# MINUTES OF THE FIFTH JUDICIAL CONFERENCE OF PENNSYLVANIA

## HELD AT PHILADELPHIA, PENNA., MAY 15 AND 16, 1936

The Fifth Judicial Conference of Pennsylvania convened in the Supreme Court Room at Philadelphia on Friday, May 15, 1936, at 11 o'clock A. M.

The Conference was called to order by its Chairman, Mr. Chief Justice JOHN W. KEPHART, who delivered the following brief address:

"Preliminarily I wish to emphasize that while the Supreme Court sponsors, as it were, the Judicial Conference, it was originally inaugurated at the request of the then Attorney General BALDRIGE and CHARLES EDWIN FOX, ESQ., and the Court, in considering that request, directed the then Chief Justice to call such conference. The purposes, since its first meeting, have assumed a wider range than anticipated, and, because of recent developments, this and future conferences must broaden the scope of activities even more materially if we wish to check the devastating inroads that are being made into the judicial field.

"At our last Conference—and I might say here, in passing, that in the last few years these meetings have been omitted because the then Chief Justice in his advanced years did not feel equal to the labor involved—we discussed a wide variety of subjects close to the judicial field at that time. Mr. Justice SCHAFFER reviewed the work of former meetings so well that they need not be referred to. I will not pretend to review in detail the work then accomplished, as time will not permit, and the work of that session will be printed; but at that meeting the discussion and interest shown demonstrated that the Judges then in office were thoroughly alive to the work of the Conference and its importance. We hope that it will continue so.

"We will now proceed to the program and take up the matters that have been listed in it."

Judge JAMES GAY GORDON, JR., Common Pleas No. 2, 1st District, acted as secretary.

Former Chief Justice MOSCHZISKER presented and the Conference approved the following Act for adoption by the Legislature:

AN ACT

Making it a misdemeanor to falsely impersonate any juror or to assist in such impersonation in the courts of this Commonwealth and providing penalties for the same.

Be it enacted, etc., That any person who in any of the courts of this Commonwealth knowingly impersonates another person whose name has been drawn for jury service and any person who shall knowingly, either directly or indirectly, aid or assist another in such impersonation, shall each of them be guilty of a misdemeanor and, on conviction, shall be sentenced to pay a fine not exceeding one thousand dollars and to undergo imprisonment for a period not exceeding three years, either or both, at the discretion of the Court.

Judge RAYMOND MACNEILLE, Common Pleas No. 3, 1st District, called up for consideration by the Conference a proposed change in the law relating to jury trials so as to authorize verdicts by less than twelve jurors. The Second Conference had recommended to the Legislature a Constitutional amendment and a statute on this subject: 297 Pa. xlix. Judge MACNEILLE argued that it would not interfere with a satisfactory determination of substantial justice in a particular case to permit a verdict to rest on the agreement of eleven jurors, and that much valuable time would be thereby saved both for the courts and the litigants, whenever one obstinate juror held out against the judgment of his fellows and forced a new trial of the case.

Judge HARRY S. MCDEVITT, Common Pleas No. 1, 1st District, expressed himself as unalterably opposed to

less than unanimous verdicts. He stated that in his experience the number of "hung juries" was so inconsiderable as to be relatively unimportant.

Judge WILLIAM M. HARGEST, Common Pleas, 12th District, pointed out that the unanimous verdict of twelve jurors was a relic of early days of English law, when a defendant was not permitted to testify in his own defense, and when some one hundred and sixty crimes were punishable by death. He also reminded the Conference that every commission appointed in recent years to study the criminal law had recommended verdicts by less than twelve jurors.

Judge THOMAS LINUS HOBAN, Common Pleas, 45th District, suggested that in civil cases any disagreement was usually due to difference as to the amount of the award and not as to the general right to recover and therefore urged, in regard to such cases, that there be separate verdicts as to liability and damages.

Mr. Justice HORACE STERN, Supreme Court, pointed out that to eliminate unanimity from civil, but not from criminal, cases might be interpreted as an indication that the Conference considered property rights as having "greater sanctity" in the eyes of the law than liberty and human life.

The Conference then recommended the following Constitutional amendment:

"Trial by jury shall remain as heretofore, and the right thereto shall remain inviolate; but the General Assembly may authorize verdicts in all civil and criminal cases, except felonious homicide, by less than a unanimous jury."

The details of the Act were left to be worked out by the Legislature.

Judge W. C. SHEELY, Common Pleas, 51st District, spoke briefly upon the problem of procedure for admission of patients to state institutions. The present difficulty, he said, was to determine which institution was the proper one in a particular case. A possible remedy

was the formation of a body composed of psychologists and sociologists to aid the Court in solving such problems. At the suggestion of the Chairman the matter was referred to a Committee for report at the next Conference. Judge SHEELY was appointed Chairman.

Judge GEORGE G. PARRY, Common Pleas No. 1, 1st District, brought up for consideration by the Conference the question: Should the law relating to non-suits be changed so as to give to a voluntary non-suit, suffered by a plaintiff after his case in chief has closed, and not taken off on motion, the effect of res judicata? Without discussing the question at length, it was referred to a Committee for study and report at the next Conference.

The Conference next took up for reconsideration an act previously recommended to the Legislature by the Second Conference, 297 Pa. xxix, giving courts the right to name and call experts in matters involving expert testimony in criminal cases. The Act was referred to a committee for study and report at the next conference.

Judge JAMES GAY GORDON, JR., Common Pleas No. 2, 1st District, expressed his belief that the operation of the Act would tend to place the court in an invidious and embarrassing position, as it would appear to be taking a part analagous to that of a party litigant on a disputed issue; that, in selecting experts, a judge's opinion of the ability and professional skill of an expert cannot be said to be inherently any wiser or more reliable than that of any other man, yet the jurors would almost inevitably give credence to the experts accredited by the Court to the exclusion of those chosen by the prosecution or the defense.

Judge PAUL N. SCHAEFFER, Common Pleas, 23rd District, outlined the Briggs Law of Massachusetts, which was the first act of this nature and stated that its operation had been very successful.

Judge WILLIAM M. PARKER, Superior Court, called attention to the unavoidable bias of experts called by opposing parties. He also stated that his personal contact

with the medical profession had revealed the distaste of that group for the contradictory positions they were required to assume, and that this change in their status, which their selection by the court would work, would receive their whole-hearted approval and co-operation.

Judge RAY P. SHERWOOD, Common Pleas, 19th District, opposed the Act because he believed that the tendency of three distinct opinions would be to confuse the minds of the jurors, but favored a method like that embodied in the Briggs Law, whereby expert testimony would be given only by experts selected by the Court.

At the conclusion of the debate the whole subject was referred to a Committee to be appointed by the Chairman, for further study and report at the next Conference.

The Conference then reconsidered and again recommended to the Legislature an Act authorizing and regulating special findings in civil cases. This Act was introduced at the Third Judicial Conference by Mr. Justice SCHAFFER: 300 Pa. xl, and reads as follows:

AN ACT

Regulating trial by jury in civil cases.

Section 1. Whenever a jury shall render a general verdict in any civil action it shall also find specially, if so requested, any relevant fact or facts by answering such reasonable number of simple interrogatories as may be propounded by the trial judge of his own accord, or on motion of counsel approved by the trial judge. Such interrogatories with the answers of the jury shall be termed special findings and shall be received, filed and become part of the record of the cause. If the special findings are inconsistent with the general verdict, they shall control, and if they are sufficiently comprehensive to include all governing issues, the court may give judgment accordingly. The Supreme Court shall make and promulgate appropriate rules to be effective in the courts of the Commonwealth for carrying out this statute.

A recess for luncheon was then had until 2:15 P. M.

Following the recess Judge LEOPOLD C. GLASS, Municipal Court, 1st District, presented the report of the committee on the handling of small claims. The Committee recommended the establishment of a division of the Municipal Court or County Court, where such Courts exist, and of the Common Pleas Court in other counties, to be known as the Small Claims, Conciliation, and Arbitration Division.

The members of the Committee were not fully in agreement as to the tentative Act which Judge GLASS had prepared, and, upon motion, consideration of the subject was held in abeyance until the second day of the Conference, in order to permit the Committee to revise the draft over night.

A committee consisting of Judge HARRY S. MCDEVITT, Common Pleas No. 1, 1st District, Chairman; Judge CALVIN S. BOYER, Common Pleas, 7th District, and Judge RAY P. SHERWOOD, Common Pleas, 19th District, reported against recommending legislation authorizing separate verdicts as to guilt and penalty in first degree murder cases. When consideration of this report began, the Chairman pointed out the importance of such legislation because of its bearing on the controversial question of the admissibility of character evidence which, while relevant only on the question of penalty, is admissible during the trial of the issue of guilt. He stated that such evidence almost inevitably tends to inflame the minds of the jurors and, in particular cases, might prejudice them in evaluating the evidence touching upon the guilt of the accused.

Judge HARRY S. MCDEVITT, Common Pleas No. 1, 1st District, stated that the criminal record of the accused was rarely admitted in Philadelphia, and that, in his opinion, to open the door, in the way suggested, would place an additional burden on the defendant.

Judge RAY P. SHERWOOD, Common Pleas, 19th District, related a practice which he had adopted at one

time of carefully separating the two groups of evidence.

Judge JAMES GAY GORDON, JR., Common Pleas No. 2, 1st District, commented on the prejudice against the accused necessarily caused by the admission of such evidence, and cited Professor Wigmore as favoring the double verdict. He stated that he was strongly in favor of recommending such a change in the law to the Legislature.

Mr. Justice HORACE STERN, Supreme Court, pointed out the anomaly in excluding such evidence in the trial of minor crimes and yet admitting it in homicide cases. He expressed himself in favor of the double verdict because he believed it would clarify rather than confuse the trial of criminal cases.

Judge THOMAS LINUS HOBAN, Common Pleas, 45th District, observed that the proposed procedure was an untried measure, and, therefore, the wisdom of recommending it doubtful; to which Judge GEORGE G. PARRY, Common Pleas No. 1, 1st District, replied that it was not a question of using an untried method but of trying anything rather than permitting an impossible or undesirable situation to remain.

After some further general debate upon the subject, the Conference declined to adopt the report of the Committee, and on motion referred the whole subject to a new Committee, to be appointed by the Chairman, the members of the original committee having asked to be excused from further responsibility because of their unalterable opposition to such an Act.

A motion by Judge WILLIAM M. HARGEST, Common Pleas, 12th District, was duly seconded and passed that the Executive Committee be empowered to determine what Acts should be presented to the Legislature.

The Conference reconsidered and disapproved the following Acts recommended by the Fourth Conference: (1) An Act requiring three judges to hear pleas of "guilty" in murder cases, and (2) An Act authorizing

judges to conduct the examination of jurors on their *voir dire.*

An Act providing that separate trials of jointly indicted defendants in homicide cases should rest in the sound discretion of the trial court, passage of which Act had been recommended by the First and Fourth Conferences, was again approved by the Conference.

The Conference thereupon adjourned to meet at the same place on the following morning at ten o'clock.

---

The Conference resumed its work at the same place, May 16, at ten o'clock A. M.

The Committee on small claims presented its amended report, and submitted a tentative draft of an Act establishing a small claims division in the courts having jurisdiction of such matters, and, upon motion, the Conference referred the proposal to the Executive Committee for redrafting, and submission to the Legislature at an appropriate time.

A Committee consisting of Judge JAMES GAY GORDON, JR., Common Pleas No. 2, 1st District, Chairman; Judge FRED S. REESE, Common Pleas, 9th District; Judge FRANK P. PATTERSON, Common Pleas, 5th District, submitted a report on the Sci. Fa. Act of 1929 amended by Act of June 22, 1931, P. L. 663, sec. 2; and Act of May 18, 1933, P. L. 807, No. 125, section 1. The Report recommended further amendment of the Act in two particulars: (1) to confer power upon the courts to direct, in proper cases, separate trials of the issues between the different defendants, to accomplish which the following form of amendment was submitted:

"The court shall have power upon its own motion or upon cause shown to direct separate trials of issues between such defendants and added defendants as to which or whom the plaintiff would not be entitled to recover a verdict directly if in the judgment of the court a single trial of the issues between all parties would tend to con-

fusion and to prevent an exact and satisfactory determination thereof."

and (2) for the purposes of execution to subrogate the plaintiff to the rights of the original defendants against added defendants.

To this end the following form of amendment was submitted:

"Upon the entry of judgment in favor of the plaintiff against any defendant or added defendant, the plaintiff shall, to the extent necessary to secure satisfaction of his judgment, be subrogated to the rights of such defendant or added defendant in any judgment that may be recovered by him or them against any other added defendant, and may have execution thereon in his own name, notwithstanding no judgment may have been recovered or recoverable by the plaintiff against such added defendant."

The Chairman suggested the desirability of a further amendment with respect to the section of the Act covering service of process upon added defendants resident in counties other than that in which the litigation is pending. He pointed out that the broad language of the present Act would permit vexatious and often oppressive process against citizens of distant localities, by bringing them in as additional defendants, through service upon them by deputization of the sheriffs of the counties in which they reside. The recommended amendments and the suggestion of the Chairman were referred to the Executive Committee, with directions to study the whole subject, and to send their conclusions to the Members of the Conference for consideration. If the responses of the Judges to the Executive Committee's recommendations be favorable, the Committee was authorized to draft appropriate legislation for submission to the Legislature.

The Conference then turned its attention to an Act relating to the selection and drawing of jurors in the City of Philadelphia, which was recommended to the Legis-

lature by the Third Judicial Conference, but which was not passed. That Act was again recommended and referred to the Executive Committee to be resubmitted at an appropriate time to the Legislature. The text of the proposed Act is contained in the report of the Third Conference, in 300 Pa. xxvi.

Judge FRANK B. WICKERSHAM, Common Pleas, 12th District, reported for the Committee on Juvenile Courts, in regard to the suggestion that juvenile and domestic relations business be transferred to the Orphans' Court. The recommendation of the Committee was that the suggestion be not approved and, upon motion, this recommendation was adopted.

The recommendation of the Fourth Conference that the penalty for second degree murder be increased to forty years, which had been submitted to, but not passed by, the Legislature, was reconsidered by the Conference, which voted not to recommend it again to the Legislature.

The action of the Second Conference in recommending to the Legislature a constitutional amendment and an Act pursuant thereto, providing for separate trial of insanity pleas in criminal cases, 297 Pa. xxxvi et seq., was reaffirmed, and was referred to the Executive Committee with power to resubmit the same at an appropriate time.

The Conference reconsidered and again disapproved a proposal, which had been disapproved by the Third Conference, that all criminal appeals, except in murder cases, be permitted only after allowance by a judge of the appellate court to which the appeal lies: 300 Pa. xxxiii.

A resolution limiting the time for taking appeals in criminal cases to three weeks was adopted by the Third Conference (300 Pa. xxxiii), but no action was taken to submit an Act in accordance therewith to the Legislature. At this time the resolution was again approved and the matter referred to the Executive Committee with

directions to formulate such an Act and submit it to the Legislature at an appropriate time.

A resolution that the law forbidding adverse comments by court or counsel on the failure of a defendant on trial to offer himself as a witness should be repealed, to the end that all legitimate arguments and comment thereon should be allowed, action on which was deferred by the Third Conference (300 Pa. xxxiii), was approved by the Conference.

A resolution recommending the admission, in the discretion of the court, of police records of defendants on trial, action on which was deferred by the Third Conference (300 Pa. xxxii), was disapproved.

The Conference then referred the following Act to the Standing Committee on Civil Practice:

"AN ACT

"Concerning practice and procedure authorizing the Supreme Court to promulgate rules regulating such matters, subject to approval by a majority of the judges of the court or courts to be affected.

"Section 1. Be it enacted, etc., That the power and authority now vested in the Supreme Court of Pennsylvania to make rules of practice in equity proceedings is hereby extended to all actions, suits and proceedings at law, so that hereafter the Supreme Court may promulgate and enforce rules of practice and procedure to govern actions at law, either on the criminal or the civil side of the law, throughout the Commonwealth. Provided that the rules so adopted shall not be inconsistent with the statutory law, and provided further that before any rule is finally adopted and promulgated by virtue of the authority granted by this act, it shall first be submitted to the judges of the court or courts which will be affected by the proposed rule, and the rule shall not be adopted unless a majority of the judges of the court or courts to be affected shall favor it. The method of submission may either be by a vote at a conference of the judges duly

called or by a vote taken by correspondence through the mail. The Supreme Court shall make such rules as may be necessary to govern the taking of such a vote. When a rule is adopted and promulgated it shall be binding upon all subordinate tribunals administering the law, to which the rule may be applicable. Local courts may pass rules that are not inconsistent with those adopted by the Supreme Court. The promulgation of such rules by the Chief Justice of the Supreme Court shall be conclusive as to their formal adoption in accordance with the requirements of this act, and any rule so promulgated shall be binding upon the courts of the Commonwealth."

The Chairman stated that a similar act had been adopted in connection with the Federal courts, and that a more effective administration of these courts had resulted from the adoption of rules of practice thus formulated. He further called attention to the need for such rule-making power to meet and avert public criticism of the courts for delay in the determination of causes. He suggested that the work of recommending rules be handled by the Committee on Civil Practice, in collaboration with a committee from the State Bar Association.

Mr. Justice HORACE STERN, Supreme Court, concurred in this thought, and suggested that scientific study by eminent practitioners, judges and law teachers, might also be made available.

The Conference then discussed briefly the question of raising the jurisdictional age limit of the Juvenile Court from sixteen to eighteen years. The consensus of opinion among the members of the Conference seemed to be that the problems created by delinquents within these ages were properly sociological and not judicial, and hence no action should be taken by the Conference.

The Chairman then closed the Conference with the following address:

"Gentlemen of the Conference, speaking for myself and the rest of the Court, which, as I have said, spon-

sors all these meetings, it is very moving to see so many judges present.

"We are sorry that we have been unable to present to you a program as complete as it might have been if we had more time to work upon it. We were necessarily at a disadvantage because of uncertainty as to the standing of various members and just what would be done after the first of the year. If there are no changes, I think that Judge GORDON and the rest of the Committees will endeavor at the next Conference to present matters of even greater moment than we have before us on this occasion; and, may I add, in between times, it is our purpose to keep the judiciary informed as best we can of matters which may come up and in which you may be interested.

"I think that is part of the work of a good conference and its officers, particularly in regard to some of the matters which we discussed here in relation to the committee which is to take into consideration the rule-making power. It is a matter of great importance to all of you.

"It is a very fine thing for the judges to get together and meet each other. I think it will develop a better spirit and a better organization for the effective carrying out of the laws of the Commonwealth. We meet and interchange views, and it is very helpful. As I said at the opening, I was very much pleased to have so many members here. There were over a hundred judges in attendance. We hope that our next meeting will be even more successful than the present."

The Chairman later appointed the following Committees authorized by the Conference:

1. Committee on procedure for admission of patients to State institutions.

Judge W. C. SHEELY, Common Pleas, 51st District, Chairman;

Judge FRANK SMITH, Common Pleas No. 5, 1st District;

Judge FRANK PATTERSON, Common Pleas, 5th District.

2. Committee on the law relating to voluntary nonsuits.

Judge GEORGE G. PARRY, Common Pleas No. 1, 1st District, Chairman;

Judge ELDER W. MARSHALL, Common Pleas, 5th District;

Judge WILLIAM W. UTTLEY, Common Pleas, 58th District.

3. Committee on suggested legislation giving courts the right to name and call experts in matters involving such testimony in criminal cases.

Judge WILLIAM H. KELLER, Superior Court, Chairman;

Judge WILLIAM M. HARGEST, Common Pleas, 12th District;

Judge HARRY E. KALODNER, Common Pleas No. 2, 1st District.

4. Committee on suggested legislation authorizing separate verdicts as to guilt and penalty in first degree murder cases.

Justice HORACE STERN, Supreme Court, Chairman;

Judge CHESTER H. RHODES, Superior Court;

Judge WILLIAM E. HIRT, Common Pleas, 6th District.

[Signed] JOHN W. KEPHART,
*Chairman.*

[Attested]:

JAMES GAY GORDON, JR.,
*Secretary.*