not say, or they make an exception to the law, this kind of a thing, and they get a good result in a case, and no one is particularly excited about that case when it comes down because people sense that a just result was reached. The fellow who lost the case will be excited, but except for him you won't get a lot of excitement. But it makes for bad law, according to Holmes, because in a system of jurisprudence which relies heavily on the doctrine of stare decisis you leave on the books a twisted rule or an exception or an adversely construed contract or the like to haunt a judge who is dealing with a subsequent case that may not have the same fireside equities.

I think a pretty good case could be made for the fact or proposition that the Uniform Sales Act got twisted out of existence. I think there was so much manipulation with that statute to get right results that the statute was just rendered useless. Professor Llewellyn, who did most of the drafting of Article 2, was asked by the New York Law Revision Commission when they were studying the whole Commercial Code a very strange question, and he gave an answer that they found equally strange. One fellow said to him, apparently just to ask a question, "How would you compare the Uniform Commercial Code with the Uniform Sales Act?" That was the question put to Llewellyn. He said, "Compared to the Uniform Commercial Code, the Uniform Sales Act is a twisted midget." Well, this fellow looked around and he didn't understand the answer, but Llewellyn intended it to be very short. There were a few twitters. I knew what he meant, and a lot of other people knew what he meant. He meant "twisted" in this sense, that the Sales Act really had been twisted by these manipulations in the courts to get just results. They had to twist it in many cases because it was not drafted well enough to really reflect the kind of justice we want to get. So they had to twist it to do it. The midget

part I am not sure of, except that anything Llewellyn would do would be a giant compared to anything anybody else had done, so therefore the Sales Act becomes a midget on his grounds. That was his answer. What the doctrine of unconscionability really is aimed at doing is to give us a safety valve. What it says, in effect, is: "Read this statute. Give it a straightforward plain meaning construction. Don't twist around with it. Take the sales contract and read it in a straightforward manner. If you come to a situation having done that where you cannot get a just result, then you have identified an unconscionable situation. Then have the courage to say it." 2-302 says: "If the Court..." It's got to be the court that does it as a matter of law, not as a fact finder. You say, "As a matter of law, this thing is unconscionable. I am saying it is unconscionable because I can't get a just result. Apply these revisions to the contract that's written." If you do that, you're doing what 2-302 is designed to do. It's a safety valve to prevent the rest of the code from being mangled and distorted by the hard case. If a lower court does it, what they do is review, so the parties have a great measure of protection. A lower court cannot hide on the grounds they are doing it as a fact finder or anything like that. The court does it as a matter of law. So there is the protection of reviewability. This is what it is for.

Let me give you an example of what I think the courts did in the past. I think I used in my outline the MacDonald v. Mack Motor case. The Mack Motor case--again, you have to read between the lines of the decision, and I am guessing this is what happened, but this is the way I read the case anyway--involved a situation in which a man went to a used car dealer to buy a used truck, and he spotted a very old beat-up truck, and it pleased him. The dealer said to him, "Now, you'll notice that this truck is old and it's been very extensively used, and if you buy, you're going to buy it without any warranties whatsoever. I'm apprising you of that fact right now." So the fellow said, "All right, I'll take it on that basis," and the price that was charged reflected it. The buyer was going to take this risk. So a bill of sale was prepared in which the seller used the language: "There are no warranties, express or implied." There are at least six cases handed down by the highest

court in Maine stating that this language is fully efficacious to knock out all warranties. It is a very effective disclaimer. So he used the right words. It wasn't clumsiness on his part. The buyer then took the truck and used it, and it worked pretty well. The only trouble with it was the seller had never owned it.

Now a third party has come in and taken it away from the buyer. The seller, it turns out, did not know he did not own it. It was a stolen truck, but he was innocent of that fact. So what kind of an action does the buyer have against the seller to get his money back? He can't bring a fraud action, because there is no sign of proof of knowledge. You guess what he did. He brought a breach of implied warranty of title. You can guess what the seller's defense was. He said, "Can't you read? It's right here. I gave you no warranties."

Section 13 of the Act describes the title warranty as an implied warranty. Here are six cases from the highest court in Maine saying this disclaimer is fully efficacious. That is a hard case, as I see it, because the law is all on one side and the justice is on the other. Obviously, this poor buyer ought to have some kind of relief. They fussed with it, but what do you do with this? Finally the Supreme Court of Maine got it. They said, "It's true we do have the six cases, but for this particular situation where the language says, 'There are no warranties expressed or implied' and that does catch most of the warranties, it is not broad enough to catch this one." How do you make it broader? Now comes Holmes' philosophy of the hard case making bad law. Suppose you are a junior working in a law firm and the senior partner comes in and says, "Look, they just handed down a decision that this language is not broad enough. Broaden it." He starts writing, "There are no warranties, express or implied, and we really mean this." Pretty soon we've got a long clause. Someone sees it and says, "My God, who drafted this?" This is his problem.

There is one way you can make it broader. The seller can say, "I don't own the truck," or something like that. Or he can say, "You take the risk." When you go to a seller and say to him, "That is what you ought to do in these cases," then he says, "No. I prefer the old language. It's got a smoother ring to it or something." That's why the old language is

really unconscionable, because this involves a surprise result. You've got the buyer looking up the street. It's an old truck. It's been extensively used. He's looking up the quality street. Sure you've apprised them there are no warranties. If this truck breaks down, he can't complain. Then you hit him from this side, which is a title street. He isn't thinking of title. Indeed, for most lawyers the word "warranty" does not connote title. On a free association test it would connote quality. It is a quality association, although it connotes title as well. The way the Maine court would handle it is to say, "It's a good disclaimer. The only trouble is it is unfair to use it in this kind of a circumstance. You've got the fellow looking that way. It's unconscionable for you then to hide your title business underneath it." We did not have any trouble in New Jersey. Here we had Judge Francis with the doctrine of unconscionability thanks to the decision in the Henningson case. The doctrine of unconscionability held the code up in many states, but in 1959 and early 1960 our Supreme Court, in a very good opinion--I think it was written by Judge Francis--brought forth the doctrine of unconscionability in a case in which I think you would really have an oppressive result but for that doctrine. When the legislative committee or particularly a group from the bar came in and said, "We're afraid of this doctrine. We'll get rid of it, " it is very nice to say that it is already the law of New Jersey. The Henningson decision not only talks about unconscionability but cites the commercial code for the proposition that took care of that one. In other states it has been hard to come by.

What kind of things would be unconscionable? I think really two things. One would be the surprise result where you technically may have covered something with your language but it does not really apprise the party of the risk he is taking and therefore he is muted, to use a midwestern expression. You've got him looking as in the Maine case. You are making him think quality all the time. In the meantime you're hitting him with this title problem. That is one distinct area of unconscionability. The other one is the oppressive situation; namely, in the contract where one party has all the bargaining strength and the other doesn't have any, and then you just impose on this fellow, a blood letting contract. An example of that kind

is found in Campbell Soup Company v. Wentz. That came out of the Third Circuit. It's a New Jersey case involving New Jersey parties, and in that case the Campbell Soup Company had made contracts with various farmers, in which the Campbell Soup Company agreed to take their tomatoes and onions and carrots and the like, but there is a provision in the contract that, in the event of a strike or other specified difficulty, the Campbell Soup Company does not have to take the tomatoes, carrots, and so forth, but if they did not take them the farmer could still not dispose of them by the terms of this contract. What he was to do with them the contract does not state, but he had to keep them. So Judge Goodrich said, "This is unconscionable. You can't tie a farmer up in this way where you are out so you don't have to take his tomatoes, but he is contractually obligated to keep them and let them spoil and not sell them to someone else. You've ruined the farmer's living." This is not as oppressive as it really seems. The lawyers, again, have to do a better job on this. If you analyze the situation, you will find that Campbell probably had something in mind. If the farmer is going to be released, say, on a one-day strike so he can sell to other people, then you have given labor far more power than you want to give them in your contracts with the farmers, because even the threat of a strike can bring Campbell to heel because if they strike for one day the farmer is released to sell his stuff elsewhere. Even if you settle the strike, you have lost his supply. What I think they were trying to do inartistically--again, I am just guessing--was to take care of that. The lawyer has to do better. He can do this. He can recite clauses in the sales contract that ought to do the job. You have all seen those. The lawyer used them now in a very banal way. You have seen them: "Whereas the seller wants to sell and whereas the buyer wants to buy, now therefore..." then they state the terms. That's foolish. Obviously the seller wants to sell or he's not making the contract. Obviously the buyer wants to buy. The purpose of the whereas clause is to educate the court, or whoever is going to administer the contract, as to the background and the problems. You can put or should put in that whereas clause exactly why they have this provision. Therefore, just the plain reading of that contract and the way the court construes it seem to me to be sound enough. It looks unconscionable and looks oppressive but I would urge you to dig down and see really

if there is oppression. I don't think myself that there are many business concerns that are really out to squeeze the last drop of blood out of people. They are often poorly counseled. That's the truth of it. The contracts are inartistically drawn and, looking at them at first blush, it looks as if they are terrible, but when you dig into them, sometimes you will find they are not quite so bad.

MR. HAWKLAND: During the break, I talked to some of the Judges and they were anxious to get my thinking on the doctrine of unconscionability as applied to or whether it is applicable to installment sales contracts, particularly the ones that involve the sale of lightening rods or aluminum siding or food plans, and so forth, and that may involve a high degree of rascality, if a seller never delivers the goods and takes a paper which he immediately discounts with a finance company that may be set up especially for the purpose and the like.

I think it is somewhat hazardous to bring unconscionability in, if you can bring other doctrines in its place. I am not sure it was intended for that. On the other hand, I am satisfied in my own mind, that where you have an oppressive contract that you can't handle with other legal doctrine, that the doctrine of unconscionability should be applicable, as long as you have a sales transaction. If it is not a sales transaction, if you are completely out of the sales area, then the plain mention of 230-2 would be off-end by using it, because it makes it applicable only to Article 2, transactions which are sales transactions. But, I suppose 999 out of 1,000 of these installment situations that we see around do involve a sale, and I think that 230-2, therefore could be used. Referee Burtwald F. Ortilate -- he is a referee in bankruptcy in Philadelphia, Pennsylvania -- took that view at a fairly early point. He has written some pretty good opinions which have been influential in many courts that don't want to cite referees in bankruptcy, but they have been citing him, and so there is that line of authority going now under the Commercial Code.

There have been other courts, however, that have taken the other point of view, so that is one of these things that you are going to have to wrestle with. The problem, as I cite in New Jersey, is the Legislature really hasn't provided enough weapons. If you are interested in expressing this type of thing, it seems to me then that the Retail Installment Sales Act or similar legislation would be the way to do it. You are putting a fairly heavy burden on Unconscionability to make it do the job that the legislature should do, and most of the things that you see in Article 9, for example, dealing with these problems where there is the conditional sales kind of problem, says this rule -- for example there is a rule 920-6 that the parties can put a provision in the security agreement that the buyer will not assert defenses against the third party financeer, but that is qualified by another provision that says that if the state has a Statute or Common Law to the contrary, then this provision is not applicable.

I think one of the difficulties in New Jersey is that we don't have here a Statute to the contrary. So, whether in view of the fact that the legislature seems to be reluctant to add it, the Court should plow in and grab 230-2. It is, of course, for you to decide. I just don't know. I think it is there, it is available, and some Courts of great respectability have used it in that way. I want to mention one other thing in the sales area, and then move on. This kind of problem that is new that you may get, if it is properly handled, we still have a Statute of Frauds for sales transactions, we still have the $500.00

limit and so forth. One of the big problems with the Statute of Frauds in the past has been that it has been too easily satisfied. Too many devices have been used to satisfy it, and it probably has encouraged businessmen to go ahead and make oral contracts, even where they are dealing with $500.00 or more. In drafting the Statute of Frauds, the question was asked, "Why should a businessman ever make a contract? Let it rest in parole if he is dealing on a $500.00 level." Obviously, you shouldn't have to put in writing a sale of a twenty-five cents cigar or anything like that, but when you are up to $500.00, a lot can be said for the proposition that the contract should be in writing with no exceptions.

The businessman almost always has got to make a memorandum anyway. He can't administer his office without papers. He has got to have a file, and if he has to do that, why doesn't he make the contract? The one answer that has been persuasive to that question is the telephone. Some businessmen do a lot of business on the telephone and they will make deals on the phone. Well, then, how about having them confirm by letters? The trouble in the past has been that the letter of confirmation, so-called is operated as a memorandum which binds the sender but doesn't bind the recipient.

Two businessmen get together on the telephone and make a deal. Before the day is out, one of them writes a letter to the other saying, "I am happy we made this deal. As I understand it, the terms are as follows:" and he states them and then he signs his name and sends the letter. As you remember under the Uniform Sales Act, this would constitute a memorandum and would satisfy the Statute of Frauds against the sender. So, the sender no longer would have the Statute of Frauds to protect him. Now, look at what that does to the recipient. He has the letter, he has signed nothing. Now you are in a marginal transaction. He can sit by and watch the market. If it goes the right way for him, he goes ahead and confirms. If it goes the wrong way for him, then he writes a letter saying, "I got your letter but you are all wrong. I am surprised that you thought we made a contract. We never did make one. We had some preliminary talk and so forth and that is the end of that."

So many business men have learned the rule do not write letters of confirmation. They have been taught that the hard way. Sometimes it is the easy way in school, and they won't write them. That has been a big problem, so what do you do with the telephone? The draftsman of the Code said the best way to satisfy the Statute of Frauds is by letter of confirmation. We have to work out a scheme to make it work. And so, 220-1, which is our Statute of Frauds Section, was set up in such a way as to give the letter of confirmation effect. The provision that I call to your attention now is 201-2, "Between merchants, if within a reasonable time, a writing in confirmation of the contract, sufficient against the sender, is received and the party receiving it has reason to note its contents, it satisfies the Statute of Frauds against such party, unless written notice of objection to its contents is given within ten days after it is received."

So, if the party receives a letter of confirmation and does not object within ten days after the receipt thereof, the Statute of Frauds is satisfied as far as he is concerned, and is satisfied as against the sender as well. This puts the thing in some form of parody. So you don't have the situation where one has lost the Statute and the other hasn't, and this would encourage people to writing. We want to encourage them to do it, and this would mean that the Judges, I think, ought to be

pretty tough on the other exceptions. There is a way out for the man who says to the first question why shouldn't you put in writing a contract of $500.00, if his answer is, "I don't do business on the phone." You say "Write a letter of confirmation," if his answer is, "I am afraid to write them," and you say, "The Commercial Code lets you write them." This is the most satisfactory way we have got of satisfying the Statute and that is the way you ought to do it. Don't try to satisfy it in any other way. or we will be tight on the other ways."

Now, the Code does provide the other ways, but it tightens them and it pays. You will remember the partial performance satisfied the Statute of Frauds in the sales transaction. This would take the form of buyer receiving the goods and actually taking the goods in, or the seller taking part of the price and the question or the proposition always was made, why would a buyer pay part of the price to the seller and the seller take it in, unless they did have a deal or conversely, why would the buyer receive the goods and actually take them in, accept them unless they had a deal. There is no doubt that they had a deal, but the big problem is we don't know one of the crystal terms, the quantity term. Without the quantity term, it is impossible to construct a sales contract to do justice to both parties.

In 1942 a series of cases came down around the country that are very instructive if you read them, so as to be instructed. I read them between the lines. They were automobile cases, everyone of them. They involved this situation: In 1941, October and November, automobile dealers were calling General Motors, Ford, Chrysler and the like ordering the 1942 model cars. They called General Motors, "I want 15 Buicks." This kind of thing. All of a sudden, December 7, 1941 is on us, and we are in World War II. Now the automobile dealer is very unhappy that he ordered such a small number of cars, because he knows they are going to be impossible to get. If he can't get cars, he is out of business, so he is kicking himself around the place saying, "Gentlemen, I wish I had ordered 50 cars instead of 15. We could use them." About this time, under the war pressure and the like, his memory gets a little tricky, and so his partner says, "I thought you said 50." Fifteen does sound something like 50 and his memory starts, "Yes, I think I did." They call in the secretary. "What did you hear?" And she says, "Well, I am not -- wasn't it 50?" Well, if you say so, yes.

So, you see, they have received 15 cars in the meantime. This is a partial performance. Now you get a hot letter off to General Motors, "Where are the other 35 cars, you thieves? Sincerely yours." A strong letter follows, or whatever, and this is what they send off.

Now, of course, General Motors denies that they ever had a contract for 50 cars, but the Statute of Frauds is satisfied with the 15 having been received. The thing is out of the Statute, so now you go to the mat and try the case, basically on the basis did he order 15 or did he order 50, and if that case is brought in Pink River Falls, South Dakota before 12 good men and true of Pink River County against General Motors, you have a pretty good chance of winning. If you bring it in Chicago, New York or any other place, indeed, if you look at all of those cases, you will not see a single case in which Ford, General Motors or Chrysler won. They lost everyone of those cases that came down right at the start of the war, and that shows the folly of allowing the Statute of

Frauds to be satisfied by partial performance. You should allow it to be satisfied only to the extent of the performance. You received 15 cars from me; the proof is we have a contract for at least 15 cars. It doesn't prove we have a contract for 50, 500 or 160 or anything else. If you are permitted simply to take the stand and testify that we had a contract for 500, how does that really differ from letting you take the stand and testifying we had a contract for some other number? To start with, the Commercial Code does tighten this by saying that the Statute of Frauds is satisfied only to the extent of the actual payment or the receipt. Unfortunately, some courts are looking at the old law and following it rather blindly. "The old rule of partial performance ought to satisfy the Statute of Frauds," said one lower court in Pennsylvania, "because there was a deal." This sounds sensible until you start analyzing it in terms of while you know there was a deal of sorts, you don't know this critical term, quantity term, and without that quantity term, it is pretty hard to do justice for the parties. You can always construct a price term if we know that the parties dealt with 50 cars and they left the price out. This can be worked in, because you can find out what the going price is and so forth, but if you leave quantity out, then you are really in the quicksand. I would say we ought to tighten that up.

There is a provision that is controversial in the Statute of Frauds, which is 220-13-B and I invite your attention to that, also, because I think this is something you may want to think about. 220-13-B permits the Statute of Frauds to be satisfied if the party against whom enforcement is saught admits in his pleadings, testimony or otherwise in court that a contract for sale was made. Contract is not enforceable beyond the quantity of goods admitted. If he admits he made a contract for 15 cars, you have satisfied it to the extent of 15 cars. You can't prove 16. In satisfaction to that extent, the query -- the interesting query -- is could you compell a defendant over proper objection, to take the stand and to make the admission on threat of perjury. Suppose the Plaintiff calls the defendant as the first witness and says, "I have one question for you," the defendant is pleading the Statute of Frauds, "Did you make the contract or didn't you?" I suppose if it is asked in that way, his lawyer will object. This calls for conclusion. He will do that so he can think of the real objection he is going to make. They back up and ask the question properly, but after he has asked it properly, then what is the objection? The objection, normally, would be that he is priveleged, that he doesn't out of his own mough, have to give up his defense of the Statute of Frauds.

That is my meaning. We shouldn't force a man to take the stand on threat of perjury; give it up. You will hear arguments about it. There is no doubt what the purpose of this provision is. The Statute of Frauds was never designed to shield the welcher. The man has made a contract orally or in writing or whatever, he has made a contract. It ought to be enforceable. The Statute of Frauds was designed to prevent non-existent contracts from being falsely sworn to on people. If you claim you made a contract with me and you sue me, because I didn't perform it, all I have to do under this rule is to take the stand and say I didn't make the contract with you, and I plead the Statute of Frauds. I don't want to even run the risk of adverse fact finding on the question. I stand on the Statute of Frauds, and that is it. And

the Statute gives me that protection, because you are a very gay fellow and so forth. We don't let you go to the jury then and let them hold against me on this kind of question. It wouldn't even get there.

On the other hand, if I am willing to take the stand and say I made a contract, then what good reason is there to let me off? If I really did make that contract? It doesn't have to go to court. The language is broad enough. It says if he makes the admission in his pleadings, testimony or otherwise in court -- I think this is broad enough to cover the deposition surely, and the Interrogatories and so forth. I think a standard question ought to be if a man is pleading the Statute of Frauds, in the Interrogatories or when you take his deposition, "Did you make the contract or didn't you?" If he says yes, I take it he has lost the Statute of Frauds. If he says, "I won't answer that question," I think he ought to be compelled to answer it. If he didn't make the contract, all he has to say is, "No," he didn't make it and then we ought to enforce it against him.

I don't know how many lawyers realize the potential of that provision or what it means. If it is handled correctly by the bar, it will do -- it will revolutionize the Statute of Frauds problems. This will be the way to get at them. Standard treatment would be, "So you claim the Statute of Frauds. Did you make the contract or didn't you," and then have the Court say, "You have to answer that question." We are interested. If you didn't make it, we are not going to let him force it on you. Just say no; Then you have your Statute of Frauds. If you did, then we are going to hold you to it." This gives us a just result. It doesn't fly in the face of the philosophy behind the Statute of Frauds. Indeed, it implements it. This is not a Statute to penetrate trade. This is to prevent it, and fraud can come from both sides. The fellow that made the contract and now is welching can perjure as much as the fellow now falsely swearing. I would call that to your attention as one of the things that would be worth thinking about.

Well, we could go on all day under the 200 sections. There are a great number of new provisions in the Sales Article that lawyers can use and that the Courts can use. Some mischiefs that the Courts have done in the past, I think have been rectified but unless the lawyers learn about all of these things, then we stillmay have difficulty. I want to mention just one other provision in Article 2, an illustration in the performance area that would be of interest, I think. It is Section 2-508, which is the brand new kind of concept. It is called Cure by the seller of improper tender of delivery. Justice Hand, in 1926, handed down a famous decision in Mitsubishi v. J. Aaron & Company in which he made a ringing statement that there is no place in commercial law for -- well, it is substantially, you either perform or you don't. If you don't perform, you have breached and if you do, you have not, and that is the long and short of it. Because of the eminance of the author of that opinion, that opinion has stood and I think has done a great deal of mischief, actually in the commercial area, because while you could say there is a lot to be said for hard-boiled attitudes, if the businessman agrees to deliver 100 bags of sugar, you mean 100 bags and not 99, and so forth, and he should do it.

The so-called force-breach kind of situations have developed because of this. At least I call them forced-breaches. I don't know of

any other names. They are situations in which, either one party or the other becomes unhappy with the bargain, but he is solvent, and he is bound. Now, breach is no way out for that party. If he breaches, he is going to have to respond in damages and costs and the like, and he will end up paying more than he would pay if he went ahead and performed, so most business men will perform and take their licking. The only way out that they have got is to force the other fellow to breach, which is a very difficult thing to do. The buyer forces the seller to breach by microscopic inspections. This has always been the technique. The seller is obligated to deliver 1,000 bags of sugar by July 1. He comes in on July 1 and the buyer looks at the sugar and counts and lo and behold, there are 990 bags. Someone missed the count as the seller has planned, or maybe 10 bags broke on route, so the buyer says, "I reject." The seller says, "On what ground?" The buyer says, "I reject on the ground that the goods do not conform to the contract." If he is well advised, these are the words he uses. Then the seller says, "In what respect do they not conform?" The buyer says, "They do not conform, period." There has never been any rule saying he has to specify or anything like that.

Now, the seller wonders did I send white sugar instead of brown or what is it, is it the wrong day and so forth, and he is trying to figure out what was wrong. He goes back and finally he finds out that he is 10 bags short. So, he calls a few days later and says, "I can bring you the 10 bags. The buyer says, "I told you July 1, forget it. It is now July 4, I don't want it. I am out of the deal. I may sue you for damages. At least I can recind and get out of a bad deal." This is the way the buyer has typically breached -- forced the seller to breach, and under the Hand dictum, many courts have said that is a breach. You have to perform. If he wanted 990, he would have ordered them. The seller forcing the buyer to breach by refusing to take his check has been the typical .. device.

Something is wrong with the market, but the seller has agreed to take $2.00 a bushel for the sugar or bag, and the price is up to $10. He is very unhappy. He brings the 1,000 bags and the buyer is waiting with the check, and the seller says, "I refuse to take the check. If he is smart, he brings his in at 4:30 in the afternoon, after the baknks are closed. The buyer says, "I can't get the money. If you think I am going to stand here with $10,000.00 and so forth, " and the seller says, "that is your problem. If I wanted a check, I would have said that in the contract. The contract calls for $10,000.00 and that is construed to mean cash. There is nothing in our law saying I have to take a check, even a certified check." So, this is the way he has done it. If the buyer, incidentally, waits for him with the cash, because he suspects this is going to happen, then the seller says, "I will take your cash but I won't give you a receipt." "Why?" "Well, that is just the way I am. I don't give receipts.

"Well," the buyer says, "if this fellow will take my money and not receipt it for me, he may deny I ever paid him," so he says, "I won't give you the money unless you give me a receipt," to which the seller says, "Do I understand that you have conditioned your tender?" He has had legal advice of somebody. Then he says, "There is no such thing as legal condition. Either you tender or not. If you condition it, you have breached." Then he says, "Well, I don't know. I won't

give you the money unless you give me a receipt." This fellow screams, "Breach," and he is off the hook. This is the way they have worked it.

Articles 250-8 and 251-1 work hand in hand. 250-8 says, "Where the buyer rejects a job, which the seller had reasonable grounds to believe would be acceptable, with or without money allowance, the seller may furnish reasonable notice to the buyer of a further reasonable time to conform to constitute a conforming tender." So that in the first hypothetical where the buyer says, "I reject." The seller says, "On what ground." The buyer says, "The goods don't conform to the contract." The seller says, "In what respect do they not conform?" At that point the Code comes in with another provision and says the buyer has to specify. If he doesn't specify, he loses the right to defend on that ground in court. So then he says, "You are 10 bags short." Then the seller says, "I insist on the right to cure, and I hereby agree that I am going to cure this deficiency, and you have to give me a further reasonable time to get the 10 bags." So 250-8 does a lot for this doctrine of substantial performance. It will enable businessmen to proceed along reasonable grounds. Notice, it has to be a surprise rejection. He has got to have reason to think the fellow would take it if he comes in with it. If he comes in with no sugar at all, this is another matter.

Now, 251-1 is just the converse of that. It says that unless otherwise agreed, no tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business, unless the seller demands payment in legal tender, which he can do, and gives any extension of time reasonable and necessary to procure it. So, if the seller says to the fellow, "I won't take your check at 4:30 in the afternoon," then the buyer can say, "Very well. You have that right, but you have to give me, now, time to get the cash, and I will be here tomorrow morning with the cash. You have to give me a reasonable time to procure it, and that means until the banks are open."

We used to have in 120 of one of the general provisions, a receipt rule, you pay your money, you are entitled to a receipt. It was said just about that simply. It developed that there was a deficiency in the Statute of Frauds. The Statute of Frauds didn't cover chose in action, and someone had spotted that and they said, "We ought to get something in there on chose." They didn't want to put it in Article 2, because many of the choses involved other times, documents and the like. So it ought to go in Article 1. In the meantime, many people had found the Article of these choses. They could call out the section numbers of these codes and it was a great concern if they put in a new number on the one level, it would promote all numbers and these fellows would have to re-learn all the numbers and so someone said, and I know this for a fact, let's go through the Article and find a provision that doesn't mean anything and we will throw it out and we will put this Statute of Frauds in there. So, they start on through and they get down to 120-F and they find this little thing, "If you pay your money, you are entitled to a receipt." Someone must have said at this point, "That is obvious," so that one was the one that got ripped out and in its place went a Statute of Frauds. It had nothing to do with the problem. Now, this receipt thing is still open. Not only is it open but it is fortified. But you can see someone before you saying, "The legislature in its wisdom

had this thing in there," and they struck it out. This means that he conditioned his tender and so forth. I would say that you ought to, somehow get around that, but I don't know just how to do it, so I leave that one to you.

There are problems of that kind that I would not want to hide from you, that the Code will still give you. Article 20 on sales is a fascinating article. There are a lot of things in there. I wish we had more time to go through. You won't find nearly the same fascination, I think, with Article 30, Commercial Paper. Indeed, the article is pretty standard fare, as I said this morning. It is really the NIL in new terminology. It is easier to work with, because we have consolidated all of the provisions and set them out, I think that in a somewhat scientific manner, and made it easier to work with. The problem with Article 30, is that I think it has been over-sold. Some of the problems that have persisted through the years is the trades-men tried to grapple with them without success and yet, many of the lawyers have felt there has been success here. I will just give you one illustration of the kind of thing, the post obituary note. I don't know if you are familiar with that, but I don't think we have had too much experience in New Jersey with it.

I always explain it to my class in the case of the impatient nephew, to use a Perry Mason kind of gimmick. This is the kind of thing where a man, usually a young man -- or woman -- is going to come into an inheritence, but they can't wait. They want to borrow on it. They may have a vested remainder in some trust, as soon as Uncle George dies, they will get this $25,000.00, but he seems to be living forever, and they are waiting and waiting for him and they go to the bank and say, "Won't you lend us some money on the strength of inheritence?" When is it going to be paid? This is the thing they can't answer. If you were to make a promisory note which said I promise to pay you $25,000.00 the very day that Uncle George dies, this would be non-negotiable, because the time at which the note would come due would be too uncertain. One of the formal requisites is still certainty of maturity. Banks do want negotiable instruments. A bank cannot re-discount a note unless it is negotiable. Federal Reserve Rules require negotiability for re-discounting and so forth. They have many reasons why they have to have it negotiable.

The banks, however, persuaded the Courts 200 years ago to handle that problem by saying that since it is morally certain that Uncle George is going to die that this note is certain enough to make it negotiable. Anything that is bound to happen is sufficient for this certainty purpose. The only problem is, you see, calling it negotiable doesn't do anything for you, because the economics behind negotiability is you want certainties so you can rationally fix your discount rates. No bank is going to give this fellow $25,000.00 with 6 percent interest, because if Uncle George lives ten years, this thing has now built up to $35,000.00 with the interest, and then George dies and leaves only $25,000, and they are not going to get their $10,000.00 interest.

So, they will discount that kind of paper. That is the way they handle it. They say, "Well, you make a note for $25,000.00 and we will discount it." "Well, how much are you going to discount it?" "Well, we will have to take into account all the facts." And where you don't have

certainty -- if they knew he was going to die for sure in one year, it would be relatively easy arithmatic to work down exactly what they would give on it, but now they are looking at George and he is 88 years old, but they say, "Look at that old guy go. He has pleanty left." And the bankers say they are conservative and another banker says, "Well, that Indian lived to be 149 years old and first thing you know they are all figuring this fellow may live fifty years. This is a case from the Supreme Court of Pennsylvania this past year. It is called in re Gerber's Estate. I don't have it here, but if you are interested in it, it is exactly that problem. Uncle George is 78, the impatient nephew went to the First Pennsylvania Company, which is a big and reputable Bank in Philadelphia, to borrow on the inheritence. They discounted. We will make the loan. You give us a note for $25,000.00. How much do you think they gave him? $6,000.00. It was a $19,000.00 discount and Uncle George died eight days later.

So now the fellow is screaming usery and all this kind of thing. The Supreme Court of Pennsylvania held for the bank saying they took the risk. This fellow could have lived 30 years and so forth. The Commercial Code in re Gerber's Estate. The Commercial Code attempted to handle that problem in 3-109, Sub Section 2, which says, "An instrument by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence, is not payable at a definite time, even though the act or event has occurred. So this was to take care of that problem. The only hooker is that they broadly validated acceleration provisions. That is, you could -- you can make a note payable in 50 years, but you can accelerate the date of the payment upon the happening of almost any event, indeed, the happening of any event, because 310-91-C says an instrument is payable at a definite time. If by its terms it is payable at a definite time, subject to any elevation. Now, the acceleration clause is a standard kind of provision that is badly needed. We need this kind of thing for flexibility. I will mention why we need it, in a minute.

I see some doubts across your faces. I wouldn't want you to think or have any doubt of that proposition, but what you can do to make this thing stand up, you say I promise to pay you $25,000.00 50 years from today, but if Uncle George, my blessed Uncle, should depart earlier and so forth, God forbid, I will pay you then. If you set the note up in that way, then it is a negotiable instrument, which they will take and that is the way the note was set up in the Pennsylvania case.

The acceleration clause is needed because it gives the borrower and the bank the power to bargain over the terms, i.e. a bank will always want a demand note. If you go and say, "I want to borrow $25,000." they say, "Fine. Here is the $25,000. It is payable on demand." The borrower is always uneasy with that, because he is afraid the bank will call at any time. "Why do you want it payable on demand?" The bank says, "We wouldn't call it for sixty days, but this gives us flexibility. If anything happens, if you seem a little odd or something, we can move in on you." That is why they want it.

The borrower, on the other hand, always bargains for a time instrument. He says, "I need the money for sixty days, and by golly, let's make this thing payable December 1. That way, I know where I stand."

The bank is worried about that on this side. Gee, suppose this that or the other thing happened, but when you talk to a bank, is that what you are worried about that I lose my job? Then we will make it payable December 1, but it can be accelerated to the point of time that I have lost my job, if that is the worry. I am going to leave the State. That can accelerate. Whatever you are worried about, you put in there. So the acceleration is the inbetween area where a bank and customer that have relatively even bargaining power, all may arrive at. So the acceleration is needed and whatever the bank is worried about is the kind of thing you have to take care of there, and it can be almost anything. Therefore the Code broadly validated and says if a bank is worried this person's wife is going to get drunk, if that is the kind of thing they worry about, we will let them put it in. There is another provision on that, that I will mention now. 120-8 deals with a standard clause that banks sometimes use.

The clause says he promises to pay on December 1, or if the holder deems him insecure. That kind of clause is frequently used. Banks like to think that is a demand clause, but the banker can wake up one Monday morning and he says, "You know, Mable, I feel a little insecure today. I don't know why, but I am going to blow the whistle on this fellow." He hasn't done anything. The court says that deemed insecure clause is a bargaining clause. It is not a demand clause. If you want to call in a note because you feel insecure, you have got to show objective facts of insecurity.

I mention that only to show you the great detail this Code goes into on all of these things, and hammers out, I think, beautiful solutions to most of them. If I labored today on the areas of weakness, it is not because I think the Code is weak. I think you may be getting some of these and I thought they would be worth talking about.

Article 4 is the kind of thing that will come before the courts and will be the stuff in the 4400 section, the bank-customer relationship, rather than the involved checks. The bank to bank relationship when a bank is guilty of negligence and not forwarding items, and that kind of thing will come before the courts with great infrequency. During the depression, very few of those came forward, but 4-401 through 4-407 sets out the rules that govern the bank-customer relationship; how they can treat him on his deposit account and so forth, that the courts may see more and more of. They may see them now, because lawyers are being educated for the first time in some cases, to the fact that we do have law on this, and they have something now to hang their hat on.

The most controversial section is the section in 4-403 of that group, on the stop order. The Code permits a customer to make an oral stop order, which is good for 14 days. The banks resisted that, first in this State and then in other States. It is a compromise solution which didn't please them completely. On the other hand, the State Chamber of Commerce was unhappy that they only got 14 days. This presented an interesting battle between businessmen represented by the State Chamber of Commerce and the banks, represented by the New Jersey Bankers Association. People used to say in law school that the bankers wanted a written stop order so they could force you to sign this little paper they

have which says if they miss your check, even though you have put in a stop order, that they are exonerated from liability, and banks still use that form, although another provision of the Code, 4-103, says that form isn't worth the paper it is written on. It is thrown out on public policy grounds. This is consistent with case law in New Jersey. So, the exculpatory provision that you are familiar with, where you stop a check and you say, now if you miss this check through inadvertance, etcetera, that you can charge our account is out. Indeed, the banks have never insisted, in this State at least so far as I could find, on holding people to that. Why, then, do they want a written stop order? They want the written stop order because of identification, and identification, they say is a big problem for them.

The drawer writes a check, gives it to the payee, the payee now has been swindled out of a check, so he calls the drawer and says stop payment on the check before they make payment. The drawer says I am not taking care of your business. He is one of these tough guys. I am not my brother's keeper, take care of your own affairs. The payee has no right to stop the check. It is only the drawer who can stop it. The payee may call the bank and say, "This is John Drawer." The bank doesn't know him. Anyway, the banks are too big now. Even if they did, they may say, "John, that doesn't sound like you." "Well, I have a cold. I am calling to tell you to stop payment on this check, and if you don't stop payment on the check, don't bother to charge my account."

Now, the bank is in a dilema. They may try to get a hold of the drawer. If they can't get him, what are they going to do? If they honor the check and the stop order is valid, they are stuck with it. They can't charge the account. If they dishonor the check, on the other hand, and the stop order wasn't put in by the drawer, it is a wrongful dishonor, for which they can be held for substantial damages, so they are in a box. For that reason, they say, "We have to have people come down so we really know it is the customer." What is the businessman's argument? His argument is, "Look, I travel all around the country. Suppose I am in San Francisco, and I am swindled by someone out there. So I call my bank in Newark and say, 'Please stop payment on the check,' only to have them say, 'Come down to the bank and we will take care of you.' 'I am out on a six week trip.' 'You could be anyplace in the world. We can't do business on this basis.' " So a compromise was struck here.

The oral stop order is good for 14 days. After that, you have to put it in writing. If you put it in writing, it is good for six months. I say the banks have been unhappy with it and so has the businessman, but they both got a little something out of it, and I think in many of these provisions, that where someone can make out a case like that on the equities, it is well to explore what is behind it. You may well find compromise similar to this one, where they have been given something and the other side has been given something, also. This is surely that case.

I mentioned, earlier, to you the subrogation business that the New York Banks had. Article 4 had a novel provision on subrogation, and they thought this was a good reason for opposing the clause. The subrogation that 4-407 has, is, I feel, for the banks. That is, the banks

couldn't ask for a better provision. New Jersey has had the same kind of provision before. What it does in many states, the rule had evolved, including New Jersey, that if a bank pays over a stop order, that they can't, of course, charge the drawer's account, nor could they collect the money from the person that received it, incidentally. Take this hypothetical: a man goes down to buy a television set for $500.00, a color T.V. He gives the television store a $500.00 check. He takes the set home and it doesn't work, so he immediately then calls the bank and he does it orally, and he says, "I want to stop payment on this check. I have been swindled." The television man brings the check in. He hasn't been told anything is wrong with the set. He innocently presents it at the counter and collects his $500.00. The bank learns about this. Under the orthodox view they could not charge the customer's account, because he had stopped payment, nor could they get the money back from this innocent recipient of the money, so the bank is out $500.00.

In the meantime, the drawer is back at his house and he has found out what is wrong with the set. He forgot to plug it in. Now, he has it plugged in and his wife is saying to him, "Tell me again how it is that we didn't have to pay for the set?" Well, he mumbles something about, "They tell me there is no doctrine of subrogation," and her answer is, "The law is a very mysterious thing, indeed."

What 4-407 does is give us a law of subrogation. If the bank pays out on a stop order, it can subrogate, either to the position of the drawer or to the position of the recipient; if the set really was satisfactory, and the only thing wrong is that he didn't plug it in, or something like that, then they step into the boots of the recipient and collect the $500.00 from him on the grounds he really hasn't paid. To prevent the unjust enrichment, he has to pay. On the other hand, if the set is defective, they subrogate to the other way around, by stepping into the boots of the buyer, suing the seller for breach of warrenty. It doesn't encourage the banks to miss stop orders. It is not fun subrogating. They would much sooner catch the stop order, initially, and not have these problems, so there is no problem on that ground. Once this was fully conveyed to the banks, they realized it was a good provision. The novelty is you seldom see a subrogation rule where you can go this way or this way. You either subrogate to one of two positions, to the creditor's. So, it is novel to that extent, but it is designed to prevent unjust enrichment and does a very good job of it.

Article 6, I mentioned earlier this morning, is a troublesome article, because it is not well drafted. My objection stems, primarily from the drafting of 810-2, which defines the bulk transfer. Just reading the first phrase, gives you a clue to what is ahead. In the drafts above, transfer is any transfer in bulk, and not the ordinary course of the transferer's business, of a major part of the materials, supplies, merchandise or other inventory of an enterprise, subject to this article. Major part is undefined. What is a major part?

Our speculation, which we gave to the legislature here was that major has the same meaning as majority. This probably means something over 50 percent. Fifty percent of what? Fifty percent of inventory, although that is not clearly spelled out. How do you measure 50 percent? Do you measure it in terms of sheer numbers or in terms of

value? These are unanswered questions which you can speculate on. Suppose a jeweler, for example, has 100 rings, 100 diamond rings, and 90 little ones and 10 big ones. Suppose the 90 little ones constitute only ten percent of his inventory when measured in terms of value, but they constitute 90 percent of it when measured in terms of numbers; suppose, conversely, the ten rings measure 10 percent in terms of numbers, but 90 percent when measured in terms of value. Suppose the jeweler sells the 90 little rings, has he validated the Bulk Sales Act? You could make an argument that he sold 9/10 of his inventory, sold 9 out of ten of the rings that he had. On the other hand, I would think the answer is pretty clear on that, or should be. The purpose of the Bulk Sales Act is to protect creditors, would be the way I would go. The creditors don't care about sheer numbers, they are anxious that the value not be dissipated. The dissipation of value, that would worry them. I would say that he has not committed a bulk sale.

Many courts have taken the view that the Bulk Sales Law is in derrogation of the Common Law, therefore, to be strictly construed, and they would play it both ways. They would say 90 out of 100 rings is not a bulk sale, because it is only 10 percent of the value. If he had sold the 10 rings, they might take the view that is not a bulk sale, because it is only 10 rings out of 100, so this way you would never get bulk sales. I think this derrogation is interesting, but it is a maxim. It is in derrogation of the Common Law and should be strictly construed. But it is also remedial, therefore, ought to be liberally construed, depending upon which of those maximums you cease on. You get one result or the other result, and I think what you ought to do is to try to define what the legislature had in mind, since they don't tell you very clearly in their own language. You more or less have to guess at it.

If you have this study, the State of New Jersey study of the Uniform Commercial Code, which our group prepared, at least you will have the thinking that our group came up with on these questions. We had a lot of doubts and quieries about Article 6, exactly that kind of doubt and thought. We have given our answers in it. I think they are set out in New Jersey Statutes Annotated, I think, quid pro quo. The West Publishing Company, through its subsidiary, Soney & Sage, printed this thing up and distributed it free to all the lawyers in the State; in return for that we gave them permission to put it in their Statute Books, so I think it is all in there. It could be useful to you. I don't know how valid it is. It is always fun to say we told the legislature about this, and therefore this is legislative history, but these fellows, I say, in all deference -- because there is no particular reason why they should know all of these things -- but I am pretty sure they didn't read the study in its entirety and if they did, I am pretty sure they didn't understand a lot of it, and as I say, I don't say this in any disparaging way, there is no reason why they should read it all or should understand it.

Some farmer from North Jersey, surely isn't going to read the study and know everything about Bulk Sales, and he could vote for this in good conscience that he did the right thing. I don't know if it is fair to say he voted for it and therefore he is stuck with what Hawkland said major part is, and so forth. You can go pretty far on this. We have made some suggestions, I think, as to how these things might be answered.

The courts are dividing on Article 6, simply because it is not well drafted. One of the problems is this major part business. The double sale has been trouble, too. The Illinois Supreme Court now finds itself in conflict with the Seventh Circuit Court, which controls the Illinois area. Just on this subject. Suppose a farmer, to put the problem simply, has 100 cows, or a jeweler has 100 rings, all of equal value. We will take that problem. Mr. A comes along and buys 40 rings, and then Mr. B comes along and buys 40. Has A committed a Bulk Act violation? The answer to that would be almost surely no. If you construe major the way that I do, I would construe it that he has only bought 40/100 of the value, or the number. If you go to the question, how about B? Well, B has not bought 40/100, because when A bought his 40, that reduced the denominator. The Jeweler is left now with only 60, or the farmer with 60 cows, so Mr. B that comes in and buys 40, is buying 40/60, and that is enough of a fraction to trigger the thing. Is he guilty of a Bulk Sale violation? Yes, I think. The Illinois Supreme Court said no. Because to do this would be to discriminate B, and in favor of A. They said both parties have done exactly the same thing. Indeed, they bought on the same day and it was a cow case where the farmer had advertised cows. He has 100 cows. A comes out and buys 40 of them. B comes out and buys 40 a couple of hours later. Be had seen the whole heard earlier, and had known there had been 100, originally, but he just came back to the farmer and said, "If you have 40 cows left," and the farmer says, "Yes," and he trotts out 40.

The Supreme Court said it would be unfair to constitute B a receiver, where he is to hold the cows for the creditors of the farmer, whereas A is scott free and they have both done the same thing. I don't think they have done the same thing. I think one fellow bought 40 percent and the other fellow bought two thirds. I think they could have counted. This would have done it. That is what the Seventh Circuit Court of Illinois said. "We don't buy what the Supreme Court of Illinois has done, so we have this problem of doing equity for the parties," and so forth. Whatever we intended here, I think we should have expressed it more clearly than we have done.

I would say as soon as the fiftieth state adopts the Uniform Code, Article 6 is going to come in for major repair. It is basically a good Article, but the draftsmen had some bad days when they worked it out. They didn't anticipate all of the problems. I don't think they were familiar with all of them. One great advantage of reading a lot of cases is that you can spot a lot of problems, then as you draft legislature, you can try to take care of the cases. I don't think that happened in Article 6.

You have been a very patient group to listen to me all day like this and I commend you, the busy Judges, for coming down here and studying something as dry as Commercial Code, and probably other equally dry subjects. I think it is a credit to you and the bench of New Jersey. I think this is one of the great Benches in the United States. I think your Supreme Court is the best of all the State Supreme Courts, and looking at you people working on this stuff today, I can see why that is so. Thank you, very much.

JUSTICE WEINTRAUB: I can recall no occasion that evoked the

kind of response he ought to have evoked here, and it is the kind of thing that makes you want to go back to law school. It was wonderful. I have a few announcements to make. First of all, there will be cocktails at the Palmer Room at 5:30. In small print, but nonetheless it is here, Dutch Treat. Next, the annual dinner of the Judiciary will be at 7:00 P.M. I take it it will be in this room, and Sunday, our retired Colleagues will be the guests of honor. Finally, I ask you to take note of the agenda tomorrow morning, and will you please report directly to the room at which your group is scheduled to meet.

One word for the Judges of the Juvenile-Domestic Relations Court. There is some advanced reading material at the registration desk. Will you please pick it up. It doesn't indicate when you are going to do the reading. I am sure you are used to expediting matters, and I am sure you will be able to do it. The hearing is adjourned.

M E M O R A N D U M

ANALYSIS OF JUDICIAL OPINIONS REVIEWING CONDUCT AND REMARKS OF PROSECUTORS

Prepared by JUDGE JAMES R. GIULIANO

Judges Seminar, September 3-4, 1964.

PANELISTS:

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I - INTRODUCTION

The purpose of this memorandum is to analyze conduct of the prosecutor which the appellate courts have reviewed, to serve as a guide line for judges and prosecutors.

The responsibilities of a prosecutor are described by statute and by the Canons of Professional Ethics.

The statutory responsibilities of a prosecutor are embodied in N.J.S. 2A:158-5:

> "Each prosecutor shall ... use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the law."

The Supreme Court has by R.R. 1:25 declared:

> "The Canons of Professional Ethics, and the Canons of Judicial Ethics, ... shall govern the conduct of the judges and the members of the bar of this State."

Canon 5 of the Canons of Professional Ethics sets forth the basic obligation of a prosecutor:

> "... The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."

Canon 15 warns that:

> "... It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause."

Canon 18 deals with the treatment of witnesses and litigants:

> "A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, ... The client ... has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable...."

Canon 22 calls for candor and fairness:

> "It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, ... Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or by-standers."

In State v. D'Ippolito, 19 N.J. 540, 549-550 (1955), Chief Justice Vanderbilt noted in addition, that a public prosecutor "has special responsibilities." Those responsibilities, he said:

> "... have never been better described than by Mr. Justice Sutherland in Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935):
>
> The * * * (prosecuting) Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. * * * "

The Chief Justice condemned the prosecutor's "highly insidious inference as to the bad character" of the defendant since the defendant had not placed his character in issue, and then stated:

> "This is not the first case in recent years involving error caused by an overzealous prosecutor bent more on obtaining a conviction than on seeing that justice is done. We have had to point out such transgressions on various occasions and to emphasize the bounds of propriety in the exercise of the duties of a county prosecutor, ..." At p. 548.

In spite of this and other admonitions, improprieties have continued and have frequently led to reversals.

In State v. Thornton, 38 N.J. 380, 400 (1962), the Supreme Court again warned:

> "Appellate courts continue to be too much occupied in review of prosecutor's summations. In a considerable number of cases we and our predecessors have adjudged statements improper but have not reversed because it could not be said that they reached the quality of impropriety which prejudiced the defendant's right to a fair trial. But such results do not sanction the practice. Our purpose is not to fill the reports with criticisms and admonitions but to instill in the affected persons a realization that ordinary conventions should not be put aside for tactical advantage or lost sight of because of the stress of a trial. We have tried to make it plain that prosecutors should confine their summations to a review of, and an argument on, the evidence, and not indulge in improper expressions of personal or official opinion as to the guilt of the defendant, or in collateral improprieties of any type, lest they imperil otherwise sound convictions. We trust that this opinion marks the last time we shall have to deal with this subject."

Following is an analysis of those opinions which have dealt with alleged impropriety of the prosecution. Attached hereto is a chart which has included the following:

(a) Type of alleged misconduct.

(b) Case.

(c) Prosecutor's remarks or conduct.

(d) Court's approval or disapproval of conduct or remarks.

(e) Crime charged.

It should be noted that our Supreme Court has consistently held that ordinarily a defendant will not be heard to claim prejudice from improper conduct of a prosecutor if defense counsel did not interpose a timely and proper objection, State v. Bogen, 13 N.J. 137 (1953), unless the conduct constituted "plain error." State v. Johnson, 31 N.J. 489 (1960); State v. Corby, 28 N.J. 106 (1958); R.R. 1:5-1(a).

A verdict may be upset if prejudice is done by improper remarks of the prosecution notwithstanding the effort of the trial judge to eradicate such prejudice by his instructions or charge to the jury. The courts will consider such circumstances as whether an objection was made, whether the remark was withdrawn, and the sufficiency of the trial judge's instruction to the jury to disregard the comments. State v. Bogen, supra; see also Paxton v. Misiuk,

54 N.J. Super. 15, 22-24 (App. Div. 1959).

The chart and list includes cases involving the Plain Error Rule, R.R. 1:5-1(a), harmless error, the curative effect of trial judge's instructions and charges, and conduct of the prosecution which was challenged but was held to be proper.

C H A R T

TYPE OF ALLEGED MISCONDUCT	CASE	PROSECUTOR'S REMARKS OR CONDUCT	COURT'S COMMENTS	CRIME CHARGED
Name calling and inflammatory comments	State v Siciliano, 21 N.J. 249 (1956)	"There is the butcher boy who killed Jane Harrison and the baby," in prosecutor's summation. At p.262	Remark prejudicial even though trial court directed jury to disregard it.	Abortion
Name calling and inflammatory comments and comments outside the evidence	State v Bruce, 72 N.J.Super.247 (App. Div. 1962)	Defendants were called "animals" and "brutes" in prosecutor's summation.	Words "animals" and "brutes" were not a part of the testimony of any witness and their use was not proper. Court noted obvious connotation of the two words.	Rape
Name calling and inflammatory comments and improper placing of defendant's character into issue	State v Von Atzinger, 81 N.J.Super. 509, (App. Div. 1963)	Defendants were called bums, hoods, and punks in prosecutor's summation.	"We do not have to consult the dictionary for the meaning of these invidious epithets from the current argot or to assay their likely prejudicial effect upon a jury which knew that the defendant had a prior criminal record." At p. 516	Armed Robbery
Offering evidence of the character or reputation of defendant without defendant first raising issue	State v D'Ippolito, 19 N.J. 540 (1955)	In summation prosecutor suggested to jury that defendant could have called character witnesses.	"The Prosecution should never be permitted to turn the defendant's failure to avail himself of the privilege of introducing character evidence in his own behalf into an affirmative weapon against him." At p. 548	False Swearing
Comments upon matters outside the evidence	State v Bogen, 13 N.J.137 (1953)	In summation prosecutor referred to investigation conducted by Senator Kefauver and stated: "What odds do these fellows (bookies) pay? They take more than Monmouth Park, and they do not even play square with the bettor." At p. 139	Objection by defense counsel to these remarks and trial court intervened: "There is no evidence that the bookmakers do not play square with the bettors. - - - Proceed and confine your summation to the evidence." At p. 143 Appellate Court found no prejudice in light of these circumstances.	Bookmaking

Expressions of personal belief of a defendant's guilt and improper remarks	State v. Butler, 27 N.J. 560 (1958)	Prosecutor in summation stated "... You'll wake up at night remembering 'Thou shalt not kill,' with three murderers roaming the streets if you don't convict these men." At p. 607	Although conviction reversed on other grounds, court noted that these remarks were improper and should not be repeated at the retrial.	Murder
Improper prompting of witness to answer question directed by defense counsel	State v Landeros, 20 N.J.69 (1955)	Police captain was being cross-examined by defense to answer whether officer had any doubts about defendant's guilt. The prosecutor intervened and told him to answer the question, whereupon the officer replied "He is as guilty as Mrs. Murphy's pet pig." At p. 74	"It was not within his province to regulate the procedure or to prompt the witness to answer the pending question, especially when the police captain awed to momentary silence by the unprecedented inquiry by the defense, with the instant consciousness of the devastation and impressiveness of the contemplated answer, hesitated with an innate realization of its natural and decisive consequences." At p. 74	Assault w/i to commit rape
Prosecutor's remarks in opening that defendant refused a number of times to take a lie detector test. Improper comments about defense counsel.	State v Driver, 38 N.J. 255 (1962)	"Why? Because they know that Driver is lying and that man--is not telling the truth when he stood in front of you,.... To win a case. They would resort to anything to win this case." At p. 291 Emphasis of Court.	Remarks about lie detector test and defense counsel were improper.	Murder
Improper use of prior convictions for proof of guilt instead of attacking defendant's credibility	State v Driver, 38 N.J. 255 (1962)	"He is a confirmed criminal and robbery is his way of life and it is only through the grace of God that he went through 32 of these jobs without killing somebody and now that has happened. He went on his last job when his luck ran out." At p. 292 Emphasis of Court.	"That type of comment is highly improper because it has a strong psychological appeal to lay jurors who understandably may be diverted thereby from an independent analysis of the evidence and into the effortless conclusion 'once a thief, always a thief.'" At p. 292 (Emphasis added)	Murder

Prosecutor's statement of his personal belief of defendant's guilt	Aponte v State, 30 N.J. 441 (1959)	Prosecutor in summation stated "I live with these cases. When I try a case I try it to win, not to lose. And if I thought it was a loser I would try some other means to get out of the case." At p. 447	Chief Justice Weintraub stated: "It is clearly improper for a prosecutor to state his personal belief if the import is or may be that it is based upon facts not before the jury." At p. 447	Murder
Prosecutor addressed some jurors by name and referred to their specific religious faiths	Aponte v State, 30 N.J.441 (1959)	In summation prosecutor addressed some jurors by name and referred to their specific religious faiths which he said he knew from his investigation. He was even wrong on one of them and was corrected by the juror.	Court disapproved addressing jurors individually or by name.	Murder
Improper remarks and beration implying fraudulent acts of defense counsel	State v Guido, 40 N.J. 191 (1963)	"He said 'the defense in this case - I am sorry to say this - has been concocted;' I have been practicing at the bar of this State for a good many years ladies and gentlemen, and this was the first time in my experience that I came across doctors who changed their opinion just to suit the defense that Mr. Saltzman wanted to make in this case;' that Mr. Saltzman was 'in cahoots with doctors Galen and Chodosh and perpetrated a fraud on this Court'." At p.201	"The trial judge did not stop this unjustifiable attack --- The Prosecutor's baseless charge of fraud tended to imply the charge of counsel was connected with dissatisfaction with the medical report and a plan to fabricate a defense of insanity." At p. 202	Murder
Improper remark that every time prosecutor puts a question on cross-examination he has facts to support its implication. Engaging in nasty personalities and insinuations.	State v West, 29 N.J. 327 (1959)	Prosecutor claimed with aggravating effect that he always has facts to support any question on cross-examination.	Remarks were improper.	Viol. of Securities Act

Giving statements, with respect to a pending prosecution to a newspaper where such statements may tend to prejudice public against the defendant	State v Demko, 56 N.J.Super.193 (1959)	"The laws we now have on the books are inadequate to have the baby forcibly removed from the custody of the parents unfortunately. The Prosecutor's office has been aware for several weeks that the baby might be discharged and has exercised every reasonable effort to have the baby placed in a foster home or some other institution. We have attempted to have the parents give up the baby voluntarily but they have refused. Under the circumstances and the laws as they now exist we have been unable to accomplish anything." At p. 195 These were alleged words of Prosecutor.	"The Prosecutor should hereafter bear in mind that in any pending case no statements, directly or indirectly, should be given to the papers that may tend to prejudice the public." At p. 195	A.A.&B
Depreciatory innuendoes and insinuations	State v Orecchio, 16 N.J.125 (1954)	Prosecutor remarked "anybody around here knew the game was going on." At p. 140, during State's examination of its witness. Prosecutor asked own witness whether they knew notorious gambler Frank Costello.	Prosecutor's conduct and line of questioning was improper.	Willful failure to arrest persons maintaining gaming houses
Comment on defendant's failure to take the stand and insinuation	State v Ferrell, 29 N.J.Super.183 (App. Div. 1954)	Prosecutor in summation remarked "What does he (the defendant) have to hide?" After objection over-ruled Prosecutor said to defense attorney "If you step out in the hall, I will tell you why the defendant did not take the stand." At p. 186	"The insinuations that go with this gross remark are patent." At p. 186 "Indeed a vague challenging insinuation of unlimited import uttered by the officer there to represent the State, may be far more damaging than an allusion to some specific fact not in the record, which is a serious enough matter." At p. 186 "There is no doubt that the assistant prosecutor's remark was improper and constituted error on his part." At p. 187	A.A.&B

Prosecutor commented that defendant had failed to produce any character witness.	State v Welsch, 29 N.J.152 (1959)	"And does anyone come to the stand saying what is this man's reputation for Christian virtue or moral probity? Where did you hear it from anybody? And you have a right to decide this case on those issues, Ladies and Gentlemen." At p. 156	Prosecutor improperly created an issue of bad repute.	Open lewdness
Improper use of evidence relating to defendant's previous convictions of crime	State v Buffa, 31 N.J.378 (1960)	Prosecutor comment that one of prior convictions was for rape when in fact it was for lesser crime of fornication and use of convictions of offenses of defendant as a juvenile.	"In our judgment, the portions of the summation which were not expressly challenged when uttered by the prosecutor were improper, but in the entire context of the trial we cannot say that they constituted plain error. -- The trial court -- instructed the jury comprehensively that the probative force of such convictions was limited to its effect on the witness' credibility. -- This matter is singled out for mention for the purpose of making plain that such form of argument should not be repeated." At p. 379	Armed Robbery
Eyes of society are focused on this jury	State v Smith, 27 N.J.433 (1958)	"The people of this county are looking to this jury. Shall the teenagers of this county, the school girls of this county walk the streets without fear. --- I again repeat to you that the eyes of Bergen County, especially, are now on this jury." At p. 461	The trial judge's comprehensive charge cured any prejudice which might have resulted.	Murder
Misstatement of law	State v D'Ippolito, 22 N.J. 318 (1956)	"When a witness testifies to any fact that is proven to be false, even in this one instance, the jury is then entitled to find that his testimony might be false in its entirety." At p. 324	Prosecutor's statement was open to some criticism but no reversible error prejudicial to the extent of requiring a new trial.	False Swearing

Suggestion that defense counsel's sole objective in murder trial is acquittal. Personal belief in defendant's guilt. Concerned about justice to State of New Jersey.	State v Thornton, 38 N.J. 380 (1962)	"The defense is concerned with one primary element and that is seeing that the defendant is found not guilty. That is the sole area in which the defense attorney operates." At p. 396 "... he is concerned with justice to the defendant and justice to the citizens of the State of New Jersey." At p.397 "First, he has to determine whether the facts indicate the guilt or innocence of the defendant. Once that is done the matter is ready for trial." At p. 397	Remarks held improper but did not constitute error to require reversal of the conviction but did require comment and criticism.	Murder
Attacking defendant's credibility in advance of his testimony. Maneuvering defendant into taking the stand	State v. Ernst, 32 N.J.567 (1960)	In opening, prosecutor stated "I can't discuss what the defendant intends to prove because I don't know what his defense is. All I know is that he has pleaded not guilty to this indictment. I just want to caution you that when the defendant takes the stand, if he takes the stand, he might say anything to save himself." At p. 576	Remark was improper but no harm done because trial court ruled with defendant who did not intimate that he would not have testified but for this incident.	Murder
Insinuation of undisclosed evidence proving guilt. Personal conviction of defendant's guilt	State v Anderson, 35 N.J. 472 (1961)	"And many of the things we developed, we can't bring in here as evidence. We are limited by the rules of evidence as to what we can tell you. Other things might have a prejudicial tendency." At p. 474 "As a matter of fact, the first homicide that came to my attention when I was prosecutor in this county involved a man who was shot coming into somebody else's home. It never got beyond the Grand Jury." At p. 495	Remarks held not prejudicial but court directed several pages to analyzing remarks.	Murder

Alleged inflammatory remarks characterizing defendants as members of an organized criminal group. Reference to statute for life imprisonment and legislative intent.	State v Grillo, 11 N.J. 173, cert. denied. 345 U.S.976 (1953)	Prosecutor stated that statute providing for recommendation of life imprisonment was not intended to apply to defendants such as these defendants.	Remarks were strong and forceful but prosecutor confined himself to the evidence.	Murder
Depreciatory innuendoes and insinuations	State v Bartell, 15 N.J.Super.450 (App. Div. 1951) affirmed 10 N.J.9 (1951)	See p. 456-457 where court analyzes at length cross-examination of defendant by prosecutor.	Court analyzed at length improper cross-examination of defendant by prosecutor.	Illegal registration of voters
Appeal to jury as conscience of society and public sentiment	State v Buono, N.J.Super. (App. Div.1964) Decided September 28, 1964	"But I want you people to be the voice, the conscience of the people of Union County. Stop this slaughter upon the highway. Bring in a verdict of guilty."	Remarks were improper but did not constitute plain error.	Death by Automobile
Appeal to emotions of jury. Name calling. Violation of oaths of individual jurors	State v Johnson, 31 N.J.489 (1960)	Prosecutor referred to defendants as "callously indifferent to all that went on" at p.509, and described individual defendants as "triggerman," "ring leader," "conniving fingerman" at p. 511. Prosecutor argued that jury may be guilty of violating their oaths if they did not impose the death sentence, and commented that it was not the jury but the law that would sentence the defendants to death.	Remarks did not do any harm and any possible harm was overcome by accurate statements of law in the balance of the prosecutor's summation and the court's charge.	Murder
Branding defense tactics unfair	State v Wise, 19 N.J.59 (1955)	Prosecutor referring to defense's opening statements "I am rather surprised by these objections. In their opening counsel said they were not denying anything in this case. They weren't going to put the State to all the burden of this." And again "In their openings counsel made the statement that they weren't going to deny the presence of their clients at the crime." At p.97.	Remarks not improper or prejudicial where defense counsel in opening narrowed issue to be tried to the punishment to be imposed.	Murder

Branding defense tactics unfair	State v Tune, 17 N.J. 100 (1954)	The prosecutor, on several occasions characterized the tactics of the defense as 'unfair' and stressed the fact that he was being 'fair."	Remarks proper and did not confuse or inflame jury.	Murder
Statements supported by the evidence. Alleged inflammatory remarks	State v Tansimore, 3 N.J.516 (1950)	Prosecutor in summation stated defendant was "two-time murderer" and said "I say to you, members of the jury, you go into your jury room and do your duty, Don't let this man, twice bloody go twice unbowed." At p. 535	Remarks made by prosecutor were within limitations of the testimony taken and supported by the evidence.	Murder
Alleged inflammatory remarks and confinement to the evidence	State v Lang, 75 N.J.L. 1 (Sup.Ct. 1907); aff. 75 N.J. L.502 (E & A 1907); aff. 309 U.S. 467 (1908).	Prosecutor in summation stated that defendant was "monster in his passions, licentious in his desires, beastly in his love, brutal when thwarted and cowardly when caught." At p. 7	Remarks not improper because proofs supported these inferences.	Murder
Alleged remarks not confining to the evidence	State v Dunlap, 61 N.J.Super.582 (App. Div. 1960)	In summation, prosecutor stated several times and referred to fact that defendants, "both Negroes" were out looking for a "white girl." At p. 587	Remarks proper because based on the evidence.	Kidnapping and rape
Improper use of prior convictions	State v DeMarco, 76 N.J.Super.318 (App. Div. 1962)	In summation prosecutor stated: "Now do we come to conclude or infer or find the intent in the mind of the defendant? It is true we have his past record. He is a convicted criminal, and he has previously committed similar offenses. He is an admitted rapist. From that we can infer his motive and intent, the reason why he was in the back of this automobile on the morning of May 16th, the reason why he was carrying State's exhibit which is this knife. * * * (con't)	Remarks improper but did not constitute plain error; trial judge's charge was complete emphasizing that proof of previous conviction is admissible only to attack credibility.	Rape

		The defense witness DeMarco, the defendant, the main, principal witness, this is for him playing for high stakes in this case. He is a two-time loser or, I should say, a convicted criminal for similar offenses, and don't you think it is important for him to do everything he would think humanly possible to avoid the penalty of a conviction under this crime? Do you think he is entitled to any consideration or sympathy because he happens to be a convicted criminal?" At p. 322		
Insinuation as to integrity of certain witnesses	State v. Hozer, 19 N.J. 301 (1955)	Prosecutor's comment during interrogation of defendant's witness. "Some of these people are not in good standing. Mr. Gaudielle (defense counsel) knows that." At p. 312	Remarks not inherently prejudicial.	Nonfeasance in office
Inflammatory and prejudicial remarks	State v McNair, 59 N.J.Super.453 (App. Div. 1960)	Prosecutor in summation stated "... Now, this is a horrible thing we are dealing with. Are you going to let - after all this proper evidence has been introduced and after a case has been made out beyond a reasonable doubt, are you going to let the defendant go out again." At p. 460	Remark improper but did not substantially effect defendant's rights.	Possession of Narcotic Drugs
Statement of personal belief of guilt not based on the evidence	State v Pisano, 33 N.J.Super.559 (App. Div. 1955)	Prosecutor in summation stated: "I do not know how it (the fire) started, but I do know that this defendant did it. You can arrive at the same conclusion if you examine the facts. That is all I ask you to do, ladies and gentlemen. Examine these facts." At p. 564 Emphasis of court.	Remarks not improper because the prosecutor knew those facts were before the jury.	Arson

Limitation and extensive presentation of proof	State v Roscus, 16 N.J. 415 (1954)	Defendant claimed reversible error on testimony of shooting in Freddie's Tavern because it was an isolated offense unconnected with the killing of Trixie King, and such testimony was inflammatory. Prosecutor used such testimony for purpose of revealing defendant's state of mind and introduced 11 witnesses of this shooting.	No reversible error but unnecessary for State to go into an extended presentation of this testimony.	Murder
Misuse of criminal's prior record	State v Wade, 40 N.J. 27 (1963)	Prosecutor in summation stated "Nathaniel has been convicted of crime thrice. They know just what happens in police work and they have had the experience. They know what to do and what not to do." At p. 38	Remarks proper because prosecutor directed remarks to defendant's credibility.	Murder
Prosecutor adopted factual statements of defendant and suggested different conclusions	State v Reynolds, 41 N.J.163 (1963)	Prosecutor in summation referred to defendants as "two constant repeaters" and continued, "You have heard their testimony, their background, over and over again during the trial of this case, breaking and entry, larceny, breaking and entry, larceny, breaking and entry, larceny." At p. 184	Remarks proper since defendant placed evidence of juvenile offenses to show mitigation of punishment.	Murder
Stating facts in opening without subsequent proof by competent evidence; Personal belief in defendant's guilt not based on facts in evidence; Excursions outside the evidence; insinuation of defense counsel's suppression of evidence; Misstatement of law.	State v Hipplewith, 33 N.J. 300 (1960)	"I can sum up in this case with a lot of convictions that this man is guilty. I think in getting this case before this jury the investigation that has gone on prior to our appearance in court, when we go over the sum total of everything, I am convinced that this man is guilty and I feel that at the close of this case there is only one verdict that this jury can return and that verdict also will indicate the guilt of this defendant." At p. 311 (All emphasis added by court.) (con't)	"But a prosecutor's expression of belief in a defendant's guilt is not necessarily reversible error if he states that it is based solely on facts adduced at the trial." At p. 311 "Assuming the prosecutor had misstated the law, such an instruction would cure the error. State v. Continental Purchasing Co., Inc., 119 N.J.L. 257 (Sup.Ct. 1938), affirmed 121 N.J.L. 76 (E.& A. 1938)." At p. 315	Murder

		"I think there was an attempt to cover up some pertinent information as to when and where this cigarette case was found." At p.313 Defendant claimed error in prosecutor's invitation to jury to speculate whether defendant would have killed Ruff or Rumpf if each had not answered to defendant's satisfaction when he asked, "Are you one of them?" At p. 314 Defendant claimed prosecutor erroneously "instructed" jury that private person can never legally kill to prevent commission of crime; based on N.J.L.2A:113-6. At p. 315		
Improper appeal to personal characteristics of individual juror and inflammatory remarks	State v Bucanis, 26 N.J.45 (1958)	Prosecutor used phrase, "Dear John letter" when he knew one of jurors was ex-serviceman. At p. 57 During colloquy with opposing counsel, prosecutor stated "I don't want anybody pointing a gun at me." At p. 57 Prosecutor stated that defendant kept crucifix in a box of "junk" in back of his car. At p. 57 Prosecutor stated victim had come "back from the grave" through the autopsy photograph to prove that her husband had aimed his rifle at her. At p. 58 Defendant claimed prosecutor attempted to have the jury substitute its special knowledge for evidence rejected by the court.	Remarks not improper to justify resort to plain error rule.	Murder

Prosecutor's declaration of his individual opinion in defendant's guilt	State v McCormack, 93 N.J.L. 287 (Sup. Ct. 1919)	"Would I, District Attorney, have delved in this case for months, urge this prosecution if I did not believe what the prosecutrix said was true." At p. 289	Remarks improper but no error because prosecutor withdrew the remarks and asked that they be disregarded.	A & B
Inflammatory remarks	State v Ravenell, 43 N.J.171 (1964)	Prosecutor stated Warset "was on his hands and knees begging for his life" and had said "take the money, but don't kill me." At p. 186	"Odom's statement had described Warset as being on his hands and knees begging not to be shot and to such extent as the Prosecutor's remark was applicable to the defendant Odom, it was not improper; in any event it appears clear from the entire record that it did not prejudice or impair any of Ravenell's substantial rights." At p. 186	Murder

III - RECAPITULATION OF IMPROPER CONDUCT OF PROSECUTION

Following is a list of objectionable behavior.

Reference should be made to the Chart for actual

improper conduct of prosecution.

1. DO NOT CALL DEFENDANT INFLAMMATORY NAMES.

State v Ravenell, 43 N.J. 171 (1964)
State v. Siciliano, 21 N.J. 249 (1956)
State v. Butler, 27 N.J. 560 (1958)
State v. Bucanis, 26 N.J. 45 (1958)
State v. Von Atzinger, 81 N.J. Super. 509 (App. Div. 1963)
State v. Bruce, 72 N.J. Super. 247 (App. Div. 1962)

2. DO NOT OFFER EVIDENCE OF THE CHARACTER OR REPUTATION OF DEFENDANT UNLESS THE DEFENDANT FIRST RAISES ISSUE.

State v. Welsch, 29 N.J. 152 (1959)
State v. D'Ippolito, 19 N.J. 540 (1955)

3. DO NOT EXPRESS PERSONAL BELIEF OF DEFENDANT'S GUILT UNLESS BASED ON THE EVIDENCE.

State v. Thornton, 38 N.J. 380 (1962)
State v. Anderson, 35 N.J. 472 (1961)
State v. Hipplewith, 33 N.J. 300 (1960)
Aponte v. State, 30 N.J. 441 (1959)
State v. Butler, 27 N.J. 560 (1958)
State v. Pisano, 33 N.J. Super. 559 (App. Div. 1955)
State v. McCormack, 93 N.J.L. 287 (Sup. Ct. 1919)

4. DO NOT COMMENT UPON MATTERS OUTSIDE THE EVIDENCE.

State v. Hipplewith, 33 N.J. 300 (1960)
State v. West, 29 N.J. 327 (1959)
State v. Bogen, 13 N.J. 137 (1953)
State v. Grillo, 11 N.J. 173, cert. denied, 345 U.S. 976 (1953)
State v. Tansimore, 3 N.J. 516 (1950)
State v. Lang, 75 N.J.L. 1 (Sup. Ct. 1907)
State v. Dunlap, 61 N.J.Super. 582 (App. Div. 1960)
State v. McNair, 59 N.J.Super. 453 (App. Div. 1960)

5. DO NOT PROMPT WITNESS TO ANSWER QUESTION DIRECTED BY DEFENSE COUNSEL.

State v. Landeros, 20 N.J. 69 (1955)

6. DO NOT COMMENT THAT DEFENDANT REFUSED TO TAKE A LIE DETECTOR TEST.

State v. Driver, 38 N.J. 255 (1962)

7. DO NOT USE PRIOR CONVICTIONS TO ESTABLISH PRESENT GUILT OF DEFENDANT BUT ONLY TO ATTACK HIS CREDIBILITY.

State v. Wade, 40 N.J. 27 (1963)
State v. Driver, 38 N.J. 255 (1962)
State v. Buffa, 31 N.J. 378 (1960)
State v. DeMarco, 76 N.J.Super. 318 (App. Div. 1962)

8. DO NOT GIVE STATEMENTS WITH RESPECT TO PENDING PROSECUTION TO NEWSPAPER WHERE SUCH STATEMENTS MAY TEND TO PREJUDICE PUBLIC AGAINST THE DEFENDANT.

State v. Demko, 56 N.J. Super. 193 (1959)

9. DO NOT REFER TO INDIVIDUAL JURORS BY NAME OR TO THEIR SPECIFIC RELIGIOUS FAITHS.

Aponte v. State, 30 N.J. 441 (1959)

10. DO NOT IMPLY FRAUDULENT ACTS OF DEFENSE COUNSEL.

State v. Guido, 40 N.J. 191 (1963)
State v. Wise, 19 N.J. 59 (1955)
State v. Tune, 17 N.J. 100 (1954)

11. DO NOT MISSTATE DEFENSE ATTORNEY'S POSITION IN ANY PROSECUTION.

State v. Thornton, 38 N.J. 380 (1962)

12. DO NOT ENGAGE IN DEPRECIATORY INNUENDOES AND INSINUATIONS.

State v. Anderson, 35 N.J. 472 (1961)
State v. Hipplewith, 33 N.J. 300 (1960)
State v. West, 29 N.J. 327 (1959)
State v. Orecchio, 16 N.J. 125 (1954)
State v. Ferrell, 29 N.J. Super. 183 (App. Div. 1954)
State v. Bartell, 15 N.J. Super. 450 (App. Div. 1951)

13. DO NOT COMMENT ON DEFENDANT'S FAILURE TO TAKE THE STAND.

State v. Ferrell, 29 N.J. Super. 183 (App. Div. 1954)
Malloy v. Hogan, 378 U.S. 1 (1964)

which casts doubt on the prosecutor's right to comment on defendant's failure to testify as abridging his privilege against self-incrimination.

Ever since Parker v. State, 61 N.J.L. 308 (Sup. Ct. 1898), New Jersey's general practice has been to permit prosecutor and court to comment upon the silence of the accused.

14. DO NOT TELL JURY THAT EYES OF SOCIETY ARE FOCUSED UPON THEM OR THAT PROSECUTOR IS CONCERNED ABOUT JUSTICE TO STATE OF NEW JERSEY.

State v. Thornton, 38 N.J. 380 (1962)
State v. Smith, 27 N.J. 433 (1958)

15. DO NOT APPEAL TO JURY AS CONSCIENCE OF SOCIETY AND PUBLIC SENTIMENT OR THAT JURORS WOULD VIOLATE THEIR OATHS UNDER CERTAIN CONDITIONS.

State v. Johnson, 31 N.J. 489 (1960)
State v. Buono, N.J.Super. (App. Div. 1964)

16. DO NOT ENGAGE IN UNNECESSARY EXTENSIVE PRESENTATION OF PROOF.

State v. Roscus, 16 N.J. 415 (1954)

17. DO NOT MAKE MISSTATEMENTS OF LAW IN SUMMATION TO JURY.

State v. D'Ippolito, 22 N.J. 318 (1956).

18. DO NOT ATTACK DEFENDANT'S CREDIBILITY IN ADVANCE OF HIS TESTIMONY.

State v. Ernst, 32 N.J. 567 (1960)

19. DO NOT MANEUVER DEFENDANT INTO TAKING THE STAND.

State v. Ernst, 32 N.J. 567 (1960)

In conclusion, it is our purpose that this chart and list with accompanying judicial comment can serve as a most useful tool for judges and prosecutors, both engaged in achieving justice in the difficult sphere of criminal administration.

INSTRUCTIONS FOR REQUESTING COMPUTER SEARCHES

[To be used with Word Frequency List of New Jersey Laws]

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INSTRUCTIONS FOR REQUESTING COMPUTER SEARCHES

A. How the Statutes Are Organized on Magnetic Tape

B. How a Computer Search Is Organized

C. How to Submit Searches

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SAMPLE SEARCH FORMAT

E. KWIC Searches

F. New Jersey Common Word List

INSTRUCTIONS FOR REQUESTING COMPUTER SEARCHES

The following instructions should make it possible for attorneys, without knowledge of computer operation, to request computer searches of the New Jersey statutes. The basic requirement for successful computer searching is knowledge of the legal issues involved in the problem to be searched - the same type of knowledge which is needed for statutory research using traditional methods. Knowledge of computing is no more necessary for computer searching than is knowledge of printing for reading a book.

A. HOW THE STATUTES ARE ORGANIZED ON MAGNETIC TAPE

The search system is based on two premises: First, that it is possible to organize the actual words of statutory sections for computer searching without human indexing. Second, that a properly framed request will cause the computer to print the statutory sections desired by the searcher.

Each statutory section is put into the computer word for word, exactly as enacted. As each section is placed in the computer it is given a document number. The first section of the New Jersey statutes becomes document No. 1, the second, document No. 2, and so on. The computer then creates an alphabetical list of every word in the New Jersey statutes (with the exception of certain very common words, such as "the", "and", "a", etc., a complete list of which appears on page xi.) It identifies the exact location of each occurrence of each "non-common" word in the statutes.

A small portion of this alphabetical list might appear as follows:

TAX	897.9.7	4281.13.5
	4282.16.4	4921.4.11
TAX-FREE	22.16.8	98.2.18
	2053.11.4	2099.1.2

This would mean that the word "tax" appears in document 897 of the New Jersey statutes, in sentence 9 of that document as the seventh word. It appears again in document 4281, sentence 13, word 5, as well as in some other locations. The word "tax-free" appears in document 2053, sentence 11, word 4, and elsewhere. The alphabetical list is the basic tool for searching the statutes.

The word frequency list, a copy of which you now hold, lists all the "non-common" words. The first number preceding each word indicates the total number of times the word occurs in the statutes; the second indicates the number of different statutory sections in which it appears. The word frequency list might also contain several thousand numbers, such as the date 1961, which are used in the New Jersey statutes. The copy of the list you are reading omits all such numbers although they are available to use in a search.

B. HOW A COMPUTER SEARCH IS ORGANIZED

If unlimited time were available to research a legal problem involving statutes, one could read each individual section of the New Jersey statutes. If the researcher's attention does not wander, all sections relevant to the problem should be found. In reading each section, the researcher recognizes certain words or phrases which indicate

that the section may be relevant to his problem. He then knows that the section should be read more carefully.

For example, if the legal question being researched concerns the rights of an illegitimate child and the duties owed by the natural parents of such a child, the words in the problem give a number of leads which identify sections which would probably apply. Any section which contains the word "illegitimate", of the word "child", or the word "parent", or a grammatical form of these words might possibly be relevant. The presence in a section of combinations of these words would give a stronger indication of relevance. Thus, while the presence of the word "illegitimate" or the word "child" would constitute a signal, the presence of the two in combination, as in the phrase "illegitimate child", would constitute a stronger signal of possible relevance.

Although neither the word "bastard" nor the phrase "born out of wedlock" appears in the legal question as posed, the presence of either in a section would most likely indicate that the section should be carefully examined. Moreover, words such as "father", "mother", "unwed", and "unmarried" in a section might also indicate that the section is relevant. So these words should also be considered.

In a computer search, the entire body of New Jersey statutes is scanned in less than an hour. If the search is properly organized, all those sections which the researcher would desire to read to determine whether they were relevant are identified. The person preparing a computer search makes a list of words or phrases which, if he were scanning the entire body of statutes, would indicate to him the relevance of particular sections. Based on his knowledge and experience with statutes, the searcher lists in advance the words which, if found in a section, would cause him to read it more carefully.

Thus, if you wish to search for all the New Jersey statutes dealing with the rights of illegitimate children and the duties owed them, one group of words to select (called Group A) would include "baby", "child", "foundling", "orphan", "infant", "juvenile", "minor", etc. These words would be chosen because any section which contained one of them might be relevant. Given this list of words, the computer searches through the alphabetical list until it reaches the word "baby". It copies the numbers of each document in which the word "baby" occurs. It then continues through the vocabulary list to the word "child" and repeats the process, adding to the previous list the numbers of the documents in which the word "child" appears. This process is repeated for each word in Group A. The net result is a list of documents (statutory sections) which contain one or more of the words in the group. If desired, the computer will then print the texts of these statutory sections.

However, it is quite likely that a search using only the words of Group A would produce many statutes which, although they contain one of the words selected, are unrelated to the rights of illegitimate children or the duties owed them. Statutes dealing with child labor would usually contain the word "child", but would usually not be relevant to a search involving illegitimate children. In order to reduce the number of non-relevant sections produced, two or more groups of words can be used in organizing the search.

In the illegitimate children search, a second group (Group B) should be selected to include words such as "father", "mother", "parent", "unwed", "unmarried", "natural", etc. The search might require that a potentially relevant document must contain at least one word from Group A

and one word from Group B. To execute this request the computer would create a list of document numbers in the manner previously explained for Group A and a similar, separate, list for Group B. The two lists are then compared in the computer. Only those sections will be listed whose document numbers are on both lists. These may then be printed on command.

A third group (Group C) might also be created. Group C would contain words such as "bastard", "parentage", "putative", "illegitimate", etc. Words in Group C are thought to be so meaningful that any section in which they are present would be worth reading, regardless of whether any words from Group A or B were present. The search is thus organized so that a section is considered relevant by the computer if it has at least one word from Group A and one word from Group B, or one word from Group C.

In organizing a search, as many groups of words, alone or in combination, can be used as seems desirable. It should be remembered that if words are used alone, more non-relevant sections may be forecast. On the other hand, as more groups are used in combination, (requiring that at least one word from Group A and one from Group B and one from Group C and one from Group D be present in the same section) it is more likely that fewer sections will fit these criteria and thus increase the possibility that some relevant sections will be missed.

An indication that using a word by itself may produce a large number of non-relevant sections is the frequency with which that word appears in the total statutes. The numbers preceding the word in the word frequency list represent its total occurrence and the number of sections in which it occurs. These numbers may be so high as to indicate that the

word should be used only in combination with other words. Another way to limit the number of documents printed when words with high frequencies or words of relatively general meaning are employed in the search is to use them as part of a phrase. If this is done, the search will require that the words in the phrase must appear in the same sentence of the document, or within so many words of each other in the same sentence.

Thus, in the illegitimate children search, the phrase "born out of wedlock" was used. The search required that the word "wedlock" appear in the same sentence and no more than three words after "born". It was considered that coupling "born" and "wedlock" in a phrase greatly lessened the possibility that they would occur in a non-relevant section. Consequently this phrase was made a part of Group C and any section which contained it was considered potentially relevant.

As many words or phrases may be used as seem desirable to insure that all relevant sections are produced. The word frequency list may suggest words to add to the search. So many a dictionary, a thesaurus, or the index to the statutory compilation. After the different words have been thought of and grouped, each word should be checked in the word frequency list. If variations in the grammatical forms of the words selected appear on the word frequency list these variations should be added to the group. Thus, the plural "babies" should be added to Group A, and the word "children" included in addition to "child".

Occasionally a misspelling in a statute is not caught in proof-reading before the statutes are put on magnetic tape. Since the computer treats this version of the word as a separate entry in the alphabetical list, if a misspelled version of the word appears in the word frequency

list it must also be included in the search. A hyphenated word is treated by the computer as a single word. For example, "able-bodied" appears in the word frequency list as one entry with a frequency of four. Since the computer does not permit the use of an apostrophe, the apostrophe is represented as a dash. Therefore, the word "parent's" appears as "parent-s".

Thus, the word frequency list acts to suggest other words to be put in the various groups, as well as a reminder to include other forms of the words selected, to include any misspelled versions of the word, and as a guide to grouping words of relatively high frequencies, either in phrases or in groups, to be used in combination.

It does no harm to include words in a search which do not appear in the word frequency list. If the word does not occur in the statutes, the computer will indicate this when printing the search results. Thus, the searcher knows at a later time that he did not forget to select the word and also that it did not exist in the body of statutes.

After organizing the structure of the search, the searcher should indicate the form desired for the printed results. If "cite" is requested, the computer will print out the citations of the statutory sections which result from the search. If "print" is requested, the entire text of each section deemed relevant will be printed.

C. HOW TO SUBMIT SEARCHES

The person requesting a computer search has the responsibility of selecting the words to be used in the search and arranging them in groups likely to produce the potentially relevant statutes. The personnel of the Health Law Center will arrange the searches in the format required for the computer.

A note of caution should be added. The search system is experimental. Thus, successful results cannot be guaranteed. Also, the method of submitting searches assumes that there will be no personal contact between the Center staff and the person requesting the search. For these reasons it is essential that the following instructions be followed carefully.

Submit the search on plain white paper and attach one carbon copy. An accompanying letter should request the search and identify the requestor by letterhead or otherwise. The letter should contain a statement of the legal question involved in the search, one paragraph in length.

Begin the search on a separate page. Since all information on this page or pages will be keypunched and printed by the computer to identify the search results permanently, be brief but explicit.

D. INSTRUCTIONS FOR COMPOSING SEARCHES

1. State the name and address of the person requesting the search and to whom the results are to be sent.

2. Include a short, one sentence, statement of the question to be searched. This statement may be in question form or in the form of a declarative sentence.

3. Set forth the lists of words or phrases constituting each group in the search. Words or phrases in each group should be listed one under the other. Give each group a letter name. The first would be Group A, the second Group B, etc. Include the desired grammatical forms of the words selected and any misspellings of the words selected that appear in the word frequency list. Proofread these lists carefully.

If a phrase is used as part of a list it will be presumed that the requestor desires that the words of the phrase occur in a certain order and in the same sentence. The search will be organized accordingly. Note the phrase "natural father" in Group B of the sample search format. If the requestor is not certain that the words in the phrase will be in a certain order, he may indicate this by putting "same sentence" immediately after the phrase. The search will then be organized so that the words of the phrase must be in the same sentence but need not be in any particular order.

4. After setting forth all the groups indicate in a sentence any relationship desired between them. See format used in point 4 of the sample search.

5. Indicate the state or states on which the search is to be run. If a search is desired which includes materials other than the New Jersey statutes, this must be specified. In such case, remember that the word frequency list for New Jersey is only a guide and words that seem relevant should be included, whether they appear in the New Jersey word frequency list or not.

SAMPLE SEARCH FORMAT

1. John E. Doe
   One Broad Street
   Newark, New Jersey

2. Statutes setting forth the rights of illegitimate children and the responsibilities of their natural parents to them.

   (or, alternatively)

   What are the rights of illegitimate children and the responsibilities owed them by their parents?

3.

GROUP A	GROUP B	GROUP C
baby	natural father	born out of wedlock
babies	natural father-s	bastard
child	natural fathers	illegitimate
child-s	natural mother	illegitimates
children	natural mother-s	illegitimacy
children-s	natural mothers	legitimacy
childhood	natural parent	legitimated
foundling	natural parent-s	legitimation
infant	natural parents	legitimations
infant-s	unwed	parentage
infants	unmarried	putative
infancy		
juvenile		
juvenile-s		
juveniles		
minor		
minor-s		
minors		
orphan		
orphan-s		
orphans		
orphanage		

4. Print any document containing at least one word or phrase from Group A and one from Group B, as well as any document that contains a word from Group C.

5. New Jersey Laws.

E. KWIC SEARCHES

Computer techniques also make it possible to obtain a listing of all the occurrences of a "non-common" word in the context in which it is used. When a KWIC search is requested on a particular word, the computer will identify the precise position of each occurrence of that word in the total text of the statutes. It will then print each occurrence in its context, setting off the word itself for readability, and citing the statutory section from which the context has been printed. (See sample).

If a KWIC search is to be done on more than one word, the occurrences of all the words will be printed in the sequence in which they appear in text. By requesting an alphabetical arrangement, all occurrences of each individual word will be grouped together and arranged in statutory sequence. It is also possible to KWIC search two-word phrases by requesting a search on the first word and an alphabetical arrangement of the second. To illustrate, a KWIC search on the word CONCLUSIVE, sorted on the word following it, would group together all occurrences of CONCLUSIVE EVIDENCE and all occurrences of CONCLUSIVE PRESUMPTION.

KWIC searches are to be submitted in the same form as full text searches, except that the statement of the question (item 2 of Sample Search Format) will merely be: KWIC search. The words to be searched should be listed under item 3., with an indication of the desired printing order, i.e.

Text sequence, or
Sort alphabetically, or
Sort on following word.

F. NEW JERSEY COMMON WORD LIST

UP	VOL	OVER	BEING	DEEMED	HOWEVER	OVERFLOW
SO	GEN	EVEN	THESE	DURING	WHETHER	
IF	HAD	SUPP	WOULD	WITHIN	THERETO	
PA	BUT	NEXT	EVERY	EITHER	BETWEEN	
ON	WHO	INTO	THERE		THROUGH	
HE	WAS	WERE	THEIR		THEREOF	
AT	REV	THEN	THOSE			
NO	ARE	CORP	UNDER			
IT	ART	MORE	WHERE			
AN	TIT	THEY	WHICH			
IS	OUT	STAT				
AS	ANN	THEM				
BY	HAS	ALSO				
BE	ALL	ONLY				
IN	HIS	SAME				
TO	ITS	SAID				
OR	SEC	EACH				
OF	ANY	WHEN				
	FOR	BEEN				
	AND	MADE				
	THE	HAVE				
		FROM				
		UPON				
		THAT				
		THIS				
		WITH				
		SUCH				

The twenty-six individual English letters are also eliminated.