

THE LAW OF AGENCY by S. J. Stoljar [Sweet & Maxwell, London, 1961.
xliii + 341 pp. inc. index. £1-15-0.]

The law of agency has quite recently attracted considerable attention among textbook writers. New editions of Bowstead, Powell and Hanbury and a new book by Fridman have all appeared within the last two years. Dr. Stoljar's book is the fifth to be added to the list, but it is a book to which, within its field, none of the others offers any competition. Dr. Stoljar has not set out to expound but to re-examine: his book is not a work to which a busy practitioner will turn to solve a particular problem for him in a hurry, for it is a book to be read rather than consulted. It is above all a stimulating book, and like most books which come within this category it contains much with which a reviewer would disagree, but this is not to be counted a defect but rather a merit, for in attempting to disagree with Dr. Stoljar the reader will learn much more than by agreeing with most other writers on the subject.

Dr. Stoljar opens by stressing that whatever may be the colloquial use of the term "agent", the law of agency is concerned with "agents" only in so far as they can establish or attempt to establish contractual relations between a principal and a third party. One of the factors which has led to more confusion in the law of agency than any other has been, it is submitted, the attempt to make the law of agency cover a wider range of activity. Dr. Stoljar by confining the concept of agency to the establishment of contractual relations takes at the outset the first step towards clarification of the subject.

Again Dr. Stoljar clarifies the problem of the relations between the concepts of agency and service. The controversy as to whether agency was a species of service or *vice versa* has for too long bedevilled the law of agency, as has also the assumption that agency and service are mutually exclusive. Dr. Stoljar takes a second major step towards a rational exposition of the law of agency by his discussion of these problems.

Dr. Stoljar makes yet another valuable contribution to the rational treatment of agency by cutting through the haze of real, actual, constructive, implied ostensible, usual and apparent authority, and by stressing the actual-apparent distinction. In developing this distinction, however, Dr. Stoljar relies upon a further distinction which gave your reviewer considerable difficulty. This is the distinction between contracts made *inter praesentes* and those made *inter absentes*. The justification for this distinction seems to be that in the contract *inter praesentes* there is no possibility of a lack of agreement between the parties:

In this case the law does not intervene in the *formation* of the contract, but rather intervenes to enforce the agreement.

In the case of a contract *inter absentes*, however, according to Dr. Stoljar, there is the possibility of a lack of real agreement:

In the former, the agreement is entirely a product of the parties; in the latter, the agreement is "declared" by the law. For in the former (*inter praesentes*) situation, agreement is a factual statement as the parties must themselves emerge from their negotiations with an actual or virtual handshake; while in the latter (*inter absentes*) situation, contractual formation is the result of legal rules.

With respect, this is rather difficult to follow. The ordinary law relating to mistake in contract furnishes many examples of persons who have been negotiating *inter praesentes* and yet emerge with nothing that can realistically be called real agreement, but yet in which the courts hold the parties to the contract on the ground that the mistake is not operative. Surely in these cases the law does in fact intervene in the formation of the agreement whether the parties are *inter praesentes* or not. With respect, however, this particular distinction does not seem really to form a vital part of Dr. Stoljar's analysis. Taken as a whole Dr. Stoljar's analysis of the problems of the agent's apparent authority effects a major clarification of this particularly confused part of the law.

Dr. Stoljar's treatment of agency of necessity does not seem to attain the extraordinarily high level of analysis achieved in other parts of the book. In the first place Dr. Stoljar does not, in our submission, place sufficient emphasis upon the distinction between the case where the "agent of necessity" acts himself and then claims reimbursement from his "principal" and the case where the "agent" acts as a true agent and purports to enter into a contract with a third party on behalf of his principal. Dr. Stoljar merely remarks that "it is always assumed that in a case of true necessity, an agent . . . would also have the right to pledge P's credit with T." It may be so assumed, but is this assumption justified? It may be noted that it is considerably easier to claim that the two cases can be treated together if the concept of agency is not limited, in the way in which Dr. Stoljar suggests, to the situation in which the agent contracts on behalf of his principal. In any case the fact that the alleged agent might have, under the circumstances, authority to pledge the alleged principal's credit does not solve the question of his legal position if he does not in fact pledge the principal's credit but rather performs himself some act for his principal. Agency, as Dr. Stoljar points out, involves a tripartite relationship, but this very fact is missing in many of the cases which are cited as cases on agency of necessity. In many such cases there are merely two parties involved: the person on whose behalf work is done and the person who does the work. Such cases cannot properly be regarded as cases of agency at all.

It would be possible to continue for some length attempting to make minor points in relation to Dr. Stoljar's treatment of this or that aspect of the law of agency, but to do so would be to create an entirely false impression of the book. Whether one can agree or not with every point that Dr. Stoljar makes the fact remains that this is an extraordinarily good book on the law of agency. It is learned, it is controversial, it is stimulating, and one feature which your reviewer discovered to his cost is that Dr. Stoljar is a very hard man to throw. The points when your reviewer thought that Dr. Stoljar had committed some glaring fallacy were the very points at which on re-reading the authorities he found Dr. Stoljar's argument remarkably secure.

This is not a book to which, as mentioned earlier, the practitioner will turn to in order to find the solution for a given problem, but it is a book which any practitioner who wishes to make sense of the cases cited in his more familiar manuals should read and ponder.

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