The Last Political Law Lord
The Last Political Law Lord: 
Lord Sumner (1859-1934) 

By 

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To those who knew Sumner well it is the very man himself. They might say before it, 'Hush! He will speak', and await the clearing of the throat that was commonly the prelude to some devastating fulmination
—Lord Justice MacKinnon
To Jenny, Ralph, Michael and Helen
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ACKNOWLEDGMENTS

The quest for Sumner has taken me along some curious byways and far longer than anticipated. I cannot claim, like Tacitus, that senectuti seposui, I saved it for my retirement; but that is how things have turned out as far as its completion is concerned. It also chances, however, that 2009 marks the 150th anniversary of Sumner’s birth, the 75th of his death, the centenary of his promotion to the Bench, the 80th anniversary of his last year on the Bench, and the 90th of his appointment to the Paris Peace Conference.

Through the passage of time I have incurred a number of debts, of which many can now be acknowledged only posthumously: to Lord Denning, Lord Devlin, Lord Hailsham, Lord Roskill, Lord Scarman, Professor R.F.V. Heuston, Professor Agnes Headlam-Morley, Mr G.I.S. Bailey (Old Mancunians) and Sir Patrick Macrory. Acknowledgments are due to the Baker Library, Harvard Business School, Balliol College, Oxford, Birmingham University Library, the Bodleian Library, Oxford, the British Library; the Syndics of Cambridge University Library, the Churchill Archives Centre, Churchill College, Cambridge, the Harvard Law School Library, the House of Lords Records Office, the India Office Library, King’s College, Cambridge, Magdalen College, Oxford, the National Archives, the National Portrait Gallery, the Public Record Office of Northern Ireland, Queen’s University, Ontario, the Scottish Record Office, the Squire Law Library, Cambridge, Trinity College, Cambridge, the Modern Records Centre, Warwick University, the West Sussex Record Office, Chichester, to the Rt Hon Michael Ancram, QC MP, the Earl of Selborne, the Most Honourable the Marquess of Salisbury and his librarian and archivist, Mr. Robin Harcourt-Williams, Mr Berin Carter, Lord Cunliffe, Mrs Josephine Fairclough, Dr John Hemery, Mr Geoffrey Lewis, Mr P.V. MacKinnon, Lord Mersey and Sir Gerrard Peat. To all of these I gratefully acknowledge their assistance, as I do that of all other owners of copyright in the manuscripts listed at the end of the book whom I may have inadvertently omitted.

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Cambridge, December 2008
I wish that people could be persuaded to realise that judges are human beings; it would be a real help to jurisprudence.

—Harold Laski on Lord Sumner

In an address delivered in 2005 to celebrate ‘the lives of the law’ featured in the *Oxford Dictionary of National Biography*, the senior law lord, Lord Bingham, spoke of ‘a sense of wonder at the richness, the diversity and the intrinsic interest’ of the lives of those who have ‘forged the legal traditions which we have been privileged to inherit and enjoy’. The life of John Andrew Hamilton, Lord Sumner (1859-1934), was one such life by any reckoning.

Seventy-five years after his death, Sumner is familiar to lawyers for incisive judgments pungently expressed in leading cases. His politics and his personality have not made him everyone’s favourite judge. Yet few have questioned his high reputation or qualified the tributes paid by contemporaries to his ‘legal and literary genius’, his ‘happy upholding of the great prose tradition of English Common Law judgments’ and his standing among ‘the greatest exponents of the English Common Law in all its long history’—‘one of the greatest lawyers who ever advised or argued, and one of the greatest judges who ever decided a cause’.

Less well known, though legendary in his time, is the man behind the judgments: a character far out of the ordinary, whose forceful personality and controversial opinions and activities on and off the Bench mark him out sharply from the overall twentieth-century judicial norm of political neutrality. Startling in this respect by the standards of the second half of the century, he was exceptional even by those of the first.

A political unknown before his elevation to the House of Lords in 1913, Sumner was seconded, in a move unparalleled for a law lord, to the Paris Peace Conference of 1919, and was held responsible by John Maynard Keynes for the much criticised reparation chapter of the Treaty of Versailles. He became a prominent spokesman for Tory attitudes on the diehard wing of the Conservative Party throughout the 1920s and up to his death in 1934, a thorn in the side of Governments from the Lloyd George Coalition to the National Government of MacDonald and Baldwin, and a bugbear to the Liberal Left—for his outspoken interventions on the most
hotly debated issues of his time: notably his defence of General Dyer of Amritsar, his pointed criticisms of the Irish Treaty of 1921, and his leadership in the campaigns to restore the power of the House of Lords and to maintain British rule in India—the most divisive issue of the century in the Conservative party before the advent of Hitler.

This combination of outstanding judicial prowess and keen political activism to a degree unique in a Lord of Appeal lends fascination to Sumner as a rare and singular individual. Even in his own time it was objected that, other than in their appellate capacity, law lords should be seen and not heard in the Upper House, a contention which Sumner both denied and defied.

With the establishment in 2009 of a Supreme Court entirely separate from the House of Lords, Sumner is of particular historic interest as unquestionably the last of a judicial type: the overtly and unapologetically political law lord; and now that the venerable title of Lord Chancellor is little more than an empty name, never again will anyone vie, as Sumner did—three times a candidate—for that once great and coveted office of state.

3 Stevens, Law and Politics, p.265.
5 The Times, 23 January 1922.
ABBREVIATIONS

ACP: Austen Chamberlain Papers
BL: British Library
BLP: Bonar Law Papers
BodL: Bodleian Library, Oxford
BP: Baldwin Papers
BUL: Birmingham University Library
CAB: Cabinet Papers
CaP: Carson Papers
CC: Churchill College, Cambridge
CP: Cave Papers
*Crawford Papers*: The Crawford Papers. The Journals of David Lindsey, twenty-seventh Earl of Crawford and tenth Earl of Balcarres 1871-1940 during the years 1892 to 1940, (ed.) J. Vincent, 1984
CUL: Cambridge University Library
CuP: Cunliffe Papers
DNB: The Dictionary of National Biography
EAP: Edgar Abraham Papers
FO: Foreign Office
HH: Hatfield House
H.L. Deb., 5s: Parliamentary Debates. House of Lords Debates, 5th series
HLRO: House of Lords Record Office
HMP: Headlam-Morley Papers
IOL: India Office Library
LCO: Lord Chancellor’s Office
LGP: Lloyd George Papers
Lentin, Guilt: A. Lentin, Guilt at Versailles, Lloyd George and the Pre-History of Appeasement, 1985
LL: 'Legal Luminaries: Lord Sumner'. Galley proof from unidentified periodical, 1928
LP: Lothian Papers
NA: National Archives, Kew
ODNB: The Oxford Dictionary of National Biography
OMAR: Old Mancunians Annual Report for 1911
PRONI: Public Record Office of Northern Ireland, Belfast
Sanderson: Sir Lancelot Sanderson, 'Lord Sumner', The Times, 29 May 1934
SP: Salisbury Papers (4th Marquess)
SRO: Scottish Register Office, Edinburgh
Wrigley, Companion: C. Wrigley, (ed.), A Companion to Early Twentieth-Century Britain, 2003
INTRODUCTION

THE CHALLENGE OF SUMNER

Lawyers’ lives—appellate judges—Sumner’s reputation—his formidable character—trenchancy and durability of his judgments—his ambition for the woolsack frustrated—his diehard politics and outspokenness—the ‘last political law lord’—his controversial role at the Paris Peace Conference—judicial biography and Sumner—problems and challenges of a Life of Sumner.

Half a mile from Ibstone House, by a steep roadway leading to the Turville valley in the Chiltern Hills, stands the village church of St Nicholas. In the north-east corner of the churchyard, close to the chancel, is a small rectangular precinct, some four square yards, enclosing a sundial and a grey stone plinth. The plinth is surmounted by a carved laurel wreath, below which an inscription records that the monument is in memory of John Andrew Hamilton, Viscount Sumner of Ibstone, with the dates of his birth and death. The place is peaceful and secluded, set back from the road and shaded by a large horse-chestnut. The stonework is somewhat fallen away, the index is missing from the sundial, the ground is overgrown, as the seasons pass, with aconites, snowdrops and primulas…

‘Lawyers, whether judges or not, are usually wholly forgotten when they retire or die’.1 Such was the melancholy reflection of Lord Roskill. Yet there seems no obvious reason why judges as a class should be consigned to oblivion or deemed less fit a subject for biography than other men. In the United States, with its long-established tradition of judicial biography, the question does not even arise.

True, by the nature of their calling, those who reach the High Court Bench, and a fortiori the Court of Appeal and House of Lords, tend, at least after appointment, to lead prudent, sequestered, sedentary lives of what Sumner mocked as ‘old age and decorum and perhaps dullness’.2 A judge does not come into his own until middle age; and Sumner, raised to the High Court at fifty, rightly thought it a notable achievement to reach the Court of Appeal at fifty-three, before his still more rapid elevation a year later to the House of Lords, to become the youngest of the then six
serving law-lords (today a round dozen), described by Lord Chancellor Haldane as ‘elderly gentlemen in various stages of increased years’,\(^3\) whose ages, when he nominated Sumner to join them, averaged sixty-three. Lords of Appeal, then, reach prominence and make their greatest contribution at a time when other men will be laying plans for retirement; and Sumner’s first fifty years, two thirds of his life, the prelude to his fame, are compressed in this biography within a single chapter.

Yet the greatest appellate judge enjoys a unique advantage, a kind of immortality. His work survives him in a direct and practical sense as ‘one of the great judges’, in Sumner’s own words, ‘whose tradition is handed down for generations’.\(^4\) The American judge and jurist, Justice Oliver Wendell Holmes, computed a life expectancy for leading cases of about fifty years.\(^5\) By this reckoning Sumner’s judgments, delivered across the two decades from 1909 to 1929, enjoy exceptional longevity. Around a century later they continue to be held out both as models of legal reasoning and for memorability of expression.

Whether viewed from his mastery of the subject-matter, his rigorous analysis of case-law, or the combination of lucidity and forcefulness which lends them their stamp of monumental finality, ‘his judgments’, said the Times, ‘it is not too much to claim, are usually the outstanding feature of any case in the House of Lords in which he took part, as they are from their literary qualities the best reading’.\(^6\) A fellow-judge, J.W. Scobell Armstrong, admired in Sumner’s rulings the ‘wonderful felicity of their wording and the scintillating wit that relieves them from dullness’.\(^7\) With the exception of Lords Bowen and MacNaghten, no other judge can boast an entry in the Oxford Book of English Prose.\(^8\) Wherever in the world the Common Law is followed or respected, the name of Sumner is cited in many a judgment. As a classicist (though he was both too modest and too proud to boast), he could have quoted Horace’s *non omnis moriar*:

\begin{quote}
I will not wholly die; my better part  
Shall ‘scape the sullen hearse; bright fame shall raise  
My memory renewed, with future praise.\(^9\)
\end{quote}

On the other hand, it is true that while his name may be frequently invoked in the lawcourts, the judge as a person is usually little remembered outside his immediate circle. In this respect Lord Roskill is surely right, and behind the history of the Common Law, the story of the judges who made it is often a blank. It may therefore be of interest to trace
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There is something peculiarly bracing about a man most of whose portraits capture him in some arresting or forbidding pose. Sumner is nearly always scowling, glaring from canvas or photograph through rimless pince-nez. What fixes us are the hooded lids, the glassy stare, the curved lip, the set jaw, the head slightly tilted as if at bay. ‘He is an amazingly powerful person’, observed an unexpected and sometimes horrified but always fascinated critic, the left-wing intellectual, Harold Laski,10 who wrote of ‘Sumner, whom I admire and dislike’.11 ‘Formidable’ was a word frequently on the lips of observers. It is an ambiguous epithet. As if in the proximity of some great volcano, intermittently active, an Etna or Vesuvius, learned counsel—and not only they—approached Sumner apprehensive of the incandescent depths rumbling beneath that menacing exterior and the sudden, thunderous, scalding eruption, the ‘devastating fulmination’,12 in the words of Lord Justice MacKinnon, that might follow without warning and with crushing effect.

Sumner was a man of intriguing contradictions. Beneath the baleful glare, the iron mask of cynical inscrutability that was his adopted front to the world, was a passionate, often vitriolic spirit, whose life is to some degree a study in failure. The reader’s sympathies may be engaged by the experience of a man who, conscious of great gifts, early in his career suffered galling years of professional failure; and for whom, at the height of his fame, the supreme prize for a lawyer with political ambitions—the woolsack—came within his sights and appeared to be tantalisingly within his grasp, in 1915 and again in 1922, only to elude him at the last minute. Once more, in 1928, though on this occasion perhaps without his knowledge, his chance came up again, to be thwarted by an unusually determined Baldwin. This is the life of a man whose highest aspiration was frustrated. The greatest judge never to become Lord Chancellor: an unenviable epitaph.

Sumner was a stern adherent of the doctrine of precedent. A rule, he said, ‘may be hard, and yet wholesome for all that’.13 To those brought up, like the writer, in an age of rapid legal reform—the era of Lord Denning—such attitudes may savour of harshness. What, as Denning said of precedent, is the merit in being wrong twice over? Yet there is much to be said for the primacy of predictability in the law, whose first purpose after all is to enable men to go about their business with as much assurance as is possible in an uncertain world; and we may admire in Sumner the rigour of a strict constitutionalist, for whom the law may not be altered save by
the legislators of a sovereign Parliament—though Sumner also had the gravest fears for the health of the Legislature after the wounds inflicted on it by the Parliament Act of 1911.

Then there are Sumner’s politics. ‘What, that crusty old Tory?’ a distinguished Cambridge lawyer exclaimed at my choice of subject. Lord Roskill dismissed Sumner as ‘a hopeless reactionary’, a defender of what turned out to be among the lost or losing causes of the 1920s. Sumner was not one of the original ‘diehards’, those in both Houses of Parliament who resisted the Parliament Act to the point that they preferred, metaphorically at least, to ‘die in the last ditch’. For while in 1911 he was an interested and caustic observer of contemporary events, he was no more than a High Court judge of two years’ standing. It is an irony that, though one of the first such judges to be appointed on strictly non-political grounds, Sumner would as a law lord become notorious for his political outspokenness from the ‘diehard’ wing of the Conservative party.

Even at the time, acceptance of a politically neutral judiciary was gaining ground, especially following a succession of controversial rulings on trade unions at the turn of the century associated with the veteran Lord Chancellor, Halsbury, also conspicuous in the vanguard of the ‘ditchers’. Today, as Lord Bingham reminds us, ‘it is regarded as a cardinal feature of judicial impartiality that the judge should be a political eunuch’. Reticence on matters of political controversy is deemed a settled constitutional convention, a concomitant of the separation of powers, a corollary of the independence of the judiciary and of public confidence in its neutrality.

But that this rule extended to the law lords in their legislative and deliberative capacity was not a doctrine accepted unanimously or unresistingly in Sumner’s day. Sumner for one accepted no such gag, denied any such self-denying ordinance and took no vow of silence. He flatly rejected the requirement of judicial emasculation and he declined to be either neutered or mute. He was adamant in his insistence on a law lord’s absolute right, equal, he said, to that of any other member of the Second Chamber, to speak his mind there without reserve on whatsoever topic might arise. He made no secret of his political predilections; and his powerful and hard-hitting speeches, which caused annoyance and embarrassment to successive Governments into the 1930s, commanded the plaudits of his supporters and the attention of all who heard them. ‘Although he seldom speaks’, wrote one observer, ‘no peer carries greater weight when he does speak’.

Thus Sumner stood forth as a staunch imperialist, critic of concessions to nationalist demands in Ireland and India, defender of the Raj, and
scourge of socialism. When in 1930 he resigned unexpectedly from the Bench, it was in order to campaign openly against the Government as President of the Indian Empire Society, and to join battle and fight, literally to the death, in one of the fiercest internal struggles of the century within the Conservative Party.

Sumner was a spokesman, eloquent and committed, of a Toryism not usually known for articulateness in its advocates, a register of feeling on the right of the Conservative Party towards the momentous changes taking place in the decade following the Great War—the advent of mass democracy and the beginnings of the end of Empire. To recount his part in the controversies of yesteryear, to revisit the causes in which he engaged with such passion, will perhaps seem tedious and jejune to today’s reader. Versailles, Amritsar, the Irish Treaty, House of Lords reform, the Raj: has not History, with a sigh or a yawn, long since pronounced a final verdict on those lost causes?

But who knows? Clio is an active and versatile muse, ever on the watch for new and unexpected vantage-points, and happy to overturn the solemn nostrums of a generation. Orthodoxies that now seem solidly entrenched may yield in the perspective of time to other insights. At any rate, it may be of interest, and perhaps even instructive, to review those once burning issues through Sumner’s keen and unblinking gaze, recalling, as Maitland reminds us, that events now long in the past were once in the future. Recent scholarship already suggests that the movement for House of Lords reform was more significant than is commonly supposed, and its relevance has seldom been greater than today. The perils of what the second Viscount Hailsham thirty years ago called an ‘elective dictatorship’, perils which have not diminished since, were singled out by Sumner more than half a century before. The pertinence of Sumner’s reactions also lives on in the mixed and troubled aftermath of empire.

‘The law lords’, Lord Bingham declared a decade ago, ‘are judges not legislators and do not belong’ in the House of Lords. From 2009, the Lords of Appeal in Ordinary will no longer sit as members of the Upper House but as Justices of a Supreme Court. To symbolise the strict separation of powers, they will be relocated to a courthouse wholly detached from the Palace of Westminster, on the other side of Parliament Square. Sumner thus retains particular interest as the last of a species now formally and finally condemned to extinction—a political law lord. Likewise, now that the ancient office of Lord Chancellor—hitherto head of the judiciary, speaker of the House of Lords, Cabinet minister and first subject of the realm after the Primate of All England—has been reduced to
the shadow of a name, no-one will ever again share that last infirmity of ambitious lawyers by aspiring, as Sumner did, to the woolsack. In more than one sense, we shall not look upon his like again.

An episode in Sumner’s life of great historical importance was his secondment to the Paris Peace Conference of 1919 as principal British delegate on reparations. The episode confronts his biographer with the most controversial phase of a controversial career, for Sumner’s reputation has never recovered from the opprobrium heaped on what was largely his handiwork: the reparation chapter of the treaty of Versailles.

It was Keynes’s intention, in *The Economic Consequences of the Peace*, to include, in his barbed review of the personalities of the Conference, a sketch of Sumner; but he was persuaded to think better of it. ‘Your remarks on Lord Sumner’, he was warned, ‘approach libel – don’t they?’ Among some preliminary jottings, Keynes had likened Sumner to a vulture, gorging on its victim’s flesh. Another vignette, deleted from the proofs, gives a flavour of the pen-portrait that would have been: ‘A figure of sinister influence’, it began, ‘who presided over the problem of reparation in the spirit and with the aspect of a Holy Inquisitor’. Even after all reference to him had been removed, Sumner remained a spectral presence, an evil spirit hovering above Keynes’s polemic, the avowed aim of which was ‘to make the Treaty, or much of it, a dead letter’. Sumner assisted in an attempted rejoinder, an official apologia of reparations; but even as he did so, Keynes renewed his attack. ‘The Reparation Chapter’, he wrote waspishly in 1920, ‘is a foolish performance which no sensible man should seek to defend’. The planned rejoinder came to nothing, and despite the reservations of later historians, Keynes’s image of Versailles as a ‘Carthaginian peace’ continues to cast its seemingly unbreakable spell on the public mind.

Keynes’s indictment of the treaty as laying up kindling for a second European conflagration gained added weight in the troubled thirties, and so did Sumner’s reputation as one of the miscreants of the Peace Conference. Lloyd George himself, having thought better of reparations, adroitly deflected much of the blame onto Sumner. The *Manchester Guardian* voiced the accepted view that Sumner ‘exercised a potent and, it must be said, unhappy influence upon affairs’. He ‘vigorously pressed the views of the “Make Germany Pay” fanatics’ against the supposedly liberal inclinations of Lloyd George. The *Times*, more obliquely, said of that influence that ‘it has passed into history and has left its mark for good or evil upon the world’. ‘History’, Sumner agreed at Paris, ‘will demand from us an account of our decisions’, but accounts of his role have been almost uniformly one-sided. This hostile verdict makes a defence
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unusually difficult. Yet the nature of his role has been misconceived and exaggerated, and the effort should be made to place it in a truer and fairer perspective.

Judicial biography, assiduously cultivated across the Atlantic by both lawyers and historians,31 is a field more sparsely tilled in Britain.32 C.H.S. Fifoot’s Lord Mansfield (1936) and his cameos in Judge and Jurist in the Reign of Victoria (1959) of such luminaries as Bramwell, Willes, Blackburn, MacNaghten and Bowen—all judges admired by Sumner33—have proved something of a false dawn.34 The exemplar of judicial biographers was the late R.F.V. Heuston, whose two-volume Lives of the Lord Chancellors (1964 and 1987) remains a treasure-house of profound learning, illuminating fact, elegant narrative and sound judgment. Forty years ago, Heuston called for lives to be written of appellate judges, singling out Atkin, Blackburn, Wrenbury and Sumner.35 Of this quartet, Geoffrey Lewis has produced an admirable life of Lord Atkin (1983).36

Sumner, himself a man of letters, may be reckoned a prince among biographers. He was one of the first and most prolific contributors to the Dictionary of National Biography, author of almost 300 entries, of which 88 have been thought worthy of inclusion a century later in its sequel, the Oxford Dictionary of National Biography. Of these 88, 47 are the lives of judges. One may even regret that Sumner did not abandon law for literature, such was his mastery of the miniaturist’s skills—the triumphant amalgam of selection, compression, intelligence and artistry, and the final éloge that sums up and distills the subject’s essence. Sumner, a fine judicial biographer, serves as the model and invites the challenge.

By way of apprenticeship, I contributed entries on ten lawyers (of whom eight, including Sumner, were judges) to the Oxford Dictionary of National Biography,37 having earlier, in 1984 published a brief memoir in the Law Society’s Gazette to mark the fiftieth anniversary of Sumner’s death.38 Several contemporary accounts of Sumner particularly whetted my biographical appetite. The first is the Times obituary by William Reeve Wallace,39 Chief Clerk to the Judicial Committee of the Privy Council. Refreshingly free from the conventional pieties of the genre, it is usefully supplemented by sensitive correctives from two of Sumner’s friends, Sir Lancelot Sanderson,40 a member of the Judicial Committee, and Sir Claud Schuster,41 Permanent Secretary in the Lord Chancellor’s Office. A further valuable account is the glowing entry by Lord Justice MacKinnon in the Dictionary of National Biography.42 The authority of Reeve, Schuster and MacKinnon will be frequently cited in this account.

This is not in the strict sense a legal biography,43 still less a study in jurisprudence.44 Nor, despite its title, is it a purely political biography.
Rather it is a ‘life in the law’, a ‘life and times’, with law and politics in
the foreground, ‘anchored’, as Heuston recommended, ‘in the mainstream
of the English biographical tradition of “Life and Letters”’. As with any
biography, its guiding principle and justification must be fidelity to truth.
‘I should be grieved’, wrote Sir Lancelot Sanderson, ‘to think that the real
nature of this great man should be misrepresented even in the smallest
degree’. I was necessarily sympathetic to this concern; and in striving to
recapture something of ‘the magnetism of Sumner’s personality’, I have
tried to depict him as faithfully as the evidence allows, in the hope of
evoking some echo of that voice now long stilled.

In my quest for Sumner, however, I was at all times sensitive to the
fragmentary nature of the surviving evidence, frustrated by lack of
information, by the random and piecemeal nature of the raw material at
my disposal and by the role of serendipity in coming across it. My
curiosity was baffled by a hundred-and-one questions that can now
probably never be answered. There is a dearth of those personal details
which, as Plutarch held, reveal a man’s mind and character at least as
much as his public acts. ‘The incidents which give excellence to
biography’, as Johnson says, ‘are of a volatile and evanescent kind, such
as soon escape the memory and are rarely transmitted by tradition’. I
would have given much for an account of Sumner by his wife, his
physician or his chauffeur. Through my own procrastination, I failed to
follow up the possibility of interview, until too late, with his housemaid.

Here and there I managed to glean some precious nuggets. The letters
of Harold Laski to Mr Justice Holmes were a lucky source of occasional
brilliant flashes that light up the subject. ‘I am tickled’, wrote Holmes,
‘by what you tell me of Lord Sumner’. Of those who knew or
encountered Sumner at first hand, Lord Denning was, I think, the last. I
much regretted not to have known the late Mrs Olive Robins, Lady
Sumner’s niece, who, I was reliably assured, could have offered a mine of
reminiscences of ‘Uncle John’. As it is, I am greatly indebted to her
daughter, Mrs. Josephine Fairclough, who generously lent me such private
papers of Lord and Lady Sumner as remain, together with photographs,
several of which are reproduced in this book.

Like his great contemporary, Birkenhead, Sumner could no more keep a
witty saying in his mouth than a burning coal. The wish was expressed
by Theobald Mathew, a connoisseur of forensic humour, that an anthology
of *sumneriana*, impromptu as well as premeditated, should be collated
before the winged words were lost forever. Some gems of Sumner’s
legal wit sparkle in Sir Robert Megarry’s *Miscellany-at-Law* (1955); but
the full task was never done, and such rare instances of Sumner’s table-
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talk and post-prandial conversation as have come down to us give but a faint impression. ‘He frequently said caustic, witty and amusing things, many of which I shall always remember with pleasure’, Sir Lancelot Sanderson assures us. Unfortunately neither Sir Lancelot nor anyone else found leisure to record them for the delectation of posterity.

Whatever the want of private memorabilia, an appeal court judge’s ultimate monument, his legacy to jurisprudence, lies open to public scrutiny in the serried tomes of the Law Reports. The Law Quarterly Review remarked of Sumner ‘how impressive would be a volume of his collected judgments’; but unlike Birkenhead, Sumner did not publish a collection of his rulings. The student must therefore look them up. There they are, shining examples of a stylised art form refined across generations: an amalgam of logic and eloquence, of analogy with past precedent and statement of present need, which in a leading case persuades and binds, and goes to make up the living tradition of the Common Law.

In presenting Sumner’s judgments, ‘the great judgments’, as has been said, ‘for which he will retain an undoubted place in judicial history’, a problem of dimension arises. I have eschewed the solution, favoured by Heuston in his Lives, of relegating them to a brief appendix. They are after all the core of Sumner’s achievement. On the other hand, selectivity was essential if his biography was to be kept within bounds—there are 139 published reports of his House of Lords and Judicial Committee rulings alone. I have therefore focussed on the score or so of judgments which by common consent ‘rank as legal classics’, and have endeavoured to weave them into the narrative of his life-story, in sufficient detail, I hope, to interest lawyers and non-lawyers without wearying or alienating either. In reading Sumner’s judicial pronouncements, and equally the parliamentary speeches for which he was hailed as an ‘oratorical pyrotechnist’ or deplored as a political firebrand, there is never any doubt that one is in the presence of a great mind.

I also set store by pictorial evidence. Like Carlyle,

I sought to procure a bodily likeness of the personage enquired after: a good portrait, if such exists; failing that even an indifferent if sincere one. In short, any representation, made by a faithful human creature, of that face and figure, which he saw with his eyes, and which I can never see with mine.

Images of Sumner give two contrasting impressions. On the one hand, the bluff, uncompromising man of independent mind, sure of himself, tenacious of purpose and indifferent to what others might think or say.
Hence the striking portrait by Augustus John on page 85, where the artist has caught and set down Sumner’s pose of defiant self-confidence—the ‘pronounced and well-founded belief in his own ability’, as Wallace and Laski confirm, of a man ‘completely deaf to external opinion’. On the other hand, there is the portrait by Oswald Birley which forms the frontispiece to this book and brings out Sumner’s mellow, albeit astringent reflectiveness. For three quarters of a century this portrait has graced the Bencher’s smoking-room of the Inner Temple. ‘Benevolent malevolence’ was the comment of Lord Chief Justice Goddard on contemplating this likeness. ‘To those who knew Sumner well’, wrote MacKinnon, ‘it is the very man himself’.

Yet pictures and even photographs may be only masks, or tell us what their subject looked like, rather than what he was like. Still, the biographer must attempt, imperfectly and through a glass darkly at two generations’ remove, to emulate the portraitist and to produce, through an account of a life as he perceives it, a convincing image of his subject, warts and all, and avoiding the kind of ‘grossly eulogistic’ account of which, as Sumner complained with characteristic impatience, ‘it is difficult to speak temperately’. At work on Sumner, I have sensed his shadow and his frown, for ‘he hated ‘inaccuracy of statement and looseness of thought’, anything ‘facile’ or ‘half-baked’. As Montaigne, another lawyer with a literary bent, wrote of the notional biographer who might attempt his life, ‘I want it to be done truthfully and fairly. I would willingly return from the other world to contradict anyone who represented me other than I was, albeit to do me honour’. In the lack of finality, however, inherent, as Montaigne understood, in the attempt to pin down the essence of any human being, this can only be an essay in biography.

Notes

2 Sir John Hamilton to Sir John Simon, 18 August 1912, BodL MS Simon, 49/33.
5 Lord Wright, Legal Essays and Addresses, 1939, p.400.
6 Wallace.
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10 Laski to Holmes, 27 March 1928, HLL, p. 1040.
11 Laski to Holmes, 13 July 1925, HLL, p. 764.
12 MacKinnon, p. 395.
15 The name ‘Diehards’ was originally given to a British regiment for its stubborn resistance at the battle of Albuera, 1811. It was applied by Lord Curzon to the do-or-die opponents of the Parliament Act, 1911. G. Dangerfield, The Strange Death of Liberal England, 1936, p. 43.
18 Ll.
20 The Listener, 21 October 1976.
22 Florence Keynes to J.M. Keynes, late 1919, King’s College, Cambridge, Keynes Papers EC1/9.
26 In 146 BC, after the Third Punic War, the Romans destroyed Carthage, killed or enslaved its inhabitants and sowed the ground with salt so that nothing should grow there. The expression ‘a Carthaginian peace’ was applied by General Smuts to the Treaty of Versailles and made famous by Keynes.
27 Manchester Guardian, 26 May 1934.
28 Wallace.
29 Burnett, vol. 1, p. 43.
31 See R.A. Posner on ‘Judicial Biography’ in his Law and Literature, 1998, pp. 357-77. For recent lives of Sumner’s American contemporaries, Supreme Court Justices Oliver Wendell Holmes and Benjamin Cardozo, see G. E. White, Justice

32 For a review of judicial biography see P. Girard, ‘Judging Lives: Judicial Biography from Hale to Holmes’, Australian Journal of Legal History, 7 (2003), 87-106. Professor Girard claims (p.106) that ‘the genre in England has run out of steam’. However, a Legal Biography Project was established at the London School of Economics in 2007.

33 Sumner wrote entries on Willes and MacNaghten for the DNB.

34 The accounts of Bramwell and Bowen by Edmund Heward in his Lives of the Judges, 2004, are largely derivative.


36 Geoffrey Lewis has also written a life of the second Viscount Hailsham (1997) and of Lord Carson (2005).


39 Wallace.

40 Sanderson.

41 Schuster.

42 MacKinnon, pp.392-5.

43 There is a useful survey of Sumner’s judgments in R. Stevens, Law and Politics, pp.262-5. An interesting example of legal biography, strictly so called, and oddly reticent on the political career of a figure important in Irish history, is G.M. Golding, George Gavan Duffy 1882-1951. A Legal Biography, Backrock, Co. Dublin, 1982.


45 Heuston, Judges and Biographers, p.17.

46 Sanderson.


48 There is no known recording of Sumner’s voice.

49 The Rambler, No. 60, 13 October 1750.

50 Holmes to Laski, 6 April 1928, HLL, p.1044.

51 Lord Beaverbrook, Men and Power 1917-1918, 1956, p.52. The description of Birkenhead was Bonar Law’s.

52 T. Mathew, For Lawyers and Others, 1937, p.278.

53 Sanderson.

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55 LL.
56 Manchester Guardian, 26 May 1934.
59 Wallace.
60 Laski to Holmes, 27 March 1928, HLL, p.1040.
64 Schuster, Law Times, 177 (2 June 1934), p.375.