else, the sheer multiplicity of closely similar statutory offences makes difficulties here, and they are not lessened by the parallel situation created by statutory supplementation of common law crimes. But statute notwithstanding there would be problems enough. The point is made by referring to the rules governing joinder of pleadings, duplicity, trials of co-accused and merger of felonies and misdemeanours. And of course the development, to which Australia has made a significant contribution, of a doctrine of issue estoppel in criminal cases. This last question, the circumstances under which a verdict is to be taken in later criminal proceedings as conclusive of findings of fact, is particularly interestingly explored in chapter 6, and the knotty problem tackled of its relationship with the much older special pleas of *autrefois acquit* and *convict*.

The last big area of law relevant to double jeopardy, and the one most neglected, is the influence upon it, and its proper relationship with, the criminal appeal system, particularly the now generally accepted power of the appeal court to order a new trial. Here again the historical approach works well. The reader concludes with an awareness not only of the inherent problems and how they have been moulded by the past, but also of the continued existence of procedures not generally known. Lastly there is an account of the operation of double jeopardy in and with tribunals outside the usual court system, such as courts-martial and disciplinary bodies and foreign courts. The last chapter is a study of federal problems of double jeopardy in Canada, no doubt singled out for special mention because the author is a member of the Faculty of Law at Toronto University and the work was financed by Canadian grants.

Professor Friedland's style is easy to read, clear and continuously interesting, which is no mean achievement in such a tangled and technical branch of the law His recently published casebook displayed his competence in writing at the student level.[1] *Double Jeopardy* shows the same competence at the specialist level. Criminal law scholars are fortunate in his addition to their number.

COLIN HOWARD*

Employees' Misconduct, by ALFRED AVINS, B.A. (C.U.N.Y.), LL.B. (COLUMBIA), LL.M. (N.Y. UNIV.), M.L., J.S.D. (CHICAGO), PH.D. (CAMBRIDGE); Professor of Law in Memphis State University. (Law Book Company Ltd., Allahabad, 1968), pp. i-cxxiv, 1-731. Australian price $6.00.

This is an extraordinary book. One cannot but admire the tremendous industry which must have gone into the compilation of the cases which cluster thickly in the footnotes on each page; one however cannot but question the motivation behind this vast accumulation of raw material. The author proclaims that he has gone to the reports of all the law courts of every portion of the British Commonwealth 'which seemed relevant'. One can well believe this when one sees that, in so far as Australia is concerned, he has drawn from the decisions of Conciliation Commissioner and Boards of Reference as well as from the decisions of State Industrial Tribunals. His greatest concentration however is upon India where one can well believe that he has produced some reference to every decision of every court or labour tribunal which could have any bearing whatever on the topic.

As regards the motivation, the author's intent apparently is to disprove the orthodox view that Misconduct is not an area of the law which involves fixed rules. It is extremely doubtful whether he demonstrates this thesis. Whilst there are some honourable exceptions, for the most part his sections and sub-sections seem to consist of dogmatic assertions each of which summarizes the effect *in vacuo* of a certain decision or group of decisions without much attempt to reconcile such assertion with similar summations of the effect of other decisions or to provide any satisfying thread of unity. The classification on the basis of which the book is divided seems to be merely on the footing of isolating certain areas of action

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1 Reviewed (1969) 7 *M.U.L.R.* 146.

without any logical differentiation. One would like to see the application of some general sifting criteria, for instance when must 'misconduct' involve a course of conduct rather than consist of an isolated act? Why should the same general concept include the act of hitting the foreman on the head with a bottle on the one hand and the act of merely displaying lack of skill on the other? And so on.

The most serious defect indeed is the almost total lack of any synthesis. What there is of attempted synthesis is contained in less than a page of the introduction and this is *far* too short. Some thread might have been provided if the author had given us some treatment of the legal *effect* of proved misconduct. His failure to treat this except for a few short remarks in the introduction is productive of considerable obscurity and ambiguity. For instance, he says (p. 639) that certain types of employee who appear drunk in public disgrace their position 'and may be disciplined'. What does this mean? Take the position with which we are familiar in Australia. Assume an employee is guilty of a certain act which is condemned by the law. There may be different results of this. If the act was a breach of an industrial award, then the act is criminal or at least quasi-criminal and the sanction is penal. If it is not a breach of an award, then it will be a breach of the express or implied duties of the employee under the contract of employment. It may then under that general heading be a breach of such a fundamental character as to entitle the employer to dismiss summarily; on the other hand it may be a lesser breach of such a nature as to entitle the employer to sue for damages (if he can prove any) but not to dismiss. It may well be that in other countries these distinctions are preserved or it may be that in the context of the systems of those other countries 'disciplined' involves some imposition of a penalty or even a gaol sentence. We just do not know. Yet the criteria of misconduct may well be different in each case.

Though the author in the introduction hastily rejects the notion that misconduct is to be viewed as a breach of the contract of service, yet when he passes to the vague concept of 'industrial discipline', it is difficult to know what he means when he talks about 'punishment'. The same obscurity is apparent throughout. For instance, though the book talks about 'wilful' refusal to obey orders by an employee, it does not place this in any sort of context. It does not contrast this with 'non-wilful' refusal though this is the very basis of such a case as *Adami v. Maison de Luxe Ltd.*[1]

One other point may be made. The author makes quite extensive use, so far as Australian decisions are concerned, of decisions by Conciliation Commissioners and Boards of Reference. In so far as these are the decisions of lay tribunals—and on very frequent occasions they are—they are admittedly evidence of good industrial practice in resolving disputes and issues, but they are hardly authorities on points of law. If the decisions of tribunals in other countries have been similarly handled then one may well doubt the value of the propositions for which some of such cases are cited as authority.

The value of the book seems to be that with its rather well-constructed index it may prove a means of locating, somewhere or other round the world, a decision on a fact situation similar to or identical with the one before the inquirer. However, so far as anything more ambitious is concerned, the book seems to prove the truth of the proposition which it sets out to counter, *viz* that there is no fixed rule of law to define the degree of misconduct which will justify dismissal. The present reviewer inclines to the view that it is a good thing that there is not! If there was ever an area where judicial flexibility was needed, this is surely it.

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1 (1924) 35 C.L.R. 143.

Essays In Australian Federation, by A. W. MARTIN (ed.), (Melbourne University Press, 1969), pp. i-xi, 1-206. Price $6.30.

This book is one in a series established by the Melbourne University Press, to quote the description put out by the Press itself, 'for the publication of scholarly writing upon Australian Federation'. It is apparently the third to appear, the first two being Sawer's engagingly informative *Australian Federalism In the Courts* and La Nauze's edition of Deakin's letters to the Morning Post, published as *Federated Australia.* Since the very purpose of the series is to facilitate the publication and increase the availability of specialized studies of the federation, it would be beside the point to criticize this book on the ground that the collection of essays it comprises is organized round no more coherent theme than that they all have something to do with the event of federation as it actually occurred. It should be received as a convenient repository of a number of highly specialized studies unlikely to be of equal value to any one scholar, or indeed of equal interest to any one reader, but severally very useful in the various fields to which they relate.

For the lawyer the prize offering is J. A. La Nauze's acerbic account of the authorship of the two words of the Australian Constitution familiar to a wider range of people than any other expression in the entire document: the words 'absolutely free' in section 92. Professor La Nauze was moved to look into the matter by the tendency of lawyers taxed with having made a monumental hash of interpreting 'absolutely free' to excuse themselves by maintaining that it was a layman's idea to put these words in in the first place. He makes it abundantly clear that as a fact of history this argument is without foundation, notwithstanding George Reid's unduly celebrated and altogether muddled remark about laymen's language. He scores early with the telling reminder that Reid was immediately contradicted by Barton, who said it was the language of three lawyers, a proposition much nearer the truth. The rest of the essay is fascinating, not least because it is a rare and happy experience to have a professional historian commenting in detail on an instance of what he calls, quite rightly, 'a curious sort of hypothetical history indulged in by various learned judges' (p. 58). Lawyers are very apt to rationalize backwards by inventing history and then covering themselves against error by conceding that the whole speculation is hypothetical anyway. It must present an eerie intellectual spectacle to someone who knows what he is talking about. The only matter of regret is that, as La Nauze handsomely acknowledges, there is nowadays so little cross-fertilization between specialists that he was unaware when writing this study of F. R. Beasley's earlier work on section 92 in the Convention Debates. He is also unaware, apparently, of Sharwood's later disagreement with some of Beasley's conclusions.[1]

From the constitutional lawyer's professional point of view the next most relevant study is B. K. de Garis's account of the part played by the Colonial Office in the amendments to the Constitution Bill; or perhaps one should say account of how the part was played, for the Colonial Office meant Joseph Chamberlain and the more one reads about his part in federation the more one marvels at his incomprehension of the manner of men he was dealing with. In retrospect his deviousness and attempted manoeuvering through Reid seem quite childish. From the standpoint of the law this essay includes some interesting details of the course of the amendments. In retrospect once again, it all seems to be a great ado about very little.

The other essays are of more immediate concern to the historian or political scientist than to the lawyer, but the word 'immediate' should be stressed for in fact they compel the attention of anyone genuinely interested in this country and in the remarkable generation of men who brought it into being. Perhaps the most entertaining study is that by R. Norris of what he politely calls economic influences on the 1898 South Australian referendum. Economic influence in this context meant, quite naturally, the question whether in monetary terms South Australians could expect to make a swift, measurable profit out of the deal or not. On page 140 there is reproduced an advertisement from the *Orroroo Enterprise*