

Case No. 4,212.

DUVALL v. WRIGHT.

[4 Cranch, C. C. 169.]¹

Circuit Court, District of Columbia.

May Term, 1831.

COSTS—DEATH OF SURETY FOR—PRACTICE—PLEADING.

1. If the plaintiff's surety for costs in scire facias, die, pending the suit, the court, on motion, will require new security, although the administrator of the former surety may have assets.
2. After the issue joined upon nul tiel record, and the cause is called for trial on that issue, the court will not permit the defendant to plead that the plaintiff was never administrator.

Scire facias [by Benjamin Duvall, administrator of Ann Jackson, against Thomas C. Wright], nul tiel record, and issue made up under the general authority given to the clerk by the attorneys of this court, to make up their issues. W. Emack was surety for costs.

Mr. Redin, for defendant suggested the death of Mr. Emack, and demanded new security for costs.

THE COURT suggested, that perhaps Mr. Emack's administrator had assets.

Mr. Redin said that the defendant was entitled to security not dependent upon assets.

THE COURT yielded to that suggestion, and Mr. R. P. D. became surety.

Mr. Redin then asked leave to plead that the plaintiff is not administrator; and cited *North v. Clark*, in this court at May term, 1827 [Case No. 10,308], in which this court decided that the defendant had a right to demand oyer and plead that the plaintiff is not administrator, at any time before the expiration of the rule to plead.

But THE COURT (THRUSTON, Circuit Judge, doubting) refused now, at the trial court, when the cause is called for trial on the issue of nul tiel record, to permit the plea to be filed, unless the defendant will make oath of the fact that the plaintiff is not administrator, considering it only a temporary bar; and CRANCH, Chief Judge, doubting whether the plaintiff is bound to have his letters of administration in court at this term to give oyer so long after profert, and when the only issue he came prepared to try, was nul tiel record.

¹ [Reported by Hon. William Cranch, Chief Judge.]