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EDSON R. SUNDERLAND'S CONTRIBUTION TO
THE REFORM OF CIVIL PROCEDURE IN ILLINOIS

*George Ragland, Jr.**

ILLINOIS is greatly indebted to Edson R. Sunderland for the effective and enduring contributions which he made to the Civil Practice Act of 1933.¹ That reform was encouraged in no small degree by his speeches and writings. He served as its principal draftsman. His suggestions were of much assistance to the bench and bar of the state in modifying and implementing the original draft so that the measure could be successfully put into operation. Regulation of details of practice by rules of court, which was a primary feature of Professor Sunderland's draft and one which he helped defend against attack, has played a large part in enabling Illinois to keep step with progress in matters of civil procedure.

The reforms which culminated in the Illinois Civil Practice Act of 1933 were long overdue. Essentially the same civil procedure then in use throughout the state had been abandoned by New York three quarters of a century earlier. The English procedure had been modernized by the Judicature Act of 1873. Most of the states had adopted codes based upon either the New York or English versions or features from both, with changes based upon their own experience. Yet Illinois and a few other states continued to lag behind and to provide "the only museum in the world for the ancient species of pleading and procedure."²

For many years prior to the events which led to the adoption of the Civil Practice Act of 1933 prominent Illinois practitioners had attempted to do something about this intolerable situation, although their efforts had met with scant success. They received a decided stimulus in 1926 from Professor Sunderland's address before the American Bar Association in that year³ and from his article in the *Harvard Law Review* entitled "The English Struggle for Procedural Reform."⁴ These clear calls for action in the United States directed the attention of the Illinois bench and bar to him as a guide in the struggle for procedural reform in this

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¹ Ill. Laws (1933), pp. 784-831.

² See Introduction by Judge Floyd E. Thompson to Illinois Civil Practice Act Annotated, p. iv.

³ Reported in 12 A.B.A.J. 548-552 (1926).

⁴ 39 HARV. L. REV. 725 (1926).

state. He had pointed out how an aroused public in England through the press had compelled reforms in spite of the legal profession and suggested that the bar here would be acting in its own enlightened self-interest if it led the way.

Publication of Professor Sunderland's studies on the historical development and characteristics of the English administration of justice created widespread popular interest in the subject of procedural reform. A series of articles were published by him under the auspices of the American Bar Association in a number of American newspapers. The *Chicago Tribune* ran one of the articles in serial form for seven successive Sundays in July and August 1926 under the heading "Hundred Years War for Legal Reform in England." The first installment was prominently displayed on the front page of the first section of the *Chicago Sunday Tribune* for July 11, 1926 with an editorial foreword which read:

"The Tribune herewith presents the first installment of an article by Prof. Edson R. Sunderland of the law school of the University of Michigan on the history of the English struggle for the reform of legal procedure and the character of the remarkably efficient system by which England now administers justice through the courts.

"Other installments will be printed week by week. It will be seen that the subject is one in which laymen should be as keenly interested as lawyers. The article has been prepared under the auspices of the American Bar Association, which contends that, unless the public is willing to do its share in cooperation with the legal profession, this generation in America is not likely to enjoy the benefits of a system of legal procedure comparable in efficiency to that now in effect in England."

The practical character of Professor Sunderland's contribution to the new Michigan Rules also had been noted by a number of Chicago lawyers.

On October 18, 1929 Francis X. Busch, President of the Chicago Bar Association, wrote Professor Sunderland as follows:

"The Chicago Bar Association has seriously set about the task of aiding the movement for a complete revision and modernization of the court machinery and practice and procedure of the State of Illinois. A special committee has been

appointed to investigate the defects in the present machinery and procedure and to formulate a concrete program for remedying such defects. The Committee has just organized for its work. It is felt, both by the officers of the Association and the Committee, that nothing is so essential, at the moment, as the correct approach to the problem at hand, if the work is to be done with the least possible waste of time and the results are to be commensurate with the effort expended. Knowing of your own outstanding labors in this special field of the law, the thought occurred to us that if your time and other engagements permitted, you could render most invaluable assistance to this Committee, particularly at this stage of its work.”⁵

Shortly after this letter was written, Clarence P. Denning, Executive Secretary of the Chicago Bar Association, and other influential members of the association, talked with Professor Sunderland during the meeting of the American Bar Association in Memphis, Tennessee and encouraged him to undertake the task. He then accepted the offer and came to Chicago on October 29 to confer with the special committee of the association.⁶

The task ahead is described thus in Professor Sunderland’s penciled notes of that significant first conference: “to prepare a

⁵ When Professor Sunderland addressed the dinner meeting of the Chicago Bar Association on the new act just prior to its effective date, Isaac S. Rothschild, a member of the special committee, introduced him as follows: “Our very early studies and deliberations convinced us that there was one man who more than any other in the country could best guide us in the work that we were about to attempt. In the literature upon legal reform, Professor Sunderland’s name constantly recurred. His paper read before the American Bar Association in 1926 was, I should say, the source of inspiration in our early deliberations before we met Professor Sunderland, and he had written a series of articles for the laity that appeared in the Chicago Tribune, that demonstrated that he not only had a depth of scholarship, but a practical common sense, which is the real requisite when you are trying to work out a new system of practice. It so happened that none of us on the committee knew Professor Sunderland personally, but we ventured to get in touch with him and he very cheerfully volunteered to come to Chicago and sit with us and talk with us.”

⁶ The special committee of the Chicago Bar Association was a subcommittee of the Committee on Judiciary, the Chairman of which was Charles O. Loucks. Harry N. Gottlieb was Chairman of the special committee and the other members were William H. Holly, Chester A. Legg, Charles O. Loucks, Isaac S. Rothschild and Floyd E. Thompson. Professor Sunderland’s penciled notes of the conference show that all of the members of the special committee, as well as the president and a vice-president of the Association, attended and that the conference lasted all day and into the night. Professor Sunderland’s family and his son, Thomas E. Sunderland, who is a prominent member of the Chicago bar, have permitted copies to be made of these penciled notes as well as much other material, including the items referred to herein, so that they can be kept together along with the books on Practice and Procedure in the Library of the Chicago Bar Association.

plan of reorganization of procedure in Illinois." After indicating that the various Illinois statutes should be consolidated and that "such matter as properly belongs there" should be transferred to a single new act which would incorporate "new and better provisions" as to parties, pleading, summary judgments, declaratory judgments, discovery before trial, special verdicts, abolition of special findings and "Some improvements in app. prac.," the basic structure agreed upon for the reorganized version is described as follows in his notes:

"The consolidated material to be divided into two parts.

(1) A simple statute which shall contain the basic principles of judicial procedure. (2) A set of court rules into which the rest of the material shall be cast."

Professor Sunderland's three-page letter to Chairman Gottlieb dated November 16, 1929 is a model of concise and accurate reporting. The letter covered concisely the agreed outline of the job ahead and provided an accurate blueprint for the "plan for the reorganization of legal procedure in Illinois" which was to assume precise form almost four years later.

The special committee held a meeting promptly to consider the letter, and expressed general agreement with Professor Sunderland's proposal. Chairman Gottlieb wrote him:

"The Committee all felt that your letter outlined very clearly the program of the work as we understand it. On one or two phases such as the vesting of the rule making power, there has been some uncertainty all along in the minds of the Committee members, but it is our thought that the basis indicated by you will be a good one upon which to proceed, and after it has been formulated, any slight variations can be discussed at one of our conferences with you."

The first complete draft of the proposed new Practices Act with its accompanying Schedule of Rules was released by Professor Sunderland on March 15, 1930. The next year was spent in review-

⁷ Professor Sunderland made it clear from the start that his position as Director of the Legal Research Institute of the University of Michigan Law School made it possible for him "to contribute my time as a matter of public service to the profession." Although the Association offered and clearly expected to pay Professor Sunderland compensation for his services, he would accept only reimbursement for his out-of-pocket expenses on trips to Chicago.

ing and revising that draft. The minutes of committee meetings show the carefulness with which its members went about the task. A revised draft, incorporating the suggestions of the committee, was prepared with the apparent thought of distributing it among the bar of the state for discussion and criticism. By the time it was completed, however, the Fifty-Seventh General Assembly had only a few months of life remaining, and it was decided to attempt to have the draft introduced before that session of the legislature ended. That effort proved unsuccessful, however, and the session adjourned *sine die* June 30, 1931 without the bill being introduced.

After the legislative session had ended without the bill even being introduced, steps were taken to bring the bench and bar of the entire state actively into the deliberations on the proposed measure. Help was sought from the Illinois State Bar Association, as apparently had been contemplated prior to the abortive attempt to secure speedy enactment. Judge Floyd E. Thompson, who was a member of the special committee of the Chicago Bar Association and was well known downstate, was appointed chairman of a committee of the Illinois State Bar Association analogous to the special committee of the Chicago Bar Association and all of the members of the special committee, as well as additional members from various parts of the state, were appointed. An appropriation was secured from the State Bar Association for printing the draft, and 10,000 copies were printed and distributed among the members of the General Assembly, judges of courts of record, committees of local bar associations, and other interested members of the profession throughout the state.

In September 1931, the committee selected Albert E. Jenner, Jr., and Walter V. Schaefer to assist it, a selection which proved very important to the success of the reform.⁸

Throughout the year following the failure to have the proposal introduced in the legislature, the committee and special committee of the Illinois State and Chicago Bar Associations, respec-

⁸ From that time forward these two Chicago lawyers, who have since become leading members of the bar and bench, respectively, participated actively, not only in helping the committee put the proposal in such form that it would be acceptable and assisting in its presentation, but also in following through for years after its adoption until the reform was understood and, where necessary, adjusted, so that its operation in practice would be successful. In addition to the references *infra*, see Jenner and Schaefer, "The Proposed Illinois Civil Practice Act," 1 UNIV. CHI. L. REV. 49 (1933).

tively, each of the district bar associations, and about fifty local bar associations in all parts of the state held meetings at which the draft was presented and discussed section by section.⁹ At practically all of these meetings members of the committee were present to explain the draft. Numerous suggestions and comments were received at or as the result of those meetings. In addition, many others were contained in letters from individual lawyers.¹⁰

It was possible, with Professor Sunderland's assistance, for the committee to complete and distribute an amended draft by the last of May 1932. Later in that year another revised draft was prepared for submission to the annual meeting of the State Bar Association, and after section-by-section discussion, a resolution was adopted approving it and directing a special committee under the direction of Judge Thompson, as vice-president of the association, with Mr. Gottlieb as chairman and with members from each of the seventeen circuits outside of Cook County and fourteen members from Cook County, to promote the proposal and arrange for its introduction in the legislature.¹¹

Mr. Gottlieb wrote Professor Sunderland on April 12, 1933 about the introduction of the revised draft as a Senate bill and about the first hearing thereon before the Senate Judiciary Committee on April 11, in part as follows: "The Committee adopted a recommendation that the bill do pass, not only unanimously, but with enthusiasm." With a few changes,¹² the proposal received the approval of the Senate and finally of the House and was then signed by the Governor on June 23, 1933, to become effective January 1, 1934.

⁹ The plan of publishing the proposed Act and Schedule of Rules and circulating them widely over the state and holding discussions of them at local meetings of lawyers had already proved very successful in Michigan when the new Michigan Rules were being formulated. That plan, Professor Sunderland wrote to Herbert Harley, Secretary-Treasurer of the American Judicature Society, "enables the die-hards to abuse the changes to their hearts' content, but the result is that the familiarity produced by debate finally dissipates professional fear, and it appears that there is nothing very dreadful after all in the proposals."

¹⁰ See 20 ILL. B.J., No. 2, p. 3 (1931) and 21 ILL. B.J., No. 3, p. 6 (1933). Some of the suggestions received by letter were especially significant, such as a comprehensive one respecting appellate practice from Walter F. Dodd.

¹¹ 21 ILL. B.J., No. 1, p. 3 (1932).

¹² The two most important changes involved deletion of the sections authorizing special verdicts and declaratory judgments. Specific mention had been made of both provisions in Professor Sunderland's penciled notes of his first conference with the committee (note 6 supra), and they were in all drafts of the act. Both of these "two admirable remedies" were stricken during the debates before the legislature. Sunderland, "The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act," 1 UNIV. CHI. L. REV. 188 at 207 (1933).

Professor Sunderland addressed the Chicago Bar Association on the new act at a dinner meeting on the evening of December 7, 1933. The concluding sentence of his notable address was:

“The attitude of the lawyers in using the Act and the attitude of the judges in interpreting its provisions, will determine how far it will aid the profession to reestablish itself in the esteem of the public and to demonstrate its ability to conduct litigation in a businesslike and efficient way.”

Not only had thorough orientation of the bench and bar prior to and following enactment of the new measure partially answered Professor Sunderland's challenge already but publication of the “Illinois Civil Practice Act Annotated, With Forms”¹³ further assured the success of the new act and rules. Professor Sunderland “read the entire manuscript” of this book and “made many helpful suggestions.”¹⁴

In retrospect, Professor Sunderland's contribution to the lasting quality of procedural reform in Illinois was as important as his contribution to the text of the 1933 Act. He helped the legal profession realize ways and means within its own ranks of bringing about changes in court machinery that are practical and reasonable and in its interest as well as the public interest. The 1933 Act and Rules were flexible enough to permit relatively easier modification in the future to meet changing conditions.

Professor Sunderland's writings in legal periodicals and in the public press had made it clear that it is in the realistic interest of the bench and bar and not merely of the public for court procedure to be kept up to date. Indeed it was these writings that had brought him to the attention of the profession in Illinois. He also suggested practical ways by which that responsibility could be met. Full discussion of proposed changes throughout the state and participation

¹³ This 458-page book, with a 206-page appendix containing the forms which could be used and the source tables and a comprehensive index, was prepared and published under the direction of the Illinois State Bar Association just before the new act and rules became effective, with Professor O. L. McCaskill of the Law School of the University of Illinois, Editor-in-Chief, and Albert E. Jenner, Jr. and Walter V. Schaefer, Associate Editors, who, like Professor Sunderland, worked with the committee without compensation. Special mention was also made in Judge Thompson's Introduction to “the services rendered by Professor Edward W. Hinton of the Law School of the University of Chicago, Professor Robert W. Millar of the Law School of the Northwestern University and Hon. John M. O'Connor, Justice of the Appellate Court” in “drafting and revising the text of the Civil Practice Act.” (p. vi) A supplement to the book was published in 1936.

¹⁴ Introduction of Professor Sunderland by Mr. Rothschild, note 5 supra.

by the bar in drafting court rules prior to adoption have become the pattern in Illinois. Illinois is indebted to Professor Sunderland for suggestions in that regard.

Perhaps the most vital contribution of the 1933 Act from a long-range viewpoint of making the reform lasting and capable of being kept up to date was the extensive rule-making power which it conferred on the supreme court. Professor Sunderland proposed, as stated, that the first part of the new measure should be a "simple statute" containing "the basic principles of judicial procedure" and that the details should be covered by a "set of court rules."¹⁵ Even though there was some opposition to the proposal of conferring general rule-making power on the supreme court and even though some eminent lawyers and scholars questioned its constitutionality, the grant of such power survived throughout as a key feature of the reform. But the legislature still retained authority so that it could control larger questions of policy and also remain a forum to which further efforts for reform could be addressed.

By the grant the supreme court was thus given authority to regulate the rules of pleading, practice and procedure in all courts of record in the state, except the Municipal Court of Chicago.¹⁶ A Schedule of Rules was attached to the act as finally passed but although the rules thus received legislative approval as a part of the act, they were expressly declared to operate only as rules of court, "subject to suspension and amendment in any part thereof, by the Supreme Court, as experience shall show to be expedient."¹⁷ The delay of six months between passage of the new act and its effective date permitted substantial strengthening of the rules. The bar participated in that also. Committees representing the Illinois State and Chicago Bar Associations and the Illinois State and Cook County Judicial Advisory Councils, "assisted by Messrs. Walter F. Dodd and Albert E. Jenner, Jr., who drafted" the proposals, presented to the supreme court for its consideration a proposed

¹⁵ Pencil notes of Professor Sunderland's first meeting with the special committee of the Chicago Bar Association on October 29, 1929, note 6 *supra*.

¹⁶ The reason for the exception of the Municipal Court of Chicago was that from the time of its establishment in 1905 it had enjoyed comprehensive rule-making power [Ill. Laws (1905), p. 157 at 180, §51]. Effective January 1, 1956, the rules governing practice in that court were revised under the direction of Municipal Judge Joseph J. Drucker in order to condense and coordinate them with the Civil Practice Act and Supreme Court Rules, and are known as the "Civil Practice Rules of the Municipal Court of Chicago."

¹⁷ Sec. 3 of Civil Practice Act of 1933; Ill. Rev. Stat. (Cahill, 1933), c. 110, §3.

new set of 71 rules to replace the 41 which had comprised the Schedule of Rules which had attached to the act as passed.¹⁸ The Illinois Supreme Court met the challenge provided by the act's grant of rule-making power to it and adopted the 71 substituted rules on December 22, 1933, to become effective along with the act on January 1, 1934.¹⁹

The rules of court were required to be "supplementary to but not inconsistent with" the legislative provisions of the new act.²⁰ While this provision limited the scope of rule making more narrowly than many jurisdictions have found desirable, it did not impair this feature of the reform in Illinois. Shortly after the 1933 Act and Rules became effective Professor Sunderland wrote:

"Illinois has followed the same course as Connecticut, New Jersey and New York. It has conferred substantial rule-making power upon the Supreme Court while at the same time the major part of the field of procedure still remains under the control of the legislature. Every reform is a compromise. The tradition for statutory regulation, which had continued unbroken during the entire history of the state, was probably too firmly established to justify any attempt to entirely supplant it."²¹

This compromise, with its resulting sharing of responsibility by both the legislature and the court for keeping court machinery up to date, has proved wise in Illinois. Modifications of the statute and the rules from 1933 to date emphasize, however, how largely the burden continues to fall upon the legal profession to suggest and promote desired changes.

Developments in Illinois civil practice since the 1933 Act furnish one measure of the state's debt to Professor Sunderland. Those developments show both the lasting success of that reform and the part which the legal profession has played in its continued modernization. The latest revision, effective January 1, 1956, is illustrative. At the suggestion of the supreme court,²² the Illinois State

¹⁸ 22 ILL. B. J., No. 5, p. 129 (1934).

¹⁹ 355 ILL. 11-64 (1934).

²⁰ Ibid. Sec. 2 (1) of Civil Practice Act of 1933; ILL. REV. STAT. (CAHILL, 1933), c. 110, §2 (1).

²¹ Sunderland, "The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act," 1 UNIV. CHI. L. REV. 188 at 191 (1934).

²² For the background of this "suggestion" see the "President's Page" during Albert E. Jenner, Jr.'s term as President of the Illinois Bar Association in 38 ILL. B. J. 5-6, 101-102, 165, and Annual Address of the President, 526 at 531-532 (1949-1950).

and Chicago Bar Associations appointed a Joint Committee on Illinois Civil Procedure in 1950 to study the Civil Practice Act in the light of developments and experience during the seventeen years that it had been in effect. Twenty-eight leading lawyers and judges from all sections of the state comprised the joint committee, of which Owen Rall of Chicago served as chairman and Professor Edward W. Cleary of the University of Illinois College of Law as draftsman. They worked diligently over a period of five years, incorporating the views of the legal profession of the entire state before submitting a proposal for revision in the legislature and court. It was then quickly adopted. In a foreword to the revised Act and Rules the joint committee stated: "Even the most skeptical practitioner will concede that the Illinois Civil Practice Act and the Supreme Court Rules have functioned admirably."²³ The committee then pointed out how the revision had been made "in the light of experience under [the 1933 Act and Rules] and subsequent advances made throughout the nation in the field of practice, pleading and procedure."²⁴ The 1956 revision shows how largely the pattern which Professor Sunderland outlined almost three decades ago has made it possible for the legal profession in Illinois to "modify the practice, as experience might from time to time suggest, in order to keep it adjusted to the needs of the state."²⁵

²³ Separate volume of Smith-Hurd Ill. Ann. Stat. on the Civil Practice Act and Supreme Court Rules, effective January 1, 1956, p. III.

²⁴ *Ibid.*

²⁵ "Analysis of the Civil Practice Act of 1933, by Edson R. Sunderland, Professor of Law and Legal Research, University of Michigan Law School," printed as a foreword to the act in Ill. Rev. Stat. (Cahill, 1933), p. 2143 at 2144.