

Case No. 5,367.

[2 Wash. C. C. 130.]<sup>1</sup>

GERNON v. BOECALINE.

Circuit Court, D. Pennsylvania.

Oct. Term, 1807.

NE EXEAT—AUTHORITY OF DISTRICT JUDGES TO ISSUE—SUPPORTING  
AFFIDAVIT—AMENDMENT.

1. The district judges of the courts of the United States have no authority to issue writs of ne exeat. [Cited in *Loewenstein v. Biernbaum*, Case No. 8,461a; *Lewis v. Shainwald*, 48 Fed. 500.]
2. The affidavit upon which this writ will issue, should be positive to a debt, or to the belief of the plaintiff, that a certain balance of account was due.
3. The plaintiff was admitted to amend his affidavit; and being sworn, at the instance of the defendant, he was permitted to state, that a particular item of his claim had not been passed upon by arbitrators, who had examined the accounts between the parties.

A ne exeat had been awarded in this case, by the district judge, and bail taken. A motion was now made to discharge it on the ground that the district judge had no power to award it Upon this ground, the court quashed the writ The plaintiff then moved to award a new writ which was objected to by Levy, for defendant; the plaintiff having stated, that the bill is filed on account of a particular transaction, in a certain vessel, which transaction has been referred, and was settled, as appears by an item in the account on which the arbitrators acted, in which they credit the defendant 9,000 dollars, on account of this vessel and cargo. Secondly: that the affidavit is insufficient as it merely states that the plaintiff has a just demand against the defendant; whereas if he claimed a debt, he should have stated positively, that so much was due, or if he claimed a balance of account he should have sworn, that he verily believed the balance in his favour to be so much. Tidd. Pr. 21; 2 Ves. Sr. 489; 3 Atk. 501. Thirdly: the bill has no equity for this court; for if a balance is due the plaintiff, he may have a remedy at common law.

Mr. Rawle, for plaintiff.

Mr. Levy, for defendant.

BY THE COURT. The affidavit is clearly defective. The plaintiff should swear positively to a debt or to his belief that a certain balance of account was due. The plaintiff being in court and mating this affidavit the court awarded a new writ; it appearing upon the examination of the plaintiff, who was sworn at the instance of the defendant that the particular account on which this suit was brought though laid before the arbitrators, had not been acted upon in any manner.

[See Case No. 5,366.]

<sup>1</sup> [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]