MINUTES OF THE EIGHTH JUDICIAL CONFERENCE OF PENNSYLVANIA

Held at Pittsburgh, Pennsylvania

April 14 and 15, 1955

The Eighth Judicial Conference of Pennsylvania convened in the Supper Room of the Schenley Park Hotel, Pittsburgh, on Thursday, April 14, 1955, with Chief Justice Horace Stern as chairman. After calling the Conference to order, the Chairman introduced Rev. Dr. Ansley C. Moore, minister of the Sixth United Presbyterian Church of Pittsburgh, who pronounced the invocation.

Then the Chairman introduced the Hon. David L. Lawrence, Mayor of Pittsburgh, who extended to the Conference an official welcome on behalf of the City.

The Chairman extended thanks to Judges William H. McNaugher and Henry X. O'Brien (Allegheny) and to Pat Bolsinger, Prothonotary of the Western District, for their efforts in arranging for the Conference and to Judge Eugene V. Alessandroni (Philadelphia) for his efficient handling of the duties of secretary of last year's Conference in Philadelphia. He also praised the efforts and contributions of the Pennsylvania and Allegheny County Bar Associations. After outlining the agenda of the Conference, he called for the election of a secretary for the Conference. Judge A. Marshall Thompson (Allegheny) nominated Judge Alessandroni. Judge Adrian Bonnelly (Philadelphia Municipal Court) seconded the nomination and Judge Alessandroni was elected unanimously.

The Chairman next introduced Judge Henry G. Sweney (Delaware) as the first speaker, who discussed the subject, "The Law's Delays".

Judge Sweney divided his study into five main topics: (1) Compulsory arbitration for cases involving $1,000 or less under the Act of 1952, P. L. 2087, 5 PS §21, held constitutional in *Smith Case,* 381 Pa. 223. (2) Trial without jury under proposed Supreme Court Rules 233 and 1048. (3) Pretrial conference, not widely used in this State, but furnishing several definite benefits. (4) Surveillance by the Supreme Court under Rule 77, based on voluntary monthly reports by lower court judges on the status of their undisposed cases. (5) Law school surveys, including those in progress at the University of Pennsylvania and the Chicago School of Law.

Judge Sweney also discussed four principal obstacles to disposing of trial lists: (1) Trial practitioners with many cases on each trial list. (2) Continuances by agreement of counsel, one lawyer usually being reluctant to force his opponent to trial. (3) Devices intended to expedite trial but in practice often used to delay it, e. g. rules covering preliminary objections, discovery and oral examination. (4) Tendency of both judges and lawyers to make unnecessarily long speeches in the course of trials.

[The full text of Judge Sweney's address appears in The Legal Intelligencer for May 2, 1955].

At the conclusion of Judge Sweney's address Chief Justice Stern expressed the view that problems of reform in the substantive law are far less pressing than those involved in the administration of that law, that is, procedural questions and the speeding up of litigation. He stated that a recent issue of the United

States Law Week had called attention to the Pennsylvania Arbitration Act and had expressed the editorial opinion that this State may have found an answer to the congestion of court calendars caused by the flood of small accident cases. He thought that the system of voluntary co-operation on the part of the judges in keeping their calendars up to date was more effective and more economical than the complicated and expensive systems in effect in several other states. He pointed to the fact that the percentage of judges turning in their monthly reports by the tenth of each month in accordance with Rule 77 had risen from sixty-one percent a year ago to eighty-six percent in the most recent month, while the remaining fourteen percent came in within three or four days after the 10th day deadline. Furthermore, the reports of April, 1954 showed a total of 246 cases in the hands of judges for sixty days or longer, while the latest month's reports showed only two of those cases still undisposed of and a current total of only 109.

The Chief Justice also mentioned that the University of Chicago survey had stated that out of 900 judges throughout the country regularly returning the survey's questionnaires only twenty judges in Pennsylvania had been doing so. He urged his hearers to cooperate as faithfully as possible with the survey.

Justice Allen M. Stearne expressed the hope that Congress would shortly bring about some simplification of habeas corpus proceedings, which would be of some aid in reducing general court congestion, and went on to register his approval of Rule 77.

General discussion was opened by Judge William H. Neely (Dauphin) who observed that arbitration had been very successful in his county, but that cases where

arbitrators had entered compulsory nonsuits had to be sent back to the arbitrators for definite findings. He also mentioned a recent instance where application had been made to his court for a certiorari from an award of arbitrators under the constitutional provision authorizing common pleas courts to issue certioraris to inferior courts. The Dauphin County Court of Common Pleas decided that the recent Arbitration Act was an amendment to the basic Arbitration Act of 1836, that arbitrators acting under the earlier act were not a court and that therefore arbitrators functioning under the later act were not a court. However, in view of the Supreme Court's liberality in *Delaware County National Bank v. Campbell,* 378 Pa. 311, allowing a certiorari to an administrative agency, Judge Neely wondered whether it would be inappropriate to issue a certiorari to a board of arbitrators actually functioning in a judicial capacity.

Justice John C. Bell, Jr. placed the high tribunal on record as being unanimously and enthusiastically in favor of expediting litigation and in favor of compulsory arbitration as a means to that end. However, he anticipated that sooner or later the constitutionality of court rules providing for compulsory arbitration might come before the Supreme Court of the United States. He urged the greatest of care in drawing such rules to safeguard within constitutional limits the right of trial by jury for the poor as well as the rich.

Justice Charles Alvin Jones agreed heartily that the right of jury trial must be protected but pointed out that in certain circumstances in civil cases it has been justifiably abrogated, as in Justice of the Peace proceedings involving no more than $5.33. He shared Justice Bell's view that a rule of court imposing disproportionate arbitrators' fees on small litigants

amounted to deprivation of trial by jury. Still, that only rendered the rule unconstitutional, not the act.

Justice Jones stated on the authority of J. Campbell Brandon, Esquire, president of the Pennsylvania Bar Association, that in his county of Butler some 500 cases had been arbitrated, not more than half a dozen had been appealed and in none of them had the arbitrators been reversed. In that county an appellant is not compelled to pay the arbitrators' fees if he can take an affidavit similar to a pauper's affidavit. Justice Jones was of the opinion that such fees should be taxed as costs against the loser.

Judge Herbert A. Mook (Crawford) reported that in two and one-half years of compulsory arbitration in his county, 154 cases had been arbitrated and 11 of them appealed. Six of the eleven were settled after appeal and in the other five the juries agreed with the arbitrators.

Supplementing Justice Jones' reference to the finality of magistrates' judgments, Chief Justice Stern observed that even the Constitution of the United States provides a minimum below which there is no constitutional right to jury trial in the provision that where the amount in controversy is over twenty dollars the right of trial by jury shall be as heretofore.

Judge Robert E. McCreary (Beaver) stated that in one and one-half years of compulsory arbitration in his county, 154 cases had been arbitrated, three of them appealed, two of the three sustained by the jury and the third still pending.

Judge Edwin O. Lewis (Philadelphia) announced that the common pleas court judges in that city were considering in their committee on civil business, of which he is chairman, the adoption of compulsory pre-

trial procedure, but were by no means sold on it as yet. He had found, contrary to Judge Sweney's experience, that preliminary objections were not normally used as a dilatory maneuver, but he had met with numerous attempts to abuse discovery machinery, such as petitions by defendants to require plaintiffs to divulge the circumstances surrounding the happening of accidents. If uncontrolled, this would amount to holding two trials and add considerably to the work of both court and counsel.

Judge Lewis expressed indecision as to whether compulsory pretrial conferences would encourage more arbitration and more nonjury trials. He was also of the opinion that the consolidated trial list and assignment room for all seven Philadelphia courts had increased rather than decreased delays between trials on the same day while the court waited for new counsel and new jury. Such delays were not encountered when ten or fifteen cases were assigned for trial in each courtroom at the beginning of the day.

Judge John McP. V. Diggins (Delaware) described the chief advantage in pretrial to be the opportunity to determine what necessary elements of evidence may be introduced without formal proof, thus saving time and money for litigants and potential witnesses.

Judge Harry M. Montgomery (Allegheny) said that the Common Pleas Court in that county is not too concerned with compulsory arbitration because cases involving less than $2,500 are usually transferred to the County Court. Nonjury cases are encouraged by persuading lawyers to waive findings of fact and conclusions of law. The saving of time then depends upon how long the judge may take to reach his conclusions. On the basis of his experience in conducting pretrials

Judge Montgomery had come to the conclusion that pretrial is workable if conducted by the judge who tries the case because then lawyers are more inclined to cooperate; also that there is not only a question of compulsory pretrial but of compulsory trial. After getting cases lined up at pretrial and ready for the trial itself there will be no postponement except for excellent reasons.

Judge Montgomery was further of the opinion that one of the best ways to reduce trial calendar congestion would be to compel lawyers to dispose of their cases. The big obstacle is the large number of cases in the hands of comparatively few trial specialists. His court is trying to induce such lawyers to employ more assistants or else to take fewer cases. This is enforced by refusing to accept excessive business as a ground for postponement.

Judge Montgomery stated that the practice in his county was to certify all cases under $2,500 to the County Court. He admitted that this imposed a considerable burden on the County Court.

The Chief Justice wondered whether that did not amount to sweeping the dirt from one part of the room to another and whether the Act could not be utilized even in the County Court.

Judge Henry Ellenbogen (Allegheny) believed that it could, but stated that the County Court's burden had not been greatly increased since a survey had shown that only about 200 cases were affected by compulsory certification, because few lawyers would admit that their cases were worth less than $2,500.

The Conference then adjourned for lunch in the Juvenile Court Building.

The afternoon session was opened by Judge William H. McNaugher (Allegheny) for a discussion of House Bill No. 75, as requested in a communication from the Pennsylvania Prison Society.

Judge McNaugher explained that this bill would require the release of a convict upon expiration of his minimum sentence without any discretion on the part of the Parole Board provided his conduct in confinement has been good, also that he should not be detained beyond the given time merely for lack of a sponsor.

Judge McNaugher said that the judges of his court approved of the provision for not detaining a prisoner for lack of a sponsor but that a majority of them did not believe in mandatory release upon completion of minimum sentence. Originally sentences were allowed to be for a straight maximum term, whereas the maximum-minimum now in effect cuts the sentence in half. This allows no real expression of the trial judge's thinking beyond the mere fact that he was imposing the maximum allowed by law, and not whether he felt that the whole maximum ought to be served. Judge McNaugher quoted Judge John J. Kennedy as favoring compulsory release after completion of the minimum provided that in addition to a good record of conduct a psychiatric examination would show the subject a safe risk to turn loose on the community. Judge Kennedy (Allegheny) corroborated that statement of his opinion. Judge McNaugher suggested that the Conference should recommend the defeat of the maximum-minimum provision in the legislature pending further study.

The Chief Justice called attention to the American Prison Society's concern that the bill violates the spirit and thought of the 1938 commission headed by the late Judge James G. Gordon, Jr. and would be likely to pass unless clearly opposed by the Conference. He ex-

pressed his own firm, though offhand, agreement with Judge McNaugher's stand, pointing out that the hardened criminals are more apt to appreciate the value of maintaining a good conduct record in jail than are the first offenders. The supreme test is whether the particular man can be released with safety to society. He advised against taking a formal vote for fear that it might be misleading. It would be preferable for judges to use their personal influence directly on individual members of the legislature. Justice Bell argued that the principal causes of the current crime wave were (1) maudlin sentiment, (2) laws providing for minimum sentences and (3) leniency of judges. He saw no need for further study of the question and moved that the Conference express its opposition to House Bill No. 75. The motion was seconded by Judge Bonnelly. The Chief Justice feared that if the Conference should undertake to register votes on a series of controversial questions it might cloud the spirit of the Conference and be misleading to the public; also that Judges not in attendance might be impelled to make public statements that they did not have a chance to vote. Justice Jones concurred with Justice Bell's sentiments but dissented from his desire to put the question to a vote. He feared that for the Conference to take a positive stand on anything might create the impression that it was an administrative body trying to make the very laws that the judges were later to pass upon. Possible exceptions might be questions directly affecting the judiciary, such as judges' salaries. The Chairman asked for a show of hands on the question whether motions similar to that of Justice Bell should be voted on. The result indicated that the sentiment of the meeting was against the taking of such votes.

The discussion of House Bill No. 75 being concluded, Judge W. Russell Carr (Fayette) took the

chair to preside over the remainder of the afternoon session. Judge Carr opened by asking whether there was any further discussion of Judge Sweney's address at the morning session.

Judge Leo H. McKay (Mercer) sought advice on how far a trial judge could go in limiting his discussion of the testimony in order to save time.

Chief Justice Stern ventured the suggestion that it was foolish to review in detail each individual witness' statements. If the judge misquotes a witness it may lead to a new trial. If he quotes him accurately it is only repeating what the jury has already heard. The Chief Justice thought that the trial judge should merely summarize the two opposing propositions and let the testimony as to each speak for itself.

Judge Charles S. Williams (Lycoming) spoke of two factors in the delay of trials that he thought might be more troublesome in the rural districts than in the larger centers, namely: (1) the difficulty in getting competent court reporters and (2) the apparent preference of "upstate" lawyers for trying before juries, the latter obstacle being perhaps remediable by appropriate legislation.

After ascertaining that there were no further thoughts on the subject of the law's delays, Judge Carr introduced Judge Vincent A. Carroll (Philadelphia), who presented a proposal to broaden the scope of the action for divorce.

Judge Carroll began by pointing out that the great increase in domestic relations litigation since the Second World War has underlined the inadequacies of the existing system, not only as to divorce but division of property and custody of children. It also raises questions of validity of wills, eligibility for social security

benefits, tort and contract liability and many others. In terms of a hypothetical case he described how a divorced couple, unable to agree on custody or support of their minor children or division of their joint property, including real estate, would be compelled to go through at least three separate court proceedings to have their respective rights adjudicated. (1) To settle custody, recourse must be had to habeas corpus in the Common Pleas Court under *Gard Appeal,* 356 Pa. 378 (1947). (2) If still no agreement is possible as to support of the children, another action must be instituted. In Philadelphia this must be in the Municipal Court, in Allegheny County in the County Court, and in other counties in the Quarter Sessions Court. (3) The most vexatious point of difference is likely to be the division of property, both real and personal and whether by the entireties or otherwise.

To resolve all potential contested features of a broken marriage five actions may be necessary: (1) divorce action in the Common Pleas, (2) custody action by way of habeas corpus, (3) support action in Philadelphia Municipal (or Allegheny County or Quarter Sessions) Court, (4) partition of real property held by the entireties under the Act of May 10, 1927, P. L. 884, 68 PS 501, and (5) accounting for other jointly held property, real or personal, by complaint in equity.

Judge Carroll concluded with a recommendation that a legislative committee be created to cooperate with a committee of the bar association to make a complete reappraisal of both substantive and procedural elements of the law of divorce with its attendant problems. [The full text of Judge Carroll's address appears in The Legal Intelligencer for April 22, 1955]

Upon the Chairman's throwing the subject open to discussion Judge Alexander C. Flick (Warren) com-

mented that in his county it is seldom necessary to litigate anything but the divorce, as attorneys are usually able to work out the collateral problems by agreement. He feared that consolidating all of them into the divorce action might remove the incentive to work by agreement and thus have the effect of increasing litigation. He agreed that bar association representatives should be included in any investigation or survey.

Judge Felix Piekarski (Philadelphia Municipal Court) criticized Judge Carroll's dissertation on two counts: (a) that it confused property rights with custodial rights, whereas a child is not a chattel, and (b) it assumed that the common pleas has jurisdiction of habeas corpus in custody cases simply because it has jurisdiction in divorce, whereas in Philadelphia the Municipal Court has always had jurisdiction in custody as well as in support cases. He strongly opposed the consolidation of custody into divorce cases because the common pleas court cannot properly determine the best placement of a child when the court's first contact with the family is on the occasion of its disruption; it is not equipped for continued probation and continued contact with the particular situation, whereas the Municipal Court judge who first hears a custody case has it under his charge for the rest of his days on the bench.

Judge W. Walter Braham (Lawrence) wondered whether Judge Carroll had, on the other hand, gone as far as he should have since he failed to consider the unfortunate division of judicial power among Pennsylvania courts. If the slate could be swept clean, he surmised that there would be one court of justice for each county with various divisions, including a domestic relations division. But he reminded Judge Piekarski that the judicial setup would have to be taken as it is unless and until the state constitution is rewritten,

also that most judges in this Commonwealth do not work under the situation existing in Philadelphia. Considering the rationale of the whole system, Judge Braham felt that Judge Carroll's position was essentially sound.

Judge Adrian Bonnelly did not disagree with Judge Piekarski but recognized the merit of Judge Carroll's recommendation. He remarked that his court, which is specially equipped to handle the whole gamut of family relationships, is continually faced with families already riven by divorce without benefit of adequate guidance from either the divorce court, the master or counsel. The Municipal Court then has to step in because the divorce was obtained too easily with no conception of the obligations devolving upon the parties thereafter, such as those of a father of two sets of children by successive wives. The situation is easiest in the smallest counties, where all phases of a domestic upheaval are heard by the same judge, although technically sitting in different courts for different purposes. Judge Bonnelly's solution as regards Philadelphia would be legislation transferring jurisdiction in divorce from the Common Pleas to the Municipal Court.

Chief Justice Stern interposed a word of defense for what Judge Carroll had referred to as the "doctrinaires" in the law schools, believing that academic surveys by persons outside the active profession could serve very useful purposes.

Judge Carroll expressed his regret for having offended Judge Piekarski and praised the work of the Municipal Court. He asserted that Judge Piekarski had misconstrued his talk and expressed confidence that a perusal of the printed version would change Judge Piekarski's opinion.

Justice Bell felt Judge Carroll's position to be theoretically sound but inquired whether Judge Carroll would favor entrusting the custody of children to masters in counties using the mastership system. Judge Carroll replied that he would not. He further observed that to his way of thinking divorce was too easy and that there was no such thing as illegitimate children or delinquent minors—only illegitimate and delinquent parents.

Judge Thomas L. Hoban (Lackawanna) asserted that the problem of consolidation of all domestic relations actions into one was not so acute in the smaller counties as in the larger centers due to the more closely knit court system in the former. He had long felt very keenly that since the State is an interested third party in every divorce action because of the social desirability of preserving the sanctity of marriage, the State should provide machinery for determining whether each action is founded on bona fide legal grounds and not on mere collusive agreement, as all too many probably are.

Judge Bonnelly reiterated his position, emphasizing that if the Municipal Court had jurisdiction in divorce as well as other phases of domestic relations, it would see to it that a prospective divorce plaintiff would be fully apprised of the problems that may follow divorce before taking the step.

The discussion of divorce procedure being concluded, the Chairman called upon Judge James C. Crumlish (Philadelphia) to bring up the subject of judicial salaries. Judge Crumlish began by calling upon Judge Harold L. Ervin of the Superior Court for a summary of the historical background.

Judge Ervin described how the only organized statewide judicial body functioning in the period between

the Sixth and Seventh Judicial Conference was the Conference of Juvenile Court Judges which held regular meetings at least annually and conjointly with the Pennsylvania Bar Association. An offshoot of this Conference was a committee that grew to over forty members as widely representative as possible, both geographically and politically. Under Judge Ervin as its chairman this committee made a practice of threshing out behind closed doors various problems of concern to judges, and, having reached agreement, taking action with a united front. One such problem was that of a judicial pension plan, which was finally worked out apparently satisfactorily to all judges.

At a meeting held this past winter a salary plan was also worked out and Judge Crumlish was appointed chairman of a legislative committee to obtain its passage by the legislature.

Resuming the floor, Judge Crumlish stated that judges' salaries had been reviewed by the legislature only twice in the past quarter century because unlike most other local officeholders the judges had no agreed program and no organization to act on a program if they had had one. He expressed confidence that the present legislature would bring about some reasonably satisfactory adjustment of both salaries and pensions for judges.

Judge Byron A. Milner (Philadelphia) stressed the necessity of unity among the judges as to both salary and pension plans in order to obtain the requisite legislative support. He admitted that when judges' salaries had last been under consideration by the legislature in 1952 some differentiation had been made between salaries of judges in different parts of the state because of geographical differences in living costs and in judges' work loads. The same differentiation has been

made in every other State in the Union—hence the proposal for a flat fifty percent increase for all. He expressed willingness to accept any plan that would satisfy all judges and concluded by pointing out the importance of adequate compensation as an incentive to able lawyers to accept judicial positions.

Judge Crumlish called for an expression of opinion on whether the salary increase bill should be supported in its present form and the majority answered in the affirmative. Judge Ervin believed that the meeting should go definitely on record and made a formal motion that the bill should be approved and supported. The motion was carried.

Judge Ervin made a similar motion as to the pension bill. It was seconded by Judge Bonnelly and carried unanimously. Judge Crumlish then introduced in succession Bernard G. Segal, Esq. and former Judge Charles E. Kenworthey. Both gentlemen related their largely successful efforts in championing the raise in federal judges' salaries as being of possible assistance to this Conference.

At the conclusion of Judge Kenworthey's remarks, Judge Crumlish announced that he had for distribution a supply of copies of the Philadelphia Chamber of Commerce resolution favoring the bills.

The Conference thereupon recessed until the following morning at ten o'clock.

The annual banquet of the Conference on Thursday evening, April 14, was addressed by the Honorable Carl V. Weygandt, Chief Justice of Ohio. [The full text of Chief Justice Weygandt's address appears in The Legal Intelligencer for April 21, 1955]

Drawing on his long experience as an advocate, as a trial judge, as judge of the court of intermediate appeal and finally as a member of the highest tribunal of his state, Chief Justice Weygandt discoursed informally on a variety of topics suggested to his mind by the title of his address, "Obiter Dicta". He expressed the earnest opinion that no system of judicial selection could operate properly, or as it was intended, if it would result in a court of final appeal on which no member had had any experience as a trial judge. He also emphasized the importance of both clear thought and clear expression among the tools of a judge. Two lessons that a new judge usually has to learn in writing opinions are, first, promptness in reaching and stating the dispositive question or questions and, second, willingness to quit when he has decided the case, resisting the temptation to discuss and determine additional questions that may only serve to unsettle the law and foment rather than reduce litigation. Chief Justice Weygandt concluded with a tribute to the great usefulness of the Conference of Chief Justices, organized in St. Louis in 1949.

The third session of the Conference was called to order on the morning of April 15 by President Judge Chester H. Rhodes of the Superior Court, as Chairman.

The Chairman opened by calling on Judge Sweney, who announced that the roster showed 147 judges in attendance at the Conference including six of the Supreme Court justices and all of the Superior Court judges. Forty-seven judicial districts were represented covering fifty counties. Judge Clarence E. Bodie had failed to arrive because his plane was grounded and

Judge W. C. Sheely was absent because of a death in his family.

Judge Edwin H. Satterthwaite (Bucks) announced that a luncheon of Orphans' Court judges would be held immediately following the close of this session, at which other interested judges would be welcome.

The Chairman then stated that the subject of this session would be "The Uniform Rules of Evidence", but, before proceeding to that, voiced two thoughts suggested to him by the previous day's discussions. Referring to Judge Carroll's suggestion that divorce, support and custody should be consolidated into one action, Judge Rhodes pointed to the lack of uniformity or consistency in the review on appeal of these three types of cases. He could see no valid reason for the diversity and felt it not conducive to an efficient administration of justice. In the matter of opinion writing by common pleas judges Judge Rhodes warned against summary dismissal or hasty disposition of habeas corpus applications as being productive of further litigation. He urged care in creating adequate records in the trial courts in order to facilitate review on appeal. He then introduced Judge W. Walter Braham (Lawrence) for a discussion of the Uniform Rules of Evidence.

Judge Braham in opening noted the fact that the law of evidence, standing midway between solely substantive and purely adjective law, becomes deeply ingrained in the habits of trial lawyers and hence is not easily changed. The shock in recent years has come, he said, from the courts' realization that they have been losing business to the administrative agencies, less firmly bound by form, precedent and the rules of evidence and yet to the apparent satisfaction of the pub-

lic. Judge Braham referred to several endeavors to modernize the law of evidence, including the Model Code of Evidence promulgated by The American Law Institute in 1942, designed as a statute, but never enacted anywhere. In 1948 the Commission on Uniform State Laws undertook to prepare a more acceptable set of evidence rules, which was completed in 1953. The new proposal is designed not for enactment as a statute, but for adoption as rules of court by the several State supreme courts. It is a statement of certain fundamental rules, not a codification of the whole law.

Observing that his commission from the Chief Justice was to inform rather than to convince, Judge Braham proceeded to summarize the 72 rules proposed by the Commission under the nine principal groupings that it had used, namely: (1) General Provisions, (2) Judicial Notice, (3) Presumptions, (4) Witnesses, (5) Privileges, (6) Extrinsic Policies affecting admissibility, (7) Expert and other Opinion Testimony, (8) Hearsay Evidence, and (9) Authentication of Contents of Writings.

Judge Braham observed that since evidence and procedure are closely akin the judicial power should include the power to prescribe the rules of evidence especially since much of the law of evidence is judge-made already. "The law," he said, "passes from the soft tissue of custom and tradition through the gristle of inference and presumption to the hard bone of law and the place where this metabolism takes place is in the courts." [The full text of Judge Braham's address appears in The Legal Intelligencer for April 27, 1955]

The Chairman having declared the floor open for discussion, Chief Justice Stern asked whether Judge Braham would interpret the uniform rules as justifying the Pennsylvania doctrine laid down for communist

conspiracy prosecutions, namely that the Communist Party objective of aiming to overthrow constitutional government by force is so universally well known that judicial notice may be taken of it, thus obviating long weeks of reading communist writings to the jury in every new prosecution.

Judge Braham replied that it would depend upon whether the true nature of the Communist Party had become perfectly apparent and understood by everybody, and he was of the opinion that it had. He said that under the uniform rules the court would notify counsel that he proposed to take judicial notice of the Communist Party as an international conspiracy and the issue would be fought out in the absence of the jury.

Judge Robert V. Bolger (Philadelphia) saw serious difficulties facing a judge in such a situation, endeavoring to balance national security against the rights of defendants and make an adequate record for purposes of appellate review.

Justice Bell inquired of Judge Braham whether the Supreme Court had power to promulgate rules of evidence that would in some instances fly in the face of certain State statutes in that field. Judge Braham pointed out that that was the same problem that was presented when the Rules of Procedure were adopted and that the legislature had specifically empowered the courts to nullify contradictory statutes. He repeated his earlier observation that most of the law of evidence was case law rather than statutory, so that the idea should not be too terrifying.

Judge Alessandroni felt that basically the theory of submitting the writings of acknowledged leaders of the communist cause to juries was a sound one. The

fact that the writings of Marx, Lenin, Stalin, et al. are generally accepted as immutable party doctrine, leaving no question of fact to be considered, is due to world conditions, not to some principle of law. Judge Braham agreed with that expression on the ground that Americans have been trained all their lives to think of the courts as open forums where all such matters are to be aired and developed in full public view.

Reverting to presumptions and burden of proof, Judge Theodore L. Reimel (Philadelphia) asserted that as to criminal actions in view of the strong presumption of a defendant's innocence, which is not overcome sufficiently to shift the burden of proof, an unfavorable comment on his failure to testify is rather dangerous. Judge Braham replied that if the power of showing previous convictions of felony should be withdrawn, the power of comment should be retained.

Judge Gerald F. Flood (Philadelphia) saw no serious doubt about the judicial power to make rules of procedure and evidence in either civil or criminal cases but warned that the basic consideration as regards criminal cases should be whether the proposed rules would affect any constitutional rights of defendants. He did not think that they would, especially since of late years numerous defenses have been habitually raised as virtually constitutional rights, although they actually are not. The presumption of innocence may be a constitutional right, but the right not to have it commented on is not of constitutional status.

Judge Alessandroni observed that although a court may not comment on a defendant's failure to testify, yet it may point out to the jury that the prosecution's evidence is not contradicted, which amounts to almost the same thing.

Chief Justice Stern stated that in his opinion rules of evidence had been developed along too technical lines which was not the case in England.

The Chair inquired whether there was anything else to come before the meeting, whereupon Judge Sweney (Delaware) asked whether it had been settled how often and in what time of year future conferences would be held.

The Chief Justice replied that beginning in 1957 the Pennsylvania Bar Association would hold its annual conventions in January instead of June and that they would be alternately in Philadelphia and in Pittsburgh. It had been suggested that the judges hold their conference in the same place as the Bar convention and either immediately before or immediately after it in order to facilitate judges' attendance at both. He was reluctant to express his own opinion on the question but was aware of some sentiment against holding judicial conferences as often as once every year.

Judge Leo H. McKay (Mercer) asserted that the conferences were too helpful to all concerned not to have them every year and suggested that they might be reduced to one-day sessions and omit the banquet.

On the motion of Judge John M. Davis, seconded by Judge Mark E. Lefever (both of Philadelphia), it was resolved that the conference be held every January in conjunction with the Pennsylvania Bar Association convention.

The meeting was then adjourned for lunch.

The fourth session opened in the afternoon under the chairmanship of Judge Karl E. Richards (Dauphin), who after a few preliminary remarks introduced

Judge James F. Brady (Lackawanna) as the principal speaker on the subject of Problems of the Orphans' Courts.

Judge Brady's address covered nine main topics. (1) Adoption under the Act of 1953; (2) Incompetents' estates under the Act of 1951, as amended in 1953, giving concurrent jurisdiction to both common pleas and orphans' courts, which Judge Brady felt should be exclusively in the latter; (3) Foreign Beneficiaries, especially those located in communist dominated countries; (4) Territorial Limit of a Citation; (5) Court approval of Fiduciaries' contracts under the Act of 1945, P. L. 944; (6) Jury trials in Orphans' Courts; (7) Procedure in settling small estates; (8) Fiduciaries' compensation and unconverted assets; and (9) Rights of the spouse of a deceased heir or devisee of real estate under sections 104, 547 and 734 of the Fiduciaries' Act. [The full text of Judge Brady's address appears in The Legal Intelligencer for April 25, 1955]

Following Judge Brady's talk, Judge Mark E. Lefever (Philadelphia) delivered a summary of amendments to existing legislation as proposed by the Advisory Committee on Estates and Trusts of the Joint State Government Commission.

1. *Orphans' Court Partition Act of 1917.*

Parts of the Fiduciaries' Act of 1947 covering distribution of real estate have rendered the Partition Act obsolete. It is therefore recommended that the Partition Act be repealed except as to the estates of decedents who died on or before December 31, 1949.

2. *Intestate Act of 1947.*

Since the Fiduciaries' Act of 1949 provided for the first time that real estate should be administered by

the personal representative, it was necessary to include in the Intestate Act of 1947, §§10, 11 and 12, procedure for appraisal and award of real estate when the spouse claimed an allowance or claimed the whole estate or when realty was distributable to the Commonwealth. Confusion has arisen in the decisions as to whether this procedure was mandatory or whether the realty could be awarded directly at the audit. The Advisory Committee recommends replacement of these three sections of the Intestate Act with three new sections that will clarify the power to award distribution of both realty and personalty at the audit under certain circumstances.

3. *Wills Act of 1947.*

It is recommended that §18 be broadened to enable a testator to appoint a guardian for property devolving upon the minor (1) by will, (2) through life insurance, (3) by an inter vivos transfer, (4) through a cause of action arising by reason of testator's death, (5) by death benefit payable by testator's employer or organization of which testator was a member or (6) through a tentative trust created by testator.

4. *Estates Act of 1947.*

Section 2 of this Act empowers the court to terminate wholly or partly small trusts for "failure of original purpose" in hardship situations regardless of any spendthrift or similar provisions. This section is prospective only and the Committee recommends that it be made retroactive as well.

Section 11 of the Act gives a surviving spouse power to treat certain inter vivos conveyances by the decedent as testamentary. Proposed amendments would expressly exclude life insurance, would require the surviving spouse to take against the will as well as against

the inter vivos conveyance and require the court in determining the surviving spouse's share in the estate to take into consideration "the then value of all interests given by the testator to the surviving spouse including insurance and inter vivos trust."

5. *Fiduciaries' Act of 1949.*

The size of a small estate to be settled by petition under §§202 and 731, and also the amount which can be awarded directly to a minor or his guardian under §1001, is recommended to be raised from $1,000 to $1,500.

Section 211 of the Act, providing that if there be no spouse, or if he has forfeited his rights, "such children as form part of the decedent's household" may claim the family exemption would be amended to read "such children as are members of the same household as decedent". Eliminating the requirement that decedent must have been the owner at his death would make the exemption available to a son or daughter to whom he had transferred title before his death but with whom he continued to reside until his death.

Judge Lefever stated it be the opinion of the Advisory Committee that there is no longer a need for the traditional "inventory and appraisement", because the value of most kinds of assets is readily ascertainable without the use of experts. An amendment is therefore proposed to §402 which would delete the word "appraisement".

The Advisory Committee is also of the opinion that the old "one year lien of debts" should be restored in place of the newer requirement of §732 applying the regular statute of limitations to debts insofar as they are potential liens against real estate.

A new §737 would in effect incorporate into the Fiduciaries' Act of 1949 the so-called "Iron Curtain Act" of 1953, P. L. 674, limiting awards to beneficiaries in Communist dominated countries.

6. *Fiduciaries' Investment Act of 1949.*

A proposed amendment to §12(3) would increase the amount of interest bearing deposits constituting legal investments in savings banks, etc. from $1,500 to the amount fully insured by the Federal Deposit Insurance Corporation, which is presently $10,000.

7. *Orphans' Court Act of 1951.*

It is proposed to amend the Orphans' Court Act of 1951 and the Incompetents' Estates Act to give the Orphans' Court exclusive jurisdiction over both incompetents' estates and trusts inter vivos on the theory that it is better equipped for the administration of estates in general.

As a member of the Advisory Committee Judge Lefever stated definitely that §746(c) of the act was intended to mean what it says in giving a jury verdict in a will case in the orphans' court the same effect as a jury verdict in the common pleas. However, many judges have doubted whether it actually changes the rule of *Stewart Will,* 354 Pa. 288, and *Williams v. McCarroll,* 374 Pa. 281, that the judge in a will contest has the power to set aside a verdict if it does not satisfy his conscience. This view expresses the fear that literal application of §746(c) would open wide the door to the rewriting of wills by juries. The Committee has decided to revert to the rule of the *Stewart* case by amending §§744, 745, and 746 to make the verdict conclusive only if the judge is satisfied with the justice of it on the basis of all the evidence.

8. *Statute of Accumulations.*

The Advisory Committee believes that the Statute of Accumulations has outlived its usefulness and should be replaced by a Statute against Accumulations with actualities rather than possibilities governing. It would exempt charitable trusts, pension trusts, provisions in trusts inter vivos and testamentary trusts that empower trustees to treat extraordinary dividends as principal rather than income.

9. *Suits Against Personal Representatives.*

There is a grave question whether the personal representative of a nonresident decedent can be sued here for injury or death to a Pennsylvania resident inflicted in Pennsylvania. The Committee recommends amendments to the Nonresident Motorist Act, The Vehicle Code and the Fiduciaries' Act of 1949 that would authorize the Secretary of Revenue to accept service of process either for the nonresident defendant or, in the event of his death, for his personal representative.

Judge Lefever concluded with a reference to a proposed amendment to §4 of the Wills Act of 1947. The Advisory Committee was about evenly divided on it, not because of doubts as to its merit but because of its radical departure from existing law. It would in effect invalidate any will executed after January 1, 1957 unless executed with all the formal requisites as to subscribing witnesses. He stated that virtually all jurisdictions in the English speaking world now require formal execution of wills except, in a few of them, for holographic wills. The hoped for result would be greater care and the seeking of professional guidance in the drawing of wills.

Judge Bolger offered several comments on Judge Lefever's address. He suggested that formal execution

with subscribing witnesses be required of revocations of wills also and that separation of will contest jury trials from other orphans' court jury trials, and expressed doubt about the constitutionality of §746 because it changed the right of trial by jury as it existed before the Constitution.

Judge Bolger described early efforts that he had made to bring about both Federal and State legislation against awarding inheritances to iron curtain citizens and pointed out that the present law applies reciprocally to all alien nations, not merely those under communist domination.

He described the method of administering the Iron Curtain Act in his court. An assignment from an iron curtain citizen is not taken at its face value but is subjected to the same burden of proof of its voluntarily origin that a direct award would be subjected to as regards the distributee's right to use and enjoy it himself. The person entitled to it then has the right to apply to the court at any time and establish such fact.

Judge Bolger concluded with an earnest recommendation to Judge Lefever that the Advisory Committee in connection with the proposed revocation of the Statute of Accumulations consider including in the list of exemptions the so-called cemetery trust in which the testator makes the amount excessive in order to circumvent the rule against accumulations.

The discussion of orphans' court problems having been concluded, Judge Robert E. McCreary moved that the addresses delivered at the conference be printed and sent to all judges in the State. He also hoped that someone would move a vote of thanks to the judges and ladies of Allegheny County for their hospitality.

Judge Homer L. Kreider (Dauphin) seconded the motion but wondered how the printing would be paid for.

The Chief Justice stated that the minutes would be printed in the Pennsylvania State Reports.

The Chairman asked leave to broaden Judge McCreary's motion to thank the Chief Justice for his indefatigable efforts, to the Associate Justices for their favor in attending, to the Pennsylvania and Allegheny County Bar Associations and to all others who contributed to the success of the meeting. The motion was unanimously carried.

The Chairman then turned the meeting back to the Chief Justice, who expressed deep gratification at the favorable reception given to the idea of holding annual conferences and also at the opportunity afforded to all the judges and justices to become personally acquainted with each other. Thereupon the conference adjourned.

EUGENE V. ALESSANDRONI,
Secretary