PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES

In Memory of Mr. Justice Sutherland[1]

MONDAY, DECEMBER 18, 1944.

Present: THE CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE.

MR. GEORGE WHARTON PEPPER addressed the Court as follows:

May it please the Court: At a meeting of the Bar of the Supreme Court of the United States held this morning,[2] to take appropriate action following the death of Mr. Justice Sutherland, a Minute was adopted which I have been requested to present to the Court with the prayer that it be made a part of its permanent records.

Mr. Pepper then read the following:

RESOLUTIONS

George Sutherland was born at Stoney Stratford, Buckinghamshire, England, on March 25, 1862. Of his Scotch-Irish and English forebears he was always proud and it

[1] MR. JUSTICE SUTHERLAND retired from active service on January 18, 1938 (303 U. S. IV), and died in Washington, D. C., on July 18, 1942 (317 U. S. III, V).

[2] The Committee on Arrangements for the meeting of the Bar consisted of Solicitor General Charles Fahy, Chairman, and Messrs. James

was to this racial blend that many of his distinguished characteristics may be attributed.

When he was but eighteen months old his parents came to the United States and made their home in Utah. There his early life was lived and there, even in boyhood, he engaged in the man-making struggle for existence characteristic of the American frontier. At Brigham Young Academy he received his preliminary, if not his only, academic education. In 1882 he entered the law school of the University of Michigan of which at the time Judge Thomas N. Cooley was dean. His law school experience, as he often stated in later life, marked the beginning of his intellectual development. After a brief period of intensive study he was admitted, in March 1883, to practice in the Supreme Court of Michigan and joined his father in the general practice of the law in Provo, Utah.

Immediately after his admission to the bar he was married to Miss Rosamond Lee, of Beaver City. Of the three children of their marriage, only Mrs. Walter A. Bloedorn now survives.

While practicing with his father he accepted any business that came his way, whether civil or criminal. He often traveled miles on horseback through the mountains to try cases before justices of the peace. He defended many persons indicted under the Federal Anti-Polygamy Statutes and throughout his life he had the esteem and confidence of his Mormon neighbors.

In 1886 he formed a partnership with Samuel R. Thurman, Esq., afterward Chief Justice of the Supreme Court of Utah. Entering politics he became an active member of the Liberal or Gentile Party opposed to the practice of

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Francis Byrnes, Homer Cummings, William H. King and William W. Ray. Addresses were made at the meeting by the Honorable Harold M. Stephens, Associate Justice of the United States Court of Appeals for the District of Columbia; Colonel William Cattron Rigby, and Mr. Charles Evans Hughes, Jr. The addresses appear in a memorial volume published under the supervision of Mr. Charles Elmore Cropley, Clerk of the Court.

polygamy, and later was influential in the organization of the Republican Party of Utah. When Utah finally attained Statehood in 1895 he was elected to the first State Legislature, where his legal ability was promptly recognized. In April 1896, when the United States Circuit Court was organized for the District of Utah, he was admitted to practice before that tribunal. Thereafter, he became a member of the firm of Sutherland, Van Cott & Allison of Salt Lake City and on October 20, 1899, he was admitted to the Bar of the Supreme Court of the United States.

Elected in the fall of 1900 to the United States House of Representatives as a Republican, he gave hearty support to all measures which he deemed to be for the public good. After serving one term he declined renomination and resumed practice with his old firm. However, he was not suffered to remain long in private life and in 1904 was elected to the Senate of the United States.

During his service as a Senator he was active in the cause of judicial reform and took a leading part in the evolution of the Penal and Judicial Codes. During his first term the controversy over Senator Smoot's right to his seat became acute. While Senator Sutherland had opposed Smoot's nomination on the ground that no representative of the Mormon Church or of any other religious body ought to be sent to the Senate, yet when the people of Utah had fairly elected Smoot, Senator Sutherland vigorously and successfully supported the right of the Senator-elect to take his seat.

In his second term Senator Sutherland became deeply interested in foreign affairs and in legislation relating to employers' liability, workmen's compensation, and labor relations. His great speech in July of 1911 in opposition to the movement for recall of judicial decisions made him a national figure.

In September of 1916 he was elected president of the American Bar Association but when nominated for a third

term in the Senate he was defeated at the polls by his Democratic opponent and former partner, Senator King. After his retirement he resumed the practice of law and found time to deliver a course of lectures at Columbia University and to make many important public addresses. In the years immediately preceding his elevation to the Bench, he appeared in many cases before the Court of which he was so soon to become a member. He was appointed by President Harding as counsel for the United States in the *Norwegian Ship* cases before the Permanent Court of Arbitration at The Hague. When, likewise under President Harding's appointment, he took his seat upon the Bench he was the fifth member of the Court from the date of its creation who had not been born a citizen of the United States or of the American Colonies.

In the sixteen years of his service upon the Bench the opinions which he delivered covered a wide range of subjects. His intimate knowledge of the laws relating to land, mining, and irrigation in the Rocky Mountain and desert States was of special value to the Court when called upon to render decisions in this field. His own early fight against poverty and his sympathy for the pioneers of the great West who had turned a vast wilderness into a land of promise made him an advocate of the rights of men who acquired their property by labor and physical privation, but he had no sympathy with the speculator who accumulates his wealth by preying upon his fellows.

It was in the field of constitutional law that he made his greatest contribution to our jurisprudence. Most of his judicial service was rendered in the closing years of that century of constitutional interpretation which began at the death of Chief Justice Marshall. This was the period in which the judicial tendency was to maintain a balanced and substantially equal dual sovereignty, with reliance upon natural law and the due process clauses of the Fifth and Fourteenth Amendments. It would be difficult to specify any one of his opinions as being the

greatest that he wrote. In *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304 (1936), he delivered the opinion of the Court which with clarity and force supports the doctrine that in the field of international relations the President is "the sole organ of the federal government" and as such possesses a power which does not require an act of Congress as a basis for its exercise. His dissenting opinion in the Minnesota Moratorium case (*Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398; 1934) is certainly one of the most powerful opinions ever written with an exclusively historical approach. His point of view is well illustrated by the following extract from the opinion:

"The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated."

His felicity of expression and his mastery of clear and vigorous English were all the more remarkable when his limited opportunities for formal education are borne in mind. He was tenacious of his views without being pugnacious in asserting them. He never antagonized his associates and always retained their friendship and affection. His judgments were the result of independent reasoning. In the *O'Donoghue, Hitz,* and *Williams* cases (289 U. S. 516–553; 1933) he delivered the opinion of the Court, holding that the Supreme Court and the Court

of Appeals of the District of Columbia are constitutional courts and that the compensation of their judges may not be diminished during their terms of office, thus distinguishing them from the Court of Claims and the Court of Customs Appeals. An illustration of his wholly impersonal approach is the disapproval expressed in this opinion of a dictum which his close friend and colleague, Mr. Justice Van Devanter, had previously uttered in the *Bakelite* case (279 U. S. 438; 1929).

Although even as a child he had struggled for self-support, he could not bring himself to uphold the constitutionality of the Federal Child Labor Legislation. Similarly, it was his view that the minimum wage law of the District of Columbia was unconstitutional in that (to quote the language of his own opinion) "it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis . . . is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals." (*Adkins* v. *Children's Hospital,* 261 U. S. 525; 1923). He was firm in his belief in the Bill of Rights and wrote the opinion of the Court in the Scottsboro case (*Powell* v. *Alabama,* 287 U. S. 45; 1932) and many others in which the rights and liberties of individuals were upheld.

Perhaps the character of the man himself cannot better be described than in the words which he himself used when, in 1941, he spoke thus to the graduating class of his Alma Mater, the Brigham Young University:

"Good character does not consist in the mere ability to store away in the memory a collection of moral aphorisms that runs loosely off the tongue. Seneca gave the world a book of beautifully-written moral maxims; but he stood in the Roman Senate and shamelessly justified Nero's murder of his own mother. Character to be good must

be stable—must have taken root. It is an acquisition of thought and conduct which have become habitual—an acquisition of real substance, so firmly fixed in the conscience, and indeed in the body itself, as to insure unhesitating rejection of an impulse to do wrong."

He was the personification of his own ideals. This was the opinion of all who knew him and to this effect is the testimony of his associates in the letter which they addressed to him upon the announcement of his intention to retire from the Bench.

His death on July 18, 1942, was the passing of a great American. The services at Washington Cathedral conducted on July 22, 1942, by the late Bishop Freeman were in keeping with the simplicity of his life and the reasoned certainty of his Christian faith.

Resolved, That the Chairman of the Committee on Resolutions be requested to present these Resolutions to the Court with the prayer that they be embodied in its permanent records.

The CHIEF JUSTICE directed that the resolutions be received and spread upon the minutes of the Court.

MR. ATTORNEY GENERAL BIDDLE addressed the Court, as follows:

Mr. Chief Justice and Associate Justices: I deem it a privilege to offer these remarks in memory of Mr. Justice Sutherland who died July 18, 1942, and to ask that they be spread upon the permanent records of this Court.

George Sutherland, born in Buckinghamshire, England, of Scotch-English parents, was brought to the United States by his parents shortly after his birth on March 25, 1862. The family settled in a pioneer community in the Far West which was later to become the State of Utah, and young Sutherland was educated in the public schools of Salt Lake City and at the University of Michigan. Before

he reached his 21st birthday, his studies had been completed and he had been admitted to the bar. Some thirteen years later, in 1896, when Utah was admitted to the Union, he became a member of its first Senate and also of the State's first judiciary committee. He later served one term in the House of Representatives at Washington and two terms in the United States Senate. During his years in the Senate he formed a close bond of friendship with his colleague Reed Smoot, one of the Republican leaders, and was a member of the Senate Judiciary Committee. It was during his service in the Senate that he established his reputation as an able and conscientious exponent of the Constitution, a lawyer and a scholar of high distinction.

In 1916 he was elected President of the American Bar Association to succeed Elihu Root, and devoted much of his time to its interests. It was while he was in this office that he registered a warning about national prohibition which later events proved to be of striking accuracy. "It does not require a prophet," he said, "to foresee that laws of this character, exacting penalties so utterly disproportionate to the offense, can never be generally enforced, and to write them into the statutes to be cunningly evaded or contemptuously ignored will have a strong tendency to bring just and wholesome laws dealing with the liquor question into disrepute." His vision on this highly controversial issue of national policy is the more striking when it is coupled with his personal approval of abstinence from alcoholic beverages and of prohibition by local option.

It is interesting at this time to recall the toast he made to the Allies when, as retiring President of the Association, he said on September 6, 1917: "To our Allies. May they and we together soon celebrate the surrender of the last stronghold of autocracy in a world of universal liberty." And he added prophetically, ". . . for it is as certain as anything can be that the Imperial German Government aimed at nothing less than . . . to occupy toward the

modern world the same relation which Imperial Rome occupied toward the ancient world 2,000 years ago."

During the five years of private life which intervened between his service in the Senate and his appointment to the Bench, Justice Sutherland served, in 1921, as Chairman of the Advisory Committee to the International Armament Conference; and, in the same year, represented the United States Government at The Hague in the dispute with the Norwegian Government over requisitioning Norwegian ships during the war.

An appointment to the Bench had been suggested for him for more than a dozen years prior to the time he was appointed and assumed his seat in the Supreme Court of the United States in 1922. It was not surprising that his former associate in the Senate, President Harding, remembering Sutherland's frequent speeches on constitutional law on the floor of the Senate, and impressed with his learning and lucidity, should have made the appointment. He came to this Court as a leader to whom his country even then owed its gratitude for his contribution as a scholar, legislator, and statesman.

He was an active member of this Court for sixteen years. His service extended even to a year after his retirement when he sat in an important case involving the misconduct of a member of the federal judiciary. When he died on July 18, 1942, at the age of 80, he left to his country a record of public service which extended over a period of nearly thirty years.

Justice Sutherland frankly described himself as a conservative, and he brought to the Halls of Congress, and later to the Bench, unmistakably conservative views. His essential conservatism did not, however, prevent him from vigorously advocating, while in the Senate, reforms in which he believed, such as postal savings banks, employees' compensation, parcel post, the Railway Safety Appliance Act, and the Hours of Labor Act. He strongly advocated giving this Court the power to regulate practice

in the federal courts, and he was active as a member of the Statutory Revision Committee and the Joint Congressional Committee on Revision and Codification of the Law.

Even though he opposed the application of federal power to the regulation of industrial evils, as enunciated in the *Adkins* case, he strongly supported the power of the national government in foreign affairs. As early as 1910, he was found vigorously endorsing the view that the federal government is not one of limited powers in the family of nations, but on the contrary is clothed with all the power inherent in sovereignty to deal with international affairs. "It results that the investment of the federal government with the powers of external sovereignty," he wrote in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, "did not depend upon the affirmative grants of the Constitution. . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of other members of the international family."

In the great tradition of this Court, Justice Sutherland was vigilant in sustaining the fundamental personal rights guaranteed by the Federal Constitution. Speaking for the Court in *Powell* v. *Alabama*, 287 U. S. 45, for instance, he insisted on the right of the Scottsboro Negroes not only to have counsel but also sufficient time to prepare their defense.

His firm belief in the protective function of the Court extended to personal rights and property rights alike, perceiving a larger area of similarity than of difference in the two areas of protection. In this respect he embraced a tradition of great importance in the history of our thought. The philosophy of *laissez faire* abhorred interference by the state with what were considered the competitive forces of nature and the free market place. It was believed that these forces, harsh as they often proved to be, ultimately brought about the best possible result,

namely, the survival of the fit. It was natural that men who held to the theory of the free market place should extend it from trade to ideas, and that they should be particularly concerned with the protection of freedom of speech. In *Grosjean* v. *American Press Co.*, 297 U. S. 233, in setting aside a state tax imposed on the owners of newspapers as a violation of the First Amendment, Justice Sutherland used these words: "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. . . . Since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

This outlook was in keeping with the economic beliefs of John Stuart Mill and his nineteenth century followers, who still largely dominated English and American thinking when, during his early years in the frontier State of Utah, the basis for Justice Sutherland's emotional and intellectual background was being laid. This background cannot be forgotten when making a fair appraisal of his views—views which have at times been so bitterly assailed. And when we observe that he said to a graduating class at Brigham Young University in 1941 that "nobody worried about child labor" in that pioneer community in which his parents first settled, we better understand his point of view, and indeed that of many of his contemporaries. His philosophy sprang from an environment where the nineteenth century still lingered, untouched by the impact of life under conditions of modern mass production.

Justice Sutherland will long be remembered by his friends and associates for his amiability and consideration for the feelings of others. He was warm, kind and friendly

to all who met him. His admirable human qualities won him devoted friends, including many who disputed his views with a sincerity equal to his own. Those who worked with him knew his devotion to the business of the Court; his painstaking examination of briefs and records; his absorption in the questions involved and his quiet courtesy to the members of the bar.

I close with a quotation from an address made by Justice Sutherland while he was a Senator. It was on an occasion similar to this:

"While the stern necessities of the living will not permit us to sit idly with the dead, it is fitting and proper that we pause in the conflict and pay passing tribute to the memory of those who, having borne with us the heat and stress of the struggle, have passed on to their final rest. It is appropriate that we reverently give expression to our gratitude for what they did and our appreciation of what they were."

The CHIEF JUSTICE responded:

Mr. Attorney General: For more than twelve years it was my privilege to sit on this Bench, in close association with Mr. Justice Sutherland. Your words stir in me, as they will in many others, intimate recollections of his genial and kindly personality and his high conception of the public service and of the duty of public officials. It is well too for us all to be reminded of his vision of the mission and greatness of his adopted country, and of his constant concern for the true dignity of this Court and the faithful performance of its great function of holding even the balances which measure the distribution of the powers of government under a written constitution.

Justice Sutherland was one of the five Justices of this Court who were born in foreign lands. But his life experience and his outlook were typically American and typical also of those Justices who came to this Court from beyond the Mississippi River during the period between the out-

break of the Civil War and the First World War. Indeed, his life was a part of and symbolizes the epic story of the great west. His life in America began as a child in the mining camps of Montana and Utah. At twelve years of age he was working for his living in Salt Lake City. After two years at the Brigham Young Academy in Utah and a year spent at the University of Michigan, when he was twenty years of age, his formal education came to an end and he was admitted to the Bar in Michigan and in Utah, then a territory, where he began his practice of the law. Among all the demands and exigencies of a country law practice in a western pioneer community, later after he removed to Salt Lake City, and still later after he took up his practice in the District of Columbia, he continued and in truth never ceased to be an assiduous student of the law, and especially of the problems growing out of the relations of law to government. After he removed to Salt Lake City in 1894 and until his appointment to this Bench in 1922, he frequently made addresses before Bar Associations and other public gatherings, which won wide attention by their felicity of expression, their philosophical bent, and their grasp of governmental and constitutional problems.

He early became active in politics, supporting the movement for the suppression of polygamy in Utah and for restriction of the Mormon influence in the state government. His career in the House of Representatives, from 1902 to 1903, and for two terms in the Senate, from 1905 to 1917, marked him as a zealous student of public affairs and as an able and resourceful antagonist in debate. His diligent service on the committees of House and Senate, particularly the Judiciary Committee of the Senate and the Joint Committee on the Revision of the Federal Statutes, extended his knowledge of government and public affairs. It was knowledge which later enabled him to wield a potent influence in the deliberations of this Court.

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In 1916, the year before his retirement from the Senate, he became President of the American Bar Association. In 1919 he delivered the Blumenthal Lectures at Columbia University on "Constitutional Power and World Affairs," in which he gave special attention to the war and treaty-making powers under the Constitution. He also served as a member of the Advisory Committee of the International Disarmament Conference held in Washington in 1921, and in 1922 as counsel for the United States in the Norway-United States arbitration at The Hague for the adjustment of the dispute growing out of our seizure of Norwegian ships during the First World War.

By this time he had become a national figure, generally recognized as a leading exponent of constitutional theory and practice. His selection in 1922 to succeed Mr. Justice Clarke as an Associate Justice of this Court was not unexpected and met with general approval. Chief Justice Taft then presided over this Court. With him and with Justice Van Devanter and Justice Butler, the newly appointed Justice shared substantially common views of law, government and public policy, and in them especially he found congenial companions. But his relations with all of his associates were characterized by a personal regard and esteem which found their source in mutual respect and derived their strength from common devotion to the institution which they served. This friendly relationship with his colleagues rose above all differences of opinion and was ended only by his death on July 18, 1942, in his eightieth year, four years and six months from the day of his retirement from this Court.

The period from the close of the Civil War to the time of Justice Sutherland's retirement constitutes an epoch in our constitutional history and in the history of this Court. That period saw the adoption of the Fourteenth Amendment, the expansion and, so far as we can now see, the culmination of the constitutional restraints of due process on state action in the field of business and economics. We already know that during the sixteen years when Justice

Sutherland served on this Court he exercised a profound influence on the development of constitutional law, and especially on the interpretation of the Fourteenth Amendment. But only when that period is viewed in the perspective which time alone can give to historic trends and events, will it be possible to appraise the permanence and the extent of that influence. It is too soon, and we are perhaps still too close to the smoke of battle, to see clearly or to say with omniscient finality precisely how the great constitutional issues of that period should have been decided. Indeed, who would be so rash as to say now, despite shifting emphases and attitudes and the changes which time has brought and will bring, that Justice Sutherland's influence will not continue, perhaps in greater measure than today, to play its part in directing the current of our legal thinking. In any event, wise men will not doubt that the viewpoint which he so ably represented must be reckoned with in the formulation of constitutional principles by a tribunal which must determine the boundaries and distribution of power under a federal constitutional system.

In a time when it had become the fashion to classify men by labelling them, Justice Sutherland was labelled a conservative. It is true, as he said of himself, that his was the type of mind "to put a great deal of faith in experience and very little in mere experiment." He was profoundly convinced that ill-considered experimentation in government in pursuit of passing fashions in legislation, and the loose governmental control of administrative officers, would in the end prove to be the real enemies of true democracy, and a grave danger to constitutional government. Among those who did not share fully his views of constitutional functions, few would be so bold as to deny those dangers. He saw in these encroachments of government on the freedom of the individual, the perils of the oppressive exercise of governmental power which he held it was the design of the due process clause to prevent.

He gave vigorous expression to these views in a series of opinions which stirred widespread public discussion of some of the most fundamental problems of constitutional government. Notable among them were his opinions holding unconstitutional the legislative regulation of the wages of women in *Adkins* v. *Children's Hospital,* 261 U. S. 525; the regulation of the fees of employment agencies in *Ribnik* v. *McBride,* 277 U. S. 350; the regulation of the resale price of theatre tickets in *Tyson* v. *Banton,* 273 U. S. 418; and a statute prohibiting the operation of drug-stores owned by corporations whose stockholders were not licensed pharmacists in *Liggett Co.* v. *Baldridge,* 278 U. S. 105.

Let it be said that the so-called conservative temper of these opinions was not inspired by any antagonism to progress in the law, but rather by the emphasis which Justice Sutherland placed on the constitutional protection of the few from the tyranny of the many. Indeed, these opinions were but steps in the process of finding solutions of what perhaps has been the greatest problem of constitutional interpretation throughout the twentieth century, the need to bring into proper balance the competing demands, on the one hand that constitutional sanctions shall safeguard the individual from the abuse of power by the majority, and on the other that the Constitution be not so interpreted as to clothe the individual with power to restrict unduly the welfare and progress of the community as a whole.

Sound legal principles adequate to meet all the vicissitudes of human experience never sprang full-fledged from the brains of any man or group of men. They are the ultimate resultant of the abrasive force of the clash of competing and sometimes conflicting ideas—ideas which are rooted in different experiences and different appraisals of all the multifarious interests which it is in some measure the concern of government to foster and protect. The time will come when it will be recognized, perhaps more clearly than it is at present, how fortunate it has been for the true progress of the law that, at a time when the trend

was in the opposite direction, there sat upon this Bench a man of stalwart independence, and of the purest character who, without a trace of intellectual arrogance, and always with respectful toleration for the views of colleagues who differed with him, fought stoutly for the constitutional guaranties of the liberty of the individual. As one of those who sometimes differed, I shall ever hold in grateful remembrance this contribution of Justice Sutherland to the work of the Court.

It would be a grave error to suppose for a moment that Justice Sutherland did not see and appreciate the need of progress in the law. In a speech in the Senate on July 11, 1911, he said: "I am not in favor of standing still. No one who takes the slightest thought desires that we shall do that. Of course, we must advance, but we must at our peril distinguish between real progress and what amounts to a mere manifestation of the speed mania. Among the games of the ancient Greeks there was a running match in which each participant carried a lighted torch. The prize was awarded not to that one who crossed the line first, but to him who crossed the line first with his torch still burning." Justice Sutherland was a consistent advocate of progress in the law, but he wished to make progress with the torch of the law still burning. While he was a vigorous opponent of the now forgotten proposals for the recall of judicial decisions, he was an equally vigorous advocate of the adoption of laws for the improvement of the postal service, of workmen's compensation laws and the Safety Appliance Act. He was especially interested in legislation for the relief of working conditions of seamen, and as a Justice he was deeply interested in the cases involving their rights under such legislation.

He never thought of the law as a cut-and-dried system and he realized that if it is to perform its true function it must be flexible enough to be adaptable to the changing conditions of a changing world. His belief that the law carries within it the germ of its own capacity for growth is illustrated and admirably stated in his opinion in *Funk* v. *United States,* 290 U. S. 371, 380–386, which rejected, as outmoded, the common law rule disqualifying a wife

from testifying in behalf of her husband in a criminal trial. His opinion in *Radice* v. *New York*, 264 U. S. 292, sustaining the constitutionality of a statute prohibiting women's work at night, and in *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, upholding the constitutionality of zoning ordinances, are illuminating examples of the application of constitutional principles to new situations. His decision in the Scottsboro cases, *Powell* v. *Alabama*, 287 U. S. 45, that the Fourteenth Amendment requires a state court to so conduct a criminal trial as not to deprive the defendant of the benefit of counsel, opened a new and important chapter in the judicial history of civil liberty.

Justice Sutherland's sixteen years' service on this Court were marked throughout by his diligence in carrying on the work of the Court, his unusual capacity for sustained productive work, and his complete fidelity to the highest interests of the Court as an institution. His opinions are models of legal exposition. He wrote easily, with graceful lucidity, and developed the principles of decision with logical and persuasive power.

When he laid aside his judicial labors, he left the Court with the personal esteem and affectionate regards of all his associates. Chief Justice Hughes then rightly said to him: "Not only have you brought to our deliberations learning and dialectical skill, a wide knowledge of affairs enriched by varied and eminent public service, and a habit of thoroughness and precision, but you have matched tenacity of purpose with an unvarying kindliness and have mellowed our deliberations with unfailing humor."

As we recall the years of Justice Sutherland's service on this Court, in the common endeavor with his colleagues to attain the ideal of justice under law, we cherish the recollection of this man's integrity and sturdy independence, and his devoted loyalty to a great task. Let our memory of him remind us that these, rather than unanimity of thought and opinion of those who must shape the course of law, are the indispensable qualities of the judge, without which justice will not prevail.