

9FED.CAS.—65

Case No. 5,167.

GADSBY v. MILLER.

{1 Cranch, C. C. 39.}<sup>1</sup>

Circuit Court, District of Columbia.

Oct. Term, 1801.

PRACTICE AT LAW—APPEARANCE—SCIRE  
FACIAS—SERVICE—DISCONTINUANCE.

1. If a defendant appear to a sci fa. it is not material by whom the writ was served. It is no plea for bail to say that the principal was in jail in Maryland at the time of the judgment against him and has remained in jail ever since.
2. Bail is not discharged by a discontinuance of the suit at the rules, if it be reinstated.

Scire facias. 1st plea: That Miller [special bail of Colquhoun], resides in Caroline county, in Virginia, and was served with the scire facias by the sheriff of Caroline county. To this plea there was a special demurrer. 2d plea: That Colquhoun was in jail in Baltimore at the time of the original judgment, and has remained so ever since. 3d plea: That the original writ against Colquhoun was discontinued by the plaintiff at the rules in October, and reinstated, at the motion of the plaintiff, at the next rules in November. 4th plea was the same in substance as the 3d. To these three last pleas there was a general demurrer.

Mr. Faw and Mr. Swann, for plaintiff.

Mr. Simms and Mr. Jones, for defendant.

On the part of the plaintiff, it was said; as to the first plea, that such a service of a scire facias is good by the laws of Virginia. Rev. Code, p. 95, §30. And, at all events, it is cured by the appearance of the defendant. The second plea was abandoned by the defendant's counsel. As to the third and fourth pleas, the defendant in a scire facias, cannot plead that which the original defendant might have pleaded to the original action. *Wraight v. Kitchingman*, 1 Strange, 197. For the defendant, it was said, as to the first plea, that if the defendant comes and pleads the want of proper process, he shall not be prevented by his having appeared. 1 Bac. Abr. As to the third plea. If the plaintiff does any act by which the bail loses the right of taking the principal in order to surrender him, the bail is discharged. In this case the original action was discontinued one month, and during that time the bail would not have been justified in seizing the principal. It gave him an opportunity to escape. Judgment for the plaintiff.

<sup>1</sup> [Reported by Hon. William Cranch, Chief Judge.]