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# Tom Molitor and the Divine Right of Kings

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# NOTES AND COMMENTS

## Tom Molitor and the Divine Right of Kings

It is doubtful that a nation has ever existed more firmly dedicated to the ideal of universal education than the United States, for free schools are to be found everywhere throughout the land. Such schools have been the heritage of the people of Illinois since an early day when, following the dictate of the Northwest Ordinance,[1] the first constitutional convention, meeting to accept the offer of statehood, assigned one section of land in each township "for the use of schools."[2] With the passage of time, the standards relating to free public education have been enhanced,[3] the one-room rural school house has disappeared from the scene,[4] and in its place we now have the more elaborate centrally located consolidated school. Whatever the advantages of the latter, there is at least one disadvantage, to-wit: the necessity for daily mass transportation of pupils to and from their distant homes to the central point. The school bus, used to serve this need, has come to add the hazard of injury from highway accident to the lives of the school children of the state.

Such were the conditions in Illinois in March, 1958, when Thomas Molitor and others, pupils of the school conducted by Community Unit District No. 302 in Kane County, boarded the school bus for their daily trip. It proved to be an ill-fated one for the bus crashed into a culvert and burned, causing injury to most of its passengers. Tom's father, as next friend, filed suit against the school district to secure compensation for his son's injuries and the setting was laid for the eventual holding in the case

[1] Article III of the Northwest Ordinance of 1787, after expressing the thought that "religion, morality and knowledge" are necessary to good government and the happiness of mankind, declares: ". . . schools and the means of education shall forever be encouraged." The full text appears in Smith-Hurd Ill. Stat. Ann., Const., p. 96.

[2] See the Ordinance Accepting the Enabling Act, adopted at Kaskaskia on August 26, 1818, set forth in Smith-Hurd Ill. Stat. Ann., Const., p. 111.

[3] Compulsory education up to the age of sixteen years, with provision for continuing education to the age of eighteen, is now the rule in Illinois: Ill. Rev. Stat. 1959, Vol. 2, Ch. 122, § 12—3.

[4] The passing thereof appears to have posed some legal problems, witness the holding in Hackett v. School Trustees, 398 Ill. 27, 74 N. E. (2d) 869 (1947). See also Brown v. Trustees of Schools of Township No. 5, 403 Ill. 154, 85 N. E. (2d) 747 (1949), and Low v. Blakeney, 403 Ill. 156, 85 N. E. (2d) 741 (1949). The adoption of a curative limitation statute, now Ill. Rev. Stat. 1959, Vol. 2, Ch. 83, §§ 1a-1b, appears to have abated a flood of threatened litigation. See Trustees of Schools v. Batdorf, 6 Ill. (2d) 486, 130 N. E. (2d) 111 (1955), noted in 34 Chicago-Kent Law Review 250.

of *Molitor* v. *Kaneland Community Unit District No. 302*.[5] By the decision therein, one dealing with an aspect of the divine rights of kings, *i.e.*, immunity from suit, young Tom has been found eligible to maintain his suit against the school district. The other children who rode with him,[6] however, have been denied an equal right. Each morning in their schoolroom, as they face the American flag and repeat the pledge of allegiance, they must indeed wonder what it is that could be meant by the words "justice to all" contained in that pledge. They too must wonder what has happened to that quest for "morality," so necessary to good government, which caused a sovereign state to establish a system of free public schools for their education. They are not alone in their bewilderment.

We are not here concerned with the particular decision in Tom's case itself.[7] There is a more serious question, one demanding more serious inquiry, and that is the question as to how such a decision could have been achieved. We cannot require our courts to be perfect, but we can and should be disturbed when the operation of a judicial system produces a result, at the highest level, which is patently unfair and violative of the most elementary concept of all, that of equality before the law. We can and should be disturbed when honest men in high judicial office, while acting in good faith, reach a position that is morally indefensible.

How can this be explained? Simply stated, the majority of the Illinois Supreme Court must have conceived itself to be a legislative rather than a purely judicial body; must have assumed the role of repudiator of the doctrine of stare decisis; and must have elected to become a regal dispenser of a system of rewards. The clues lie in the text of the majority opinion. At one point, quoting from a Washington case,[8] the majority emphasized its position by saying: "We closed our courtroom doors without legislative help, and we can likewise open them."[9] At another, it said that it intended to "reward appellant for having afforded us the opportunity of changing an outmoded and unjust rule of law."[10] But the implications go far beyond and lead to the issue whether courts have such rights and whether judges should be free to operate on such assumptions.

[5] 18 Ill. (2d) 11, 163 N. E. (2d) 89 (1959), reversing 20 Ill. App. (2d) 555, 155 N. E. (2d) 841 (1959). Davis, J., wrote a dissenting opinion, concurred in by Hershey, J. Bristow, J., concurred in part and dissented in part. An appeal to the United States Supreme Court is pending.

[6] Among the children injured were three other members of the Molitor family: 163 N. E. (2d) 89 at 105.

[7] An extended discussion thereof appears in DeMoss, "Limiting the Retroactive Effect of a Decision," 48 Ill. B. J. 412-25 (1960).

[8] The court quoted from the opinion of Hamley, J., in Pierce v. Yakima Valley Memorial Hospital Ass'n, 43 Wash. (2d) 162 at 175, 260 P. (2d) 765 at 774 (1953).

[9] The quotation appears in 18 Ill. (2d) 11 at 26, 163 N. E. (2d) 89 at 96.

[10] 18 Ill. (2d) 11 at 29, 163 N. E. (2d) 89 at 98.

Consider first the bold assertion that courts may depart from stare decisis because "justice and policy require such departure."[11] "Policy" is an ambiguous term, but certainly it is to be assumed that every decision is to be a reflection of "justice." Is there some inclination here to distinguish between "law" and "justice"? As an exercise in semantics, such distinction is easy. When applied to judicial decisions, however, distinction should be impossible.

If "justice" is to be, in the words of Justinian, the "constant and perpetual disposition to render to every man his due," the application of that principle through the mechanics of judicial decision must mean that every man shall receive, by judicial decision, that which is due to him under law. Judges are the instruments by which justice is administered; the primary function being the determination of what is due to a particular man under given circumstances. How is that to be determined? Law is the product of society. A man living apart would have no need for law in its social sense. Law, then, exists to regulate the rights and relationships of individuals, of one man against another. "Justice," in that situation, consists of determining what is due from one to another.

What is due can be determined in a variety of ways. It is the law of the jungle that each has what he can take and hold, for there strength is law. The very existence of Man, however, serves to repudiate the validity of this type of law. In his experiments to go beyond that primitive concept, Man has tried many things, from trial by combat to decision by the will of a divine-right monarch. Each early experiment proved itself to be inherently unsatisfactory and was, in turn, rejected. Those who claim the heritage of the English Common Law hold to the concept that men have rights which are inherent, which are superior even to the will of the sovereign. And there lies the reason for stare decisis. Law is not to be what the king says it is, to be dispensed as a regal favor; it is to be the same for all men, for equality of treatment is probably one of the oldest as well as one of the soundest aspirations of mankind.

Stare decisis is not an American invention any more than the equality of man is an American invention, but it is the best device known to man for insuring equal treatment under law. This is necessarily so for Law is decision and, under our system, it is only decision. A written constitution or a statute means only what the courts, by their decision, say that it means. Law is nothing but an exercise in semantics until it is given effect through specific decisions. If, then, we are to learn what the law is, we must look to the decisions for law can be found no place else.

[11] 18 Ill. (2d) 11 at 27, 163 N. E. (2d) 89 at 96.

If a court is to treat the citizen before it as others have been treated in similar situations, the only point of reference must be the decisions which show how others have been treated. This is stare decisis at work. It guarantees equal treatment, and that is all it does or is designed to do.

The failure of courts to recognize the purpose of stare decisis, and the inclination to treat the doctrine merely as an unwelcome yoke, have led to confusion and difficulty. This confusion is readily apparent in the Molitor case. The repudiation of the rule of tort immunity is not based upon any pretext that it has not been the rule. There is not the slightest question that others who have sought recovery from school districts for alleged torts have been denied recovery.[12] The majority of the court does not pretend otherwise. Rather, it says that the rule is "unjust, unsupported by any valid reason, and has no rightful place in modern day society," hence considers it to be the duty of the court to "establish a rule consonant with our present day concepts of right and justice."[13] There is not a word said, however, about equality of treatment and the most frightening thing about the decision is the fact that the majority of the court appears to feel no obligation to give equal treatment.

The binding effect of precedent arises not from the fact that it is "right" but from the fact that it has been so decided. If each case is to be decided, without regard to other decisions, upon the basis of "present day concepts of right and justice," the guarantee of equal treatment before the law becomes nebulous to say the least. If a decision is to reflect only the inclination of the present day judicial "monarch," Runnymede and Concord will be no more than place names to remember. The fight to vindicate the guarantee of equality will have to begin anew.

Let us turn to consider the implications contained in the suggestion made by the majority of the court that the departure from precedent taken in the Molitor case was justified because of an absence of "reliance" on the prior decisions. In support thereof, it borrowed a statement from a New Jersey case to the effect that in "the law of torts . . . there can be little, if any, justifiable reliance and . . . the rule of stare decisis is admittedly limited."[14] If this statement is to be taken at face value, what can be said as to the value to be given to the further remark that it is a "basic concept underlying the whole law of torts today that liability fol-

[12] The former law on the subject is illustrated by the holdings in Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536 (1898), and in Thomas v. Broadlands Community Consol. School Dist., 348 Ill. App. 569, 109 N. E. (2d) 636 (1953).

[13] 18 Ill. (2d) 11 at 25-6, 163 N. E. (2d) 89 at 96.

[14] The court quoted from the opinion of Jacobs, J., in Collopy v. Newark Eye and Ear Infirmary, 27 N. J. 29 at 42, 141 A. (2d) 277 at 283 (1958).

lows negligence, and that individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment."[15] Can this "basic concept" be relied upon? If so, which portions of the law of torts are or are not to be relied upon?

Concerning the actuality of reliance, it can be said that the applicability of the law of torts constitutes the major civil business of the courts today despite the fact that most compensable torts do not reach the courts at all. In the disposition of these matters, the parties, their insurance carriers, their attorneys, yes, even the judges themselves, are motivated to act in reliance on something. Upon what do they rely? In every instance, reliance is based upon what those concerned believe the law to be. Where do they get this law? They get it from the only source from which it can be obtained; from the reports of prior decisions. There *is* reliance, a majority of the Supreme Court of Illinois to the contrary notwithstanding.

It is equally misleading to suggest that there is no reliance because people do not commit torts in reliance upon the law. People do not do any unlawful act in reliance upon the law. If persons only followed the law, there would be nothing to litigate at all in any field. Courts are called upon to adjudicate those instances in which it is claimed that the law has not been followed. Every plaintiff relies upon the law upon which he bases his claim, and every defendant relies upon the law which he believes constitutes his defense. The law is not created by their reliance. It must pre-exist to be relied upon.

The extent of the confusion in this area of judicial thought is again well demonstrated by the Molitor decision. The court says that prior precedent can be disregarded because there can be no justifiable reliance upon it, yet, in the same opinion, it justifies an argument that immunity should be abolished with the statement that such abolition "may tend to decrease the frequency of school bus accidents by coupling the power to transport pupils with the responsibility of exercising care in the selection and supervision of the drivers."[16] Suffice it to say that unless school boards regard the Molitor case as binding precedent, at least for the future, they will take no action in reliance upon it!

What the court is actually suggesting, of course, is that prior decisions "do not govern this one, but that this decision shall govern future ones." The position is untenable. The court says: "We closed our courtroom doors . . . we can open them." This is true only in the sense that the

[15] 18 Ill. (2d) 11 at 20, 163 N. E. (2d) 89 at 93.
[16] 18 Ill. (2d) 11 at 24, 163 N. E. (2d) 89 at 95.

"we" referred to describes the court as a continuing entity, as distinguished from the judges who comprise the court. By the same rule, then, the statement must be amplified to read "and we can close them, and open them, and close them, and open them" *ad infinitum*. This is the ultimate rejection of precedent. This is the assertion of a power on the part of the court to make decisions in each case on an *ad hoc* basis, free from precedent and governed only by "public policy and social needs." It is the complete abandonment of any obligation to treat present litigants as those before have been treated. This is a revolution.[17]

If the decisions of yesterday impose no obligation upon today's court, then the decisions of today impose no obligation upon the one of tomorrow. Then, truly, there can be no reliance, for there will be nothing upon which to rely. Every time a judge refuses to abide by precedent because it is "wrong," he (1) establishes himself as the supreme arbiter of what is "wrong," and (2) asserts the right to treat those before him in a manner different from those who have appeared before other judges in a similar situation on a prior occasion. The significant question is not whether or not judges have been placed in a position where they have the power to do this. The moral issue is whether or not judges have the right to so modify our form of government. Along with that issue is the further question as to whether or not lawyers, as special custodians of a public trust, have the right to stand by and permit it to be done in secret.

The government to which American lawyers have each sworn allegiance is a composite federal-state one organized under written constitutions providing for distinctive executive, legislative and judicial branches and contemplating a strict separation of powers. It is not the government of England transposed and any seeming analogies between our system and the English one are superficial, erroneous, and misleading. The American Revolution did not substitute a president for a king, whether a divine-right monarch or one of lesser power, but rather vested governmental power, *i.e.*, the traditional "rights" of the king, in the hands of each citizen. The American president is the servant of the citizens, not their master. The American courts are likewise the servants of the citizens, deriving their authority from the grant of the people and not from the will of some executive.

Inherent in a government of this form is the concept that the law shall be the same for all persons. It is true that stare decisis is not a phrase to be found in a constitution but it is the only means by which law,

[17] There is irony in the fact that the court sought to justify its position by citation of precedent. One is led to wonder concerning the authority of precedent for the proposition that precedent is not authority.

under that constitution, can be maintained to be the same for all citizens. The courts cannot act otherwise. A system of trial courts, appellate courts, and a supreme court would be meaningless without adherence to precedent, for what review by an appellate court can there be except review in terms of precedent? "Public policy" and "social needs" are mere words, "right" and "justice" are meaningless terms, except as they are given application in specific situations. Every judicial decision should be "right," every judicial decision should be "just." Concede that fact, and it will give no help in deciding a particular dispute between particular persons. Only precedent gives meaning. Only precedent can be followed.

Judges are human and may be expected to make mistakes from time to time. It requires a certain conceit, however, for one man to say "I am wiser and cleverer and more endowed with insight into the truth than the man who decided this before me—therefore, his decision is 'wrong' and mine is 'right'." It may be true, but it may not. One thing, however, is certain—if only the last decision of the highest court is to represent the law in any situation, then every case must be appealed to and be decided by that court. It is the supreme irony that a court which purports to act in repudiation of one of the "divine rights" of kings, that relating to immunity from suit, should by this very act of repudiation arrogate to itself the prerogative which was thought to be destroyed. If courts are not bound by precedent, they are bound by nothing; their power is more terrible than that exercised by any absolute monarch. It is far more to the credit of a judge to say, "This I find to be the law and I must follow it, even though I believe it should be otherwise," than to say, "I am the law." It is the acme of arrogance for judges to say, "If we do not change the law, it will not be changed." This is an assertion not only of freedom from precedent but of an absolute right to exercise the legislative function.

The legislature has no function except to produce change in law, but it is not free from constitutional restriction in this regard.[18] No similar express restraint is placed upon the taking of legislative action by a Supreme Court for the same reason that none has been placed upon law-making by the executive—it was not, and is not, contemplated that these bodies will engage in law-making. Those elaborate and specific constitutional safeguards which control the exercise of legislative action are appropriately absent with respect to the judicial and the executive departments,

[18] Illustrative of the restraints which have been placed on legislative action are constitutional provisions forbidding the enactment of laws designed to establish an official religion (U. S. Const., Amend. I), or the granting of a title of nobility; U. S. Const., Art. I, § 9. In the state area, the restraint operates to prevent the passage of special legislation or extinguishing the indebtedness of any corporation or individual to the state: Ill. Const. 1870, Art. IV, §§ 22-3.

but there would be far more reason to impose limitations upon the latter than upon the legislature if law-making was meant to be a part of the judicial or executive functions. The legislature, at least, is responsive to the will of the electorate; there is no one to check upon the court.

In addition, there are many practical reasons why a Supreme Court is not equipped to exercise the legislative function.[19] Lawmaking is a complicated process based upon time-consuming deliberation in legislative committees, upon hearings, and extensive studies of the basic problem. If a Supreme Court were to attempt to perform these functions, it would have time for nothing else. The alternative, then, is legislation by intuition.[20] But the assumption that judges are automatically endowed with special wisdom sufficient to make their wishes law is without precedent or foundation save in the classic case of the omniscience of a monarch.

The Molitor decision demonstrates what is wrong with judicial legislation. If a legislature were to enact a law providing that whenever eighteen children are injured in the burning of a school bus one shall have a cause of action to recover damages and seventeen shall not, cries of outrage would ring through the land. It is doubtful that it would be possible to find a single court which would hesitate, even for one moment, before declaring such an enactment unconstitutional and void.[21] Yet the Supreme Court of Illinois asserts the right to grant, as a matter of reward, that which a legislature could not.

It has been centuries since a monarch has had the effrontery to declare, as law, a preference for the civil rights of one citizen over another, even as a matter of imperial reward. Through the Molitor decision, however, the Supreme Court of Illinois has asserted a right to declare such preference.[22] Two arguments were advanced. One of them asserts that

19 No challenge is directed to the power of a court to adopt rules of procedure governing operations within the judicial department: Ill. Rev. Stat. 1959, Vol. 2, Ch. 110, § 2. Except for this, the customary "separation of powers" provision forbids the judicial and executive departments from entering into the realm of the legislative: Ill. Const. 1870, Art. III, § 1.

20 Legislation by intuition has not worked well, if the experience of the court in the area of family tort law is any criterion. In the case of Brandt v. Keller, 413 Ill. 503, 109 N. E. (2d) 729 (1953), the Illinois Supreme Court abrogated the common law rule which forbade suits between spouses based on personal torts committed during coverture. It apparently sensed a change in public opinion on the point. The legislature, however, then in session, took prompt action to restore the bar to suits of this character: Laws 1953, p. 437; Ill. Rev. Stat. 1959, Vol. 2, Ch. 68, § 1. See also, as to exculpatory clauses in leases, the holding in O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. (2d) 436, 155 N. E. (2d) 545 (1959), and compare with Laws 1959, p. —; Ill. Rev. Stat. 1959, Vol. 2, Ch. 80, § 15a.

21 If any state court should so hold, the United States Supreme Court would doubtless intervene, under the clear injunction of the 14th Amendment, to prevent a state from such a denial of equal protection of law.

22 18 Ill. (2d) 11 at 28, 163 N. E. (2d) 89 at 97.

it was necessary to grant a preference in order that everything which was said should not be "mere dictum."[23] That argument seems particularly inappropriate[24] except as it gives further emphasis to the difference between legislative and judicial action. Everything that the legislature says in the course of official enactment is precedent. Its words, embodied in a statute, apply to all future conduct. If courts are to legislate, the rule should be the same. What difference should it make what issue is before the court if the pronouncements of that tribunal create the law? Yet, in all the annals of judicial history, that position is as untenable as anything could be. The argument destroys its author.

As a second, and "more important," justification for its acts, the court cites the need to "reward" the litigant for giving it the opportunity to make that pronouncement which the court itself says would be meaningless if it did not favor the litigant.[25] This is a wholly remarkable exercise in semantics. It is reasonably clear that if anything remains of the doctrine of precedent at all, if the concept of dictum is to survive, the only thing that the court has decided is that young Tom Molitor has a cause of action. Every statement concerning the rights of those not before the court is "mere dictum" and nothing more.

This is the morass in which one may well expect to flounder who leaves established paths and decides to blaze new trails, even through an old wilderness. The way of the pioneer may be exciting but it is not an appropriate one for those charged with a special assignment and endowed with a special trust. One could picture a tribal chieftain rewarding a favored servant for calling attention to some situation concerning which His Majesty is pleased to make a pronouncement. It is not possible, however, to look upon similar action by a high court in the same light. Among free men, judicial decision ought never be a matter of "reward." Whatever decision a citizen obtains from our courts, it must and should come to him as a matter of right. There is no place in our system for a divine right of courts any more than there is room for a divine right of kings.

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[23] Ibid.

[24] There is nothing inappropriate in the distinction between "dictum" and "holding," for the doctrine of stare decisis contemplates that a case is precedent only as to matters necessarily therein decided. As Chief Justice Marshall once expressed the thought, the point is one not to be disregarded that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control" the judgment therein or in a subsequent suit where the very point is presented for decision. See Cohens v. Virginia, 19 U. S. (6 Wheat.) 264 at 399, 5 L. Ed. 257 at 290 (1821).

[25] 18 Ill. (2d) 11 at 28, 163 N. E. (2d) 89 at 97.

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