

A C T S

OF THE

General Assembly of Pennsylvania,

Passed at a Session which commenced October 14th, 1724,
and ended August 21st, 1725.

1724-5.

WILLIAM KEITH, LIEUTENANT GOVERNOR.

CHAPTER CCLXXXV.

An ACT to regulate the practice upon writs of summons and arrest. (y)

WHEREAS it hath been the earnest endeavours of the legislative power of this government to provide for the liberty of the subject, by regulations of this kind, without the least design of protecting mens estates from payment of their debts; but, so far as justice would permit, to maintain the freedom of their persons, according to the ancient common law of England, which suffered not the body, in case of debt, to be detained in prison, but be at liberty to follow his own affairs and business, &c. And it seems highly just

(y) There is no privilege of exemption from being sued by *capias* vested in a county Lieutenant, who comes from a distant county to Philadelphia, in order to obtain commissions for the militia officers; nor in a Sheriff elect, who comes to solicit his commission, and to give official sureties. 1 Dallas, 295.

A member of the State Convention, which adopted the Federal Constitution, coming from a distant county, was adjudged to be privileged from arrests, or being served with a summons, or other process, issuing out of the Common Pleas of Philadelphia, during his attendance on the duties of his appointment. 1 Dallas, 296.

One of the defendants in a foreign attachment was an American Consul, and in that character actually residing abroad, in the public service; but the court, notwithstanding, refused to quash the attachment. 1 Dallas, 305, 274 306.

In trespass *vi et armis*, a *capias* was issued; but on proof that the defendant was a freeholder, the writ was quashed; though it was contended that the case was not within the act, a fine being due to the commonwealth, upon the judgment *capiatur pro fine*, in actions *vi et armis*. Unless it is a suit on a recognizance, or for a fine actually due to the state, the court would not take up a mere fiction, to defeat a positive privilege. 1 Dallas, 310.

On a rule to shew cause why a *capias* should not be quashed, it appeared that the defendant was a freeholder; but that the plaintiff, having delayed issuing process until within three or four days of the term, had issued a *capias*, and directed the Sheriff to accept the defendant's agreement to appear. After argument, the rule was made absolute. 1 Dallas, 348. (Note to former edition.)

that the same reason should take place in this new colony, where 1724-5.
 plantations are to be improved by hard labour and great diligence :
 Therefore, *Be it enacted*, That no freeholder, inhabiting in any part
 of this province, who hath resided therein for the space of two years,
 and has fifty acres of land, or more, in fee-simple, well seated, and
 twelve acres thereof, or more, well cleared or improved, or hath a
 dwelling-house worth fifty pounds current money of America, in some
 city or township within this province, clear estate, or hath unimproved
 land to the value of fifty pounds like money, shall be arrested or
 detained in prison by any writ of arrest, or *capias ad respondendum*,
 in any civil action, unless it be in the King's case, or where a fine is
 or shall be due to the King, his heirs or successors; or unless they
 be such freeholders as by this act are made liable to be arrested; but
 that the original process against freeholders shall be a writ of sum-
 mons, under the hand and seal of one of the Justices of the Court
 of Common Pleas for the proper county, directed to the Sheriff or
 Coroner there as the case may require, commanding to summon the
 defendant: The form of which writ shall be as followeth, *viz.*

No freeholder to be arrested; and who shall be deemed such.

Except in the King's case, &c.

Process to be by writ of summons.

[*GEORGE, By the grace of God, of Great-Britain, France and Ireland, King, Defender of the Faith, &c.*] *To the Sheriff of the county of* The Form.
Greeting. We command you, that you
summon so that he be and appear before our
Justices at our Court of Common
Pleas, there to be held day of next, to an-
swer the complaint of of a plea, &c.
Witness Esq. day of
at in the year of our reign.

And if the defendant in such writ does not appear at the day of the return thereof, but makes default, and the officer to whom such writ was directed, or his lawful deputy, doth certify to the court, upon oath or affirmation, that on or before the day of the return of such writ, he hath summoned the defendant, mentioning the day he did so, or left notice in writing of such summons at the house of the defendant, in the presence of one or more of his family or neighbours, signifying that the defendant should be and appear according to the contents of such summons: upon which return, if the defendant has been so served ten days, and the plaintiff had filed his declaration in the office of the Prothonotary, within the space of five days before the court to which such writ is returnable, it shall be lawful to and for the plaintiff in such action to file a common appearance for the defendant so making default, and proceed to judgment and execution by *nihil dicit*. (z)

The defendant not appearing upon such summons, &c.

The plaintiff may proceed to judgment and execution.

II. *Provided always*, That nothing herein contained shall exempt any person from being arrested, or shall debar any person from taking out writs of arrest, if the plaintiff in every such writ, or some-
 Proviso, where a freeholder may be arrested.

(z) The style of the writ is repealed and supplied. [The writ in section I. must be changed in the form—“*The Commonwealth of Pennsylvania.*—”]
 The service of a summons on the

person of the defendant, as well as if left at his house, must be ten days before the return, in order to entitle the plaintiff to judgment by default. 1 Dallas, 154. (Note to former edition.)

1724-5. body for him, doth make appear by affidavit, upon oath or affirmation, which the Justice that grants such writ is hereby empowered and required to administer, testifying, that the defendant in the same writ named hath signified his intentions of going to sea, or of removing out of this province, or lurks in secret places, or conceals himself in his own or others house; or that the defendant in such writ hath refused or neglected, upon demand, to give either real or personal security for the debt, or refused, without process, to appear and put in special bail to the plaintiff's action for the debt or cause for which he complains; or that the defendant suffered himself to be arrested, or judgment to be entered against him; or made over his lands or chattels to others, or suffered them to be attached, and made no proper defence to such proceedings; or where the plaintiff can make appear from records, or otherwise, that so much of the defendant's estate is mortgaged, aliened, entailed, or liable to one or more judgments suffered or ordered to be entered against such defendant, so that the value of his fee-simple estate, in possession, clear of those, and all other incumbrances, will not, as the deponent believes, be sufficient to satisfy the debt demanded; or that the defendant in such writ hath not been a resident in this province for the space of two years next before the date of the same writ: In all which cases, writs of arrest shall be granted, and the defendant held to special bail, if the case requires it; and the Justices that grant the same shall cause all the affidavits they take, as above required, to be filed by the clerk of the court where such writs are returnable. (a)

Freeholders arrested within the intent of this act, the writ to abate, and the defendant allowed costs.

III. But if any freeholder, exempted from arrests by virtue of this act, shall happen to be taken by any writ of arrest, the court, where such writ is depending, shall forthwith, upon the defendant's motion, stay all further proceedings against him till they examine his circumstance; and if they find he is such as by this act is intended to be exempted, the court shall of their own accord abate the writ, and allow the defendant thirty shillings costs to be paid by him or them that procured such writ, and for non-payment thereof, the court shall grant an attachment, as in other cases where a rule of court is not complied with.

Persons offending against this act to answer at the Supreme Court.

IV. And if any of the Justices or clerks of the said courts, or practitioners at law, shall contemn this act, and wilfully proceed in the premises, contrary to the direction thereof, they shall be liable to answer, and be fined for the same, at the Supreme Court of this province, any sum not exceeding ten pounds.

Repeal of a former law, (chap. 101.)

V. And be it further enacted, That the act directing the process of summons against freeholders, and every article, clause or

(a) The court have a controuling power to enquire into the circumstances of the case, and to relieve a defendant from an arrest, if they think he was intended to be exempted, although the words, that he has not been resident, may be inserted in the plaintiff's affidavit, before the *capias* issues. 1 Dallas, 241. What circumstances of absence will not be sufficient to destroy a freeholder's privilege. Ibid. 348,

A judgment obtained before a Justice of the Peace is sufficient to destroy a freeholder's privilege. 1 Dallas, 436. (Note to former edition.)

[Of the writs of *capias*, and summons in Pennsylvania, and the difference between them and English writs, &c. See 1 Dallas, 412.]

thing, therein contained, shall be and are hereby repealed, to all intents and purposes whatsoever. 1724-5.

Passed 20th March, 1724-5.—Recorded A. vol. II. page 318. (b)

(b) Considerable alterations in the practice of the courts are made by the act entitled "An act to regulate arbitrations and proceedings in Courts of Justice," passed March 21st, 1806, (post. chap. 2686.) By sect. 10, new forms are devised and prescribed, of the summons against a freeholder, and the writ of *capias*. And the defendant has until 20 days previous to the second term to file his statement of defence; and must appear on the third day of the second term, where the term is but one week, and on the second Monday of the term where the same is to continue two weeks; and in case of default in such appearance, the court shall render judgment against him, which supersedes the old practice of judgment by default at the first term under the first section of the act in the text.

By the tenth section of the consolidating act, respecting the jurisdiction of Justices, passed March 20th, 1810, No judgment, whether obtained before a Justice, or in any court of record within this Commonwealth, shall deprive any person of his or her right as a freeholder, longer, or for any greater time than such judgment shall remain unsatisfied.

Of Privilege.

An ejectment, depending in *Allegheny* county, was marked for trial on the list of causes at *Nisi Prius*. The defendant's attorney, after looking at the papers of the opposite party, confessed judgment.

On *Affidavit* of defence, a motion was made in the Supreme Court, to set aside the judgment, on the ground, principally, that the defendant was a member of the General Assembly, attending his public duty, at the time of marking the cause for trial and confessing judgment.

By the Court. A member of the General Assembly, is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him. And, upon principle, his suits

cannot be forced to trial and decision, while the session of the Legislature continues.

But every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The Judges are not bound, judicially, to notice a right of privilege, nor to grant it without a claim. In the present instance, neither the defendant, nor his attorney, suggested the privilege as an objection to the trial of the cause; and this amounts to a waiver, by which the party is for ever concluded.

We are therefore, unanimously of opinion, that the judgment cannot now be set aside, or opened. *Geyer's lessee v. Irvin*, 4 Dallas, 107.

Privilege of a foreign minister. 4 Dallas, 321.

A witness is privileged from arrest for a reasonable time, to prepare for his departure, and return to his home, as well as during his actual attendance upon court. But the privilege does not extend throughout the term, at which the cause is marked for trial; nor will it protect him while the witness is engaged in transacting his general private business after he is discharged from the obligation of the *subpana*. *Smythe v. Banks*, *Circuit Court, United States*. 4 Dallas, 329. So, from an arrest on a *ca. sa.* *Hurst's case*. 4 Dallas, 387.

No privilege against a *subpana*.—*Semb.* 4 Dallas, 341.

Privilege of members of Congress from arrest on *mesne* process, or execution. 3 Dallas, 478.

A party while attending an appeal from the court of another county to the Supreme Court is privileged from the service of a summons. 1 Binney, 77.

Service of a summons, by leaving a copy with defendant's partner, with whom he has lived, before he went abroad on a trading concern, from whence he is daily expected to return, and who has his children now living with him, held good. *MSS. Reports, Supreme Court.*