Mr. Justice Sutherland, A Man Against the State (Joel Francis Paschal, 1951)

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BOOK REVIEWS

Oral arguments before the Supreme Court of the United States.

Part I sets forth an analysis of certain important practices of both federal and state appellate courts, including the Supreme Court of Florida—practices of singular importance to the appellate advocate’s quest for “know how” but not discoverable by reference to any set of rules. It deals with the actual mechanics used by these courts themselves in handling cases before and after argument. This information alone is worth many times the price of the book.

This treatise should be a working tool of every attorney practicing at the appellate level. For the novice or infrequent visitor to the courts of “last guess” it provides the benefit of the vast experience of a polished and successful advocate. For the seasoned campaigner it offers, at the very least, a basis for comparison of methods and a check list for future endeavors.

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George Sutherland was on the United States Supreme Court from 1922 through 1937, and was a more articulate, but less extreme, member of the most reactionary group ever to hold sway in the Court. His importance derives mainly from the fact that predominance of his views in the Court as then constituted led to the historic clash between it and the Roosevelt Administration.

Sutherland was an exceptionally able man of much erudition; even adversaries described him as “that first-rate lawyer and judicial craftsman.” Before coming to the Court he had been an active Re-

The chapter contains excerpts from a letter of July 28, 1948, by the Honorable Elwyn Thomas, then Chief Justice of the Florida Court, to Mr. Wiener stating that briefs are never read by the Florida justices prior to the argument (p. 15). A new system, instituted January 9, 1951, provides for preparation of a memorandum of each case by one of the research assistants; and prior to the argument this is placed in the hands of each justice sitting.

Mason, Brandeis, A Free Man’s Life 545 (1946).
publican politician, a congressman and senator from Utah, President of the American Bar Association, and an intimate of Warren G. Harding. As a senator Sutherland sometimes went beyond mere party loyalty to sponsor worthwhile social measures, and did valuable work toward improvement of judicial administration. Some of his opinions show marks of depth and vision characteristic of great judicial ability: *Village of Euclid v. Ambler Realty Co.*, 2 sustaining municipal zoning as against the Fourteenth Amendment; *Funk v. United States*, 3 abrogating an archaic rule of testimonial exclusion; the *Scottsboro Cases*, 4 giving vitality to the civil rights provisions of the Fourteenth Amendment; and *United States v. Curtiss-Wright Export Corp.* 5 and *United States v. Belmont*, 6 expounding the concept of inherent federal sovereignty with reference to international relations.

On the whole, however, in the large matters with which he dealt Sutherland was a force of obstruction. As a member of the joint congressional committee investigating the Ballinger-Glavis affair, the Teapot Dome scandal of its day, he seemed to be actuated by small partisan motives. 7 As a member of the Senate Judiciary Committee he fought vigorously against confirmation of Wilson’s appointment of Brandeis. 8 Justice Sutherland seemed to deal with great questions of constitutional law after the manner of Sir Edmund Saunders handling seventeenth century rules of pleading. 9 For about ten years Sutherland was a colleague of the great Holmes, but there seems to have been little profit from the association. Throughout his extended correspondence with Sir Frederick Pollock, Holmes made frequent mention of many men who stimulated him, but in only one letter does he mention Sutherland and that was merely a notation of his appointment to the Court; in that very same letter Holmes expresses his wish that Learned Hand were on the Court. 10 This appointment, if a parenthetical remark may be pardoned, makes

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2272 U.S. 365 (1926).
290 U.S. 371 (1933).
299 U.S. 304 (1936).
301 U.S. 324 (1937).
MASON, *op. cit. supra* note 1, at 259-261, 276, 278-279.
MASON, *op. cit. supra* note 1, at 504.
E.g., Adkins v. Children’s Hospital, 261 U.S. 525 (1923); many more of the extreme opinions are discussed by Paschall.
HOLES-POLLOCK LETTERS 113 (Howe ed. 1941).
one reflect on the caprice of a political system that passes over men like Hand to make way for men like Sutherland—or like the bulk of those appointed since his time.

Paschal’s biography is a well-written book, a candid and thorough outline of the official work and career of the Justice. It is scholarly and free of bias. The cases with which Sutherland dealt are discussed with commendable skill, accuracy, and relevant penetration. As an analysis and interpretation of the Justice’s work and philosophy the book is excellent and very readable. The notes are a credit. The way in which ideas picked up in college and law school by Sutherland are explained as having influenced his views on the Court is most interesting. His extreme laissez-faire attitude is attributed in part to the fact that he was under the influence of a college teacher who believed implicitly in the doctrines of Herbert Spencer.

As a biography Paschal’s book has some shortcomings. Issues are dealt with to the almost entire exclusion of personalities. Except for a brief mention that the Justice was a good story-teller we are left in the dark as to his personal traits. No light is thrown on his friends and associates, and very little is said about Sutherland’s experiences at the bar. We do not know whether the man smoked, chewed, or drank. In this respect I cannot help contrasting the book with Fairman’s biography of Mr. Justice Miller,11 which in addition to discussing the legal questions with great insight tells of the Justice’s dunking soda crackers in whisky during a quiet evening at home, and of his colleagues’ eating candy and apples while listening to argument of counsel.

Despite the dearth of the personal, however, Paschal’s book is recommended, especially to those desiring further light on the important issues dealt with by the Supreme Court in the twenties and thirties.

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11Fairman, Mr. Justice Miller and the Supreme Court (1939).