BOOK REVIEWS

The Law of AWOL, by Alfred Avins, New York, Oceana Publications, 1957, 288 pp. with Index. ($4/95.)

The Law of AWOL arouses curiosity. Who or where was AWOL—some ancient lawgiver or prophet or an oriental principality? But men in the services, becoming accustomed to United States military terminology, know that AWOL—the author always uses capital letters for it—is absence without leave. It means only what a.w.l. long meant to soldiers in the service of the Crown. AWOL one may accept, but from it the author has bred "AWOLism", "AWOLees" and "petty AWOLs"—linguistic monsters that one can only hope will remain in the United States. Unfamiliar expressions and jarring jargon are, of course, no ground on which to condemn a book. Nevertheless, however one tries to disregard the unusual style, the lack of uniformity in typography and the unsystematic arrangement, which the author in his preface recognises, the impression remains that he has only been able to expand his material into a book by theorising about the obvious and by digressions from his theme. This is not surprising, for charges of absence without leave raise questions of fact, not of law, for military tribunals. The author's style is involved. He uses many invented phrases. His writing thus lacks altogether the terseness of good military language and the simplicity of military codes. Section 38 of the Army Act (1957) for example provides:

> Any person subject to military law who—(a) absents himself without leave, or (b) persuades or procures any person subject to military law to absent himself without leave, shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.

Once the meaning of "subject to military law" is grasped, not even a lawyer, one would think, could find that that provision needs any explanation, much less that it could be enlarged into a book. But the author's capacity for unlimited explanation and the manner of his explanations may be illustrated by the way in which he treats the distinction between desertion and absence without leave. This is explained in the *Manual of Military Law* as follows:

> The criterion between desertion and absence without leave is intention. The offence of desertion—that is to say, of deserting or attempting to desert His Majesty's service—implies an intention on the part of the offender either not to return to His Majesty's service at all, or to escape some particular important service. . . . A man who absents himself in a deliberate and clandestine manner with a view to shirking some important service, though he may intend to return when the evasion of the sentence is accomplished, is liable to be convicted of desertion just as if an intention never to return had been proved against him.

Part of a page from this book—there is more than a page dealing with the same topic—runs:

> AWOL is very closely related to desertion, for historically AWOL has always been a lesser included offense of desertion. Desertion originally included only absence without leave with intent to remain away permanently (that is, for an indefinite period or for the life of the accused). Intentional AWOL is unauthorized absence with intent to remain away for a definite period of time. Since any definite period of time is included in an indefinite period of time (both starting at the same time), the intent to remain away for such definite period is included in the intent to remain away for the indefinite period. The duration of the absence being the same (or lesser included), AWOL logically is a lesser included offense of desertion. Of course, the accused really intends to remain away for the period of his life. Therefore, it may be argued that since he may not live for two years, for example, after he absents himself without leave, an intent to remain away for two years may be considered as an intent to remain away for life, and the accused should be considered guilty of desertion. (This erroneous rationale could be extended to an intent to remain away for a day, since the accused may die during the day.) The answer to that argument is that the accused can never be sure that he will die within the period of time he intends to remain AWOL. And the difference between AWOL and desertion is measured by the quality of the intent, and not its effect in the light of subsequent events, even if such effect could be known. Of course, if an accused intends to remain away for a period of years during which he is certain to die (100 years, for example), the quality of intent is actually that of remaining away permanently, and the accused may be convicted of desertion.
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> AWOL committed through the negligence or recklessness of the accused, rather than intentionally, is also a lesser included offense of desertion. The reason for this is analogous to the reason why AWOL is a lesser included offense of desertion by AWOL with intent to avoid hazardous duty or shirk important service, since in both instances the quantity of the fault is lesser included.[1]

and so on and on and on.

Almost every page provides a sententious statement of the obvious. These examples will suffice:

> The duration of an unauthorized absence is the period between the time it commences and the time it is terminated. When these two periods are proved, the duration of the AWOL may be inferred, absent proof of a later inception or an earlier termination.[2]
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> A person can only be AWOL when he has a duty not to be absent. Hence a charge or proof that an accused absented himself from an organization under whose control he did not have to be fails to charge or prove an offense respectively.[3]

The offence of absence without leave has long been in the military codes. The author sets out Article 86 of the American code which corresponds more or less with s.15 of the Army Act as that Act was before 1955. But he does not, in his references to matters arising in the British service, make clear what were the terms of the relevant Article of War or Statute. He quotes for example from Hough's *Precedents in Military Law* (1855) one passage which really relates to the old East India Company's Articles and native Articles. It is as misleading in military law as elsewhere to treat as relevant to one statutory offence illustrations drawn from cases on other statutes; and the history of a provision, however illuminating and interesting, is not to be substituted for its words. It is unfortunate that the author's enthusiasm should not have produced

[1] At 39.
[2] At 69.
[3] At 55.

a better result, for he has ranged far in search of material. He quotes exotic, if barely relevant, authority to support propositions which do not always need support, for example:

> Written orders are not an effective communication if the recipient is illiterate, or if communicated in a language that he cannot read. See *Oh Yeah Heng* v. *Eastern Extension Australasian and China Telegraph Co., Ltd.*, 1 Kyshee's Reports (Straits Settlements) 364 (1874) where it was held that an advertisement in English published in a local newspaper is no notice to a Chinaman who is unable to read that language.[4]

The book shows how a lawyer can spin a web of spurious legalism; and how a body of seeming case law can be constructed by recording the facts of a great number of cases which are merely illustrations of the application of a rule. It may, for example, be interesting to know that CMD. 12-194, p. 322-5 dealt with the case of a sailor whose "service record entries were *prima facie* evidence of an unauthorized absence from naval jurisdiction", but who was living in barracks, eating in a mess, obeying orders and playing baseball at a supply centre, where the officers apparently valued his services as a member of the baseball team too highly to let him go. But this adds nothing to the law.

The plan of the book is unusual. It begins with an introduction described as "the rationale, importance and history of the offence and its relation to other offences".[5] This contains some useful references. The book then goes on to deal with the prosecutor's case and then with the defence's case. There is a good deal concerning the duration of an AWOL. Troublesome questions can arise when a man on leave overstays his leave, and is then prevented by, for example, illness or arrest by the civil power or the movement in the meantime of his unit to another theatre, or some other event outside his control, from rejoining his unit when he should. But such questions are really of no great legal interest. The present rules concerning involuntary absences have been established in British services since 1882. Their consequences in relation to forfeiture of pay and allowances and calculation of length of service are really administrative rather than legal.

Much of the book is taken up with digressions. For example, obedience to orders, excuses for disobeying orders, and the effect of unlawful orders are discussed; but the discussion is incomplete and in places seems confused. The doctrine of condonation has a chapter to itself. This doctrine, which is in a sense peculiar to military law, is not without some juristic and historical interest; and for anyone who has to command troops it can have practical importance. It is surprising to find that the author refers to what he calls its historical basis without any reference to what is, in British armies, generally regarded as its most authentic statement, the Duke of Wellington's pronouncement that: "performance of a duty of honour or of trust after the knowledge of an offence committed ought to convey a pardon for the offence". This is explicit and exact, as were most things that the Duke wrote. The contrast between the Duke's statement and the ruling of the Court of King's Bench on *habeas corpus* in *Sir Walter Raleigh's Case*[6] is noted by Clode. "A formal overlooking of an offence by a superior having authority to dispose of the case with a knowledge of the circumstances" is how condonation is described in Simmons's *Constitution and Practice of Courts Martial.*[7] A passage in O'Dowd's *Hints to Courts Martial*[8] (quoted in Mr. V. Le Gay Brereton's *Memoranda on Courts Martial,* issued to the Australian Military Forces) drew attention long ago to some misapprehensions and emphasised that condonation involves an intentional act of forgiveness. Today the application of the doctrine according to its true spirit and intent should cause no difficulty. But it seems that in the United

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[4] At 104.
[5] At 33ff.
[6] (1619) Cro. Jac. 495.
[7] (7 ed.) 235.
[8] (2 ed.) 27.

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.

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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.