enough, as in this instance, to produce *ex parte* affidavits to that effect; unless the fact be controverted, and full proof thereof should be expressly required by a creditor or party, when it must be proved according to the regular course of the Court. *Fladong* v. *Winter*, 19 *Ves.* 196; *Clark* v. *Young*, 1 *Cran.* 181; *Brown* v. *Ross*, 6 *Mun.* 391. (*g*)

542 *I am therefore of the opinion, that these affidavits of John W. Duvall, and Robert Welsh, of Ben, must in this case be received as sufficient evidence of the insolvency of the makers of the notes which were endorsed by the deceased.

It appears from the vouchers of the claims, as referred to by the auditor, that the deceased, Beale M. Worthington, had, in his life-time, given a single bill to Warfield & Ridgeley, No. 39, for the payment of a certain sum of money; and was, besides, in-

(*g*) EMORY *v.* SETH.—This was a creditor's bill, filed on the 27th of March, 1806, stating that the late Thomas J. Seth was indebted to the plaintiff; that the personal estate of the deceased was insufficient to pay his debts; that the defendants were his heirs; that he left real estate; and praying that it might be sold, &c. Upon the answers coming in, the case was submitted, and a decree was passed in the usual form, that the real estate be sold; which was sold accordingly.

The auditor in his report, made on the 1st of May, 1813, among other things, stated that account No. 14, was a claim of Marmaduke Tilden and wife, which originated under the will of John Costin, father of the said Ann, by which a share of his personal estate was bequeathed to her. That this claim, to the amount stated in the account current referred to, appeared to be well established against Charlotte Clayland, executrix of Jacob Clayland, who was administrator *de bonis non cum testamento annexo*, of the said John Costin, by a judgment rendered therefor in Queen Anne's County Court, of which judgment, a short copy was exhibited with the usual proof; that the securities of the said Charlotte Clayland, in her administration bond, were James Clayland, Sr. and Thomas J. Seth, the deceased ancestor of these defendants. And affidavits of the insolvency of Charlotte; and a certificate of James Clayland's discharge under the insolvent laws, were exhibited. But it did not appear that a *fieri facias* had ever been issued on the said judgment against the said Charlotte, as executrix, or that *nulla bona* was returned; or that any proceeding had ever been had upon her bond; nor was there any authentic certificate of her discharge under the insolvent law.

In the notes of the solicitor of this claimant, it was said, that the auditor had rested his objection as to the necessity of the return of *nulla bona*, on the Act of 1720, ch. 24, which was wholly inapplicable to the case; and that proofs, by affidavits alone, of the insolvency of the principal, were amply sufficient to entitle the claimant to obtain payment from the estate of the surety; and that what was sufficient proof of insolvency, was in all cases, a matter of sound discretion with the Court; and was not necessary to be shewn, either by a return of *nulla bona*, or by a certificate of a legal discharge under the insolvent laws.

KILTY, C., 26th July, 1813.—Ordered, that the claim of M. Tilden and wife, No. 14, be allowed, and paid as other claims, by the order of 22d June, 1813.