is not likely it will arise, in the same form, on another trial: and this remark applies to the two remaining exceptions on the merits arising on the accounts offered in evidence, and the decision and instructions given by the court thereupon. Questions of law and fact, growing out of the prayers and instructions on this part of the case are so blended, and presented in such a shape, that it is extremely difficult to decide upon them; and as the cause must go back, and as these matters may not be presented on *another trial, under the same aspect, these questions may become immaterial, and we pass them by, without any decision. The judgment of the circuit court is reversed, and the cause sent back, with directions to issue a *venire de novo*. [*703

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, it is adjudged and ordered by this court, that the judgment of the said circuit court in this case be and the same is hereby reversed, and that the said cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo*.

Ex parte GEORGE MILBURN. [*704

Habeas corpus.—Criminal process.

As the jurisdiction of the supreme court is appellate, it must be shown to the court, that the court has the power to award a *habeas corpus*, before one will be granted.

George Milburn was imprisoned in the jail of the county of Washington, upon a bench-warrant, issued by the circuit court of the United States for the district of Columbia, to answer an indictment pending against him for keeping a faro bank, an offence which, by an act of congress, is punishable by imprisonment at hard labor in the penitentiary of the district. He had been arrested on a former *capias*, issued on the same indictment, upon which he gave a recognisance of bail, with sureties, in the sum of one hundred pounds, Maryland currency, according to the statute of Maryland, conditioned to appear in court at the return-day of the process, &c.; he did not appear, and the recognisance was forfeited, and a *scire facias* was issued against him, and his sureties, returnable to December term 1833. At the same term, another writ of *capias* was issued against him, returnable immediately, and returned *non est inventus*; at June vacation 1834, another writ of *capias* was issued against him, returnable to November term 1834, on which he was arrested, and from which arrest he was discharged on a *habeas corpus*, by the chief justice of the circuit court, on the ground, that the writ of *capias* improperly issued; on a return of this discharge by the marshal, a bench-warrant was issued by order of a majority of the judges of the circuit court, and on which he was in custody. He applied for a writ of *habeas corpus* to this court, to obtain his discharge: *Held*, that he was properly in custody. The rule for the *habeas corpus* was refused.

A RULE to show cause why a *habeas corpus* should not be awarded, to bring up the body of George Milburn, in confinement in the jail of county of Washington, in the District of Columbia. (*a*) The case, as stated in the opinion of the court, was as follows:

(*a*) When the petition in this case was presented to the court, a *habeas corpus* was asked to be issued, and it was proposed to argue the question of the right of the petitioner to his discharge, on the return af the *habeas corpus*.

MARSHALL, Ch. J., said:—As the jurisdiction of the supreme court is appellate, it must first be shown that the court has the power in this case to award a *habeas corpus*. A rule was granted to show cause why a *habeas corpus* should not be issued.

Ex parte Milburn.

"This is an application to the court, by petition, for a writ of *habeas corpus* to bring up the body of George Milburn, now imprisoned in the jail
*705] of Washington county, in the district of *Columbia, upon a bench-warrant issued against him by the circuit court of this district, to arrest him to answer to an indictment, now pending in the same court against him, for keeping a faro bank, an offence which, by the act of congress of the 2d of March 1831, ch. 37, is punishable by imprisonment and labor in the penitentiary of the district. The main grounds for the application (for it is not necessary to go into the minute facts) are, that the party was arrested on a former *capias*, issued on the same indictment, upon which he gave a recognisance of bail, with sureties, in the sum of one hundred pounds, Maryland currency ($266.67), according to the statute of Maryland, passed in October 1780, ch. 10 (which is in force in this district), conditioned to appear in court on the return-day of the process, to attend the court from day to day, and not to depart therefrom without leave of the court. At the return-day he did not appear, and the recognisance was forfeited, and a *scire facias* issued against him and his sureties, returnable to November 1833. At the same term, another writ of *capias* on the indictment, was issued against him, returnable immediate, which was returned *non est inventus*. Afterwards, in June 1834, in vacation, another writ of *capias* was issued by the district-attorney, upon the same indictment, returnable to November term 1834, upon which the party was arrested, and from which, upon a writ of *habeas corpus*, he was discharged by Mr. Chief Justice CRANCH, of the circuit court, upon the ground, that the writ of *capias* improperly issued. The marshal having returned this matter specially to the circuit court, at the November term 1834, upon motion of the district-attorney, the present bench-warrant was issued, by the order of the majority of the court, and upon which the party is now in custody."

The case was argued by *Brent* and *Jones*, for the relator; and by *Key*, district-attorney, contrà.

Brent stated, that two points presented themselves for the consideration of the court. 1st. Whether the bench-warrant, under which the relator is in confinement, is legal. 2d. Whether the case had not, previously to the
*706] *issuing of the bench-warrant, been finally adjudged by a competent tribunal.

The attention of the court is requested to the fact, that the process is not an *alias*, but appears as an original proceeding. It is in the same term with the first process; and is entirely novel in its character, in the courts of the United States, and of England. An *alias* always issues after the return of the first writ, as having been inoperative. This is not sanctioned by law or practice. 4 Chitty's Crim. Law 213–17, 224–5; 4 Burn's Justice 48–9. In Dalton on the Duties of Sheriff, it is laid down, that in criminal cases, where an indictment is found, the practice is to issue a *capias*, then an *alias* and a *pluries* writ. If this is the law, the writ in this case was illegal; and did not authorize the marshal to take the relator; and his imprisonment is illegal.

There is another objection to the issuing of the writ. When it issued, there was no such suit in court. The United States had, by their own act, discontinued the case. 4 Burn's Justice 42. The principle established by

this court, in the case *Ex parte Watkins*, 7 Pet. 568, that no one can be twice arrested for the same cause, entirely protects the defendant from imprisonment, after his discharge by Chief Justice CRANCH. No other writ, not an *alias*, can be issued, after that discharge. 1 Tidd's Prac. 196; 4 Burr. 2502; 3 East 309; 7 Pet. 568. In the case before the court, the record shows, that a *capias* issued on the indictment against Milburn; that he was taken by virtue of it, and he was thus in the custody of the law, before the circuit court. He was, afterwards, by the judgment of the chief justice of the court, the case being regularly before him, discharged. The United States had their remedy upon the recognisance given by him and his sureties; and the case, as to all other matters, was out of court, and at an end.

Under the law of Maryland, of 1780, ch. 10, when a defendant is in custody for an offence, found by an indictment, less than felony, the sheriff must take bail in less than one hundred pounds. The *capias* is returned with the recognisance; and if he does not appear, the recognisance is prosecuted to judgment. Although the keeping a faro table is punishable by imprisonment *in the penitentiary, yet it is not a felony. The relator having done all the law required, on the original *capias;* he [*707 could not be required to do more. After the most diligent search into precedents, and a reference by the chief justice of the circuit court to the most distinguished members of the bar of Maryland, no case has been found, where the principle has been asserted and maintained, which is claimed by the United States. If the law was otherwise, a case would have been found to maintain it. The law of Maryland requires, that the recognisance shall be sued out. It says nothing about further proceedings against the defendant, who has suffered the recognisance to be forfeited. It is different in the case of felony. Within forty-four years, not an instance has occurred in the courts of Maryland, where an *alias* capias has issued, in a case less than felony. All the counsel at the bar of Maryland appear to have considered, that under the act of 1780, everything that could be done, on the neglect of the person charged with a misdemeanor to attend, was to forfeit the recognisance, and sue it out. The opinion of Chief Justice CRANCH, who has been familiar with the law and practice of Maryland for forty years, and who is the chief justice of the circuit court, delivered in this case, is referred to, and it will be found to sustain these positions.

The last reason why relief should be given to the relator is, that the discharge by Judge CRANCH, the chief justice of the circuit court, during vacation, is a *res judicata*, between the United States and the prisoner. Under the act of congress organizing the courts of the district of Columbia, the chief justice, in vacation, acts as, and has all the powers of, a circuit court. The act of congress gives him the power to award a *habeas corpus;* and his discharge of a prisoner brought before him, is a bar to another arrest, in the same manner as if it had been given by the circuit court, during its session.

Key, for the United States.—It is not, by the practice of the courts of Maryland, required, that a *capias*, returned "*non est*," shall be followed by an *alias capias*. It is the course of proceeding, to adopt any practice to bring in a defendant. Original writs of *capias* are issued, after others have

not *produced an arrest. There is no necessity for any other form of proceeding, as, under the law of Maryland, there is no such thing as outlawry.

STORY, Justice, stated, that, as he understood the counsel for the relator, it is contended, that wherever there has been an arrest for a misdemeanor, and a recognisance entered into by the person charged, and the party has forfeited it, he can never be again prosecuted for the offence.

THOMPSON, Justice.—Is it possible, that the law of Maryland considers, that where there has been a forfeiture of a recognisance, in a case less than felony, it is in the nature of a penalty paid for the offence?

Key.—This is the doctrine claimed by the relator.

Brent, read the act of assembly of Maryland, before cited.

Jones, for the relator.—The court is referred to the opinion delivered by Chief Justice CRANCH, for the local laws of Maryland (4 Cr. C. C. 552); under which proceedings on criminal cases are conducted in the county of Washington. In that opinion, the court will also find a statement of the practice in such cases. They are as claimed by the relator.

This case rests on the highest principles known in the administration of justice, that no one is to be twice punished for the same offence. In England, when there is a second arrest, the recognisance is always released. No case has been found, except where there has been an escape, where, if a bail-bond, or a recognisance, has been given, you may take again. The exception, in the case of escape, shows that, in general, there is no such right. The arrest in this case is not only irregular, but it is a contempt of the law. The party who has been twice arrested, was in actual custody, at the time of the second arrest. He was under bail, and bail, by the authorities, is nothing more than "a living prison," in which the party is kept; there is, *therefore, no reason why an authority should be produced, to show
*709] the present imprisonment illegal, the defendant being in the custody of his bail, under the first recognisance, although it has been forfeited. The first recognisance should be remitted, or he will be twice punished.

What is the difference between a civil and a criminal action, when the defendant has been admitted to bail? A civil suit for the same cause of action, cannot be instituted, after bail given, unless after discontinuance of the prior suit, and a discharge of the bail. This action on the bail-bond, must be against all the parties who have become bail, unless under special circumstances. Saunders on Pleading, 187; 13 Johns. 424.

In Virginia, the practice is different, by a special statute; but according to the common law, the default of appearance is an insuperable bar to another action on the original case. If there is no statutory provision to the contrary, the operation of bail, in both cases, will be the same. When you admit to bail, *eo nomine*, you admit all the consequences of bail. 2 Chit. 109; Highmore on Bail 200. A *scire facias* issues alike in criminal as in civil cases. The legislature of Maryland, in fixing the amount of bail to be taken, after arrest for a misdemeanor, have taken an average of the sums to be required in all such cases. They have considered the justice of the state as satisfied by the amount so fixed. In England, there is a wider

discretion ; but in Maryland, it may be less, but cannot be greater than one hundred pounds.

This court, in a review of all the authorities cited, will be satisfied, that wherever there has been a suit on a forfeited recognisance, a second arrest cannot take place, without a discontinuance of the suit. This has not been done in the case now before the court. The contrary practice comes within the rule, that no one shall be twice punished for the same criminal action.

STORY, Justice, after stating the facts of the case, delivered the opinion of the court.—The points principally relied on at the argument are, in the first place, that the party is not liable to be arrested to answer the indictment, after having given a recognisance of bail ; *although the recognisance has been forfeited, and the party has not appeared and answered, and been tried on the indictment ; in the next place, that the discharge upon the habeas corpus before Mr. Chief Justice CRANCH, is a bar to any subsequent arrest. [*710

We are of opinion, that neither of these grounds can, in point of law, be maintained. A recognisance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offence, when it is forfeited and paid ; but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offence. And *à fortiori*, it cannot be deemed to apply to a case like the present, of a penitentiary offence ; for that would be to suppose, that the law allowed the party to purge away the offence, and the corporeal punishment, by a pecuniary compensation. There is nothing, in our opinion, in the Maryland statute of 1780, ch. 10, to change this construction of the law.

The other ground is also unmaintainable. A discharge of a party, under a writ of *habeas corpus*, from the process under which he is imprisoned, discharges him from any further confinement under the process ; but not under any other process, which may be issued against him, under the same indictment.

For these reasons, we are of opinion, that the party is rightfully in custody under the bench-warrant of the circuit court ; and therefore, that the petition for the writ of *habeas corpus* ought to be denied. The rule, therefore, to show cause is discharged ; and the motion for the *habeas corpus* is overruled.

Writ refused.