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The Judiciary and the Rule-Making Power

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NOTES

THE JUDICIARY AND THE RULE-MAKING POWER

"If we would preserve free government in America, we must make free government, good government. Nowhere does government touch the life of the people more intimately than in the administration of justice; and nowhere is it more important that the governing process be shot through with efficiency and with common sense."[1]

I. INTRODUCTION

"Judicial administration" connotes many things to many people; suffice it to say that the term, relatively unknown one hundred years ago, is now a part of the vocabulary of almost everyone associated with the legal profession. Judge Stanley H. Fuld, Chief Judge of the Court of Appeals of New York, has succinctly summarized what judicial administration represents:

> The concept of judicial administration as an indispensable tool in the prompt and efficient disposition of judicial business has achieved wide acceptance in the United States. More and more, the Federal and State judicial systems have come to recognize that, although the operation of a court system may not be completely equated with the management of a business, there are many methods and procedures utilized in private enterprise that can be adapted to service the courts and thereby, the People. Trained administrators, data processing, computerization, in-service training programs, personnel structures, continuing objective and professional evaluation of court operations—all have a place in achieving betterment of the administration of justice, a goal we all seek.[2]

The goal is thus improvement in the process through which and by which the business of the courts is carried on; the tool, judicial administration.[3]

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1. Bennett, VIRGINIA LAW WEEKLY, DICTA, Vol. XIX, No. 7 at 4 (1966), *quoting from* 27 A.B.A.J. 71 (1941).

2. Fuld, *Introduction: Observations on Judicial Administration*, 36 BROOKLYN L. REV. 329 (1970).

3. "There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management." MANUAL FOR COMPLEX AND

There has been little disagreement as to the necessity for modernization of existing administrative structures, methods, and objectives, nor has there been a basic dispute as to the mechanics of such modernization. Where conflict has arisen is in the determination of who has the *power* to provide for the proper administeration of justice; who has the *power* to determine what changes are administratively necessary and desirable; who has the *power* to effect and implement those changes in court organization, structure, and personnel which are found to be judicially expedient. At the center of this controversy has been the rule-making power of the judicary—that is, the power of the courts to promulgate rules to provide for the proper and efficient administration of the business of the judicial branch of the government. Because this power—its existence, scope, and effect—is of such critical importance in any discussion of judicial administration, this note will examine the rule-making power of the judiciary as that power exists today.[4]

II. THE RULE-MAKING POWER

A. Source

In an often-quoted address before the Conference of Bar Association Delegates in 1926, Roscoe Pound, Dean of the Harvard University School of Law, referred to the four stages of judicial rule-making in England:

(1) rule by custom of the court;
(2) procedure governed by rules of court;
(3) procedure governed by legislative decree; and
(4) a return to procedure governed by rules of court.[5]

MULTIDISTRICT LITIGATION II (West Publishing Co. 1970) (for use with FEDERAL PRACTICE AND PROCEDURE by C.A. Wright and A.R. Miller).

4. For a discussion of the historical background of the rule-making power *see* R. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926) and A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 91-145 (1949), the latter of which contains a state-by-state analysis of the rule-making power of the judiciary. *See also*, Note, *Judicial Rule Making: Propriety of Iowa Rule 344(f)*, 48 IOWA L. REV. 919 (1963).

The scope of this note has been purposely limited to the subject of rule-making becaue of the vast wealth of scholarly materials dealing with statistical data pointing to the necessity for improvement in judicial administration and the mechanics of judicial administration.

5. R. Pound, *The Rule-Making Power of The Courts*, 12 A.B.A.J. 599 (1926).

The transition from the first stage to the second represented a mere maturation and formalization of court procedure. The second transition occurred because of a need for reform during a period when the legislative body enjoyed a position of ascendancy and acted where the judiciary had failed to act. The final transition—that is, a return of the rule-making power to the courts—took place when the legislative body recognized that the judiciary was peculiarly suited *and empowered*[6] to promulgate and implement its own rules of procedure to meet the changing demands of judicial administration.

Analogizing between the situation in England when the final transition took place and the situation in the United States in 1926,[7] Dean Pound called for a return of the rule-making power to the courts and the judicial branch in the United States because

> [e]xperience shows abundantly that regulation of procedure by rules of court is the way to insure a simple effective procedure, attained by gradual and conservative overhauling and reshaping of existing practice. It shows that in this way new demands upon the machinery of judicial administration may be met promptly by the ordinary means of legal growth instead of waiting vainly for years for intervention of the legislative *deus ex machina*.[8]

What Dean Pound recognized in 1926 was that conservative judicial rule-making could be more immediately responsive to the changing demands of judicial administration than could the slower legislative process which, though tempered by deliberation, can in many cases act only after a problem has existed for some length of time.

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6. Dean Pound declared: "In truth procedure of courts is something that belongs to the courts rather than the legislature, whether we look at the subject analytically or historically." *Id.* at 601.

7. While energetic in his call for a return of the rule-making power to the judiciary, Dean Pound urged restraint in pursuit of that goal:

> It may be that today, after seventy-five years of codes and practice acts and prolific procedural legislation, we can't go so far as to pronounce such legislative interference with the operations of a coordinate department unconstitutional.

Id. at 601.

8. *Id.* An excellent example of the judiciary's ability to overhaul and reshape existing rules of practice promptly so as to insure a sound and expeditious judicial process was the adoption of amendments to South Carolina Circuit Court Rules 44, 87, and 89 by the General Convention of Justices and Judges on August 28, 1970. Where the judiciary has the power to alter or amend its own rules of procedure—here, power granted pursuant to S.C. CODE ANN. § 10-16 (1962)—the judiciary can make changes required by judicial decision, legislative decree, or the demands of judicial administration in a prompt and efficacious manner.

With the above background—legislative preemption of the rule-making field, a call for a return of the rule-making power to the judiciary or an assertion of the inherent rule-making power of the courts by the judiciary, and a persuasive argument for exercise of the rule-making power by the judiciary—the basic problem remains: power. Who has the power to make rules of procedure for the judicial branch of the government? Because the constitution of each state must be the ultimate source of the judicial power in that state,[9] a general discussion of the rule-making power is of minimal value; rather, three examples of various types of constitutional situations may usefully be studied.[10]

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9. 21 C.J.S. *Courts* § 120 (1940).

> Except in so far as authorized by the constitution, the legislature cannot abolish, divide, reorganize, or consolidate constitutional courts *nor alter or diminish the essentials* of jurisdiction, functions, or *judicial powers conferred on such courts.*

Id. at § 122 (emphasis added). In the comment to the above, the commentator states:

> Hence, the universally recognized rule that, except in so far as it is authorized to do so by the constitution, the legislature cannot . . . abrogate or abridge their inherent powers or functions.

Id. at 182-83. Based on the above distinction, the court, in *Adams v. Rubinow*, 157 Conn. 150, 251 A.2d 49 (1968), distinguished between "constitutional courts" and "lower courts" and found that, as to the former, the legislature could make no rules of procedure but that, as to the latter, the legislature has full rule-making power. *Id.* at 171-72, 251 A.2d at 56.

S.C. CONST. art. V, § 1 provides in part:

> § 1. Judicial power vested in certain courts.—The Judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit: A Court of Common Pleas having civil jurisdiction and a Court of General Sessions with criminal jurisdiction only. The General Assembly may also establish County Courts, Municipal Courts and such Courts in any or all of the Counties of this State inferior to Circuit Courts as may be deemed necessary, but none of such Courts shall ever be invested with jurisdiction to try cases of murder, manslaughter, rape or attempt to rape, arson, common law burglary, bribery or perjury: *PROVIDED*, Before a County Court shall be established in any County it must be submitted to the qualified electors and a majority of those voting must vote for its establishment.

There would thus appear to be a similar distinction between constitutional courts and lower or inferior courts in South Carolina; whether the distinction holds true as to allocation of rule-making power has not been expressly decided.

10. Where the constitution of a particular state expressly grants and defines the rule-making power accorded to the judiciary under that instrument, the problem of rule-making *power* is relatively insignificant. The *extent* of such a grant of power would, of course, be determined by the constitutional provision. Consider the Alaska Constitution which expressly gives the supreme court the rule-making power but with the proviso that

First, where the constitution is silent as to the rule-making power and the court has refused to assert or recognize an inherent rule-making power, the legislature has either preempted the judiciary in the rule-making field and has codified rules of judicial procedure or has expressly granted rule-making power to the state courts by statute.[11] Thus, in *Fair v. State*[12] the Georgia court forthrightly acknowledged that its rule-making power stemmed from a 1945 legislative enactment and that the court possessed no residuary inherent powers which would authorize it to make rules governing its own procedure.[13]

Second, where the constitution of a particular state is silent on the subject of rule-making power and the legislature desires to return the rule-making power to the judiciary or the legislature has granted rule-making power to a court which has asserted its inherent power in the area, a compromise has frequently been reached. Content with possession of rule-making power, the courts have avoided friction between the different branches of government by a diplomatic assertion that the rule-making power is "neither exclusively legislative nor judicial"[14] or that such power is both statutory and inherent.[15]

Third, where the constitution is silent and the legislature has either

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"[t]hese rules may be changed by the legislature by two-thirds vote of the members elected to each house." ALASKA CONST. art. IV, § 15. In *Zeege v. Martin*, 379 P.2d 447 (Alas. 1963) the Alaska court stated:

> Judicial power to make rules of practice and procedure is not absolute. The legislature may change rules initiated by the judiciary when the desirability of making a change is evident . . . .

Id. at 450.

11. *See* Pan American Petroleum Corp. v. Texas Pac. Coal and Oil Co., 340 S.W.2d 548 (Tex. 1960) (where the court cites the legislative grant of rule-making power to the judiciary and states that such grant was made to aid in the administration of justice and to avoid unnecessary delay and expense in the judicial process).

12. 220 Ga. 750, 141 S.E.2d 431 (1965).

13. *Id.* at 752, 141 S.E.2d at 433. In *Fair* the Georgia court did, however, construe the 1945 enactment more liberally than it had in an earlier decision, *Wilson v. State*, 215 Ga. 775, 113 S.E.2d 607 (1960), and decided that under the legislative grant of rule-making power the court could make a rule governing motions for new trials in criminal cases. *Id.* at 752, 141 S.E.2d at 433. Thus, while the Georgia court has expressly held that it has no inherent rule-making power, the court has asserted itself under the legislative grant of power and has expanded the area in which the judiciary can exercise its power.

14. State v. Gibson Circuit Court, 239 Ind. 394, 399, 157 N.E.2d 475, 477 (1958). The court noted that the rule-making power was granted to the judiciary by a legislative body which wished to fix responsibility for promulgation of rules of procedure in one place. *Id.* at 400, 157 N.E.2d at 478.

15. Shettles v. State, 209 Tenn. 157, 352 S.W.2d 1 (1961).

failed or refused to grant rule-making power to the judiciary or has granted only limited rule-making power to the judicial branch, the courts have asserted their *inherent power* to make rules governing procedure. The New Hampshire court has stated its position in this manner:

> The inherent rule-making authority of courts of general jurisdiction in this state to prescribe rules of practice and rules to regulate their proceedings "as justice may require" has an ancient lineage supported by consistent custom, recognized by statute and enforced by numerous judicial precedents. . . . The matter has been succinctly summarized by a careful legal historian in the following language: "Thus, the rule-making power was firmly established over three hundred years ago. A statute in 1701 confirmed the ancient power which has never been lost." Page, Judicial Beginnings in New Hampshire, 1640-1700, p. 43 (1959).[16]

Perhaps the most cogent argument which supports an assertion of inherent rule-making power in the judiciary is that based on a separation of powers theory. In *Craft v. Commonwealth*[17] the Kentucky court examined the relationship existing between the legislature and the judiciary with respect to the rule-making power. The court stated:

> [I]t has generally been recognized that courts (even without express authority given by the constitution, statute, or rule of a supreme court of a state) have *inherent power* to prescribe rules to regulate their proceedings and to facilitate the administration of justice.
>
> . . .
>
> When we say that an express constitutional grant of rule-making power is unnecessary we do not mean that the rule-making power does not flow from that instrument. The fountain source of that power is in the act of division of powers among the three branches of the government . . . and the grant of judicial power to the courts by the constitution carries with it, as a necessary incident, the right to make that power effective in the administration of justice.[18]

The court concluded:

16. Garabedian v. Donald William, Inc., 106 N.H. 156, 157, 207 A.2d 425, 426 (1965).

17. 343 S.W.2d 150 (Ky. 1961).

18. *Id.* at 151 (emphasis added).

> Thus, the circuit court and this court have the power to formulate rules for the fair administration of justice *aside from additional grant or limitation by the legislature*.[19]

The assertion of an inherent rule-making power residing in the judiciary and flowing from a constitutional guarantee of separation of powers is an extremely appealing approach: first, the rule-making power of the courts would thus have a distinct constitutional base, and, second, the position of the judiciary as a separate, coordinate, and equal branch of government is enhanced by such assertion. Most important, the concept of a strong judiciary with adequate power to deal with its own internal problems of administration is fostered by such an approach.

As Dean Pound urged, there has been a return of the rule-making power from the legislature to the judiciary. The precise route, whether by legislative decree or by assertion of inherent power, is certainly not so important as the end result—a judiciary with the *power*, the rule-making power, to use the *tool*, the concepts of judicial administration, to achieve the *goal*, the betterment of the process through which the business of the courts is carried on.[20]

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19. *Id.* at 152 (emphasis added). While the Kentucky court asserted its inherent rule-making power even against possible limitation by the legislature, the court did recognize that on some occasions statutes and rules of court would conflict. *Id.* at 151-52. *See* Part II-E *infra* for a more detailed discussion of this problem. In deference to the legislature and statutory law several courts which promulgate rules under their inherent powers assert their power as did the West Virginia court in *State v. Davis,* 141 W. Va. 488, 93 S.E.2d 28 (1956):

> "Courts have inherent power and authority to prescribe and enforce rules and regulations for the conduct of their business in accordance with established procedure, not inconsistent with organic or statutory law, nor unreasonable, oppressive, or obstructive of common right."

Id. at 493, 93 S.E.2d at 31, *quoting from* Teter v. George, 86 W. Va. 454, 103 S.E. 275, 276 (1920).

20. In South Carolina the judiciary clearly possesses rule-making power, but whether the origins are purely statutory, purely inherent, or a hybrid species is somewhat unclear. In *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391 (1910), *aff'd* 240 U.S. 305 (1916), in holding a purported legislative conferral of judicial power on a state commission unconstitutional, the South Carolina Supreme Court delineated and defined the constitutionally guaranteed concept of separation of powers. The court decided:

> The Constitution ordains (article 1, § 14) that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." This language is as strong as it is simple and clear. The Legislature

> therefore cannot assume to itself the exercise of judicial powers. . . . Nor can it confer "judicial powers," in the sense in which those words are used in the Constitution, upon any other body than the Courts mentioned and provided for in section 1, art. 5 of the Constitution, which provides that "the judicial power of this state shall be vested in" the courts therein specifically mentioned and provided for.

87 S.C. at 290, 69 S.E. at 398. The court continued.

> It would be difficult to give an exact definition of the words "judicial power" as used in the Constitution, which would be applicable to all cases which might arise, and we shall not attempt it. The lines of demarcation between the powers of the three departments of government are often shadowy and illusive; but in the main they are clear, well defined, and well understood.
>
> The Constitution assumed the existence of an organized society, and when it vested the judicial power in the courts, it had reference to the judicial power then existing, and such as the people then understood to be vested in and exercised by the courts.
>
> There can be no doubt or difficulty as to those powers, which, from the earliest periods in the history of our constitutional forms of government, have been exercised by the courts in the *due and orderly* interpretation *and administration of the law.*

Id. at 291, 69 S.E. at 399 (emphasis added).

And in *Brown v. Piedmont Mfg. Co.*, 109 S.C. 343, 96 S.E. 138 (1918), the court, in overruling exceptions to the trial judge's overruling the defendant's motion for a new trial because the defendant made neither a motion for a nonsuit or for a directed verdict, declared:

> This Court has a right in the orderly conduct of business to frame rules as to how the question of raising points shall be made, and the manner in which they are to be first made, and in so doing it is not a denial of right, but simply a question of practice, *and inherently in the power of the Court to adopt.*

Id. at 347, 96 S.E. at 138 (emphasis added).

In spite of such an assertion of inherent power, the court has consistently held that rules of court must fall if in conflict with a statute, State v. Cottingham, 224 S.C. 181, 77 S.E.2d 897 (1953), and has consistently recited statutory authority for rules promulgated by the supreme court.

For relevant statutory sections, see S.C. CODE ANN. §§ 10-16, 10-17, 15-144, 15-231, 15-447, and 15-616 (1962).

In 1969 the South Carolina Supreme Court adopted seven additional circuit court rules; Professor James Dreher reports:

> On May 8, 1969, the Supreme Court Justices and Circuit Judges took a remarkable step forward by adopting seven additional Circuit Court Rules which, for the first time, allow effective pretrial discovery procedures in the South Carolina courts. . . .
>
> The authority for the promulgation of these rules is recited as Code Section 10-16, although it could be argued that some of them violate the limitation of that Code Section that rules adopted pursuant to it should not be "inconsistent with" the statutory law. . . . When the rules were announced there were a few speeches made in the General Assembly to the effect that the Court was exceeding its authority in adopting the rules, but no real effort was made to abrogate them.
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> The action of the Court is particularly impressive in that on several occasions in the past Bar Association groups have attempted to persuade

B. Scope

The general rule is that rules of court govern procedure and cannot affect substantive law.[21] Rules of court should logically be directed toward control of court procedure and matters of judicial administration; such rules should not be promulgated or used to deny to a party a substantive right created by the legislature.[22]

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the General Assembly to pass discovery statutes modeled on the Federal Rules and have failed in those efforts. The Court's unilateral move into a field which had been rather generally assumed to belong to the legislature, may be read as an intentional assertion, against challenge if need be, of the Court's inherent power to make rules as to all aspects of the conduct of litigation before it. We do not know, of course, whether the court intended to make this broad assertion of power or not, but, if it did, the doctrine is one which has always had the strong support of students of government. We are told that historically it was widely accepted and applied throughout the American States until Jacksonian Democracy brought in the ascendency of the legislature. Much has been written on the subject which it would be pointless to repeat. Most simply put, advocacy of the judiciary's inherent power to make the rules for conducting litigation rests upon two basic arguments, one a matter of principle and the other a practical one. The principle is the separation of governmental powers. The practical argument is that the judiciary, with its legal training and experience, would naturally know what procedures work best in litigation.

Our overall conclusion must be that substantial improvements in the administration of justice are possible in South Carolina under the present Constitution through wise rule-making by the Court itself. This is true no matter whether the power is an inherent one or one delegated by the legislature under Code Section 10-16 and similar statutes. The General Assembly shows no inclination to diminish its grants of this authority.

J. DREHER, STAGE ONE STUDY 77-79 (1971 (hereinafter referred to as DREHER). STAGE ONE STUDY is a currently unpublished report prepared for the Institute of Judicial Administration by Professor James Dreher of the University of South Carolina School of Law, with the assistance of Professor Glenn Abernathy of the University of South Carolina Political Science Department. The study is an excellent unbiased and critical report on "the court system now existing in South Carolina and the changes which may be effected in it, if found desirable, under three different documents: The present Constitution of 1895, the Judicial Article proposed by the Committee to Make a Study of the South Carolina Constitution, and the Model Judicial Article supported by the American Bar Association." *Id.* at 1. The STAGE ONE STUDY delineates various alternative changes which might be made in the judicial system of South Carolina with respect to (I) court structure; (II) judges; (III) administration; (IV) rule making; and (V) finances. *Id.* at 4-5. This report does not however, make recommendations as to preferable choices among the alternatives discussed; such recommendations are expressly reversed until a pending empirical study of the court system is completed. *Id.* at 1. STAGE ONE STUDY is here cited and quoted in part by and with the consent of the authors and the Institute, to whom the *South Carolina Law Review* expresses its appreciation.

21. *See, e.g.*, Richey v. Richey, 389 S.W.2d 914 (Ky. 1965). *See also* State v. Romes, 74 N.J. Super. 520, 181 A.2d 560 (1962).

22. *In re* Templeton, 399 Pa. 10, 159 A.2d 725 (1960).

In the procedural area, however, the rule-making power may *and should* be forcefully used to control the order, the flow, and the timeliness of the business before a particular court. Many articles have been written and speeches given decrying the inequities of a system of jurisprudence where a case may remain on a docket untried for two, three, or more years. Such argument need not be reiterated here; the point has been made over and over. Nor should one assert naively that the rule-making power is the one answer to the problems of judicial delay and crowded dockets. But the rule-making power is historically, logically, and properly to be used toward a solution to this problem.

In *Ham v. State*[23] the court, considering a request for trial of a certain case out of the regular order because of hardship, stated:

> Every litigant has a right to the trial of his case in the regular order and this is a "substantial right" . . . of which he may not be deprived arbitrarily without violating the due process doctrine . . . . Within this framework, and inherent in courts, is the power of the court to control the order of its business—"This power has been recognizd as judicial in its nature, and as being a necessary appendage to a court organized to enforce rights and redress wrongs" . . . .[24]

And in *William A. White & Sons v. Doelger*[25] the court, in denying a motion to vacate an order of dismissal after the plaintiff's counsel refused to accept an assignment of the case for trial,[26] declared:

> It is within the Court's inherent and statutory power to control the order of its business . . . and the assignment of the cases on the calendar cannot be subjected to the arbitrary acts of counsel.[27]

In *Holm v. State*[28] the Wyoming court, while recognizing that a court in the exercise of its rule-making power "cannot enlarge or abridge substantive rights,"[29] stated:

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23. 185 N.Y.S.2d 940, 18 Misc. 2d 356 (1957).

24. *Id.* at 942, 18 Misc. 2d at 358, *quoting from* Riglander v. Star Co., 98 App. Div. 101, 90 N.Y.S. 772 (1904), *aff'd* 181 N.Y. 531, 73 N.E. 1131 (1905).

25. 232 N.Y.S.2d 1 (1962).

26. Dismissal was ordered only after the case had been continued at the plaintiff's request from February 27, 1962, to April 16, 1962, to May 7, 1962, to May 16, 1962, to May 23, 1962. *Id.* at 3. See S.C. CODE ANN. § 15-142 (1962) (order and priority of hearing cases).

27. 232 N.Y.S.2d at 3.

28. 404 P.2d 740 (Wyo. 1965).

29. *Id.* at 743.

> Courts have inherent power to control the course of litigation and to adopt suitable rules therefor. . . . This means, of course, it is not within the power of the legislature to prescribe how courts shall perform their functions any more than courts can prescribe how the legislature or executive officers shall perform their functions.[30]

Thus, within the realm of procedural matters subject to the rule-making power—indeed, at the very heart of such matters—lies the complex problem of control of the order, the flow, and the timeliness of business transacted before a court.

Generally, the courts in the exercise of their rule-making power control matters of pleading, practice, and procedure.[31] The scope of the rule-making power, however, is defined largely by the substantive-procedural distinction, and only the more modern judicial articles prescribe precise lines between rules governing pleadings, those governing practice, and those governing procedure.[32]

C. *Substance v. Procedure*

Definition of a precise line between substance and procedure has always been difficult. In related areas apart from judicial rule-making, courts have proceeded on a case-by-case basis and have decided substantive-procedural issues within the context of a concrete factual situation. In the rule-making area, a similar pattern has developed

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30. *Id. See also* Robbins v. Campbell, 65 Ill. App. 2d 478, 213 N.E.2d 641 (1965) and People v. Lobb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959).

31. Professor Dreher categorizes judicial rules as follows:

> (1) Rules of administration—when courts will be held, what records are to be kept, what reports made, etc.;
>
> (2) Rules of procedure—the filing of pleadings, the conduct of the trial itself, the mechanics of the appeal, the final disposition of the cause, etc.;
>
> (3) Rules governing the practice of law—. . . ; and
>
> (4) under some modern judicial articles, such as the ABA Model, rules establishing the composition and jurisdiction of lower courts.

DREHER, *supra* note 20, at 73-74.

See also S.C. CODE ANN. § 56-96 (1962) which provides in part:

> The inherent power of the Supreme Court with respect to regulating the practice of law . . . is hereby recognized and declared. The authority conferred on that court in §§ 56-96 to 56-100 shall be deemed as cumulative thereto.

32. See Thews v. Miller, 255 Iowa 175, 121 N.W.2d 518 (1963) (where the court, noting that inferior courts cannot adopt rules contrary to supreme court rules in a particular state, can adopt local rules to govern areas in which supreme court rules are not applicable).

which makes particularized case study more desirable than generalized or abstract definitions.

In *Heat Pump Equipment Co. v. Glen Alden Corp.*[33] the court was faced with the issue of whether a rule relating to service of process was procedural and hence within the rule-making power of the judiciary. Using a separation of powers argument, the court announced that

> [r]ules of practice and procedure governing the courts have been considered in this State to be essentially judicial in nature, with the power to make them inherent in the courts on the basis of the State Constitution which distributes the powers of government among the legislative, executive, and judicial departments . . . and vests the judicial power of the state in the Courts . . . .[34]

The court then stated:

> "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[35]

Holding that a rule relating to service of process was procedural, the court noted, however, that even procedural rights might be *substantial* rights; thus, *substantive* and *substantial* would not always be exact equivalents.[36] Of importance, the *Heat Pump* court made emphatically clear that the rule-making power of the judiciary—the power to govern "procedure"—was not cut off merely because a matter of procedure was significant or substantial.

In *State v. District Court*[37] the issue before the court was whether a rule requiring service of a demand for jury trial upon the other parties was "one of procedure and . . . governed by the rules."[38] Answering in the affirmative, the court discussed the distinction between substance and procedure.

> Distinction between procedure and substance has not always been easy, as is amply demonstrated in Federal cases where the court was exercising jurisdiction solely because of the diversity of

33. 93 Ariz. 361, 380 P.2d 1016 (1963).
34. *Id.* at 363, 380 P.2d at 1017.
35. *Id.* at 364, 380 P.2d at 1017, *quoting from* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).
36. 93 Ariz. at 364, 380 P.2d at 1018.
37. 399 P.2d 583 (Wyo. 1965).
38. *Id.* at 585.

citizenship of the parties. 1 Barron and Holtzoff, Federal Practice and Procedure, §§ 8 and 138 (1960); 35A C.J.S. Federal Civil Procedure § 25. This is true in other fields, 52 C.J.S. Law, p. 1026; 1 C.J.S. Adjective Law, p. 1468. However, as bears upon matters such as the one before us, the statement in Kellman v. Stoltz, N.D. Iowa, 1 F.R.D. 726, 728 is significant:

> "* * * It may * * * be assumed that the term 'substantive law' is not mathematically exact, but as respects both the terms 'procedure' and 'substantive law' there is a possible twilight zone. Examination of many authorities leads me to conclude that substantive law as constitutionally, legislatively and judicially recognized, includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property, and quite generally as fixing the type of remedy available in case of invasions of those rights. As to the term 'procedure', I conceive it to include those rules and forms applicable in the administration of the remedies available in cases of invasion of primary rights of individuals in Courts or other lawfully constituted tribunals and agencies. Such rules include both pleading and practice, including all rules and forms which govern the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution. ***" More specific to the present question the court said in Ogdon v. Gianakos, 415 Ill. 591, 114 N.E.2d 686, 689, that "procedure" is the machinery for carrying on the suit, including pleading, process, evidence, and practice, and held that a statute relating to the proper method of obtaining jurisdiction in respective instances was a part of the law of procedure and not of substantive law. Similarly, in the case before us, the question of the requirement of serving upon the other parties a demand for a trial by jury is one of procedure and is governed by the rules.[39]

Again, a substantial requirement was involved, but one found by the court to be procedural in nature and subject to the rule-making power.

Another procedural area of increasing importance in both federal and state courts has been that of discovery.[40] In *Ames v. Ames*[41] the New Jersey court discussed the proper disposition of the rule-making power in such cases.

> Depositions are a form of discovery, and discovery falls into the field of *practice and procedure*, over which the Constitution of

39. *Id.*

40. See notes 8 and 20 *supra.*

41. 89 N.J. Super. 267, 214 A.2d 544 (1965).

> 1947 granted exclusive jurisdiction to the Supreme Court, entirely free from interference from the legislature, which latter body, however, still remains supreme in the making and changing of substantive law. . . . That grant of power, in Art. VI, Sec. II, par. 3 of the Constitution, stating that "The Supreme Court shall make rules governing . . . the practice and procedure in all such courts," effectively deprived the Legislature of the power to prescribe in which courts discovery should and should not be allowed. Such power is in the exclusive possession of the Supreme Court, which has in its rules given the deposition power to several of the courts . . . and at the same time impliedly denied it to this [juvenile] court by its silence.[42]

While the precise rule announced by the *Ames* court might not apply under state constitutions which reserve to the legislature control over inferior courts,[43] discovery is generally deemed procedural and subject to the rule-making power of the court, whether statutory or inherent.[44]

Slagle v. Valenziano[45] is a case which presents a closer question as to where the line between substance and procedure will be drawn. There, a trial court had, pursuant to statutory authority to adopt local rules, promulgated a rule which allowed the court in its discretion to dismiss a case without notice when a case had remained on the docket for four full terms of court without any action in the case.[46] The appellate court, while recognizing that there was early authority for dismissal for want of prosecution absent statutory grounds for such dismissal, relied on later authority and held that "a court has no inherent or common law power to dismiss an action except for lack of jurisdiction and . . . an involuntary nonsuit may not be ordered in the absence of statutory authority therefor."[47] Of significance, the court based much of its argument on the assertion that a substantial, if not substantive, right was abrogated by the rule.[48]

In a concurring opinion in *Slagle* one judge, however, distinguished the rule in question from a similar rule which would provide for notice before dismissal and a reasonable period for reinstatement after dismissal. He intimated that such a rule would not

42. *Id.* at 273-74, 214 A.2d at 548 (emphasis added).
43. See note 9 *supra.*
44. See note 20 *supra.*
45. 134 Ind. App. 360, 188 N.E.2d 286 (1963).
46. *Id.* at 362, 188 N.E.2d at 286-87.
47. *Id.* at 364, 188 N.E.2d at 287.
48. *Id.* at 365, 188 N.E.2d at 288.

only be valid but should be used to control the order of business in the various trial courts:

> I believe that trial courts should have some control over the "old dog cases" that have stagnated and clogged their dockets for long periods of time for reasons that are beyond and outside the knowledge of the trial court and unless the courts do have some control over such delinquent actions we would be saying in effect that such negligence, procrastinations, delays and laches in the pursuit of the prosecution of their causes of action must be rewarded.[49]

He continued:

> In most jurisdictions the right to dismiss for lack of prosecution is recognized as an inherent right of the trial courts. . . .
>
> "The elimination of delay in the trial of cases and the prompt dispatch of court business are prerequisites to the proper administration of justice. Those goals cannot be attained without the exercise by the courts of diligent supervision over their own dockets. Courts should discorage delay and insist upon prompt disposition of litigation."[50]

While the *Slagle* court may have been technically correct, the opinion of the concurring judge suggests that the line between substance and procedure may often be more accurately determined in rule-making cases by looking at the purpose behind the rule—" 'whether the rule really regulates procedure . . . .' "[51] If the rule "really regulates procedure" and is administratively efficacious, a court would do well to look twice before automatically classifying the subject of the rule

49. *Id.* at 368, 188 N.E.2d at 289 (concurring opinion).

50. *Id.* at 368, 188 N.E.2d at 289-90 (concurring opinion), *quoting from* Sweeney v. Anderson, 129 F.2d 756, 758 (10th Cir. 1942).

51. Heat Pump Equip. Co. v. Glen Alden Corp., 93 Ariz. 361, 364, 380 P.2d 1016, 1017 (1963), *quoting from* Sibbach v. Wilson & Co. 312 U.S. 1, 14 (1941).

See also, State v. Eighth Judicial Dist. Court, 79 Nev. 280, 382 P.2d 214 (1963) (rule-making power does not extend to questions of jurisdiction absent specific grant of power); Tiffany v. O'Tool Realty Co., 52 Del. 83, 153 A.2d 195 (1959) (rule requiring substitution of a proper party within two years of the death of a party under penalty of dismissal is a rule of procedure and within the rule-making power; where statute granting state court rule-making power is identical to statute grainting federal courts rule-making power, reasoning in federal cases is persuasive in question as to state court rules); and State v. Terry, 51 Del. 458, 148 A.2d 102 (1959) (rule fixing deadline for filing petition for recount of ballots is procedural and within the rule-making power of both courts and administrative tribunals).

substantive because of a prior determination in an area other than the rule-making area.

D. Power to Appoint Ministerial Officers

Corollary to the rule-making power of the judiciary is the power of the courts to appoint ministerial officers to aid the court in providing for the effective administration of justice. The power to make rules and the power to appoint administrative assistants and the like may properly be considered together, since both are necessary and desirable where the judicial branch of the government is to be strong enough to work toward improvement of the judicial system.

The Florida court in *Blitch v. Buchanan*,[52] discussing the power of the courts to appoint ministerial officers, stated:

> In view of section 27, article 3, of the Constitution, governmental functions requiring independent judgment, discretion, and authority can in general legally be exercised only by officers who are elected by the people or appointed by the Governor, unless otherwise provided or permitted by the Constitution . . . . There are exceptions to the above general rule, as, for example the statutory *and inherent power* of a competent court to appoint suitable persons to perform functions in the court or to execute its orders and mandates, when no officer is available for that purpose, to the end that the court may not be hindered or rendered impotent in the complete exercise of its judicial functions.[53]

And in *State v. St. Louis County*[54] the Missouri court, noting the inherent power of the judiciary as a separate, coordinate, and equal branch of government to "do all things that are reasonably necessary

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52. 100 Fla. 1202, 131 So. 151 (1930), *aff'd* 100 Fla. 1242, 132 So. 474 (1931).

53. 100 Fla. at 1204, 131 So. at 154 (citations omitted, emphasis added). The general rule has been stated in this manner:

> Apart from statute, a court of general jurisdiction, of record, or of last resort possesses the inherent power to provide the necessary attendants and assistants as a means of conducting its business with reasonable dispatch . . . .

21 C.J.S. COURTS § 142(c) (1940).

> "In addition, in the absence of contrary legislation courts have inherent power to provide themselves with appropriate instruments required for the performance of their duties, including authority to appoint persons to aid the court in the performance of special administrative or judicial duties."

Id. at § 140(a).

54. 451 S.W.2d 99 (Mo. 1970).

for the administration of justice,"[55] declared that the "court has inherent and constitutional authority to employ necessary personnel with which to perform its inherent and constitutional functions . . . ."[56]

The power to appoint officers to aid in the administration of justice is, however, meaningless unless there is some source of funding to pay the salaries and expenses of these officers. The *St. Louis County* court thus continued: "The court has inherent and constitutional authority . . . to fix the salary of such personnel, with reasonable standards, and to require appropriation and payment therefor."[57] The court stated:

> The right to appoint a necessary staff of personnel necessarily carriers [sic] with it the right to have such appointees paid a salary commensurate with their responsibilities. The right cannot be made amenable to and/or denied by a county council or the legislature itself. . . . The arm which holds the scales of justice cannot be shackled or made impotent by either restraint, circumvention or denial by another branch of that government.[58]

The Missouri court then held:

> When, however, conventional sources do not provide necessary funds, the court does have inherent authority to do those things essential to the performance of its inherent and constitutional functions.[59]

Once again, the better path lies in cooperation between the legislative, the executive, and the judicial branches of the government. While separation of powers serves a very practical purpose—that is,

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55. *Id.* at 101.

56. *Id.* at 101. *See In re* Walter Peterson, 253 U.S. 300 (1920) (power of federal district court to appoint auditor).

57. *Id.*

58. *Id.* at 102.

59. *Id.* The rule has been stated in this manner:

> Subject to statutory and constitutional restrictions, a court has *inherent* power to incur such expenses as may be requisite to the proper performance of its duties.

21 C.J.S. *Courts* § 14 (1940). In the comments to § 14 the commentator notes that a court cannot, however, remain open when funds have been exhausted in the face of a constitutional provision that prohibits municipal indebtedness beyond revenues for a particular year. *Id.* § 14 at 28. See also *State v. Becker*, 351 Mo. 769, 174 S.W.2d 181 (1943) where the court summarized:

> "The courts have the inherent powers and authority to incur and order paid all such expenses as are (reasonable) necessary for the holding of court

that of checks and balances—and while much of the inherent power of the courts is founded in such theory, "cooperation" among the branches of government is as basic a precept as is "separation," and mutuality of purpose best fosters the goals and objectives of each branch.

Thus, while there is assertedly inherent power in the courts to appoint ministerial officers, whether the power be inherent, statutory, or constitutional, the better rule would seem to be that stated in *Leahey v. Farrell*[60]:

> [While] [i]t is well settled that the legislature may not encroach upon the judiciary in the administration of justice . . . [c]ontrol of state *finances* rests with the legislature, subject only to constitutional limitations. . . . The function of the judiciary to administer justice does not include the power to levy taxes in order to defray the necessary expenses in connection therewith. It is the legislature which must supply such funds. . . . *But the successful and efficient administration of government assumes that each branch will cooperate with the others.*[61]

Through such a rule the judiciary loses none of its power of appointment but looks to the historical source of state funds, the

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and the administration of the duties of courts of justice." . . . The limitation on the courts' inherent power is that the expenses incurred or the thing done must be reasonably necessary to preserve the courts' existence and protect it in the orderly administration of its business.

Id. at 778, 174 S.W.2d at 183, *quoting from* Schmelzel v. Board of County Comm'rs, 16 Idaho 32, 35, 100 P. 106, 107 (1909).

60. 362 Pa. 52, 66 A.2d 577 (1949).

61. *Id.* at 54, 66 A.2d at 578-79 (emphasis added). *See also* Laughlin v. Clephane, 77 F. Supp. 103 (D. Col. 1947).

In South Carolina the supreme court has stated:

> It is fundamental that the appropriation of public funds is a legislative function, Const. 1895, art. X, § 9, and therefore beyond the power of the Grand Jury . . . . It is likewise beyond the province of the judiciary, perforce Article I, § 14 of the Constitution.

Gregory v. Rollins, 230 S.C. 269, 274-75, 95 S.E.2d 487, 490 (1956). In *Foster v. Taylor*, 210 S.C. 324, 42 S.E.2d 531 (1947) the court noted, however, that "[t]here is a reciprocal duty upon the legislature to respect the judgments of the court." *Id.* at 333, 42 S.E.2d at 536.

See S.C. CODE ANN. § 15-7.1 (1962) (whereby the Chief Justice of the Supreme Court is made the administrative head of all the courts in the state). See also S.C. CODE ANN. §§ 15-111, -112, and -113 (1962) (which govern appointment of a messenger and an attendant, a reporter, and a clerk respectively).

For an excellent discussion of court administrators—their history, use, and prospectus—see Bennett, VIRGINIA LAW WEEKLY, DICTA, Vol. XIX, No. 7 at 1 (1966).

legislature, for appropriation of monies to pay the reasonable and necessary expenses of appointive ministerial officers.

E. Effect

Where a court exercises its inherent or statutory rule-making power, what effect does the rule promulgated have? Basically, rules of court have the effect of law,[62] but, where a rule of court conflicts with a statute, the statutory provision will prevail.[63]

There is a line of authority among courts which have asserted their inherent rule-making power to the effect that rules of court prevail in spite of contrary legislation. In *Craft v. Commonwealth*[64] the court announced:

> "So long as the rules of practice fixed by the legislature accord with the proper and effective administration of justice, they should be, and they are, followed to the letter. No other rule will accord with the duty of each of the three branches of government so to coordinate its administration as to carry into effect the

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For proposed South Carolina constitutional provisions relative to court administrators, see FINAL REPORT: COMMITTEE TO MAKE A STUDY OF THE SOUTH CAROLINA CONSTITUTION OF 1895 art. V, § D (1969).

An interesting question in this area of *judicial power* is whether the judiciary can order physical facilities erected, modernized, or improved in an effort to improve the administration of justice. Consider the remarks of Chief Justice Walter H. McLaughlin of the Massachusetts Superior Court at the Midwinter (1971) meeting of the Massachusetts Bar Association.

> May I remind the County Commissioners that our Supreme Judicial Court is a constitutional court. It derives its powers, as does also the Legislative and Executive branches of government, from the people in whom finally rests all powers of government. The inherent power of the Court to manage the Judicial branch of government has never been severely tested in this Commonwealth. I do not profess to speak for the Supreme Judicial Court in the exercise of its power of superintendence of the entire Judicial branch of government. It is not, however, beyond the realm of probability that the day may come when, by reason of continued default of those vested by statute with authority to provide courthouse facilities, the Supreme Judicial Court may put on their hard hats and do the job themselves.

Address by Chief Justice Walter H. McLaughlin, Massachusetts Bar Association Midwinter Meeting, January 23, 1971.

62. Trahan v. Petroleum Cas. Co., 250 La. 949, 200 So. 2d 6 (1967); State v. Atterberry, 129 S.C. 464, 124 S.E. 648 (1924).

63. State v. Cottingham, 224 S.C. 181, 77 S.E.2d 897 (1953); Grecian Gardens, Inc. v. Board of Liquor Control, 2 Ohio App. 2d 112, 206 N.E.2d 587 (1964).

64. 343 S.W.2d 150 (Ky. 1961).

> purpose of the Constitution. Where, however, a situation arises in which the administration of justice is impaired or the general rules of practice are unworkable the duty undoubtedly rests on the courts to draw upon the reserve of their inherent power, not in the assertion of a domination over other co-ordinate branches of government, but in co-operation with the legislative and executive branches to carry out the purposes of the Constitution."[65]

And in *State Bar Association v. Connecticut Bank & Trust Co.*[66] the court, discussing separation of powers and rules governing the practice of law, declared:

> Courts acting in the exercise of common-law powers have an inherent right to make rules governing procedure in them. . . . The Supreme Court of Errors, established by the state constitution, likewise has the inherent power, *independent of and despite any statute*, to make rules governing procedure before it.[67]

Thus, the exercise of inherent rule-making power by the judiciary arguably carries with it a comparable supremacy of judicial rule over statute so long as the rule is within the power of the judiciary to make constitutionally.

What becomes of paramount importance where judicial administration is concerned is that the courts have not only rule-making power but rule-making power of sufficient breadth to allow the judiciary to act completely and coherently within the procedural sphere. The assertion of inherent rule-making power, based on the *Craft* type of case discussed above, provides a broader base for innovative rule-making; however, where a legislature sees the wisdom of abdicating all rule-making power to the judiciary and gives to the judiciary complete power to promulgate rules with respect to procedural matters, the same power base is provided while more harmonious relations prevail between the separate governmental branches.[68]

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65. *Id.* at 151-52, *quoting from* Burton v. Mayer, 275 Ky. 263, 267, 118 S.W.2d 547, 549 (1938).

66. 145 Conn. 222, 140 A.3d 863 (1958).

67. *Id.* at 232, 140 A.2d at 869 (emphasis added); *see also*, Heiberger v. Clark, 148 Conn. 177, 169 A.2d 652 (1961).

68. *See* Allen Steel Supply Co. v. Bradley, 89 Idaho 29, 402 P.2d 394 (1965) [where the legislature was held to have abdicated its rule-making power "'[i]n order to remove any conflict which would inevitably result from both the Legislature and the Supreme Court promulgating rules of procedure . . . .'" 89 Idaho at 43-44, (on motion for remittitur), *quoting from* State *ex rel.* Blood v. Gibson Circuit Court, 239 Ind. 394, 400, 157 N.E.2d 475, 478 (1959)].

F. Construction and Waiver

In *Perry v. Minit Saver Food Stores of South Carolina, Inc.*[69] the South Carolina Supreme Court enunciated a clear rule of construction to be applied to rules of court.

> It is the settled law in this state that where the terms of a statute are clear and free of ambiguity there is no room for construction and the courts are required to apply such according to their literal meaning. . . . We know of no sound reason why this principle should not apply to a court rule as well as to a statute.[70]

The rule announced has the advantage, first, of simplicity of application and, second, of having a parallel rule as to construction of statutes which should prove useful by analogy in cases of difficult rule construction.

Finally, while court rules of procedure are designed to facilitate and aid the prompt and efficient administration of justice and should not be used in a super-technical sense to do an injustice, waiver of court rules provides an escape route for the dilatory and negligent attorney. For this reason the sounder rule—both from a standpoint of administrative efficacy and judicial policy—is that reiterated by the North Carolina court in *State v. Kirby*.[71]

> The Rules of the Supreme Court have been dictated by experience and stem from a desire to expedite the public business. They are designed to enable the court to grasp more quickly the questions involved and to help it follow the assignments of counsel more intelligently. These rules are mandatory and will be enforced.[72]

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69. 255 S.C. 42, 177 S.E.2d 4 (1970).

70. *Id.* at 45, 177 S.E.2d at 4-5.

71. 276 N.C. 123, 171 S.E.2d 416 (1970).

72. 171 S.E.2d at 421. *See also* Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962). Speaking to the problems of local custom supplanting rules of court the Florida court well stated the applicable policy considerations:

> The orderly and efficient administration of justice compels the observance of rules of procedure to the end that aside from the interests of the parties litigant, the bench and bar may not be properly subjected to public scorn for the law's delay. As wholesome and desirable as any local custom may be to a happy rapport between members of the bar, they do not supersede the rules of practice and cannot be relied on to excuse the observance thereof.

Citizens Cas. Co. of New York v. Oaks, 167 So. 2d 233, 234 (Fla. 1964).

Under such a rule, waiver within the discretion of a court should be available only upon a showing of good cause why compliance with the rule could not be timely had.

G. *Sanctions*

In *People v. Mattson*[73] the court stated:

> [I]t is the duty of the court to safeguard and promote the orderly and expeditious conduct of its business and to guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings.[74]

Pursuant to this duty, a court faced with a violation of or failure to comply with a rule of court must have some sanction to use against the dilatory attorney or party. The contempt proceeding is the sanction most commonly recognized and used where enforcement by sanction is necessary.[75] Where a sound and continuing educational program which discusses and debates current and proposed rules and rule changes is available both at the law school level and at the bar association level, the necessity for other than infrequent resort to legal sanctions should be rare.

III. CONCLUSION

Under federal and state constitutions the right to a "speedy" trial is guaranteed to every citizen.[76] The constitution guarantees the right; the citizenry demands the right[77]—the judiciary must see to it that a

73. 51 Calif. 2d 777, 336 P.2d 937 (1959).

74. 336 P.2d at 948.

75. Pittman v. District Court, 149 Colo. 380, 369 P.2d 85 (1962); Cantillon v. Superior Court, 150 Calif. App. 2d 184, 309 P.2d 890 (1957).

76. S.C. CONST. art. 1, § 15.

77. In his State of the State address delivered to the South Carolina General Assembly on January 27, 1971, Governor John C. West said:

> In these days of new and growing pressures on our system of criminal justice, there must be no compromise in South Carolina with the principle that justice must be fairly and swiftly administered. To that end, I recommend that full administrative control of our state courts be placed in the hands of the Chief Justice of the South Carolina Supreme Court, said [sic] that he or his administrative assistant be authorized to take whatever action is necessary to provide immediate trials of cases, both criminal and civil. Believing that the prospect of a speedy trial and certain punishment is a major deterrent to a prospective lawbreaker, I recommend that we

speedy trial in all cases, both civil and criminal,[78] is provided to every person who becomes involved in the judicial process.

The rule-making power—whether inherent, constitutional, or statutory—is the power by which and through which the judiciary can act to improve and better the judicial process. Alone, the rule-making power is of minimal value; but, as part of an integrated and coordinated movement among all members of the legal profession—with cooperation with and from the legislative and the executive branches of government—the rule-making power becomes a singularly appropriate catalyst towards a sounder judicial model.

The goal—an improved judicial process; the tool—judicial administration; the power—the judicial rule-making power.

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establish a legislative mandate that every person accused of a crime be tried within 60 days after his indictment and that any appeals be disposed of expeditiously. The office of solicitor should also become a full time position.

The State, Jan. 28, 1971, § D at 1.

78. Davis v. Whitlock, 90 S.C. 233, 73 S.E. 171 (1911).