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Dicta Editorial Board

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AMERICAN LAW INSTITUTE

For the past six months the American Law Institute has prepared monthly short articles concerning the work and accomplishments of the Institute. We publish below several articles and will be glad to have our readers comment on the value of the articles and their interest in publication of the same.

PROBLEMS OF RESTATEMENT

The Privilege of Political Discussion

Extended discussion was aroused at the recent Torts conference of the American Law Institute over the privilege of political discussion of public officers and candidates for office. There is a distinct split of authority, both sides of which are championed by reputable courts, as to whether the principle of fair comment upon a matter of public interest extends to and affords a protection against liability for defamation for the false allegations of facts which besmirch the character of such persons. The cases are in agreement that, if the facts are truly stated, the expression of a disparaging opinion, if it is an honest one, is conditionally privileged, so long as it pertains to the public conduct of an officer or to the qualifications of such a person or a candidate for such an office. An illustration will show the application of the rule: A published an article in a newspaper, criticizing the method of construction of certain sewers in X, declaring that there were many indications of incompetence in the performance of the work. B, the public official in charge of the construction, sues A for libel. A's remarks are privileged if they represent his honest judgment. If this condition exists, the fact that the sewers were well and competently constructed, does not defeat the immunity.

The desirability of such protection in a democracy is obvious. Public servants are accountable to the public. Even the most conscientious and scrupulously honest public officer must expect criticism. Moreover, he must expect his public life to be appraised by persons whose judgment does not con-

form to sound critical standards. Therefore, he knows or should know that he will be misunderstood and subjected to disparagement which is undeserved. Those who contend for political preferment cannot be thin-skinned. The most that can be expected is that opinion not be misrepresented, that is, that it be a sincere expression of the critic's actual view.

Many courts, however, distinguish sharply between the expression of opinion upon facts truly stated and the misrepresentation of facts, however honestly made, the former being privileged, the latter not. This view was upheld by Judge Taft in the Circuit Court of Appeals on the grounds that "the danger that honorable and worthy men may be driven from politics and public life by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof." On the other hand, the opposite view is championed by the Supreme Court of Kansas and has been followed in a number of western states. A recent Kansas case, Majors vs. Seaton, 46 P. 34 (1935), reiterates the view of the court expressed in Coleman vs. MacLennan, 78 Kan. 711 (1908).

Observers insist that there is no discernible difference between the class of persons who in those states engage in public life and those who receive the protection of the stricter rule. The preliminary draft of the Restatement, now in preparation for submission to the Council, sets forth the Kansas rule although the members of the Torts group are divided in their views in the matter.

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LAW INSTITUTE RESTATEMENT MAKING RAPID PROGRESS

Whether or not the bite of a watchdog off duty is privileged to the same degree as the bite of a watchdog on duty was one of the questions which enlivened the deliberations of

the midwinter meeting of the Council of the American Law Institute held in the Bar Association Building, New York City, the last of January and the first two days of February. The question arose over a section in the preliminary draft of the chapter on Absolute Liability of the Restatement of Torts. As presented by the Reporter and his advisers, the section concerning watchdogs stated that a possessor of land or chattels is privileged to protect his property by keeping therein a watchdog under the same conditions as those which fix his privilege to use a mechanical protective device. A comment to this rule asserted that if the circumstances are such as to give the possessor of land the privilege to employ a watchdog as protector, the dog, even during the time when it is not busy at its work on the premises, if kept with the care which its dangerous nature requires, is not kept at the risk of absolute liability, such as attaches to the possession of abnormally dangerous domestic animals. The phrase, "an abnormally dangerous domestic animal" means an animal whose behavior is not common to its class, such as a Great Dane in the habit of leaping in play on children or a horse playfully putting its forefeet on people's shoulders. It does not include stallions, bulls or other stud animals. Ferocity, in other than a watchdog, would stamp the dog as abnormally dangerous. The guiding consideration in fixing the privilege is the social purpose served by the animal.

Shall the owner of livestock be compelled to fence them *in*, or the owner of premises upon which they may roam be compelled to fence them *out*, was another question debated. The draft of the Reporter, Prof. Francis H. Bohlen of the University of Pennsylvania Law School, stated the English common law rule to the effect that a possessor of livestock which stray upon the land of another is liable for their intrusion and any consequent harm, although the possessor used every care to prevent the straying. Although a Special Note called attention to the fact that in many states the common law rule had been rejected, some members of the Council felt this should be more particularly emphasized.

Work in progress, representing a greater advance in the task of Restatement than has previously been achieved in any similar period, was evidenced by new or revised drafts in Trusts, Torts, Property, Quasi-Contracts, Sales of Land, and the Administration of Criminal Law. A proposed final draft in Trusts will be submitted to the annual meeting of the Institute in May, and subject to such change as may be directed by the membership and Council, the official draft will be issued in the fall of 1935. A revision of the model statute on Double Jeopardy was submitted to the Council and will also be brought before the annual meeting in May. The basic principle followed in the text of this draft is that an acquittal or conviction—not jeopardy of conviction or punishment—is a bar to a second prosecution for the same offense.

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HOW THE COURTS USE THE AMERICAN LAW INSTITUTE'S RESTATEMENT

A new and greatly enlarged edition of "The Restatement in the Courts" has just been published by the American Law Institute. It is sent to all purchasers of the Restatement of Conflict of Laws. About three-fourths of the 354-page book is given over to a series of concise citation paragraphs designed to show just how the courts have used the several subjects of the Restatement. Of the 819 citations given, the subject of Contracts accounts for the largest fraction, with Conflict of Laws and Agency in second and third place. While Contracts would be expected to lead, having been available in official form since 1932, it is interesting to note that Conflict of Laws, existing only in tentative form until last February, has been cited more frequently than Agency, of which the official draft was issued in 1933. There are 369 Contracts paragraphs, 141 Conflict of Laws, 133 Agency, 92 Torts, 53 Trusts, 7 Property.

The distribution of the citations by states shows that the courts of every state, as well as the Federal and United States Supreme Court, have referred to the Restatement. New York, Pennsylvania, Kansas, Wisconsin, Mississippi and Maryland, in the order named, furnished the greatest number of paragraphs.

In view of the fact that the subjects of Contracts and Agency are the only parts of the Restatement which have been available in definitive form until a few months past, this widespread representation well attests the Restatement's influence. With the publication of the first two volumes of Torts last fall, and the Restatement of Conflict of Laws last February, a considerable increase in citations seems likely, especially by the courts which have felt reluctance to cite tentative drafts.

The citation paragraphs have been prepared for the practical use of the lawyer. In a compressed, headnote style they give the pertinent factual circumstances and the holding of the court, together with the sections of the Restatement cited.

For the convenience of those who have used tentative drafts of the subjects of Agency, Conflict of Laws, Contracts and Torts, parallel tables of old and new section numbers, making possible the ready conversion of tentative draft sections into official draft sections, are included in the book.

Another useful feature of the book, which may save a good deal of page thumbing, consists of a glossary of words and phrases used in the Restatement. The glossary covers Agency, Conflict of Laws, Contracts, Property, Trusts and Torts.

HOW NOT TO DO IT

Colonel Van Cise dug up the following clause in a will and suggests that it ought to go down in history as an example of what not to do:

"I hereby revoke any and all other wills, codicils or testamentary dispositions heretofore at any time made by me insofar as the same may be in conflict or inconsistent herewith."

UNLAWFUL PRACTICE OF LAW

A bill (S. 2944) was introduced in the Senate of the United States May 13, 1935, to prevent and make unlawful the practice of law before government departments, bureaus, commissions, and their agencies by those other than duly licensed attorneys-at-law.