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EDSON R. SUNDERLAND AND THE TEACHING OF PROCEDURE

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ONCE having arrived at the University of Michigan Law School, Edson Sunderland never left, except on a temporary basis. He entered the school in 1898, having previously received his Bachelor's and Master's degrees from the University's College of Literature, Science and the Arts. Immediately upon his graduation in 1901 he was invited to become a member of the faculty, an invitation which he accepted effective the following fall.

That Professor Sunderland chose to stay in Ann Arbor was a felicitous turn of events, in more ways than one. It was a happy choice for him, since it made possible spending the rest of his four score and five doing what he loved to do, in a place where he loved to do it. He loved Ann Arbor. He loved the University and in particular the Law School. He loved the teaching of law and the prodigious research that went with it. But, above all, he loved the hundreds and hundreds of students who over the years were privileged to sit in his classes.

Professor Sunderland's decision to stay in Ann Arbor was an equally happy choice for the Law School. More than the bricks and mortar of Haven and Hutchins Halls, he was one of the pillars upon which the tremendous prestige and nation-wide reputation of the law school came to be built. When a lawyer looks back to his law school days, he instinctively tends to remember first the teacher who made the deepest and most lasting impression upon him. For Michigan graduates of the years when he was still there, the odds are long that such initial remembrance will be of Professor Sunderland.

The chief beneficiaries of Professor Sunderland's long stay in Ann Arbor were his many students. To them was afforded the opportunity of studying an extremely difficult and highly technical subject under the tutelage of an acknowledged master of his craft. Of even greater value was the privilege of knowing him personally. For thousands of young men and women, many of them today's leaders of their chosen profession, this was a rewarding and inspiring experience. The clarity and conciseness of his thought, the lucidity and directness of his expression and the

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sprightliness of his humor were surpassed only by his kindliness and sympathetic understanding. Here truly was a "gentleman of the old school."

To say that Professor Sunderland was a great teacher is easy; to explain what made him so is not. What makes a good law teacher is difficult if not impossible of definition. It depends on the impact he makes upon his students, and unfortunately all law students do not respond in the same way to the same stimuli. The object, of course, is to generate in the student an intellectual curiosity concerning the subject at hand and to stimulate him to satisfy that curiosity to the best of his ability. How this may best be done is a question to which there is no simple answer. Some teachers do it by acerbity and some by lucidity. Others do it by exhortation and some by exasperation, the latter technique being usually described as putting a burr under the student's blanket.

Professor Sunderland accomplished his results, I think, by inspiration. Here was a man who was a recognized authority in his field, a fact which became immediately obvious to any student who even so much as glanced at the footnotes to his casebook. They were replete with references to the professor's own published writings on the subject.

In class, his mastery of the subject became even more apparent. So did his capacity to expound it in logical and understandable fashion. Coupled with this was a friendly eagerness to be helpful—a never-failing willingness to lend a hand over the rough spots of a discipline both difficult and esoteric. Rare indeed would be the student who by such a teacher would not be inspired to do his very best.

Professor Sunderland's first assignment at the law school was to supervise the work of the Practice Court, first established at Michigan in 1893, and a project which always remained close to his heart. Such courts were rare then but are commonplace today, largely as a result of the development and expansion of the one at Michigan under the supervision of Professor Sunderland.

At least during his first year, Professor Sunderland devoted all of his time to the work of the Practice Court. But he soon began teaching some of the traditional procedural courses, probably Common Law Pleading to begin with. Whether this assignment to him of courses in pleading and practice was a matter of his choice or whether, as the newest member of the faculty, he was "stuck" with them is not a matter of record. That the latter may have been true is indicated by the fact that for the first five years

or so of his teaching career, his published writings dealt with other than procedural matters. It was not until 1909, when he wrote the chapters of "Cyc" dealing with Pleading and Process, that he began the long series of books and articles which were to have such a tremendous impact on American procedural law.

In any case, he became enraptured of the subject and stayed with it all his life, with probably more influence, both through his students and through his published writings and other activities, than any other lawyer or law teacher of his time. He was perhaps the first American teacher of procedure who refused to believe that next to the Bible the greatest book in the English language was *Chitty on Pleading.*

Very early in his teaching career, Professor Sunderland came to a very simple conclusion concerning the purpose of legal education, a conclusion which today would cause him in many quarters to be branded as old-fashioned. "[T]he chief function of a law school," he wrote in 1903, "is to fit men for the practice of the law."[1] In 1914, he reiterated that the task of a law school "is to train men to do well the technical work expected from their profession. It looks to skillful performance in certain lines of activity. The test of its success is the efficiency of its output. . . . The law school does not justify its existence by contending that a legally trained mind makes a good citizen, though that may be entirely true. It justifies itself by asserting that the country needs well-trained lawyers and by showing that it can produce them."[2]

As the years went by, a considerable expansion took place in Professor Sunderland's ideas and concepts concerning the proper function of legal education. He came to recognize, and perhaps was one of the first to do so, that there was more to a great law school, or even a good one, than simply equipping its graduates with the specialized information and technical skills essential to success in the performance of their professional function. As president, in 1930, of the Association of American Law Schools, he urged that the schools contribute to "the development and understanding of a science of law" and be leaders in "making the law more responsive to social needs."[3]

1 Sunderland, "The Practice Court," 9 MICH. ALUMNUS 295 (1903).

2 Sunderland, "The Teaching of Practice and Procedure in Law Schools," 12 MICH. L. REV. 185 at 189 (1914).

3 Sunderland, "The Law Schools and the Legal Profession," 5 TULANE L. REV. 337 at 341, 339 (1931).

Parenthetically, Professor Sunderland was one of the three Michigan faculty members who have been honored by election to the presidency of the Association of American Law Schools. For an additional year, he served on its executive committee.

There is no question, however, that the intense practicality of Professor Sunderland's early ideas about teaching law in general greatly colored his original approach to the teaching of procedure in particular. On one occasion he wrote, "The lawyer is essentially a practitioner, and the schools must therefore aim to do what they can to prepare men for practice."[4] On another occasion, he said that "the law schools, in order to fully fill the place for which they have been created and maintained, should give their students a complete preparation for all that the practice of the profession will afterwards demand of them."[5]

It was not until 1915, with the publication of an article decrying the disability of most American trial judges to assist juries in the performance of their function by the expression of comments on the evidence, the testimony and character of witnesses, that Professor Sunderland is found to be changing from a teacher of what legal procedure is to an advocate of what it ought to be. A few years later another concept appears, that the teaching of procedure should not only train men for the practice of their profession and to be leaders in the improvement of judicial administration, but should also be a vehicle for imparting to the student a greater sense of his future professional responsibility. This idea bore fruit in his *Cases on Judicial Administration,* published in 1937, a considerable portion of which is devoted to the professional status and responsibility of the attorney.

When Professor Sunderland first joined the faculty at Michigan, the coverage of procedure in the curricula of most law schools was usually restricted to two courses, one in pleading and the other in evidence, with sometimes a course in equity practice thrown in. The course in pleading seldom went beyond a study of the forms of action and the declarations, demurrers, pleas and replications of the common law. The surface of code pleading had hardly been scratched, a course in trial practice was unheard of and only a few schools had moot or practice courts of any consequence.

Forty-three years later, when he retired from active teaching,

[4] Sunderland, "The Art of Legal Practice," 18 MICH. ALUMNUS 252 at 256 (1912).

[5] Sunderland, "The Teaching of Practice and Procedure in Law Schools," 12 MICH. L. REV. 185 at 189 (1914).

the share of the curriculum devoted to the study of procedure in its various aspects had in all American law schools been greatly expanded. Using Michigan as an example, many law schools now require courses in Introduction to Law and Equity, Jurisdiction and Judgments, Pleading and Joinder, and Evidence. These are supplemented by voluntary but virtually universal participation in a moot court program conducted under the auspices of the so-called Case Clubs, followed by a faculty supervised Practice Court, the first part of which is in reality a classroom course in Trial Practice. Harvard Law School, for another example, lists courses in Civil Procedure, Equitable Remedies, Evidence, Federal Courts and Trial Practice. In addition, there is practice court work for first year students under the supervision of the teaching fellows, as well as the moot court programs of the law clubs. These latter are followed in the second year by the Ames Competition.

Without question much of this giving to the subject of procedure a greater slice of the curricular pie has been the result of Professor Sunderland's exhortations to that end. As early as 1914, he was complaining that the law schools considered procedural courses as an "unscholarly necessity — a form of surrender to popular demands."[6] On the contrary, according to him, "procedure, when rightly considered, is the very life of the law."[7]

"I take it to be clear," he wrote, "that the professional equipment of the lawyer ought to include a reasonable familiarity with the fundamental rules under which remedies are obtained in the courts. And it follows that the law schools, which are established to prepare lawyers for professional work, ought to do what is reasonably possible to give them the necessary training in the principles of procedure."[8]

To this end, he vigorously advocated that the law curriculum should include not only common law pleading and evidence but further courses in modern or code pleading, trial practice and appellate procedure, all to be followed by work in a practice court which would serve as a "summation or integration of the other branches."[9]

Today, in virtually every American law school, what Professor

[6] Id. at 197.
[7] Id. at 187.
[8] Id. at 189.
[9] Id. at 197.

Sunderland thus hopefully advocated has practically become the accepted minimum of coverage that should be given to procedural subjects.

He was never one merely to advocate an idea; his dynamic nature required that he do something about it as well. The result was a series of casebooks which, if they had all been published, would have embraced each of the subjects which Professor Sunderland set forth as necessary to supply a lawyer with his basic procedural needs. The first was his *Cases on Trial Practice,* published in 1912. This was followed in successive years by his *Cases on Code Pleading* and *Cases on Common Law Pleading.* The flyleaves of these books indicate that there were more to come, on Equity Pleading and Practice, Criminal Procedure, Appellate Practice and Evidence, but with the exception of Appellate Practice, which was subsequently combined with Trial Practice into a single volume, these other projected volumes never appeared. The probable reason for this was that, as the faculty at Michigan expanded, the courses in Equity, Criminal Law and Evidence were assigned to other teachers, who produced their own casebooks.

When Professor Sunderland's *Cases on Trial Practice* was published in 1913, that subject had not theretofore been included in the curriculum of any American law school. To him, this was a grave omission which needed correction, for the reason that "the trial is the end and essence of procedure. It is the center about which all other procedure subjects revolve. To really understand the trial is to understand procedure. The pleadings lead up to it, the evidence is part and parcel of it, the appeal grows out of it."[10]

Professor Sunderland attributed the curricular neglect of Trial Practice to two causes: one, "the failure to clearly distinguish between trial practice as a body of well defined and accurately developed principles of procedure and trial practice as a vague and shadowy discourse on success in advocacy,"[11] and the other "the prevalent idea that trial practice is essentially local in its close dependence on statutes and court rules."[12]

His *Cases on Trial Practice* demonstrated that neither of these causes for neglecting the subject were valid, especially the latter. "[T]here is no subject of the law," he wrote, "either in procedure

[10] Id. at 191.
[11] Id. at 192.
[12] Id. at 193.

or the substantive branches, where there is less diversity in fundamentals and in the principles of interpretation than in the trial practice."[13]

As a result of Professor Sunderland's pioneering in the area, Trial Practice eventually became a standard item in the curriculum of practically every law school in the country. Naturally, other casebooks appeared but his continued to set the basic pattern for the course and to enjoy a widespread popularity, so much so that the book went through three editions.

To mention again the good fortune of Professor Sunderland's long stay at Ann Arbor, it seems not amiss to note that Callaghan and Company must have enjoyed a goodly share of it. They published all of his casebooks, which, including the several editions, numbered an even ten. It must have been an eminently satisfactory arrangement for both parties.

What really was a second edition of Professor Sunderland's *Cases on Trial Practice* was not published as such. Rather the title was changed to *Cases on Trial and Appellate Practice,* to reflect the inclusion in the book of a substantial body of materials dealing with the latter aspect of procedure. Here was another teaching innovation. Until this book appeared in 1924, the subject of appellate practice had been completely omitted from law school curricula, for largely the same reasons that prevailed twelve years earlier in respect to Trial Practice. Again, Professor Sunderland demonstrated that the subject was readily susceptible to law school teaching, with the result that, while its inclusion in law school curricula may not be universal, at least it is covered in most of the better schools.

A later edition contained still another innovation—the inclusion of a section on judgments. Except as their validity from a jurisdictional standpoint was touched upon in courses in Conflicts of Law, the subject of Judgments was another that theretofore had been ignored by the law schools. Yet, as he said, "The judgment is one of the most vital features of our system of litigation . . . [e]mbodying as it does the final result of the entire judicial process. . . ."[14]

Here, then, are a few of Professor Sunderland's many contributions to the teaching of procedure. In his own classes, he contributed mightily to the professional proficiency of his students.

[13] Ibid.

[14] SUNDERLAND, CASES ON TRIAL AND APPELLATE PRACTICE, 2d ed., iii (1941).

Through them, he helped awaken the bar to a greater sense of professional responsibility and to the continuing need for improvement in judicial administration. He brought the subject of procedure out of the curricular closet and gained for it an expanded and honored place at the table of legal education. Through his work with the Practice Court at Michigan he gave impetus to the establishment and development of similar programs at many other schools. Because of him, more than a generation of lawyers, while still in law school, received formal training in the fundamental principles which govern the trial of lawsuits. Many of them, also because of him, received additional training in appellate practice and in the law of judgments.

To conclude on a personal note, I recall that while doing graduate work at Ann Arbor under Professor Sunderland's direction I once took my partially completed thesis to his office, for him to look over. Responding to a criticism by him of the lack of clarity in a particular passage, I made the same excuse that surely every law teacher has heard a hundred times over, especially at examination time, that I had in my head what I was trying to say but was having difficulty getting it down on paper. I was brought up short by the comment that such could not be the case, that if I couldn't get it straight on paper then I didn't have it straight in my mind. I've never forgotten that lesson; neither shall I ever forget the great and fine man who taught it to me.