*APRIL TERM, 1797.

Present, IREDELL and PETERS, Justices.

UNITED STATES *v.* VILLATO.[1]

Treason.—Alienage.

An unnaturalized alien cannot be guilty of treason against the United States.
The naturalization act of Pennsylvania of 1789 was repealed by the adoption of the constitution of 1790.[2]

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 Dall. Laws, 241), 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; independently 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 Dall. Laws, 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, 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was in force in the year 1793; that it was not affected by the establishment of the new state constitution, nor repealed by any subsequent law; that the power of naturalization *granted to the federal government was concurrent with, and not exclusive of, the state jurisdiction upon the subject; [*371

French republic had refused to file a claim to the vessel; and he said, that he was prepared to contend, that the suggestion filed *ex officio* by the attorney of the district, ought to be dismissed. The next day, he mentioned, that presuming the decision against the jurisdiction of the circuit court, was, in effect, a recognition of the jurisdiction of the district court, he should report to that tribunal, without giving this court (who had deferred pronouncing their decision, in order that he might consider the matter) any further trouble.

[1] s. c. Whart. St. Trials, 185. [2] See note to the case of Collet *v.* Collet, *ante*, p. 294.

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 (1 U. S. Stat. 414); *Collet* v. *Collet*, *ante*, p. 295.

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 inquire, whether the federal power of naturalization is concurrent or exclusive; since, it will be sufficiently shown, 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 Dall. Laws, app. 60. 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 Dall. Laws, 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 (1 U. S. Stat. 103). 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 *the
*372] rules which congress had previously prescribed. A citizen of the United States, adopted under the act of congress, is a citizen of each and every state; and the convention of Pennsylvania could conceive no means of establishing uniformity (the very object contemplated by the federal constitution), if each state, in a distinct and different mode, might likewise convert the character of an alien, into that of a citizen of the United States.

The state constitution is, therefore, silent; and it only remains to be shown, that the law passed in the year 1789, was virtually repealed by the ratification of that constitution; which provides, indeed, that all the pre-existing laws, not inconsistent with itself, shall continue in force. Schedule, § 1. But the act of 1789 was not only entirely dependent on the existence

of the old constitution, which was abrogated; but is in many essential points inconsistent with the new constitution. Thus, it is to be remarked, that the part of the act of assembly on which the controversy turns, is not a substantive and original section, but a mere declaratory proviso, that the legislature did not intend to do, what it was out of their power to have done, that is, to alter the 42d section of the constitution, by a mere repeal of the test laws. The proviso proceeds in the following words: "every such foreigner as in the said section mentioned, who shall come to settle in this state, after one year's residence therein, be entitled to the full enjoyment of the rights and privileges therein specified," upon taking and subscribing the oath, or affirmation, &c. When the whole constitution was destroyed, none of its parts could survive; and when, therefore, the 42d section was annulled, the description of foreigners which it contained, and the rights and privileges which it specified, could no longer furnish a foundation, on which the act of assembly could stand, and it inevitably shared the fate of every baseless superstructure. But is it possible to render the act consistent with the existing constitution? A slight comparison will yield a satisfactory answer. The act declares, that a foreigner, having taken the oath or affirmation of allegiance, and resided here one year, shall be entitled to all the rights and privileges specified in the 42d section of the old constitution; that is, he may acquire, hold and transfer real estate, and enjoy all the rights of a natural-born subject of this state, except the right of being elected a representative, which he cannot enjoy for two years. Now, the existing constitution will not allow any man to be even an elector, who has not resided here two years; and besides requiring a longer period of residence than two years, to entitle a citizen to be elected a representative, a senator or governor, it superadds the qualification, that he shall be of a certain age, before he can be chosen for those offices respectively. If, then, the act of assembly is in force, an alien, naturalized *under it, having the rights of the old, is in a situation pre- [*373
ferable 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 inquire 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.

UNITED STATES *v.* PARKER *et al.*

Process.

An *alias capias* must be tested of the term to which the original was returnable, and be made returnable to the next ensuing term.

A CAPIAS had issued in this cause against Daniel Parker, William 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, *374] and proceeding against the other alone, upon the principles *of the practice of the courts of Pennsylvania), after issue had been joined, and a variety of continuances, and other entries made upon the record, an original, not an *alias capias* was issued, on the 8th of August 1796, returnable to October term following, against Holker alone, upon which writ he was arrested; but upon a hearing before WILSON, Justice, he was discharged on common bail.(*a*) In October term, the attorney of the district (*Rawle*) had obtained two rules: 1st. That Holker show cause, on the first day of the present term, why the writ issued should not be amended, conformable to the precept, which, it was alleged, directed an *alias capias;* and 2d. That Holker show cause why the plaintiff should not file common bail for him. It was agreed, however, that the case should be argued, as if the last writ had been an *alias capias*, reciting the original *capias* and return; and the only question discussed was—whether an *alias capias* could issue, after the lapse of so many terms, and under the circumstances appearing upon the record, to arrest Holker, and make him a party to the existing suit?

Rawle, for the plaintiff, observed, that upon principles of common justice, and, he thought, upon principles of law too, when there were several defendants, and one only was taken on the first writ, process might issue, from time to time, to bring the others into court, without compelling the plaintiff to discontinue his action. By the 14th section of the judicial act (1 U. S.

(*a*) This action had been originally instituted in the supreme court of Pennsylvania, and Holker (who was then the only person arrested) pressed for a trial; but after an ineffectual opposition to an order for bringing on the case, the attorney of the district entered a discontinuance. On this ground, I am informed, Judge WILSON directed common bail to be accepted from Holker in the second suit.