[J-186-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 43 EAP 2006
	:	
Appellant	:	Appeal from the Order of the Superior Court entered on July 6, 2005 at No. 2899 EDA 2003, reversing, vacating and remanding the Order of the Court of Common Pleas of Philadelphia County entered on August 20, 2003 at CP-51-CR-0606701-2001.
v.	:	
	:	881 A.2d 841 (Pa. Super. 2005)
RICHARD MCMULLEN,	:	
	:	ARGUED: March 7, 2007
Appellee	:	RESUBMITTED: October 23, 2008

COMMONWEALTH OF PENNSYLVANIA,	:	No. 44 EAP 2006
	:	
Appellant	:	Appeal from the Order of the Superior Court entered on July 6, 2005 at No. 1271 EDA 2003, reversing, vacating and remanding the Order of the Court of Common Pleas of Philadelphia County entered on August 20, 2003 at CP-51-CR-0606701-2001 and MC-51-0824791-2003.
v.	:	
	:	881 A.2d 841 (Pa. Super. 2005)
RICHARD MCMULLEN,	:	
	:	ARGUED: March 7, 2007
Appellee	:	RESUBMITTED: October 23, 2008

CONCURRING AND DISSENTING OPINION

With regard to the first issue, I concur in the result based solely on Commonwealth v. Sorrell, 500 Pa. 355, 456 A.2d 1326 (1982), which, as the majority explains, held broadly that "the right to trial by jury is not a 'substantive right,' but a right of procedure through which rights conferred by substantive law are enforced." Id. at 361, 456 A.2d at 1329.

Absent such precedent, however, I would construe Section 4136 of the Judicial Code as having significant substantive aspects and, thus, not violative of Article 5, Section 10(c) of the Pennsylvania Constitution. See PA. CONST. art. 5, §10(c); accord Sorrell, 500 Pa. at 364, 456 A.2d at 1330-31 (Nix, J., dissenting) ("The truth of the matter is that the right to trial by jury unlike most other rights is neither purely 'procedural' nor purely 'substantive,' but rather '. . . fall[s] within the uncertain area between substance and procedure, [and is] rationally capable of classification as either." (quoting Hanna v. Plumer, 380 U.S. 460, 472, 85 S. Ct. 1136, 1144 (1965))).

Furthermore, as I have previously expressed, both in gray areas between substance and procedure, and in matters that have not yet been occupied by this Court via its own procedural rules, I would allow some latitude to the Legislature to make rules touching on procedure, so long as such rules are reasonable and do not unduly impinge on this Court's constitutionally prescribed powers and prerogatives. Accord Commonwealth v. Morris, 573 Pa. 157, 187, 822 A.2d 684, 702 (2003) (Saylor, J., concurring).[1]

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[1] Notably, in Penn Anthracite Mining Co. v. Anthracite Miners of Pa., 318 Pa. 401, 178 A. 291 (1935), the Court considered a constitutional challenge to the precursor of the disputed statute -- the Act of June 23, 1931, P.L. 925 (as amended 17 P.S. §§2047, 2048), which, like Section 4136, provided for a jury trial and limited punishment for indirect criminal contempt to fifteen days and a one-hundred dollar fine. Indeed, the (continued…)

Here, I believe that Section 4136 is reasonable, since it operates as a constraint on the ability of a single tribunal to make a rule, adjudicate its violation, and assess its penalty, a power that at least one Supreme Court Justice has observed is "out of accord with our usual notions of fairness and separation of powers." International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 840, 114 S. Ct. 2552, 2563 (1994) (Scalia, J., concurring). For this reason, I also respectfully dissent with regard to the second issue, which is not controlled by precedent, and as to which the majority invalidates Section 4136(b) based on an inherent-powers rationale.

(…continued)
issue addressed in Penn Anthracite was, "[m]ay the Legislature grant the right to a jury trial for one charged with the 'indirect criminal contempt for violation of a restraining order' and limit the punishment?" Id. at 406, 178 A. at 293. In upholding the statute, the Court expressly rejected the assertion that it materially interferes with the inherent power of the judiciary, noting that similar restrictions on federal courts have not interfered with judicial administration. See id. at 411, 178 A. at 295 (citing Michaelson v. United States, 266 U.S. 42, 65, 45 S. Ct. 18, 20 (1924)). Although this decision did not consider the Court's exclusive rulemaking power under Article 5, Section 10 (as this section was not yet in existence), it found the statute governing indirect criminal contempt to be a valid limitation on the court's chancery powers. See id. at 411-12, 178 A. at 295.