

insufficiency of the estate of such administrator, as shall in the judgment of the Court render the creditor remediless save by an action on the bond. On which it has been decided in a number of cases, see *Dorsey v. the State*, 4 G. & J. 471, that compliance with one or other of these prerequisites must be averred in the declaration, see also the *State v. Jones*, 8 Md. 88. An exception is, where an executor gives bond to pay all debts and legacies, in which case he is discharged from the obligation to exhibit an inventory or account, and is answerable absolutely for debts and legacies, and then the plaintiff need not shew assets nor compliance with the Act of 1720, for the surety is equally bound with the principal as on an absolute obligation of the latter, *Duvall v. Snowden*, 7 G. & J. 430. But though a judgment against an executor is conclusive on him as well as to the debt as to the sufficiency of assets to pay it, as to his surety in the testamentary bond it is but *prima facie* evidence of both, *Iglehart v. the State*, 2 G. & J. 235.⁴³ There the defendant, who was a surety on a **593** testamentary *bond, rejoined to a replication to a plea of performance in an action on the bond, setting out the judgment, a *feri facias* arrested by writ of error and the insolvency of the estates of the original testator and the executor, that the executor had no goods or chattels which were of the testator at the time of his death in his hands to be administered, nor had at any time thereafter, and it was held that this did not amount to a general plea of *nulla bona devenerunt*, extending over the whole time from the death of the testator to the death of the executor, for its relative expressions "nor at any time thereafter" evidently indicated a particular point of time when the executor was without goods or chattels with which to pay the debt, as they implied a period of time when he had such goods and chattels. It could be considered only as a plea of *plene administravit*, or a substitute for such a plea, and was defective in leaving uncertain the point of time when the executor was without goods, &c. to answer a demand against him, and in omitting to aver that he had not any goods, &c. of the testator on the day of issuing out of the original writ or ever after.

If an administrator conceives he has not assets to discharge a claim, or any part of it, for which a suit is brought against him, he may by the Code, Art. 29, sec. 20⁴⁴ (1802, ch. 101, sec. 1), plead the fact, and a trial by jury shall be thereupon had; and by sec. 21,⁴⁵ if on such trial the plaintiff's claim shall be contested, and there be any other issue than that of assets joined, the jury, if they find for the plaintiff on such issue, and the amount of assets be less than the debt, shall declare the amount of the debt and the sum to be paid to the plaintiff, regard being had to the amount of assets on hand and debts due by the deceased, and judgment shall be entered for the damages laid in the declaration and costs, if the Court shall so direct, to be released on payment of the sum ascertained to be paid by the verdict and interest thereon; by sec. 22,⁴⁶ the

⁴³ See note 38 *supra*.

⁴⁴ Code 1911, Art. 26, sec. 26; *Gill v. Staylor*, 93 Md. 473.

⁴⁵ Code 1911, Art. 26, sec. 27; *Neale v. Hermanns*, 65 Md. 474; *Gill v. Staylor*, 93 Md. 473.

⁴⁶ Code 1911, Art. 26, sec. 28.