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Paschal: Mr. Justice Sutherland

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REVIEWS

MR. JUSTICE SUTHERLAND. By Joel Paschal. Princeton University Press, 1951. Pp. xii, 267. \$4.00.

THIRTY-TWO years ago an America thoroughly tired of brilliance, reform, world-saving and liberalism elected Warren G. Harding as President. For the dominant mood of the time, the choice was good; that amiable, handsome non-entity could be relied upon not to disturb anyone deliberately.

As befitted a candidate chosen because he was the very antithesis of a crusader, as well as because he couldn't do himself nearly as much harm by silence as by talking, Harding ran a "front porch campaign" and stayed off the stump. Principal among his veranda advisers, after the members of the "Ohio gang," was his old Senate companion, George Sutherland of Utah. Sutherland, one of the first to realize that dark-horse Harding would survive when the other candidates knocked each other out, gave firm post-nomination advice to the candidate: "We have only to sit tight to be sure of winning."

After the election, Sutherland himself sat tight. Not in the Cabinet, he was untouched by scandal. Fifteen months after Harding took office, he appointed Sutherland to the Supreme Court.

Once again, for the dominant mood of the time, the choice was admirable. When the American people chose Harding, they chose conservatism. When he chose Sutherland, Harding gave more lasting form to that choice. But Harding did more than pick a man of conservative slant; he chose an able lawyer and a deeply systematic exponent of conservative philosophy. If Sutherland be compared with the other conservative extremists of the Bench from the death of Brewer in 1910 to the passing of McReynolds, the last of the die-hards, in 1941, he stands at the head of the list by any measure of ability. His accomplishments outrank those of Lamar, Day, McKenna, Van Devanter, McReynolds, Butler, Sanford, and, more doubtfully, even Taft.

This eminence warrants a first class book about Sutherland, and Mr. Paschal has produced it. A well-written intellectual history, the volume recounts enough of Sutherland's personal development to keep human interest. An outstanding quality of the work is its dispassion. Sutherlandism is extinct now, beyond the acceptance of responsible Americans of any shade of opinion. Is there anyone left who believes, for example, that government either does or should lack the power to set minimum wages for women? A modern writer could treat the credo of the '20's on the one hand as a distant obsolescence, on the other as a target for barbs from well-remembered controversies. Paschal does neither. He writes with sympathy, respect, and understanding of Sutherland's point of view, if with very little acceptance. His tone is suggested by his conclusion:

"Today, less than ten years after his death, there has been a complete, and probably final, repudiation of much of Sutherland's thought.

Few would contend for his extravagant notions of judicial prerogative. . . . Even granting all this, Sutherland's achievement remains a sizable one. In cases where he did not become enmeshed in his hostility to government, his opinions continue to have a vital influence. . . . Sutherland is today influential in both the fair and efficient administration of justice. And in the field of foreign affairs, he seems destined to enjoy a lasting preeminence."¹

I

Born in England in 1862, Sutherland was brought to Utah the next year by Mormon parents migrating to the Promised Land.² His father shortly abandoned Mormonism, and Sutherland grew up as a Gentile in the Mormon state. From the root to the flowering of his education in Utah he was indoctrinated in laissez faire philosophy, and these views were given legal content when he studied law at Michigan under Cooley. Sutherland never forgot the implied maxim of his master: The most important part of a Constitution is its *limitations*. Paschal well develops this training, which continued as Sutherland returned to practice in Utah and through reading and bar activities, fell under the intellectual leadership of the most conservative forces in the profession. By 1900, at the age of 38, Sutherland had a full-blown social and legal philosophy which could only be applied, not expanded, in the remainder of his life.

In 1900, Sutherland, elected to Congress as a McKinley man, found Theodore Roosevelt in the White House upon his own arrival in Washington. The new Congressman and the new President did not pull well together, splitting promptly on an issue of tariff reduction which TR proposed and Sutherland opposed. In 1905 Sutherland went to the Senate, and soon after, in the Taft administration, moved into the Republican leadership as a vigorous anti-Progressive. Though one of the lesser Old Guard leaders, opposing the income tax and supporting new high tariffs manfully, he was not—and this is important—a total standpatter. He supported an eight hour day for government employees, aided in establishing the Children's Bureau, was a leader for women's suffrage, and dallied with that old devil Socialism itself by supporting the Postal Savings system.

In the election of 1912 Sutherland saw his candidate, Taft, fall far behind Wilson and Roosevelt, but he had the comfort of seeing his own state one of the two Taft carried. In the Wilson administration, as an opposition Senator, Sutherland came into his own as an across-the-boards opponent of government action. A vitriolic critic of Wilson's domestic and foreign policies, he particularly opposed the creation of the Federal Trade Commission and the Clayton Act. His activities made him the darling of the bar associations,

1. P. 240.

2. The facts in this section of the review are drawn from Paschal. The discussion in the remainder of the review is largely independent of his, and he is not necessarily chargeable with either the facts or views.

before whom he regularly spoke. In 1917, as President of the American Bar Association, his annual address bewailed the sad plight of the business community, "beset and bedeviled with vexatious statutes, prying commissions, and government intermeddling of all sorts."

His program, good enough to elect him President of the A.B.A., was not equally satisfactory to the people of Utah. In 1916, although endorsed by the American Federation of Labor as a result particularly of his support of seamen's legislation, he was defeated for re-election. His Democratic opponent, William H. King, who turned out to be an equally conservative Senator, campaigned on the allegation that Sutherland was "the servant of" an "ultra-respectable class which believes it has a proprietary interest in the government of this country."

In the six years between the defeat and his judicial appointment, Sutherland practised law in Washington, aided in the election of Harding, and became an even more articulate conservative than he had been before. He told the New York Bar Association that "[a]ny attempt to fix a limit to personal acquisition is filled with danger," and particularly denounced post-World War I attempts at price control: "It had been proved by centuries of experience . . . under all conceivable circumstances . . . that government should confine its activities, as a general rule, to preserving a free market and preventing fraud." He invoked the principles of *laissez faire*, as economic "forces of nature whose movements are entirely outside the scope of human power."³

On September 5, 1922, Warren G. Harding took advantage of the retirement of Justice Clarke to put Sutherland into a position to ensure that no human power would interfere with the economic "forces of nature."

II

The two prime questions about Sutherland the Justice are: first, what did a devout intellectual conservative believe in the 1920's and 1930's; and second, how much of a heritage has his work left to our times?

One good source is his own opinions, 281 for the majority and 27 dissents recorded between 1922 and his retirement in 1938.⁴ Quantitatively, certainly, he did his share of the job, his average of 18 majority opinions giving him considerably more opinions each year than any Justice of the present Court, with its light docket of recent years, has had an opportunity to write.

3. Pp. 109, 110.

4. The workmanship of the Paschal book is meticulous throughout except for an appendix, doubtless prepared by an assistant, which purports to list all of Sutherland's opinions. The figures 281 and 27, given above, are based on some revision of that list, but the corrections are only those which turned up in the course of using the list, and may not be complete. For examples, *Burnet v. Guggenheim*, 288 U.S. 280 (1933); *Burnet v. Wells*, 289 U.S. 670 (1933); and *Cook v. United States*, 288 U.S. 102 (1933), though listed as majority opinions, were dissents. *Hart Ref. Co. v. Montana*, 278 U.S. 584 (1929) was a *per curiam* opinion. The *Ickes v. Fox*, 300 U.S. 82 (1937) group of cases is listed as three separate cases instead of as one, though all were treated in one opinion.

As an opinion writer, Sutherland had at least two distinct styles. For what he regarded as his great cases, he was extensive and comprehensive, though rarely verbose.⁵ For his lesser efforts, he was terse.⁶ He had a shrewd eye for the occasions which would warrant one or the other approaches. His opinions covered not only every aspect of constitutional law, but almost everything else as well. As befits a westerner from an arid state, he was given a large share of public lands and water law questions;⁷ but he also wrote in a great number of tax cases,⁸ some antitrust cases,⁹ some employer's liability cases,¹⁰ and some federal jurisdiction cases.¹¹ In addition, he was called upon in a wide range of miscellaneous statutory interpretations.

5. His major cases are mentioned below. He took an interest in the fairly obvious historical sources, though he did not produce any serious original historical research. Examples of this historical interest are *Patton v. United States*, 281 U.S. 276 (1930), on jury trial in criminal cases; *Home Bldg. & Loan Co. v. Blaisdell*, 290 U.S. 398 (1934), dissent, on the contract clause.

6. Examples are *Atl. C.L.R. Co. v. Ford*, 287 U.S. 502 (1933), on presumptions of liability in railroad accidents; *Chi. R. I. & P. R. Co. v. Schendel*, 270 U.S. 611 (1926), on *res judicata*. There was, of course, a range of quality in his opinions as with any judge. One of the poorest, from the standpoint of simplicity and clarity, is *Frost Trucking Co. v. R. R. Comm.*, 271 U.S. 583 (1926), on the relation of private and public carriers.

7. *E.g.*, *Gulf Ref. Co. v. United States*, 269 U.S. 125 (1925); *Cox v. Hart*, 260 U.S. 427 (1922).

8. Something over 20% of his opinions were tax cases. These include some of his most rigid and most ephemeral interpretations, as his work on intergovernmental tax immunities, *e.g.*, *Brush v. Comm.*, 300 U.S. 352 (1937); or interpretations of the Internal Revenue Code, *e.g.*, *Crooks v. Harrelson*, 282 U.S. 55 (1932), discussed below. And see his *Heiner v. Donnan*, 285 U.S. 312 (1932), invalidity of presumption that gift is in contemplation of death; and *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39 (1935), on taxability for estate tax purposes of a trust in which deceased had retained a reversionary interest.

9. Notably, if not exactly memorably, *Bedford Cut Stone Co. v. Stonecutters Ass'n*, 274 U.S. 37 (1927), secondary boycott a violation of the Sherman Act; and, as other examples, *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923), applicability of Sherman Act to leasing of motion picture films by producers; *Industrial Ass'n v. United States*, 268 U.S. 64 (1925), restraint in local sale of building materials, not a violation.

10. These are surprisingly numerous. See, *e.g.*, *Ches. & O. v. Mihas*, 280 U.S. 102 (1929); *B. & O.R. Co. v. Carroll*, *id.* at 491. It cannot be said that Sutherland let sympathy for individuals affect his judgments in these and other personal injury cases; see *Balt. S.S. Co. v. Phillips*, 274 U.S. 316 (1927), suit in admiralty by injured seaman barred subsequent action at law though admiralty action was dismissed as result of misapprehension of admiralty jurisdiction rather than merits; *Erie R.R. Co. v. Duplak*, 286 U.S. 440 (1932), five year-old losing leg while playing on railroad track denied recovery by virtue of a state statute barring actions of this type.

11. Best known of many are perhaps *Kline v. Burke Const. Co.*, 260 U.S. 226 (1922), on the power to enjoin state court interference with federal court proceedings, *cf.* 23 U.S.C. § 2283 (Supp. 1951) and *Hurn v. Oursler*, 289 U.S. 238 (1933), attempting to define "cause of action" for the purpose of "federal question" jurisdiction in copyright cases.

Sutherland's basic approach was that both the Constitution and the statutes should be applied exactly as written, with no straining on the part of the Judge to achieve socially desirable or, indeed, even rational results. Since he equally firmly believed that the Constitution was written to achieve a wide immunization of business from control, an inexorable law and his social convictions usually coincided. And yet, in his *rigor juris* approach to the law as in the other aspects of his thought, Sutherland may be too easily pigeonholed. At times he was capable of a limited freshness and daring.

Consider first some of his restrictive opinions. One of the best known is the *Minnesota Mortgage Moratorium* case,¹² in which Sutherland dissented on the ground that the contract clause precluded such mortgage relief. The opinion is not necessarily narrow in result; a fair-minded man could readily conclude that the Minnesota legislation pushed the contract clause too far. But Sutherland's approach is both morally and historically rigid. With a fine ignorance of what farmers had borne for 15 years, Sutherland assures them that they can only achieve recovery by more "self-denial and painful effort." This is legally imperative—because Shays' rebellion had antedated the contract clause and from that whole episode Sutherland deduces that the Founding Fathers opposed a drastic farm relief. In such a view, the Hughes majority opinion which attempts to discern the progressive spirit of the growth of the contract clause over 150 years is simply incomprehensible. To Sutherland, in this mood, the notion of a growing Constitution was a contradiction in terms—if it grows, it can scarcely be a Constitution.

Clearer examples of his approach are in the immigration and tax fields, areas in which no judge has ever been more the automaton. In *Crooks v. Harrelson*,¹³ the issue was the interpretation of the Revenue Act of 1918 which made estates taxable where the interest of the decedent "is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." A Missouri estate, largely real property, claimed complete immunity from the tax because of an oddity in Missouri law under which the property was subject to payment of charges and to distribution, but was not subject to "expenses of its administration." Unless by some device or another the "expenses" clause was made an alternative, the law was made absurd—Congress had by accident taxed the inheritance of the rest of the real property in the country, but not that in Missouri. Under the *Trinity Church* doctrine,¹⁴ the Court might have avoided the absurdity by finding that, despite the words, the law did not accord with the intent of Congress.

Sutherland rejected this alternative. He would correct absurdities only where "so gross as to shock the general moral or common sense." He continued, "It is not enough merely that hard and objectionable or absurd conse-

12. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

13. 282 U.S. 55 (1930).

14. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

quences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the lawmaking authority and not with the courts."¹⁵

In tax cases, only the fisc suffers from this approach. But in immigration cases, the results could be tragic. There are scarcely two harsher cases on the books than two of Sutherland's. In one, an American-born Chinese sought to bring in his foreign-born wife. Under the statute, if he had been a naturalized, instead of a native-born American, he clearly could have done so. The issue therefore was whether a native-born American should have the same right to bring in a foreign wife as is accorded a foreign-born American. Sutherland, conceding that the result "unjustly discriminates against the native-born citizen," that it was "cruel and inhuman in its results," nevertheless would not stretch the statute to correct its obvious drafting error.¹⁶ In a second immigration case, the issue was whether the Palestinian wife and child of an American rabbi must be deported. One section of the immigration laws bars immigration from parts of Asia except for specified classes including ministers and their wives and children. Another permitted free entrance for ministers without consideration of their geographic origin. Said Sutherland, this wife and child must be deported because they fell in the hole between the two sections—because not from the right part of Asia they could not claim the exemption of the first section, and because they were not the minister, but only his family, they likewise were excluded from the second. He concedes that this is a case of "peculiar and distressing hardship"; but "[t]he contention that it is absurd and unreasonable . . . does not require consideration, since the result we have stated necessarily follows from the plain words of the law. . . ."¹⁷

In these cases Sutherland seems almost to welcome the hair shirt of compulsion to patently irrational results. He portrays himself as the instrument of inevitable law, exemplifying the view he expressed in an address at the age of 33: "Judges do not make laws, but declare them; the rules which govern their deliberations and decisions are to a large extent fixed and permanent, in no wise to be controlled by temporary considerations or policies." Hence, he had argued in 1895, Chancellor Kent, then dead a half century, could if resurrected, "by reading the statutes which have been enacted since his death . . . serve the commonwealth quite as well as any of the present in-

15. *Crooks v. Harrelson*, *supra* note 13, at 60. For example of an Internal Revenue Code case in which the Court takes another approach and quietly overrides an absurdity in the statute, see *Helvering v. Owens*, 305 U.S. 468 (1939).

16. *Chung Fook v. White*, 264 U.S. 443 (1924).

17. *Comm. Immig. v. Gottlieb*, 265 U.S. 310 (1934). For example of an immigration case of opposite spirit, in which the Court construes away a statutory rigidity rather than permit a gross injustice, see *Delgado v. Carmichael*, 332 U.S. 388 (1947).

cumbents."¹⁸ These immigration cases particularly read as if they had been written by a ghost rather than a human being.

And yet his process is not so automatic after all. One opinion which suggests that he was not absolutely controlled by *stare decisis* overrules two cases interpreting the Federal Employer's Liability Act.¹⁹ During the latter half of his judicial service, he wrote two opinions in a genuine spirit of moderate progress. In the *Continental Bank* case, the issue was whether the bankruptcy power was broad enough to permit Congress to direct reorganizations as well as bankruptcies. The Founding Fathers certainly had nothing like railroad reorganizations in mind when they wrote the bankruptcy clause. Yet Sutherland, who in the mortgage moratorium case found his answer in the attitude of the Convention toward Shays' rebellion, proclaims his indifference to the 1787 concept when bankruptcy is involved: he recites the "fundamental and radically progressive nature" of the bankruptcy laws for a century and a half, which "demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day."²⁰

Or consider his other outstanding progressive opinion, *Funk v. United States*. The issue was whether in a federal criminal case a wife might testify in behalf of her husband. Two not-so-ancient Supreme Court cases, following the common law anachronisms on interested witnesses, had held that such testimony must be excluded. Sutherland, overruling those cases over the objection of Justices McReynolds and Butler, applauded the "capacity for growth and change in the common law," and declined "to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just," merely "because we have once adopted them."²¹ He, who would treat a statute as though it were a device precise enough to measure milligrams, includes pages in praise of the maxim that common law should never outlast the reason which gave it birth.

Sutherland's occasional flashes of novelty are at most a piddling progressivism. He tolerated slight changes, but he never shook the temple of the familiar. To support postal savings in the Senate, to condone reorganization as within the bankruptcy power, to let a wife testify in support of her husband—these are scarcely exhibits of daring. In one area, and in one only, was Sutherland actually blazing a trail of power expansion.

That one area was foreign affairs. The *Curtiss-Wright* case, the *Belmont* case, and the *Cincinnati Soap* case are landmarks today. *Curtiss-Wright*, the

18. Pp. 17, 18.

19. *Chicago & E.I.R. Co. v. Comm.*, 284 U.S. 296 (1932). This involved no casual overruling; there were conflicting decisions.

20. *Continental Ill. Bank v. Chicago, R.I. & P.R. Co.*, 294 U.S. 648, 671 (1935).

21. *Funk v. United States*, 290 U.S. 371, 383 (1933).

most important, clearly announces the absolute sovereignty of the federal government over foreign affairs and, less theoretical and more significant, gives extraordinarily large range to the powers of the President in that field.²² The *Cincinnati Soap* case, involving a federal tax on Philippine coconut oil, includes a firm statement of the powers of Congress over dependencies which, while not novel, has at least the value of being succinct in an area of the law where others have been verbose.²³ *Belmont*, analyzing the consequences of the recognition of Russia, is the leading statement of the consequences of recognition and of the powers of the President in respect to it.²⁴

III

Intellectually much of Sutherland may be as remote as the dinosaur. What is remarkable is that so much remains vital, far more than the dinosauric comparison comprehends. His colleagues, McReynolds and Van Devanter, who served far longer, are gone almost without effect in our times; it is possible that no greater matter will be affected for better or worse, throughout the 1950's by anything they said. Unlike them, Sutherland is not sunk without trace.

Much of what he wrote has, of course, been overruled. Some of his most important constitutional interpretations are discarded, and the statutes have been much revised to escape his rigorous construction. At least 19 of his opinions, including many of the most important, have been either overruled or restricted so severely as to be of no consequence, and the number may be much higher.²⁵ His whole approach to due process, as in *Adkins v. Children's*

22. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, at 319 (1936), says: "Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." The passage may have relevance if Congress should push its inquiries into the recent conversations between President Truman and Mr. Churchill.

23. *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937).

24. *United States v. Belmont*, 301 U.S. 324 (1937). Perhaps because of his experience on the Senate Foreign Relations Committee, Sutherland resolved legal questions concerning foreign affairs with a different chamber of his mind than he used on purely domestic questions. The two of his opinions which come closest to being adverse to interests of property are cases involving the use of the eminent domain power in war time. There the federal power is broadly upheld, and federal damages kept down. *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); *Russell Co. v. United States*, *id.* at 514.

25. The following list gives the Sutherland opinion and unless otherwise noted, the case which either overrules or sharply limits it: (1) *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). (2) *Bedford Cut Stone Co. v. Stone Cutters Ass'n*, 274 U.S. 37 (1927); *Hutcheson v. United States*, 312 U.S. 219 (1941). (3) *Bogardus v. Comm.*, 302 U.S. 34 (1936); discussed with reference to

Hospital and Ribnik v. McBride; or the commerce clause, as in *Carter v. Carter Coal Co.*; or the contract clause, as in *Coombes v. Getz*, are all of about the same significance as dinosaur tracks in 1952.²⁶

But consider what remains. The foreign affairs opinions are outstanding today. *Berger v. United States* is the leading decision on bias and prejudice at trial,²⁷ and *Powell v. Alabama*²⁸ is the great landmark on the right to counsel in capital cases. *Massachusetts v. Mellon*,²⁹ by its practical prohibition of constitutional challenge to federal expenditures, has given more meaning to the spending power, and has done more to encourage the modern grant-in-aid system of federal-state relations than any other case-law development in history. The leading double jeopardy discussion,³⁰ the original important encouragement to zoning,³¹ one of the foremost opinions developing the im-

its limitations in PAUL, FEDERAL ESTATE & GIFT TAXATION § 16.02 (1942). (4) *Brush v. Comm.*, 300 U.S. 352 (1937); *Helvering v. Gerhardt*, 304 U.S. 405 (1938). (5) *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *NLRB v. Jones & Laughlin Co.*, 301 U.S. 1 (1937). (6) *Colgate v. Harvey*, 296 U.S. 404 (1935); *Madden v. Kentucky*, 309 U.S. 83 (1940). (7) *Coombes v. Getz*, 285 U.S. 434 (1932); *cf. Veix v. Sixth Ward Ass'n*, 310 U.S. 32 (1940), which though distinguishable, reflects a very different attitude. (8) *FTC v. Raladam Co.*, 283 U.S. 643 (1931); *cf. Same v. Same*, 316 U.S. 149 (1942). (9) *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932); *State Tax Comm. v. Aldrich*, 316 U.S. 181 (1942). (10) *Frost v. Corp. Comm.*, 278 U.S. 515 (1929); *cf. Tigner v. Texas*, 310 U.S. 141 (1940). (11) *Frost Trucking Co. v. R. R. Comm.*, 271 U.S. 583 (1926); *cf. Calif. State Ass'n v. Maloney*, 341 U.S. 105 (1951). (12) *Heiner v. Donnan*, 285 U.S. 312 (1932); discussed with reference to its statutory and judicial limitations, PAUL, *op. cit. supra* § 602. (13) *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39 (1935); *Helvering v. Hallock*, 309 U.S. 106 (1940). (14) *Jones v. SEC*, 298 U.S. 1 (1936); *cf. as restrictive to the point of rejection, Resources Corp. v. SEC*, 97 F.2d 788 (7th Cir. 1938); *Same v. Same*, 103 F.2d 929 (D.C. Cir. 1939). (15) *Macallen Co. v. Mass.*, 279 U.S. 620 (1929); *cf. Tradesmen's Bank v. Tax Comm.*, 309 U.S. 560, 566 (1940). (16) *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937); *Graves v. New York*, 306 U.S. 466 (1939). (17) *Ribnik v. McBride*, 277 U.S. 350 (1928); *Olsen v. Nebraska*, 313 U.S. 236 (1941). (18) *Tyson Bros. v. Banton*, 273 U.S. 418 (1927); *cf. Olsen v. Nebraska, supra*, and cases there cited. (19) *United States v. Macintosh*, 283 U.S. 605 (1931); *Girouard v. United States*, 328 U.S. 61 (1946).

The list is incomplete because not all his opinions were checked. With regard for obsolescence from all sources, including statutory changes, a very rough guess is that about half of Sutherland's opinions no longer have any practical significance.

26. The cases are cited in note 25 *supra*.

27. 295 U.S. 78 (1935).

28. 287 U.S. 45 (1932).

29. 262 U.S. 447 (1923). See also his *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1937), on the unassailability of grants.

30. *Blockburger v. United States*, 284 U.S. 299 (1932).

31. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The zoning cases are a reminder that even to Sutherland, far more state laws challenged under due process, the contract clause, or the commerce clause were valid than were invalid. At the same time the line between the valid and the invalid was frequently narrow, and Sutherland put no limit to the degree of judicial supervision over local affairs. Compare the *Euclid* case

portant principle that a law may be void for indefiniteness,³² a whole group of federal jurisdictional decisions,³³ and *Grosjean v. American Press Co.*,³⁴ the outstanding decision on the freedom of the press from discriminatory taxation—these are a living monument to the dead.

Always courteous, good-natured,³⁵ and diligent, George Sutherland was in every way an outstanding exponent of conservatism in law. Mr. Paschal's excellent book gives real insight into a spirit, exemplified in Sutherland, which not so long ago dominated America, and which, with some adjustment to the problems of a new decade, may do so again.

JOHN P. FRANK†

EFFECTS OF TAXATION: CORPORATE MERGERS. By J. Keith Butters, John Lintner and William L. Cary. Boston: Graduate School of Business Administration, Harvard University, 1951. Pp. xviii, 364. \$4.25.

ECONOMIC EFFECTS OF SECTION 102. Panel Investigation by Tax Institute, Inc. Princeton, 1951. Pp. xxiii, 314. \$5.00.

IN all branches of human life we act—we must act—with little foreknowledge of the consequences. The wise planner does the best he can, never forgetting that his best-laid plans may go awry. When a tax is levied, its ultimate effects are as unknowable as the future life of an infant; so far, at least, neither the theoretician nor the electronic computer has given us greater power to predict the one than the other. Yet in the tax field, perhaps even more than in other areas of human affairs, we are surrounded by soothsayers who confidently promise that one course of action will bring us prosperity while another will return us to the Stone Age. Almost invariably these predictions emerge from a single, and simple, minded devotion to the premise that a tax rests where it first falls, so that a taxed activity is necessarily repressed. The possibility that the levy will be shifted to some other person

with *Nectow v. Cambridge*, 277 U.S. 183 (1928), one of the extremest due process cases in the reports. There Sutherland's opinion requires the revision of a zoning line for one lot in Cambridge, Mass.

32. *Connally v. Gen. Const. Co.*, 269 U.S. 385 (1926).

33. As examples in addition to the cases cited in note 11, *supra* (one of which, *Hurn v. Oursler*, is perhaps glorified by being described as an accomplishment), consider the cases on the status of the courts of the District of Columbia, *O'Donoghue v. United States*, 289 U.S. 516 (1933), and the Court of Claims, *Williams v. United States*, 289 U.S. 553 (1933).

34. 297 U.S. 233 (1936).

35. Paschal's Appendix C, a private memorandum by Sutherland on a Conference, illustrates that Sutherland tended to "go along with" Taft and Van Devanter somewhat more uncritically than with the rest of his colleagues; but Paschal's text discussion shows that the Justice's relations with all of his colleagues were good.

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