WHITE, *Ex Parte.*

By the 16th section of the Declaration of Rights all persons are entitled to bail, except in capital offences where the proof is evident or the presumption great.

An indictment in a capital case does not raise such presumption of defendant's guilt as absolutely to preclude the power of this court to go behind the indictment, and investigate the merits of the charge with the view of ascertaining whether the party is entitled to bail, but it raises such presumption against defendant as to deprive him of the privilege of habeas corpus as a matter of right; and to entitle him to the writ, he must state such facts in his petition, under oath, as will rebut the presumption raised against him by the indictment.

In such case a general allegation of his innocence is not sufficient to entitle him to the writ.

Application for Habeas Corpus.

FOWLER and RINGO & TRAPNALL, for the petitioner. At common law all criminal offences were bailable. The first limitation was in the statute of Westminster, 3 Edward, 1 ch. Other statutes were subsequently passed, restricting the right of justices of the peace to let to bail. 4 *Black.* 299, 300. *Petersdorf on Criminal Proceedings,* 10 *Law Library,* 270. These acts did not apply to the court of King's Bench, and this court, in taking bail in cases of treason, murder, &c., was only limited by its discretion. *Com. Dig., Bail, F. Rex vs. Remnoni,* 2 *Tenn. R.* 169. *Rex vs. Marks,* 3 *East.* 157. *Elderton's case,* 2 *Ld. Raym.* 978. *Hort.* 500. *Skin.* 683. *Cowp.* 333. *Rex vs. Baltimore,* 1 *Black. R.* 648.

If there be a reasonable doubt as to the truth of the accusation, bail will be granted by the King's Bench in all cases. *Petersdorf on Bail,* 270.

After an indictment for murder, &c., the English court, in many cases, refused to carry the examination behind the indictment, for this reason alone, that the evidence, upon which the grand jury found the bill, was by law not to be disclosed, and the court could not know upon what proof they acted. *Rex vs. Moheen,* 1 *Salk.* 104. *Goodwin's case,* 1 *Wheeler's Crim. Cases,*

446. *Lester's case,* 1 *Salk.* 103. *Rex vs. Marks,* 3 *East.* 160, 163. *Taylor's case,* 5 *Cow.* 39.

In New York it is decided that the right to bail, in all cases, is regulated alone by the discretion of the court. 1 *Wheeler's Crim. Cases,* 436. But a person indicted will not be bailed unless something is presented, in opposition to the charge, to raise a presumption of innocence. *Idem,* 437.

If it stands indifferent whether a party charged with felony is guilty or not, he ought to be bailed. *Idem,* 445. *Hawkins,* 6, 2, 40, 50. And even in capital cases, where there is any circumstance to induce the court to suppose he may be innocent, they will bail. *Idem,* 445, 446, 447.

In *The State vs. Hill,* 1 *S. C. Const. Rep.* 244, the court say, expressly, they have a right to go into the case, although an indictment was found, to examine if the defendant was entitled to bail. *Barney's case,* 5 *Mod.* 323. *Farrington's case,* 2 *John.* 222. The same doctrine is affirmed by the supreme court of North Carolina in the *State vs. Ward,* 2 *Hawks,* 447, although he could not be bailed after conviction. *Foley ad. People,* 1 *Breese,* 32,

The reason for the rule in England does not exist here, because the grand jury are required to preserve minutes of the evidence. *Rev. Stat.,* 295.

The 16th section of the 2d article of our constitution declares that all persons shall be bailable, by sufficient securities, unless in capital cases, where the proof is evident or the presumption great. If the framers of the constitution intended to say that the indictment should raise a presumption great against the prisoner, they would have done so, and not used ambiguous terms. We contend that it is the constitutional right of every citizen, even under an indictment for murder, to have the merits of his case examined upon a habeas corpus to enable the court to determine if the proof of guilt be evident, or the presumption great. Under the act of 1838 there are made two degrees of murder, one of which only is capital: and on such an indictment the accused may be found guilty of manslaughter: the minutes of the examining court and grand jury are within the reach of

the court, so that the indictment, in no event, could, of itself, raise a presumption against the prisoner that he was guiity of a capital offence.

At common law the court of King's Bench had the discretionary power to admit prisoners to bail in all cases, including murder and high treason, and as well before indictment found as after. 1 *Chit. Cr. Law,* 98. 1 *Bac. Abr.* 223, *et seq.* 4 *Black. Com.* 298, 299. 3 *Petersdorf's C. L.,* 302, 303.

WATKINS, Att. Gen'l, *contra.*

JOHNSON, C. J. This is an application made by Oscar L. White for a writ of habeas corpus. The applicant shows in his petition that he stands indicted, by a grand jury of the county of Saline, in this State, as an accessory before the fact to the murder of Henry Carr by John B. Hester, and that he is now held in custody in the jail of Pulaski county under said indictment. After making this statement of facts he then prays for the writ of habeas corpus, and that he may be admitted to bail, and then concludes with a general allegation of his innocence, which he verified by his affidavit.

This application involves but one single question for our consideration and decision. The question is, whether we have the power, under our constitution and laws, to go behind an indictment, for a capital offence, to investigate the merits of the case with the view of letting the party indicted to bail. The statute declares that an accessory before the fact shall be deemed in law a principal, and that he shall be punished accordingly. There can be no doubt, therefore, but that the petitioner stands indicted for a capital offence. The 16th section of the Declaration of Rights provides, " that all prisoners shall be bailable by sufficient securities, unless in capital offences, where the proof is evident or the presumption great." It is contended by the prisoner's counsel that the provision, being general in its terms, embraces all cases as well after as before indictment. We are willing to concede the correctness of the construction contended

for, yet we do not think that it follows, by any means, that the writ can be claimed as a matter of right after an indictment for a capital offence. The petitioner's counsel have referred to numerous ancient authorities upon the subject, and argue that because the King's Bench in England have the power to bail for any crime whatever, therefore the same power is incident to this court. These authorities we do not consider as applicable to the case before us, as this matter is not left in doubt, but, on the contrary, is fully settled and forever put to rest by the express language of our bill of rights. It has expressly and emphatically prohibited the granting of bail to persons charged with capital offences where the proof is evident or the presumption great.

It is contended by the prisoner's counsel that the indictment raises no presumption against the party indicted, and that therefore he is entitled to the writ as a matter of right, and that where he has complied with the requisitions of the habeas corpus act this court has no option in the matter. The habeas corpus act was designed to apply exclusively to cases before indictment found, or to such cases after indictment as are expressly made bailable by the constitution and laws of the land. It is true, as a general rule, that an indictment raises no presumption against the indictee as to his guilt of the crime charged against him; but this does not prove that it does not raise presumptions for all the purposes of his capture and custody, and that for such purposes it is perfectly conclusive till rebutted. We are inclined to think that, under our system of laws, such is the legal effect of an indictment for a capital crime. This doctrine is clearly deducible from the case of *The State vs. Hill,* 1 *vol. S. Carolina C. R. p.* 242, and *Ex parte, Taylor,* 5 *Cow. R. p.* 50. Chief Justice SAVAGE, in the case of *Ex Parte, Taylor,* said: "The writ was allowed in this case for a defect apparent upon the face of the warrant. No affidavit was therefore necessary on the part of the prisoner stating the circumstances which he might consider as entitling him to relief." Here is a clear recognition of the necessity of stating some facts or circumstances, which, if found upon examination to exist, would entitle the party to bail. But

the prisoner insists that he has made sufficient showing in this case to entitle him to the writ. This we are not willing to admit. He has made a general allegation of his innocence, which is nothing more than a mere conclusion of law, and not such a showing of facts or circumstances as comes within the principle laid down by Chief Justice SAVAGE, and which we are disposed to recognize as entitling him to relief. The law requires the party to make an affidavit of merits to warrant this court in going behind the indictment, and the affidavit must state such particular facts that, if proven to be false, the affiant could be indicted for perjury: otherwise, the requiring of an affidavit would be a merely idle form.

As the affidavit in this case is a general one of innocence and does not set out such facts as are required by law, the writ must be denied.

SCOTT, J. While I fully concur in the conclusion arrived at in the opinion of the court, just delivered by the Chief Justice, I do not entirely concur in all the views expressed.