NOTES AND COMMENTS

TWO NOTES ON JURISPRUDENCE

1. *What is Jurisprudence?*

THE purpose of this note is to protest against the attempt made by teachers and writers to give students a short definition. The topics dealt with in the subject can be ascertained by looking at the table of contents of a standard text-book such as Salmond. Save that all these topics are connected with law, there is no such connection between them as would justify Allen's compendious description: "a scientific synthesis of the essential principles of law." Jurisprudence, like all the social studies, can hardly claim to be a science until human free will is proved to exist or not to exist, or its limits defined. The difficulty is felt particularly by lawyers, because the development of legal principles seems so frequently to be whimsical. The history of the rule in *Rylands v. Fletcher* in the U.S.A. is an outstanding example. But, furthermore, to the extent that jurisprudence lays down propositions true of most societies and, having an appearance of scientific cohesion, it will be found on close examination that they are descriptions of human relations belonging to general sociology, not statements of legal principle at all, whether general or narrow. In some cases they are moral saws. Thus it may be said that "ownership" is common to developed legal systems. But either this refers to common social demands or else it is misleading. As far as *legal* principle is concerned, there is for instance a wide difference between the fundamental principles of allodial ownership in Romanic systems and the tenurial principles of the Common Law. Similar moral principles evidently lie behind the Roman actions based on unjust enrichment and some of the Common Law indebitatus counts. But the idea that there was any fundamental legal principle common to these systems was rudely dispelled in *Sinclair v. Brougham.*[1] What can be said of supposed "essential principles of law" from which courts cannot by any logical process deduce specific consequences? Even when it comes to the process of legislation, judicial or parliamentary, these supposed principles appear in the light of modern sociological analysis to be of less importance than a mass of economic and psychological factors, the analysis of which takes one far indeed from law and usually lands one in metaphysics. Perhaps it would be better if no more ambitious claim were made for jurisprudence than that it collects together general information as to rules of law and legal institutions which is not conveniently included in the study of specific branches of law, and submits the contents and operation of legal systems to ethical criticism. I use the word "ethical" in it broadest sense.

1. [1914] A.C. 398.

2. *Status and Contract*

Since Maine, there has been a tendency to treat the development of the social service state as involving a movement from a "contract" as the basis of human relations back to the "status" state of the Middle Ages. I use the term status in the sense approved by modern jurists—the condition of belonging to a class whose legal capacities and incapacities are significantly different from those of the normal adult male. (This does not altogether accord with the use of the term by English judges, who persist, for instance, in saying that married women occupy a status, or even that marriage is a status. The legal capacities and incapacities of married women under Australian law, still more under English law, are hardly distinguishable from those of the normal adult male, and marriage is a relationship between specific persons.) It may be conceded that the legislation of the Third Reich relating to the peasants has put that class into a status of the old type, almost making them *adscripti glebae*. It is also true that legislation is gradually increasing the area of human relations governed by the general law rather than by free contract, not only under Fascism and in the U.S.S.R., but also in the capitalist democracies. It seems, however, that the result is materially different from that achieved under a strict status system such as that of the Hindu castes. The distinguishing feature of the new system is that the law does not allocate peculiar legal positions to persons as such, but defines mandatorily the incidents of certain abstract relationships, leaving the individual free to move into and out of these relationships, but not to alter their incidents by contract. Thus a man is free to become successively a civil servant, a teacher, a farm produce agent and a masseur. His relationships with other people in each of these occupations will be in important respects fixed by statutory provisions. This is not "free contract," as Maine understood it, nor is it truly "status." It is free choice among fixed relationships.

GEOFFREY SAWER, LL.M.

FEDERAL JURISDICTION

Adams v. Chas. S. Watson Pty. Ltd.[1]

IT is provided by Section 210 of the Justices Act 1928 that an information must be laid within twelve months from the time when the matter of the information arose if no time is limited for laying an information in the Act of Parliament relating to such a case. By virtue of Section 50 (2) of the Sales Tax Assessment Act (No. 1) 1930-35, a prosecution in respect of any offence against Section 12 of the Act may be commenced at any time. The Police Magistrate dismissed four informations laid under Section 12 on the ground that, being out of time as prescribed by Section 210, the Court had no jurisdiction under Section 39 (2) of the Judiciary

1. [1938] A.L.R. 365.