MINUTES OF THE SIXTH JUDICIAL CONFERENCE OF PENNSYLVANIA

HELD AT PHILADELPHIA, PENNSYLVANIA, MAY 14 AND 15, 1937

The Sixth Judicial Conference of Pennsylvania convened in the Supreme Court Room at Philadelphia on Friday, May 14, 1937, at 11 o'clock a. m.

The Conference was called to order by its Chairman, Mr. Chief Justice JOHN W. KEPHART, who addressed the Conference as follows:

"The Supreme Court is very anxious to have the meeting at this time because of the fact that there are so many things occurring which are of the greatest interest to the Judges throughout the State, and we thought that it might be a good thing for the Judges to get together and discuss them, with the possible outcome of submitting our views in some form to the present administration.

"There have been a number of proposed acts which no doubt have been before you and which call for immediate attention from the Judges. These are very important changes in the methods of procedure, changes in the criminal laws, and in the Criminal Code, and a number of other matters that no doubt you have had placed on your tables. We of the Supreme Court have had these matters before us, and we pick out these bills, not with the idea of circularizing the judiciary, but in the hope that the judiciary will, from the information that I am informed they do receive from Harrisburg, and which they are required to get, pick out the bills themselves."

The Chairman then called attention to the record of the Supreme and Superior Courts in their disposition of cases, and pointed out that both tribunals were "completely up-to-date" in their work for the past year. He said that the Supreme Court had heard 819 appeals and a number of miscellaneous matters and allocaturs, and

that everything had been finished for the previous year. Of 150 or 175 arguments heard since January 1, 1937, the Chairman said more than half had been decided. As to the work of the Superior Court, 798 appeals and 374 miscellaneous matters had been heard in the previous year, and every case had been finished. He pointed out that this great volume of work had been disposed of "under the most trying circumstances, because in the last year, at least in our Court, we have been met with the most serious problems, constitutional and otherwise."

The Chairman continued his remarks saying: "In calling this judicial conference, we have printed the reports of the two former conferences. They have been sent to every member. We hope that you have received them, and I want to say this: Whether or not this conference is going to accomplish as much is a matter which you know as much about, possibly, as I do, but every bill that was recommended at the last conference has been reported out, and I am informed by the Attorney General's office that they have been placed on the calendar for passage, and they expect them to become laws; so that our last judicial conference and the one before have really been productive of some good. I trust that something constructive will come from this conference, even if it comes merely in the shape of very sharp criticism and analysis of the Judicial Code, the Code of Criminal Laws, and the Code of Procedure.

"If any of you have taken the time to read either of them you were probably astonished. There are some changes in them that are incomprehensible. Some are serious matters and must be taken up, and straightened out. The Attorney General's office is anxious, and willing, and waiting, as I understand from Harrisburg, from the head of the department, to hear from the judges on what changes should be made in these acts. If none are suggested and they go through, and if we are made to bear the brunt after they come into the field of prac-

tice and before the judges for consideration, we have nobody but ourselves to blame."

At the conclusion of the opening address of the Chairman, the meeting proceeded to its regular order of business, and Judge W. C. SHEELY, 51st District, was called upon for the report of the Committee on procedure for the admission of patients to State institutions. Judge SHEELY said that the Committee had no report to make; that his conclusion after discussion with some of the other members of the committee was that there was not sufficient interest in the subject matter to justify a report; and offered a motion that the Committee be discharged. The motion being seconded was adopted by the Conference.

Judge GEORGE G. PARRY, Common Pleas No. 1, 1st District, then presented the report of the Committee on the Law Relating to Voluntary Nonsuits as follows:

"Your Committee is of the opinion and so reports that the plaintiff's right to suffer a voluntary nonsuit during the progress of a trial should be further limited. At common law he might suffer a voluntary nonsuit at any time before the verdict was actually recorded, but in 1814 a statute was passed providing that he should not be permitted to take a nonsuit after the jury were ready to give in their verdict, and later, in 1903, the principle of limitation was slightly extended to prohibit a voluntary nonsuit, except by special allowance, after a jury had sealed a verdict and separated.

"The statutory provisions are not at all effective to remedy the evil which exists. A plaintiff may consume the time of the Court for days or weeks, put the defendant to his proof, and then, if plaintiff's success appears doubtful and the charge of the Court is adverse, he may take a voluntary nonsuit. This process, which he may continue repeatedly until the statutory period elapses, the Court is powerless to prevent.

"At any time during the presentation of his case if the plaintiff is dissatisfied with the state of his proof or his

ability to make convincing proof, he is allowed the free exercise of his judgment as to whether he will go on or suffer a voluntary nonsuit. But when he finishes his proof and rests it is to be presumed that he does so because he is satisfied that he has made out a prima facie case of as convincing a nature as the circumstances will permit. There appears to be no reason at all why he should have any further right. To permit him to take a nonsuit after he has elected to submit his case to the arbitrament of that particular tribunal without assigning any reason therefor is to give him not only an undue advantage over his opponent, but a privilege peculiarly susceptible to abuse. When a plaintiff rests his case he has had his day in Court and is not entitled to another as a matter of right.

"If it is unduly prejudicial to the plaintiff to proceed with the case it is more advantageous for him to ask the Court to withdraw a juror, for if he is without fault that will not involve him in any liability for costs which he will have to pay if he takes a nonsuit.

"We therefore suggest to the conference the introduction of a Bill repealing the Acts of 1814 and 1903 and providing:—'That hereafter upon the trial of any civil cause in any court of record in this Commonwealth, the plaintiff, having rested, shall not be permitted to suffer a voluntary nonsuit after the defendant has either begun to offer or has announced to the court an intention not to offer any evidence; unless such nonsuit shall be allowed by the court upon cause shown.'"

The Chairman called for discussion. Judge JAMES GAY GORDON, JR., 1st District, related an incident in his experience in which he had refused to allow a petition for leave to suffer a voluntary nonsuit after defendant had closed his case on the ground that the petition for leave was improper procedure. He suggested that a better cure for the trouble would be achieved by regulating the effect of a voluntary nonsuit suffered at a certain time—namely, by providing that a voluntary non-

suit should have the same effect as a compulsory nonsuit after the Court has refused to take the latter off.

Judge PARRY replied to this that he did not think the plaintiff should be allowed to stop his case whenever he wished. He pointed out that when plaintiff rests he presumably has done the best he can, and has had his day in court; but a defendant has no such right. He also called attention to the fact that if the plaintiff has any reason at all to stop his case, he can always ask the Court to withdraw a juror, and that under the proposed legislation he can ask leave to take a voluntary nonsuit, which request will always be granted if a valid reason therefor exists. He declared the Act would stop litigants from wasting the Court's time. Upon motion the report of the Committee was approved by the Conference.

The Chairman pointed out that the approval of such proposals by the Conference automatically caused them to be referred to a Committee to draft the bill and submit it to the next Legislature.

President Judge WILLIAM H. KELLER, Superior Court, reporting for the Committee on suggested legislation giving the courts the right to name and call experts in matters involving such testimony in criminal cases, said that he had not had an opportunity to confer with the other members of the Committee, but that proposed acts on this subject, prepared by Mr. Justice HORACE STERN, Supreme Court, Judge EDWARD M. BIDDLE, JR., retired, and himself, had been approved by two previous Conferences, and failed of passage by the Legislature. The Secretary said that Judge KELLER'S committee had been appointed to study the subject further in view of certain strong opposition which had arisen at the Fifth Conference. Upon motion it was resolved that the Committee be continued, and the matter deferred.

Mr. Justice HORACE STERN, Supreme Court, read the following report of the Committee on suggested legisla-

tion authorizing separate verdicts as to guilt and penalty in first degree murder cases:

"Your Committee is of opinion that it is desirable to maintain in this State the policy of allowing the jury to fix the penalty as between life imprisonment and death in cases where they render a first degree verdict. We do not believe, however, that the question of guilt and of penalty should be submitted to them in the one trial, or that testimony bearing on the question of punishment should be permitted on the trial of the issue as to guilt or innocence.

"It is one of the most cherished traditions of our jurisprudence that a defendant in a criminal case is not to be prejudiced by admission of evidence of prior crimes or convictions, unless he himself takes the stand or puts his reputation in evidence. If, then, this principle is upheld in all other criminal trials, how much more important it is that it should be observed in the case of the highest crime known to the law, that of murder. The question of guilt and the question of penalty are totally distinct, and should not be confused by mingling them in the same issue, especially before a tribunal of laymen, whose minds cannot be divided into hypothetical compartments so as to keep distinct the questions of guilt and of penalty and to avoid prejudice resulting from a presentation in the same trial of evidence bearing on both.

"We therefore advocate an amendment to the law so as to provide that, at the trial of the issue as to guilt or innocence of one accused of first degree murder, the jury shall be informed in the charge that if they find defendant guilty of murder in the first degree they will immediately thereafter be called to hear evidence to fix the penalty, which will be within their discretion. If a verdict of murder in the first degree is rendered, the jury shall thereupon sit as a sentencing tribunal, hear testimony as to defendant's previous record and other facts pertinent to the determination of the proper penalty,

and render their finding as to the penalty based upon the testimony thus presented."

Mr. Justice STERN stated that the Committee proposed that the jury should be informed when passing upon the initial question of guilt that if they find first degree murder, they will then be called upon to fix the penalty; and that the object of this is to accomplish what would seem to be the purpose of the law originally —namely, to prevent the jury from bringing in second degree murder when they would be inclined on the merits of the case to find first degree murder, and thus to fix the lesser degree of guilt because it does not carry the death penalty. He went on to say that the procedure in a murder trial of putting the record of the defendant into evidence together with the evidence of the commission of the crime is shocking in the extreme, since jurors in his opinion cannot properly dissociate the two classes of evidence, and the presence of evidence as to the defendant's record inevitably tends to color the verdict as to his guilt. Upon motion the Conference approved the report of the Committee.

Judge CALVIN S. BOYER, 5th District, addressed the Conference to propose legislation authorizing the entry in criminal cases of judgment on the whole record in favor of a defendant notwithstanding the verdict when the Court feels there is insufficient evidence. The Chairman stated the suggestion in the form of a resolution as follows: "Resolved that the Conference favor legislative enactment to empower courts of criminal jurisdiction to enter judgment on the whole record in favor of a defendant notwithstanding the verdict, where the evidence is insufficient to sustain such verdict, with the right to appeal by either party," and called for discussion. Judge WILLIAM M. PARKER, Superior Court, opposed the resolution, expressing the opinion that, when an accused has been found guilty by a jury, the district attorney should have another chance to prosecute, if the Court grants a new trial, since the inference naturally

follows that "there is something wrong there," and especially since, upon further investigation, sufficient evidence to warrant a conviction may be found.

Judge JAMES GAY GORDON, JR., 1st District, said the opinion expressed by Judge PARKER astonished him; that an accused needed more and not fewer safeguards; and that if the Court should originally have given binding instructions, it would be only justice to enter judgment notwithstanding the verdict. He said that Judge BOYER'S suggestion was fundamentally sound, and urged that it be adopted by the Conference.

Judge WILLIAM M. HARGEST, 12th District, stated that he agreed with Judge PARKER; that many of the traditional "safeguards" should be dispensed with, since they no longer were founded upon reason and justice; and that while Judge BOYER'S suggestion was sound, Judge PARKER'S position was also well taken. It was pointed out that under the present procedure the rights of the accused were adequately protected by the granting of new trials and appeals to the higher courts; that if the Commonwealth had the right of appeal from a judgment notwithstanding the verdict, it might result in a new trial anyway; and that the suggestion merely adds an unnecessary new mode of procedure.

The resolution being put to the conference was defeated, whereupon the Conference recessed until 2:00 p. m.

The Conference was called to order at 2:00 p. m. by Mr. Justice WILLIAM I. SCHAFFER, Supreme Court, acting as Chairman in place of Mr. Chief Justice KEPHART.

Judge PAUL N. SCHAEFFER, 23rd District, spoke on the subject of legislation relating to the method of selection and appointment of probation officers of Juvenile Courts. He stated that social workers throughout the country had been criticizing the work of the Juvenile Court, and had been urging that the disposal of the child in the Juvenile Court be taken away from the Judge and given to social workers. Judge SCHAEFFER said

that he did not agree with the proposal, but believed that probation officers should be acquainted with the technique of social work, and that this thought was not limited to Juvenile Court alone, but should be applied to Quarter Sessions Courts as well. He mentioned the work of a committee appointed by former Governor Pinchot which recommended a bill to the Legislature regulating the appointment of probation officers by limiting the selection of the Courts to a group of persons determined through the medium of character investigation and professional examinations, to be especially qualified to do the work.

Judge FRANK B. WICKERSHAM, 12th District, said that the Dauphin County Court had had the same officer for the past seventeen years, a man who was an expert in this field, and that his assistant was selected from among the welfare workers in the district. Judge WICKERSHAM also called attention to the fact that his Court had appointed a board of men and women of outstanding reputation in the community to hear the cases submitted by the parole officer and give its recommendation to the court. He said that he did not approve of having welfare workers select the probation officers, and that he would not like to see a change in the system used in his district.

The Conference thereupon adopted a resolution that a committee be appointed to study the question and report at the next conference.

Judge ALLEN M. STEARNE, Orphans' Court, 1st District, was reported ill, and Judge GROVER C. LADNER, Orphans' Court, 1st District, acting for him, submitted to the Conference the following draft of an Act authorizing the Orphans' Courts to conduct jury trials on issues of fact instead of certifying such issues to the Common Pleas Court, as is done in the present practice:

"Section 1. Be it enacted, etc., . . . that Section 21 of the act approved the Seventh day of June, A. D., one thousand nine hundred and seventeen (Pamphlet Laws

363) entitled, 'Act relating to the organization, jurisdiction and procedure of the orphans' court; the powers and duties of the judges thereof; and appeals therefrom' be, and the same is hereby amended by adding at the end thereof a new subdivision to read as follows:

"D: In any case where it would be lawful, proper or expedient for the Orphans' Court to send an issue to the Court of Common Pleas for the trial of facts by a jury, the Orphans' Court may in its discretion draw a jury and designate one of its own Judges to preside at the trial of said issue. The panel of jurors drawn for service in the Common Pleas Court of the county in which the Orphans' Court is located shall be available for such service in the Orphans' Court when required, and the Orphans' Court and the Courts of Common Pleas of said county shall by appropriate rules provide for and regulate the manner in which the jurors shall be made available and sent to the Orphans' Court when required for the trial of issues therein.

"Unless and until the Orphans' Court otherwise directs, the rules of the Common Pleas Courts of said county regulating the taking and disposition of motions for new trials, taking off nonsuits and entering judgments N. O. V. shall apply to jury trials of issues in the Orphans' Court except that said motions shall be heard and disposed of by the Orphans' Court sitting en banc instead of by the Common Pleas Court.

"The entry of judgment upon the verdicts rendered at such trials of said issues in the Orphans' Court shall have the same force and effect and be subject to appeal in the same manner as appeals in like cases are now taken in the Common Pleas Courts from judgments on issues certified by the Orphans' Court."

Judge LADNER stated that the purpose of the suggestion was to expedite procedure, since, under the present practice, two appeals are necessary, whether the issue certified be of right or merely advisory. He pointed out that in Philadelphia the trial list habitually lags sev-

eral months behind, and, when an issue from the Orphans' Court is certified to the Common Pleas, the Judges of the latter courts are usually asked to set it at the head of the list, a practice frequently unfair to other litigants. Judge LADNER said that the proposed practice was not to be compulsory, but only discretionary, thus preserving the old practice in counties where that is preferred.

Judge CHARLES SINKLER, Orphans' Court, 1st District, said the Judges of the Orphans' Court of Philadelphia were unanimously in favor of the suggestion. The Acting Chairman stated that in his opinion the Act did not take into consideration the districts in which no separate Orphans' Court existed, and would hence require some change. Former Chief Justice ROBERT VON MOSCHZISKER said the proposed Act was wise in principle, but that it needed some slight revision as to the "appeal" provision; that as he understood the proposal, the intent was to eliminate two appeals.

Judge J. BURNETT HOLLAND, 38th District, said the language could be clarified by stating more definitely that the appeal was to be taken from the Orphans' Court final decision on the verdict. He stated that in districts having but one Orphans' Court Judge there should be no difficulty about what constituted the definitive decree by the Court en banc, as the single judge sits en banc. He asked the meaning of the words "proper" and "expedient" in the draft of the Act.

Judge LADNER explained that "proper" referred to issues certified as of right, and "expedient" referred to advisory issues. He said the "appeal" provisions could be clarified by adding "Except but one appeal shall be taken from the final decree of the Orphans' Court."

Upon motion the Conference approved the principle of the Act and referred it to a Committee to make such suggestions to the Legislature as should seem advisable.

The Chairman called upon Judge W. WALTER BRAHAM, 53rd District, to speak on his suggestion of a

change in the number of challenges to be allowed defendants in murder cases. Judge BRAHAM said that his suggestion had been incorporated in Sections 1216-1217 of the proposed Code of Criminal Procedure, and that he was in substantial agreement with these provisions.

Mr. Justice HORACE STERN, Supreme Court, as Chairman of the Committee on Practice in the civil courts, reported that the Committee had certain suggestions to make, but that these had been referred to Mr. Chief Justice JOHN W. KEPHART, Supreme Court, who would bring them up for discussion later.

Judge ELDER W. MARSHALL, 5th District, Chairman of the Standing Committee on Practice in the Criminal Courts, read a brief report in which he pointed out that the proposed Criminal Code and Code of Criminal Procedure had adopted eight of the Committee's recommendations, viz.: (1) codification of all criminal offenses; (2) provision for entry of all bail bonds as liens; (3) abolition of the plea of nolle contendere; (4) provision that the Court should examine on voir dire; (5) reduction in the number of challenges; (6) revision of the law respecting additional jurors; (7) requirement of advance notice to the District Attorney of intention to plead alibi or insanity; (8) requirement that motions to quash be filed a specified time in advance of trial; and (9) empowering the Court to comment on testimony and credibility. Judge MARSHALL stated that in view of the pendency of the codes there would seem to be no need for action by the Conference on the subsections mentioned. He reported that the Committee also recommended that the proposed codes be amended in the following particulars:

"A. By permitting defendants to waive finding of bills of indictment and to consent to be tried on District Attorneys' bills.

"B. By codifying the statutes of limitation with respect to criminal offenses.

"C. By providing for suspension of the running of the statute of limitations after indictment found.

"D. By providing for two grades of larceny, petit and grand.

"E. By new definitions of offenses where injury or death is caused by the operation of a motor vehicle.

"F. By depriving jurors of the right to act as judges of the law."

The Chairman then called for discussion of the proposed Code of Criminal Procedure, Senate File No. 851. Former Chief Justice ROBERT VON MOSCHZISKER, being recognized by the Chair, said that he had looked through the draft of the Codes casually; that while he was not prepared to make recommendations, nevertheless certain of the subjects had attracted his attention. He referred to Section 211 of the Code as a radical departure in preliminary hearings, and said that he could see no reason to abandon the present rule in that respect. The former Chief Justice then spoke of the change in the function of the Grand Jury under Article IV of the Code, the additional expense to counties for expert witnesses called by the courts, the possibility upon filing of a motion to quash of a jury trial before the ordinary criminal trial with a jury, the inconsistency of Section 901 of the Code relating to offenses against the Commonwealth committed by a person within or without its territorial limits, the awkwardness of Article X relating to the challenge of an individual judge on the ground of prejudice, the absence of reference to the practice of demurring to the evidence, the careless draftsmanship of Section 1812 permitting a special verdict rather than special findings, and the provisions for appeal by the Commonwealth. He concluded his remarks with the suggestion that the Conference oppose the passage of

the Code as drawn until an opportunity for further study could be had.

Judge W. C. SHEELY, 51st District, read a letter[1] which he had sent to the Attorney General after examination of the proposed Codes. He expressed therein his belief that the Code of Criminal Procedure had little of benefit in it and a great deal of unwise innovation. He stated, however, that the provisions giving priority to the hearing of appeals in criminal cases in the appellate courts had his unqualified approval. The Code in general, he said, followed the procedure now in use, but he believed the changes would tend to cause delay and confusion. He then called attention specifically to a number of the sections and criticized each in detail.

At the conclusion of the reading the Chairman expressed the appreciation of the Conference to Judge SHEELY and Former Chief Justice VON MOSCHZISKER for their statements.

Judge RUSSELL C. STEWART, 3rd District, said he had studied the Codes, and while there was little objectionable matter in the Penal Code, he could not criticize too severely the defects pointed out by the previous speakers. He stated that he had found the draftsmen of the Code, while able men, had had no experience whatever in the trial of criminal matters; that the Code was indefensible; and that the Conference should take immediate action to forestall its adoption by the Legislature.

Judge CHARLES M. CULVER, 42nd District, said he had written to the Attorney General setting forth his objections; that he agreed with what had previously been said about the Code; and that if the Code became law it would disrupt the orderly administration of criminal justice for years. He called attention to the impracticability of the provisions relating to arrest in counties other than that in which a crime was committed; to the

[1] The letter is reprinted in the addendum to these Minutes, on page xlv.

inconsistency of having a stenographic record of the proceedings before the Grand Jury, the provision that nothing which there transpired could be disclosed in court, and the provisions that an indictment might be quashed if it were shown that the requisite number of grand jurors did not vote for it.

Judge WILLIAM M. HARGEST, 12th District, told the Conference about the Committee on Legislation of the Pennsylvania Bar Association. He said the function of the Committee was to study the Bills and communicate its opinion to the Chairmen of the Legislative Committees in charge of the various Bills; that no Bill disapproved by that Committee had ever come out of Committee; and that its study of the Code of Criminal Procedure would shortly be finished and its recommendation be forwarded to the Legislative Committee.

Mr. Chief Justice JOHN W. KEPHART, Supreme Court, resumed the Chair. He stated that he had sent thirty or forty objections to the Legislature, and the Attorney General's office had reported that every suggestion made had been followed; and that he had proposed to the Attorney General to appoint a Committee of District Attorneys throughout the State to study and redraft the Code.

Judge HARRY A. COTTOM, 14th District, asked the reason for omitting the Penal Code from the Agenda of the Conference, and whether the two Codes were such companion bills that they must stand or fall together. The Chairman replied that they were separable, and the reason the latter was not put in the Agenda was that it was substantive law, whereas the Conference should deal only with procedure and practice.

Judge W. WALTER BRAHAM, 53rd District, said the proper function of the Conference in his opinion was to report on the Bill suggesting that it be redrawn, and proposed the Bill be referred to a Committee to prepare and report the conclusions of the Conference. The

Chairman pointed out the shortness of the time in which to act. Judge J. E. B. CUNNINGHAM, Superior Court, said he thought Judge BRAHAM'S suggestion was the best method of attacking the problem.

Judge JAMES GAY GORDON, JR., 1st District, offered the following motion: "Be it resolved, by reason of the many inconsistencies, impractical innovations, and undesirable changes made by the proposed Code of Criminal Procedure in the existing practice of the criminal courts, that the Conference deprecates its adoption in the form as it is introduced into the Legislature, and suggests a further hearing and study by the Legislature." The Conference approved this motion.

Discussion having been concluded, the Chairman read a letter from Judge JAMES GAY GORDON, JR., 1st District, tendering his resignation as Secretary of the Conference on the ground that the honor of holding that office should not be accorded for too long to one individual; that others who merited it should be given the recognition they deserved; and that reasonably frequent changes in the official personnel of the Conference would stimulate general interest in its work and would promote its healthful growth and activities.

Judge GEORGE GOWEN PARRY, 1st District, moved that the resignation be refused. Mr. Justice WILLIAM I. SCHAFFER and Mr. Justice WILLIAM B. LINN, Supreme Court, expressed themselves as opposed to accepting the resignation. The Conference voted not to accept the Secretary's resignation and then adjourned at the call of the Chair.

[Signed] JOHN W. KEPHART,
Chairman.

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

FIFTY-FIRST JUDICIAL DISTRICT

GETTYSBURG, PA.

W. C. SHEELY
PRESIDENT JUDGE

April 19, 1937

Honorable Charles J. Margiotti
Attorney General
State Capitol
Harrisburg, Pa.

Dear General Margiotti:

I have your letter of April 13th relative to the Code of Criminal Procedure and Penal Code now under consideration by the Committee on Judiciary General in the Senate.

I have read the Code of Criminal Procedure with some care and I am frank to say that I can see little in it that would be beneficial, or which would materially aid the administration of criminal courts. In fact, the only provisions of the Code which, in my opinion, would speed up the handling of criminal cases are the provisions of Sections 2334 and 2335 which provide that the appellate court shall hear all appeals at the earliest possible time and that appeals in criminal cases shall take precedence over other appeals.

Other provisions of the Code follow almost exactly the procedure which is now, in general, followed, and the time required for the various steps in the procedure would not be lessened in any degree. The changes in other respects apply merely to technical forms and would, in my opinion, cause more confusion and delays in interpretation than they would accomplish good.

It is my thought that the subject involved in this bill is so important that the bill should not be enacted until the next session of the legislature in order that it may be carefully studied by the various agencies interested in this work before it is finally passed.

Complying with your request for my comments and suggestions on the bill, I would say that the following sections strike me as requiring particular comment:

Sec. 104

The words "probable cause" are used in this section and in the section providing for the binding over by the magistrate and in the section providing for the return of a true bill by the grand jury. I do not know what is meant by these words but if they mean the same thing as a "prima facie case" it would seem that

the latter words would be preferable since they have acquired a definite legal meaning. If the words are intended to imply something different than a prima facie case it will take a number of years before they would acquire a definitely accepted meaning. In either event their use would open the door for litigation to determine the meaning.

Sec. 105
" 114

It would seem that both the warrant and the summons, if the latter is to be adopted, should contain a statement of when and where the offense was committed. The defendant is certainly entitled to know definitely the offense with which he is charged, and to arrest a man solely on a charge that he "did commit an assault and battery on John Jones" without more would open the door for numerous abuses.

The use of the summons might be all right in a number of cases, but the discretion of whether to use a summons or a warrant if placed in the magistrate might be open to serious abuse. Furthermore, I doubt the advisability of having different rules applying to different classes of offenders. In the criminal courts all defendants should be treated alike, and even though the person charged with the crime may be a substantial citizen or a friend or political ally of the magistrate he should be treated the same as any other defendant.

Sec. 111

Providing for the issuance of a warrant in one county for an offense triable in another county is bad generally because it would require the courts to take cognizance of complaints laid before magistrates over whom the courts would have no authority. It is further bad because the section provides that it must appear that the person against whom the complaint is made is in the county where the complaint is made, thereby raising the question of jurisdiction if it should appear that the defendant was not in the county when the complaint was made.

Sec. 209
" 210

The provision for the procedure in a preliminary hearing before the magistrate under which the defendant may make a statement not under oath, then testify, and then make another statement not under oath, all of which statements shall be transcribed and returned with the record, strikes me as being nothing more or less than an attempt to bait the defendant into making a statement

which can later be used against him although the section does provide that the magistrate must tell him that he need not make the statement unless he chooses. The idea of an unsworn statement by the defendant, which could have no effect on the case, is novel to say the least.

Sec. 213

The requirement that the testimony of the witnesses before the magistrate shall be reduced to writing or taken in shorthand will, in most cases, necessitate the employment of a reporter for every preliminary hearing. It would be impossible for a magistrate to reduce the testimony to writing, particularly if the hearing is lengthy. The cost of reporting all hearings would be prohibitive to the county.

Sec. 210
" 215

The provisions relative to the admissibility of the defendant's unsworn statement and his depositions in evidence are unnecessary under the general rule of law that any admission made by him would be admissible for the purpose of contradiction.

Sec. 216

I stated hereinbefore the use of the words "probable cause" in connection with holding the defendant for court is new and is of doubtful value. Under this section the magistrate would be practically trying the case rather than merely determining whether a prima facie case has been made out. Furthermore, if it appears that the defendant is guilty of another offense a new information should be made.

Sec. 222

The complaint made before the magistrate which was the basis of the warrant should be returned with the magistrate's transcript as it forms the foundation for the entire proceeding.

Sec. 223 (2)

Which provides that the defendant shall not be discharged on a writ of habeas corpus nor shall the preliminary examination be held invalid because the offense for which the defendant is held to answer is other than that stated in the complaint is bad. If a defendant is arrested on one charge and it develops at the preliminary examination that that charge is unfounded but that he might be guilty of another charge, he is certainly entitled to have a new complaint made on the basis of the new charge, and unless this is

done he should be discharged. It is also pointed out that if the defendant were held by the magistrate on a charge other than that laid in the complaint the case would come before the court without a responsible prosecutor who might be liable for costs in the event of an acquittal.

Secs. 338-344

These sections provide for the entry of the recognizance in the office of the Prothonotary and the indexing thereof so as to constitute a lien on the real estate of the defendant and his sureties and for certain proceedings thereon in the Common Pleas Court. I do not believe that the title to the act is sufficient to give notice that it deals with the entry of liens and that it imposes duties on the Common Pleas Court. The general idea of the entry of the lien is good.

Sec. 422
" 423

Providing that the grand jury may hear evidence for the defendant and shall weigh all the evidence received by them, and that they must be convinced that there is a probable cause to believe the defendant guilty is objectionable in that it practically authorizes the grand jury to enter into a full hearing of the entire case, thereby enlarging its function. Again, the use of the words "probable cause," particularly in conjunction with the word "convinced," is objectionable.

Secs. 505-537

Relating to the form of indictment is perhaps the most objectionable feature of the whole bill. I cannot see how the administration of justice would be furthered by eliminating from an indictment all the terms and provisions which the courts have interpreted and the substitution of new terms which have not been interpreted. Again, the defendant is entitled to know definitely the crime charged against him and when and where the crime is alleged to have been committed. It is not enough that he may get this information by a bill of particulars, and that after verdict he may have the indictment amended so as to include these items and thereby make the indictment good for a plea of former conviction or acquittal. No District Attorney worthy of the office has ever had any difficulty preparing a proper indictment, and the danger to the defendant's rights under the changes are too great to be ignored. Under the provisions of this code it would be a simple matter for a District Attorney to bring a defendant into court on

a fishing expedition and after a conviction, amend his indictment so as to charge the offense finally proved.

A variance, without amendment, in Common Pleas always results in a nonsuit. A defendant in a criminal case is entitled to at least the same rights as a defendant in a civil case.

Sec. 912
" 913

Providing for prosecution for larceny or kidnapping in any county into which the defendant has taken the stolen property or the kidnapped person is objectionable. The Commonwealth should not have the right to select the forum of trial and the defendant is entitled to be tried in the county in which the offense occurred, and in which the witnesses would be available.

Sec. 1004
" 1005

Providing for a change of judge upon application of the defendant or the Commonwealth at the time the case is called for trial is objectionable. First, an application of this kind should be made a sufficient length of time before trial to enable the court to call in another judge and thereby prevent a continuance to a subsequent term of court which in some counties would be six months. Second, the granting of the application for the change of judge should be discretionary with the court, and should be compulsory only when there is real basis for it.

Sec. 1216

Providing for the number of challenges is objectionable as there is no valid reason for cutting down the number now allowed. To allow three in the case of a misdemeanor would be to allow fewer challenges to a criminal defendant than to a civil defendant.

Sec. 1701

Providing for the attendance of an official stenographic reporter is objectionable because of the expense to the smaller counties. Our practice has been in the past to call in a reporter only when requested by either side, thereby saving that expense in the trial of minor criminal cases.

Sec. 1715

The provision that the court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary is objectionable. The court, in the exercise of this power can, in a large number of cases control the verdict of

the jury, and telling the jury to disregard what the court has said does not cure the situation.

Sec. 1810

The requirement of calling the roll of the jury when they return with a verdict is unnecessary unless requested or unless the court sees fit to do so. Ordinarily, it would result only in the consumption of time.

Sec. 1812

A special verdict should be permitted only in the discretion of the court and the jury should not be empowered to decide whether to return a general or a special verdict.

Sec. 2104

The requirement that a judgment of guilty or not guilty should be entered by the court and the judgment of guilty should not be rendered until three days after the conviction is unnecessary. The passing of sentence is a sufficient judgment, and the requirement of a delay of three days would mean that a special session of court would have to be held three days after the final discharge of the jury in order to pass judgment on the last case convicted.

Sec. 2115

The requirement that before passing sentence the court or clerk shall inform the defendant of the accusation and ask if he has any cause why sentence should not be pronounced is unnecessary, and Section 2116 providing for the setting aside of a sentence where this is not done makes it objectionable. In the first place, the defendant knows of the accusation, and, in the second place, he is certain to let the court know if there is any reason why sentence should not be pronounced.

Sec. 2218

The provisions that where a sentence of death has not been executed at the time appointed a judge shall have the defendant brought before the court to determine if there is any legal ground why the sentence should not be executed is objectionable since the entire matter of executing the sentence is in the hands of the Governor after the sentence is imposed.

To carry out this provision the county would be put to the expense of returning the defendant from the penitentiary in order to hold this hearing. Just what would be done if the court found that there was a legal ground why sentence should not be executed is not clear.

Sec. 2316

I am afraid that the sections dealing with the mechanics of appeal are going to be very confusing. Just how the appeal can be handled without definite assignments of error is not clear to me, and certainly neither side should be permitted to take an appeal without definitely specified grounds. It would seem that the grounds of the appeal should be specified before the appellant's brief is filed so that the appellee may know definitely what he has to meet.

Sec. 2317

In granting a stay of execution I believe it would be better to make the granting of the stay discretionary than to permit it where the judge certifies that there is probable cause for reversing the judgment. The defendant might be justly entitled to a stay even though the court should not think that there was probable cause for a reversal.

Sec. 2328
" 2330

The papers to be sent by the clerk to the appellate court should be the original papers rather than certified copies thereof as the cost of preparing such certified copies would be prohibitive.

Sec. 2331

The requirement that the clerk should deliver a copy of the appeal papers without charge to the defendant and to the District Attorney is objectionable as this would require a copy of the notes of testimony as well as of the formal papers. The county should not be required to bear the expense of making these copies.

Sec. 2338

To permit the appellate court to review all rulings whether exceptions were entered to the rulings or not is unwise. If such rulings are fundamentally erroneous it might be all right, but the defendant should not be allowed to permit an erroneous ruling to be made without calling the error to the attention of the court, and thereby take his chance on a favorable verdict, saving the erroneous ruling as a safety valve in the event of a conviction.

I am heartily in favor of any reforms in criminal procedure which would correct abuses and speed up the handling of cases without depriving the defendant of any of his rights. I would also be in favor of a codification of the laws relating to criminal procedure in order that we might have definite rules covering the

various steps in the procedure. However, I do not believe that anything will be gained by establishing new rules for the handling of the details of procedure and at the same time retaining the general forms now in force.

With kindest regards, I am

Sincerely yours,

W. C. SHEELY.

WCS: jc