"SALMOND'S BENCH": THE NEW ZEALAND SUPREME COURT JUDICIARY 1920-1924

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John Salmond dominated the New Zealand legal environment during the early twentieth century. Salmond performed many roles in the New Zealand legal system. This article focuses on his final legal role, as a Supreme Court judge, and looks at the nature of the Supreme Court Bench from 1920 to 1924. Some of New Zealand's greatest legal names sat with Salmond during this time. Twentieth century New Zealand legal history is a relatively unexplored area and requires more attention from historians. This article provides the basis for possible future work on the Supreme Court Bench during the early 1920s.

In discussing the nature of "Salmond's Bench" the backgrounds of the different Supreme Court justices are explored. Following this, selected cases are analysed revealing distinctive factors relating to how this group of judges worked together and the nature of their judgments. Particular attention is paid to the divisions on the Bench regarding the crucial social issue of divorce. Viewing the decisions made by Salmond's Bench in the context of the political and social backgrounds of the judges and the historical background of this period provides a vital third dimension to the judgments. Salmond's distinctive approach to judicial decision-making becomes clearer when directly compared with the approaches of his judicial peers.

I INTRODUCTION

John Salmond has been described as "the greatest lawyer that this country has ever produced".[1] Salmond was the leading legal intellect of his era in New Zealand and a major international jurisprudential figure. While his contributions to the New Zealand legal environment were many, this paper will focus on Salmond's role as a Supreme Court judge. His tenure with the Supreme Court began in 1920 and was cut tragically short in 1924 when he died aged 62. This study will

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1 Hubert Ostler "Bench and Bar 1903-1928" in Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Reed, Wellington, 1969) 57, 68.

begin the task of analysing the nature of the Supreme Court Bench during this period.[2] Early twentieth century New Zealand legal history is a neglected area of scholarship. This article is one attempt to remedy this.

In analysing the nature of "Salmond's Bench" this paper will briefly consider the historical context in which Salmond adjudicated. This background allows for a greater understanding of the words and actions of Salmond and his judicial peers. The following section is devoted to the personal and professional backgrounds of the different Supreme Court justices. Some of New Zealand's most prominent legal figures sat with Salmond, including Robert Stout, Frederick Chapman, Alexander Herdman and William Sim. An appreciation of this background information is necessary to fully appreciate the judicial dynamics at work on the Bench during the early 1920s. The final section of this article analyses selected Court of Appeal cases to see how Salmond's Bench worked as a unit. This is not an exhaustive survey. Cases highlighting social issues have been chosen, and in particular cases focusing on the interpretation of recently passed divorce legislation. The contentious nature of these cases serves to illuminate the distinctive judicial personalities of Salmond's Bench.

II HISTORICAL CONTEXT

The early 1920s was a difficult time for New Zealand, with the country facing economic and social instability.[3] Soldiers who had fought in World War One were struggling to settle back into New Zealand society. When Salmond took up his position as Supreme Court Justice in 1920, New Zealand was a nation recovering from a tragedy of epic proportions. Thousands of young New Zealand men had been killed or injured in World War One.[4] When the survivors returned to New Zealand they hoped to forget the horrors of foreign battlefields and build a new life. Unfortunately, the strong economy of the 1910s weakened in the 1920s and by the end of the decade New Zealand was in the throes of the Great Depression. The soldiers were not the only New Zealanders traumatised by the War. Family members sent sons and husbands away who never returned. Salmond himself lost a son to the War in 1918. Many of the lawyers who appeared before the judges of the early 1920s had fought in the War.

The devastation of World War One had a profound effect on Western morality. To many people, World War One represented a massive societal failure. After the war ended in 1918 there was a

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2 It is important to remember that the Supreme Court Bench during this period was also the Court of Appeal Bench. This paper will focus on cases at both levels.

3 An excellent description of this period can be found in Michael Bassett *Coates of Kaipara* (Auckland University Press, Auckland, 1995).

4 New Zealand sent over 100,000 people overseas as part of its war effort. Of these approximately 17,000 were killed and 41,000 wounded. New Zealand's population at this time was approximately 1 million: Michael King *The Penguin History of New Zealand* (Penguin, Auckland, 2003) 302.

reaction against the traditional values associated with the outbreak of war, such as unquestioning obedience to authority. During the "Roaring Twenties" or "Jazz Age", young people in particular questioned received wisdom. In the period immediately following the end of the war, women gained more independence, and in Britain and the United States also gained the right to vote. One specific development directly linked to these changes was a more liberal approach to divorce law. This development is analysed in the case study section of this article.

This was a society accustomed to heartbreak. The Influenza Epidemic had spread through New Zealand in 1918, killing approximately 6700 people.[5] Wellington lost 1406 to the disease. Salmond's final years were lived during this traumatic period. Soon after the end of War, Salmond's wife was admitted to a mental hospital.[6] Yet Salmond was by no means alone in his suffering. His Supreme Court colleague, Frederick Chapman, also experienced profound tragedy around this time. One of Chapman's sons was killed in the War in 1915 and the other committed suicide a year later.

Events such as these could obviously affect even the most impartial judge. Chapman's reactionary decision in the *R v Rua* case,[7] the year after the death of his second son, could have been influenced by the double tragedy. Chapman famously denounced the Māori leader Rua Kenana Hepetipa for challenging the King's authority. Having seen his son die in defence of "King and Country", Chapman would have been infuriated by Rua's rebellious attitude.[8] Rua, a prophet following in the footsteps of Te Kooti, had established a religious community deep in the Urewera ranges. This separate community was seen as a threat to Pakeha dominance in the region. Rua was initially charged with illegally selling alcohol and resisting arrest but a charge of using seditious language was added at the 1916 trial. The jury dismissed the sedition charge but found Rua guilty of resisting arrest.[9] To the jury's dismay, Chapman gave Rua a particularly harsh sentence, possibly demonstrating not only his own views on Māori autonomy but also those of the Pakeha community at this time. Chapman's summation at the trial still resonates in New Zealand's legal history:[10]

> You have learned that the law has a long arm, and that it can reach you, however far back into the recesses of the forest you may travel, and that in every corner of the great Empire to which we belong

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5 Lynne Richardson (ed) *Bateman New Zealand Encyclopedia* (5 ed, David Bateman, Auckland, 2000) 311.

6 Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) 179.

7 Unreported but descriptions of the trial appeared in the *New Zealand Herald* and *Auckland Star*. Discussed in Peter Spiller *The Chapman Legal Family* (Victoria University Press, Wellington, 1992) 206.

8 Frederick Chapman's life and career are recounted in Spiller, ibid.

9 Judith Binney "Rua Kenana Hepetipa" in *The Dictionary of New Zealand Biography: Volume 3* (Auckland University Press, Auckland, 1996). For a full treatment of this subject see Judith Binney, Gillian Chaplin and Craig Wallace *Mihaia: the Prophet Rua Kenana and his Community at Maungapohatu* (Oxford University Press, Wellington, 1979).

10 Spiller *The Chapman Legal Family*, above n 7, 206.

> the King's law can reach anyone who offends against him. That is the lesson that your people should learn from this trial.

The post-war period saw an economic recession. Returned servicemen who had bought farmland on credit after the war watched in dismay as commodity prices and land values dropped. Many were forced to walk off the land. Though this recession was relatively minor compared to what would come at the end of the decade, New Zealand was a less optimistic nation in the early 1920s than it had been on the eve of war in 1914. The New Zealand legal profession managed to weather these hard times for, as any legal historian knows, lawyers can flourish in bad times just as much as in good. Mortgagee sales and loan defaults are very lucrative to a profession that often operates in an environment of dispute and personal misfortune.

III SALMOND'S BENCH

The Supreme Court Bench ("The Bench") during the time of John Salmond featured some of New Zealand's most famous judges, including Robert Stout and Frederick Chapman. Although men such as William Sim and Alexander Herdman are not household names in New Zealand history, their achievements also deserve attention from our legal historians. The other five judges who served on the Supreme Court Bench with Salmond were John Hosking, Thomas Stringer, John Reed, Alexander Adams and William MacGregor. The Bench of the early 1920s was one of the strongest ever.

Salmond's generation of judges could be considered New Zealand's third. The first generation was of a socially liberal,[11] humanitarian bent and included William Martin and Henry Chapman. Martin was an outspoken supporter of Māori[12] while Chapman was responsible for the *R v*

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11 The terms "liberal" and "conservative" are used throughout this article. Both of these terms are notoriously difficult to define. For the purposes of this article the following definitions have been used. In relation to societal outlook, a "liberal" is defined as someone generally open to new ideas, supportive of individual rights (especially minority rights) and favouring moderate reform. A "conservative" is generally in favour of preserving existing values and institutions and suspicious of change proceeding more than gradually. In an early twentieth-century New Zealand political context, a conservative can also be defined as someone in favour of retaining power within an affluent, white, male elite. In relation to adjudication, a "liberal" is defined as a judge willing to challenge existing doctrine and take an "activist" approach to creating precedent. A "conservative" is a judge more likely to follow the strict rules of precedent and deny that judges in fact "make" the law. New Zealand judges of a conservative bent have often been fiercely loyal to English precedents. Beyond these general definitions, "Liberalism" and "Conservatism" also relate to the two major New Zealand political parties of Salmond's era. Reflecting the Liberal/Conservative divide in British politics, the Liberal Party and the Reform Party dominated New Zealand's political landscape during the early twentieth century. These terms are of course relative. While William Martin might appear "liberal" compared with James Prendergast, his outlook on society would be very different to a modern-day "liberal". This article does not use "liberal" and "conservative" in an economic context.

12 Guy Lennard *Sir William Martin: The Life of the First Chief Justice of New Zealand* (Whitcombe & Tombs, Christchurch, 1961).

Symonds[13] decision that upheld the doctrine of native title. The next judicial generation was far more reactionary. Men such as James Prendergast and Christopher William Richmond were strong supporters of the colonial establishment and wary of any "judicial activism".[14] With the retirement of Chief Justice Prendergast in 1899, and the appointment of Robert Stout in his place, the Supreme Court had the opportunity to change direction once more. After the death of Salmond, yet another generation took its place on the bench, as described by Justice Ostler:[15]

> When I was appointed [in 1924] the Bench consisted almost entirely of much older men, but very soon after my appointment they began to drop off. Sir John Salmond had died before I was appointed, in fact I filled the vacancy caused by his death; but within a fortnight after my appointment Mr Justice Hosking retired owing to failing health. ... The next to go was Sir Robert Stout in 1926. ... Sir Walter Stringer also retired in 1927. … Sir William Sim died in 1928 practically in harness after nineteen years of distinguished service on the Bench. ... One by one the men ahead of me, Sir Alexander Herdman, Sir John Reed, Mr Justice Adams and Mr Justice MacGregor retired, and in less than twelve years I found I had worked through from the bottom to the top of the list and had become the senior puisne Judge.

The Bench of the early 1920s consisted of an intriguing mix of men. For example, Herdman was a leading Conservative politician, while Stout was a Liberal icon. While Herdman had smashed the Waihi Miner's Strike of 1912 and the Waterfront Strike of 1913, Stout had played a leading role in John Ballance's Liberal Party of the 1890s.[16] Ballance and his ministers made groundbreaking reforms in industrial relations, improving the position of workers and strengthening unionism. Herdman has no full biography but historian Susan Butterworth's entry in *The New Zealand Dictionary of Biography* pulls no punches, saying "[i]t is clear that with Herdman, in the concept of law and order, order came ahead of law."[17]

The Bench during this time was dominated by Otago lawyers: "In fact, of the eleven presidents of the Otago District Law Society between 1879 and 1897, four were to become Supreme Court judges (Stout, J H Hosking, F R Chapman, and W A Sim)."[18] Alexander Adams, Alexander Herdman and William MacGregor also worked as lawyers in the Otago region. Therefore, of the

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13 *R v Symonds* (1847) NZPCC 387 (SC).

14 Grant Morris *Chief Justice James Prendergast and the Administration of New Zealand Colonial Justice, 1862-1899* (PhD thesis, University of Waikato, 2001).

15 Ostler, above n 1, 83-86.

16 These differences in political outlook are apparent in *R v Crown Milling* [1925] NZLR 753 (CA), discussed in the case study section of this paper.

17 Susan Butterworth "Alexander Herdman" in *Dictionary of New Zealand Biography: Volume 3*, above n 9, 212.

18 MJ Cullen *Lawfully Occupied: The Centennial History of the Otago District Law Society* (Otago District Law Society, Dunedin, 1979) 45.

nine judges who served on the Supreme Court with Salmond, only two did not have legal experience in Otago, namely John Reed and Thomas Stringer. While Salmond was not an Otago man, he did work as a lawyer in Temuka not far from the "border" between South Canterbury and North Otago. This southern dominance is less surprising when one considers the economic dominance that the South Island exerted during the late nineteenth and early twentieth century. This dominance is in marked contrast to the position of the South Island today, which now has a smaller population than Auckland.

Salmond served with nine other judges. While all have interesting histories, this paper will only focus on four of the judges, being those with the highest historical profiles. This paper will not look at Salmond's background as this subject is already being covered in great depth elsewhere in this journal edition.

Robert Stout is one of New Zealand's greatest historical figures. Stout was Prime Minister from 1884 to 1887 and Chief Justice from 1899 to 1926. This paper will only discuss his role as Chief Justice of Salmond's Bench. Stout and Salmond both shared a passion for education. They were first and foremost teachers and men of ideas. While Stout was a key member of the Liberal Party, his views were not always particularly forgiving:[19]

> [H]e blamed poverty on the failings of individuals and saw it as an inevitable, and indeed beneficial, part of the process that led to the 'survival of the fittest'. Poverty was a punishment for 'selfishness, ignorance, wastefulness and imprudence.'

As Chief Justice, Stout had a mixed record. He served for 27 years and heard over 1400 cases.[20] He often took a liberal view towards statutory interpretation[21] and social policy questions. This was in contrast to several of his peers on the Bench. Stout adopted an inquisitive adjudicative style evidenced by his readiness to refer to American legal precedents.[22] Stout has a record of having one in three cases taken on appeal from his decisions end in success.[23] While this statistic does not necessarily detract from Stout's judicial abilities it does show that his colleagues were regularly prepared to disagree with him. There is no doubt that Stout was a strong leader and provided excellent support to his puisne judges as Chief Justice. His loyalty to fellow judges can be seen in his support of the famous Protest of Bar and Bench in 1903. Stout spoke in defence of his fellow

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19 David Hamer "Robert Stout" in *The Dictionary of New Zealand Biography: Volume 2* (Bridget Williams Books, Wellington, 1993) 485.

20 Ibid, 486.

21 Though not in *Gower v Public Trustee* [1924] NZLR 1233 (CA) discussed in the case study section of this paper.

22 Jeremy Finn "New Zealand Lawyers and 'Overseas' Precedent 1874-1973 – Lessons from the Otago District Law Society Library" 11 (2007) Otago LR 469, 487-88.

23 Hamer, above n 19, 486.

judges and against the Privy Council despite the Privy Council supporting his decision over the decision of his fellow judges.[24] Stout is one of the great New Zealanders. As one of his biographers states, his achievements "made Stout one of the most influential architects of a democratic New Zealand."[25]

Frederick Chapman served as a judge from 1903-1924 and was the son of New Zealand's first puisne judge, Henry Chapman. Like his father, Frederick was a noted scholar and man of wide intellectual interests. The Chapman legal family formed possibly the greatest legal dynasty in New Zealand's history.[26] Chapman was the first New Zealand-born Supreme Court judge. As with other judges mentioned in this paper, Chapman had to fulfil the role of President of the Court of Arbitration early in his judicial career. Like William Sim, Chapman was seen as favouring employer's interests.[27] Chapman was particularly noted for his criminal law decisions. While Chapman officially retired soon after Salmond joined the Bench, he regularly returned as a temporary judge. Such was his ability that it would have been a waste to have him living in New Zealand but not adjudicating.

Alexander Herdman (1918-1935),[28] like Chapman, was one of a new generation, those judges born and educated in New Zealand. He had a long and varied career as a lawyer, politician, judge and husband.[29] Two judges on the Bench during Salmond's time had extensive experience in national politics. Robert Stout was Prime Minister of New Zealand and Herdman served as Attorney-General. Herdman was elected an Otago MP in 1902. While he lost his seat in the next election, Herdman returned to Parliament representing Wellington North in 1908. In 1912 William Massey's Reform Party took office and Herdman became a leading light of this conservative force.[30]

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24 *Protest of Bench and Bar re* Wallis v Solicitor-General (1903) NZPCC 730.

25 Hamer, above n 19, 487. See also WH Dunn and Ivor LM Richardson *Sir Robert Stout: A Biography* (Reed, Wellington, 1961).

26 See Spiller *The Chapman Legal Family*, above n 7.

27 Peter Spiller "Frederick Chapman" in *Dictionary of New Zealand Biography: Volume 3*, above n 9. See also the discussion regarding *R v Crown Milling*, above n 16, which appears in JL Robson (ed) *New Zealand: the Development of its Laws and Constitution* (2 ed, Stevens, London, 1967) 285. In this case (after Salmond's death), Sim and Herdman delivered decisions supporting big business while Stout pursued a public interest approach.

28 Dates in brackets refer to service on the Supreme Court/Court of Appeal Bench.

29 Herdman outlived 3 wives.

30 Butterworth, above n 17, 212.

As Attorney General, Herdman was involved in prosecuting the Māori "dissident" Rua Kenana:[31]

> He made it clear that he regarded anyone interfering by word or deed with the war effort as an enemy of the state, to be treated as such, but his heavy use of the War Regulations Act 1914 to suppress dissent and strike action caused some concern even among moderate opinion. The most spectacular case was the arrest of the Tuhoe prophet Rua Kenana in April 1916 with a degree of armed force out of all proportion to the liquor licensing charges concerned.

As mentioned earlier in this paper, Herdman's future judicial colleague Frederick Chapman completed the successful prosecution of Kenana as the sentencing judge.

William Sim (1909-1928) distinguished himself as a lawyer, judge and Royal Commissioner. Sim began his legal career in Dunedin in 1877 where he was clerk to Robert Stout. He later became a partner in Stout's firm and carried a heavy workload burden while Stout was engaged in national politics. This professional connection would continue for half a century until the retirement of Stout in 1926. Stout and Sim worked together to create *The Practice of the Supreme Court & Court of Appeal of New Zealand* which was first published in 1892.[32] As President of the Court of Arbitration, while making some decisions in support of unions, he was usually seen as a supporter of the employer.[33]

In the present-day era of high-profile Treaty settlements, Sim is most famous for his role as Chairman of the 1927 Royal Commission of Inquiry into Māori lands confiscated during and after the New Zealand Wars. The inquiry found the Crown at fault in Taranaki and Waikato and ordered payment of a paltry sum. The confiscations in the Bay of Plenty were considered just and no compensation was ordered. The Bay of Plenty confiscations have recently been condemned by the Waitangi Tribunal and substantial redress given in the recent Ngati Awa settlement.[34] While the compensation ordered by the Sim Commission may have been small, the formal vindication of Māori complaints was vital in setting the scene for today's much larger settlements.

Two other judges that should be mentioned in passing are Alexander Adams and Walter Stringer. Alexander Adams (1921-1933) had several early connections with members of Salmond's Bench. He had been taught by Stout at North Dunedin Grammar School and later faced his former teacher in the *Re Roche* case. The pupil prevailed over the master in this case which established that

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31 Ibid.

32 Sir Robert Stout and William Alexander Sim *The Practice of the Supreme Court & Court of Appeal of New Zealand* (James Horsburgh, Dunedin, 1892). See Nigel Jamieson "William Sim" in *Dictionary of New Zealand Biography: Volume 3*, above n 9, 474.

33 Ibid. Sim's decision in *R v Crown Milling* can be interpreted as being supportive of big business interests.

34 Ngati Awa Claims Settlement Act 2005.

a married woman could not hold a hotel licence.[35] Adams succeeded William MacGregor as Dunedin Crown Solicitor and had a very successful career as an advocate before taking his place on the Supreme Court Bench. Adams was a leader of the New Zealand prohibition movement, a position that made some of his colleagues wary.[36] The drinking habits of the legal profession are well known but it seems Adams did not allow his views on alcohol to affect his cordial relationships with colleagues.

Walter Stringer was born in Christchurch where he served as Crown Prosecutor amongst other roles. As the newest Supreme Court judge after his appointment in 1914, Stringer took up the role of President of the Arbitration Court. In doing this he followed William Sim who had in turn succeeded Frederick Chapman. Thus the Bench of the early 1920s had a wealth of experience in industrial relations and arbitration.[37] Stringer retired in 1927 after serving on the Bench for 13 years. The decisions of Stringer J were rarely appealed from.[38]

These men formed an interconnected group that travelled together up the professional legal ladder. They were among the best and brightest of their generation. It may be more accurate to call this group of men "Stout's Bench", but during the brief period from 1920 to 1924 New Zealand's greatest legal theorist sat among them. Salmond's national and international reputation had already been established by 1920 and his influence on his fellow judges is clear from studying the New Zealand Law Reports.

IV THE JUDICIAL DYNAMICS OF SALMOND'S BENCH: A CASE-STUDY

Salmond's Bench played a significant role in helping to create a distinctive New Zealand common law. A huge range of cases came before these men. This article will not attempt to canvass all the legal areas in which decisions were made. Instead a select number of social policy cases will be examined. Through an analysis of these cases certain dynamics distinctive to Salmond's Bench become apparent. This limited case study is offered as only one piece of a jigsaw that with contributions from others could ultimately form a whole and provide a comprehensive answer to the question "What was distinctive about the Supreme Court/Court of Appeal Bench, 1920-1924?" Divorce, in particular, has been chosen because it provides insights into the social outlooks of different judges and also reflects a controversial issue of the era. The social outlooks of the judges were very relevant in the important divorce cases tried before the Full Supreme Court and Court of

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35 *Re Roche* (1888) 7 NZLR 206 (CA). W J Hunter New *Zealand Legal Portraits* (MS-Papers 1777, Alexander Turnbull Library, Wellington, c 1950).

36 Ibid.

37 Ibid.

38 Ostler, above n 1, 84.

Appeal during the early 1920s. These cases include *Mason v Mason*,[39] *Schlager v Schlager*[40] and *Barker v Barker*.[41]

Mason v Mason shows the Court of Appeal discussing the changing area of divorce law. The Divorce and Matrimonial Causes Amendment Act 1920 was an important step in the process of liberalising divorce law. Under Section 4 of this Act, spouses separated for at least three years could petition the court for dissolution:[42]

> It shall be lawful for the Court, in its discretion, on the petition of either of the parties to a decree of judicial separation, or to a separation order made by a Stipendiary Magistrate or by a Resident Magistrate, or to a deed or agreement of separation, or separation by mutual consent, when such decree, order, deed, or agreement is in full force and has so continued for not less than three years, to pronounce a decree of dissolution of marriage between the parties.

Thus the decision on dissolution was largely left to the discretion of the court in these situations. Previously in the New Zealand legal system, a divorce had been extremely difficult to obtain and had to be based on a specific statutory marital offence such as cruelty, desertion or adultery. As mentioned earlier in this paper, World War One created a moral crisis for many Western societies, as people questioned traditional value systems and often blamed them for contributing to the war. This crisis altered the way many people viewed marriage and divorce. Public and political opposition to divorce lessened somewhat in the post-war years. In a number of divorce hearings, Salmond assertively highlighted the social ills that result from restrictive access to divorce.[43]

Salmond's realist[44] view was echoed by other leading legal thinkers of the era, including New Zealand's most celebrated trial lawyer, Alfred Hanlon. In his memoirs, Hanlon discussed the 1920 Amendment and described it as "on the whole, wise and beneficent."[45] Hanlon even urged that the three year minimum period be reduced, stating:[46]

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39 *Mason v Mason* [1921] NZLR 955 (CA).

40 *Schlager v Schlager* [1924] NZLR 1011 (SC).

41 *Barker v Barker* [1924] NZLR 1078 (SC).

42 Divorce and Matrimonial Causes Amendment Act 1920, s 4.

43 Including *Mason*, above n 39; *Barker*, above n 41; *Lodder* v *Lodder* [1921] NZLR 876 (SC) and *Lodder* v *Lodder* [1923] GLR 123 (SC).

44 "Realist" and "realism" are used in this essay to mean a pragmatic approach to adjudication that acknowledges the wider social context of judicial decisions. "Realism" in this essay does not refer to the jurisprudential school of realism.

45 AC Hanlon *Random Recollections: Notes on a Lifetime at the Bar* (Otago Daily Times, Dunedin, 1939) 306.

46 Ibid, 45, 306-307.

> I have never been able to agree that any good purpose can be served by keeping two people tied together against their will. … Let the moralist say what he will. Such a situation is not in the best interests of morality.

In overturning Herdman J's decision in *Mason*, Salmond J took a purposive approach to the new legislation and like Hanlon cited morality as a key reason for the 1920 Amendment:[47]

> 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.

Mason concerned a husband who had left his wife and was seeking a divorce. The petition for dissolution was opposed by his wife. The appeal was from a Supreme Court decision by Herdman J. Herdman J had considered himself bound by an earlier decision and stated: "The Court should not view with favour an application made by one whose misconduct has produced a state of affairs upon which he founds his application for the Court's assistance."[48] Herdman's judgment directly contradicted Salmond J's Supreme Court decision in *Lodder v Lodder* a month earlier. Salmond J had held that the "Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court as prima facie a good ground for divorce",[49] and "Whether the petitioner is the guilty party or the innocent, the marriage has equally come to an end in fact."[50]

Herdman J's characteristically unforgiving decision was overturned by Sim, Stringer, Hosking and Salmond JJ in the Court of Appeal, with Salmond J delivering the Court's decision holding that:[51]

> the fact of the petitioner's own misconduct being the cause of the separation was not in itself a bar to a decree of divorce, and that prima facie when husband and wife had been separated for three years, whether by judicial decree or by mutual consent, each of them was entitled to a dissolution of the marriage.

Lodder had been upheld by the majority. Salmond J's judgment reflects his pragmatic approach to family law and also demonstrates a purposive reading of section 4 of the Divorce and Matrimonial Causes Amendment Act 1920. In the judgment Salmond J used a variation on the

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47 *Mason*, above n 39, 961 Herdman J.

48 Ibid, 957 Herdman J.

49 *Lodder*, above n 43, 877 Salmond J.

50 Ibid, 879 Salmond J.

51 *Mason*, above n 39, 955 Salmond J for the Court.

public interest test stating that it is not in the public interest that spouses remain together if the marriage has failed.[52] This early version of the no-fault approach to divorce was subsequently amended in 1922 to deny the party deemed responsible for causing the separation a divorce, unless the non-offending party agreed to dissolution.[53] The *Mason* decision was effectively overturned by the legislature, indicating the limits of "judicial activism". Herdman J's viewpoint may have been rejected by his judicial peers but it was supported by Parliament.

The moral tussle did not end there however. Salmond J had the opportunity to revisit the *Lodder* fact situation in September 1922. While bound by the Divorce and Matrimonial Causes Amendment Act 1922 he chose to abandon his purposive approach to divorce legislation and interpret the amendment in a narrow fashion, thus once again dissolving the marriage. The 1922 Amendment allowed judicial discretion as to what constituted a wrongful act or conduct on the part of the partitioner. Salmond J held that to achieve a divorce the act or conduct must be one of the legally recognised matrimonial offences. Mr Lodder's alleged offences did not fit into any of the established categories.[54]

The case of *Schlager v Schlager*, delivered by the Full Court of the Supreme Court less than two months before Salmond's death, directly contradicted his second *Lodder* decision. Herdman J was one of the judges responsible for the decision, though MacGregor J delivered the judgment.[55] With a similar fact situation to *Lodder*, the *Schlager* decision takes a broad reading of the 1922 Amendment. Mr Schlager committed none of the legally recognised matrimonial offences and had been separated for over three years, but his wrongful conduct nevertheless barred him from successfully seeking a divorce. In the view of the Full Court, to adopt Salmond J's approach:[56]

> would be to do violence to the language of the statue – to legislate and not to interpret. … would be, in effect, to read into the proviso words of limitation which are not there, without any justification from the language of the statute itself.

Of the three judges who supported Salmond J in *Mason* (upholding the first *Lodder* decision), only Sim J sat on *Schlager*. Salmond J's attempt to avoid the 1922 Amendment was not supported by his peers.

Controversial divorce legislation arose again in *Barker v Barker*. The case revolved around the definition of desertion as set out in section 21(b) of the Divorce and Matrimonial Causes Act 1908

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52 Ibid, 961 Salmond J for the Court.

53 Divorce and Matrimonial Causes Amendment Act 1922.

54 *Lodder*, above n 43, 123 Salmond J.

55 The case was heard by Stout CJ, Sim, Herdman, Reed and MacGregor JJ.

56 *Schlager*, above n 40, 1014-15 MacGregor J for the Court.

as modified by section 9 of the 1919 amending Act.[57] The question facing the Supreme Court Bench was whether the refusal of sex by a wife amounted to desertion. All five judges provided a judgment.[58] A recent decision by the English Divorce Court, *Jackson v Jackson*, made a clear ruling on the matter stating that "the mere refusal or abandonment of sexual intercourse, however persistent and unjustifiable, does not constitute desertion".[59] The New Zealand Supreme Court Bench felt unable to go against this English decision. Salmond J and his regular ally on divorce issues, Sim J, were openly critical of the *Jackson* decision but still felt bound by it despite stare decisis not strictly applying. Once again, Salmond J criticised the law for attempting to uphold failed marriages.

Herdman J was quite happy to follow *Jackson* and during his judgment took the time to criticise Salmond J's ruling in *A v B*,[60] an earlier desertion case in which Salmond J stated that refusal to engage in sexual intercourse *can* constitute desertion. In *A v B*, Salmond J took a pragmatic view of marriage, arguing that to "live together as man and wife involves as an essential element the establishment and continuance of normal sexual relationships."[61] Herdman J then moved on to make a strong argument for judicial conservatism,[62] both in relation to morality and the doctrine of precedent:[63]

> [A]though the wife has refused to perform one of the duties incident to the married state, she has not deserted the petitioner. ... I think that it is best in New Zealand that we should endeavour to decide contests in the Divorce Court upon principles which, as far as our statute law will permit, are in unison with the principles acted upon in the English courts.

In reviewing the divorce cases chosen for this section, one might get the idea that Salmond was a progressive liberal on social issues. This view is not borne out by Salmond's life and career. Salmond was extremely perceptive and ultimately a realist. These wordly qualities make him an appealing figure to our generation but they do not make him a social liberal or a consistent supporter of the underdog. The cases of *Mason, Schlager* and *Barker* show fault-lines on the Bench, notably Herdman's frustration with Salmond's purposive interpretation of recent divorce legislation.

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57 Divorce and Matrimonial Causes Amendment Act 1919.

58 Stout CJ, Sim, Herdman, Salmond and Reed JJ.

59 *Jackson v Jackson* [1924] P 19 (English Divorce Court), cited in *Barker*, above n 41, 1088 Salmond J.

60 *A v B* [1920] GLR 311 Salmond J.

61 Ibid.

62 Interestingly, Herdman J seems to have followed in the footsteps of Prendergast CJ. Both are remembered as judicial conservatives and both initially rose to prominence as hard-line Attorneys-General supporting Conservative governments. See Morris, above n 14.

63 *Barker*, above n 41, 1085 Herdman J.

Salmond resolutely supported the ability of spouses to divorce in the event of a failed marriage. Herdman was just as strongly opposed to the liberalisation of the divorce laws. This is clear from obiter statements found in the cases under analysis. It is not merely a clash between literal and purposive approaches to statutory interpretation, as although Salmond shows a preference for the purposive approach in this area of law he can be seen taking both approaches.[64] This article focuses only a limited range of legal topics, but divisions in Salmond's Bench are clearly evident.

In *Gower v Public Trustee*,[65] a Supreme Court decision issued by Stout CJ was overturned by the Court of Appeal.[66] Salmond J wrote the leading opinion for the Court, supported by Sim and Stringer JJ, with Adams J dissenting. The case deals with a testator who left assets to his son in a will on the condition that his son did not become a Roman Catholic. After the execution of the will the son became a Roman Catholic, with his father's support. The legal issue was whether the will giving life interest to the beneficiary could be void for uncertainty. Stout CJ's Supreme Court decision provides an interesting insight into the Chief Justice's non-conformist (and controversial views) on religion. The following quotation from the decision also shows the contexual knowledge that Stout CJ brought to the Bench:[67]

> We know that it is not uncommon for people to change their religion. We have had examples of it in history, and even examples of it in modern times. John Knox was at one time a Catholic, then an Anglican, and then a Presbyterian. Martin Luther was a Catholic and became the most vigorous of Protestants. Then, we have had John Newman and Manning, two of the most eminent Anglicans, becoming Catholic; and many examples could be given of a change of religion at the present day. Further, it is thought by the various Churches that what is termed 'conversion' is a praiseworthy thing, and it is not an improper thing when people become of an age to determine their own religion.

Stout CJ ultimately takes a literal approach to the will, arguing that the phrase "so long as he shall not become a Roman Catholic" is self-evident.

In his appeal judgment, Salmond J also demonstrates a keen interest in religious affairs, especially as he seeks to define what exactly is a Catholic:[68]

> If reception into the Church by baptism in infancy is not enough, and if voluntary adherence to the Church after attaining years of discretion is not requisite, what intermediate act or event is sufficient or necessary to make the testator's son a Roman Catholic within the meaning of the will?

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64 Purposive in the first *Lodder* case, *Mason* and *Barker* and narrow in the second *Lodder* case.

65 *Gower v Public Trustee* [1924] NZLR 1233 (CA).

66 This was not an unusual occurrence as mentioned earlier in this article.

67 *Gower*, above n 65, 1239 Stout CJ.

68 Ibid, 1236 Salmond J.

After going through the different milestones in a Catholic's religious up-bringing, Salmond J is unable to fix upon the key event that the testator would have seen as "becoming a Catholic". The question of "when does one become a Roman Catholic?" for Salmond J was essentially a social question rather than a legal one. As in the divorce cases, Salmond J shows a keen understanding of the ambiguities involved in questions of faith and love. As a result of the confusion, Salmond J determined that the will could be void for uncertainty and that the appellant should take the estate and residue "free from the condition of not becoming a Roman Catholic".[69]

The Court of Appeal decision of *Re J R Lundon*,[70] provides an insight into Salmond and his peers' high moral standards, though it is not concerned with divorce or religion. This case proceeded straight to the Court of Appeal. Salmond J delivered the Judgment of the Court and can be seen to take a hardline, almost unforgiving, position supported by Stout CJ, Hosking and Herdman JJ. *Lundon* proves that Salmond J and Herdman J could agree as well as disagree. *Lundon* was a case that offered much scope for judicial discretion, so it is fair to use it as a helpful guide to the nature of Salmond's Bench when faced with an issue of professional discipline. John Lundon had been struck off the rolls for gross overcharging and dubious actions relating to trust money. After several years as a dairy farmer, Lundon applied for readmission. His advocate, Blair, came from the fledgling firm of Chapman Tripp.[71] Salmond J was not convinced of Lundon's changed character stating that a "man may be very fit to be a farmer, and yet be disqualified by defects of character from being a solicitor … To lead an honest life for four years as a farmer is not enough".[72] As a man of the utmost professional integrity, Salmond J did not look kindly upon those found guilty of undermining the legal profession.

Divisions on Supreme Court/Court of Appeal Bench during the early to mid 1920s can be seen not only in social policy cases but also in the area of commercial law. Another possible faultline on the Bench is apparent in *R v Crown Milling*.[73] This faultline relates to economics and whether to support the actions of monopoly corporations. This case was heard soon after Salmond's death but included several of the judges with whom he had worked. In *Crown Milling*, Stout CJ, Herdman, Reed, MacGregor, Alpers JJ heard an appeal from Sim J's decision that held a flour distribution trust

69 Ibid, 1260 Salmond J.

70 *Re J R Lundon* [1923] NZLR 236 (CA).

71 Or more accurately Chapman, Skerrett, Tripp and Blair. Chapman Tripp is now New Zealand's largest law firm.

72 *Lundon*, above n 70, 243-244 Salmond J for the Court.

73 *R v Crown Milling*, above n 17.

to not be a monopoly acting contrary to the public interest. Stout CJ, Reed and MacGregor JJ overturned Sim J's decision, but Herdman and Alpers JJ dissented.[74]

This decision forms a case study in JL Robson's *New Zealand: Development of Laws and Constitution*.[75] In this article, Robson tentatively views judicial backgrounds as having some influence on the outcome of the case. Robson notes that:[76]

> The Chief Justice, Sir Robert Stout, had been prominent as a Liberal politician before his elevation to the Bench. He favoured State action to protect the poor and weak. This case reflects his humanitarianism, his intense solicitude for the consumer and his distrust of combinations which sought to restrain trade, particularly in food.

In relation to Herdman, Robson states, "Mr. Justice Herdman had been Attorney-General in the 'Reform' Government which had been more kindly disposed towards big business than the Liberal Government in its heyday."[77] As with the divorce cases, Salmond's colleagues did not always approach legal issues from a similar perspective.

V CONCLUSION

To provide comprehensive conclusions on the nature of Salmond's Bench an exhaustive survey of all relevant decisions would need to be conducted. This is a huge task and better suited to a doctoral thesis rather than a short journal article. This paper has analysed a limited number of cases, which may or may not be a representative selection. That said, some tentative conclusions can be reached from the study of *Mason*, *Schlager*, *Barker*, *Crown Milling*, *Gower* and *Lundon*. The Bench was divided on the crucial social issue of divorce. In particular, Salmond J and Herdman J viewed the issue quite differently. The disagreement was based on both legal and personal perspectives.

The Court was also divided on the issue of competition law as seen in *Crown Milling*. Herdman J was once again clearly aligned with one side: that of big business. Like Herdman J, Stout CJ's opposing viewpoint can be linked back to political beliefs and even specific political actions in his pre-judicial career. This is not to say that Salmond's Bench was bitterly divided but rather that divisions can be seen in at least two issues. *Lundon* shows a Bench including Stout CJ, Salmond and Herdman JJ in total agreement on the issue in question.

This journal edition is devoted to Salmond and while this particular article is focused on more than one judge, Salmond's judicial personality can be vividly highlighted by exploring his

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74 The Privy Council ultimately overturned the Court of Appeal decision and reinstated Sim J's original decision.

75 Robson, above n 27, 285.

76 Ibid, 291.

77 Ibid.

judgments in relation to those of his judicial peers. In divorce law, Salmond was a pragmatic realist with a worldly appreciation of the pain resulting from a failed marriage. Salmond used both purposive and literal statutory interpretation in his attempts to apply this realism in his judgments. It does not follow that Salmond held radical progressive social views. His written judgment in *Lundon* is as ethically righteous as anything Alexander Herdman could have penned.

A perennial issue for legal historians is the degree to which personal background affects judicial decision making. For example, in this article reference has been made to Salmond's realism and Herdman's social conservatism. While these labels may accurately describe the individual personalities in question there is no guarantee that these personalities directly affected any given judgment. Herdman J's decision in *Mason* may have been the obvious legal outcome for this particular judge rather than a reflection of his moral beliefs and political background. While Salmond's Bench was a mixture of different social outlooks, the legal historian must be careful not to assume that this was a determining factor in every decision. The personal background information provided in this paper does suggest connections, however. For example, Herdman's hardline, reactionary decisions as Attorney-General share similarities with his decisions as a Supreme Court judge. It is also clear that the historical context of the period affected judicial decision making. For example, Salmond's ability to articulate a liberal approach to divorce was partly due to the less restrictive morality of the post-war era.

The Supreme Court Bench from 1920 to 1924 was the last to be dominated by judges who had learned their trade in Dunedin, the cradle of New Zealand's legal profession. Never again would the Dunedin influence be so obvious in our legal system. From the late 1920s onwards, Auckland and Wellington increasingly dominated all aspects of the legal profession. The men of Salmond's Bench were interconnected through public and private relationships. This small group consisted of the leaders of a homogenous and elite profession.

More needs to be done on twentieth century New Zealand legal history and colonial legal biography. These are neglected areas of study. There are of course exceptions. For example, Peter Spiller's recent history of the Court of Appeal is a vital contribution to late twentieth century legal history.[78] Much of New Zealand's legal history output is related to Māori-Crown relations in the nineteenth century. This is primarily due to the national importance of Māori-Pakeha relations, especially in the area of land loss. Much of the Waitangi Tribunal's voluminous historical work is legal history. Tribunal history has been heavily weighted towards nineteenth century study as this was the era when the bulk of Māori land loss occurred.

An interesting result of this focus has been the connection of colonial legal biography to Māori land issues, such as Richard Boast's article in this volume, Peter Spiller's article on Chapman and *R v Symonds* and two papers on Prendergast and *Wi Parata*, one by this author and the other by David

78 Peter Spiller *New Zealand Court of Appeal 1958-1996: A History* (Brookers, Wellington, 2002).

Williams.[79] It is vital that these issues relating to the Treaty of Waitangi, native title and Māori land loss are explored in depth. The risk though is that other important areas of New Zealand's legal history are neglected. Salmond's Bench deserves more attention from legal historians. This paper is only an initial step in achieving this goal.

Salmond's Bench included an impressive line-up of judges. Robert Stout was a towering figure in early twentieth century New Zealand. While his judicial decision-making may have been somewhat unpredictable, he was a great leader. Frederick Chapman and William Sim can also be included amongst New Zealand's greatest judges. New Zealand was also very fortunate to have one of the world's greatest legal theorists sit on its Supreme Court Bench. Few legal theorists are able to put theory into action. Oliver Wendell Holmes was one. John Salmond was another. The Salmond Symposium held at the Victoria University of Wellington Faculty of Law in August 2006, from which this paper derives, was an initial step in realising the words of Stout CJ upon Salmond's death:[80]

> Sir John Salmond would be regarded by future law historians, not only as one of the greatest Judges of New Zealand, but as one of the great Judges of the Empire, a very great jurist, and an authority on law subjects.

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79 Peter Spiller "Chapman J and the *Symonds* Case" (1990) 4 Cant LR 257; Grant Morris "James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century" (2004) 35 VUWLR 117; David Williams "Fame and infamy – a Tale of Two Men of the Law in Colonial New Zealand" (Paper presented at the Salmond Symposium, Victoria University of Wellington, August 2006).

80 Published in (30 September 1924) *The Dominion* Wellington and quoted in Frame, above n 6, 239.