MINUTES OF THE SEVENTH JUDICIAL CONFERENCE OF PENNSYLVANIA

Held at Philadelphia, Pennsylvania

January 20 and 21, 1954

The Seventh Judicial Conference of Pennsylvania convened in the Burgundy Room of the Bellevue-Stratford Hotel, Philadelphia, on Wednesday, January 20, 1954.

The Conference was called to order by Chief Justice Horace Stern, acting as Chairman, who proceeded to introduce Rev. Ernest A. de Bordenave. The Chairman prefaced his introduction with a brief historical sketch of famous Christ Church, which was established in this city in 1695, and of which Dr. de Bordenave is the present rector. The invocation was then pronounced by Dr. de Bordenave.

The Chairman then addressed the Conference, expressing his pleasure that a total of 161 judges throughout the State had taken valuable time from their duties in order to be present. He pointed out that the last previous Conference had been held in 1937 under the ægis of the then Chief Justice Kephart and stated that this Conference was intended to provide a medium whereby the Judges could discuss means of perfecting their own work.

As the first order of business the Chairman proposed the election of a secretary. Judge Eugene V. Alessandroni, of Philadelphia, was nominated by Judge Vincent A. Carroll, seconded by Judge Louis E. Levinthal, and approved without opposition.

At the request of the Chair, the Secretary read communications from the Honorable Richardson Dilworth, District Attorney of Philadelphia; from J. Wesley McWilliams, Esquire, President of the Pennsylvania Bar Association, and from Mrs. Eleanor Evans, Secretary of Public Assistance.

Judge Robert E. Woodside (Superior Court) was introduced by the Chairman and presented the results of a study of ways and means of speeding the disposition of civil cases awaiting jury trial. He summarized a sampling of the status of trial calendars made in 1953 by the Institute of Judicial Administration covering 97 trial courts throughout the nation. Included were the counties of Philadelphia, Allegheny, Lackawanna, Lehigh and Delaware in Pennsylvania. Lackawanna was low with a normal wait of two and one-half months between listing and trial while Allegheny was high at twenty-five months. Philadelphia's usual wait was eight months, lowest of the large cities in the country.

Among the measures suggested by Judge Woodside for reducing backlogs were the following:

(1) Encourage trials without jury. This has been found successful where Judges are willing to spend more time in court and lawyers are willing to dispense with findings of fact.

(2) Make wider use of the Arbitration Act of 1951, which applies to claims under $1,000.

(3) Make wider use of pre-trial conferences, which often result in the settlement of cases without trial.

(4) Restrict the granting of continuances by request of counsel without good cause. This involves cooperation by the bar, especially on the part of attorneys with large numbers of cases awaiting trial.

(5) Procure more Judges to conduct trials, preferably by obtaining help from outside Judges whose calendars are less crowded.

(6) Encourage Judges to make their decisions "while the arguments of counsel are still ringing in their ears."

(7) Invest President Judges with greater authority to prod their associates who fall behind in their work.

(8) Restrict the number and length of opinions (even at the cost of more work for appellate courts).

(9) Keep courts open for jury trials all year around.

(10) Integrate all courts in the State under the administrative control of the Supreme Court, so that that court may assign Judges temporarily where they are most needed, as recommended by the American Bar Association.

(11) Procure fuller compliance with Supreme Court Rule 77, which requires monthly reports to the Supreme Court Prothonotary on the status of cases awaiting decision by Judges. This creates deadlines for Judges to meet, thus discouraging undue delays.

As to appellate court calendars, Judge Woodside suggested that the time between appeal and decision could be shortened if the Supreme and Superior Courts would hold shorter but more frequent argument sessions. This would afford the Judges more opportunity to write their opinions while the arguments are still fresh in their minds.

Judge McCreary (Beaver) complained of the ever present danger of Judges in rural districts failing of reelection when their terms expire, their valuable ex-

perience then going to waste. He suggested that by constitutional amendment, if necessary, such Judges could be utilized at reduced salaries for occasional assignments to other districts.

Judge Gilbert (Philadelphia) suggested that the Conference go on record as urging all lawyers to be ready for trial when their cases are reached to avoid breakdown of the trial lists.

Judge Hoban (Lackawanna) described the system developed in his county for drastically reducing the time lag in bringing cases to trial. First, litigants are allowed to control the litigation. A case is not listed for trial unless a party orders it listed and any application for a continuance by agreement of counsel is automatically granted. Continuance for cause over objection is subject to motion, and if the motion is made as late as the beginning of the trial week it is not granted without payment of all term costs by the moving party, including costs of summoning all witnesses. Second, every case is listed for a day certain at least thirty-five days in advance. If it is not reached, or the parties decide not to try it, it goes over to the next term, not the next day, and then only on praecipe.

Judge Bretherick (Delaware) doubted that time would be saved by encouraging trials without jury due to the requirement outside of Philadelphia and Allegheny that Judges must make findings of fact and conclusions of law. He said that in 1951 a bill passed the State House of Representatives that would have removed that requirement but failed of passage in the Senate because the Senator from Indiana County was asked by his Judge to oppose it.

Chief Justice Stern described the method he used while he was a Judge in Philadelphia. He held in-

formal conferences with the leading negligence trial lawyers of the city, representing both plaintiffs and defendants, and persuaded them to waive jury trial in many of their pending cases. Smaller cases were tried first as an experiment. The experiment worked so well that within a very few years a backlog of over 3,000 cases awaiting trial was reduced virtually to the vanishing point. He obtained the approval of the Supreme Court in making simply three stereotyped findings in accident cases:

(1) That defendant was or was not guilty of negligence;

(2) That plaintiff was or was not guilty of contributory negligence;

(3) That plaintiff suffered damage in the amount of ..... dollars.

Conclusion of law: Verdict for defendant, or verdict for plaintiff, in such and such amount.

He also followed the system of giving an immediate verdict just as a jury would. Judge Sweney (Delaware) ventured the opinion that more Judges would become interested in trying cases without a jury if such a simple method of decision could be put into effect throughout the State.

Judge Braham (Lawrence) stated that the Supreme Court's Procedural Rules Committee, of which he was a member, after long consideration had decided against recommending simple verdicts in equity cases. That type of case is usually so involved that findings of fact at the Common Pleas level, although laborious, facilitate consideration of the case on appeal. However, he strongly favored the practice in trespass.

Judge Flood (Philadelphia) also a member of the Procedural Rules Committee, seconded Judge Braham's

views and suggested a Supreme Court rule granting power to the local courts to make their own rules on the point.

Judge Pinola (Luzerne) doubted the need of a rule since the Chancellor was not required to make findings of fact unless specially requested to do so. Judge Francis Shunk Brown, Jr. (Philadelphia) pointed out that under Rule 270(b) of that county the adjudication may consist only of the decision but may include such other matters as the Chancellor deems desirable. He believed that the scope and extent of an adjudication, and whether or not there should be findings, should be left to the discretion of the trial Judge, even in equity.

Judge Bok (Philadelphia) placed a substantial share of the blame for clogging of trial calendars on the Bar, especially those few trial specialists who represent a large number of insurance companies. He advised, on behalf of the larger counties, that insurance and transportation companies be required to provide as many lawyers to try their cases as there would be courtrooms available. This would prevent a breakdown of the list when a few lawyers have too many cases listed for them to attend to themselves while at the same time other lawyers are dissuaded from preparing their own cases because of the large number of cases ahead of them.

Judge Carroll (Philadelphia) agreed with Judge Bok but included plaintiffs' firms in the indictment. He strenuously objected to the courts being made the whipping boys for delays in the administration of justice over which they have no control. He also advocated increasing the costs of litigation in metropolitan areas on the theory that twenty-five percent of the cases

started there should not have been started and would not have been if it had cost more to start them.

Judge Sweney (Delaware) stated that Judge Bok's suggestion had already been tried in that county and that the bar had cooperated with considerable benefit to all.

Judge McNaugher (Allegheny) said the same scheme had been tried in Pittsburgh with some success.

Judge Flood quoted the trial master in Philadelphia to the effect that any case could be disposed of in nine months if there were no insurance trial specialists with personal backlogs on the list.

Justice Jones (Supreme Court) noted with approval that the Philadelphia Transportation Company spreads its cases for trial out among a large number of lawyers whom it does not employ for any other purpose. He contrasted this with the practice of the transit company in Pittsburgh which formerly gave all its trial work to two attorneys, since increased to five. He also raised the question what is a backlog, answering it with his definition as embracing cases currently on the list waiting to be called. He advocated putting off the list entirely any case not ready when reached and imposing a compulsory non pros on any case at issue for five years without trial.

Judge Alessandroni pointed out the underlying objective as being service to the public. Litigants whose cases are dropped from the list are still waiting for their cases to be disposed of and responsibility for that rests upon the court rather than counsel. As the public sees it, those are still cases that the court is not trying and the court therefore gets the blame.

Judge Bolger (O. C., Philadelphia) described the method used to dispose of litigation in his court. Coun-

sel must order the case down and if he does not appear on the day set for it the case is continued generally and must be re-ordered. If it is not re-ordered in a certain time, the Judge notifies counsel to order it down for disposition or the file will be returned to the clerk's office.

Judge Mook (Crawford) related how prior to the 1951 Act, he had reduced a backlog of 135 cases to 45 within a year by an arbitration system for small claims. All claims involving less than $1,000—or a higher sum if counsel agree—are heard by a board of three members of the bar. Decision is rendered immediately and appeal can be taken only upon payment of the arbitrators' fees. This greatly discouraged the practice of some insurance companies of appealing from every adverse judgment of a Justice of the Peace in the hope that the opponent would lose interest during the long wait for trial.

Judge Mook then advanced several suggestions for affording Judges more time in chambers for writing opinions by relieving them of various nonjudicial duties:

(1) Persuade the legislature to transfer the approving of tax collectors' bonds to the county commissioners.

(2) Persuade the legislature to transfer the approving of bonds of Justices of the Peace to the Prothonotary and of constables' bonds to the Clerk of Quarter Sessions.

(3) Relieve Judges of approving delayed birth certificates.

(4) Persuade the legislature to transfer filling of vacancies on school boards to the superintendent of schools.

(5) Establish a separate domestic relations court implemented by trained social workers.

(6) Persuade the legislature to amend the Act of 1951 that requires the court either to issue a writ of habeas corpus or grant a rule to show cause and to give the court power to dismiss the writ when clearly without merit.

Justice Bell (Supreme Court) referred to some of his opinions as showing what he thought of the recent decisions of the Supreme Court of the United States dealing with habeas corpus. He wondered how to get away from them if Judge Mook's suggestion should be adopted.

Judge Woodside considered the habeas corpus question important enough to be made a separate subject of discussion at some future conference.

Judge Henninger (Lehigh) described his method of handling tax collectors' bonds. In conference with the commissioners' clerk the proper amount of all bonds was tentatively set. The boroughs and townships were notified that if they were satisfied the court would enter an order accordingly; if not, they might appear in court at a certain time. Only one party appeared to request a different amount of bond and a great deal of valuable time was thereby saved.

Judge Neely (Dauphin) mentioned that the courts in his county have all the habeas corpus problems of the other counties and more besides. When remedies are exhausted in the other counties, litigants come into Dauphin with writs of mandamus. Judge Neely agreed with Judges Bok and Carroll that responsibility for trial list backlogs lay more upon the bar than upon the courts. He said that his court was able to keep virtually up to date as to cases that counsel were ready

to try. He also expressed grave doubt about the constitutionality of the arbitration act while admitting that it was not the cases coming within its scope that was delaying the trial list.

Judge Hubbard (McKean) echoed Judge Mook's opinion that Judges, especially in districts with no separate orphans' court, should be relieved of a number of minor yet time-consuming duties. Among these he mentioned correction of birth certificates, granting waivers of the three-day wait on marriage licenses, granting marriage licenses to minors under sixteen, and appointing numerous officers, such as election officers, township auditors and constables.

Judge Laub (Erie) felt that many problems regarding arrangement of trial lists can be solved in the course of pre-trial conferences and suggested that further discussion be resumed in connection with that topic.

Justice Stearne (Supreme Court) expressed earnest regret that many lower court Judges had not been observing the requirements of Rule 77 regarding monthly reports of their pending cases. He urged more faithful compliance, and added that Judges genuinely unable to keep abreast of their work should make arrangements to obtain help.

Chief Justice Stern added that the New Jersey system of supervising the lower courts through an administrative office of the Supreme Court cost considerable money and said that he did not favor that system for Pennsylvania. (Applause.) However, he echoed Justice Stearne's sentiments, and stated that the Supreme Court Prothonotary had been asked to appoint a special clerk to handle such reports, not in the spirit of scolding but merely of reminding the Judges of their

obligations. He felt that reasonable cooperation by the Judges would be just as effective as the New Jersey system.

He concluded with a statement that the annual conference of the 48 Chief Justices, which he had attended in Boston the preceding summer, had devoted a great deal of serious attention to the problem of habeas corpus and that he expected some important remedial developments on that subject in the not too distant future.

The Conference then recessed for lunch.

The afternoon session was called to order by Judge William H. McNaugher (Allegheny) as chairman, who opened by making the same request for extra Judges to help in reducing the criminal trial lists in his county that District Attorney Richardson Dilworth had made through his communication read at the morning session. He said that Allegheny's civil trial lists were two years behind largely because of the personal backlogs of a comparatively few negligence trial specialists.

He asked if there was any further discussion on the subject of the morning session. Judge Alessandroni asked for leave to present for consideration a form of a proposed rule to show cause designed to enable the court issuing it to clear away the "really dead backlog cases". The form of rule (to be used under and in accordance with an appropriate rule of court) is as follows:

AND NOW, TO WIT, this ——— day of ———————, 195—, the Court of its own motion enters a Rule upon the above party (or parties) plaintiff and defendant returnable the ——— day of ———————— to show cause why the above case should

not be stricken from the trial list and marked "discontinued and ended".

IT IS FURTHER ORDERED that a copy of this Rule shall be served by counsel upon the parties hereto and that an affidavit of service of such Rule and Notice thereof shall be filed of record on or before the return day thereof.

_____,
J.

Judge Alessandroni admitted that the second sentence especially would encounter much opposition as tending to embarrass attorneys in the eyes of their clients, which Judges, as former attorneys, are naturally reluctant to do. However, he argued that too much deference to the lawyer enabled the lazy or unprincipled lawyer, who was himself blocking the trial of his case, to make the client, and ultimately the public at large, believe that the delay was the court's fault. In answer to a question from the chair, Judge Alessandroni stated that the proposal needed study and that he was making it merely for consideration rather than immediate action.

Judge Diggins (Delaware) suggested as a more workable plan that the Prothonotary should automatically list for trial every case that is at issue, thus throwing the burden on the lawyers to take the cases off for cause.

Judge Shumaker (Butler) took the position that a backlog case is anything filed in the Prothonotary's office that may eventually come to the court's attention. His system is to order the Prothonotary to summon counsel in all cases undisposed of for the last five years, ascertain the reason for the non-disposition and note it on the docket. Counsel in cases older than five years have been ordered to file praecipes for disposition during May. It was found that many cases had been

disposed of as far as both parties and counsel were concerned but that there were questions about Prothonotary's costs never cleared up.

Judge Alessandroni emphasized that under his plan each lawyer would be responsible for serving his own client with the notice so that the client would know that the delay was his lawyer's, not the courts.

Judge Williams (Lycoming) objected that if every case at issue were automatically listed for trial the list would be cluttered up at the expense of parties eager to obtain trial promptly.

Chairman McNaugher approved Judge Alessandroni's plan because of the assurance that the client will know of the court's concern about his case and that the delay is not the court's fault.

Judge Gilbert (Philadelphia) asserted that a case listed for trial and answered not ready should be stricken from the list and start its course over again, unless good cause for continuance is shown. He also suggested amending Judge Alessandroni's proposal by providing for the attorney to serve the notice on the opposite client to save his being embarrassed in his own client's eyes. This should not be considered a breach of ethics since he would be acting under order of court.

Judge Mays (Berks) suggested that the courts had inherent power to issue such process without a special rule.

Judge Henninger defined a backlog as consisting of cases at issue and listed for trial but unable to be tried because the court cannot get around to it. He disclaimed any responsibility in the courts for delay in trying cases not listed for trial or that, having been

listed, have been continued. The court is to blame only for not trying a case at the next trial term after it is at issue.

Taking this to be the conclusion of discussion on the point raised by Judge Alessandroni, the chairman introduced Judge Burton R. Laub (Erie), who delivered an address on "Sentencing and Criminal Practice".

Judge Laub's study dealt with new legislation, Acts 409, 411 and 412 of 1953, based on the report of a special committee headed by General Jacob L. Devers, U.S.A., retired, to the Governor in April, 1953. This new approach to the problem of correction is keyed to the principle of classification, i.e., selection of prisoners for treatment in appropriate institutions according to their characters and potentialities. It involves careful screening, scientific programming and prompt release of the prisoner at the proper psychological moment.

Judge Laub believed that in the course of experimentation the sentencing process would be thoroughly reexamined with special attention to the system of maximum and minimum sentences. He mentioned two basic assumptions in the arguments of those who hold that sentencing is more properly a medical or clinical than a judicial function:

(1) Since the effect of therapy upon a prisoner cannot be adequately predicted, sentence should not be imposed immediately after conviction but left to the discretion of trained social workers who observe him during his confinement.

(2) Scientifically trained psychiatrists and social workers are far more competent than Judges to evaluate the factors which determine the proper release time.

Judicial reluctance to accept these views stems mainly from the apparent undependability of psychiatric testimony as shown in numerous instances where the testimony of opposing psychiatrists has been in hopeless conflict. Yet such views should not be lightly dismissed. At least one Judge in Pennsylvania has expressed the opinion that the Judge should go no further than determining whether the protection of society requires that the particular convicted defendant be sent to prison, and that, if it does, the time of his release should be determined by a clinic within the prison.

Judge Laub admitted that the known disparity in the sentencing practices of different Judges was an argument in favor of the proposed change, holding, however, that the disparity usually resulted simply from the different human attributes of different Judges. His answer was that equality of sentencing cannot exist where there is individualized treatment, since it is admitted that similarity of offense and of background circumstances does not govern the length of confinement under the "proposed sociological Utopia". Inequality exists whether the sentencing is done by Judges or clinical "experts".

Judge Laub noted that the clinical theory of sentencing stems from the doctrine that rehabilitation rather than punishment is the sole aim of confinement. The better view seems to be that the real objective is the maximum protection of society from crime and criminals. All other purposes are subordinate to that.

Pennsylvania has now reached a stage where the old and new theories are curiously intermixed. The sentencing power remains in the judiciary but the release procedure to a degree follows the new thought. Judges should fully grasp the significance of the new

legislation. Administration of penal affairs is now lodged in the Department of Justice instead of Welfare, largely because the Attorney General, being a member of the Board of Pardons, is an ideal liaison among the various interested agencies. Wider and wiser use of commutation may be expected, which some Judges dislike as smacking of extra-judicial review of a judicial function. However, observed Judge Laub, a reduction in the margin of sentence differences would probably lessen the need for extra-judicial interference.

He described the main objective of a criminal sentence in the modern view as not to predict the length of time necessary to correct the offender but to fix a reasonable period within which the corrective processes can function. To bring about some uniformity in the sentencing system throughout the State there must be considerable expansion of facilities for interchange of information and ideas among Judges and other interested officers. Ultimately this might take the form of a set of guidance tables designed not to straitjacket but to aid all Judges in their sentencing function. Before this can be done, however, there must be some agreement on what the ultimate purpose of legal sanctions is and on the criteria to be integrated into such tables. Thus a skillful Judge could correlate his sentences with those of others.

In the discussion which followed Judge Laub's talk Judge Mays (Berks) and Judge Knight (Montgomery) sought advice on the wording of sentences and on disposition of prisoners under the new laws. Judge Laub replied that according to his understanding of the phrase "sentence to a State institution" in Act No. 411 those words should be used in sentencing a prisoner for diagnostic and classification purposes. That would qualify him for admisson to and treatment in the near-

est State penitentiary or county prison equipped as a penitentiary.

Judge Sweney (Delaware) told of the middle course adopted by his court between the judicial and clinical theories of sentencing. A close working relationship has been established with the staff of Norristown State Hospital under which those guilty of lesser offenses but apparently unbalanced are sent to that institution for diagnosis and advice before sentencing. Until reversed by a higher authority this procedure will be continued. Judge Laub saw no objection to this but added that diagnosis and transfer to the appropriate institution could now be done in the penitentiary rather than locally.

In answer to a question from Judge Mays, Judge Laub gave it as his opinion that the new acts did not deprive a local court of power to parole prisoners sentenced for less than twenty-four months and to seek psychiatric advice in doing so, if desired. He added that pyschiatrists are used in his court but mostly for diagnostic rather than therapeutic purposes.

Judge Carroll reminded the assemblage that the primary and basic consideration in the whole subject is the best protection of the public. He urged once and for all a careful definition of the purpose of sentence and punishment judicially and not theoretically. Judge Laub agreed and stressed the danger of the sentencing power being taken away from Judges if something, such as guidance tables, were not done about gross inequalities in sentencing, one of the main causes of the widespread prison riots of 1952 and 1953.

Judge Bok suggested following the path blazed by the American Law Institute in narrowing the gap between maximum and minimum sentences by grading not only offenses but punishments.

Judge Flood, who had worked with the Institute on the subject, stated that its tentative conclusion was that Judges should retain the sentencing power. He also praised Judge Laub for having delivered a clear and able report and urged the appointment of a committee to carry on the study, cooperate with the Institute and report to the next judicial conference.

Judge Laub pointed out that even after that job should be finished it would still have to be sold first to the Legislature and then to the Governor. He also believed it important to obviate the use of commutation by the parole board in order to rectify grossly inequitable sentences. If the process were automatic there would be little need of a parole board except to supervise.

Judge Braham expressed the view that sometimes it is in the interest of justice for the Judge to have opportunity to impose a severe sentence which may be modified later after public indignation has run its course. Public indignation is to a Judge as running water is to an engineer—something to be treated with respect.

Justice Bell as a former member of the Parole Board urged that before blaming the Board for apparently arbitrary overriding of a sentence the particular Judge take pains to communicate to the Board his views of the prisoner's application for pardon or commutation, as is in fact required by statute. Judge Little (Susquehanna) suggested that the trial Judge should send to the Parole Board his reasons for having set a certain maximum. Judge Laub agreed and added that a copy might be sent by the Judge to the clinic.

Discussion of this topic having been concluded, Chairman McNaugher recognized Judge Mook, who of-

fered a resolution to express the Judges' sorrow and sense of loss over the tragic fatal shooting of Judge Allison D. Wade of Warren County by a prisoner in open court just one week before. The resolution was seconded by a number of Judges and the entire assemblage arose for a few moments of silent tribute to the memory of Judge Wade. Chief Justice Stern announced that he had already written a letter to Warren, where Judge Evans of Erie was conducting a memorial service, expressing the sympathy of this Conference for Judge Wade's family and the people generally.

The Chairman then introduced Judge Frank L. Pinola (Luzerne) who delivered an address on the subject of standardized jury instructions.

Judge Pinola opened his subject by quoting various authorities with widely divergent opinions as to the importance of instructing a jury and as to its effect on the jury's deliberations. All authorities agree, however, that instructing the jury is the most difficult service that the trial Judge has to perform.

He reviewed numerous judicial statements in Pennsylvania dealing with questions of jury instruction, including (1) adequacy of instructions, (2) presumptions, (3) mortality tables, (4) present worth of future earnings, (5) burden of proving alibi, (6) effect of circumstantial evidence, (7) effect of character evidence, (8) reasonable doubt, and (9) presumption of malice in felonious homicide.

He then turned to certain attempts to standardize jury instructions outside Pennsylvania, such as in Alabama, in Utah, in the Municipal Court of Chicago, a study by the American Bar Association for the Federal courts and in particular a monumental work by Judge

William J. Palmer of the Superior Court of California. This latter was said to be guided by consideration of

(1) Practical need for a certain instruction either because of the common occurrence of the circumstances or the difficulty in drafting a satisfactory instruction on the given subject; and

(2) Positive effort to state the law (a) impartially, (b) correctly, (c) clearly to a lay mind, (d) concisely yet completely, (e) in grammatically and syntactically good English.

The results of Judge Palmer's work in California and other western states have been a great saving of time for lawyers and Judges, both nisi prius and appellate, a minimizing of retrials, more just and fair verdicts, and facilitation of juries' understanding.

Judge Pinola concluded with an earnest recommendation that the Supreme Court of Pennsylvania undertake the preparation of standardized jury instructions for use in trial courts.

Owing to the lateness of the hour, discussion of Judge Pinola's report was deferred and the meeting was adjourned.

At the banquet held Wednesday evening Chief Justice Arthur T. Vanderbilt of the Supreme Court of New Jersey was the guest speaker and former Senator George Wharton Pepper was toastmaster.

Justice Vanderbilt reviewed his experiences both before and after the adoption of the judiciary article of the new State Constitution. He warned that the judiciary at large should profit by New Jersey's example and for its own good take steps to dispel three popular conceptions, *i.e.*:

(1) That Judges are not always as honest as they should be,

(2) That courts often dispose of cases on technicalities rather than on the merits.

(3) That delays in deciding cases are often too long.

New Jersey went a long way toward solving this problem, he said, by integrating and streamlining its court structure in (1) transforming its former seventeen separate courts into four and (2) abolishing the outmoded Justice of the Peace system in favor of Judges compensated by salary instead of by fees based on the number of convictions.

He emphasized the usefulness of pre-trial procedure as a means of reducing delay in disposing of cases. This does not mean requiring lawyers to settle, he said, but eliminating irrelevant matter from both sides of the case.

The third session was called to order on Thursday morning, January 21, by Honorable Chester H. Rhodes, President Judge of the Superior Court, as Chairman.

After expressing a high opinion of the usefulness of judicial conferences and councils in general, whether sponsored by the Supreme Court or by the Legislature, Chairman Rhodes threw the meeting open for discussion of the report of Judge Pinola, delivered the previous afternoon, on the subject of standardized jury instructions.

Judge Pinola opened the discussion by making a motion, seconded by Judge Bretherick, that the Supreme Court be requested to undertake the standardiza-

tion of jury instructions. There being a division in the voice vote on the motion the Chairman called for a standing vote, but before the vote was taken Justice Bell rose to question the wisdom of the motion rather than allowing the Supreme Court to decide for itself. Judge Pinola replied that no other agency was in a position to do it.

Chief Justice Stern expressed a grave doubt about its being a proper function of the Court since it would amount to an academic and abstract promulgation of substantive rules of law. He suggested the appointment of a committee of Judges and lawyers to formulate suggested forms of standardized jury charges without official or authoritative significance except as reflecting the opinions of the appellate courts in decided cases.

Judge Sloane (Philadelphia) objected to the motion as tending to stereotype Judges and hamper their individual treatment of the individual case. Chief Justice Stern replied that there was no intention to reduce Judges to robots in the matter of instructing juries but that there were some subjects, such as the definition of reasonable doubt, that would not allow much variation according to the circumstances, and would therefore lend themselves to standardization.

Judge Sloane maintained that some proposed instructions that he had seen still sustained his fears. As to reasonable doubt he was not sure but that it would be better practice to refrain from defining it for the jury at all, as is the rule in English courts.

Judge McKay (Mercer) believed that standardized charges would be most helpful to newcomers to the bench trying cases in fields with which their prior experience had not already familiarized them.

Judge Diggins suggested an amendment to Judge Pinola's motion providing for consideration of the question by a committee of this conference, as a result of which, if acceptable to a future conference and winnowed out by elimination and correction, a set of forms might be developed that would become law.

Judge Bok (Philadelphia) said that a set of innocent looking suggestions finally becoming the law was just what he was afraid of, and that an enlightened personality on the bench free to express himself in his own way could raise the whole tone of a trial.

Justice Bell, while speaking for himself only, doubted that the Supreme Court would be willing to accept the task. He approved of the idea of having the matter studied by a committee of the Conference.

Judge Pinola willingly deferred to Chief Justice Stern and Justice Bell by offering a substitute motion that a committee be appointed to assemble a group of standardized instructions. Judge Bretherick seconded the motion.

Judge Kun (Philadelphia) supported the motion but urged deemphasis of the underlying idea of standardization on the ground that the law is continually in a state of flux and what is standard today might not be standard tomorrow.

The Chairman put Judge Pinola's substitute motion to a vote and it was carried.

Judge Shumaker (Butler) raised the question of how the work of the committee would be financed but the question was left undecided.

The chair then recognized Judge Bolger (O. C., Philadelphia) who announced that he had arranged a luncheon for all orphans' court Judges who would

care to attend and discuss problems peculiar to their field. Fifteen Judges indicated that they would like to attend.

Judge Byron A. Milner (Philadelphia) was then introduced by the chair for a discussion of judicial salaries and pensions. He pointed out the extreme difficulty of a Pennsylvania Judge in saving enough to provide for his old age and still maintain a standard of living consistent with his position in these days of high prices and high taxes. The condition is aggravated by the fact that most Judges come to the bench in middle age and are seldom able to resume active practice twenty or thirty years later, also by the fact that since the United States Supreme Court's decision in Graves v. N. Y. (1939), they have been subject along with all State officials and employes to the steadily increasing burdens of the federal income tax. These facts operate to discourage able and experienced lawyers from accepting judicial office, and to hamper the independence of action that the nature of the office requires.

The combined effect of the fallen dollar and the application of the income tax means that a Judge who receives a salary fifty percent higher in modern dollars than he received in 1939 dollars has thirty-three percent less purchasing power now than he had in 1939. Either or both of two means of relieving this situation might be possible, said Judge Milner, (a) increasing judges' salaries or (b) exempting all or part of their salaries from income taxes. Since the former course would only increase the income tax along with the salary, he reasoned that the second course would be preferable from the Judges' standpoint.

Judge Milner proceeded to summarize the State Employes' Retirement Act, which covers Judges, but not adequately. A contributing member upon reaching age

sixty, with fifteen years of service may retire and receive an annuity, the amount of which depends on his final salary and his number of years of service, which is paid partly by accumulated deductions from his salary and partly directly by the State. Judges in office on the second Monday of January, 1930, by electing to join the system may receive additional benefits for years of service prior to that date.

Judge Milner referred at length to Bill No. 1205 introduced in the 1953 session of the Legislature to supplement the Retirement Act for the benefit of Judges. It would have provided a pension amounting to one-half his salary for each Judge reaching the age of seventy after fifteen years of service, or age sixty-five after twenty years of service; or one-third of his salary if permanently disabled after reaching the age of sixty with fifteen years of service. It also provided that a Judge retiring on such a pension, if capable, should hold himself in readiness for occasional service as master, auditor and the like as the court might require of him; also, that the pension should be reduced by any amount that he might earn out of private law practice and also by any amount by which his payments under the Retirement Act might exceed fifty percent of his final salary. This last provision was to prevent anyone's receiving more income by retiring than by remaining on the bench. The bill was reported out of committee but failed of passage.

Judge Milner recommended that at the next session the help of business and labor interests be enlisted in support of such a bill as he feared that lawyers' influence on the Legislature would be insufficient.

Judge Milner closed his discourse by yielding the floor to Judge Shughart (Cumberland), who discussed various changes that he thought should be made in

Bill No. 1205 before its reintroduction at the next session in order to make it more acceptable politically as well as to make provision for pensioning Judges who might be no longer in office upon reaching the retirement age of sixty-five. The principal feature was a provision for a minimum period of ten years' service before a Judge could become eligible for a pension, whether still in office or not upon reaching the retirement age. This would remove as a possible argument against his reelection the point that his reelection would burden the taxpayers with his pension, because after serving a full term he would already have earned a pension.

While admitting that his bill would cost more money than the original Bill No. 1205, Judge Shughart felt it more likely to be passed because all Judges in the State would be covered and therefore all of them could unite in supporting it. He emphasized that nobody would be eligible for a pension unless and until he reached the age of sixty-five (whether in office then or not), gave up private practice, and made himself available for the occasional duties already mentioned.

At the conclusion of Judge Shughart's remarks Judge Aponick (Luzerne) voiced the opinion that the retirement age instead of sixty-five should be sixty or even fifty-five, as is the case in a number of other states, in order to make enjoyment of the benefits of the plan more certain to those of a short life expectancy.

Judge Milner replied that this was designed in the nature of a true pension plan to take care of a Judge in his old age. It is to be distinguished from the Retirement Plan, to which Judges are already, and will continue to be, eligible, and under which a member can

under certain circumstances retire with an allowance at a much earlier age than sixty-five.

Judge Lewis (Allegheny) stated that the bill would be more acceptable to the rural senators and representatives if it placed a ceiling of thirty-five percent rather than fifty percent of the member's salary, thus conforming to the maximum set by most business institutions when the employe makes no contribution. He also suggested that a Judge who has served ten years or more should receive two percent for each year of service up to thirty-five years of service with a retirement age of sixty as suggested by Judge Aponick. He also strongly urged every Judge to exert all possible personal influence on his representatives in the Legislature to obtain passage of the bill.

Judge Williams (Lycoming) spoke approvingly of Judge Shughart's proposition because it would take care of younger Judges as well as older. In the present state of the law a younger Judge has to remain in office for thirty years in order to derive adequate retirement benefits.

In answer to questioning by Judge Woodside, Judge Milner conceded that under Bill No. 1205 a Judge who upon retiring from the bench should become vice president of an insurance company would still receive his retirement benefits, whereas, if he became general counsel of the same company, he would not receive them because then he would be practicing law. Judge Woodside therefore urged deletion of the provision against practicing law in order to remove the temptation for a retired Judge to make dishonest returns of his activities.

A discussion followed, participated in by Edward N. Polisher, Esquire, of Philadelphia, during which it

was learned that a pertinent ruling had been issued only three days previously by the Internal Revenue Bureau. As a result, if a Judge or other State employe dies without having filed an election of options under the Retirement Act, and his survivor therefore receives a lump sum payment, that part of it which represents accumulated interest is taxable only as a capital gain and not, as was the case before the ruling, as current income. Mr. Polisher added that a credit against income tax on this sum would be allowed for any estate tax payable on it.

Judge Little (Susquehanna) suggested for reasons of practical expediency that the pension bill would find easier passage if it provided for some contributions, however slight, by the Judges themselves. This proposal was endorsed by Judge Kreider (Dauphin).

On motion by Judge Milner it was decided that a committee be appointed to develop the matter in more detail with Judges Milner and Shughart and include in the new bill a provision for contributions to the pension fund by the Judges.

Chairman Rhodes then declared a recess for lunch.

The afternoon session was called to order by Judge W. C. Sheely (Adams) as Chairman. He immediately proceeded to introduce Judge A. Marshall Thompson (Allegheny) for a discussion of pre-trial conference.

Judge Thompson stated that pre-trial procedure had been used in his county under rules of court for some time before the Procedural Rules Committee had set to work on it. The objective was to save time, simplify the pleadings and expedite the administration of justice. Their procedure had included procedure for

discovery, but the Supreme Court, in a case originating in Allegheny, had held that the older procedure for discovery was still available. The newly proposed procedural rules on the subject of pre-trial, he noted, had pretty well adopted the Allegheny system. He therefore believed that the older remedy has become nearly obsolete.

In Allegheny a printed form of record is used in pre-trial. In a negligence case, for example, the form sets forth the plaintiff's expenses and other claims going to the measure of damages, the length of time which each party deems necessary to try the case, the number of witnesses, including experts, that they intend to produce, and other pertinent details. This is very helpful to the trial Judge in simplifying the case.

Judge Thompson referred briefly to two pre-trial questions that had come before him. In one case he had held that the plaintiff in a personal injury suit could not be compelled to submit to a blood test to determine whether he had syphilis, although it was a material point.

In another case it was held that the plaintiff would have to submit to a more elaborate X-ray examination where the original X-ray pictures were inadequate to show the extent of injury.

One problem not solved yet, according to Judge Thompson, is how to require the presence at a pre-trial conference of counsel who are going to try the case when many such counsel are trial specialists engaged in trying other cases.

Another problem is to enable the pre-trial Judge to combine various related duties such as listing all cases for trial, combining and severing cases for trial and amending pleadings.

Many differences of opinion on points of pre-trial procedure still exist in both bench and bar, concluded Judge Thompson, but the system contains great possibilities of usefulness and every effort should be made to make it effective.

Before calling for discussion from the floor, Chairman Sheely introduced Judge Gerald F. Flood (Philadelphia) for a talk on discovery as provided for in the proposed procedural rules.

Judge Flood pointed out that before 1951, in Pennsylvania, discovery was quite limited in scope. At law it was permitted only (1) to enable the plaintiff to prepare his complaint, (2) to enable the defendant to prepare his answer, and (3) where there was an issue of forgery. The remedy in equity was considerably broader, as described by Justice Linn in *Peoples City Bank v. John Hancock Ins. Co.,* 353 Pa. 123 (1945), but was complicated and expensive. Consequently discovery was little used in this State.

After adoption of the Federal Discovery Rules in 1938 our Procedural Rules Committee proposed a set of rules of discovery but they proved so controversial that they were never put into effect. The present rules were prepared and adopted in 1951.

The chief difficulty under these rules has been caused by Rule 4011(c), which forbids discovery or inspection that would disclose facts, other than identity or whereabouts of witnesses, which (1) are not relevant to the subject matter of the action, (2) are not competent or admissible as evidence, (3) are known, or reasonably ascertainable, by the petitioner, or (4) are not necessary to enable the petitioner to prepare his pleadings or prove a prima facie claim or defense.

Rules 4011(c), (1) and (2) have caused trouble, especially the latter, because it compels the court to decide in advance what evidence may be admissible at the trial with nothing before it but the pleadings, which, of course, may be freely amended. There are often questions of this nature which even an experienced trial Judge cannot adequately settle in advance of trial.

Rules 4011(c), (3) and (4) have also caused trouble, as where, in a trespass case, plaintiff is forbidden to obtain discovery of defendant's version of the accident, or vice versa, since normally the petitioner himself knows or should know how it happened. Exceptions have been authorized, as where plaintiff was afflicted with retrogressive amnesia or where defendant's car was driven by an agent who was killed in the collision. Some recent cases have denied defendants discovery of plaintiffs' damages on the ground that it is not necessary to the preparation of a defense. These conditions seem to indicate a trend back to the law as it existed before the present rules.

The proposed new rules eliminate Rule 4011(c) and insert in its place a new provision in Rule 4007(a). The effect is that, subject to the rest of 4011, a party may be examined regarding any matter not privileged which is relevant to the subject matter and will substantially aid in the preparation of pleadings or preparation or trial of the case. Thus relevancy but not competency or admissibility will require decision in advance of trial. The other restriction—as to substantial aid—should enable our courts to go further than Federal courts can to prevent harassment and fishing expeditions.

One other major change in the proposed rules is elimination of the petition for discovery. In most

cases discovery will be available merely on notice to the other side, but under Rules 4012 and 4013 the respondent where oral depositions are sought may object and even ask for a stay while the depositions are being taken. Only then will discovery proceedings have to appear on motion lists.

Judge Flood concluded that the proposed rules should pave the way for determinations based on a common sense view of the case without having to decide questions depending on future circumstances impossible to predict.

The floor being thrown open to questions and discussion Judge Thompson stated in answer to a question from Judge Sweney that in Pittsburgh all civil cases are pre-tried, including equity. Some judges sit on the bench in the usual formal manner, others more informally, sitting down with the clerks. If more difficult questions arise the conference is likely to be held in chambers.

Judge Braham expressed the hope that pre-trial discovery may eventually be controlled through the pre-trial conference but in such a way that each case is not tried twice in the process. He said that he had conferred with some Judges in Youngstown, Ohio, where pre-trial is widely used, especially in negligence actions. Those Judges expressed great boredom with interminable questions beginning: "Weren't you asked this question?" and "Didn't you give that answer?" He hoped that extensive pre-trial discovery would be confined to cases where it was indispensable. He discounted the argument that unlimited pre-trial discovery was desirable because it would remove the element of surprise from the trial. He feared that it would also remove the element of spontaneity and even the element of truthfulness.

There being no further discussion the chair recognized Judge Sweney, who, with apologies to the Chief Justice, offered a resolution thanking Chief Justice Stern for his leadership and guidance and also thanking J. Wesley McWilliams, Esquire, president of the Pennsylvania Bar Association; C. Brewster Rhoads, Esquire, Chancellor of the Philadelphia Bar Association, and Mrs. McWilliams and Mrs. Rhoads for their share in making the conference a success. The motion was seconded by Justice Chidsey, also by Judge Bolger, who proposed in connection with the vote a arising tribute to the Chief Justice. All present rose and applauded.

The chair then recognized Judge Knight (Montgomery), who discussed the question of holding future conferences. Judge Gilbert moved that conferences be held annually and that each Judge contribute at least five dollars a year dues.

Judge Sweney urged that the date of the conference be fixed far enough in advance for the Judges to arrange their court calendars to permit their attendance at the conference.

Judge Flood expressed willingness to have the next conference held in Pittsburgh. Judge McCreary (Beaver) agreed on the ground that it could be dovetailed with the midwinter meeting of the Pennsylvania Bar Association, which will be held in that city in 1955.

Judge Nelson (Cambria) inquired whether anyone could say how much dues ought to be charged.

Chairman Sheely pointed out that an unseconded motion was on the floor, whereupon Judge Flood seconded it.

Judge Bolger rose to announce the results of the luncheon meeting of Orphans' Court Judges. He said that they had resolved to meet in conjunction with the Pennsylvania Bar Association convention at Spring Lake in June; also that a committee consisting of Judge Lefever (Philadelphia) and Judge Satterthwaite (Bucks) had been appointed to receive suggestions on the formation of an agenda.

Chairman Sheely redirected attention to the motion on the floor and said he had ascertained that five dollars a year dues would be sufficient. The motion, so amended, was carried. Judge Carroll nominated Judge Sheely for Treasurer, and Judge Gilbert seconded the nomination.

Chief Justice Stern expressed his pleasure that a conference had been decided upon rather than a more restricted, and therefore less democratic, council. He hoped that all who attended had found their sacrifice of time, effort and money worthwhile and that they all felt they had contributed something. He thought that the conference had developed a feeling of camaraderie and a common desire to advance the administration of the law throughout the State. He disclaimed credit for originating the idea of calling the conference but he did adopt it eagerly when it was suggested to him. He said that 165 Judges had replied to his questionnaire as to whether a conference should be held and every one had favored it, many of them most enthusiastically.

He concluded by saying that as there were no other nominations for Treasurer the nominations were closed and the Secretary would cast a unanimous ballot in favor of Judge Sheely.

Judge Bolger asked leave to point out the important contribution to national security that the courts would

make in the proper handling of naturalization proceedings, a fact fully recognized by both the American and Pennsylvania Bar Associations. He had attended naturalization court proceedings conducted by Judge Knight in Norristown in December, 1953, and was so impressed that he persuaded the Pennsylvania Bar Association through its president to authorize its reprint. He urged all Judges to avail themselves of the copies that he had obtained as an inspiration and a guide. He pointed out that such a proceeding is exempt from the restrictions of the Canons of Judicial Ethics as to publicity and stressed the importance of not only impressing the new citizen but creating a sense of rededication in the minds and hearts of all.

Judge Bolger added that if any other Judges were interested in studying the Philadelphia rules of procedure in administration of incompetents' estates he had some extra copies for distribution.

Judge Bonnelly (Philadelphia) interposed a word of compliment to Judge Alessandroni in his discharge of the duties of Secretary, after which Chairman Sheely declared the Conference adjourned.

EUGENE V. ALESSANDRONI,
Secretary of the Seventh Judicial Conference.