



Butterworths

INTRODUCTION TO CRIMINAL LAW IN NSW

2nd Edition

R P Roulston

with

J Oxley-Oxland

J F White

G Woods

INTRODUCTION
TO
CRIMINAL LAW
IN
NEW SOUTH WALES

SECOND EDITION

R.P. ROULSTON

LLB (Syd), LL.M (Tas)

Associate Professor of Law, Sydney University

with

J OXLEY-OXLAND

BA, LLB (Rhodes), LL.M (Yale)

Senior Lecturer in Law, Sydney University

J F WHITE

LL.M (Syd)

Part-time Lecturer in Law, Sydney University

G D WOODS

LL.M, DIP ED

Recently Senior Lecturer in Law, Sydney University

BUTTERWORTHS

SYDNEY — MELBOURNE — BRISBANE — ADELAIDE — PERTH

AUSTRALIA

BUTTERWORTHS PTY LIMITED

271-273 Lane Cove Road, North Ryde 2113

Bookshop, 233 Macquarie Street, Sydney 2000

343 Little Collins Street, Melbourne 3000

Commonwealth Bank Building, King George Square, Brisbane 4000

Rechabite Chambers, 195 Victoria Square, Adelaide 5000

45 St Georges Terrace, Perth 6000

Canberra House, Marcus Clarke Street, Canberra 2601

National Mutual Building, 119 Macquarie Street, Hobart 7000

NEW ZEALAND

BUTTERWORTHS OF NEW ZEALAND LTD, Wellington and Auckland

ENGLAND

BUTTERWORTH & CO (PUBLISHERS) LTD, London

CANADA

BUTTERWORTH & CO (CANADA) LTD, Toronto

BUTTERWORTH & CO (WESTERN CANADA) LTD, Vancouver

SINGAPORE

BUTTERWORTH & CO (ASIA) PTE LTD, Singapore

SOUTH AFRICA

BUTTERWORTH PUBLISHERS (PTY) LTD, Durban and Pretoria

USA

MASON PUBLISHING CO, Minnesota

BUTTERWORTH LEGAL PUBLISHERS, Massachusetts, Texas and Washington

D AND S PUBLISHERS, Florida

National Library of Australia

Cataloguing-in-Publication entry

Introduction to criminal law in New South Wales.

2nd ed.

Index.

ISBN 0 409 43629 1.

1. Criminal Law — New South Wales. I. Roulston, R.P.

345'.994

©1980 Butterworths Pty Limited

Reprinted 1983

This book is copyright. Apart from any fair dealing for the purposes of private study, research, criticism or review, as permitted under the Copyright Act, no part may be reproduced by any process without written permission.

Inquiries should be addressed to the publishers.

Printed in Australia by Hogbin, Poole (Printers) Pty Ltd.

Preface to the Second Edition

When I wrote the first edition I indicated that I believed that most students, confronted with criminal law early in their legal studies, needed supplementary guidance to that obtainable from the standard textbooks on criminal law. I still do. This edition remains an introduction and is not intended as a complete substitute for other references.

However, with the rapidly accelerating differences between English and Australian criminal law and the increasing divergences of criminal law in each of the Australian States, I see a continuing and growing need for a specific State focus, without becoming unnecessarily parochial. The Code States may remain relatively homogeneous, but for the others the chances are diminishing rapidly, despite moves for uniformity and the labours of Law Reform Commissions (or their equivalent) in each State and the Commonwealth of Australia.

I remain mindful not only of the needs and interests of law students coming new to the study of law but also of many others who are required to attain a knowledge and appreciation of the elements and reach of the criminal law. I am grateful to them all for their response to, and support of, the first edition, without which the book would have sunk mercifully without trace.

It became apparent to me, and my publishers, that the rapid and undiminished flow of case law and statute law had wrought such changes in the criminal law that a new edition was necessary. Unfortunately, at that time, due to illness and many other factors, it was obvious to me I could not complete the task in a reasonable time alone. I therefore called upon some of my colleagues who were at the time also teaching criminal law, for help. They agreed and I am grateful to them.

John Oxley-Oxland, John White and Greg Woods have assisted me in an unusual co-operative effort of reorganizing, rewriting and revising in varying ways and varying degrees much of the complete text. Their efforts, constructive criticism and generous contribution of time have made this a better and a truer work. I hope the reader finds it so. Nevertheless, in the end, I must take responsibility for the sins of omission and commission, the mistakes, the errors and the inaccuracies that experience has taught me are bound to be there.

Substantial new material has been added, particularly on the development of criminal law, corporations, vicarious liability and sequential crimes and the number of chapters has been extended and their sequence altered.

Thanks are due to Ethel Bohnhoff who, once again, has converted a messy draft into a coherent manuscript, Mary Elliot and Gordon Elkington for proof reading, the publishers for their patience and assistance and my wife for her forbearance and restraint.

We have attempted to state the law as at June 1979.

R P ROULSTON

*Law School
University of Sydney*

Table of Cases

- Abbott v R [1976] 843
 Aberg (R v) [1948] 607
 Adams (R v) [1957] 908
 Anderson (R v) [1973] 847
 Andrews v DPP [1937] 1005, 1028
 Andrews v R [1969] 1355
 Arnold (R v) (1883) 1367
 Ashman (R v) (1858) 917
 Ashwell (R v) (1885) 1331, 1334
 A—G for South Australia v Brown [1960]
 721
 A—G v Whelan [1934] 837
 Audley (R v) (1631) 1205
 B and L (R v) (1954) 1105, 1107, 1230
 Baba (R v) [1977] 519
 Bacon (R v) [1977] 847
 Bailey (R v) (1907) 1322
 Balcombe v De Simoni (1972) 1371, 1437
 Balogh v R (1954) 1357
 Bank of NSW v Piper [1897] 1221
 Bartho v R (1978) 304
 Bastian (R v) [1958] 746
 Beard (DPP v) [1920] 805, 807, 808, 914
 Bedder v DPP [1954] 1012
 Bernhard (R v) [1938] 1309, 1424, 1427,
 1430
 Beynon (R v) [1957] 729
 Bhagwan (DPP v) [1970] 513, 515
 Billing v Pill [1954] 1303
 Black Bob (R v) (1867) 1208
 Blaue (R v) [1975] 906, 908
 Bogacki (R v) [1973] 1307
 Bonner (R v) [1957] 306, 1240
 Bourke (R v) [1915] 818, 1217
 Bourne (R v) [1938] 1235
 Boyle (R v) [1954] 1407
 Bratty v A—G for Northern Ireland [1961]
 303, 712, 816, 820, 829, 834
 Bravery v Bravery [1954] 1109
 Brisac (R v) (1803) 505
 Broadhurst v R [1964] 808
 Brown v US (1920) 848
 Brown (R v) (1968) 1411
 Brown and Morley (R v) [1968] 842, 843
 Brown (R v) [1975] 1218
 Bush (R v) (1975) 215, 216, 406
 Buttle (R v) [1960] 1305, 1322
 Button (R v) [1900] 531
 Button v Director of Public Prosecutions [1965]
 116
 Button and Swain (R v) [1966] 1110, 1111,
 1116
 Byrne (R v) [1960] 740, 741, 742, 744, 745
 Cabbage (R v) (1815) 1314
 Cahill (R v) (1978) 519, 520
 Camplin (R v) [1978] 848, 1012, 1016
 Carr-Briant (R v) (1943) 1411
 Carrier's case (1473) 115
 Carter (R v) [1959] 822
 Casserley's case (1938) 602
 Cato (R v) [1976] 205, 908
 Chandler (R v) [1913] 1407
 Chapple (R v) (1840) 608
 Charlson (R v) [1955] 823
 Cherry (R v) (1781) 1307
 Church (R v) [1965] 202, 1028, 1033, 1036,
 1037
 Churchill v Walton [1967] 522, 533
 CLA Society v Smith (1938) 118
 Clarence (R v) (1888) 1205
 Clarke (R v) [1949] 1204
 Clarkson (R v) [1971] 406
 Clayton (R v) (1920) 1309
 Clear (R v) [1968] 1421, 1423
 Clift v Clift (1964) 734
 Clout v Hutchinson (1951) 211
 Cockburn (R v) [1968] 1315, 1317
 Codere (R v) (1916) 715
 Coffey, Ex parte; Re Evans [1971] 505
 Cogan (R v) [1975] 413, 503, 1205, 1219
 Collingridge (1976) 535
 Collins (R v) [1972] 1215, 1406
 Coney (R v) (1882) 406, 1108
 Cooper (R v) (1914) 1350
 Cooper v McKenna [1960] 823
 Corry (R v) [1966] 745
 Cottle (R v) [1958] 823, 828, 829
 Coupe v Guyett [1973] 218, 404
 Cox (R v) [1923] 1366
 Creamer (R v) [1919] 1360
 Crimmins (R v) [1959] 601, 604, 607
 Croton v R (1967) 1326
 Crowley (R v) (1963) 1324, 1364, 1366,
 1367, 1368
 Crump (R v) (1825) 1314
 Cunningham (R v) [1957] 928
 Curlija (R v) [1967] 1359
 Curr (R v) [1967] 502, 503, 524
 Daly (R v) [1968] 1218
 Dashwood (R v) [1942] 728
 Davey v Lee [1957] 530
 Davidson (R v) [1969] 847, 1235, 1236, 1239
 Davies (R v) [1913] 302
 Davies (R v) [1970] 1305, 1306, 1322, 1360

Reference is to paragraph numbers

TABLE OF CASES

- Dawson (R v) (1907) 1360
Dawson (R v) [1978] 847
Dick (R v) [1966] 747
Donelly v Commissioner of Inland Revenue
[1960] 1221
Donnelly (R v) [1970] 534
Donovan (R v) [1934] 207, 208, 1108, 1229
Doot (DPP v) [1973] 506, 507
Dorman, Ex Parte; Re Macreadie (1959) 850
Duffy (R v) [1949] 1007
Dudley and Stephens (R v) (1884) 846
Dymond (R v) [1920] 1426, 1430
Dyson (R v) [1908] 905
Eagleton (R v) (1855) 530
Easom (R v) [1971] 1319
Edwards v R [1973] 1017
Enright (R v) [1961] 1012, 1024
Evans (R v) [1962] 1030
Evans v Gardiner (No 1) [1976] 843
Evans and Gardiner (No 2) (R v) [1976] 205,
906, 908
Fairclough v Whipp [1951] 1229
Farey and Lindsay (R v) [1978] 817
Farrelly, Ex parte (1906) 1351
Feely (R v) [1973] 1313, 1316, 1317
Finlayson (R v) (1864) 1322
Fisher & Co v Apollinaris Co (1875) 604
Flaherty (R v) (1968) 1206
Flannery (R v) [1969] 1218
Flattery (R v) (1877) 1216
Fleeton (R v) [1964] 733
Flight (R v) (1977) 818
Flowers (R v) (1886) 1331
Foster (R v) (1967) 1318, 1319
Ford (R v) [1972] 742
Foy (R v) [1960] 823
Gallienne (R v) (1963) 1213
Gammage v R [1970] 929
Gilks (R v) [1972] 1333
Gill (R v) [1963] 836
Glennan (R v) (1970) 412, 533
Gordon (R v) [1963] 807, 808, 809, 914
Gould (R v) [1968] 1240
Gray v Barr [1971] 1036, 1037
Greene v R (1949) 1369
Griffiths (R v) [1965] 504
Grocock (R v) (1888) 1416
Gunn (R v) (1930) 526
Gunter (R v) (1921) 211
H L Bolton (Engineering) Co Ltd v T J Graham
& Sons Ltd [1956] 402
Hain (R v) (1966) 1030
Haley (R v) (1959) 1020
Hallett (R v) [1969] 907
Halloran (R v) [1967] 1404
Halsted v Patel [1972] 1315
Harding (R v) [1976] 407, 409, 843
Hare (R v) [1934] 1229, 1230
Harrison (R v) (1930) 1417
Harrison (R v) [1957] 1369
Harrison-Owen (R v) [1951] 819
Haughton v Smith [1973] 201, 203, 524, 534,
1360
Haywood (R v) [1977] 818
Heavener (R v) (1933) 1352
Henry and Manning (R v) (1968) 1224
Hibbert v McKiernan [1948] 1303, 1335
Hildebrandt (R v) [1964] 905
Hill v Baxter [1958] 303, 712, 822
Hokin (R v) (1922) 528
Holloway (R v) (1849) 1314
Holman (R v) [1970] 1207
Holmes (R v) [1946] 1008, 1009, 1012, 1014
Holzer (R v) [1968] 1036
Hornbuckle (R v) [1945] 818
Howard (R v) [1965] 1228
Howe (R v) (1958) 101, 848, 1020, 1022,
1023, 1024, 1025, 1026, 1027
Howell (R v) [1947] 811
Hudson and Taylor (R v) [1971] 839, 840
Huggins (R v) (1730) 217
Hurley and Murray (R v) [1967] 838
Hutty (R v) [1953] 903
Hyam (R v) [1974] 207, 208, 209, 910, 915,
916, 917
ICR Haulage Ltd (R v) [1944] 401
Iannella v French [1968] 1221
Instan (R v) [1893] 1039
Jakac (R v) [1961] 919
Jarman (R v) [1946] 920
Jayasena v R [1970] 301
Jenkins (R v) [1964] 732
Johns (R v) [1978] 409
Johnson v R (1867) 1317
Johnson v R (1976) 1015, 1016, 1018, 1019
Jones v Sherwood [1942] 1104
Jones (R v) [1948] 608
Jones v Brooks (1968) 532
Jordan (R v) (1956) 908
Joukhadar (R v) [1975] 212, 213
Joyce (R v) [1970] 830, 832
Justelius (R v) [1973] 1327, 1368
Kamara (R v) [1973] 515
Kemp (R v) [1957] 711
Kennedy (1979) 216
Kindon (R v) (1957) 1321
King (R v) (1908) 1335
King (R v) [1938] 1360
King (R v) [1965] 605
Kirkpatrick, Ex parte (1916) 1308
Knulier v DPP [1972] 514, 521
Kwaku Mensah v R [1946] 1011, 1033
La Fontaine v R (1976) 209, 407, 409, 919
Lacis v Cashmarts [1969] 1334
Lamb (R v) [1967] 1028, 1036, 1038
Lambert (R v) [1919] 1212

Reference is to paragraph numbers

TABLE OF CASES

- Langlands (R v) [1932] 1416
 Lapier (R v) (1784) 1307
 Larkin (R v) [1943] 1033, 1034
 Larsonneur (R v) (1933) 214, 215, 513
 Lawrence v Metropolitan Police Commissioner
 [1971] 1308
 Lawrence and Pomroy (R v) (1973) 1434
 Lee Chun-Chuen v R [1963] 1014
 Lennards Carrying Co Ltd v Asiatic Petroleum
 Co Ltd [1915] 403
 Levy (R v) [1912] 608
 Lloyd (R v) [1967] 743
 Lim Chin Aik v R [1963] 215
 Lipman (R v) [1969] 816, 829, 914
 Lobell (R v) [1957] 849
 London and Globe Finance Corporation Ltd, In
 re [1903] 1370, 1437
 London Borough of Southwark v Williams
 [1971] 845
 Lowe (R v) [1973] 1039, 1041
 Lucas v R [1970] 724, 733, 748
 Lucraft (R v) (1966) 606, 608
 Lutherborrow (R v) (1912) 1369
 Lynch (R v) (1930) 1202
 Lynch v DPP [1975] 843
 McBride v R (1965) 1030
 McCafferty (R v) [1974] 843
 McCarthy (R v) [1954] 1012
 McConnell (R v) [1977] 202, 843
 McDonnell (R v) [1966] 507
 McDonough (R v) (1962) 503, 524
 McInnes (R v) [1971] 101, 1025
 McKay (R v) [1957] 1020, 1021, 1025
 McKenna (R v) (1964) 1361
 M'Naghten's case (1843) 305, 706
 Macleod v A-G for NSW [1891] 905
 Maes (R v) [1975] 1218
 Majewski v DPP [1976] 101, 210, 817, 818,
 914
 Mamotte-Kulang of Tamagot v R (1964)
 1035
 Mancini v DPP [1942] 1012, 1016
 Markby v R (1978) 410, 413, 931
 Martin (R v) [1963] 1240
 Martin v Puttick [1967] 1307
 Mawji v R [1957] 507
 Maxwell (R v) [1978] 411
 Menniss (R v) [1973] 807
 Merriman (R v) [1972] 405
 Meyrick (R v) (1929) 504, 505
 Middleton (R v) (1873) 1330, 1331, 1332,
 1333, 1334
 Miller (R v) [1954] 1204
 Miller (R v) [1955] 1366
 Minigall v McCammon [1970] 4338, 1340
 Moffa v R (1977) 1009, 1010, 1011, 1015
 Morgan (R v) [1975] 209, 306, 1205, 1219,
 1220, 1222
 Moynes v Cooper [1956] 1332
 Mraz (R v) (1955) 909, 923, 927, 928, 929
 Mulcahy (R v) (1868) 505, 509
 Mullins (R v) [1961] 930
 Murphy (R v) (1837) 505
 Newbury and Jones (DPP v) [1976] 1037,
 1038
 Newland (R v) [1954] 510
 Nikosyana 1966 501
 Nock (R v) [1978] 523
 Nundah (R v) (1916) 1309
 O'Brien (R v) (1921) 1305, 1322
 Ohlson v Hylton [1975] 1418
 Onufrejczyk (R v) [1955] 904
 Orton (R v) [1922] 505
 Packer (R v) [1932] 1203
 Palmer v R [1971] 848, 1025, 1026
 Papadimitropoulos v R (1958) 1211, 1213,
 1214, 1216
 Pantelic (R v) (1973) 830, 834
 Parker (R v) [1964] 930, 1008, 1013, 1014,
 1016, 1018
 Parnell (R v) (1881) 505
 Pemble v R [1971] 209, 409, 919, 1001, 1028,
 1036
 Percy Dalton (London) Ltd (R v) [1949] 524
 Perera (A-G for Ceylon v) [1953] 1014
 Perry (R v) (1845) 1303
 Petric (R v) (1947) 1361
 Petronius-Kuff (R v) (1978) 1324, 1367
 Phillips (R v) [1971] 907
 Plomp v R (1963) 904
 Podola (R v) [1959] 728, 729, 826
 Pollock and Divers (R v) [1966] 119, 1415,
 1433
 Porter (R v) [1910] 519
 Porter (1936) 711, 714, 716
 Potisk (R v) [1973] 1334
 Price (R v) [1963] 746
 Pritchard (R v) (1836) 725
 Quick and Paddison (R v) [1973] 712, 829
 Rankin (R v) [1966] 1011
 Rasmussen (R v) (1928) 1421
 Redman (R v) [1978] 848
 Revell (R v) [1977] 210
 Riley (R v) (1853) 1321, 1322
 Robert Millar (Contractors) Ltd (R v) [1970]
 401
 Roberts (R v) [1953] 729, 730
 Roberts' case (1569) 608
 Robertson (R v) (1968) 729
 Robinson (R v) [1915] 531
 Rolph (R v) [1962] 745
 Rose v R [1961] 741, 742
 Royle (R v) (1971) 1301
 Ruse v Read [1949] 1321
 Russell (R v) [1933] 406
 Russell v Smith [1958] 1332

Reference is to paragraph numbers

TABLE OF CASES

- Ryan v R [1967] 203, 821, 910, 911, 920,
921; 924, 927, 929
- Scarrow (R v) (1968) 1110, 1113
- Scott v Commissioner of Police for the Met-
ropolis [1974] 515, 516
- Selway (R v) (1859) 1416
- Senior (R v) [1899] 1039
- Sergi (R v) [1974] 919
- Shannon (DPP v) [1974] 508
- Sharp and Johnson (R v) [1957] 1110
- Shaw (DPP v) [1961] 206, 512, 513, 514
- Slattery v R (1905) 1303, 1347, 1352
- Smith (R v) [1959] 908
- Smith (DPP v) [1961] 917
- Smith v Desmond and Hall [1965] 1416
- Snelling (R v) (1942) 1359
- Sodeman v R (1936) 716, 720, 721
- Sorlie (R v) (1925) 1229
- Sparre (R v) (1942) 307, 1228
- Sperotto (R v) (1970) 1209, 1220, 1222
- Spriggs (R v) [1958] 739
- Spurge (R v) [1961] 1030
- Stapleton v R (1952) 715, 716
- Steele (R v) [1977] 1204
- Stellino (R v) [1966] 834
- Stones (R v) (1955) 806, 807, 808, 809, 918,
928, 929
- Stone (R v) [1965] 930, 1008, 1013
- Stone and Dobinson (R v) [1977] 212, 213,
1041
- Storn (R v) (1865) 1404
- Straker (R v) (1977) 1015
- Sullens (R v) (1826) 115
- Summers (R v) (1972) 1110
- Sutton (R v) [1966] 1365
- Sykes (DPP v) [1961] 117, 601, 604, 607, 608
- Taylor v R (1978) 747
- Taylor v DPP [1973] 1110, 1111, 1112, 1113,
1114, 1115
- Tesco Supermarkets Ltd v Nattrass [1971]
402, 404
- Thabo Meli v R [1954] 202, 405
- The Lady Gwendolen [1965] 403
- Thomas v R (1938) 1240
- Thompson (R v) (1947) 1308
- Thompson v Nixon [1965] 1338, 1339, 1345,
1351
- Thorne v Motor Trade Association [1937]
1421, 1426, 1427
- Thurborn (R v) (1849) 1336, 1339, 1340
- Timbu Kolian v R [1969] 912, 1001
- Todd (R v) [1957] 510, 511
- Townley v R (1871) 1303
- Trainer v R (1906) 1308, 1361
- Tsigos (R v) [1965] 834, 1008
- Turner (R v) [1944] 1217
- Turvey (R v) [1946] 1307
- Valence (R v) (1959) 1229
- Vallance v R (1961) 915
- Varley v R (1976) 408, 413, 904, 931
- Veen (R v) [1979] 738, 744, 748
- Venables (R v) (1908) 1305, 1322
- Venna (R v) [1975] 210
- Vickers (R v) [1957] 917
- Villensky (R v) [1892] 1360
- Viro v R (1978) 101, 210, 808, 810, 817, 848,
914, 1001, 1022, 1023, 1026
- Wade (R v) (1869) 1309
- Wakefield (R v) (1957) 823
- Wald (R v) (1971) 847, 1235, 1237, 1238,
1239
- Wallis v Lane [1964] 1307
- Walters v Lunt [1951] 850, 1359
- Walton v R [1978] 742, 747
- Ward (R v) (1938) 1324, 1347, 1352, 1365,
1368
- Watmore v Jenkins [1962] 819
- Wauchope (R v) (1957) 1334
- Weaver (R v) (1931) 526
- Welham v DPP [1961] 1370, 1371
- White (R v) (1904) 1303
- White (R v) [1910] 535
- Whitehouse (R v) [1977] 502, 524
- Whybrow (R v) (1951) 533
- Wilford (R v) (1876) 1362
- Willgoss v R (1960) 715
- Williams v Bayley (1866) 603, 604, 607
- Williams (R v) [1893] 853
- Williams (R v) [1923] 1216
- Williams (R v) [1953] 1317
- Williams v Phillips (1957) 1303
- Williamson (R v) [1972] 836, 840
- Willis (R v) (1864) 853
- Wilson v Inyang [1951] 1221
- Wilson (R v) [1969] 1411
- Windle (R v) [1952] 716
- Winson (R v) [1968] 217
- Withers (R v) (1925) 1008
- Withers (R v) [1974] 517, 519, 1008
- Woolmington v DPP [1935] 302, 303, 305,
409
- Yates (R v) (1963) 1411
- Young (R v) (1947) 1303
- Ziems v The Prothonotary (1957) 823

Reference is to paragraph numbers

Table of Contents

	Page
PREFACE	iii
TABLE OF CASES	ix
CHAPTER	
1 HISTORY, SOURCES AND CLASSIFICATION	1
History of Criminal Law	1
Introduction	1
Late Danish and Anglo-Saxon Periods	1
Norman Period	2
Early Plantagenet Period	3
Middle Plantagenet Period	3
Late Plantagenet and Tudor Periods	4
Stuart and Early Hanoverian Periods	5
Late Hanoverian Period	6
Saxe-Coburg and Windsor Periods	7
Conclusion	7
Sources of Criminal Law	8
Legislation	8
Judgments	10
Text Books	10
Classification of Crimes	11
Felonies and Misdemeanours	11
Indictable and Summary Offences	12
Common Law and Statutory Crimes	12
2 ACTUS REUS AND MENS REA	14
General Rule	14
Essential Elements	14
Activity	14
Causation	16
Injury	16
Intention and Recklessness	18
Specific Intent	19
Negligence	19
Exceptions	20
Liability for Inactivity	20
Situational Liability	21
Strict Liability	22
Vicarious Liability	23

TABLE OF CONTENTS

CHAPTER		Page
3	PROOF BEYOND REASONABLE DOUBT	26
	General Rule	26
	Rule Expounded	26
	Relevant Cases	26
	Exceptions	29
	Insanity	29
	Honest and Reasonable Mistake of Fact	29
	Diminished Responsibility	30
4	PARTIES TO CRIME	33
	Corporations	33
	Direct Liability	33
	Perpetrators	35
	Principals in the First Degree	35
	Accomplices	36
	Actus Reus	36
	Mens Rea	38
	Strict Liability	41
5	ANTECEDENT CRIMES	42
	Incitement	42
	In General	42
	Impossibility	42
	Conspiracy	44
	Actus Reus	44
	Mens Rea	56
	Impossibility	57
	Adjective Law	58
	Attempt	59
	Actus Reus	59
	Mens Rea	62
	Impossibility	62
6	SEQUENTIAL CRIMES	65
	Misprision of Felony	65
	In General	65
	Representative Cases	66
	Compounding a Felony	68
	Being Accessory After	68
7	EXEMPTIONS FROM CRIMINAL LIABILITY	70
	Mental Illness and Related Matters	70
	General	70
	The M'Naghten Rules	71
	Analysis of the M'Naghten Rules	73
	The Legislative Framework	79
	Fitness to Plead	80
	Some General Comments on the Defence of Mental Illness	83

TABLE OF CONTENTS

CHAPTER	Page
Diminished Responsibility	85
General	85
The New South Wales Legislation	86
The English Approach	87
Substantial Impairment	88
Irresistible Impulse	88
The Queensland Approach	89
The Role of the Prosecution	89
Medical Evidence	90
Practical Effect	90
Questioning the Jury	91
8 GENERAL DEFENCES	93
The Defence of Intoxication	93
General	93
The Modern Development	94
Further Qualification of Beard's Case	95
The Evolving Drug Problem	97
What is Specific Intent?	99
The Defence of Automatism	99
The Nature of Automatism	99
The Acceptance of the Doctrine	100
Involuntary Conduct Leading to a Complete Acquittal	101
Conduct not Amounting to Automatism	102
Proof of Automatism	105
Duress, Compulsion and Coercion	106
The Nature of Duress	106
Duress in Very Serious Crime	110
Necessity	112
Self Defence	114
Infancy	117
9 MURDER	119
General Ingredients of Homicide	119
A Human Being	119
Proof of Death	120
Within the Queen's Peace	120
The Year and a Day Rule	121
Causation	121
The Definition of Murder	123
The Act or Omission	125
The Intent to Kill or Inflict Grievous Bodily Harm	126
Reckless Indifference to Human Life	129
Felony/Murder Rule in New South Wales	132
Malice in New South Wales	134
Manslaughter Verdict on a Murder Charge	136
10 MANSLAUGHTER	139
Voluntary Manslaughter	140
Provocation	140
Manslaughter by Excessive Use of Force in Self Defence	148
Involuntary Manslaughter	151
Death Caused by Criminal Negligence	151
Death Caused by an Unlawful and Dangerous Act	153

TABLE OF CONTENTS

CHAPTER		Page
	Death Caused by an Omission to Perform a Personal Duty Imposed by Law	156
11	ASSAULT AND AFFRAY	160
	Assault	160
	Affray	163
12	SEXUAL OFFENCES	166
	Rape	166
	The Meaning of Rape	166
	The Actus Reus	167
	The Mens Rea	174
	Mistake as to Consent	175
	Related Sexual Offences	178
	Unlawful Carnal Knowledge	178
	Indecent Assault	179
	Abduction and Kidnapping	180
	Abortion	181
	Bigamy	183
13	GENERAL PROPERTY OFFENCES INVOLVING DISHONESTY	185
	Larceny	185
	Definition of Larceny	186
	The Subject Matter of Larceny	187
	Elements in the Crime of Larceny	188
	Intention to Later Return Property	192
	Conditional Intent	195
	Trespassory Taking	195
	Larceny by a Trick	197
	Larceny as a Result of an Accidental Mistake	199
	Larceny by Finding	203
	Larceny by a Bailee	204
	Some Other Property Offences	206
	Fraudulent Appropriation	206
	Fraudulent Misappropriation	206
	Receiving Stolen Property	207
	Embezzlement	211
	Obtaining Property by False Pretences	212
	Obtaining Money, etc by Deception or by False or Misleading Statements	216
14	HOUSEBREAKING AND CRIMES AGAINST PROPERTY INVOLVING VIOLENCE OR THREATS	218
	Sacrilege	218
	Housebreaking	219
	Dwelling House	219
	The Intent	220
	Breaking	220
	Entering	221
	Offences Related to Housebreaking	221
	Robbery	223
	Blackmail or Extortion	225
INDEX		233

CHAPTER 1

History, Sources and Classification

HISTORY OF CRIMINAL LAW

Introduction

[101] Section 24 of the *Australian Courts Act* 1828 (UK) (9 Geo IV c83) provided in part that “all laws and statutes in force within the realm of England at the time of the passing of this Act [25 July 1828] shall be applied in the administration of justice in the courts of New South Wales and Van Diemen’s Land respectively, so far as the same can be applied within the said colonies”. As a result of this provision, a large proportion of the then existing English criminal law became common to both England and New South Wales.

During the ensuing 150 years, this common core has been added to, subtracted from, and otherwise varied by the legislatures and judiciaries of the two countries. Sometimes the same result has been achieved; on other occasions that has not been the case. The law relating to intoxication, for example, as laid down by the House of Lords in *DPP v Majewski* [1976] 2 All ER 142, has been accepted as the law for New South Wales by the High Court of Australia in *Viro* (1978) 18 ALR 257. On the other hand, the law relating to excessive self defence, as laid down by the High Court in both *Howe* [1958] ALR 753 and *Viro* has been rejected as the law for England by the Criminal Division of the Court of Appeal in *McInnes* [1971] 3 All ER 295. And such rejection seems to have the approval of the House of Lords: *Reference under s 48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975)* [1976] 2 All ER 937.

For all the changes that have been made since 1828, the fact remains that the criminal law of New South Wales is still essentially similar to English criminal law. This is true not only of the substantive law, but of the adjective law as well.

In order properly to understand English criminal law, and therefore also the criminal law of New South Wales, it is necessary to have at least a basic appreciation of its history. For this purpose, one must go back almost a millennium.

Late Danish and Anglo-Saxon periods

[102] During the half century preceding the Norman Conquest, England was divided into shires, each shire into hundreds (or wapentakes), and each hundred into townships. Every hundred had a court of its own, as did every shire. A hundred court usually sat once a month, while a shire court did so only two or three times a year. A hundred court was presided over by the shire reeve, or sheriff,

who was also a judge in the shire court presided over by the local earl and bishop.

Wrongs were generally adjudicated upon by the shire courts. An alleged criminal would be brought before a shire court either by the person he had supposedly injured or by that person's kinsman. The judges would then decide which of the two parties should prove his case and how he should do so. The accused might, for example, be put to the ordeal of fire. This involved carrying a red-hot iron a distance of nine feet. If the resulting burns did not heal in three days, the accused would be guilty, and would be sentenced by the court. The penalty would be exacted by the sheriff.

Wrongs were either major wrongs or minor wrongs, the rough equivalents of what today would be regarded as crimes and torts respectively. For a minor wrong a wrongdoer would have to pay only a bot (monetary compensation) to his victim. For a major wrong, he would normally have to pay not only a bot, but also a wite (fine) to the king. There were some major wrongs, however, which were "botless", and for which the penalty was not simply a wite, but rather either death or mutilation combined with forfeiture of the criminal's property to the king. Examples are to be found in the laws of Canute (1017-35): housebreaking, ambush, the receiving of outlaws, and (a definite sign of the times) neglect of the summons to the army.

Norman period

[103] After the conquest of England, William I was recognized as the sole owner of all the land. As such, he granted large portions of it to his leading barons for them to hold (Latin *tenere*) for as long as they were prepared to perform certain services, usually of a military nature. (So, for example, he granted most of Kent to his half-brother Odo, the Bishop of Bayeux, who commissioned the great Bayeux Tapestry.) The barons became known as tenants-in-chief (Latin *tenentes-in-capite*). Each portion held by a baron was called a fee (Latin *feudum*), a word which, of course, is still used today to describe a reward for services rendered, and from which the adjective "feudal" is derived to describe the social system introduced by the Conqueror.

Two or three times a year, many of the tenants-in-chief would meet with the king for the purpose of legislation. During the rest of the year, a select number would be at his side for the day to day governance of the realm. Both the occasional large grouping and the permanent small grouping were called the Curia Regis, or Court of the King.

Besides doing executive work, the small Curia also did judicial work. This was of both a civil and a criminal nature, involving essentially the determination of land disputes between tenants-in-chief, and the adjudication of any major wrongs they might commit. Thus, for example, in about 1072, the small Curia decided a land dispute between Odo and Lanfranc, the Archbishop of Canterbury, in favour of Lanfranc. Again, in 1082, the small Curia found Odo guilty, in effect, of treason, and he was imprisoned in the castle of Rouen in Normandy until William I's death.

During the ensuing reigns of William II (1087-1100), Henry I (1100-35), and Stephen (1135-54), major wrongs, or "Pleas of the Crown", were greatly increased in number. In addition, many more of them came to be "unemendable"; ie botless, to use the old Anglo-Saxon term.

At the same time, earls and bishops were removed from the shire courts, now

known as county courts. As a result, the office of sheriff greatly increased in importance.

Early Plantagenet period

[104] In 1166, the large Curia Regis sat with Henry II (1154–89) at Clarendon and passed a revolutionary statute subsequently named after the session itself. This statute, the *Assize of Clarendon*, together with a supplementary statute passed ten years later, the *Assize of Northampton*, introduced the system of public, as opposed to private, prosecutions. Instead of an alleged criminal being brought to court either by his supposed victim or by that person's kinsman [102], he was to be presented by a jury of presentment. This jury was to be made up of 12 representatives from each hundred in the county, as well as four representatives from each township therein. It was to present the suspect in the first instance to a special session of the hundred court known as the sheriff's "tourn". If the crime charged was emendable, the sheriff could deal with the case himself. If it was unemendable, then the suspect had to be kept in custody until the arrival of a judge from the small Curia Regis, who would constitute a new local criminal court known as an assize court.

During the rest of the reign of Henry II and throughout the reigns of Richard I (1189–99) and John (1199–1216), the judge would put the accused to the ordeal of water. This involved binding the accused and lowering him into a pool. If he sank a certain distance, he was guilty; if he did not do so, he was innocent. Then, however, as a result of the condemnation of ordeals by Pope Innocent III at the Lateran Council of 1215, the ordeal by water was rapidly abandoned. In its place, a second jury began to be used for the purpose of determining the guilt or innocence of the accused.

Middle Plantagenet period

[105] During the reigns of Henry III, the first three Edwards, and Richard II, spanning almost two centuries from 1216 to 1399, the situation thus far established became much more complex. The developments which took place were in essence as follows.

The large Curia Regis changed gradually into the English Parliament through the increasingly regular addition of knights and burgesses, whose consent to taxation became more and more necessary. At the same time, the small Curia split up into the Royal Council, or government, on the one hand, and the royal courts on the other.

The royal courts were three in number; viz the Court of Exchequer, the Court of Common Pleas, and the Court of King's Bench. The first and second courts handled most of the civil disputes in the realm. The third was pre-eminent, controlling not only those courts, but also the local criminal courts.

The latter courts continued to be the sheriff's tourn and the assize court until just after the middle of the fourteenth century, when influential laymen, called justices of the peace, began to supplant the sheriffs in the counties. They were directed to sit four times a year, and the courts they constituted consequently became known as courts of quarter sessions. The justices were commissioned to deal not only with emendable crimes (now known as trespasses), but also with all unemendable crimes (now known as felonies), except those of the most serious or difficult kind, which could be dealt with only by the itinerant judges of the assize courts. These

judges were predominantly drawn from the courts of King's Bench and Common Pleas and operated under royal commissions referred to as "oyer and terminer" (hear and determine) and "gaol delivery". Both they and the justices had accused persons presented to them by juries of presentment, and adjudged guilty or innocent before them by trial juries.

Late Plantagenet and Tudor periods

[106] Although the English Parliament and the Royal Council formed primarily the legislature and the executive of the realm, this did not mean that they retained no judicial powers from the days when they and the royal courts were all essentially one body referred to as the Curia Regis [103]. Indeed, not only did such powers exist, but also they were exercised to such a degree between 1399 and 1603 that a number of separate courts came into being.

With respect to the English Parliament, it consolidated itself as a bicameral assembly during the reigns of the three Lancastrian Henrys (1399–1461). The tenants-in-chief constituted the House of Lords, the knights and burgesses the House of Commons. At the same time, the House of Lords became the final court of appeal, the penultimate court of criminal appeal being the Court of King's Bench.

So far as the Royal Council was concerned, it eventually gave birth, during the reigns of the two Tudor Henrys (1485–1547), to two entirely new courts. The civil and criminal law hitherto fashioned in the existing courts did not always work justice. Thus, for example, no contract not recorded in a deed under seal or made for valuable consideration was enforceable, and no attempt to commit a crime was punishable. As a result, aggrieved persons would petition the Royal Council for redress. Acting now as a judicial organ, the council would be presided over by the king's Chancellor. An ecclesiastic learned in Roman and Canon law, the Chancellor would not unnaturally enforce ordinary agreements, punish attempts, and otherwise ensure that subjects conducted themselves according to the precepts of the Church. So, for instance, he would punish conspiracies, which often preceded attempts. Eventually, because he dispensed civil and criminal justice in separate rooms of the Palace at Westminster, two courts rather than one came to be recognized as in operation: the Court of Chancery and the Court of Star Chamber. The latter was possibly so-called because the night sky was depicted on the ceiling of the chamber in which hearings were held.

[107] The crimes punished by the Court of Star Chamber were called misdemeanours, a term which came to be applied also to trespasses [105] and to a number of offences created by statute. Where these offences were only minor transgressions, such as swearing or drunkenness, the legislation provided that they should regularly be dealt with by either one or two justices of the peace in a summary fashion. This involved the justice or justices forming a new court (very much later known as a court of petty sessions), and no juries being used for the purpose of presentment or adjudication: the justice or justices did everything.

By two statutes of 1554 and 1555, it was provided that, instead of a person suspected of felony or trespass being presented to an assize court or a court of quarter sessions by a jury of presentment [104], he should be taken before such courts only after a preliminary investigation by a "court of petty sessions" had established a case to answer. The jury of presentment subsequently changed into the grand jury, consisting of 24 persons, which considered the evidence given on

behalf of the Crown at the preliminary investigation, as well as the charges (the indictment) based upon it, and then either approved or disapproved the indictment by endorsing it with the words "true bill" or "*ignoramus*" (ie "found").

After an indictment had been approved by the grand jury, it would be read out to the accused, who would then be asked to plead to it. This was known as the arraignment. If he pleaded not guilty, the Crown would join issue by replying that the accused was guilty, and that it was ready to prove him so. A trial (or petty) jury of 12 persons, would thereafter be empanelled. The case for the prosecution would be presented against the accused, who could not, however, give any evidence himself or, if charged with felony, call any witnesses on his own behalf. The presiding judge or justice would sum up for the jury, and ask it to consider its verdict. Finally, if the verdict was one of guilty, he would pass judgment on the convicted man.

Proceedings in the Court of Star Chamber, by contrast, were essentially inquisitorial. They were begun by the king's Attorney-General filing an information based upon charges laid before him by a person whose identity might never be revealed. The accused had to put in a written answer, upon which he would be interrogated, sometimes under torture. The evidence of witnesses, meanwhile, would be taken by affidavit, and they, too, might be interrogated under torture. Ultimately, the guilt or innocence of the accused would be decided, not by a jury, but by the court alone.

Stuart and early Hanoverian periods

[108] By the time James I (1603-25) ascended the throne of England, the Royal Council had come to be known as the Privy Council. The change of name did not, however, alter the fact that, although there was now both a Court of Chancery and a Court of Star Chamber derived from it, the council still retained extensive judicial powers. This might not have been of any political consequence had not Charles I (1625-49) ruled England without summoning a parliament for 11 years (1629-40), and used the Court of Star Chamber as an instrument of oppression in the process. When at last the Long Parliament (1640-53) began to sit, it immediately passed statutes not only abolishing the Court of Star Chamber, but also drastically curtailing the judicial powers of the Privy Council over Englishmen.

The Privy Council continued, however, to exercise judicial powers over the inhabitants first of the Channel Islands and then of the colonies in America and the West Indies. It did so as a final court of appeal, the court being constituted by the Committee for "Trade and Foreign Plantations". This committee, staffed mainly by non-lawyers, became more and more inadequate as the Empire expanded. Eventually, by an Act passed in 1833 "for the better administration of justice in His Majesty's Privy Council", a special committee known as the Judicial Committee was set up, consisting essentially of those Privy Councillors who were, or had been, holding high judicial office.

In the meantime, the substantive law developed by the Court of Star Chamber was taken over by the traditional criminal courts. The adjective (also court procedure) law was not, except to the extent that the Court of King's Bench allowed informations for misdemeanours to be filed by the king's Attorney-General. The resulting trials before the court were not inquisitorial, but similar instead to trials before the assize and quarter sessions courts.