

Dred Scott v. Sandford / Excerpts from the Dissenting Opinion—Answer Key

The following are excerpts from Justice McLean’s dissenting opinion:

He [Scott] is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicile in the State under whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is “a freeman.” Being a freeman, and having his domicile in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him.

In the discussion of the power of Congress to govern a Territory, in the case of the *Atlantic Insurance Company v. Canter*, (1 Peters, 511; 7 Curtis, 685,) Chief Justice Marshall, speaking for the court, said, “... the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory; whichever may be the source whence the power is derived, the possession of it is unquestioned.”

If Congress may establish a Territorial Government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion. This being the case, I do not see on what ground the act [Missouri Compromise] is held [by the Supreme Court majority’s opinion in the *Scott* case] to be void. It did not purport to forfeit property, or take it for public purposes. It only prohibited slavery; in doing which, it followed the ordinance of 1787.

Now, if a slave abscond, he may be reclaimed; but if he accompany his master into a State or Territory where slavery is prohibited, such slave cannot be said to have left the service of his master where his services were legalized. And if slavery be limited to the range of the territorial laws, how can the slave be coerced to serve in a State or Territory; not only without the authority of law, but against its express provisions? What gives the master the right to control the will of his slave? The local law, which exists in some form. But where there is no such law, can the master control the will of the slave by force? Where no slavery exists, the presumption, without regard to color, is in favor of freedom. Under such a jurisdiction, may the colored man

be levied on as the property of his master by a creditor? On the decease of the master, does the slave descend to his heirs as property? Can the master sell him? Any one or all of these acts may be done to the slave, where he is legally held to service. But where the law does not confer this power, it cannot be exercised.

Does the master carry with him the law of the State from which he removes into the Territory? and does that enable him to coerce his slave in the Territory? Let us test this theory. If this may be done by a master from one slave State, it may be done by a master from every other slave State. This right is supposed to be connected with the person of the master, by virtue of the local law. Is it transferable? May it be negotiated, as a promissory note or bill of exchange? If it be assigned to a man from a free State, may he coerce the slave by virtue of it? What shall this thing be denominated? Is it personal or real property? Or is it an indefinable fragment of sovereignty, which every person carries with him from his late domicile? One thing is certain, that its origin has been very recent, and it is unknown to the laws of any civilized country.

Questions to Consider

1. On what key points does Justice McLean disagree with Chief Justice Taney?

Justice McLean disagrees with Justice Taney on these points:

- on whether Dred Scott is a citizen — Justice McLean says that he is and so can bring a case to court;
- the Missouri Compromise was constitutional and slavery could be prohibited; and
- when an enslaved person travels with his enslaver to a free state, he must be presumed free because it is the local laws that control the relationship. A person does not carry with him the laws of his own state when he travels to other states.

2. What examples does Justice McLean use to demonstrate that Scott has the right to sue in court?

Justice McLean states the women and minors may sue in federal court even though they are not allowed to vote.

3. In his decision, Chief Justice Taney declared the Missouri Compromise unconstitutional. How does Justice McLean deal with this argument in his dissent?

Justice McLean states that Congress has the power to declare slavery illegal in the territory because it has control over that territory. Until a territory becomes a state, it does not have equivalent powers of self-governance and the jurisdiction over the territory is defined by the Ordinance of 1787.