the plaintiff may maintain his action without stating the determination of the first suit. (*b*)

Upon this principle it is obvious that in an action for maliciously and falsely holding to bail on the pretext that the party was leaving the country, the plaintiff may recover on proof of his discharge from arrest, though the debt really existed. (*c*). The Ontario Court of Appeal has held that in an action for maliciously holding to bail, the gravamen of the suit is the defendant's bad faith in procuring the judge's order, and upon this theory decided that the plaintiff is entitled to shew that the order was so procured without proving either that the order was rescinded, or that he was discharged from arrest (*d*).

(*b*). *Where the question is whether the procedure complained of was for the purpose of effecting something not within the scope of the suit*—A distinction is taken between the cases in which the act complained of was a process, "incident and auxillary to" the previous suit, and those in which it was not (*e*).

On the one hand an averment that the suit has been terminated is not necessary where the defendant is charged with having attempted to use the process of the court in order to effect something not properly within the scope of the suit, as where the action

(*b*) *Fahey* v. *Kennedy* (1869) 28 U.C.Q.B. 301, holding that it is not necessary to aver that the attachment of the debtor's person has been set aside, where the action is brought against one of the creditor's deponents for making a false affidavit that he believed that the plaintiff had departed from the country with intent to defraud such creditor. See also *Eakins* v. *Christopher* (1868) 18 U.C.C.P. 532.

(*c*) Wightman, J., in *Craig* v. *Hasell* (1843) 4 Q.B. 481 (p. 488).

(*d*) *Erickson* v. *Brand* (1888) 14 Ont. App. 614 (diss. Burton, J.A., on the ground that the proceedings were not ex parte, but that the judge in making the order acted judicially: see infra, sub-sec. (*c*). "The falsity of the creditor's affidavit," said Osler, J.A. (pp. 650, 651) "is not proved by the subsequent discharge of the debtor any more than its truth is affirmed by the discharge being refused or not applied for." . . . The granting or refusal of the charge does not decide the question involved in the action, viz., whether the defendant's affidavit fairly stated the facts on which he procured the judge to make the order, or suppressed material facts which should have been brought to his notice. "If the complaint," said Patterson, J.A. (p. 645), "concerns the debt sworn to, the rule applies. . . . Where, however, the complaint is respecting the facts asserted to lead to the inference that the defendant is about to quit the country with intent to defraud his creditors, the principle ceases to apply." [See also *Gilding* v. *Eyre*, cited in (*b*) infra.] Where the improper issue of a writ of extent is the grievance complained of, the inquisition and the finding therein are not a part of the proceedings in such a sense that the subsequent suit cannot be maintained while the finding remains in force: *Craig* v. *Hasell* (1843) 4 Q.B. 481.

(*e*) *Parton* v. *Hill* (1864) 12 W.R. 754.