

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 5: The Jacksonian Era — Equality/Gender

Shanks v. Dupont, 28 U.S. 242 (1830)

Ann Shanks and Abraham DuPont were the grandchildren of Thomas Scott, a resident of South Carolina. Thomas Scott died in 1782. He left his property to his two daughters, Ann and Sarah Scott. Ann Scott married Joseph Shanks, a British officer. She moved to England in 1782, had five children and died in 1801. Ann Shanks was her child. Sarah Scott married a citizen of South Carolina. She remained in South Carolina for the rest of her life, had several children, and died in 1802. Abraham DuPont was her child. When the Scott estate was sold, Abraham DuPont and his siblings claimed the right to all the proceeds. All parties to the litigation agreed that Ann Scott's children were aliens because their father was a British citizen. The crucial issue was whether Ann Scott was a citizen of South Carolina or England. Ann Shank claimed that her mother became a British subject when she moved with her husband to England in 1782. Under the treaty of Paris (1783), British subjects who owned land in the United States had the right to will that land to their children. The DuPonts maintained that Ann Scott's children had no right to the land because Ann Scott never renounced her South Carolina citizenship. South Carolina law declared that aliens could not inherit property from South Carolina citizens.

Justice Joseph Story ruled that Ann Scott became a British subject when she moved to England in 1782. For this reason, her children were entitled to half the proceeds from the sale of the Scott estate. Does Justice Story claim that Ann Scott self-consciously choose to become an English citizen? Why does Justice Johnson dispute this analysis? If Scott did not self-consciously choose English citizenship, how did she become an English citizen? Suppose the case involved the children of an American male who moved to England in 1783 and married a British subject. Same result given the common law rule that allegiance is determined by birth?

JUSTICE STORY delivered the opinion of the Court.

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The question then is, whether her subsequent removal with her husband operated as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown by the treaty of peace of 1783. . . . The treaty of peace of 1783 acted upon the state of things as it existed at that period. . . . All those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from all allegiance to the British crown. All those who then adhered to the British crown, were deemed and held subjects of that crown. . . .

It cannot, we think, be doubted that Mrs. Shanks, being then voluntarily under British protection, and adhering to the British side, by her removal with her husband was deemed by the British government to retain her allegiance, and to be, to all intents and purposes, a British subject. It may be said that . . . she had no right to make an election; nor ought she to be bound by an act of removal under his authority or persuasion. If this were a case of a crime alleged against Mrs. Shanks, in connection with her husband, there might be force in the argument. But it must be considered, that it was at most a mere election of allegiance between two nations, each of which claimed her allegiance. The governments, and not herself, finally settled her national character. They did not treat her as capable by herself of changing or absolving her allegiance; but they virtually allowed her the benefit of her choice, by fixing her allegiance finally on the side of that party [her husband] to whom she then adhered.

It does not appear to us that her situation as a feme covert disabled her from a change of allegiance. British femes covert residing here with their husbands at the time of our independence, and adhering to our side until the close of the war, have been always supposed to have become thereby American citizens, and to have been absolved from their antecedent British allegiance. The incapacities of femes covert, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations. . . .

But if Mrs. Shanks's citizenship was not virtually taken away by her adherence to the British at the peace of 1783, still it must be admitted that, in the view of the British government, she was, at that time, and ever afterwards to the time of her death, and indeed at all antecedent periods, a British subject. At most, then, she was liable to be considered as in that peculiar situation, in which she owed allegiance to both governments. Under such circumstances, the question arises whether she and her heirs are not within the purview of the ninth article of the treaty with Great Britain of 1794. It appears to us that they plainly are. The language of that article is, 'that *British subjects* who now hold lands in the territories of the United States, and *American citizens* who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, &c. &c.; and that neither they, nor their heirs or assigns shall, so far as respects the said lands, and the legal remedies incident thereto, be regarded as aliens.

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Upon the whole, the judgment of the court is, that the plaintiffs in error are entitled to the moiety of the land in controversy, which came by descent to their mother, Ann Shanks, and of course to the proceeds thereof; and that the decree of the state court of appeals ought to be reversed; and the cause remanded, with directions to enter a decree in favour of the plaintiffs in error.

JUSTICE JOHNSON, dissenting.

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As the common law of Great Britain is the law of South Carolina, it would here perhaps be sufficient to state that the common law altogether denies the right of putting off allegiance. British subjects are permitted, when not prohibited by statute (as is the case with regard to her citizens), to seek their fortunes where they please, but always subject to their natural allegiance. And although it is not regarded as a crime to swear allegiance to a foreign state, yet their government stands uncommitted in the subject of the embarrassments in which a state of war between the governments of their natural and that of their adopted allegiance may involve the individual. On this subject the British government acts as circumstances may dictate to her policy. That policy is generally liberal; and as war is the calling of many of her subjects, she has not been rigorous in punishing them even when found with arms in their hands, where there has been no desertion, and no proclamation of recall. The right however to withdraw from their natural allegiance is universally denied by the common law.

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... It is the doctrine of the American court, that the issue of the revolutionary war settled the point, that the American states were free and independent on the 4th of July 1776. On that day, Mrs. Shanks was found under allegiance to the state of South Carolina, as a natural born citizen to a community, one of whose fundamental principles was that natural allegiance was unalienable; and this principle was at no time relaxed by that state, by any express provision, while it retained the undivided control over the rights and liabilities of its citizens.

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Upon the whole I am of opinion, that Mrs. Shanks continued, as she was born, a citizen of South Carolina; and of course unprotected by the British treaty.