



Justice Sutherland

If George Sutherland had not been born a British subject, he might have had at least an outside chance to become Secretary of State in the post-war days when the voice of American diplomacy sounded far in world affairs.

If in 1922 William Howard Taft had not been both a lawyer and a living ex-President, Sutherland even now might be Chief Justice of the United States Supreme Court.

As it was, however, when Warren G. Harding appointed the shy Utah lawyer to be an associate justice of the nation's highest tribunal, he only engulfed him in the obscurity which has swallowed all but the most individualistic members of the Court.

Better than any of his colleagues, the white-bearded man with the pince-nez glasses has been able to observe the tradition which has made of most Court members men without public personalities or distinguishing characteristics. While Washington attorneys may tell anecdotes to illustrate the somewhat affected sweetness of Cardozo or the great gall of McReynolds, about Sutherland there are no stories at all.

This does not mean that Sutherland has no traits of his own. But his outstanding characteristic—lack of assertiveness—has prevented him from figuring very largely in the forming of Court decisions. He has seldom been known to try to impose his arguments on any of his associates.

Indeed, the complaint has been heard that his fellows on the bench never know in advance which way he may turn in cases which do not touch directly on the fundamentals of the Constitution. In spite of this tendency, however, his courtesy and gentlemanly qualities have earned him respect within the Court.

Decisions by the high bench are one thing. Their literary expression in written opinions is another. While Sutherland is no heavyweight in Court debates, he does perform brilliantly when argument has ceased and the task becomes one of explaining why the decision was made.

To Sutherland, the law is the law, and its letter can have but one interpretation. For that reason he is

Justice Sutherland

supremely useful in writing opinions about which his concurring colleagues may have some misgivings. He has the ability to make decisions which may have been tortuously arrived at seem final and unequivocal as any of the Ten Commandments.

This gift first became notably apparent a year after Sutherland was appointed to the bench. In 1923 a District of Columbia minimum wage law came before the Court. This was the suit of *Adkins vs. Children's Hospital*, in which the Supreme Court reversed itself last week.† The question was whether Congress, acting in its capacity as the legislature for the Federal district, could require employers to pay at least a minimum wage to women elevator operators.

In one of the most unpopular decisions ever handed down by the Court, Sutherland delivered the opinion which outlawed the measure. He argued that the Congress without due process of law had deprived women workers of their liberty to bargain for wages. Instantly every liberal newspaper in the country snorted that Sutherland had given female wage-earners "the liberty to starve to death."

Nine years later, in the first *Scottsboro* case, Sutherland put the Constitutional provisions concerning personal liberty to slightly better effect, holding that the trial had taken place in a prejudiced atmosphere and did not constitute "due process of law."

Otherwise, however, the justice from Utah has shown little broadness of outlook. As long as 25 years ago, in a rapidly changing world, Sutherland was looking backward. As Senator from Utah he declared: "What we need, in my judgment, is not so much the adoption of new, experimental—not to say dangerous—panaceas for the ills of the body politic as the conscientious and vigorous enforcement of the old and proved remedies." With this point of view in mind, it is not hard to understand the mutual unpopularity which exists between Sutherland and the present administration.

Like Van Devanter, his fellow conservative, Sutherland developed his early conservatism in the West.

Born of British parents in Buckinghamshire, England, 75 years ago, Sutherland was taken to the Utah territory by his parents when he was only a year old. His father was a man of unusual resource, even in the unsettled frontier life which made every man a jack-of-all-trades. He hauled freight, shod horses, taught school, argued law cases, became a justice of the peace and was finally made a mine recorder for the U. S. Land Office. Young George himself was apparently well on the way to such a career when he took a job as agent for the Wells-Fargo express company while he was still in his teens.

But while Van Devanter's Wyoming was largely in the hands of the then greedy Union Pacific railroad, Utah was already under the stern but enlightened rule of the Mormon elders. As a result, Sutherland found an institution of higher learning near at hand in the Brigham Young Univer-

† For the Court's reversal and Sutherland's dissent, see page 4.

Justice Sutherland

sity at Provo, Utah. Enrolled there, he became friendly with two other students whose paths were to cross with his again. One was Reed Smoot, who was later to be Sutherland's colleague in the U. S. Senate. The other was William H. King.

Both King and Sutherland went from Brigham Young to the University of Michigan law school. Always precocious, Sutherland was back in Utah and admitted to the State bar in only slightly more than a year. And within a year after that he had married Rosamond Lee of Beaver, Utah, and had formed a law partnership with King in Provo.

In 1895, Sutherland, who had embraced the cause of Republicanism in a safely Republican State, was elected to the Utah Senate. In 1900 he went to Washington as a member of the House of Representatives.

After his first term in the national Congress, Sutherland allowed his auspiciously begun political career to languish, returning to practice in Salt Lake City. In 1905, at the age of 43, he picked up the thread of politics again and was elected by the Utah Legislature to the United States Senate.

As a young lawyer, Sutherland had helped design the judicial system of the new State of Utah. In Washington, he became a quiet member of the Senate Judiciary Committee.

From a political standpoint, in his Senate years he was simply "the other Senator from Utah" besides Reed Smoot. He seldom spoke, but when he did, his oratory was so learned and convincing that within a small circle he earned a reputation for being one of the leading Constitutional authorities in the country. A keen English observer, James Lord Bryce, went so far as to call him "the living voice of the Constitution."

Living voice or no, Sutherland was soon to find his legal prestige of little avail. In 1916 the people of the State elected their Senators by direct vote for the first time. Always a shy stump speaker, when Sutherland ran for his third term in the Senate he was defeated by his more impressive schoolmate, Democrat William King.

Despite this loss, Sutherland went on to add new distinction to his name. From 1916 to 1917 he served as president of the conservative American Bar Association. At the same time he became a lecturer at Columbia University in New York and pleaded cases before the Supreme Court.

In 1920, when General Leonard Wood and Governor Frank Lowden were occupying the spotlight at the Republican national convention, Sutherland shrewdly became one of the first to advocate the nomination of Warren G. Harding.

After Harding's nomination, Sutherland, a former member of the Senate Foreign Affairs Committee, was the Ohioan's leading counselor on the then burning question as to whether or not the United States should enter the League of Nations. He stayed at Marion to help in the Republican's "front-porch" campaign. Often he was spoken of as "Harding's Colonel House."

Justice Sutherland

Following the Republican victory, Harding's friends thought that he would reward Sutherland by appointing him Secretary of State. When the post went to Charles Evans Hughes, newspapers consoled Sutherland with the theory that his failure to receive the honor had been due to his British birth. In the case of the death of both President and Vice President, the Secretary of State succeeds to the Presidency. Sutherland, foreign-born, would have been ineligible.

As chairman of an advisory committee to the Washington Conference in 1921, however, Sutherland was given credit for much of the work accomplished by the international parley.

When Chief Justice White died in 1921, Sutherland's chance seemed to have arrived again. But while his name was favorably mentioned, the vacancy was finally filled by ex-President Taft. This time consolation appeared a year later with an appointment to fill the associate justiceship left by John Hessin Clarke.

Hardly less shy in public life than he is in the matter of court debates, Sutherland lives an inconspicuous existence in Washington. He and Mrs. Sutherland occupy an apartment on Connecticut Avenue. Of their three children, two daughters are married and the only son is dead. Part of the justice's \$20,000-a-year salary, however, helps support other relatives.

Sutherland passed his 75th birthday on March 25 without saying whether he would retire or not. Through a curious coincidence, nevertheless, he long ago went on record against Court alteration. When the Arizona State Constitution of 1910 allowed the recall of judges of the State courts, Senator Sutherland saw a horrible vision: "I declare my solemn conviction that the moment a provision for the recall of Justices of the Supreme Court shall be written into the Federal Constitution, that moment will mark the beginning of the downfall of the Republic and the destruction of the free institutions of the American people."