SIR JOHN SALMOND

[The following article was originally solicited from Mr. Heuston, the present editor of "Salmond on Torts" to mark the opening of the new Adelaide University Law School premises, the library of which is to be called the "Sir John Salmond Library". It is appropriate, however, irrespective of any particular occasion, as a commemoration of the association with the Law School of one of the most distinguished of jurists and perhaps the most notable of our forebears.]

Sir John Salmond was born at North Shields in December 1862 and died at Wellington, New Zealand, in September 1924. His father had been Professor W. Salmond of the University of Otago, New Zealand, where the boy had been brought up from his earliest years returning to England only very occasionally. Salmond married Anne, the daughter of James Guthrie, in 1891, at Newcastle-on-Tyne. She was the mother of two children, one of whom was killed in the First World War on the western front in 1918. The other child, a daughter, is now Mrs. Gillingham of Wellington, New Zealand.

When Salmond died in 1924 Sir Frederick Pollock contributed a brief obituary to the *Law Quarterly Review*, a periodical which does not normally publish obituaries.

> "The sudden death of Mr. Justice Salmond, of New Zealand, is a grievous loss both to the learning of the common law and to that new and fast growing body of constitutional doctrine and practice which has sprung from the full recognition of the dominions as partners in the Commonwealth of the British Empire. It will be remembered that Sir John Salmond was a delegate to the Washington Conference and took an active part there. His reputation as an author in our law has been established for many years. It was first made by a volume of learned and ingenious essays, of which the substance is now largely embodied in his books on Jurisprudence and on Torts. These books attained a classical rank in his lifetime, far above that of the many well-known and meritorious treatises whose chief aim is to furnish practising lawyers with a classified repertory of authorities. We trust that they will escape the fate which has befallen some excellent works at the hands of recent editors, of being overgrown with additional matter until they become digests. In that process the student's loss in clearness of exposition is ill-compensated by the practitioner's gain in fullness of material. Sir John Salmond belongs to the emancipated modern school of English jurisprudence, English in essentials but emancipated from the insular bonds of the utilitarian jurists and economists who dominated most of our 19th century teachers and many of our Judges. His criticism is always enlightened and profitable, whether on questions of principle or

> on particular decisions. At least one writer covering much the same ground has never failed to find it instructive even in those cases (not a large minority) in which he could not accept the results."

Salmond's career was interesting. After having been called to the bar in New Zealand in 1887 and practising for a few years, he became Professor of Law in the University of Adelaide, where he remained from 1897 to 1906. We catch a glimpse of him there in the *Life of Chief Justice Way* by the former South Australian Crown Solicitor, Mr. A. J. Hannan. Chief Justice Way wrote to W. R. Phillips on 9 August 1904:

> "Salmond . . . is what I should call an institutional man and he has written a book on Jurisprudence which appears to me to be clearly expressed and was highly reviewed by Sir Frederick Pollock and other pundits. . . . Nevertheless he is a very dull dog, without the faintest gleam of humour, and he is not much liked by the students. He resents any question or discussions."

Way was a man of rather egotistical and domineering temperament who was Chancellor of the University of Adelaide as well as being Chief Justice of South Australia and he regarded the University as his own private concern. It is possible that he and Salmond were temperamentally opposed. In any event, those who remember Salmond testify to his friendly manner and engaging conversation.

In 1906 Salmond left South Australia to become Professor of Law at Victoria University, Wellington, but he held that post for only one year before becoming Counsel to the Law Drafting Office of the New Zealand Government. Three years later in 1910 he was appointed Solicitor General for New Zealand. The Solicitor General in New Zealand is the permanent head of a small but separate independent department of the Public Service, the Crown Law Office. He is the chief legal adviser to the Government subject to any views the Prime Minister or Cabinet may seek from the Attorney General and is its chief advocate in the courts. We are told that "the only recorded instances in which the Attorney General has expressed an opinion at variance with that of the Solicitor General are a couple of occasions when Sir Francis Bell differed from Salmond." In 1920 Salmond was appointed to the Supreme Court of New Zealand, but held that position for only four years. His contribution to law was therefore primarily made as an academic jurist rather than as a Judge.

Although he had been a government servant for some dozen years before he was appointed to the bench, it would be generally agreed that Salmond's reputation had been made as a jurist. It is interesting to note that the only two examples in the Common Law World (outside the U.S.A.) of an academic lawyer being appointed to the bench of a superior court are both in the Antipodes, Salmond in New Zealand

and the late Dean of the Queensland Law School. Salmond's first published article was in the *Law Quarterly Review* for January 1888. The article, entitled "History of Contract", was a sober and scholarly assessment and criticism of the veiws of Holmes and Ames. It is a remarkable production for a man of 26—indeed if we allow for the time necessary for the passage of proofs by steamer between England and New Zealand, Salmond must have wrtiten the article when only 24 or 25. There is probably no other example of an article being published in the *Law Quarterly Review* by an author at so youthful an age, though F. E. Smith, later Lord Birkenhead, published his article on remoteness of damage in the Law of Contract at the age of 28. From that time on there appeared a steady succession of articles, eleven in the *Law Quarterly Review* alone. Some of these were later collected in his *Essays in Jurisprudence*, published by Stevens in 1891, which received a warm welcome in the *Law Quarterly Review*. An unsigned editorial notice said: "The defects are such as time and experience will mend, and the merits such as they will improve." Others were incorporated in the textbook on Torts, or in the textbook on Contracts—unhappily left unfinished at the author's death, but skilfully edited for publication, first by P. H. Winfield, and then by Dr. J. Williams.

We can now consider in turn his works on Torts and Jurisprudence, and in private duty bound, I start with his work on Torts. The first edition of this appeared in 1907 under the imprint of Messrs. Stevens and Haynes, although the book was in fact printed in New Zealand.

> "It may not be generally known that the manuscript of 'Salmond on Torts' was offered to the publishers for £100, and the offer declined, and the book was published by and at the expense of the author. Many years later, when the book was an assured success, the surviving partner in the publishing firm was forwarding a cheque representing the profits accruing to the learned author in respect of a subsequent edition, and was lamenting the want of foresight shown by the firm. The language of the surviving partner was extremely forcible, as the cheque represented a sum far in excess of that for which the firm could originally have acquired the copyright. The death of all the parties concerned now renders it possible for the editor to relate a story, for the truth of which he can vouch."

So wrote A. E. Randall in 1924. The present writer can confirm that the attitude of the publishers remains unaltered. The first edition of "Salmond on Torts" was reviewed in the *Law Quarterly Review* by Thomas Beven, who on the whole gave it a warm welcome, though remarking that the standard of legal writing was now so much higher than thirty years ago that Salmond "must be content to take his place as one of a number of very capable writers." But events have shown

that the world has given "Salmond on Torts" a warmer welcome. In 1910 the Harvard Law School awarded it the Ames Prize for "the most meritorious law book or legal essay written in the English language" during the preceding five years. It should be unbecoming for me to say more, but I may perhaps point out that "Salmond on Torts" has never been a work the readership of which has been confined solely to students. It is interesting to note that when A. E. Randall reviewed the fifth edition in the *Law Quarterly Review*, he said: "We cannot pretend to ignore the fact that there is a general impression that 'Pollock on Torts' is essentially a book for the student and that 'Salmond on Torts' is better designed to meet the needs of the practitioners." Salmond has had a wide circulation amongst practitioners and, even more important, has been read by the bench. There are no less than 150 passages in Salmond which have been the subject of express judicial approval in England or elsewhere in the common law world. In the very latest copy of the Australian Law Journal, which is on my table as I write, there is a report of a case in the High Court of Australia, *Hargrave* v. *Goldman* (37 A.L.J.R. 277), in which Mr. Justice Taylor and Mr. Justice Owen expressly approved Salmond's view of the liability of an occupier of property for a nuisance created by a trespasser. The number of reported cases in which Salmond has been cited incidentally by counsel during argument, or by a judge in the course of his judgment, is legion. The work as a whole is a remarkable achievement for a young man in the Antipodes before 1914 when one considers the distance in space and time by which he was separated from the main centres of legal development. Today it is very different, for not merely has the speed of communication put the centres of decision nearer to each other, but as we all know, the High Court of Australia has, under Sir Owen Dixon, established for itself a remarkable supremacy in the common law world.

The chief characteristics of "Salmond on Torts" are an entire mastery of the decided cases and the rules of law which they lay down, combined with a firm grasp of general principle which gives the book a clear structure and enables it to be read through as a whole and not merely referred to as a digest or encyclopaedia. The style is functional, clear and vigorous, if somewhat old-fashioned. There are no epigrams, although a slight tendency towards rhetorical questions is observable. The only defect as Winfield noticed, is a slight tendency to overload argument by the citation in the text of an unnecessary number of decisions.

Salmond's mastery of the case law is well displayed in the two chapters on Easements and Conversion. These deal with some very technical legal problems and display a complete mastery of the com-

plex rules to be found in the cases. No better short account of the law relating to easements and profits can be found than in these pages. On the other hand, his ability to rise above the level of mere exposition can be found in the first chapter, which contains the best short account of the general principles the Law of Torts which has ever been written. Salmond, as is well known, was a fervent advocate of the principle of no liability without fault. He drew a sharp contrast between the criminal law, the object of which was punishment, and the civil law, the object of which was compensation, and he thought the loss should lie where it fell unless there was to be found some good reason for shifting it from the injured party to the defendant, and the only good reason which he could find was the personal fault or blameworthiness of the defendant. Consistently with this view, Salmond maintained throughout the six editions for which he was personally responsible that no more retrograde decision could be found in the whole law of Torts than *Rylands* v. *Fletcher*. Somewhat inconsistently, Salmond denied that there existed any general principle of liability in tort. There was to him a law of Torts and not a law of tort. On this matter time has vindicated Salmond's critics rather than Salmond himself, but on the first matter his views still deserve the closest attention.

Turning now to Salmond on Jurisprudence, there will be general agreement that the work occupies a dominant position in the literature on the subject. When it first appeared in 1895, the *Law Quarterly Review* stated that it was "exceedingly suggestive, though decidedly heterodox in its opinions". The second edition was welcomed more warmly. "We hope it will soon be more definitely recognized by our seats of learning, at some of which students are still compelled to mumble the dry bones of Austinian doctrine." The last edition by Salmond himself was the seventh in 1924. Since then there have been four more, the eighth by Professor C. A. W. Manning in 1930, the ninth by J. L. Parker in 1937 (stigmatized by the *Law Quarterly Review* as "the ugliest law book ever seen"), and the tenth and eleventh, in 1948 and 1953 respectively, by Dr. Glanville Williams. The various editors have, I think, found some difficulty in keeping up to date a work which essentially represents a peculiar intellectual standpoint. As Dr. Williams wrote on page nine of the tenth edition:

> "Salmond's method in writing the book was to give a smooth and lucid presentation of his own point of view, mostly as though it were the only opinion in the world. He would not approve of his book being made a farrago of the conflicting views of others."

Nevertheless the demands of students for a text book on a notoriously difficult subject have forced later editors to provide such a precis of what others have written on this elusive subject. If we discard the

layers of material deposited by successive editors, we come upon Salmond's own contribution, which is remarkable in various ways. First of all one notices the sweep of his learning. He was widely read amongst the 19th century continental jurists such as Savigny, Ihering, and Dernburg, in a way in which I suspect no living jurist in the common law world is. Secondly, on many points, he had a firmly thought-out philosophical position. Nevertheless he was sufficiently clear and skilful expositor to provide enough lucid information for a basic students' text book. Thirdly, on a number of specific problems in Jurisprudence Salmond made a major contribution. It is sufficient to mention six points of which any discussion even today must still refer to Salmond. The distinction between Law and Justice; The difference between the legal and historical sources of law; Possession and ownership; Sovereignty; Precedent; The nature of legal rights.

Salmond holds an unchallenged place as one of the major jurists of the 20th century.

R. F. V. HEUSTON.*

* M.A., Fellow of Pembroke College, Oxford.