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THE LEGACY OF DRED SCOTT: A JUDGE'S SYMPOSIUM*

In 1857, Chief Justice Roger B. Taney, speaking for the United States Supreme Court held that, “. . . they (Negroes) had no rights which the white man was bound to respect.” *Scott v. Sanford*, 60 U.S. (19 How.) 393 at 407 (1857). The decision ended equivocation by the various states concerning the rights of slaves to claim freedom upon entering nonslave-holding territory. This unequivocal pronouncement broke Anglo-Saxon precedent of 85 year as enunciated by Lord Mansfield (*Somerset v. Stewart*, 98 Eng. Rep. 499 (1772)) and established an iniquitous precedent that made it relatively easy to circumscribe the rights of “African descendants” who were an “inferior and subject class.”

Scott v. Sanford was the touchstone for sanctioning all post-Thirteenth Amendment stigmata. Discrimination in public accommodations (*Civil Rights Cases*, 109 U.S., 3 (1883)), common carriers (*Plessy v. Ferguson*, 163 U.S. 537 (1896)), public school education (*Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899)), and voting rights (*Grovey v. Townsend*, 295 U.S. 45 (1925)) were all bottomed on the reasoning of Taney's semantical gymnastics.

Although probably illegally decided because of the questionability of federal jurisdiction (See Freund, *On Understanding The Supreme Court* (1951)), *Scott v. Sanford* marks a point of departure for Blacks that has a dual significance. It is, at one and the same time, both a reference point for indicating how far the legal rights of Blacks have moved and a sardonic reminder that lest Blacks be ever watchful as a people, vestiges of the “no rights which a white man was bound to respect” concept will continually arise. It cannot be gainsaid that the legal rights of Blacks *qua* Blacks in this country stands on the most favorable footing since the good ship *Jesus* first entered upon the African slave trade. It also cannot be denied that whatever rights have been won have come as a result of fairly bitter struggles against a background of *Scott*. Even perceived victories have been tinged with the vestigial echoes of Taney's edict. As the late Judge Loren Miller pointed out, one of the more curious issues in *Brown v. Board of Education*, 347 U.S. 483 (1954) was that the U.S. Supreme Court felt that it could delay the personal and *present* constitutional rights of Black children to a more propitious time. (Miller, *The Petitioners*, at 346 (1967)). The decision in *Moose Lodge v. Irvis*, — U.S. —, 92 S.Ct. 1965 (1972) most certainly can be traced directly to its precursor, *Scott v. Sanford*. As the dissenters in *Moose Lodge* point out, the “private” club that was per-

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mitted to discriminate on the basis of race could have not existed without the State Liquor Authority.

While there may be uncertainty as to whether the federal government's support of sterilization projects in Alabama, North Carolina and Georgia, the Tuskegee "experiment" which subjected Black farmers to the ravages of syphilis and the California and Mississippi psychosurgery projects involving Black prisoners can be traced directly to *Scott*, it is a fact that Associate Justice Rehnquist, in an April 4, 1973 speech at Duke Law School, stated that in his opinion Justice Taney was the greatest Justice to ever sit on the U.S. Supreme Court and it was his (Rehnquist's) desire to emulate him. (Justice Rehnquist was the author of the majority opinion in *Moose Lodge v. Irviss*.)

Continued exploration must be made of both judicial attitudes and official sanction of repressive tactics. The importance of *Scott* cannot be sloughed off in the face of cases such as *Moose Lodge v. Irviss*; *Jefferson v. Hackney*, — U.S. —, 92 S.Ct. 1724 (1972); and *San Antonio Independent School District v. Rodriguez*, — U.S. —, 93 S.Ct. 1278 (1973). While the latter two decisions are not based upon race alone, as was pointed out by the majority in *Jefferson*, the overwhelming proportion of recipients of Aid to Financially Dependent Children affected by the Texas benefit reduction formula were Black and Mexican-American. And as Justice Marshall indicated in his dissenting opinion in *Rodriguez*, "inequality in the educational facilities may make for discriminatory state action." 93 S.Ct. 1278 at 1323. Justice Marshall recognized the fact that it is minority group children who inhabit the "disadvantaged" school districts.

Wright v. Emporia City Council, — U.S. —, 92 S.Ct. 2196 (1972), set a precedent of sorts. It was the first time since *Brown* that the Supreme Court had rendered a nonunanimous decision concerning school desegregation. The split became most apparent in the northern desegregation case, *Keyes v. School District No. 1, Denver*, — U.S. —, 93 S.Ct. 2686 (1973). Justice Powell, in a well reasoned dissent in the Colorado case, objected primarily to the use of busing as a constitutional mandate to achieve desegregation. Justice Rehnquist's dissent, filled with scathing denunciations of the majority's "bald statements," and "jumbled hash of unrelated events," went primarily to opposition to desegregation *per se*. His statement concerning the inability to determine the intent of a school board in the racial imbalance situation due to "turn overs as a result of frequent periodic elections" (93 S.Ct. 2686 at 2723) echoes his philosophical progenitor's (Taney) question begging statement that ". . . the public history of every European nation" demonstrated that the Founding Fathers did not intend that, "the class of persons who had been imported as slaves, nor their descendents, whether they had become free or not," were ever intended to be citizens. (60 U.S. 393 at 407).

There is no question of a misperception of the thrust of some recent

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decisions. Rights of minorities have in fact been circumscribed by these pronouncements from the nation's highest court.

As part of NCCU Law School's continuing interest in exploration of judicial attitudes, several members of the bench were invited to participate in a symposium to examine "The Legacy of Dred Scott." Judge Bruce McM. Wright, Criminal Court of The City of New York and Judge Ladson Hart, Brevard District Court consented to participate in the symposium.

Judge Wright's remarks follow; Judge Hart was unable to prepare his written remarks in time for publication in the *Law Journal*, however, his general opinion was that there were no vestiges of the *Dred Scott* opinion in present day America.

H.R.W