Case No. 13,896.

THOMAS v. ELLIOT.

{2 Cranch, C. C. 432.}[1]

Circuit Court, District of Columbia. Oct. Term, 1823.

ACTIONS—ASSIGNEES OF CAUSE—SPECIAL BAIL—SURETIES.

1. Where there are contending assignees of a cause of action pending in court, the court will not, on motion, decide the merits of their respective claims, by ordering the action to be entered upon the docket as for the use of either of them.

2. If special bail be taken out of court, by two justices of the peace, by recognizance, there must be two sureties.

The scire facias, in this case against William Elliot, as bail for Peter Morte, recites a recognizance before two justices of the peace for this county on the 17th of November, 1818, by which "a certain William Elliot, of the said county of Washington, came personally in his own proper person, and became pledge and bail," &c., "for a certain Peter Morte," &c., in the usual form. The suit against Morte was originally brought by the creditor, George N. Thomas, in his own name; who, before judgment, was discharged under the insolvent law, on the 7th of August, 1820. and assigned all his effects to John L. Brightwell, his trustee under that law, who became a party plaintiff in the place of George N. Thomas, and obtained a judgment in his own name as trustee of Thomas for $311. This judgment is also recited in the scire facias.

Mr. Key, for Offa Wilson, administrator of Henry M. Wilson, obtained a rule on Brightwell to show cause why this scire facias should not be entered for the use of Offa Wilson, as administrator of Henry M. Wilson; and produced an assignment dated June 4th, 1819, more than a year before Thomas's application for the benefit of the insolvent act, from the said Thomas

to the said Henry M. Wilson, of the proceeds of that suit, and an order from Thomas to the clerk of the court to enter the suit for the use of Wilson.

But THE COURT, on the 23d of January, 1824, discharged the rule and refused to order the cause to be entered for the use of Wilson, without prejudice to the rights of the parties.

Mr. Redin, for defendant, moved the court to quash the scire facias, because upon its face it appeared that only one person was taken by the justices as bail, whereas the act of 1715, c. 28, which is the only act which authorizes them to take special bail out of court, requires the defendant to go before the justices with two sufficient freeholders; and the form prescribed is, "You A. B. and C. D., and either of you do under-take," &c. Every such authority must be strictly pursued, as this court has decided in several cases upon the act of Maryland of 1791, c. 67. § 1, authorizing judgments to be superseded. Smith v. Middleton, at April term, 1821 [Case No. 13,079], and Mandeville v. Love, October term, 1821 [Id. 9,012]; Rogers v. Reeves, 1 Term R. 418; Scryven v. Dyther, Cro. Eliz. 672; Symes v. Oakes, 2 Strange, 893.

Mr. Key, for plaintiff, contra.

THE COURT (THRUSTON, Circuit Judge, absent) quashed the scire facias, giving judgment upon the issue of "no such record."

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