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.

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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.

Act 1903-1937. The High Court unanimously upheld an appeal on all counts and dismissed the arguments touching federal jurisdiction in a manner surprisingly summary to those who thought the dicta in the *Sawmillers'* case[2] and *Le Mesurier's* case[3] and the analogy of the *Minerals* case[4] created difficulty.[5]

The most important of the three aspects of the case is the distinction made by Latham C.J. between the *structure* and *function* of Courts. With respect to the nature and structure of judicial organisms, the powers of the Commonwealth Parliament are prescribed by Section 72 of the Constitution and it cannot, whilst investing State Courts with Federal jurisdiction, evade that Section by changing the constitution of those Courts. But taking a properly constituted State Court, it may confer new functions on it and prescribe the ambit of those functions. The distinction is of value and reconciles the dicta of the *Le Mesurier* case with the practical administration of federal law, but whether structure and function are logically dichotomous is a matter of grave doubt. It is now settled that an officer of a Court, such as a Registrar,[6] is part of the structure of the Court and jurisdiction is part of its function. But what of the process of a State Court, its rules, its hearing dates? Only the High Court could settle the doubts that would appear to arise if the Commonwealth Parliament entered these fields. Again, are Barristers and Solicitors officers of a Court in the same sense as Registrars, or are they merely part of the Court's function so that the Commonwealth can provide for the appearance of persons not duly qualified to practise in that Court?[7]

It was argued that, as Section 39 (2) of the Judiciary Act expressed the jurisdiction conferred on State Courts to be "within the limits of their several jurisdictions, whether such limits are as to locality, subject matter or otherwise, and as Section 210 of the Justices Act limited jurisdiction, then the Court had, by virtue of Commonwealth legislation, itself no power to hear the informations. This argument was emphatically rejected on the ground that in *Whyte's* case[8] it was held that Section 210 did not limit the jurisdiction of Courts of Petty Sessions.[9] It is now, therefore, beyond doubt that the doctrine of acknowledgments applies to statute-barred debts in Petty Sessions. It was unfortunate that before the Magistrate it was admitted, on behalf of the Commonwealth, that the words "Act of Parliament" in Section 210, referred only to an Act of the Victorian Parliament, although *arguendo* two learned Justices were convinced that, as Federal matters had been brought within the scope of the Justices Act, the expression must be taken to include Acts of the Federal Parliament. In Starke J.'s opinion the whole argument

2. 15 C.L.R. 308.
3. 42 C.L.R. 481.
4. 33 C.L.R. 1.
5. *sed vide* the emphatic pronouncement in *Lorenzo v. Carey*, 29 C.L.R. at 253, not cited in argument or in the judgment.
6. *Le Mesurier*.
7. Section 50 of the Judiciary Act 1903-1937.
8. [1938] A.L.R. 119.
9. This was contended in *Res Judicatae* (1937), p. 233, *et seq.*

failed even if Section 210 went to jurisdiction, because in Section 50 (2) of the Sales Tax Act the Commonwealth had "otherwise expressly declared."[10] This view, no doubt, is based on the principle that Section 50 (2) being a later enactment than Section 39 (2), *pro tanto* repealed it, and also on the general overriding powers of the Commonwealth with respect to Federal jurisdiction.[11]

The disappointment of the case lies in the absence of any pronouncement on the relation of State Courts to the Federal Judicature, on the rationale of the Commonwealth's power to prescribe procedure in State Courts invested with Federal jurisdiction, and on the relation of Section 51 (xxxix) of the Constitution to Chapter III thereof, although in argument a learned Justice expressed doubts as to whether *pl.* (xxxix), granting its doubtful necessity, applied to the judicial powers at all.

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10. 15 C.L.R. at 813 *per* Griffiths C.J.
11. This latter is the short round of Dixon J.'s judgment on this aspect.

NATIONAL INSURANCE AND THE CONSTITUTION

THE National Health and Pensions Insurance Act 1938 raises a number of interesting constitutional points including, *e.g.*, the fundamental question of whether the insurance power conferred by Section 51 *pl.* xiv, covers such a "national insurance" scheme,[1] and the further question whether the provisions of Sections 168-172 have the effect of purporting to confer part of the judicial power of the Commonwealth on bodies which do not satisfy the requirements of Section 72 of the Constitution. Neither of these problems is discussed in this note which is confined to a third point, viz., whether the Commonwealth Parliament has power to do what it has purported to do in Section 187,[2] *i.e.*, to require the State Governments to pay contributions to the National Insurance Fund in respect of their employees. This discussion which assumes, of course, that the scheme as a whole is valid, does not pretend to be a full examination of the question but is merely intended to draw attention to the existence of the problem and to some of the relevant considerations and authorities.

Before the *Engineers'* case,[3] the answer to this question would undoubtedly have been that such an enactment was *ultra vires*. Now, however, we must ascertain how far that case and subsequent cases have gone in subjecting the States to the legislative power of the Commonwealth. It must be admitted that there are in the *Engineers'* case dicta which are wide enough to justify the view that such a section is within the powers of the Commonwealth. However, there is

1. See on this point Cantor, 2 A.L.J. 219, and Wynes, *Legislative and Executive Powers in Australia*, at pp. 144-5. Both these learned writers take the view that such a scheme is *ultra vires*, though it may be observed, with respect, that the reasons advanced for that contention do not appear wholly convincing.
2. Sec. 187: "The application of this Act shall, subject to the exceptions therein contained, extend to persons employed by the Commonwealth or a State or by any authority of the Commonwealth or of a State."
3. 28 C.L.R. 129.