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EDSON SUNDERLAND AND THE FEDERAL RULES  
OF CIVIL PROCEDURE

*Charles E. Clark\**

IT WAS my privilege to be associated with Edson Sunderland for many years in a major endeavor for the improvement of law administration, namely, the framing of the Federal Rules of Civil Procedure. In this association I came to know what a rare spirit he was, how devoted to the public service he had undertaken, and yet withal how gay and charming a friend and co-worker he always showed himself. In the roster of American workers for better justice he stands preëminent for the length, the original character, and the unique persistence of his labors. But this wholehearted idealism in a particular area still left him occasion for public and community service of a high order, while he remains one of the great American law teachers of all time. For me it is a sacred duty to pay all the tribute of which I am capable to a memory so dear and so cherished.

Our endeavor in fashioning the federal rules — shared of course with the other members of the Supreme Court's Advisory Committee — comprised not only the original drafting of the new procedure, but also its critical study, with the suggestion of clarifying amendments, over a period of two decades. But my association with Professor Sunderland dated from a time even earlier. From my first teaching days in the early '20s I had learned to recognize the outstanding leadership he had shown in his chosen field wherein I had become a worker only more or less by chance when my senior Yale colleagues spurned it. I had also come to know him and to recognize him as a scholar through his lively participation in the meetings of the Association of American Law Schools.<sup>1</sup> In 1930 he served as its president,<sup>2</sup> and I recall with some pride that two years later he was chairman of a committee which nominated me

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<sup>1</sup> Thus his address, "An Inquiry Concerning the Functions of Procedure in Legal Education," 5 AM. L. SCHOOL REV. 73 (1923), 20 PROC. ASSN. AM. L. SCHOOLS 169 (1922), 21 MICH. L. REV. 372 (1923), 29 W. VA. L. Q. 77 (1923), stimulated an unusually lively discussion.

<sup>2</sup> See his presidential address, "The Law Schools and the Legal Profession," Dec. 29, 1930, 7 AM. L. SCHOOL REV. 93 (1931), 28 PROC. ASSN. AM. L. SCHOOLS 29 (1930), 5 TULANE L. REV. 337 (1931).

to that high office.<sup>3</sup> Meanwhile Yale had embarked on a program of fact and research in trial court activities and, to obtain his advice and assistance, we appointed him Research Associate on the Sterling Foundation from 1931 to 1933. We found his wise counsel invaluable, notably in the whipping into publishable form of the study of the business of the federal courts which was published by the American Law Institute and which led to the present statistical reporting system of those courts.<sup>4</sup> Later, on several occasions, the Yale law faculty recommended that he be awarded an honorary degree; this appeared to meet with general favor except that when the dust settled the only degree thought worthy of a scholar of his distinction seemed to have just then been pre-empted for a statesman or benefactor, leaving no immediate place for an educator. Would that an honorary law doctorate could more often signalize legal scholarship!

Sunderland's work on the federal rules commenced in the summer of 1935 and continued until illness prevented his final participation in the Advisory Committee's last report in 1955.<sup>5</sup> There is a bit of history explaining why he did not become Reporter, which may perhaps bear recounting now long after the event. After the passage of the Act of 1934 conferring rule-making power for the federal district courts on the Supreme Court of the United States, Attorney General Cummings — to whose political drive and acumen we owe the act's passage — had proposed to draft only rules of law to supplement the Federal Equity Rules. Being distressed by this failure to provide for the merger of law and equity, I campaigned for a more thorough reform<sup>6</sup> and succeeded in enlisting the active interest of former Attorney General William D. Mitchell, then recently retired from public office to private practice in New York City. He wrote a uniquely historic letter to the Supreme Court urging a full reform — a letter which I induced

<sup>3</sup> 7 AM. L. SCHOOL REV. 761 at 785, 816 (1933), 30 PROC. ASSN. AM. L. SCHOOLS 7, 111 (1932).

<sup>4</sup> See A.L.I., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, Part I: Criminal Cases 22 (1934); REPORT OF THE DEAN OF THE YALE SCHOOL OF LAW 1932-1933, 24. For the connection of this study with the present system, see Speck, "Statistics for the United States Courts," 38 A.B.A.J. 936 (1952); Shafroth, "Federal Judicial Statistics," 13 LAW & CONTEMP. PROB. 200 (1948).

<sup>5</sup> This is noted in REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, October 1955, p. 4. His name appears on the PRELIMINARY DRAFT, May 1954, iv.

<sup>6</sup> See Clark, "The Challenge of a New Federal Civil Procedure," 20 CORN. L. Q. 443 (1935); Clark, "The Challenge for a New Federal Civil Procedure," 19 J. AM. JUD. SOC. 8 (1935); Clark and Moore, "A New Federal Civil Procedure—I. The Background," 44 YALE L. J. 387 (1935), and the historical references given in notes 7-9 *infra*.

him to publish many years later because of its historic value,<sup>7</sup> for this without question was the persuasive force leading Chief Justice Hughes and his associates to accept the full burden of responsibility for the complete reform and to choose Mr. Mitchell to head the drafting committee.

Immediately after the Chief Justice had announced these plans for action by the Court at the opening of the annual meeting of the American Law Institute on May 9, 1935,<sup>8</sup> Mr. Mitchell came to me saying that he had agreed to act as Chairman of the Advisory Committee which the Court proposed to appoint and desired suggestions as to law professors suitable for service upon it. He and I immediately agreed on the law professors eventually selected, viz., Cherry, Dobie, Morgan, and Sunderland; and we also decided to recommend inclusion of President Wickersham of the American Law Institute and President Loftin of the American Bar Association, as well as Colonel Tolman, Editor of the *American Bar Association Journal*, then a Special Assistant to the Attorney General and chairman of an interim drafting committee set up by the Attorney General.<sup>9</sup> It was also understood that I should serve as Reporter. The remaining members of the committee were, I believe, all chosen on Mr. Mitchell's recommendation.

A few days later Mr. Mitchell came back to say that because of my obligations as dean of the Yale University Law School it was thought that I would not have time for the drafting work and hence it had been suggested that Professor Sunderland, a scholar of distinction in the field, should be invited to undertake the task. Since he did not know Mr. Sunderland, he asked for some report on the latter's work. Necessarily I had to express warm approval of Sunderland's capabilities for the position, even though I had been prepared to give such time to the task as it might require. I happened to know that Sunderland was to address the Fourth Circuit Conference on this subject early in June, and so I did suggest to Mr. Mitchell that he write and secure a copy of the address. Now it happens that the enabling act, for all its noble sponsorship,

<sup>7</sup> Mitchell, "The Federal Rules of Civil Procedure," in DAVID DUDLEY FIELD CENTENARY ESSAYS 73 (1949), with his letter of Feb. 9, 1935, addressed to the Chief Justice, *id.* at 76-78.

<sup>8</sup> Address of Chief Justice Hughes, 21 A.B.A.J. 340 (1935), 55 S. Ct. XXXV, 12 PROC. A.L.L. 54 (1935). See "Dramatic Pronouncement by Chief Justice Hughes," 19 J. AM. JUD. SOC. 3 (1935); "Chief Justice Hughes on Rule-Making," *id.* at 6; Clark, "Two Decades of the Federal Civil Rules," 58 COL. L. REV. 435 at 439-440 (1958).

<sup>9</sup> For this background, see Clark, "Two Decades of the Federal Rules," 58 COL. L. REV. 435 at 488-489 (1958).

was poorly drawn, with the added section for the union of law and equity having provisions conflicting with the earlier section for uniform rules at law; and Professor Sunderland, as a good lawyer, carefully pointed out these difficulties in his scholarly address given on June 6, 1935.<sup>10</sup> But Mr. Mitchell by that time had developed both the enthusiasm and the drive of a crusader — a spirit which paid rich dividends in his unique leadership in carrying the project to eventual speedy and successful execution. He was profoundly disturbed by the various problems thus uncovered and so was disposed to question Sunderland's potential usefulness for the work, even as a committee member. Hence then I had to exercise such powers of persuasion as I possessed to convince this dynamic leader that Sunderland would be most useful generally and indeed was quite indispensable in the drafting of the unique discovery provisions we had in contemplation. And so he was selected for the committee and willingly accepted without (I believe) any knowledge of the contretemps which had almost prevented his choice.

I have often thought of this variance in approach which so unexpectedly developed between two truly great men, each so correct from the point of view chosen. Of course all these difficulties to the development of a single uniform set of rules did exist, and it could not then be told whether the Supreme Court would approve — as it did eventually — of the committee's direct course in refusing to impair the procedure because of the act's omissions. Here, too, Mr. Mitchell never wavered, and his steady conviction carried us through the drafting and on to ultimate approval by the Court.<sup>11</sup> As for Sunderland, he was content with uncovering the problems and willingly went along with all the committee's plans for their solution. Mitchell and Sunderland became warm friends and co-

<sup>10</sup> Sunderland, "Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise," 21 A.B.A.J. 404 (1935). The problems raised by the original Act of June 19, 1934, c. 651, the former 28 U.S.C. §§723b, 723c, are discussed in CLARK, CODE PLEADING, 2d ed., 41-45 (1947). These were settled on the revision of the act in 1948, 28 U.S.C. § 2072.

<sup>11</sup> *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (where Mr. Mitchell filed a brief *amicus curiae* upholding the validity of the rules); *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438 (1946); *Hickman v. Taylor*, 329 U.S. 495 (1947); and as to amended rules, *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956). See *Lopinsky v. Hertz Drive-Ur-Self Systems*, (2d Cir. 1951) 194 F. (2d) 422 at 424-426; Foreword to PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE, May 1936, viii, xi; Clark, "Two Decades of the Federal Civil Rules," 58 COL. L. REV. 435 at 441-442 (1958).

workers, and Mitchell had no warmer support for his truly magnificent leadership throughout the years than Sunderland gave.

Thus with the Chairman's approval I was able to commission Edson to prepare the draft of that part of the rules known originally as "v. DEPOSITIONS, DISCOVERY AND SUMMARY JUDGMENTS."<sup>12</sup> These in the Preliminary Draft of May 1936 covered rules 31 through 44, of which rules 31 through 41 covered the subject of depositions and discovery, in form and content surprisingly similar to the eventually adopted rules 26-35.<sup>13</sup> Rules 42 and 43 were later combined to be rule 56 on Summary Judgment.<sup>14</sup> And rule 44, "Defining the Issues When Case Not Fully Adjudicated on Motion for Judgment," became the famous rule 16, "Pre-trial Procedure; Formulating Issues."<sup>15</sup> My recollection is that Mr. Mitchell himself had a major hand in the final rewording of rule 16. But its original conception, as well as the several rules for discovery and summary judgment, was and now remains a tribute to Edson's genius.

The reason we so much desired Sunderland's help in this particular field was that it seemed an obvious place where a truly striking advance over existing procedures was indicated, and he by his writings and study had made himself the acknowledged master of this subject.<sup>16</sup> The resolutions of the Michigan faculty, appearing elsewhere in this issue, are particularly prescient in pointing out that beginning in 1915 Sunderland wrote constantly for 35 years pointing to paths of reform. "By following the paths so pointed out, one is able to trace the development of most, if not all, of the new features of our present civil procedure."<sup>17</sup> No more apt illustration could be found than in our present topic, which is an outstanding, perhaps the outstanding, as well as most discussed, feature of the federal rules. It thus appears in the sixteen jurisdictions which

<sup>12</sup> PRELIMINARY DRAFT, May 1936, 54-79. See REPORT, April 1937, vii: "Edson R. Sunderland supervised the draft on depositions, discovery, and summary judgments."

<sup>13</sup> As in REPORT, April 1937, FINAL REPORT, November 1937, and in the rules as adopted and extensively reprinted.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> See, for example, Sunderland, "Scope and Method of Discovery Before Trial," 42 YALE L. J. 863 (1933); Sunderland, Foreword to RAGLAND, DISCOVERY BEFORE TRIAL iii-iv (1932); Sunderland, "Discovery Before Trial," BULL. NEW HAVEN COUNTY B. ASSN., No. 11, 32 (1933); and see Clark, Book Review, 42 YALE L. J. 988 (1933). See also discussions by Sunderland in PROC. CLEVELAND INSTITUTE ON FED. RULES 277 (1938); PROC. N. Y. SYMPOSIUM ON FED. RULES 249-270 (1938); INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE, 54 W. VA. B. A. REP. 152 (1938), 45 W. VA. L. Q. 1 (1938); and "Discovery Before Trial Under the New Federal Rules," 15 TENN. L. REV. 737 (1939).

<sup>17</sup> P. 2 supra.

have adopted the federal rules, as well as in several additional states which have featured this reform separately, such as Alabama, Arkansas, California, Louisiana, and, in part, Connecticut, Illinois, and New York.<sup>18</sup> It is truly a proud record.

The system thus envisaged by Sunderland had no counterpart at the time he proposed it. It goes very much beyond English procedure, which does not provide for general depositions of parties or witnesses.<sup>19</sup> And only sporadically was there to be found here and there a suggestion for some part of the proposed system, but nowhere the fusion of the whole to make a complete system such as we ultimately presented. The outstanding accomplishments of the federal rules in this area may be listed as follows: As to discovery, the provisions for discovery not only of evidence admissible at trial, but also of testimony reasonably calculated to lead to the discovery of admissible evidence — thus doing away with “surprise” as a tactical advantage in litigation as a game and laying the bugaboo of “fishing expeditions” so-called to produce evidence; the complete freedom of examination for the former purpose, together with its fairly wide use at trial, subject to the desirability of oral testimony wherever procurable; and the detailed statement in separate rules of the various types of discovery, such as by interrogatories and production of documents, as well as by examination of parties. The latter has proved especially valuable, not the least in its demonstration to the profession of the wide uses of discovery.<sup>20</sup> And as to summary judgments, there is first and outstandingly the availability of the procedure in all civil actions, not merely in actions savoring of debt as originally viewed.<sup>21</sup> Then, too, there is the clear, detailed practice set forth permitting the use not merely of affidavits, but of the pleadings, depositions, and admissions on file, as well as the filing of what is in substance a pre-

<sup>18</sup> Wright, “Procedural Reform in the States,” 24 F.R.D. 85 (1959), and see Clark, “Two Decades of the Federal Civil Rules,” 58 COL. L. REV. 435 (1958).

<sup>19</sup> The more limited English practice, including the “summons for direction,” had been brought to the committee’s attention. See particularly RAGLAND, *DISCOVERY BEFORE TRIAL* 227-240 (1932). Compare Clark, “The Evershed Report and English Procedural Reform,” 29 N.Y. UNIV. L. REV. 1046 at 1051-1055 (1954).

<sup>20</sup> Thus note particularly rules 30, 31, 33-36, Fed. Rules Civ. Proc. The literature on federal discovery is already too vast to cite. Helpful reports on the practical working of the system may be found in Speck, “The Use of Discovery in United States District Courts,” 60 YALE L. J. 1132 (1951); Wright, Wegner and Richardson, “The Practicing Attorney’s View of the Utility of Discovery,” 12 F.R.D. 97 at 103-104 (1952); and Symposium, “The Practical Operation of Federal Discovery,” 12 F.R.D. 131 (1952).

<sup>21</sup> Compare Clark and Samenow, “The Summary Judgment,” 38 YALE L. J. 423 (1929); Clark, “The Summary Judgment,” 36 MINN. L. REV. 567 (1952).

trial order defining the issues for further trial if the case cannot be fully adjudicated on the motion and affidavits.<sup>22</sup> The system has proved itself highly operable and a necessary corollary to the general (as opposed to special) pleading planned generally in modern procedure.<sup>23</sup>

So in all the later activities of the Advisory Committee and until illness intervened, Sunderland took a major part in working upon and suggesting clarifying amendments and improvements. In addition he gave his wholehearted support to the efforts of Chairman Mitchell — and others of us after the Chairman's death — to obtain authority for continuous and permanent rule-making. I am happy that he lived long enough to witness the final legislative approval for this program.<sup>24</sup>

In this country there are many of us who have worked sporadically and for various substantial periods of time at the business of law reform. But from 1901, when he started teaching, to his death last March, Sunderland never departed from his appointed career and never wavered in expending himself to the utmost in it. Truly, as his colleagues have so eloquently attested, he was a major factor in every program for the improvement of law administration in this country.

<sup>22</sup> See rule 56(d), Fed. Rules Civ. Proc.; *Engl v. Aetna Life Ins. Co.*, (2d Cir. 1943) 139 F. (2d) 469.

<sup>23</sup> This interrelation has been often pointed out. See, e.g., Clark, "Special Pleading in the 'Big Case?'" 21 F.R.D. 45 (1958), and in Seminar on Protracted Cases, 23 F.R.D. 435 (1959); Clark, "Simplified Pleading," 1942 HANDBOOK NAT. CONF. JUDICIAL COUNCILS 136, 2 F.R.D. 456 (1943).

<sup>24</sup> By act of July 11, 1859, P.L. 85-513, 28 U.S.C.A. (Supp. 1958) §331. See the program adopted by the Judicial Conference of the United States, ANN. REP. Sept. 17-19, 1958, pp. 6-7.