

August 2, 1971

LEGISLATIVE HISTORY OF THE EVIDENCE ACT OF 1960 N.J.R.S. 2A:84A-1 et seq.

L.1960 - Chap. 52 - S-73, Cowgill, Lynch, Jones

The bill (enclosed) has a statement.
It was amended in the Senate (SCA enclosed).
Passed Senate amended, May 9, 1960 (OCR enclosed).
Passed Assembly, May 23, 1960.
Approved by Governor, June 20, 1960.

Governor Meyner's Press Release June 20, 1960 (enclosed)

Essex County Bar Association Section on Evidence Law.
Morris N. Hartman, Chairman.

Press Release, June 20, 1960 (enclosed).

II Earlier Bills

1. S-35 - 1957 - Jones, McCoy, Sharp.

Statement The purpose of this bill is to give effect to recommendations of the commission to study the improvement of the law of evidence established pursuant to JR 15 of 1955.

The bill is identical to the one proposed in the Appendix to the 1956 Report. [Hearings, Reports, etc. (2)].

There was a public hearing, however, it is unavailable; it was never transcribed. The bill died in committee.

See N.J. Law Journal vol. 80 no. 18 (May 2, 1957) - Statement of Chief Justice H. Burton Vandenberg at Joint Hearing, April 30, 1957
New Jersey Bar Association Bulletin I, April 26, 1957.

S-35... designated "The Evidence Law (1957)", revises the rules of evidence in all criminal and civil court proceedings and formal hearings before administrative agencies and tribunals; saves unchanged any other statutory provisions; operative 120 days after enactment.

The New Jersey Bar Association has a committee which is studying this matter in all its phases. This committee will present a report to the Association at its annual meeting in May, and we respectfully request that action on this bill be postponed until the Association has had an opportunity to pass upon it.

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Report by the New Jersey Bar Association Special Committee
on the Revision of the Law of Evidence.

79 NJLJ 181, May 17, 1956.

80 NJLJ 209, May 2, 1957.

See also Periodical Articles below.

2. A645, 1959 - Hyland, Connery, Swick, Barkalow.

S226, 1959 - Jones, McCoy, Cowgill, Fox, Lynch.

Identical to A645, never printed. (A645 enclosed)

Bill has Statement died without reference.

3. A106, 1960 - Hyland, Barkalow, (bill enclosed).

Bill had Statement.

Reported out of committee with committee amendment Apr.4, 1960.

Substituted by S73, May 16, 1960.

III Reports, Hearings, etc.

- 1) New Jersey Committee on the Revision of the
Law of Evidence.
Report... to the Supreme Court of New
Jersey. Union City, New Jersey, 1955.
187 pp.
(Also in 1955 New Jersey Judicial Conference
Proceedings)

974.90
L415
1955

- 2) New Jersey Commission to Study the Improvement
of the Law of Evidence.

Report... including uniform rules of evidence
proposed by it, to the Senate and General Assembly...
Newark, 1956.

974.90
L415
1956

87pp.

(Created by JR15 of 1955)

- 3) New Jersey Commission to Study the Improvement of the Law
Of Evidence, Supplemental Report, 80 NJLJ 210, May 2, 1957.
- 4) 974.90 New Jersey Legislature Assembly, Judiciary Committee.
C866 Public Hearing ACR16... re rule-making power of
1960 the Supreme Court, May 12, 1960.

This hearing deals with a constitutional amendment, but incidentally discusses and distinguishes S73, The Evidence Act.

- 5) KF
8932.2253
A2
1953
+
KF
165
A2
National Conference of Commissioners on Uniform
State Laws.
Uniform Rules of Evidence. Boston, Mass. 1953.
NCCUSL
HANDBOOK, 1953, p.161-215
- 6) Rules of Evidence Commission, 1967.
Preface...to Rules of Evidence in New Jersey Court Rules.
Newark, Gann, 1969 , p.885-886.

- 7) Biunno, Vincent P.

Preliminary comments to the rules, in New Jersey Court Rules.
Newark, Gann, 1969 p.887-895. (enclosed)

IV Periodical Articles

Brooks, Alexander D.

Evidence. 14 Rutgers Law Review 390 (1960)

Biunno, Vincent P.

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Clapp, Alfred C.

May a Court by Virtue of its Power to Make Rules of Practice and
Procedure Adopt Rules of Evidence? 78 New Jersey Law Journal 397,
November 24, 1955.

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New Jersey Law Journal 337, October 6, 1955.

Jacobs, Nathan L.
The Uniform Rules of Evidence; general provisions. 10 Rutgers
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Kean, Hamilton F.
An Analysis of the Report of the Legislative Commission to Study
the Improvement of the Law of Evidence. 79 New Jersey Law Journal
469, November 29, 1956.

Lasher, Milton T.
Statement of Milton T. Lasher, President, New Jersey State Bar
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The Proposed Revision of the Rules of Evidence. Series of
Editorials. 78 New Jersey Law Journal 244, 252, 260, 268, 276, 284,
292, 300, 308, July 14-September 8, 1955.

How Shall the Proposed Code of Evidence Be Adopted? Editorial,
78 New Jersey Law Journal 316, September 15, 1955.

Advancing Adoption of Revision of Law of Evidence. Editorial.
79 New Jersey Law Journal 28, January 26, 1956.

Report of the Bigelow Commission. Editorial. 79 New Jersey
Law Journal 460, November 22, 1956.

Evidence Revision by Cooperation. Editorial. 79 New Jersey Law
Journal 496, December 13, 1956.

Bigelow Urges Codification of Evidence Rules. 80 New Jersey Law
Journal 205, May 2, 1957.

Vanderbilt Critical of Evidence Bill; statement of Chief Justice...
on Senate 35... 80 New Jersey Law Journal 205, May 2, 1957.

New Jersey Supreme Court Commission to study the improvement of the Law of Evidence Supplemental Support 80 New Jersey Law Journal 210, May 2, 1957.

Stryker, Josiah. Statement by Josiah Stryker at legislative hearing on evidence revision, 80 New Jersey Law Journal 211, May 2, 1957.

Milton submits comments on revision, 80 New Jersey Law Journal 241, May 16, 1957.

Codification of Evidence Law favored by unanimous vote (State Bar) 80 New Jersey Law Journal 253, May 23, 1957.

Statement of Milton T. Lasher, President, New Jersey State Bar Association, concerning the proposed evidence code 80 New Jersey Law Journal 269, May 30, 1957.

Evidence reform and timing (Editorial) 80 New Jersey Law Journal 272, May 30, 1957.

An approach to Evidence Revision. Editorial. 81 New Jersey Law Journal 16, January 9, 1958.

"Two Fronts for Evidence Reform." Editorial. 82 New Jersey Law Journal 156, March 26, 1959.

The Proposed Evidence Act of 1959. 82 New Jersey Law Journal 500 512, 524, 536, 548, 560. Editorials. October 8-November 12, 1959.

Hartman, M.N. Letter to editor (on proposed Evidence Act) 82 New Jersey Law Journal 572, November 19, 1959.

Evidence Revision--a legislative achievement. Editorial. 83 New Jersey Law Journal 284, June 2, 1960.

New Evidence Act. 83 New Jersey Law Journal 305, June 16, 1960.

New Jersey State Bar Association.

Special Committee on the Revision of the Law of Evidence. Report. 79 New Jersey Law Journal 181, May 17, 1956.

----- Report. 80 New Jersey Law Journal 209, May 2, 1957.

Rosemore, William.

Suggestions with Respect to the Proposed Revision of the Law of Evidence. 78 New Jersey Law Journal 365, October 27, 1955.

Tyree, Lewis.

Evidence. 10 Rutgers Law Review 326, 1955.

V Newspaper Articles under New Jersey - Evidence, New Jersey - Wiretapping.

Martin, A.E.

Jersey Battle looms on Law of Evidence. Newark News, July 11, 1955.

Martin, A.E.

Court's Powers Questioned; committee leaves doubt on right to change law of evidence. Newark News, July 12, 1955.

Essex Bar to Review Evidence Rule Dispute. Newark News, September 9, 1955.

Essex Bar for Change; asks legislature act first in revision of evidence law. Newark News, September 30, 1955.

Law Study is Advanced; measure on evidence rules recision gets Meyner signature. Newark News, October 10, 1955.

Evidence Rule Reform Study is Authorized. Trenton Times, October 11, 1955.

Essex Bar Completes Evidence Law Study. Newark News, October 20, 1955.

Bars Courts on Evidence; Bigelow study group limits revisions to Legislature. Newark News, November 14, 1956.

See Revision Joint Task; lawyers urge court, legislature work on evidence. Newark News, November 12, 1956.

Code of Evidence. Editorial. Newark News, November 19, 1956.

Evidence Law Hearing; bill would assert prerogative of legislature to effect changes in statute. Newark News, April 23, 1957.

✓ Vanderbilt Blasts Bill on Evidence; sees it making New Jersey laughing stock of law world. Newark News, April 30, 1957.

Don't Choke New Jersey Courts, is Plea from Vanderbilt; Chief Justice advises legislature against meddling with laws on evidence -- would undo progress he says. Trenton Times, April 30, 1957.

Evidence Code Maybe up to Court; Chief Justice makes 90-minute plea against adoption. Trenton Times, May 1, 1957.

Bar to Discuss Report on Law of Evidence Bill. Newark News, May 3, 1957.

Wisner, Max

Bar in Overwhelming Vote to Codify Law of Evidence. Newark News, May 17, 1957.

Contradicts Vanderbilt; Bigelow says he consulted judges on law of evidence. Newark News, May 18, 1957.

Vanderbilt Takes Issue with Bigelow Statement. Trenton Times, May 19, 1957.

Wiener, Max.

Vanderbilt Gives Reply; appears before bar to dispute statement by Bigelow. Newark News, May 19, 1957.

Talk Invited on Evidence; legislative majority eyes parley with high court. Newark News, May 21, 1957.

Vanderbilt Acid; hits bar association on law of evidence. Newark News, May 21, 1957.

Lasher Defends Bar in Controversy; restates stand on evidence law. Newark News. May 29, 1957.

Bills Revise Jersey Rules of Evidence. Trenton Times, May 6, 1959.

Battle Over Evidence is Resolved by Compromise. Trenton Times January 17, 1960.

Governor Signs Bill Curbing Rule Power of Supreme Court. Philadelphia INquirer, June 21, 1960.

GC 1960 S 73 yes.

HP/EH
Encl.

Rules of Evidence 1960
2A:84A-1 et seq.

THE EVIDENCE ACT OF 1960
(L.1960, Chapter 52)

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leg History and Bibliography

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December 13, 1961

2A:84A-1 et seq.

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(Chapter 52 (3-73) of 1960)

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Reports and Periodical Articles

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RS/mg

ESSEX COV
744 Broad Street

Newark 2, N. J.

January 6, 1960

To his Excellency, the Hon. Robert B. Meyner,
Chief Justice Joseph Weintraub, and Mem-
bers of the Senate and Assembly of the
State of New Jersey:

At a recent meeting of this Association, attended
by approximately 250 of its members, the following resolu-
tions were unanimously adopted:

RESOLVED that it is the sense of the
Essex County Bar Association that the
creation of six additional Superior
Court judgeships is an urgent, impera-
tive need, and that the Secretary of
the Association be instructed to call
to the attention of all members of the
Legislature that the Essex County Bar
Association urges them to take prompt
action to meet this need.

FURTHER RESOLVED that the following re-
port of the Evidence Committee be ac-
cepted and approved:

"The Committee approves the general
approach and basic provisions of the
proposed Evidence Act of 1959 (Senate,
No. 226) and urges its early passage by
the Legislature. The Committee approves
specifically Article III, dealing with
the method of adoption of Rules of Evi-
dence. Without detracting from the above,
the Committee reserves the right to dis-
agree with certain of the substantive
provisions if it concludes upon
further study that changes would improve
the Bill.

"FURTHER RESOLVED that the Com-
mittee make such further continuing
study of the Bill as it may consider
desirable."

Very truly yours,

JAMES R. LACEY

Secretary

SENATE, No. 73

STATE OF NEW JERSEY

INTRODUCED JANUARY 25, 1960

By Senators COWGILL, LYNCH, FOX and JONES

Referred to Committee on Judiciary

AN ACT concerning evidence and witnesses, providing for the adoption of rules of evidence, supplementing subtitle 9 of Title 2A of the New Jersey Statutes, amending sections 2A:81-2, 2A:81-17, 2A:82-16 and 2A:82-27 and repealing sections 2A:81-3, 2A:81-5, 2A:81-7, 2A:81-9 and 2A:81-10 of said Title 2A.

1 BE IT ENACTED *by the Senate and General Assembly of the State of New*
2 *Jersey:*

ARTICLE I

GENERAL PROVISIONS

1 1. Rule 1. Definitions. As used in the rules set forth in this act or in
2 rules adopted pursuant hereto, the terms defined in this article shall have the
3 meaning specified unless the context indicates a contrary intention.

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

1 3. Rule 1. (2) "Relevant evidence" means evidence having any tendency
2 in reason to prove any material fact.

1 4. Rule 1. (3) "Proof" is all of the evidence before the trier of the fact
2 relevant to a fact in issue which tends to prove the existence or nonexistence
3 of such fact.

1 5. Rule 1. (4) "Burden of proof" means the obligation of a party to
2 meet the requirements of a rule of law that the fact be proved either by a pre-

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted
and is intended to be omitted in the law.

3 ponderance of the evidence or by clear and convincing evidence or beyond a
 4 reasonable doubt, as the case may be. Burden of proof is synonymous with
 5 "burden of persuasion."

1 6. Rule 1. (5) "Burden of producing evidence" means the obligation of
 2 a party to introduce evidence when necessary to avoid the risk of a judgment,
 3 or peremptory finding against him on a material issue of fact.

1 7. Rule 1. (6) "Conduct" includes all active and passive behavior, both
 2 verbal and nonverbal.

1 8. Rule 1. (7) "The hearing," unless some other is indicated by the con-
 2 text of the rule where the term is used, means the hearing at which the ques-
 3 tion under a rule is raised, and not some earlier or later hearing.

1 9. Rule 1. (8) "Finding of fact" means the determination from proof
 2 or judicial notice of the existence of a fact. A ruling implies a supporting
 3 finding of fact; no separate or formal finding is required unless required by
 4 a statute or rule of court of this State.

1 10. Rule 1. (9) "Guardian" means the person, committee, or other rep-
 2 resentative authorized by law to protect the person or estate or both of an
 3 incompetent or a sui juris person having a guardian and to act for him in
 4 matters affecting his person or property or both. An incompetent is a person
 5 under disability imposed by law.

1 11. Rule 1. (10) "Judge" means member or members or representative
 2 or representatives of a court or other tribunal conducting a trial or hearing
 3 at which evidence is introduced.

1 12. Rule 1. (11) "Trier of fact" includes a jury and a judge when he
 2 is trying an issue of fact other than one relating to the admissibility of evi-
 3 dence.

1 13. Rule 1. (12) "Verbal" includes both oral and written words.

1 14. Rule 1. (13) "Writing" means handwriting, typewriting, printing,
 2 photostating, photography and every other means of recording upon any tan-
 3 gible thing any form of communication or representation, including letters,

4 words, pictures, sounds or symbols, or combinations thereof, provided that
5 such recording is (a) reasonably permanent and (b) readable by sight.

1 15. Rule 1. (14) "Perceive" means acquire knowledge through one's
2 own senses.

1 16. Rule 2. Scope of the rules.

2 (1) The rules contained in this act, or adopted pursuant hereto, shall ap-
3 ply in every proceeding, criminal or civil, conducted by or under the super-
4 vision of a court, in which evidence is produced.

5 (2) Except to the extent to which the rules of evidence may be relaxed
6 by or pursuant to statute applicable to the particular tribunal, the rules set
7 forth in this act or adopted pursuant hereto shall apply to formal hearings be-
8 fore administrative agencies and tribunals; but the provisions of article II,
9 Privileges, shall apply in all cases and to all proceedings, nor shall any of said
10 provisions be relaxed.

11 (3) The enactment of the rules set forth in this act or the adoption of
12 rules pursuant hereto shall not operate to repeal any statute by implication.

ARTICLE II

PRIVILEGES

1 17. Rule 23. Privilege of accused.

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

4 (2) The spouse of the accused in a criminal action shall not testify in
5 such action except to prove the fact of marriage unless (a) such spouse and
6 the accused shall both consent, or (b) the accused is charged with an offense
7 against the spouse, a child of the accused or of the spouse, or a child to whom
8 the accused or the spouse stands in the place of a parent, or (c) such spouse
9 is the complainant.

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

13 (4) If an accused in a criminal action does not testify after direct evi-
14 dence is received of facts which tend to prove some element of the crime and

15 which facts, if untrue, he could disprove by his own testimony, counsel and the
 16 judge may comment on his failure to testify, and the trier of fact may draw
 17 an inference that accused cannot truthfully deny those facts.

1 18. Rule 24. Definition of incrimination.

2 Within the meaning of this article, a matter will incriminate (a) if it
 3 constitutes an element of a crime against this State, or another State or the
 4 United States, or (b) is a circumstance which with other circumstances
 5 would be a basis for a reasonable inference of the commission of such a
 6 crime, or (c) is a clue to the discovery of a matter which is within clauses
 7 (a) or (b) above; provided, a matter will not be held to incriminate if it
 8 clearly appears that the witness has no reasonable cause to apprehend a
 9 criminal prosecution. In determining whether a matter is incriminating un-
 10 der clauses (a), (b) or (c) and whether a criminal prosecution is to be ap-
 11 prehended, other matters in evidence, or disclosed in argument, the implica-
 12 tions of the question, the setting in which it is asked, the applicable statute of
 13 limitations and all other factors, shall be taken into consideration.

1 19. Rule 25. Self-incrimination: exceptions.

2 Subject to Rule 37, every natural person has a right to refuse to disclose
 3 in an action or to a police officer or other official any matter that will in-
 4 criminate him or expose him to a penalty or a forfeiture of his estate, except
 5 that under this rule:

6 (a) no person has the privilege to refuse to submit to examination for the
 7 purpose of discovering or recording his corporal features and other identify-
 8 ing characteristics or his physical or mental condition;

9 (b) no person has the privilege to refuse to obey an order made by a
 10 court to produce for use as evidence or otherwise a document, chattel or
 11 other thing under his control if some other person or a corporation or other
 12 association has a superior right to the possession of the thing ordered to be
 13 produced;

14 (c) no person has a privilege to refuse to disclose any matter which the
 15 statutes or regulations governing his office, activity, occupation, profession

16 or calling, or governing the corporation or association of which he is an
17 officer, agent or employee, require him to record or report or disclose;

18 (d) subject to the same limitations on evidence affecting credibility as
19 apply to any other witness, the accused in a criminal action or a party in a
20 civil action who voluntarily testifies in the action upon the merits does not
21 have the privilege to refuse to disclose in that action, any matter relevant to
22 any issue therein.

1 20. Rule 26. Lawyer-client privilege.

2 (1) General rule. Subject to Rule 37 and except as otherwise provided
3 by paragraph 2 of this rule communications between lawyer and his client in
4 the course of that relationship and in professional confidence, are privileged,
5 and a client has a privilege (a) to refuse to disclose any such communica-
6 tion, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any
7 other witness from disclosing such communication if it came to the knowledge
8 of such witness (i) in the course of its transmittal between the client and the
9 lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a
10 result of a breach of the lawyer-client relationship, or (iv) in the course of a
11 recognized confidential or privileged communication between the client and
12 such witness. The privilege shall be claimed by the lawyer unless otherwise
13 instructed by the client or his representative; the privilege may be claimed
14 by the client in person, or if incompetent or deceased, by his guardian or
15 personal representative. Where a corporation or association is the client
16 having the privilege and it has been dissolved, the privilege may be claimed
17 by its successors, assigns or trustees in dissolution.

18 (2) Exceptions. Such privilege shall not extend (a) to a communication
19 in the course of legal service sought or obtained in aid of the commission of
20 a crime or a fraud, or (b) to a communication relevant to an issue between
21 parties all of whom claim through the client, regardless of whether the re-
22 spective claims are by testate or intestate succession or by inter vivos trans-
23 action, or (c) to a communication relevant to an issue of breach of duty by
24 the lawyer to his client, or by the client to his lawyer. Where 2 or more per-

25 sons have employed a lawyer to act for them in common, none of them can
 26 assert such privilege as against the others as to communications with re-
 27 spect to that matter.

28 (3) Definitions. As used in this rule (a) "client" means a person or
 29 corporation or other association that, directly or through an authorized
 30 representative, consults a lawyer or the lawyer's representative for the pur-
 31 pose of retaining the lawyer or securing legal service or advice from him in
 32 his professional capacity; and includes an incompetent whose guardian so con-
 33 sults the lawyer or the lawyer's representative in behalf of the incompetent,
 34 (b) "lawyer" means a person authorized, or reasonably believed by the client
 35 to be authorized to practice law in any State or nation the law of which
 36 recognizes a privilege against disclosure of confidential communications be-
 37 tween client and lawyer. A communication made in the course of relationship
 38 between lawyer and client shall be presumed to have been made in profes-
 39 sional confidence unless knowingly made within the hearing of some person
 40 whose presence nullified the privilege.

1 21. Rule 27. Newspaperman's privilege.

2 Subject to Rule 37, a person connected with, or employed by, a news-
 3 paper has a privilege to refuse to disclose in a court or before a grand jury
 4 the source of any information procured or obtained by him and published
 5 in such newspaper.

1 22. Rule 28. Marital privilege—confidential communications.

2 No person shall disclose any communication made in confidence between
 3 such person and his or her spouse unless both shall consent to the disclosure
 4 or unless the communication is relevant to an issue in an action between
 5 them or in a criminal action or proceeding coming within Rule 23 (2). When
 6 a spouse is incompetent, consent to the disclosure may be given for such spouse
 7 by the guardian. The requirement for consent shall not terminate with di-
 8 vorce or separation but shall terminate with the death of either spouse. A
 9 communication between spouses while living separate and apart under a di-
 10 vorce from bed and board shall not be a privileged communication.

1 23. Rule 29. Priest-penitent privilege.

2 Subject to Rule 37, a clergyman or other minister of any religion shall
3 not be allowed or compelled to disclose a confession or other confidential
4 communication made to him in his professional character, or as a spiritual
5 advisor in the course of the discipline or practice of the religious body to
6 which he belongs or of the religion which he professes.

1 24. Rule 30. Religious belief.

2 Every person has a privilege to refuse to disclose his theological opinion
3 or religious belief unless his adherence or nonadherence to such an opinion
4 or belief is material to an issue in the action other than that of his credi-
5 bility as a witness.

1 25. Rule 31. Political vote.

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

1 26. Rule 32. Trade secret.

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

1 27. Rule 34. Official information.

2 No person shall disclose official information of this State or of the United
3 States (a) if disclosure is forbidden by or pursuant to any Act of Congress
4 or of this State, or (b) if the judge finds that disclosure of the information
5 in the action will be harmful to the interests of the public.

1 28. Rule 36. Identity of informer.

2 A witness has a privilege to refuse to disclose the identity of a person
3 who has furnished information purporting to disclose a violation of a pro-
4 vision of the laws of this State or of the United States to a representative
5 of the State or the United States or a governmental division thereof,
6 charged with the duty of enforcing that provision, and evidence thereof is
7 inadmissible, unless the judge finds that (a) the identity of the person fur-

8 nishing the information has already been otherwise disclosed or (b) disclo-
9 sure of his identity is essential to assure a fair determination of the issues.

1 29. Rule 37. Waiver of privilege by contract or previous disclosure;
2 limitations.

3 A person waives his right or privilege to refuse to disclose or to prevent
4 another from disclosing a specified matter if he or any other person while the
5 holder thereof has (a) contracted with anyone not to claim the right or privi-
6 lege or, (b) without coercion and with knowledge of his right or privilege,
7 made disclosure of any part of the matter or consented to such a disclosure
8 made by anyone.

9 A disclosure which is itself privileged or otherwise protected by the com-
10 mon law, statutes or rules of court of this State, or by lawful contract, shall
11 not constitute a waiver under this section. The failure of a witness to claim
12 a right or privilege with respect to 1 question shall not operate as a waiver
13 with respect to any other question.

1 30. Rule 38. Admissibility of disclosure wrongfully compelled.

2 Evidence of a statement or other disclosure is inadmissible against the
3 holder of the privilege if the disclosure was wrongfully made or erroneously
4 required.

1 31. Rule 39. Reference to exercise of privileges.

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

1 32. Rule 40. Effect of error in overruling claim of privilege.

2 (1) A party may predicate error on a ruling disallowing a claim of
3 privilege only if he is the holder of the privilege.

4 (2) If a witness refuses to answer a question, under color of a privilege
5 claimed pursuant to Rules 23 through 38, after the judge has ordered the wit-
6 ness to answer, and a contempt proceeding is brought against the witness, the
7 court hearing the same shall order it dismissed if it appears that the order
8 directing the witness to answer was erroneous.

ARTICLE III

ADOPTION OF RULES

1 33. The Supreme Court may adopt rules dealing with the admission or
2 rejection of evidence, in accordance with the procedures set forth in this
3 article.

1 34. The subject matter and a tentative draft of a rule or rules proposed
2 to be adopted pursuant to this article shall be entered upon the agenda and
3 discussed at a Judicial Conference whose membership shall at least include
4 delegates from the Supreme Court, the Appellate Division of the Superior
5 Court, the judges of the Law Division and the Chancery Division of the Su-
6 perior Court, the judges of the County Courts, the judges of the county dis-
7 trict courts, the judges of the juvenile and domestic relations courts, the
8 judges of the municipal courts, the surrogates, the State Bar Association,
9 the county bar associations, the Senate and General Assembly, the Attorney
10 General, the county prosecutors, the law schools of this State, and members of
11 the public.

1 35. The proposed rule or rules shall be publicly announced by the Su-
2 preme Court on September 15 next following such Judicial Conference (or, if
3 such day be a Saturday, Sunday or legal holiday, on the first day thereafter
4 that is not), and the court shall, on the same day, cause true copies thereof to
5 be delivered to the President of the Senate, the Speaker of the General
6 Assembly, and the Governor.

1 36. The rule or rules so announced and delivered shall take effect on
2 July 1 next following; provided, however, that all such rules shall remain
3 subject to cancellation at any time up to such effective date by joint resolution
4 to that effect adopted by the Senate and General Assembly and signed by the
5 Governor.

1 37. Any rule or rules so proposed or adopted shall be subject to change
2 or cancellation at any time by statute or by a subsequent rule adopted pur-
3 suant to this article.

1 38. By joint resolution adopted by the Senate and General Assembly
2 and signed by the Governor with respect to a particular rule or rules therein
3 specified, the Supreme Court may adopt such rule or rules at such time or
4 times, or with such effective date, or without presentation at a Judicial Con-
5 ference, as may be provided in the joint resolution.

1 39. By joint resolution adopted by the Senate and General Assembly
2 and signed by the Governor with respect to a particular rule or rules therein
3 specified, the period of time provided in section 36 during which the same
4 may be canceled by joint resolution may be reduced or eliminated.

1 40. All previous laws or parts of laws dealing with the admission or re-
2 jection of evidence which shall be expressly identified by footnote to any rule
3 so adopted, and which shall be in conflict or inconsistent with such rule or
4 rules, or included therein, revised or rendered obsolete thereby, shall be of
5 no further force or effect after such rule or rules shall have taken effect.

1 41. No rule adopted pursuant to this article shall abridge, enlarge or
2 modify any substantive right or eliminate the right of trial by jury.

1 42. No rule adopted pursuant to this article shall be made applicable to
2 pending proceedings or to existing rights or remedies except to the extent
3 that such application is fair and practicable, and does not impair the obliga-
4 tion of contracts or deprive a party of any remedy for enforcing a contract
5 which existed when the contract was made.

1 43. To the end that rules dealing with evidence may be conveniently
2 presented and arranged, the Supreme Court may publish or cause to be pub-

3 lished compilations and restatements thereof which may include, in addition to
4 such rules as may be adopted pursuant to this article, rules established by
5 common law, statute, constitution or otherwise, together with editorial notes,
6 tables and references, and with indications as to the source of each such rule.
7 Where practicable or desirable, the numbering and arrangement of such pub-
8 lications shall conform to standard or uniform works on the subject, or pro-
9 vide cross-reference thereto.

1 44. All rules of court heretofore promulgated and which may deal with
2 the admission or rejection of evidence shall be deemed to have the same
3 force and effect as though they had been adopted pursuant to this article.

ARTICLE IV

MISCELLANEOUS REVISIONS AND REPEALERS

1 45. Section 2A:81-2 of Title 2A of the New Jersey Statutes is amended
2 to read as follows:

3 2A:81-2. When 1 party to any civil action is a lunatic suing or defend-
4 ing by guardian or when 1 party sues or is sued in a representative capacity,
5 [no] *any* other party [thereto may testify as to any transaction with or
6 statement by the lunatic while of sound mind or with or by the decedent,
7 unless:

8 a. The guardian of the lunatic or the representative of the decedent
9 offers himself as a witness on his own behalf, and testifies to any transac-
10 tion with or statement by his testator, intestate or ward, in which event the
11 other party may be a witness on his own behalf as to all transactions with
12 or statements by the lunatic while of sound mind or by the decedent, which
13 are pertinent to the issue; or

14 b. The action is founded upon any allegation of fraud, breach of trust,
15 willful default or undue influence, in which cases the defendant may be
16 sworn and examined as a witness on his own behalf as to transactions with
17 or statements by the lunatic or decedent.

18 Where a guardian or representative is a national bank, bank, trust com-
19 pany, or other corporation, testimony of an officer or employee thereof shall

20 be deemed testimony of the guardian or representative within the meaning
21 of this section.] *who asserts a claim or an affirmative defense against such*
22 *lunatic or representative, supported by oral testimony of a promise, state-*
23 *ment or act of the lunatic while of sound mind or of the decedent, shall be*
24 *required to establish the same by clear and convincing proof.*

1 46. Section 2A:81-17 of Title 2A of the New Jersey Statutes is amended
2 to read as follows:

3 2A:81-17. Except as provided in section [2A:97-21] ~~2A:81-21~~ of this
4 Title, a witness shall be privileged from arrest in all civil actions, and no
5 other, during necessary attendance at court or other place, required by
6 subpoena previously duly served, and during his going to and returning there-
7 from, allowing 1 day for every 30 miles from his place of residence.

8 Any arrest made in violation of the privilege given by this section shall
9 be a contempt of the court out of which the subpoena issued, and the court,
10 may, by an order, forthwith discharge the witness from arrest.

1 47. Section 2A:82-16 of Title 2A of the New Jersey Statutes is amended
2 to read as follows:

3 2A:82-16. Any public record of any foreign State or territory, province,
4 county or city, or of any court therein or any copy thereof, which is admissible
5 in such State, territory, province, county or city, or in any court therein, to
6 prove the facts therein contained, or any duly certified public record of any
7 department of the United States Government or of any Federal court which
8 is admissible in any Federal court or by virtue of any Federal statute to
9 prove the facts therein contained, shall be admitted in evidence in the courts
10 of this State, and shall be evidence of the facts therein contained, to the same
11 extent as though the original paper or papers, of which the record thereof is
12 a copy, had been produced and proved; provided, that whenever a copy of
13 such record, other than a duly certified copy of any public record of any de-
14 partment of the United States Government or of any Federal court, shall be
15 offered in evidence, the same shall not be admitted, unless the same shall
16 have been first exemplified according to the Acts of Congress of the United

17 States [; and provided, further, that printed copies of schedules and classi-
 18 fications and tariffs of rates, fares and charges, and supplements thereto,
 19 filed with the Interstate Commerce Commission, which show respectively an
 20 interstate commerce number, which may be stated in abbreviated form, as
 21 I. C. C. No., and an effective date, and tariffs, rates, rules and supple-
 22 ments thereto of companies subject to the supervision of the Federal Com-
 23 munications Commission may be received in evidence without certification,
 24 and shall be presumed to be correct copies of the original schedules, classifica-
 25 tions, tariffs or supplements]. *Printed copies of (a) schedules, classifications,*
 26 *tariffs of rates, fares and charges, and supplements thereto filed with the*
 27 *Interstate Commerce Commission, which bear an Interstate Commerce Com-*
 28 *mission number which may be shown in abbreviated form as I. C. C. No.,*
 29 *and an effective date, and (b) tariffs, rates, rules, and supplements thereto*
 30 *of companies subject to the supervision of the Federal Communications Com-*
 31 *mission, shall be received in evidence to prove the contents thereof without*
 32 *certification although privately printed, and shall be presumed to be correct*
 33 *copies of the originals unless the contrary be shown.*

1 48. Section 2A:82-27 of Title 2A of the New Jersey Statutes is amended
 2 to read as follows:

3 2A:82-27. Whenever the common or statute law of any *other State or*
 4 *country* is pleaded, or notice thereof given to the court and each adverse party
 5 at or before the pretrial conference, or at least 10 days before trial when
 6 there is no pretrial conference, or within such other time as the court may fix
 7 by order, in an action in any court of this State, the court shall take judicial
 8 notice thereof. In the absence of such pleading or notice, it shall be presumed
 9 that the common law of such State is the same as the common law as
 10 interpreted by the courts of this State.

1 49. The following acts and parts of acts and all amendments and supple-
 2 ments thereto are hereby repealed: Sections 2A:81-3, 2A:81-5, 2A:81-7,
 3 2A:81-9 and 2A:81-10 of the New Jersey Statutes.

1 50. The numbering of rules of evidence within various sections in this act
2 is intended to keep the designation thereof compatible with the numbering
3 arrangement of the proposed Uniform Rules of Evidence, to the extent
4 feasible. Reference within a section or sections of this act to a "Rule" shall
5 be deemed to be equivalent to a reference to that section of this act containing
6 the designated rule. Rule numbers not used are reserved for rules hereafter
7 adopted.

1 51. No repeal effected by this act shall operate to revive any statute
2 heretofore repealed nor to impair the obligation of contracts made before the
3 effective date hereof, nor to deprive a party of any remedy for enforcing a
4 contract which existed when the contract was made.

1 52. This act shall be known and may be cited as "The Evidence Act,
2 1960."

1 53. This act shall take effect July 1, 1960, except that article III shall
2 take effect immediately.

STATEMENT

This bill will put into effect the recommendations of the Commission to Study the Improvement of the Law of Evidence (J. R. 15, 1955) by resolving the problem of method of adoption.

The bill contains the rules as recommended by way of definitions and scope, and on the subject of privilege, which involves the largest element of public policy. As to these, the Legislature will express itself on that policy by setting out the full text of the rules on that subject.

The bill then provides legislative authority to the Supreme Court to adopt rules dealing with the admission and rejection of evidence, under a specified procedure. This includes discussion at a judicial conference, public announcement on September 15 following, together with delivery of true copies to the President of the Senate, to the Speaker of the General Assembly and to the Governor. Rules so announced will not take effect until July 1 of the following year. In the intervening period, any such rule may be canceled by joint resolu-

tion. Any rule proposed or adopted also remains subject to legislative modification by statute at any time.

Rules adopted under this bill will replace existing rules which are revised, or are in conflict therewith, included therein or rendered obsolete, but the bill requires that to have this effect the law or laws intended to be replaced are to be specifically identified by way of footnote to the rule. As the work progresses this mechanism should greatly improve certainty as to which provisions are in force and which are not.

Lastly, the bill contains in article IV an amendment to the Dead Man's Act which eliminates the bar to receiving the testimony but simultaneously establishes a burden of proof to establish the claim by clear and convincing proof. Several other sections are corrected, as recommended by the commission, and a number of sections embraced by the rules on privilege in article II are repealed.

This bill will culminate the extensive studies of the bipartisan commission of both houses and with public members and will be an important landmark in law revision work.

SENATE COMMITTEE AMENDMENTS TO

SENATE, No. 73

STATE OF NEW JERSEY

ADOPTED MAY 2, 1960

Amend page 3, section 16, following line 1, insert new paragraph as follows:

“(1) The provisions of article II, Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.”

Amend page 3, section 16, line 2, delete “(1) The” and insert in lieu thereof: “(2) All other”.

Amend page 3, section 16, line 5, delete “(2)” and substitute “(3)”.

Amend page 3, section 16, line 6, immediately after “tribunal” insert: “and except as provided in paragraph (1) of this rule”.

Amend page 3, section 16, lines 8, 9 and 10, immediately after “tribunal” on line 8, delete the semi-colon and remainder of line 8, all of line 9 and all of line 10.

Amend page 3, section 16, line 11, delete “(3)” and substitute “(4)”.

Amend page 5, section 19, line 17, after “disclose” insert: “except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential”.

Amend page 6, section 21, line 2, after “person” insert “engaged on,”

Amend page 6, section 21, line 3, delete “in a court or before a grand jury”.

Amend page 6, section 21, line 4, after "source", delete "of" and insert
", author, means, agency or person from or through whom".

Amend page 6, section 21, line 4, immediately after "information" delete
"procured or obtained by him and".

Amend page 6, section 21, line 5, immediately after "newspaper" insert
"was procured, obtained, supplied, furnished, or delivered".

Amend page 6, section 22, line 6, after "incompetent" insert "or deceased".

Amend page 6, section 22, line 7, after "guardian" insert ", executor or
administrator".

Amend page 6, section 22, line 8, delete "but shall terminate with the death
of either spouse".

Amend page 7, section 23, line 2, after "clergyman", delete "or other" and
insert a comma in lieu thereof, and after "minister" insert ", or other person
or practitioner authorized to perform similar functions,".

Amend page 8, section 29, line 7, immediately before the word "matter" in-
sert "privileged".

publication and distribution. This was first done for early and broad distribution through publication in the New Jersey Law Journal.

Thereafter, the Commission arranged for publication and distribution by Gann Law Books of a pamphlet of the rules, in August of 1967.

Since then the Commission has prepared the present pamphlet, with brief comments, explanations and illustrations where appropriate.

As its next effort, the Commission has launched the preparation of a condensed but comprehensive handbook on New Jersey Evidence Law, embracing not only the Rules explicitly adopted, but other areas now governed by existing statute and case law. Publication is scheduled for the Summer of 1969.

FOOTNOTES AND EDITORIAL NOTES.

In working with this edition of the evidence rules, several matters should be carefully noted in respect to footnotes, editorial notes, and the like:

- ... "Official Notes", which are entirely in boldface type immediately following a rule, are footnotes adopted by the Supreme Court as part of the rules themselves, and under the authority of N.J.S. 2A:84A-40, these have the effect of superseding the specific statutes mentioned. In this edition, the phrasing of these notes has been altered editorially to add the word "Official" as well as an explicit reminder that cited statutes are superseded;
- ... To avoid being misled, it is urged that you go through the "Official Notes" and make an entry in the margin of your statute books opposite each statute that is superseded; and noting there the

evidence rule number involved, to serve as a reminder until such time as the statute book publishers have made appropriate entries;

- ... Bracketed notations of rules originally proposed but which were not finally adopted are included in the text as well as in the table of contents and index; these are editorial entries included to preserve some of the history as it may bear on interpretation;
- ... Following many of the rules, brief editorial notes have been inserted to provide explanation, illustration, caution, cross-reference, and a restricted number of important citations; all of these entries are unofficial, but were prepared by the 1967 Commission as an aid to the bench and bar;
- ... Two additional privilege rules have been added editorially; Rule 26A-1 is a psychologist's privilege enacted by 1966 statute, and Rule 26A-2 is a physician's privilege enacted by 1968 statute. Neither statute was drafted to coordinate with the privilege rules enacted in 1960, although the 1968 statute is a supplement to the Evidence Act, 1960. Caution will be in order in analyzing these two new privilege laws, especially in regard to Rule 2, Scope, the application of which is uncertain.

- Rule 69. Certificate of lack of record
- Rule 70. Original writings as the best evidence
- Rule 71. Proof of attested writings
- Rule 72. [Photographic copies to prove content of business and public records] Not adopted.

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PREFACE BY THE COMMISSION

The 1967 Rules of Evidence Commission has undertaken to bring to reality the adoption of a useful set of Evidence Rules. The effort began with the Report of the Jacobs Committee (1955), and was carried forward by the Bigelow Commission (1956).

A major step was taken by the adoption of the Evidence Act, 1960. That statute established the basic definitions and scope, and adopted the rules of privilege. Beyond that it created machinery for rules adoption with participation by all three branches of government, the judiciary being charged with the initiating function. Thus, the fearful jurisdictional problems of *Winberry* were laid to rest for this important subject.

After the publication of a further report by the Jacobs Committee (1963), and after extensive study and discussion, the remaining rules proposed by the Supreme Court were put in force on September 11, 1967.

This effort, spanning more than a dozen years, represented unstinting dedication toward achievement of the goal by bench and bar alike. The many individuals who contributed countless hours of research, discussion and debate, and secretarial assistance are too numerous to be listed here. They know who they are. Suffice it to say that they included appellate judges, trial judges, experienced lawyers, theoretical lawyers, and professors of evidence law from a number of law schools. All of them may justly take pride in the final product.

The effort, interestingly enough, began with a relatively academic format and was completed by sophisticated adjustments to reflect the realities of the courtroom. The

*Source: New Jersey Court Rules
1969 "Preliminary" by Commission
to the rules*

philosophy of the Rules is neither conservative nor liberal. It is realistic. The object throughout has been to compose a set of general rules in a complex field, that would provide useful anchors and guides in the day-to-day management of the trial process. For this to be efficient in an adversary posture with an impartial umpire, it is vital that both sides and the judge be equipped to deal quickly and surely with questions of evidence. No effort has been spared to make this possible.

There are, consequently, two separate phases to the whole effort. One is aimed at providing a solid foundation for dealing with the kind of question that arises repeatedly in endless trial after trial. The other is creative, and is aimed at constant improvement and broadening of the initial effort.

The 1967 Commission felt it had found an effective avenue for judicial-legislative cooperation that holds great hope for creative advances, not only in evidence law but in other areas of common concern as well.

It is hoped that the current pamphlet, and the more ambitious handbook to follow, will mark the start of a new era in the development of jurisprudence.

FOR THE COMMISSION

Senator Frank J. Guarini, Chairman.

PRELIMINARY COMMENTS TO THE RULES

Prepared by Vincent P. Biunno, Esq., of Newark, New Jersey, a member of the New Jersey Bar.

HOW THE RULES CAME INTO EXISTENCE.

The Evidence Act, 1960 (L. 1960, c. 52) adopted as law Rules 1(1) through 1(13)—Definitions; Rule 2—Scope of the Rules; and Rules 23 through 40—Privileges.

The same law set up machinery for the adoption of other rules by the joint participation of all three branches of government. Briefly, this contemplates an initiating function in the Supreme Court, which may propose rules after discussion at a Judicial Conference, and by a filing with both Houses and with the Governor. Rules so proposed take effect on July 1 of the next year unless the Legislature disagrees, this to be expressed by joint resolution approved by the Governor. See N.J.S. 2A:84A-33 to 44.

This mechanism, involving as it does the participation of all branches of State Government, renders moot any question of promulgating authority. It is borrowed from the arrangement under which the federal court rules have been promulgated, 28 U.S.C.A. sec. 723.

Rules were proposed by the Supreme Court in September, 1964. Their effective date was several times postponed. In 1967, by JR-5, changes in the language of some rules and deletion of others were set forth, with all the rules not already law to take effect September 11, 1967. In accordance with the joint resolution, a Supreme Court order was entered promulgating these rules as so modified.

**EFFECT OF THE RULES ON
EXISTING STATUTES.**

The enabling act is designed to prevent unintended repeal of existing statutes on evidence. Rule 2(4) declares that neither the rules enacted by statute nor those adopted by the Court are to repeal any statute by implication.

By section 40 of the Evidence Act, 1960, N.J.S. 2A:84A-40, rules adopted by the Court can supersede existing statutes, but to have this effect the statutes to be superseded must be expressly identified by footnote to the rule adopted. The text of such footnotes will be found among the rules in this publication.

This point has come up and has been dealt with exactly as intended by the Evidence Act, 1960. See, *Waterfront Comm'n*, 39 N. J. 436, at 454-456 (1963).

In keeping with this approach, the Evidence Act, 1960, in addition to adopting some rules and arranging for the Supreme Court to initiate others, made some statutory changes itself. These were as follows:

- ... the Dead Man's Act, N.J.S. 2A:81-2, was amended to allow testimony of transactions with a party decedent or lunatic, but requires the claim or affirmative defense involved to be established by clear and convincing proof;
- ... the statute on privilege from arrest in certain cases, N.J.S. 2A:81-17, was amended to correct an erroneous internal cross-reference;
- ... the statute on proof of foreign public record matters, N.J.S. 2A:82-16, was amended to overcome the effect of *State v. Black*, 31 N. J. Super. 418 (App. 1954), which had failed to recognize that I.C.C. tariffs are privately printed under Commission practice;

... part of the statute on judicial notice of foreign law, N.J.S. 2A:82-27 was amended to permit notice other than by pleading the foreign law; but that section, as well as others in the group, is now superseded by Rules 9, 10, 11 and 12, as indicated by the official footnote;

... a number of privilege statutes covered by new rules enacted in 1960 were repealed, as follows:

N.J.S. 2A:81-3, Marital Witnesses in Criminal Cases, now Rule 23(2);

N.J.S. 2A:81-5, Self-Incrimination, now Rules 23, 24, 25;

N.J.S. 2A:81-7, Marital Privilege, now Rule 28;

N.J.S. 2A:81-9, Priest-Penitent Privilege, now Rule 29;

N.J.S. 2A:81-10, Newspaperman's Privilege, now Rule 27.

WHERE THE RULES APPLY.

The Privilege Rules (23 through 40), apply everywhere and these rules may not be relaxed. See Rule 2(1).

All the other rules apply to all proceedings, civil or criminal, in a court (unless the rule content is itself limited to civil or criminal cases). See Rule 2(2).

The same is true of such other rules in respect to formal hearings before administrative tribunals (at all levels of government) except to the extent that the enabling statute governing the tribunal states otherwise, or that the tribunal, under statutory authority, may adopt regulations to the effect that the rules of evidence shall not apply. Some examples of such statutes are:

R.S. 17:1-8.10 (Commissioner of Banking and Insurance)

R.S. 34:15-56 (Workmen's Compensation Claims)

R.S. 43:21-50(a) (Review of temporary disability claims)

R.S. 48:2-32 (Hearings before P.U.C.)

EVIDENCE MATTERS NOT COVERED BY THESE RULES.

The group of evidence rules, from Rule 1(1) through Rule 71, does not purport to embody all the law of evidence.

The Model Code of Evidence, approved by the American Law Institute in 1942, attempted comprehensive coverage, but in so doing it presented so many details as to discourage official enactment anywhere. The Uniform Rules of Evidence approved by the National Conference of Commissioners on Uniform Rules in 1953 (on which the present rules are modelled) represented a much more modest approach.

Some examples of important areas in evidence law not dealt with by the present set of rules (in the sense that these matters have a daily or significant effect in the process of adducing evidence) are as follows:

- ... matters usually left to the control of the trial court, such as order of proof;
- ... the parol evidence rule;
- ... the several statutes of frauds and their equivalents;
- ... the special rules limiting the defenses available to a holder in due course of a negotiable instrument to stated "personal defenses", which have been described as being in the nature of evidence rules to the extent that a witness is not allowed to testify on certain matters as to special parties.

RELATION OF THE RULES TO DECISIONAL LAW.

Rule 5 deals with this subject by stating that the adoption of rules is not to bar the growth and development of the law of evidence in accordance with fundamental principles to the end that the truth may be fairly ascertained.

This is not a rule of relaxation, and neither trial judges nor appellate courts are to so consider it.

The rules, whether enacted by statute or adopted by the Supreme Court with legislative concurrence, are essentially statutory in nature. To the extent that a matter of evidence is dealt with by the rules, the rules are to be applied as written.

There will be areas in which evidence law will continue to develop on a case-by-case decisional basis.

One area will involve matters not dealt with by the formal rules (e.g., the parol evidence rule). Another area will involve cases with situations not foreseen specifically, and for which the formal rules will need to be construed and interpreted in the same way as statutes are. The third area will involve situations where some paramount requirement, such as constitutional provisions and decisions interpreting them, will bar the application of a formal rule or rule provision. This has already occurred in the case of Rule 23(4).

At the same time, it is not to be expected that the appellate courts will employ the decisional process on a case-by-case basis to modify the formal rules in the event it should seem that the applicable rules, as adopted, ought to be modified on the basis of experience or theory. In such situations the available flexible mechanism by which the Supreme Court initiates changes in the evidence rules is much more likely to be employed.

RULES OF EVIDENCE

The creation of a permanent legislative commission to consult with the Court on such matters will very likely develop workable and flexible arrangements. See c. 183, L. 1968.

GENERAL APPLICATION OF RULES.

The evidence rules were written as a comprehensive collection, and each rule is to be read and applied as part of the whole collection. In actual use it will therefore be important for users to have a good working familiarity with their overall content.

In addition, it must not be overlooked that the rules are to be applied in the context of the particular case and the issues which it involves, factually as well as legally. This is especially important in applying the hearsay exceptions which, by themselves, say that one or another kind of proof "is admissible". What this means, more accurately, is that the proof is not objectionable on the ground of hearsay; but it may be objectionable on some other ground.

Most important of all, the value of the rules will be greatly increased if they are referred to as authority in the course of argument, briefs or decision, instead of strings of reported decisions, wherever possible. For the daily run-of-the-mill evidence question, this should be enough. It will only be in the relatively rare situation where more than this will be needed.

FUNCTIONS OF THE COMMISSION.

During the period when rules proposed by the Supreme Court were under consideration, a legislative commission established by joint resolution each year undertook to study the rules content and advise the legislature in respect to whether the rules should be allowed to take effect.

RULES OF EVIDENCE

The 1967 Commission went beyond the work of its predecessors. It reviewed the rules and sifted them into three categories. One group encompassed those rules that presented no difficulty. The second group included those few rules regarded as unacceptable as a matter of policy. The third group was made up of rules generally acceptable but felt to need some change of substance or of clarification.

Comments on the second and third groups of rules were written up, submitted to the Supreme Court for study, and then discussed at joint conferences between the Commission and the Court.

The joint conferences were highly constructive. In contrast to the prior atmosphere of gingerly felt distrust, the two groups quickly discovered that both sincerely wanted to develop a sound set of rules. The discussions disclosed, on the one hand, that the Court recognized the validity of the questions raised by the Commission, and on the other hand that the Court was able and willing to improve upon the expression of concepts raised by Commission comments.

The experience was so mutually gratifying that the 1967 Commission chairman was moved to introduce and secure enactment of c. 183, P.L. 1968 (Senate No. 99), which establishes the Commission on a permanent basis. This law has established a new avenue of communication between the Court and the Legislature in an important field of law with which both branches of government are inevitably concerned. The success of the early efforts is encouraging; the future results of this cooperative endeavor should provide a useful model for further enlarging the channels of communication.

THE COMMISSION PROGRAM.

Once the basis for adoption of the rules had been established, the Commission undertook arrangements for prompt

2A: 81--2 et seq.

LEGISLATIVE FACT SHEET

ON Evidence rules -- revised
"The Evidence Act of 1960"

N.J.R.S. 2A: 81-2 et seq.

(1960 Amendment)

LAWS OF 1960

CHAPTER 52

June 20, 1960

SENATE 73

ASSEMBLY

INTRODUCED

Jan. 25, 1960

BY Cowgill, Lynch, Fox, Jones

STATEMENT

YES

NO

AMENDED DURING PASSAGE

YES

NO

HEARING YES

VETO

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n. J. Legis. Assembly. Judiciary Committee
Public Hearing on ACR No. 16, Re: Rule -
Making Power of the Supreme Court, 5/12/60.

STATEMENT to S 73 (1960)

This bill will put into effect the recommendations of the Commission to Study the Improvement of the Law of Evidence (J. R. 15, 1955) by resolving the problem of method of adoption.

The bill contains the rules as recommended by way of definitions and scope, and on the subject of privilege, which involves the largest element of public policy. As to these, the Legislature will express itself on that policy by setting out the full text of the rules on that subject. Cont'd

7-22-68 L3/RSL

OVER ->

The bill then provides legislative authority to the Supreme Court to adopt rules dealing with the admission and rejection of evidence, under a specified procedure. This includes discussion at a judicial conference, public announcement on September 15 following, together with delivery of true copies to the President of the Senate, to the Speaker of the General Assembly and to the Governor. Rules so announced will not take effect until July 1 of the following year. In the intervening period, any such rule may be canceled by joint resolution. Any rule proposed or adopted also remains subject to legislative modification by statute at any time.

Rules adopted under this bill will replace existing rules which are revised, or are in conflict therewith, included therein or rendered obsolete, but the bill requires that to have this effect the law or laws intended to be replaced are to be specifically identified by way of footnote to the rule. As the work progresses this mechanism should greatly improve certainty as to which provisions are in force and which are not.

Lastly, the bill contains in article IV an amendment to the Dead Man's Act which eliminates the bar to receiving the testimony but simultaneously establishes a burden of proof to establish the claim by clear and convincing proof. Several other sections are corrected, as recommended by the commission, and a number of sections embraced by the rules on privilege in article II are repealed.

This bill will culminate the extensive studies of the bipartisan commission of both houses and with public members and will be an important landmark in law revision work.

APPROVED June 20, 1960

[OFFICIAL COPY REPRINT]

SENATE, No. 73

STATE OF NEW JERSEY

INTRODUCED JANUARY 25, 1960

By Senators COWGILL, LYNCH, FOX and JONES

Referred to Committee on Judiciary

AN Act concerning evidence and witnesses, providing for the adoption of rules of evidence, supplementing subtitle 9 of Title 2A of the New Jersey Statutes, amending sections 2A:81-2, 2A:81-17, 2A:82-16 and 2A:82-27 and repealing sections 2A:81-3, 2A:81-5, 2A:81-7, 2A:81-9 and 2A:81-10 of said Title 2A.

1 BE IT ENACTED *by the Senate and General Assembly of the State of New*
2 *Jersey:*

ARTICLE I

GENERAL PROVISIONS

1 1. Rule 1. Definitions. As used in the rules set forth in this act or in
2 rules adopted pursuant hereto, the terms defined in this article shall have the
3 meaning specified unless the context indicates a contrary intention.

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

1 3. Rule 1. (2) "Relevant evidence" means evidence having any tendency
2 in reason to prove any material fact.

1 4. Rule 1. (3) "Proof" is all of the evidence before the trier of the fact
2 relevant to a fact in issue which tends to prove the existence or nonexistence
3 of such fact.

1 5. Rule 1. (4) "Burden of proof" means the obligation of a party to
2 meet the requirements of a rule of law that the fact be proved either by a pre-

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

3 ponderance of the evidence or by clear and convincing evidence or beyond a
4 reasonable doubt, as the case may be. Burden of proof is synonymous with
5 "burden of persuasion."

1 6. Rule 1. (5) "Burden of producing evidence" means the obligation of
2 a party to introduce evidence when necessary to avoid the risk of a judgment
3 or peremptory finding against him on a material issue of fact.

1 7. Rule 1. (6) "Conduct" includes all active and passive behavior, both
2 verbal and nonverbal.

1 8. Rule 1. (7) "The hearing," unless some other is indicated by the con-
2 text of the rule where the term is used, means the hearing at which the ques-
3 tion under a rule is raised, and not some earlier or later hearing.

1 9. Rule 1. (8) "Finding of fact" means the determination from proof
2 or judicial notice of the existence of a fact. A ruling implies a supporting
3 finding of fact; no separate or formal finding is required unless required by
4 a statute or rule of court of this State.

1 10. Rule 1. (9) "Guardian" means the person, committee, or other rep-
2 resentative authorized by law to protect the person or estate or both of an
3 incompetent or a sui juris person having a guardian and to act for him in
4 matters affecting his person or property or both. An incompetent is a person
5 under disability imposed by law.

1 11. Rule 1. (10) "Judge" means member or members or representative
2 or representatives of a court or other tribunal conducting a trial or hearing
3 at which evidence is introduced.

1 12. Rule 1. (11) "Trier of fact" includes a jury and a judge when he
2 is trying an issue of fact other than one relating to the admissibility of evi-
3 dence.

1 13. Rule 1. (12) "Verbal" includes both oral and written words.

1 14. Rule 1. (13) "Writing" means handwriting, typewriting, printing,
2 photostating, photography and every other means of recording upon any tan-
3 gible thing any form of communication or representation, including letters,
4 words, pictures, sounds or symbols, or combinations thereof, provided that
5 such recording is (a) reasonably permanent and (b) readable by sight.

1 15. Rule 1. (14) "Perceive" means acquire knowledge through one's
2 own senses.

1 16. Rule 2. Scope of the rules.

2 (1) *The provisions of article II, Privileges, shall apply in all cases and*
3 *to all proceedings, places and inquiries, whether formal, informal, public or*
4 *private, as well as to all branches of government and by whomsoever the same*
5 *may be conducted, and none of said provisions shall be subject to being re-*
6 *laxed.*

7 [(1) The] (2) *All other rules contained in this act, or adopted pursuant*
8 *hereto, shall apply in every proceeding, criminal or civil, conducted by or*
9 *under the supervision of a court, in which evidence is produced.*

10 [(2)] (3) *Except to the extent to which the rules of evidence may be*
11 *relaxed by or pursuant to statute applicable to the particular tribunal and*
12 *except as provided in paragraph (1) of this rule, the rules set forth in this*
13 *act or adopted pursuant hereto shall apply to formal hearings before ad-*
14 *ministrative agencies and tribunals[; but the provisions of article II, Priv-*
15 *ileges, shall apply in all cases and to all proceedings, nor shall any of said*
16 *provisions be relaxed].*

17 [(3)] (4) *The enactment of the rules set forth in this act or the adoption*
18 *of rules pursuant hereto shall not operate to repeal any statute by impli-*
19 *cation.*

ARTICLE II

PRIVILEGES

1 17. Rule 23. Privilege of accused.

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

4 (2) *The spouse of the accused in a criminal action shall not testify in*
5 *such action except to prove the fact of marriage unless (a) such spouse and*
6 *the accused shall both consent, or (b) the accused is charged with an offense*
7 *against the spouse, a child of the accused or of the spouse, or a child to whom*
8 *the accused or the spouse stands in the place of a parent, or (c) such spouse*
9 *is the complainant.*

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

13 (4) If an accused in a criminal action does not testify after direct evi-
 14 dence is received of facts which tend to prove some element of the crime and
 15 which facts, if untrue, he could disprove by his own testimony, counsel and the
 16 judge may comment on his failure to testify, and the trier of fact may draw
 17 an inference that accused cannot truthfully deny those facts.

1 18. Rule 24. Definition of incrimination.

2 Within the meaning of this article, a matter will incriminate (a) if it
 3 constitutes an element of a crime against this State, or another State or the
 4 United States, or (b) is a circumstance which with other circumstances
 5 would be a basis for a reasonable inference of the commission of such a
 6 crime, or (c) is a clue to the discovery of a matter which is within clauses
 7 (a) or (b) above; provided, a matter will not be held to incriminate if it
 8 clearly appears that the witness has no reasonable cause to apprehend a
 9 criminal prosecution. In determining whether a matter is incriminating un-
 10 der clauses (a), (b) or (c) and whether a criminal prosecution is to be ap-
 11 prehended, other matters in evidence, or disclosed in argument, the implica-
 12 tions of the question, the setting in which it is asked, the applicable statute of
 13 limitations and all other factors, shall be taken into consideration.

1 19. Rule 25. Self-incrimination: exceptions.

2 Subject to Rule 37, every natural person has a right to refuse to disclose
 3 in an action or to a police officer or other official any matter that will in-
 4 criminate him or expose him to a penalty or a forfeiture of his estate, except
 5 that under this rule:

6 (a) no person has the privilege to refuse to submit to examination for the
 7 purpose of discovering or recording his corporal features and other identify-
 8 ing characteristics or his physical or mental condition;

9 (b) no person has the privilege to refuse to obey an order made by a
 10 court to produce for use as evidence or otherwise a document, chattel or

11 other thing under his control if some other person or a corporation or other
12 association has a superior right to the possession of the thing ordered to be
13 produced;

14 (c) no person has a privilege to refuse to disclose any matter which the
15 statutes or regulations governing his office, activity, occupation, profession
16 or calling, or governing the corporation or association of which he is an
17 officer, agent or employee, require him to record or report or disclose *except*
18 *to the extent that such statutes or regulations provide that the matter to be*
19 *recorded, reported or disclosed shall be privileged or confidential;*

20 (d) subject to the same limitations on evidence affecting credibility as
21 apply to any other witness, the accused in a criminal action or a party in a
22 civil action who voluntarily testifies in the action upon the merits does not
23 have the privilege to refuse to disclose in that action, any matter relevant to
24 any issue therein.

1 20. Rule 26. Lawyer-client privilege.

2 (1) General rule. Subject to Rule 37 and except as otherwise provided
3 by paragraph 2 of this rule communications between lawyer and his client in
4 the course of that relationship and in professional confidence, are privileged,
5 and a client has a privilege (a) to refuse to disclose any such communica-
6 tion, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any
7 other witness from disclosing such communication if it came to the knowledge
8 of such witness (i) in the course of its transmittal between the client and the
9 lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a
10 result of a breach of the lawyer-client relationship, or (iv) in the course of a
11 recognized confidential or privileged communication between the client and
12 such witness. The privilege shall be claimed by the lawyer unless otherwise
13 instructed by the client or his representative; the privilege may be claimed
14 by the client in person, or if incompetent or deceased, by his guardian or
15 personal representative. Where a corporation or association is the client
16 having the privilege and it has been dissolved, the privilege may be claimed
17 by its successors, assigns or trustees in dissolution.

18 (2) Exceptions. Such privilege shall not extend (a) to a communication
 19 in the course of legal service sought or obtained in aid of the commission of
 20 a crime or a fraud, or (b) to a communication relevant to an issue between
 21 parties all of whom claim through the client, regardless of whether the re-
 22 spective claims are by testate or intestate succession or by inter vivos trans-
 23 action, or (c) to a communication relevant to an issue of breach of duty by
 24 the lawyer to his client, or by the client to his lawyer. Where 2 or more per-
 25 sons have employed a lawyer to act for them in common, none of them can
 26 assert such privilege as against the others as to communications with re-
 27 spect to that matter.

28 (3) Definitions. As used in this rule (a) "client" means a person or
 29 corporation or other association that, directly or through an authorized
 30 representative, consults a lawyer or the lawyer's representative for the pur-
 31 pose of retaining the lawyer or securing legal service or advice from him in
 32 his professional capacity; and includes an incompetent whose guardian so con-
 33 sults the lawyer or the lawyer's representative in behalf of the incompetent,
 34 (b) "lawyer" means a person authorized, or reasonably believed by the client
 35 to be authorized to practice law in any State or nation the law of which
 36 recognizes a privilege against disclosure of confidential communications be-
 37 tween client and lawyer. A communication made in the course of relationship
 38 between lawyer and client shall be presumed to have been made in profes-
 39 sional confidence unless knowingly made within the hearing of some person
 40 whose presence nullified the privilege.

1 21. Rule 27. Newspaperman's privilege.

2 Subject to Rule 37, a person *engaged on*, connected with, or employed
 3 by, a newspaper has a privilege to refuse to disclose [in a court or before a
 4 grand jury] the source [of], *author, means, agency or person from or through*
 5 *whom* any information [procured or obtained by him and] published in such
 6 newspaper *was procured, obtained, supplied, furnished, or delivered.*

1 22. Rule 28. Marital privilege—confidential communications.

2 No person shall disclose any communication made in confidence between
 3 such person and his or her spouse unless both shall consent to the disclosure

4 or unless the communication is relevant to an issue in an action between
5 them or in a criminal action or proceeding coming within Rule 23 (2). When
6 a spouse is incompetent or *deceased*, consent to the disclosure may be given
7 for such spouse by the guardian, *executor or administrator*. The require-
8 ment for consent shall not terminate with divorce or separation [but shall
9 terminate with the death of either spouse]. A communication between
10 spouses while living separate and apart under a divorce from bed and board
11 shall not be a privileged communication.

1 23. Rule 29. Priest-penitent privilege.

2 Subject to Rule 37, a clergymann [or other], minister or *other person*
3 or *practitioner authorized to perform similar functions*, of any religion shall
4 not be allowed or compelled to disclose a confession or other confidential
5 communication made to him in his professional character, or as a spiritual
6 advisor in the course of the discipline or practice of the religious body to
7 which he belongs or of the religion which he professes.

1 24. Rule 30. Religious belief.

2 Every person has a privilege to refuse to disclose his theological opinion
3 or religious belief unless his adherence or nonadherence to such an opinion
4 or belief is material to an issue in the action other than that of his credi-
5 bility as a witness.

1 25. Rule 31. Political vote.

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

1 26. Rule 32. Trade secret.

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

1 27. Rule 34. Official information.

2 No person shall disclose official information of this State or of the United
3 States (a) if disclosure is forbidden by or pursuant to any Act of Congress

4 or of this State, or (b) if the judge finds that disclosure of the information
5 in the action will be harmful to the interests of the public.

1 28. Rule 36. Identity of informer.

2 A witness has a privilege to refuse to disclose the identity of a person
3 who has furnished information purporting to disclose a violation of a pro-
4 vision of the laws of this State or of the United States to a representative
5 of the State or the United States or a governmental division thereof,
6 charged with the duty of enforcing that provision, and evidence thereof is
7 inadmissible, unless the judge finds that (a) the identity of the person fur-
8 nishing the information has already been otherwise disclosed or (b) disclo-
9 sure of his identity is essential to assure a fair determination of the issues.

1 29. Rule 37. Waiver of privilege by contract or previous disclosure;
2 limitations.

3 A person waives his right or privilege to refuse to disclose or to prevent
4 another from disclosing a specified matter if he or any other person while the
5 holder thereof has (a) contracted with anyone not to claim the right or privi-
6 lege or, (b) without coercion and with knowledge of his right or privilege,
7 made disclosure of any part of the *privileged* matter or consented to such
8 a disclosure made by anyone.

9 A disclosure which is itself privileged or otherwise protected by the com-
10 mon law, statutes or rules of court of this State, or by lawful contract, shall
11 not constitute a waiver under this section. The failure of a witness to claim
12 a right or privilege with respect to 1 question shall not operate as a waiver
13 with respect to any other question.

1 30. Rule 38. Admissibility of disclosure wrongfully compelled.

2 Evidence of a statement or other disclosure is inadmissible against the
3 holder of the privilege if the disclosure was wrongfully made or erroneously
4 required.

1 31. Rule 39. Reference to exercise of privileges.

2 Subject to paragraph (4) of Rule 23, if a privilege is exercised not to
3 testify or to prevent another from testifying, either in the action or with re-

4 spect to particular matters, or to refuse to disclose or to prevent another
 5 from disclosing any matter, the judge and counsel may not comment thereon,
 6 no presumption shall arise with respect to the exercise of the privilege, and
 7 the trier of fact may not draw any adverse inference therefrom. In those jury
 8 cases wherein the right to exercise a privilege, as herein provided, may be
 9 misunderstood and unfavorable inferences drawn by the trier of the fact, or
 10 be impaired in the particular case, the court, at the request of the party exer-
 11 cising the privilege, may instruct the jury in support of such privilege.

1 32. Rule 40. Effect of error in overruling claim of privilege.

2 (1) A party may predicate error on a ruling disallowing a claim of
 3 privilege only if he is the holder of the privilege.

4 (2) If a witness refuses to answer a question, under color of a privilege
 5 claimed pursuant to Rules 23 through 38, after the judge has ordered the wit-
 6 ness to answer, and a contempt proceeding is brought against the witness, the
 7 court hearing the same shall order it dismissed if it appears that the order
 8 directing the witness to answer was erroneous.

ARTICLE III

ADOPTION OF RULES

1 33. The Supreme Court may adopt rules dealing with the admission or
 2 rejection of evidence, in accordance with the procedures set forth in this
 3 article.

4 34. The subject matter and a tentative draft of a rule or rules proposed
 5 to be adopted pursuant to this article shall be entered upon the agenda and
 6 discussed at a Judicial Conference whose membership shall at least include
 7 delegates from the Supreme Court, the Appellate Division of the Superior
 8 Court, the judges of the Law Division and the Chancery Division of the Su-
 9 perior Court, the judges of the County Courts, the judges of the county dis-
 10 trict courts, the judges of the juvenile and domestic relations courts, the
 11 judges of the municipal courts, the surrogates, the State Bar Association,
 the county bar associations, the Senate and General Assembly, the Attorney
 General, the county prosecutors, the law schools of this State, and members of
 the public.

1 35. The proposed rule or rules shall be publicly announced by the Su-
2 preme Court on September 15 next following such Judicial Conference (or, if
3 such day be a Saturday, Sunday or legal holiday, on the first day thereafter
4 that is not), and the court shall, on the same day, cause true copies thereof to
5 be delivered to the President of the Senate, the Speaker of the General
6 Assembly, and the Governor.

1 36. The rule or rules so announced and delivered shall take effect on
2 July 1 next following; provided, however, that all such rules shall remain
3 subject to cancellation at any time up to such effective date by joint resolution
4 to that effect adopted by the Senate and General Assembly and signed by the
5 Governor.

1 37. Any rule or rules so proposed or adopted shall be subject to change
2 or cancellation at any time by statute or by a subsequent rule adopted pur-
3 suant to this article.

1 38. By joint resolution adopted by the Senate and General Assembly
2 and signed by the Governor with respect to a particular rule or rules therein
3 specified, the Supreme Court may adopt such rule or rules at such time or
4 times, or with such effective date, or without presentation at a Judicial Con-
5 ference, as may be provided in the joint resolution.

1 39. By joint resolution adopted by the Senate and General Assembly
2 and signed by the Governor with respect to a particular rule or rules therein
3 specified, the period of time provided in section 36 during which the same
4 may be canceled by joint resolution may be reduced or eliminated.

1 40. All previous laws or parts of laws dealing with the admission or re-
2 jection of evidence which shall be expressly identified by footnote to any rule
3 so adopted, and which shall be in conflict or inconsistent with such rule or
4 rules, or included therein, revised or rendered obsolete thereby, shall be of
5 no further force or effect after such rule or rules shall have taken effect.

1 41. No rule adopted pursuant to this article shall abridge, enlarge or
2 modify any substantive right or eliminate the right of trial by jury.

1 42. No rule adopted pursuant to this article shall be made applicable to
2 pending proceedings or to existing rights or remedies except to the extent

3 that such application is fair and practicable, and does not impair the obliga-
 4 tion of contracts or deprive a party of any remedy for enforcing a contract
 5 which existed when the contract was made.

1 43. To the end that rules dealing with evidence may be conveniently
 2 presented and arranged, the Supreme Court may publish compilations and
 3 restatements thereof which may include, in addition to such rules as may be
 4 adopted pursuant to this article, rules established by common law, statute,
 5 constitution or otherwise, together with editorial notes, tables and references,
 6 and with indications as to the source of each such rule. Where practicable
 7 or desirable, the numbering and arrangement of such publications shall
 8 conform to standard or uniform works on the subject, or provide cross-
 9 reference thereto.

1 44. All rules of court heretofore promulgated and which may deal with
 2 the admission or rejection of evidence shall be deemed to have the same
 3 force and effect as though they had been adopted pursuant to this article.

ARTICLE IV

MISCELLANEOUS REVISIONS AND REPEALERS

1 45. Section 2A:81-2 of Title 2A of the New Jersey Statutes is amended
 2 to read as follows:

3 2A:81-2. When 1 party to any civil action is a lunatic suing or defend-
 4 ing by guardian or when 1 party sues or is sued in a representative capacity,
 5 [no] any other party [thereto may testify as to any transaction with or
 6 statement by the lunatic while of sound mind or with or by the decedent,
 7 unless:

8 a. The guardian of the lunatic or the representative of the decedent
 9 offers himself as a witness on his own behalf, and testifies to any transac-
 10 tion with or statement by his testator, intestate or ward, in which event the
 11 other party may be a witness on his own behalf as to all transactions with
 12 or statements by the lunatic while of sound mind or by the decedent, which
 13 are pertinent to the issue; or

14 b. The action is founded upon any allegation of fraud, breach of trust,
 15 willful default or undue influence, in which cases the defendant may be

16 sworn and examined as a witness on his own behalf as to transactions with
17 or statements by the lunatic or decedent.

18 Where a guardian or representative is a national bank, bank, trust com-
19 pany, or other corporation, testimony of an officer or employee thereof shall
20 be deemed testimony of the guardian or representative within the meaning
21 of this section.] *who asserts a claim or an affirmative defense against such*
22 *lunatic or representative, supported by oral testimony of a promise, state-*
23 *ment or act of the lunatic while of sound mind or of the decedent, shall be*
24 *required to establish the same by clear and convincing proof.*

1 46. Section 2A:81-17 of Title 2A of the New Jersey Statutes is amended
2 to read as follows:

3 2A:81-17. Except as provided in section [2A:97-21] 2A:81-21 of this
4 Title, a witness shall be privileged from arrest in all civil actions, and no
5 other, during necessary attendance at court or other place, required by
6 subpoena previously duly served, and during his going to and returning there-
7 from, allowing 1 day for every 30 miles from his place of residence.

8 Any arrest made in violation of the privilege given by this section shall
9 be a contempt of the court out of which the subpoena issued, and the court,
10 may, by an order, forthwith discharge the witness from arrest.

1 47. Section 2A:82-16 of Title 2A of the New Jersey Statutes is amended
2 to read as follows:

3 2A:82-16. Any public record of any foreign State or territory, province,
4 county or city, or of any court therein or any copy thereof, which is admissible
5 in such State, territory, province, county or city, or in any court therein, to
6 prove the facts therein contained, or any duly certified public record of any
7 department of the United States Government or of any Federal court which
8 is admissible in any Federal court or by virtue of any Federal statute to
9 prove the facts therein contained, shall be admitted in evidence in the courts
10 of this State, and shall be evidence of the facts therein contained, to the same
11 extent as though the original paper or papers, of which the record thereof is
12 a copy, had been produced and proved; provided, that whenever a copy of

13 such record, other than a duly certified copy of any public record of any de-
14 partment of the United States Government or of any Federal court, shall be
15 offered in evidence, the same shall not be admitted, unless the same shall
16 have been first exemplified according to the Acts of Congress of the United
17 States [; and provided, further, that printed copies of schedules and classi-
18 fications and tariffs of rates, fares and charges, and supplements thereto,
19 filed with the Interstate Commerce Commission, which show respectively an
20 interstate commerce number, which may be stated in abbreviated form, as
21 I. C. C. No. , and an effective date, and tariffs, rates, rules and supple-
22 ments thereto of companies subject to the supervision of the Federal Com-
23 munications Commission may be received in evidence without certification,
24 and shall be presumed to be correct copies of the original schedules, classifica-
25 tions, tariffs or supplements]. *Printed copies of (a) schedules, classifications,*
26 *tariffs of rates, fares and charges, and supplements thereto filed with the*
27 *Interstate Commerce Commission, which bear an Interstate Commerce Com-*
28 *mission number which may be shown in abbreviated form as I. C. C. No. ,*
29 *and an effective date, and (b) tariffs, rates, rules, and supplements thereto*
30 *of companies subject to the supervision of the Federal Communications Com-*
31 *mission, shall be received in evidence to prove the contents thereof without*
32 *certification although privately printed, and shall be presumed to be correct*
33 *copies of the originals unless the contrary be shown.*

1 48. Section 2A:82-27 of Title 2A of the New Jersey Statutes is amended
2 to read as follows:

3 2A:82-27. Whenever the common or statute law of any *other State or*
4 *country* is pleaded, or notice thereof given to the court and each adverse party
5 at or before the pretrial conference, or at least 10 days before trial when
6 there is no pretrial conference, or within such other time as the court may fix
7 by order, in an action in any court of this State, the court shall take judicial
8 notice thereof. In the absence of such pleading or notice, it shall be presumed
9 that the common law of such State is the same as the common law as
10 interpreted by the courts of this State.

1 49. The following acts and parts of acts and all amendments and supple-
2 ments thereto are hereby repealed: Sections 2A:81-3, 2A:81-5, 2A:81-7,
3 2A:81-9 and 2A:81-10 of Title 2A of the New Jersey Statutes.

1 50. The numbering of rules of evidence within various sections in this act
2 is intended to keep the designation thereof compatible with the numbering
3 arrangement of the proposed Uniform Rules of Evidence, to the extent
4 feasible. Reference within a section or sections of this act to a "Rule" shall
5 be deemed to be equivalent to a reference to that section of this act containing
6 the designated rule. Rule numbers not used are reserved for rules hereafter
7 adopted.

1 51. No repeal effected by this act shall operate to revive any statute
2 heretofore repealed nor to impair the obligation of contracts made before the
3 effective date hereof, nor to deprive a party of any remedy for enforcing a
4 contract which existed when the contract was made.

1 52. This act shall be known and may be cited as "The Evidence Act,
2 1960."

1 53. This act shall take effect July 1, 1960, except that article III shall
2 take effect immediately.

SENATE COMMITTEE AMENDMENTS TO

SENATE, No. 73

STATE OF NEW JERSEY

ADOPTED MAY 2, 1960

Amend page 3, section 16, following line 1, insert new paragraph as follows:

“(1) The provisions of article II, Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.”.

Amend page 3, section 16, line 2, delete “(1) The” and insert in lieu thereof:

“(2) All other”.

Amend page 3, section 16, line 5, delete “(2)” and substitute “(3)”.

Amend page 3, section 16, line 6, immediately after “tribunal” insert: “and except as provided in paragraph (1) of this rule”.

Amend page 3, section 16, lines 8, 9 and 10, immediately after “tribunal” on line 8, delete the semi-colon and remainder of line 8, all of line 9 and all of line 10.

Amend page 3, section 16, line 11, delete “(3)” and substitute “(4)”.

Amend page 5, section 19, line 17, after “disclose” insert: “except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential”.

Amend page 6, section 21, line 2, after “person” insert “engaged on,”.

Amend page 6, section 21, line 3, delete “in a court or before a grand jury”.

Amend page 6, section 21, line 4, after "source", delete "of" and insert ", author, means, agency or person from or through whom".

Amend page 6, section 21, line 4, immediately after "information" delete "procured or obtained by him and".

Amend page 6, section 21, line 5, immediately after "newspaper" insert "was procured, obtained, supplied, furnished, or delivered".

Amend page 6, section 22, line 6, after "incompetent" insert "or deceased".

Amend page 6, section 22, line 7, after "guardian" insert ", executor or administrator".

Amend page 6, section 22, line 8, delete "but shall terminate with the death of either spouse".

Amend page 7, section 23, line 2, after "clergyman", delete "or other" and insert a comma in lieu thereof, and after "minister" insert ", or other person or practitioner authorized to perform similar functions,".

Amend page 8, section 29, line 7, immediately before the word "matter" insert "privileged".

2A:81-2

December 17, 1969

LEGISLATIVE NOTES ON R.S. 2A:81-2
(Transactions with lunatic or decedent; proof required)

(1960 amendment)

COPY NO. 1

This amendment was one of the "Miscellaneous Revisions and Repealers" which constitute ART. IV of the Evidence Act of 1960. See statement:

Pressler, S.B.

Rules governing the New Jersey Courts.
1969 Revision. page 888 (copy enclosed).

52

L. 1960, Chapter 52 - S73

See quotation from Statement on the bill at 47 NJ 4,
Garden State Development Co. v. Markowitz

RSL/PC

Pressler Rules (1969)

RULES OF EVIDENCE

EFFECT OF THE RULES ON EXISTING STATUTES.

The enabling act is designed to prevent unintended repeal of existing statutes on evidence. Rule 2(4) declares that neither the rules enacted by statute nor those adopted by the Court are to repeal any statute by implication.

By section 40 of the Evidence Act, 1960, N.J.S. 2A:84A-40, rules adopted by the Court can supersede existing statutes, but to have this effect the statutes to be superseded must be expressly identified by footnote to the rule adopted. The text of such footnotes will be found among the rules in this publication.

This point has come up and has been dealt with exactly as intended by the Evidence Act, 1960. See, *Waterfront Comm'n*, 39 N. J. 436, at 454-456 (1963).

In keeping with this approach, the Evidence Act, 1960, in addition to adopting some rules and arranging for the Supreme Court to initiate others, made some statutory changes itself. These were as follows:

- ... the Dead Man's Act, N.J.S. 2A:81-2, was amended to allow testimony of transactions with a party decedent or lunatic, but requires the claim or affirmative defense involved to be established by clear and convincing proof;
- ... the statute on privilege from arrest in certain cases, N.J.S. 2A:81-17, was amended to correct an erroneous internal cross-reference;
- ... the statute on proof of foreign public record matters, N.J.S. 2A:82-16, was amended to overcome the effect of *State v. Black*, 31 N. J. Super. 418 (App. 1954), which had failed to recognize that I.C.C. tariffs are privately printed under Commission practice;

suing or was sued in a representative capacity. See *Smith v. Burnett*, 35 N. J. Eq. 314 (E. & A. 1882), 2 *Wigmore on Evidence* (3d ed.), sec. 578. Cf. *State v. Abbott*, 36 N. J. 63, 79 (1961). This exception was initially narrowed by L. 1900, c. 150, p. 362, which permitted such testimony of the survivor where the representative of the legally disabled party offered himself as a witness. By L. 1931, c. 189, p. 474, testimony of a defendant survivor was permitted in any action brought by a representative upon a claim of fraud, breach of trust, willful default or undue influence.

In *Hollister v. Fiedler*, supra, 17 N. J., at p. 249, we stated that this statute created exceptions to the survivor's disqualification rule "designed to secure equality between the adverse parties and thus to avert the danger of injustice and oppression by means of testimony of a surviving party under the influence of self-interest put beyond refutation or explanation by the death of the other party."

As amended in 1960, N. J. S. 2A:81-2, this statutory purpose is accomplished, not by the arbitrary device of a particular type of action or of requiring the witnesses who so testify to the statements to be of a particular class, but by requiring the trier of the facts to be watchful against falsehoods which cannot be denied because the maker is dead and to arrive at a firm belief or conviction as to the truth of the claim of the surviving party.¹ *Buska v. Aguinaldo*, 84 N. J. Super., at p. 585.

[1] Plaintiffs assert that defendant is estopped from the benefit of the statute and that plaintiffs are not required to comply with the statutory standard of proof—"clear and convincing"—because defendant lost the benefit of this requirement when defendant introduced depositions of the decedent

¹ The 1960 amendment of N. J. S. 2A:81-2 is contained in section 45 of Article IV of 1960 Senate Bill No. 73 and which became Chapter 52 of Laws of 1960. In the statement attached to the bill, it is stated: "Lastly, the bill contains in Article IV an amendment to the Dead Man's Act which eliminates the bar to receiving the testimony but simultaneously establishes a burden of proof to establish the claim by clear and convincing proof."

taken in plaintiffs' discovery proceedings where counsel for both parties had ample opportunity and did examine and cross-examine Mr. Markowitz.

To raise that issue plaintiffs would have to show at least that Mr. Markowitz knew that this was the only opportunity he would have to refute or deny all plaintiffs' claims which would be made at the trial. Where, as here, Mr. Markowitz could not be aware that he would be unavailable at trial, his attorney's examination of him may not necessarily be all embracing and comprehensive, R. R. 4:16, i. e., would not be placing the entire defense upon the record. A deposition which is taken in the normal course of discovery under R. R. 4:16 contains no guarantee that the deponent defendant could not rebut or deny the claims made at trial by the opposing party. See II *Schnitzer & Wildstein, New Jersey Rules Service*, A IV-421 et seq.

Here, the deposition was one procured through ordinary discovery procedures, R. R. 4:16. Although it was offered on the part of decedent's representative to strengthen the defense, such offer should not be permitted to lessen plaintiffs' required quality of proof. In such a situation where there is no showing that the deponent was examined as to all plaintiffs' claims of liability and damages, the legislative requirement is as equally applicable as when no deposition is offered by the defendant at all. Plaintiffs were therefore required to establish their claims by clear and convincing proof.

Using this statutory standard, the trial court held that plaintiffs failed to carry their burden, characterizing the testimony of the several plaintiffs as unbelievable and unconvincing. In certain aspects the trial court found that the plaintiffs failed to establish their claims by even a preponderance of proof.

[2] Plaintiffs further make a constitutional contention that under the New Jersey Constitution of 1947, Article VI, Section II, paragraph 3, this Court is authorized to make rules governing the administration of courts and subject to law the practice and procedure in all such courts, that N. J. S.

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2A:81-2 establishes a rule concerning practice and procedure and is invalid under the rule of *Winberry v. Salisbury*, 5 N. J. 240 (1950), and it is therefore not applicable to the present case. We find no merit in this contention.

Our review of the record satisfies us that the trial court's findings of fact and conclusions of law should not be disturbed.

The judgment is affirmed.

For affirmance—Chief Justice WEINTRAUB and Justices FRANCIS, PROCTOR, HALL and SCHEITINO—5.

For reversal—None.

MARGARET BITTING AND ROBERT BITTING, HER HUSBAND, PLAINTIFFS-RESPONDENTS, v. DOUGLAS C. WILLETT, DEFENDANT-APPELLANT.

Argued February 8, 1966—Decided April 4, 1966.

SYNOPSIS

Action for injuries sustained in automobile collision. The trial court found verdict for \$10,000 for one plaintiff to be inadequate and gave defendant option of paying additional \$2,500 or submitting to new trial. Defendant filed acceptance of *additur* but plaintiff rejected it, and court entered order dismissing plaintiff's motion for new trial and plaintiff appealed. The Superior Court, Appellate Division, 89 N. J. Super. 196. 214 A. 2d 443, reversed and remanded for new trial as to the plaintiff's damages only and appeal was taken. The Supreme Court held that although defendant consented to increase and judgment erroneously did not reflect the *additur*, Appellate Division should have reviewed trial court's

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finding that the *additur* was the proper disposition of plaintiffs motion for new trial as to damages only.

Remanded.

1. New trial ⇨161(1)
 "Additur" is order denying plaintiff's application for new trial on condition that defendant consent to increase in jury's award as specified by trial judge.

2. Appeal and error ⇨151(2)
 New trial ⇨161(1)
 Option of accepting an *additur* rests with defendant and, if defendant accepts it, judgment should reflect the added sum without regard to plaintiff's wish and plaintiff may then accept judgment as thus enlarged or may appeal.

3. Appeal and error ⇨883
 Although defendant consented to increase and judgment erroneously did not reflect the *additur*, Appellate Division should have reviewed trial court's finding that the *additur* was the proper disposition of plaintiffs' motion for new trial as to damages only.

Mr. Burchard V. Martin argued the cause for appellant (Messrs. Taylor, Bischoff, Neulze & Williams, attorneys; *Mr. Martin*, of counsel and on the brief).

Mr. Morrey Lacktman argued the cause for respondents (*Mr. S. Arthur Levy*, attorney; *Mr. Lacktman*, of counsel and on the brief).

PER CURIAM. Defendant appeals from a judgment of the Appellate Division remanding plaintiff's Mrs. Bitting's automobile accident claim for a new trial as to damages only. The jury had returned a *per quod* verdict for plaintiff, Robert Bitting, in the sum of \$5,000 and for plaintiff, Margaret Bitting, his wife, in the sum of \$10,000. Upon plaintiffs'