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Volume 42  
Issue 1 *Dickinson Law Review - Volume 42,*  
*1937-1938*

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10-1-1937

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### Recommended Citation

S.A. Schreckengaust Jr., *Power of Supreme Court to Prescribe Rules of Practice*, 42 DICK. L. REV. 45 (1937).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol42/iss1/7>

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## POWER OF SUPREME COURT TO PRESCRIBE RULES OF PRACTICE

As enacted by the General Assembly and approved by the Governor on June 21, 1937, Act No. 392 is capable of producing complete revision of the rules of practice in the common pleas courts of Pennsylvania. The provisions of the act are briefly as follows:

Section 1. The Supreme Court shall have the power to prescribe by general rule the forms of action, process, writs, pleadings, and motions, and practice and procedure in civil actions at law and in equity for the courts of common pleas, provided such rules are not inconsistent with provisions of the Pennsylvania Constitution; nor abridge, enlarge or modify any substantive rights of the litigants or jurisdiction of any court; nor affect any statute of limitations. The provisions of this section do not apply to oyer and terminer, quarter sessions, or Orphans Courts. The Supreme Court shall make its rules effective not less than six months subsequent to adoption. Rules so adopted will be published by prothonotaries or clerks of county courts. "From and after the effective date of any rule promulgated under this section 1, and so long as said rule shall be operative, the operation of any act of Assembly relating to practice or procedure in such courts, and inconsistent with such rule, shall be suspended in so far as such act may be inconsistent with such rule."

Section 2 recognizes the power of common pleas courts to make rules not inconsistent with Supreme Court rules.

Section 3 and 4 provide that the Supreme Court is empowered to appoint a Procedural Rules Committee, and that judges, clerks, prothonotaries, and other court officials shall furnish the Supreme Court any information requested from them.

Section 5 gives the Supreme Court power to prescribe additional general rules for the purpose of expediting the business of the courts not otherwise specifically regulated by this act, and for the purpose of facilitating speedy and proper administration of justice. Rules regulating admissions to the bar of trial courts are not to be adopted.

Section 6, 7, and 8 provide for repeal of inconsistent acts, severability of sections in the event that any provision of the act is found to be unconstitutional, and immediate effectiveness upon final enactment.

Perhaps that part of the act which is most subject to comment is section 1 which specifically *empowers* the court to prescribe rules of practice and provides

that the operation of any act of Assembly relating to practice or procedure inconsistent with any rule adopted by the Supreme Court shall be suspended during the operation of the rule. It is submitted that such a sweeping provision is apt to lead to a controversy over the question of delegation of powers which necessarily embraces the question as to whether rule-making is a legislative or judicial function. Many courts have dogmatically laid down, by way of dicta, that the power to make rules is one which inherently belongs to the courts. Yet, one has merely to take cognizance of the volume of legislation directly relating to rules of court practice and procedure to become suspicious of the truthfulness of that dogmatism.

In 1931, a Wisconsin statute (St. 1929, No. 251.18) which contained provisions very similar to the Pennsylvania act considered in this discussion, was held to be constitutional. The court said in conclusion: ". . . It is concluded that the power to regulate procedure at the time of the adoption of the Constitution, was considered to be essentially a judicial power, or at least not a strictly legislative power, and that there is no constitutional objection to the delegation of it to the courts by the legislature."<sup>1</sup>

Dean Roscoe Pound recognized the truth of this statement: "Hence, if anything was received from England as a part of our institutions, it was that the making of these general rules of practice was a judicial function."<sup>2</sup> Dean Pound corroborates this statement by calling attention to the fact that in 1792 upon inquiry of the Attorney General, the Supreme Court of the United States said that the practice of the courts of King's Bench and Chancery in England would obtain for the time being, and "they will, from time to time, make such alterations therein, as circumstances may render necessary."<sup>3</sup> In regard to the adoption of rules by a high tribunal for subordinate courts, it is equally significant that the power to prescribe rules for nisi prius courts was an immemorial power of superior courts at Westminster.<sup>4</sup>

It would appear, therefore, that the power to prescribe rules of practice and procedure can be labeled judicial from an historical point of view,<sup>5</sup> and the fact that legislatures have performed this function for over a century does not afford ground for any constitutional objection when the legislature chooses to leave judicial procedure to the courts where it belongs.

It is submitted that the wisdom of the act under discussion cannot be doubted. The reasons given by Dean John H. Wigmore relative to this matter are inclusive and convincing:<sup>6</sup> (a) the judiciary is in a position to appreciate the needs; (b)

<sup>1</sup>In *Re Constitutionality of Section 251.18 Wis. Statutes*, 236 N. W. 717.

<sup>2</sup>"The Rule Making Power of the Courts" 12 A. B. A. Journal 599, 601-602; "Regulation of Judicial Procedure," 10 Ill. Law Review 171.

<sup>3</sup>2 Dallas 411.

<sup>4</sup>Symposium on Rule Making Powers, 6 Oregon Law Review 1, 49.

<sup>5</sup>*Wayman v. Southard*, 10 Wheat. 1, 43; *Bank of U. S. v. Halstead*, 10 Wheat. 51, 61; *State ex. rel Foster-Wyman Lumber Co. v. Superior Court for King Co.*, 148 Wash. 1; 267 P. 770, 771. 623 Ill. Law Review 276.

the judiciary is as nearly disinterested as any group could be; (c) the legislature is hampered by an inferior grade of knowledge; (d) the legislature often becomes the catspaw of intriguing lawyers; (e) the legislature necessarily can amend rules of procedure only spasmodically and tardily; and (f) the legislature invariably amends the rules by patching old rules, so that inconsistency and incompleteness are often evident.

Therefore, it would seem that the recent legislation is a step in the right direction which will ultimately result in cleaning up many anomalous situations which have developed under the series of acts and amendments enacted from time to time by the Assembly.

S. A. Schreckengaust, Jr.

### FURTHER REGULATION OF THE PRACTICE OF DENTISTRY

One of the crying evils of the dentistry profession, made such by those with low professional ethics and with little regard for the good name of dentistry as a whole, has been the vicious and over-emphatic use of advertising media to lure the unwary into dental chairs. The most severe criticism of such methods has come from members of the profession itself—from those concerned with the maintenance of professional standards that would insure both competency of the practitioner and protection for the more susceptible members of the public. The end of such deleterious practices has been assured by the passage of the Act of April 30, 1937, No. 136.

The act is very comprehensive in its listing of forbidden media of advertising, going beyond those practices heretofore considered as false, misleading or deceptive advertising. The act forbids the employment or use of solicitors or free public press agents; advertising by means of signs, posters, handbills, circulars, slides, motion pictures, radio, newspapers, magazines or other publications or advertising media—(1) professional superiority, (2) the performance of professional services in a superior manner, (3) the character or durability of his work, (4) to guarantee any dental service, (5) to perform any dental operation painlessly, (6) prices for professional services, (7) free dental work, (8) free examinations, or (9) by display of a tooth, teeth, bridge work, or any portion of the human head, or (10) by means of large, glaring or conspicuous light or other signs: Provided, however, That the foregoing shall not prevent the use of signs containing the name of any licensee and the word dentist, or any abbreviation thereof. The penalty provided for violations of the act is suspension or revocation of the license to practice.

It may well be imagined that those whose practice will be affected most by these provisions will assert the unconstitutionality of the act. The answer will be