1956-57

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VICTORIA

REPORT

FROM THE

STATUTE LAW REVISION COMMITTEE

ON

SECTIONS 471, 472 AND 572 OF THE CRIMES ACT 1928

TOGETHER WITH

MINUTES OF EVIDENCE AND APPENDICES

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EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL.

WEDNESDAY, 21ST NOVEMBER, 1956.

12. STATUTE LAW REVISION COMMITTEE.—The Honorable Sir Arthur Warner moved, by leave, That the Honorables P. T. Byrnes, W. O. Fulton, T. H. Grigg, R. R. Rawson, A. Smith, and L. H. S. Thompson be members of the Statute Law Revision Committee.

Question—put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY.

WEDNESDAY, 21ST NOVEMBER, 1956.

12. STATUTE LAW REVISION COMMITTEE.—Motion made, by leave, and question—That Mr. Barclay, Mr. Lovegrove, Mr. Manson, Mr. Mitchell, Mr. Sutton, and Mr. Wilcox be appointed members of the Statute Law Revision Committee (*Mr. Bolte*)—put and agreed to.

REPORT

THE STATUTE LAW REVISION COMMITTEE, appointed pursuant to the provisions of *The Constitution Act Amendment Act* 1956, has the honour to report as follows :—

1. The Honorable the Attorney-General, by letter dated the 14th May, 1957, recommended to the Statute Law Revision Committee that it should examine an alleged anomaly in Part III., Division 1, sub-division (21) of the *Crimes Act* 1928 relating to the power of a Court to order restitution of property stolen, embezzled, extorted, converted or received. The Committee adopted this recommendation and commenced its enquiries.

2. Appended to this Report is the evidence given by the following witnesses who appeared before the Committee :—

Mr. T. F. E. Mornane, Crown Solicitor ;

Mr. A. J. B. Aird, Legal Assistant to the Police Department ; and

Detective Sergeant R. M. Braybrook, Lecturer in Law and Police Procedure, C.I.B. Training School.

Also appended to the Report are memoranda which were submitted to the Committee by Associate Professor Norval Morris, the Chief Justice's Law Reform Committee and the Crown Solicitor.

3. Section 471 of the *Crimes Act* 1928 provides that where a person is convicted of " stealing taking obtaining extorting embezzling converting or disposing of any property, or as is mentioned in Division one of Part II. of this Act in knowingly receiving any property, the court may order the restitution thereof, in a summary manner, to the owner or his representative ". Section 472 makes similar provision with regard to restitution in cases where the person charged is aquitted.

4. The Committee was informed that, in the view of the Crown Solicitor and of Associate Professor Norval Morris the word " restitution " in these sections must be read in its restricted sense of returning to the owner the stolen goods in the condition in which they are at the date of the court's order, and hence the court is not empowered to order the convicted person to compensate the owner of the stolen goods for their loss or for damage thereto.

5. Section 572 of the *Crimes Act* 1928 empowers the court convicting for felony to award " any sum of money not exceeding the value of the property lost stolen injured or destroyed by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony ". Since this section is limited in its application to felonies it follows that in cases of stealing which do not constitute a felony, the court may merely order the return of the goods in their then state to the owner as referred to in paragraphs 3 and 4 *ante* but cannot order compensation.

6. A number of sections of the *Crimes Act* 1928 classify the stealing of particular kinds of goods as misdemeanours (e.g. section 134 relating to the stealing of books from any public library), or as offences punishable summarily (e.g. section 105 concerning the stealing of plants from a garden or orchard). It would appear again that in these cases the court could not order compensation, merely restitution. Such a procedure leaves the aggrieved person free, of course, to resort to his ordinary civil remedies at law.

7. It appears to the Committee anomalous, therefore, that in respect of some criminal offences the court may order compensation, whereas in others it may not, particularly when it is considered that the power to order compensation is given in cases of conviction for " felony "—a class of crime comprising the more serious offences—but not in respect of what are generally regarded as less serious offences. An exception is to be found in the *Crimes* (*Amendment*) *Act* 1955 section 5 of which provides that a court convicting for the misdemeanour of illegally using a motor car may also order payment of compensation for damage or destruction.

8. The Committee has received advice that it is doubtful whether the existing section 572 covers damage to property which falls short of *loss* of property. Thus the anomalous position may well exist whereby in appropriate cases a court may order restitution pursuant to sections 471 or 472 where the property is still in existence, or compensation pursuant to section 572 where the property has become a total loss, but may not, subject to the exception referred to in paragraph 7 hereof, order compensation for damage to the property which falls short of total loss.

9. The Committee, in order to remove any doubt from the section, and to assure the removal of the anomalies referred to, recommends the amendment of section 572 to extend the power of awarding compensation to include—(*a*) compensation for *damage* to property ; and (*b*) cases of misdemeanours and offences punishable summarily.

Committee Room,

24th July, 1957.

MINUTES OF EVIDENCE

TUESDAY, 9TH JULY, 1957.

Members Present:

Mr. Manson in the Chair;

Council.	*Assembly.*
The Hon. T. H. Grigg,	Mr. Lovegrove,
The Hon. R. R. Rawson,	Mr. Wilcox.
The Hon. Arthur Smith,	

Mr. T. F. E. Mornane, Crown Solicitor, was in attendance.

Mr. Mornane.—In the Crimes Act, from sections 471 to 473, provision is made in certain circumstances for the restitution of stolen property being ordered by the court before which an offender is convicted, or in certain circumstances before which the man accused is acquitted. The difference arises in this way: Where a man is convicted of stealing property, the court is satisfied that it belongs to the man who is alleged to be the owner. It is reasonable that an order should be made that the goods be returned to him. On the other hand, there are cases where an accused man is acquitted, but the basis of his acquittal is that he denies any knowledge of the property. He may be charged with stealing or receiving property; it may be found, say, in a house occupied by him or in a car owned by him. His reaction to the police visit may be, "That is not mine. I did not know it was there. I do not know anything about it." He may advance this defence, and the jury may acquit him. He makes no claim for the property, and it is rational that the court should order that it be restored to the man who swears that it belongs to him.

The suggestion is now made that, in addition to the court having power to order the restitution of property, it should also have power to make an order that the person convicted of stealing it and dealing with it in various other ways akin to stealing, should pay the costs of restoring the property to the state it was in before it was stolen. Section 5 of the *Crimes (Amendment) Act* 1955 provides that that may be done with regard to the stealing or illegal use of motor cars. Under that section, the court is empowered, where a man is convicted of stealing or illegally using a motor car, to order the person convicted to pay the owner of the damaged or destroyed motor car or property—that refers to property which is part of a motor car, such as a spare wheel—such sum as the Judge, chairman or court of petty sessions fixes as compensation in whole or in part for the damage or destruction, and the sum so ordered to be paid may be directed to be paid by instalments and shall, so far as relates to its payment or recovery, and to the consequences of failure to pay, be regarded as a fine or penalty imposed by the court upon a conviction in the exercise of its ordinary criminal jurisdiction. That is the only instance I am aware of where the legislature has made such a provision. It is rather too early to discuss its effects, as it is still in the experimental stage. In the General Sessions and the Supreme Court in Melbourne, there have been only two occasions on which an order of this type has been made. Each time, the accused has more or less adopted the attitude that he was not greatly worried —he had no money and could not pay, and whether an order was made against him did not matter much.

Leaving that aside, the objection I have to this proposal is that, first, the court would have to have evidence as to the condition in which the goods were before they were stolen and also as to the cost of repairing them. That would involve a separate inquiry, apart from that upon which the jury embarks. I am referring now to the higher courts and not to petty sessions. After the jury had returned its verdict of guilty—and it is only where a man has been convicted that such an order could be made—the Judge would have to undertake an investigation to ascertain the damage caused to the goods. This would necessitate the owner giving evidence, and that would be easy because he would normally be in attendance, having given evidence as to ownership of the goods. It would probably also necessitate other persons giving evidence as to the cost of repairs. The power would be a discretionary one, and the Judge might or might not exercise it. It would mean that there would be people waiting around the court in anticipation of the possibility of the Judge exercising the power.

The Chairman.—Why should it be discretionary and not mandatory?

Mr. Mornane.—If it is mandatory, a stage may be reached where there is a very large field as to the cost of repairs. Although motor cars are not here considered, there could be questions as to the cost of repairs to machinery, as to which there was a wide difference of opinion. Evidence could be called on either side, and the Judge might say that in such a case he did not propose to make an order, but that the man whose property had been stolen could pursue his ordinary civil remedies. The only circumstances in which this proposal would be of much use would be where the thief was a man of some means and could make good the damage. If the stage was reached where the whole matter of damages was disputed, it would be desirable to proceed according to the ordinary civil rules, where there is an issue put before a court by virtue of the pleadings before the case comes for trial.

One factor is the extra inquiry upon which the court has to embark, involving the calling of other witnesses. Furthermore, as I have pointed out previously, the criminal courts are at present overloaded, and anything which tends to lengthen proceedings is undesirable. In such a case as this, it may be only a matter of the evidence of one witness, and the Judge could make an order. On the other hand, if the matter was contested, prospective jurors would be kept hanging around for the next case at a cost of £2 10s. or £3 a day, and there are the ordinary costs of Judge, counsel, and others. They are the reasons why I do not think it desirable that this provision, or one along these lines, should be introduced at the present stage.

Concerning the collection of the money, unless it was paid the court must adopt the means provided for the recovery of fines imposed. So far as the General Sessions and the Supreme Court are concerned, that necessitates proceedings under the Crown Remedies and Liability Act. A writ would have to be issued under section 6 to start the proceedings, and if judgment was obtained, a warrant of execution would have to be taken out against the

property of the person against whom the order was made. It is a warrant which directs the sheriff to levy the amount of the fine and to take into custody the person of the man who fails to obey the order until the amount is paid. That is all done at the expense of the Crown, and it does not involve very much more in the way of work. But it does seem that, when a person has his ordinary civil rights, he may just as well exercise them.

The Chairman.—You speak about ordinary civil rights with a great deal of background knowledge which some of us lack. Suppose I am a small shopkeeper selling electrical goods, and that someone breaks in and steals two television sets and six radio sets. Eventually, he is apprehended by the police, taken to court and convicted. The goods are returned, but I find that none of the sets works. What is my civil remedy?

Mr. Mornane.—To issue a summons against him, either in a court of petty sessions, the County Court or the Supreme Court, according to the value of the goods.

Mr. Wilcox.—Assuming that the man has been convicted.

Mr. Mornane.—No; apart from the question of conviction, damages could still be claimed. I take it that the Chairman refers to a case where there is a conviction, since the power we are discussing is one to be exercised only on conviction.

The Chairman.—At the moment, there are civil remedies where there is a conviction?

Mr. Mornane.—There are civil remedies which cannot always be enforced unless there is a prosecution for the theft. The stage we have reached is that the person charged is convicted, and the goods are returned, but the sets will not work because of the damage done. The procedure is to issue a summons with the object of recovering an amount equal to the value of the damage caused. There is one difference. If an order cannot be obtained, a summons can be issued.

The Chairman.—If a summons is issued, is not exactly the same procedure followed? It would be necessary to call expert witnesses as regards the damage?

Mr. Mornane.—That is true. The expert witness is called to appear before a court which is already prepared for the hearing of the case, and you know that the case will proceed and, in the normal course of events, an order will be made. On the other hand, if the criminal court has a discretionary power in the matter, it may very well be that no order is made—that the court does not propose to embark on an inquiry leading to the making of an order, and the expert witness is not called—and you have to drop back to your ordinary civil rights.

The Chairman.—That would seem to be a good argument in favour of making it mandatory for the court to act as proposed.

Mr. Mornane.—If it is made mandatory, the criminal court will have to cease dealing with its criminal business in order to hear evidence of a civil claim.

The Chairman.—The argument is not really against the obtaining of damages but against the use of the criminal court for the purpose?

Mr. Mornane.—Yes. It is a matter of convenience. Concerning the payment of damages, an owner's rights would be much stronger under a provision such as that suggested than they would be in the ordinary civil case. In a civil action, say, in the County Court, a person issues a warrant of execution, having obtained an order, but the defendant may have no goods which can be seized.

It comes back *nulla bona.* The only other step that can be taken, if he has the means to pay, is to have him examined under the Fraudulent Debtors Act. An order obtained would be similar in effect to a fine. It would mean providing more weight with which to enforce payment, assuming the man concerned had the money with which to pay.

The Chairman.—In other words, if the matter could be kept out of the criminal jurisdiction administratively, the proposed alteration would be a good one, in your view?

Mr. Mornane.—That is so.

Mr. Wilcox.—Would it be possible for the trial to be conducted in the usual way and then at its conclusion for the Crown to ask the Judge whether he would be prepared to consider granting a restitution order? In that case a separate hearing could be arranged.

Mr. Mornane.—In that case I think it would be better, if the Judge determined that an order should be made, to refer the matter to one of the Masters of the Supreme Court or the Registrar of the County Court, as the case may be, to decide the amount of compensation payable as damages. The Judge would not be required to hear the expert evidence. Such a course would dispose of my objections, which are the waste of time in an overcrowded jurisdiction and the undesirability of having witnesses waiting around without it being known whether or not they would be required to give evidence.

The Chairman.—Our task is not to clear up administrative problems, but to decide the principle, although to some extent in this case the two aspects hang together.

Mr. Rawson.—You are opposed to the suggested alteration of the law. Do you know who favours it?

Mr. Mornane.—I think the matter arose in this way. A bicycle belonging to a lad of fifteen was stolen, but when it was recovered it was smashed. The case was reported in the press. Someone wrote to the Attorney-General asking whether the court could make an order granting the boy the cost of repairs. The Attorney-General replied that the only order the court could make would be one relating to restitution of the bicycle, and that separate proceedings would have to be taken to recover the cost of repairs.

The Chairman.—Have you any idea of the number of such cases that occur?

Mr. Mornane.—No. Motor cars are covered, but in the case of ordinary property I suppose it depends a good deal on how long it is before the property is recovered. I doubt whether there would be a great number of cases of the kind.

The Chairman.—They would be numbered in tens rather than in hundreds?

Mr. Mornane.—Yes.

Mr. Smith.—The number of cases in which the property could be recovered would be few?

Mr. Mornane.—That is so. The case may end up with the man in gaol but the goods not having been recovered.

Mr. Grigg.—Could civil action be taken against the man after he came out of prison?

Mr. Mornane.—Yes, or while he is still in prison if he has property which could be recovered.

Mr. Grigg.—Your view is that criminal matters should be kept separate from civil proceedings, is it?

Mr. Mornane.—Yes, subject to Mr. Wilcox's suggestion, which achieves my object without interfering with the running of criminal courts.

Mr. Grigg.—If a motor car is stolen and recovered damaged, has the insurance company an obligation to replace it or repair the damages?

Mr. Mornane.—It depends on the type of policy. That would be so in the case of a comprehensive policy.

Mr. Wilcox.—That would apply to many other cases in which the goods were covered by insurance.

Mr. Mornane.—That is so.

Mr. Wilcox.—Do you consider that there is need for such a change as is proposed?

Mr. Mornane.—It is difficult for me to say. The greatest need for such provision would be in relation to summary prosecutions. The police would know much more about that than I. Of course, in many cases those concerned would not be able to afford to embark on litigation.

Mr. Lovegrove.—Why is it that there have been only two test cases?

Mr. Mornane.—Only two cases have arisen in General Sessions and the Supreme Court. I do not know why that is so. In many cases cars are not damaged, and in other cases the vehicle is covered by insurance. Many cases may have occurred in courts of petty sessions, of which we have no knowledge. Of course, the Act is fairly new.

Mr. Wilcox.—Do you know whether they have actually awarded damages to the owner?

Mr. Mornane.—On two occasions they did. With regard to illegal using and stealing, I should not think more than about 50 a year would be handled in the Supreme Court or General Sessions. More such cases would be dealt with in courts of petty sessions.

The Chairman.—How do you reconcile sections 471 and 472 with section 572 of the *Crimes Act* 1928?

Mr. Mornane.—To a large extent, these provisions seem to cover your problem. I must confess I had overlooked section 572. The provisions contained in sections 471, 472 and 473 relate to restitution. The other provision relates to compensation for damages, which we are now discussing. Section 572 covers the position generally with one exception, namely, that it is limited to felony. In most cases, it is the felony of larceny as opposed to that of illegally using. I must confess that I had overlooked section 572 previously.

Mr. Wilcox.—What is a felony?

Mr. Mornane.—That is a difficult matter to explain. Some offences are catalogued as felonies, while others are called misdemeanours. The distinction is historical. In days gone by a felon's property would be forfeited to the Crown whereas that condition would not apply to a person convicted of a misdemeanour.

Mr. Rawson.—Stealing is a felony.

Mr. Mornane.—That is so. However, there is another way of obtaining goods or property, namely, by false pretences. That would be regarded as a misdemeanour.

The Chairman.—Are the separate classifications of felony and misdemeanour still needed?

Mr. Mornane.—Not really. The classification is important from the point of view that the police have the power of arresting any person whom they suspect of having committed a felony. Normally, they have no power to arrest, without a warrant, for a misdemeanour. The ordinary citizen has power to arrest any person who has committed a felony, but the police have the wider power of arresting on suspicion of a felony. With respect to a misdemeanour, an arrest without a warrant cannot be made, with the exception of some misdemeanours where it has been specifically provided that such an arrest can be made. That is the general position. I cannot see any valid reason why section 572 should not cover the position adequately.

Mr. Lovegrove.—When the 1955 legislation was brought forward, there were two schools of thought. Having regard to the published intention of the legislature, I do not understand why the matter has been tested in only two cases. Is it because the judiciary does not approve of the legislation or is it because the opportunities have not presented themselves? Further, is it possible to procure the relevant statistics?

Mr. Mornane.—Details of cases in the Court of General Sessions and the Supreme Court could be obtained. We have no record of cases heard in courts of petty sessions.

Mr. Lovegrove.—Do you know whether the incidence of car stealing is the same?

Mr. Mornane.—I cannot say. I am cognizant only of cases that come up for trial. In actual fact, prior to the passing of the 1955 Act, it was uncommon for a car stealing charge to be brought before the courts because in most cases it could not be proved that the offender intended to retain the property permanently. Our statistics will be only from January, 1956, until the present time as far as committals for trial are concerned.

Mr. Wilcox.—One possible reason for failure to invoke the new law is that the owner has not suffered any real loss because his car has been recovered in relatively good condition, and he has been compensated by his insurance company for any damage caused.

Mr. Mornane.—That is probably so. A case could probably be made out against an offender where the stolen car had been completely wrecked. Taking all factors into consideration, I should think that section 572 was probably overlooked when the 1955 legislation was drafted.

Mr. Wilcox.—If the widest use were to be made of section 572, might it not be necessary to amend that provision by deleting the word "felony"?

Mr. Mornane.—It might be preferable to insert after the word "felony" the words "misdemeanour or summary offence." It might also be desirable to insert the words "or damage thereto" after the words "loss of property." I shall be pleased to review that aspect and advise the Committee concerning it.

Mr. Wilcox.—Is there likely to be any difficulty concerning the words "immediately after the conviction of any person" in section 572?

Mr. Mornane.—I do not think so. The whole design there is to prevent the matter being brought back to the court that is dealing with the case a week later, when the details have become obscure. It is fair enough for a man to have that right. If he chooses not to use it, he still has the ordinary civil right.

The Committee adjourned.

WEDNESDAY, 10TH JULY, 1957.

Members Present:

Mr. Manson in the Chair.

Council	*Assembly.*
The Hon. W. O. Fulton,	Mr. Lovegrove,
The Hon. T. H. Grigg,	Mr. Sutton.
The Hon. R. R. Rawson,	
The Hon. Arthur Smith,	
The Hon. L. H. S. Thompson.	

Mr. A. J. B. Aird, Legal Assistant to the Police Department, and Sergeant R. M. Braybrook, Lecturer in Law and Police Procedure, C.I.B. Training School, were in attendance.

Sergeant Braybrook.—Upon examination, it would appear that the matter referred to me, as contained in Mr. Rylah's memorandum, is, in fact, covered to a degree by sections 571 and 572 of the Crimes Act. In New South Wales, the matter is dealt with in section 437 of the *Crimes Act* 1900, which provides—

> Where a person is convicted of any felony or misdemeanour the court in which he was tried or any Judge thereof may on such conviction or at any time thereafter direct that a sum not exceeding £500 be paid out of the property of the offender to any aggrieved person by way of compensation for injury or loss sustained through or by reason of such felony or misdemeanour.

The Chairman.—Does the loss referred to in that section mean loss to the person or the property?

Sergeant Braybrook.—It is paid out of the property of the offender to any aggrieved person by way of compensation for injury or loss.

Mr. Sutton.—What does "aggrieved" mean? Does it refer to the person affected—the victim?

Sergeant Braybrook.—Not only the victim; it would apply if the criminal concerned, who had obtained the property by theft or false pretences, then parted with it to an unsuspecting purchaser and the property was recovered by the Police and restored by the court to the lawful owner, in which case the person who is out of pocket would be the party aggrieved.

Section 572 of the Victorian Crimes Act deals only with a conviction for a felony; no order can be made for a misdemeanour. False pretences and larceny by trick are so close at times that the legislature has seen fit to make it possible for there to be an acquittal on one charge and a conviction for the alternative offence under the same circumstances. If it is contemplated that section 572 should be amended, then I think that misdemeanours should be covered.

The Chairman.—Would that cover the whole problem?

Sergeant Braybrook.—No, not fully; an order for compensation made under section 572 can be carried out only in accordance with section 571, which is similar to the procedure adopted for a civil debt. Therefore, it is similar to a garnishee under the Fraudulent Debtors Act or by distress of a person's goods. As I set out in my report, the provisions in the present law appear to have fallen into disuse. Perhaps that has been brought about by the manner in which the courts have power only to enforce an order.

The Chairman.—What do you mean by that?

Sergeant Braybrook.—If there was a provision for a penalty of imprisonment in default of non-compliance with the order, I think in many cases criminals who have benefited by the larceny or false pretence would be more prone to assist in the recovery of property that they have stolen or of which they have defrauded people in order that they may avoid heavier punishment. I have not examined fully the question of the drawbacks to section 437 of the New South Wales Act. Detectives from other States who have performed inter-change duty could very likely speak fully on the advantages and disadvantages of such a section.

The Chairman.—Do you know of any advantages or disadvantages?

Sergeant Braybrook.—I was on duty in Queensland in 1947 and I did notice that the detectives in that State took extreme measures in an endeavour to recover stolen property. If the property was not recovered, then a request was made to the court for an order for restitution. Of course, in default imprisonment was ordered. A similar provision exists in Victoria in relation to the Act which deals with motor-car driving offences. I have before me a form which is used by the Department to record criminal histories and prior convictions of offenders. This particular form refers to Queensland convictions and includes information concerning the conviction of an offender before the Cunnamulla Court of Petty Sessions on 13th September, 1955 for stealing. In that case a bond was granted. At Richmond, in Queensland, the same offender was convicted of two charges of false pretences on 3rd February, 1956. On the first charge he was fined 10s. and it was ordered that the property be returned to the owner. On the second charge he was convicted and fined £5, it being further ordered that he make restitution of £8 7s. 6d., in default fourteen days imprisonment.

Mr. Thompson.—What was actually stolen, money or goods?

Sergeant Braybrook.—The records do not show. This form contains information concerning a conviction at the Balmain Court of Petty Sessions on the 18th July, 1949. In this case money was stolen and the person convicted was sentenced to three months' imprisonment, the sentence being suspended on his entering into his own recognizance with a surety of £30 to be of good behaviour for three years. He was also ordered to pay compensation of £7 10s. at a rate of £2 a week. For a default in payment he was sentenced to fifteen days imprisonment. On a second charge of stealing money he was discharged upon his entering into his own recognizance of £20 to be of good behaviour for three years and to appear for conviction and sentence if called upon and to pay compensation of £8 10s. at the rate of £2 a week. A term of imprisonment was imposed in event of default.

The Chairman.—Is not the problem in Victoria that the law says that the court may or may not order compensation?

Sergeant Braybrook.—That is so.

The Chairman.—Could we make it mandatory and say that the court shall order compensation?

Sergeant Braybrook.—I think it is best for the court to have a discretion. Frequently, when persons report a larceny of property they place an enhanced value on it. Members of the force often find that the person apprehended is more honest about the value than the person from whom the property was stolen. Frequently, the property stolen is insured and in order to ensure that he does not lose anything the owner values it at a greater amount than it is really worth.

The Chairman.—What happens when an owner is caught in such circumstances?

Sergeant Braybrook.—Quite often a criminal is a person of bad character and it is implied that he is not to be believed. After speaking to criminals, we know that at times we can be satisfied that they are giving a true version. Quite often a Judge or a Magistrate will give credence to the statements of prisoners. Perhaps the Judge is not impressed by the evidence given by the loser of the property.

The Chairman.—Have you any explanation of why there have been only two cases of compensation since 1956?

Sergeant Braybrook.—Probably because once an order is made it is enforceable only as a civil debt and the person aggrieved is unwilling to spend good money to chase bad money.

Mr. Rawson.—I was not quite clear on the relevance of section 571. You mentioned a link between section 571 and section 572.

Sergeant Braybrook.—Section 571 sets out the manner in which an order for compensation can be made against the convicted person for the expenses of prosecution, and section 572 states that any person aggrieved by the felony can make an application to a court for compensation.

Mr. Sutton.—Was not there a recent amendment to the Crimes Act providing for compensation for damage occasioned to a motor car which had been stolen?

Sergeant Braybrook.—I was under the impression that we were referring to section 572.

The Chairman.—Mr. Mornane stated yesterday that there had been only two cases relating to stolen cars under that Act.

Sergeant Braybrook.—I made enquiries this morning from Sergeant Jackson, the Officer-in-Charge of the motor car stealing squad, and he told me that the courts will make orders under the new Act. I have a couple of instances of such orders having been made. In addition, yesterday, I believe, four or five men were convicted by the City Court of having illegally used a car to which they had caused damage estimated at £200. It was ordered that the compensation payable be charged equally to all those concerned.

Mr. Lovegrove.—Does the motor car stealing squad keep records of the results of their work in the courts?

Sergeant Braybrook.—They keep their own arrest book up to date and record the convictions in respect of the men they deal with personally.

Mr. Lovegrove.—The books to which you refer would cover the whole of the metropolitan area.

Sergeant Braybrook.—Yes, the men concerned go to the various courts.

The Chairman.—Apparently it would entail extracting statistics from the various books. Presumably no central record is kept.

Mr. Aird.—There is no central record kept of these particulars. I could arrange for Sergeant Jackson to give evidence of his experience if the Committee so desired.

The Chairman.—What the Committee wishes to obtain is statistical data revealing whether we are considering something large in volume, say, 200 or 300, or whether only 10 or 20 cases are involved.

Mr. Aird.—On that aspect, I spoke to Inspector Hubbard, who acts as prosecutor in the City Court. His opinion was to the effect that although there is legislative power to recover damages it does not achieve the best results mainly because of the fact that the sum involved is recoverable as a civil debt. He felt that if power was granted to impose a term of imprisonment as an alternative to the present procedure a better result might be obtained. At least the loser would have some personal satisfaction in feeling that although he did not recover damages the offender would have to serve a prison sentence in respect of those damages.

The Chairman.—It would be necessary to assess the amount of compensation payable.

Mr. Aird.—I do not think that the power should be mandatory nor should the court be compelled to provide for a prison sentence in every case, because circumstances arise wherein it would be undesirable to make such an order. I believe that the court should be given an option, but I feel that power to impose a sentence would be helpful. Inspector Hubbard's criticism is that some magistrates will not accept estimated calculations and that frequently cases come before courts shortly after the incidents concerned and a long time before the actual damage is assessed. Therefore, the courts may not be in a position to find that the estimated damage was actually caused by the incident under consideration.

The Chairman.—On the other hand, there is a school of thought which believed that any assessment of damage should be made as quickly as possible.

Mr. Aird.—That is so. Any estimate made and given to the court should be reasonably accurate.

The Chairman.—One of Mr. Mornane's objections to any change in the legislation is that it might tend to clutter up the courts.

Mr. Aird.—That certainly is a danger. I know practically nothing about the procedure in other States in respect to similar matters, but it would be of assistance if our courts could treat estimates of value as the amount to be allowed. For instance, in the case of ordinary larceny the estimate of the owner of the articles stolen is accepted as its value. If some similar scheme could be adopted in the cases we are now considering it would obviate the necessity to call a number of expert witnesses to prove the matter technically. Such evidence and the cross-examination would tend to prolong cases.

The Chairman.—Of course, the point arises as to what is the point of getting an award of £500 damages if the person who has caused the damage has no means.

Mr. Aird.—As I said before, the only satisfaction would be if the court could award a term of imprisonment in default of the payment.

The Chairman.—I should not imagine that would give a great deal of satisfaction.

Mr. Aird.—Perhaps it would not give much satisfaction, but it would be some recompense and would avoid embarking on civil proceedings. The main solution would be to enable courts to make orders which apply not only to felonies but to misdemeanours as well.

The Chairman.—Or to summary charges, in line with the suggestion made yesterday.

Mr. Aird.—In one sense, a summary charge is a misdemeanour. Speaking generally, misdemeanours cover charges which are not regarded as felonies. However, recently courts have taken the view that when considering criminal matters the term "misdemeanours" should be applied to what we regard in a general sense as criminal offences as distinct from small matters such as going against the red light or failing to give the proper hand-signals.

The Chairman.—What is the suggestion of the Police Department? Is it the desire that the law should be changed and if so in what way should it be changed?

Mr. Aird.—It is desired that the law should be made applicable to misdemeanours and that it should be made clear what offences are to be dealt with summarily. We should also like the courts to be enabled to fix a term of imprisonment at the time the assessment of compensation is made. It is difficult to suggest a formula that would not be too rigid. Magistrates are humane men and they do not like to be bound by strict rules. They like to use their imagination in appropriate cases. Perhaps some common rule could be arrived at to the effect that damages may be awarded based on the estimate submitted to the court without any provision for the proving of detailed damages.

The Chairman.—That brings me back to the general problem set out by Sergeant Braybrook that persons who lose anything are generally inclined to overestimate its value.

Mr. Aird.—That is always a danger, but I presume the courts would require some quantum of evidence to support an estimate given.

The Chairman.—Would the opinion of an insurance assessor be sufficient?

Mr. Aird.—Yes, or that of a motor mechanic or engineer.

Mr. Lovegrove.—It is sometimes impossible to get that evidence.

Mr. Aird.—I have examined files in our office which reveal that our mechanics have examined vehicles and estimated the amount of damage that has resulted from an accident, but the actual cost has been a different figure.

Mr. Lovegrove.—Is it possible, in the case of either mechanical or bodywork, to say that certain damage did result at a particular time?

Mr. Aird.—I do not think it is.

Mr. Lovegrove.—For instance, it would not be possible to determine whether injury to bodywork occurred prior or subsequent to the theft of a car.

Mr. Aird.—It would be impossible to say that with any certainty. However, if a man has sufficient experience and knowledge he can give a fairly accurate estimate that certain damage probably was the result of a particular accident. I have obtained some statistics covering the number of reported car thefts as compared with the annual registrations for the last two or three years. In 1954 there were 4379 cases of reported thefts of motor vehicles, and the registrations for the year were 500,441, the percentage being ·875. In 1955 thefts totalled 4,003, registrations were 647,672, and the percentage was ·618. In 1956, the thefts were 4,908, registrations 693,211, and the percentage ·562. Up to the 26th June, 1957, the number of thefts reported was 2,498, and to the 30th June the new registrations were 342,406 whilst the registrations in existence were 704,342. The percentage figures quoted do show a slight decline in thefts in the last three years.

Mr. Lovegrove.—What is this particular statistical method designed to show?

Mr. Aird.—The statistics I have quoted were obtained in response to a question asked of me by Mr. Grose concerning car thefts.

Mr. Lovegrove.—That is probably the result of a question I asked yesterday, but what I want to know now is what are the figures designed to show?

Mr. Aird.—I understood that the Committee wished to know if there had been any decline in car thefts since the amending of the Crimes Act in 1955. I felt that the figures indicating the number of thefts for the different years would not reflect the true position unless some comparison was made, by way of a percentage figure or some other means, between the thefts and the total registrations, as there has been a large increase in motor registrations in each year.

Mr. Lovegrove.—Do I understand that your method of determining the position is to equate the number of offences to the number of car registrations?

Mr. Aird.—That has been the effort here, but I have not sufficient knowledge of statistics to contend that it is the way of presenting the correct picture.

Mr. Lovegrove.—Those are the only two factors you have taken into consideration.

The Chairman.—What else could be taken into account?

Mr. Lovegrove.—There are other calculations that may prove of assistance to the Committee although I do not know they would come within the province of the Police Department. I refer more particularly to calculations of a social character which are taken into account in other parts of the world.

The Chairman.—Most of the discussion has centred around the theft of motor cars. Could you supply information in connexion with the theft of such articles as television sets and other electrical equipment?

Mr. Aird.—The annual report for 1956 has not yet been published. However, the 1955 report contains an appendix entitled, "Crimes Statistics." It is divided into the following sections:—Offences against persons; Offences against property with violence; Offences against property without violence; Forgery; Offences against currency; Offences against good order; and so on. The statistics cover a wide field.

The Chairman.—Members of the Committee could obtain that information from the reports which are available to them.

Mr. Lovegrove.—Could Mr. Aird supply statistics in connexion with the incidence of shopbreaking?

Mr. Aird.—Yes; the 1955 report indicates that during the 1955 calendar year there were 1,493 cases of shopbreaking and stealing, and in the same year there were 319 cases of shopbreaking defined as "smash and grab."

The Chairman.—Are the 1956 figures available?

Mr. Aird.—The 1956 annual report has been prepared but is will not be printed until it has been perused by the Under-Secretary. However, the information could be obtained before the report is printed.

The Chairman.—That information would prove useful to the Committee.

Mr. Aird.—I shall supply the relevant information. I might add that a statistical section is being established in the Police Force and although it might not be able to produce up-to-date information just now, in due course statistics of the type envisaged would be available.

Mr. Rawson.—Mr. Aird, do you think it is sound and desirable to impose a term of imprisonment on a person who cannot make restitution for damage caused?

Mr. Aird.—I think so.

Mr. Rawson.—The imposition of a penalty of that nature would not compensate the person who has lost, but it would merely give him some sort of satisfaction. Do you think that is a sound approach to the problem?

Mr. Aird.—Yes; it short-circuits the process somewhat as an offender could be imprisoned for his action as a result of civil proceedings.

Mr. Rawson.—It would not restore the value of the goods to the person who lost them; it only gives him satisfaction that someone is being punished for the crime. Is it desirable that a person should be encouraged to desire that someone else should be punished just because he is not able to pay or make restitution?

Mr. Aird.—It would have the tendency of lessening the prevalence of thefts if an offender knew that in addition to being punished for his theft he could be punished for damaging the property.

Mr. Rawson.—That is a different aspect. I accept that it would act as a deterrent, but what about the desirability of introducing to the law some means by which a term of imprisonment can give satisfaction in lieu of payment for damage done? That result could be brought about in any case, although probably at considerable expense to the victim. Sergeant Braybrook mentioned that in the New South Wales Act there was included a ceiling of £500. Why is such a ceiling necessary?

Sergeant Braybrook.—I do not know, but possibly the New South Wales Legislature followed the English Act which provides for a ceiling of £500.

Mr. Sutton.—The New South Wales legislation refers to any aggrieved person but that does not necessarily mean in the singular. It could be more than one person; for example, the original owner of the goods and the person who owns them by prescriptive right.

Sergeant Braybrook.—I shall answer that by citing a hypothetical case. A person might purchase a motor car valued at £1,000 and in payment therefor tender a cheque which later proves to be valueless. Before the car trader ascertains that the cheque is valueless the car may have been resold to someone else. As a result of inquiries, the Police might approach the person who purchased the car unwittingly and seize the vehicle as a court exhibit. Under the Goods Act—I think it is section 81—the person who loses the car can disaffirm the contract and claim restitution of the car and the court could order restitution to the original owner. The person who unknowingly purchased the car has been deprived of it and possibly he has lost also the £800 paid to the thief for the car. Why should he not be able to apply to the court as an aggrieved person for an order for the return of his money by the person convicted of misdemeanour. Frequently, by means of false pretences, persons amass a considerable sum of money and property which the court cannot touch.

The Superintendent of the C.I.B. is of the opinion that the party aggrieved should make such applications to the court for compensation and should produce witnesses. The Police Department should not be expected to further its duties by including civil matters in them. It might encourage persons to seek redress against offenders when they know they have nothing to gain. Even though the criminal has no money, the aggrieved person could say, "I want my pound of flesh and therefore I wish to see him prosecuted on my evidence." The provision may not be very good there but, on the other hand, if the aggrieved party has been led to believe that the criminal has some of the proceeds stocked away, possibly in the bank, he should be entitled to claim to the court and get some restitution of that money.

Mr. Smith.—That is the situation at the present time, is it not?

Sergeant Braybrook.—Yes; He must initiate his own claim. It applies only to felony and it does not cover misdemeanour. For example, fraudulent company operators may be charged with conspiracy, which is another misdemeanour. A man named Hammond has had several extensive trips around the world on the proceeds of depriving old women of their life savings. He has "got away with it" in many cases.

The Chairman.—Was there any further information you desired to give to the Committee?

Sergeant Braybrook.—I feel that if a criminal knows that in addition to the punishment for his offences, he is likely to incur an additional punishment for the amount of goods that he has not assisted to recover, it might encourage him to reveal the whereabouts of the goods. Frequently, when apprehended, offenders say, "Yes, I got the property, but I am not going to tell you how I disposed of it." If it is known, as it would become generally known, that restitution is now included in the law and he is likely to incur a heavier punishment by not revealing to whom he disposed of the property, an offender may be induced to "ditch" the receiver, or to assist in the recovery of the stolen property, thereby assisting the persons who lost the property.

The Chairman.—Would you have any statistics indicating in how many cases of theft the property is recovered and in how many cases it is still missing?

Sergeant Braybrook.—It would require a very long and involved process to obtain that information.

Mr. Thompson.—Would you be prepared to estimate approximately in how many cases property is recovered? Would it be in one-half or two-thirds of the total cases?

Sergeant Braybrook.—I would say that in approximately half of the cases of theft, the stolen property is recovered. Of course, frequently, a housebreaker who has been arrested may have committed 100 housebreakings and he has disposed of so much property that he does not know to whom each item was sold. Much of the stolen property is disposed of in hotels or in pawn shops or to second-hand dealers and in such cases it is difficult to recover it.

A graph prepared in the Police Department indicates a substantial fall in car thefts during the month of February, 1955, and a general falling until about the middle of the year. Since about September, 1955, there has been a general increase.

The Chairman.—The members of the Committee greatly appreciate the assistance given by the two witnesses to-day.

The Committee adjourned.

APPENDIX A.

MEMORANDUM BY THE HONORABLE A. G. RYLAH, E.D., M.P., ATTORNEY-GENERAL.

Re Crimes Act 1928.

I wish to bring before the notice of your Committee for examination and report and recommendation to the Legislative Council and the Legislative Assembly what appears to me an anomaly in the criminal law.

Part III. Division 1 sub-division (21) of the *Crimes Act* 1928 empowers the Court before which proceedings are brought in respect of stolen goods to order restitution thereof to the owner.

The expression "restitution" must according to the view of the Crown Solicitor (Mr. T. F. Mornane) be read in its restricted sense of returning to the owner the stolen goods in the condition in which they are at the date of the Court's order.

This view excludes the application of the alternative meaning of the expression of restoring the goods to the owner in the condition in which they were when stolen or payment by thief of damages equal to the cost of so restoring them to that condition.

This leaves the owner with only the remedy of civil action against the thief for damage caused to his property.

In respect of the stealing or illegally using of a motor car the *Crimes (Amendment) Act* 1955 (No. 5917) provides for the making by the Court of an order for damages against the offender caused to the car as a result of the larceny or illegal use and it would seem appropriate that the existing provisions relating to "restitution" in general should be similarly extended.

Mr. Mornane thinks it undesirable to introduce such an extension; but he will make himself available to your Committee when he can state his views.

I feel however that the matter is one well worthy of your Committee's consideration and accordingly submit it for that purpose.

14th May, 1957.

APPENDIX B.

MEMORANDUM FROM ASSOCIATE PROFESSOR NORVAL MORRIS.

1. I have no doubt that Mr. Mornane's interpretation of "restitution" in Part III. Division 1 sub-division (21) of the *Crimes Act* 1928 (sections 471-474) is correct, and that the court is not empowered to order the convicted person to compensate the owner of the stolen goods for their loss or damage to them. As to the wisdom of an extension of the law enabling compensation as distinct from restitution to be ordered might I offer the following observations.

2. Facility of litigation and saving of costs would be the main arguments for such a development of the law, and at first sight they are appealing.

3. It is assumed that the compensation discretion would be given to the trial judge or magistrate; it could hardly be safely left to the jury's decision without gravely risking the lowering of the established standard of proof in criminal cases. If it is left to the judge or magistrate, presumably he should hear evidence on the value of the loss. It is doubtful whether this type of combination of criminal and civil procedures is a happy one. It is suggested that under such a scheme the informant dissatisfied with the award in the criminal case should be able to pursue his civil remedy, the award being treated as if it were a sum paid into court in a civil action, and importing the usual rule concerning costs.

4. Presumably, the convicted person should be able to appeal against the compensation ordered without appealing against his conviction. This is an unusual type of appeal against sentence. Again the combination of two very divergent types of procedures seems unfortunate.

5. Section 472 allows the court to order restitution even though the accused is acquitted—this would be most inappropriate with reference to an order for compensation.

6. Even though the discretion concerning compensation is given to the bench and not mentioned to the jury, there may be a tendency for its existence to lower the established burden of proof in criminal issues.

7. Where the owner has insured against the loss or damage to his goods, say under a householders policy covering theft, the effect of this power in the court to order compensation would benefit only the insurance company which profits from this very risk. This, in itself, is no argument against such a power in the court; but the implications of insurance in this area need to be kept in mind in endeavouring to assess the value of such a change in the law.

8. Information on the use of the compensation provisions with respect to the larceny or illegal user of motor vehicles in the *Crimes (Amendment) Act* 1955 (No. 5917) would be of great value in estimating the value of this suggested extension of the law.

9. I am quite unable to form any opinion on the likely number of cases in which such a compensation power would be of relevance.

10. All in all I would think the onus of proof of justifying this change in the law is not sufficiently carried by paragraph 2 above hence, until I knew more concerning the proposed amendment and the incidence of the mischief it is designed to remedy, I would incline against it.

7th June, 1957.

APPENDIX C.

MEMORANDUM FROM THE SECRETARY, CHIEF JUSTICE'S LAW REFORM COMMITTEE.

Re Crimes Act 1928.

This Committee has considered the reference by the Attorney-General to an anomaly in the Crimes Act relating to the restitution of stolen goods.

This Committee is not in favour of the proposed extension and wishes to direct the attention of your Committee to the present section 572 of the Crimes Act.

18th June, 1957.

APPENDIX D.

MEMORANDUM FROM MR. T. F. E. MORNANE, CROWN SOLICITOR.

Re Crimes Act 1928—*Damage to Stolen Property.*

1. I have checked the number of orders made under Section 5 (1) of the *Crimes Act* 1955 by the Supreme Court or by Courts of General Sessions and find that there is only one instance of such an order being made.

It is as follows:—

At the Supreme Court at Ballarat on 5th May, 1956, Ronald George Williams was convicted of illegally using a motor car and sentenced to be imprisoned for two months and ordered to pay £230 for damage caused to the vehicle. This amount was to be paid by instalments of £3 per week. In all £27 was paid. Williams was again convicted on 16th October, 1956, and sentenced to twelve months' imprisonment and no payments have been made since that date. Upon his release from prison, steps will be taken to have him renew payment of the instalments.

2. The procedure for recovery under section 5 (1) of the *Crimes Act* 1955 appears to be less satisfactory than that under section 572 of the *Crimes Act* 1928. Apart from any special procedure the value of the damages sustained would be recoverable by civil action.

The objection to the value of the damages being recovered as a fine is that non-payment would result in imprisonment and upon the release of the offender from prison the owner of the damaged goods would have no further right against him. On the other hand, if an order is made under section 572, the amount ordered to be paid is deemed to be a judgment debt and the person against whom the order is made is not released from the obligation to pay, except under the *Limitation of Actions Act* 1955, until the amount of the judgment has been paid.

3. The purpose and operation of section 572 of the *Crimes Act* 1928 is made clear, in so far as it deals with property actually destroyed, in the judgment of Hood *J.* in *In* re *Samuel Clements* ex *p. Ralph Bros.* 21 V.L.R. 237 where he says, "I think . . . that it is the duty of the Court to receive evidence after the trial as to the value of the property destroyed, and not to confine itself to materials brought forward at the prisoner's trial. I think the real object of the Legislature was, as has been suggested, to avoid the scandal of a second jury reversing the verdict of the first jury; and for these reasons I think the application was made in proper time, and I shall hear evidence as to the value of the property destroyed."

In this case the prisoner had been remanded for sentence and the application was made immediately after sentence was passed.

4. It is doubtful whether section 572 in its present form covers damage to property which falls short of loss of property. Thus although reference is made to awarding a sum of money "not exceding the value of the property lost stolen injured or destroyed" it is to be awarded by way of satisfaction or compensation "for any *loss of property* suffered by the applicant."

Apart from this it is very doubtful whether the power could be exercised by a court of petty sessions.

5. If it is intended to amend this section for the purpose of enabling orders to be made by courts generally in respect of damaged property, it would be advisable that the Parliamentary Draftsman should be consulted on the precise form of the amendment.

6. I suggest that the following matters be considered in making the amendments:—

(*a*) the power should be extended to courts of petty sessions;

(*b*) the convictions which give rise to the exercise of the power should be extended to include misdemeanours and summary offences;

(*c*) the provision for satisfaction or compensation should be extended to cover damage to property.

7. In so far as what I said before the Committee is modified by what is said herein I would like what is said herein to be taken as expressing my views.

17th July, 1957.

By Authority: W. M. Houston, Government Printer, Melbourne.