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April Term, 1797.

Present—IREDELL and PETERS, *Justices*.The UNITED STATES *versus* VILLATO.

THE defendant had been committed by the District Judge, on a charge of *High Treason* against the *United States*, and on the return to a *Habeas Corpus*, issued under the act of *Pennsylvania* (2 *Vol. Dall. Edit. p.*) it appeared, that he had entered on board of a *French* privateer “in parts out of the territory of the *United States*, and that, having so entered, he aided in capturing an *American* vessel.”

But it was objected, by *Dallas* and *Du Ponceau*, for the prisoner, that he was not liable to a charge of *High Treason*; because he was by birth a *Spaniard*, and had never become a naturalized citizen of the *United States*. They contended, therefore, that he ought to be discharged from the prosecution: independent of any inquiry, whether the offence could be deemed *High Treason*, even in a citizen.

The facts were these:—*Francis Villato* was born within the dominions of the King of *Spain*; he came from *New Orleans* to *Philadelphia* in the beginning of the year 1793, and, on the 11th of *May* following, he took and subscribed, before the Mayor of the *City*, the oath specified in the third section of the act of Assembly, passed on the 13th of *March* 1789. 2 *Vol. Dall. Edit. p.* 676. He afterwards went to the *West Indies*, entered on board a *French* privateer, and acted as prize-master of the *American* brig *John* of *New-York*, which the privateer had taken, while he was on board, and procured to be libelled and condemned at *Cape François*.

Under these circumstances, the argument entirely turned upon the question; whether the prisoner had become a citizen of the *United States*, in consequence of the oath taken and subscribed by him, on the 11th of *May* 1793.

For the affirmative of the proposition, *Lee*, the Attorney General of the *United States*, and *Morgan*, contended, that the act of *Pennsylvania* was in force in the year 1793; that it was not affected by the establishment of the new State Constitution, nor repealed by any subsequent law; that the power of naturalization

tion granted to the Federal government was concurrent with, and not exclusive of, the State jurisdiction upon the subject; that the first naturalization act of Congress passed in the year 1790, furnished a new rule, but contained no repealing, or negative, words, to impair the operation of the pre-existing State laws; and that although at this time there was no other than the Federal rule for naturalizing a foreigner, yet this was the direct effect of positive negative words, in the act of Congress passed in the year 1795. 3 *Vol. Swift's Edit.* p. 163. *Collet v. Collet. Ant.* p. 295. 1797.

Dallas, in reply. It is conceded, that if the prisoner is not a naturalized citizen of the *United States*, he must be discharged. It is unnecessary to enquire, whether the Federal power of naturalization is concurrent, or exclusive; since, it will be sufficiently shewn, that even if the power is concurrent, the State had ceased to exercise it before the year 1793; and, consequently, the prisoner could not have become a citizen of the *United States* under any law of *Pennsylvania*. Before Congress had exercised the power of naturalization given by the Federal Constitution, the then existing State constitution had declared, that "every foreigner of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer, land, or other real estate; and, after one year's residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this State, except that he shall not be capable of being elected a Representative until after two years residence." 1 *Vol. Dall. Edit.* p. 60. *in Appendix.* While the test laws were in force, no particular form of qualification was prescribed for the purpose of naturalization, different from the oath, or affirmation, of allegiance and abjuration, exacted from every inhabitant of the State: But when the test laws were repealed, and before Congress had legislated upon the subject, a special provision became necessary; and the proviso in the act of the year 1789 (2 *Vol. Dall. Edit.* p. 677.) was expressly introduced to preserve and effectuate the 42d section of the Constitution, with which it is in language and meaning inseparably connected. The next change in the business of naturalization was the act of Congress, passed in the year 1790. This act, it is true, does not contain a repeal of the State law, nor any negation of a State power to naturalize; but the arguments *ab inconvenienti* are strong against a concurrent authority; and, if not on the question of power, at least on the principle of expediency, the State Convention, who afterwards formed our existing Constitution, have evidently avoided a collision of jurisdiction, by omitting to prescribe any State mode of naturalization, and leaving the subject, implicitly, to

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ralized under it, having the rights of the old, is in a situation preferable to a natural born citizen under the accumulative restraints of the new constitution. But a contrary construction has been given whenever the point was directly presented for consideration (which was not the case in *Collet v. Collet*) by the legislature, by our courts, and by the bar.

PETERS, *Justice*. At the time of committing the defendant, some doubts arose in my mind; which, on account of the importance of the subject, I thought it more proper to submit to a solemn discussion, than hastily to decide at my chambers. I take the earliest opportunity, however, to acknowledge, that I am now convinced the commitment was erroneous. The act of assembly is obviously inconsistent with the existing constitution of the state; and, therefore, cannot be saved by the general provision of the schedule annexed to it. On that ground only my opinion is formed; but it is sufficient to authorize a declaration, that the proceeding before the Mayor was, *ipso facto*, void; that, the prisoner is not a citizen of the *United States*; and that, consequently, he must be released from the charge of *High-Treason*.

IREDELL, *Justice*. I am of the same opinion. Difficulties, it is true, have been suggested on points not necessary to a decision on the present occasion; and, certainly, if the question had not previously occurred, I should be disposed to think, that the power of naturalization operated exclusively, as soon as it was exercised by Congress.

But the circumstances of the case now before the court, render it unnecessary to enquire into the relative jurisdictions of the State and Federal governments. The only act of naturalization suggested, depends upon the existence, or non-existence, of a law of Pennsylvania; and it is plain, that upon the abolition of the old constitution of the state, the law became inconsistent with the provisions of the new constitution, and, of course, ceased to exist, long before the supposed act of naturalization was performed.

The Prisoner must, therefore, be discharged.

THE UNITED STATES *versus* PARKER. *et al.*

A *Capias* had issued in this cause against Daniel Parker, Wm. Duer, and John Holker, returnable to April term 1792; and the Marshal then returned, *Cepi Corpus* as to Duer, (who gave special bail in due time) and *non sunt inventi*, as to Parker and Holker. After a declaration was filed (reciting that the Marshal had not found two of the defendants within his District, and proceeding against the other alone, upon the principles