

BOOK REVIEWS

Double Jeopardy, by M. L. FRIEDLAND. (Clarendon Press, Oxford, 1969), pp. i-xxix, 1-439. Australian price \$13.30.

This book is a rare occurrence: a thorough study of high quality of a neglected but fundamental area of criminal law. The author describes his enterprise as being the presentation of 'a coherent analysis of the concept of double jeopardy, with particular emphasis on English law', and that is exactly what he has achieved. The importance of the subject is correctly assessed in the first sentences of chapter 1: 'The history of the rule against double jeopardy is the history of criminal procedure. No other procedural doctrine is more fundamental or all-pervasive.' To which it may be added that in no other part of the law at the present day are social value-judgments of anything like comparable significance concealed in procedure. Professor Friedland regards the most important single aspect of the rule against double jeopardy as being the purpose it serves, *inter alia*, of minimizing the chances of an innocent defendant's being convicted (p. 4). This may well be so, but the very fact that the rule has such an aspect and effect is what catches one's attention. Very few substantive rules of criminal law can be reasonably said to embody a decision about the kind of society we want to live in of comparable importance and influence with the choice to emphasize protection of the innocent at the expense, if necessary, of conviction of the guilty.

Before the appearance of this book there was every reason for believing that no-one knew much about double jeopardy in the criminal law of the common law countries. Outside the special constitutional problems of America very little had been published, and the treatment, if any, which the subject received in the standard texts merely reflected the general ignorance. As is usual in such a state of affairs, the judicial pronouncements which came along from time to time tended to the *ad hoc* and superficial. The very least which was needed was a thorough historical exposition to explain how the collection of paradoxes which passes for much of the law in this area came into being. The first service which Professor Friedland has performed is to provide this historical explanation and thereby enable us to tell the wood from the trees. Any branch of law devoid of general unifying principle becomes a wilderness of contradictory instances in which there is all too often no good reason for preferring one solution to a specific problem over another. Especially is this the case when the law has developed from long-forgotten and now irrelevant procedures. At last and at least there is now no excuse for failing to understand how double jeopardy came to be as it is.

But this aspect of the book, valuable though it is, is indeed only an 'at least' contribution to our knowledge. Professor Friedland has by no means confined himself to historical exposition. His next major contribution is to set the law and its development out in a rational and orderly framework. He distinguishes first the simplest case of double jeopardy, where D is being prosecuted a second time for exactly the same offence as the first time. One ignorant of the subject might be forgiven for supposing that on this there was little to be said. The author wastes few words but it takes him nearly seventy pages to cover the ground. The heart of the problem is of course to determine what previous proceedings should properly be held to rank as a first prosecution, and the biggest impediment to the development of rationally flexible rules is the English judicial tendency to insist rather narrowly on a previous conviction or acquittal in a technical sense. This leads to a wide range of technical faults in the earlier proceedings depriving D of protection from double jeopardy. Professor Friedland loses no time in observing that this approach is 'undesirable' (p. 21), an observation which heralds a general habit of making his views perfectly clear.

The second major segment of the book is an account of the more obvious problem of dealing with subsequent prosecution for offences other than the one for which D was originally convicted or acquitted, as the case may be. Apart from anything

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.