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# Book Reviews

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# BOOK REVIEWS

A RATIONALE OF CRIMINAL NEGLIGENCE. By *Roy Moreland.* University of Kentucky Press, University of Kentucky, Lexington, Ky., Publishers. 1944, pp. viii, 175.

Professor Moreland has thoroughly explored and clarified a confused category of the law. The subject is one that has been extremely troublesome to bench and bar. The law is still in transition. The author by emphasis on rationalization and explanation by means of hypothetical cases makes a commendable contribution.

The subject is first fully developed from an historical standpoint. This lays a good foundation and furnishes premises by which future trends may be predicted.

In considering the standard of care required, full attention is given to the problem of tort law. The author makes a strong case for the objective standard in applying the requirement of reasonable care. The chapters on the importance of the "Circumstances of the Case" introduce the subjective element in a fresh approach.

The discussion concerning the legal duty arising out of the act of taking charge is especially interesting. This is the topic which has intrigued Deans Ames and Pound. Apparently it is an attempt in modern law to reintroduce moral obligation into the previously amoral legal concept of "duty to act." The recent cases are considered and the author's method of rationaiization and explanation is extremely helpful.

The book presents practical application as well as theoretical discussion. In an appendix, recommended instructions to juries are given. It is safe to say that careful effort has been expended in formulating these instructions. They deserve the attention and consideration of the bench.

The volume is attractively bound and the print easy to read. This book is recommended to all those engaged in the teaching, study, judicial administration, and practice of the criminal law. The bench and bar are agreed that the criminal law today is in crying need of re-examination. This book makes a worthy contribution in that direction.

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RESTATEMENT OF THE LAW OF JUDGMENTS. By the American Law Institute. American Law Institute Publishers, St. Paul, Minn. 1942. $6.00. Pp. iii-688.

This volume on judgments, the seventeenth published by the American Law Institute, was officially approved and published in 1942.

It begins with an introductory note and a statement of general principles. Thereafter, Chapter 2, on the validity of judgments, discusses the requisites of validity, effects of invalidity, personal judgments against individuals and corporations, and judgments in rem and quasi in rem.

Chapter 3 is entitled "Former Adjudication." It deals with its effect on the original cause of action, on counterclaims, etc. and indicates how determination shall be reached as to what is the "same cause of action," collateral estoppel, etc. The term "estoppel by judgment" is not used, since the former judgment operates as a bar to subsequent action.

Chapter 4 is concerned with the effects of judgments with reference to parties and privies. The final chapter develops principles of equitable relief.

The Restatement does not attempt, as does a book like Freeman, to deal with the whole of the law relating to judgments. Thus, it omits pleading and practice matters, foreign judgments (in the main) and the conflict of laws. It is not concerned with judgments in criminal actions nor with the technique of trial by which judgments are reached. Actually, this is one of its merits and the plan lends itself to clear statement, avoiding the confusion which results from considering at once a multitude of subjects.

The terms intrinsic and extrinsic fraud, so often used in connection with both probate and other proceedings, are regarded in the Restatement as being inadequate to a clear distinction between those cases where relief is given and those where it is not given.[1]

In Kentucky the doctrine of *res judicata* is extended to the final judgments, orders and decrees of quasi-judicial bodies such as the public service commission.[2] The Restatement, however, does not deal with administrative law.

Where the court has jurisdiction of the parties and of the subject matter, it is generally held and is so stated in the Restatement, that the judgment may be erroneous but it is not void. Several Kentucky cases seem to say that a judgment is void "if there is no law for it."[3]

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[1] RESTATEMENT, JUDGMENTS (1942) secs. 114b, 118b.

[2] Williamson v. Public Service Commission, 295 Ky. 376 (1943); Muncy v. Hughes, 265 Ky. 588 (1936); Cardinal Bus Lines v. Consolidated Coach Corp., 254 Ky. 586 (1934); Happy Coal Co. v. Harbarger, 251 Ky. 779 (1933).

[3] Wagner v. Peoples B. & L. Assn., 292 Ky. 691 (1943); Nevels v. Com., 290 Ky. 181 (1942); Jones v. Keen, 289 Ky. 779 (1942) (Judgment held void though court had jurisdiction of the parties

In Kentucky where a judgment requires an act to be done and the judgment is subsequently reversed, the actor who acts under the original judgment is protected. In *Bridges* v. *McAlister*[4] the original judgment of mandamus required defendant to fill up a certain drainage ditch which defendant proceeded to do. Damage arose therefrom. This judgment was subsequently reversed. It was held that defendant was not liable for the damage caused by his obedience to the mandamus. The Restatement applies to cases of relief from a judgment where money has been paid but it does not reach this problem.[5]

Kentucky goes further than the Restatement is willing to go in the matter of mutuality of estoppel, at least it does so in form, if not in substance. Thus, in *de Sharette* v. *St. Matthews Bank*,[6] the court said that if a judgment does not estop one of the parties it cannot be relied upon as an estoppel by the other. This case involved on the one side an infant who was held not to be bound. Hence, the other party was not bound. The Restatement declines to use the term "estoppel" in a situation like this. It says, in section 96a, that the desirability of equality between litigants with reference to the rules of *res judicata* is not, however, of pervading importance and disappears when there are countervailing reasons for requiring one to be bound and the other not.

An interesting illustration of a proceeding in rem is furnished in Kentucky. The City of Newport desired to refinance certain obligations. The Board of Aldermen accordingly had the matter put to popular vote. Thereafter, under the mandate of a statute, the city, in an ex parte proceeding, submitted the validity of the proposed bond issue to the circuit court and a decree of the court found that due procedure had been followed and that the proposed bond issue was valid. Thereafter a contract was made with a local bank for the sale to it of a large part of the proposed issue. A suit was brought by the city against the bank (presumably a friendly suit) to compel it to perform its contract. The bank raised the issue whether proper procedure had been followed. But this issue was held *res judicata*, though the prior proceeding was wholly ex parte. The statute providing for the action to test the validity of the procedure was in its nature one providing for a declaratory judgment.[7]

In section 70a a comparison is made of the doctrine of *stare decisis* with that of *res judicata*. Some reference might well have been made to the so-called doctrine of "the law of the case." Whatever the authors of this treatise think of this doctrine, it is commonly

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and of the subject matter); Phillips v. Green, 288 Ky. 202 (1941); Wolfe Co. v. Tolson, 283 Ky. 11 (1940); Helton v. Hobbs, 278 Ky. 621 (1939).

[4] 106 Ky. 791 (1899).

[5] RESTATEMENT, JUDGMENTS (1942) secs. 113h, 130c.

[6] 214 Ky. 400 (1926). See also Middleton v. Graves, 229 Ky. 640 (1929) and Creamery Co. v. Cronimus, 270 Ky. 496 (1937).

[7] City of Newport v. Newport National Bank, 148 Ky. 213 (1912).

invoked as a basis for immediate decision in Kentucky and is very like *res judicata*. This reviewer was unhappy also not to find some reference to the proposition adhered to in a number of cases and strongly advocated by certain writers, that the court pronouncing a judgment may limit it to prospective operation only.[8]

Casual mention of consent decreees or judgments as such is found.[9] Presumably the authors thought that the term "consent decree" has no specific significance or that the problem is rather one of procedural engineering. In Kentucky emphasis is often laid upon the fact that a given judgment or decree was one by consent.[10]

Even the most carefully edited treatises can scarcely avoid an occasional error. Thus, in the index, under Torts, a reference is made to section 70g, but there is no paragraph g in that section. Under *res judicata*, the reference to 70d is erroneous as is also the refernce to 78b under Party, State as a Party. This reviewer thinks that subhead c under Section 95 would be more nearly accurate if the words "all" and "not" were transposed and that likewise the words "solely" and "based" in the fifth line from the bottom of page 476 should be transposed.

If the section headings in the table of contents were accompanied by the lettered subheads in italics, it would add to the convenient use of the book more than enough to compensate for the added space required therefor.

The profession may well be congratulated that it now has access to a succinct statement of the general principles of the law of judgments. The commentaries found in the various sections expound the philosophy upon which these principles are built. They thus appear to be not arbitrary rules based upon successive decisions of widely diverse jurisdictions, but a convenient body of principles by which justice is achieved in individual cases and the time of the courts is conserved.

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[8] See Mellman v. Seeback, 297 Ky. 762 (1944); Ky. Road Oiling Co. v. Sharp, 257 Ky. 378 (1934); Ford v. Gregory, 49 Ky. (10 B. Mon.) 175 (1849); Rowland v. Craig, 2 Ky. (Sneed) 330 (1804); Note (1940) 28 Ky. L. J. 62. On *stare decisis* in Kentucky see Liberty Nat. Bank v. Loomis, 275 Ky. 445, 121 S. W. (2d) 947 (1938); Hubley v. Wolfe, 259 Ky. 574, 82 S. W. (2d) 830 (1935). On the prospective operation of judgments, see Payne v. City of Covington, 276 Ky. 380, 123 S. W. (2d) 1045 (1938) and cases there cited. See Mut. Life Ins. Co. of N. Y. v. Bryant, 296 Ky. 815 (1943). See also Montana Horse Products Co. v. Great Northern Ry. Co., 91 Mont. 194, 7 P. (2d) 919, 927 (1931) affd., 287 U. S. 358 (1932); 9 Mod. Legal Phil. XXXVIII (1917); Kocourek, *Renovation of the Common Law Through Stare Decisis* (1935) 29 Ill. L. Rev. 971.

[9] RESTATEMENT, JUDGMENTS (1942) sec. 86f.

[10] Banco-Kentucky v. National Bank, 281 Ky. 784 (1940); Ky. Utilities Co. v. Steenman, 283 Ky. 317 (1940); Harrel v. Yonts, 271 Ky. 783 (1938) ("Judgment entered by consent is not court's judgment except in the sense that the court allowed it to be recorded as such.").