The procedure laid down in the sections attempts, without the need for an established "arbitration committee" in any trade, to open the submission of peculiarly mercantile questions of fact to skilled specialists. It attempts to avoid abuse by misguided patronage. It attempts to set the proceedings in a framework of sworn joint, skilled work, under direct control of the court, with a duty of unanimous finding, which will offer a very considerable counter-weight to the tendency of the seller's choice to be the seller's "man." It attempts to further fair judgment by limiting the questions to questions which have a reasonably objective basis in trade practice, so as to induce a common standard of judgment: a matter of real moment, in a discussion within such a tribunal. It attempts to give to the finding such weight as can be counted on to seriously influence any jury or court later trying the whole case, and thereby induce settlement and avoid long drawn out litigation.

Above all, however, it attempts to offer to parties, and to their counsellors, in advance, [both in the cases which now are left in dark doubt until verdict, (usage; and quality; value of discrepancies) and in the cases where mercantile practice needs to be further drawn into account (cover, substantiality of defect)] a higher degree of safety and reckonability than has been available in our law since Mansfield's jury, or the occasional special commercial courts which have existed. Indeed, a special "commercial" court would not, and could not, today be abreast of the commercial practices of a hundred varied trades, as it could a hundred years [p. 533] ago be abreast of "the commercial practices" of a whole city or area. As the specialized trade tribunal shows, it is specialized knowledge and competence which are needed.

It is to be further noted that the law about the effect of "business custom" is quite as uncertain as are the jury-verdicts. That has not been because any sane Court has for half-a-century doubted the wisdom of fully incorporating the relevant usage of trade into the agreement and into the decision on adequacy of performance—if there had been any reliable way of determining what the usage of the trade really was. But Court after Court has felt the extreme uncertainty involved in submitting such ques-
tions to a jury of schoolteachers and men of crafts and trades not concerned in the case. And has in consequence found, "in law," that "custom cannot alter the law of the land," or has laid down such stringent tests before "a usage is such as to bind both parties" that few of the existing usages daily relied on in commerce could satisfy the test. The only answer is a reliable procedure.

B. Detail.

(1) Selection: The aim is to assure any party that he will have a man or men on the special tribunal, whom he believes competent. The danger is partisanship. The circumstances of the special questions involved, of the atmosphere, and of the skill of the other men with whom the question is discussed, are believed to give a higher guaranty against this than is afforded in the procedures available under existing law. With this, goes speed in presenting and weighing the evidence.

(2) Unanimity: Even when the result may sometimes mean compromise, it is believed to be necessarily, under the circumstances, a compromise within unusually narrow limits, and one materially more mercantilely sound than under present practice.

(3) Failure of unanimity: The sections are intended to be broad enough to allow the Court to direct the selection of a new tribunal, where that seems a hopeful procedure. But the danger of the hung tribunal is not believed to be great.

(4) The use of the finding: All question of constitutionality is believed to be here avoided. But it is believed that few petit juries could be induced to disregard the special finding.

C. What is essential is not the particular procedure here put forward. What is essential, is the provision of some adequate tribunal to determine competently and reckon-ably all questions of fact which rest in special knowledge of the trade.

[p. 534]

Without that, certainty in Sales counseling, as in Sales litigation, will continue to be absent.
Section 59. (New to Sales Act.) Submission of Mercantile Facts.

(1) In any action arising out of a sale or a contract to sell between merchants, any issue or issues involving any of the following matters may on motion of either party be submitted specially, under Section 59 through 59-D, to merchant experts—

(a) The effect on the terms or conditions of the sale or contract to sell, of mercantile usage, or of the usage of a particular trade;
(b) The conformity or non-conformity in quality, routing, or any other mercantile aspect of any delivery, to the duties or conditions resting on the seller, and the measure of the discrepancy, if any; and whether any defect in performance has been substantial;
(c) The mercantile reasonableness of any action by either party, the mercantile reasonableness of which is challenged;
(d) Any other issue which requires for its competent determination special merchants' knowledge rather than general knowledge.

(2) The sections on merchant experts are to be liberally construed, as being remedial, so as to effectuate their general purpose to accomplish speedy and competent determination of questions of fact which fall within the field of special merchants' knowledge, rather than of general knowledge.


(1) Notice that merchant experts are demanded must be given to the opposing party within [ten] days after the case is put on the trial [docket].
(2) Such notice shall contain a statement of the issues of mercantile fact which the demanding party desires to have submitted.
(3) Within five days the other party must give to the demanding party notice of any other issues of mercantile fact which he desires to have submitted.
(4) On motion of either party, the court shall then set a time, and shall settle the issues of mercantile fact.
in writing and approve them. The trial shall be stayed until after conclusion of the proceedings of the merchant experts; but those proceedings shall be had as early as is feasible.

(5) The court may, for good cause shown, alter or enlarge [p. 535] the times set in the sections on merchant experts, give dispensation for delay, or admit to settlement new issues or new phrasings of issues; but not in such manner as to permit surprise. Nor shall new issues be settled, save by consent of both parties, after any merchant experts have been appointed.

* * *

Section 59-B. (New to Sales Act.) Selection, Definition, and Organization of Merchant Experts.

(1) Within five days after the issues have been settled, the party demanding submission shall select one, or two, disinterested merchants deemed by him qualified, and who consent to serve, file a statement of their appointment with the court, and notify the other party of their appointment.

Such merchants are known in this Act as "merchant experts."

(2) Within five days after receipt of such notification, the other party shall select a like number, and in like manner file and notify.

(3) The merchant experts selected shall agree upon an additional one.

(4) If no statement of appointment is filed under subsection 2, or if no agreement is reached within ten days under subsection 3, or if the court disqualifies any merchant expert, for cause, the court shall appoint.

The court is directed, in its action under this subsection, to take into account the existence of any trade association or arbitration association having special panels, which may be available. If the parties agree upon a panel, the court shall appoint from the panel.

(5) The merchant experts shall receive no compensation, except under agreement of the parties. If the parties agree to compensate the experts, the compensation shall be taxed as costs.
(6) The parties may agree upon a single merchant expert. If they do, his determination of the issues submitted is conclusive.

* * *

Section 59-C. (New to Sales Act.) Hearing and Determination.

(1) The merchant experts shall be sworn to act not as party representatives, but as a special sworn expert tribunal to find the true facts.

(2) They shall sit with the court presiding at the hearing, and shall render a unanimous finding on each special issue submitted, which finding shall be reduced to writing.

[Addendum, Subsections (4) (5), at p. 288.]

Comment on Section 59-C. Only experience can tell how great the possibility—or danger—of the hung tribunal is. It is, however, the advance opinion of many, when the issue is narrow, and technical, and is an issue on which specialized knowledge is clear, that men in a trade are extremely likely to be able to get together on the fact; and that the arguing position of a man who is out-of-line with actual practice, rapidly becomes untenable. This goes to the possibility of the "seller's man" or the "buyer's man" becoming stubborn in an unreasonable and disruptive position.

There remain two other bothers. One, in a small community, is local merchant politics, "influence", the possibly dominating character of a single, but unreasonable "big man". The other is the precise opposite: the failure of local informal pressures toward reasonableness and decency in judgment to reach an "imported" expert.

The Committee and Section feel, however—and the Conference during informal reference to these sections seems to feel also—that no possibility of evil is presented which is not present in far greater degree with a lay jury; and that the possibility or even probability of gain is
great. Finally, experience with commercial arbitration suggests very strongly indeed that a sworn group, especially if sitting under a court, is likely to develop a strong semi-judicial conscience. And disqualification for interest is available.

It will be noted, in passing, that the machinery proposed has no precedent-building character: The fixing of trade practice and standard is believed to be properly a task for associations. The task here is to assure counsellors and buyers and sellers of an informed judgment, after the event, as to what trade practice, trade understanding, or the mercantilely reasonable, comes to; so that both the making of a contract and action under it, have some reliable basis to reckon with.

* * *

Section 59-D. (New to Sales Act.) Use of Finding at Trial. In any general trial of the issues between the parties—

(1) The special finding of the merchant experts shall be received in evidence, and shall be sufficient to sustain a verdict.

[p. 537]

(2) The court shall instruct any jury in such trial that the special finding is the expert determination of a special tribunal of sworn merchant experts constituted under the law to pass as experts on the particular issues concerned, that each party appointed (or had opportunity to appoint) to that tribunal an expert (or two experts) deemed by him competent, and that the special finding was unanimous; but that the finding can be disregarded by the jury if they can in conscience disregard it.

(3) None of the merchant experts who made the finding shall testify as an expert in the same case, nor be examined as to the basis of the finding.

* * *

Comment on Section 59-D.

(1) The form and substance of this section are believed to avoid all constitutional difficulty, especially such as may relate to trial by jury.

(2) It has thus far been assumed that the merchant experts' part in the picture is a portion of the litigation;
so that an effective arbitration clause would displace them, as it would displace the whole litigation. The matter deserves thought, however, as to whether the values of such a special tribunal can be made available in any arbitration which occurs before arbitrations who are not themselves experts in the trade concerned.
APPENDIX D*

TRANSCRIPT, N.C.C.U.S.L. FIFTY-SECOND ANNUAL CONFERENCE, AUG. 18-22, 1942, DISCUSSION OF REVISED UNIFORM SALES ACT, PROPOSED SECTIONS ON MERCHANT JURIES

Section 59. Submission of Mercantile Facts.

(1) In any action arising out of a sale or a contract to sell between merchants, any issue or issues involving any of the following matters may on motion of either party be submitted specially, under Sections 59 through 59-D, to merchant experts—

(a) The effect on the terms or conditions of the sale or contract to sell, of mercantile usage, or of the usage of a particular trade;

(b) The conformity or nonconformity in quality, routing, or any other mercantile aspect of any delivery, to the duties or conditions resting on the seller, and the measure of discrepancy, if any; and whether any defect in performance has been substantial;

(c) The mercantile reasonableness of any action by either party, the mercantile reasonableness of which is challenged;

(d) Any other issue which requires for its competent determination special merchants' knowledge rather than general knowledge.

(2) The sections on merchant experts are to be liberally construed, as being remedial, so as to effectuate their general purpose to accomplish speedy and competent determination of questions of fact which fall within the field of special merchants' knowledge, rather than of general knowledge.

Section 59-A. Demand for Experts and Settlement of Issues.

(1) Notice that merchant experts are demanded must be given to the opposing party within [ten] days after the case is put on the trial [docket].

(2) Such notice shall contain a statement of the issues of mercantile fact which the demanding party desires to have submitted.

(3) Within five days the other party must give to the demanding party notice of any other issues of mercantile fact which he desires to have submitted.

(4) On motion of either party, the court shall then set a time, and shall settle the issues of mercantile fact in writing and approve them. The trial shall be stayed until after conclusion of the proceedings of the merchant experts; but those proceedings shall be had as early as is feasible.

(5) The court may, for good cause shown, alter or enlarge the times set in the sections on merchant experts, give dispensation for delay, or admit to settlement new issues or new phrasings of issues; but not in such manner as to permit surprise. Nor shall new issues be settled, save by consent of both parties, after any merchant experts have been appointed.

[p. 125]

Section 59-B. Selection, Definition and Organization of Merchant Experts.

(1) Within five days after the issues have been settled, the party demanding submission shall select one, or two, disinterested merchants deemed by him qualified, and who consent to serve, file a statement of their appointment with the court, and notify the other party of their appointment.

Such merchants are known in this Act as "merchant experts."

(2) Within five days after receipt of such notification, the other party shall select a like number, and in like manner file and notify.

(3) The merchant experts selected shall agree upon an additional one.

(4) If no statement of appointment is filed under subsection 2, or if no agreement is reached within ten days after subsection 3, or if the court disqualifies any merchant expert, for cause, the court shall appoint.

The court is directed, in its action under this subsection, to take into account the existence of any trade association or arbitration association having special panels,
which may be available. If the parties agree upon a panel, the court shall appoint from the panel.

(5) The merchant experts shall receive no compensation, except under agreement of the parties. If the parties agree to compensate the experts, the compensation shall be taxed as costs.

(6) The parties may agree upon a single merchant expert. If they do, his determination of the issues submitted is conclusive.

Section 59-C. Hearing and Determination.

(1) The merchant experts shall be sworn to act not as party representatives, but as a special sworn expert tribunal to find the true facts.

(2) They shall sit with the court presiding at the hearing, and shall render a unanimous finding on each special issue submitted, which finding shall be reduced to writing.

[pp. 126]

(3) If unanimity on any issue cannot be had, the court may order a new tribunal of merchant experts to make a finding with regard to such issue.

Now there comes on page 288 at the end of what is on that page, a section 4 and 5.

(4) In the interest of speed, accuracy and completeness of presentation, the court may relax or dispense with the rules of evidence in the hearing before the merchant experts, so far as the court may deem wise.

(5) The rulings of the court are subject to review, and may be reversed either because there is no evidence to sustain the finding, or because the net effect of the conduct of the hearing has been materially prejudicial.

Section 59-D. Use of Finding of Fact.

In any general trial of the issues between the parties—

(1) The special finding of the merchant experts shall be received in evidence, and shall be sufficient to sustain a verdict.

(2) The court shall instruct any jury in such trial that the special finding is the expert determination of a special tribunal of sworn merchant experts constituted under the law to pass as experts on the particular issues concerned, that each party appointed (or had opportunity
to appoint) to that tribunal an expert (or two experts) deemed by him competent, and the special finding was unanimous; but that the finding can be disregarded by the jury if they can in conscience disregard it.

(3) None of the merchant experts who made the finding shall testify as an expert in the same case, nor be examined as to the basis of the finding.

Now this rather elaborate and perhaps cumbersome machinery is before you as a whole and some of the major doubts about it should be first called to your attention before you go into the discussion of it. Also, I think some of its major hoped-for values should be placed before you. The situation is that in that extremely difficult field of conformity of goods to quality, it takes an expert, except in a gross case, to know what is what, to read the contract and see what is called for [p. 127] and to size up whether the goods are as they should be. A simple matter like a suit about the quality of goods like this [indicating] can take three months to prepare with expert witnesses. You bring it in to the same experts, not as witnesses, but as judges, and they look at it like this, and they say, “That ought to be a five-cent allowance.”

MR. LANE: Can the jury believe or disbelieve the judges?

MR. LLEWELLYN: This tribunal—its finding can be disregarded, if the jury wishes to disregard it.

MR. LANE: Then their judgment is not final?

MR. LLEWELLYN: Their judgment is not final. That, we think, is essential to constitutionality, that the judgment shall not be final. That is point number one.

Now the next thing has to do with a large body of questions which in the law as it stands, and so in the act, are set up in terms of the standard of the reasonable, and we find that when courts or even juries deal with the standard of the reasonable in mercantile transactions they sometimes do it very well and they sometimes do it very blindly indeed. If a court happens to be a real-estate-minded court and thinks like a real property lawyer, the results of what it will see as reasonable or unreasonable
in a sales transaction will sometimes raise the hair. If, on the other hand, the court happens to be a mercantile-minded court, it will give you very lovely results. But the one outfit that you can rely on to know what looks reasonable to a business man is a business man in the same trade.

Finally, when it comes to a question of what is or what is not settled usage of the kind which should be read into every contract because it is the presupposed background, the only people who know what is a settled usage are the people who are in the middle of it, working under and with it, and who can tell what it really means.

To get such questions settled then by people who are really competent, who can do it fast and who have a very reasonable likelihood of agreeing—to that I want to come in just a minute—has seemed a wise line of attempt.

Now, when you set up your tribunal, take from this side and from this side and from the middle, are you not going to be faced with a purely partisan affair, with the seller's man digging in at all costs for the seller, and the buyer's man digging in at all costs for the buyer? We believe not; first, because of experience with commercial arbitration. That has not proved to be the result in commercial arbitrations. Commercial arbitrations do indeed involve a very considerable [p. 128] amount of compromise result, but the range of the compromise is a rather narrow range so far as experience can be gathered on the point. The reason for that, we believe, lies in the fact that you have not got a jury situation. You have got a situation of experts in trade, and the range within which a man can save his face and be really unreasonably partisan is a narrow range. When a man goes in to defend the seller at all costs or the buyer at all costs, and the man across the table says to him, "Do you mean to say you are willing to pay 78 cents for that kind of goods? If you are, I have got a lot I will let you have," the range of arbitrary disagreement becomes materially smaller than when it is simply a question of how long an unreasonable juryman can hang out in a closed jury room and fight.

Against that background, then, we have these sections.

Now, the first problem is that of unanimity on which I have already touched. Is it necessary? I don't know that
it is necessary. I am clear that if it is workable, it is highly desirable. I am clear that the pressure on men, to get together under the circumstances, tremendously increases if they have either got to flop or get unanimous. On the other hand, Mr. Pryor points out, and points out cogently, that to require unanimity makes deliberate hanging of the tribunal possible and that that is a wonderful stalling procedure, and that when you have a majority view, at least it is a majority view and ought to be used for what it is worth. It may not be as potent as a unanimous one but it will at least be worth a good deal if the case moves on to trial.

That is the kind of thing we want advice on. We want advice on the question of whether this is constitutional. Some of our men have doubts about it. For myself, I think this is constitutional.

MR. LANE: Wouldn’t it be a monstrosity to have some laymen seated on the bench of the court in a matter of this kind and have arbitration and court procedure so badly mixed up? Why not separate them?

MR. PRYOR: I don’t think it would be a monstrosity. I think it a procedure that is certainly a unique and distinct innovation in the trial procedure, but I take it that it is designed to, and I think would go a certain way, toward meeting of the criticism that has been levelled at the courts and the administration of justice in litigation of this character. It is an approach in that direction at any rate, I think.

The only criticism I would have is the one that Mr. Llewellyn has suggested. It seems to me that if the opinion of these experts is worth something in the trial of the case, it is admitted as an advisory proposition by the court [p. 129] and the jury, the opinion of the majority and of the minority, the court could just as well say, instead of saying they have unanimously found so and so, that two of the three members have found so and so, and the others find so and so. That is worth something to the jury and it is worth something to the parties in the litigation to have that situation presented, it seems to me. I don’t think there is any question of constitutionality.
MR. STANLEY: I just wonder. Has the Committee given consideration to the proposition that if this demand is made, that the selection be made by a court? It seems to me that you have got a situation there which would carry a lot more weight, since it ultimately is submitted to the jury. The parties then the court having selected the experts in the particular trade or business, it then becomes advisory to the court. They are not being picked by somebody. While I think that there is probably some merit to what you say with respect to the range of disagreement being small, yet some of these people that get into court might pick somebody under definite instructions to stay put, maybe their particular kind of a merchant. It seems to me that your machinery here is one of the best things in a statute that would appeal to businessmen and merchants, would relieve the talk about the slowness of the administration of justice, the rotten jury system and a lot of other things that we are hearing all the time. But it comes back to me on the desirability, if this is asked for by the merchant and you put him in a position to get the very thing he has been howling about, that is competency for the decision of mercantile facts, then the court ought to pick that as an advisory group of three and divorce it from this "you pick one, I pick one, and we'll pick a third one." I just ask the Committee to consider that because it seems to me that it makes the machinery operate smoother and adds a great deal to the whole procedure.

MR. LLEWELLYN: Mr. Stanley, the Committee has thought about that very hard and if this country were blessed in all its lines of trade with reasonably well-balanced and reasonably well-organized trade associations, there would be no question that one could go at it that way with satisfactory results, requiring the court to choose probably from a panel set up by the association. The trouble is that the organization of the available businessmen to be picked from who have standing and are known, is too spotty to be a reliable background, in general. The second trouble is that while this is uncompensated work, we believe that to be quite essential to keep this from just being a scramble, it is my belief that to do this kind of work with any type or regularity would be for
him a source of great prestige as a semi-judicial capacity and the type of thing in regard to which the appointment of friends, especially of the more worthless and leisured variety, whose leisure represents, [p. 130] not retirement at the end of long experience, but unwillingness of other folks to keep them busy, presses upon the court.

Now, I don't know how it is in your part of the country, but I know that in our part of the country there are too many judges that are looking for that kind of favor-giving power to make merchants feel comfortable if they didn't have a hand in putting their own man on the tribunal. Faced by the two choices, we have turned to the one on which there is experience. These arbitration tribunals do get set up and do work out along these lines.

MR. HARNO: The procedure outlined here I have a great deal of enthusiasm for. I have something to say in opposition perhaps or at least in criticism of them, but I want to say that they provide a method of getting at facts which we sorely need in the law. I think if there is any one criticism that stands out against our legal procedures, it is the way we determine facts in a court of justice. If a merchant or a detective were to get at the facts he would go out and find them, and find them in the best way he could, and it is our procedures that put us in disrepute.

Now here you have a procedure provided in which experts who are familiar with the trade, familiar with that business, sit and attempt to reach a settlement. They ought to be able to reach it much more rapidly than a jury could, which knows nothing about the issue under dispute, because they have a backlog, a background of knowledge, on which they can move rapidly to a decision, and so I see here something that is coming, I believe; that is, the method of determining facts. We already are approaching it in some of our other agencies that are quasi-legal, in the commissions. Sooner or later the courts and our court procedures are going to take up that method of determining issues.

I wonder whether we can ever get it by a legislature, with the personnel of a legislature as I know legislatures. I know the difficulties we had in connection with the Expert
Testimony Act because our legislatures were not prepared or ready to accept an Expert Testimony Act under which the court could appoint the experts.

I feel that the Committee might wish to give further consideration to experts appointed by the court, but perhaps they have hit upon the best method. I am somewhat interested in the fact that each party is to choose disinterested experts. I just can’t quite conceive of anything like that if they are choosing experts. They would probably choose experts that were favorable to themselves, but I suspect if they chose experts and they got around a table they could come out with some sort of a decision.

[p. 131]

I am not quite sure, as Mr. Pryor seems to be, that this is constitutional. You provide, Karl, in Section 59-D, subsection 3, that none of the merchant experts who make the findings shall testify as an expert in the same case nor be examined as to the basis of their findings. Now you are very definitely eliminating cross-examination, and if there is anything that has been deeply ingrained in our rules of evidence, it is the privilege of cross-examination, and you have under this provision taken away the privilege of cross-examination from the opposition.

MR. THOMAS: When I first read these sections, I was just as favorably impressed with them as anybody in the room. I know the difficulties of trying these commercial cases, particularly on questions of quality. That is not the only issue that will be submitted to these experts. They will pass on questions of mercantile usage or the usage of a particular trade. They will pass on not only nonconformity in quality, but routing, which sometimes is a question of law, or any other mercantile aspect of any delivery. “With the duties or conditions resting on the seller, and the measure of the discrepancy, if any; and whether any defect in performance has been substantial;” and it is contemplated that these merchants shall use their own knowledge and not be bound by any evidence in the case. That is outstanding. They cannot be examined at all. They can’t testify. There is no way of testing their knowledge.
It has been my experience and the experience of any other trial lawyer in commercial cases that when you come to a question of trade usage you will nearly always have opposing experts. One will testify, or one group will testify with the utmost confidence that a certain practice is universal in the trade and then the other party will call an equal number of experts and say that it is not universal. I have had that experience and I guess anybody that has tried these cases has had the same experience. You come to cross-examine a witness who testifies to a usage and very often his testimony shows that there is no usage. He believes there is because in his particular firm they follow it, but when the evidence is all in, there isn’t any usage.

Now, there is the value of cross-examination. You take one member of this merchant’s tribunal who is of a domineering type and he may come out with a finding, persuade the others to join him, that there is a usage, when none exists at all.

There are some of the practical difficulties. Partisanship can’t be avoided. I concede that in arbitration those things get on very well. There still is partisanship there, but the merchants put up with it.

Here you have the constitutional right of jury trial involved. You have two outstanding features in this proposed [p. 132] procedure. One is that at the motion of either party the procedure is mandatory. If the other party doesn’t appoint his experts, the court shall appoint them. If the experts appointed can’t agree on another expert, the court shall appoint him. That means “must.” In a sense, it is a compulsory arbitration of the particular issues which are to be submitted to those experts.

I can’t speak for the country at large, but we have in New York this provision of our constitution: “Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever, but a jury trial may be waived by the parties in a manner to be prescribed by law.” Now this is certainly not a waiver of a jury trial because it is compulsory.

To the extent that these merchant experts rely on their own knowledge and experience in making their findings, and that seems to be unquestionably contemplated, they cannot be interrogated as to the basis of their findings.
There may be evidence in the case, for instance, as to a trade usage. So far as I can see, they are not bound by that. They make up their minds on what they know or think they know. If the jury is not bound by the findings of these merchants, then the local procedure falls. If the jury can accept the evidence that is offered and reject the findings of the merchant tribunal, the object of the procedure is frustrated.

Now the kind of instructions to the jury which this statute contemplates are practically binding instructions because they are made to depend on the question whether the jury can in conscience disregard the findings of the merchant tribunal, which is a test, so far as I know, that is unknown to the law.

I think it is a general rule, I know it is in New York, that the testimony of experts giving opinion evidence—and much of the issues which will be submitted under this procedure are pure opinion—testimony of experts giving opinion evidence and subject to cross-examination is not binding on the jury even if it is uncontradicted, and on proper request the court must so instruct the jury.

It often happens in the trial of cases that one side will call an expert whose testimony is so preposterous that the other side doesn’t call any expert to contradict him. It may be that the jury isn’t aware of the fact that the testimony is preposterous, but they have an opportunity under proper instructions of the court, to throw that expert testimony out of the window, and very often they do.

To the extent which these merchant experts make findings which are not based on evidence in the case, they are [p. 133] invading the province of the jury. If the jury is given anything like an instruction to follow their findings, again the province of the jury is being invaded. As a matter of fact, as to every issue which is submitted to these merchants, the province of the jury is being invaded.

Now, I like to see mercantile questions determined by merchants, but this procedure enables the merchant tribunal to give findings which would not stand up under cross-examination and the jury is abdicating its functions. I cannot see, for the life of me, why that procedure does not violate the right of trial by jury as guaranteed by the New York Constitution, and I am very much impressed
with the denial of the right to cross-examine these experts as to the basis of their findings as well as the provision which keeps them from being witnesses. That is the only way that truth can be established, that is, by cross-examination. A man may think that there is a trade usage. He may be perfectly conscientious about it, though when his eyes are opened, he will have to agree himself that there isn’t any usage that is binding. There is no way of getting at the basis of the findings of this merchants’ tribunal. It just stands, that is all. You can’t inquire into it. That is the vice of the thing. The jury, if this procedure is going to be any good, has just got to abdicate its own functions. Credibility of witnesses that testify about the very things that are submitted to the merchants, the jury is supposed to pass on that, but if they find that the witnesses’ testimony is acceptable and the merchants’ tribunal comes in with a contrary finding, what are they going to do? I would say that if the witnesses are competent as the men selected for the merchants’ tribunal, it would be the duty of the jury to follow the testimony of the witnesses which is tested out on cross-examination and not accept the ipso dixit of the merchants’ tribunal. The denial of the right of interrogating these witnesses comes pretty near to violating due process.

You take a case where, for instance, a trial judge, if he is sufficiently daft and refuses to the defendant the right to cross-examine the plaintiff’s witnesses and a verdict is rendered for the plaintiff and judgment entered on the verdict, that judgment is not merely erroneous, it is void, contrary to due process of law. That is what I am afraid of in this thing. I can’t justify it. I wish to heaven we had some such tribunal. We have it in mercantile arbitration and it works fairly well, but I don’t believe that anybody reading this and lining it up with this provision of the New York Constitution which is common among states, could help but be impressed by the fact that this does invade the province of the jury. I don’t like to come to that conclusion. Take, for instance, due process. If the right of cross-examination or examination at all is denied with respect to those merchant experts whose findings are expected to be controlling, that seems to me to violate the fundamental principles of due process. You can’t inquire
[p. 134] into it at all. As I said before, very often these fellows are mistaken. We have seen it demonstrated in court time and again. Whereas if they were subject to examination, they are intelligent men, they would see the point at once. About half the merchants I have talked with, and I have talked with a lot of them, actually don't know what a usage of trade is, according to the legal rules. That is the thing you are up against. They are not subject to any instruction from the court. They go ahead on their own. That is what is contemplated.

Of course, in a commercial arbitration, the theory of the law is that the arbitrators can commit only one error at law and that is excluding relevant evidence. That is the only error they can make. Bias, fraud, something of that kind is out, but they can make an award which on the evidence before them is wrong on the facts and wrong on the laws and the court won't do a thing to it. They will let it stand. That is a chance the merchants take. They are perfectly willing to take it. I don't argue against it at all, but when you inject that element into a lawsuit, you are doing something that imperils the right of trial by jury. I am very much afraid of it.

Your due process of law requirements—they are aimed not merely at the state legislature but they are aimed at the court. I don't see how this procedure can stand. Even if the jury were instructed to give the findings of these merchants only such weight that they would give to any other evidence, that wouldn't cure it, because it isn't evidence. It has never been given any of the tests by which evidence must be tested. I regret that I have to come to that conclusion, but I am forced to it.

MR. TEISER: I don't know how many of the Commissioners come from timber states, but I have in mind a sale of timber. I have had so many litigations about it. There are expert timber estimators, and I think Mr. Llewellyn probably coming at one time from Oregon or having some connections in Oregon, if he knows anything about timber estimators or timber cruisers who are experts, knows the variance that happens between timber experts for buyer and seller. It is almost a trite saying amongst us that "you can get a timber estimator to estimate timber upon the
land, or the quality of timber upon the land one way or the other by merely telling him whether the person employing him is buying or selling.” If he is representing the buyer, the timber estimate will be low. I am not saying this unkindly about timber estimators, because some of the timber estimators are my friends.

MR. LLEWELLYN: I have even known lawyers whose judgment of the law was somewhat dependent upon which side of the case they were on.

MR. TEISER: I have, too. But especially I am speaking about getting an expert who will be afraid to say this or [p. 135] that or the other thing about the quality of goods, doesn’t stick with timber people, at least. I had a litigation in Chicago where experts got on the stand and testified as to the growing trees on a piece of land that differed to the extent in value of over a million dollars between them, and it wasn’t such a big piece of land either.

However, I am just giving that as one of the many things outside of what we usually think about mercantile practices and so forth, because that is a sale of personal property. That is true not only in the quantity of timber but in the quality of timber, whether it has bugs in it and so forth, as we call them, and there are many things in that regard which I am certain that if you expect unanimity of opinion, of determination, you would never get it in the world. If one had a question of sales of timber and I appointed for my client or my client appointed himself a timber estimator on one side and a timber estimator on the other side, and they picked a third, there would be exactly three determinations and not one, and there would never be unanimity and the case would never end and would stay in court almost forever. I can see it being used by a man who wanted the case to stay in court forever, because in that kind of a case it would stay in court if you want unanimity.

I think this section has a germ of excellency; I really do. I think in idea it is excellent and I think it can be worked out, but in the first place I think you have got to get away from unanimity. You have to have a majority judgment or verdict or determination by those experts,
whomever you employ. Secondly, I don’t believe that that opinion should be anything more than advisory, or the determination to be anything more than advisory, and in doing that you will get away from the difficulty of constitutionality, I believe. In other words, if you make this required, and it will be required if either party may do so, and permit a majority determination with that majority determination going to the jury, not as binding on them, and it isn’t binding, except when you say that if in conscience they can do so—that is a phrase that is pretty hard to get around or understand what it particularly means. More than that, you would have to, I believe, give the right somewhere in your statute to cross examine somebody—the man who makes the verdict or the man who comes to the judgment or perhaps those who came to a contrary judgment. But with those situations taken care of, I believe you could have a quasi-arbitration or quasi-determination and yet work out things within constitutionality and practicality. But I don’t believe in any sense you will get anywhere if you are going to require a unanimous determination or make the determination when made binding to the extent that you have made it binding. I realize that there are some qualifications there as to the bindingness of it, and I do believe that cross-examination should be permitted. With that you have done a lot. You have saved a tremendous amount [p. 136] of lost motion with that kind of a section. I do call your attention to the fact also that in section 59-C you provide that these people may have a hearing but you don’t say whether they can summon witnesses, whether the witnesses must be sworn or how. I think it has to be implemented to that extent also.

PRESIDENT SCHNADER: I think this may be the best procedure in the world but I don’t think it has any place in the law of sales or in the commercial code. We are preparing a uniform state act and there are at least, I suppose, half the states that still have constitutional provisions requiring an act to relate to one subject, and I think at least in Pennsylvania we couldn’t pass this act because it would be held that this part of the act relates to procedures and not to the substantive law of sales. I
think it would be very dangerous to try to hook up those two things in this one act, all else apart.

Then the second thing about which I would like to hear the frank views of the members of this conference is, in how many of their states do they think that an act could be passed which contained this procedure? I suspect that in forty-five out of forty-eight states this procedure would mean a delay of possibly ten years in getting the sales act passed. I think a great deal of educational work must be done before even the members of the Bar would advocate a procedure of this sort. Now it may be that if the prominent merchants associations, trade associations, were all behind it and for it and demanded it, that would change the picture, but I doubt whether that situation exists. I certainly think that we ought not to wrap up in one package a procedural reform, however good, with the substantive law of sales and the other subjects which go into a commercial code.

MR. BRIDGMAN: What has just been said leads me to ask: do these provisions such as this one and numerous others that are in this act that relate to merchants, relate to farmers? Is the farmer a merchant?

MR. LLEWELLYN: Not under the definition of the act.

MR. BRIDGMAN: You are quite sure that that would be construed as excluding farmers, so we wouldn't have to have farmers associations backing this to get through these special merchant provisions.

MR. LLEWELLYN: No. Transactions between merchants are inside the mercantile area with a merchant on each end.

MR. HOWARD: Some years ago, in our state, there was legislation and an act was presented by which the court was allowed to select an impartial expert who was to testify as a witness with knowledge on the part of the jury that he was chosen by the court. That procedure might be adapted to this case and would avoid the constitutional objection. The only trouble I see with it reminds me of what Mr. Schnader said because we couldn't get it passed.
MR. HARNO: That is the Expert Testimony Act, Mr. Chairman.

MR. LANE: I think that the Commissioner from New York is a very forward looking writer of statutes. It is a consummation devoutly to be wished to get these commercial cases tried expeditiously. Ever since the time of Shakespeare, we have had complaints of the law’s delay, but even with that, we must stay within certain settled principles of law, certain landmarks we call them. The jury system is so fastened upon all our state constitutions that I think it would be impossible to amend those constitutions within ten years or maybe more, even if we had an agreement among merchants as to this procedure. Now I remember last year or the last session of our Legislature, we went before it with our Expert Witness Act, with experts to be appointed by the courts, and it was very, very bitterly fought, and we had a very hard time to pass that bill in the Legislature.

We have our Arbitration Act which the merchants can now resort to and we have in our state now the Expert Witness Act. If this could be changed or modified so that these experts could come into court and be cross-examined, I think in our state it might be constitutional, but we are up against the proposition also in Wyoming that an Act can only cover one subject. Here it would cover a subject of procedure and a subject of substantive law. There are a great many things that are very worthy but as practical lawyers we cannot set aside the Constitution and we cannot coerce the Legislature to pass laws. If we do, we are violating our oath. We cannot come to the Legislature under our oath and say, “Pass this law whether it is constitutional or not.” We must give them a definite statement if they call us into a committee hearing. If we think that the law is unconstitutional we should tell them that. I do not think that we can infringe upon the province of the jury. In our state it provides that questions of fact should be decided by the jury. I know if we can get this modified so that it will expedite the hearing of our cases, and God knows we are all suffering from that, it will be a wonderful work on the part of our reporter or the writer
of this statute. But under the circumstances, I think that this could be recommitted with the suggestion that our able reporter give it attention during the coming year, and he might be able by the next meeting of the conference to bring in something that will expedite court procedure along these lines and which would not infringe upon the right of the jury to pass upon the facts or upon other constitution violations which have been mentioned here, such as the due process which we all have, both in the Federal Constitution and in our state constitutions as far as I know.

[p. 138]

MR. ROWLAND: What is the argument against the cross-examination?

MR. LLEWELLYN: When the experts come into court?

MR. ROWLAND: Yes, a lot has been said here about cross-examination and violation of constitutional provisions, but what would be the argument against permitting or allowing cross-examination of these expert witnesses before the jury?

MR. LLEWELLYN: I have been thinking about that as the discussion went on. The reason why this provision was in initially was because the experts were felt in their deliberations to be in the nature of a tribunal rather than in the nature of witnesses. Secondly, because it was desired so far as possible to keep the effect of what they had to say clean and simple, so that it would make its dent and stand out in the minds of a jury, because there it sat, uncomplicated, in simple, written form. I had not, at that time, nor had anybody until today thought of this trouble about cross-examination in relation to constitutionality, nor had it been raised previously in any discussions with me.

I am very far from satisfied about the points of constitutionality which have been made, that is the points of supposed unconstitutionality. I should hate to have the meeting close on the motion that these gruesome fears about interference with the noble trial by jury have any
such constitutional bearing as were suggested by those who have the fears. But I don’t see that this is either the time or the place to argue that because I think Mr. Rowland comes closer to the matter—why can’t the privilege of cross-examination be put in if, at the time of the trial, either side wishes to challenge the experts?

Moving to another point raised especially by Mr. Thomas, though the experts will be moving largely upon the basis of their own knowledge and should, still before they reach their determination, counsel for both sides have had a chance to present the facts and argue to them; I do not see this terrible danger of their being misled, they being reasonable men, they can see a point when they hear it, into the creation of usage which is non-existent, because counsel has been there to make them do some thinking.

Finally, and on the general theory of unconstitutionality—leaving Mr. Schnader’s point, which is one that I feel to have a real punch, for last—the notion that to invade the province of the jury by somewhat modifying the traditional manner of jury trial is therefore to become unconstitutional, because the trial by jury provision sits in the constitution, that feeling is a feeling which rests on a total ignoring of what has been done in the way of modifying the historic jury trial and [p. 139] what is going to continue being done and continue to get by the courts. But the two problems of constitutionality are to be sharply severed. The one is: Are you up against your jury trial provision of your due process clause? That, we can speak of as the general constitutional question because that you have to wrestle with whether this goes into a separate act or whether it sits in this act. It cuts through the whole question of whether it is doable without constitutional amendment.

The special constitutional question is that raised by Mr. Schnader—put any such provision or set of provisions into a sales act and do you not run up against the one subject: constitutional clauses? On that the path of wisdom is the path of caution. There is no need to run up against that. You can bring in a companion act to run with the sales act, covering any material of this character, and it
seems to me to be quite necessary that that be done because you don't know what the decision would be.

On the other, I think that part of the job of your committee for next year is not only to rework the lines of the section but to provide you in its report with something of the brief for the constitutionality of whatever lines are hit upon, with some of the authorities which make that brief a perfect persuasive, because neither the vague fears of my brethren who are worried about constitutionality, nor the light assurances on my part that it is really all right, are worth a hoot. What we need is to get down to the cases and see where we are at. It has been a highly illuminating discussion, however, gentlemen. I think it is fair to state that the discussion of this section closing this evening's meeting has been, by all odds, the most illuminating discussion on the Sales Act we have had, and from the standpoint of the Committee, thanks and more thanks! We got light, lots of light.

Mr. Chairman, we are not going to have a chance to report back, but we are under a duty to stop at ten o'clock, as I understand the Chairman.

By unanimous consent, is there any objection to extending this discussion for two minutes?

MR. THOMAS: It isn't a discussion. I just want to suggest this to the Commissioners and to Mr. Llewellyn as draftsman, there is provision in here for judicial review of the findings of the merchant experts—

MR. LLEWELLYN: No, No! Judicial review of the rulings of the court at the hearings of the merchant experts.

MR. THOMAS: Oh! Well, you would have that anyhow, wouldn't you?

[p. 140]

MR. LLEWELLYN: There is a provision in here relaxing the rules on evidence, and those rulings have got to be subject to review.

MR. THOMAS: You would have to relax the rules of evidence to get the findings in.

MR. LLEWELLYN: This is the hearing at which the merchants make their findings. That isn't the hearing
at which the merchants' results are handed to a jury. It isn't the jury trial.

MR. THOMAS: I take that when the case is all in, they go off by themselves and make up their findings, and they can make and hand those to the jury, but I got the impression that there was a provision for the review of the findings. I don't see how that is possible.

MR. LLEWELLYN: Mr. Thomas, you don't visualize this as it is planned. I do not know whether the sections are at fault.

MR. THOMAS: I am probably wrong.

MR. LLEWELLYN: The picture set here is that a hearing occurs before the merchant experts with the court sitting and presiding; no jury.

MR. THOMAS: I didn't understand that.

MR. LLEWELLYN: That is supposed to occur and be complete before you ever get to any jury trial at all. That is the picture that is set up here.

MR. LANE: You say here, Mr. Llewellyn, "but the finding can be disregarded by the jury if they can in conscience disregard it." If they don't believe this as a fact, they are going to disregard it. Why do we need that at all? That is an inherent power of the jury, to disregard any evidence if they don't believe it.

MR. LAWTHER: A point of order, Mr. Chairman, it is ten o'clock. I want to go to bed!

CHAIRMAN VAN WINKLE: I think that is a good point. Mr. Llewellyn, I will entertain a motion to take a recess until nine-thirty, tomorrow morning.

MR. LLEWELLYN: The motion is made.
[The motion was seconded, put to a vote and carried.]
ARTICLE 2 APPRAISAL

APPENDIX E*

COMMENT ON SECTION 5-8 (S77)
CURE OF IMPROPER TENDER OR DELIVERY;
REPLACEMENT

The present section follows the general policy of this Act of preserving the substance of the parties' agreement and avoiding an upset of the deal by technical matters which can be handled without undue hardship to either party by correction of the defect or by money allowance. This section looks to assuring the buyer of a tender of the full substance to which he is entitled under the contract, while preventing him from escaping from his own contractual obligation by a surprise rejection of a shipment which the seller had good reason to believe would be acceptable. Subsection (2) seeks to avoid the freezing of a seller's breach by the buyer's rejection of any defective tender made before the time for delivery under the contract has expired. The rules of this section may be altered by agreement of the parties to the contrary.

* * *

1. Subsection (1). Ordinarily in sales contracts between merchants the normal course of business involves the acceptance of deliveries which depart somewhat from the strict contractual obligations of the seller. Discrepancies in shipments are commonly waived altogether or are adjusted by money allowances. This common practice has lead to an extra-legal but very real reliance by sellers that buyers will accept what is legally a defective tender although in substance it conforms to the contract. In "good" times buyers are usually eager to accept goods which are "moving" despite minor variations from the contract and therefore "surprise" insistence on technical rights when the market has suddenly failed produces injustice and hardship.

The courts in the past have used several lines of reasoning in attempting [p. 2] to protect the seller who thus relies on the acceptability of his shipment. They have in many instances construed the terms of the agreement in their commercial, rather than their literal, sense. This Act, of course, is entirely in accord with this type of construction and has adopted a policy of full incorporation

* Llewellyn Papers, file J(X)(2)(f).
of usage of trade and course of dealing into the interpretation of the agreement. [See Section 1-12 (S 9) defining “agreement,”] and Section 2-8 (S 26) on good faith and commercial standards.] However, this line of reasoning is not adequate to meet many of the situations which arise. Secondly, many courts in an attempt to foreclose buyers who reject in commercial bad faith, have applied a rigorous rule that a buyer waives all defects which he does not state at the time of rejection. This rule in general application has proved to work severe hardships on buyers who have rejected in good faith and for substantial cause. [Compare Section 7-5 (S 94) on waiver of buyer’s objection by failure to particularize, and Comment.]

Finally, many courts have moved within the exceedingly indefinite common law concept as to when a faulty tender followed by rejection “freezes” a breach and have allowed ample room for curative tenders wherever possible. In general this is the policy adopted by the present section, and this Act approves the results of such cases as Hudson v. Germain Fruit Co. (1891) 95 Ala. 621; 10 So. 920, where a carrier refused to permit inspection by the buyer before acceptance because the bill of lading did not so provide. The buyer refused to accept the goods although he was offered an opportunity to inspect the next day and the seller recovered the purchase price.*

[p. 3] The basic purpose of this subsection is the avoidance of injustice to the seller by reason of the surprise rejection by the buyer. However, the seller is not protected unless he had “reason to believe” that the tender would be acceptable. He is charged

---

* See also Stock v. Snell (1922) 240 Mass. 427; 134 NE 378 (pastry flour not ordered was included in shipment and upon the buyer’s rejection the seller “eliminated” flour and ordered the draft reduced accordingly; the seller recovered the purchase price upon the buyer’s continued rejection); Forsyth Furniture Lines v. Druckman (1925, CCA 4) 8 F (2d) 212 (seller shipped two carloads of furniture in one month under contract calling for one shipment per month and the buyer refused to pay for all of the goods which had been shipped under the contract; seller recovered purchase price with money allowance to the buyer for any loss caused by premature shipment); Mutual Chemical Co. v. Marden, Orth & Hastings Co. (1923) 235 NY 145; 139 NE 221 (where the seller gave notice of readiness to ship a carload well in advance but the buyer delayed sending shipping instructions until the last day for delivery saying he would accept the bill of lading the next day; the shipment being slightly in excess of the contract amount, the buyer rejected and the seller, within three days, offered to include excess goods at the original contract price; seller recovered purchase price since cure of tender was timely under the circumstances).
with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract. Thus no element of surprise is involved in overseas documentary contract, for instance, where the common practices of documentary resale, marine insurance, and letter of credit financing have set a pattern of rigid compliance with contract terms known in the older law as the "strictness" of mercantile contracts. Moreover, modern usage of trade has introduced little or no relaxation in those terms which are required to be evidenced by the documents except in regard to commercially reasonable variations of quantity. Similarly, in the case of some goods such as precision parts or chemicals destined for gas mask manufacture, it is recognized by all merchants that quality is vital and no variation is permissible. In other transactions time may be of the essence, as in the case of a shipment of turkeys for the Thanksgiving market.

If the buyer gives notice either implicitly, as by a prior course of dealing involving rigorous inspections, or expressly, as by the inclusion [p. 4] of a "no replacement" clause in the contract, the seller, of course, will be held to rigid compliance. But in a "form" contract a printed clause to this effect will not bar the seller’s rights in any transaction where it is out of line with trade usage or the prior course of dealing unless it is clear that the seller’s attention has really been directed to it. [See Comment to Section 2-9 (S 23) on unconscionable contract or clause, and General Comment to II and III.]

2. "A further reasonable time to substitute a conforming tender." These are intended as words of limitation to protect the buyer. In some cases there will be no "reasonable" time for the seller to make a cure and he will be forced to stand by his original tender. This will be true particularly if the market season for the goods is nearly ended, where remanufacture is a lengthy process and will consume undue time, or where transportation time is long and the defect is discovered only after the arrival of the goods. And where a contract calls for a "May" overseas shipment, the correcting tender must be shipped in May. If the seller cannot make such a shipment available, Subsection (1) will not help him. [Compare Bowes v. Sand (1877 H.L.) 2 App. Cas. 455, where a contract calling for March and/or April shipment of rice was held breached by partially loading the vessel in February.**] However, the ever growing usage

** This Act, however, does not approve the doctrine of this case that a
of trade which substitutes price adjustment for rejection when the shipments fall within commercially reasonable limits of variation will, under this Act, solve many such difficulties without recourse to this particular subsection. [See Section 1-12 (S 9) on meaning of agreement, Section 2-11 (S 21) on course of dealing and usage of trade, Sections 8-19 (S 121) and 8-20 (S 122) on contractual modification of remedy.]

February "shipment" results when loading is begun in February and completed in March.
COMMENT ON SECTION 7-9 (S101)
BREACH IN INSTALLMENT CONTRACTS

In general the present section follows the Original Act, Section 45 (2) and the more commercial case law thereunder. However, this Act makes explicit the more mercantile interpretation of many of the rules involved. Thus the definition of an installment contract is phrased more broadly in this section than in the Original Act, so as to cover installment deliveries tacitly authorized by the circumstances or by the option of either party. The practical commercial understanding of such clauses as “each delivery is a separate contract” is also incorporated in Subsection (1), which makes clear that such contracts nonetheless call for installment deliveries.

Subsection (2) is designed to further the continuance of the contract in the absence of an overt cancellation. The perplexing question arising when an action is brought as to a single installment only, is resolved by making such action waive the right of cancellation. This of course involves merely a defect in one or more installments, as contrasted with the situation where there is a true repudiation within Section 7-11 (S 99). Whether the non-conformity in any given installment justifies cancellation as to the future depends, not on whether such non-conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract. If only the seller's security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance under Section 7-10 (S 98), but has not an immediate right to cancel the entire contract. It is clear under this Act, however, that defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect “waived.” The policy of the Original Act is continued, putting the rule as to buyer's default on the same footing as that in regard to seller's default.

[p. 2] Finally, whereas subject to the rules on cure of tender [Section 5-8 (S 77)], a tender under a single delivery contract must comply accurately with the seller's obligation or be subject to

* Lewellyn Papers, file (IX)(2)(f).
rejection, under the present Subsection (3) an installment delivery must be accepted if the non-conformity is curable and the seller gives adequate assurance of cure.

* * *

1. The meaning of "installments" under this Act. By including installment deliveries tacitly authorized by the circumstances [Section 3-6 (S 31) on delivery in single or several lots] or by the option of a party [Section 3-10 (S 35) on options and cooperation respecting performance] within the coverage of this section, this Act merely reflects the view of the sound cases. Thus in Lynn M. Ranger, Inc. v. Gildersleeve (1927) 106 Conn. 372; 138 Atl. 142, a seller of six carloads of coal consigned to himself was held entitled to recover the price of two carloads diverted to the buyer out of the total called for by the contract; and in Czarnikow-Rionda Co. v. West Market Grocery Co. (1927, CCA 2nd) 21 F. 2d 309, where the contract called for shipments at the seller's option during August, the fact that a first lot had been delivered, paid for, and accepted did not bar a rejection of a subsequent defective lot. Similarly in Portfolio v. Rubin (1922) 233 NY 439; 135 NE 843, a buyer who had ordered four pieces of textile and rejected two as non-conforming, was held justified in tendering merely the price of the two pieces accepted.

In regard to the apportionment of the price for separate payment it must be remembered that this Act applies the more liberal test of what can be apportioned rather than the test of what is clearly apportioned by the agreement. [See Comment on Section 7-7 (1) (S 96) on acceptance at the "contract rate;" and Section 3-6 (S 31) on delivery in single or several lots.] This Act also recognizes [p. 3] approximate calculation or apportionment of price subject to subsequent adjustment as in Section 3-20 (1) (S 45) on "net landed weights" and the like. Nevertheless, it is rare that a contract will imply that separate payments are to be made for each lot delivered, unless the price is at least roughly calculable by units of quantity. Where installments are authorized, however, no generalized contract between wholly "entire" and wholly "divisible" contracts has any standing under the sound cases or under this Act, which undertakes at all times to focus issues in terms of the sense of the situation. The court's statement in the Czarnikow-Rionda case, discussed immediately above, that although a contract may be "treated as an entire contract when the issue is whether a failure by the seller or the buyer in respect to an early installment may be so material a breach of the contract as to justify the other
party in refusing to perform in respect to later installments . . . it does not necessarily follow that the contract is to be deemed entire when the issue is whether acceptance of an early installment precludes rejection of a later defective installment," holds equally in regard to whether a first lot requires separate acceptance and payment.

2. "Each delivery is a separate contract" and similar clauses. This type of clause with its many variations, represents the commercial seller's attempt to avoid the old rules that, unless otherwise agreed, delivery does not require acceptance unless made in a single lot, and that delivery of the contract quantity must be complete before any payment is earned. This Act, however, rejects any approach which gives such clauses their legalistically literal effect.

Even where a clause speaks of "a separate contract for all purposes" [p. 4] a commercial reading of the language under Section 2-8 (S 26-2) on good faith and commercial standards, requires that the singleness of the document and the negotiation, together with the sense of the situation, prevail over any uncommercial and legalistic interpretation of a form clause whose possible unfortunate import is not clearly understood either by commercial men or by lawyers. "Each delivery or shipment shall be treated as a separate contract, and the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments" . . . is a clause which is often found in contracts of this description and which is very difficult to construe, or at least to apply to all possible emergencies. It seems to me, however, that whatever effect it may have . . . it cannot be construed so as to defeat the rights of the buyer under s. 31 of the Sale of Goods Act."* [Robert A. Munro & Co. Ltd. v. Meyer (1930) 2 K.B. 312, 332.]

There is commercial sense in reading such a "separate contract" clause as requiring a buyer to pay for a second and adequate delivery despite a pending claim for adjustment or damages due to a first defective delivery. Even without such a clause there is also commercial sense in requiring a seller to make his second delivery despite the buyer's holdout on payment for the first because of a good faith claim for adjustment. [See Section 8-16 (S 118) on deduction of damages from price; also Comment on Section 7-10 (S 98) on right to adequate assurances, and Lander v. Samuel

* Section 31 of the Sale of Goods Act corresponds to the present section.
Heller Leather Co. (1943) 314 Mass. 592; 50 NE (2d) 962, there discussed.] It is commercially reasonable in the case of a single installment, and especially in view of the "cover" provisions of this Act. [Section 8-11 (S 113)], to give such clause with its specific non-cancellation provision, [p. 5] the effect of requiring the buyer to cover by buying elsewhere in the event of the seller's non-delivery or misdelivery. But to press such a construction to the point of forcing the buyer to cover a sequence of non-deliveries as was done in Higgin v. Pumperston Oil Co., Ltd. (1893) 20 Session Cases 532, is inconsistent with this Act. The security and assurance provisions contained in Section 7-10 (S 98) embody policies and measures which make it impossible, whatever the language of the agreement, to disregard the essential commercial nature of a standing relation embodied in a single document and the right to cancel when this relation has been unduly disrupted. [See also Section 8-20 (S 122) barring a limitation of remedy which defeats the essential purpose of the contract.] Thus this Act rejects the broad ruling in such cases as Hetrick Mfg. Co. v. Waxahachie Cotton Mills (1924, CCA 6th) 1 F. 2d 913, in which a non-cancellation clause in a contract calling for forty separate deliveries was held to result in forty separate contracts, giving the buyer no right of cancellation regardless of how many defective deliveries were made by the seller. Indeed the aggrieved party's rights are also safeguarded by his right to assurances under Section 7-10 (S 98), where the breach in prior installments, though not yet substantial enough to impair the value of the whole contract under this section, threatens to do so.

3. Substantial impairment of the value of the whole contract under Subsection (2). This test of the right of the aggrieved party to cancel the unperformed balance of the contract is unfamiliar in phrasing, though it is analogous to the familiar concepts of substantial or essential breach as contracted with "severable" breaches. This is the same language used in Section 7-1 (S 99) as to repudiation which justifies a cancellation. The reason for adopting this test lies in the distinction made by this Act between the more jeopardizing of security in regard to future performance, [p. 6] for which Section 7-10 (S 98) provides relief by allowing suspension of performance and demand for assurance, and that flat repudiation which justifies immediate cancellation and suit for damages. Once this distinction has been made, the only type of defect in an installment which justifies summary cancellation is one whose immediate effect is a substantial impairment of the value of the whole, which is the
sound result also whenever there is breach of one of a collection of disparate obligations gathered into a single contract. Lesser breaches which entail insecurity have their remedy under Section 7-10 (S 98), over and above the remedies which relate to the deficiency in the installment as such.

In regard to default in payment it has been well said: "We must know the cause of the default, the length of the delay, the needs of the vendor, and the expectations of the vendee. If the default is the result of accident or misfortune, if there is a reasonable assurance that it will be promptly repaired, and if immediate payment is not necessary to enable the vendor to proceed with performance, there may be one conclusion. If the breach is willful, there is no just ground to look for prompt reparation, if the delay has been substantial, or if the needs of the vendor are urgent so that continued performance is imperiled in these, and in other circumstances, there may be another conclusion." [Cardozo, J. in Helgar Corp. v. Warner's Features Inc. (1918) 222 NY 449; 119 NE 113.] Such lines of analysis this Act approves and adopts whether in regard to the buyer's default in payment or acceptance, or the seller's default in delivery, but the question turns not on the confused issue of the Original Act: "whether the breach is so material as to justify the injured party in refusing to proceed and suing for damages for breach of the entire contract," but on the narrower issue of whether the value of the whole unperformed contract is so substantially impaired by the breach as to warrant [p. 7] cancellation and damages. A much lesser impairment, if it gives insecurity as to the contract-breaker's future adequate performance, will justify "refusing" temporarily "to proceed," pending the result of a demand for assurance.

This does not mean, however, a reversion to "the rule of the English statute . . . which keeps the contract alive unless the breach is equivalent to repudiation" (Cardozo, J. in the Helgar case, supra) if "equivalent to repudiation" describes such breach in installments as indicates an intention not to perform. The question under this Act goes not to intention as to the future, but to the degree of injury actually suffered by the default. If that injury is sufficient, it happens that the legal consequences are almost the same as those entailed by a repudiation.

4. Seasonable notice of cancellation under Subsection (2). A buyer who accepts a non-conforming installment which substantially impairs the value of the entire contract should properly be permitted to withhold his decision as to whether or not to cancel pending a
response from the seller as to his claim for cure or adjustment. Similarly, a seller may withhold a delivery pending payment for prior ones, at the same time delaying his decision as to cancellation. A reasonable time for giving notice of cancellation, judged by commercial standards under Section 2-8 (S 26), extends of course to include the time covered by any reasonable negotiation in good faith. However, during this period the defaulting party is entitled, on request, to know whether the contract is still in effect, before he can be required to perform further.

5. Subsection (3) (a): When an installment is rejectable. Installment contracts of necessity involve some degree of standing relations, with the result that the test of accurate conformity (subject to the factors of [p. 8] construction discussed in the General Comment to Parts II and III) which is applicable to a single total delivery under Section 7-1 (S 90) on buyer’s rights on improper delivery, is here displaced in favor of a more commercial doctrine. This does not mean that an installment agreement cannot require accurate conformity in quality as a condition to the right to acceptance if the need for such conformity is made clear either by express provision or by the circumstances. In such a case the effect of the agreement is to definite explicitly what amounts to substantial impairment of value impossible to cure. Thus in a contract for precision parts, chemicals for delicate use, or quality merchandise for a quality house, the circumstances may give notice that even minor non-conformity substantially impairs the value for the purposes of the contract. Hence what the present subsection means for installment contracts is that in the absence of circumstances which challenge attention to the need for exactitude, a clause requiring accurate compliance as a condition to the right to acceptance must have some basis in reason, must avoid imposing hardship by surprise (see General Comment to Parts II and III, paragraphs 6, 7, 8, 9 on avoidance of surprise) and is readily subject to waiver or to displacement by practical construction under Sections 2-12 and 2-13 (S. 22 and S. 24).

Substantial impairment of the value of an installment can turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and the like. It must be judged in terms of the normal or specifically known purposes of the contract. In ordinary circumstances the simplest defect to cure is one of quantity and non-conformity of this type will not normally constitute a substantial impairment of value. But an excessive shipment which swamps the buyer's storage facilities or an undershipment
which fails to meet his needs would be rejectable if acceptance [p. 9] of the whole overshipment in the one case was insisted on by the seller or if no immediate assurance a speedy supplement was forthcoming in the other.

The facts of Ballantine and Co. v. Cramp & Bosman (1923, K.B.D.), 129 L.T.R. 502, present a good illustration of the assortment problem in installment contracts insofar as the factor of "evenness" as an attribute of merchantability under Section 3-13 (S 83), is involved. In that case the contract was for 2500 sheep carcasses weighing under 72 lbs., the average weight not to exceed 60 lbs. The first shipment averaged 62 lbs. and the seller tendered five bills of lading, as a single tender, two of which covered carcasses averaging less than 60 lbs. The buyer rejected the entire shipment. The second shipment averaged 54 lbs. and was accepted. Under this Act the rightfulness of the buyer's rejection depends first, on the possibility of cure and secondly, on the adequacy of assurance of the cure. But in any event, contrary to the indication in the Ballantine case, the seller would be permitted to retender immediately and demand acceptance of the two bills of lading which covered goods which fitted the contract description since no quantities had been fixed for the installments. [Section 5-8 (S 77) on cure of improper tender of delivery.]

The defect in required documents referred to in Subsection (3) (a) refers to such matters as the absence of insurance documents under a c.i.f. contract, falsity of a bill of lading, or one failing to show shipment within the contract period or to the contract destination. Even in such cases, however, the provisions on cure of tender apply if appropriate documents are readily procurable. As between the buyer and the seller, however, when the defect shown by the documents is a defect in the goods, such as a shortage in quantity, it is not within the documentary exception of Subsection (3) (a). In such a case the test is that of substantial impairment of the value of the installment.

[p. 10] 6. Cure of non-conformity of an installment in the first instance, can usually be afforded by an allowance against the price, or in the case of reasonable discrepancies in quantity either by a further delivery or a partial rejection. As contrasted with the less commercial cases, this Act requires reasonable action by a buyer in regard to discrepant delivery and good faith requires that the buyer make any reasonable minor outlay of time or money necessary to cure an overshipment by severing out an acceptable percentage thereof. [Compare General Comment to Parts II and III, paragraph
11, on the pattern of acceptance with adjustment; and Section 2-8 (S 26) on good faith and commercial standards.] Thus this Act approves such holdings as in Stock v. Snell (1922) 240 Mass. 427; 134 NE 378, in which the buyer rejected a shipment which included pastry flour not ordered by him in addition to the contract goods. The seller "eliminated" the unordered flour from the draft for the price and was held entitled to recover upon the buyer's continued rejection of the shipment.

The facts of Burrows & Kenyon, Inc. v. Warren (1925, CCA 1) 9 F. (2d) 1, although not involving an installment contract, present an instance of the type of cooperation expected from the buyer under this Act. In that case a cargo of lumber arrived at the buyer's dock in sizes at great variance with the contract. The market had dropped. The seller offered to sort out the appropriate lumber and to supply any deficiency from local stocks. Nothing appeared to show the materiality of the short delay thus involved. Under this Act the minor extra expense incurred by the buyer through having surveyors and labor at the dock to sort the lumber is plainly curable by allowance on the price; the only question would be whether the obstruction of the dock would amount to an unreasonable burden. If it would not, the seller's proposed cure would be in order. Similarly, on the facts of [p. 11] Jackson v. Rotax Motor & Cycle Co. (1910, C.A.) 2 K.B. 937, where part of a shipment of motor horns arrived in London in a damaged condition, but the dents were such as could be straightened and the necessary repolishing done by relatively simple and inexpensive processes. Under this Act the question would turn not on accurate conformity of the delivery as it did in that case, but on whether an unreasonable burden of trouble and delay would be involved in refinishing, as it might well be, for instance, by disrupting a production schedule. But plainly, under Paragraph (3) (b), it is the seller who must take over a cure which involves any material burden; the buyer's obligation reaches only to cooperation, to paying a minor excess of freight, or to separating a certain number of casks from a larger bulk. He is not required to engage in even minor manufacturing operations on goods agreed to be delivered in merchantable condition unless the circumstances indicate that such touching up would be simple for the buyer. (For example, a delivery of parts to a manufacturer for further manufacture where no dislocation of the buyer's production schedule would be involved and the cost of rework would be minor.) Also, if the course of the buyer's performance on previous installments had been to rework,
timely notice of strict conformity would be necessary to permit rejection at all. [Section 2-12 (S 22) on course of performance or practical construction.] Adequate assurance for purposes of this subsection is measured by the same standards as under Section 7-10 (S 98), on right to adequate assurance of performance. (See Comment thereon.)