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## Practice and Procedure in the Court of Appeals

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# NOTES

## PRACTICE AND PROCEDURE IN THE COURT OF APPEALS

Few courts in our country have been called upon to do more work in recent years than the Court of Appeals of Kentucky. The large number of appeals coming before it, the practice of writing opinions in all cases and the earnest desire of members of the Court to maintain their standards of quality, have produced a situation which demands the thoughtful consideration of the people of this state.

At the annual meeting of the State Bar Association in 1938, Chief Justice Stites called attention to the difficulties confronting the Court in the disposition of cases. He gave figures which showed that, unless conditions could be improved, there was apt to be a diminishing amount of time to devote to records and briefs, with a resulting danger of ill-considered decisions. There would be, he said, no chance for relief unless some solution could be found for the Court's problems.

As a result of Judge Stites's address, a resolution was passed by the State Bar Association authorizing the president to appoint a committee of three members "to confer with the members of the Court of Appeals and the Clerk; to make such other investigation as may be necessary and proper; and to report its finding and recommendations to the Board of Bar Commissioners." The president of the State Association appointed Judge Richard C. Stoll, of Lexington, Mr. Henry E. McElwain, of Louisville, and Mr. Harry B. Mackoy, of Covington, to serve on such a Committee, Mr. Mackoy being designated as chairman. The following resume of the Committee's activities, and its recommendations should be of interest to all lawyers in the State:

### STATEMENT OF THE COMMITTEE

Gentlemen :

The Committee, since it was appointed, has made two reports containing recommendations which, under guidance of the Court

of Appeals and with its cooperation, have brought about the following helpful changes:

1. The rules of the Court have been revised in certain respects, so as to clarify procedure, to facilitate and expedite the handling of appeals, and to protect the Clerk in the care of records and collection of costs. The revised rules were published in the docket for the Fall term of the Court of Appeals.

2. An index system has been devised and installed, whereby all cases are now numbered and a record of them kept in such manner that the condition of the docket and status of cases thereon can be easily ascertained by the Judges, the Clerk and the Sergeant at Arms.

Steps are being taken to furnish more adequate filing facilities for the safe-guarding and preservation of records in the Clerk's office, which hitherto have not been kept in fire-proof receptacles.

The Committee is, likewise, expecting to prepare and present to the next regular session of the General Assembly a bill to provide a law clerk for each Judge and Commissioner of the Court of Appeals, which clerk shall be required to possess such education and experience as will enable him to render real assistance in the consideration of records and briefs so that opinions may be more rapidly prepared.

A suggestion having been made that an intermediate appellate court be established, which would have final jurisdiction in certain kinds of cases, the Committee has given careful thought to the advisability and feasibility of this step. However, the desirability of such a court appears to be controversial and demands an extensive investigation of methods and results in the states where intermediate courts exist. Furthermore, in order to secure such legislation, it will be necessary to have an amendment to the Constitution, which, judging from past experience, is difficult to obtain.

Under these circumstances, the Committee has turned its attention to the possibility of effecting desired changes in practice and procedure through rules of court. In its last report to the Board of Bar Commissioners the Committee recommended the study of such a plan, and authority was given to so proceed. The result of those studies is now submitted for consideration.

The recent adoption of new Rules of Civil Procedure in the Federal Courts has stimulated and revived interest in this question, but it is by no means new to either the courts or lawyers of our country. For many years there have been direct and

indirect attempts to confirm or grant the power. Some courts have in fact taken the position that they had the inherent right to function under self-made regulations, and without interference from executive or legislative powers. A recent writer<sup>1</sup> says that for five hundred years the British courts developed in that manner. It was only during the later half of the 18th century, when life began to be more complex with the coming of the Industrial Revolution, that "the clumsy machinery of the courts was generally recognized as being out of date". And in the following century, through the efforts of the learned Jeremy Bentham and other distinguished jurists, there was a reform which the judges themselves sponsored. The Judicature Acts of 1833, 1852, and 1873 were all framed so as to recognize the right of "the courts themselves to make rules of procedure, uniform for all courts".

In our country the prevailing practice has been otherwise. The author just quoted explains the reasons for this difference as follows:<sup>2</sup>

"In the United States, until recently, the policy has been to prescribe rules of practice by legislative enactment. \* \* \* the courts in England were integrated at the time the American Bar was being formed, but in this country, from the beginning, lawyers were, in common with the American character, highly individualistic. In their development of our system of courts and judicial administration, their efforts and activities were carried on in that manner. As soon as independence from the mother country was established, the lawyers who reached positions on the bench and who were elected to legislative bodies took charge of the development of our judicial system. That in America, alone among all the English-speaking countries of the world, despite our emphasis upon constitutional division of powers, procedure in the courts was regulated by legislative enactment, is a paradox for historians to ponder."

To such an extent has this legislative influence been manifested that in some states provision has been made in their constitutions for a Code to be formulated by the law-making body rather than by the Supreme Court. As a result, in New York State, where such a constitution was adopted in 1846,<sup>3</sup> the practice, pleading and procedure were required to be fixed by the legislature (the "Field Code" was adopted in 1848). Later in the states of Indiana, Ohio and Wisconsin similar

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<sup>1</sup>"A Task for the Rule-making Authority of North Carolina" by Frank E. Winslow, American Bar Association Journal, August, 1938, page 647, etc.

<sup>2</sup>Same as Note 1 above, page 648.

<sup>3</sup>New York Constitution, 1846, Article VI, Section 8.

action was taken, so in those states they have had legislative Codes (adopted in 1852, 1853 and 1856, respectively) partly because there has been a constitutional limitation upon the rule-making power of the courts. And in the statutes of those states such a restriction has to be taken into account in conferring this power. For instance in a proposed Act recently drafted by the Committee on Procedure of the Ohio State Bar Association to confer the power on the Supreme Court of that state, is the following provision: "Nothing in this act shall abridge the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice and procedure".

This policy of having court procedure regulated by legislators has frequently resulted in a patchwork of confused rules, or has permitted a small group of lawyers, who were not elected because of special competence in the field of judicial administration, to become the rule-making authority. The members of law-making bodies who have not been legally trained have left the determination of all questions involving the courts to those who are presumably qualified. Unfortunately, the men so delegated have not often had experience in such matters, have not held office with any continuity, and have frequently been lacking in competent advisers. The result has been that the courts of the United States have been greatly behind those of England in the efficient disposition of their calendars.<sup>4</sup> Consequently, they have been criticized for delays, for faulty opinions and for causing cumbersome and expensive litigation, when these conditions have not always been their fault. Such situations have arisen simply because courts are being forced to work with antiquated tools, furnished by a totally different department of the government, without a fair opportunity to meet the problems confronting them.

It does not seem possible to state exactly when the various states began to seriously consider the need for having the rule-making power reposed in the courts. There appear to have been considerable confusion and uncertainty as to the distinction between rules of practice and those relating to procedure or pleading. Most of the early constitutions and legislative acts which attempted to grant or confirm the power apparently related to questions of practice. These were intended to govern

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<sup>4</sup> Same as Note 1 above, page 648, etc.

“the dispatch of the courts’ business”, such as the manner of filing papers, making arguments, preservation of discipline, and similar details. They were looked upon as necessary to the preservation of the court’s dignity and integrity and to expedite the hearing and decision of cases. In fact, as we have indicated, some courts assumed the right to prescribe rules of this character as a part of their inherent power, and later the right was recognized by statute. Such was the case in Alabama, where the Supreme Court announced its power to make such rules as far back as 1838<sup>5</sup>, although the Legislature did not confirm that stand until 1923, at which time it also granted the court “full plenary power \* \* \* to adopt such other rules to regulate the practice and proceeding in all courts of the state, or such modifications of existing rules as they may deem proper.”

At least as far back as 1875 certain states began to give their supreme courts the power to make rules of procedure, as well as those of practice. In that year Missouri by its constitution specifically vested the power in its Supreme Court to “have a general superintending control over all inferior courts.”<sup>6</sup> In 1879 the Connecticut legislature passed an act granting the Judges of the Superior Court power to make all such orders and rules as should be necessary and proper to give full effect to the earlier Act to Simplify Procedure in Civil Causes.<sup>7</sup> By constitutional enactment in 1889 the State of Idaho conferred the rule-making power on its Supreme Court as to procedure *in that court*.<sup>8</sup> From that time to the present there has been a steady trend in the direction of greater amplification of such powers, as well as an increasing number of states where the powers have been created either by constitution or statute or upon the basis of the courts’ inherent rights.

The language of the earlier, as well as some of the later, provisions in both state constitutions and statutes was occasionally rather guarded, and it was not always possible to determine whether the power conferred by them was applicable to practice and procedure, or to practice alone. For instance in New Mexico, which now has a modern and up-to-date law, the

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<sup>5</sup> “The Rule-making Power of the Courts in the Several States”, issued in 1927 by the Committee of the Conference of Bar Association Delegates of the American Bar Association, page 5.

<sup>6</sup> Same as Note 5 above, page 65.

<sup>7</sup> *Idem*, page 17.

<sup>8</sup> *Idem*, page 27.

language of Section 4258, of its Statutes Codification of 1915, simply provided that:

"The Justices of the Supreme Court, and until they act, the Judges of the District Courts, respectively, may make such rules as may be necessary and applicable to proceedings under the provisions of this chapter."

Under such acts, or similar ones, many courts did not proceed very far in the adoption of rules. In a few jurisdictions it would appear that the judges did not want to exercise the powers conferred, or did not have a clear conception of their duties and rights. It is possible that in others there was not the machinery to properly formulate new rules or to revise the old ones. These conditions have now been met in several states by the establishment of Procedural Rules Committees, which occasionally possess secretarial staffs. Such committees are in some instances created by statute, but are more frequently appointed by the courts. Quite often the Judicial Council, where such a body exists, functions as such a committee. It has been through them, and with the intelligent assistance of various state bar associations, that the movement has been growing for a still greater extension of the rule-making power of the courts.

As a result of this movement, in 1926, at the Denver meeting of the Conference of Bar Delegates of the American Bar Association, a resolution was adopted, providing for the creation of a new committee of the Conference, to be known as the Committee on the Rule-Making Power of the Courts. That Committee under the leadership of Josiah Marvel, leader of the Delaware Bar, and comprising in its membership such men as Roscoe Pound, of Harvard, and Edson R. Sunderland, of the University of Michigan, made an exhaustive study of the subject. It may be well to quote some of the conclusions which they reached and the reasons given for their conclusions.<sup>9</sup>

As to the main objective, Professor Sunderland says: "The regulation of legal procedure under the control of the courts, has the double purpose of saving the public from the burden of an utterly inadequate system of justice, and of rescuing the profession from the undeserved charge of responsibility for that inadequacy \* \* \* While we have welcomed and encouragd the services of experts in every other field, we have never permitted

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<sup>9</sup>American Bar Association Journal, Part II, No. 3, Vol. 13, page 1, etc.

legal experts to control the complex machinery of our courts." On the other hand, "new tribunals supplementing the courts, whether strictly judicial, or partly administrative, have in almost every instance enjoyed the benefit of regulation by those who are specialists in the work."

Comparing our country with England, Charles S. Cushing writes: "During the long history of English law, Parliament has at no time attempted to enact a full legislative code of procedure \* \* \*. The restrictions (in this country) on the Courts are those of a by-gone era and, I submit, have been discredited by experience".

Another member with a similar name, Charles S. Cutting, comments: "When one considers the care with which the great departments of our government, both federal and state, are separated, each one of which is, as far as may be, independent of the other, we may well wonder how it ever came about that the legislative and the executive so far trespassed upon the prerogatives of the courts as to prescribe the rules relating the pleading, practice and procedure of the courts themselves."

Professor Pound's remarks are too voluminous to quote, but he stresses the increased flexibility, the greater expedition and the more sympathetic interpretation of the law by a court which can regulate its own procedure. "No one", he states, "is so well qualified as the judiciary to determine what experience requires and how rules are working."

Chairman Marvel himself dwells largely on the advantages of the English court procedure, where "we see a Rules Committee clothed with the power and responsibility of keeping them abreast with the growth of the substantive law." On the other hand in more than half the states of our country we see an iron hand reaching out "from the state capitals to command in what manner the administration of justice may proceed". "I concede", Mr. Marvel adds, "the right of the Legislative branches of Government to say what Courts may do, but I object when they attempt to say how the Courts shall do it."

The foregoing quotations have been given in order to show how the foremost men of the bar are regarding this important subject, and to explain the reasons for studying it. Arthur T. Vanderbilt, president of the American Bar Association last



year, in an address at the Cleveland meeting, July 6, 1938,<sup>10</sup> listed the granting or confirming of the rule-making power to higher courts in six states as one of three major improvements in the administration of justice within a ten-year period. And the new president of that Association, Mr. Frank J. Hogan, has just appointed in every state special committees on Procedural Reform, which committees are expected to take up this question as the first and most vital matter for their consideration. In his letter of appointment the president says:

"If the highest court of your state does not now possess the rule-making power, I suggest that the greatest service your Committee could render would be to have your legislature pass an act conferring that power on your court of last resort".

The gentlemen appointed to the Procedural Reform Committee for Kentucky are those already serving on the State Docket Committee and the following:

Robert T. Caldwell, Ashland  
Charles I. Dawson, Louisville  
Frank M. Drake, Louisville  
Shelley D. Rouse, Covington  
Mac Swinford, Cynthiana  
Simeon S. Willis, Ashland

Mr. Mackoy has been designated by Mr. Hogan to act as Chairman of his committee.

Despite the foregoing indorsements of prominent jurists, it has seemed wise to your committee, as a part of its investigation, to verify to some extent the statements which have been made concerning the need for granting or confirming the rule-making power to the courts and to ascertain the results accomplished thereby. Accordingly, first-hand information has been sought in the states where the power has been exercised. This has been done through letters and questionnaires addressed to secretaries of state bar associations, lawyers and clerks of the courts. In the somewhat limited time at its disposal, the committee has not been able to exhaust the sources of information, but the results may be briefly summarized as follows.

Fifteen states have been definitely reported as functioning under such a plan, and eleven of them have responded to our

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<sup>10</sup> Journal of American Judicature Society, Vol. 22, No. 3, October, 1938, page 117.

inquiries. In all of the latter the power to make rules has apparently been confined to matters of practice and procedure and does not cover pleading. In one of the eleven, South Dakota, though the power has been recognized as being inherent in the courts, it had not yet been exercised up to December 31, 1938.<sup>11</sup>

The sources of the power are said to be legislative in nine states; both constitutional and legislative in two; inherent in the courts in one; and of doubtful origin in one.

In eight of the states the rules promulgated have been suggested or formulated by a committee, which has usually been appointed by the state bar association or the court; and in two instances the rules have been formulated on the court's own motion. In South Dakota, as stated above, there had been no rules announced up to December 31, 1938, but it was said they would be "about January 1". They were being prepared by a Code Commission of three members created by act of the Legislature in 1937.

As to the results, in all but three states the lawyers and judges were reported to be pleased with the exercise of the rule-making power by the courts, and in the remaining three the opposition or criticism directed towards it had been negligible. The attitude of most members of the legal profession is expressed by the Secretary of the New Mexico Association, who writes that: "The bench and bar generally favor the exercise of this power. *Occasionally* some lawyer has a complaint". The committee has been advised of only one case where the opposition took an aggressive stand. In Wisconsin an action was brought to test the validity of the Act conferring the power, but the Act was upheld.<sup>12</sup>

The committee has felt that special consideration should be given to the situation existing in our own state of Kentucky, in order to ascertain the need for the rule-making power in the Court of Appeals, and to determine the possibility of securing legislation to grant or confirm it, if necessary. A careful study

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<sup>11</sup> Since the date mentioned, Judge Van Buren Perry, of South Dakota, Chairman of the Committee on Rules of the Judicial Council of that State, has shown us the first proofs of revised codes to be submitted to the Code Commission, which will in turn report them to the Supreme Court of South Dakota, to be acted upon by the next legislature. These codes constitute a most important and valuable achievement.

<sup>12</sup> *In re* Constitutionality of Statute Empowering Supreme Court to Promulgate Rules, etc., 204 Wis. 501, 236 N. W. 717 (1931).

of the question was made by the Efficiency Commission of our state in 1923, and its report on the Judiciary, published December 31st of that year, contains some valuable suggestions. Referring to the relative merits of legislative or judicial control of procedure, it said:<sup>13</sup>

"Speaking broadly, the legislative method has failed, whereas the judicial method, through rules of court, has been highly successful. In a majority of the States of the Union there has been incessant criticism of procedural rules, both in code States and in common law States, and constant tinkering by legislatures. The British experience has been quite the opposite; under judicial power, exercised by well qualified committees of judges, procedure has undergone a steady evolution toward its highest purpose, that of affording a simple, direct, and speedy route to justice."

A further examination of the subject was made in 1927 by Mr. William W. Crawford, of the Louisville Bar, a former president of the Kentucky State Bar Association, and the conclusions which he reached have been exceedingly helpful to the committee.<sup>14</sup> The Court of Appeals itself, however, has in the past two and a half years thrown more light on the matter than was available to either the Efficiency Commission or Mr. Crawford. This has been done not only through decisions of the Court, but in its statements elsewhere, such as the remarks of Judge Stites before the Judicial Council on November 10, 1938.

In an opinion handed down June 16, 1938,<sup>15</sup> the Court of Appeals has summarized its views as to the rule-making power in clear and concise language:

"Section 109 of the State Constitution vests the 'judicial power' of the Commonwealth 'in the senate when sitting as a court of impeachment, and one supreme court (to be styled the court of appeals) and the courts established by this Constitution'. The separation of the judicial power from the executive power and the legislative power was not merely a matter of convenience. The three branches of government are co-ordinate and yet each, within the administration of its own affairs, is supreme. The grant of the judicial power to the courts carries with it, as a necessary incident, the right to make that power effective in the *administration* of justice under the Constitution. *Capps v. Gore*, 231 Ky. 185, 21 S. W. (2d) 266; *Commonwealth ex rel., etc. v. Harrington*, 266 Ky. 41, 98 S. W. (2d) 53; *In re Sparks*, 267 Ky. 93; 101 S. W. (2d) 194. Rules of practice and procedure are, fundamentally, matters within the judicial power and subject to the control of the courts in the

<sup>13</sup> "The Judiciary of Kentucky, A Report by the Efficiency Commission of Kentucky", Advance Pamphlet VII, December 21, 1923, page 80.

<sup>14</sup> "The Rule-making Power of the Courts in the Several States, *supra*, page 38.

<sup>15</sup> *Burton, et al. v. Mayer, et al.*, 274 Ky. 263, 118 S. W. (2d) 547, 549 (1938).

administration of justice. The courts accept legislative *cooperation* in rendering the judiciary more effective. They deny the right of legislative *dominance* in matters of this kind."

It will be observed that, while in the above statement the court emphasized the inherent right of that body to control the administration of justice, it also said that it would "*accept legislative cooperation* in rendering the judiciary more effective". In his address to the Judicial Council Judge Stites approved the suggestion that the State Legislature should do as the Federal Congress has already done and place the responsibility for civil procedure in the hands of the Court of Appeals. Such a step would assure cooperation between the two branches of government, just as it was accomplished when the integrated bar was established. In that case, it will be remembered by those lawyers who worked to bring about integration that, while the Court of Appeals then recognized its inherent power to organize and regulate the Bar, it desired first to have the General Assembly pass an Act confirming such power so that there might be such cooperation.

It is believed that these conclusions of the Court of Appeals represent the considered judgment of able jurists in Kentucky extending over a period of eighty years.<sup>16</sup> There are other reasons, however, why it will be desirable to proceed both through legislative act and rules of court to revise our civil procedure. Kentucky's present Civil Code was first enacted in 1851, being modeled after that of the State of New York. It was attempted in that work to embody all the adjective law relating to practice, procedure and pleading. Since then, however, there have been adjective provisions enacted which have improperly crept into the Statutes of our state, and, on the other hand, there have been substantive provisions that belong in the Statutes which have been wrongly placed in the Code. The dividing line between these different provisions is sometimes difficult to define, and, in order to perform the task satisfactorily, it will be necessary to carefully and systematically proceed to segregate the substantive from the adjective. This should be and no doubt can be brought

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<sup>16</sup> See *Kennedy and Brother v. Cunningham*, 59 Ky. (2 Metcalfe) 533, 541 (1859); *In re R. W. Wooley*, 74 Ky. (11 Bush) 95, 111-112 (1875); *Capps v. Gore*, 231 Ky. 185, 21 S. W. (2d) 266 (1929); *Commonwealth ex rel. Ward v. Harrington*, 266 Ky. 41, 98 S. W. (2d) 53 (1936); and later disbarment cases.

about through the sincere and intelligent cooperation of the judicial and the legislative departments.

Fortunately, our state's procedure in civil cases has been remarkably well handled as compared with other jurisdictions. The following comment of the Efficiency Commission on that topic is well-deserved:<sup>17</sup>

"It is in order to say that Kentucky has been exceptionally fortunate in the operation of its code of civil procedure. As first written it gave a great scope for efficient judicial administration compared with the archaic body of procedural law which it succeeded. The most remarkable fact, probably, and one difficult to match in any other State, is that the code has been in operation seventy-two years and has been but little tampered with. It has fortunately escaped the long succession of unskilled amendments which, in many states, have marked the degeneration of this field of law. It should be said further that the Kentucky code has, to an unexampled degree, been wisely and understandingly construed by the highest Court so that it has not suffered the perversion which has befallen similar codes in other States."

In our opinion the hour has come, however, when it is desirable and proper to urge the confirmation of the rule-making power in the Court of Appeals, in order to help provide the relief which that court is demanding and which lawyers themselves are beginning to feel is important for their own advantage. It will not only simplify procedure, it will save time, labor and expense. Records will be made less voluminous; volumes of reports may be less numerous and therefore less costly. By proper rules the whole system of practice may be made more efficacious and expeditious. When wrong, the trouble can be easily and quickly rectified; and if such is not the result, the responsibility will be that of the court where it rightfully belongs. Moreover, the General Assembly will be relieved of a task, about which most of its members know little, and care less.

It is opportune that the Bar Association take this step now, because, as many members will remember, the Statutes Commission, for the creation of which the Association may claim credit, is at present engaged in a revision of our statutes. As part of its work, the Commission has already made a thorough check and tabulation of the sections in the Statutes and the Codes (Criminal as well as Civil) which should be transferred from one to the other, or which might be consolidated one with the other, or which it might be wise to repeal. It happens that the Chairman of the Docket Committee is likewise a member of

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<sup>17</sup> "The Judiciary of Kentucky, etc.", *supra*, pages 80-81.

the Statutes Commission, and he can assure the Committee that the results of the Commission's investigations and all its facilities will be available in the proposed legislation or in any subsequent program of the Committee.

As to the bill itself, since there are no constitutional prohibitions or limitations, there can be no difficulty in its preparation. Our Federal Congress has furnished an excellent model in the very simple Act under which the Supreme Court was given power to prescribe general rules for the District Courts of the United States.<sup>18</sup> That act did not provide for a procedural rules committee, but the Supreme Court appointed such a committee, to formulate the rules adopted and promulgated by the Court. In some of the states provision is made in the law for such an advisory committee, which is in a few instances the Judicial Council of the state. It is the Docket Committee's belief that the plan whereby the Federal Rules were prepared is the better one. Furthermore, it is thought that a committee appointed by the Court of Appeals will be more satisfactory to the lawyers, since that Court and the Bar Association will, as in the past, continue to strive for the best interests of the bench, the legal profession and the people of the State.

RICHARD C. STOLL	}	DOCKET COMMITTEE
HENRY E. McELWAIN		
HARRY B. MACKOY,		
<i>Chairman</i>		

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<sup>18</sup> The Act passed by Congress in 1934 reads in substance as follows, viz.:

*"Be It Enacted:*

1. That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the District Courts of the United States, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions in law so as to secure one form of civil action and procedure for both; Provided, however, that in such union of rules the right of trial by jury as at common law, and as guaranteed by the Seventh Amendment of the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress at the beginning of a regular session, and until after the close of such session."