BOOK REVIEWS

Restitution to Victims of Crime, by Stephen Schafer, Reader in Criminology, University of Maryland, U.S.A. London, Stevens and Sons Ltd., 1960. ix and 129pp. (£1/14/6 in Australia).

This is a stimulating book dealing with a neglected aspect of the criminal law at a time when its purely deterrent and retributive aspects are being substantially modified in favour of the view that one of the major ends of a penal system is the reformation of the offender, because, as the author of this book points out, "history suggests that growing interest in the reformation of the criminal is matched by decreasing care for the victim".[1] The mould of the average judicial mind trained in the English system is to be suspicious of any attempt to join restitution or compensation to penal sanctions. Most judicial officers accept the conventional view that a crime is an offence against the State to be dealt with by means of imprisonment, or fine, or recognisance, and it is rare to find any attempt to devise sanctions that, in addition to dealing with the traditionally claimed purposes of the criminal law, will assist the victim also.

It is not without interest that the author refers to a proposal of Sir George Arney, Chief Justice of New Zealand, at the International Prison Congress held in Stockholm in 1878, for "a more general return to the ancient practice of making reparation to the injured".[2]

The book contains a survey of legislation in various parts of the world, covering twenty-nine countries including Australia, but though reference is made to the Crimes Acts of Queensland, Tasmania, Western Australia and Victoria, there is no reference to an interesting series of sections in the New South Wales Crimes Act,[3] dealing with compensation and restitution.

Section 437 makes provision, where a person is convicted of any felony or misdemeanour, for a direction for the payment of compensation in a sum not exceeding £1,000 out of the property of the offender to any aggrieved person. Enforcement of compensation so directed is provided for by s.457 by giving the order the effect of a judgment of the Supreme Court at law and, hence, as is pointed out in *Zaccour* v. *Basha*,[4] it is enforceable by *fi fa* and not by *ca sa*. The sanction, therefore, to enforce payment of such compensation is civil and not criminal. Section 438 provides that, where a person is convicted under the Act of stealing, embezzling or receiving property, the court may order the restitution thereof in a summary manner to the owner or his representative. As I read that section, it proceeds on the basis that the property is still in existence and can be handed over. The First Offenders provisions of the

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[1] At 12.
[2] At 9.
[3] Act No. 40, 1900 (N.S.W.) as amended.
[4] (1920) 20 N.S.W. L.R. 431.

Crimes Act which apply to "minor offences"[5] provide that

> If the offence of which a person is convicted has relation to property or is an offence against the person, the Court may, if it thinks fit, upon suspending the execution of the sentence as hereinbefore provided, order the offender to make restitution of the property in respect of which the offence was committed or to pay compensation for the injury done to such property or compensation for the injury done to the person injured, as the case may be, and may assess the amount to be paid by the offender in any such case and may direct when and to whom and in what instalments the amounts ordered to be paid shall be paid.[6]

Further powers are given to order security for performance of such an order and the sanction for breach of that order is a criminal sanction because "Every such order may be enforced by any Justice in the same manner as orders made by Justices upon summary convictions".[7]

It is probable, though as far as I know the point has never been examined in the Court of Criminal Appeal, that a Judge or Magistrate could, as a condition of a common law recognisance to come up for sentence if called upon and to be of good behaviour, make compensation or restitution a condition of the recognisance.

The First Offenders provisions found in Part 15 of the Crimes Act certainly, and perhaps the use of common law recognisances, would give legal justification for an order such as was made in the case of *R.* v. *Peel*,[8] where the Court of Criminal Appeal "strongly condemned" what I think was an eminently sensible decision of a Chairman of Quarter Sessions. In that case the applicant pleaded guilty to embezzling two small sums amounting to £7/13/8d., but the Prosecutor stated that the total defalcations amounted to £70 and the prisoner did not dispute that allegation. Peel was bound over at Quarter Sessions on probation to pay the £70 at the rate of 10/- per week, subject to probation. Three months later Peel was brought up for breach of the bond and again on two further occasions about two years after that. He was sent to prison for six months with hard labour. The Court of Criminal Appeal said it "strongly disapproves of any criminal Court making itself the medium of compelling people to pay their debts. That is not the function of criminal Courts. The Court of quarter sessions in this case was really turning itself into a debt-collecting society and helping the prosecutors to recover money for which they might have claimed in the county court".

Though one would agree with Humphreys, J. in expressing strong disapproval of using a criminal Court as the medium of compelling a debtor to pay his debts, there is a strong case, I believe, in support of the view that if the interests of everyone, including society as a whole, can best be served by releasing a man on a bond to make full restitution, it is only common sense to do so.

Notwithstanding the existence of these provisions, I think the attitude of the Courts generally to restitution and compensation is too rigid and the extent to which they use the powers they possess in this regard too narrow, though it is fair to point out that quite a number of Quarter Sessions Judges and Magistrates have used either the First Offenders provisions or the common law recognisance from time to time as a method of effecting compensation or

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[5] As to what are "minor offences", see *R.* v. *McDonough* (1904) 21 W.N. (N.S.W.) 61, and *R.* v. *Goldrick*, (1924) 24 S.R. (N.S.W.) 396.

[6] Crimes Act, s.559(1).

[7] *Id.* s.559(2) and (3). *Ex p. Cassel*, (1909) 9 S.R. (N.S.W.) 481, contains an interesting divergence of judicial view on the meaning of these subsections. There, by a majority, it was held that there was no power in the section to require the offender or his surety to enter into a recognizance to pay compensation. The surety had been called on to pay under the offender's recognizance but the Court granted certiorari to quash. I think the dissenting judgment of Pring, J. was correct.

[8] *R.* v. *Peel* (1943) 29 C.A.R. 73.

restitution. As is pointed out in the book under review[9]—

> Attention was frequently called to the hardship which ensued to a person who lost his property by some criminal act and who has to be content, if the offender be brought to justice, with no other satisfaction for his loss than can be afforded by the punishment of the offender by the State as one guilty of a public wrong but not required to make restitution for the private loss which his action has caused.

Perhaps the number of cases in which effective compensation could be implemented is comparatively small and there must be crimes where the amount of damage inflicted by the offender would be out of all relationship to his capacity to pay. These considerations caused Dr. Schafer[10] to discuss the idea that "the state should pay compensation to the victims of personal violence", citing a case of a man "who was blinded as the consequence of a criminal offence and because of the injury was awarded compensation of £11,500. Considering the fact that the two assailants of this man were ordered to pay him 5/- weekly, 'the victim will need to live another 442 years to collect the last instalment' ". But in those cases where it is possible, making people pay and pay dearly for their crimes, not only by way of compensation and restitution but by way of costs, rather than by time spent in gaol, would, in a proportion of cases, operate effectively, especially if the law was sufficiently wide to require the offender to obtain sureties to see that he paid the compensation or restitution ordered. One would need to be careful to see that in the case of persons with means such a system did not equate with buying immunity from gaol sentences which poorer people would have to serve.

Consideration might also be given to widening either the sentencing or the parole power to require a person, even after he has served his sentence, to make a periodic payment out of his wages each week and to be liable to further sanctions if he was able to and did not, though in some cases the record or the situation of the offender may clearly indicate that any such order could not or would not be attempted to be complied with or that the man, even if he tried to, could not do so.

Increased use of restitution and compensation in criminal cases may require far more individualisation of sentence than most Judges would regard as desirable because, though in some cases restitution might operate as a heavy penalty, in other cases it would not and "The social and penal value of punitive restitution may be destroyed if individuals were permitted to compromise crimes by making restitution".[11]

How a system could be worked out to provide some real degree of compensation or restitution to victims of crime without taking away the ordinary rights to a verdict where the offender possessed property or, as is more material in present circumstances, was insured, would present serious but not insuperable difficulties. One thing that would have to be carefully guarded against would be making criminal prosecutions the means of enforcing claims for debts and non-criminal torts, and to this end safeguards would have to be devised, not only for this purpose but to prevent the use of the criminal law to enable a compensatory or restitutory order to be imposed on top of imprisonment under conditions which might be crushing to the offender.

At the end of this small book, the author puts forward certain principles by which a system of restitution might be implemented, emphasizing that "the punitive side of restitution is a great aid in reforming the criminal".[12]

This is a book to be carefully read by anyone interested in penal sanctions

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[9] Preface vii, quoting Sir Evelyn Ruggles Brice's *Report to the Secretary of State for the Home Department on the Proceedings of the Fifth and Sixth Penitentiary Congresses*, H.M.S.O. Lond., (1901) 51.

[10] At 111.

[11] At 127.

[12] At 128.

and the fact that such sanctions require serious consideration of the rights of victims. There is room for very serious inquiry into "an evaluation in terms of the deterrent and reformative potentialities and the requirements of restitution".[13]

There are young men in this community who, if instead of getting three or six months imprisonment for illegally using a car, might have been much more effectively dealt with if they had had to pay by instalments the total cost of the damage to the car, plus the cost of recovering it, plus the cost of the prosecution, plus interest on the unpaid amount. When the first gaol sentence looms up relatives will often do anything to avoid it for the offender. To have the intra-social and intra-family pressure of a bond which relatives have to meet, if the young man does not, means that someone within the family group has to lose £3 a week from their wages for two or three years. This could operate as a much sharper deterrent than a short period in gaol, and would make the offender pay for what he has done, and stop him boasting around his own narrow world that gaol is easy, and that (as the phrase is) "I did it on my head".

J. G. McCLEMENS*

Unincorporated Non-Profit Associations: Their Property and their Liability, by Harold A. J. Ford, S.J.D. (Harvard), LL.M. (Melbourne), Reader in Law in the University of Melbourne. Oxford, Oxford University Press, 1959. xii and 145 pp. and Index. (£2/6/6 in Australia).

The unincorporated association has always been regarded as something of an orphan in English legal thinking and the difficulties of explaining its origin and legal qualities have been met by resort to the principles of co-ownership and the doctrines of agency. These explanations, as Dr. Ford points out, have neither been entirely successful nor logical, but they have become fairly well established in our jurisprudence.

At root the development of the law respecting the property of unincorporated associations and the rights of members along these lines is traceable to the theory that it would be an infringement of the Royal prerogative for an association or body of individuals not incorporated by Royal Charter to have any status as a juristic entity. With the wide legislative provisions which facilitate incorporation of associations of various kinds this policy is no longer relevant but its influence on the law remains. Moreover, neither that policy nor any present policy of the law can have any real bearing on the determination of the nature and extent of the rights of strangers who are harmed by the group activity; the extent to which there is any theory of liability for such activity is declared by the author to be the aim of the book.

The scope of the work is much wider than this stated aim would suggest. Part I is devoted to an examination of the effect of dispositions of property to or for the benefit of associations. The problems which have arisen in this field in Anglo-American experience are discussed in detail; they stem in the main from the conveyancing difficulties which the common law created and, although the theory of trust was availed of to mollify the common law, the rule against perpetuities often produced the consequence of invalidity and frustrated a testator's or grantor's intention.

Dr. Ford has attempted to show that the decisions and *dicta* open a path to the conclusion that every disposition to an association should be taken to operate as a trust for a purpose. This conclusion which provides the basis for

[13] At 125, quoting from (1939) 39 *Columbia Law Rev.* at 1187.

* The Hon. Mr. Justice McClemens, of the Supreme Court of New South Wales.