

together, and in one tract, nor unless application for the same be made, and the consideration thereof tendered to the Receiver-General of the Land-Office, on or before the first day of November next. 1785.

Passed 21st December, 1784.—Recorded in Law Book No. II. page 384.

### CHAPTER MCXIII.

*An ACT for incorporating the Presbyterian congregation of Pequea, in the township of Salisbury, and county of Lancaster.*

Passed 5th February, 1785.—Private Act.—Recorded in Law Book No. II. page 393.

### CHAPTER MCXVII.

*An ACT to alter and confirm the charter of the corporation for the relief of the widows and children of clergymen in communion of the church of England, in America. (g)*

Passed 9th February, 1785.—Private Act.—Recorded in Law Book No. II. pa. 405.

(g) By the 9th section of this act, the power of revising, checking and confirming the accounts and proceedings of the corporation, in the manner expressed in the charter, is transferred

to the Executive, the Chief Justice, and the Attorney-General of the commonwealth, for the time being, or any two of them. (Note to former edition.)

### CHAPTER MCXXI.

*An ACT for the better securing personal liberty, and preventing wrongful imprisonments.*

SECT. I. WHEREAS personal liberty is a principal blessing derived from free constitutions of government, and certain methods of proceeding should be prescribed, so that all wrongful restraints thereof may be easily and speedily redressed: *Be it therefore enacted, and it is hereby enacted by the Representatives of the Freemen of the commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same;* That if any person shall be or stand committed or detained for any criminal or supposed criminal matter, unless for treason or felony, the species whereof is plainly and fully set forth in the warrant of commitment, in vacation time and out of term, it shall and may be lawful to and for the person so committed or detained, or any one on his or her behalf, to appeal or complain to any Judge of the Supreme Court, or to the President of the Court of Common Pleas for the county, within which the person is so committed or detained; and such Judge or Justice, upon view of the copy or copies of the warrant or warrants of commitment or detainer, or otherwise, upon oath or affirmation legally made, that

*Habeas Corpus to be granted by Justices of Supreme Court; and the President of the Court of Common Pleas of the several counties.*

1785. such copy or copies were denied to be given by the person or persons, in whose custody the prisoner is detained, is hereby authorized and required, upon request made in writing by such prisoner, or any person on his or her behalf, attested and subscribed by two witnesses, who were present at the delivery of the same, to award and grant an *Habeas Corpus*, under the seal of the court, whereof he shall then be a Judge or Justice, to be directed to the person or persons, in whose custody the prisoner is detained, returnable immediate before the said Judge or Justice; and to the intent, and that no officer, sheriff, gaoler, keeper or other person, to whom such writ shall be directed, may pretend ignorance of the import thereof, every such writ shall be made in this manner, "By Act of Assembly, one thousand seven hundred and eighty-five," and shall be signed by the Judge or Justice who awards the same. And whenever the said writ shall by any person be served upon the officer, sheriff, gaoler, keeper, or other person whatsoever, to whom the same shall be directed, by being brought to him, or by being left with any of his under officers or deputies, at the gaol or place where the prisoner is detained, he, or some of his under officers or deputies, shall, within three days after the service thereof as aforesaid, upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the Judge or Justice who awarded the writ, and thereon endorsed, not exceeding twelve pence per mile, and upon security given by his own bond to pay the charges of carrying him back, if he shall be redemanded and not to escape by the way, make return of such writ, and bring or cause to be brought the body of the prisoner unto or before the Judge or Justice, before whom the said writ is made returnable, and, in case of his absence, before any other of the Judges or Justices aforesaid, and shall then likewise specifically and fully certify the true cause or causes of the commitment and detainer of the said prisoner, and when he was committed, unless the commitment be in any place beyond the distance of twenty miles from the place where such Judge or Justice shall be residing, and if beyond the distance of twenty miles, and not above one hundred miles, then within ten days, and if beyond the distance of one hundred miles, then within twenty days: And thereupon the Judge or Justice, before whom the prisoner shall be so brought, shall within two days discharge the prisoner from imprisonment, taking his or her recognizance, with one or more surety or sureties, in any sum, according to his discretion, having regard to the circumstances of the prisoner, and the nature of the offence, for his or her appearance at the next court of Oyer and Terminer, General Gaol Delivery, or General Quarter Sessions of or for the county, city or place, where the offence was committed, or in such other court where it may be properly cognizable, as the case shall require, and then shall certify the said writ, with the return thereof, and the said recognizances, into the court where such appearance is to be made, unless it shall appear to the said Judge or Justice, that the party so committed is detained upon legal process, order or warrant, for such matter or offences, for which by the law the said prisoner is not bailable, and that the said Judge or Justice may, according to the intent and meaning of this act, be enabled, by investigating the

Form of a writ.

Process of service, and time and manner of returning the writ.

The Judge or Justice to discharge the prisoner from imprisonment taking a proper recognizance for appearance.

or to remand him, if not bailable.

truth of the circumstances of the case, to determine whether, according to law, the said prisoner ought to be bailed, remanded or discharged; the return may, before or after it is filed, by leave of the said Judge or Justice, be amended, and also suggestions made against it, that thereby material facts may be ascertained.

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The return may be amended.

SECT. II. *And be it further enacted by the authority aforesaid,* That, in term time, it shall and may be lawful for any prisoner as aforesaid, in manner aforesaid, to move and obtain his or her *habeas corpus* out of the Supreme Court, or the Court of Common Pleas for the county in which he or she is imprisoned, whereupon proceedings shall be had as aforesaid.

Habeas corpus may be moved for in term time.

SECT. III. *And be it further enacted by the authority aforesaid,* That if any person shall be committed for treason or felony, and shall not be indicted and tried some time in the next term, session of Oyer and Terminer, General Gaol Delivery, or other court, where the offence is properly cognizable, after such commitment, it shall and may be lawful for the Judges or Justices thereof, and they are hereby required, upon the last day of the term, sessions, or court, to set at liberty the said prisoner upon bail, unless it shall appear to them, upon oath or affirmation, that the witnesses for the commonwealth, mentioning their names, could not then be produced; and if such prisoner shall not be indicted and tried the second term, sessions, or court, after his or her commitment, unless the delay happen on the application, or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment.

Person committed for treason or felony, not indicted at the next court, may be discharged, unless delayed for want of witnesses, or by his own act.

SECT. IV. *Provided always,* That nothing in this act shall extend to discharge out of prison any person guilty of or charged with treason, felony or other high misdemeanor, in any other state, and who by the confederation ought to be delivered up to the executive power of such state, nor any person guilty of or charged with a breach or violation of the laws of nations.

This act not to operate with respect to crimes in other states, or committed in violation of the laws of nations.

SECT. V. *Provided also,* That nothing in this act shall extend to discharge out of prison any person charged with debt or other action, or with process in any civil cause, but that after discharge for such criminal or supposed criminal matter, he or she shall be kept in custody, according to law, for such other suit.

This act not to release from imprisonment in any civil action.

SECT. VI. *And that no person may avoid his or her trial, by procuring a removal, so that he or she cannot be brought back in time, Be it enacted by the authority aforesaid,* That no person shall be removed upon any *habeas corpus* granted in pursuance of this act, within fifteen days next preceding the term, sessions of Oyer and Terminer, General Gaol Delivery, or other court, where the offence with which he or she stands charged, is properly recognizable, but, upon such *habeas corpus*, shall be brought before the Judges or Justices thereof, who are thereupon to do what to justice shall appear.

No person to be removed upon habeas corpus, within fifteen days next before the court, where the offence is cognizable.

SECT. VII. *Provided nevertheless,* That after such court the person detained may have his or her *habeas corpus*, according to this act.

After the said court it may be issued.

SECT. VIII. *And be it further enacted by the authority aforesaid,* That if any Judge or Justice aforesaid, being appealed or com-

Forfeiture, in case Judge or Justice

1785. plained to as aforesaid, upon view of the copy or copies of the warrant or warrants of the commitment or detainer, or upon oath or affirmation made that such copy or copies were denied as aforesaid, shall refuse or neglect to award any writ of *habeas corpus*, by this act required to be granted, he shall forfeit to the prisoner, or party-grieved, the sum of three hundred pounds, to be recovered by the said prisoner or party-grieved, his or her executors or administrators, against such offender, his executors or administrators, by action of debt, suit, bill, plaint, or information, in any court of record, wherein no essoin, protection, privilege, injunction, wager of law, or stay of prosecution, shall be allowed, or any more than one imparlance.

aforesaid refuse to grant writ of *habeas corpus*, and mode of recovery.

Penalty on officer, to whom the writ is directed, refusing to execute.

SECT. IX. *And be it further enacted by the authority aforesaid,* That if any officer, sheriff, gaoler, keeper, or other person to whom any such writ shall be directed as aforesaid, or any of his under officers or deputies, shall refuse or neglect to make the returns aforesaid, or to bring the body of the prisoner according to the command of the said writ, within the respective times aforesaid, all and every such officer, sheriff, gaoler, keeper or other person, under officer or deputy, shall be guilty of a contempt of the court, under the seal of which the said writ shall have issued, and shall also for the first offence forfeit to the prisoner or party-grieved, one hundred pounds, and for the second offence two hundred pounds, and shall be and is hereby made incapable to hold or execute his said office; the said forfeitures to be recovered by the prisoner, or party-grieved, in manner aforesaid.

Penalty on refusing a copy of warrant of commitment.

SECT. X. *And be it further enacted by the authority aforesaid,* That if any officer, sheriff, gaoler, keeper, or other person, to whom such writ shall be directed as aforesaid, or any of his under officers or deputies, upon demand by the prisoner, or some person in his or her behalf, shall refuse to deliver, or within six hours after demand, shall not deliver to the prisoner, or person so demanding, a true copy or copies of the warrant or warrants of commitment and detainer of such prisoner, which are hereby required to be delivered, all and every such officer, sheriff, gaoler, keeper, or other person, under officer or deputy, so offending, shall, for the first offence, forfeit to the prisoner, or party-grieved, one hundred pounds, and for the second offence two hundred pounds, and shall also be and is hereby made incapable to hold or execute his said office; the said forfeitures to be recovered by the prisoner, or party-grieved, in manner aforesaid.

No person to be re-committed for the same offence, after discharge.

SECT. XI. *And for preventing unjust vexation by reiterated commitments for the same offence, Be it further enacted by the authority aforesaid,* That no person, who shall be delivered or set at large upon an *habeas corpus*, shall, at any time thereafter, be again committed or imprisoned for the same offence by any person or persons whatsoever, other than by the legal order and process of such court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause, and if any other person or persons shall knowingly, contrary to this act, re-commit or imprison, or knowingly procure or cause to be re-committed or imprisoned, for the same offence, or supposed offence, any person de-

livered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner, or party grieved, any pretence of variation in the warrant or warrants of commitment notwithstanding, the sum of five hundred pounds, to be recovered by the prisoner, or party grieved, in manner aforesaid.

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SECT. XII. *And be it further enacted by the authority aforesaid,* That any person being committed to any prison, or in custody of any officer, sheriff, gaoler, keeper, or other person, or his under officer or deputy, for any criminal or supposed criminal matter, shall not be removed from the said prison or custody into any other prison or custody, unless it be by *habeas corpus*, or some other legal writ, or where the prisoner is delivered to the constable or other inferior officer, to be carried to some common gaol, or where any person is sent by any Judge or Justice, having proper authority, to some common work-house or house of correction, or where the prisoner is removed from one place to another, within the same county, in order to his or her trial or discharge in due course of law, or in case of sudden fire or infection, or other necessity; and if any person or persons shall, after such commitment as aforesaid, make out, sign, countersign, and issue any warrant or warrants for such removal, except as before excepted, then he or they shall forfeit to the prisoner, or party grieved, two hundred pounds, to be recovered by the prisoner, or party grieved, in manner aforesaid.

Penalty on removing persons imprisoned for any criminal matter, unless by *habeas corpus*, or other legal writ.

SECT. XIII. *And be it further enacted by the authority aforesaid,* That all the provisions herein before made for the awarding and granting writs of *habeas corpus*, and proceeding thereon, in case of commitment or detainer for any criminal or supposed criminal matter, shall, in like manner, extend to all cases where any person, not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his or her liberty, under any colour or pretence whatsoever, and that upon oath or affirmation made by such person, so confined or restrained, or by any other in his or her behalf, of any actual confinement or restraint, and that such confinement or restraint, to the best of the knowledge and belief of the person so applying, is not by virtue of any commitment or detainer for any criminal or supposed criminal matter, an *habeas corpus*, directed to the person or persons so confining or restraining the party as aforesaid, shall be awarded and granted, in the same manner, and under the same penalties, to be recovered from the same persons, as is herein before directed; and the Court, Judge or Justice, before whom the party so confined or restrained, shall be brought, shall, after the return made, proceed, in the same manner as is herein before prescribed, to examine into the facts relating to the case, and into the cause of such confinement or restraint, and thereupon either bail, remand, or discharge the party so brought, as to justice shall appertain.

Persons not committed for any criminal matter, but confined or restrained of their liberty, under any colour or pretence whatever, may proceed under this act.

SECT. XIV. *And be it further enacted by the authority aforesaid,* That whensoever any writ of *habeas corpus*, awarded and granted, either in term or vacation time, for any person so confined or restrained, without a commitment for any criminal or supposed criminal matter, shall be served upon the person or persons so confining

The proceedings upon a writ of *habeas corpus*, when taken out for any person restrained of

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his liberty  
without a  
warrant of  
commitment,  
to be sued  
in the same  
as in  
other cases.

Penalty.

Penalty under  
this act  
to be sued  
for within  
two years.

The general  
issue, and  
the special  
matter, to be  
given in evi-  
dence.

or restraining such party, by being brought to such person or persons, or by being left at the place where the party shall be so confined or restrained, the person or persons so confining or restraining such party shall make return of such writ, and bring, or cause to be brought, the body of such party, according to the command thereof, within the respective times limited, and under the provisions herein before prescribed, and every such person refusing or neglecting so to make return of such writ, or to bring, or cause to be brought, the body of the party, according to the command thereof, within the times respectively limited, and under the provisions herein before prescribed, shall be guilty of a contempt of the court, under the seal of which the said writ shall have issued, and shall also forfeit for the first offence, to the party grieved, one hundred pounds, and for the second offence two hundred pounds, to be recovered by him or her, his or her executors or administrators, against the offender, his or her executors or administrators, in manner aforesaid.

SECT. XV. *Provided always, and be it further enacted by the authority aforesaid,* That no person shall be sued, impleaded, molested or troubled, for any offence against this act, unless such person be sued or impleaded for the same within two years after the time wherein the said offence shall have been committed, in case the party grieved shall not be then in prison, or confined or restrained as aforesaid, and if the said party shall be then in prison, or so confined or restrained, then within two years after the decease of the person imprisoned, or so confined or restrained, or his or her delivery out of prison, or from such confinement or restraint.

SECT. XVI. *And be it also enacted by the authority aforesaid,* That in or upon any action, suit, bill, plaint, or information, for any offence against this act, the defendant or defendants may plead the general issue, and give the special matter in evidence.

Passed 18th February, 1785.—Recorded in Law Book No. II. page 425. (h)

(h) The writ of *habeas corpus*, is a writ of right, and the proceedings thereon are merely regulated by this act.

By the 11th section of the act of 22d of May, 1722, (vol. 1, page 139,) power is given to the judges of the supreme court, "To issue forth writs of *habeas corpus*, *certiorari*, and writs of error, and all remedial and other writs and process, &c." And, by the 13th sect. (vol. 1, page 140,) generally to minister justice to all persons, and to exercise the jurisdictions and powers thereby granted, as fully and amply, to all intents and purposes whatsoever, as the justices of the court of *king's bench*, *common pleas*, and *exchequer* at *Westminster*, or any of them, may or can do."

By the 9th section of the first article of the constitution of the *United States*, "The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion, or invasion, the public safety may require it."

And by the 14th section of the 9th article of the existing constitution of *Pennsylvania*, it is declared, "That all prisoners shall be bailable by sufficient surties, unless for capital offences, when the proof is evident, or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless, when, in cases of rebellion or invasion, the public safety may require it."

By the 9th section of the "Act to establish the judicial courts of this commonwealth, in conformity to the alterations and amendments in the constitution," passed 13th of April, 1791, (chap. 1564,) "The said president and judges, [viz. *president and associate judges of the several courts of common pleas*,] shall, from and after the 31st day of August, [then] next, severally have the powers to issue writs of *habeas corpus* in vacation time, and out of term, and to give relief thereupon in the same manner, and as fully, as the

president of any court of common pleas in this commonwealth at present may or can do, by virtue of an act of assembly, entitled "An act for the better securing personal liberty, and preventing wrongful imprisonments."

In the case of the *United States v. Richard Johns* in the circuit court, Pennsylvania district, which was a prosecution on the 2d section of the act of congress of 26th March, 1804, in these words,—“If any person shall, on the high seas, willfully and corruptly cast away, burn, or otherwise destroy, any ship or vessel of which he is owner, in part or in whole, or in anywise direct or procure the same to be done, with intent or design to prejudice any person, or persons, that hath underwritten, or shall underwrite, any policy or policies of insurance thereon, or if any merchant or merchants that shall load goods thereon, or of any other owner or owners of such ship or vessel, the person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death.”

The defendant was brought up by *habeas corpus*, before the court, holding an adjourned session, on the 8th of January, 1806, when it appeared that, on the 27th of Dec'r, 1805, he had been committed by the mayor of the city of Philadelphia, “Charged on the oath of Andrew Clarke, with having on the 20th day of August last, or thereabouts, on the high seas, scuttled the schooner *Enterprise of Baltimore*, with intention to defraud the underwriters, as he believes.”

The prisoner's counsel objected, 1st. That the commitment was vague, and did not describe the offence within the words of the act of congress. 2d. That the offence was not committed within the district of Pennsylvania; and no demand having been made for his surrender by the executive of any other state, there was no law to warrant his arrest or detention. 3d. That the evidence was not sufficiently strong to found an indictment against him, and he was entitled, at all events, to be discharged on bail.

It was answered by the attorney of the district, 1st. That whatever might be the formal defects of the original commitment, the court, being now satisfied with the evidence, would remand the prisoner for trial. 2d. That it was not necessary, for that purpose, to give positive proof of guilt; but to shew probable cause for the accusation. 3d. That the case did not come, at all, under the constitutional, or legislative provisions, for the surrender of a fugi-

tive from the justice of another state; but it was the case of a crime against the *United States*, committed on the high seas; when the trial is directed to be in the district where the offender is apprehended.

By the Court, (*Washington and Peters;*) upon a *habeas corpus*, we are only to enquire, whether the warrant of commitment states a sufficient probable cause to believe, that the person charged, has committed the offence stated. We have heard the evidence; and cannot doubt of its sufficiency to that extent. We do not think, that the prisoner ought either to be discharged or bailed. He must be remanded for trial. 4 Dallas, 412.

#### *Hecker v. Jarrett.*

This was an action of debt to recover the penalty of £ 500 imposed by the *habeas corpus* act upon any one who shall, without the order and process of a court having jurisdiction of the cause, knowingly re-commit or imprison a person for the same offence, or supposed offence for which he has been once delivered on a *habeas corpus*.

The declaration stated, that the plaintiff was arrested by virtue of an execution issued by the common pleas of Northampton county, and directed to the defendant who was the sheriff of that county; that he was brought by *habeas corpus* before one of the associate judges of said court, and by the said judge was discharged from imprisonment; and, that the defendant, knowing the same, arrested him, and committed him a second time to prison, without any legal order of the court of common pleas of the said county, or any process issuing out of the same, other than the writ of execution aforesaid; by reason whereof action accrued to the plaintiff to demand and have of the defendant £ 500, &c. To this declaration the defendant demurred, and the plaintiff joined in demurrer.

After argument, the following judgment was delivered by

*Tilghman, C. J.* The *habeas corpus* act contains distinct provisions for the relief of persons imprisoned for criminal and for civil matters. The 1st twelve sections relate to criminal matters. The 8th section imposes a penalty of £ 300 on any judge or justice who shall refuse or neglect to award any writ of *habeas corpus* required to be granted by the act. The 9th section imposes on officers, sheriffs, gaolers, &c. to whom writs of *habeas corpus* shall be directed, and who shall refuse or neglect to make return, or to bring the body of the prisoner accord-

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ing to the command of the writ, a forfeiture to the party grieved of £. 100 for the first offence, and for the second, £. 200, and also an incapacity on the officer to hold his office. The 10th section imposes the like forfeiture and incapacity on officers, refusing to deliver, upon demand, a copy of the warrant of commitment and detainer of any prisoner. The 11th section enacts, that no person who shall be delivered on any *habeas corpus*, shall be again committed or imprisoned for the same offence, by any person whatever, other than by the legal order and process of such court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause, and that any person, who shall knowingly recommit or imprison such person for the same offence, or supposed offence, shall forfeit to the party grieved £. 500.

It is very clear that this 11th section relates solely to the cases of persons confined for criminal or supposed criminal matter; because it makes no mention of any persons but those who are committed for offences.

The 13th section extends "all the provisions before made for the awarding and granting writs of *habeas corpus* and proceeding thereon, in case of commitment or detainer for any criminal or supposed criminal matter, to persons, not being committed or detained for any criminal or supposed criminal matter, but confined or restrained of their liberty, under any colour or pretence whatever;" and the same section goes on to provide, that upon a certain oath being taken, "a *habeas corpus* shall be awarded and granted in the same manner and under the same penalties, to be recovered from the same persons as is herein before directed."

It is contended by the plaintiff, that under the general words of the 13th section, all penalties of every kind imposed on any persons in any cases whatever, by any of the preceding sections, are extended to civil cases. The most general words in the 13th section, are those which mention "all provisions before made for the awarding and granting writs of *habeas corpus*, and proceeding thereon." Had the provision respecting civil matters stopt there, there might have been some ground for the argument, that the intent of the law was to extend the same penalties which had been imposed in criminal matters, to all persons, and all cases, in civil matters. But it is evident that such was not the opinion of the legislature, because in a subsequent part of the same section a *habeas corpus* is ordered to be awarded and granted in the same

manner and under the same penalties, to be recovered from the same persons as is before directed. Now if the first part of the section had been sufficient to extend all penalties in all cases, the latter part extending one of the penalties in a particular case, would have been not only unnecessary, but improper. But to make the matter still clearer, the 14th section goes on to provide particular penalties in other particular civil cases: that is to say, in cases of writs of *habeas corpus* not being returned, or the bodies of prisoners not being produced by the persons to whom the writs are directed; but there is a total omission of any penalty for imprisoning a person a second time for the same cause for which he had been before imprisoned and discharged.

If it is asked why a penalty should not be inflicted upon a second imprisonment in a civil, as well as in a criminal case, it is sufficient to answer, that the case being omitted, the penalty cannot be inflicted, even supposing that such omission was by accident, and without reason. But there may have been a very good reason why this penalty was designedly omitted in civil cases. It is this; that the object of the *habeas corpus* act was to protect the liberty of individual citizens; and the danger of oppression is not so great in civil matters, as in case of crimes, or supposed crimes. Governments often magnify real crimes, and sometimes impute offences falsely to innocent persons, for the purpose of oppression. From this quarter has generally arisen the danger to liberty; and this might have induced the legislature of Pennsylvania to omit the penalty in civil cases. Be that as it may, as they have omitted it, and as it is a well established rule of construction that penalties are not to be imposed without express words, or necessary implication, I am of opinion that the plaintiff is not intitled to recover the penalty of £. 500, upon the case stated in his declaration.

Judgment must be entered for the defendant.

On a *habeas corpus*, where it clearly appears, that a wrong person has been arrested, and deprived of his liberty, the court will interpose immediately for his relief: But where it is dubious, a jury must decide. *Republica v. The gaoler of Philadelphia*, In the supreme court, December, 1797. (MSS. Reports.)

*Republica v. Levi Arnold, Benjamin Arnold and James Arnold*, circuit court, Fayette county, October, 1801, before Teates and Smith, justices. (MSS. Reports.)

On motion for a *habeas corpus*, the deposition of *I Levi Arnold* was read; stating, that on the 3d of February, 1801, *Benjamin Arnold* and himself were committed to the gaol of *Fayette* county, on suspicion of burning the barn of *Nathaniel Breeding*, esq. or being accessories thereto, and that *James Arnold* was admitted to bail; that at the March sessions following, an indictment was found by the grand jury against *Joseph Cairns*, as principal in the said Arson, and against himself, and the other two defendants, as accessories before the fact, in the court of general quarter sessions of the peace. That a precept for holding a court of *Oyer and Terminer* and general gaol delivery, issued to the June sessions following, when the defendants were ready for their trials with their witnesses; but that *Cairns*, the principal, not being taken on the process, the indictment was continued, and the defendants admitted to bail; that another court of *Oyer and Terminer* was held in *September* sessions following, when the defendants were again ready for trial, with their witnesses; but *Cairns* having fled, the trial was postponed, and the defendants again entered into recognizances for their appearance.

The court remarked, that application should be made to the justices of *Oyer and Terminer* for relief; if there was no prospect of apprehending the principal, and no special circumstances could be shewn against the defendants, such as concealing of the principal, or keeping him, or the witnesses out of the way, they would certainly discharge the defendants from bail, as was done in the case of *James Young* and *Jack*, in *Franklin* county; or, if they deemed them to be dangerous characters, they would bind them over to the peace.

The counsel on both sides answered, that this application had been made and refused; and that they had been expressly referred to this court, by the justices of *Oyer and Terminer*, at their last sessions.

Several depositions were then read, tending to shew on the part of the defendants, their innocence, and the improbability of the charge made against them; and on the part of the commonwealth, that the defendants had threatened the state witnesses, and assisted in the escape of *Cairns* the principal, from justice.

For the defendants, it was moved, that a *habeas corpus* might issue to the bail, that they might be discharged from their recognizances. The defendants were, in a legal sense, under actual confinement and restrained of their

liberty; their bail might surrender them. 1785.

The 3d section of the act of 18th of February, 1785, expressly directs, that if a person committed for treason or felony shall not be tried the first sessions after his commitment, he shall on the last day of the sessions be admitted to bail, unless it shall appear, that the witnesses for the commonwealth could not then be produced; and if he shall not be tried at the second sessions, unless the delay happens on his application, or with his consent, he shall be discharged from imprisonment. This law is obligatory on the court, and takes away all discretion; it is couched in strong terms; "It shall and may be lawful for the justices, and they are hereby required, &c." Should a defendant be guilty of improper practices by tampering with witnesses, or preventing their appearance to give evidence, he is obnoxious on that score to a prosecution for the misdemeanor, but is legally intitled to a discharge from the crime laid against him. Here the indictment originated in the quarter sessions, and two sessions of *Oyer and Terminer* have passed over without bringing the defendants to trial.

In opposition to this, it was said, that here there had been no oppression, or unreasonable delay on the part of the state. It is a well known principle of law, that accessories cannot without their consent be tried before the principal. They have refused that consent, and therefore have no grounds to complain of the delay.

The 3d section of the act extends only to principals, and not to accessories. The words are "if any person shall be committed for treason or felony, &c." Nor does this part of the act, (which is borrowed from the British statute of 31 Car. 2, c. 2, called the *habeas corpus* act,) refer to any other cases, than where the party applying is in gaol, in actual custody. The first section runs "if any person shall be, or stand committed or detained for any criminal or supposed criminal matter, &c." the *habeas corpus* is to be directed to the person in whose custody, the prisoner is detained, there is to be a payment or tender of the charges of bringing the said prisoner, &c. the word prisoner being used throughout this section, and also in the 2d and 3d sections.

Besides, it has been proved by the depositions, that highly improper threats have been thrown out by the defendants against the witnesses on the part of the prosecution; and there are strong colourable grounds to believe, that they have aided in the escape of

1785. the principal offender. Under such special circumstances, the court of *Oyer and Terminer* clearly possessed the power of continuing the parties under recognizance.

*By the Court.* There can be no difficulty in saying, that if principals, the superior offenders, are intitled to the benefits of the law of 1785, the accessories, who are in inferior grades of criminality, must have the same pretensions.

*Yeates, J.* was of opinion, that the second objection on the part the commonwealth, was well founded. The provisions in the first twelve sections of the law of 1785, all go to the cases of persons committed or detained for any criminal, or supposed criminal matter, to prisoners in actual custody of some officer of justice. The 13th and 14th sections are not to be found in the British statute of 31 Car. 2, c. 2, and are valuable improvements of the rights and liberties of citizens; but they do not respect commitments for criminal matters. The 3d section of the act directs, that the justices of *Oyer and Terminer*, shall, on the last day of the term, next after the commitment of the party, who shall not be indicted and tried, set at liberty the said prisoner, upon bail, &c. This clearly shews, that the legislature did not contemplate a party admitted to bail, as a prisoner under commitment, besides confining the authority and requisition so to act, solely to the court,

before whom the prisoner is to receive his trial. Would not a *habeas corpus* directed to the bail of a supposed offender, be perfectly novel? Could we, or either of us, do an act, which would amount to a legal discharge of the recognizances in the court of *Oyer and Terminer*?

*Smith J.* said, that the inclination of his mind was, that the *habeas corpus* would not lie to the bail, but declined giving any decided opinion on the point.

*By the Court.* We have no doubt of the powers of the court of *Oyer and Terminer* of retaining the defendants under bail, to answer the indictment, if their minds were satisfied, either that the witnesses were kept out of the way by the procurement, or threats of the defendants, or that they had prevented the arrest of the principal. It would be monstrous to suppose, that the parties by their own improper conduct, should elude the punishment for a superior offence, by subjecting themselves to a prosecution for a misdemeanor. We must refer the defendants to the court of *Oyer and Terminer*, who are best acquainted with the circumstances of the case: there they will not be treated with oppression; but if the public interests and safety require it, they will administer that preventive justice, which the laws of the government empower them to exercise. *Motion denied.*

#### CHAPTER MCXXIV.

An ACT to incorporate the Presbyterian congregation in Abington township, in the county of Montgomery.

Passed 22d February, 1785.—Private Act.—Recorded in Law Book No. II. page 425.

#### CHAPTER MCXXV.

An ACT for erecting part of the county of Lancaster into a separate county.

SECT. I. WHEREAS the inhabitants of the upper parts of Lancaster county have, by petitions, set forth to the General Assembly of this state, that they have long laboured under many inconveniences, from their being situated at so great a distance from the seat of judicature in said county, and have prayed that they may be relieved from the said inconveniences, by erecting them into a separate county. And as it appears but just and reasonable that they should be relieved in the premises;

SECT. II. Be it therefore enacted, and it is hereby enacted, by the Representatives of the Freemen of the commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same, That all that part of Lancaster county, lying within the bounds and