

Case No. 7,362. JOHNS ET AL. V. BRODHAG.
[1 Cranch, C. C. 235.]¹

Circuit Court, District of Columbia.

Dec. Term, 1804.

SURETIES—INSOLVENT DEBTOR—PRACTICE.

Sureties of an insolvent debtor, in a bond for duties to the United States are not entitled to judgment against their principal at the first term.

This cause stood on the appearance-docket of this term.

Mr. Morsell, for plaintiffs, moved for judgment in an action brought to this term on a bond given by the defendant, with the plaintiffs as sureties, to the United States, for duties; the plaintiffs having paid the duties, and the defendant having become insolvent. This suit was brought under the act of congress of the 2d of March, 1799, § 65 (1 Stat. 676).

Mr. Key, for defendant, contended—1st, That sureties are not entitled to judgment at the first term. 2d, That if they have that remedy, it can be used only in cases of such kinds of insolvency as are mentioned in the

act of congress of the 2d of March, 1799, § 65, supra.

Mr. Mason and Mr. Morsell, for plaintiffs, relied on the words “the like advantage, priority or preference for the recovery,” etc. They admitted that the United States could not recover judgment on a bond for duties, but by a jury trial in common form; but contended that the surety who pays the debt of an insolvent principal has a right to a trial at the first term.

THE COURT (FITZHUGH, Circuit Judge, absent) were of opinion that the surety was entitled only to the priority of payment out of the effects of the insolvent; not to the trial at the first term: Because the clause giving such trial is subsequent to the clause which gives “the like advantage, priority,” &c; because, by the words of the act, the priority of suit is only given when the duties are due to the United States; because the defendant cannot get a continuance of the cause unless the attorney of the United States be present; and because, in a suit by a surety, many more facts can be pleaded by the defendant than in a suit by the United States—such as the surety had not paid, or an offset, or that he was not insolvent, &c.

The motion was overruled, and the cause took its regular course through the dockets.

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