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Stare Decisis vs. Generalizations

T. W. A.
West Virginia University College of Law

STARE DECISIS VS. GENERALIZATIONS.—The Association of American Law Schools meets every year in Chicago. This Association includes all law schools in the United States which conform to certain standards fixed by the association, and therefore the representatives include the most learned of the law teaching profession. Yet in the discussions at that association one is impressed with the difficulty of getting an expression of opinion from anyone on any legal subject which is not particularly his own. The teacher of Negotiable Instruments is quick to disclaim any and all knowledge on the subject of negligence. The student of Real Property carefully avoids airing his views on controverted questions of personal property. While the water tight compartment theory of the law was long ago abandoned, it seems to be reappearing in a new form. No one who thoroughly studies the decisions in any one branch of the law has time to familiarize himself with other subjects to such an extent that he feels at home in discussing them.

The same is true in the preparation of legal articles and notes. It is becoming constantly more difficult to express opinions or advance theories on legal topics without an overwhelming amount of research, much of which must be spent in the socially useless task of making sure that some court somewhere has not decided contra to the proposition advanced. For if such a case is omitted, however ill reasoned it may be, the unfortunate author must face the scorn of all his right thinking colleagues. These burdens are of course increasing with each dividend that the law book publishing companies pay to their stockholders. No one dares write an article without foot notes bristling with decisions. The idea that a casual, well reasoned comment might be helpful such as the early English judges were constantly making in cases involving that celebrated litigant, Anonymous, has disappeared.

If the most learned of the law teachers are timid about venturing out of fields on which they have spent years of study, what of the courts and lawyers who are forced to do so, in each case that arises. Bound by the old tradition that they must discover and cite the weight of authority, they are forced to turn to the short cuts offered by philanthropic law publishers. Long excerpts from Corpus Juris

are being constantly cited, and even when not cited, are determining the opinions of courts. The annotated cases are becoming increasingly used. There one finds, conveniently arranged, more cases on a given point than can be read in a week. But the writer of these notes is always obliging enough to quote excerpts from the opinion in a few lines, giving what he conceives to be the reasoning of the case. These are, more often than not, generalizations. They are not however generalizations based on any study of the purpose of the rule, but only an attempt to reconcile a number of cases with each other. These anonymous writers do not share the timidity of the law teacher about venturing in fields with which they are not acquainted. In fact they have been exposed to the scorn of the law teacher for so long that they are hardened to it. Yet to a constantly increasing extent, these anonymous annotators are influencing the law in jurisdictions where new questions arise.

The restatement of the law by the American Law Institute is an attempt to substitute accurate and well reasoned generalizations for those of the law book publishing companies. But this whole tendency gives rise to the anxious query, What is happening to the case system, in the study and in the announcement of the law? Are there not numerous signs that it is breaking of its own weight? Are courts following decided cases, or are they following generalizations which are gradually becoming independent of undecided cases?

We suspect that no one can answer that question. The reception of the restatement of laws by courts will throw further light on it. The close study of facts of decided cases is still important in trying a law suit. But is it as important as it was before there were so many cases and so many annotations and general statements?

—T. W. A.