States it has caused difficulties and injustices—that is if the author's remarks are justified. Perhaps they are not. He has strong opinions on what he calls "conditional constructive condonation". A passage which in the index—a strange compilation—is referred to under the quaint heading "vestigial defense" states in rather confused language: "the defense of constructive condonation has gradually been whittled away until now it consists of a lot of legal technicalities thrown up around it to prevent its use by defendants. If this defense ought not to be available to defendants, it would be better to abolish it entirely than leave a vestigial defense in the law of AWOL to increase litigation and multiply appeals."[9]

Enough has been said to indicate the prolix character of the writing. Matters which are explained clearly and sufficiently in a few sentences in the *Manual of Military Law* are expanded into chapters. Some of the chapters have headings and sub-headings with a quasi-legal sound, but no real meaning, such as "Collateral Illegality", "Non-Disabling Disability", "Duty to Mitigate Impossibility". Despite the numerous quotations and references, there are some rather surprising omissions from the list of works, called "Table of Authorities", at least so far as the British literature is concerned. The text-books referred to are old, and early editions of them are preferred to later ones. The list starts with Adye, *Courts Martial*, 1769 edition, an interesting book historically, which had reached its eighth edition by 1810. The fourth, 1852, edition of Simmons's work is referred to; but the seventh edition had appeared in 1875. The reference to O'Dowd's little book *Hints to Courts Martial* is to the 1882 edition. The second edition was published in 1883. This may seem of little importance, but between the two dates came the important ruling concerning non-liability for involuntary absences. There are no references to Clode's two volumes on the *Military Forces of the Crown*, a mine of information on many topics, nor to his admirable *Military and Martial Law* published in 1874. And most surprising of all the *Manual of Military Law* is not mentioned.

One chapter is headed "De Minimus". And this is not a misprint, for the expression is frequently repeated. However the author, who incidentally seems uncertain whether *dicta* is plural or not[10] would no doubt reply that this is but a little thing, for he assures us that the rule is *de minimus non curat lex*. For this *Lastlow* v. *Thomlinson*[11] is given as an authority. But the maxim is not mentioned there. Had the author gone to, say, Broom's *Legal Maxims*, he could have avoided making Latin grammar a petty AWOLee.

It would really be futile to criticise this book in any detail; for there is unfortunately too much to criticise. It may have some value as a collection of references to other works if the references be carefully checked. But to a lawyer it is at best a curiosity. To a soldier it could be so seriously misleading as to be dangerous if he were to take it seriously. One wonders what the Duke and Mr. Larpent would have thought, could they have guessed that anyone would ever claim that a work like this would be helpful.

W.J.V.W.

The Development of Australian Trade Union Law, by J. H. Portus, Commissioner under the Conciliation and Arbitration Act (Cwlth.), Member of the English and South Australian Bars, Melbourne University Press, 1958. xxix and 267 pp. (£2/17/6 in Australia.)

There are few areas of Australian law which are so complex as the law relating to trade unions. It is an intricate combination of statute law and

[9] At 272. [10] At 210. [11] (1614) Hobart 88.

judicial decision, of common law and equity, of civil law and criminal law, of law inherited or copied from England and of law drawn from Australia's native system of industrial arbitration. It is further complicated by the division of legislative, executive and judicial powers between the Commonwealth and the six States and by the actual structure of the union organization itself. Yet this body of law deals with one of the most important forms of organization in our present-day society and its operation affects the whole sphere of industrial relations.

Particularly welcome, therefore, is Mr. Portus' work, the first comprehensive treatment of this difficult branch of the law. The author has brought to bear on this topic not only a wide and accurate knowledge of the subject but also an invaluable practical experience gained as a Commissioner of the Commonwealth Concilation and Arbitration Commission. The result is a readable, non-partisan and well-documented exposition compressed, nevertheless, within 260 pages.

Australian trade union law comes from two main sources: the law inherited or copied from England and the law derived from the native system of industrial arbitration. The author has based his work on this main division.

Part 1—The English Background of the Law[1]—is primarily a survey of the development of trade union law in England.

The first section of this part discusses the law of property, the law of contract, the criminal law and the law of tort in relation to trade unions and trade union activities. It deals, of course, not only with laws relating specifically to trade unions,[2] but also with laws which, although of general application, do, in practice, generally operate in that context.[3] It is not intended to be an exhaustive treatment of the law: its primary purpose is to provide the necessary English background and not to serve as a text-book on contract, torts and so on. Judged by this standard it appears generally to fulfil the requirements of accuracy and reasonable selection of material. Even so, there are some shortcomings,[4] particularly in Ch. IV—Strikes and the Civil Law. There is virtually no mention of the tort of intimidation, while recent developments in the tort of inducing breach of contract are not sufficiently emphasised.[5] Moreover, to give completeness to this section a short account of the torts of assault and battery, false imprisonment and possibly defamation would not seem out of place.[6]

Secondly, in this Part, the author considers the application of the principles of corporate liability and *ultra vires* to trade unions.[7] Wisely, no doubt, he avoids becoming entangled in any discussion of juristic theory and concentrates rather on an analysis of the *Taff Vale Case*,[8] the Trade Disputes Act, 1906,[9] the *Osborne Case*[10] and the Trade Union Act, 1913.[11] The treatment of the *Taff Vale Case* is rather disappointing, particularly in view of its potential

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[1] Cc. ii-iv; 11-84. The author indicates how far the material, covered in this part applies in Australia.

[2] E.g., Trade Union Act, 1871 (Eng.), 34 and 35 Vict., c. 31; Trade Union (Amendment) Act, 1876 (Eng.) 39 and 40 Vict., c. 22; Trade Disputes Act, 1906 (Eng.), 6 Edw. 7, c. 47.

[3] E.g., the torts of conspiracy and of inducing breach of contract.

[4] See 57.

[5] E.g., *D. C. Thomson & Co.* v. *Deakin* (1952) Ch. 646.

[6] Acts giving rise to liability under these heads may easily occur. See e.g., *Williams* v. *Hursey* (1959) 33 A.L.J.R. 269. (H.C.). See also E. I. Sykes, "An Industrial Law Goldmine: The Hursey Case" (1959) 1 *Tas. Univ. Law Rev.* 175.

[7] C. v; 60-68.

[8] *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (1901) A.C. 426.

[9] 6 Edw. 7, c. 47.

[10] *Osborne* v. *Amalgamated Society of Railway Servants* (1910) A.C. 87.

[11] 2 and 3 Geo. V, c. 30.

importance in Australia.[12] There is virtually no discussion of differing *rationes decidendi* in that case. Nor does the author indicate in any real sense the subsequent pattern of development through *Kelly's Case*[13] and *Bonsor's Case*.[14] As regards the *Osborne Case*, the author's statement that *Buck* v. *Typographical Association*[15] and *Wilson* v. *Scottish Typographical Association*[16] applied the *Osborne Case* to unregistered trade unions may perhaps be regarded as too somewhat lop-sided the solution would seem to lie in lengthening the substantive treatment[24] which follows rather than in shortening this introductory in Australia.[18]

The third and last section of this Part[19] is a short description of the function of trade unions within the English framework of industrial relations. It describes the growth of collective bargaining and the use of voluntary conciliation and arbitration there. It indicates the use of Wages Councils and Fair Wage Resolutions to supplement collective agreements. And, interestingly from an Australian point of view, it reveals the very limited extent to which compulsory arbitration has been employed in Great Britain. Most important, however, is the author's discussion of the legal effect of voluntary collective agreements, particularly in view of the pressure from various quarters in Australia for a greater measure of free bargaining outside the arbitration system. Mr. Portus subscribes to the generally accepted view that voluntary collective agreements are not enforceable and that they have no normative effect on individual contacts of employment. The only authority on this matter is the New Zealand case of *Beattie, Coster & Co. Ltd.* v. *Duncan*[20] where the judge took the opposite view to Mr. Portus. It is doubtful, however, whether this case would be followed if and when the matter comes up for decision again.

The first Part of this work is not only a short account of the law but also an account given in its historical context. As such, it reveals the pattern of interaction between judicial decision, generally unfavourable to the unions, and legislative remedy, and indicates the change "from an institution which was prohibited by the State to an institution which was tolerated".[21]

The second and main Part of the work—Australian Legislation and its Interpretation[22]—is primarily an analysis of the arbitration and wages board legislation, Commonwealth and State, insofar as it applies to trade unions. Nevertheless, it retains some connection with the first Part by means of frequent cross-references; the reader is never left with the feeling that the English background has no application since the advent of compulsory arbitration.

The author devotes quite a deal of space[23]—maybe too much in view of the size of the book—to the historical background and the present structure and functioning of the various arbitration and wages board systems. This can, perhaps, be justified on two grounds. In the first place, Australian trade union law can only be understood in relation to its historical and functional back-

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[12] Only one Australian State, Queensland, has adopted the provisions of the Trade Disputes Act, 1906 (Eng.).

[13] *Kelly* v. *National Society of Operative Printers' Assistants* (1915) 84 L.J.K.B. 2236.

[14] *Bonsor* v. *Musicians' Union* (1956) A.C. 104. It is true that the author refers to this decision in another context at p. 28 but he does not, except by way of footnote, relate it to the general problem of corporate liability. See 5, n. 10 and 62, n. 13.

[15] Lancaster Chancery Court, 10 July, 1910.

[16] (1912) Sc. L.T. 203.

[17] See *Williams* v. *Hursey*. Cited *supra* n. 6., *per* Fullagar, J., at 279.

[18] Only in N.S.W. and Queensland have the provisions of the Trade Union Act, 1913 (Eng.), (which enable trade unions, whether registered under the Trade Union Act or not, to devote their funds to political purposes) been generally followed. The principles of the *Osborne Case* do not apply to unions (organisations) registered under the Conciliation and Arbitration Act (Cwlth.).

[19] C. v—The Trade Union—Employer Relationship under English Law.

[20] (1922) N.Z.L.R. 1220.

[21] At 243.

[22] Cc. vii-xviii; 87-260.

[23] Cc. vii-x; 87-147.

ground and Mr. Portus is quite right in assuming that many, perhaps most, of his readers lack sufficient knowledge of that background. Secondly, the periphery of trade union law is, in any case, so uncertain that it can be argued legitimately that a discussion of industrial agreements and awards with particular reference to the role of the unions is an integral part of trade union law. If, however, the result has been to make the second Part of the work somewhat lop-sided the solution would seem to lie in lengthening the substantive treatment[24] which follows rather than in shortening this introductory section.

The author's treatment of "Australian" trade union law, *stricto sensu*, is contained in four chapters, viz., Subscriptions, Fines and Levies, Voluntary and Compulsory Unionism, Registration of Trade Unions and Government Control over Trade Union Affairs, a field explored in the past by Dr. Foenander.[25] The matter of government control (which means very largely the internal relationships of the unions) is perhaps the most vital topic in the work, yet the author disposes of it in a mere 20 pages and this includes the seven industrial jurisdictions. Surely this aspect, which represents a really important Australian contribution, could have been more heavily weighted.

Chapters XV and XVI[26] discuss the legal liability of trade unions and their members for strike activity, not only under the industrial arbitration and wages board legislation but also at common law. The latter topic is an important practical contribution for, in Australia, it is not generally realised that unions are potentially vulnerable at common law. When a strike occurs legal action, if any, is normally taken under the penal or de-registration provisions of the relevant Industrial Arbitration Act; it is very exceptional to see an injured employer or workman relying on his common law remedies for, say, civil conspiracy or inducing breach of contract.[27] This aspect assumes added significance when it is remembered that the *Taff Vale Case*[28] applies in Australia,[29] certainly to unions registered under the Trade Union Acts, while, except in New South Wales, registration of a union as an industrial union (or organisation) results in its being incorporated "for the purposes of the (particular) Act".[30] In either situation the union can, in an appropriate case, be sued for torts arising out of industrial action. Moreover, only Queensland has adopted the relevant provisions of the English Trade Disputes Act, 1906 rendering trade unions immune from such actions. Why employers have not availed themselves more of the common law remedies is a matter for speculation. Perhaps it is the result of ignorance—perhaps it would be regarded as poor industrial relations policy. In this connection it will be interesting to see the trend of future developments, in terms both of judicial decision and legislative reaction.

The latter part of Ch. XVII[31] discusses the application of the *Osborne Case*[32] to Australian trade unions. This matter is of great topical interest since the right of trade unions to use their funds for political purposes has been the subject of litigation in two recent cases in both the State Supreme Courts and the High Court.[33] It is interesting to note that the author's views were cited by Walsh, J. of the New South Wales Supreme Court in *Wheatley* v. *Federated Ironworkers' Association of Australia & Ors.*[34] and were generally upheld both

[24] Cc. xi-xiv; 148-202.
[25] Notably in *Industrial Regulation in Australia* (1947).
[26] 203-234.
[27] See, however, *Williams* v. *Hursey* (1959) 33 A.L.J.R. 269, *Coal Miners' Industrial Union of Workers* v. *True* (1959) A.L.J.R. 224. It may be that these cases mark the beginning of a new trend to resort more to common law remedies.
[28] *Supra* n. 8.
[29] Discussed in C. xviii; 235-37.
[30] See 235 and *Williams* v. *Hursey supra* n. 27.
[31] 237-242.
[32] *Supra* n. 10.
[33] *Williams* v. *Hursey, supra* n. 27; *Wheatley* v. *Federated Ironworkers' Association of Australia* (1959)—not yet reported (N.S.W. Sup. Ct.).
[34] *Supra* n. 33.

in that case and also in the *Hursey Case*.[35] It is unlikely that we have heard the last of this controversial topic; indeed, the New South Wales Parliament is at present enacting legislation to widen the rights of unions to make political contributions.

It is often difficult to write a conclusion and that is why, perhaps, Ch. XVIII—Comparison of English and Australian Trade Union Law[36]—appears somewhat in the nature of an anti-climax. It contains some material which, arguably, should have been dealt with earlier and also re-states a number of points which have previously emerged in various parts of the treatise; but it is a rather colourless ending. What the reader might like to see would be the author's own critical appraisal of the present structure of the law and some ideas for future change. This would certainly strengthen the work.

The field of industrial law and relations is a most dynamic field, productive of frequent change. This has certainly been true of Australian trade union law during the past year, the period since the publication of Mr. Portus' work. It has seen, *inter alia*, the *Hursey Case*,[37] *Wheatley* v. *Federated Ironworkers' Association of Australia & Ors.*[38] and *Coal Miners' Industrial Union of Workers* v. *True*,[39] although none of these decisions have substantially challenged the validity of the author's work. Moreover, in 1958 the Commonwealth Conciliation and Arbitration Act[40] was extensively amended in relation to trade unions, but for the most part it was a change in procedure rather than in substance, the purpose being to ensure that various powers exercisable by the Commonwealth Industrial Court fell clearly within the ambit of the federal judicial power. What is more, there is at present (November 1959) a Bill before the New South Wales Parliament which will, *inter alia*, effect a number of important changes in relation to trade union law and thereby render part of Mr. Portus' work out of date. It is, from the author's point of view, unfortunate that so many important developments should have taken place within such a short time after publication. No doubt, however, they will be covered in a subsequent edition of the work.

The author has frankly admitted that the purpose of his work is to state the law and not indicate the extent to which it actually operates in relation to particular unions or organisations. By and large he has disciplined himself to this end. If this self-imposed limitation appears to detract from the value of the work, two matters should be remembered: the author's official position and the compact size of the book. It is for future writers to indicate the actual impact of the law on union organisation and function.

The Development of Australian Trade Union Law is, as stated earlier, a relatively short treatise, written not only for the lawyer but for all those interested in the field of industrial relations. Herein lies one of its great virtues for it will be read by and influence a comparatively large reading public. But perhaps its greatest importance lies in the fact that it is, in many respects, a pioneer in its field and that it may inspire others to specialise and develop the area which the author has opened up for research and scholarship.

Mr. Portus is to be congratulated on such a valuable contribution to the study of industrial law and relations.

D. C. THOMSON.*

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[35] *Supra* n. 27. In the *Hursey Case*, however, the High Court did not subscribe to the author's views concerning the suability of unregistered trade unions by virtue of Order LIII, Rules 13 *et. seq.* of the Rules of the Supreme Court of Tasmania (which enable actions to be taken by or against unincorporated associations in the name of the association). See also Order 48A, Rules 21, 22 of the Rules of the Supreme Court of South Australia.

[36] 243-260.

[37] *Supra* n. 27.

[38] *Supra* n. 33.

[39] *Supra.* n. 27.

[40] Act No. 13 of 1904—Act No. 40 of 1959 (Cwlth.). The author notes this amendment in the Appendix to his work. See p. 261.

* B.A., LL.B. (W.A.). Senior Lecturer in Law, University of Sydney.