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RESPUBLICA *versus* SAMUEL CHAPMAN.

BY a proclamation, dated the 15th June 1778, issued by the *Supreme Executive Council*, in pursuance of the act of Assembly, passed the 6th of *March* preceeding, for the attainder of divers traitors, &c. the prisoner had been required to surrender himself on the 1st of *August* following, &c. or to be attainted of high treason agreeably to that act. The time allowed for his surrender being elapsed; the *Attorney General* filed a suggestion, in the usual form, stating that *Samuel Chapman* the prisoner was the person required by the proclamation to surrender himself, &c. that he had not surrendered himself, &c. that he was therefore attainted; and this he was ready to verify, &c. The Chief Justice then asked the prisoner, what he had to say, why execution should not be awarded against him.

Upon which the said *Samuel Chapman*, the prisoner, saith, *ore tenus*, that he was born, and hath ever remained and continued a subject of the king of *Great Britain*, and is now a prisoner of war; and that he is not, nor hath ever been a *subject or inhabitant* of this Commonwealth; nor hath he, nor he never had, any real estate in this Commonwealth; neither hath he at any time owed allegiance thereto: *Wherefore* he prays that execution may not be awarded against him, &c.

The *Attorney General* replied, that the said *Samuel Chapman*, the prisoner was an *inhabitant and subject* of this Commonwealth, &c. and that he did owe allegiance thereto, &c. *Whereupon* issue was joined.

The evidence upon the trial of this issue was, that the prisoner was born in *Bucks County* in this State, and that he had resided there until the 26th day of *December* 1776, at which time he departed and joined the enemy. Whether, upon these facts he was to be considered as an *inhabitant and subject* of the Commonwealth of *Pennsylvania*, at the time of his departure, was the great question to be decided.

-His counsel argued that on the 26th *December*, 1776, there was no government established in *Pennsylvania*, from which he could receive protection; and consequently, there was none to which he could owe allegiance—protection and allegiance being political obligations of a reciprocal nature. The doctrine of perpetual allegiance to be found in the books, applies only to established and settled governments; not to the case of withdrawing from an old government, and erecting a distinct one. Then every member of the community has a right of election, to resort to which he pleases; and even after the new system is formed, he is entitled to express his dissent; and, dissenting from a majority, to retire with impunity unto another country. Upon this principle, it was asserted that the prisoner never was a subject of the State of *Pennsylvania*; and

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the following narrative of the measures pursued in organizing the constitution, was delivered in support of the assertion.

The first act of legislation, under the constitution was passed on the 21st January, 1777. On the 28th day of the same month, the laws of the late Province, with certain restrictions, were, from and after the 10th day of February then next, to be revived; and on the 4th of March following, the first President and Vice-President were elected; when also, the first minutes were made on the records of the *Supreme Executive Council*. So that the prisoner's departure from this State, on the 26th December, 1776, was near a month antecedent to any legislative act; and near three months before all the branches of the government were organized and put into actual operation.—Besides, the act for the revival of the laws, expressly admits that they were not in force from the 14th May, 1776, until the 11th February, 1777; and the act for declaring what shall be treason, which did not pass till the last mentioned date, excludes every idea of retrospect; declaring only, “that all persons now inhabiting, &c. within the limits of the State of Pennsylvania; or that shall voluntarily come into the same hereafter to inhabit, &c. do owe and shall pay allegiance, &c.”—The prisoner, at the time of passing this act, was not an inhabitant; nor has he since voluntarily become one. He does not, therefore, owe allegiance to the State, and cannot be denominated a subject of Pennsylvania.—With respect to the act of the 6th March, 1778, on the authority of which the present proclamation issued, it is evidently an *ex post facto* law, and as such, contrary to the words, and spirit of the Constitution. But if the prisoner never was a subject of the Commonwealth of Pennsylvania, this law cannot operate against him in the decision of the issue before the court.

The Counsel for the prisoner cited the following authorities in the course of their argument: *Puff.* 639. *Lock. on Gov.* 229. 168. 227. *Vatt.* 23. 25. b. 3. p. 109. *Burlimaqui* 27. 33. 1 *Blackst.* 45. *Foster C. L.* 55. *Harvey's case*.

The Attorney General stated the question to be, in fact, whether Pennsylvania was a Commonwealth on the 26th day of December, 1776? By the declaration of independence, on the 4th July, 1776, every State in the union was solemnly declared to be free and independent. But even before that period Congress had recommended, that new governments should be framed, adequate to the exigency of the public affairs; and a Council of Safety, with other temporary bodies, actually discharged the functions of the State. See *Journals of Congress* 10th and 14th May, 1776. 4th of June, 1776. 16th June, 1776. 24th do. and July 14th.

In consequence of the declaration of independence, however, a General Convention assembled at Philadelphia on the 15th July, 1776; and on the 28th of September following, agreed to that social compact under which the people of this State are now united. It appears that a quorum of the legislative body, created by the constitution

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thus established, met on the 28th of November, 1776, and then chose their Speaker and Clerk. 1 Min. Aff. 98. On the succeeding day the clerk was qualified, several public officers were appointed, and votes were entered into respecting the collection of fines from *non-associators*, and the enacting of a *Militia-law*. *id.* On the 30th of November, the house having made sundry orders relative to the *Militia*, adjourned till the 1st of December; and on the 5th of that month, when the house were again assembled, a committee was appointed to bring in the draft of a *Militia-law*, *id.* 100—With respect to the *Executive Council*, it is true, that body did not enter upon any official business, till the beginning of *March*, 1777; but its members were chosen at the same time with the members of the Legislature.

From this recapitulation, it appears, that, even before the establishment of the constitution, a government under the authority of the people was administered by councils, committees, and conventions. After the establishment of the constitution, however, the legislative (which is the sovereign) body assembled and proceeded to discharge its duties; and it was not necessary to the existence of the government, either that they should have enacted a law, or that the *Supreme Executive Council* should have been convened.

Under every change of the government, *Samuel Chapman*, remained here till the 26th day of *December*, 1776; and, at that time, he was certainly a subject of the state of *Pennsylvania*, under the constitution agreed to on the 28th day of *September* preceding, whatever doubts may be entertained with respect to the former establishments. That this was, likewise, the sense of the legislature, is abundantly evident from the act on which the proclamation is founded; for, *Mr. Galloway*, and others, who joined the enemy in the fall of 1776, are there considered as subjects of *Pennsylvania*; and all the states are clearly deemed to have been free and independent from the declaration published by Congress on the 4th of *July* in that year.

The *Attorney-General*, to shew the definition of a nation, the relation which a citizen bears to the state; and the natural connexion between a state of society and the institution of a government, cited the following authors: *Vatt. 92. id. B. 1. c. 19. sect. 212. id. sect. 1. p. 9. id. sect. 4. Burling. 25. 1. Black. Com. 46. 47. 48. 213. Vatt. p. 15. sect. 26. id. 19. sect. 38.*

THE CHIEF JUSTICE, delivered a learned and circumstantial charge to the Jury. After stating the proclamation, the issue, and the evidence, he proceeded as follows.

M'KEAN Chief Justice:—The question that is to be decided on the facts before us, is, whether *Samuel Chapman*, the prisoner at the bar, ever was a subject of this Commonwealth? The reason which has been principally urged to take him out of that description, is that on the 26th day of *December*, in the year 1776, when he withdrew from *Pennsylvania*, no government existed to which he could owe allegiance as a subject.—I shall, in the first place, consider how far

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The *Attorney-General*, has referred to the declaration of independence, on the 4th of *July*, 1776, when the freedom and sovereignty of the several states were announced to the world; and also, to a resolution of Congress recommending the formation of such governments, as were adequate to the exigency of the public affairs. The latter states pursued different modes of complying with this recommendation. The citizens of *Connecticut*, *New-Hampshire* and *Rhode-Island*, considered themselves in a situation similar to that which occurred in *England*, on the abdication of *James* the second; and, wanting only the form of a Royal Governor, their respective systems of government have still been continued: while the other states adopted temporary expedients, till regular constitutions could be formed, matured, and organized.

And here it is contended, that, prior to the constitution under which we now live, the state of *Pennsylvania* was governed by a council of safety, and committees. But to this, it is answered, that until laws were passed by a competent legislative power, no government could be said to exist; and, as the act of the 28th of *January* 1779, for the revival of the laws, virtually declares that they were suspended from the 14th *May*, 1776, till the 11th *February*, 1777, it is inferred, that during that period, no allegiance was due, and no treason could be committed.

Although I think this point immaterial to the prisoner, since a government might have existed, and yet not be of such a nature as to affect him, it cannot be denied, that a kind of government, independent of *Great Britain*, was administered in *Pennsylvania*, antecedent to the establishment of the present constitution. The powers of sovereignty were then lodged with Congress, under whose authority a council of safety had been elected by the people, and were employed, in conjunction with other committees, to conduct the war, and to secure, as far as so imperfect a system could, the rights of life, liberty, and property, within this state. It is certain, indeed, that a formal compact is not a necessary foundation of government; for, if an individual had assumed the sovereignty, and the people had assented to it, whatever limitations might afterwards have been imposed, still this would have been a legal establishment.—No express provision, however, has been at any time made, for defining what should be treason against those temporary bodies; but it may be well enough to observe, that treason is a crime known to the Common-law.

Afterwards, we find, that a *General Convention*, elected by the people, met on the 15th day of *July*, 1776, for the express purpose of framing a new government; and during the sessions of this body, its members, collectively, assumed the powers of making ordinances, of appointing members of Congress, and of defining *High Treason*, and its punishment.—All their proceedings and injunctions, except the ordinance respecting treason, were approved and executed

uted; and the Constitution which they eventually agreed upon, was incontrovertibly a dissolution of the government, as far as related to the powers of *Great Britain*, but not in relation to the powers which had been before exercised by councils and committees. 1781.

The *Attorney-General* has urged that, at least, as soon as the Government, under the new constitution was formed, which he says was on the 28th of *November*, 1776, the members of council being then chosen, and the legislature actually assembled, the sovereignty of the state was complete, and allegiance followed by a necessary consequence; without the intervention of any positive law. But the advocates for the prisoner again object, that the government cannot be said to be established; until there is a meeting of all its parts, and that as the Executive Council never met till the 4th of *March*, 1777, the state was incapable of affording protection, and, therefore, was not entitled to allegiance, before that time.

On this occasion, the sentiments of several eminent *Civilians* have been read to us; not as authorities binding upon our judgment, but as a means of information derived from the great learning and abilities of the respective writers, and, principally indeed, on account of the intrinsic weight of the reasons by which their doctrines are supported. *Locke* says, that when the *Executive* is totally dissolved, there can be no *treason*; for laws are a mere nullity; unless there is a power to execute them: But that is not the case at present in agitation; for before the meeting of Council in *March*, 1777, all its members were chosen, and the legislature was completely organized: so that there did antecedently exist a power competent to redress grievances, to afford protection, and, generally, to execute the laws; and allegiance being naturally due to such a power, we are of opinion, that from the moment it was created, the crime of *High Treason* might have been committed by any person, who was then a subject of the Commonwealth: The act of the 11th of *February*, 1777 expressly authorises this opinion; for, we find it there said, "That all and every person and persons (except prisoners at war) now inhabiting &c. within the limits of this state; or that shall voluntarily come into the same hereafter to inhabit, &c. do owe, and shall pay allegiance, &c.?" This, therefore, contradicts the idea, suggested by the advocates for the prisoner, that allegiance was not due till the meeting of the executive council on the 4th of *March* ensuing; and, although he cannot be convicted upon that act, yet allegiance being due from the 28th of *November*, 1776, when, as I have already observed the legislature was convened, and the members of council were appointed, treason, which is nothing more than a criminal attempt to destroy the existence of the government, might certainly have been committed, before the different qualities of the crime were defined, and its punishment declared by a positive law. 1 *Blackst. Com.* 46.

Having thus dismissed the preliminary question, whether the prisoner's defence would avail him upon an indictment for *High Treason*

1781. *son*, I shall proceed to enquire, if there are any circumstances that take his case out of the general opinion expressed by the court upon that point.

The act for the revival of the laws, passed the 28th of *January*, 1777, was intended, I think, merely to declare, that those laws, which were originally enacted under the authority of *George the Third*, ceased any longer to derive their virtue and validity from that source. But there is great inaccuracy in penning the act; for, though it would seem, by the former part of the second section, to be the sense of the legislature, that from the 14th of *May* 1776, to the 10th of *February*, 1777, the operation of all the acts of assembly should be suspended; yet, in the close of the same section, obedience to those acts, to the common law, and to so much of the statute law of *England*, as have heretofore been in force in *Pennsylvania*, is, with some exceptions in point of style and form, expressly enjoined. We may, however, fairly infer from the general tenor of the act, that those who framed it, thought the separation from *Great Britain* worked a dissolution of all government, and that the force, not only of the acts of Assembly, but of the common law and statute law of *England*, was actually extinguished by that event.

This, therefore, necessarily leads to the consideration of a very important subject. In *civil wars*, every man chuses his party; but generally that side which prevails, arrogates the right of treating those who are vanquished as rebels. The cases which have been produced upon the present controversy, are of an old government being dissolved, and the people assembling, in order to form a new one. When such instances occur, the voice of the majority must be conclusive, as to the adoption of the new system; but, all the writers agree, that the minority have, individually, an unrestrainable right to remove with their property into another country; that a reasonable time for that purpose ought to be allowed; and, in short, that none are subjects of the adopted government, who have not freely assented to it. What is a reasonable time for departure, may, perhaps, be properly left to the determination of a court and jury. But whether a man should be suffered to join a party, or nation, at *open war* with the country he leaves, is a question of singular magnitude. The ground is hitherto untrodden, but there is such apparent injustice in the thing itself, that I am inclined to think, it would amount to an act of treason. *Puffendorff*. 639.

This is not, however, the situation of the prisoner. *Pennsylvania*, was not a nation at war with another nation; but a country in a state of *civil war*; and there is no precedent in the books to shew what might be done in that case; except indeed, where a prince has subdued the people who took arms against him, before they had formed a regular government, which is, likewise, inapplicable here.

But this difficulty seems to vanish by having recourse to the opinion of the legislature, in their act of the 11th *February*, 1777; for, when describing from whom allegiance is due, they speak only
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of persons then inhabiting the state; or who should *thereafter* become its inhabitants. Hence a discrimination is evidently made between those persons, and such as had previously joined the enemy;—meaning that this election to adhere to the *British* government, should not expose the party to any future punishment. It is true, that there are not any negative words to this effect; but, taking the act for the revival of the law also into consideration, we think the desire and intention of the legislature sufficiently appears to have been, to allow a choice of his party to every man, until the 11th of *February, 1777*; and that no act favouring of treason, done before that period, should incur the penalties of the law.

This construction, it may be said, is favorable to traitors, and tends to the prejudice of the Commonwealth. But we cannot be influenced by observations of a political nature in the exposition of the law; it is our duty to seek for, and to declare, the true intention of the Legislature; the policy of that intention, it is their duty to consider. The sentiments which I have now delivered, I always entertained. On the 13th of *August 1779*, the *Executive Council* had sixteen or seventeen persons in their power, who, though not attainted, were in circumstances similar to the Prisoner's. On that occasion I was consulted, and gave the same opinion; but with great diffidence, owing to the novelty of the question. Those persons were, accordingly, treated as Prisoners of War.

But there is yet another important point to be examined in the case before us. By an act, subsequent to all those which have been mentioned, it is declared, “that all and every person and persons *being subjects or inhabitants of this state, or those who have real estate in this Commonwealth, who may adhere to, and knowingly and willingly aid and assist the enemies of this State, or of the United States of America, by having joined their armies within this State, or elsewhere, or who hereafter shall do the same, and whom the Supreme Executive Council of this State, by their proclamations to be issued under the State seal, during the continuance of the war with the King of Great-Britain, shall name and require to surrender themselves, by a certain day therein to be mentioned; to some, or one, of the justices of the supreme court, &c. and shall not render themselves accordingly &c. shall from and after the day to them to be prefixed by such proclamation stand and be attainted of high treason to all intents and purposes, &c.*”—Under the authority of this clause, the Prisoner was duly required by proclamation to surrender himself; and, therefore, his case seems to come properly within the act.

Generally speaking, *ex post facto* laws are unjust and improper; but there may certainly be occasions, when they become necessary for the safety and preservation of the Commonwealth; and although no Legislature had previously met, yet the assembly that passed this law, if they were impeded with the necessity of the case, had incontrovertibly a right to declare any person a traitor, who had gone over to the enemy, and it had adhered to them. The validity

1781. and operation of the law, however, the prisoner is now precluded from controverting, if, at any time before the date of the proclamation, he was a subject of the State of *Pennsylvania*.

Here, then, the matter rests. Had, the issue been in the *disjunctive*, the prisoner would clearly have come within the description of an *inhabitant* of *Pennsylvania*; but when the word *subject* is annexed, it means a subjection to some sovereign power, and is not barely connected with the idea of territory—it refers to one who owes obedience to the laws, and is entitled to partake of the elections into public office. On this point, therefore, we must again advert to the act of Assembly, declaring what shall be treason, which has no retrospect, and to the act for the revival of the laws, which implies a suspension of all the laws from the 14th of *May* 1776, to the 11th of *Feb.* 1777. If there were no laws to be obeyed during that period, the prisoner could not be deemed a subject of the State of *Pennsylvania* on the 26th day of *December* 1776. Whether the Legislature meant to include this case we will not positively determine;—it is a new one, and we ought to tread cautiously and securely: But, at all events, it is better to err on the side of mercy, than of strict justice,

The jury found a verdict of *not Guilty*.

September Term, 1781.

REPUBLICA *versus* JOSHUA BUFFINGTON.

THE Attorney General filed a suggestion, stating, that *Joshua Buffington* of the county of *Chester*, yeoman, being a subject, or inhabitant of the State, was by proclamation of the Supreme Executive Council, dated the 2d of *October* 1780, required in pursuance of the attainder law, to surrender himself to a justice of the Supreme Court &c. on or before the 13th of *November*, 1780, to abide his legal trial for the treasons in the proclamation mentioned, &c. That the said *Joshua Buffington* did not surrender himself, &c. whereby he is attainted, &c. and he prays an award of execution.

Joshua