ENGLISH STUDIES IN CRIMINAL SCIENCE

AN INTRODUCTION TO THE CRIMINAL LAW IN AUSTRALIA

BY
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PREFACE BY
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Edited for
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by
L. RADZINOWICZ AND J. W. C. TURNER

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CITATION OF LAW REPORTS

A. L. R.	Argus Law Reports (Victoria) 1895—still current.
C. L. R.	Commonwealth Law Reports (High Court of Australia) 1903—still current.
L. R. (N. S. W.)	Law Reports (New South Wales) 21 volumes, 1880–1900.
Legge	Legge, Supreme Court Cases (New South Wales) 2 vols. 1825–1862.
Q. C. R.	Queensland Criminal Reports, 1 vol., 1860–1907.
Q. J. P. R.	Queensland Justice of the Peace Reports, 1907—still current.
Q. W. N.	Queensland Weekly Notes.
S. A. L. R.	South Australian Law Reports, 1865–1892; 1899–1920.
S. A. S. R.	State Reports (South Australia), 1921—still current.
S. C. R. (N. S. W.)	Supreme Court Reports (New South Wales), 1862–1876.
S. R. (N. S. W.)	State Reports (New South Wales), 1901—still current.
St. R. Qd.	State Reports (Queensland), 1902—still current.
Tas. L. R.	Tasmanian Law Reports, 1905—still current.
V. L. R.	Victorian Law Reports, 1875—still current.
W. A. L. R.	Western Australian Law Reports, 1898—still current.
W. & W.	Wyatt & Webb's Reports (Victoria) 2 volumes, 1861-2.

LEGISLATION

THE most important legislation is as follows:

Queensland: The Criminal Code Act, 1899.

This Code has been amended various times, but the amendments are inserted in a Butterworth reprint of 1937, which is obtainable as a separate booklet. Since that date there have been amendments of 1939 and 1943 (the Act in each case being called The Criminal Code Amendment Act). These amendments are furnished by the publishers along with the volume containing the Code.

Western Australia: Criminal Code Act, 1913.

This Code is now out of print.

Tasmania: The Criminal Code Act, 1924.

This is obtainable from Butterworth's as a reprint.

South Australia: Criminal Law Consolidation Act, 1935, as amended by The Criminal Law Consolidation Act Amendment Act, 1940.

This is obtainable from the Government Printer.

Victoria: Crimes Act, 1928.

Government Printer's copies are available. The Act has been amended in minor details, but there are no substantial changes. A new consolidation is expected.

New South Wales: Crimes Act, 1900.

Government Printer's copies are available which include the amendments up to 1937.

PREFACE

IMPRESSED by the recent developments in the criminal law of Australia of which there has not yet been any authoritative account, Dr L. Radzinowicz and Mr J. W. C. Turner, the Editors of this Series, invited Professor G. W. Paton of the University of Melbourne and Mr Justice Barry of the Supreme Court of Victoria to prepare such a survey. This approach met with a most generous response. In collaboration with Mr G. Sawer of the University of Melbourne and a group of distinguished correspondents, Professor Paton and Mr Justice Barry have written a report which they have modestly called *An Introduction to the Criminal Law of Australia.*

As the learned authors state in their Foreword, their aim has been "not to produce a technical work of reference, but to delineate broadly the characteristic features of the criminal law in Australia in order to stimulate interest in comparative law." This difficult task they have accomplished with admirable precision and thoroughness. Their book which we now have the pleasure of introducing will be found of great value not only by those concerned with the administration of criminal law in Australia but also by those who are interested in the development of criminal law generally. It is an addition of primary importance to comparative law, and the Historical Introduction, quite apart from its relation to criminal law, ought to be read by every English law student.

The Cambridge Department is greatly indebted to our Australian friends for their most kind collaboration in bringing our initial scheme to fruition.

P. H. WINFIELD

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September 1947

FOREWORD

THIS work was undertaken at the request of the Department of Criminal Science at the University of Cambridge. The aim is not to produce a technical work of reference, but to delineate broadly the characteristic features of the criminal law in Australia in order to stimulate interest in comparative law. In order to keep the discussion within due bounds, the main emphasis has been on the general principles of criminal liability, and the detailed examination of each specific crime has not been attempted.

Because of the war and the scattering both of the profession and of University staffs, the completion of the task has been somewhat delayed. The work has deliberately been kept free of exhaustive footnotes, which cite every authority in point. For those who desire a wealth of reference, there exist the Australian and New Zealand Pilot to Halsbury's *Laws of England* and the *Australian Digest of Case Law*.

Thanks are due for the co-operation of the State correspondents and also to the officials in charge of penal establishments in the various States who courteously supplied the information which we sought. Mr. A. L. Turner has kindly assisted in reading the proofs.

J. V. B.
G. W. P.
G. S.

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HISTORICAL INTRODUCTION

A. The Reception of English Law[1]

The traditional theory of the English common law is that when new colonies are acquired by settlement or occupation (as opposed to conquest), the British colonists carry with them the common law and the statutes of England so far as they are applicable to the conditions of the colony. New South Wales was founded in 1788, but for some years there were doubts as to the position, two arguments being advanced: firstly that Australia was already inhabited by blacks and therefore the rules concerning conquest should be applied: secondly, that the colony was really an extended gaol and therefore that the normal rules concerning a settled colony were not in point.

The first argument was conveniently ignored. If a Dutch colony was conquered, it was reasonable to assume that Dutch law remained in force so far as no other rules were directly applied, for there would be in the colony a civilised body of law, but none dared to suggest that the law of the primitive aborigines should be held to govern the legal transactions of a civilised race.

The second argument caused more difficulty, although the better view was that English law was in force from 1788. However, to quiet doubts, an Imperial statute was passed which stated that all laws in force in England on July 25, 1828, should be applied in the administration of justice in N.S.W. and Van Dieman's Land (which is now Tasmania) *so far as the same can be applied within the said colonies*.

The exact interpretation of the words italicised is no easy matter. It was admitted that they were somewhat vague, but it was difficult to provide a more definite test. Whether a rule of common law was applicable could only be determined by the courts over the years: so far as statutes are concerned, as late as 1928 Sir Leo

[1] Much of the material in this chapter is drawn from Dr. S. H. Z. Woinarski's unpublished doctoral thesis, "An Introduction to the History of Legal Institutions in Victoria." An interesting study of the early days of N. S. Wales is *Rum Rebellion* (Angus & Robertson, 1939), by Dr. Evatt, now Attorney-General of the Commonwealth. The book deals with the overthrow of Governor Bligh.

Cussen, as the draftsman of a Victorian consolidation, emphasised the difficulty of determining exactly what English Acts these words covered. There are no formal marks to distinguish a statute which, having arisen only out of English conditions is, therefore, inapplicable in N.S.W. from one that is applicable. Moreover, when self-government was introduced, it was necessary to distinguish between over-riding imperial statutes which the local legislature could not repeal and other imperial statutes which the local legislature could deprive of operation.

For New South Wales and Tasmania, 1828 is thus the date of the reception of English law. Victoria separated from N.S.W. in 1851 and Queensland in 1859, but in both cases the law of N.S.W. was accepted and thus the English law of 1828 was received indirectly. Queensland, by the Supreme Court Act 1867, made express statutory provision adopting as the date of reception the 25th day of July 1828.

So far, we have been speaking of law in general. English criminal law was imported from the very beginning because the Letters Patent of 1787 (relying upon 27 Geo. III c.2) authorised the Governor to convene a court for the trial and punishment of offences which would be treason, felony or misdemeanour according to the law of England. This was the rather savage law as described by Blackstone, but the early Governors Phillip, Hunter and King were, according to contemporary standards, very lenient in their application of it.

South Australia was founded in 1836, responsible government being achieved in 1855, and Western Australia was first settled in 1826. In these cases there were none of the doubts which at first existed in N.S.W. as to the date of the reception of English law.

The problems that arise in determining what statutes apply are illustrated by the rather macabre case of *R.* v. *Knatchbull*,[1] in which a prisoner, who had been sentenced to death, appealed on the ground that the sentence was illegal as the judge had not directed that the body of the prisoner should be "dissected and anatomised", or alternatively buried within the precincts of the prison. The decision entailed a learned discussion of the English 9 Geo. IV c. 31, the New South Wales 9 Geo. IV c. 83 and various other statutes to which reference had been made in the latter Act. The Court held that the sentence was right, seeing no reason to depart from a

[1] (1844) 1 Legge 176.

practice of seven years, followed without objection by counsel in previous cases.

B. The Growth of Self-Government

The first representative legislature in New South Wales was granted in 1842, but responsible government was not conceded and of the 36 members of the Legislative Council 12 were official. The Governor was still his "own Prime Minister".[1] In 1855 a new constitution was set up—in fact responsible government was not mentioned, but it was brought into being on the strength of a despatch from the Secretary of State.

Constitutions embodying substantially the same provisions were conferred about the same time on Queensland, Victoria, Tasmania and South Australia, but Western Australia was forced to wait until 1890. The struggle for responsible government is an interesting story enlivened by a "rum rebellion" in New South Wales and a "Eureka Stockade" in Victoria, but with the lesson of the American revolt well learnt, English statesmen proved on the whole fairly responsive to the demand.

The degree of legislative power granted to the colonial legislatures was extended as the century advanced. There was a doctrine that colonial legislatures could not pass any law repugnant to the law of England, but this was modified by the Colonial Laws Validity Act (1865) which enacted that no colonial law should be invalid on the ground of repugnancy unless it was repugnant to some Act of the Imperial Parliament applicable to the colonies.

C. The Commonwealth

The six states remained separate colonies until the establishment of the Commonwealth in 1901. As in all federations, delicate questions arose concerning the division of powers as between the central and State Parliaments, but so far as the criminal law is concerned, no great problems have arisen. By the constitution, the great bulk of the criminal law is a matter for the States, and the criminal laws in force in each State were not greatly affected by the creation of a federation. Naturally a central government, to protect itself, must have some powers of using the criminal sanction, and during the present war a multitude of offences has been

[1] Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 39.

created under National Security Regulations. The Commonwealth, created these offences, under its defence power. There is a Commonwealth Crimes Act (1914-41) which deals with: offences against the Government (such as sedition or inciting to mutiny, unlawful drilling, destruction of Commonwealth property, false pretences to defraud the Commonwealth): protection of the Constitution and of the Public and other Services (unlawful associations, advocation of violence): offences relating to the administration of justice (judicial or official corruption, giving false testimony, corruption of witnesses, conspiracy to defeat justice, aiding a prisoner to escape): offences relating to coinage: forgery: offences by and against public officers and breach of official secrecy. The Defence Forces are under Commonwealth control and that part of the criminal law dealing with national defence is attracted to Commonwealth power. In a broad comparative survey, however, it is to the laws of the individual States that we must mainly turn.

D. A Federal Common Law?

An incidental point of interest, which can here be only mentioned, is whether there is a "general common law". The common law was received in each State and undoubtedly the Constitution of the Commonwealth pre-supposes as its base certain fundamental common law doctrines. How far, however, there is a general common law applicable to offences against the Commonwealth, and to the relations between States, is a matter of dispute. In the law of tort, intricate problems arise. The Commonwealth is liable in tort: but there is no federal law of tort. Has the Commonwealth accepted liability according to the common law of the State where the tort took place and such statutes as were in force in that State in 1904 when the Commonwealth consented to be bound?[1] In the criminal law, there are few decisions dealing with the problem of a federal common law, but *The King* v. *Kidman*[2] illustrates the difficulty. The Federal Crimes Act of 1915 added conspiracies to defraud the Commonwealth to those already made criminal by federal law, and enacted that this section was to be deemed to have been in force since a date in the previous year. The question arose whether such retrospective legislation was a valid

[1] *Washington* v. *The Commonwealth*, 39 S.R. (N.S.W.), 133.

[2] (1915) 20 C. L. R. 425. See the only exhaustive discussion of this problem of federal common law in Australia by Sir Harrison Moore in 17 *Jo. Comp. Leg.* (1935) 163; for the law of tort see Paton, 22 *Can. Bar Rev.* (1944) 731.

exercise of Commonwealth power. The majority held that it was, but incidentally the question was discussed whether there was a common law of Australia independent of the common law of the States. Griffith C. J. considered that the colonists carried the common law with them and that, as separate colonies were set up, this law was not split up into six separate bodies of law, although it became part of an identical law applicable to six separate political communities. It was an offence at common law to conspire to defraud the King, and on the establishment of the Commonwealth, it became an offence to conspire to defraud the Sovereign as head of the Commonwealth. He therefore considered that there was a Commonwealth common law and that the Act was merely declaratory. Isaacs J. considered that there was a peace of the Commonwealth, not because there is a special common law of the Commonwealth, but because the common law of Australia recognises the peace of the King in relation to the Commonwealth by virtue of the Constitution, just as it recognises the peace of the King in relation to each separate State. There are no decisive modern cases relating to this issue.

Section 80 of the Commonwealth Constitution actually states: "The trial on indictment of any offence against any law of the Commonwealth shall be by jury. . . ." This naturally covers statute law, but some authorities also suggest that it covers any common law offence against the Commonwealth which the Federal Courts may have jurisdiction to try e.g. bribery of a Commonwealth officer or any act of fraud on a public officer.[1]

On the other hand, Evatt J. has entered a warning: "I protest against the growing tendency to assume, without argument or proof, the existence of 'inherent' power in the Commonwealth Parliament. In this case the very name—the Crimes Act—challenges inquiry, because unlike the Dominion of Canada, the Commonwealth does not possess general jurisdiction over the domain of criminal law. The States of the Commonwealth have power over that subject-matter and have exercised it very fully and extensively. This does not mean that the enactments of the Commonwealth Parliament, which were questioned before us, cannot be sustained as lawful by reference to some definite subject matter of Commonwealth power, for, in such event, the aspect of criminal law co-exists with that of the definite subject matter. But it does, or should, compel a very searching enquiry for the purpose

[1] Quick & Garran, *Annotated Constitution of the Australian Commonwealth*, 809.

of deciding whether some at least of the provisions of the Crimes Act are 'properly framed' enactments with respect to a subject-matter which is, by the Constitution, withdrawn from the power of the Parliaments of the States into the power of the Parliament of the Commonwealth".[1]

E. The Codes

Three States have adopted criminal codes—Queensland, Western Australia and Tasmania. In the other three States (New South Wales, Victoria and South Australia), the common law is still in force, subject to applicable English statutes before 1828 and local statutes thereafter. The Commonwealth has a consolidated Crimes Act. There is much greater uniformity with modern English law than might be imagined. The codes in large part are based on the common law and in the common law States, although all modern English statutes have not been adopted, the similarity of the systems is illustrated by the fact that no great inconvenience is caused if a student uses standard English text-books. He will have to learn new references for his statutes, and he must note that some English Acts are not in force, but as statute law is consolidated in each of the common law States, a reference to the relevant Crimes Act will quickly supply the answer to any problem. Marginal notes frequently indicate when a section is copied from an English Act. For obvious reasons of uniformity of interpretation, the exact words of an English statute are followed by the draftsman unless there is a strong argument for variation.

F. Elements Constituting the Criminal Law

To put the matter in summary form, the criminal law of the States consists of the following elements:

(*a*) English statutes considered applicable at the date of the reception, which have not since been repealed by the State legislature:

(*b*) English decisions considered applicable at the date of the reception, which have imperative[2] authority so far as no local statute to the contrary exists:

[1] *The King* v. *Hush—ex parte Devanny* (1932) 48 C. L. R. at 518–9.

[2] This is the theoretical basis of the "reception". But, as pointed out below, modern English cases have great influence and no Australian court would follow an English decision prior to 1828 which had been over-ruled since that date. What was adopted was the common law, not a specified number of actual decisions—hence modern declarations as to the nature of the common law cannot be ignored.

(*c*) State statutes or codes:

(*d*) Imperial statutes which were considered to have overriding authority:

(*e*) In all States save those with a code, the basic doctrines of the common law.

The date of the reception being 1828 in the eastern States, English decisions given thereafter are of persuasive authority only. Australian courts are imperatively bound by the decisions of the Privy Council, but not of the House of Lords. In fact, however, decisions of the Lords are really, though not formally, binding. In 1943 the Australian High Court directed that in cases of clear conflict between a decision of the House of Lords and the High Court, Australian courts should follow the House of Lords.[1] Decisions of the C.C.A. and C.A., though not binding, are treated with great respect, because of the strong desire to keep the law uniform within the Empire. Indeed the High Court has over-ruled, on occasion, one of its own decisions in deference to a decision of the Court of Appeal. In *Waghorn* v. *Waghorn*,[2] Dixon J. said: "The question how far this court should defer to the decisions of the Court of Appeal is one to which an unqualified answer can hardly be given. But I think that if this court is convinced that a particular view of the law has been taken in England from which there is unlikely to be any departure, wisdom is on the side of the court's applying that view to Australian conditions, notwithstanding that the court has already decided the question in the opposite sense". Even the Privy Council is loath to depart from the settled law as laid down by the Court of Criminal Appeal, because that would establish one law for England and another for the Empire.[3]

But the Court is not willing to adopt this view where it considers that the decision of the C.C.A. was erroneous and the matter concerns the liberty or life of a prisoner. Thus in *Sodeman* v. *R.*[4] Evatt J. considered that the view of the C.C.A. "the rulings of which are not considered necessarily authoritative by the House of Lords" should not be followed on the question of irresistible im-

[1] *Piro* v. *Foster & Co. Ltd.*, [1943] Argus Law Reports 405, 68 C. L. R. 313.

[2] (1941) 65 C. L. R. 289.

[3] *Sodeman* v. *R.* 55 C. L. R. 192 at 231–2. The Court of Appeal has, however, on occasion differed from the Court of Criminal Appeal. Cf. the stop list cases discussed in *Thorne* v. *Motor Trade Association*, [1937] A. C. 797.

[4] (1936) 55 C. L. R. 192 at 227.

pulse. The same approach is seen in *Thomas* v. *The King*,[1] where the High Court refused to follow *R.* v. *Wheat*,[2] on the ground that respect should be paid to the full implications of *R.* v. *Tolson*.[3] The facts were that the prisoner's wife deserted him, remarking that her marriage to him was void because the decree nisi which the prisoner thought had terminated her previous marriage with X had never been made absolute. Actually this statement was false, but, believing it, the prisoner married again and for this marriage was charged with bigamy. The jury having found that the prisoner honestly and reasonably believed that his first marriage was void, the High Court held this to be a defence. Starke and Evatt JJ. dissented on the ground firstly that uniformity of decision in the criminal law is manifestly desirable and secondly that *R.* v. *Wheat* was rightly decided. The majority, however, (after a very thorough analysis of *Tolson's Case* which revealed the misconceptions of the court in *R.* v. *Wheat*) considered that uniformity could be bought at too high a price. "If a rule were adopted which would exclude honest and reasonable belief in the invalidity of the accused's earlier marriage because the decree nisi dissolving his wife's first marriage had not been made absolute, it would lead to consequences which would not only be contrary to principle, but would be discreditable to our system of criminal law. It must be remembered that, although it is going through the ceremony of marriage that exposes the party to punishment, marriage in itself is perfectly innocent. . . . It is only because of the wrong done by the wickedness of going through a form of marriage with the knowledge of the impediment of a prior marriage that the subsequent marriage merits punishment."[4]

Hence the position is that a decision of the Judicial Committee is formally binding, and that a decision of the Lords is binding in reality even if not technically. Great respect is paid to decisions of the Court of Appeal, the Court of Criminal Appeal and even to the decision of a single Judge, but in these cases Australian courts reserve liberty to depart if they consider that the decision in question is erroneous and that the point is of sufficient importance to

[1] (1937) 59 C. L. R. 279. The case is discussed in an article by G. W. Paton in *Canadian Bar Review* (1939), 94.

[2] [1921] 2 K. B. 119. On the other hand, the Supreme Court of Nova Scotia recently followed *R.* v. *Wheat*; *R.* v. *Morgan* (1942) 4 D. L. R. 321. See note 16 *Aust. Law Jo.* 369.

[3] (1889) 23 Q.B. D. 168.

[4] Per Dixon J. at 311 in *Thomas* v. *The King* (*supra*).

warrant a sacrifice of uniformity. Starke J. said in the High Court: 'This Court is not bound by decisions of the Court of Appeal, but it is of no little importance that the interpretation of like enactments should be uniform unless some manifest mistake appears".[1] Thus in a civil case, the High Court refused to follow *Hurst* v. *Picture Theatres*[2] on the ground that it was erroneously decided and had been severely criticised in the law reviews.[3]

G. Trial by Jury

In 1787 an Imperial statute authorised the establishment of a criminal court in N.S.W. consisting of the Judge Advocate for the time being together with six army or naval officers appointed by the Governor. The Court was accordingly set up in 1788.

From the foundation until 1823 there was a regime of military government. The Governor alone could convene the court: he nominated six out of the seven members, and he could exercise the power of pardon in all cases save treason and wilful murder. The Court had the trappings of a military court, for service members attended in full uniform. The very term Judge Advocate suggested a military tribunal. A simple majority sufficed, save in capital cases where the concurrence of five members was required for conviction.

The Judge Advocate had wide powers. He not only drew the indictment and examined the witnesses on behalf of the Crown, but he also acted as President of the Court. Although his function was to advise the Court on matters of law, he only had one voice in the final result, and his legal opinions were not always followed. Sometimes the Judge Advocate himself was not "learned in the law" with the result that it was difficult for the court to found its decisions on a proper basis.

Agitation soon sprang up for a more democratic method of applying justice. The combination of the functions of Judge and Prosecutor in one person aroused resentment—as also did the fact that, in a community where sectional feeling sometimes ran high, the officers on the court represented only one class and did not always act with discretion. There was no right of challenge in the prisoner.

The regime of military government came to an end in 1823 when a Supreme Court was established and given cognisance of all pleas,

[1] *Perpetual Trustee* v. *Tindal* [1940] A. L. R. 197 at 199.
[2] [1915] 1 K. B. I.
[3] *Cowell* v. *Rosehill Racecourse Co. Ltd.* (1937) 56 C. L. R. 605.