

THE LAW OF AGENCY, ITS HISTORY AND PRESENT PRINCIPLES, by S. J. Stoljar, LL.B., LL.M., Ph.D., of Gray's Inn, Barrister-at-Law; Senior Fellow in the Australian National University, Canberra. London: Sweet & Maxwell Limited, 1961, pp. i-xliii, 1-341. **THE LAW OF QUASI-CONTRACT**, by S. J. Stoljar, LL.B., LL.M., Ph.D., of Gray's Inn, Barrister-at-Law; Professorial Fellow in Law in the Australian National University, Canberra. The Law Book Company of Australasia Pty Ltd., 1964, pp. i-xxviii, 1-223.

Dr. Stoljar has been known for some years to students of the common law as the author of many important articles on aspects of the law of contract and of related fields. Those who have followed his writings know that he has evolved and perfected an approach to legal problems which can best be characterised as "historical and analytical". The basis of Stoljar's approach appears to be the conviction that legal principles, at least those of the common law, can best be understood, applied and developed to greater perfection if their historical background as well as the rational justification for their continued existence are thoroughly understood. Indeed, without such ground-work, the question "What is the law?" whether asked by the judge, the practitioner or the academic lawyer, cannot be answered, except, perhaps, in the simplest of cases. Stoljar comments on his own method as follows:—

"My own task I conceived to be that of a searching re-examination: to pay renewed attention to the historical context of the basic rules and to their logical explanation; thus to show not only what the rules are, but why they are what they are; and thus, at least, to promote some clarification of our central principles and problems." (Agency, p. ix.)

Having perfected his method, the author is now turning to studies of a more comprehensive kind, tackling in monographic form some of the fields which traditionally have had a close association with the law of contract. Both the treatise on agency and the treatise on quasi-contract draw on a wider range of material than is usual for books of this kind. The historical evolution of existing principles is rightly one of the chief concerns of the author. Not content with a bland statement of the legal-historical evidence, he interweaves references to the evolution of commercial institutions and customs, without some knowledge of which the legal principles which concern and control them often remain unintelligible. Examples are: the change-over from sailing ships to steamers as it affected the law of maritime salvage. (Quasi-contract, pp. 171f), the development of postal services, as it affected the law on conclusion of contracts (Agency, p. 33), the introduction of paper currency and its effect on the law of undisclosed agency (Agency, pp. 205f). The task of relating social conditions in past ages to legal doctrine does, of course, require a degree of historical insight not normally possessed by lawyers, and Stoljar must be commended for relying on this material only in cases where the historical evidence seems unambiguous. A further positive feature of Stoljar's work is his thorough grasp of American legal thought. It is obvious from many references that the book on

agency owes a good deal to American writers, notably to Seavey, whilst the treatise on quasi-contract is strongly and avowedly (*cf.* p. v) influenced by Woodward's well-known book on restitution. That reference to American material can enrich and improve the rational clarity of English law is demonstrated by Stoljar's treatment of *Watteau v. Fenwick* (Agency, pp. 55ff.). In that case, an "undisclosed principal" was held liable for the purchase price of cigars bought by the manager of his hotel against the principal's directions, but within the usual course of business in such an establishment. The result was sensible, but Wills J. failed to explain how the principal could be held liable when he had not in any sense "held out" the agent as his manager. As Stoljar points out, an earlier American case, *Hubbard v. Tenbrook* (1889) 124 Pa. 291, had come to the same result and provided such a rationale very clearly:

"To allow an undisclosed principal to absorb the profits, and then when the pinch comes, to escape responsibility on the ground of orders to his agent not to buy on credit, would be a plain fraud on the public." (Agency, pp. 58f.)

References to civil law systems as well as to the Roman law, are sparingly used; they are obviously not intended to provide anything but the most fleeting basis for comparison. This reviewer does not suggest for a moment that the author's object, *viz.*, to elucidate the common law, could have been furthered by a more detailed examination of the modern European codes; it is, however, regretted that the author felt it necessary to accompany his uninformative statements with such uncomplimentary comments (Quasi-contract, pp. 15f).

Not content with a mere statement of legal rules, Stoljar provides "theories" for the explanation of some of the more intricate aspects of agency and quasi-contract. Although this tends to lend unity and coherence to Stoljar's treatment of the subject matter, it is, at the same time, a risky procedure since it makes the whole message embodied in the treatises dependant on these theories, at least in appearance. *Debile fundamentum fallit opus*: Stoljar himself quotes this maxim of Noy's (Agency, p. 204). By giving these "theories" such a prominent place, Stoljar holds out a strong temptation to his reviewers to quarrel with him over them.

The most difficult aspects of the law of agency are probably the problem of apparent or ostensible authority and the rules on undisclosed agency. A factor which makes it rather difficult to understand Stoljar's treatment of apparent authority is his wholesale condemnation of the view that an appearance of authority created by the principal, leads to "agency by estoppel" on the part of the agent. This view may suffer from some flaws, but is its core unsound? Stoljar himself gives the example of a principal who openly instructs his agent to sell Blackacre and then secretly countermands these instructions. Surely Stoljar is stating the core of the "agency by estoppel" theory when he comments: "Here A has no real authority to sell Blackacre but he has an apparent authority; an authority the appearance of which is caused by P himself, i.e., by his active manifestations to T." (Agency, p. 21.) This "hard core" of apparent authority taken away, it becomes difficult to know exactly how much

Stoljar allows to remain. The notion of "usual" authority acquires a greater significance:

"... the significance of 'usual', etc., only emerges within the context of apparent authority. For, strictly speaking, a person cannot *have* a usual authority, he can only *appear* to have one." (Agency, p. 43.)

It is true that the attempt to turn "usual authority" into a technical phrase has produced many strange definitions of "usual". Why not abandon such attempts? Is not usual authority simply an authority the scope of which is defined by commercial custom? It is not easy to see why it should not be possible to invest an agent with real authority of this type. Stoljar suggests that the rules of apparent authority are "rules to guide T's quick or *spontaneous* inferences as to A's authority, when T cannot immediately ascertain the whole truth about A" (Agency, p. 25). With this point again, we should not agree too readily. Whether the third party comes to quick and spontaneous, or to slow and considered mistaken conclusions about the agent's authority, doesn't seem to this reviewer to matter in the slightest. We might also want to quarrel with the final statement:

"... the chief object of the rules about apparent authority is to provide the legal machinery for buying and selling on a large scale, where the true contracting parties are not or cannot be face to face." (Agency, p. 25.)

Is not the chief object of these rules to deprive the principal of the defence that the agent has acted without authority when the third party has been misled by representations for which the principal can, in some way, be regarded as responsible?

The contractual bond created by the law between the undisclosed principal and the third party is difficult to explain in terms of ordinary contract law. Of the theories advanced to explain this peculiarity of the law of agency, Stoljar reviews the "trust" theory advanced by Ames, the "benefit theory" advanced by Huffcut and finally Goodhart and Hamson's well-known suggestion that the doctrine of undisclosed agency is best considered as a primitive and highly restricted form of assignment (Agency, pp. 228ff). This last theory Stoljar adopts in a slightly modified form, suggesting that the agent does not assign his rights and liabilities to the principal, but rather that a transmission of rights by operation of law takes place. The difficulty with the assignment idea, as well as with Stoljar's view, is that an agent contracting, whether avowedly or not, for a principal, is not himself party to the contract and therefore at no stage invested with the rights and liabilities under the contract. There is, in other words, nothing to be assigned or transmitted. The rights and liabilities accrue in P's person without having previously been in anyone else. Stoljar argues that "we cannot say that there is a direct contract between P and T." (Agency, p. 232), but fails to explain why we are labouring under this supposed handicap. It may be that there is something fictitious about such a finding, but is it not a good deal less fictitious than the theories advanced by the author himself?

In the treatise on quasi-contract Stoljar informs us that quasi-contract is "a genuine subject with independent juristic content."

(Quasi-contract, p. v.) To make good this claim, he proceeds to demonstrate that a "proprietary theory" is most clearly suited to serve as the basis of quasi-contractual recovery. Although this is strictly at variance with the view of the "traditionalists" who regarded "implied contract" as the true basis of such actions, Stoljar appears to favour their determined search for basic principle over the nebulous "modernist" reference to fairness and equity. The old controversy concerning the basis of quasi-contract is concisely traced by the author (Quasi-contract, p. 2, n. 4). Whether Stoljar's suggested basis of quasi-contract is analytically satisfactory we shall not examine; there is much to be said for his approach. The criticism offered here is of a very different order. Whether Stoljar's proprietary theory is elegant or functionally satisfactory does not seem to be the principal question. As most practitioners would probably and rightly tell us, the question is "What is the law?", and in this respect Stoljar cannot be spared the criticism that he approaches the historical evidence with a proprietary prejudice: "A proprietary approach also suggests the right questions as we begin to look for quasi-contract in the history of English law." (Quasi-contract, p. 9.) That the action of *assumpsit* generated the bulk of the modern law of quasi-contract is undisputed. Are the "traditionalists", as Stoljar calls them, not right in their insistence that *assumpsit* actions were based on promises, real or fictitious? There seems to be good reason for regarding the early cases of quasi-contractual recovery in *assumpsit* as more closely associated with contract than Stoljar appears to suggest. He quotes *Babington v. Lambert* for the proposition that "the implied *assumpsit* was held non-traversable" (Quasi-contract, p. 11). It is only fair to point out that this interpretation accords with the interpretation advanced by the leading treatise on the subject (Jackson, *The history of quasi-contract in English law* (1936), p. 94). But is it tenable? According to Moore's Report the plaintiff's declaration stated that the defendant had received money for the plaintiff from various persons and that the defendant had made a promise to pay this over on a specified day. The plaintiff recovered judgment and on a motion to arrest the judgment, the defendant argued that the declaration was defective, since it failed to name the persons from whom the defendant had obtained the various sums of money. This argument was rejected by the Court for the following reason:—"But the whole Court was against him (the defendant) since it is an executed consideration and thus not traversable." The significance of this ruling seems to be quite contrary to Stoljar's interpretation. So far from regarding the defendant's subsequent promise as non-traversable, the Court put all its reliance on that promise so that, as long as it was proved, the plaintiff need not bother to describe in detail or prove the facts originally leading to the defendant's liability. All indications point to the fact that the early 17th century cases in which quasi-contractual recovery was allowed in *assumpsit* were, in a sense, genuine contracts cases because the actions were based on actual promises to pay. In fact it is not before 1677 that we find the first clearcut enunciation of the proposition that *indebitatus assumpsit* can lie despite the absence of privity [*Arris v. Stukely* (1677) 2 Mod. 260]. When the law began to dispense with the need to prove such promises, when "the law created privity" or created the promise, nothing was a more natural

description of the legal position than the proposition that the plaintiff's recovery was based on a fictitious promise to pay. As long as this proposition is not disproved, that part of quasi-contract which remained under *assumpsit* is firmly tied to the notion of promise and thus has a contractual basis. Stoljar might usefully have presented more argument to the effect that *indebitatus assumpsit*, though contractual in appearance, is yet proprietary in substance. Unless this is done, the possibility remains that Stoljar's proprietary theory is at variance with the existing law.

Stoljar promises us a re-construction of the subject as a whole. The task which the author thus set himself is by no means easy. The difficulty lies in the fact that the traditional exposition of the subject, which follows closely the various counts which were used prior to the abolition of the forms of action, has the attraction of clarity and simplicity. The section on quasi-contract in *Cheshire and Fifoot on Contracts* is one of the most lucid parts of that popular and successful treatise. Dr. Stoljar's scheme is perhaps somewhat less unorthodox than his preface seems to indicate. "Payment under mistake" (Chapter 2), "Reward for unsolicited services" (Chapter 7); as well as most of the material in Chapter 8 are organised along more or less traditional lines. Dr. Stoljar might have been more radical by introducing a new category: Money paid which was not owing. Whether money was paid under mistake, compulsion or under a defective contract, the substantive reason for its return is not so much either the mistake or the compulsion, but rather the fact that it was paid although it was not owing.

The criticisms offered here do not detract from the real merit of these books. They give expositions of agency and quasi-contract without ignoring either the historical, the social or the analytical perspective, and in achieving this, the author has rendered us a very valuable service.

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THE CONSTITUTIONS OF THE AUSTRALIAN STATES, by R. D. Lumb, (1963. University of Queensland Press).

This book would be greatly improved by a more unpretentious title. In fact it is a historical study of the constitution *statutes* of the various States together with some study of the Governor's executive power and the limitations on the legislative powers of the State Parliaments.

A book which does not deal with (a) the judiciary and judicial power at all; (b) the Conventions of the State Constitutions which differ widely from their English ancestry; (c) Cabinet except in the barest outline; or (d) the effect of the Federal constitution and Federal powers on the State Constitutions can hardly be described as "The Constitutions of the Australian States".

In the part of the Constitutions that is dealt with the writer is usually content to state the powers as they appear on the Statute book and not as they work in practice. To give but two examples: (1) the power of the Legislative Council to refuse supply and bring about a dissolution at a time inconvenient to the government in the Lower

House is much more important than the deadlock provisions; (2) the various Electoral Acts between 1867 and the 1930s have caused a very considerable shift of power which is seen in its most extreme form in this State but which in its working is common to all States so that although in their main features the constitutions have not really altered from the original Statutes the working of them is radically different from anything envisaged by the founding fathers.

One minor correction as to this State on p. 69. Although Sir Thomas Playford is often cartooned as though he were the whole Cabinet he is not in fact the Chief Secretary.

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TOWARDS WAGE JUSTICE BY JUDICIAL REGULATION: AN APPRECIATION OF AUSTRALIA'S EXPERIENCE UNDER COMPULSORY ARBITRATION, by J. N. Timbs, *Institut de Recherches Economiques, Sociales et Politiques* (Louvain, 1963).

Compulsory arbitration, like Australian Rules football, has been a long while with us and has in the course of the years become established as part of our Australian way of life. Also like Australian Rules football, it is something which other countries of the world have not chosen to copy, if one excepts New Zealand, where compulsory arbitration is as firmly established as here, and Japan and some of the new States of Asia where it operates only to a limited extent.

As an almost unique Australian institution, it has been in the course of time analysed by many writers from a sociological, political, economic and legal point of view. A great deal has been published from the economic point of view in the form of articles for journals, but the importance of the Reverend Father Timbs' book is that it is the most comprehensive purely economic study which has been done. It is his doctoral thesis written during his studies at the University of Louvain from 1954 to 1957. Unfortunately due to his sudden death after his return to Australia his decorate was never conferred on him. The book now published is therefore an account of wage regulation in Australia which ends in 1957. This is unfortunate when one considers the developments which have taken place in the relationship between wages and national productivity since that date; the four basic wage decisions which have been given, in particular the important 1961 decision, and the two reference bench decisions of 1959 and 1963 concerning margins.

The book is divided into three sections. In an interesting first section the author searches for moral principles of wage regulation and concludes that there are the following four basic principles:

1. *The Principle of Needs*, that is on the basis of needs the living standard of employees along with that of all members of society should rise as improvement in productivity makes higher real wages possible.
2. *The Principle of Necessary Performance* which is that real wages should rise on the ground that the co-operation of all wage earners is equally as necessary as the abstinence of proprietors in making capital available for continued activity.

3. *The Principle of Differential Performance* which is that real wages should rise not by a flat equality but by a proportionate equality corresponding to the differential performance of individual wage earners or wage earning groups. In the author's view a title to a particular wage can reside in an individual worker on account of a differential element in his performance and this title is confirmed because of its consistency with economic common good which requires differentials in order to establish full economic co-operation by workers.

4. *The Principle of Equal Pay*, that is equal pay for work of equal market value.

Armed with these four principles the author in the second section proceeds to an examination of the fixation of wages in Australia; firstly the basic wage and then the secondary wage ("margins") are considered.

The Harvester basic wage of Mr. Justice Higgins as a wage necessary to give to all workers irrespective of skill a minimum standard of living adjusted to movements in cost of living satisfies in part the author's principle of needs. But only in part, for it provided merely for the maintenance of the Harvester standard and not for any increase in that standard. Looking back, it is surprising that it remained a cornerstone of the Australian system for so long. From the economic depression of the 1930's gradually there emerged in its place the present concept of the basic wage as the highest amount that can be paid irrespective of skill, having regard to the economic capacity of the Commonwealth. This concept is in line with both the author's principles of needs and of necessary performance. One of the problems of the basic wage has been the extent to which the wage should be adjusted in accordance with changes in the cost of living. For many years such adjustment took place automatically. In 1953 this system was abandoned by the Commission. In 1961 there was in part a return to the old system. Cost of living adjustments were not to be automatic but they would be made yearly unless there was good reason to the contrary. The author's contribution on this subject is of value and one feels that had he lived he would have approved the 1961 judgment.

On top of the basic wage there is built the marginal wage structure. Here, as the author points out, the underlying principle is comparative wage justice, the fixation of marginal rates for a particular employment classification on the basis of comparison of work done and wages paid to other classifications in the same industry and in other industries. As such this principle is in accord with the author's third and fourth principles. The most interesting contribution in this section is the comparison of male and female hourly wage rates between Australia and other countries. This showed that the female rate was proportionately lower in Australia than in other countries up to the second world war. This reflected the needs basic wage approach in this country which fixed a female basic wage at 54 per cent. of the male basic wage having in mind that the normal female was not a bread winner for a family. But the present fixation of 75 per cent. of the male basic wage brought about by higher rates paid to women during war time has resulted in the female rate now being proportionately higher than in the other countries quoted. The author also draws attention to the narrowing of the gap over the last fifty years

between the skilled and the unskilled workers which has been a characteristic of U.S.A., England and France. In Australia this has not been so, the tendency of the arbitral authorities has been to preserve the 1907 relationship.

In the final section, the author deals with the effect of wage regulation on the industrial structure. His main conclusions are that wage regulation has encouraged tariff protection in Australia and that in the absence of price control, it has not played any decisive role in altering the distribution of the share of production between labour and capital.

The book is a very worthwhile contribution; its particular value is that it is a scholarly detailed economic study liberally studded with footnotes and references; it is a pity that it contains no index.

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STUDIES IN CRIMINAL LAW, by *Norval Morris and Colin Howard*. Oxford: 1964. Oxford University Press, pp. i-xxxiv, 1-270.

For a variety of reasons lecturers at Australian law schools have not made many significant contributions to legal literature. Most publications have been teaching tools—with “case books” becoming increasingly fashionable. Unfortunately this has meant that Australian publications neither reflect nor record the considerable amount of original and perceptive legal reasoning which emanates from the bench, the professions and the university in Australia. This book is an exception to the general rule. An introduction by Sir John Barry, which merits closer consideration than one normally accords to introductions, prepares the reader for this collection of seven essays. “The original aim” (was) “to acquaint a wider public than hitherto with a number of original and valuable contributions to the criminal law by the courts of Australia.” This formal statement scarcely does justice to the authors’ own elaboration of those contributions. Although the inspiration is Australian the book will be significant wherever there is interest in the English criminal law.

In the first essay the authors free themselves from the shackles of legal authority and search for an ideal definition of murder. Their basic concern is to reject the doctrine of constructive murder and to limit murder to “unlawful homicide performed intentionally or recklessly”. The authors’ discussion of intentional and reckless killing indicates that they would confine murder to cases where the accused foresaw that death was certain or likely to result from his actions. We can accept this general definition and the justification for it. But some of the other issues canvassed in this essay are controversial. The authors maintain that where a court has to determine whether A caused the death of B the judge should first determine whether A’s action was a *sine qua non* of B’s death and then leave the matter to the jury with a direction that A will be responsible for B’s death if his action “substantially contributed” to the death.

Neither a philosopher nor a layman will be satisfied with this suggestion. The philosopher will object that the concepts of “*sine qua*

non" and "substantial contribution" are imprecise. The layman will take the view that his task is not a problem of scientific reconstruction. The jury will have a medical explanation of how the death occurred. Their problem is to decide whether the death should be attributed to the accused. Left to themselves, probably they would answer this question in terms of foresight of the accused. Morris and Howard contemplate a situation where the accused foresaw that death was likely to result from his actions but it cannot be said that his actions caused the death. These are cases where the death occurs in a way which he did not foresee (e.g. because of the intervention of some third person). In such a case it is unlikely that a jury would hold the accused responsible for the death. If we were forced to offer an alternative to that proposed by Morris and Howard we would suggest that an accused should be responsible for the death if he foresaw not merely that death was likely to result from his actions but also the intervening events which in fact occurred between his action and the death. Admittedly there are problems of degree—well illustrated in the civil cases of *Hughes v. Lord Advocate* (1963 A.C. 837 and *Doughty v. Turner Manufacturing Co. Ltd.* (1964) 1 All E.R. 98 and by trying to apply this test to the conundrum posed by Morris and Howard (p. 34). The reason why the discussion of causation is so critical is not because of its application in murder cases where the concept of *mens rea* would be a sufficient check to most unmeritorious prosecutions but because Morris and Howard contemplate the application of the same test in other cases of unlawful homicide where the other rules determining liability are not so precise. Their acceptance of the decision in *Stephenson v. State* (1933) 179 N.E. 633 without criticism is disturbing.

Insanity and automatism are discussed in the second essay where the authors canvass the extensive Australian authority. They acknowledge their debt to the dissenting judgment of Monahan J. in the Victorian Supreme Court decision in the case of *Mizzi*. It is to be hoped that His Honour's views on the burden of proof of insanity will ultimately be accepted although the High Court dealing with the appeal in *Mizzi* (1960) 34 A.L.J.R. 307 showed no inclination to accept them. The chapter on provocation contains a disappointingly brief reference to the statutory provisions in N.S.W. and Tasmania but an extensive discussion of the common law rules and the code provisions in W.A. and Queensland. Since the book was published the Privy Council has decided *Parker v. R.* (1964) 2 All E.R. 641 which has important implications for the common law rules as well as the N.S.W. statutory provision.

In the fourth chapter Morris and Howard argue in favour of a "new manslaughter"—comprising cases where the jury is satisfied that the accused was acting in self-defence but that he exceeded the limits of self-defence. Their argument is likely to meet a cool reception in Sydney where the newspapers and radio stations have given extensive publicity to a number of offences committed by persons "prowling" on private property. Already one innocent person, suspected of being a prowler, has been shot (albeit not fatally). The law should stress that the intentional killing of a human being is forbidden except in most exceptional circumstances. Of course Mackay *was* convicted of manslaughter and Morris and Howard do not argue that he should

be free of all criminal liability. But it is unfortunate that Mackay was released after a mere three months. If Mackay had shot an innocent person whom he wrongly but reasonably believed to be a chicken thief, the newspapers may not have clamoured for his release—but there would have been no valid reason to inflict a different punishment.

The chapters on Penal Sanctions and Human Rights and Strict Responsibility are unexceptional. Although the authorities seem to support the view espoused by Morris and Howard (at p. 221) that the accused carries the burden of proving a reasonable mistake of fact as a defence the reviewer unrepentantly maintains his previous view that if this is the law it should not be.¹

The last chapter is concerned with the vexed question of *res judicata* in the criminal law which recently received the attention of the House of Lords in *Connelly v. D.P.P.* (1964) 2 All E.R. 401. In that case Lord Morris emphasized that in criminal cases the issues are not isolated and it is consequently impossible in most cases to determine precisely what the jury decided. Granted that this is a significant objection, there is, nevertheless, a powerful sentiment that a prosecutor should not have the power to re-litigate issues which have been decided in favour of the accused in a previous trial. The solution suggested in *Connelly*—that the second prosecution may be struck out if it is an abuse of process—involves difficulties which merit more consideration than can be attempted here. The authors are to be congratulated for their perceptive analysis of a problem to which the courts have not found a satisfactory answer.

It is a compliment rather than a criticism to write that this book will provoke discussion. Certainly the scholarship of the authors will command respect even where their conclusions do not command agreement.

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1. See D. J. MacDougall, "The Burden of Proof in Bigamy" (1958), 21 *Modern Law Review* 510.