

THE JUDICIAL LEGACY OF SALMOND J IN NEW ZEALAND

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John Salmond was a judge of the Supreme Court of New Zealand during the years 1920-1924. This paper examines the nature of Salmond J's contribution to judicial precedent in New Zealand in five areas of the law: administrative; family; procedural; property; and contract law. Salmond J's judgments in these areas amply justified his reputation as an outstanding jurist. They were characterised by balance, fairness and a keen sense of human reality, and were presented with admirable structure and clarity. Of particular note is Salmond J's interpretation of the significant body of legislation passed from 1908 onwards. Fortified by his experience of legislative drafting at the time when this legislation was passed, Salmond J confidently supplemented the legislation with case law based on the legislative intent. The overall effect of Salmond J's judicial work was that, during the eight decades after his death, his judgments provided his successors on the bench with apposite language, frameworks and reference points in the cases before them.

I INTRODUCTION

John Salmond was a judge of the Supreme Court of New Zealand for four years (1920-1924). During this time he produced a number of key judgments which have been used by succeeding judges in New Zealand and overseas.

This paper examines the nature of Salmond J's contribution to judicial precedent in New Zealand. There are several reasons why his judgments made a significant contribution to New Zealand case law. First, Salmond J had a justifiable reputation amongst New Zealand judges as an "internationally distinguished New Zealand jurist".¹ This reputation rested in large part on his body of works, especially *Jurisprudence: or The Theory of the Law*, which earned the label "liberal and liberating".² Indeed, these texts, particularly on jurisprudence, were repeatedly referred to by

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1 *Lai v Chamberlains* [2005] 3 NZLR 291, 323 (CA) Hammond J.

2 John Salmond *Jurisprudence: or the Theory of the Law* (Stevens & Haynes, London, 1902); F W Maitland "Review of *Jurisprudence, or The Theory of the Law*" (1902-3) 16 Harv LR 315.

subsequent judges in developing appropriate legal language and understanding of legal concepts.³ For example, Hammond J, in a case involving a claim for exemplary damages, referred to Salmond's outline of the goals of punishment as "one of his most durable analyses".⁴

Secondly, Salmond J amply demonstrated in his judgments the intellectual abilities that had won him wider renown. He showed a keen analytical mind, and a scholarly interest in teasing out, dissecting and classifying legal issues. Thus, for example, a later Chief Justice adopted a precedent of Salmond J as coming from a jurist of "acute mind".⁵ He displayed a talent for lucid expression, and later judges were to adopt the words that he used.⁶ His judgments also revealed an ability to grasp legal concepts and to discern the purpose behind legal phenomena. Characteristic of his approach was his purposive, flexible and morality-based conception of law, rooted in human reality:⁷

The rules of action enforced by the State are, in theory at least, the rules of right and wrong ... Law is justice speaking to men by the mouth of the State, though it must be admitted that the message is often sadly garbled in the process of transmission.

Thirdly, Salmond J's judgments revealed the experience and expertise that he had gained from his career in government. This career gave him unique insights into key statutes and the operation of the State. In the period 1907-1910 he served as Counsel to the Law Drafting Office under Attorney-General John Findlay. Findlay believed in a parental or protective role of the State and under his direction Salmond drafted a number of key statutes.⁸ In this process, Salmond developed his brand of writing which combined simplicity and directness with technical legal language where appropriate.⁹ Furthermore, Salmond was alive to the range of landmark legislation passed at this time and which he was later required to interpret.¹⁰ Salmond then progressed to the Crown Law

3 *Harrison v Harrison* [2004] 2 NZLR 638, para 127 (HC) Fogarty J (sanctity of contract); *Attorney-General v Ngati Apa* [2003] 3 NZLR 643, para 27 (CA) Elias CJ (distinction between sovereignty and property), and *Archives and Records Association of New Zealand v Blakeley* [2000] 1 NZLR 607, para 73 (CA) Keith J for the Court (nature of a fiction).

4 *Tabley Estates Ltd v Hamilton City Council* [1996] 1 NZLR 159, 162 (HC) Hammond J.

5 *Kirkpatrick v Commissioner of Inland Revenue* [1962] NZLR 493, 496 (SC) Barrowclough CJ.

6 For example in *Dolling v Bird* [1924] NZLR 545, 550 (SC), Salmond J defined a prima facie case as one "which may be accepted as sufficient proof of the evidence in view of the failure of the defendant to give or call any evidence in denial or explanation" (adopted in *Police v Coward* [1976] 2 NZLR 86, 89 (SC) Roper J).

7 J W Salmond *The First Principles of Jurisprudence* (Stevens and Haynes, London, 1893) 98.

8 Alex Frame *Salmond Southern Jurist* (Victoria University Press, Wellington, 1995) 83-95.

9 J W Salmond "The Literature of the Law" (1922) 22 Columbia LR 202.

10 For example, Salmond J pronounced on the meaning of fraudulent preference under the Companies Act 1908 (*Official Assignee v Wairarapa Farmers' Co-operative Association Ltd* [1925] NZLR 1, 8 (SC)

Office, where he was Solicitor-General for 10 years. In this role, Salmond retained responsibility for law drafting, in addition to the advisory and litigation work undertaken on behalf of the Crown. Salmond's advice continued to be expressed in precise and simple terms, as he grappled with the range of human interaction with the State in difficult times.¹¹

Fourthly, Salmond J in his judgments showed a readiness to use his judicial office to develop the law. He brought to his judicial career a confident and unapologetic acceptance of the law-making role of judges. He believed that the primary purpose of the administration of justice was "to maintain right, to uphold justice, to protect rights, to redress wrongs".¹² This process, he said, required judges to search out the principles of natural justice in a pragmatic way in the light of human reality:¹³

We must openly admit that precedents make law as well as declare it ... Creative precedents are the outcome of the intentional exercise by the courts of their privilege of developing the law at the same time that they administer it. ... Whence then do the courts derive these new principles ...? They are in truth nothing else than the principles of natural justice, practical expediency, and common sense ... So long as judges affect to be looking for and declaring old law, they cannot adequately express the principles on which they are in reality making new.

As part of this approach, Salmond recognised a key role for judges in the interpretation of legislation. While he accepted that clear legislation had to be applied in its exact terms, he said that defective, ambiguous, inconsistent or incomplete legislation required judges to play a supplementary role in pursuing legislative intent:¹⁴

In these cases, as the authoritative formulation of the law has failed to express a single harmonious and complete idea, it may be lawfully supplemented by considerations drawn from the real or presumed purpose of the legislature and from the requirements of natural justice.

I shall now illustrate the influence that Salmond J's judgments had on five areas of the law. I shall concentrate on those judgments which were adopted and proved influential in subsequent case law. Of course, such is the inherent uncertainty of many legal issues that not all of Salmond J's

Salmond J, followed in *Tyree Power Construction Ltd v D S Edmonds Electrical Ltd* [1994] 2 NZLR 268, 272 (CA) Hardie Boys J for the Court); and on the meaning of attempt under the Crimes Act 1908 (*R v Barker* [1924] NZLR 865, 876, 878 (CA) Salmond J, followed in *Queen v Bateman* [1959] NZLR 487, 490 (CA) North J for the Court). Salmond J's unequivocal act test for attempt has been termed "the one visionary gift" in New Zealand's criminal jurisprudence (Frame, above n 8, 229-231).

11 Frame, *ibid*, 107.

12 Salmond *First Principles of Jurisprudence*, above n 7, 16.

13 J W Salmond "The Theory of Judicial Precedents" (1900) 16 LQR 378, 389.

14 *Ibid*, 390.

decisions were adopted by his colleagues and subsequent judges. For example, while his views on indefeasibility of title in *Boyd v Mayor of Wellington* were respectable,¹⁵ they were not followed by the majority of the Court of Appeal in that case or by subsequent courts.¹⁶

II ADMINISTRATIVE LAW

In two landmark cases on the writ of certiorari, Salmond J's produced judgments which came to be regarded as classic statements on the relevant law. In one he provided principles relating to the test for bias and in the other he supplemented the Arbitration Act on a question of jurisdiction.

In *English v Bay of Islands Licensing Committee*, Salmond J was faced with a motion for a writ of certiorari on the basis that a Licensing Committee had shown bias. In this case, the Committee had publicly declared, before a hearing, that it would not renew a certain licence until the hotel premises were rebuilt. That ground for declining renewal was found to be irrelevant and unlawful. Salmond J's judgment was a model of clarity, order and balance. He held that bias extends to:¹⁷

any such predetermination of the issue as is sufficient to show a real probability that the issue will not be determined in an unbiased and impartial manner. ... The decision may in fact have been perfectly honest, and yet it may be invalidated by circumstances sufficient to show an antecedent probability of partiality.

Salmond J was careful to add that the "rule of disqualification by reason of predetermination must be applied with the utmost caution", and that not every judicial officer would be disqualified by the premature expression of an opinion as to the matter in issue. However in the present case he found that the Committee had gone far beyond a mere expression of opinion and created a reasonable probability that it could be affected by bias.¹⁸

Salmond J's discriminating test for bias came to be adopted by later judges,¹⁹ and was used to support differing outcomes. In *Anderton v Auckland City Council*, the Council had had a close association with the project in question for five years and was thus seen to have disabled itself from adjudicating fairly on the objections to a town planning scheme. Mahon J used Salmond J's decision in *English* and its supporting test for bias to quash the Council's decision on the scheme.²⁰ However, in *Turner v Allison*, the Court of Appeal heard an appeal from the Supreme Court

15 *Boyd v Mayor of Wellington* [1924] NZLR 1174 (CA).

16 *Frazer v Walker* [1967] NZLR 1069, 1078 (PC) Lord Wilberforce.

17 *English v Bay of Islands Licensing Committee* [1921] NZLR 127, 133 (SC) Salmond J.

18 *Ibid*, 135 Salmond J.

19 *Whitford Residents and Ratepayers Assn (Inc) v Manukau City Corporation* [1974] 2 NZLR 340, 347 (SC) Moller J.

20 *Anderton v Auckland City Council* [1978] 1 NZLR 657, 687 (SC) Mahon J.

directing that a writ of certiorari be issued to the members of a Town and Country Planning Appeal Board to quash its decisions. Amongst the supporting grounds for the writ was the claim that the chairman had already indicated his view of the application before it was heard. The Court of Appeal reversed the decision of the Supreme Court. Wild CJ noted that Salmond J's cautionary view applied to tribunals of the kind in question.²¹

In *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer*, Salmond J was a member of the Wellington Full Court required to decide on the power of the Supreme Court to control the exercise of the award-making jurisdiction of the Court of Arbitration. This was in the face of a privative clause in the Industrial Conciliation and Arbitration Act 1908 which declared that "no award ... shall be liable to be challenged, appealed from, reviewed, quashed, or called into question by any Court of judicature on any account whatever".²²

Salmond J noted that if these words were to be read literally they would "produce the extraordinary result that the Arbitration Court possesses uncontrolled authority to make in any matter whatever such orders and awards as it thinks fit", and that "all orders and awards so illegally made must by the Supreme Court and all other Courts be recognized and acted on without question as undisputably valid".²³ Salmond J decided that the privative clause should be interpreted as allowing the Supreme Court to control want or excess of jurisdiction by the Arbitration Court. He stated:²⁴

That Parliament could, if it thought fit, establish in this country such a system of judicial autocracy cannot be doubted, but in order to do so effectually it would be necessary for Parliament to use language so clear and coercive as to be incapable of any other interpretation. In the present case another interpretation is obvious. Section 96 may and should be construed in the same restrictive sense in which statutory provisions taking away the writ of certiorari have always been read. By the established course of judicial decisions interpreting a long series of statutes to this effect, it is settled law that the taking away of certiorari does not extend to certiorari to quash on the ground of want or excess of jurisdiction ... A statute taking away certiorari is construed ... as leaving unaffected the power and duty of a superior Court to compel the observance by inferior Courts of the statutory limits of their jurisdiction.

21 *Turner v Allison* [1971] NZLR 833, 843 (CA) Wild CJ. See also *Patrick v Police* [1982] 2 NZLR 629, 632 (HC) Bisson J.

22 *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 (SC Full Court).

23 *Ibid*, 701-702 Salmond J.

24 *Ibid*, 701. Salmond J's judgment was seen to anticipate a similar development which shortly occurred in England which accepted the need for a wide scope to the prerogative writs (R B Cooke "The Changing Face of Administrative Law" (1960) 36 NZLJ 133).

Five years later, this judgment was expressly approved and followed by the Full Court led by Myers CJ in *Butt v Frazer*.²⁵ After that Salmond J's judgment was regarded as a classic statement of a settled principle of law. Thus, in *Cameron v Auckland Transport Board*, the Court affirmed its right to inquire whether a Metropolitan Licensing Authority had acted within its jurisdiction to impose conditions on the grant of a taxicab licence. Turner J quoted the judgment of Salmond J as "exhibiting the wonderful lucidity characteristic of his writing". In the face of a privative clause similar to that in the *Waterside Workers'* case, Turner J had no hesitation in adopting "the principle so emphatically laid down by Salmond J".²⁶

III FAMILY LAW

Salmond J was required to interpret family-related statute law which was so broadly-worded that it gave him the opportunity to make new law by formulating legal principles.²⁷ In this process, Salmond J was in a unique position to understand the reasoning behind the statutes, as these had been drafted and passed either during or shortly after his time as legislative draftsman. The judgments that he produced revealed his customary ability to distil broad and flexible principles and express neat definitions of key terms.

In *Re Allen*, Salmond J was faced with an application by the widow and a daughter of a wealthy deceased for increased allowances under the Family Protection Act 1908.²⁸ Salmond J's judgment was characterised by clarity, logic and principled justice. He began by articulating the general principle which the Act provided as follows:²⁹

The Act is ... designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.

25 *Butt v Frazer* [1929] NZLR 636, 640, 645, 650, and 661 (SC, Full Court) Myers CJ for the Court.

26 *Cameron v Auckland Transport Board* [1959] NZLR 941, 944-5 (SC) Turner J. See also *The New Zealand Sheepowners' Industrial Union of Employers v Tyndall* [1960] NZLR 606, 609 (SC) McCarthy J; and *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283, 295 (CA) Richmond J.

27 Frame, above n 8, 222.

28 *Re Allen* [1922] NZLR 218 (SC).

29 *Ibid*, 220-221 Salmond J.

Salmond J then went on to state that applications under the Family Protection Act for further provision of maintenance were divisible into two classes. He stated that "the first and by far the most numerous class consists of those cases in which, owing to the smallness of the estate and to the nature of the testamentary dispositions, the applicant is competing with other persons who have also a moral claim upon the testator".³⁰ He stated that in these cases "all that the Court can do is to see that the available means of the testator are justly divided between the persons who have moral claims upon him in due proportion to the relative urgency of those claims".³¹ Salmond J said that the second class of case was that in which, owing to the largeness of the estate or the nature of the testamentary dispositions, the applicant for relief was complaining of the failure of the testator to make sufficient provision for the proper maintenance of the claimant. He stated that, in such a case, the Court had the more difficult task of determining the absolute scope and limit of the moral duty of a wealthy husband or father to make testamentary provision for the maintenance of his widow and children. He summed up:³²

In the first class of case the Court has to judge between the competing claims of different dependants; in the second class of case it has to judge between the claims of a dependant to be maintained by the testator and the claim of the testator himself to do as he pleases with his own.

Salmond J found that the present application came within the second class of case. He then dealt with the claims of the widow and the daughter separately, concluding that no provision for the widow was necessary or justifiable but that the daughter should receive further income from the trustees until she attained 25 years.

Salmond J's approach to Family Protection cases was developed in *Welsh v Mulcock*. Here he was faced with the question of whether the remarriage of a surviving spouse before the making of an application to the Court under the Act was a jurisdictional bar to a claim. Salmond J enunciated the principle that the status of a wife or a husband as a possible claimant under the Act was fixed once and for all at the date of the testator's death, and so subsequent marriage did not affect a claim under the Act.³³

Salmond J's statements of general principle were expressly approved by the Privy Council in *Bosch v Perpetual Trustee Co Ltd*,³⁴ and after this time were adopted by New Zealand judges as

30 Ibid, 221 Salmond J.

31 Ibid.

32 Ibid, 222 Salmond J.

33 *Welsh v Mulcock* [1924] NZLR 673 (SC). This principle was followed in *Bailey v Public Trustee* [1960] NZLR 741, 744 (CA) Hutchison J for the Court.

34 *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 479 (PC) Lord Romer.

providing an authoritative general summary of the duty of the Court.³⁵ Thus, in *Re Downing*, Haslam J remarked that "in this country we prefer to put in the forefront the moral duty of a parent as it was emphasised by Salmond J in his celebrated judgments in *Re Allen* and in *Welsh v Mulcock*".³⁶

Likewise, New Zealand courts adopted Salmond J's classification of cases in *Re Allen*.³⁷ In *Re Sutton*, the Court of Appeal had to decide on a claim by a widow for further provision in an estate where the de facto wife was a beneficiary under the will. Cooke J turned to the issue of principle to which the case gave rise. He found that the case was within the first of the two classes identified in "the classic words of Salmond J", and the Court on this basis divided the estate into two with one half going to the widow.³⁸ On the other hand, in *Re Easton*, the Court of Appeal faced an appeal by the daughters of the deceased against the provision made for them by the Supreme Court. The Court marginally increased the provision of one of the daughters and otherwise confirmed the provision. The Court noted that "the estate is an unusually large one by New Zealand standards, and falls squarely within the second class mentioned in the classic judgment of Salmond J".³⁹

Salmond J's other body of influential family case law emerged out his interpretation of the new grounds for divorce contained in the Divorce and Matrimonial Causes Amendment Act 1920. Salmond would have been in tune with the thinking behind this legislation because amendments to the Act had been in train during the end of his time as Solicitor-General.⁴⁰ In *Mason v Mason*, Salmond J gave the judgment of the Court of Appeal granting a decree in terms of the new discretionary grounds. Salmond J described the policy underlying the new legislation which allowed either party, whether innocent or guilty, to petition for a divorce on the specified grounds:⁴¹

The policy underlying this legislation is that it is not conducive to the public interest that men and women should remain bound together in permanence by the bonds of a marriage the duties of which have long ceased to be observed by either party and the purposes of which have irremediably failed. Such a condition of marriage in law which is no marriage in fact leads only to immorality and unhappiness, and the Court has now been entrusted with a discretionary jurisdiction to put an end to it.

35 *Mudford v Mudford* [1947] NZLR 837, 839 (CA) Smith J for the Court and *Re Mercer (deceased)* [1977] 1 NZLR 469, 472 (SC) White J.

36 *Re Downing* [1975] 1 NZLR 385, 389 (SC) Haslam J.

37 *In re Goodwin (deceased)* [1958] NZLR 320, 330 (CA) Henry J for the Court.

38 *Re Sutton* [1980] 2 NZLR 50, 53 (CA) Cooke J for the Court.

39 *Re Easton* [1958] NZLR 125, 134 (CA) Turner J for the Court.

40 Frame, above n 8, 221.

41 *Mason v Mason* [1921] NZLR 955, 961-2 (CA). Salmond J's judgment in this case confirmed his earlier judgment in *Lodder v Lodder* [1921] NZLR 876 (SC).

Salmond J's judgment prompted Parliament to pass an amendment which took away the Court's discretion to grant a contested divorce to the party who had caused the separation.⁴² However, the principles which Salmond J enunciated proved to have a more enduring influence. Over 40 years later, in the context of more flexible legislation, Wilson J was faced with a petition for divorce where the parties' separation was due to the conduct of the petitioner. Wilson J stated that "the principles upon which the Court should now exercise its discretion in a case such as this should be the same principles as those which were enunciated by [Salmond J]".⁴³

In *Johnson v Johnson*, Salmond J granted a divorce petition on the new ground of seven years insanity with confinement in a mental institution during the last three years. In the course of his judgment he held that mental unsoundness meant "such a kind and degree of mental disorder as would have justified at all times during the statutory period of seven years the committal of the respondent to a mental hospital".⁴⁴ This test was referred to with approval and applied in subsequent divorce proceedings based on corresponding grounds.⁴⁵ Over fifty years later, Somers J remarked that Salmond J's judgments still provided "the apposite test".⁴⁶

IV PROCEDURAL LAW

In a series of cases raising procedural issues, Salmond J gave judgments which proved to be influential on the outcome of subsequent cases. The common theme of these judgments was a principled and flexible approach which best served the interests of justice.⁴⁷

As in other areas of law, Salmond J's major contribution to procedural law arose out of interpretations of recently-passed Acts. Once such Act was the Judicature Act 1908, the general wording of which required the Court to render its meaning more specific.⁴⁸ In *Rutherford v Waite*, the appellant sought leave to appeal to the Court of Appeal from the decision of the Supreme Court to dismiss his appeal from the Magistrate's Court. Salmond J stated that section 67 of the Judicature Act 1908 in no way indicated the principles on which such applications should be determined, and

42 Frame, above n 8, 222-223.

43 *Newell v Newell* [1965] NZLR 737, 738 (SC) Wilson J.

44 *Johnson v Johnson* [1921] NZLR 1054, 1057 (SC) Salmond J.

45 *G v G* [1936] NZLR 752, 753-4 (SC) Callan J, and *S v S* [1940] NZLR 98, 102 (SC) Myers CJ.

46 *Z v Z* [1975] 2 NZLR 582, 584 (SC) Somers J.

47 See, for example, *Davidson v Quirke* [1923] NZLR 552, 566 (SC) Salmond J, adopted in *Mathewson v Police* [1969] NZLR 218, 220 (SC) Wild CJ; *Police v Machirus* [1977] 1 NZLR 288, 291-2 (SC) Richmond P; and *McFarlane v Police* [1981] 2 NZLR 681, 682 (HC) Quilliam J.

48 *Re Pukuweka Sawmills Ltd* [1922] NZLR 102, 103 (SC) Salmond J, adopted in *In re Auckland Piano Agency Ltd (In Liquidation)* [1928] GLR 249, 251 (SC) Blair J and *Kay v Auckland Farmers Freezing Co Ltd* [1959] NZLR 262 (SC) Turner J.

so the authority to grant such leave was purely discretionary. Salmond J declared that in the exercise of this jurisdiction "leave should be granted only on good cause shown".⁴⁹ He stated that the underlying principle of the legislature's intention was *interest reipublicae ut sit finis litium*, meaning that it was in the public interest that the administration of justice should be cheap and speedy. Salmond J then explained what good cause did not mean before proceeding to relevant considerations. He stated that the merits of the case were relevant "only to the extent that the Court must be satisfied that the appeal will raise some question of law or fact which is capable of bona fide and serious argument".⁵⁰ But he pointed out that the appellant had to show more than this:⁵¹

He must show that there is involved in the case some interest, public or private, of sufficient importance to outweigh the cost and delay that would result from further proceedings in the Court of Appeal. Only by showing the existence of some such interest can he exclude the application of the [above] maxim.

Salmond J proceeded to provide examples of where an appeal might be justly granted, such as questions of law on matters of general and public importance, test cases, and decisions affecting the appellant's reputation or his business generally. In all these cases the importance of the decision was "not to be measured by the amount directly in dispute between the parties".⁵² In the case at hand he found no such ground and concluded that to allow the appeal would be unreasonable and oppressive.⁵³

Salmond J's *Rutherford* judgment was confirmed and adopted by subsequent judges.⁵⁴ In *Waller v Hider*, the applicant had been largely unsuccessful in proceedings in the Family Court and in his appeal to the High Court, which declined leave to him to bring a second appeal to the Court of Appeal. Blanchard J, in delivering the judgment of the Court of Appeal dismissing the application, remarked that the test for such applications "is well established", and adopted Salmond J's wording above.⁵⁵

The *Rutherford* judgment was also used in new and analogous situations. In *Green v Commissioner of Inland Revenue (No 2)*, Barker J applied Salmond J's reasoning to an interlocutory application for discovery of documents, where the Master had declined discovery but this was overruled by the High Court. Barker J refused the Commissioner's application to appeal to the Court

49 *Rutherford v Waite* [1923] GLR 34, 35 (SC) Salmond J.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*, 36 Salmond J.

53 *Ibid.*

54 *P v P (No 2)* [1958] NZLR 349, 350 (SC) Barrowclough CJ.

55 *Waller v Hider* [1998] 1 NZLR 412, 413 (CA) Blanchard J.

of Appeal, citing in support Salmond J's reasoning.⁵⁶ Then, in *Cuff v Broadlands Finance Ltd*, the Court of Appeal was asked to exercise its statutory power (granted in 1980) to give leave to appeal where the High Court had refused leave. In this case the High Court had set aside the judgment of the District Court and refused leave to appeal. The Court of Appeal decided to grant leave to appeal and Somers J remarked:⁵⁷

Much of what was said in *Rutherford v Waite* is obviously still applicable. The intention of the legislature remains the same, that one appeal is normally to be sufficient. From this it follows that the case must show some features which justify a second appeal. The indicia mentioned by Salmond J are therefore still important. But as he observed, the section places no fetters on the exercise of the discretion to grant leave. That being so, the guiding principle in the end must be the requirements of justice.

Another statute which gave rise to an important judgment by Salmond J was the Juries Act 1908. In *Stevens v Parkin*, Salmond J had before him an application to order a new trial in a case where there had been a disagreement in respect of one of two defendants. The jury had found in favour of the second defendant. The motion was opposed by the first defendant on grounds that the jurisdiction to order a new trial in terms of section 154 of the Juries Act 1908 was discretionary and that it was appropriate that the application be refused. Salmond J remarked that if section 154 were read literally and without reference to section 153 it appeared to give the Court a discretion to refuse a retrial. However, he said that that section had to be reconciled with the provisions of section 153(2), which provided that on discharge of the jury "such proceedings may thereupon be taken anew".⁵⁸ Salmond J therefore considered that the discretion in section 154 must be regarded as limited to deciding the time at which a new trial should take place. Salmond J added obiter that, similarly, in a criminal case, if the jury disagreed and was discharged, the prosecutor was entitled as of right to one or more further trials until a verdict had been obtained or until the Attorney-General chose to exercise his statutory authority to enter a stay of proceedings under section 435 of the Crimes Act 1908. He affirmed that the Court had itself no authority to stay the proceedings by refusing an order for a new trial.⁵⁹

Salmond J's judgment was subsequently affirmed and applied in criminal cases by judges declining to review the Crown's decision to order a new trial after a jury's disagreement.⁶⁰ In *R v Barlow*, the line of authority stemming from Salmond J's judgment was challenged on account of its

56 *Green v Commissioner of Inland Revenue (No 2)* [1991] 3 NZLR 14, 15 (HC) Barker J.

57 *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343, 347 (CA) Somers J for the Court.

58 *Stevens v Parkin* [1924] NZLR 619, 622 (SC) Salmond J.

59 *Ibid.*

60 *R v Aves* [1937] NZLR 110, 111 (SC) Myers CJ and *R v Hetherington* [1978] 2 NZLR 23, 24 (CA) Woodhouse J for the Court.

age and new developments such as the Bill of Rights Act 1990. But the Full Court declared that "the decisions have provided an established part of our criminal procedure for very many years; and there is no occasion for simply rejecting them now".⁶¹

V *PROPERTY LAW*

Salmond J was required to interpret provisions of the Land Transfer Act 1915, and certain of his judgments on this Act came to be regarded as "classic statements" by subsequent judges.⁶²

A particularly significant judgment was that in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd*. Here the Court of Appeal, of which Salmond J was a member, was required to decide on the meaning of fraud under the Act. Salmond J joined with the majority in dismissing the plaintiff's appeal for a declaration of a right to possession on the basis of the defendant's fraud, Salmond J characteristically presented contrary views of the meaning of fraud in the light of the "spirit and purpose of the Land Transfer Act" and "any reasonable standard of good faith and honest dealing".⁶³ He then presented his own view of what was meant by fraud in this statute:⁶⁴

The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either to make further inquiries before purchasing, or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them. If, knowing as much as this, he proceeds without further inquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights, if they exist, he is guilty of that wilful blindness or voluntary ignorance which, according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud.

The decision of the majority of the Court of Appeal was upheld by the Privy Council, although the Board did not specifically comment on Salmond J's judgment.⁶⁵ Subsequently, Salmond J's comments on and test for fraud were repeatedly cited in analysing what did or did not amount to fraud in relation to land transfers. Sometimes the test was used in support of a decision that there was fraud,⁶⁶ and sometimes in support of the opposite decision.⁶⁷ On one occasion Hardie Boys J, in finding that there was an arguable case of fraud, noted that "the best explanation" of what was

61 *R v Barlow* [1996] 2 NZLR 116, 120-1 (HC, Full Court) Judgment of the Court.

62 See, for example, *Wellington City Council v Public Trustee* [1921] NZLR 423, 434 (SC) Salmond J, followed in *Sutton v O'Kane* [1973] 2 NZLR 304, 331 (CA) Turner P and *Domb v Oowler* [1924] NZLR 532 (SC) Salmond J, followed in *Morley v Spencer* [1994] 1 NZLR 27, 30 (CA) Richardson J.

63 *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1923] NZLR 1137, 1174 (CA) Salmond J.

64 *Ibid*, 1175, Salmond J.

65 *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 (PC).

66 *Efstratiou v Glantschnig* [1972] NZLR 594, 602-3 (SC) Turner J for the Court.

67 *Cricklewood Holdings Ltd v CV Quigley & Sons Nominees Ltd* [1992] 1 NZLR 463, 481-2 (HC) Holland J.

enough for fraud under the Land Transfer Act was to be found in the words of Salmond J in the *Waimiha* case.⁶⁸

Such was the open-textured and balanced nature of principles outlined by Salmond J in *Waimiha* that sometimes his comments and test were used by judges to arrive at different decisions in the same case.⁶⁹ In *Bunt v Hallinan*, the purchaser of property was aware of an unregistered interest of lessees in the property, and so sought and received advice from his solicitor that the lessees had no rights to the land before completing the transfer. In the District Court the judge applied Salmond J's test and concluded that the purchaser's actions in the light of the knowledge that he had of the lease amounted to fraud. In the High Court the judge relied upon the same test but found that the purchaser had not acted dishonestly as he had proceeded only after obtaining legal advice that the lessees had no rights. In the Court of Appeal the majority applied Salmond J's test and upheld the High Court's decision. Eichelbaum J, dissenting, found that the purchaser had known enough to make it his duty as an honest man to stay his hand and so his attitude was tantamount to wilful blindness and thus fraud.⁷⁰

VI CONTRACT LAW

The most important judgment that Salmond J gave on contract law was with respect to the Sale of Goods Act 1908. In *Taylor v Combined Buyers Ltd*, the purchaser of a car brought an action for rescission or damages. The alternative grounds were fraudulent misrepresentation and breach of the implied statutory conditions of reasonable fitness for the purpose for which the car was bought and merchantable quality. Salmond J held that the charge of fraud had not been sustained. He then undertook a lengthy analysis of the meaning of fitness for purpose and merchantable quality of goods bought by description. In the absence of statutory definitions of the terms used in the section, Salmond J's analysis proceeded on the basis of principles, case law authorities, the perceived purpose of the section, and weighing-up of concrete examples. In defining "merchantable quality", he recognised the difficulty of formulating a definition of universal application and said that "the question must always be asked and answered with reference to the particular description under which the goods are sold".⁷¹ He did however present the following test:⁷²

68 *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138, 142 (CA) Hardie Boys J for the Court.

69 *Sutton v O'Kane* [1973] 2 NZLR 304, 312, 314 (CA) Wild CJ and 336, 347 Richmond J.

70 *Bunt v Hallinan* [1985] 1 NZLR 450, 453, 454 (CA) McMullin and Richardson J and 466 Eichelbaum J.

71 *Taylor v Combined Buyers Ltd* [1924] NZLR 627, 646 (SC) Salmond J.

72 *Ibid*, 647 Salmond J. Mary McKenzie, who wrote an LLM thesis on Salmond, described Salmond J's judgments as "well nigh perfect both in substance and in technique ... A Roman legion marching on an Imperial highway". Mary McKenzie *John William Salmond* (MA Thesis, Victoria University of Wellington, 1926). Frame suggests that the *Taylor* judgment came closest to this description (Frame, above n 8, 228).

Are the goods of such a quality and in such a state and condition as to be saleable in the market, as being goods of that description, to buyers who are fully aware of their quality, state, and condition, and who are buying them for the ordinary purposes for which goods so described are bought in that market?

Salmond J found that there had been breaches of the implied conditions of fitness for purpose and merchantable quality. However, under sections 13 and 37, he found that the purchaser had lost the right to reject the car as he had retained the car after the lapse of a reasonable time without informing the seller of its rejection. Salmond J thus concluded that the appropriate remedy was an award of damages.⁷³

Salmond J's judgment came to be regarded by New Zealand judges as a "famous" statement of the law relating to sale of goods by description,⁷⁴ and was relied upon in judgments both in favour of and against purchasers of defective goods.⁷⁵ An indication of the esteem attached to Salmond J's *Taylor* judgment was provided in Mahon J's judgment in *Feast Contractors Ltd v Ray Vincent Ltd*. Mahon J found, on the basis of Salmond J's test, that there was no breach of merchantable quality. Mahon J declared that Salmond J's "formulation has certainly stood the test of time", and that "in the case of an ordinary contract for the sale of goods the classic definition of the great jurist seems to me to span without difficulty the gulf of the years".⁷⁶

VII CONCLUSION

It has been suggested that Salmond J died before he had time to make a mark on the law reports.⁷⁷ The above survey indicates that this suggestion is unfounded. The scores of judgments published in the law reports under his name provided expositions of a range of legal principles. These judgments amply justified his reputation as an outstanding jurist. They were characterised by balance, fairness and a keen sense of human reality, and were presented with admirable structure and clarity.

Salmond J's most significant contribution lay in interpreting the significant body of legislation passed from 1908 onwards. Fortified by his experience of legislative drafting at the time when this legislation was passed, Salmond J confidently supplemented the legislation with case-law based on the legislative intent.

73 Ibid, 652 Salmond J.

74 *Finch Motors Ltd v Quin (No 2)* [1980] 2 NZLR 519, 521 (HC) Hardie Boys J.

75 *Armaghdown Motors Limited v Gray Motors Limited* [1963] NZLR 5, 7-8 (SC) McGregor J and *Milne Construction Ltd v Expandite Ltd* [1984] 2 NZLR 163, 185 (HC) Moller J.

76 *Feast Contractors Ltd v Ray Vincent Ltd* [1974] 1 NZLR 212, 218 (SC) Mahon J.

77 A W B Simpson *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 459.

The resultant effect has been that, during the eight decades after his death, Salmond J's judgments have provided his successors on the bench with reference points, frameworks and apposite language. In this way, Salmond J has continued to enhance the ongoing endeavours of New Zealand judges to provide justice to the litigants who appear before them.

