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Notes and Comments

J. O. Kostner

J. L. White Jr.

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NOTES AND COMMENTS

STRIKE TWO ON RACIAL COVENANTS

Our Washington sports correspondent reports that the fearless long-ball hitter known to the fans as Racial Restrictive Covenant¹ is still standing at the plate in a long drawn out inning in the contest between Civil Rightists² and Property Protectionists.³ The count, however, is narrowing for it is presently reported to be no balls and two strikes. The first pitch, thrown via the case of *Shelley v. Kraemer*,⁴ a roundhouse curve which managed to nick the corner of the plate for a called strike, made equitable enforcement by state court injunctive process constitutionally improper before it became necessary to hold up the game on account of rain. A few garden pitches tossed in a warm-up session prior to the resumption of the game appear to have been inconclusive⁵ but, with the game again in full session by virtue of the writ of certiorari issued in the case of *Barrows v. Jackson*,⁶ the second pitch, a twister which almost tore the arm of the catcher, also managed to stay in the strike zone long enough to bring the count to nothing and two. Rightist fans around the country are breathing easier. But Mudville fans know that Casey wasn't out until the umpire⁷ pontifically called "Strike Three!" so Property Protectionist followers are still hopeful over the final outcome.⁸

The second pitch may have fractured more than the catcher's wrist. It seems to have dented the playing rules also for the non-Caucasian oc-

¹ Date of birth uncertain; entered the national league about the time of the decision in *Corrigan v. Buckley*, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1926).

² First added to the national league about 1868, with the adoption of the Fourteenth Amendment; more vociferous in recent years as the team has added to its standing with success after success.

³ The club antedates the Fall of Rome, but the team name has been changed from time to time.

⁴ 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). See also the companion case of *Hurd v. Hodge*, 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187 (1948). The Illinois law, adopted in response to these cases, may be found in *Tovey v. Levy*, 401 Ill. 393, 82 N. E. (2d) 441 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 178.

⁵ State court holdings in *Weiss v. Leason*, 359 Mo. 1054, 225 S. W. (2d) 127 (1949), and in *Correll v. Earley*, 205 Okla. 366, 237 P. (2d) 1017 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 350, have indicated that complaints at law to recover damages for breach of racial covenants were adequate. In opposition thereto, see *Roberts v. Curtis*, 93 F. Supp. 604 (1950), and *Phillips v. Naff*, 332 Mich. 389, 52 N. W. (2d) 158 (1952).

⁶ 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953), affirming 112 Cal. App. 534, 247 P. (2d) 99 (1952). Chief Justice Vinson wrote a dissenting opinion.

⁷ The text should really read "umpires" for action by a majority of a quorum of the justices of the United States Supreme Court will be needed to make the call.

⁸ They hope, that is, that their principal batter will never be declared ineligible by reason of "public" policy.

cupiers of the property concerned in the Barrows case, whose constitutional rights were there being asserted, were not at bat. Actually, the parties to that litigation were contracting parties, and a successor to a contracting party, to the particular restrictive covenant. The suit was one for damages allegedly arising from a violation of the restriction by conveying the realty without incorporating the restriction in the grant and also for permitting non-Caucasians to move in and occupy the premises. The court had to strain procedural rules to take jurisdiction⁹ but enough of the judges concurred to hold that a state court of law was obliged to deny an award of damages for breach of such a contract, just as, according to the Shelley case, an equitable tribunal was obliged to deny equitable enforcement of the restrictive covenant. In each instance to date, however, the court has refused to declare covenants of the kind in question to be illegal.¹⁰ Nevertheless, the net result has been to place effective limitations on contracts of this type unless other, particularly non-judicial, methods for their enforcement exist.

The weird notion that state court judicial action, said to be denied by virtue of the terms of the Fourteenth Amendment, is forbidden in cases of this nature, despite the admitted legality of the contract, seems to be heading the game toward a dangerous conclusion. Ancient Anglo-Saxon remedies like the feud and the right to self-help have, quite properly, been made to yield to the demands of civilized society that private disputes should be submitted to impartial determination through peaceful processes. No one could deny that society's equitable substitute for self-help, the injunction, is to be accorded a petitioner solely as a matter of grace, hence may be denied whenever it would appear to be equitable to do so. The decision on the pitch in the Shelley case, granting for the moment the premise that judicial action at the instance of the private litigant is a form of prohibited state action, could be considered, for this reason, to be acceptable law.

⁹ See dissent by Vinson, Ch. J., in *Barrows v. Jackson*, 346 U. S. 249 at 264, 73 S. Ct. 1031, 97 L. Ed. 1586 at 1599. He stated: "This deep-rooted, vital doctrine demands that the Court refrain from deciding a constitutional issue until it has a party before it who has standing to raise the issue."

¹⁰ In *Shelley v. Kraemer*, 334 U. S. 1 at 13, 68 S. Ct. 836, 92 L. Ed. 1161 at 1180, the court said: "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment." See also *Barrows v. Jackson*, 346 U. S. 249 at 253, 73 S. Ct. 1031, 97 L. Ed. 1586 at 1594, where the statement is made that "the law applicable in that case did not make the covenant itself invalid, no one would be punished for making it, and no one's constitutional rights were violated by the covenantors' voluntary adherence thereto." The Canadian view, in direct contrast, treats the racial restrictive covenant as being void for opposition to public policy: *Re Drummond Wren* [1945], 4 D. L. R. 674, O. R. 778. See also *Re Noble & Wolff* [1951], 1 D. L. R. 321, S. C. R. 64, declaring a covenant of this character invalid as an illegal restraint on alienation.

Can the same thing be said with respect to the call in the Barrows case and what it means with respect to the socially provided substitute for self-help designated as an action at law? While, at one time, an action in that form may have been available as a matter of privilege, granted or withheld at the whim of the sovereign and often permitted only on terms and at a price fixed by him, ball-playing Englishmen and their descendants, since Magna Carta, have been entitled to demand justice according to law as a matter of right.¹¹ Umpires, too, since then, have been under an obligation to dispense that justice, an obligation which can be enforced to the point where they can be compelled to act when they will not.¹² To say that free men with legal claims are to be denied access to their own courts while also saying they have not the right to settle their disputes according to the ancient forms threatens to undermine the very basis on which modern civilized governments have been established and on the maintenance of which their existence depends.

Aside from this, and excepting the fact that men, even ball-players, may voluntarily adhere to any form of arrangement agreeable to themselves, not otherwise inimical to civilization, without becoming exposed to criticism at the hands of the United States Supreme Court,¹³ it would be interesting to speculate on what the court would have to say if it were confronted with a situation similar to the one in *Correll v. Early*.¹⁴ The theory there advanced to sustain a suit at law for damages was that certain of the defendants, who had procured an insolvent white grantee to take title and to reconvey to Negro grantees, had conspired to injure the plaintiffs, property owners in the restricted area, by provoking a breach of the covenant in question.¹⁵ If restrictive covenants are valid agreements, the court might have difficulty with the conspiracy doctrine for it has previ-

¹¹ The negative treatment of the point in the Fifth Amendment to the effect that no person shall be "deprived of life, liberty, or property, without due process of law," is countered to some extent by the declaration, in the Ninth Amendment, of a reservation of those "rights retained by the people." Affirmative statement of the concept appears in most state constitutions where the expression runs to the effect that every person "ought to find a certain remedy in the laws for all injuries and wrongs" and should be able to obtain right and justice "freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay." See, for example, Ill. Const. 1870, Art. II, § 19.

¹² See *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N. E. 369 (1911).

¹³ In the Barrows case, the court appears to have acknowledged this fact by saying that no one's constitutional rights would be violated by voluntary adherence, for that would constitute "individual action" only. The emphasis to date has clearly been against "state" action. In particular, see 346 U. S. 249 at 253-4, 73 S. Ct. 1031, 97 L. Ed. 1586 at 1594.

¹⁴ 205 Okla. 366, 237 P. (2d) 1017 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 350.

¹⁵ See *Pearce v. Knepper*, 53 N. Y. S. (2d) 845 (1945), affirmed in 56 N. Y. S. (2d) 415 (1945), leave to appeal denied, for a comparable situation with respect to a conspiracy to breach a contract which did not involve a racial covenant.

ously ruled that even though a contract be terminable by agreement of the parties it is not terminable by the will of others.¹⁶

Given the basis for an action for malicious interference with contract, what could the court say if the suit came to it via a federal court action based on diversity of citizenship? Any prohibition in the Fourteenth Amendment against state action would certainly not solve the problem, nor would the decision in the case of *Hurd v. Hodge*¹⁷ be of much help for it dealt with a matter purely local to the District of Columbia. If the Court threw out such a suit while refraining from declaring the covenant illegal, as indeed it must for the basic issue is one of state not federal policy, hence beyond the competence of the court, it would be likely to cause a small riot among some of the fans who, our correspondent reports, are already beginning to show signs of a slow burn over the notion that men may be denied access to the courts at the same time they are forbidden to use more forceful measures.

To date, the critical "nothing and two" count has arisen because the Property Protectionist team, presently at bat, has turned to the courts for relief. It would be interesting to see what the result would be if one of this team, having transferred title to land under a form of conditional fee with possibility of reverter¹⁸ in the event a non-Caucasian of the opposing side were to occupy or purchase the realty in question,¹⁹ should be able to regain possession of the property so conveyed, thus forcing the excluded non-Caucasian to bring an action of ejectment. As the Property Protectionist in the supposed case had the right to call for entry for condition broken and had, in fact, privately enforced the same by the forfeiture, the court would not be asked to take prohibited state action to enforce the restrictive covenant but would be asked, instead, to grant relief against one who was in possession under legal right.²⁰ If the court acted to oust such a person, the incipient riot against the umpire could well reach the proportion of actual violence.²¹ If so, our corre-

¹⁶ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 229 (1917).

¹⁷ 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187 (1948).

¹⁸ See Restatement, Property, Vol. 2, § 154.

¹⁹ Gray, *Rule Against Perpetuities*, 4th Ed., § 113.3, treats this possibility of reverter as being a vested interest.

²⁰ The same thought might be carried over to such matters as land trusts, long-term leases, options to repurchase, and the like. See Scanlan, "Racial Restrictions in Real Estate," 24 *Notre Dame Law*. 157 (1949).

²¹ The violence, in the light of history, would be directed not to the Court but to the Constitution, calling for another amendment to offset the effect of the decision, as was true in the cases of the Eleventh and Sixteenth Amendments. In Cahn, *Supreme Court and Supreme Law* (Indiana University Press, Bloomington, Indiana, 1954), at p. 25, the matter was put in apt form by describing an unending colloquy between the court and the people, with the court asserting "You live under a

spondent says it would be futile to expect the United Nations police department to respond.²² Such being the case, the whole country may be said to be waiting for the call on the next pitch.

J. O. KOSTNER.

MAINTAINING LIBERTY THE JUDICIAL WAY

It has been necessary, from time to time, to flash an alert signal to the American public by way of warning them that their personal liberties, purportedly guaranteed by written constitutions, have become exposed to danger from encroachment, or threatened encroachment, at the hands of one branch of the government or another. While the need to do this because of conduct on the part of the judicial department has been less frequent than in the case of the other branches, it cannot be said that the courts have always and invariably been the maintainers of liberty. A justice of the United States Supreme Court remarked quite recently that the "over-stepping or irresponsible use of judicial power" can be as much of an evil as lawlessness on the part of the other branches would be.¹ In fact, that evil would be even the more insidious for, if the average member of the public should become conscious of the fact, he would not only lose some of his traditional reverence for courts, a reverence never granted to the executive or the legislature, but would be "convinced that his welfare and liberty were ultimately at the mercy of a self-conceived super-legislature."²

To prevent the fostering of impressions of that character, judges should take care to refrain from acting as policy-making bodies. They ought to give prime attention to their function of "giving effect to the will of the

Constitution but the Constitution is what *we* say it is," and the people incessantly replying, "As long as your version of the Constitution enables us to live in pride in what *we* consider a free and just society, you may continue exercising this august, awesome, and altogether revocable authority."

²² In *Sipes v. McGhee*, 316 Mich. 614, 25 N. W. (2d) 638 (1947), the court indicated that the provisions of the United Nations Charter were inapplicable to the contractual rights of citizens of the United States when seeking a determination with respect thereto before American state courts. While the holding therein was later reversed in conjunction with the decision in *Shelley v. Kraemer*, 334 U. S. 1, 63 S. Ct. 836, 92 L. Ed. 1161 (1948), the federal supreme court made no mention of this point. See also *Rice v. Sioux City Memorial Park Cemetery*, — Iowa —, 60 N. W. (2d) 110 (1953), upholding a racial restriction regulating burial in a lot in a private cemetery against a similar contention that the provision violated the United Nations Charter. It is understood that certiorari has been granted therein for the purpose of testing this point: — U. S. —, 74 S. Ct. 638, 98 L. Ed. 540 (1954).

¹ Jackson, "The Task of Maintaining Our Liberties: The Role of the Judiciary," 39 A. B. A. J. 961 (1953).

² Bischoff, *The Role of Official Precedents*, in Cahn, *Supreme Court and Supreme Law* (Indiana University Press, Bloomington, Indiana, 1954), p. 78.

Legislature; or, in other words, to the will of the law."³ Despite this, the recent past would indicate that some American courts have engaged in irresponsible exercises of the judicial power to such an extent that it could be said that the judicial way, instead of serving to maintain liberty, at times tends to threaten its existence.

Lest it be thought that these be nothing more than idle charges, the citation of a few recent cases should serve to prove the point. The debacle projected by the case of *Brandt v. Keller*,⁴ wherein an Illinois court said that a wife might sue her husband for a personal injury inflicted by him on her during coverture, but the legislature, just as promptly, said she could not,⁵ offers one illustration. The Wisconsin holding in *Green Bay Drop Forge Company v. Industrial Commission*,⁶ to the effect that a deafened worker could be entitled to compensation even though he had not lost a penny of wages, was equally promptly rejected by a statutory amendment to the contrary.⁷ The inconclusive attempt, through *Daily v. Parker*,⁸ to foster new remedies in favor of persons previously considered remediless, appears to have aborted, and the judicial experiment indulged in through the medium of the case of *Hitafer v. Argonne Company, Inc.*,⁹ appears to be headed in the same direction.

The list could be readily expanded, but one more illustration should suffice. Despite a long-standing policy to the contrary,¹⁰ the case of

³ Marshall, C. J., in *Osborn v. Bank of United States*, 22 U. S. (9 Wheat.) 738 at 866, 6 L. Ed. 204 at 234 (1824).

⁴ 413 Ill. 503, 109 N. E. (2d) 729 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 343.

⁵ Ill. Laws 1953, p. 347; Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, § 1.

⁶ 265 Wis. 38, 60 N. W. (2d) 409 (1953), reh. den. 61 N. W. (2d) 847 (1953).

⁷ Wis. Laws, 1953, c. 328, § 12, amending Wis. Gen. Stats. 1949, Ch. 328, § 102.52(17).

⁸ 152 F. (2d) 174 (1945), noted in 25 CHICAGO-KENT LAW REVIEW 90.

⁹ 183 F. (2d) 811 (1950), cert. den. 340 U. S. 852, 71 S. Ct. 80, 95 L. Ed. 39 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 162. The views there expressed with regard to a wife's right to claim compensation for loss of consortium in case injury has been inflicted on her husband have been rejected in *Franzen v. Zimmerman*, 127 Colo. 381, 256 P. (2d) 897 (1953); *Ripley v. Ewell*, — Fla. —, 61 So. (2d) 420 (1952); *LaEace v. Cincinnati, Newport & Covington Ry. Co.*, — Ky. —, 249 S. W. (2d) 534 (1952); *Larocca v. American Chain & Cable Co.*, 23 N. J. Super. 195, 92 A. (2d) 811 (1952); *Passalacqua v. Draper*, 279 App. Div. 660, 107 N. Y. S. (2d) 812 (1951); *Lurie v. Mammone*, 200 Misc. 320, 107 N. Y. S. (2d) 182 (1951); *Nelson v. A. M. Lockett & Co.*, 206 Okla. 334, 243 P. (2d) 719 (1952). In *Cooney v. Moomaw*, 109 F. Supp. 448 (1953), a federal district judge expressed a belief that the controlling law of Nebraska might permit recovery by the wife, but he could cite no case in point.

¹⁰ The nature of the policy and the fact that a majority of jurisdictions which have accepted a rule denying a cause of action have refused to overrule it by judicial decision, referring the matter instead to the legislative department, is noted in 28 CHICAGO-KENT LAW REVIEW 147. See also *Cavanaugh v. First National Stores*, 329 Mass. 179, 107 N. E. (2d) 307 (1952); *Bliss v. Passanesi*, 326 Mass. 461, 95 N. E. (2d) 206 (1950); and the dissenting opinion of Lewis, J., in *Woods v. Lancet*, 303 N. Y. 349, 102 N. E. (2d) 691 (1951).

Amann v. Faigy,¹¹ an action for wrongful death brought by the personal representative of a child who had been negligently injured *en ventre sa mere* and who had died subsequent to birth allegedly as a result of such injury, illustrates what courts can do when they cast themselves in the role of the legislature and act to create substantive rights without an expression of the public will to that end.

Commendable though that decision may be as a matter of abstract justice, it disregards the fact that, if the American legal system is to remain one of laws and not of men, judges ought not go beyond the proper limits of judicial power. If the vision of a court becomes blurred by collateral considerations or out of regard for the personal feelings of litigants, its own prejudices will materially affect recognized legal principles¹² to the point where organized society will be unable to rely on hitherto unequivocal rules.¹³ The uncertainty thus produced, brought about by a failure to take cognizance of the fact that it is for the legislature, not the courts, to translate popular demands into law, merits both professional and public distrust.¹⁴

Controversy with respect to the boundaries which properly belong about judicial law-making is neither new in character nor mild in quality. It rises, as Justice Jackson has observed, from the fact that there is confusion at the bar and disagreement on the bench for lack of an accepted system of weights and measures by which to mete out justice.¹⁵ Accurate as this statement may be with regard to issues of constitutional law, it is scarcely true as to private law for, in that area, the doctrine of *stare decisis* has prevailed for generations.¹⁶ Under it, and justifiably so since

¹¹ 415 Ill. 422, 114 N. E. (2d) 412 (1953), reversing 348 Ill. App. 37, 107 N. E. (2d) 868 (1952).

¹² *Friend v. Cummings*, 207 Iowa 1201, 224 N. W. 510 (1929).

¹³ As conduct can, and should, be measured only by law in existence at the time, each time the judiciary arbitrarily overrules a settled principle of law, the decision being rendered with reference to past conduct, it retroactively alters the rules on which reliance has been placed to the hardship of the litigant who, for the first time, is made to realize that he has obeyed the wrong law. See Snyder, "Retrospective Operation of Overruling Decisions," 35 Ill. L. Rev. 121 (1940).

¹⁴ In a dissenting opinion to *Hole v. Rittenhouse*, 2 Phila. 411 at 417-8 (1856), Judge Black called attention to this fact when he said: "Hereafter if any man be offered a title which the Supreme Court declared to be good, let him not buy it if the judges who made the decision are dead; if they are living, let him get an insurance on their lives; for ye know not what a day or hour may bring forth."

¹⁵ Jackson, "The Task of Maintaining Our Liberties: The Role of the Judiciary," 39 A. B. A. J. 961 (1953), at p. 962.

¹⁶ Consider *Neff v. George*, 364 Ill. 306 at 308-9, 4 N. E. (2d) 388 at 390-1 (1936), where the court said: ". . . the doctrine of *stare decisis* expresses the policy of the courts to stand by precedents and not to disturb settled points. The general rule is that decisions long acquiesced in . . . should not be disturbed even though a different conclusion might have been reached if the question presented were an open one, unless the evils of the principle laid down will be more injurious to the community than can possibly result from a change." See also Loughran, "Some Reflections on the Role of Judicial Precedent," 22 Ford. L. Rev. 1 (1953).

the common law lacks a constructive code, the influence of the prior decision is relied upon as authoritative,¹⁷ providing that fair measure of certainty which, in any body of law, is a prime requisite.¹⁸ For this reason, adherence to precedent should be the rule and not the exception.¹⁹ Nevertheless, the tendency to disregard precedent, urged by some as a desirable display of "judicial activism" in taking the initiative in bringing about fundamental changes in law, is viewed by others as an alarming note which encourages a legitimate doubt whether the law today will be the same tomorrow or, more nearly, whether present liberties will remain as liberties.

Admittedly, the doctrine of *stare decisis* is not one which commands blind obedience from the courts for it recognizes that the prior decision can be rejected if inapplicable or if it can be shown to be logically and fundamentally unsound. Once the prior decision has become law, however, only the most impelling reasons should be treated as adequate to call for reversal, particularly since courts cannot know what expectations have been based thereon. To say, as a Washington court recently did, that since it had closed the "courtroom doors without legislative help," it could likewise open them, and that it was "not necessary that courts be slow to exercise a judicial function simply because they have been fast to exercise a legislative one,"²⁰ reveals a degree of cynical disregard for the force of precedent²¹ as well as the function it plays in the preservation of liberty. If, because of changed conditions or the like, controlling precedent, *i.e.* law, has become infirm or incapable to dealing with new problems, the solution, in any polity existing under a written consti-

¹⁷ Lile, "Views on the Rules of Stare Decisis," 4 Va. L. Rev. 95 (1916), especially p. 97.

¹⁸ Von Moschzisker, "Stare Decisis in Courts of Last Resort," 37 Harv. L. Rev. 409 (1924), at p. 410.

¹⁹ Cardozo, *Nature of Judicial Process* (Yale University Press, New Haven, 1921), p. 149. Douglas, "Stare Decisis," 49 Col. L. Rev. 735 (1949), contains an appendix, at pp. 756-8, listing the major cases later overruled by the United States Supreme Court. It would have to be expanded by several more pages to bring the list up to date.

²⁰ *Pierce v. Yakima Valley Memorial Hospital Ass'n*, — Wash. — at —, 260 P. (2d) 765 at 774 (1953).

²¹ Currie, J., in *Smith v. Congregation of St. Rose*, — Wis. — at —, 61 N. W. (2d) 896 at 898 (1953), speaking with respect to the doctrine relating to the immunity of a charitable corporation for tort, said: ". . . if this court were not bound by the rule of *stare decisis* but were passing on the question for the first time, we would accord very little weight to the historical reasons originally advanced in support of the rule of immunity. However, we feel that it is for the legislature and not this court to change the rule of immunity at this late date after its wide acceptance over the years in the prior decisions of this court." See also the opinion of Andrews, J., in *Crowley v. Lewis*, 239 N. Y. 264, 146 N. E. 374 (1925), where the point was made that thousands of sealed instruments must have been executed in reliance upon a holding of the court by reason of which the court "did not feel at liberty to change a rule so well understood and so often enforced."

tution, lies not in the judicial reversal of precedent but in a wholesome appeal to the legislative department. It, speaking the measured will of the popular majority, can produce the change in a fashion not inconsistent with established plans while effectuating the legal system as to the future.

The "excelsior cry for a better system"²² sounds far more harmonious in a legislative hall than it does in a courtroom. There, the figure of Justice, blindfolded or not, strains to catch the echoes of the past. Judges who sit there, legislating interstitially, can produce a degree of wreckage in established systems far beyond the good they might do in individual cases. If they knowingly so legislate, they not only do violence to their oaths of office but work to undo the "knowne certaintie of the law" which Lord Coke so wisely said "is the safetie of all."²³ Admitted to be noble in purpose, law must also be uniform and standard in its operation for these are component parts of equality and justice. If judges yield to the demand to overturn precedent, except in those instances where the challenged precedent is clearly unsound, they are not so much keeping up with progressive society as they are inviting disharmony and uncertainty into an area where the direct opposite should prevail.²⁴

Sceptics will say that precedents "drawn from the days of travel by stagecoach do not fit the conditions of travel today."²⁵ Others would intimate that the law would become stagnant from strict adherence to *stare decisis* if new ideas were not permitted to percolate into the structure. Still others, asserting that the crowning glory of the common law system lay in its capacity to grow, would urge that the growth thereof should be fostered under judicial aegis. Some, more impatient than the rest, would demand of the judges that they should decide their cases by hunch, or something akin thereto, as if the reasoning behind all earlier decisions were suddenly no longer valid.²⁶

²² So described in the opinion of Dunklin, J., in *Gowin v. Gowin*, 264 S. W. 529 at 538 (Tex. Civ. App., 1924).

²³ Coke, Litt., 395a, as quoted in *Davis v. Pennsylvania Co. of Insurances on Lives, etc.*, 337 Pa. 456 at 464, 12 A. (2d) 66 at 71 (1940).

²⁴ Sprecher, "The Development of the Doctrine of *Stare Decisis* and the Extent To Which it should be Applied," 31 A. B. A. J. 501 (1945), at p. 509.

²⁵ Cardozo, J., in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382 at 391, 111 N. E. 1050 at 1053 (1916).

²⁶ Contrast the views of Jerome Frank, expressed in *Law and the Modern Mind* (Brentano, New York, 1930), with those of Judge Collin, set out in the opinion in *Grifenhagen v. Ordway*, 218 N. Y. 451, 113 N. E. 516 (1916). The latter said: "We should not undermine the law by reversing a decision of this court unless it has been demonstrated to be erroneous through the failure by us to consider a statute, prior decision, material fact or other substantial features, or unless through changed conditions it has become obviously harmful or detrimental to society—a condition the Legislature will very rarely suffer to exist."

To each of these, the answer should be made that, whatever the source of the common law or the nature of its growth, the day has long since passed when the people looked to the judiciary to make the law. For generations, people have been more content to leave the job of shaping the law in the hands of chosen legislators. That shift began with *Magna Carta*²⁷ and was carried over into the Provisions of Oxford, with its prohibition on the issuance of new writs.²⁸ Edward I accelerated the process when he directed that truly new cases be referred to Parliament.²⁹ The growth of parliamentary supremacy, firmly established by the time of the American Revolution, served to accentuate the difference between the judicial and the legislative powers. The whole idea might be said to have become crystallized by a wise choice, expressed in the form of constitutional language, calling for a separation in the powers of government.³⁰

By so declaring, the people reserved to the courts the power to apply existing law, even in new factual situations properly falling thereunder, but the power to make wholly new law was denied. Recognizing that courts might, in the course of deciding cases, come to learn of deficiencies, calling for a correction or a revision in the state of the law, the people gave direction to the courts not to make the change but to invite legislative attention to the facts.³¹ Through constitutional arrangements of that character, the people evidenced their belief that if the need for change was apparent, or the demand impelling enough, the legislature could be trusted to bring about revision, even to the point of overturning the existing order, through appropriate legislation. If, by contrast, the proposed change was one not so urgently needed as to command an exercise of the majority will, there would be reason to believe that the old order should stand.

These concepts, far from serving to diminish the powers of the

²⁷ McKechnie, *Magna Carta* (James Maclehose & Sons, Glasgow, 1914), pp. 346-55.

²⁸ Holdsworth, *Hist. Eng. Law*, Vol. 1, p. 398.

²⁹ Stat. West. II, 1285; 13 Edw. I, c. 24. The famous "like case" clause thereof, utilized by the judges as a basis for expanding the common law through enlargement of the then existing remedies, closes with the statement: "Plaintiffs may adjourn it [the 'unusual' or doubtful case] until the next Parliament and let the Cases be written . . . lest it might happen after that the Court should long time fail to minister Justice to Complainants."

³⁰ See, for example, Ill. Const. 1870, Art. III.

³¹ By Ill. Const. 1870, Art. VI, § 31, the judges of the supreme court are directed to "report in writing to the governor such defects and omissions in the constitution and laws as they may find to exist, together with appropriate forms of bills to cure such defects and omissions in the laws." Presumably, the governor is to forward these recommendations to the general assembly in the message he is required to submit pursuant to Ill. Const. 1870, Art. V, § 7. While the court may have followed this mandate, the job of advocating reform has generally been left to the organized bar except in those instances where, by a successful overthrow of precedent, the court has produced some change in the law.

judicial department, actually operate to preserve for the judges their traditional function of applying the law in individual cases. When they depart from that function, particularly when they embark on the job of law-making, they not only endanger their own independence and the liberties of the people but they invite the type of chastening reproof which has recently been served up to them.

J. L. WHITE, JR.