MINUTES OF THE FOURTH JUDICIAL CONFERENCE OF PENNSYLVANIA

HELD AT PHILADELPHIA, PENNA., APRIL 8 AND 9, 1932

The Fourth Judicial Conference of Pennsylvania convened in the Supreme Court Room at Philadelphia on Friday, April 8, 1932, at eleven o'clock A. M.

The Conference was called to order by its Chairman, Mr. Chief Justice ROBERT FRAZER, who requested Mr. Justice WILLIAM I. SCHAFFER, Supreme Court, to review briefly the history of the Conference. Mr. Justice SCHAFFER then addressed the Conference as follows:

"Mr. Chief Justice, and gentlemen of the Conference, I do not know whether all of you have looked over the reports of the Judicial Conference meetings which have been held, and which appear in the various volumes. In talking the matter over with the Chief Justice preliminary to this meeting, he made the suggestion which you have heard him announce.

"The First Judicial Conference was not called into being by the Judges themselves; the First Judicial Conference was called by Chief Justice MOSCHZISKER at the request of Attorney General BALDRIGE and CHARLES E. FOX, ESQ., Chairman of the Commission on Penal Law. It was called for the purpose of considering matters within the domain of the criminal law solely. You will recall that we met in connection with the district attorneys of the state. They were in session at the same time we were, and there was an endeavor made to blend the work which they were endeavoring to accomplish with the work which we, as judges, were interested in. At this first meeting the entire agenda was confined to the consideration of matters pertaining to the trial and conviction of persons accused and convicted of crime. The matters that were considered at the First Conference were:

"1. The law forbidding adverse comment by court or counsel on the failure of the defendant to offer himself as a witness.

"2. Whether the Commonwealth should be permitted to present the fact in evidence that police or court records indicate that a defendant is a professional criminal.

"3. Whether the right to separate trials of defendants jointly indicted for capital offenses should rest in the sound discretion of the trial court.

"4. Whether the law should require the examination of prospective jurors on their voir dire to be conducted exclusively by the trial judge.

"5. Whether appeals should be taken in criminal cases only after allowance thereof by a judge of the appellate court to which the appeal lies and the time for taking of appeals should be limited to three weeks.

"6. Whether in criminal prosecutions all motions preliminary to trial, such as demurrers, motions to quash, and bills for particulars, should be deemed to have been decided against the party advancing them, unless, within four days after hearing, the trial court shall decide them otherwise.

"6a. Whether the Legislature should be requested to pass a general act authorizing the appellate courts, with the approval of a majority of the judges of the quarter sessions, to adopt rules to expedite and standardize the trial and punishment of those charged with criminal offenses.

"6b. Whether legislation should be enacted establishing a uniform rule of four days for motions for new trials and in arrest of judgment.

"6c. Whether in granting a new trial the court hearing the motion should file of record a statement of its reasons.

"7. The trial of criminal cases by a judge without a jury.

"8. Graduated penalties depending upon the number of former convictions.

"9. Repeal of the Ludlow Act.

"10. Expert witnesses in criminal cases.

"11. The method of furnishing trial courts with information as to the mental condition of persons indicted or convicted of crime.

"12. Selection of jurors.

"No judges were invited to that Conference except those members of the judiciary who dealt with the criminal aspects of the law.

"At the Second Judicial Conference, which also devoted itself exclusively to criminal matters, the scope of the Judicial Conference was enlarged on motion of Judge Fox, of Dauphin County, who introduced a resolution to the effect that the Conference should not confine itself to the consideration of criminal matters alone, but should also consider other matters which seemed to be desirable.

"The Third Judicial Conference, in April, 1930, proceeded to consider matters relating to civil as well as criminal law, and this Conference will follow that program.

"It seems to me, and has always seemed to me, in view of the modern conditions and trend of things throughout the country, that if we judges do not have such an organization as this to handle matters about which we may be considered experts, then the other alternative is that a judicial council will be created, such as has been created, as you know, in many of the states. In some of the states I understand it has functioned satisfactorily, and in other states there has been a conflict with the judges as to the method by which courts should be regulated, and the practice of the law carried on.

"You will recall that a bill was introduced for the creation of a judicial council in Pennsylvania, and it was vetoed by Governor Fisher for the reason that this Judicial Conference was in existence, and he thought it was the better method for handling questions which re-

lated to trials and the conduct of the courts, rather than a judicial council outside of this body.

"At the last Judicial Conference it was the sense of the Conference as the result of a vote that was taken that the Conference should confine its recommendation, and its consideration of matters that were brought to its attention, to those that related to practice and procedure, and not to matters of substantive law. That came about, as you may recall, as the result of the introduction of a resolution that the law of comparative negligence should be embodied in the statutory laws of the state, and it was decided that it was unwise for this Conference to deal with matters of that kind.

"In a very sketchy way, I have endeavored to outline to you, without going into detail, what the situation is today.

"There is a matter which will come up, on which I may have something to say, but I will not anticipate. I know it is very gratifying to the Chief Justice that there are so many of you here in attendance today, and I am sure that in speaking for myself, I am also speaking for the Chief Justice, when I say that those of us who have to sit on Courts of Appeal feel that it is a real pleasure to know, in a way that this Conference enables us to know, the men whose work we are reviewing, and which we are always glad to confirm, if we can, and reverse always with extreme reluctance."

At the conclusion of Mr. Justice SCHAFFER'S address the Conference proceeded to the business before it, the first matter being the report of the Committee appointed to consider the question of the selection of jurors in Allegheny County. The report of that committee was as follows:

"In the matter of the proposed legislation relating to the selection of jurors in Allegheny County, nothing has been done by reason of the fact that the members of the Bench and Bar of Allegheny County were content with the present system of the selection of jurors until the ex-

periment has been given further trial. The objection to the existing Act was the random selection, which apparently resulted in an unsatisfactory class of jurors appearing for service. As the investigation of prospective jurors has become more thoroughly systematized, the class seems to be improving and at the present time no immediate action looking towards a change is contemplated. Before the next session of the Legislature, the matter will be further taken up with the Allegheny County Bar Association and if a change is desired by the trial lawyers of this jurisdiction, it will be asked to formulate an amendment to the Act of 1925."

Judge SAMUEL H. GARDNER, Common Pleas, 5th District, outlined the method of selection, which had been introduced in the 5th District, and expressed his opinion that, in view of the discretionary power of the jury commission as to drawing out certain names, the difficulty was being resolved satisfactorily.

A committee appointed to consider the questions of the right of jointly indicted defendants to separate trials, and the method of selecting jurors on their voir dire, reported that, after renewed consideration of the Resolutions adopted by the Second Conference in this regard, no reason in its opinion existed for their alteration. The Resolutions previously adopted read as follows:

"RESOLVED, That the right to separate trials of defendants jointly indicted for capital offenses should rest in the sound discretion of the trial court as in other cases."

"RESOLVED, That the law should require the examination of prospective jurors on their voir dire to be conducted exclusively by the trial judge, subject to the right of counsel, after such examination, to suggest additional questions to be put to the prospective juror by the trial judge, in his discretion."

Upon motion, the bills which had heretofore been drafted to bring about these reforms were referred to a

Committee appointed for the purpose to be re-introduced at the next session of the Legislature.

A Committee appointed to consider the subject of Juvenile Courts and the procedure therein and to submit a revised Juvenile Court Act presented a lengthy report including a draft of the proposed Act. The Act is too long to be printed here and is contained in full at pages 13 to 30 of the Program of the Fourth Conference.

The Chairman called upon Judge CHARLES C. GREER, Common Pleas, 47th District, to comment upon his suggestion that the juvenile and domestic relations matters be transferred to the Orphans' Court. Judge GREER stated that his suggestion was based upon the thought that delinquent minors should not be treated as criminals in the usual acceptation of that term, but be subjected to correction rather than punitive measures. He read to the Conference a letter from the National Probation Association giving information as to the systems in force in New York, Massachusetts, and Ohio, which stated that "In general the movement has been to create a separate division of the higher criminal court for juvenile court purposes."

Judge CHARLES L. BROWN, Municipal Court, 1st District, proposed a change in regard to punishment of those who contribute to the delinquency of minors. His suggestion was that the judge, under section 20 of the Act, be given summary jurisdiction of the adult concerned, at least as to the less serious crimes, for example, in cases where junk dealers purchase stolen property from minors. He related that his practice, to avoid calling the minors to testify in a criminal prosecution against the adults, was to impose a fine upon the junk dealer, which would aggregate the amount of damage that was sustained in the pilfering on the part of the minor, and give the alternatives of paying that or being held in bail for appearance before the Grand Jury.

Judge PAUL N. SCHAEFFER, Common Pleas, 23rd District, suggested that the age limit fixed by the proposed

act at sixteen years be raised to eighteen years. Judge FRANK B. WICKERSHAM, Common Pleas, 12th District, said that the original draft of the Act submitted fixed the age at eighteen, but that the objection thereto of Judge CHARLES L. BROWN, Municipal Court, 1st District, had led to adopting the lower age. Judge BROWN then stated that his objection to the higher age was based upon his experience in the Juvenile Court in Philadelphia, which had led him to believe that boys between the ages of sixteen and eighteen had reached the "age of banditry" and should be held accountable for their crimes in the regular criminal courts. He expressed his opinion, however, that, at least in respect to girls over sixteen who were incorrigible, there should be a statute placing them within the control of the Juvenile Court. Judge HENRY HOUCK, Common Pleas, 21st District, said that while Judge BROWN'S remarks applied to Philadelphia, he did not feel that the same were true in other jurisdictions in the Commonwealth; that his experience had shown a serious gap between the ages of sixteen and twenty-one; and that, at least as to girls, raising the age limit to eighteen would be a good thing.

Judge RAYMOND MACNEILLE, Common Pleas, No. 3, 1st District, stated that at sixteen a considerable change takes place in both boys and girls, and that it would not, therefore, be very wise to change that age in the Act. He also pointed out the practical difficulty that many correctional institutions will not take minors over the age of sixteen. He suggested that the solution might lie in segregation in the penal institutions.

Judge PAUL N. SCHAEFFER, Common Pleas, 23rd District, agreed with Judge MACNEILLE as to the problem of placing children over sixteen in institutions, but said that the other objection—i. e. the association of boys of seventeen and eighteen with truly innocent children—was met by the provision in the Act that the judge may certify such cases over to the Quarter Sessions, and that

he favored placing this power also in the District Attorney.

Upon motion, Section 1, paragraph 2, of the proposed Act was amended to read as follows:

"The word 'child' as used in this Act, means a male minor under the age of sixteen years, and a female minor under the age of eighteen years."

Judge WILLIAM M. HARGEST, Common Pleas, 12th District, suggested the following amendments which were adopted without objection:

Section 2, paragraph 2, to read:

"The powers of the court for the purpose of this Act may be exercised by any one or more of the judges of such court who may be assigned for the purpose; such court, when exercising the jurisdiction conferred by this Act, shall be known as the Juvenile Court."

Section 15, by striking out the words:

"At the cost of the party requesting such review and rehearing."

Section 17 to read:

"Said compensation and expenses shall be paid monthly, or semi-monthly, as in the case of other county employees, by the county treasurer, upon an order of the county commissioners, approved by a judge of said court."

Judge WILLIAM NEVIN APPEL, Orphans' Court, 2nd District, suggested the following amendment, which was adopted without objection:

Section 13, by striking out the words:

"Consent to Adoption."

Judge JOHN M. GRAFF, Common Pleas, 2nd District, suggested the following amendment of the report, which was adopted without objection:

Section 17, by striking out the words:

"and the county commissioners."

Upon motion the suggestion of Judge CHARLES C. GREER, Common Pleas, 47th District, in regard to assignment of juvenile and domestic relations matters to

ceive no more consideration from the Legislature than would one to repeal the Ludlow Act. The majority report of the Committee was adopted by the Conference.

Judge J. E. B. CUNNINGHAM, Superior Court, read the report of the Committee appointed to consider and report upon the code of criminal procedure drafted by the American Law Institute. The conclusion of the Committee was that the adoption of the code as a whole would not be considered by the legal profession at the present time.

In regard to fixing the place of trial for offenses committed during the course of a journey by aircraft over the Commonwealth, Section 49 of the Criminal Procedure Act of 1860, P. L. 427, fixing the venue, in its present form, was not, in the opinion of the Committee, sufficiently specific to include a journey by aircraft. The Committee, therefore, recommended the adoption of the following resolution:

"RESOLVED, That Section 49 of 'An Act to Consolidate, Revise, and Amend the Laws of this Commonwealth, Relating to Penal Proceedings and Pleading' should be amended by adding aircraft, as defined in section 2, of Article I, of the Aeronautics Act of April 25, 1929, P. L. 724, to the list of vehicles therein enumerated." This resolution was, after consideration, adopted by the Conference.

Judge HORACE STERN, Common Pleas No. 2, 1st District, Chairman of the Committee to draft an Act regulating the hearing and determination of pleas of "guilty" in murder cases, reported that the Committee favored adoption of the following Act, prescribing that, in pleas of "guilty" in murder cases, the Court should be composed of three judges:

"AN ACT

"To amend section seventy-five of the act approved the thirty-first day of March one thousand eight hundred and sixty (Pamphlet Laws three hundred eighty-two) entitled 'An act to consolidate, revise and amend the

penal laws of this Commonwealth' as amended by providing how the court shall be constituted in cases of pleas of guilty of murder in determining the degree of murder and the penalty therefor.

"Section 1. Be it enacted, etc.

"Section 75. That every person convicted of the crime of murder of the first degree shall be sentenced to suffer death in the manner provided by law or to undergo imprisonment for life at the discretion of the jury trying the case which shall fix the penalty in its verdict. The Court shall impose the sentence so fixed as in other cases. In cases of pleas of guilty the court where it determines the crime to be murder of the first degree shall at its discretion impose sentence of death or imprisonment for life. In hearing cases of pleas of guilty the court shall be constituted of three judges of the judicial district learned in the law. Where there are not three such judges available in the judicial district involved judges of other judicial districts shall be called upon to serve in accordance with the provisions of existing law. It shall be the duty of the clerk of the court wherein such conviction takes place and he is hereby required within ten days after such sentence of death to transmit a full and complete record of the trial and conviction to the Governor of this Commonwealth.

"Section 2. All acts or parts of acts inconsistent herewith are hereby repealed."

Judge STERN reported that the bill as drafted had been introduced in the last Legislature and referred to the Committee on Judiciary General, but never came out of committee. He advised the Conference that a hearing was held on the bill and that, although no arguments were presented against it, the committee, which was composed principally of lawyers who practiced in the criminal courts, seemed to feel that trial before one judge enabled a case to be disposed of less formally than before a bench of three judges; the lawyers on the Committee also seemed to think that they would not have as

close an approach to such a tribunal, by way of suggestion as to findings or penalties, as they would have if the Court was composed of only one judge. Judge STERN believed that it was these apparently indefinite feelings on the part of members of the Committee, rather than because of any logical argument against the bill, that it was not reported out of Committee.

Judge WILLIAM M. HARGEST, Common Pleas, 12th District, objected to the proposed act because he believed there would be great difficulty in obtaining three judges to sit, at least in the country districts. Judge STERN answered that he was not aware of any other instance, even in courts martial in time of war, where one man was compelled to accept the responsibility of determining the question of life or death, and that, since three judges, or at least a court en banc, sit on motions for new trials and for judgments n. o. v. in civil cases, the Supreme Court having said that one judge alone cannot perform that function, he felt that, in a case involving human life, being at least as important as one involving property rights, a similar court, even at the cost of some inconvenience, should be required to determine the issue involved.

Judge THOMAS D. FINLETTER, Common Pleas No. 4, 1st District, observed that the inconvenience to the defendant of sitting in the electric chair was probably quite as great as that imposed upon a judge in summoning judges from other districts.

Former Chief Justice ROBERT VON MOSCHZISKER suggested an amendment permitting the judge to use a jury to advise him in hearing cases on pleas of guilty, but the proposal was not adopted. After further discussion the report of the Committee recommending the act to the Legislature was approved by the Conference.

Judge JAMES GAY GORDON, JR., Common Pleas No. 2, 1st District, read the report of the Committee on Public Defenders, which recommended adoption of the following resolutions:

"RESOLVED, That the employment of public defenders to represent persons accused of crime, who are unable to procure private attorneys, is approved by the Conference, and the establishment of such a system is earnestly recommended to the Governor and General Assembly of the Commonwealth."

"RESOLVED, That, in the absence of a public defender, the judges of the several criminal courts of this Commonwealth, avail themselves of the services of voluntary defenders provided by a trustworthy body of citizens lawfully organized for this purpose and having the confidence of the court."

At the conclusion of debate, the Conference voted to reject the resolutions.

Judge M. A. MUSMANNO, County Court, 5th District, introduced the subject of procedure for the collection of wages and other small claims, and spoke briefly upon the unfortunate position in which a person with a claim of this nature—usually for less than fifty dollars—finds himself. The usual practice, he stated, was that the defendant took an appeal from the magistrate to a court of record, thus placing upon the plaintiff the burden of expending in lawyers' fees, etc., almost double the amount of his claim. He called attention to the appeals from justices of the peace in Allegheny County, during the year 1929, of which there were 789, involving claims of less than fifty dollars. Of these, 588, or 74%, he said, were never brought to trial, presumably because of the cost involved. After an extended discussion of this question, the whole matter was referred to a committee to report at the next Conference.

The Conference was called to order at 10:20 A. M., Saturday, April 9, 1932.

Judge JAMES I. BROWNSON, C. P., 27th District, proposed and the Conference approve the amendment of the second and third sentences of section 25 of the Juvenile Court Act to read as follows:

"Any cases in the juvenile courts, begun previous to and remaining unadjudicated at the date on which this act takes effect, shall not be affected thereby as to their hearing and disposition, but shall be proceeded with and disposed of in accordance with the laws in force immediately prior to said date: Provided, however, that any supplementary proceedings in or in connection with or respecting any such case or cases taken subsequent to the original disposition thereof as aforesaid, and also any supplementary proceeding in or in connection with or respecting any case adjudicated and disposed of previous to the time when this act goes into effect, that may be had after said time, shall be governed by the provisions hereof both as to procedure and as to the powers of the court."

Judge HORACE STERN, Common Pleas No. 2, 1st District, suggested the appointment of a standing committee of the conference on the subject of civil pleadings, procedure, and practice. The function of such a Committee would be twofold: First, to invite suggestions from the bench and bar respecting defects in the procedural law that may come to their attention, to consider such suggestions, and report on them to the Conference; and, second, to study procedural law generally, and itself to initiate suggestions for procedural reform. Judge STERN pointed out that in Pennsylvania there is no permanent and recognized body devoting itself to a continuous study of the procedural law, and that, in his opinion, if such a committee were to act in liaison with the academic element of the profession, a real and permanent improvement and development of legal procedure might result. This suggestion was unanimously adopted by the Conference.

Judge JAMES GAY GORDON, JR., Common Pleas No. 2, First District, suggested to the Conference the recommendation of an act to the Legislature requiring the jury in murder cases to render successive verdicts, the first as to guilt, and the second as to penalty. He

pointed out the inflammatory tendency of much evidence that is admissible only for the purpose of aiding the jury to determine the penalty, and its probable harmful effect upon the deliberations of the jury when considering questions of guilt. He referred to a recent decision of the Supreme Court that a jury could not render more than one verdict in a case, and hence that all the evidence had to be admitted before the jury retired; and to an article by Professor Wigmore advocating successive verdicts in cases where the jury fixes the penalty as well as determines guilt. Judge GORDON then moved the appointment of a special committee, with power to prepare an Act authorizing successive verdicts in murder cases, and to submit the same to the Legislature without further action by the Conference. This motion being put to a vote, was passed by the Conference.

The next matter presented to the Conference was a suggestion for amending the Sci. Fa. Act of 1929, P. L. 479, as amended by Act of 1931, P. L. 63, so as to prevent the bringing in by scire facias of persons alleged to be solely liable to the plaintiff, and also to permit the trial court, in proper cases, to direct separate trials of the issues raised between different parties to such litigation.

Judge JAMES GAY GORDON, JR., Common Pleas No. 2, 1st District, expressed his feeling that the Act was a good idea, but that it was being subjected to abuse. He called attention to certain practical injustices resulting from a single joint trial of all the issues in the case, and said that, owing to the facts that no appellate court decision had settled the powers of the court to direct separate trials of issues between different defendants, and that the judges of the trial courts appeared to be in hopeless disagreement as to their power in this respect, a direct legislative grant of such power was desirable. He, therefore, suggested that the matter be referred to a committee to study the subject and recommend a suitable amendment or amendments.

Mr. Justice ALEX SIMPSON, JR., Supreme Court, stated his approval of this suggestion, and moved the appointment of a committee to act in conjunction with a Committee of the Pennsylvania Bar Association and other bodies dealing with the subject, in preparing a bill for submission at the next Conference. The Conference authorized the appointment of such a Committee.

The Chairman called for remarks upon the status and disposition of previous recommendations of the Conference, which had not been adopted by the Legislature. The Conference approved the suggestion of former Chief Justice ROBERT VON MOSCHZISKER that the executive committee should be authorized to decide which of the bills already recommended should be pressed before the Legislature.

The question of the method of pressing the various recommendations of the Conference to passage by the Legislature was next discussed. Mr. Justice ALEX SIMPSON, JR., Supreme Court, with whom Judge FRANK B. WICKERSHAM, Common Pleas, 12th District, agreed, said that, without something more than a mere passive expression of its opinion to the Legislature, the Conference could not hope to effect passage of its recommendations, and, therefore, suggested that the Executive Committee be empowered to appoint representatives to advocate the particular bills before the legislative committees.

Judge JAMES GAY GORDON, JR., Common Pleas No. 2, 1st District, objected that such a practice might expose the Conference to the accusation of "lobbying," and suggested that a fixed formal method of communication with the Governor and the Legislature be adopted.

Judge JAMES A. CHAMBERS, Common Pleas, 53rd District, proposed that the difficulty might be removed by sending a committee of members of the Conference who had retired from the Bench, and who would, therefore, be perfectly free from any suggestions of partisanship.

The Conference then voted to authorize the Executive Committee to select some persons to appear in the interests of the recommendations of the Conference.

Judge RAYMOND MACNEILLE, Common Pleas No. 3, 1st District, moved the appointment of a standing committee to study criminal practice and procedure, with powers and functions similar to those of the standing committee on civil practice and procedure, which the Conference had just created. This motion, being seconded and put to the Conference, was carried.

The Conference was then adjourned to meet again at the call of the Chief Justice.

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

1. Committee to consider and recommend an act authorizing separate verdicts as to guilt and penalty in first degree murder cases:

Judge HARRY S. MCDEVITT, Common Pleas No. 1, 1st District, Chairman;

Judge CALVIN S. BOYER, Common Pleas, 7th District;

Judge RAY P. SHERWOOD, Common Pleas, 19th District.

2. Committee on handling of small claims:

Judge M. A. MUSMANNO, County Court, 5th District, Chairman;

Judge LEOPOLD C. GLASS, Municipal Court, 1st District;

Judge SAMUEL J. MCKIM, County Court, 5th District.

3. Standing Committee on practice in the criminal courts.

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

Judge JAMES M. BARNETT, Common Pleas, 41st District;

Judge W. WALTER BRAHAM, Common Pleas, 53rd District;

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

Judge HOWARD W. HUGHES, Common Pleas, 27th District;

Judge BENJAMIN R. JONES, Common Pleas, 11th District;

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

Judge RAYMOND MACNEILLE, Common Pleas No. 3, 1st District;

Judge MARION D. PATTERSON, Common Pleas, 5th District;

Judge PAUL N. SCHAEFFER, Common Pleas, 23rd District.

4. Committee to consider amendment or repeal of the Sci. Fa. Act.

Judge JAMES GAY GORDON, JR., Common Pleas No. 2, 1st District, Chairman;

Judge FRED S. REESE, Common Pleas, 9th District;

Judge W. A. VALENTINE, Common Pleas, 11th District;

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

Judge FRANK P. PATTERSON, Common Pleas, 5th District.

5. Standing committee on civil practice and procedure.

Judge HORACE STERN, Common Pleas No. 2, 1st District, Chairman;

[Signed] ROBERT S. FRAZER,
Chairman.

[Attested]:
JAMES GAY GORDON, JR.,
Secretary.